

**OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 12/06/2001**



**State of Oregon
Department of
Environmental
Quality**

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Oregon Department of
Environmental Quality

Strategic Directions

Through 2005



DRAFT



November 2001

Dear Oregonian:



Over the years, our ethic of environmental responsibility has led to ground breaking legislation and significant gains in Oregon's environment. In the past, DEQ has helped achieve these gains by regulating pollution from the largest and most obvious sources.

Challenges of the 21st century are more complex. In Oregon, we are feeling the cumulative effects of increased population and human activity. For example, while more people are recycling, total waste generation continues to rise. Protecting water quality for beneficial uses and native salmon now must include control of pollution from urban runoff, recreational activities, agricultural or forest practices, and other sources which traditionally have not been regulated. In addition, more traffic means more toxic pollutants from automobiles. To respond to these challenges, we need creative thinking, good management and involvement by all Oregonians.

In addition, the events of September 2001 have added a new dimension to how we view our world. The impacts to our economy, environmental protection and the way that Oregonians live are yet to be determined. During challenging times, government must provide leadership and clear direction to ensure that the important work gets done. For the next few years, DEQ will focus on four strategic directions that represent the key priorities of the agency:

- Deliver Excellence in Performance and Product
- Protect Oregon's Water
- Protect Human Health and the Environment from Toxics
- Involve Oregonians in Solving Environmental Problems

This document outlines the key actions that we will accomplish for each of these priorities. I look forward to working with you to implement this plan and continuing our proud environmental legacy.

Sincerely

A handwritten signature in cursive script that reads "Stephanie Hallock". The ink is dark and the signature is written in a fluid, connected style.

Stephanie Hallock
Agency Director

Introduction and Agency Background

Oregon's history of environmental regulation dates back to 1938, when the Oregon State Sanitary Authority was formed in response to citizens who overwhelmingly supported an initiative petition known as the "Water Purification and Prevention of Pollution Bill."

The bill declared a state policy to preserve Oregon waters from pollution. In 1969, the Authority changed its name to the Department of Environmental Quality (DEQ) and became an independent state regulatory agency.

Today's DEQ oversees a variety of activities and programs designed to protect the quality of Oregon's environment. Activities include monitoring and assessing environmental conditions, establishing policies and rules, issuing permits, cleaning up contamination, enforcing to deter non-compliance, and educating to encourage pollution prevention. This work is accomplished by a team of scientists, engineers, technicians, administrators and support staff who are highly committed to restoring, maintaining and enhancing Oregon's environment.

DEQ's policy and rule making board is the Environmental Quality Commission (EQC), a five member governor-appointed commission. In

addition to policy and rule adoption, the EQC issues orders, judges appeals of fines or other agency actions, and appoints the director.

DEQ is organized into 5 divisions and 3 regions, with offices in 18 locations around the state. A team of senior managers, the Executive

Management Team (EMT), with representatives from each division and region, provides leadership and direction for the agency.

Headquarter's divisions develop environmental policy and provide administrative support. Headquarter's and regional offices implement

environmental protection programs and work with local communities to solve environmental problems. The laboratory provides monitoring and analytic support across the entire agency, ensuring that sound science is behind all we do.

DEQ's vision is to work cooperatively with all Oregonians for a healthy sustainable environment. We believe decisions affecting environmental management need to be guided by the understanding that all aspects of life are interconnected, interdependent and cumulative. This requires that we work together and that people, communities and businesses assume more responsibility for environmental protection.

DEQ's mission is to be a leader in restoring, maintaining and enhancing the quality of Oregon's air, water and land.



Deliver Excellence in Performance and Product



Protecting the environment requires a commitment to sound science and effective regulation. DEQ recognizes that how we do our work is as important as laws, rules and science. Managing and motivating employees to perform their best and breaking down organization barriers are essential to operating efficiently and achieving DEQ's mission. Good management delivers excellence in performance and product. To cultivate good management, DEQ promotes the following cultural values:

- **Environmental Results**
- **Customer Service**
- **Partnership**
- **Excellence and Integrity**
- **Employee Growth**
- **Teamwork**
- **Diversity**

DEQ recognizes that even well-managed agencies need to continue to improve. The key actions that follow outline DEQ's efforts for delivering excellence in all that we do.

Key Action: Make it easier to do business with DEQ.

DEQ interacts with many customers – the public, members of the regulated community, government agencies and other organizations. DEQ is striving to improve customer service and to streamline regulatory programs. Service improvements will initially target programs that affect small businesses and individuals. A survey of customers is being conducted to help the agency identify internal training needs and opportunities for other service improvements that will make it easier for our customers to do business with DEQ.

Key Action: Reinforce effective management.

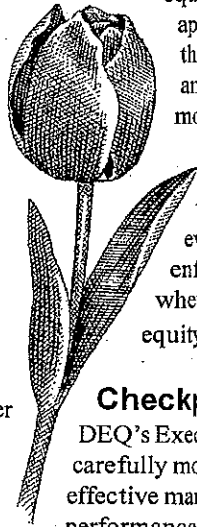
The range and complexity of issues facing DEQ is diverse and has grown over time. Managing DEQ’s budget, with its large number of dedicated funds, demands constant attention in order to provide accountability to the legislature and all Oregonians. At DEQ, we recognize that effective staff and effective management make things happen. This key action reinforces the importance of effective budget and management practices.

Key Action: Emphasize cross-program environmental problem solving.

DEQ implements laws and regulations that are developed and funded along program lines to protect the air, water and land. Many environmental problems affect multiple parts of the environment: both water and land, both land and air. When environmental issues cross program lines, DEQ needs to develop holistic approaches to problem solving. DEQ has identified a list of ten management actions to improve cross program coordination.

Key Action: Ensure understandable, equitable compliance and enforcement.

DEQ is committed to having an effective compliance and enforcement program that is understandable, encourages compliance, is equitable across programs, and appropriately reflects the severity of the violation. The office of Compliance and Enforcement (OCE) will access and modify internal compliance and enforcement processes to ensure consistent, understandable and timely actions. The OCE will also evaluate current rules governing enforcement actions to determine whether changes are needed to ensure equity in enforcement.



Checkpoints

DEQ’s Executive Management Team will carefully monitor efforts that promote more effective management. We will evaluate performance by the following:

- Is the regulated community and general public satisfied with the service DEQ provides?
- Is DEQ operating within the constraints of its budget?
- Are DEQ employees receiving the direction and feedback they need to be effective?
- Are the management actions that DEQ implements to improve cross program coordination having the desired effect?
- Is DEQ achieving equitable, consistent, understandable and timely compliance and enforcement?



Protect Oregon's Water



Water has many beneficial uses: from drinking water, to supporting industrial processes, crops and livestock, to recreational activities. Water and watersheds are a critical link to ecosystem health and support for wildlife habitats. DEQ is committed to ensuring that Oregon's rivers, lakes, streams and groundwater meet water quality standards and support varied beneficial uses.

Historically, water pollution control has been directed at industrial and municipal discharges. This traditional permitting approach alone isn't enough to ensure that Oregon's waters are sufficiently protected. We need to take a more systemic approach to water quality management that considers the impacts of non-regulated sources of pollution. Addressing multiple sources of pollution in watersheds is a more integrated and efficient approach to water management. To achieve improved water quality DEQ will implement the following key actions.

Key Action: Implement a comprehensive watershed approach.

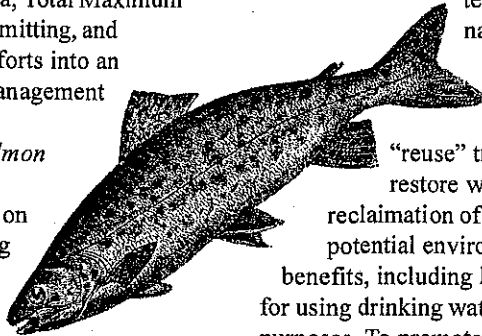
Implementing the watershed approach by focusing our efforts geographically in river basins is DEQ's primary initiative to protect Oregon's water quality. A watershed concept combines water quality data; Total Maximum Daily Loads (TMDLs), permitting, and groundwater protection efforts into an integrated water quality management approach.

The Oregon Plan for Salmon and Watersheds brings agencies together to work on a watershed basis restoring healthy aquatic habitats.

The *Oregon Plan* encourages incentives and education to motivate permitted sources to go beyond traditional regulations. DEQ is committed to doing our part to ensure the success of these efforts.

One tool that is critical to improving impaired waterbodies is a TMDL. This process assigns load allocations to ensure that water quality meets regulatory standards. TMDLs also identify and minimize impacts from non-regulated sources of pollution, which are the biggest contributors to today's water quality problems, examples include pollution from urban runoff, recreational activities, and agricultural or forest practices.

In addition to TMDL development, DEQ is shifting water quality permit renewal to a watershed basis while simultaneously working to minimize a backlog of permits. This transition is scheduled to be complete in 2006. DEQ is focusing on developing TMDLs for all impaired waterbodies in the state by 2007.



Key Action: Develop a strategy to encourage broader reuse of wastewater.

The direct release of treated wastewater into surface water is a common water quality management practice. This wastewater, while technically clean, often contains nutrient and temperature levels that exceed natural water conditions. As an alternative, many treatment plants have developed strategies to "reuse" treated water to irrigate or to restore wetland habitats. This reclamation of wastewater has many potential environmental protection benefits, including helping to offset the need for using drinking water supplies for non-drinking purposes. To promote greater investment in these activities, DEQ will develop opportunities and strategies to encourage more reclamation and reuse of wastewater.

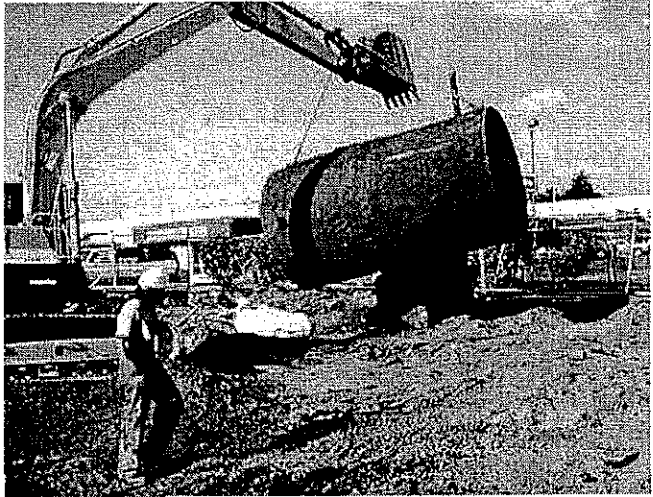
Checkpoints

The DEQ laboratory has developed an Oregon Water Quality Index (OWQI) to evaluate improvements in water quality over time. The OWQI integrates eight distinct criteria into a single number expressing water quality, and data generated from routine monitoring is used to determine the OWQI. The OWQI is DEQ's primary indicator of trends in water quality. In addition to the OWQI, we will evaluate performance by the following:

- Are we making progress toward reducing permit backlogs and completing TMDLs?
- Are Water Quality Management Plans being implemented as developed?
- Has the percentage of water reuse increased?
- Have we shifted to a watershed approach for protecting water quality?



Protect Human Health and the Environment from Toxics



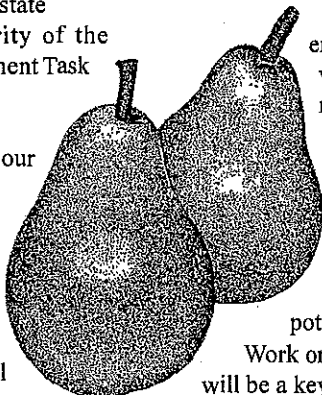
Human exposure to toxic chemicals is of increasing concern in Oregon. On a daily basis, Oregonians are exposed to toxics through many sources such as chemical emissions from cars, trucks, and industrial plants, or through the food chain where persistent and bio-accumulative toxics can appear. The threat of terrorism has elevated the importance of being prepared to deal with chemical agents and hazardous materials. DEQ is committed to ensuring that the agency is prepared to manage any potential chemical crisis efficiently and effectively, and to having more accurate, credible, and user-friendly toxics information available to Oregonians. DEQ plans to implement the following key actions.

Key Action: Work with other agencies to minimize potential threats from chemical agents.

Chemical agents are highly dangerous to humans and the environment. Understanding the potential risks and developing a state preparedness plan are a priority of the Governor's Emergency Management Task force. DEQ is an active player in development of this plan.

DEQ is working on developing our laboratory capabilities to more safely analyze unidentified substances for the presence of chemical agents.

In addition, DEQ is responsible for overseeing activities at the Umatilla Chemical Depot to ensure the public and environment is protected from risks associated with storage and destruction of chemical agents.



Key Action: Reduce the health and environmental risks associated with contaminated sediments and abandoned mines.

Contaminated sediments and abandoned mines represent an emerging environmental concern. DEQ will prioritize cleanup of abandoned mines by conducting preliminary assessments to identify potential environmental and health impacts. Mines that pose the greatest risk for contamination will be the first to enter cleanup to remove or isolate contamination and reduce potential exposure.

Work on sediment contamination cleanup will be a key cross program activity. As with mines, a process for addressing contamination that poses the greatest risk will be utilized to address sediments.

Key Action: Develop and implement a toxics management strategy for mercury.

During upcoming months, DEQ will begin working with a broad range of industries, governmental agencies, and citizens to learn more about the origins, amounts, and types of toxics released in Oregon. DEQ will use data collected to inform Oregonians about the status of toxics in Oregon, develop plans for reduction, provide technical assistance, and offer economic incentive programs to help implement the plans. In the short term there will be a concentrated effort on mercury reduction.

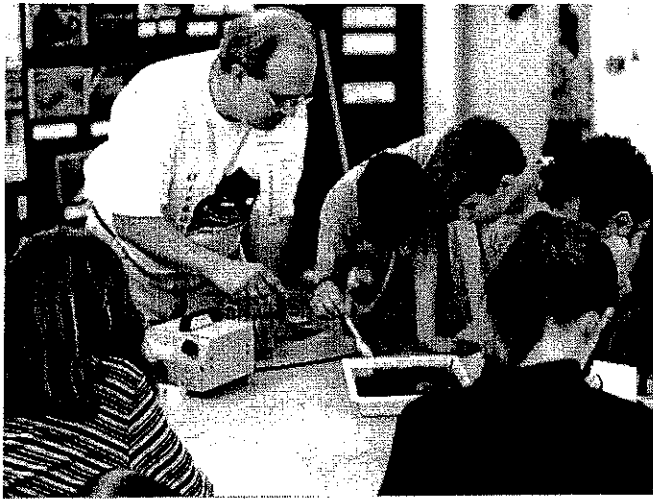
Checkpoints

Because measurable changes in the environment take several years, for the short term DEQ will evaluate performance by the following:

- Are we prepared to respond to threats of chemical agents?
- Have we reduced risk through safe and timely elimination of chemical agents at Umatilla?
- Do we have an effective strategy to reduce mercury in the environment?
- How many of the known abandoned mines in Oregon have been assessed for risk?
- What can DEQ do to identify and address sediment issues?



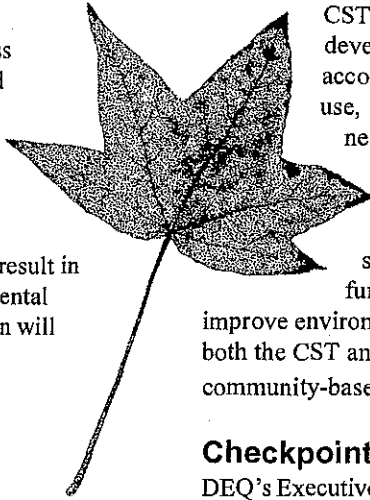
Involve Oregonians in Solving Environmental Problems



In the 21st century, responsibility for environmental protection needs to expand beyond a traditional “command and control” regulatory models. Gains obtained from this approach are not sufficient to address pollution from non-regulated sources such as run-off from urban and rural roads, driveways, lawns, gardens, and forest and agricultural practices. Cumulatively, pollution impacts from non-regulated sources account for the largest percentage of pollution in Oregon. For this reason, the greatest future environmental benefits will come from engaging individuals and small businesses as environmental stewards. DEQ’s role is to educate and provide tools to empower all Oregonians to take action. To promote greater citizen involvement in solving environmental problems, DEQ will implement the following key actions.

Key Action: Further enable Oregonians to use personal actions to protect the environment.

DEQ will identify opportunities to educate Oregonians on additional ways to reduce their impact on the environment. Simple actions such as using less fertilizer, disposing of household hazardous waste properly, or taking the bus once a week all add up. Once opportunities are identified, DEQ will survey Oregonians to identify where changes in baseline actions will result in the most gains in local environmental protection. A voluntary campaign will then be developed to provide information and incentives to Oregonians.



Key Action: Provide Oregonians with better access to information on local environmental conditions and issues.

DEQ is working to increase the quantity and quality of information that we make available to Oregonians. Specifically, we are committed to having environmental monitoring data accessible to inform Oregonians about pollution levels in their geographic areas. Within the next few years, DEQ will expand and improve methods for providing this information, such as location-based tools on our Web site. Another important emphasis of this action is to improve the electronic infrastructure and links between systems within the agency and with other state agencies. Improving connections between systems will allow citizens easier access to information from different sources.

Key Action: Support communities in solving local problems.

DEQ participates on state agency Community Solutions Teams (CSTs), for collaborative problem solving with local communities. CSTs work to ensure that economic development can proceed, while accommodating environmental, land use, transportation and housing needs. DEQ also formed the Environmental Partnerships for Oregon Communities (EPOC) program to help small local communities pursue funding and develop projects that improve environmental protection. The goal of both the CST and EPOC efforts is to support community-based problem solving.

Checkpoints

DEQ's Executive Management Team will monitor the progress and success of measures for each key action by answering the following questions:

- Are Oregonians more aware of things they can do to protect the environment, and have they modified their actions?
- How are Oregonians asking for information, and are they getting the information they want and need?
- Are CSTs and EPOC efforts helping local communities implement more environmentally sustainable development strategies?



For More Information

This document does not reflect all of the work we do. If you would like more specific information, visit DEQ's Web site at www.deq.state.or.us, call 1-800-452-4011, or contact one of the following staff.

Strategic Planning (general inquiry): Dawn Farr, 503-229-6935
farr.dawn@deq.state.or.us

Air Quality: Greg Aldrich, 503-229-5687
aldrich.greg@deq.state.or.us

Water Quality: Karen Tarnow, 503-229-5988
tarnow.karen@deq.state.or.us

Land Quality: Paul Slyman, 503-229-5332
slyman.paul@deq.state.or.us

Management Services: Holly Schroeder, 503-229-6785
schroeder.holly@deq.state.or.us

DEQ Laboratory: Mary Abrams, 503-229-5983, ext.225
abrams.mary@deq.state.or.us

Office of Compliance & Enforcement: Anne Price, 503-229-6585
price.anne@deq.state.or.us



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Environmental Quality Commission Meeting

December 6-7, 2001

Department of Environmental Quality
811 SW Sixth Avenue, Room 3A, Portland

On the evening of December 6, the Commission will join DEQ staff for a holiday reception at the DEQ Northwest Region Office in Portland.

Thursday, December 6 Beginning at 1:00 p.m.

- A. Contested Case: Case No. WMC/HW-WR-99-086 regarding Dar Tammadon
- B. Contested Case: Case No. WQ/I-NWR-00-125 regarding Reggie Huff
- C. Informational Item: Report on Rulemaking for Methane Regulation
- D. Discussion Item: Strategic Planning and Performance Measures
- E. Informational Item: City of Portland Combined Sewer Overflow Control Program Status Report

Friday, December 7 Beginning at 8:30 a.m.

The Commission will hold an executive session at 8:00 a.m. to consult with counsel concerning legal rights and duties regarding current and potential litigation against the Department. Executive session is held pursuant to ORS 192.660(1)(h). Only representatives of the media may attend but will not be allowed to report on any deliberations during the session.

- F. Approval of Minutes
- G. Consideration of Tax Credit Requests
- H. Director's Report
- I. Discussion and Public Comment on an Approval Process for Umatilla Chemical Agent Disposal Facility Operation. **This item will begin at approximately 9:30 a.m.**
- J. †Rule Adoption: On-Site Fee Reduction
- K. Discussion Item: Development of Performance Appraisal Process for Director
- L. ~~†Rule Adoption: Amendment and Clarification of Asbestos Rules~~
- M. †Rule Adoption: Incorporation of National Emission Standards for Hazardous Air Pollutants
- N. †Rule Adoption: SIP Amendments: LRAPA Title 36 Excess Emissions Rules and VIP On-Site Testing Program
- O. Commissioners' Reports

†Hearings have been held on Rule Adoption items and public comment periods have closed. In accordance with ORS 183.335(13), no comments may be presented by any party to either Commission or Department on these items at any time during this meeting.

Note: Because of the uncertain length of time needed for each agenda item, the Commission may hear any item at any time during the meeting. If a specific time is indicated for an agenda item, an effort will be made to consider that item as close to that time as possible. However, scheduled times may be modified if participants agree. Those wishing to hear discussion of an item should arrive at the beginning of the meeting to avoid missing the item.

Public Forum: The Commission will break the meeting at approximately 11:30 a.m. on Friday, December 7, 2001, for public forum if people are signed up to speak. Public forum is an opportunity for citizens to speak to the Commission on environmental issues and concerns not part of the agenda for this meeting. Individual presentations will be limited to five minutes. The Commission may discontinue public forum after a reasonable time if a large number of speakers wish to appear. Public comment periods for Rule Adoption items have closed and, in accordance with ORS 183.335(13), no comments may be presented to the Commission on those agenda items.

The next Commission meeting is scheduled for January 24-25, 2002.

Copies of staff reports for individual 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 503-229-5301, or toll-free 1-800-452-4011. Please specify the agenda item letter when requesting reports. If special physical, language or other accommodations are needed for this meeting, please advise Emma Djodjic in the Director's Office, 503-229-5990 (voice)/503-229-6993 (TTY) as soon as possible but at least 48 hours in advance of the meeting.

**BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON**

In the Matter of)	
)	
DAR TAMADDON,	)	REMAND ORDER
	)	No. WMC/HW-WR-99-086
)	
Respondent)	

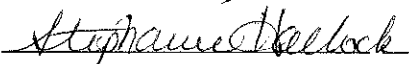
On December 6, 2001, the Environmental Quality Commission heard the Respondent's appeal of Hearing Officer Kevin Anselm's proposed contested case order, dated January 10, 2001. The Commission considered the written materials submitted on behalf of the Respondent and Department. The Commission also heard oral arguments from A. B. Cummins, Jr., Esq., on behalf of the Respondent and Jeffrey R. Bachman, Environmental Law Specialist, and Larry Edelman, Assistant Attorney General, on behalf of the Department.

During its deliberation, the Commission determined that it wished to have the Hearing Officer consider and address the following legal and factual issues:

- (1) When a respondent's violation is based on imputed or vicarious liability, is the "R factor" under OAR 340-012-0045 (1)(c)(D) to be based upon the negligent, reckless or flagrant conduct of the respondent, the conduct of the respondent's agents, or the conduct of either?
- (2) Based on the existing record, is the hearing officer able to make findings regarding whether Mr. Tamaddon is directly liable for the cited violation?
- (3) Based on the existing record, is the hearing officer able to make findings with respect to whether the conduct of Mr. Tamaddon's employees was negligent, intentional, or flagrant?

The Commission hereby remands this matter to the Hearing Officer for further consideration and preparation of an amended proposed order. If the Hearing Officer is able to make findings as described in items (2) and (3) without reopening the record for additional testimony, the Hearing Officer is respectfully directed to make such findings.

Dated this 26th day of December, 2001.


Stephanie Hallock, Director
Department of Environmental Quality
For the Environmental Quality Commission



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

December 20, 2001

DRAFT

Kevin Anselm
Hearing Officer
Hearing Officer Panel
875 Union St NE
Salem, OR 97311

RE: In the Matter of Dar Tamaddon. EQC No. WMC/HW-WR-99-086

Dear Ms. Anselm:

I am the Environmental Quality Commission's legal counsel, and on behalf of the Commission I am respectfully forwarding the Commission's order remanding the Tamaddon case for additional consideration and preparation of an amended proposed order.

On December 6, 2001, the Commission considered Mr. Tamaddon's appeal of your proposed order dated January 10, 2001. During the course of its deliberations, an issue arose regarding the proper interpretation and application of the "R factor" in OAR 340-12-0045(1)(c)(D). Specifically, the Commission questioned whether the "negligent, intentional or flagrant" act of the Respondent refers to the conduct of the Respondent himself, to the conduct of the Respondent's employees or the conduct of either. The Commission was also concerned about whether there is substantial evidence in the record upon which to base a finding on the nature of the employees' conduct in the event that such conduct is relevant to the R factor. Similarly, the Commission questioned whether there is substantial evidence in the record to support a finding that Mr. Tamaddon directly, as opposed to vicariously, violated ORS 466.100(1).

The Commission determined that it would benefit from your consideration of the legal issue as well as any additional findings that you might be able to make relating to the R factor. (The Commission was clear, however, that it was not seeking to reopen the evidentiary record.) Accordingly, the Commission directed me to prepare a remand order for Director Hallock's signature.

Kevin Anselm
December 20, 2001
Page 2

On behalf of the Commission, thank you for your additional consideration of this matter.

Sincerely,

Larry Knudsen
Assistant Attorney General
Natural Resources Section

LJK:lan/GENA5155

cc: Melinda Eden, Chair
Mikell O'Mealy
Jeffrey Bachman
A. B. Cummins, Jr.
Larry Edelman

State of Oregon
Department of Environmental Quality

Memorandum

Date: November 20, 2001
To: Environmental Quality Commission
From: Stephanie Hallock, Director *SHallock*
Subject: Agenda Item A, Action Item: Appeal of Proposed Order the Matter of Dar Tamaddon, WMC/HW-WR-99-86, December 6, 2001 EQC Meeting

Appeal to EQC Dar Tamaddon appealed the Proposed Order (Attachment G) dated January 10, 2001, which assessed Mr. Tamaddon a \$7,200 civil penalty for illegally disposing of hazardous waste.

Background Findings of fact made by the Hearing Officer are summarized as follows:

Dar and Christy Tamaddon leased a gasoline service station, located at 3498 Pringle Road, Salem, from Richard Kirshner. At the time the Tamaddons leased the station, Kirshner was storing 13 or more drums of underground storage tank (UST) rinseate from an UST decommissioning at another of his properties. Mr. Kirshner testified that Mr. Tamaddon offered to remove and dispose of the contents of the drums in exchange for a credit on his rent. Mr. Tamaddon testified that he tried to obtain an estimate from the company that picked up the station's waste oil, but the company refused to touch the drums because their contents were not labeled. Mr. Tamaddon further testified that Mr. Kirshner informed him that the drums would be removed during an UST upgrade at the Pringle Road station in December 1998 or January 1999. The Hearing Officer found that in preparation for the upgrade, Mr. Tamaddon instructed his employees to move the drums to a different location on the site. Further, the Hearing Officer found that Tamaddon's employees dumped the drums either accidentally or with the intent to lighten the drums to make them easier to move. The Hearing Officer ultimately found that Mr. Tamaddon committed illegal disposal of hazardous waste because he "is responsible for the actions of his employees in dumping the barrel contents regardless of whether he specifically directed them to dump the barrels."

In his appeal to the Commission, Mr. Tamaddon took the following exceptions to the Proposed Order:

1. He did not violate ORS 466.100(1) by illegally disposing of hazardous waste. Mr. Tamaddon argues in his appeal brief (Attachment E) that he cannot be held liable for his employees' actions because he and they were acting for the benefit of Mr. Kirshner and as such, were Mr. Kirshner's agents and subagents.
2. If he did violate ORS 466.100, the civil penalty imposed by the Hearing Officer

- is excessive. Mr. Tamaddon also argues that his base penalty for the violation should be \$1,000, because the magnitude of the violation should be minor as opposed to major, as found by the Hearing Officer. Mr. Tamaddon argues that the violation should be minor because he did not intentionally dump the drums.
3. Christy Tamaddon did not tell City of Salem Environmental Compliance Specialist William Fear during an interview that her husband, Dar Tamaddon, dumped the drums.

With respect to Mr. Tamaddon's first exception, the Department argued in its reply brief (Attachment D) that no principle of agency law would absolve Mr. Tamaddon of individual liability for the action of his employees, even if Mr. Kirshner is also liable. The Department's specific arguments on this point were made in a memorandum prepared by the Attorney General that was attached to the Department's Hearing Memorandum (Attachment I) and to its reply brief. Regarding Mr. Tamaddon's second exception concerning the civil penalty calculation, the Department cited the specific rules relied upon by the Hearing Officer in arriving at the civil penalty. In so doing, the Department argues that there is no legal basis for finding the violation to be minor as opposed to major, and thus for reducing the penalty in the manner Mr. Tamaddon suggested. Regarding Mr. Tamaddon's third exception, the Department took no position on Christy Tamaddon's communication to Mr. Fear because the Hearing Officer did not take her testimony into account in determining Mr. Tamaddon's liability or in calculating the civil penalty. The Department argues that this issue is not relevant to the appeal.

**EQC
Authority**

The Commission has the authority to hear this appeal under OAR 340-011-0132.

Alternatives

- The Commission may:
1. As requested by Mr. Tamaddon, find him not liable for illegally disposing of hazardous waste and dismiss the Notice of Civil Penalty Assessment, or
 2. As requested by Mr. Tamaddon, if the Commission finds that he is liable, find that his civil penalty, as calculated in the Hearing Officer's Proposed Order is excessive and recalculate the penalty in the manner described by Mr. Tamaddon in his appeal brief, or
 3. Uphold the Hearing Officer's Proposed Order.
 4. As a separate matter, the Commission may find that Ms. Tamaddon did not make the statement attributed to her in Mr. Fear's testimony and cited in Hearing Officer's Findings of Fact. This would require reviewing at least a portion of the record. Such a finding would not itself affect the Proposed

Order or civil penalty.

In reviewing the proposed order, including the recommended findings of fact and conclusions of law, the Commission may substitute its judgment for that of the Hearing Officer except as noted below.¹ The proposed order was issued under current statutes and rules governing the Hearing Officer Panel Pilot Project.² Under these statutes, DEQ's contested case hearings must be conducted by a hearing officer appointed to the panel, and the Commission's authority to review and reverse the Hearing Officer's decision is limited by the statutes and the rules of the Department of Justice that implement the project.³

The most important limitations are as follows:

- (1) The Commission may not modify the form of the Hearing Officer's Proposed Order in any substantial manner without identifying and explaining the modifications.⁴
- (2) The Commission may not modify a recommended finding of historical fact unless it finds that the recommended finding is not supported by a preponderance of the evidence.⁵ Accordingly, the Commission may not modify any historical fact unless it has reviewed the entire record or at least all portions of the record that are relevant to the finding.
- (3) The Commission may not consider any new or additional evidence, but may only remand the matter to the Hearing Officer to take the evidence.⁶

The rules implementing these statutes also have more specific provisions addressing how Commissioners must declare and address any ex parte communications and potential or actual conflicts of interest.⁷

In addition, the Commission has established by rule a number of other procedural provisions, including:

- (1) The Commission will not consider matters not raised before the hearing

¹ OAR 340-011-0132.

² Or Laws 1999 Chapter 849.

³ *Id.* at § 5(2); § 9(6).

⁴ *Id.* at § 12(2).

⁵ *Id.* at § 12(3). A historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist either before or at the time of the hearing.

⁶ *Id.* at § 8; OAR 137-003-0655(4).

⁷ OAR 137-003-0655(5); 137-003-0660.

officer unless it is necessary to prevent a manifest injustice.⁸

- (2) The Commission will not remand a matter to the Hearing Officer to consider new or additional facts unless the proponent of the new evidence has properly filed a written motion explaining why evidence was not presented to the hearing officer.⁹

Attachments

- A. Letter from Mikell O'Mealy, dated November 8, 2001
- B. Letter from Stephanie Hallock, dated May 9, 2001
- C. Department's Motion for Extension of Deadline, dated April 17, 2001
- D. Department's Brief in Reply to Appellant's Exceptions and Brief, dated April 17, 2001
- E. Petitioner's Exceptions and Brief, dated March 14, 2001
- F. Petition for Commission Review, dated February 12, 2001
- G. Order for Assessment of Civil Penalty, dated January 10, 2001
- H. Appellant's Response to Hearing Memorandum, dated November 17, 2000
- I. Department's Hearing Memorandum, dated November 11, 2000
- J. Exhibits from Hearing of October 10, 2000
 - 1. Notice of Hearing
 - 2. Notice of Contested Case Rights and Procedures
 - 3. Notice of Assessment of Civil Penalty, dated August 6, 1999
 - 4. Notice of Appeal and Answer
 - 5. Site Map Drawing
 - 6. Photographs
 - 7. Chain of custody form for soil samples
 - 8. Analytical results report for soil samples
 - 9. E-Mail detailing basis for economic benefit calculation, dated July 12, 1999
 - 10. Department's BEN calculation, dated July 13, 1999

**Available
Upon Request**

OAR Chapter 340, Division 11; ORS Chapter 468

Report Prepared By: Mikell O'Mealy
Assistant to the Commission

Phone: (503) 229-5301

⁸ OAR 340-011-132(3)(a).

⁹ *Id.* at (4).



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TTY (503) 229-6993

November 8, 2001

Via Certified Mail

Arthur B. Cummins, Jr.
Attorney for Petitioner, Dar Tamaddon
P.O. Box 183
Salem, OR 97308

Jeffrey R. Bachman, Environmental Law Specialist
Oregon Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

RE: Case No. WMC/HW-WR-99-086

The appeal in the above referenced matter has been set for the regularly scheduled Environmental Quality Commission meeting on Thursday, December 6, 2001. The matter will be heard in the regular course of the meeting. The meeting will be held at the Department of Environmental Quality headquarters building, 811 SW Sixth Avenue, Room 3A on the third floor, in Portland, Oregon. Attached is the meeting agenda. I will forward the case record to you as soon as it is available.

The Commission will hear oral arguments from each party at the meeting. Each party will be allowed 5 minutes for opening arguments, followed by 5 minutes of rebuttal and 2 minutes for closing arguments.

If you have questions or need special accommodations for the meeting, please contact me at (503) 229-5301 or (800) 452-4011 ex. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Larry Edelman, AAG





Oregon

John A. Kitzhaber, M.D., Governor

Attachment B

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TTY (503) 229-6993

May 9, 2001

Arthur B. Cummins, Jr.
Attorney for Petitioner, Dar Tamaddon
P.O. Box 183
Salem, OR 97308

RE: Dar Tamaddon
Case No. WMC/HW-WR-99-086

U.S. Postal Service CERTIFIED MAIL RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)

7000 1670 0009 9005 9674

Postage		\$	Postmark Here
Certified Fee			
Return Receipt Fee (Endorsement Required)			
Restricted Delivery Fee (Endorsement Required)			
Total Postage & Fees		\$	
Sent To <u>Arthur B. Cummins, Jr.</u>			
Street, Apt. No., or PO Box No.			
City, State, ZIP+4			
PS Form 3800, May 2000		See Reverse for Instructions	

The Environmental Quality Commission received a request for an extension of the deadline for filing briefs on behalf of the respondent in the above referenced case. The respondent's brief was due on April 16, 2001. Due to an error on the part of the respondent's representative, the brief was not filed until April 17, 2001. An extension of the deadline to April 17, 2001, has been granted. If you have any questions, please feel free to contact Mikell O'Mealy, Assistant to the Commission, at (503) 229-5301 or (800) 452-4011 ex. 5301 within the state of Oregon.

Sincerely,

Stephanie Hallock
Director

cc: Jeffrey R. Bachman, Environmental Law Specialist



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

RECEIVED
OFFICE OF THE DIRECTOR

3	IN THE MATTER OF:	)	MOTION TO EXTEND
4	DAR TAMADDON,	)	TIME FOR FILING OF
		)	RESPONDENT'S BRIEF
5	PETITIONER	)	No. WMC/HW-WR-99-086
		)	MARION COUNTY

On January 10, 2001, the Commission's Hearing Officer issued a Proposed Order in the referenced case. Mr. Tamaddon timely filed a Petition requesting that the Commission review the Hearing Officer's Proposed Order. Mr. Tamaddon's Exceptions and Brief were also timely filed.

The Department's Brief was due to be filed January 16, 2001. Due to an error on the part of the Department's lay representative, the Department's Brief was not filed until January 17, 2001.

Oregon Administrative Rule 340-011-0132(3)(e) grants the Chair of the Commission or the Director of the Department unlimited discretion to grant extensions on the filing of briefs in Petitions for Commission Review. The Department moves the Chair and the Director to extend the deadline for filing of the Department's Brief to January 17, 2001. While the Department was in error, it contends that the error was harmless because the Petitioner was not prejudiced in any manner as a result of the late filing, nor were the proceedings in this case unduly delayed.

4/17/01

Date

Jeffrey R. Bachman

Jeffrey R. Bachman
Environmental Law Specialist

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2001, I served Respondent's Brief and Motion to Extend Time for Filing of Respondent's Brief in Case No. WMC/HW-WR-99-086 upon:

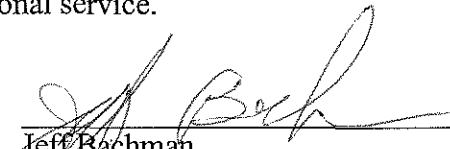
The Oregon Environmental Quality Commission
811 SW Sixth Avenue
Portland, OR 97204

Stephanie Hallock, Director
Oregon Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

Arthur B. Cummins, Jr.
Attorney for Petitioner, Dar Tamaddon
P.O. Box 183
Salem, OR 97308
(503) 364-0810

By facsimile, regular mail, and personal service.

4/17/01
Date


Jeff Bachman
Environmental Law Specialist
Department of Environmental Quality

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

RECEIVED
APR 17 2001
OFFICE OF THE DIRECTOR

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IN THE MATTER OF: DAR TAMADDON,)	RESPONDENT'S BRIEF
)	
PETITIONER)	NO. WMC/HW-WR-99-086
	)	MARION COUNTY

Respondent, Department of Environmental Quality (the Department), submits this Brief to the Environmental Quality Commission for its consideration in the appeal of the proposed Hearing Officer's Order in Notice of Assessment of Civil Penalty No. WMC/HW-WR-99-086, filed by Dar Tamaddon, Petitioner.

I. CASE HISTORY

On August 6, 1999, the Department assessed Petitioner a \$12,878 civil penalty for allegedly illegally disposing of hazardous waste. Petitioner appealed and a Contested Case Hearing was held on October 10, 2000. On January 10, 2001, the Hearing Officer issued a Proposed Order finding that Mr. Tamaddon had illegally disposed of hazardous waste, but reducing his civil penalty to \$7,200.

II. COMMISSION ACTION REQUESTED

The Department requests that the Commission deny Mr. Tamaddon's petition and issue a Final Order upholding the Hearing Officer's Findings of Fact, Conclusions, and Proposed Order.

III. FINDINGS OF FACT

The Hearing Office found that: Mr. Tamaddon leased a Salem gas station and mini-market property from Richard Kirshner. At the time Mr. Tamaddon leased the property, some sixteen to eighteen 55-gallon drums of underground storage tank rinseate generated by Mr. Kirshner at another gas station were stored at the Salem station. The rinseate was a toxic characteristic hazardous waste for benzene. In preparation for an upcoming tank upgrade at the Salem station, Mr. Tamaddon directed his employees to move the drums to another location on the station.

1 Because of the weight of the drums, the employees accidentally or intentionally dumped the
2 contents of the barrels onto unpaved ground behind the service station.

3 III. ARGUMENT

4 In his Petition, Mr. Tamaddon made three exceptions to the Hearing Officer's proposed
5 order: (1) That he was not liable for the actions of his employees because the moving of the drums
6 which led to the illegal disposal of their contents was done for the benefit of Mr. Kirshner, (2) that
7 the civil penalty was incorrectly calculated, and (3) That Mr. Tamaddon's wife, Christy Tamaddon,
8 did not, in fact, make a statement which the Hearing Officer found Ms. Tamaddon to have made.

9 Regarding Petitioner's first exception, the Department submits that the Hearing Officer
10 made the correct determination in finding Mr. Tamaddon liable for the actions of his employees.
11 This issue was briefed for the Hearing Officer in a memorandum prepared by the Attorney General
12 and attached to the Department's Hearing Memorandum. The Attorney General's memorandum is
13 attached to this brief.

14 Regarding Petitioner's third exception, the Department makes no argument because whether
15 Ms. Tamaddon actually made the alleged statement is not determinative as to Mr. Tamaddon's
16 liability. The Department does note, however, that the Commission may reverse a Hearing
17 Officer's finding of fact only if it finds that the finding is not supported by a preponderance of the
18 evidence in the Hearing Record. Oregon Administrative Rule (OAR) 137-003-0665(4).

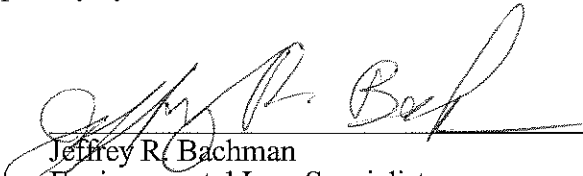
19 In his Petition, Mr. Tamaddon asks the Commission to reduce the magnitude in the civil
20 penalty calculation from major to moderate. Mr. Tamaddon, however, offers no legal basis for
21 doing so. OAR 340-012-0045(1)(a)(B) states that "the magnitude of a violation is determined by
22 first consulting the selected magnitude categories in OAR 340-012-0090." Other criteria for
23 determining magnitude may only be employed in the event there is no selected magnitude for the
24 violation. Selected magnitudes for illegal disposal of hazardous waste are found in OAR 340-012-
25 0090(3)(b). In the Notice, the Department alleged thirteen 55-gallon drums, or 715 gallons, of
26 hazardous waste were illegally disposed. OAR 340-012-0090(3)(b)(A) states that if more than 150
27 gallons of hazardous waste is illegally disposed, the magnitude of the violation is major.

1 Mr. Tamaddon has never disputed the quantity of hazardous waste disposed. Instead he
2 argues that the magnitude should be reduced because he did not intentionally dispose of the waste
3 and did not personally dispose of the waste. These are not legitimate criteria for determining
4 magnitude. Mr. Tamaddon's state of mind is applicable only in determining the "R" factor in the
5 civil penalty. See OAR 340-012-0045 generally and OAR 340-012-0045(1)(c)(D) specifically.

6 Mr. Tamaddon further argues that a typographical error in Exhibit 1 of the Notice, where
7 the violation was referred to as being of moderate magnitude, indicates that the Department really
8 intended the magnitude to be moderate. It is clear, however, from Exhibit 1, that the use of the
9 word moderate is an error and not reflective of the Department's intent. In the prior paragraph of
10 the Exhibit, the magnitude is identified as major and cites the correct basis for making that
11 determination. Furthermore, in the paragraph cited by Mr. Tamaddon, the Exhibit states that the
12 base penalty for a Class I, moderate (sic) magnitude violation is \$6,000 in the matrix listed in OAR
13 340-012-0041(1). Referring to that matrix, the base penalty can only be \$6,000 for a Class I, major
14 magnitude violation.

15 Finally, Mr. Tamaddon claims that the Department's representative, Jeff Bachman, said in
16 his opening remarks at hearing that if the violation were a negligent violation, the civil penalty
17 would only be \$2,400. Mr. Tamaddon misrepresents the record. Under OAR 340-012-0045, a
18 \$12,878 civil penalty could not be reduced to \$2,400 simply by altering the "R" factor from
19 intentional to negligence. Mr. Bachman said that if the Hearing Officer found that Mr. Tamaddon's
20 negligence caused the violation rather than his intentional conduct, as was alleged in the Notice,
21 then the total civil penalty would be reduced *by* \$2,400, not *to* \$2,400. This potential alternative
22 finding and civil penalty were addressed in the Department's Hearing Memorandum. In her
23 Proposed Order, the Hearing Officer did find the cause of the violation to be negligence and
24 accordingly reduced the total civil penalty by \$2,400.

25
26 4/17/01
27 _____
Date



Jeffrey R. Bachman
Environmental Law Specialist

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2001, I served Respondent's Brief and Motion to Extend Time for Filing of Respondent's Brief in Case No. WMC/HW-WR-99-086 upon:

The Oregon Environmental Quality Commission
811 SW Sixth Avenue
Portland, OR 97204

Stephanie Hallock, Director
Oregon Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

Arthur B. Cummins, Jr.
Attorney for Petitioner, Dar Tamaddon
P.O. Box 183
Salem, OR 97308
(503) 364-0810

By facsimile, regular mail, and personal service.

4/17/01

Date



Jeff Bachman
Environmental Law Specialist
Department of Environmental Quality

THE LAW FIRM
OF
A.B. CUMMINS, JR., P.C.
P.O. Box 183
SALEM, OREGON 97308

ARTHUR B. CUMMINS, JR.
LAWYER

PAMELA J. CUMMINS
LORI STIPE
LEGAL ASSISTANTS

March 14, 2001

Department of Environmental Quality
811 S.W. 6th Avenue
Portland, OR 97204-1334

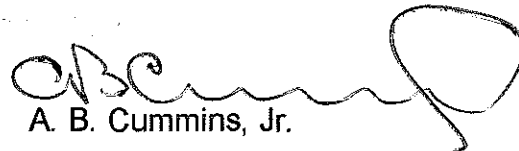
Attention: Stephanie Hallock, Director

Re: Dar Tamaddon
No. WMC/HW-WR-99-086
Marion County

Dear Ms. Hallock:

Enclosed is the Respondent's Exceptions and Brief in the above matter.

Yours truly,


A. B. Cummins, Jr.

ABC:pjc

Encl: Orig & tc of Respondent's Exceptions and Brief

cc: Dar and Christy Tamaddon
(w/pc encl)

1
2
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4
5
6 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
7 OF THE STATE OF OREGON

8 IN THE MATTER OF:) RESPONDENT'S EXCEPTIONS
9 DAR TARMADDON) AND BRIEF
10) No. WMC/HW-WR-99-086
11) MARION COUNTY
12)

13 EXCEPTIONS

14 1. Respondent did not violate ORS 466.100(1) by
15 illegally disposing of hazardous waste.

16 2. If respondent did violate ORS 466.100(1), the
17 civil penalty imposed is excessive.

18 3. Christy Tamaddon did not tell Fear during an
19 interview that Tamaddon dumped the barrels, which Tamaddon
20 believed contained rusty water.

21 ARGUMENT AND AUTHORITIES

22 Exception No. 1

23
24 It serves no useful purpose to restate all the
25 circumstances of the disposal of the hazardous waste. Suffice
26 to say that Tamaddon had no knowledge of the contents of the

1 drums and Tamaddon did not expressly or otherwise direct that
2 the contents of the drums be dumped.

3 The act of dumping was done by temporary employees of
4 Tamaddon without his knowledge.

5 The drums were unlawfully stored on the premises by
6 Kirshner, the owner/lessor of the premises. There were no
7 markings on the drums to identify the contents. The drums and
8 their contents were the property of Kirshner.

9 The hearings officer concludes that "Tamaddon is
10 responsible for the actions of his employees in dumping the
11 barrel contents regardless of whether he specifically directed
12 them to dump the barrels. Such a conclusion is unreasonable
13 under the circumstances.

14 Tamaddon and his employees were acting for the benefit
15 of Kirshner in moving the drums to facilitate the disposal of
16 the contents of the drums. As such, Tamaddon was the agent of
17 Kirshner, and his employees were subagents. As the owner/lessor
18 of the premises and the owner of the drums and their contents,
19 they, in fact, were under the control and direction of Kirshner.

20 No one authorized (directly or impliedly) the dumping
21 of the contents of the drums and no one reasonably expected the
22 drums would be dumped in the process of moving them from point A
23 to point B on the premises.

24
25
26
RESPONDENT'S EXCEPTIONS AND BRIEF

Page 2 of 6

A.B. CUMMINS, JR., P.C.
LAWYER
180 CHURCH STREET S.E.
P.O. Box 183
SALEM, OREGON 97308
503-399-2400 / FAX: 503-364-0810

1 There is legal authority that lends support to this
2 threshold concept. In Badger v. Paulson Inv. Co., 311 Or 14
3 (1991), it is stated that:

4 "No reason to impose punitive damages against
5 principal whose agent is not acting within
6 scope of agency, particularly where there is
7 no evidence that principal knew (had knowledge)
8 of agent's acts."

9 Further, a principal should not be held liable for intentional
10 acts of agent, where such are not expected. See Jones v. Herr,
11 39 Or App 937 (1979); and Barendrecht v. Clark, 246 Or 535
12 (1967).

13 Lastly, **equity** will not allow one whose wrongdoing has
14 caused a loss to shift to another on whose apparent behalf he
15 was acting without actual authority. See MacNab v. Fireman's
16 Fund Ins. Co., 243 Or 267 (1966).

17
18 Exception No. 2

19 Though the hearings officer reduced the civil penalty
20 from \$12,878 to \$7,200, respondent maintains the civil penalty
21 is still unreasonable and excessive, particularly the "base
22 penalty factor."

23 The quantity of hazardous waste that was dumped is not
24 disputed. Clearly, the violation is a major one to the extent
25 that Kirshner is involved. The Notice of Noncompliance to
26

1 Richard Kirshner (ENF-WMC/HW-WRS-99-100) states in relevant part
2 (Violation 4) as follows:

3 "There has been no documentation that you took
4 part in the intentional dumping of these drums
5 or that you issued orders to dispose of the
6 drums in this manner. It is documented you did
7 not manage the drums of waste generated at the
8 Bend decommissioning site in accordance with
9 Federal and State hazardous waste laws and that
10 The waste was stored at Aaron's Quick Stop
11 October 1996 through January 7 & 8, 1999.
12 **Had the waste been managed in accordance
13 With the federal and state hazardous waste
14 Laws, it would not have been present in
15 January of 1999. (emphasis added)**

16 Tamaddon may have been negligent to some extent, (e.g.
17 failure to supervise or perhaps failure to give more specific
18 instructions), but he did not intentionally do anything, nor
19 could he have as that term is defined in OAR 340-012-0030(9).
20 The actual dumping was done by others, and the mere fact that
21 dumping was done by employees of Tamaddon does not subject
22 Tamaddon to civil penalty without more. There needs to be
23 authority and reasonable expectation. Movement of the drums was
24 what was reasonably expected. There was no authority (express,
25 implied or apparent) to dump the contents of the drums.

26 If someone other than Kirshner should be punished for
intentional acts it is the employees, not Tamaddon.

In his opening remarks at the hearing, DEQ
representative, Jeff Bachman said the civil penalty for an
RESPONDENT'S EXCEPTIONS AND BRIEF

1 "intentional violation" would be \$12,878 and for a "negligent
2 violation" \$2,400. This is a substantial difference.

3 The hearings officer accepted this situation as a
4 Class I "major" violation, justifying BP of \$6,000. It is
5 curious that the Findings and Determination of Respondent's
6 Civil Penaltiyy (Exhibit 1) to the Notice of Assessment of Civil
7 Penalty dated August 6, 1999 in this case states:
8

9 "BP is the base penalty, which is \$6,000 for
10 a Class 1, **moderate** magnitude violation in the
11 matrix listed in OAR 340-12."

12 A Class 1 "moderate" BP would be \$3,000, not \$6,000. Perhaps a
13 "moderate" violation was what was intended to begin with.

14 Mr. Bachman, in his opening remarks before the
15 hearings officer, said "Tamaddon had his employees dump the
16 contents (of the drums) on the ground." The definition of
17 "intentional" is found at OAR 340-012-0030(9) and classified
18 this as an intentional violation. "Intentional" is defined as
19 "conduct by a person with a **conscious objective** to cause the
20 result of the conduct." There is no evidence Tamaddon directed
21 the employees to dump the contents or that he ever intended
22 that.
23

24 The record simply does not support Mr. Bachman's
25 contention.
26

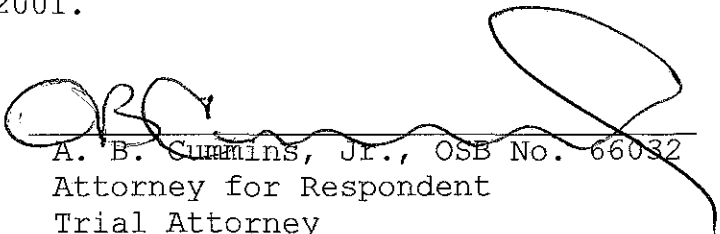
1 It is submitted that the role of Tamaddon in this
2 violation is only minor. As such a BP of \$1,000 would be
3 appropriate.

4 To then apply the reasoning of the hearings officer
5 regarding the remainder of the formula would be a fair
6 resolution of this matter and one that Tamaddon could accept if
7 this matter is not dismissed outright.
8

9 Exception 3

10 During her testimony at the hearing, Christy Tamaddon
11 denied telling investigator Fear that Tamaddon dumped the
12 barrels, or that Tamaddon believed the barrels contained rusty
13 water. It was a physical impossibility for Tamaddon to dump the
14 barrels because he wasn't on the premises at the time. Tamaddon
15 stated in his testimony that Kirshner told him the barrels
16 contained "rinse water" when Tamaddon told Kirshner a certain
17 company would not dispose of the contents because the drums did
18 not have labels. Of course, the lack of labels was intentional
19 so Kirshner could conceal the fact that the hazardous waste was
20 being improperly stored.
21

22 DATED: March 14, 2001.

23
24 
25 A. B. Cummins, Jr., OSB No. 66032
26 Attorney for Respondent
Trial Attorney

CERTIFICATE OF MAILING

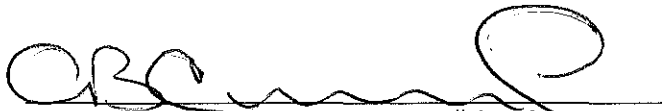
I certify that I served the foregoing **RESPONDENT'S**
EXCEPTIONS AND BRIEF in Case No. WMC/HW-WR-99-086 by placing a
true, full and exact copy thereof, duly certified to be such by me,
in a sealed envelope, postage prepaid, and depositing the same in
the United States post office at Salem, Oregon, on the date below
addressed:

Stephanie Hallock
Director
Dept. of Environmental Quality
811 S.W. Sixth Avenue
Portland, OR 97204

Jeff Bachman
Dept. of Environmental Quality
2020 S.W. 4th Ave., Ste 400
Portland, OR 97201-4959

Laurence Edelman
Asst. Attorney General
1515 S.W. 5th Ave. Ste. 410
Portland, OR 97201-5451

Dated the 14th day of March 2001.



A.B. Cummins, Jr., OSB #66032
180 Church Street S.E.
P. O. Box 183
Salem, Oregon 97308
Telephone: (503) 399-2400

Attorney for Respondent

THE LAW FIRM
OF
A.B. CUMMINS, JR., P.C.
P.O. Box 183
SALEM, OREGON 97308

ARTHUR B. CUMMINS, JR.
LAWYER

PAMELA J. CUMMINS
LORI STIPE
LEGAL ASSISTANTS

February 12, 2001

Department of Environmental Quality
811 S.W. 6th Avenue
Portland, OR 97204-1334

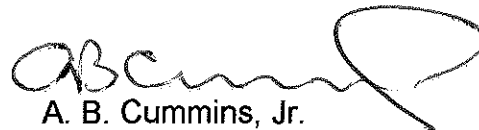
Attention: Stephanie Hallock, Director

Re: Dar Tamaddon
No. WMC/HW-WR-99-086
Marion County

Dear Ms. Hallock:

Enclosed is the Petition for Review in the above matter.


Yours truly,


A. B. Cummins, Jr.

ABC:ls

cc: Dar and Christy Tamaddon

THIS IS A CERTIFIED
TRUE COPY

by 

STATE OF OREGON

BEFORE THE HEARING OFFICER PANEL

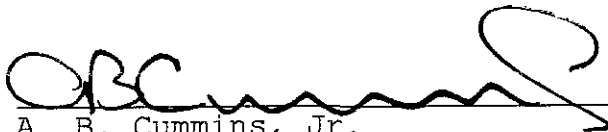
FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:)
	) No. WMC/HW-WR-99-086
DAR TAMADDON)
	) PETITION FOR REVIEW
)
)

Respondent requests review of the decision of the Hearings Officer by the Oregon Environmental Quality Commission.

Respondent received the decision by first class mail on January 12, 2001. This Petition is filed within 30 days of the date the order was served on respondent.

Dated: February 12, 2001.



A. B. Cummins, Jr.
Attorney for Dar Tamaddon,
Respondent
P. O. Box 183
Salem, OR 97308
503-399-2400

CERTIFICATE OF MAILING

I certify that I served the foregoing **PEITION FOR REVIEW** in Case No. WMC/HR-99-086 by placing a true, full and exact copy thereof, duly certified to be such by me, in a sealed envelope, postage prepaid, and depositing the same in the United States post office at Salem, Oregon, on the date below addressed:

Stephanie Hallock
Director
Dept. of Environmental Quality
811 S.W. Sixth Avenue
Portland, OR 97204

Jeff Bachman
Dept. of Environmental Quality
2020 S.W. 4th Ave., Ste 400
Portland, OR 97201-4959

Laurence Edelman
Asst. Attorney General
1515 S.W. 5th Ave. Ste. 410
Portland, OR 97201-5451

Dated the 12th day of February 2001.



A.B. Cummins, Jr., OSB #66032
180 Church Street S.E.
P. O. Box 183
Salem, Oregon 97308
Telephone: (503) 399-2400

Attorney for Respondent

Ref No.: G60374
Case No: 01-GAP-00004
Case Type: DEQ

STATE OF OREGON
Before the Hearing Officer Panel
For the

Dec Mailed: 01/11/01
Mailed by: SLS

DEPARTMENT OF ENVIRONMENTAL QUALITY
875 Union Street NE
Salem, Oregon 97311

HEARING DECISION

DAR TAMADDON
1094 GARLOCK ST S

SALEM OR 97302 6025

DEPARTMENT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

A. B. CUMMINS, JR., ATTORNEY
PO BOX 183

SALEM OR 97308 0183

JEFF BACHMAN
DEQ ENFORCEMENT SECTION
2020 SW 4TH AVE STE 400
PORTLAND OR 97201 4959

LAURENCE EDELMAN
ASST ATTORNEY GENERAL
1515 SW 5TH AVE STE 410
PORTLAND OR 97201-5451

SUSAN GRECO

The following **HEARING DECISION** was served to the parties at their respective addresses.

STATE OF OREGON
BEFORE THE HEARING OFFICER PANEL
FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of)
DAR TAMADDON)
Respondent)

PROPOSED ORDER
Notice of Assessment of
Civil Penalty
No. WMC/HW-WR-99-086

HISTORY

The Department of Environmental Quality (hereinafter the "Department") issued a Notice of Assessment of Civil Penalty No. WMC/HW-WR-99-086 on August 6, 1999 to Respondent for dumping 13 drums of hazardous waste onto the ground at "Aaron's Quick Stop", 3498 Pringle Road SE, Salem, Oregon. Respondent Dar Tamaddon (hereinafter "Tamaddon") requested a hearing on August 22, 1999.

The Department referred the matter to the Central Hearings Panel. The Panel appointed Hearing Officer Kevin Anselm to hear the case. The hearing was held October 10, 2000 at the Department of Environmental Quality, 750 Front St. NE, Suite 120, Salem, Oregon. Respondent Tamaddon appeared, and was represented by attorney Arthur B. Cummins. Christy Tamaddon appeared as respondent's witness. Jeff Bachman, Environmental Law Specialist, represented the Department. The Department called Richard Kirschner, property owner; William Fear, City of Salem Environmental Compliance Specialist; Josh Graham, former employee; Joe Petrovich, Hazardous Waste Specialist for the Department; and Les Carlough, Department Enforcement Section Manager, as witnesses. Department employees Susan Greece and Jeanine Camilleri observed the hearing.

The parties agreed to hold the hearing record open until 5 p.m. October 20, 2000 for the Department's closing brief and argument; until 5 p.m. November 3, 2000 for respondent's closing argument; and until November 15, 2000 for the Department's response.

On October 11, 2000, the Department requested a post-hearing telephone conference regarding argument due dates. A post-hearing conference was held with Mr. Cummins and Mr. Bachman on October 12, 2000 at 8:30 am. The parties agreed to modify the closing argument schedule to hold the hearing record open until 5 p.m. November 1, 2000 for the Department's closing brief and argument; until 5 p.m. November 17, 2000 for respondent's closing argument, and until 5 p.m. December 1, 2000 for the Department's response. The Department's closing brief and argument was received by fax on November 1, 2000 and marked as Exhibit 11. Respondent's response was received by fax on November 17, 2000 and by mail on November 20, 2000 and marked as Exhibit 12. The Department waived the response due on December 1, 2000 by telephone message to the hearings office on or about November 21, 2000.

ISSUES

Did Respondent Tamaddon violate ORS 466.100(1) by illegally disposing of hazardous waste?

If so, is the civil penalty imposed appropriate pursuant to OAR 340-012-0045?

FINDINGS OF FACT

Respondent Tamaddon (also known as Dara Tamaddon), and his wife, Christy Tamaddon, leased and operated Aaron's Quick Stop located at 3498 Pringle Road SE in Salem, Oregon (hereinafter "Pringle Property"), beginning in mid-July 1998. The business included a mini-market and gas pumps, as well as a fenced storage lot behind the building. The property owner, Richard Kirschner (hereinafter "Kirschner"), stored a number of unmarked barrels behind the building, as well as several cars that were not running. The barrels contained underground storage tank rinseate that were generated at another Kirschner property, then transported and stored by Kirschner at the Pringle property prior to leasing the premises to Tamaddon. Kirschner intended to properly dispose of the rinseate.

Tamaddon and Kirschner discussed removal of the barrels during the fall of 1998. Kirschner advised Tamaddon that the 16-18 barrels containing rinseate had to be disposed of properly. Kirschner first alleged that Tamaddon told him that the costs to remove the barrels, based on Tamaddon's contact was about \$2,500, and that Tamaddon asked for a credit against rent if Tamaddon took care of the disposal. Kirschner told Tamaddon that he would need receipts before he would reimburse Tamaddon for any expenditure. Later in his testimony, Kirschner said he told Tamaddon that it would cost \$2,500 to properly dispose of the rinseate.

Tamaddon said he inquired with the company that removed the station's petroleum waste about removing the barrels, but found out that the company would not move the barrels because the barrels did not have content labels. Tamaddon then understood from Kirschner that the barrels would be removed during the station upgrade that Kirschner planned for late December 1998 and early January 1999.

In preparation for the tank upgrade and associated clean up, Tamaddon instructed employees to move items, including barrels to various places on the premises. The employees experienced difficulty in moving heavy items, including the barrels, by handtruck on the unpaved portion of the fenced area. The employees dumped the barrels either accidentally or with the intent to lighten the barrels to make them easier to move.

Tamaddon left for a California visit on January 7 or 8, 1999. On Saturday, January 9, 1999, Kirschner stopped by the Pringle property. Kirschner did not often stop by the Pringle property and did not remember when he last stopped at the property prior to January 9, 1999. Christy Tamaddon told Kirschner that Tamaddon left a message with her for Kirschner that the barrels had been taken care of. Kirschner smelled a heavy gas odor in the area, and after a period of time, called the fire department because he suspected that some or all of the barrels were dumped on the ground behind the building.

The fire department and the City of Salem responded to the Pringle property. William Fear (hereinafter "Fear"), an environmental compliance specialist, conducted an investigation, including taking pictures and samples of the affected area. Fear also interviewed Christy Tamaddon, who told him that Tamaddon dumped the barrels, which Tamaddon believed contained rusty water.

A former employee, Josh Graham (hereinafter "Graham") worked for Tamaddon for a few days in January 1999, although he does not remember the dates he worked there. He recalls seeing another employee dump drums that purportedly contained water and that there were still 10-15 full barrels behind the building.

The lab results from Fear's samples showed that the contaminated soil included benzene, a known human carcinogen posing a human health risk and hazardous waste. Neither respondent nor the Pringle property has a Department permit to store or dispose of hazardous waste. The Department

requested a quote from So Pro, a Washington firm, for the removal of 13 barrels of underground storage tank rinseate waste. So Pro provided a quote of \$4,661.50 in July 1999.

The Department calculated the civil penalty according to the formula outlined on Exhibit 1 to the Notice of Assessment of Civil Penalty including \$6,000 for the base penalty for a Class I moderate magnitude violation; +2 for repeated or continuous violations alleging the violation occurred on more than one day; +6 for respondent's intentional conduct and attributing economic benefit of \$2,878.

ULTIMATE FINDINGS

One or more of Tamaddon's employees dumped about thirteen barrels of underground storage tank rinseate waste containing benzene on the Pringle property on or before January 9, 2000.

The civil penalty included factors to increase the penalty for repeated or continuous violations, respondent's alleged intentional conduct and purported economic benefit.

APPLICABLE LAW

Oregon Revised Statute (ORS) ORS 466.100 Disposal of waste restricted; permit required.

(1) Except as provided in subsection (3) of this section, no person shall dispose of any hazardous waste anywhere in this state except at a hazardous waste disposal site permitted pursuant to ORS 466.110 to 466.170.

(2) No person shall establish, construct or operate a disposal site without a permit therefor issued pursuant to ORS 466.005 to 466.385 and 466.992.

(3) The Department of Environmental Quality may authorize disposal of specified hazardous wastes at specified solid waste disposal sites operating under department permit issued pursuant to ORS 459.205 to 459.385. Such authorization may be granted only under procedures approved by the Environmental Quality Commission, which shall include a determination by the department that such disposal will not pose a threat to public health, welfare or safety or to the environment.

Oregon Administrative Rule (OAR) 340-012-0068 Hazardous Waste Management and Disposal Classification of Violations, states, in part:

Violations pertaining to the management and disposal of hazardous waste, including universal wastes, shall be classified as follows:

(1) Class One:

* * *

(1) Illegal disposal of hazardous waste;

* * *

OAR 340-012-0045 Civil Penalty Determination Procedure

(1) When determining the amount of civil penalty to be assessed for any violation, other than violations of ORS 468.996, which are determined according to the procedure set forth below in OAR 340-012-0049(8), the Director shall apply the following procedures:

(a) Determine the class and the magnitude of each violation:

(A) The class of a violation is determined by consulting OAR 340-012-0050 to 340-012-0073;

(B) The magnitude of the violation is determined by first consulting the selected magnitude categories in OAR 340-012-0090. In the absence of a selected magnitude, the magnitude shall be moderate unless:

(i) If the Department finds that the violation had a significant adverse impact on the environment, or posed a significant threat to public health, a determination of major magnitude shall be made. In making a determination of major magnitude, the Department shall consider all available applicable information including such factors as: The degree of deviation from the Commission's and Department's statutes, rules, standards, permits or orders, concentration, volume, percentage, duration, toxicity, and the extent of the effects of the violation. In making this finding, the Department may consider any single factor to be conclusive for the purpose of making a major magnitude determination;

(ii) If the Department finds that the violation had no potential for or actual adverse impact on the environment, nor posed any threat to public health, or other environmental receptors, a determination of minor magnitude shall be made. In making a determination of minor magnitude, the Department shall consider all available applicable information including such factors as: The degree of deviation from the Commission's and Department's statutes, rules, standards, permits or orders, concentration, volume, percentage, duration, toxicity, and the extent of the effects of the violation. In making this finding, the Department may consider any single factor to be conclusive for the purpose of making a minor magnitude determination.

(b) Choose the appropriate base penalty (BP) established by the matrices of OAR 340-012-0042 after determining the class and magnitude of each violation;

(c) Starting with the base penalty, determine the amount of penalty through application of the formula: $BP + [(.1 \times BP) \times (P + H + O + R + C)] + EB$, where:

(A) "P" is whether the Respondent has any prior significant actions relating to statutes, rules, orders and permits pertaining to environmental quality or pollution control. A violation is deemed to have become a Prior Significant Action on the date of the issuance of the first Formal Enforcement Action in which it is cited. For the purposes of this determination, violations that were the subject of any prior significant actions that were issued before the effective date of the Division 12 rules as adopted by the Commission in March 1989, shall be classified in accordance with the classifications set forth in the March 1989 rules to ensure equitable consideration of all prior significant actions. The values for "P" and the finding which supports each are as follows:

(i) 0 if no prior significant actions or there is insufficient information on which to base a finding;

(ii) 1 if the prior significant action is one Class Two or two Class Threes;

(iii) 2 if the prior significant action(s) is one Class One or equivalent;

(iv) 3 if the prior significant actions are two Class One or equivalents;

(v) 4 if the prior significant actions are three Class Ones or equivalents;

- (vi) 5 if the prior significant actions are four Class Ones or equivalents;
- (vii) 6 if the prior significant actions are five Class Ones or equivalents;
- (viii) 7 if the prior significant actions are six Class Ones or equivalents;
- (ix) 8 if the prior significant actions are seven Class Ones or equivalents;
- (x) 9 if the prior violations significant actions are eight Class Ones or equivalents;
- (xi) 10 if the prior significant actions are nine Class Ones or equivalents, or if any of the prior significant actions were issued for any violation of ORS 468.996;
- (xii) In determining the appropriate value for prior significant actions as listed above, the Department shall reduce the appropriate factor by:
 - (I) A value of 2 if the date of issuance of all the prior significant actions are greater than three years old; or
 - (II) A value of 4 if the date of issuance of all the prior significant actions are greater than five years old.
 - (III) In making the above reductions, no finding shall be less than zero.
- (xiii) Any prior significant action which is greater than ten years old shall not be included in the above determination;
- (xiv) A permittee, who would have received a Notice of Permit Violation, but instead received a civil penalty or Department Order because of the application of OAR 340-012-0040(2)(d), (e), (f), or (g) shall not have the violation(s) cited in the former action counted as a prior significant action, if the permittee fully complied with the provisions of any compliance order contained in the former action.
- (B) "H" is Respondent's history in correcting prior significant actions or taking reasonable efforts to minimize the effects of the violation. In no case shall the combination of the "P" factor and the "H" factor be a value less than zero. In such cases where the sum of the "P" and "H" values is a negative numeral the finding and determination for the combination of these two factors shall be zero. The values for "H" and the finding which supports each are as follows:
 - (i) -2 if Respondent took all feasible steps to correct the majority of all prior significant actions;
 - (ii) 0 if there is no prior history or if there is insufficient information on which to base a finding.
- (C) "O" is whether the violation was repeated or continuous. The values for "O" and the finding which supports each are as follows:
 - (i) 0 if the violation existed for one day or less and did not recur on the same day, or if there is insufficient information on which to base a finding;
 - (ii) 2 if the violation existed for more than one day or if the violation recurred on the same day.

(D) "R" is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act of the Respondent. The values for "R" and the finding which supports each are as follows:

(i) 0 if an unavoidable accident, or if there is insufficient information to make a finding;

(ii) 2 if negligent;

(iii) 6 if intentional; or

(iv) 10 if flagrant.

(E) "C" is the Respondent's cooperativeness and efforts to correct the violation. The values for "C" and the finding which supports each are as follows:

(i) -2 if Respondent was cooperative and took reasonable efforts to correct a violation, took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the violation would not be repeated;

(ii) 0 if there is insufficient information to make a finding, or if the violation or the effects of the violation could not be corrected;

(iii) 2 if Respondent was uncooperative and did not take reasonable efforts to correct the violation or minimize the effects of the violation.

(F) "EB" is the approximated dollar sum of the economic benefit that the Respondent gained through noncompliance. The Department or Commission may assess "EB" whether or not it applies the civil penalty formula above to determine the gravity and magnitude-based portion of the civil penalty, provided that the sum penalty does not exceed the maximum allowed for the violation by rule or statute. "EB" is to be determined as follows:

(i) Add to the formula the approximate dollar sum of the economic benefit gained through noncompliance, as calculated by determining both avoided costs and the benefits obtained through any delayed costs, where applicable;

(ii) The Department need not calculate nor address the economic benefit component of the civil penalty when the benefit obtained is de minimis;

(iii) In determining the economic benefit component of a civil penalty, the Department may use the U. S. Environmental Protection Agency's BEN computer model, as adjusted annually to reflect changes in marginal tax rates, inflation rate and discount rate. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the economic benefit gained by Respondent's noncompliance. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect that Respondent's actual circumstance. Upon request of the Respondent, the Department will use the model in determining the economic benefit component of a civil penalty;

(iv) As stated above, under no circumstances shall the imposition of the economic benefit component of the penalty result in a penalty exceeding the statutory maximum allowed for the violation by rule or statute. When a violation has extended over more than one day, however, for determining the maximum penalty allowed, the Director may treat the violation as extending over at least as many days as necessary to recover the economic benefit of noncompliance. When the purpose of treating a violation as extending over more than one day is to recover the economic benefit, the Department has the discretion not to impose the gravity and magnitude-based portion of the penalty for more than one day.

(2) In addition to the factors listed in section (1) of this rule, the Director may consider any other relevant rule of the Commission and shall state the effect the consideration had on the penalty. On review, the Commission shall consider the factors contained in section (1) of this rule and any other relevant rule of the Commission.

(3) In determining a civil penalty, the Director may reduce any penalty by any amount the Director deems appropriate when the person has voluntarily disclosed the violation to the Department. In deciding whether a violation has been voluntarily disclosed, the Director may take into account any conditions the Director deems appropriate, including whether the violation was:

(a) Discovered through an environmental auditing program or a systematic compliance program;

(b) Voluntarily discovered;

(c) Promptly disclosed;

(d) Discovered and disclosed independently of the government or a third party;

(e) Corrected and remedied;

(f) Prevented from recurrence;

(g) Not repeated;

(h) Not the cause of significant harm to human health or the environment; and

(i) Disclosed and corrected in a cooperative manner.

(4) The Department or Commission may reduce any penalty based on the Respondent's inability to pay the full penalty amount. If the Respondent seeks to reduce the penalty, the Respondent has the responsibility of providing to the Department or Commission documentary evidence concerning Respondent's inability to pay the full penalty amount:

(a) When the Respondent is currently unable to pay the full amount, the first option should be to place the Respondent on a payment schedule with interest on the unpaid balance for any delayed payments. The Department or Commission may reduce the penalty only after determining that the Respondent is unable to meet a long-term payment schedule;

(b) In determining the Respondent's ability to pay a civil penalty, the Department may use the U.S. Environmental Protection Agency's ABEL computer model to determine a Respondent's ability to pay the full civil penalty amount. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds

will most accurately calculate the Respondent's ability to pay a civil penalty. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model;

(c) In appropriate circumstances, the Department or Commission may impose a penalty that may result in a Respondent going out of business. Such circumstances may include situations where the violation is intentional or flagrant or situations where the Respondent's financial condition poses a serious concern regarding the ability or incentive to remain in compliance.

CONCLUSIONS AND REASONS

The respondent violated ORS 466.100(1) by illegally disposing of hazardous waste.

Respondent does not dispute that a number of barrels containing hazardous waste were dumped on his business premises while the premises was under his control and direction as lessee. Tamaddon is responsible for the actions of his employees in dumping the barrel contents regardless of whether he specifically directed them to dump the barrels. Accordingly, Tamaddon violated ORS 466.100(1) by illegally disposing of hazardous waste on the Pringle property. The remaining question is whether the civil penalty assessed for dumping the hazardous waste is appropriate in this case.

The civil penalty imposed is not appropriate pursuant to OAR 340-012-0045.

In this case, the civil penalty is not appropriately calculated in respect to factors for repeated or continuous violations, the cause of the violation and inclusion of an economic benefit factor. The Department had the burden to prove each factor value as alleged. The remaining factors not addressed below, including the base penalty factor, are correctly valued.

First, the "single or repeated occurrence" (O) variable was incorrectly valued as 2. The Department alleged that the dumping occurred on more than one day, but provided no plausible evidence of a continuing violation beyond Kirschner's belief that the barrels were not dumped at once. Kirschner acknowledged that he was not often at the Pringle property. A former employee testified that he saw some barrels being dumped that contained, as he understood at the time, water. Given the various numbers of barrels, anywhere from 10 - 18 that may or may not have been involved, barrels containing something other than rinsewater or hazardous waste may have been dumped in the former employee's sight. Since that employee cannot recall what few days he worked for Tamaddon, a timeframe cannot be accurately assigned. Accordingly, the correct value for the "single or repeated occurrence" (O) is '0' because there is insufficient information on which to base a finding.

Second, the "cause of the violation" (R) variable was incorrectly valued as +6. The Department alleges that the respondent deliberately emptied or directed others in his employ to empty the drums containing hazardous waste on to the ground. The Department argues that Christy Tamaddon's message from Tamaddon to Kirschner indicates that Tamaddon either personally emptied or directed his employees to empty the barrels on the ground on January 7 or 8, 1999. Further, the Department argues that respondent was fully aware of the contents of the barrels because Kirschner told respondent that the barrels contained rinsewater. Respondent argues Kirschner did not tell him that the barrels contained hazardous waste until after the barrels were dumped. He further argues that he directed staff to move the barrels over to a pick-up area for disposal, and that the staff either inadvertently, or for ease, dumped the barrels. He continues that while Christy Tamaddon told Kirschner that the barrels were taken care of, she was simply advising that the barrels were ready for collection as arranged for during the tank upgrade. Based on the evidence presented, respondent was

at least negligent in either properly directing and controlling his employees, or allowing them to dump barrels, the specific contents of which may not have been known by respondent. However, the weight of the evidence does not show that the respondent intentionally dumped or directed the dumping of hazardous waste on the ground. Accordingly, the correct value for "Cause of the Violation" is '2' for negligence.

Third, the Department attributed an Economic Benefit (EB) that the respondent gained by not properly disposing of hazardous waste. To determine the economic benefit, the Department apparently contacted one Washington vendor So Pro, for a quote. There is no information about what services the quote covered, nor is there more than one quote to determine the average cost for the services. The quote was nearly double what Kirschner alleged was the cost reported to him by Tamaddon or attributed by Kirschner's knowledge, which casts some doubt on both Kirschner's testimony and the lone quote. Further, all parties agree that the waste belonged to Kirschner, and that Kirschner planned to dispose of the waste at some point. There is no evidence that Tamaddon would have received a benefit from that disposal because Kirschner said he would not credit Tamaddon with any costs incurred until Tamaddon provided Kirschner with appropriate receipts. If that type of transaction had happened, the financial portion would have been a wash for Tamaddon. Based on the evidence presented, attributing cost avoidance of \$4,862 as a resulting economic benefit is not appropriate. Accordingly, no economic benefit value should be included in the calculation.

Applying the three corrected values to the Penalty Calculation results in a civil penalty calculation of \$7,200 as follows:

$$\begin{aligned} \text{Penalty} &= \text{BP} + [(.1 \times \text{BP}) (\text{P}+\text{H}+\text{O}+\text{R}+\text{C})] + \text{EB} \\ &= \$6,000 + [(.1 \times \$6,000) \times (0+0+0+2+0)] + 0 \\ &= \$6,000 + [(\$600) \times (2)] + 0 \\ &= \$6,000 + \$1,200 + 0 \\ &= \$7,200 \end{aligned}$$

PROPOSED ORDER

IT IS HEREBY PROPOSED that:

Respondent Dar Tamaddon is assessed a civil penalty of \$7,200 for violating ORS 466.100(1) by illegally disposing of hazardous waste on or before January 9, 1999.

Dated this 10th day of January, 2001

For the DEPARTMENT OF ENVIRONMENTAL QUALITY



Kevin Anselm
Hearings Officer

If you are not satisfied with this decision, you have the right to have this decision reviewed by the Oregon Environmental Quality Commission. To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date this order is served on you as provided in Oregon Administrative Rule (OAR) 340-011-0132(1) and (2). The Petition for Review must be filed with:

Stephanie Hallock, Director
DEPARTMENT OF ENVIRONMENTAL QUALITY
811 SW Sixth Avenue
Portland, OR 97204.

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as in provided in OAR 132-011-0132(3). If the petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0132.

Unless you timely and appropriately file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Environmental Quality Commission 30 days from the date of service on you of this Proposed Order. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. See ORS 183.400 et. seq.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:
DAR TAMADDON

)
) HEARING MEMORANDUM
)
) No. WMC/HW-WR-99-086
) MARION COUNTY
)

This Hearing Memorandum is offered in support of Notice of Assessment of Civil Penalty (Notice) No. WMC/HW-WR-98-086, issued August 6, 1999, to Dar Tamaddon by the Department of Environmental Quality (the Department or DEQ).

I. APPLICABLE STATUTES AND ADMINISTRATIVE RULES

The Department issued the Notice pursuant to Oregon Revised Statutes (ORS) Chapters 468 and 183, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. The Department alleges that Mr. Tamaddon violated a substantive provision of ORS 466.

II. ISSUES

1. Did Mr. Tamaddon violate ORS 466.100 by illegally disposing of a hazardous waste?
2. If so, did the Department correctly calculate the penalty assessed in the Notice?

III. FACTS

The undisputed evidence entered into the record by the Department and Mr. Tamaddon establishes the following facts. Sometime prior to July 1998, approximately 13 drums of underground storage tank (UST) rinseate were generated during an UST decommissioning at a Bend service station owned by Richard Kirshner. The fluid in the drums was a characteristic hazardous waste for the benzene toxicity characteristic. Shortly after their generation, the drums were transported to another service station owned by Mr. Kirshner and located at 3498 Pringle Road in Salem. In July 1998, Mr. Tamaddon and his wife Christy Tamaddon leased the Pringle Road station from Mr. Kirshner. The drums of benzene waste were stored on site at the time and the Tamaddons were aware of the presence of the drums when they took possession.

1 Sometime before January 9, 1999, at least one employee of the Tamaddons, Joseph
2 Delgado, dumped the contents of the drums onto the ground behind the service station building.
3 Mr. Delgado and possibly one other employee also dumped several other drums located on the
4 property onto the ground. The origin and contents of these drums is unknown, but a total of
5 eighteen drums were dumped. The dumped waste covered a large area and ran off the property
6 onto a neighboring residential property. Mr. Kirshner expended approximately \$60,000 in
7 cleaning up the waste.

8 IV. ARGUMENT

9 At issue in this case is 1) did Mr. Tamaddon direct his employees to empty the drums
10 onto the ground, and 2) if Mr. Tamaddon did not direct his employees to empty the drums onto
11 the ground, is he vicariously liable for the illegal disposal of hazardous waste because of his
12 employees actions? The first issue is addressed below. The second issue is addressed in the
13 attached memorandum prepared by the Oregon Attorney General.

14 The question of whether Mr. Tamaddon directed his employees to dispose of the drums
15 by dumping them on to can only be answered by determining the credibility of the witnesses who
16 testified at hearing. Mr. Kirshner testified to the following: A month or so prior to the disposal,
17 Mr. Tamaddon, knowing the contents of the drums, offered to Mr. Kirshner to arrange for the
18 the drums disposal. Mr. Kirshner agreed on the condition that Mr. Tamaddon provide
19 documentation of proper disposal in the form of receipts.

20 On January 9, 1999, Mr. Kirshner went to the station and was met by Ms. Tamaddon,
21 who told him that her husband had taken care of the drums and that they were due their
22 compensation. Mr. Kirshner then discovered that the drums had been overturned behind the
23 station, whereupon he called 911. As a result of the 911 call, the Salem Fire Department and
24 William Fear, an environmental compliance specialist for the City of Salem, responded to the
25 station. While talking in garage bay of the station, Mr. Kirshner and Mr. Fear were approached
26 by Ms. Tamaddon, who said that she had just spoken on the phone to her husband and that Mr.
27

1 Tamaddon told her that he had poured out the drums, but that he thought they only contained
2 water.

3 Mr. Fear testified that shortly after arriving at the station, Mr. Kirshner related the
4 statement Ms. Tamaddon made to him when he arrived: that she said her husband had taken care
5 of the drums and they wanted their compensation. Mr. Fear also testified that when he went
6 inside the station garage bay with Mr. Kirshner, Ms. Tamaddon told them both that she had just
7 spoken on the phone with her husband, and that Mr. Tamaddon admitted to disposing of the
8 drums but that he thought they contained only water.

9 At hearing, Mr. Tamaddon denied ever instructing his employees to pour the hazardous
10 waste onto the ground. He said that Mr. Kirshner told him that the contents of the drums were to
11 be disposed of along with fluids generated during the upcoming upgrade of the Pringle Road
12 station tanks. Mr. Tamaddon further said that Mr. Kirshner asked him to move the drums from
13 one side of the property to the other to facilitate emptying them into the mobile tank which would
14 be on site to receive the upgrade fluids. Mr. Tamaddon said he instructed his employees to move
15 the drums as Mr. Kirshner requested and provided them with a dolly. When, because of the
16 weight of the full drums, the dolly become stuck in the dirt and gravel behind the station, the
17 employees took it upon themselves to empty the drums onto the ground so they could be moved.

18 In determining which version of the events is true, the Department's witnesses are more
19 credible. According to Mr. Kirshner and Mr. Fear, Ms. Tamaddon admitted that her husband had
20 poured the drums out on the ground. Regardless of whether she knew that it was actually Mr.
21 Tamaddon that did the dumping or employees acting at his direction, her husband did
22 communicate to her that he was responsible for the dumping and she communicated that to Mr.
23 Kirshner and Mr. Fear.

24 Mr. Kirshner has no motive to lie or falsely implicate Mr. Tamaddon. Mr. Kirshner
25 received an approximately \$29,000 civil penalty for his role as the generator of the waste, and for
26 arranging with Mr. Tamaddon to dispose of the waste. Implicating Mr. Tamaddon does not
27 reduce his liability in any fashion. Furthermore, Mr. Kirshner did not receive any reduction in

1 his civil penalty in exchange for his testimony. Mr. Fear also has no motive to fabricate the
2 statement he attributed to Ms. Tamaddon. Furthermore, Mr. Kirshner's and Mr. Fear's
3 recollection of the conversation with Ms. Tamaddon in the garage bay, in which she said her
4 husband told her that he had poured the drums out, were essentially identical. At the hearing, the
5 witnesses were sequestered, so Mr. Fear did not hear Mr. Kirshner's testimony before he
6 testified. Nor is there any evidence that Mr. Kirshner or Mr. Fear spoke to each or had other
7 opportunity to "get their stories straight" after January 9, 1999.

8 On the other hand, the Tamaddons have a strong financial motivation to remember events
9 differently. Convincing the Hearing Officer that the employees acted on their own is
10 fundamental to their argument that they cannot be held liable for the illegal disposal of hazardous
11 waste. The Tamaddons' version of events does not stand up to scrutiny. For example, three
12 witnesses, Mr. Kirshner, Mr. Fear, and Mr. Graham, all testified that the spill area smelled
13 strongly of gasoline. Ms. Tamaddon, however, testified that she did not notice any out of the
14 ordinary gasoline smell in the spill area. Further, if, as Mr. Tamaddon testified, he told the
15 employees to move the drums so they would be near the fence, why were eight to ten drums
16 placed back empty into the garage bay and only ten were placed at the fence?

17 The Tamaddons are also not credible because their story just doesn't make sense.
18 Why would the employees decided to dump the drums on the ground when Mr. Kirshner directed
19 them to move the drums so that the contents could be more easily disposed of along with the tank
20 upgrade wastewater? Even if the drums could not be moved with the dolly, why would the
21 employees, knowing what they knew, dump the drums, particularly when the smell of gas was
22 obvious, instead of informing the Tamaddons of the problem and figuring out another way of
23 moving the drums. The employees' alleged decision to dump becomes even more inexplicable,
24 when you consider that they continued to dump after Mr. Graham refused to assist them because
25 he knew it was wrong.

26 Mr. Tamaddon's version is also not credible because he failed to provide any independent
27 corroborating evidence of his testimony even though such evidence should have been available.

1 For example, Mr. Tamaddon testified that Mr. Kirshner asked him to move the drums so the
2 contents could be picked up and disposed of along with the Pringle station tank upgrade
3 wastewater. Mr. Tamaddon could have, but did not, corroborate that assertion by calling the tank
4 upgrade contractor, Mr. Ulrich, to confirm that he had such an arrangement with Mr. Kirshner.

5 When considering the relative credibility of the witnesses, the Department meets its
6 burden of proof in establishing that Mr. Tamaddon directed his employees to dispose of the
7 hazardous waste in the drums by dumping it on to the ground.

8 V. CIVIL PENALTY CALCULATION

9 Exhibit 1 of the Notice sets forth the calculation of Mr. Tamaddon's civil penalty
10 pursuant to OAR 340-012-0045. Illegal disposal of hazardous waste is a Class I violation
11 pursuant to OAR 340-012-0068(1)(l). The amount of hazardous waste disposed was
12 approximately 715 gallons (13 drums multiplied by 55 gallons per drum). Illegal disposal of
13 more than 150 gallons of hazardous waste is a major magnitude violation pursuant to OAR 340-
14 012-0090(3)(b)(A). The base penalty for a Class I, major magnitude hazardous waste violation is
15 \$6,000 pursuant to OAR 340-012-0042(1)(e).

16 Mr. Tamaddon's penalty was aggravated for two factors. The Department assigned a
17 value of 2 for the "O" or occurrence factor, pursuant to OAR 340-012-0045(1)(c)(C)(ii) because
18 the illegal disposal occurred for more than one day. Mr. Graham testified that Mr. Delgado
19 indicated that some of the drums had been disposed of the day before he asked for Mr. Graham's
20 assistance in dumping the remaining drums.

21 The Department assigned a value of 6 for the "R" or the causation factor pursuant to
22 OAR 340-012-0045(1)(c)(D)(iii) because the cause of the violation was Mr. Tamaddon's
23 intentional conduct. OAR 340-012-0030(9) states that "intentional" "means conduct by a person
24 with a conscious objective to cause the result of the conduct". This definition does not require that
25 a person have a conscious intent to violate the law, only that a person consciously engage in the
26 conduct that constitutes a violation. Knowledge of the law is required only if the Department
27 alleges that the cause of the violation is a Respondent's flagrant conduct. See OAR 340-012-

1 0030(7). For his conduct to be intentional, Mr. Tamaddon need only to intend that the contents of
2 the drums be disposed of on the ground. He does not need to know that the contents of the drums
3 are hazardous waste, nor that it is illegal to dispose of hazardous waste, other than at a permitted
4 hazardous waste storage facility. While there is no requirement that Mr. Tamaddon know that the
5 drums contained hazardous waste for a finding of intentional, Mr. Kirshner testified that he
6 informed Mr. Tamaddon of the contents of the drums. It also doesn't make sense that Mr.
7 Tamaddon would, as he testified at hearing, pressure Mr. Kirshner to remove the drums, if Mr.
8 Tamaddon thought they contained only water.

9 At the hearing the Department also introduced evidence that Mr. Tamaddon gained an
10 economic benefit of \$2,878 by avoiding the costs of proper disposal of the hazardous waste. OAR
11 340-012-0045(1)(c)(F)(i) states that the Department may add to a civil penalty "the approximate
12 dollar sum of the economic benefit gained through noncompliance, as calculated by determining
13 both avoided costs and the benefits obtained through any delayed costs, where applicable." The
14 economic benefit in this case is the avoided cost of proper disposal. Delayed costs are not
15 applicable as Mr. Tamaddon will never pay the cost of proper disposal.

16 The Department also assessed economic benefit for avoided cost of proper disposal in Mr.
17 Kirshner's penalty. The Department may assess the same cost against both Mr. Tamaddon and Mr.
18 Kirshner because both parties had an independent responsibility to ensure proper disposal of the
19 material. Mr. Kirshner's responsibility arose from his status as the generator of the material. By
20 failing to ensure that his waste was disposed of properly, he avoided the cost of proper disposal.
21 Mr. Tamaddon gained an economic benefit because when he undertook disposal of the material, he
22 also had a responsibility to ensure that it was done so properly.

23 VI. ALTERNATIVE CIVIL PENALTY

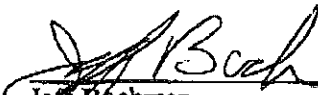
24 If the Hearing Officer finds that the Department did not meet its burden in proving that Mr.
25 Tamaddon directed the illegal disposal of hazardous waste, the Department requests that the
26 Hearing Officer find he is still vicariously liable for the violation because he stands as principal to
27 his employees. In that event, the "R" or causation factor should be revised to change the finding

1 from intentional to negligence. This would reduce the value for the R factor from 6 to 2. An
2 alternative civil penalty calculation is attached as Alternative Exhibit 1.

3 4 5 VII. CONCLUSION

6 The facts in evidence prove that Mr. Tamaddon, for the purpose of receiving compensation
7 from Mr. Kirshner, directed his employees to illegally dispose of the hazardous waste stored at the
8 Pringle Road service station. The Department's witnesses are more credible than the Tamaddons as
9 they have no motives to lie or falsely implicate Mr. Tamaddon. The Tamaddons are clearly
10 motivated to fabricate a different version of events so as to avoid the paying the civil penalty
11 assessed by the Department. Furthermore, their version of events, in and of itself is not credible.
12 The Department requests the Hearing Officer to issue a Proposed Order upholding the civil penalty
13 assessed by the Department. In the alternative, the Department requests that if the Hearing Officer
14 finds insufficient evidence that Mr. Tamaddon directed the illegal disposal, it still find him liable
15 for the violation on the basis of vicarious liability and to recalculate the penalty in the manner
16 described above.

17
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21 ~~10~~ 11/1/00
22 Date


23 Jeff Bachman
24 Environmental Law Specialist
25 Department of Environmental Quality
26
27

ALTERNATIVE EXHIBIT 1

**FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045**

VIOLATION: Illegal disposal of hazardous waste in violation of Oregon Revised Statute (ORS) 466.100(1).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-12-0068(1)(I).

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-012-0090(3)(b)(A) because more than 150 gallons of hazardous waste was illegally disposed.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:

$$BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$$

"BP" is the base penalty, which is \$6,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant action(s) and receives a value of 0 as Respondent has no prior significant actions.

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 as Respondent has no prior significant actions.

"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 2 as the violation occurred on more than one day.

"R" is the cause of the violation and receives a value of 2 as the cause of the violation was Respondent's negligent in that he failed to exercise reasonable care to avoid the foreseeable risk of committing the violation. Respondent failed to adequately supervise his employees who illegally disposed of the hazardous waste.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as the violation could not be corrected.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$2,878. The economic benefit portion of the civil penalty formula is simply the monetary benefit that the violator gained by not complying with the law. It is not designed to punish the violator, but to (1) "level the playing field" by taking away any economic advantage the violator gained over its competitors through noncompliance, and (2) deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. DEQ uses EPA's "BEN" computer model which considers interest rates, tax rates and deductions, and other factors in determining an estimated benefit, pursuant to OAR 340-012-0045(1)(c)(F)(iii). In this case the Respondent gained an economic benefit by illegally disposing hazardous waste. By avoiding costs of \$4,862, Respondent realized an EB of \$2,878.

PENALTY CALCULATION:

$$\begin{aligned}\text{Penalty} &= \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{R} + \text{C})] + \text{EB} \\ &= \$6,000 + [(0.1 \times \$6,000) \times (0 + 0 + 2 + 2 + 0)] + \$2,878 \\ &= \$6,000 + [(\$600 \times 4)] + \$2,878 \\ &= \$6,000 + \$2,400 + \$2,878 \\ &= \$11,278\end{aligned}$$

Pursuant to OAR 340-012-0045(1)(c)(F)(iv) the violation is considered to have extended over as many days as necessary to recover the economic benefit.

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**BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON**

**IN THE MATTER OF
DAR TAMADDON,
Respondent.**

**MEMORANDUM OF THE DEPARTMENT
OF ENVIRONMENTAL QUALITY
REGARDING LIABILITY OF
RESPONDENT**

This memorandum is submitted on behalf of the Department of Environmental Quality (DEQ) and pertains to specific legal issues raised at the hearing in the above referenced matter. DEQ is also submitting a Post-Hearing memorandum addressing the factual matters.

BACKGROUND

DEQ assessed a civil penalty against Respondent on the basis of allegations that Respondent or his employees illegally dumped hazardous waste onto the ground at Aaron's Quick Stop (a business leased by Respondent) in Salem, Oregon. DEQ alleged that the dumping was a violation of ORS 466.100(1).

At the hearing, counsel for Respondent suggested that the law of Agency and Bailment might somehow absolve Respondent of liability for the violation.

1 ARGUMENT

2 Neither Agency nor Bailment law provide a defense in this case. Regardless of whether
3 Respondent, himself, or Respondent's employees dumped the hazardous waste, Respondent is
4 strictly liable to DEQ for the penalties assessed.

5 ORS 466.100(1) reads as follows:

6 Except as provided in subsection (3) of this section, [not relevant in
7 this matter] no person shall dispose of any hazardous waste anywhere
8 in the state except at a hazardous waste disposal site permitted
pursuant to ORS 466.110 to 466.170.

9 The statute is written without regard to intentionality, making the person responsible for
10 improper disposal strictly liable for civil penalties.¹

11 Under any construction of the facts in this case Respondent is a person (as defined in
12 ORS 466.005(13)) responsible for the dumping.

13 If it is found that Respondent did the dumping himself Respondent is directly liable.

14 If it is found that Respondent's employees did the dumping, Respondent is liable under
15 the doctrine of respondeat superior. The doctrine of respondeat superior holds an employer
16 accountable for acts of employees if the employees were acting within the scope of their
17 employment – regardless of whether the employer expressly authorized the specific act creating
18 the liability. See eg *Fearing v. Bucher* 328 OR 367, 372-373 (1999). The record clearly
19 supports a finding that to the extent Respondent's employees were involved in the dumping,
20 they acted within the scope of their employment. Id. 372-378.

21 There is no dispute in the record that Respondent was an agent of the property owner,
22 Mr. Kirshner, in connection with arranging for disposition of the hazardous waste that was
23 ultimately dumped. No principle of Agency Law, however, in any way absolves Respondent of
24 strict liability for his acts or those of his employees in violation of ORS 466.100(1).
25

26 ¹ See, eg *United States v. Earth Sciences, Inc.* 599 F2d 368, 374; 13 ERC 1417, 1421 (10 Cir. 1979) construing a similar provision in the Clean Water Act.

1 Similarly the law of Bailment provides no defense for violation of a strict liability statute
2 Even assuming a bailor/bailee relationship existed as between the property owner and
3 Respondent with respect to the stored hazardous waste, that relationship has no relevance to
4 Respondent's strict statutory liability for the dumping.

5 DATED this 1 day of November 2000.

6 Respectfully submitted,

7 HARDY MYERS
8 Attorney General

9 
10 Larry Edleman, OSB# 89158

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1 **CERTIFICATE OF MAILING**

2 I hereby certify that I served Hearing Memorandum in Case No WMC/WR-99-086 upon

3
4 Kevin Anselm
5 Hearing Officer
6 Oregon Employment Department
7 (503) 606-2950

8 Arthur B. Cummins, Jr.
9 Attorney for Respondent
10 (503) 364-0810

11 by faxing a true copy of the above.

12 
13 _____
14 Department of Environmental Quality

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THE LAW FIRM
OF
A.B. CUMMINS, JR., P.C.
P.O. Box 183
SALEM, OREGON 97308

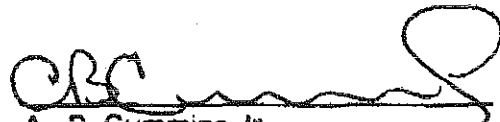
Attachment I

ARTHUR B. CUMMINS, JR.
LAWYER

PAMELA J. CUMMINS
LORI STIPE
LEGAL ASSISTANTS

FACSIMILE COVER SHEET

Date: November 17, 2000 **Time:** 12:57 PM
To: Kevin Anselm **From:** A.B. Cummins, Jr.
Jeff Bachman
503-606-2950
Fax Number: 503-229-6945 **Fax Number:** (503) 364-0810
Pages to Follow: 7 **Original Sent By:**
RE: Dar Tamaddon
Comments: Response to follow.


A. B. Cummins Jr.

NOTICE TO RECIPIENT

This information contained in this facsimile is intended only for the use of the individual or entity named above and may contain attorney privileged or confidential information. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (collect call will be accepted) and return the original message to us at the above address via the U.S. Postal Service.

Please call (503) 399-2400 if transmittal is incomplete or unreadable.

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:) RESPONSE TO HEARING MEMORANDUM
) OF DEQ AND DEPARTMENT OF
DAR TARMADDON) JUSTICE
)
) No. WMC/HW-WR-99-086
) MARION COUNTY

From Mr. Tamaddon's perspective the facts would appear to be as follows:

In July 1998, the Tamaddons leased the station from Kirshner. Certain drums were stored by Kirshner on this site, and the Tamaddons were aware of the presence of the drums when they took possession.

The Tamaddons had no knowledge of the contents of the drums, and the drums were not labeled in any way. The Tamaddons apparently were told by Kirshner that the drums contained "rinse water." Kirshner himself knew the drums contained hazardous waste, and that they needed to be labeled, stored and/or disposed of in accordance with DEQ requirements.

1 The drums were to be removed from the site. There was
2 some conflict in the testimony as to how this was to be done.
3 This conflict is inconsequential because it is clear the
4 contents were never to be emptied. The Tamaddons intended that
5 the contents of the drums be disposed of as part of an ongoing
6 project on site using a mobile tank that would be available.
7 Regarding this relationship, the Tamaddons are servants of
8 Kirshner (master).
9

10 In order to facilitate the disposal, Dar Tamaddon told
11 his employees to move the drums to a location on the site that
12 would be more convenient for this purpose. The employees of the
13 Tamaddons for this purpose would be classified as servants of
14 Tamaddons and as subservants of Kirshner. Kirshner and Tamaddon
15 had the right to control these employees to the extent that they
16 were performing as requested, to move the drums and their
17 contents from point A to point B on the site.
18

19 The Tamaddons never gave instructions, express or
20 implied, to empty the drums, nor did Kirshner. It just
21 happened, perhaps due to simple negligence, e.g. lack of
22 instructions or supervision. Bachman said the penalty for this
23 is about \$2,400.00.
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RESPONSE TO HEARING MEMORANDUM OF DEQ
AND DEPARTMENT OF JUSTICE

Page 2 of 6

A.B. CUMMINS, JR., P.C.
LAWYER
180 CHURCH STREET S.E.
P.O. Box 183
SALEM, OREGON 97308
503-399-2400 / FAX: 503-364-0810

1 The employees intentionally opened the drums and
2 dumped their contents on the ground on their own volition to
3 lighten the load and facilitate the movement of the drums.

4 The substantial benefit of disposal flows to Kirshner.
5 The only benefit to the Tamaddons was the removal of the drums
6 from the site to provide more space for their use.

7
8 The Tamaddons had no proprietary interest in the drums
9 and their contents. They had no responsibility to dispose of
10 the contents of the drums. They exercised control over the
11 drums and their contents only to the extent that Kirshner
12 allowed them to as he was the owner. The lease document
13 contained no language regarding the drums.

14
15 Nothing in the circumstances related supports the
16 conclusion that Dar Tamaddon intentionally dumped the drums.
17 The role of the Tamaddons is *de minimis* at best, and certainly
18 cannot justify a civil penalty as assessed by DEQ or even
19 \$11,278.00. Such forfeitures are not favored.

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21 The economic benefit of avoiding the costs of proper
22 disposal of hazardous waste (\$2,878.00) is Kirshner's, not the
23 Tamaddons. The economic benefit to the Tamaddons is freeing up
24 some space or square footage, whichever they already contracted
25 to pay for, by moving the drums off site, whether full or empty.
26 This is a very important distinction that DEQ refuses to make.

RESPONSE TO HEARING MEMORANDUM OF DEQ
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1 To clarify their testimony which is restated, in part,
2 in the hearing memorandum filed by DEQ and Department of
3 Justice, the Tamaddons submit that:

4 1. Page 2, line 6. Part of the cost of cleanup was
5 paid by the Tamaddons.

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7 request compensation from Kirshner. Kirshner is the only one
8 saying this and his motivation is clearly to avoid some of the
9 responsibility for what occurred. Kirshner did not immediately
10 call 911. Somewhere between 1 and 2 hours passed before he did
11 this.
12

13 3. Page 3, lines 5-8. Fear did not testify to this
14 at the hearing. These are strong statements that the Tamaddons
15 object to, and which are not supported by credible evidence.
16

17 4. The credibility of Kirshner is lacking across the
18 board. He decided to store hazardous waste in a residential
19 neighborhood; he failed to notify anyone of the presence of the
20 hazardous waste; he failed to label the contents as he is
21 required to do; and he failed to properly dispose of the
22 hazardous waste as he is required to do. He is the only one who
23 has culpability under the circumstances. If he had acted
24 appropriately in the first place and taken care of business,
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RESPONSE TO HEARING MEMORANDUM OF DEQ
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Page 4 of 6

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1 there would not be an issue today. His has been a pattern of
2 deception since day one.

3 5. Page 4, lines 12, 15 and 18. Gas stations tend to
4 smell like "gas," especially cheap gas as was sold at this site.
5 Kirshner directed Quick Stop employees to move the drums into
6 the bay area to assess the situation after he discovered what
7 had occurred. It is important to note that DEQ based its
8 reported conclusions on alleged input from the employees. The
9 burden is on DEQ to prove their allegations and they offered no
10 testimony from any employee involved in the actual dumping of
11 the hazardous waste material. No fair conclusion can be drawn
12 about what any employee thought or intended based upon the
13 action or inaction of Graham.

14 6. Page 5, lines 3-5. Corroboration is not
15 necessary. This circumstance was never contested by DEQ. DEQ
16 knew of the Tamaddons' position from the outset and certainly
17 would have summoned Ulrich to testify if untrue.

18 In summary, DEQ made its decision and assessed a
19 penalty based upon circumstances it assumed to be true, but have
20 not been proven. The facts remain that the Tamaddons never

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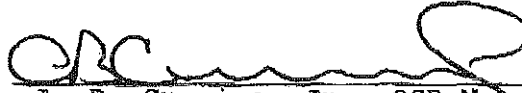
24 RESPONSE TO HEARING MEMORANDUM OF DEQ
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26 Page 5 of 6

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503-399-2400 / FAX: 503-364-0810

1 intended the contents of the drums be emptied on the ground and
2 they didn't do it. The responsibility for the entire incident
3 rests at the feet of Kirshner.

4 DATED: November 17, 2000.

6 

7 A. B. Cummins, Jr., OSB No. 66032
8 Attorney for Respondent
9 Trial Attorney

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CERTIFICATE OF MAILING

I certify that I served the foregoing **RESPONSE TO HEARING MEMORANDUM OF DEQ AND DEPARTMENT OF JUSTICE** in Case No. WMC/WR-99-086 upon:

Kevin Anselm
Hearing Officer
Oregon Employment Department
605 Cottage St. N.E.
Salem, OR 97310
Fax #: 503-606-2950

Jeff Bachman
Dept. of Environmental Quality
2020 S.W. 4th Ave., Ste 400
Portland, OR 97201-4987
Fax #: 503-229-6945

By faxing a true copy of the above.

Dated the 17th day of November 2000.



A.B. Cummins, Jr., OSB #66032
180 Church Street S.E.
P. O. Box 183
Salem, Oregon 97308
Telephone: (503) 399-2400

Attorney for Respondent

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NOV 20 2000
EMPLOYMENT HEARINGS

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

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DAR TARMADDON) OF DEQ AND DEPARTMENT OF
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EMPLOYMENT HEARINGS

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RESPONSE TO HEARING MEMORANDUM OF DEQ
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NOV 20 2008

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RESPONSE TO HEARING MEMORANDUM OF DEQ
AND DEPARTMENT OF JUSTICE

Page 4 of 6

A.B. CUMMINS, JR., P.C.
LAWYER

180 CHURCH STREET S.E.
P.O. Box 183

SALEM, OREGON 97308

NOV 20 2000 503-399-2400 / FAX: 503-364-0810

EMPLOYMENT HEARINGS

1 there would not be an issue today. His has been a pattern of
2 deception since day one.

3 5. Page 4, lines 12, 15 and 18. Gas stations tend to
4 smell like "gas," especially cheap gas as was sold at this site.
5 Kirshner directed Quick Stop employees to move the drums into
6 the bay area to assess the situation after he discovered what
7 had occurred. It is important to note that DEQ based its
8 reported conclusions on alleged input from the employees. The
9 burden is on DEQ to prove their allegations and they offered no
10 testimony from any employee involved in the actual dumping of
11 the hazardous waste material. No fair conclusion can be drawn
12 about what any employee thought or intended based upon the
13 action or inaction of Graham.

14
15
16 6. Page 5, lines 3-5. Corroboration is not
17 necessary. This circumstance was never contested by DEQ. DEQ
18 knew of the Tamaddons' position from the outset and certainly
19 would have summoned Ulrich to testify if untrue.

20 In summary, DEQ made its decision and assessed a
21 penalty based upon circumstances it assumed to be true, but have
22 not been proven. The facts remain that the Tamaddons never

23
24 ///

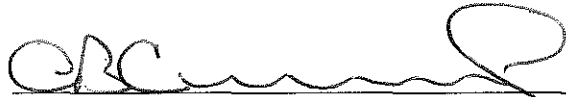
25 ///

26 ///

NOV 20 2000
EMPLOYMENT HEARINGS

1 intended the contents of the drums be emptied on the ground and
2 they didn't do it. The responsibility for the entire incident
3 rests at the feet of Kirshner.

4 DATED: November 17, 2000.

6
7 

8 A. B. Cummins, Jr., OSB No. 66032
9 Attorney for Respondent
10 Trial Attorney

11
12
13
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21
22 RECEIVED

23
24 NOV 20 2000

25 EMPLOYMENT HEARINGS
26

CERTIFICATE OF MAILING

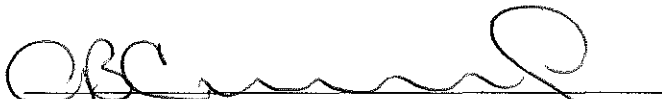
I certify that I served the foregoing **RESPONSE TO HEARING MEMORANDUM OF DEQ AND DEPARTMENT OF JUSTICE** in Case No. WMC/WR-99-086 upon:

Kevin Anselm
Hearing Officer
Oregon Employment Department
605 Cottage St. N.E.
Salem, OR 97310
Fax #: 503-606-2950

Jeff Bachman
Dept. of Environmental Quality
2020 S.W. 4th Ave., Ste 400
Portland, OR 97201-4987
Fax #: 503-229-6945

By faxing a true copy of the above.

Dated the 17th day of November 2000.



A.B. Cummins, Jr., OSB #66032
180 Church Street S.E.
P. O. Box 183
Salem, Oregon 97308
Telephone: (503) 399-2400

Attorney for Respondent

RECEIVED

NOV 20 2000

EMPLOYMENT HEARINGS

Note: Tamaddon

All the originals
of the Exhibits
were returned to
Hearing Officer as
this case was
remaned to H.O.

POST CODE: d711
OPEN DATE: February 4, 2002
CLOSE DATE: February 15, 2002.
ANNOUNCEMENT NUMBER: LE100589A
CLASSIFICATION NUMBER: C3807
LOCATION: Portland Metro Area

RECRUITING FOR

VEHICLE EMISSIONS TECHNICIAN 1

Vehicle Inspector

\$1,665 to \$2,253 monthly

GENERAL INFORMATION

This recruitment will be used to fill multiple permanent full-time, permanent part-time, limited duration full-time, and limited duration part-time current openings for vehicle inspectors with the Department of Environmental Quality, Vehicle Inspection Program. We have openings in the Portland Metro Area at this time.

The Vehicle Inspection Program (VIP) reduces automotive-caused air pollution through operation of periodic inspection/maintenance program. The program operates seven Clean Air Stations, and a Technical Center. The Vehicle Inspection Program prides itself on delivering high quality customer service and maintaining a collaborative, team approach to maintaining and improving the program's efficiency.

This is an opportunity for anyone who wants a good career doing important work. The Vehicle Inspection Program is a fee-funded program that uses some of the most advanced emission testing technology in the world. Oregon offers a competitive salary, a fully funded retirement program, excellent benefits, and ample leave time. DEQ received the 1999 "Families in Good Company Award " because of our policies supporting the family life of our employees.

TO QUALIFY

There are no specific minimum qualifications for this classification.

IF YOU QUALIFY

See the Skill Code and Geographic Location Sheet.

DUTIES AND RESPONSIBILITIES

VEHICLE INSPECTION

- Performs OBD II, basic, or enhanced emissions tests in accordance with all test procedures & guidelines.
- Makes visual inspections for safety and directs vehicle driver to the appropriate test lane.
- Instructs driver on test procedures.

Ref No: G60374
 Agency Case No: WMCHWWR99086
 Case Type: DEQ

STATE OF OREGON
 HEARING OFFICER PANEL

Date Mailed: 07/20/00
 Mailed By: LMV

NOTICE OF HEARING

DAR TAMADDON
 1094 GARLOCK ST S
 SALEM OR 97302 6025

DEPARTMENT OF ENVIRONMENTAL QUALITY
 811 SW 6TH AVE
 PORTLAND OR 97204 1334

A.B. CUMMINS, JR., ATTORNEY
 PO BOX 183

 SALEM OR 97308 0183

JEFF BACHMAN
 DEQ ENFORCEMENT SECTION
 2020 SW 4TH AVE STE 400
 PORTLAND OR 97201 4959

HEARING DATE AND TIME

TUESDAY, OCTOBER 10, 2000
 9:30 AM PT

HEARING PLACE

DEPT OF ENVIRONMENTAL QUALITY
 750 FRONT ST NE
 SUITE 120
 SALEM OREGON

ADMINISTRATIVE LAW JUDGE

ANSELM

*If you have questions prior to your hearing, call toll-free: 1-800-311-3394.
 If you are calling from the Salem area, please use: 947-1515.*

BE PROMPT AT TIME OF HEARING. INQUIRE IN LOCATION'S LOBBY AREA REGARDING HEARING ROOM. If you need directions, call the above number.

The issue(s) to be considered are:

DID RESPONDENT TAMADDON VIOLATE ORS 466.100(1) BY ILLEGALLY DISPOSING OF HAZARDOUS WASTE? IF SO, IS THE CIVIL PENALTY IMPOSED APPROPRIATE PURSUANT TO OAR 340-012-0045?

EXHIBIT # /

Held by: Hearing Officer Panel, Employment Department
 875 Union Street NE
 Salem, OR 97311

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

Notice of Contested Case Rights and Procedures

Under ORS 183.413(2), you must be informed of the following:

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 (the Oregon Administrative Procedures Act) and Oregon Administrative Rules (OAR) of the Department of Environmental Quality (DEQ), Chapters 137 and 340.
2. Right to an attorney. You may represent yourself at the hearing, or be represented by an attorney or other representative, such as a partner, officer, or an employee. A representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. The hearings officer will decide whether to grant such a request. About half of the parties are not represented by an attorney. DEQ will be represented by an authorized agent, called an environmental law specialist.
3. Presiding Officer. The person presiding at the hearing is known as the hearings officer. The hearings officer will rule on all matters that arise at the hearing. The hearings officer is an administrative law judge for the Employment Department, under contract with the Environmental Quality Commission to perform this service. The hearings officer is not an employee, officer or representative of the agency and does have the authority to make a final independent determination based only on the evidence at the hearing.
4. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the hearings officer will have the opportunity to ask questions of all witnesses. DEQ will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.
5. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

Page Two--Notice of Contested Case Rights and Procedures

6. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical or written evidence, as well as your own testimony.
7. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the hearings officer will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ. DEQ may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ take "official notice" of any fact and you will be given an opportunity to contest any such facts.
 - b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
 - c. Writings. Written documents including letters, maps, diagrams and other written material may be received in evidence.
 - d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence.
8. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:
 - a. The evidence is unreliable;
 - b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
 - c. The evidence is unduly repetitious and duplicates evidence already received.

Page Three--Notice of Contested Case Rights and Procedures

9. Continuances. There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. Please make sure you have all your evidence ready for the hearing. However, if you can show that the record should remain open for additional evidence, the hearings officer may grant you additional time to submit such evidence.

10. Record. A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This will be done by tape recorder. This tape and any exhibits received in the record will be the whole record of the hearing and the only evidence considered by the hearings officer. A copy of the tape is available upon payment of a minimal amount, as established by the Department of Environmental Quality (DEQ). A transcript of the record will not normally be prepared, unless there is an appeal to the Court of Appeals.

11. Appeal. If you are not satisfied with the decision of the Hearings Officer, you have 30 days to appeal his decision to the Environmental Quality Commission. If you wish to appeal its decision, you have 60 days to file a petition for review with the Oregon Court of Appeals from the date of service of the order by the Environmental Quality Commission. See ORS 183.480 et seq.

OregonDEPARTMENT OF
ENVIRONMENTAL
QUALITY

August 6, 1999

CERTIFIED MAIL Z 440 760 450

Dar Tamaddon
1094 Garlock Ave. S.
Salem, OR 97302Re: Notice of Assessment of
Civil Penalty
No. WMC/HW-WR-98-086
Marion County

Dear Mr. Tamaddon:


On January 11, 1999, the Salem Department of Environmental Services (DES) responded to a report of a fuel spill at property you were then leasing, known as Aaron's Quick Stop, at 3498 Pringle Road SE, Salem. A joint investigation by DEQ and DES determined that on January 7 and 8, 1999, you and/or your employees at your direction dumped at least 13 drums of underground storage tank rinseate and sludge on to the ground at Aaron's Quick Stop.

The owner of the property, Richard Kirshner, generated the waste during an underground storage tank decommissioning on another service station property he owns. Analysis of samples collected from the area where the waste was dumped found the drum contents were a toxic hazardous waste because the contents contained benzene. Dumping the waste onto the ground constitutes illegal disposal of hazardous waste, a Class I violation of Oregon waste management law.

Benzene is a known human carcinogen and as such presents a direct human health risk. Dumping the waste onto the ground could also have resulted in ground-water contamination, necessitating a lengthy and expensive clean up. You are liable for a civil penalty assessment because you violated Oregon environmental law. In the enclosed Notice, I have assessed a civil penalty of \$12,878. In determining the amount of the penalty, I used the procedures set forth in Oregon Administrative Rule (OAR) 340-12-045. The Department's findings and civil penalty determination are attached to the Notice as Exhibit 1.

Appeal procedures are outlined in Section IV of the Notice. If you fail to either pay or appeal the penalty within twenty (20) days, a Default Order 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.

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6993
DEQ-1 EXHIBIT # 3

DAR TAMADDON

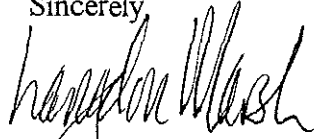
Case No. WMC/HW-WR-99-086

Page 2

I look forward to your cooperation in complying with Oregon environmental law in the future. However, if any additional violations occur, you may be assessed additional civil penalties. Copies of referenced rules are enclosed. Also enclosed is a copy of the Department's internal management directive regarding civil penalty mitigation for Supplemental Environmental Projects (SEPs). If you are interested in having a portion of the civil penalty fund an SEP, you should review the enclosed SEP directive.

If you have any questions about this action, please contact Jeff Bachman with the Department's Enforcement Section in Portland at 229-5950 or toll-free at 1-800-452-4011, enforcement extension 5950.

Sincerely



Langdon Marsh
Director

e:\winword\letters\tamaltr.doc

Enclosures

cc: Joe Petrovich, Western Region, Salem Office, DEQ
Waste Management and Cleanup Division, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Marion County District Attorney

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
2 OF THE STATE OF OREGON

3 IN THE MATTER OF:
4 DAR TAMADDON

5 Respondent.

6 } NOTICE OF ASSESSMENT
7 } OF CIVIL PENALTY
8 } No. WMC/HW-WR-99-086
9 } MARION COUNTY

10 I. AUTHORITY

11 This Notice of Assessment of Civil Penalty (Notice) is issued to Respondent, Dar Tamaddon,
12 by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes
13 (ORS) 468.126 through 468.140, 466.880, ORS Chapter 183, and Oregon Administrative Rules
14 (OAR) Chapter 340, Divisions 11 and 12.

15 II. VIOLATION

16 On or about January 7 and 8, 1999, Respondent violated ORS 466.100(1) by illegally
17 disposing of hazardous waste. Specifically, Respondent or his employees emptied 13 drums of D018
18 hazardous waste onto the ground at property known as "Aaron's Quick Stop", 3498 Pringle Road SE,
19 Salem. This is a Class I violation pursuant to OAR 340-012-0068(1)(I).

20 III. ASSESSMENT OF CIVIL PENALTIES

21 The Department imposes a civil penalty of \$12,878 for the violation in Section II, above. The
22 findings and determination of Respondent's civil penalty, pursuant to OAR 340-12-045, are attached
23 and incorporated as Exhibit 1.

24 IV. OPPORTUNITY FOR CONTESTED CASE HEARING

25 Respondent has the right to have a formal contested case hearing before the Environmental
26 Quality Commission (Commission) or its hearings officer regarding the matters set out above, at which
27 time Respondent may be represented by an attorney and subpoena and cross-examine witnesses. **The request for hearing must be made in writing, must be received by the Department's Rules Coordinator within twenty (20) days from the date of service of this Notice, and must be accompanied by a written "Answer" to the charges contained in this Notice.**

1 In the written Answer, Respondent shall admit or deny each allegation of fact contained in this
2 Notice, and shall affirmatively allege any and all affirmative claims or defenses to the assessment of this
3 civil penalty that Respondent may have and the reasoning in support thereof. Except for good cause
4 shown:

- 5 1. Factual matters not controverted shall be presumed admitted;
- 6 2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or
7 defense;
- 8 3. New matters alleged in the Answer shall be presumed to be denied unless admitted in
9 subsequent pleading or stipulation by the Department or Commission.

10 Send the request for hearing and Answer to: **DEQ Rules Coordinator, Office of the**
11 **Director, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for
12 hearing and an Answer, Respondent will be notified of the date, time and place of the hearing.

13 Failure to file a timely request for hearing and Answer may result in the entry of a Default
14 Order for the relief sought in this Notice.

15 Failure to appear at a scheduled hearing or meet a required deadline may result in a dismissal of
16 the request for hearing and also an entry of a Default Order.

17 The Department's case file at the time this Notice was issued may serve as the record for
18 purposes of entering the Default Order.

19 V. OPPORTUNITY FOR INFORMAL DISCUSSION

20 In addition to filing a request for a contested case hearing, Respondent may also request an
21 informal discussion with the Department by attaching a written request to the hearing request and
22 Answer.

23 VI. PAYMENT OF CIVIL PENALTY

24 The civil penalty is due and payable ten (10) days after an Order imposing the civil penalty
25 becomes final by operation of law or on appeal. Respondent may pay the penalty before that time.
26 Respondent's check or money order in the amount of \$12,878 should be made payable to "State
27

1 Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental**
2 **Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

3
4 8-6-99

5 Date

Langdon Marsh

Langdon Marsh, Director

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EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

- VIOLATION:** Illegal disposal of hazardous waste in violation of Oregon Revised Statute (ORS) 466.100(1).
- CLASSIFICATION:** This is a Class I violation pursuant to OAR 340-12-0068(1)(I).
- MAGNITUDE:** The magnitude of the violation is major pursuant to OAR 340-012-0090(3)(b)(A) because more than 150 gallons of hazardous waste was illegally disposed.
- CIVIL PENALTY FORMULA:** The formula for determining the amount of penalty of each violation is:
$$BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$$
- "BP" is the base penalty, which is \$6,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-12-042(1).
- "P" is Respondent's prior significant action(s) and receives a value of 0 as Respondent has no prior significant actions.
- "H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 as Respondent has no prior significant actions.
- "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 2 as the violation occurred on more than one day.
- "R" is the cause of the violation and receives a value of 6 as the cause of the violation was Respondent's intentional conduct in that he acted with the conscious intent to cause the result of his conduct. Respondent deliberately emptied or directed others in his employ to empty the drums containing hazardous waste under the ground.
- "C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as the violation could not be corrected.
- "EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$2,878. The economic benefit portion of the civil penalty formula is simply the monetary benefit that the violator gained by not complying with the law. It is not designed to punish the violator, but to (1) "level the playing field" by taking away any economic advantage the violator gained over its competitors through noncompliance, and (2) deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. DEQ uses EPA's "BEN" computer model which considers interest rates, tax rates and deductions, and other factors in determining an estimated benefit, pursuant to OAR 340-012-0045(1)(c)(F)(iii). In this case the Respondent gained an economic benefit by illegally disposing hazardous waste. By avoiding costs of \$4,862, Respondent realized an EB of \$2,878.

PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} &= \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{R} + \text{C})] + \text{EB} \\ &= \$6,000 + [(0.1 \times \$6,000) \times (0 + 0 + 2 + 6 + 0)] + \$2,878 \\ &= \$6,000 + [(\$600 \times 8)] + \$2,878 \\ &= \$6,000 + \$4,800 + \$2,878 \\ &= \$13,678 \end{aligned}$$

Pursuant to ORS 468.140, the gravity-based portion of a penalty for a single violation is limited to \$10,000. Pursuant to OAR 340-012-0045(1)(c)(F)(iv) the violation is considered to have extended over as many days as necessary to recover the economic benefit. Respondent's civil penalty is \$12,878.

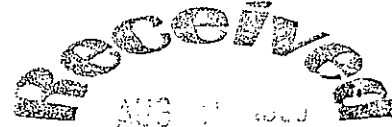
THE LAW FIRM
OF
A.B. CUMMINS, JR., P.C.
P.O. Box 183
SALEM, OREGON 97308

ARTHUR B. CUMMINS, JR.
LAWYER

PAMELA J. CUMMINS
LORI STIPE
LEGAL ASSISTANTS

August 22, 1999

State of Oregon
Department of Environmental Quality



DEQ Rules Coordinator
Office of the Director
811 S.W. 6th Avenue
Portland, OR 97204

OFFICE OF THE DIRECTOR

Re: Notice of Appeal/Request for Hearing/Answer
No. WMC/HW-WR-98-086

9

Gentlemen:

Respondent appeals the Notice of Assessment and requests a formal hearing.

The Notice of Assessment of Civil Penalty was received by respondent on August 11, 1999. Therefore, this request is timely.

As far as his Answer is concerned, counsel has not had sufficient time to investigate this matter or to research the applicable regulations and procedure.

Reserving the right to amend the following, the respondent admits and denies as follows:

On or about January 7 and 8, 1999, drums containing a hazardous substance were emptied at 3498 Pringle Road S.E., Salem, Oregon.

Under the circumstances the civil penalty is inappropriate; and if a penalty is appropriate, the formula was not used properly to determine the amount of the penalty.

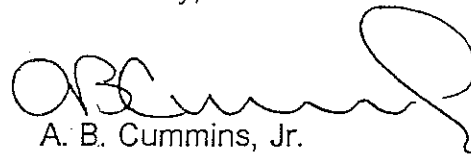
EXHIBIT # 4

DEQ Rules Coordinator
Re: No. WMC/HW-WR-99-086

August 23, 1999
Page Two

Please furnish me a copy of the DEQ investigative file in this matter, including the statement of all persons interviewed by a DEQ representative.

Yours truly,



A. B. Cummins, Jr.

ABC:pjc

cc: Dar and Christy Tamaddon

1-11-79

Sloped Down

Fence Chain Link Locked Gated

Plk #2

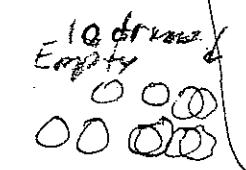


Approx 35' x 35' area of spill sledge on ground

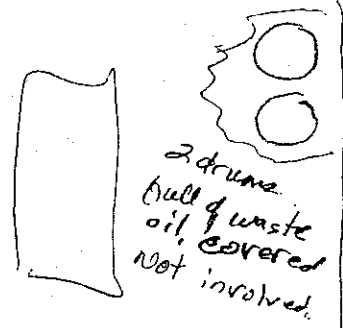
Area all Stained Black



Junk stored

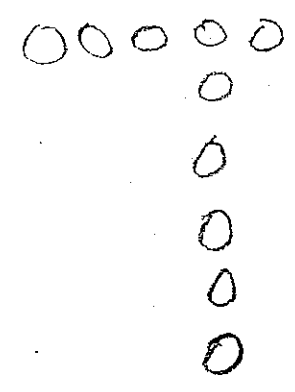


10 drums Empty



2 drums full of waste oil, covered Not involved.

Garage Bay



10 drums empty 2 were already inside and not part of spill.

Quick mart.

#1-24 Gre sample sites. Collected ON 1-9-99 BR

U/T AREA

Fence (wood)

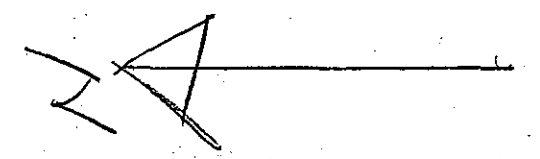
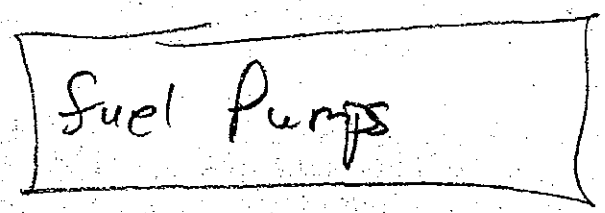
Gated locked

R/O door

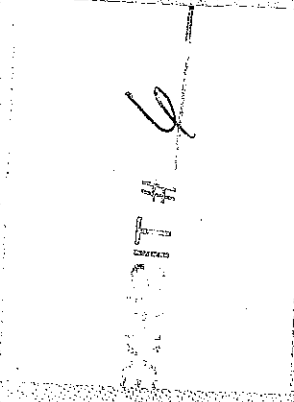
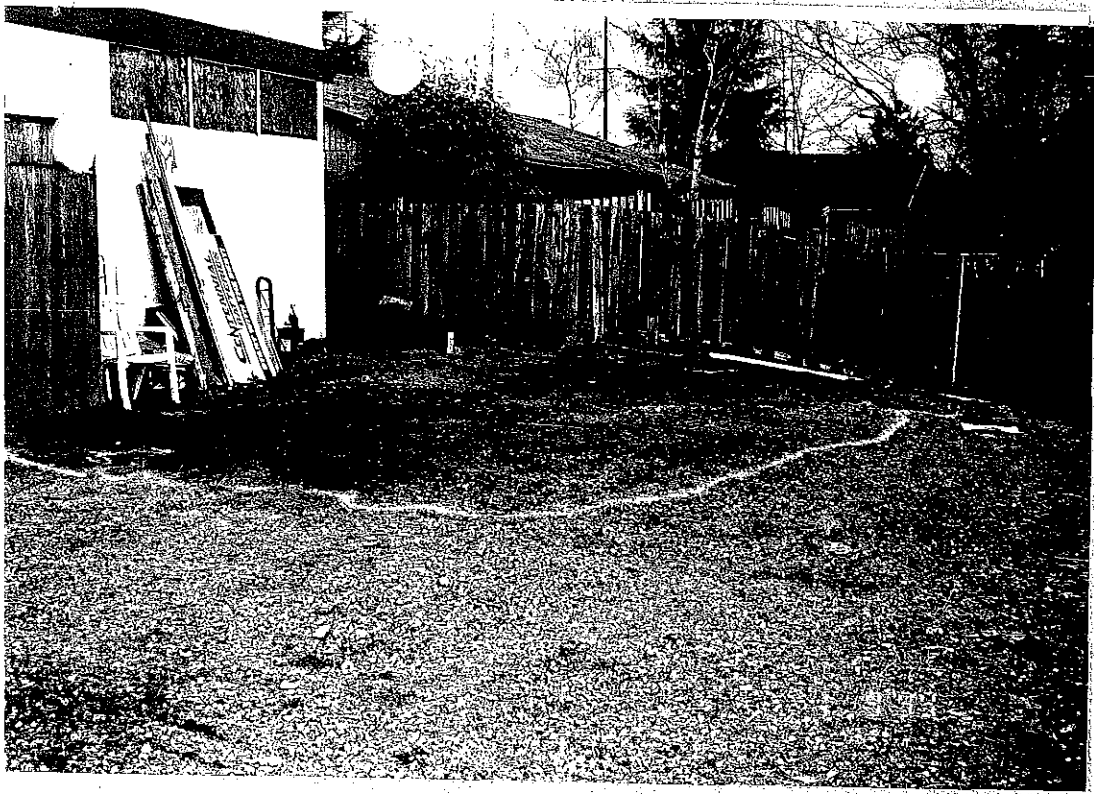
R/O door

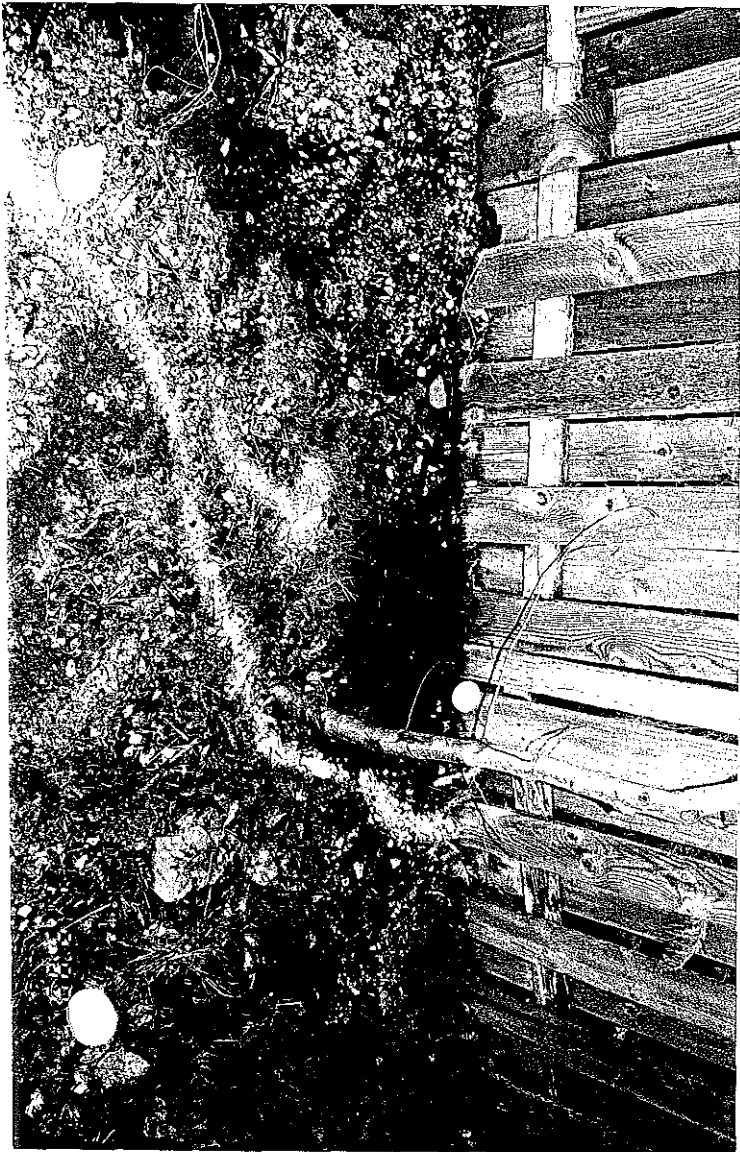
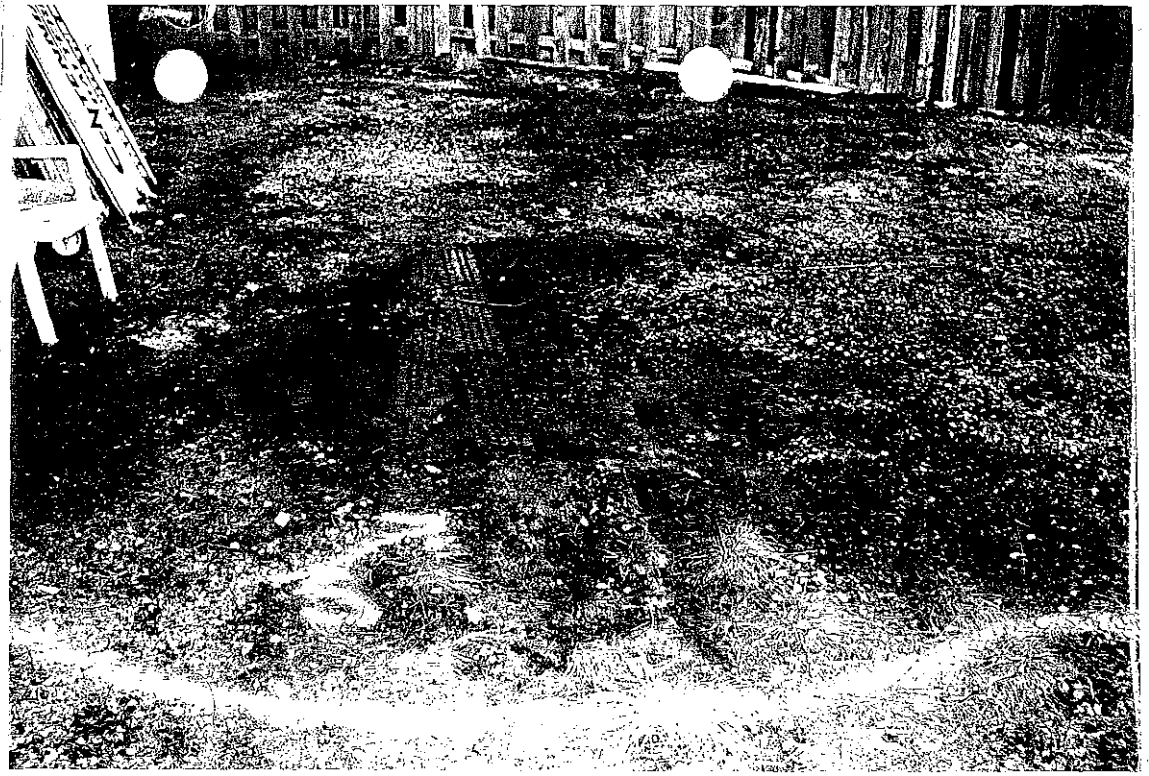
Not to scale

Machona



PENGAD-Bejams, N. J.
EXHIBIT
B





CITY OF

Salem

AT YOUR SERVICE

175 22nd St. SE.

Salem

97302

Env. Serv.

Willow Lake Laboratc
5915 Windsor Isl. Rd. N.
Salem, OR 97303
503-588-6380
Fax: 503-588-6387

470131

1402-5

RA-52-18-5) 1/18

CHAIN OF CUSTODY RECORD

Testing Laboratory: REA

Purchase Order #: _____

SOURCE NAME:					LAB I.D. #	NO. OF CONTAINERS	ANALYSES TO BE PERFORMED			COMMENTS: Sample Name
SAMPLER: <u>B. Fear</u> <u>Fear</u>							AMTEST To Perform			
DATE	TIME	COMP	GRAB	SAMPLE LOCATION						
1/8/99	1610 hrs		X	South end of dump site 0"-3"	6404-1	1	f-PHG TELP Pb	1402	#1-3498P-99	
1/9/99	1616 hrs		X	North END of dump site along fence 0"-3"	6404-2	1	TELP Pb	1403	#2-3498P-99	
1/9/99	1622 hrs		X	North East end of spill site along fence 0"-3"	6404-3	1	TELP Pb	1404	#3-3498P-99	
1/9/99	1646 hrs		X	North side of Fence at North end of spill site on private property 0"-3"	6404-4	1	TELP Pb	1405	#4-3498P-99	
					Tests added by Jim Bonyler <i>Jim Bonyler</i> 1/13/99					

EXHIBIT
C
FENGAD-Bayonne, N. J.

LOCK BOX #	SECURITY TAPE? Y X N	OPENED BY: <i>John B...</i> 1/11/99 1630
RELINQUISHED BY: (SIGNATURE) <i>B. Fear</i>	DATE 1-11-99	TIME 1538 hrs
RELINQUISHED BY: (SIGNATURE) <i>Ronald E. P...</i>	DATE 1-11-99	TIME 1611 hrs
RELINQUISHED BY: (SIGNATURE) <i>John B...</i>	DATE 1-13-99	TIME 10:30 hrs
BOX LOCK NO. REMOVED AT LAB	DATE	TIME
		NO. SAMPLES RECEIVED BY LAB:

Special Instructions:
1) Attach sample seal to this sheet.
2) Copies: A) Attach original to report of results, keep in lab files.
B) Attach photocopy to results, send to originator.

Relinquished by: *Chris Ball* Received by: *John Bonyler*
Date/Time: 2/8/99 4:55 Date/Time: 2/8/99 4:55

1/22 1404 BTEX
per B: EXHIBIT # 7

Attachment J7

QUALITY ASSURANCE REPORT: ORGANICS

Attachment J8

Case Name: Salem Environmental Services Case Fund Code: 3256G

Case #: 990131

Sample date: 11-Jan-99

QA report date: 10-Mar-99

cut of RHH 3/11/99

VOLATILE ORGANICS: Method 8020

Item	Samples	Analyte	Sample		Duplicate		Report			Standard Deviation	RPD	
			Replicate	(A) (B)	(A) (B)	Sample	Duplicate	Diff. Range				
1	South end	Benzene	190	120	NS	NS	155	#N/A	70	70	#N/A	45%
		Toluene	1250	1070	NS	NS	1160	#N/A	180	180	#N/A	16%
		Ethylbenzene	480	390	NS	NS	435	#N/A	90	90	#N/A	21%
		m-Xylene	650	530	NS	NS	590	#N/A	120	120	#N/A	20%
		p-Xylene	1230	1030	NS	NS	1130	#N/A	200	200	#N/A	18%
		o-Xylene	740	630	NS	NS	685	#N/A	110	110	#N/A	16%
2	North end	Benzene	13	NS	NS	NS	13	#N/A	#N/A	0	#N/A	#N/A
		m-Xylene	55	NS	NS	NS	55	#N/A	#N/A	0	#N/A	#N/A
		p-Xylene	59	NS	NS	NS	59	#N/A	#N/A	0	#N/A	#N/A
		o-Xylene	69	NS	NS	NS	69	#N/A	#N/A	0	#N/A	#N/A
3	NE of spill	Benzene	16	NS	NS	NS	16	#N/A	#N/A	0	#N/A	#N/A
		Ethylbenzene	8	NS	NS	NS	8	#N/A	#N/A	0	#N/A	#N/A
		m-Xylene	160	NS	NS	NS	160	#N/A	#N/A	0	#N/A	#N/A
		o-Xylene	360	NS	NS	NS	360	#N/A	#N/A	0	#N/A	#N/A
4	North of spill	Benzene	6	NS	NS	NS	6	#N/A	#N/A	0	#N/A	#N/A

Data appearing in shaded boxes do not meet QA criteria, refer to analytical report. Data is for information only!

█ : Exceeds calibration range.

██ : Probable lab contamination.

▨ : Detected But Not Confirmed.

RPD: Relative Percent Difference is computed only when two results are compared.

RSD: Relative Standard Deviation is computed if more than two results are compared.

NA = Not Applicable, NS = No sample

Data which is reported as "less than" (<) is used at 80% the numerical value to calculate difference and RPD.

Surrogate Spike Recovery		a,a,a-Trifluorotoluene Percent Recovery		
Item	Samples	(A)	(B)	Avg.
1	South end	125%	103%	114%
2	North end	121%		
3	NE of spill	119%		
4	North of spill	120%		
5	0	120%		
	Lab blank			
Average Spike Recovery:		118%		



EXHIBIT # 8

BACHMAN Jeff

From: PETROVICH Joe
Sent: Monday, July 12, 1999 3:29 PM
To: BACHMAN Jeff
Subject: Tamaddon Referral

Per Dean (?) of Sol Pro in Tacoma, Washington

\$7.27 per gallon

13 drums X 50 gallons per drum X \$7.27 per gallon = \$4725.50 + Shipping cost \$136 = \$4861.50.

Gil is on vacation, Cheryl Parr is Acting Manager. She and I have reviewed Kirschner documents and are awaiting a "go-ahead" from Steve Greenwood. Will advise you as soon as I hear from Steve G.

Joe



EXHIBIT # 9

State of Oregon
Department of Environmental Quality

Memorandum

Date: July 13, 1999

To: Jeff Bachman
From: Roger Dilts
Subject: BEN calculation for Dar Tamaddon

The economic benefit portion of the civil penalty formula is simply the monetary benefit that the violator gained by not complying with the law. It is not designed to punish the violator, but to (1) "level the playing field" by taking away any economic advantage the violator gained over its competitors through noncompliance, and (2) deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance.

DEQ uses EPA's "BEN" computer model which considers interest rates, tax rates and deductions, and other factors in determining an estimated benefit, pursuant to OAR 340-12-045(1)(c)(F)(iii).

In this case the Respondent gained an economic benefit by illegally disposing hazardous waste. By avoiding costs of \$4862, Respondent realized an EB of \$2,878.

Data submitted to support the calculation and a printout of the BEN run are attached.

I recognize that this may not completely circumscribe the economic benefit the Respondent received to date because it does not include uncertain advantage-of-risk and competitive-advantage benefits. However, I consider these economic benefits to be *de minimis* in light of the difficulties in calculation. Pursuant to OAR 340-12-045(1)(F)(ii), the Department need not calculate an economic benefit if that benefit is *de minimis*.

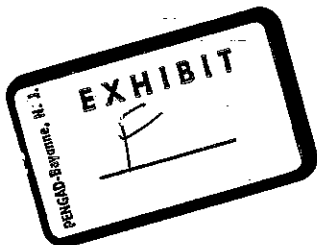


EXHIBIT #

10

Run Name = disposal

<u>Present Values as of Noncompliance Date,</u>	<u>07-Jan-1999</u>
A) On-Time Capital & One-Time Costs	\$2,674
B) Delay Capital & One-Time Costs	\$0
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$2,674
E) Final Econ. Ben: at Penalty Payment Date,	
<u>13-Oct-1999</u>	<u>\$2,878</u>

For-Profit (not C-Corp.) w/ OR tax rates

Discount/Compound Rate	10.1%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	13-Jul-1999

Capital Investment:

Cost Estimate	customized
Cost Estimate Date	customized
Cost Index for Inflation	customized
# of Replacement Cycles; Useful Life	N/A; N/A
Projected Rate for Future Inflation	N/A

One-Time Nondepreciable Expenditure:

Cost Estimate	customized
Cost Estimate Date	customized
Cost Index for Inflation	customized
Tax Deductible?	Y

Annually Recurring Costs:

Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A

User-Customized Specific Cost Estimates:

On-Time Compliance Capital Investment	\$0
Delay Compliance Capital Investment	\$0
On-Time Compliance Replacement Capital	\$0
Delay Compliance Replacement Capital	\$0
One-Time Compliance Nondepreciable	\$4,862
Delay Compliance Nondepreciable	\$0

A) On-Time Capital & One-Time Costs: Initial Cycle

	07-Jan-1999	07-Jul-1999	07-Jul-2000	07-Jul-2001	07-Jul-2002	07-Jul-2003	07-Jul-2004	07-Jul-2005	07-Jul-2006
One-Time, Nondepreciable Expenditure	(4,862)								
Capital Investment	0								
Depreciation	0	0	0	0	0	0	0	0	0
Marginal Tax Rate	45.0%	45.0%	45.0%	45.0%	45.0%	45.0%	45.0%	45.0%	45.0%
Net After-Tax Cash Flow	(2,674)	0	0	0	0	0	0	0	0
PV Factor: Adjusts Cash Flow to NCD	1.0000	0.9534	0.8657	0.7863	0.7142	0.6487	0.5890	0.5350	0.4859
PV Cash Flow as of NCD	(2,674)	0	0	0	0	0	0	0	0

Net Present Value (NPV) as of NCD:

Initial Cycle	(\$2,674)
Subsequent Replacement Cycles	\$0
Total -- All Cycles	(\$2,674)

Depreciation (MACRS):	14.2860%	24.4897%	17.4935%	12.4953%	8.9243%	8.9243%	8.9243%	4.4626%
-----------------------	----------	----------	----------	----------	---------	---------	---------	---------

B) Delay Capital & One-Time Costs: Initial Cycle

	13-Jul-1999	13-Jan-2000	13-Jan-2001	13-Jan-2002	13-Jan-2003	13-Jan-2004	13-Jan-2005	13-Jan-2006	13-Jan-2007
One-Time, Nondepreciable Expenditure	0								
Capital Investment	0								
Depreciation	0	0	0	0	0	0	0	0	0
Marginal Tax Rate	45.0%	45.0%	45.0%	45.0%	45.0%	45.0%	45.0%	45.0%	45.0%
Net After-Tax Cash Flow	0	0	0	0	0	0	0	0	0
PV Factor: Adjusts Cash Flow to NCD	0.9519	0.9068	0.8234	0.7479	0.6793	0.6170	0.5602	0.5088	0.4622
PV Cash Flow as of NCD	0	0	0	0	0	0	0	0	0

Net Present Value (NPV) as of NCD:

Initial Cycle	\$0
Subsequent Replacement Cycles	\$0
Total -- All Cycles	\$0

DILTS Roger

From: BACHMAN Jeff
Sent: Monday, July 12, 1999 4:21 PM
To: DILTS Roger
Subject: EB a go-go

Our respondent is one Mr. Dar Tamaddon, who arranged with his landlord to dump 13 drums of benzene-characteristic hazardous waste in the form of UST rinseate and sludge onto the ground behind the gas station he was leasing. Cost avoided of proper disposal: \$4,861.50. Should have disposed of waste on January 7, 1999. Date penalty paid ?, lets say September 1, 1999. As always, if you attach a copy of your memo, por favor.

Muchas Gracias

- HW? ~~we?~~

Intro:

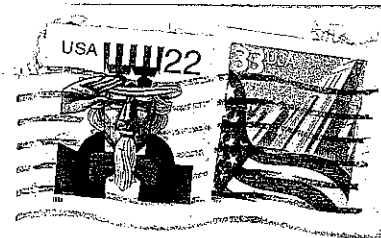
Looks up status for another. (Kushner)

13 drums of waste below + ~~discarded~~ on site

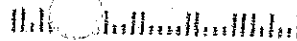
Tamaddon tells he will take care of.

He hires ~~two~~ people to keep the drums out of site.

A. B. Cummins, Jr., P.C.
Attorney at Law
180 Church Street S.E.
P. O. Box 183
Salem, OR 97308



Kevin Anselm
Oregon Employment Dept.
875 Union St. N.E.
Salem, OR 97311
Attn: Hearings Panel



HARDY MYERS
Attorney General



PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

June 5, 2003

Stephanie Hallock
Director
Department of Environmental Quality
811 SW Sixth
Portland, OR 97204


Re: *Huff v. DEQ*, CA A117410
DOJ File No. 340310/ACV0062-02

Dear Ms. Hallock:

I am pleased to advise the Court of Appeals has affirmed in this appeal. A copy of the court's decision is enclosed.

I will keep you advised of any further appeal developments.

Sincerely,



Jas. Jeffrey Adams
Assistant Attorney General

encl.

cc: Anne Price, DEQ (w/encl)
Sue Greco, DEQ (w/encl)
Don Arnold, Gen Counsel (w/encl)

RECEIVED

JUN 09 2003

Oregon DEQ
Office of the Director

FILED: June 5, 2003

IN THE COURT OF APPEALS OF THE STATE OF OREGON

REGGIE D. HUFF,)	
)	
Petitioner,)	
	)	Environmental Quality Comm.
v.	)	No. WQ/I-NWR-00-125
)	
ENVIRONMENTAL QUALITY)	
COMMISSION,	)	A117410
)	
Respondent.)	

Argued or submitted on briefs: May 1, 2003

Before Haselton, Presiding Judge, and Linder and Wollheim, Judges

Attorney for Petitioner: Reggie D. Huff, *pro se*

Attorney for Respondent: Jas. Jeffrey Adams

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

No costs allowed.

Costs allowed, payable by:

**BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON**

In the Matter of)	
)	
REGGIE D. HUFF,	)	FINAL ORDER
	)	No. WQ/I-NWR-00-125
)	
Respondent)	

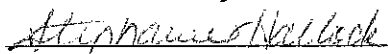
On September 20, 2001, the Environmental Quality Commission considered the Respondent's appeal of Hearing Officer Kevin Anselm's proposed contested case order. That order is dated April 21, 2001 and incorporated herein as Attachment A. The Commission considered the exceptions and brief submitted by the Respondent and the briefs submitted by the Department of Environmental Quality. Neither the Respondent nor the Department requested oral arguments.

At the September hearing, the Commission determined that it wished to hear oral argument on the issue of how the phrase "likely to escape or be carried into waters of the state" in ORS 468B.025(1) should be interpreted and applied to this case. Accordingly, the Commission set the matter over to its regular meeting on December 6, 2001. At the December meeting, oral arguments were provided by Mr. Huff and by Susan Greco, an environmental law specialist with the Department.

After considering the written and oral arguments presented by Mr. Huff and the Department, the Commission affirms the April 27, 2001 proposed order of the Hearing Officer and adopts it as its final order with the following clarification:

The Commission concludes that the term "likely" as used in ORS 468B.025 should be given its ordinary and common meaning and applied on a case-by-case basis. The Hearing Officer correctly found that the waste water was placed in a storm drain. The storm drain was designed to convey storm water into the surrounding ground and groundwater. Under these circumstances, the waste water was placed in a location where it was likely to reach waters of the state.

Dated this 17 day of December, 2001.


Stephanie Hallock, Director
Department of Environmental Quality
On behalf of the
Environmental Quality Commission

Notice of Appeal Rights

RIGHT TO JUDICIAL REVIEW: You have the right to appeal this Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the day this Order was served on you. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was *mailed*, not the day you received it. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.

Attachment A

GEN83645

Ref No.: G60417
Case No: 01-GAP-00037
Case Type: DEQ

STATE OF OREGON
Before the Hearing Officer Panel
For the
DEPT OF ENVIRONMENTAL QUALITY
875 Union Street NE
Salem, Oregon 97311

Dec Mailed: 04/27/01
Mailed by: LMV

HEARING DECISION

REGGIE D. HUFF
51377 SW OLD PORTLAND RD

SCAPPOOSE OR 97056 4018

DEPT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

SUSAN GRECO
DEQ ENFORCEMENT SECTION
811 SW 6TH AVE
PORTLAND OR 97204 1334

The following **HEARING DECISION** was served to the parties at their respective addresses.

STATE OF OREGON
BEFORE THE HEARING OFFICER PANEL
FOR THE ENVIRONMENTAL QUALITY COMMISSION

In the Matter of)
REGGIE D. HUFF)
Respondent)

PROPOSED ORDER
Notice of Assessment of
Civil Penalty
No. WQ/I-NWR-00-125

HISTORY

The Department of Environmental Quality (hereinafter the "Department") issued a Notice of Assessment of Civil Penalty No. WQ/I-NWR-00-125 on August 1, 2000 and amended October 30, 2000 to Respondent for disposing of approximately 500 gallons of waste anti-freeze into a dry well that discharged to groundwater in Scappoose, Oregon. Respondent Reggie D. Huff (hereinafter "Huff") requested a hearing on August 9, 2000 and November 13, 2000.

The Department referred the matter to the Central Hearings Panel. The Panel appointed Hearing Officer Kevin Anselm to hear the case. The hearing was held February 27, 2001 at the Department of Environmental Quality, 2020 SW 4th Street, 4th floor conference room E, Portland, Oregon. Respondent Huff appeared and represented himself. Daniel E. Murphy, Water Quality Complaint Coordinator for the Department, and Robert Gill, hydrologist, appeared as respondent's witnesses. Respondent's wife and daughter observed the hearing. Susan Greco, Environmental Law Specialist, represented the Department. The Department called witnesses Lucinda Ann Bidleman, a Department Natural Resource Specialist in the area of ground water; Susan Shewczyk, a Department Hazardous Waste Inspector; and Anne Cox, a Department Natural Resource Specialist and case investigator.

On March 8, 2001, the Hearing Officer transmitted a question regarding the Department's interpretation of the terms "negligence" and "negligent" to the Department. The Department responded on April 4, 2001. Huff postmarked his rebuttal to the Department's response on April 12, 2001. The hearing record closed upon receipt of Huff's rebuttal on April 13, 2001.

ISSUES

Shall the Department's Notice of Assessment of Civil Penalty dated August 1, 2000, amended October 30, 2000, be affirmed, modified or vacated?

FINDINGS OF FACT

Respondent Huff operates Acro-Tech, Inc. from a leased building and parking lot located at 51377 SW Old Portland Rd. in Scappoose, Oregon (hereinafter the "property"). The company leased the property in 1996, and operates a research laboratory, conducting research and development for improving internal combustion engine processes, including ways to make the processes more environmentally friendly (Exhibit 21). In 1999, the research laboratory included a combustion engine and an open tank containing fluids that were pumped through the engine for cooling purposes. The 2000-gallon capacity tank initially contained about 450-500 gallons of water. In November 1996, Huff added about 55 gallons of ethylene glycol, commonly known as anti-freeze, to the tank.

Ethylene glycol lowers the freezing point of water, so is used as antifreeze in cooling and heating systems. It is an odorless liquid, soluble in water, and is relatively non-volatile. Huff added ethylene glycol to the tank contents to inhibit the freezing of the contents, which may cause problems with the combustion engine equipment. Ethylene glycol is toxic if ingested or inhaled in sufficient amounts. (Exhibits 10 -11)

In the spring of 1999, Huff thought he might need to quickly move the business and its equipment from the property because of problems with the landlord. The tank needed to be empty in order to move it. He was concerned about disposing the tank contents of about 500 gallons of ethylene glycol solution. Huff said that he called the Department to find out how he was required to dispose of the contents, but he does not recall whom he spoke with at the Department. Huff testified that the Department representative did not seem concerned about disposal. Because he had concerns about the Department's seeming disinterest, Huff then called the City of Scappoose. After a conversation with Steve Wabshall, Operations Superintendent, at the City of Scappoose, Huff received permission to discharge the ethylene glycol solution into the city's sanitary sewer system. Wabshall recommended that Huff make the discharge in small amounts over a week's time. (Exhibit 6)

Huff discharged the ethylene glycol solution through a hose connected to the tank and into the storm drain located in the Huff property parking lot over about 10 days in the spring of 1999. He did not test the solution for any chemicals or other substances before draining it, although he did check the solution's specific gravity at some point. Huff recalls that the specific gravity of the solution was about the same as water.

While preparing for a court case against his landlord in December 1999, Huff talked again to the City of Scappoose, and found out that the storm drain in the parking lot was not connected to the sanitary sewer system. The property building plumbing, however, is connected to the sanitary sewer.

Beginning in February 2000, the Department conducted an investigation at the site and found that under the grate in the parking lot was a holding cylinder or sump from which fluid contained there may flow into a drywell under the parking lot asphalt. From the drywell, fluid may drain or seep into the surrounding ground. The relevant area is covered with asphalt, and the specific piping could not be seen. There was no outlet or piping in the area that originated at the sump which then moved fluid to a ditch or other surface waterway. The Department is familiar with the construction of this type of storm system, which allows fluids that enter the cylinder or drywell to seep into the ground.

The ground in the area is generally well drained. The area soil characteristics of the stream or water-laid (alluvial) deposits include clay or clay mixed with other soil types in layers from the soil surface to depths ranging between 11 - 30 feet (Exhibits 9 and 23). Clay is generally more impermeable than other soil types, and may direct fluids more horizontally, depending on the integrity of the clay layer. The land topography slopes gently downhill from the property. Surface water is generally not evident in the immediate area, with the closest surface water location estimated at over 1000 feet downhill and away from the Huff property. There was no evidence presented about soil saturation conditions or rainfall during or after the spring of 1999.

On February 4, 2001, Huff took a sample of the solution remaining in a pipe from the tank that formerly contained the solution, and had the sample tested for volatile organic compounds. The sample was not tested for ethylene glycol. (Exhibits 19-20).

In addition to residual ethylene glycol, the Department is concerned about possible metal contamination of ground water from the solution. Ethylene glycol solutions used to cool engines often contain metals that are leached from the engine components during the cooling process. The Department testified that the ethylene glycol breaks down to a certain extent with time and exposure, but that it does not lose toxicity. Ethylene glycol may be consumed by some bacteria in the soil, or

may be ionized, or attached to soil particles, which would inhibit additional movement through the soils. Any metallic contamination is less likely to break down, and would continue to be present in the ground or ground water, unless carried away.

The Department calculated the civil penalty according to the formula outlined on Exhibit 1 to the Amended Notice of Assessment of Civil Penalty including \$1,000 for the base penalty for a Class II moderate magnitude violation; +2 for repeated or continuous violations alleging the violation occurred on more than one day; and +2 for respondent's negligent conduct.

ULTIMATE FINDINGS

Huff disposed of about 500 gallons of solution containing ethylene glycol and metal leachings from internal combustion engine cooling operations into a storm drain sump that was not connected to a sanitary sewer.

The civil penalty includes factors to increase the penalty for repeated or continuous violations and respondent's alleged negligent conduct.

APPLICABLE LAW

Oregon Revised Statute (ORS) 468B.025 Prohibited Activities states in part:

- (1) Except as provided in ORS 468B.050 or 468B.053, no person shall:
 - (a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.

* * *

ORS 468B.005 Definitions for water pollution control laws states in part:

As used in the laws relating to water pollution, unless the context requires otherwise:

* * * *

- (2) "Industrial waste" means any liquid, gaseous, radioactive or solid waste substance or a combination thereof resulting from any process of industry, manufacturing, trade or business, or from the development or recovery of any natural resources.
- (3) "Pollution" or "water pollution" means such alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself or in connection with any other substance, create a public nuisance or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof.

* * * *

- (7) "Wastes" means sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive or other substances which will or may cause pollution or tend to cause pollution of any waters of the state.

(8) "Water" or "the waters of the state" include lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction. [Formerly 449.075 and then 468.700]

OAR 340-012-0030 Definitions, states in part:

(11) "Negligence" or "Negligent" means failure to take reasonable care to avoid a foreseeable risk of committing an act or omission constituting a violation.

OAR 340-012-0045 Civil Penalty Determination Procedure

(1) When determining the amount of civil penalty to be assessed for any violation, other than violations of ORS 468.996, which are determined according to the procedure set forth below in OAR 340-012-0049(8), the Director shall apply the following procedures:

(a) Determine the class and the magnitude of each violation:

(A) The class of a violation is determined by consulting OAR 340-012-0050 to 340-012-0073;

(B) The magnitude of the violation is determined by first consulting the selected magnitude categories in OAR 340-012-0090. In the absence of a selected magnitude, the magnitude shall be moderate unless:

(i) If the Department finds that the violation had a significant adverse impact on the environment, or posed a significant threat to public health, a determination of major magnitude shall be made. In making a determination of major magnitude, the Department shall consider all available applicable information including such factors as: The degree of deviation from the Commission's and Department's statutes, rules, standards, permits or orders, concentration, volume, percentage, duration, toxicity, and the extent of the effects of the violation. In making this finding, the Department may consider any single factor to be conclusive for the purpose of making a major magnitude determination;

(ii) If the Department finds that the violation had no potential for or actual adverse impact on the environment, nor posed any threat to public health, or other environmental receptors, a determination of minor magnitude shall be made. In making a determination of minor magnitude, the Department shall consider all available applicable information including such factors as: The degree of deviation from the Commission's and Department's statutes, rules, standards, permits or orders, concentration, volume, percentage, duration, toxicity, and the extent of the effects of the violation. In making this finding, the Department may consider any single factor to be conclusive for the purpose of making a minor magnitude determination.

(b) Choose the appropriate base penalty (BP) established by the matrices of OAR 340-012-0042 after determining the class and magnitude of each violation;

(c) Starting with the base penalty, determine the amount of penalty through application of the formula: $BP + [(1 \times BP) \times (P + H + O + R + C)] + EB$, where:

(A) "P" is whether the Respondent has any prior significant actions relating to statutes, rules, orders and permits pertaining to environmental quality or pollution control. A violation is deemed to have become a Prior Significant Action on the date of the issuance of the first Formal Enforcement Action in which it is cited. For the purposes of this determination, violations that were the subject of any prior significant actions that were issued before the effective date of the Division 12 rules as adopted by the Commission in March 1989, shall be classified in accordance with the classifications set forth in the March 1989 rules to ensure equitable consideration of all prior significant actions. The values for "P" and the finding which supports each are as follows:

(i) 0 if no prior significant actions or there is insufficient information on which to base a finding;

(ii) 1 if the prior significant action is one Class Two or two Class Threes;

(iii) 2 if the prior significant action(s) is one Class One or equivalent;

(iv) 3 if the prior significant actions are two Class One or equivalents;

(v) 4 if the prior significant actions are three Class Ones or equivalents;

(vi) 5 if the prior significant actions are four Class Ones or equivalents;

(vii) 6 if the prior significant actions are five Class Ones or equivalents;

(viii) 7 if the prior significant actions are six Class Ones or equivalents;

(ix) 8 if the prior significant actions are seven Class Ones or equivalents;

(x) 9 if the prior violations significant actions are eight Class Ones or equivalents;

(xi) 10 if the prior significant actions are nine Class Ones or equivalents, or if any of the prior significant actions were issued for any violation of ORS 468.996;

(xii) In determining the appropriate value for prior significant actions as listed above, the Department shall reduce the appropriate factor by:

(I) A value of 2 if the date of issuance of all the prior significant actions re greater than three years old; or

II) A value of 4 if the date of issuance of all the prior significant actions are greater than five years old.

(III) In making the above reductions, no finding shall be less than zero.

(xiii) Any prior significant action which is greater than ten years old shall not be included in the above determination;

(xiv) A permittee, who would have received a Notice of Permit Violation, but instead received a civil penalty or Department Order because of the application of OAR 340-012-0040(2)(d), (e), (f), or (g) shall not have the violation(s) cited in the former action counted as

a prior significant action, if the permittee fully complied with the provisions of any compliance order contained in the former action.

(B) "H" is Respondent's history in correcting prior significant actions or taking reasonable efforts to minimize the effects of the violation. In no case shall the combination of the "P" factor and the "H" factor be a value less than zero. In such cases where the sum of the "P" and "H" values is a negative numeral the finding and determination for the combination of these two factors shall be zero. The values for "H" and the finding which supports each are as follows:

(i) -2 if Respondent took all feasible steps to correct the majority of all prior significant actions;

(ii) 0 if there is no prior history or if there is insufficient information on which to base a finding.

(C) "O" is whether the violation was repeated or continuous. The values for "O" and the finding which supports each are as follows:

(i) 0 if the violation existed for one day or less and did not recur on the same day, or if there is insufficient information on which to base a finding;

(ii) 2 if the violation existed for more than one day or if the violation recurred on the same day.

(D) "R" is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act of the Respondent. The values for "R" and the finding which supports each are as follows:

(i) 0 if an unavoidable accident, or if there is insufficient information to make a finding;

(ii) 2 if negligent;

(iii) 6 if intentional; or

(iv) 10 if flagrant.

(E) "C" is the Respondent's cooperativeness and efforts to correct the violation. The values for "C" and the finding which supports each are as follows:

(i) -2 if Respondent was cooperative and took reasonable efforts to correct a violation, took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the violation would not be repeated;

(ii) 0 if there is insufficient information to make a finding, or if the violation or the effects of the violation could not be corrected;

(iii) 2 if Respondent was uncooperative and did not take reasonable efforts to correct the violation or minimize the effects of the violation.

(F) "EB" is the approximated dollar sum of the economic benefit that the Respondent gained through noncompliance. The Department or Commission may assess "EB" whether or not it applies the civil penalty formula above to determine the gravity and magnitude-based portion

of the civil penalty, provided that the sum penalty does not exceed the maximum allowed for the violation by rule or statute. "EB" is to be determined as follows:

(i) Add to the formula the approximate dollar sum of the economic benefit gained through noncompliance, as calculated by determining both avoided costs and the benefits obtained through any delayed costs, where applicable;

(ii) The Department need not calculate nor address the economic benefit component of the civil penalty when the benefit obtained is de minimis;

(iii) In determining the economic benefit component of a civil penalty, the Department may use the U. S. Environmental Protection Agency's BEN computer model, as adjusted annually to reflect changes in marginal tax rates, inflation rate and discount rate. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the economic benefit gained by Respondent's noncompliance. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect that Respondent's actual circumstance. Upon request of the Respondent, the Department will use the model in determining the economic benefit component of a civil penalty;

(iv) As stated above, under no circumstances shall the imposition of the economic benefit component of the penalty result in a penalty exceeding the statutory maximum allowed for the violation by rule or statute. When a violation has extended over more than one day, however, for determining the maximum penalty allowed, the Director may treat the violation as extending over at least as many days as necessary to recover the economic benefit of noncompliance. When the purpose of treating a violation as extending over more than one day is to recover the economic benefit, the Department has the discretion not to impose the gravity and magnitude-based portion of the penalty for more than one day.

(2) In addition to the factors listed in section (1) of this rule, the Director may consider any other relevant rule of the Commission and shall state the effect the consideration had on the penalty. On review, the Commission shall consider the factors contained in section (1) of this rule and any other relevant rule of the Commission.

(3) In determining a civil penalty, the Director may reduce any penalty by any amount the Director deems appropriate when the person has voluntarily disclosed the violation to the Department. In deciding whether a violation has been voluntarily disclosed, the Director may take into account any conditions the Director deems appropriate, including whether the violation was:

(a) Discovered through an environmental auditing program or a systematic compliance program;

(b) Voluntarily discovered;

(c) Promptly disclosed;

(d) Discovered and disclosed independently of the government or a third party;

(e) Corrected and remedied;

- (f) Prevented from recurrence;
- (g) Not repeated;
- (h) Not the cause of significant harm to human health or the environment; and
- (i) Disclosed and corrected in a cooperative manner.

(4) The Department or Commission may reduce any penalty based on the Respondent's inability to pay the full penalty amount. If the Respondent seeks to reduce the penalty, the Respondent has the responsibility of providing to the Department or Commission documentary evidence concerning Respondent's inability to pay the full penalty amount:

(a) When the Respondent is currently unable to pay the full amount, the first option should be to place the Respondent on a payment schedule with interest on the unpaid balance for any delayed payments. The Department or Commission may reduce the penalty only after determining that the Respondent is unable to meet a long-term payment schedule;

(b) In determining the Respondent's ability to pay a civil penalty, the Department may use the U.S. Environmental Protection Agency's ABEL computer model to determine a Respondent's ability to pay the full civil penalty amount. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the Respondent's ability to pay a civil penalty. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model;

(c) In appropriate circumstances, the Department or Commission may impose a penalty that may result in a Respondent going out of business. Such circumstances may include situations where the violation is intentional or flagrant or situations where the Respondent's financial condition poses a serious concern regarding the ability or incentive to remain in compliance.

CONCLUSIONS AND REASONS

The respondent violated ORS 468B.025(1)(a) by placing a solution containing ethylene glycol and metal leaching in a place where it may be carried into the waters of Oregon.

The basic facts of the case are not in dispute. Huff freely admits that he disposed of about 500 gallons of fluid that originally contained about 10% ethylene glycol, that had been used in his internal combustion engine research, in a storm drain over a period of about 10 days in the spring of 1999. Huff disagrees with the characterization of the fluid as a waste or pollution because he believes it was not harmful by the time it was discharged. He further argues that even if the fluid is deemed as waste or pollution, the ground absorbed the fluid, and it did not ultimately enter the ground, surface or any other waters of the state.

The ethylene glycol solution clearly fits the definition of waste when it was originally mixed in the tank because of the toxic properties of the ethylene glycol to humans and animals. As the solution was used in cooling the internal combustion equipment, it is likely to have leached metallic compounds from the equipment. Huff's argument that the solution contained little or no ethylene glycol or other contaminants possibly injurious to health or the environment is not supported by the

weight of evidence offered, including the laboratory tests that were not contemporaneous with the discharge and did not include testing for ethylene glycol or possible metallic contaminants. Huff's own actions of inquiring about proper disposal methods reflects his conscientiousness about possible pollutants and the realization that the solution deserved to be handled with care in order to avoid polluting. Further, Wabshall's instruction to discharge small amounts of the solution over a period of time indicates some concern over the solution's content.

Huff also argues that there is no proof that the solution ever entered the waters of the state. Huff is correct. However, the law provides that waste may not be placed in a location where such wastes are "likely to escape or be carried into the waters of the state by any means" (emphasis added). In this case, the Department's testimony about how a dry sump system works is persuasive. Fluid held in the sump or drywell can seep into the surrounding ground and into ground water. Rainwater or other fluid entering the dry sump system may flush the solution into the ground and existing groundwater. There is no allegation or evidence that Huff purposely placed waste where it could enter into the waters of the state. It is clear that Huff conscientiously endeavored to properly dispose of the solution by securing permission from the City of Scappoose to drain the tank contents into the sanitary sewer. Unfortunately, and unbeknownst to Huff, the parking lot sump was not part of the sanitary sewer. Accordingly, Huff violated ORS 468B.025(1)(a) by discharging the ethylene glycol solution in a place where it may be carried into the waters of Oregon.

The remaining question is whether the civil penalty assessed for violating ORS 468B.025(1)(a) is appropriate in this case.

The civil penalty imposed is not appropriate pursuant to OAR 340-012-0045.

In this case, the civil penalty is not appropriately calculated in respect to the factor for the cause of the violation. The Department has the burden to prove each factor value as alleged. The remaining factors, including the base penalty factor, are correctly valued.

The "single or repeated occurrence" (O) variable is correctly valued as +2. Huff agrees that he drained the tank in several small amounts over the 10-day period as instructed by the City of Scappoose. While it is unfortunate that the penalty is increased because Huff was attempting to follow instructions, the variable is correctly valued in this case of an ongoing or repeat violation.

The "cause of the violation" (R) variable is incorrectly valued as +2. The Department alleges that while Huff determined that the waste could be disposed of into a sanitary sewer, he failed to take reasonable steps to determine whether the storm drain lead to the sanitary sewer, and was therefore negligent. The Department's rule defines negligent or negligence as "failure to take reasonable care to avoid a foreseeable risk of committing an act or omission constituting a violation". In this case, Huff solicited and received permission to discharge the tank contents into the sanitary sewer. He mistakenly thought the storm drain was connected to the sanitary sewer. The Department offered no evidence or testimony that Huff failed to take reasonable care to ascertain whether the storm drain was connected to the sanitary sewer. Huff thought that all storm drains were connected to the sanitary sewer. There is no evidence that persons in a like circumstance would ask about the storm drain, or that there was something different about this storm drain than others in the area that may cause a reasonable person to question whether the storm drain was connected to the sanitary sewer. There is not enough information to determine whether Huff was negligent for failing to determine whether the storm drain was attached to the sanitary sewer. Accordingly, the correct value for "Cause of the Violation" is '0'.

Applying the correct values to the Penalty Calculation results in a civil penalty calculation of \$1,200 as follows:

$$\begin{aligned} \text{Penalty} &= \text{BP} + [(.1 \times \text{BP}) (\text{P}+\text{H}+\text{O}+\text{R}+\text{C})] + \text{EB} \\ &= \$1,000 + [(.1 \times \$1,000) \times (0+0+2+0+0)] + 0 \\ &= \$1,000 + [(\$100) \times (2)] + 0 \\ &= \$1,000 + \$200 + 0 \\ &= \$1,200 \end{aligned}$$

PROPOSED ORDER

IT IS HEREBY PROPOSED that the Notice of Assessment of Civil Penalty No. WQ/I-NWR-00-125 issued on August 1, 2000 and amended October 30, 2000 be MODIFIED as follows:

Respondent Huff is assessed a civil penalty of \$1,200 for violating ORS 468B.025(1)(a).

Dated this 21st day of April, 2001

For the ENVIRONMENTAL QUALITY COMMISSION



Kevin Anselm
Hearings Officer

If you are not satisfied with this decision, you have the right to have the decision reviewed by the Oregon Environmental Quality Commission. To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date this order is served on you as provided in Oregon Administrative Rule (OAR) 340-011-0132(1) and (2). The Petition for Review must be filed with:

Environmental Quality Commission
c/o Stephanie Hallock, Director, DEQ
811 SW SIXTH AVENUE
Portland, OR 97204.

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as in provided in OAR 340-011-0132(3). If the petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0132.

Unless you timely and appropriately file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Environmental Quality Commission 30 days from the date of service on you of this Proposed Order. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. See ORS 183.400 et. seq.



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TTY (503) 229-6993

October 2, 2001

Reggie D. Huff
34685 Bachelor Flat Rd.
St. Helens, Oregon 97051

Susan Greco
Oregon Department of Environmental Quality
811 S.W. Sixth Ave.
Portland, OR 97204

RE: Case No. WQ/I-NWR-00-125

Dear Mr. Huff and Ms. Greco:

On September 21, 2001, the Oregon Environmental Quality Commission considered Mr. Huff's petition for Commission review of the Hearing Officer's decision in the above referenced matter. Neither Mr. Huff nor the Department requested oral argument and accordingly, Ms. Greco did not attend the Commission meeting.

During the Commission's deliberations, Mr. Huff asked to address the Commission. This request was denied because Ms. Greco was not present at the meeting and the Commission determined that under these circumstances it would be inappropriate to hear from the petitioner without providing a similar opportunity to the Department.

To allow for fuller consideration of the case, however, the Commission has set this matter over to its December meeting. At that time, the Commission will provide you the opportunity to present oral argument on the issues of the proper interpretation of the phrase "likely to escape or be carried into waters of the state" in ORS 468B.025 and the hearing officer's application of that language to this case.

The Commission's meeting is presently scheduled for December 6 and 7, 2001 and will be held at the Department of Environmental Quality, Room 3A, 811 SW Sixth Avenue in Portland. I will provide you the agenda for this meeting as soon as it is available. If you have any questions about this matter, please contact Larry Knudsen, the Commission's legal counsel. He may be reached at (503) 229-5725.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc. Melinda Eden, Chair
Larry Knudsen, AAG

State of Oregon
Department of Environmental Quality

Memorandum

Date: August 31, 2001
To: Environmental Quality Commission
From: Stephanie Hallock, Director *S. Hallock*
Subject: Agenda Item C, Action Item: Appeal of Proposed Order in the Matter of Reggie Huff, Case No. WQ/I-NWR-00-125, September 20, 2001, EQC Meeting

Appeal to EQC Reggie Huff appealed the Proposed Order (Attachment E), dated April 27, 2001, which found Mr. Huff liable for a civil penalty in the amount of \$1,200 for placing waste where it was likely to escape or be carried into waters of the state.

Background Findings of fact made by the Hearing Officer are summarized as follows:

On October 30, 2000, the Department assessed Mr. Huff a \$1,400 penalty for allegedly placing waste in a location where it was likely to escape or be carried into waters of the state. Mr. Huff appealed and a contested case hearing was held on February 27, 2001. Mr. Huff operates Acro-Tech, Inc., from a building located at 51377 S.W. Old Portland Road in Scappoose, Oregon. In this building was a 2000-gallon tank, which in 1999, contained approximately 450-500 gallons of water and 55 gallons of ethylene glycol. The solution was used to cool engines used in research. In the spring of 1999, Mr. Huff disposed of the approximately 500 gallons of cooling solution into a storm drain located in the property's parking lot. The storm drain consists of a sump from which fluids flow into a drywell under the parking lot, then drain or seep into the surrounding ground. When disposed of by Mr. Huff, the solution contained ethylene glycol and metal leachings. The ground in the area is generally well drained and includes deposits of clay or clay mixed with other soil types from the surface to depths ranging from 11 to 30 feet.

The Hearing Officer held that Mr. Huff placed 500 gallons of waste where it was likely to escape or be carried into waters of state and he was liable for a civil penalty in the amount of \$1,200. On May 29, 2001, Mr. Huff timely appealed the Proposed Order.

Mr. Huff took the following exceptions to the Proposed Order:

1. the waste was not likely to enter waters of the state,
2. the Hearing Officer erred by replacing 'likely' with 'may' in the Proposed Order,

3. the waste must still be waste by definition when it enters waters of the state, and
4. the wastewater disposed of was not waste.

Additionally, Mr. Huff raises the issue that the Department's Brief was not filed in a timely manner (see Attachment B, Reply Brief). The Department's Brief was filed with Mikell O'Mealy on behalf of the Commission, on June 26, 2001, within 30 days of filing of Mr. Huff's Brief (May 29, 2001), as set forth in the Department's rules. See OAR 340-011-0132(3)(b) and Attachments C and D.

The Department expressed concerns that Mr. Huff relied on facts to support his arguments that are not in the record or are not in the Hearing Officer's findings of fact (see Attachment C, Department's Brief). As explained below, the Commission is limited in its ability to modify a recommended finding of fact or accept additional evidence.

**EQC Action
Alternatives**

The Commission may:

1. As requested by Mr. Huff, find that he did not place waste were it was likely to escape or be carried into waters of the state and is thus, not liable for a civil penalty; or
2. Uphold the Proposed Order determining that Mr. Huff violated ORS 468B.025 and is liable for a civil penalty in the amount of \$1,200.

The Commission may substitute its judgment for that of the Hearing Officer except as noted below.¹ The Order was issued under 1999 statutes and rules for the Hearings Officer Panel Pilot Project,² which require contested case hearings to be conducted by a hearing officer appointed to the panel. The Commission's authority to review and reverse the Hearing Officer's decision is limited by the statutes and rules of the Department of Justice that implement the project.³

The most important limitations are as follows:

1. The Commission may not modify the form of the Order in any substantial manner without identifying and explaining the modifications.⁴
2. The Commission may not modify a recommended finding of historical

¹ OAR 340-011-0132.

² Or Laws 1999 Chapter 849.

³ *Id.* at § 5(2); § 9(6).

⁴ *Id.* at § 12(2).

fact unless it finds that the recommended finding is not supported by a preponderance of the evidence.⁵ Accordingly, the Commission may not modify any historical fact unless it has reviewed the entire record or at least all portions of the record that are relevant to the finding.

3. The Commission may not consider any new or additional evidence, but may only remand the matter to the Hearing Officer to take the evidence.⁶

Rules implementing the 1999 statutes also have more specific provisions for how Commissioners must declare and address any ex parte communications and potential or actual conflicts of interest.⁷

In addition, a number of procedural provisions are established by the Commission's own rules. These include:

1. The Commission will not consider matters not raised before the hearing officer unless it is necessary to prevent a manifest injustice.⁸
2. The Commission will not remand a matter to the Hearing Officer to consider new or additional facts unless the proponent of the new evidence has properly filed a written motion explaining why evidence was not presented to the Hearing Officer.⁹

Attachments

- A. Letter from Mikell O'Mealy dated August 29, 2001
- B. Mr. Huff's Reply Brief dated July 23, 2001
- C. Department's Brief dated June 26, 2001
- D. Mr. Huff's Petition for Review, Exceptions to Proposed Order, Brief and Attachments dated May 29, 2001
- E. Proposed Order dated April 27, 2001
- F. Exhibits from Hearing of February 27, 2001
 1. Notice of Hearing, Amended Notice of Hearing and Changed Notice of Hearing
 - 1A. Notice of Contested Case Rights and Procedures
 2. Notice of Assessment of Civil Penalty dated August 1, 2000
 3. Huff Request for Hearing dated August 9, 2000
 4. Amended Notice of Assessment of Civil Penalty dated October 30, 2000
 5. Huff Request for Hearing dated November 13, 2000

⁵ *Id.* at § 12(3). A historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist either before or at the time of the hearing.

⁶ *Id.* at § 8; OAR 137-003-0655(4).

⁷ OAR 137-003-0655(5); 137-003-0660.

⁸ OAR 340-011-132(3)(a).

⁹ *Id.* at (4).

6. Wabschall Letter dated December 10, 1999
7. Notice of Noncompliance dated April 26, 2000
8. Huff Letter dated May 3, 2000
9. Area Map and Well Logs
10. EPA Hazard Summary – Ethylene Glycol/ToxFAQs – Propylene Glycol
11. Condensed Chemical Dictionary – Ethylene Glycol definitions
12. Conversion Factors
13. Crow Water Systems letter and attachments with fax dated August 23, 2000
14. Cox email dated February 25, 2000
15. Complaint log dated August 16, 2000
16. Murphy's note dated April 10, 2000
17. Huff affidavit signed February 14, 2001
18. The Chronicle news release dated October 28, 2000
19. NCA test results dated February 19, 2001
20. NCA letter dated February 22, 2001
21. AcroTech brochure
22. Pictures of grate and recent construction in area of AcroTech parking lot
23. Columbia County Department of Land Development letter dated August 17, 2000 with tax map
24. Greco letter and Mutual Agreement and Order dated September 18, 2000
25. Center for Hazardous Materials Research letter dated January 7, 1994
26. Transmittal of Question dated March 8, 2001
27. Huff letter dated March 15, 2001
28. Letter to Huff from hearing officer dated March 21, 2001
29. Fax from Susan Greco dated March 29, 2001
30. Department Response to Transmitted Question dated April 4, 2001
31. Huff Rebuttal to Transmitted Question dated April 11, 2001

Report Prepared By: Mikell O'Mealy
Assistant to the Commission

Phone: (503) 229-5301

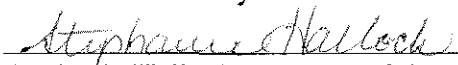
BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In The Matter of the Second Petition)
by CLEAN, an Unincorporated Association,)
for Rulemaking Relating to Methane)

DENIAL OF PETITION
FOR RULEMAKING

1. On August 21, 2001, CLEAN, an unincorporated citizens association, filed a petition for rulemaking pursuant to ORS 183.390 and OAR 137-001-0070. The petition proposed both temporary and permanent rule amendments relating to the regulation of methane at unpermitted landfills. The Commission considered the petition at its regularly scheduled meeting on September 21, 2001. After review of the petition, the Department of Environmental Quality staff report, and related materials, the Commission determined that neither temporary nor permanent rulemaking was appropriate and it denied the petition.
2. On November 20, 2001, CLEAN filed a second petition with the Commission again seeking the adoption of temporary rules relating to the regulation of methane at unpermitted landfills.
3. The Commission considered the second petition at its regular meeting on December 6, 2001. The Commission reviewed written materials submitted by CLEAN, the Department, Briar Development Company and Polygon Northwest Company. In addition, the Commission considered oral arguments presented by CLEAN in support of its petition.
4. The Commission concluded that it is not appropriate to adopt a temporary rule at this time. The Commission noted, however, that it is concerned about the present inability of the Department to regulate methane gas at unpermitted landfills and it directed the Department to:
 - A. Bring this matter back to the Commission at its regular meeting in January 2002;
 - B. Provide the Commission with a discussion of its authority to adopt temporary and permanent rules; and
 - C. Propose a temporary rule for possible adoption at the January 2002 meeting if the Department concludes that the Commission has authority to adopt such a rule and the rule would be effective and in the public's interest.

The Petition for Rulemaking is DENIED.

 12-14-01
Stephanie Hallock, Director of the Date
Department of Environmental Quality
for the Environmental Quality Commission

State of Oregon
Department of Environmental Quality

Memorandum

Date: November 16, 2001
To: Environmental Quality Commission
From: Stephanie Hallock, Director *S. Hallock*
Subject: Agenda Item C, Informational Item: Methane Issue Status Report
December 6, 2001 EQC Meeting

Purpose of Item On August 21, 2001, the Commission received a petition from CLEAN for temporary and permanent rulemaking to add methane, under certain conditions, to the list of hazardous substances subject to the state's environmental cleanup rules. CLEAN is an association of citizens concerned about environmental and safety issues associated with development of the former Cobb's Quarry Landfill in Beaverton, Oregon.

At the September 21 EQC meeting, the Commission:

- denied the petition for temporary rulemaking to add methane, under certain conditions, to the list of hazardous substances subject to the state's environmental cleanup rules, and
- directed DEQ to consult with stakeholders, initiate permanent rulemaking to address methane issues, and present a status report to the Commission at its meeting in December, 2001.

This informational item presents the status of the Department's efforts.

Summary DEQ staff identified the following options for addressing methane from unpermitted and formerly permitted solid waste landfills: a) rulemaking under ORS 465 (the environmental cleanup statute); b) rulemaking under ORS 459 (the solid waste management statute); c) use the state's Environmental Hazards Notice under ORS 468; d) develop potential statutory changes; and e) technical assistance to developers and local governments. An analysis of these options is provided as an attachment.

DEQ hosted a public meeting on November 13, 2001 to get advice and perspectives of stakeholders on the available options. Individuals attending the November 13 meeting included representatives for property developers, neighborhood representatives, the building industry, solid waste landfill managers, and local governments. Generally, attendees at this meeting agreed

that addressing methane at these sites falls outside DEQ's current regulatory authority, and that some regulation is necessary, particularly for sites where there is no owner or operator.

Next Steps

DEQ will review the issues raised in the policy framework and the November 13 meeting in more detail and develop a proposed strategy or recommendation. A follow-up meeting with stakeholders will be scheduled to provide an opportunity for discussion of the proposed strategy.

Initiation of permanent rulemaking is one of several options being considered by the Department and stakeholders to address this issue. Other options include using the existing statutory procedures for posting environmental hazard notice on property, or continuing technical assistance to developers and local governments (see attachment for description of all options). The possibility exists that the strategy that emerges from the public process may include a solution other than rulemaking, and instead, involves one or more of these other options. This would be contrary to the Commission's direction to the Department in September 2001. If this occurs, the Department proposes to report back to the Commission at a future meeting before implementing the strategy.

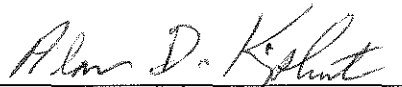

Attachment

"Draft Policy Framework for Evaluation of Potential Methane Management Tools at Historic Fill Sites", November 1, 2001.

Approved:

Section:

Division:

Report Prepared By: Jeff Christensen

Phone: (503) 229-6391

DRAFT
**Policy Framework for Evaluation of Potential Methane
Management Tools at Historic Fill Sites¹**
Prepared by Oregon Department of Environmental Quality
11/01/01

Problem Statement

The Oregon Department of Environmental Quality (DEQ) has limited authority under existing statutes and rules to require investigation and, if necessary, management of methane generated by historic solid waste disposal sites (landfills). DEQ regulates methane at permitted solid waste sites under its ORS Chapter 459 permitting authorities. However, the ORS 459 permitting authorities do not apply to historic disposal sites which were closed before adoption of permitting statutes or to disposal sites that were permitted but for which DEQ has terminated active supervision.

In addition, DEQ's cleanup authorities cannot be used to address methane issues because methane is not a "hazardous substance" for purposes of the Oregon Environmental Cleanup Law (ORS Chapter 465). The result is the current regulatory vacuum evident at several historic disposal sites. The problem is significant: lack of an effective regulatory authority could result in potential fire or explosive hazards to residents and workers in the vicinity of these sites.

Identification of Potential Sites

Virtually every community in Oregon has one or more historic landfill sites, where municipal solid waste, demolition debris and other material has been disposed. Typically, these landfills generate methane as organic material within the fill decomposes². Depending on site conditions, methane can migrate vertically or horizontally and may accumulate within enclosed areas—such as utility corridors, basements or buildings—in concentrations that present a fire or explosion hazard for site workers or residents.

The extent of current or future risks depends on site-specific factors. These factors include the landfill's shape and size, the volume and type of waste disposed, the age and rate of decomposition of material within the fill, environmental conditions (e.g., weather, geology and hydrogeology), and current and future land uses on or near the site.

DEQ has limited information about historic landfills and their methane-related risks³, although we believe the majority pose little risk to the public. A few sites present current or potential future risks, especially as

¹ "Historic fill sites" refers to landfills not currently subject to requirements of a solid waste permit pursuant to ORS 459.205 and more specifically to: 1) unpermitted landfills that received waste prior to adoption of solid waste permit requirements; 2) landfills where operational and post-closure permits have expired or are otherwise not enforceable including orphan sites; and, 3) miscellaneous older landfills where organic material may have been disposed in violation of solid waste regulatory requirements (e.g., "clean fill" landfills where domestic solid waste, construction debris or vegetative material was illegally placed).

² Methane is a colorless, odorless and flammable gaseous hydrocarbon (CH₄) that is a product of decomposition of organic material.

³ Additional information on approximately 100 historic fill sites can be found in the Department's Environmental Cleanup Site Information (ECSI) system. With few exceptions, monitoring for the presence of methane or other hazardous substances has not been conducted at these sites.

communities grow and new developments occur in proximity to these sites. In addition, there may be sites not currently known to DEQ that present current or future risks.

The following information describes sites with known methane concerns.

Bethel-Danebo—located in Eugene, Bethel-Danebo is a formerly permitted municipal landfill that came to DEQ's attention as a potential methane problem in 1997 and 1999. After closure of the landfill, a portion of the property became a plywood mill. The current property owner is now redeveloping the property as a light industrial/commercial use park, and is participating in DEQ's Voluntary Cleanup Program⁴.

Cobb's Quarry—located in Beaverton, Cobb's Quarry was authorized for disposal of clean fill ("clean fill" landfills do not require a solid waste permit). However, apparently the facility was also used for disposal of organic material. (Because "clean fill" is limited to soil, concrete and similar inert material, clean fill would not generate methane at levels of concern). Potential methane problems associated with the site first came to DEQ's attention in the year 2000. Two developers have options to buy properties comprising Cobb's Quarry from the owners in order to develop the properties for housing and retail uses. The developers are currently participating in DEQ's Voluntary Cleanup Program⁵ to address groundwater contamination at the site. DEQ has encouraged the owner to address methane issues, and the agency has agreed to provide technical assistance for that effort.

Killingsworth Fast Disposal (KFD)—located in Portland, KFD was permitted for disposal of demolition debris. The landfill became an orphan after the site's owner and operator, a private corporation, dissolved. The landfill's gas collection system was found to be inadequate and in failing condition. Consequently, in 1999, DEQ requested Environmental Quality Commission adoption of a temporary rule declaring methane a hazardous substance under the state's environmental cleanup rules. Following adoption of the temporary rule, DEQ was able to use the state's Solid Waste Orphan Site Account⁶ to address methane risks associated with the site. The temporary rule expired in January 2000.

Policy Assessment

DEQ has identified a range of options for addressing risks associated with methane from historic landfill sites. They include:

1. development of administrative rules under ORS 465, the state's environmental cleanup law, defining methane under certain conditions as a "hazardous substance";
2. development of administrative rules under ORS 465, the state's environmental cleanup law, adding "methane from unpermitted landfills" to the list of hazardous substances.
3. development of administrative rules under ORS 459, the state's solid waste law, specifying land use design and construction requirements for owners of historic landfills;
4. implementation of the existing Environmental Hazards Notice Process;

⁴ DEQ's Voluntary Cleanup Program is available to property owners and others interested in site investigation or cleanup of hazardous substances as defined by the state's environmental cleanup rules..

⁵ See footnote 4.

⁶ The Solid Waste Orphan Site Account exists to provide funding for municipal (domestic) solid waste sites requiring cleanup under ORS 465 in cases where the responsible party is "unknown, unwilling or unable" to conduct required investigation and cleanup. The Account is also available at sites where a local government is a responsible party or contributed solid waste if specified surcharge requirements of ORS 459.311 have been addressed.

5. amendment of state law (ORS 459 and 465) to bring some or all historic landfills into the permit framework and to allow use of the state's Solid Waste Orphan Site Account for investigation and cleanup of methane problems associated with historic landfills; and
6. non-site-specific technical assistance to property owners, developers, local governments and interested persons.

Of course, various combinations of the preceding options are possible and additional options may be identified.

Option 1—465 (Temporary Rule Model)

Adopt rules defining methane as a “hazardous substance” subject to the state environmental cleanup laws perhaps using the earlier temporary rule as a model. Then, develop a generic remedy for investigation and cleanup of methane.

Advantages

- As sites meeting the proposed definition are discovered, authorizes DEQ to require property owners to conduct necessary site investigation and take measure necessary to address methane problems.
- Allows DEQ to require investigation and action both on-site and off-site, if necessary and therefore may be regarded as “good fit” for sites requiring additional investigation and/or installation and operation of methane collection systems.
- The previously-enacted temporary rule language may represent an acceptable model for development of permanent rules in a relatively efficient manner.
- Site-specific DEQ work would be fully cost recoverable using existing authorities and established invoicing procedures.
- Development of a generic remedy—pursuant to ORS 465.315(1)(f) and OAR 340-122-0047—could streamline the process of completing remedial investigations, risk assessments and feasibility studies for methane sites.
- Allows use of the Solid Waste Orphan Site Account, if required for financing of investigation and cleanup of orphan sites.

Disadvantages

- Probably requires a minimum of 6 months for implementation given requirements for permanent rulemaking, and an additional 6 months for development of a generic remedy (these activities could overlap in time).
- At many disposal sites, methane concentrations vary over time. A rule that defines methane as a hazardous substance only at certain concentrations could create a situation where methane at a site might be a hazardous substance and subject to regulation one week, and not the next. This approach also differs with DEQ's treatment of all other hazardous substances, which are chemical-specific, regardless of concentrations and steps already taken to remedy site problems. For those other substances, concentrations are factors in determining risk and cleanup levels, but are not regulatory criteria.
- A rule that proposes to define a substance as hazardous, and therefore subject to regulation, only at certain locations having certain conditions (e.g., sites with inadequate methane collection systems) differs with DEQ's approach for regulating all other hazardous substances. In effect, conditionally defining methane as a hazardous substance is a potential issue for listing and

delisting (confirmed release list and inventory) and for ensuring ability to require full investigation and cleanup.

- Other provisions of the cleanup laws governing enforceability of the cleanup statute and rules might not be consistent with this proposal because cleanup acceptable risk standards (e.g., carcinogenic, noncarcinogenic and ecological risk standards) generally do not encompass hazards associated with methane explosion (reduction of methane concentrations below explosive levels).
- This option is not a particularly “good fit” for sites that primarily require review and approval of land development design and construction proposals that are taking place over time, i.e., the process of selecting a remedy (cleanup) does not match well with phased land development proposal review.
- A generic remedy, if developed, might be used infrequently or not at all.
- Other potential environmental concerns that may be associated with historic landfills (e.g., nitrates, fecal coliform, iron and manganese in landfill leachate) are not hazardous substances under ORS 465—they are similar to methane—and therefore this approach does not address these potential concerns.

Option 2—465 (New Rules)

Adopt rules under ORS 465, the state’s environmental cleanup law, adding “methane from unpermitted landfills” to the list of hazardous substances. Then, develop a generic remedy for investigation and cleanup of methane.

Advantages

- As sites meeting the proposed definition are discovered, authorizes DEQ to require property owners to conduct necessary site investigation and take measure necessary to address methane problems.
- Allows DEQ to require investigation and action both on-site and off-site, if necessary and therefore may be regarded as “good fit” for sites requiring additional investigation and/or installation and operation of methane collection systems.
- Site-specific DEQ work would be fully cost recoverable using existing authorities and established invoicing procedures.
- Development of a generic remedy—pursuant to ORS 465.315(1)(f) and OAR 340-122-0047—could streamline the process of completing remedial investigations, risk assessments and feasibility studies for methane sites.
- Allows use of the Solid Waste Orphan Site Account, if required for financing of investigation and cleanup of orphan sites.

Disadvantages

- Probably requires a minimum of 6 months for implementation given requirements for permanent rulemaking, and an additional 6 months for development of a generic remedy (these activities could overlap in time).
- Some provisions of the existing cleanup statute and rules are not fully or entirely consistent with this proposal because cleanup acceptable risk standards (e.g., carcinogenic, noncarcinogenic and ecological risk standards) generally do not encompass hazards associated with methane explosion (reduction of methane concentrations below explosive levels).
- DEQ has no reporting requirements for past releases of hazardous substances; as such, methane problems might not be addressed before an accident or catastrophe occurs.

- This option is not a particularly “good fit” for sites that primarily require review and approval of land development design and construction proposals that are taking place over time, i.e., the process of selecting a remedy (cleanup) does not match well with phased land development proposal review.
- A generic remedy, if developed, might be used infrequently or not at all.
- Other potential environmental concerns that may be associated with historic landfills (e.g., nitrates, fecal coliform, iron and manganese in landfill leachate) are not hazardous substances under ORS 465—they are similar to methane—and therefore this approach does not address these potential concerns.

Option 3—459 (rules for managing future land use)

Adopt rules, under the solid waste statute, to manage or regulate future land use associated with historic landfills.

Advantages

- Site management requirements can be tailored specifically for land use issues at historic landfills (i.e., new land development rules for historic landfills rather than amendments to existing environmental cleanup rules).
- This model would allow DEQ and/or local governments to review and approve land development design and construction proposals.
- Most of the Department’s technical and program expertise associated with solid waste issues resides in the solid waste program.

Disadvantages

- The Environmental Quality Commission probably does not have adequate statutory authority to adopt rules under ORS 459 to require historic landfills to obtain permits; require site investigation and corrective action in the absence of pending land development proposals; or require payment of fees.
- Development of a well-designed regulatory framework under this model would probably be the most resource intensive of the potential solutions, i.e., careful thought would need to be given to appropriate requirements including identification and description of sites to be regulated and their requirements.
- In Oregon, most of the expertise and authority for review and approval of land development design and construction practices resides with local governments.
- Probably requires a minimum of 9 months for implementation, given requirements for permanent rulemaking and an assumed need for greater detail in the rule compared to regulatory changes pursuant to ORS 465.
- Might be difficult to tailor regulations to avoid encumbering historic landfills with relatively little potential for creating methane risks. Also, might be difficult to develop a fee structure that is self-supporting for the Department’s site-specific costs while remaining equitable for affected properties.
- Would not allow access to the Solid Waste Orphan Site Account for methane control, unless pertinent existing statutes are modified.

Option 4—EHN

Use the existing Environmental Hazards Notice process (ORS 466.360 et. seq. and OAR 340-130).

Advantages

- The EHN tool exists now and may be used to address sites requiring immediate attention.
- Requires careful coordination of proposed regulatory actions with property owners and local governments responsible for land use decisions (local governments are the primary entity in Oregon for review and approval of land use decisions).
- The EHN process generally authorizes EQC to adopt land development requirements tailored to specific site conditions and needs.
- Authorizes actions necessary to prevent inappropriate future land uses and construction practices. Also, in situations where property is being actively developed, indirectly, the EHN notice process is likely to result in performance of necessary site investigations and remediation.
- The EHN process can be initiated relatively easily by administrative action and requires early notification of property owners and local governments. (The time and process required for EQC and local government adoption of the EHN, however, is fairly extensive.)
- Represents a relatively “low cost” alternative for managing methane from historic landfills.
- Potential legal challenges or risks generally limited to the EHN statute and rules.

Disadvantages

- May not be a “good fit” for investigations and implementation of methane control measures in situations where the property is not being developed or redeveloped. In addition, this option might not provide adequate authority for DEQ to require off-site investigation and control measures, if necessary.
- The EHN process has not been used; therefore, its efficiency and effectiveness have not yet been tested.
- While the EHN notification and negotiations process might result in immediate action, site-specific EQC action is likely to require a minimum of 6 months. Also requires formal local government action following EQC action.
- Requires site-specific action each time a hazards notice is required.
- DEQ costs for implementation of the EHN process would not be recoverable by DEQ. DEQ would need to invest time and money into the investigations, technical work and negotiations necessary for making a decision to use an EHN at individual sites.
- DEQ would not be able to access the state’s Solid Waste Orphan Site Account (if necessary), unless existing statutes relating to the Orphan Site Account were modified to include methane from historic fills.

Option 5—Amend Oregon Revised Statutes (ORS) Chapter 459 relating to disposal sites and Orphan Site Account, and ORS Chapter 465 relating to Orphan Site Account

The purpose of these amendments would be twofold. First, the amendments would provide DEQ with statutory authority to regulate disposal sites that currently are not included in DEQ’s regulatory authority, both the so-called “historic” sites that were never permitted and sites that were permitted but for which DEQ has ceased active supervision. Second, the amendments would allow the Orphan Site Account to be used, when necessary, to address environmental and human health threats caused by methane.

Advantages

- Would authorize DEQ to order or conduct investigations and take actions as necessary to protect human health and the environment from threats caused by methane at disposal sites.
- Allows DEQ to require investigation and action both on-site and off-site, if necessary, and therefore may be regarded as “good fit” for sites requiring additional investigation and/or installation and operation of methane collection systems.
- Would allow use of the Orphan Site Account, as necessary, to address problems at sites for which responsible parties are unknown, or unwilling or unable to address methane problems and/or sites involving local governments.
- Could utilize existing Solid Waste rules regarding investigation and control of methane.

Disadvantages

- Requires legislative action, so it is uncertain whether the amendments would be adopted. Similarly, the substance of any bill adopted might be significantly different than the original intent of proposed legislation.
- If adopted, would not be effective before July 2003.
- Would require careful crafting so the law is clear that site investigation and cleanup is required only when appropriate, i.e., unless properly drafted, could inadvertently burden properties with no potential regulatory concerns.
- Would need a provision to allow DEQ recovery of costs.

Option 6—Non-Site Specific Technical Assistance

Provide local governments, property owners, developers and others with general advice and suggestions for identifying and managing historic landfill methane problems.

Advantages

- Encourages others to address potential methane issues by providing general advice and information on DEQ’s roles and responsibilities by relying on education and technical assistance in lieu of regulations.
- Represents a relatively “low cost” option.
- Could be implemented fairly quickly and results made available in the near future.
- This option could be implemented in isolation or in combination with other alternatives.

Disadvantages

- Limited effectiveness if the local government and/or property owners are not interested or concerned about methane issues, or the site is an “orphan”.
- DEQ costs for implementation of non-site-specific technical assistance would not be recoverable by DEQ.
- Local governments and property owners may lack expertise or financial resources to address potential methane concerns even if they have general information.
- DEQ would not be able to access the state’s Solid Waste Orphan Site Account under this option.

The following table provides a summary of considerations for selecting options for management of methane from historic fills.

Table 1
Potential Site Needs and Available Tools

Potential Site Needs	465	459	EHN	TA	Amend 459/465
1. Site Investigation	Y	N	Partial*	Partial	Y
2. New Development—Design and Construction	Partial ^A (institutional control)	Y (review by state)	Y (review by local govt.)	Partial	Y
3. Implement On-Site Methane Controls	Y	N	Partial*	N	Y
4. Implement Off-Site Methane Controls	Y	N	N?	N	Y
5. Operate and Maintain a Methane Control System	Y	N	Partial*	N	Y
6. Long-Term Monitoring	Y	N	Partial*	N	Y
7. OSA Funding	Y	N	N	N	Y

Y = Tool directly available for specified site need.

N = Tool not available for specified site need.

* "Partial" because site investigations and implementation of methane controls could probably not be required directly through the EHN process. However, in development situations, the EHN process probably would ensure that necessary investigations and controls are implemented prior to issuance of building permits and other development approvals.

^A "Partial" based on the assumption that institutional controls appropriate for a given site can be implemented in some but not all situations. For example, an institutional control restricting certain specific actions generally probably would be implementable and reliable (assuming the property owner agrees to the controls). In contrast, a proposed institutional control intending to provide for ongoing site-specific consultation, review and approval of development proposals by DEQ would likely present practical difficulties.

State of Oregon
Department of Environmental Quality

Memorandum

To: Environmental Quality Commission **Date:** December 3, 2001
From: Mikell O'Mealy
Subject: Addendum to Item C: Response to Petition for Methane Regulation

Attached is an addendum to the staff report for Item C, an informational report on the Department's rulemaking plans for regulating methane as a hazardous substance. The Department developed this addendum in response to a second petition the Commission recently received for listing methane as a hazardous substance. EQC is required to act on the petition within 30 days of receipt, as it did with the first petition in September 2001.

If you have questions about the petition or Department's response, please do not hesitate to contact Al Kiphut at 503-229-6834.

See you on Thursday.



State of Oregon
Department of Environmental Quality

Memorandum

Date: December 4, 2001
To: Environmental Quality Commission
From: Stephanie Hallock *S. Hallock*
Subject: Agenda Item C, Addendum, Response to CLEAN Petition Concerning Methane
December 6, 2001 EQC Meeting

Proposed Action On November 20, 2001, a citizen association named CLEAN submitted a second petition to the Commission for: a) temporary rulemaking to add methane, under certain conditions, to the Department's list of hazardous substances; and b) stopping issuance of any No Further Action letters from the Department related to the former Cobb's Quarry Landfill site in Beaverton (see Attachment A).

This addendum is provided in response to the latest petition. (See Agenda Item C staff report for information on the Department's actions to consider permanent rulemaking options).

**Background and
Key Issues**

- The Cobb's Quarry site is divided into three separate parcels: Sexton Place, Hagen, and Sexton Crest.
- At the September 21, 2001 EQC Meeting, the Commission denied a similar petition submitted by CLEAN for temporary rulemaking because the Commission determined that there was no immediate threat at the site. The Commission also directed the Department to work with stakeholders on permanent rulemaking to address methane issues. This effort was started with DEQ staff development of an option paper in October, and a stakeholder meeting on November 13, 2001.
- Although CLEAN correctly notes that methane levels observed at the site in September and October are higher than previous observed levels, and higher at the Hagen and Sexton Crest parcels than at Sexton Place, in the Department's judgment the observed levels do not represent an imminent risk to public health. No information is presented in the petition or otherwise known to the Department that warrants reconsideration of the Commission's September 21, 2001 action.
- CLEAN also asks the Commission to halt DEQ's issuance of "no further action letters" regarding cleanup of the Cobb's Quarry site. EQC authority for acting on petitions, however, is limited to temporary and/or

Agenda Item C, Action Item: Addendum Report, Response to CLEAN Petition Concerning Methane

December 6, 2001 EQC Meeting

Page 2 of 2

permanent rule making. Oregon's environmental cleanup law does not include authority for EQC action on petitions regarding issuance or denial of "no further action letters." Concerns and/or public comments about proposed "no further action letters" should be directed to the Department. It should also be noted that any "no further action letters" issued address only the actions taken to remediate other hazardous substances at the sites and do not apply to methane (see Attachment B).

- The developers are participating in DEQ's Voluntary Cleanup Program. The developers and the City appear to be addressing potential methane problems in an appropriate manner.

EQC Action Alternatives

EQC could grant the petition for temporary rulemaking and adopt rules under OAR 340-122-0115 as proposed by the petitioner. The Department's Cleanup Program would then develop appropriate procedures and standards necessary to address methane issues at this type of site through permanent rule making, which would take several months.

Department Recommendation

The Department recommends the Commission deny the petition for temporary rulemaking. The Department recommends this action because there is no imminent threat at this site and discussions have begun with stakeholders on ways to permanently address methane issues.

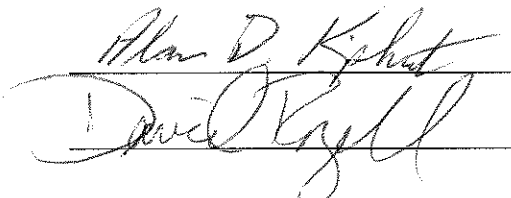
Attachments

- A. Petition from CLEAN, November 20, 2001
- B. Sexton Place No Further Action Letter, September 12, 2001

Approved:

Section:

Division:



Two handwritten signatures are present. The first signature, "Alan D. Kipert", is written in black ink above a horizontal line. The second signature, "David Kyll", is written in black ink below a horizontal line.

Report Prepared By: Jeff Christensen
Phone: (503) 229-6391

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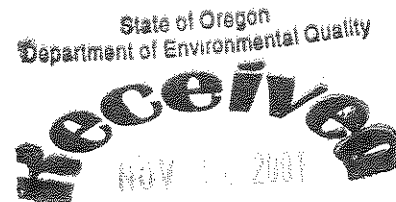
CHRISTOPHER A. RYCEWICZ
BRIAN D. CHENOWETH*
CHRISTOPHER E. MARTIN*
CHRISTOPHER W. RICH†
WILLIAM L. BARBER

*ADMITTED IN OR AND WA
†ADMITTED IN OR AND CO

November 20, 2001

Via Hand Delivery

Environmental Quality Commission
c/o Stephanie Hallock, Director
Oregon Department of Environmental Quality
811 SW 6th Avenue, 10th Floor
Portland, OR 97204



RE: *Cobb's Quarry Landfill*

Dear Environmental Quality Commission:

As you are aware, I represent "CLEAN," an association of citizens concerned about environmental conditions and safety issues at the former Cobb's Quarry Landfill in Beaverton, Oregon.

On November 20, 2001, I submitted a Petition for Temporary Rulemaking, on behalf of CLEAN, to provide DEQ adequate authority to regulate methane gas, recently documented at explosive levels and positive static pressures at the former Cobb's Quarry Landfill, as a "hazardous substance" under OAR 340-122-115.

I note that the Environmental Quality Commission ("EQC") is scheduled to hear an information item on this same general topic (Item C) at the December 6, 2001, EQC meeting. Because "no further action" letters are pending on the two development parcels that directly relate to the Petition for Temporary Rulemaking, I hereby request that the EQC consider and rule on CLEAN's Temporary Rulemaking Petition at the December 6-7, 2001 EQC meeting. While CLEAN regrets the lateness of this request, please understand that CLEAN only recently obtained both the current methane monitoring data (which demonstrates the elevated levels of methane causing concern) and the two DEQ letters indicating that "no further action" letters are pending on the Sexton Crest and Hagen sites.

Thank you for your consideration of this request, and I look forward to your reply.

Respectfully submitted,

RYCEWICZ & CHENOWETH, LLP

A handwritten signature in black ink, appearing to read "Christopher W. Rich".

Christopher W. Rich

Received
NOV 20 2001

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

STATE OF OREGON

IN THE MATTER OF THE
AMENDMENT OF OAR 340-122-115
DEFINING METHANE AS A
HAZARDOUS SUBSTANCE

PETITION FOR TEMPORARY
RULEMAKING TO
AMEND OAR 340-122-115
(HAZARDOUS SUBSTANCES)

TO: ENVIRONMENTAL QUALITY COMMISSION
c/o Stephanie Hallock, Director
Oregon Department of Environmental Quality
811 SW 6th Avenue
Portland, Oregon 97204

1. Petitioner is "CLEAN" an unincorporated association of citizens and owners of property in the vicinity of the former Cobb's Quarry Landfill, located between Murray Boulevard and Beard Road in Beaverton, Oregon. CLEAN may be contacted via its attorney, Christopher W. Rich, at 1001 SW 5th Avenue, Suite 1300, Portland, Oregon, 97204.

2. The Cobb's Quarry Landfill was operated as a rock quarry between the 1940's and the 1970's. Sometime between the 1970's and the 1990's, the large excavation created by the quarrying activities was filled with soil, rock, vegetative matter, and other solid waste materials. Because the site was operated as an unpermitted landfill, the exact nature of the materials disposed of at the site are unknown. Numerous residents now live directly adjacent to the landfill.

3. The Cobb's Quarry Landfill site has been broken into three parcels for proposed development: Sexton Place, Sexton Crest, and a Haggen Grocery facility. Polygon Northwest Company (Sexton Place and Sexton Crest) and Briar Development Company (Haggen) are actively pursuing residential and commercial development of these three parcels. Initial zoning and land use approvals for the three developments have already been granted by the City of Beaverton, and land grading has begun at the Sexton Place parcel.

///

1 4. The Oregon Department of Environmental Quality (“Department” or “DEQ”) first
2 became aware of potential environmental concerns at the Cobb’s Quarry Landfill in May of 2000
3 when residents, including members of CLEAN, raised questions about the environmental
4 conditions at the site and questioned whether development could proceed safely. These residents
5 had, through their own diligent investigations, identified numerous reports documenting the
6 presence of hazardous substances and methane gas at explosive levels at the Cobb’s Quarry
7 Landfill.

8 5. On January 2, 2001, DEQ prepared a “Preliminary Assessment” of the Cobb’s
9 Quarry Landfill site which identified numerous hazardous substances documented in soils,
10 including asphalt, TPH, aromatic volatiles, gasoline, diesel fuel, oil, barium, cadmium, and lead.
11 The Preliminary Assessment also identified groundwater contamination, including BTEX,
12 PAHs, arsenic, barium, and groundwater seeps of an unknown nature onto adjacent residential
13 properties. Perhaps most significantly, the Preliminary Assessment also confirmed that methane
14 gas has been documented at the site at concentrations of up to 67% in air, where methane is
15 explosive at concentrations of 5% to 15%. DEQ noted in the Preliminary Assessment that the
16 methane gas concentrations would be of particular concern to field workers who could be
17 exposed to potential explosive or toxic site conditions.

18 6. DEQ informed Petitioner that, based upon consultation with the Oregon Attorney
19 General’s Office, DEQ lacks any specific authority to regulate methane that is documented at
20 abandoned landfills, as that term is defined in ORS Chapter 459. This is an apparently
21 unintended regulatory loophole, as DEQ has also concluded that if a site was a permitted landfill
22 it would possess clear authority to regulate methane under ORS Chapter 459. Without such
23 regulatory authority, the public is left without the protection of DEQ authority, without certain
24 continued DEQ oversight, and without any enforceable standards concerning methane at the
25 Cobb’s Quarry Landfill or other similar sites.

26 ///

1 7. The proposed Temporary Rulemaking will fill the regulatory gap by providing
2 adequate authority to DEQ to mandate remedial actions and standards to abate methane
3 concerns, and also by providing immediate DEQ access to response or remedial funds to address
4 methane concerns at closed or abandoned landfills where responsible persons have not, or will
5 not, take all necessary remedial actions. Without such express regulatory authority, DEQ lacks
6 any enforceable way to regulate potentially dangerous and explosive methane gas at closed or
7 abandoned landfills including the Cobb's Quarry Landfill.

8 8. The Cobb's Quarry Landfill developers' consultant, GeoDesign, conducted some
9 methane sampling at the former landfill site between May of 2000 and August of 2001. These
10 methane investigations confirmed numerous locations where methane gas was documented
11 above explosive levels.

12 9. On August 21, 2001, CLEAN filed a "Petition for Temporary and Permanent
13 Rulemaking" with the Environmental Quality Commission ("EQC"), asking the EQC to direct
14 the Department to initiate Temporary and Permanent rulemaking designating methane at
15 "abandoned landfills" as a "hazardous substance" when methane is documented above the Lower
16 Explosive Level ("LEL") of 5% per volume. CLEAN filed the August 21, 2001, petition in large
17 part due to concerns about the documented methane, above explosive levels, on the three tax lots
18 that overlay the former Cobb's Quarry Landfill and that were pending development.

19 10. Although the DEQ staff report concerning CLEAN's August 21, 2001,
20 rulemaking petition, opined that the pending development at the "Sexton Place" parcel did not
21 pose an "imminent threat" because generally lower methane levels had been documented at *that*
22 *one parcel*, DEQ specifically advised the EQC that the other two parcels (Sexton Crest and the
23 Haggen site) posed greater threats. The DEQ staff report stated as follows: "existing information
24 does not indicate an 'imminent threat' is present primarily because the pending development
25 proposal involves only one of the three parcels comprising the former Cobb's Quarry Landfill
26 site. At the subject parcel, observed methane levels are less concentrated compared to the other

1 undeveloped parcels, and additional sampling of the site is being conducted by the developer to
2 ensure that observed levels are below the lower explosive limit for methane.”

3 11. In the DEQ August 31, 2001 staff report on CLEAN’s rulemaking petition (*See*
4 Attachment “A”), the Department recommend that the EQC direct DEQ to pursue formal
5 rulemaking on methane, in consultation with stakeholders. Toward that goal, on November 13,
6 2001, CLEAN and other interested parties met as a “methane working group” to discuss options
7 for permanent methane rulemaking. CLEAN entered into this “working group” in a good faith
8 effort to help develop some enforceable standards for the Cobb’s Quarry Landfill site, and for
9 other similar sites statewide. DEQ, however, is now poised to issue “no further action” letters
10 for both the Haggen and Sexton Crest Sites. *See* Attachments “B” & “C.” These “no further
11 action” letters, if issued, will not mean or ensure that methane at these high-concern sites is
12 addressed because DEQ still lacks authority to regulate methane at such sites. “No further
13 action” letters signal essentially the end of DEQ oversight of the Cobb’s Quarry Landfill, as once
14 such letters are issued, there is no regulatory basis or authority for any continued DEQ oversight
15 concerning methane.

16 12. The critical facts supporting this Petition for Temporary Rulemaking is that the
17 most recent methane data, from readings in September and October of 2001, proves that methane
18 at both the Sexton Crest and the Haggen sites is at highly explosive levels *and* is venting from
19 the former landfill at positive pressures. Specifically, at the Haggen site methane is reported as
20 high as 69%, and at static pressure up to 1.1 inches. *See* Attachment “D.” At the Sexton Crest
21 site, methane is reported as high as 81.8 %, and at up to 1.4 inches of static pressure. *See*
22 Attachment “E.” These high levels of methane, at positive pressure (i.e., “venting” or potentially
23 venting from the landfill) constitute an imminent threat to human health. The depth of the
24 landfill material at the Haggen site is at least 80 feet below ground surface (“bgs”) and the
25 landfill material at Sexton Crest is at least 110 feet bgs. *See* Attachment “F” (excerpts from
26 October 29, 2001 GeoDesign Report, p. 5); Attachment “G” (excerpts from November 2, 2001

1 GeoDesign Report, p. 10). With fill material extending to such depths, Petitioner is concerned
2 that methane generating material will be left in place, and that such methane might migrate on
3 and off-site, via new utility corridors, into crawl spaces, under impermeable surfaces, and other
4 preferential pathways that do not currently exist.

5 13. Despite the high methane readings, the developers' own consultant concluded that
6 "...studies indicate there is not driving pressure that would create potential for methane migration
7 either on or off site. The lack of off site migration is supported by low or non-detectable methane
8 concentrations and lack of pressure at monitoring points on east and west sides of the Haggen
9 property; the north, west and east sides of the Sexton Crest property; and at various monitoring
10 points installed at the Sexton Place property." See Attachment "F," p. 5.

11 14. In short, CLEAN's concerns have unfortunately been validated. In light of the
12 EQC's denial of the August 21, 2001 temporary rulemaking petition, the high-methane, high-
13 concern parcels at the Cobb's Quarry development are now poised to drop of DEQ's regulatory
14 map via "no further action" letters before any formal rulemaking could occur. The practical
15 result of issuing "no further action" letters will be that decisions regarding what is "safe" as to
16 methane shall be largely left to the discretion of the developers, with the advice of consultants
17 that have discounted the risks associated with documented venting methane, at explosive levels,
18 at the former Cobb's Quarry Landfill.

19 15. Pursuant to ORS 183.390, and in light of the above documented facts, CLEAN
20 petitions the Environmental Quality Commission to direct the Department to initiate immediate
21 Temporary Rulemaking to amend OAR 340-122-115 to include methane as a "hazardous
22 substance" under certain circumstances.

23 16. Pursuant to the criteria outlined in ORS 183.335, Temporary Rulemaking is
24 needed and justified in order to ensure that any continued development (which has already begun
25 via grading at Sexton Place, and is imminent at Sexton Crest and Haggen) fully addresses
26 the investigation, monitoring, and mitigation of methane at the former Cobb's Quarry Landfill in

1 a manner that fully protects human health under DEQ regulatory authority. Without a
2 Temporary Rule, DEQ lacks the authority to order property owners or developers in this case,
3 and also in any similar circumstances statewide, to establish remedial standards, or take any
4 steps whatsoever, to control methane at abandoned landfills. This lack of DEQ authority and
5 oversight places the public at potential risk. In the event that DEQ accepts as adequate
6 GeoDesign's recent investigation of "hazardous substances" at the Sexton Crest and Hagen
7 parcels, DEQ will again be in the untenable position of potentially issuing a "no further action"
8 letter stating the parcel does not contain any "hazardous substances," and yet having already
9 opined to the EQC that these same sites pose a methane concern. The public has a right to have
10 DEQ oversight and standards to address valid methane concerns.

11 17. Methane concerns should properly be factored into any decision to issue a "no
12 further action" letter at a former landfill as such a letter, even if qualified, signals termination of
13 DEQ oversight and is relied upon by the public as an indication that environmental threats no
14 longer exist.

15 18. The concerns raised in this Petition also apply to other parcels with methane
16 issues that might be discovered at any time. DEQ is not prepared, in light of the regulatory
17 vacuum that exists, to address any such new sites that may come to light.

18 19. Failing to act promptly in initiating Temporary Rulemaking will result in serious
19 prejudice to the public interest, or the interests of individuals working and living near the Cobb's
20 Quarry Landfill and other similar landfills, by potentially exposing the public to dangers
21 associated with explosive, venting, methane gas without adequate state regulatory oversight.

22 20. The Environmental Quality Commission and DEQ have previously identified and
23 consented to the need for a substantially similar rule. In June of 1999, the Environmental
24 Quality Commission adopted a Temporary Rule that designated methane gas, in cases of closed
25 or abandoned landfills, as a "hazardous substance." *See* Attachment "H." The rationale for this
26 earlier rulemaking was "to insure that the department will have the authority and resources to

1 take immediate action to prevent risks to human health posed by the potential movement of
2 methane gas out of [a] landfill and into confined spaces such as neighboring residences and
3 businesses.” This specific rationale is imminently valid under the present petition. Temporary
4 rule, DEQ 11-1999 (Temp), f. & cert. ef. 7-6-99 thru 1-2-2000, should not have been allowed to
5 expire without initiation of Permanent Rulemaking by DEQ. Petitioner asks DEQ to re-adopt a
6 substantially similar (though not identical) version of this former Temporary Rule. The text of
7 the proposed Temporary Rule is attached hereto as Attachment “I.”

8 21. Pursuant to ORS 183.390 CLEAN petitions the Environmental Quality
9 Commission to amend OAR 340-122-115 as a Temporary Rule to protect the public from the
10 imminent threat posed by the documented venting methane at explosive levels at the Cobb’s
11 Quarry Landfill. CLEAN also makes this petition so that DEQ will possess adequate authority,
12 pending any permanent rulemaking under the EQC’s direction, to regulate methane as a
13 “hazardous substance” under the conditions outlined in the proposed temporary rule.

14 22. Petitioner contends that any “voluntary” measures by owners of former landfills
15 with methane concerns are insufficient to adequately protect human health and the environment
16 as any such voluntary actions are without standards, development or otherwise, that are
17 enforceable by DEQ. In light of the risks to persons working or living near the former Cobb’s
18 Quarry Landfill and in light of potential for “off-site” migration of methane from one parcel to
19 another as methane does not strictly respect arbitrary tax lot boundaries on a single landfill, DEQ
20 regulation and oversight is in the public interest and benefit.

21 23. Petitioner contends that because methane is not listed in OAR 340-122-115 as a
22 “hazardous substance,” DEQ lacks the authority to immediately utilize “Orphan Fund Site
23 Account” funds in order to respond to threats to public health and safety from methane gas at
24 former landfills in the event that an owner or responsible party is unable or unwilling to take
25 steps necessary to mitigate risks associated with methane.

26 ///

1 24. ORS 465.400 authorizes the Environmental Quality Commission to designate
2 additional substances as “hazardous substances” for purposes of ORS Chapter 465.

3 25. In consideration of the above, the proposed Temporary Rule is necessary and in
4 the public interest.

5 26. CLEAN further petitions DEQ to stay issuance of any “no further action” letters
6 related to the Cobb’s Quarry Landfill, or any other closed or abandoned landfills with current
7 methane concerns, until the Commission and the Department have acted on this petition and any
8 subsequent rulemaking. Alternatively, CLEAN asks the EQC to make any temporary or
9 permanent rule retroactive to September 1, 2001 to encompass any sites with methane problems
10 that might have been issued “no further action” letters.

11 27. Persons known to be interested in this rule are attached hereto as Attachment “J.”

12

13 DATED: November 20, 2001

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Christopher W. Rich, OSB# 99095
Of Attorneys for CLEAN

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State of Oregon
Department of Environmental Quality

Memorandum

Date: August 31, 2001
To: Environmental Quality Commission
From: Stephanie Hallock, Director
Subject: Agenda Item L, Action Item: Petition for Temporary and Permanent Rulemaking to Amend OAR 340-122-0115, Regarding Hazardous Substances September 21, 2001 EQC Meeting

Department Recommendation The Department recommends that the Commission:
1) deny the petition for temporary rulemaking to add methane, under certain conditions, to the list of hazardous substances subject to the state's environmental cleanup rules. No imminent threat exists to warrant temporary rulemaking.
2) direct DEQ to consult with stakeholders, initiate permanent rulemaking to address methane issues, and present a status report to the Commission at its meeting in December, 2001.

Need for EQC Action On August 21, 2001, CLEAN petitioned the Commission for temporary and permanent rulemaking to add methane, under certain conditions, to the list of hazardous substances subject to the state's environmental cleanup rules (Attachment A). CLEAN is an association of citizens concerned about environmental and safety issues associated with development of the former Cobb's Quarry Landfill in Beaverton, Oregon.

Key Issues

- DEQ has informed the City of Beaverton about the presence of elevated levels of methane associated with portions of the former Cobb's Quarry unpermitted landfill and has recommended that the City address potential hazards in reviewing and approving land use proposals. The City of Beaverton has responsibility for local government land use approvals affecting Cobb's Quarry (aka Sexton Mountain Landfill).
- A No Further Action letter being issued to the developer specifically states that that the NFA "does not extend to methane". The authority for petitions to the EQC is limited to temporary and/or permanent rule making and not the issuance of No Further Action letters.
- DEQ is currently evaluating a range of potential tools for managing or regulating methane generated at unpermitted and previously permitted solid waste landfills. Options being evaluated include: a) a permanent rule identifying methane under certain conditions as a hazardous substance subject to the state's environmental cleanup rules; b) modification of the existing solid waste rules to address generation of

Agenda Item L, Petition for Temporary and Permanent Rulemaking to Amend OAR 340-122-0115, Regarding Hazardous Substances

Page 2 of 3

methane from unpermitted and previously permitted landfills; and c) use of the existing environmental hazards notice process (OAR 340-130).

- DEQ agrees with the petitioners that the methane management issue has broad (statewide) implications with regard to public health and safety. In addition, DEQ agrees with the petitioners that this issue should be given priority for resolving as quickly as possible.
- DEQ intends to use our advisory committees to assist the Department in identification of the best alternative for managing methane problems.
- The EQC previously adopted a temporary rule concerning methane (cited by the petitioners as a model for the petitioner's proposed action). The rule was necessary to address an imminent threat to adjacent residences associated with a specific orphan site (no responsible party), known as Killingsworth Fast Disposal and, more specifically, to allow access to the State's Solid Waste Orphan Site Account to address these threats.
- Cobb's Quarry is not an "orphan site". In addition, existing information does not indicate an "imminent threat" is present primarily because the pending development proposal involves only one of the three parcels comprising the former Cobb's Quarry Landfill site. At the subject parcel, observed methane levels are less concentrated compared to the other undeveloped parcels, and additional sampling of the site is being conducted by the developer to ensure that observed levels are below the lower explosive limit for methane.
- The developer is participating in DEQ's Voluntary Cleanup Program. In addition, the developer and the City appear to be addressing potential methane problems in a manner consistent with DEQ recommendations provided under oversight of the Voluntary Cleanup Program. City actions have included retention of the services of an independent expert to advise the city about engineering and monitoring measures appropriate for development of Cobb's Quarry Landfill.

EQC Action Alternatives

EQC could grant the full petition and adopt the temporary rule as proposed by the petitioner. The Department of Justice, however, has formally advised agencies against readoption of temporary rule.

Attachments

- A. Petition for Temporary and Permanent Rulemaking to Amend OAR 340-122-0115, Regarding Hazardous Substances
- B. December 14, 2000 DEQ letter to City of Beaverton

Agenda Item L, Petition for Temporary and Permanent Rulemaking to Amend OAR 340-122-0115, Regarding Hazardous Substances

Page 3 of 3

Approved:

Section: _____

Division: _____

Report Prepared By: Jeff Christensen

Phone: (503) 229-6391



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5263 Voice
TTY (503) 229-5471

RECEIVED
NOV 13 2001

November 8, 2001

Fred Gast
Polygon Northwest
Andresen Plaza
2700 NE Andresen Road, Suite D-22
Vancouver, WA 98661-7343

Re: Subsurface Investigation – Proposed Sexton Crest Development
Former Cobb's Quarry Landfill (Sexton Mountain)

Dear Mr. Gast:

The Department of Environmental Quality (DEQ) reviewed the *Subsurface Investigation, Former Cobb Quarry, Proposed Sexton Crest Development* report dated August 28, 2001, and the revised report dated November 2, 2001. Both reports were submitted by GeoDesign, the latter following our meeting with you and GeoDesign in September. The revised report is approved by DEQ. In addition, DEQ reviewed the *Soil Sampling and Removal Report* dated May 16, 2001, previously submitted by GeoDesign.

While there were updates to methane monitoring in the report, any comments regarding methane will be addressed separately by Tim Spencer at a later date.

DEQ concurs with the findings that following the soil removals reported by GeoDesign, hazardous substances have not been detected in soil or groundwater at the Sexton Crest site at concentrations that exceed risk-based screening levels. In order to confirm that the contaminants which were detected in groundwater are consistently below concentrations of concern, DEQ requests one additional round of groundwater sampling from the existing wells. The follow-up sampling should conform to the June 2001 Work Plan and include the following:

- Monitoring and sampling of wells MW-SC1s (not previously sampled), MW-SC2s (not previously sampled), and MW-SC3i (or at which interval water is available).
- Analysis of all samples for total petroleum hydrocarbons (TPH) by NWTPH-Gx and NWTPH-Dx, volatile organic compounds (VOCs), polynuclear aromatic hydrocarbons (PAHs), and the leachate parameters listed in the Work Plan.

DEQ concurs with GeoDesign that given the consistency in groundwater occurrence in site borings there appears to be little benefit in waiting for the spring to sample. The additional sampling may proceed at your earliest convenience.

EXHIBIT B

Page 1 of 2

DEQ-1



GeoDesign Inc.

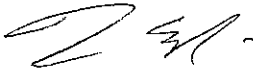
Page 2

Any residual petroleum-contaminated soil in the removal areas will have to be managed as solid waste during site grading activities. Because soil removals were conducted at two locations to address TPH-contaminated soils at the site, a 30-day public notice and comment period is required for DEQ approval of the cleanup. Consistent with how DEQ notifies the public at other sites where a cleanup has been conducted, we will issue a press release regarding the soil removals and submit a notice to the Secretary of State's Bulletin for publication December 1st.

If the additional water sampling data is consistent with previous results and below concentrations of concern, no additional groundwater sampling for hazardous substances will be required. DEQ will review any comments submitted regarding the cleanup. Following review and approval of the additional data, and pending substantive comments regarding the cleanup, DEQ will issue a "no further action" determination similar to that issued for Sexton Place, which did not apply to potential methane hazards.

If you have any questions about our review or the additional sampling requested, please call me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup / Portland Harbor

Cc: Don Pettit / Tim Spencer, DEQ NWR
Bob Belding, GeoDesign
- Richard Allen, Ball Janik
- Joel Gordon, Buck & Gordon
- Mayor Rob Drake, City of Beaverton
- Elise Smith, CLEAN
- Chris Rich, Rycewicz & Chenoweth

EXHIBIT B

Page 2 of 2



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Avenue
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Portland, OR 97201-4987
(503) 229-5263 Voice
TTY (503) 229-5471

November 7, 2001

RECEIVED
NOV 16 2001

Joel Gordon
Buck & Gordon LLP
902 Waterfront Place,
1011 Western Avenue
Seattle, WA 98104-1097

Re: Subsurface Investigation – Proposed Haggen Development
Former Cobb's Quarry Landfill (Sexton Mountain)

Dear Mr. Gordon:

The Department of Environmental Quality (DEQ) reviewed the *Subsurface Investigation, Former Cobb Quarry, Proposed Haggen Development* report dated August 20, 2001, and the revised report dated October 29, 2001. Both reports were submitted by GeoDesign, the latter following our meeting with you and GeoDesign in September. The revised report is approved by DEQ.

While there were updates to methane monitoring in the report, any comments regarding methane will be addressed separately by Tim Spencer at a later date.

DEQ concurs with the report finding that hazardous substances were not detected in soil or groundwater at the Haggen site at concentrations that exceed risk-based screening levels. In order to confirm that those contaminants which were detected in groundwater are consistently below concentrations of concern, DEQ requests one additional round of groundwater sampling from the existing wells. The follow-up sampling should conform to the June 2001 Work Plan and include the following:

- Monitoring and sampling of wells MW-H1i (or MW-H1 if sufficient water is present), MW-H2s (not previously sampled due to lack of water) and MW-H3s.
- Analysis of all samples for total petroleum hydrocarbons (TPH), volatile organic compounds (VOCs), polynuclear aromatic hydrocarbons (PAHs), and the leachate parameters listed in the Work Plan.

DEQ concurs with GeoDesign that given the consistency in groundwater occurrence in site borings there appears to be little benefit in waiting for the spring to sample. The additional sampling may proceed at your earliest convenience.

If the additional water sampling data is consistent with previous results and below concentrations of concern, no additional groundwater sampling for hazardous substances will be required.

EXHIBIT C
Page 1 of 2

DEQ-1

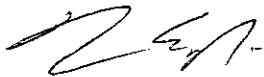


GeoDesign Inc.
Page 2

Following review and approval of the additional data, DEQ will issue a "no further action" determination similar to that issued for Sexton Place, which did not apply to potential methane hazards.

If you have any questions about our review or the additional sampling requested, please call me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup / Portland Harbor

Cc: Don Pettit / Tim Spencer, DEQ NWR
Bob Belding, GeoDesign
Richard Allen, Ball Janik
Fred Gast, Polygon Northwest
Mayor Rob Drake, City of Beaverton
Elise Smith, CLEAN
Chris Rich, Rycewicz & Chenoweth

Nov. 16 2001 03:12PM P1
503 229 6945 P.05/00

FAX NO. : 5036463847
GEO NWR PORTLAND, OR

15:07

FROM : Elise Smith
NOV 15 2001

GeoDesign, Inc.

<p style="text-align: center;">TABLE 2 Summary Of Methane Monitoring Data Former Cobb Quarry Haggen Site Beaverton, Oregon</p>						
Sample ID	Screened Interval (fsg)	Date	Methane (%)	Carbon Dioxide (%)	Oxygen (%)	Static Pressure (inches water column)
MW-H1	30 - 70	07/26/01	65.2	28.2	0.2	0.0
		07/31/01	65.5	27.5	0.0	0.0
		08/13/01	63.9	26.9	0.4	0.3
		09/20/01	67.9	28.0	0.9	0.8
		10/25/01	68.4	27.0	0.4	1.0
		10/26/01	68.0	27.1	0.3	1.1
		10/29/01	69.3	27.0	0.0	0.9
MW-H1a	5 - 15	07/26/01	17.6	13.3	0.7	0.0
		07/31/01	22.4	13.9	2.9	0.0
		08/13/01	33.0	19.5	2.0	0.0
		09/20/01	32.8	24.6	4.8	0.0
		10/25/01	34.9	27.4	1.5	0.0
		10/26/01	35.0	27.4	1.5	0.0
		10/29/01	36.0	28.7	1.3	0.0
MW-H1f	20 - 38	07/28/01	0.1	0.2	19.8	0.0
		07/31/01	0.0	0.4	19.0	0.0
		08/13/01	0.3	0.4	19.1	0.0
		09/20/01	1.7	1.1	20.2	0.0
		10/25/01	2.8	1.5	19.5	0.0
		10/26/01	0.2	0.1	20.7	0.0
		10/29/01	0.0	0.0	20.3	0.0

Table 2
Page 1 of 3

Polygon-47:100101

EXHIBIT

Page 1 of 1

TABLE 1 Summary of Soil Gas Monitoring Results Proposed Sexton Crest Development Beaverton, Oregon								
Location	Date	% CH ₄		% O ₂		% CO ₂		Pressure (inches)
		T ₀	T ₁	T ₀	T ₁	T ₀	T ₁	
MW-SC1i (40-80)	08/07/01	-	0.0	-	19.4	-	0.0	0.0
	08/13/01	0.3	6.5	18.4	18.1	1.4	0.2	0.0
	08/20/01		3.8		19.9		0.7	0.0
	10/25/01		0.0		20.5		0.0	0.0
	10/26/01		0.0		20.6		0.0	0.0
	10/29/01		0.0		20.5		0.0	0.0
MW-SC1 (55-85)	08/07/01	-	82.5	-	1.7	-	11.0	0.3
	08/13/01	25.0	66.0	0.6	2.8	12.4	11.0	0.2
	09/20/01		81.8		0.8		12.7	0.1
	10/25/01		81.6		0.4		12.0	1.1
	10/26/01		81.5		0.5		12.5	1.4
	10/29/01		81.5		0.4		12.3	1.0
MW-SC2s (5-25)	08/07/01	-	0.0	-	13.0	-	4.4	0.0
	08/13/01	0.0	0.0	19.8	11.7	0.0	4.8	0.0
	09/20/01		0.1		14.9		6.2	0.0
	10/25/01		0.0		7.9		14.2	0.0
	10/26/01		0.0		6.6		14.6	0.0
	10/29/01		0.0		7.0		13.9	0.0
MW-SC2i (30-60)	08/07/01	-	0.0	-	19.0	-	0.1	0.0
	08/13/01	0.0	0.0	19.1	19.0	0.1	0.0	0.0
	09/20/01		0.1		20.7		0.0	0.0
	10/25/01		0.0		19.9		0.0	0.0
	10/26/01		0.0		20.0		0.0	0.0
	10/29/01		0.0		19.8		0.0	0.0

Table 1
Page 17 of 19



SUBSURFACE INVESTIGATION
Former Cobb Quarry
Proposed Haggen Development
Beaverton, Oregon
GDI Project: Haggen-5

For
Oregon Department of Environmental Quality
Northwest Region

EXHIBIT F
Page 1 of 9



Geotechnical • Environmental • Geological

October 29, 2001

Oregon Department of Environmental Quality
Northwest Region
2020 SW 4th Avenue, Suite 400
Portland, Oregon 97201

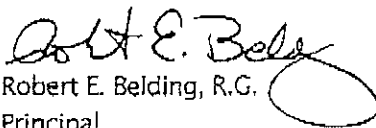
Attention: Mr. Tom Roick

Subsurface Investigation
Former Cobb Quarry
Proposed Haggen Development
Beaverton, Oregon
GDI Project: Haggen-5

GeoDesign, Inc. is pleased to present the results of our subsurface investigation conducted at the proposed Haggen development portion of the former Cobb Quarry in Beaverton, Oregon. Field activities were conducted in accordance with our Work Plan dated June 21, 2001. Based on the results of this investigation, further investigation of site soil, groundwater, and leachate does not appear warranted nor is recommended. Because contaminants of concern were either not detected or were detected at concentrations less than applicable screening levels, there appears to be no conditions of unacceptable risk at the site. Therefore, we recommend that the DEQ consider the site for case closure and issue a letter of "No Further Action." Please contact us if you have questions regarding this report.

Sincerely,

GeoDesign, Inc.


Robert E. Belding, R.G.
Principal

cc: Mr. Fred Gast, Polygon Northwest Company (one copy)
Mr. Joel Gordon, Buck & Gordon (four copies)
Mr. Richard Allan, Ball Janik, LLP (one copy)
Mr. Tim Spencer, Oregon Department of Environmental Quality - NWR (one copy)
Mr. Jim Duggan, City of Beaverton (one copy)
Mr. David King, Squier Associates (one copy)

JFK:RFR:kt

Attachments

Two copies submitted (1 bound, 1 unbound)

Document ID: Haggen-5-102901-envr.doc

EXHIBIT FPage 2 of 7

DEQ, the groundwater sample obtained from MW-H11 was submitted for the following additional analyses:

- SVOCs using EPA Method 8270C
- Organochlorine pesticides using EPA Method 8082/8081A
- PCBs using EPA Method 8082/8081A
- Dissolved arsenic, barium, beryllium, cadmium, chromium, cobalt, iron, manganese, nickel, selenium, silver, vanadium, and zinc using EPA Method 6010A
- Dissolved lead, mercury, and antimony using EPA Methods 7421, E7470A, and SW7041, respectively
- Ammonia (as N) using EPA Method E350.1
- Total Kjeldahl nitrogen using EPA Method E351.2
- Nitrate and nitrite using EPA Method 353.1
- Chloride and sulfate using EPA Method SW9056
- PH using EPA Method 150.1
- Hardness (as CaCO₃) using EPA Method 130.2
- Total alkalinity using EPA Method 310.1
- Specific conductance using EPA Method 120.1
- Total dissolved solids using EPA Method 160.1
- Fecal coliform using EPA Method SM9221E
- Chemical oxygen demand using EPA Method 410.4

METHANE

Fill material on the Haggen site extends to a maximum depth of approximately 80 feet bgs, the upper portion of which will be removed or reworked as part of site development. Methane monitoring was conducted using groundwater monitoring wells MW-H1, MW-H2, and MW-H3. In addition, soil vapor monitoring wells MW-H1s, MW-H1i, MW-H2s, and MW-H3s were installed adjacent to the three groundwater monitoring wells. The soil vapor monitoring well screens were completed at shallower depth intervals than the groundwater monitoring well screens to evaluate the vertical and horizontal extent of methane. Given the planned extent of the site grading and soil removal activities on the property, current methane concentrations provide a conservative basis for implementing techniques to mitigate potential future accumulation of methane. Soil vapor monitoring well construction diagrams are included in Appendix A.

After conducting the groundwater sampling activities, permanent gas sampling ports were installed on each of the wells on July 24, 2001 to allow methane monitoring and pressure measurement in each well. On July 26 and 31, August 13, and September 20, 2001, the new wells were monitored for carbon dioxide, oxygen, methane, and pressure using a Landtec GEM 500 analyzer.

EXHIBIT F
Page 3 of 7

groundwater samples from MW-H1i and MW-H3s by submitting these samples for analysis of VOCs and PAHs. Based on the laboratory results, VOCs and PAHs were either not detected in these samples or were detected at concentrations less than the EPA Region 9 Tap Water PRG.

Except for manganese, metals were either not detected or detected at concentrations less than EPA Region 9 Tap Water PRGs. Manganese was detected at a concentration of 9.09 mg/l in the groundwater sample obtained from MW-H3s. The EPA Region 9 Tap Water PRG for manganese is 0.88 mg/l. It is our opinion that elevated manganese concentrations are likely the result of rainwater infiltration through oxidized basalt gravel and do not pose a risk to human health.

METHANE

Methane monitoring was initially conducted within two days of installing the gas sampling ports on the groundwater and soil vapor wells, and then again on July 31, August 13, and September 20, 2001. On July 26, 2001, methane was not detected in three of the seven wells (MW-H2, MW-H2s, and MW-H3s) and was detected at concentrations of 0.1 or 0.2 percent by volume in MW-H1i and MW-H3, respectively. Methane was detected at a concentration of 17.6 percent in MW-H1s and 65.2 percent in MW-H1.

On July 31, 2001, methane was detected at concentrations consistent with those measured on July 26, 2001. In addition, there was no static pressure recorded in any of the wells during the July monitoring events. The results of monitoring conducted in August and September 2001 were consistent with the results of previous monitoring at the site. Results of the monitoring conducted at the site, including the methane, carbon dioxide, and oxygen concentrations, as well as the pressure measurements, are summarized in Table 10.

CONCLUSIONS

Between June 29, and August 31, 2001, GeoDesign conducted a soil, groundwater, and methane investigation at the former Cobb Quarry site in Beaverton, Oregon. During our investigation of the former quarry, we submitted 24 soil samples, 9 groundwater samples, and 2 surface water samples to a laboratory for a combination of the following analyses: VOCs, SVOCs, PAHs, PCBs, petroleum hydrocarbons, organochlorine pesticides, metals, and leachate parameters. To date, a total of 50 soil samples, 21 groundwater samples, and 2 surface water samples obtained from the former quarry have been submitted for laboratory analysis. Based on the results of this and previous investigations, we have concluded that sufficient data has been obtained to adequately characterize soil, groundwater, surface water, and potential seeps at the proposed Hagen site. We have also concluded that the results of the characterization indicate that there is no unacceptable current or future risk to human health from these media.

IMPORTED FILL

The vertical and horizontal extent of the imported fill beneath the site has been evaluated using data from 52 borings and test pits. Basalt was encountered in 33 of the explorations, and additional information regarding the depth to basalt was obtained at 11 additional locations using historical aerial photos as described in the Work Plan. Based on these data

EXHIBIT F

Page 4 of 7

between a depth of 40.0 and 60.0 feet bgs and did not contain a measurable quantity of groundwater.

- Temporary borings GP-22 and GP-23 were completed on the Sexton Crest site at the top of the terrace slope and extended to a depth of 24.0 feet bgs. Groundwater was not encountered in either boring in November 2000.
- Wells MW-H1s, MW-H1i, and MW-H1 were installed at the base of the terrace east of the surface water body. Groundwater was first encountered in the intermediate well (MW-H1i) at a depth of 18.63 feet bgs in July 2001. If the water encountered at this location represents water that may form the surface water body, then the water level dropped more than 18 feet during the three-month period between April and July 2001. Based on depth to water measurements obtained during a three-month period between July and October 2001, the water level in MW-H1i only dropped 1.12 feet.

The nearest boring completed on top of the terrace that contained groundwater was boring B-4 completed by GeoDesign in November 2000. A groundwater sample was obtained from a depth of 25.0 feet bgs from this boring, which is a slightly higher elevation than the surface water body (Figure 2). The groundwater sample was submitted to a laboratory for analysis of VOCs, PAHs, and dissolved metals. Only barium was detected in the sample and was detected at a concentration less than the EPA Region 9 PRC.

As previously stated, storm water collected after development will be discharged to the City of Beaverton storm water system. Therefore, we do not consider future on-site surface water to pose a risk to human health.

METHANE

On July 31, 2001, methane was detected in MW-H1 and MW-H1s at concentrations between 67.9 and 32.6 percent by volume, respectively, which exceeds the lower explosive limit (LEL) of 5 percent by volume. Methane was either not detected in other monitoring wells or detected at concentrations well below the LEL during both monitoring events. Results of our methane studies on the Haggen property are consistent with those conducted at various monitoring points elsewhere within the former Cobb Quarry site. These studies indicate there is no significant driving pressure that would create potential for methane migration either on or off site. The lack of off site migration is supported by low or non-detectable methane concentrations and lack of pressure at monitoring points on east and west sides of the Haggen property, including the MW-H3 nest located near the southern property boundary adjacent to the Sexton Place development; the north, west, and east sides of the Sexton Crest property; and at various monitoring points installed at the Sexton Place property. Near surface basalt bedrock exists over the majority of the western portion of the Haggen and Sexton Crest properties, which further reduces the potential for methane migration to the west.

Significant methane concentrations at the property have only been detected in the MW-H1 well nest, located near the north margin of the property. To the south, the fill material thickness decreases substantially, and methane concentrations have been low or non-detectable in the MW-H3 well nest and in monitoring points installed on the Sexton Place property. These data indicate that significant methane occurrence is limited in extent with no

EXHIBIT F

Page 5 of 7

migration south to the Sexton Place property. Planned mitigation measures for the Haggen property, as discussed below, have been developed to mitigate potential future migration to adjoining properties through adequate venting of proposed surfaced areas on the east side of the property.

As presented in our correspondence to DEQ dated September 20, 2001, titled "Methane Mitigation Measures," and as further discussed during our recent meeting with DEQ, Haggen Stores intends to implement conservative methane mitigation measures to address and alleviate concern related to isolated pockets of methane in the fill material. The objectives for these measures are to: 1) mitigate potential for methane migration to the Haggen Store from fill areas beneath the proposed parking lot area; 2) prevent methane migration from areas of fill material beneath the parking lot as a result of accumulation beneath surfaced areas; and 3) prevent migration of methane through utility corridors.

Although the potential for methane in the area of the proposed Haggen building is considered to be low, an impermeable membrane will be installed beneath the footprint of the store. In addition, a passive venting system will be installed across the east parking lot area to mitigate potential for methane accumulation or migration beneath asphalt paving. Impermeable backfill material will also be used in utility trenches at selected locations across the property, including at all property boundaries and adjacent to on-site structures. Additional details for proposed mitigation measures to be implemented by Haggen Stores, incorporating the conclusions of recent discussions with DEQ, are currently being prepared for submittal under separate cover.

RECOMMENDATIONS

Proposed grading of the three properties will result in a significant volume of exported soil. Although contaminated soil was not encountered in any of the borings conducted during this investigation, a Soil Management Plan (SMP) will be prepared prior to exporting any fill from the site. The purpose of the SMP will be to provide information regarding environmental conditions on the former quarry site. The SMP will discuss proper detection, handling, transport, disposal, and management procedures for handling contaminated soils, if any, encountered during proposed grading or other construction activities associated with development of the site. Soil removed as part of planned regrading activities will be disposed of in accordance with DEQ regulations.

GeoDesign recommends abandoning all monitoring wells installed during this investigation in accordance with Oregon Water Resources Department regulations prior to development activities.

GeoDesign recommends implementation of the proposed methane mitigation measures as presented in our September 20, 2001 correspondence, incorporating the comments and conclusions discussed during our meeting with DEQ on October 1, 2001. GeoDesign is currently preparing an addendum to our September 20, 2001 letter that will provide additional detail pertaining to the planned mitigation measures.

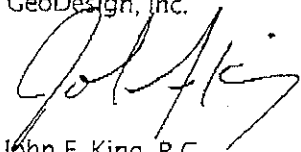
Based on the results of this investigation, further investigation of site soil, groundwater, and leachate does not appear warranted nor is recommended. Because contaminants of concern were either not detected or were detected at concentrations less than applicable screening levels, there appears to be no conditions of unacceptable risk at the site. Therefore, we recommend that DEQ consider the site for case closure and issue a letter of "No Further Action."

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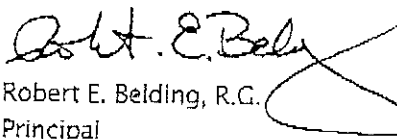
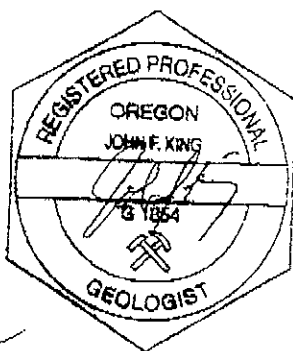
Please call if you have questions concerning this report.

Sincerely,

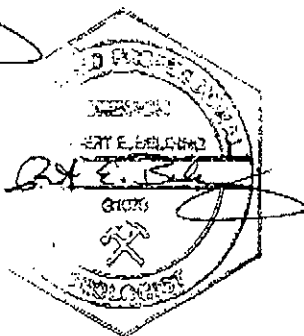
GeoDesign, Inc.



John F. King, R.G.
Project Geologist



Robert E. Belding, R.G.
Principal





Geotechnical · Environmental · Geological

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NOV 2 2001

DEPT OF ENVIRONMENTAL QUALITY
NORTHWEST REGION

SUBSURFACE INVESTIGATION
Former Cobb Quarry
Proposed Sexton Crest Development
Beaverton, Oregon
GDI Project: Polygon-53, Task 4

For
Oregon Department of Environmental Quality
Northwest Region

EXHIBIT 6

Page 1 of 9



Geotechnical • Environmental • Geological

November 2, 2001

Oregon Department of Environmental Quality
Northwest Region
2020 SW 4th Avenue, Suite 400
Portland, Oregon 97201

Attention: Mr. Tom Roick

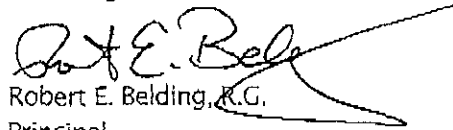
Subsurface Investigation

Former Cobb Quarry
Proposed Sexton Crest Development
Beaverton, Oregon
GDI Project: Polygon-53, Task 4

GeoDesign, Inc. is pleased to present the results of our subsurface investigation conducted at the proposed Sexton Crest development portion of the former Cobb Quarry in Beaverton, Oregon. Field activities were conducted in accordance with our work plan dated June 21, 2001. Based on the results of this investigation, further investigation of site soil, groundwater, and leachate does not appear warranted nor is recommended. Because contaminants of concern were either not detected or were detected at concentrations less than applicable screening levels, there appears to be no conditions of unacceptable risk at the site. Therefore, we recommend that the Oregon Department of Environmental Quality consider the site for case closure and issue a letter of "No Further Action." Please contact us if you have questions regarding this report.

Sincerely,

GeoDesign, Inc.



Robert E. Belding, R.G.
Principal

cc: Mr. Fred Gast, Polygon Northwest Company (two copies)
Mr. Joel Gordon, Buck & Gordon (four copies)
Mr. Richard Allan, Ball Janik, LLP (one copy)
Mr. Jim Duggan, City of Beaverton (one copy)
Mr. David King, Squier Associates (one copy)

JFK:REB:kt

Attachments

Two copies submitted (1 bound, 1 unbound)

Document ID: Polygon-53-T4-110201-envr.doc

EXHIBIT 6Page 2 of 9

Groundwater samples from MW-SC1, MW-SC2, and MW-SC3i were submitted to the laboratory for the following analyses:

- Petroleum hydrocarbon identification using Method NWTPH-HCID
- Diesel- and oil-range petroleum hydrocarbons using Method NWTPH-Dx
- VOCs using EPA Method 8260B
- PAHs using EPA Method 8270SIM

A groundwater sample was obtained from MW-SC1 and submitted for additional laboratory analysis. This well was chosen based on the relatively high field specific conductivity measurement results obtained during development, because the well screen interval is deeper than MW-SC3i and approximately equal to MW-SC2, and because of the detection of PAHs and diesel- and oil-range petroleum hydrocarbons in the groundwater from MW-SC1. The groundwater sample obtained from MW-SC1 was submitted for the following additional analyses:

- SVOCs using EPA Method 8270C
- Organochlorine pesticides using EPA Method 8082/8081A
- PCBs using EPA Method 8082/8081A
- Dissolved arsenic, barium, beryllium, cadmium, chromium, cobalt, iron, manganese, nickel, selenium, silver, vanadium, and zinc using EPA Method 6010A
- Dissolved lead, mercury, and antimony using EPA Methods 7421, E7470A, and SW7041, respectively
- Ammonia (as N) using EPA Method E350.1
- Total Kjeldahl nitrogen using EPA Method E351.2
- Nitrite plus nitrate using EPA Method 353.1
- Chloride and sulfate using EPA Method SW9056
- Fecal coliform using EPA Method SM9221E
- pH using EPA Method 150.1
- Hardness (as CaCO₃) using EPA Method 130.2
- Total alkalinity using EPA Method 310.1
- Specific conductance using EPA Method 120.1
- Total dissolved solids using EPA Method 160.1
- Chemical oxygen demand using EPA Method 410.4

METHANE

Fill material on the Sexton Crest site extends to a maximum depth of approximately 110 feet bgs, the upper portion of which will be removed or reworked as part of site development. Methane monitoring was conducted using the new monitoring wells (MW-SC1 through MW-SC3) to further evaluate methane occurrence and distribution across the site. Soil vapor monitoring wells MW-SC1s, MW-SC1i, MW-SC2s, MW-SC2i, MW-SC3s, and MW-SC3i were installed adjacent to the three groundwater monitoring wells (MW-SC1, MW-SC2, and MW-SC3, respectively). The soil vapor monitoring well screens were completed at shallower depth intervals than the groundwater monitoring well screens to evaluate methane conditions vertically in the fill material. In addition, soil vapor monitoring wells MW-SC4s and MW-SC4i were installed adjacent to the northern property boundary outside of the former quarry pit.

EXHIBIT 6

Page 3 of 9

Given the planned extent of the site grading and soil removal activities on the property, current methane concentrations provide a conservative basis for implementing techniques to mitigate potential future accumulation of methane.

Permanent gas sampling ports were installed on each of the wells either immediately after installation or after conducting groundwater sampling activities to allow methane monitoring and pressure measurement in each well. On August 7 and 13, 2001 the new wells were monitored for carbon dioxide, oxygen, methane, and pressure using a properly calibrated LandTec GEM 500 analyzer. Soil gas monitoring has subsequently been conducted on September 20, 2001, and October 25, 26, and 29, 2001, with the most recent monitoring events conducted during a persistent low barometric pressure event.

INVESTIGATION RESULTS

Soil, groundwater, and soil vapor sampling activities were conducted at the proposed Sexton Crest site between June 29 and October 29, 2001. The following sections present the field screening and laboratory analytical results for site sampling activities.

SOIL

The purpose of the soil sampling activities was to evaluate the following:

- the composition and total depth of former quarry pit fill material;
- the potential for future surface soils to contain contaminants at concentrations greater than EPA Region 9 Residential PRGs; and
- the potential for former quarry pit fill material to contain contaminants at depths other than future surface soils.

Fill Material Composition and Depth

Surface and subsurface soils encountered in the 12 borings consisted primarily of fill ranging from silt to gravel with trace organics and asphalt. Organic material encountered in the borings completed during this investigation consisted only of rootlets. Gravel fill with no organics (reworked quarry basalt) was encountered in the lower 6 to 11 feet in borings MW-SC2 and MW-SC3, respectively. The gravel encountered at the base of these borings likely originated from either gravel talus slopes that extended from the former quarry pit walls onto the floor of the pit or from gravel that was used to construct temporary access roads on the quarry pit floor. Solid waste was not encountered in any of the borings completed for this or previous site investigations. Soil types observed during this investigation were consistent with soil descriptions presented in boring logs completed for previous site investigations. Boring logs are included in Appendix A.

Basalt bedrock was encountered in borings MW-SC1, MW-SC2, and MW-SC3 at depths of 86.5, 91.5, and 60.0 feet bgs, respectively. Basalt bedrock was encountered near the anticipated depth in boring MW-SC3; however, basalt was 6.5 feet deeper than anticipated at MW-SC1 and 18.5 feet shallower than anticipated at MW-SC2. Actual depths of borings MW-SC1 through MW-SC3 are presented on Figures 4, 6, and 7. Figure 4 shows the actual depths of the borings compared to anticipated fill depths based on aerial photogrammetry

EXHIBIT 6Page 4 of 9

hydrocarbons in soil or groundwater; however, these concentrations have been evaluated by comparing VOC and PAH concentrations from the surface water sample to their respective PRGs. As stated previously, VOCs and PAHs were either not detected in the sample or were detected at concentrations less than the EPA Region 9 Tap Water PRGs.

Except for manganese, metals were either not detected or detected at concentrations less than EPA Region 9 Tap Water PRGs. Manganese was detected at a concentration of 8.18 mg/l in sample Seep-2. The EPA Region 9 Tap Water PRG for manganese is 0.88 mg/l. Elevated manganese concentrations are likely the result of seep water migration through oxidized basalt gravel and do not pose a risk to human health. Analytical results for surface water samples are summarized in Tables 5 through 9.

METHANE

The new monitoring wells installed at the Sexton Crest property include nested wells at four locations across the property. MW-SC1, MW-SC2, and MW-SC3 are located in the fill material on the central and eastern portions of the site, and MW-SC4 is located on the north-central margin of the property. MW-SC1 through MW-SC3 consist of nested wells screened in three intervals, whereas MW-4 is screened in two intervals. Methane monitoring was conducted on August 7 and 13, September 20, and October 25, 26, and 29, 2001 at the existing shallow monitoring points, the three recently installed groundwater monitoring wells, and the eight recently installed soil vapor monitoring points.

Methane was not detected, or was detected at insignificant concentrations (not greater than 0.1 percent by volume) during each of the monitoring events in the MW-SC2 and MW-SC3 well nests, representative of conditions in the areas of greatest fill thickness on the east margin of the property. Methane was also not detected in the MW-SC4 well nest on the north margin of the property during any of the monitoring events. Methane was detected below the Lower Explosive Limit of methane (5 percent by volume) in MW-SC1i (intermediate zone) on September 20, 2001; but was not detected during the other monitoring events. Methane was detected at concentrations up to 19 and 81 percent by volume in MW-SC1s screened from 5 to 35 feet bgs) and MW-SC1 (screened from 55 to 85 feet bgs), respectively. Zero pressure has been measured at all monitoring points during each monitoring event, with the exception of MW-SC1 in the central portion of the site. Negligible pressure has been measured at MW-SC1 during the monitoring events, ranging from 0.1 to 1.4 inches of water column.

Based on the results of the monitoring events, there was no methane detected in areas of fill along the east margin of the property or on the north margin of the property that would represent potential for off site migration of methane. Elevated methane concentrations in the deeper fill material appear to be limited to the area of MW-SC1.

Results of the monitoring conducted at Sexton Crest, including the methane, carbon dioxide, and oxygen concentrations, as well as the pressure measurements, are summarized in Table 10.

EXHIBIT 6

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CONCLUSIONS

Between June 29 and August 13, 2001, GeoDesign conducted a soil, groundwater, and methane investigation at the proposed Sexton Crest development site in Beaverton, Oregon. During our investigation of the former quarry, we submitted 24 soil samples, 9 groundwater samples, and 2 surface water samples to a laboratory for a combination of the following analyses: VOCs, SVOCs, PAHs, PCBs, petroleum hydrocarbons, organochlorine pesticides, metals, and leachate parameters. To date, a total of 50 soil samples, 21 groundwater samples, and 2 surface water samples obtained from the former quarry have been submitted for laboratory analysis. Based on the results of this and previous investigations, we have concluded that sufficient data has been obtained to adequately characterize soil, groundwater, and surface water at the proposed Sexton Crest site. We have also concluded that the results of the characterization indicate that there is no unacceptable current or future risk to human health from these media.

IMPORTED FILL

The vertical and horizontal extent of the imported fill beneath the proposed Sexton Crest site has been evaluated using data from 79 borings and test pits completed during environmental and geotechnical investigations of the site. Basalt was encountered in 26 of the explorations, and additional information regarding the depth to basalt was obtained by photogrammetric interpretation at 12 additional locations by Spencer Gross, Inc. using historical aerial photos as described in the work plan. Based on these data, the former quarry pit was limited to the eastern half of the site with a maximum depth of approximately 120 feet bgs in the northern portion of the former quarry pit.

Based on soil descriptions of the 79 subsurface explorations, imported fill material ranged from silt to gravel with trace organics and occasional asphalt and concrete material. Solid waste was not encountered in any of the borings completed during this or previous site investigations.

Only occasional organic material (i.e., rootlets) were encountered in the borings during the current investigation. Previous geotechnical investigations (i.e., test pit explorations) found isolated pockets of woody and leafy debris. As stated in GeoDesign's memorandum to DEQ dated July 10, 2001, during site development excavation activities will be conducted across much of the site and any isolated pockets of woody debris found in the fill will be removed. Storm water collected on future structures and roads will be discharged into the City of Beaverton storm water system thereby reducing the rate of on site rain water infiltration.

During this and previous subsurface investigations, soil was evaluated at 26 locations across the proposed Sexton Crest site either continuously or at regular intervals from the ground surface to the base of the imported fill using field screening techniques. During this investigation, evidence of contamination was observed only in boring MW-SC1 at depths of 31 and 56 feet below the planned surface soil interval. Therefore, there is no potential for current or future contact with these soils. Based on the results for a groundwater sample obtained from well MW-SC1 screened across the deeper potentially impacted soil, only low concentrations of diesel- and lube-oil-range petroleum hydrocarbons were detected in the

EXHIBIT Page 6 of 9

and the environment. Further, planned development activities include the construction of structures and roads, which will act as barriers for rainfall infiltration and reduce the potential for future leachate generation. Based on information provided by Polygon Northwest Company, storm water collected after development will be discharged to the City of Beaverton storm water system.

The results of this and previous investigations show that shallow and deep-perched groundwater does not contain contaminants at concentrations greater than EPA Region 9 Tap Water PRGs; therefore, there is no unacceptable risk to human health for shallow groundwater discharge to the ground surface or for downward migration into the regional aquifer.

SURFACE WATER/SEEPS

Surface water was observed at one location on site during the April 5, 2001 visit and at two locations during field activities conducted in July 2001, which indicates that surface water and potential seeps are seasonal and likely present only after extended wet weather conditions. Concerns related to surface water and seeps are the potential for impacted seep water to discharge off site and the fate of on-site seep water.

Based on field observations and information provided by the DEQ from the neighboring residences, there are no known seeps adjacent to the proposed Sexton Crest site. On-site surface water was evaluated at two locations on the proposed Sexton Crest site. Based on analytical results, contaminants were either not detected in samples obtained from both surface water bodies or detected at concentrations less than EPA Region 9 PRGs except manganese. As previously stated, we believe that the elevated dissolved manganese concentration is likely the result of rainwater infiltration through oxidized basalt gravel and does not pose a risk to human health.

Except TDS, leachate parameters for the surface water samples were within the EPA Secondary Drinking Water Standards, which are not enforced in Oregon. In our opinion, the results of the leachate parameter analyses indicate that solid waste is not present beneath the site.

Based on field observations, analytical results of surface water samples, and planned development activities, we do not consider current or future on-site surface water to pose a risk to human health.

METHANE

Results of our methane studies on the Sexton Crest property are consistent with those conducted at various monitoring points elsewhere within the former Cobb Quarry site. These studies indicate there is no significant driving pressure that would create potential for methane migration either on or off site. The lack of off site migration is supported by non-detectable methane concentrations and lack of pressure at monitoring points on east and north sides of the property, and lack of pressure in any of the shallow monitoring points at Sexton Crest.

EXHIBIT 3

Page 7 of 9

RECOMMENDATIONS

Proposed grading of the three properties will result in a significant volume of exported soil. Although contaminated soil was not encountered in any of the borings conducted during this investigation, a Soil Management Plan (SMP) will be prepared prior to exporting any fill from the site. The purpose of the SMP will be to provide information regarding environmental conditions on the former quarry site. The SMP will discuss proper detection, handling, transport, disposal, and management procedures for handling contaminated soils, if any, encountered during proposed grading or other construction activities associated with development of the site. Soil removed as part of planned regrading activities will be disposed of in accordance with DEQ regulations.

GeoDesign recommends abandoning all monitoring wells installed during this investigation in accordance with Oregon Water Resources Department regulations prior to development activities.

The results of extensive methane investigations conducted at the site indicate that methane exists in isolated areas of the fill material and is not migrating off site. At part of the site development, GeoDesign recommends implementation of appropriate measures to mitigate potential for methane accumulation and/or migration to on- or offsite structures. Specific recommendations to achieve these objectives will be presented to DEQ under separate cover.


Based on the results of this investigation, further investigation of site soil, groundwater, and leachate does not appear warranted nor is recommended. Because contaminants of concern were either not detected or were detected at concentrations less than applicable screening levels, there appears to be no conditions of unacceptable risk at the site. Therefore, we recommend that DEQ consider the site for case closure and issue a letter of "No Further Action."

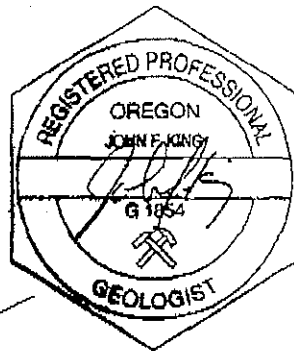
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Please call if you have questions concerning this report.

Sincerely,

GeoDesign, Inc.


John F. King, R.C.
Project Geologist



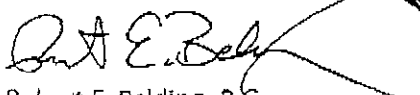
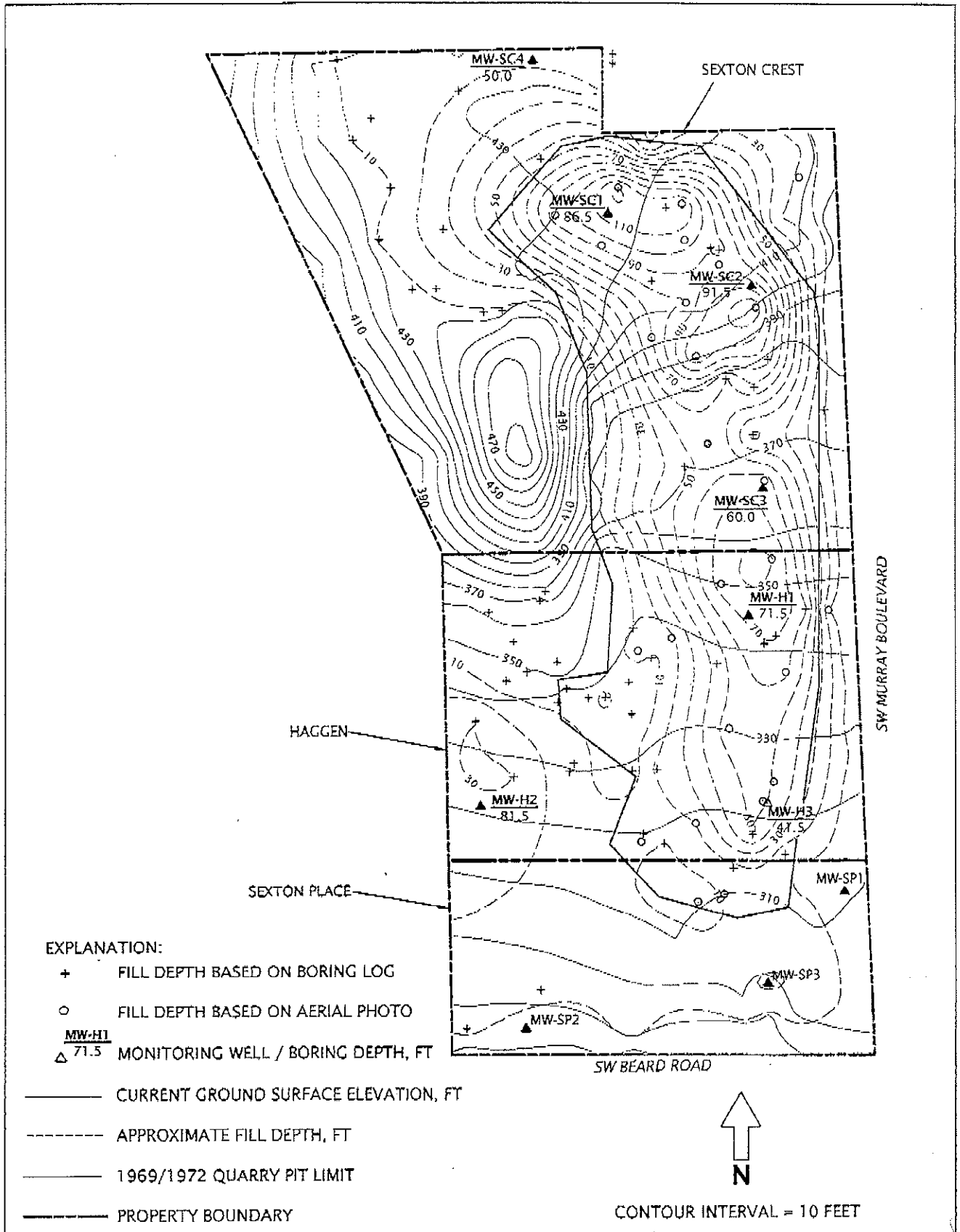

Robert E. Belding, R.C.
Principal

EXHIBIT 6

Page 8 of 9

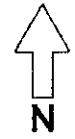


EXPLANATION:

- + FILL DEPTH BASED ON BORING LOG
- o FILL DEPTH BASED ON AERIAL PHOTO
- $\frac{MW-HI}{\Delta 71.5}$ MONITORING WELL / BORING DEPTH, FT

- CURRENT GROUND SURFACE ELEVATION, FT
- - - - - APPROXIMATE FILL DEPTH, FT
- - - - - 1969/1972 QUARRY PIT LIMIT
- - - - - PROPERTY BOUNDARY

CONTOUR INTERVAL = 10 FEET



GEODESIGN INC

QUARRY FILL DEPTH

POLYGON-53

OCTOBER 2001

FIGURE 4

EXHIBIT 65
Page 9 of 9

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of Temporary Rulemaking)
To Designate Methane Gas Generated) Proposed Temporary Rule
From Solid Waste Landfills, In Certain)
Circumstances, As a Hazardous Substance,)
Pursuant to ORS 465.400)

1. Proposed adoption of the following temporary rule amending Oregon Administrative Rule 340-122-115 as follows:

(30) "Hazardous substance" means:

- (a) Hazardous waste as defined in ORS 466.005;
- (b) Any substance defined as a hazardous substance pursuant to section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act, P.L. 96-510, as amended, and P.L. 99-499;
- (c) Oil as defined in ORS 465.200(19); and
- (d) Any substance designated by the commission under ORS 465.400. Under ORS 465.400, the commission has designated methane gas, from abandoned landfills as defined in ORS 459.005, provided: (1) methane is present, or is reasonably likely to be present at concentrations exceeding 5% by volume (the lower explosive limit for methane); and (2) a potential exists for methane to migrate into confined spaces or occupied structures and pose a hazard to human health and safety; and (3) the accumulations of methane are uncontrolled, poorly controlled, or require continued operation and maintenance of a landfill gas collection system.

ATTACHMENT I - PROPOSED TEMPORARY RULE

1. Proposed adoption of the following temporary rule amending Oregon Administrative Rule 340-122-115 as follows:

- (30) "Hazardous substance" means:
 - (a) Hazardous waste as defined in ORS 466.005;
 - (b) Any substance defined as a hazardous substance pursuant to section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act, P.L. 96-510, as amended, and P.L. 99-499;
 - (c) Oil as defined in ORS 465.200(18); and
 - (d) Any substance designated by the commission under ORS 465.400. **Under ORS 465.400, the commission has designated methane gas, from abandoned landfills as defined in ORS 459.005, provided: (1) methane is present, or is reasonably likely to be present at concentrations exceeding 5% by volume (the lower explosive limit for methane); and (2) a potential exists for methane to migrate into confined spaces or occupied structures and pose a hazard to human health and safety; and (3) the accumulations of methane are uncontrolled, poorly controlled, or require continued operation and maintenance of a landfill gas collection or monitoring system.**

ATTACHMENT J - INTERESTED PERSONS

Polygon Northwest Company
c/o Fred Gast
2700 NE Andresen, Suite D-22
Vancouver, WA 98661

Briar Development Company
c/o Joel Gordon
902 Waterfront Place
1011 Western Avenue
Seattle, WA 98104-1097

Mayor Rob Drake
City of Beaverton
4755 SW Griffith Road
P.O. Box 4755
Beaverton, OR 97076



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5263 Voice
TTY (503) 229-5471

September 12, 2001

Fred Gast
Polygon Northwest Company
2700 Northeast Andresen, Suite D-22
Vancouver, WA 98661

Re: No Further Action Determination - Sexton Place
Former Cobb's Quarry Landfill (Sexton Mountain) ECSI # 2766

Dear Mr. Gast:

The Department of Environmental Quality (DEQ) reviewed the results of investigation activities at the proposed Sexton Place parcel of the former Cobb's Quarry Landfill, located at SW Murray Boulevard and SW Beard Road in Beaverton, Oregon. The following findings do not apply to the other Cobb's Quarry Landfill parcels, Haggan and Sexton Crest, which are still under review. DEQ determined that no further action is warranted for hazardous substances at Sexton Place, as a result of our evaluation and judgment based on the regulations and facts as we now understand them, including:

1. A DEQ Strategy Recommendation was completed for Cobb's Quarry Landfill January 29, 2001. Based on a review of previous investigation reports and other site information, DEQ determined that further investigation was required to complete the site characterization and define the nature and extent of hazardous substances at the site.
2. On March 7, 2001, Briar Development signed a Voluntary Cleanup Letter Agreement with DEQ for review of the additional site investigation activities at the former Cobb's Quarry Landfill.
3. GeoDesign, Inc., on behalf of Briar Development and Polygon Northwest Company, conducted a subsurface investigation for the Sexton Place parcel in June 2001. Hazardous substances were either not detected, or were below EPA Region 9 Preliminary Remediation Goals (PRGs), used by DEQ as screening values for assessing the potential risk to human health. Ten polynuclear aromatic hydrocarbons (PAHs) were detected ranging from 0.0125 mg/Kg benzo(k)fluoranthene to 0.0723 mg/Kg pyrene in one soil sample (MW-SP1) at a depth of 6 feet below current grade. The analytical laboratory indicated that the PAHs appear to be related to asphalt. Weathered asphalt is known to be present in the landfill and is considered acceptable "clean fill" because it is unlikely to leach and impact groundwater. In addition, all PAH detections were below their respective residential PRGs. Lead was also detected in this sample at 38.9 mg/Kg, below the residential PRG for lead of 400 mg/Kg. Acetone was detected in one soil sample (GP-SP-2) at 0.168 mg/Kg, below the residential



September 12, 2001

Page 2

PRG of 1,600 mg/Kg. Arsenic was detected at a maximum of 3.16 mg/Kg, which is within naturally occurring background concentrations for this area. Toluene was detected in a single groundwater sample (GP-SP7-W) at 1.12 ug/L, which is near the detection limit of 1.00 ug/L and below the tap water PRG of 720 ug/L. No other hazardous substances were detected in the soil and groundwater samples analyzed.

4. Contaminant concentrations were compared to DEQ ecological Screening Benchmark Values (SBVs) for those substances that have SBVs. All contaminant concentrations were below their respective SBVs.

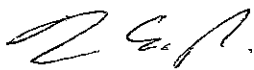
No further action is required for hazardous substances at Sexton Place under Oregon Environmental Cleanup Law, ORS 465.200 et. seq., and Oregon Administrative Rules 340-122-010 through -115, unless additional information becomes available which warrants further investigation.

Proper soil characterization and management during site grading and construction are necessary to distinguish solid waste materials such as vegetative matter or other debris from "clean fill" (as defined in Oregon Administrative Rules 340-93). Improper disposal of excavated solid waste would be subject to enforcement under DEQ's Solid Waste statutes and rules.

Although DEQ is providing this no further action determination with respect to hazardous substances at the site, it does not extend to methane which may continue to present a risk at Sexton Place as well as the Hagen and Sexton Crest parcels of Cobb's Quarry Landfill. DEQ expects Polygon Northwest to address methane and solid waste concerns. We will continue to provide technical assistance to Polygon Northwest and the City of Beaverton regarding these site issues. We will update DEQ's Environmental Cleanup Site Information database (ECSI) to reflect the current site status. Due to the lack of hazardous substances that exceed an acceptable risk level under Oregon's Environmental Cleanup Law, the site will not be listed on DEQ's Confirmed Release List or Inventory.

Thank you for your participation in the Voluntary Cleanup Program. If you have any questions about this determination, you may contact me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup and Portland Harbor

September 12, 2001

Page 3

Cc: Neil Mullane/ Mike Rosen/ Sally Puent, DEQ NWR
Paul Slyman/ Jeff Christensen/ Al Kiphut/ Chris Taylor/ Charlie Landman, DEQ HQ
Larry Edelman, AG
Richard Allen, Ball Janik
Joel Gordon, Buck & Gordon LLP
Bob Belding, GeoDesign
Mayor Rob Drake, City of Beaverton
Jim Duggan, City of Beaverton
Elise Smith, CLEAN
Chris Rich, Rycewicz & Chenoweth

BALL JANIK LLP

A T T O R N E Y S

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RICHARD H. ALLAN

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Direct Fax (503) 226-3910

December 4, 2001

BY HAND-DELIVERY

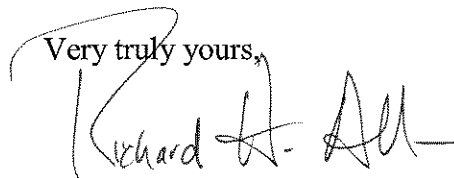
Oregon Environmental Quality Commission
811 SW Sixth Avenue
10th Floor
Portland, OR 97204
Attention: Ms. Mikell Omealy

Re: Response to Petition for Temporary Rulemaking

Dear Chairperson Eden and Members of the Environmental Quality Commission:

This firm represents Polygon Northwest Company and Briar Development Company, which are involved in redevelopment of the former Cobb's Quarry property in Beaverton, which once again is the subject of a Petition for Temporary Rulemaking to list methane as a hazardous substance. Enclosed is a response to the Petition. I respectfully request that you consider our response in making a determination on the Petition.

Very truly yours,



Richard H. Allan

RHA:bwo
Enclosure

cc: Paul Slyman
Christopher W. Rich
Mayor Rob Drake (by fax)
Joel Gordon (by fax)
Fred Gast (by fax)
Craig Ware (by fax)



**BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
STATE OF OREGON**

In the Matter of the Amendment of)
OAR 340-122-115 defining Methane)
As a Hazardous Substance)
)
)
)
)
)
)
)

**RESPONSE TO PETITION FOR
TEMPORARY RULEMAKING TO
AMEND OAR 340-122-115**

Briar Development Company (“Briar”) and Polygon Northwest Company (“Polygon”) hereby submit this Response to the Petition by “CLEAN” for a temporary rulemaking declaring methane to be a hazardous substance under certain circumstances.¹ The Commission considered and rejected a nearly identical petition from CLEAN at its September meeting. Nothing has changed in the interim to warrant a different result. Polygon and Briar request that the Environmental Quality Commission deny the Petition for the reasons set forth below.

1. Interest of Polygon Northwest Company and Briar Development Company in this proceeding.

Polygon and Briar have been engaged for several years in obtaining land use approvals necessary for the development of the former Cobb’s Quarry site in Beaverton. CLEAN’s Petition identifies no other sites allegedly requiring CLEAN’s proposed temporary rule. The Cobb’s Quarry site and the development proposals by Polygon and Briar plainly are the target of the Petition.

¹ It appears that the Petition was submitted to DEQ on November 20. Despite the fact that Briar and Polygon filed a response to the previous petition and participated in DEQ’s November 13, 2001 stakeholders meeting on methane issues, Briar and Polygon did not obtain a copy of CLEAN’s November 20 petition until November 29, after specifically requesting a copy from DEQ.

CLEAN has known of the presence of methane at the former Cobb's Quarry site for at least a year. Results of the methane investigation conducted under DEQ oversight were reviewed by DEQ staff prior to the preparation of the staff report on CLEAN's prior petition. Subsequent monitoring results are consistent with the earlier results.

CLEAN's Petition comes before the Commission at this time because CLEAN and related opponents of development at the site have nearly exhausted their opportunities to appeal land use approvals for development of the site. On November 23, the Oregon Court of Appeals flatly rejected the latest attempt to block development of a Haggen supermarket on the middle portion of the Cobb's Quarry site.² Having failed in the courts, development opponents now seek to change DEQ's rules in order to block issuance of "no further action" determinations. The Commission should not allow its rulemaking process to be abused in this manner.

2. Polygon and Briar Have Voluntarily Addressed Concerns About Hazardous Substances and Methane.

A DEQ Strategy Recommendation issued in January 2001 indicated that the Cobb's Quarry site might be extensively contaminated with hazardous substances. Polygon and Briar disagreed, but entered DEQ's Voluntary Cleanup Program to address those potential concerns under a DEQ-approved work plan. Work Plan, Former Cobb's Quarry Site, GeoDesign, Inc., June 21, 2001.

Earlier this year, two relatively small areas of petroleum contaminated soil (which had been identified in earlier environmental investigations) were removed from the Sexton Crest parcel. Soil Sampling

²In Neighbors for Livability v. City of Beaverton, CA A114637, the Court of Appeals rejected the opponents' contention that the presence of methane made the property unsuitable for residential or commercial development. The Court noted

and Removal Report, Proposed Sexton Crest Development, GeoDesign, Inc., May 16, 2001.

Otherwise, the investigation under the oversight of the VCP has not revealed any releases requiring remediation. Similarly, Polygon and Briar have voluntarily worked with DEQ staff to address concerns regarding pockets of methane in the fill material at the Cobb's Quarry site.

The Cobb's Quarry site is divided into three separate parcels for purposes of development. A site plan showing the location of the parcels is attached as Exhibit 1. It is important that the Commission understand the status of development activities and environmental investigation on each of these parcels.

2.1 Sexton Place

"Sexton Place," at the south end of the site, was purchased by Polygon after Polygon completed a site investigation under DEQ's Voluntary Cleanup Program. On September 12, 2001, DEQ issued a "no further action" determination for the Sexton Place parcel. A copy is attached as Exhibit 2.

Methane monitoring, performed under a DEQ-approved work plan, was conducted both prior to and after grading of the site for development. Fill on the Sexton Place parcel was relatively shallow, and much of it was removed in the course of grading the site. Where low levels of methane were detected after grading, the organic material generating the methane (mostly tree roots and branches) was excavated and removed. Summary of Methane Mitigation and Monitoring Activities, Sexton Place Development, GeoDesign, Inc., October 30, 2001. The approach was effective in

that the City found that any problems with methane could be mitigated using proven methods, and the City imposed

addressing methane concerns. Memorandum to Tim Spencer, DEQ, Re: Supplemental Methane Monitoring Results, GeoDesign, Inc., November 13, 2001. The Sexton Place parcel is currently being developed with townhomes.

2.2 Haggen

The "Haggen" parcel is located in the middle of the site, between Sexton Place and Sexton Crest. The parcel is the proposed site of a Haggen supermarket. Briar has been working for years to obtain land use approvals for the Haggen parcel, and has been working with DEQ over the past year to address concerns regarding hazardous substances and methane, all in advance of purchasing the property. As with Polygon on the Sexton Place and Sexton Crest parcels, Briar has been participating in DEQ's Voluntary Cleanup Program. Soil and groundwater conditions on the parcel have been investigated in accordance with the DEQ-approved Work Plan. Subsurface Investigation, Former Cobb Quarry, Proposed Haggen Development, GeoDesign, Inc., August 20, 2001. By letter dated November 7, 2001 (copy attached as Exhibit 3), DEQ approved the subsurface investigation but requested an additional round of groundwater sampling. That sampling has been completed. Groundwater and Sampling Report, Former Cobb Quarry, Proposed Haggen Development, GeoDesign, Inc., November 19, 2001. On the basis of those investigations, Briar has requested and anticipates receiving a "no further action" determination from DEQ for the Haggen parcel.

With respect to methane, GeoDesign developed a monitoring program to assess the presence of methane on the parcel and the potential for offsite migration. GeoDesign installed three permanent

conditions of approval to ensure methane concerns would be addressed in development.

monitoring points at locations approved by DEQ to monitor for methane at depths ranging from 5 to 80 feet below what will be the finished grade for the Haggen project. Only one of the monitoring points, MW-H1, has had elevated levels of methane, with nominal positive pressure measured only in the deepest screened interval and only at that monitoring location. The high percentage of methane in that pocket, coupled with the absence of similar results in the nearest monitoring points on the Haggen, Sexton Place and Sexton Crest parcels, indicates that the methane is not migrating but is a limited pocket, likely isolated by surrounding soils of lower permeability. The lack of pressure in the shallow and intermediate screened interval of MW-H1 and the consistent lack of pressure at all other perimeter monitoring points do not support offsite migration or CLEAN's assertion that the methane presents an imminent threat to human health.

To ensure that development does not result in any potential for methane migration, Briar's consultant has developed specific, conservative recommendations for methane management measures to be used in conjunction with development of a store on the parcel. Final Recommendations for Methane Mitigation, Proposed Haggen Food Store and Pharmacy, GeoDesign, Inc., November 8, 2001 (copy attached as Exhibit 4). The recommendations were developed in consultation with DEQ and have been provided to Tim Spencer of DEQ for review and approval as well as to the City of Beaverton's engineering staff and the City's consultant (Squier Associates). The recommendations include:

- An impermeable membrane will be installed beneath the entire footprint of the store. For major utilities entering the footprint of the building below the membrane, penetrations will be appropriately sealed to maintain the integrity of the membrane.

- Impermeable backfill (a bentonite slurry mixture or equivalent) will be installed in all utility trenches entering the footprint of the building as well as at all property boundaries.
- All electrical utilities entering the building footprints will be properly sealed to prevent migration of methane through electrical conduits.
- A passive venting system would be installed beneath paved areas on the east side of the property to mitigate potential for methane accumulation or migration beneath asphalt paving.

CLEAN's petition not only misrepresents the methane concerns on the site, it also completely fails to address the methane management recommendations and does not even assert that the management measures would not be adequate.

2.3 Sexton Crest

The Sexton Crest parcel is located at the north end of the site. Polygon has the right to purchase the parcel, but has not yet exercised that right. The parcel is planned for single-family residential development.

Polygon has been working with DEQ over the past year to address concerns regarding hazardous substances and methane before committing to purchase the property. Polygon has been participating in the Voluntary Cleanup Program, and has investigated the parcel in accordance with the DEQ-approved Work Plan. Subsurface Investigation, Former Cobb Quarry, Proposed Sexton Crest Development, GeoDesign, Inc., November 2, 2001. By letter dated November 8, 2001 (copy attached as Exhibit 5), DEQ accepted the subsurface investigation but requested an additional round of groundwater monitoring. That groundwater monitoring has been completed. Groundwater

Monitoring and Sampling Report, Former Cobb Quarry, Proposed Sexton Crest Development,

GeoDesign, Inc., November 21, 2001. Polygon anticipates receiving a “no further action”

determination from DEQ for the Sexton Crest parcel on the basis of those investigations and the soil removal activities mentioned above.

Methane monitoring has been ongoing at numerous permanent monitoring points across the Sexton Crest parcel for over a year. Summary of Soil Gas Monitoring Activities, Proposed Sexton Crest Development, GeoDesign, Inc., April 4, 2001. Monitoring results from MW-SC1 indicate an isolated deep pocket of methane at a high concentration. If that methane were migrating, one would expect to see a gradient in concentration and pressure showing the movement of the methane from areas of higher concentration and pressure to areas of lower concentration and pressure. There is no evidence of such a gradient. Rather, it appears that a limited pocket of methane may have been isolated by surrounding soils of lower permeability, accounting for both the high concentration and the positive readings for pressure. Appropriate management measures are under consideration but have not yet been proposed to DEQ or the City.

3. The Petition Does Not Meet the Standards for a Temporary Rule

The requirements for adoption of a temporary rule are set forth in ORS 183.335(b). The first requirement is that the agency adopting the temporary rule must provide findings that the agency’s failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned. For several reasons, those findings cannot be made in this instance.

First, the only site specifically identified by the Petitioner as a justification for the temporary rule is the former Cobb's Quarry site in Beaverton. The Petitioner has not presented the Commission with any facts justifying a statewide rule of general applicability.

Second, the Cobb's Quarry site does not present an imminent hazard. As discussed above, organic material has been excavated from the Sexton Place parcel in conjunction preparations for development of townhomes. Although isolated pockets of methane at high concentrations and insufficient pressure to cause migration are found at significant depth on the Haggen and Sexton Crest parcels, there is no evidence that the methane is migrating offsite. There is no potential for development at the deeper levels of the site, and no evidence that methane at deeper screening levels presents any danger. Methane in shallower soils would be addressed through management measures such as those proposed for the Haggen parcel.

Third, a temporary rule is not necessary to address "orphan site" issues. Cobb's Quarry is not an orphan site. For that reason, the temporary rule adopted by the Commission in June 1999 does not serve as a justification for the proposed temporary rule. The temporary rule adopted in 1999 was intended to make funds from the Orphan Site Account available to address methane threats at a specific orphan site. Petitioner has not identified any such orphan site to justify the rule Petitioner proposes. To the contrary, Polygon and Briar have committed to addressing any methane issues, even though they did not cause or contribute to the presence of methane, and they have proven that commitment through their actions. Polygon and Briar have paid for investigation and monitoring of

methane on the site, and have worked with the City of Beaverton, the City's consultant, and Department of Environmental Quality staff to address concerns regarding methane.

In summary, the situation at the former Cobb's Quarry site is Petitioner's only specific justification for the temporary rulemaking and, as the Commission decided at its meeting in September, that situation is no justification whatsoever for a temporary rule.

4. The Proposed Rule Would Accomplish Nothing Substantive and May Delay Efforts to Address Methane Issues at Cobb's Quarry

The temporary rule proposed by Petitioner would list methane as a hazardous substance under certain circumstances, but would not address the cleanup standards applicable to sites at which methane is present. DEQ staff has informed Polygon and Briar that the agency is following the same approach with respect to investigation and management of methane that it would use for a site under its solid waste regulatory jurisdiction. CLEAN has not identified any inadequacy in the investigation or management measures. Thus, there is no apparent advantage to a temporary rule for the Cobb's Quarry site.

There is, however, a potential disadvantage: if the Commission were to adopt the proposed temporary rule without concurrently adopting standards under ORS 465 for remediating methane, DEQ, Polygon and Briar would have no way of determining whether the work they currently are performing would meet future standards under the hazardous substances cleanup program. In that circumstance, work to address methane at the former Cobb's Quarry site could come to a halt. The proposed rule, in other words, appears to be a purely procedural gambit, intended solely for purposes of delay.

5. Conclusion

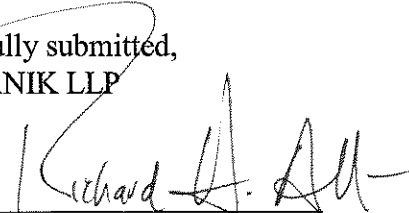
The ultimate irony of CLEAN's Petition is that Polygon and Briar, and their proposed development of the former Cobb's Quarry site, are the solution rather than the problem. Methane exists on the site whether or not the site is developed. If CLEAN and its members feel that their neighboring properties are threatened by methane at the site, they should welcome developers that are willing to spend substantial sums on investigation of methane even prior to purchasing their respective development parcels. In addition, Polygon and Briar voluntarily agreed to a condition of approval of local land use permits requiring that they address methane issues to the satisfaction of an independent expert, and they are committed to complying with that condition. Polygon and Briar's development plans offer the only near term opportunity to address methane issues on portions of the Cobb's Quarry site.

Polygon and Briar respectfully request that the Commission again deny the Petition for Temporary Rulemaking.

Dated: December 4, 2001.

Respectfully submitted,
BALL JANIK LLP

By:


Richard H. Allan, OSB #88147
Of Attorneys for Polygon Northwest
Company and Briar Development Company

SERVICE LIST

Paul Slyman
Oregon Department of Environmental Quality
2020 SW Fourth Avenue, Suite 400
Portland, OR 97204

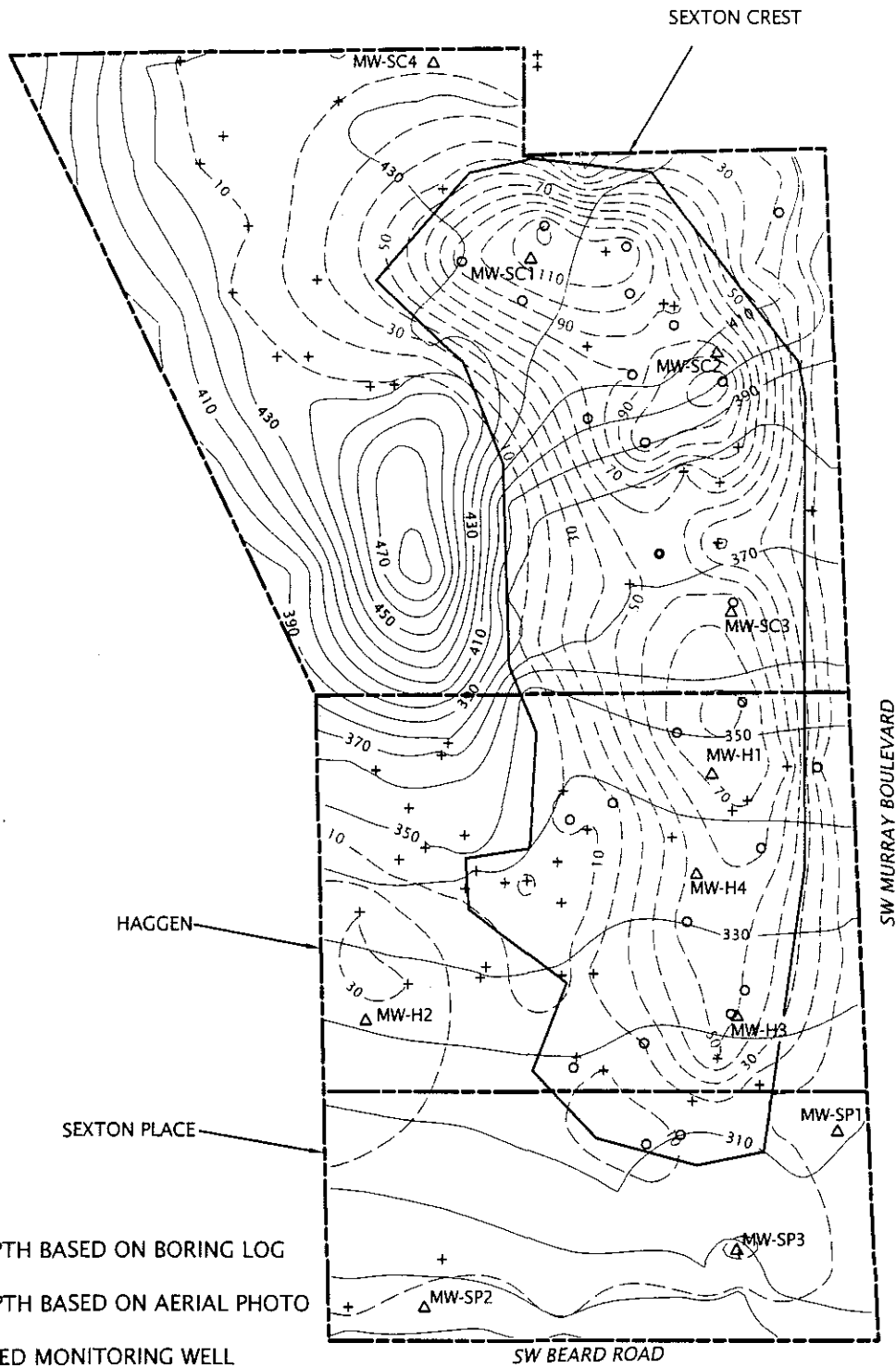
Christopher W. Rich
Rycewicz & Chenoweth, LLP
1001 SW Fifth Avenue
Suite 1300
Portland, OR 97204-1151

Mayor Rob Drake
City of Beaverton
City Hall
4755 S. W. Griffith Drive
Beaverton, OR 97076

11 RESPONSE TO PETITION FOR TEMPORARY
RULEMAKING TO AMEND OAR 340-122-115

BALL JANIK LLP
One Main Place
101 Southwest Main Street, Suite 1100
Portland, Oregon 97204-3219
Telephone 503-228-2525

EXHIBIT 1



EXPLANATION:

- + FILL DEPTH BASED ON BORING LOG
- o FILL DEPTH BASED ON AERIAL PHOTO
- MW-H1
△ PROPOSED MONITORING WELL

- CURRENT GROUND SURFACE ELEVATION, FT
- - - - - APPROXIMATE FILL DEPTH, FT
- 1969/1972 QUARRY PIT LIMIT
- - - - - PROPERTY BOUNDARY



CONTOUR INTERVAL = 10 FEET

GEODESIGN INC

QUARRY FILL DEPTH

POLYGON-53

JUNE 2001

FIGURE 12

EXHIBIT 2



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5263 Voice
TTY (503) 229-5471

September 12, 2001

Fred Gast
Polygon Northwest Company
2700 Northeast Andresen, Suite D-22
Vancouver, WA 98661

RECEIVED

SEP 14 2001
BALL JAMES

Re: No Further Action Determination - Sexton Place
Former Cobb's Quarry Landfill (Sexton Mountain) ECSI # 2766

Dear Mr. Gast:

The Department of Environmental Quality (DEQ) reviewed the results of investigation activities at the proposed Sexton Place parcel of the former Cobb's Quarry Landfill, located at SW Murray Boulevard and SW Beard Road in Beaverton, Oregon. The following findings do not apply to the other Cobb's Quarry Landfill parcels, Haggan and Sexton Crest, which are still under review. DEQ determined that no further action is warranted for hazardous substances at Sexton Place, as a result of our evaluation and judgment based on the regulations and facts as we now understand them, including:

1. A DEQ Strategy Recommendation was completed for Cobb's Quarry Landfill January 29, 2001. Based on a review of previous investigation reports and other site information, DEQ determined that further investigation was required to complete the site characterization and define the nature and extent of hazardous substances at the site.
2. On March 7, 2001, Briar Development signed a Voluntary Cleanup Letter Agreement with DEQ for review of the additional site investigation activities at the former Cobb's Quarry Landfill.
3. GeoDesign, Inc., on behalf of Briar Development and Polygon Northwest Company, conducted a subsurface investigation for the Sexton Place parcel in June 2001. Hazardous substances were either not detected, or were below EPA Region 9 Preliminary Remediation Goals (PRGs), used by DEQ as screening values for assessing the potential risk to human health. Ten polynuclear aromatic hydrocarbons (PAHs) were detected ranging from 0.0125 mg/Kg benzo(k)fluoranthene to 0.0723 mg/Kg pyrene in one soil sample (MW-SP1) at a depth of 6 feet below current grade. The analytical laboratory indicated that the PAHs appear to be related to asphalt. Weathered asphalt is known to be present in the landfill and is considered acceptable "clean fill" because it is unlikely to leach and impact groundwater. In addition, all PAH detections were below their respective residential PRGs. Lead was also detected in this sample at 38.9 mg/Kg, below the residential PRG for lead of 400 mg/Kg. Acetone was detected in one soil sample (GP-SP-2) at 0.168 mg/Kg, below the residential



September 12, 2001

Page 2

PRG of 1,600 mg/Kg. Arsenic was detected at a maximum of 3.16 mg/Kg, which is within naturally occurring background concentrations for this area. Toluene was detected in a single groundwater sample (GP-SP7-W) at 1.12 ug/L, which is near the detection limit of 1.00 ug/L and below the tap water PRG of 720 ug/L. No other hazardous substances were detected in the soil and groundwater samples analyzed.

4. Contaminant concentrations were compared to DEQ ecological Screening Benchmark Values (SBVs) for those substances that have SBVs. All contaminant concentrations were below their respective SBVs.

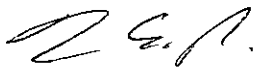
No further action is required for hazardous substances at Sexton Place under Oregon Environmental Cleanup Law, ORS 465.200 et. seq., and Oregon Administrative Rules 340-122-010 through -115, unless additional information becomes available which warrants further investigation.

Proper soil characterization and management during site grading and construction are necessary to distinguish solid waste materials such as vegetative matter or other debris from "clean fill" (as defined in Oregon Administrative Rules 340-93). Improper disposal of excavated solid waste would be subject to enforcement under DEQ's Solid Waste statutes and rules.

Although DEQ is providing this no further action determination with respect to hazardous substances at the site, it does not extend to methane which may continue to present a risk at Sexton Place as well as the Hagen and Sexton Crest parcels of Cobb's Quarry Landfill. DEQ expects Polygon Northwest to address methane and solid waste concerns. We will continue to provide technical assistance to Polygon Northwest and the City of Beaverton regarding these site issues. We will update DEQ's Environmental Cleanup Site Information database (ECSI) to reflect the current site status. Due to the lack of hazardous substances that exceed an acceptable risk level under Oregon's Environmental Cleanup Law, the site will not be listed on DEQ's Confirmed Release List or Inventory.

Thank you for your participation in the Voluntary Cleanup Program. If you have any questions about this determination, you may contact me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup and Portland Harbor

EXHIBIT 3



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5263 Voice
TTY (503) 229-5471

November 7, 2001

Joel Gordon
Buck & Gordon LLP
902 Waterfront Place,
1011 Western Avenue
Seattle, WA 98104-1097

Re: Subsurface Investigation – Proposed Haggen Development
Former Cobb's Quarry Landfill (Sexton Mountain)

RECEIVED

NOV 11 2001

BALL

Dear Mr. Gordon:

The Department of Environmental Quality (DEQ) reviewed the *Subsurface Investigation, Former Cobb Quarry, Proposed Haggen Development* report dated August 20, 2001, and the revised report dated October 29, 2001. Both reports were submitted by GeoDesign, the latter following our meeting with you and GeoDesign in September. The revised report is approved by DEQ.

While there were updates to methane monitoring in the report, any comments regarding methane will be addressed separately by Tim Spencer at a later date.

DEQ concurs with the report finding that hazardous substances were not detected in soil or groundwater at the Haggen site at concentrations that exceed risk-based screening levels. In order to confirm that those contaminants which were detected in groundwater are consistently below concentrations of concern, DEQ requests one additional round of groundwater sampling from the existing wells. The follow-up sampling should conform to the June 2001 Work Plan and include the following:

- Monitoring and sampling of wells MW-H1i (or MW-H1 if sufficient water is present), MW-H2s (not previously sampled due to lack of water) and MW-H3s.
- Analysis of all samples for total petroleum hydrocarbons (TPH), volatile organic compounds (VOCs), polynuclear aromatic hydrocarbons (PAHs), and the leachate parameters listed in the Work Plan.

DEQ concurs with GeoDesign that given the consistency in groundwater occurrence in site borings there appears to be little benefit in waiting for the spring to sample. The additional sampling may proceed at your earliest convenience.

If the additional water sampling data is consistent with previous results and below concentrations of concern, no additional groundwater sampling for hazardous substances will be required.



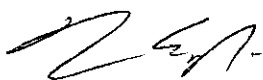
GeoDesign Inc.

Page 2

Following review and approval of the additional data, DEQ will issue a "no further action" determination similar to that issued for Sexton Place, which did not apply to potential methane hazards.

If you have any questions about our review or the additional sampling requested, please call me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup / Portland Harbor

Cc: Don Pettit / Tim Spencer, DEQ NWR
Bob Belding, GeoDesign
Richard Allen, Ball Janik
Fred Gast, Polygon Northwest
Mayor Rob Drake, City of Beaverton
Elise Smith, CLEAN
Chris Rich, Rycewicz & Chenoweth

EXHIBIT 4

November 8, 2001

Briar Development
c/o Buck & Gordon LLP
902 Waterfront Place
1011 Western Avenue
Seattle, Washington 98104-1097

Attention: Mr. Joel M. Gordon

RECEIVED

NOV 09 2001

BALL JAN...

Final Recommendations for Methane Mitigation

Proposed Haggen Food Store and Pharmacy

Beaverton, Oregon

GDI Project: Haggen-5

DEQ ECSI No. 2766

INTRODUCTION

GeoDesign previously presented recommendations to address concerns related to methane on the Haggen Food Store property in Beaverton, Oregon. On October 1, 2001, a meeting was conducted with representatives of the Oregon Department of Environmental Quality (DEQ), in part, to discuss the recommended measures and establish concurrence on final recommendations related to methane. This letter has been prepared to incorporate revisions to the overall approach for methane mitigation consistent with the results of our meeting with DEQ.

GeoDesign previously installed methane monitoring points at various depths within three areas of the property in accordance with a work plan approved by the DEQ. Results of the methane monitoring were presented in GeoDesign's memorandum to DEQ dated August 14, 2001. Methane was detected at significant concentrations only at the north-central portion of the site, with little or no driving pressure to create a potential for gas migration either on or off site. GeoDesign also conducted methane monitoring on September 20, and on three occasions in October 2001. As discussed with DEQ, the monitoring events in October 2001 were conducted during an extended low barometric pressure event. The results of the monitoring in both September and October 2001 were consistent with the results of previous monitoring at the Haggen site, with no significant changes observed during the low pressure event. Results of the recent monitoring events will be submitted to DEQ under separate cover.

Our recommendations presented herein include installation of a passive venting system beneath the parking area, installation of an impermeable membrane beneath the proposed store, and use of impermeable backfill at selected locations in utility trenches to prevent subsurface migration of methane on and off site. We believe the proposed measures discussed in this letter are conservative based on our environmental studies, but prudent to alleviate concerns related to the isolated pockets of methane found in the fill.

SUMMARY OF CONDITIONS

As summarized in the August 14, 2001 memorandum, nested monitoring wells were installed in the north-central (MW-H1 nest), southwest (MW-H2 nest), and southeast (MW-H3 nest) portions of the property to evaluate methane conditions and potential for off site migration. Results of monitoring conducted at the wells has indicated that methane was not detected, or was detected at very low concentrations, at the well nests located in the southwest and southeast portions of the site. Methane was detected at 5 to 15 feet and 30 to 70 feet below grade in the well nest on the north-central portion of the property.

Results of our methane studies on the Hagen property are consistent with those conducted at various monitoring points elsewhere within the former Cobb Quarry site. These studies indicate there is no driving pressure that would create potential for methane migration either on or off site. The lack of off site migration is supported by low or non-detectable methane concentrations and lack of pressure at monitoring points on east and west sides of the Hagen property; the north, west and east sides of the Sexton Crest property; and at various monitoring points installed at the Sexton Place property. Near surface basalt bedrock exists over the majority of the western portion of the Hagen and Sexton Crest properties, which reduces the potential for methane migration to the west.

OBJECTIVES

The objectives of the methane mitigation measures for the Hagen project are to:

- Mitigate potential for methane migration to the Hagen Store from fill areas beneath the proposed parking lot area,
- Prevent methane migration from areas of fill material beneath the parking lot as a result of accumulation beneath surfaced areas, and
- Prevent migration of methane through utility corridors.

HAGEN STORE

The majority of the west side of the Hagen property consists of near surface bedrock, and significant excavation into the basalt rock is planned to achieve finished grade for the proposed building slab. In addition, fill in the southwest corner of the building footprint will be either removed and replaced with clean structural fill or reworked to remove appreciable organic material. Because the building will be completely constructed on rock or soil that will not generate methane, there is little potential for methane occurrence beneath the proposed store. However, to address any concern related to methane in this area, an impermeable

membrane will be installed beneath the entire footprint of the store. Basalt bedrock beneath the building slab is currently planned to be over-excavated to accommodate various utilities beneath the building. The impermeable membrane will be placed on grade after excavation for the building slab, with the majority of utilities above the membrane. For major utilities entering the footprint of the building below the membrane, penetrations will be appropriately sealed to maintain the membrane integrity.

The membrane material shall consist of a 24 mil thickness woven HDPE polyolefin fabric with LDPE coating, equivalent to Matai USA, Inc.'s PPL 24 Membrane product. If warranted, and depending on the nature of material to be used for backfill of the slab area, a geosynthetic fabric shall be used to reduce puncturing of the membrane liner. Alternatively, sand or earth cover may be used to accomplish this objective. Earthen material shall be free of sticks, stones, or other materials that may damage the liner.

The membrane shall be field seamed by qualified personnel using a hand-held heat gun and roller. All field seams shall be lapped with a minimum of 2 inches of heat bonding on all seams. Utility penetrations shall be sealed with fabricated boots that are heat bonded with stainless steel straps, and butyl caulking shall be used between the liner and pipe to ensure proper seal.

There is a small potential that low concentrations of methane could migrate through utility trenches from fill areas east of the proposed store. Therefore, we recommend that impermeable backfill be installed in all utility trenches entering the footprint of the building to mitigate potential for migration of methane in trench backfill. Impermeable backfill shall consist of a bentonite-slurry mixture or equivalent. In addition, all electrical utilities entering the building footprint shall be properly sealed to prevent migration of methane through electrical conduits.

PARKING AREA

Passive venting is recommended on the east side of the property beneath paved areas to mitigate potential for methane accumulation or migration beneath asphalt paving. The venting system should consist of 4-inch-diameter, perforated PVC piping installed on 50-foot centers across the parking area. The perforated piping should be connected together in a manifold located along one side of the parking area. Vertical piping from the manifold is recommended at a minimum of two locations along each lateral to provide venting to atmosphere. The vertical pipe can be located in planters currently proposed for the development.

UTILITY CORRIDORS

Various utilities are planned on the property that could serve as a preferential pathway for migration of methane. To prevent potential for methane migration off site, or to the proposed store building, we recommend installation of impermeable backfill in utility

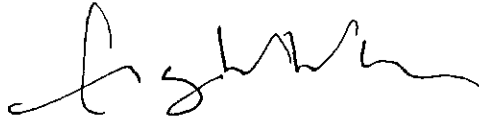
trenches at selected locations including at all property boundaries and adjacent to the on-site structures. As discussed previously, the impermeable backfill should consist of a bentonite-slurry mixture.

◆ ◆ ◆

We appreciate the opportunity to provide these recommendations. From our meeting with DEQ, these recommendations are considered appropriate to address potential concerns related to methane, and to achieve both Haggen and DEQ's goal of protecting public health and safety. Please call if you have any questions regarding this issue, and we will be pleased to discuss specific details for implementation of these recommendations.

Sincerely,

GeoDesign, Inc.



Craig W. Ware, R.G.
Senior Geologist



Scott V. Mills, P.E.
Senior Principal

cc: Mr. Fred Gast, Polygon Northwest Company (one copy)
Mr. Richard Allan, Ball Janik, LLP (one copy)
Mr. Tim Spencer, Oregon Department of Environmental Quality - NWR (one copy)
Mr. Tom Roick, Oregon Department of Environmental Quality - NWR (one copy)
Mr. Jim Duggan, City of Beaverton (three copies)
Mr. David King, Squier Associates (one copy)

CWW:SVM:kt

Two copies submitted

Document ID: Haggen-5-110801-envl-Finalmethanerecs.doc

EXHIBIT 5



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Avenue
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(503) 229-5263 Voice
TTY (503) 229-5471

November 8, 2001

Fred Gast
Polygon Northwest
Andresen Plaza
2700 NE Andresen Road, Suite D-22
Vancouver, WA 98661-7343

RECEIVED

NOV 11 2001

BALL JONES

Re: Subsurface Investigation – Proposed Sexton Crest Development
Former Cobb's Quarry Landfill (Sexton Mountain)

Dear Mr. Gast:

The Department of Environmental Quality (DEQ) reviewed the *Subsurface Investigation, Former Cobb Quarry, Proposed Sexton Crest Development* report dated August 28, 2001, and the revised report dated November 2, 2001. Both reports were submitted by GeoDesign, the latter following our meeting with you and GeoDesign in September. The revised report is approved by DEQ. In addition, DEQ reviewed the *Soil Sampling and Removal Report* dated May 16, 2001, previously submitted by GeoDesign.

While there were updates to methane monitoring in the report, any comments regarding methane will be addressed separately by Tim Spencer at a later date.

DEQ concurs with the findings that following the soil removals reported by GeoDesign, hazardous substances have not been detected in soil or groundwater at the Sexton Crest site at concentrations that exceed risk-based screening levels. In order to confirm that the contaminants which were detected in groundwater are consistently below concentrations of concern, DEQ requests one additional round of groundwater sampling from the existing wells. The follow-up sampling should conform to the June 2001 Work Plan and include the following:

- Monitoring and sampling of wells MW-SC1s (not previously sampled), MW-SC2s (not previously sampled), and MW-SC3i (or at which interval water is available).
- Analysis of all samples for total petroleum hydrocarbons (TPH) by NWTPH-Gx and NWTPH-Dx, volatile organic compounds (VOCs), polynuclear aromatic hydrocarbons (PAHs), and the leachate parameters listed in the Work Plan.

DEQ concurs with GeoDesign that given the consistency in groundwater occurrence in site borings there appears to be little benefit in waiting for the spring to sample. The additional sampling may proceed at your earliest convenience.

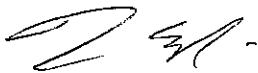


Any residual petroleum-contaminated soil in the removal areas will have to be managed as solid waste during site grading activities. Because soil removals were conducted at two locations to address TPH-contaminated soils at the site, a 30-day public notice and comment period is required for DEQ approval of the cleanup. Consistent with how DEQ notifies the public at other sites where a cleanup has been conducted, we will issue a press release regarding the soil removals and submit a notice to the Secretary of State's Bulletin for publication December 1st.

If the additional water sampling data is consistent with previous results and below concentrations of concern, no additional groundwater sampling for hazardous substances will be required. DEQ will review any comments submitted regarding the cleanup. Following review and approval of the additional data, and pending substantive comments regarding the cleanup, DEQ will issue a "no further action" determination similar to that issued for Sexton Place, which did not apply to potential methane hazards.

If you have any questions about our review or the additional sampling requested, please call me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup / Portland Harbor

Cc: Don Pettit / Tim Spencer, DEQ NWR
Bob Belding, GeoDesign
-Richard Allen, Ball Janik
-Joel Gordon, Buck & Gordon
-Mayor Rob Drake, City of Beaverton
-Elise Smith, CLEAN
-Chris Rich, Rycewicz & Chenoweth

12/6-7/01, EQC Meeting, Supplemental Information, Item C.

State of Oregon
Department of Environmental Quality

BALL JANIK LLP

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www.balljanik.com

TELEPHONE 503-228-2525

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RICHARD H. ALLAN

rallan@bjllp.com

Direct Fax (503) 226-3910

Received
12/7/01

December 4, 2001

BY HAND-DELIVERY

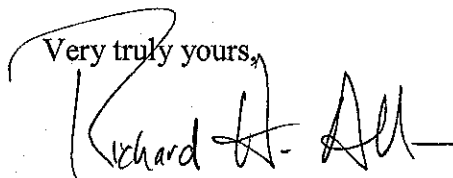
Oregon Environmental Quality Commission
811 SW Sixth Avenue
10th Floor
Portland, OR 97204
Attention: Ms. Mikell Omealy

Re: Response to Petition for Temporary Rulemaking

Dear Chairperson Eden and Members of the Environmental Quality Commission:

This firm represents Polygon Northwest Company and Briar Development Company, which are involved in redevelopment of the former Cobb's Quarry property in Beaverton, which once again is the subject of a Petition for Temporary Rulemaking to list methane as a hazardous substance. Enclosed is a response to the Petition. I respectfully request that you consider our response in making a determination on the Petition.

Very truly yours,



Richard H. Allan

RHA:bwo
Enclosure

cc: Paul Slyman
Christopher W. Rich
Mayor Rob Drake (by fax)
Joel Gordon (by fax)
Fred Gast (by fax)
Craig Ware (by fax)

\\ODMA\PCDOCS\PORTLAND\2673531

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12/4/2001

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December 4, 2001

BY HAND-DELIVERY

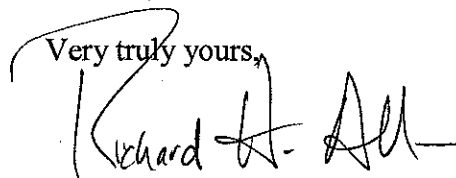
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811 SW Sixth Avenue
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Attention: Ms. Mikell Omealy

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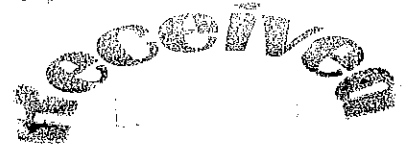
Very truly yours,



Richard H. Allan

RHA:bwo
Enclosure

cc: Paul Slyman
Christopher W. Rich
Mayor Rob Drake (by fax)
Joel Gordon (by fax)
Fred Gast (by fax)
Craig Ware (by fax)



**BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
STATE OF OREGON**

In the Matter of the Amendment of)
OAR 340-122-115 defining Methane)
As a Hazardous Substance)
)
)
)
_____)

**RESPONSE TO PETITION FOR
TEMPORARY RULEMAKING TO
AMEND OAR 340-122-115**

Briar Development Company (“Briar”) and Polygon Northwest Company (“Polygon”) hereby submit this Response to the Petition by “CLEAN” for a temporary rulemaking declaring methane to be a hazardous substance under certain circumstances.¹ The Commission considered and rejected a nearly identical petition from CLEAN at its September meeting. Nothing has changed in the interim to warrant a different result. Polygon and Briar request that the Environmental Quality Commission deny the Petition for the reasons set forth below.

1. Interest of Polygon Northwest Company and Briar Development Company in this proceeding.

Polygon and Briar have been engaged for several years in obtaining land use approvals necessary for the development of the former Cobb’s Quarry site in Beaverton. CLEAN’s Petition identifies no other sites allegedly requiring CLEAN’s proposed temporary rule. The Cobb’s Quarry site and the development proposals by Polygon and Briar plainly are the target of the Petition.

¹ It appears that the Petition was submitted to DEQ on November 20. Despite the fact that Briar and Polygon filed a response to the previous petition and participated in DEQ’s November 13, 2001 stakeholders meeting on methane issues, Briar and Polygon did not obtain a copy of CLEAN’s November 20 petition until November 29, after specifically requesting a copy from DEQ.

CLEAN has known of the presence of methane at the former Cobb's Quarry site for at least a year. Results of the methane investigation conducted under DEQ oversight were reviewed by DEQ staff prior to the preparation of the staff report on CLEAN's prior petition. Subsequent monitoring results are consistent with the earlier results.

CLEAN's Petition comes before the Commission at this time because CLEAN and related opponents of development at the site have nearly exhausted their opportunities to appeal land use approvals for development of the site. On November 23, the Oregon Court of Appeals flatly rejected the latest attempt to block development of a Hagggen supermarket on the middle portion of the Cobb's Quarry site.² Having failed in the courts, development opponents now seek to change DEQ's rules in order to block issuance of "no further action" determinations. The Commission should not allow its rulemaking process to be abused in this manner.

2. Polygon and Briar Have Voluntarily Addressed Concerns About Hazardous Substances and Methane.

A DEQ Strategy Recommendation issued in January 2001 indicated that the Cobb's Quarry site might be extensively contaminated with hazardous substances. Polygon and Briar disagreed, but entered DEQ's Voluntary Cleanup Program to address those potential concerns under a DEQ-approved work plan. Work Plan, Former Cobb's Quarry Site, GeoDesign, Inc., June 21, 2001. Earlier this year, two relatively small areas of petroleum contaminated soil (which had been identified in earlier environmental investigations) were removed from the Sexton Crest parcel. Soil Sampling

²In Neighbors for Livability v. City of Beaverton, CA A114637, the Court of Appeals rejected the opponents' contention that the presence of methane made the property unsuitable for residential or commercial development. The Court noted

and Removal Report, Proposed Sexton Crest Development, GeoDesign, Inc., May 16, 2001.

Otherwise, the investigation under the oversight of the VCP has not revealed any releases requiring remediation. Similarly, Polygon and Briar have voluntarily worked with DEQ staff to address concerns regarding pockets of methane in the fill material at the Cobb's Quarry site.

The Cobb's Quarry site is divided into three separate parcels for purposes of development. A site plan showing the location of the parcels is attached as Exhibit 1. It is important that the Commission understand the status of development activities and environmental investigation on each of these parcels.

2.1 Sexton Place

"Sexton Place," at the south end of the site, was purchased by Polygon after Polygon completed a site investigation under DEQ's Voluntary Cleanup Program. On September 12, 2001, DEQ issued a "no further action" determination for the Sexton Place parcel. A copy is attached as Exhibit 2.

Methane monitoring, performed under a DEQ-approved work plan, was conducted both prior to and after grading of the site for development. Fill on the Sexton Place parcel was relatively shallow, and much of it was removed in the course of grading the site. Where low levels of methane were detected after grading, the organic material generating the methane (mostly tree roots and branches) was excavated and removed. Summary of Methane Mitigation and Monitoring Activities, Sexton Place Development, GeoDesign, Inc., October 30, 2001. The approach was effective in

that the City found that any problems with methane could be mitigated using proven methods, and the City imposed

addressing methane concerns. Memorandum to Tim Spencer, DEQ, Re: Supplemental Methane Monitoring Results, GeoDesign, Inc., November 13, 2001. The Sexton Place parcel is currently being developed with townhomes.

2.2 Haggen

The "Haggen" parcel is located in the middle of the site, between Sexton Place and Sexton Crest. The parcel is the proposed site of a Haggen supermarket. Briar has been working for years to obtain land use approvals for the Haggen parcel, and has been working with DEQ over the past year to address concerns regarding hazardous substances and methane, all in advance of purchasing the property. As with Polygon on the Sexton Place and Sexton Crest parcels, Briar has been participating in DEQ's Voluntary Cleanup Program. Soil and groundwater conditions on the parcel have been investigated in accordance with the DEQ-approved Work Plan. Subsurface Investigation, Former Cobb Quarry, Proposed Haggen Development, GeoDesign, Inc., August 20, 2001. By letter dated November 7, 2001 (copy attached as Exhibit 3), DEQ approved the subsurface investigation but requested an additional round of groundwater sampling. That sampling has been completed. Groundwater and Sampling Report, Former Cobb Quarry, Proposed Haggen Development, GeoDesign, Inc., November 19, 2001. On the basis of those investigations, Briar has requested and anticipates receiving a "no further action" determination from DEQ for the Haggen parcel.

With respect to methane, GeoDesign developed a monitoring program to assess the presence of methane on the parcel and the potential for offsite migration. GeoDesign installed three permanent

conditions of approval to ensure methane concerns would be addressed in development.

monitoring points at locations approved by DEQ to monitor for methane at depths ranging from 5 to 80 feet below what will be the finished grade for the Haggen project. Only one of the monitoring points, MW-H1, has had elevated levels of methane, with nominal positive pressure measured only in the deepest screened interval and only at that monitoring location. The high percentage of methane in that pocket, coupled with the absence of similar results in the nearest monitoring points on the Haggen, Sexton Place and Sexton Crest parcels, indicates that the methane is not migrating but is a limited pocket, likely isolated by surrounding soils of lower permeability. The lack of pressure in the shallow and intermediate screened interval of MW-H1 and the consistent lack of pressure at all other perimeter monitoring points do not support offsite migration or CLEAN's assertion that the methane presents an imminent threat to human health.

To ensure that development does not result in any potential for methane migration, Briar's consultant has developed specific, conservative recommendations for methane management measures to be used in conjunction with development of a store on the parcel. Final Recommendations for Methane Mitigation, Proposed Haggen Food Store and Pharmacy, GeoDesign, Inc., November 8, 2001 (copy attached as Exhibit 4). The recommendations were developed in consultation with DEQ and have been provided to Tim Spencer of DEQ for review and approval as well as to the City of Beaverton's engineering staff and the City's consultant (Squier Associates). The recommendations include:

- An impermeable membrane will be installed beneath the entire footprint of the store. For major utilities entering the footprint of the building below the membrane, penetrations will be appropriately sealed to maintain the integrity of the membrane.

- Impermeable backfill (a bentonite slurry mixture or equivalent) will be installed in all utility trenches entering the footprint of the building as well as at all property boundaries.
- All electrical utilities entering the building footprints will be properly sealed to prevent migration of methane through electrical conduits.
- A passive venting system would be installed beneath paved areas on the east side of the property to mitigate potential for methane accumulation or migration beneath asphalt paving.

CLEAN's petition not only misrepresents the methane concerns on the site, it also completely fails to address the methane management recommendations and does not even assert that the management measures would not be adequate.

2.3 Sexton Crest

The Sexton Crest parcel is located at the north end of the site. Polygon has the right to purchase the parcel, but has not yet exercised that right. The parcel is planned for single-family residential development.

Polygon has been working with DEQ over the past year to address concerns regarding hazardous substances and methane before committing to purchase the property. Polygon has been participating in the Voluntary Cleanup Program, and has investigated the parcel in accordance with the DEQ-approved Work Plan. Subsurface Investigation, Former Cobb Quarry, Proposed Sexton Crest Development, GeoDesign, Inc., November 2, 2001. By letter dated November 8, 2001 (copy attached as Exhibit 5), DEQ accepted the subsurface investigation but requested an additional round of groundwater monitoring. That groundwater monitoring has been completed. Groundwater

Monitoring and Sampling Report, Former Cobb Quarry, Proposed Sexton Crest Development,

GeoDesign, Inc., November 21, 2001. Polygon anticipates receiving a "no further action" determination from DEQ for the Sexton Crest parcel on the basis of those investigations and the soil removal activities mentioned above.

Methane monitoring has been ongoing at numerous permanent monitoring points across the Sexton Crest parcel for over a year. Summary of Soil Gas Monitoring Activities, Proposed Sexton Crest Development, GeoDesign, Inc., April 4, 2001. Monitoring results from MW-SC1 indicate an isolated deep pocket of methane at a high concentration. If that methane were migrating, one would expect to see a gradient in concentration and pressure showing the movement of the methane from areas of higher concentration and pressure to areas of lower concentration and pressure. There is no evidence of such a gradient. Rather, it appears that a limited pocket of methane may have been isolated by surrounding soils of lower permeability, accounting for both the high concentration and the positive readings for pressure. Appropriate management measures are under consideration but have not yet been proposed to DEQ or the City.

3. The Petition Does Not Meet the Standards for a Temporary Rule

The requirements for adoption of a temporary rule are set forth in ORS 183.335(b). The first requirement is that the agency adopting the temporary rule must provide findings that the agency's failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned. For several reasons, those findings cannot be made in this instance.

First, the only site specifically identified by the Petitioner as a justification for the temporary rule is the former Cobb's Quarry site in Beaverton. The Petitioner has not presented the Commission with any facts justifying a statewide rule of general applicability.

Second, the Cobb's Quarry site does not present an imminent hazard. As discussed above, organic material has been excavated from the Sexton Place parcel in conjunction preparations for development of townhomes. Although isolated pockets of methane at high concentrations and insufficient pressure to cause migration are found at significant depth on the Haggan and Sexton Crest parcels, there is no evidence that the methane is migrating offsite. There is no potential for development at the deeper levels of the site, and no evidence that methane at deeper screening levels presents any danger. Methane in shallower soils would be addressed through management measures such as those proposed for the Haggan parcel.

Third, a temporary rule is not necessary to address "orphan site" issues. Cobb's Quarry is not an orphan site. For that reason, the temporary rule adopted by the Commission in June 1999 does not serve as a justification for the proposed temporary rule. The temporary rule adopted in 1999 was intended to make funds from the Orphan Site Account available to address methane threats at a specific orphan site. Petitioner has not identified any such orphan site to justify the rule Petitioner proposes. To the contrary, Polygon and Briar have committed to addressing any methane issues, even though they did not cause or contribute to the presence of methane, and they have proven that commitment through their actions. Polygon and Briar have paid for investigation and monitoring of

methane on the site, and have worked with the City of Beaverton, the City's consultant, and Department of Environmental Quality staff to address concerns regarding methane.

In summary, the situation at the former Cobb's Quarry site is Petitioner's only specific justification for the temporary rulemaking and, as the Commission decided at its meeting in September, that situation is no justification whatsoever for a temporary rule.

4. The Proposed Rule Would Accomplish Nothing Substantive and May Delay Efforts to Address Methane Issues at Cobb's Quarry

The temporary rule proposed by Petitioner would list methane as a hazardous substance under certain circumstances, but would not address the cleanup standards applicable to sites at which methane is present. DEQ staff has informed Polygon and Briar that the agency is following the same approach with respect to investigation and management of methane that it would use for a site under its solid waste regulatory jurisdiction. CLEAN has not identified any inadequacy in the investigation or management measures. Thus, there is no apparent advantage to a temporary rule for the Cobb's Quarry site.

There is, however, a potential disadvantage: if the Commission were to adopt the proposed temporary rule without concurrently adopting standards under ORS 465 for remediating methane, DEQ, Polygon and Briar would have no way of determining whether the work they currently are performing would meet future standards under the hazardous substances cleanup program. In that circumstance, work to address methane at the former Cobb's Quarry site could come to a halt. The proposed rule, in other words, appears to be a purely procedural gambit, intended solely for purposes of delay.

5. Conclusion

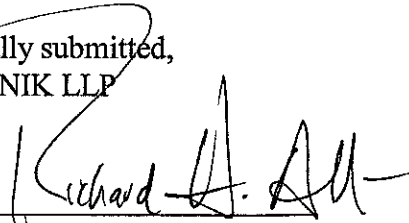
The ultimate irony of CLEAN's Petition is that Polygon and Briar, and their proposed development of the former Cobb's Quarry site, are the solution rather than the problem. Methane exists on the site whether or not the site is developed. If CLEAN and its members feel that their neighboring properties are threatened by methane at the site, they should welcome developers that are willing to spend substantial sums on investigation of methane even prior to purchasing their respective development parcels. In addition, Polygon and Briar voluntarily agreed to a condition of approval of local land use permits requiring that they address methane issues to the satisfaction of an independent expert, and they are committed to complying with that condition. Polygon and Briar's development plans offer the only near term opportunity to address methane issues on portions of the Cobb's Quarry site.

Polygon and Briar respectfully request that the Commission again deny the Petition for Temporary Rulemaking.

Dated: December 4, 2001.

Respectfully submitted,
BALL JANIK LLP

By:


Richard H. Allan, OSB #88147
Of Attorneys for Polygon Northwest
Company and Briar Development Company

SERVICE LIST

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Oregon Department of Environmental Quality
2020 SW Fourth Avenue, Suite 400
Portland, OR 97204

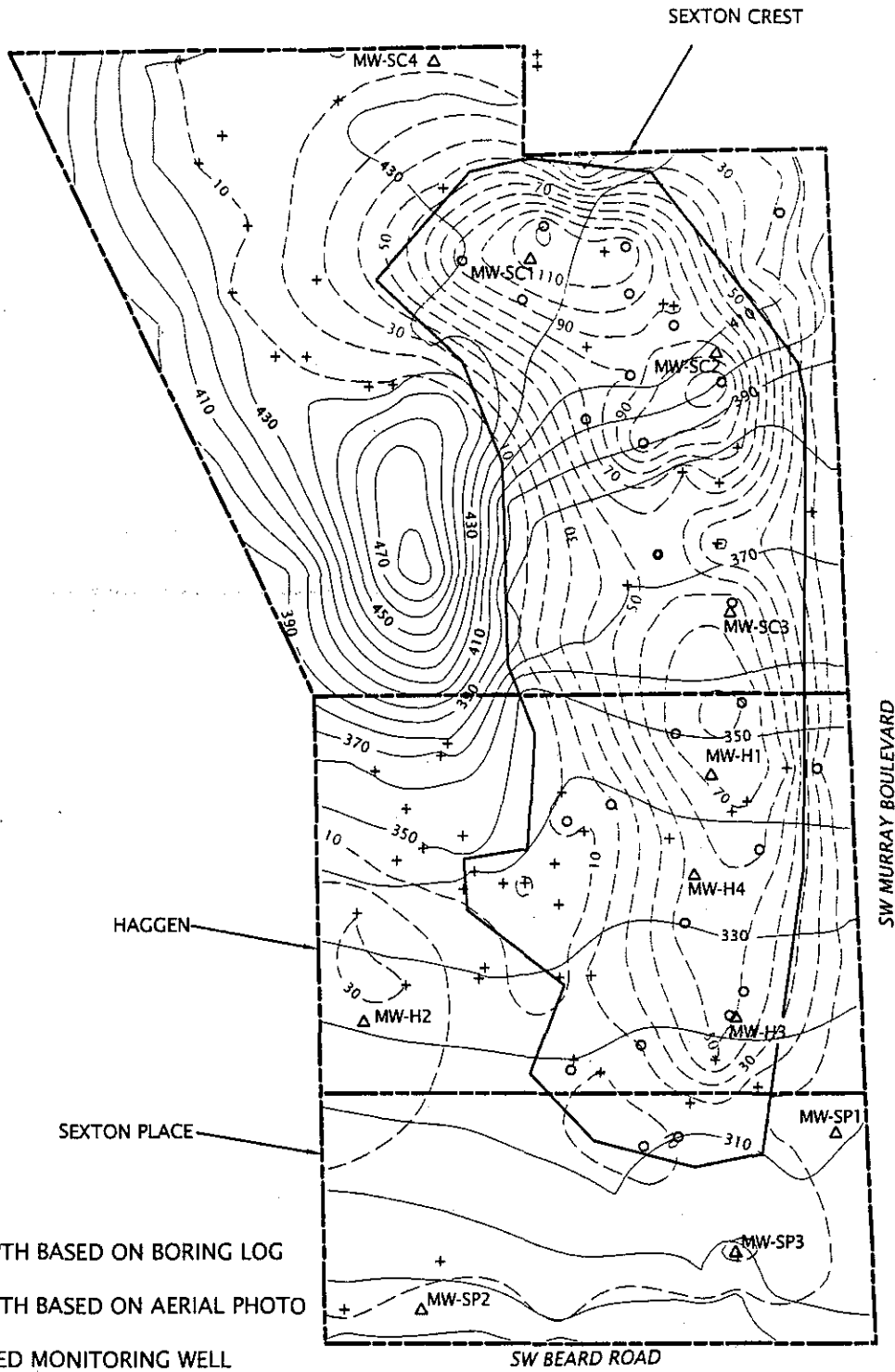
Christopher W. Rich
Rycewicz & Chenoweth, LLP
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Suite 1300
Portland, OR 97204-1151

Mayor Rob Drake
City of Beaverton
City Hall
4755 S. W. Griffith Drive
Beaverton, OR 97076

11 RESPONSE TO PETITION FOR TEMPORARY
RULEMAKING TO AMEND OAR 340-122-115

BALL JANIK LLP
One Main Place
101 Southwest Main Street, Suite 1100
Portland, Oregon 97204-3219
Telephone 503-228-2525

EXHIBIT 1



EXPLANATION:

- + FILL DEPTH BASED ON BORING LOG
- o FILL DEPTH BASED ON AERIAL PHOTO
- MW-H1
- Δ PROPOSED MONITORING WELL

- CURRENT GROUND SURFACE ELEVATION, FT
- - - - - APPROXIMATE FILL DEPTH, FT
- 1969/1972 QUARRY PIT LIMIT
- PROPERTY BOUNDARY


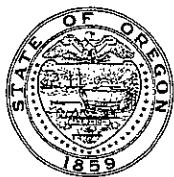

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 CONTOUR INTERVAL = 10 FEET

EXHIBIT 2



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5263 Voice
TTY (503) 229-5471

September 12, 2001

Fred Gast
Polygon Northwest Company
2700 Northeast Andresen, Suite D-22
Vancouver, WA 98661

RECEIVED

SEP 14 2001

FALL 2001

Re: No Further Action Determination - Sexton Place
Former Cobb's Quarry Landfill (Sexton Mountain) ECSI # 2766

Dear Mr. Gast:

The Department of Environmental Quality (DEQ) reviewed the results of investigation activities at the proposed Sexton Place parcel of the former Cobb's Quarry Landfill, located at SW Murray Boulevard and SW Beard Road in Beaverton, Oregon. The following findings do not apply to the other Cobb's Quarry Landfill parcels, Haggan and Sexton Crest, which are still under review. DEQ determined that no further action is warranted for hazardous substances at Sexton Place, as a result of our evaluation and judgment based on the regulations and facts as we now understand them, including:

1. A DEQ Strategy Recommendation was completed for Cobb's Quarry Landfill January 29, 2001. Based on a review of previous investigation reports and other site information, DEQ determined that further investigation was required to complete the site characterization and define the nature and extent of hazardous substances at the site.
2. On March 7, 2001, Briar Development signed a Voluntary Cleanup Letter Agreement with DEQ for review of the additional site investigation activities at the former Cobb's Quarry Landfill.
3. GeoDesign, Inc., on behalf of Briar Development and Polygon Northwest Company, conducted a subsurface investigation for the Sexton Place parcel in June 2001. Hazardous substances were either not detected, or were below EPA Region 9 Preliminary Remediation Goals (PRGs), used by DEQ as screening values for assessing the potential risk to human health. Ten polynuclear aromatic hydrocarbons (PAHs) were detected ranging from 0.0125 mg/Kg benzo(k)fluoranthene to 0.0723 mg/Kg pyrene in one soil sample (MW-SP1) at a depth of 6 feet below current grade. The analytical laboratory indicated that the PAHs appear to be related to asphalt. Weathered asphalt is known to be present in the landfill and is considered acceptable "clean fill" because it is unlikely to leach and impact groundwater. In addition, all PAH detections were below their respective residential PRGs. Lead was also detected in this sample at 38.9 mg/Kg, below the residential PRG for lead of 400 mg/Kg. Acetone was detected in one soil sample (GP-SP-2) at 0.168 mg/Kg, below the residential



September 12, 2001

Page 2

PRG of 1,600 mg/Kg. Arsenic was detected at a maximum of 3.16 mg/Kg, which is within naturally occurring background concentrations for this area. Toluene was detected in a single groundwater sample (GP-SP7-W) at 1.12 ug/L, which is near the detection limit of 1.00 ug/L and below the tap water PRG of 720 ug/L. No other hazardous substances were detected in the soil and groundwater samples analyzed.

4. Contaminant concentrations were compared to DEQ ecological Screening Benchmark Values (SBVs) for those substances that have SBVs. All contaminant concentrations were below their respective SBVs.

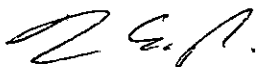
No further action is required for hazardous substances at Sexton Place under Oregon Environmental Cleanup Law, ORS 465.200 et. seq., and Oregon Administrative Rules 340-122-010 through -115, unless additional information becomes available which warrants further investigation.

Proper soil characterization and management during site grading and construction are necessary to distinguish solid waste materials such as vegetative matter or other debris from "clean fill" (as defined in Oregon Administrative Rules 340-93). Improper disposal of excavated solid waste would be subject to enforcement under DEQ's Solid Waste statutes and rules.

Although DEQ is providing this no further action determination with respect to hazardous substances at the site, it does not extend to methane which may continue to present a risk at Sexton Place as well as the Haggan and Sexton Crest parcels of Cobb's Quarry Landfill. DEQ expects Polygon Northwest to address methane and solid waste concerns. We will continue to provide technical assistance to Polygon Northwest and the City of Beaverton regarding these site issues. We will update DEQ's Environmental Cleanup Site Information database (ECSI) to reflect the current site status. Due to the lack of hazardous substances that exceed an acceptable risk level under Oregon's Environmental Cleanup Law, the site will not be listed on DEQ's Confirmed Release List or Inventory.

Thank you for your participation in the Voluntary Cleanup Program. If you have any questions about this determination, you may contact me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup and Portland Harbor

EXHIBIT 3



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Ave.
Suite 400
Portland, OR 97201-4987
(503) 229-5263 Voice
TTY (503) 229-5471

November 7, 2001

Joel Gordon
Buck & Gordon LLP
902 Waterfront Place,
1011 Western Avenue
Seattle, WA 98104-1097

Re: Subsurface Investigation – Proposed Haggen Development
Former Cobb's Quarry Landfill (Sexton Mountain)

RECEIVED

NOV 11 2001

HALL

Dear Mr. Gordon:

The Department of Environmental Quality (DEQ) reviewed the *Subsurface Investigation, Former Cobb Quarry, Proposed Haggen Development* report dated August 20, 2001, and the revised report dated October 29, 2001. Both reports were submitted by GeoDesign, the latter following our meeting with you and GeoDesign in September. The revised report is approved by DEQ.

While there were updates to methane monitoring in the report, any comments regarding methane will be addressed separately by Tim Spencer at a later date.

DEQ concurs with the report finding that hazardous substances were not detected in soil or groundwater at the Haggen site at concentrations that exceed risk-based screening levels. In order to confirm that those contaminants which were detected in groundwater are consistently below concentrations of concern, DEQ requests one additional round of groundwater sampling from the existing wells. The follow-up sampling should conform to the June 2001 Work Plan and include the following:

- Monitoring and sampling of wells MW-H1i (or MW-H1 if sufficient water is present), MW-H2s (not previously sampled due to lack of water) and MW-H3s.
- Analysis of all samples for total petroleum hydrocarbons (TPH), volatile organic compounds (VOCs), polynuclear aromatic hydrocarbons (PAHs), and the leachate parameters listed in the Work Plan.

DEQ concurs with GeoDesign that given the consistency in groundwater occurrence in site borings there appears to be little benefit in waiting for the spring to sample. The additional sampling may proceed at your earliest convenience.

If the additional water sampling data is consistent with previous results and below concentrations of concern, no additional groundwater sampling for hazardous substances will be required.

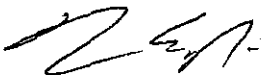


GeoDesign Inc.
Page 2

Following review and approval of the additional data, DEQ will issue a "no further action" determination similar to that issued for Sexton Place, which did not apply to potential methane hazards.

If you have any questions about our review or the additional sampling requested, please call me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup / Portland Harbor

Cc: Don Pettit / Tim Spencer, DEQ NWR
Bob Belding, GeoDesign
Richard Allen, Ball Janik
Fred Gast, Polygon Northwest
Mayor Rob Drake, City of Beaverton
Elise Smith, CLEAN
Chris Rich, Rycewicz & Chenoweth

EXHIBIT 4

November 8, 2001

Briar Development
c/o Buck & Gordon LLP
902 Waterfront Place
1011 Western Avenue
Seattle, Washington 98104-1097

Attention: Mr. Joel M. Gordon

RECEIVED

NOV 09 2001

BALL JAN...

Final Recommendations for Methane Mitigation
Proposed Haggen Food Store and Pharmacy
Beaverton, Oregon
GDI Project: Haggen-5
DEQ ECSI No. 2766

INTRODUCTION

GeoDesign previously presented recommendations to address concerns related to methane on the Haggen Food Store property in Beaverton, Oregon. On October 1, 2001, a meeting was conducted with representatives of the Oregon Department of Environmental Quality (DEQ), in part, to discuss the recommended measures and establish concurrence on final recommendations related to methane. This letter has been prepared to incorporate revisions to the overall approach for methane mitigation consistent with the results of our meeting with DEQ.

GeoDesign previously installed methane monitoring points at various depths within three areas of the property in accordance with a work plan approved by the DEQ. Results of the methane monitoring were presented in GeoDesign's memorandum to DEQ dated August 14, 2001. Methane was detected at significant concentrations only at the north-central portion of the site, with little or no driving pressure to create a potential for gas migration either on or off site. GeoDesign also conducted methane monitoring on September 20, and on three occasions in October 2001. As discussed with DEQ, the monitoring events in October 2001 were conducted during an extended low barometric pressure event. The results of the monitoring in both September and October 2001 were consistent with the results of previous monitoring at the Haggen site, with no significant changes observed during the low pressure event. Results of the recent monitoring events will be submitted to DEQ under separate cover.

Our recommendations presented herein include installation of a passive venting system beneath the parking area, installation of an impermeable membrane beneath the proposed store, and use of impermeable backfill at selected locations in utility trenches to prevent subsurface migration of methane on and off site. We believe the proposed measures discussed in this letter are conservative based on our environmental studies, but prudent to alleviate concerns related to the isolated pockets of methane found in the fill.

SUMMARY OF CONDITIONS

As summarized in the August 14, 2001 memorandum, nested monitoring wells were installed in the north-central (MW-H1 nest), southwest (MW-H2 nest), and southeast (MW-H3 nest) portions of the property to evaluate methane conditions and potential for off site migration. Results of monitoring conducted at the wells has indicated that methane was not detected, or was detected at very low concentrations, at the well nests located in the southwest and southeast portions of the site. Methane was detected at 5 to 15 feet and 30 to 70 feet below grade in the well nest on the north-central portion of the property.

Results of our methane studies on the Haggan property are consistent with those conducted at various monitoring points elsewhere within the former Cobb Quarry site. These studies indicate there is no driving pressure that would create potential for methane migration either on or off site. The lack of off site migration is supported by low or non-detectable methane concentrations and lack of pressure at monitoring points on east and west sides of the Haggan property; the north, west and east sides of the Sexton Crest property; and at various monitoring points installed at the Sexton Place property. Near surface basalt bedrock exists over the majority of the western portion of the Haggan and Sexton Crest properties, which reduces the potential for methane migration to the west.

OBJECTIVES

The objectives of the methane mitigation measures for the Haggan project are to:

- Mitigate potential for methane migration to the Haggan Store from fill areas beneath the proposed parking lot area,
- Prevent methane migration from areas of fill material beneath the parking lot as a result of accumulation beneath surfaced areas, and
- Prevent migration of methane through utility corridors.

HAGGEN STORE

The majority of the west side of the Haggan property consists of near surface bedrock, and significant excavation into the basalt rock is planned to achieve finished grade for the proposed building slab. In addition, fill in the southwest corner of the building footprint will be either removed and replaced with clean structural fill or reworked to remove appreciable organic material. Because the building will be completely constructed on rock or soil that will not generate methane, there is little potential for methane occurrence beneath the proposed store. However, to address any concern related to methane in this area, an impermeable

membrane will be installed beneath the entire footprint of the store. Basalt bedrock beneath the building slab is currently planned to be over-excavated to accommodate various utilities beneath the building. The impermeable membrane will be placed on grade after excavation for the building slab, with the majority of utilities above the membrane. For major utilities entering the footprint of the building below the membrane, penetrations will be appropriately sealed to maintain the membrane integrity.

The membrane material shall consist of a 24 mil thickness woven HDPE polyolefin fabric with LDPE coating, equivalent to Matai USA, Inc.'s PPL 24 Membrane product. If warranted, and depending on the nature of material to be used for backfill of the slab area, a geosynthetic fabric shall be used to reduce puncturing of the membrane liner. Alternatively, sand or earth cover may be used to accomplish this objective. Earthen material shall be free of sticks, stones, or other materials that may damage the liner.

The membrane shall be field seamed by qualified personnel using a hand-held heat gun and roller. All field seams shall be lapped with a minimum of 2 inches of heat bonding on all seams. Utility penetrations shall be sealed with fabricated boots that are heat bonded with stainless steel straps, and butyl caulking shall be used between the liner and pipe to ensure proper seal.

There is a small potential that low concentrations of methane could migrate through utility trenches from fill areas east of the proposed store. Therefore, we recommend that impermeable backfill be installed in all utility trenches entering the footprint of the building to mitigate potential for migration of methane in trench backfill. Impermeable backfill shall consist of a bentonite-slurry mixture or equivalent. In addition, all electrical utilities entering the building footprint shall be properly sealed to prevent migration of methane through electrical conduits.

PARKING AREA

Passive venting is recommended on the east side of the property beneath paved areas to mitigate potential for methane accumulation or migration beneath asphalt paving. The venting system should consist of 4-inch-diameter, perforated PVC piping installed on 50-foot centers across the parking area. The perforated piping should be connected together in a manifold located along one side of the parking area. Vertical piping from the manifold is recommended at a minimum of two locations along each lateral to provide venting to atmosphere. The vertical pipe can be located in planters currently proposed for the development.

UTILITY CORRIDORS

Various utilities are planned on the property that could serve as a preferential pathway for migration of methane. To prevent potential for methane migration off site, or to the proposed store building, we recommend installation of impermeable backfill in utility

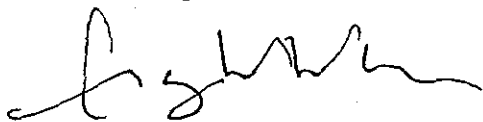
trenches at selected locations including at all property boundaries and adjacent to the on-site structures. As discussed previously, the impermeable backfill should consist of a bentonite-slurry mixture.

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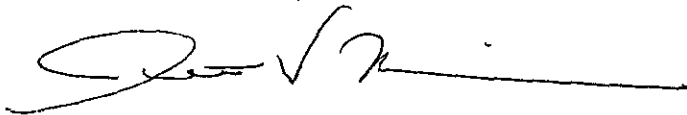
We appreciate the opportunity to provide these recommendations. From our meeting with DEQ, these recommendations are considered appropriate to address potential concerns related to methane, and to achieve both Hagggen and DEQ's goal of protecting public health and safety. Please call if you have any questions regarding this issue, and we will be pleased to discuss specific details for implementation of these recommendations.

Sincerely,

GeoDesign, Inc.



Craig W. Ware, R.G.
Senior Geologist



Scott V. Mills, P.E.
Senior Principal

cc: Mr. Fred Gast, Polygon Northwest Company (one copy)
Mr. Richard Allan, Ball Janik, LLP (one copy)
Mr. Tim Spencer, Oregon Department of Environmental Quality - NWR (one copy)
Mr. Tom Roick, Oregon Department of Environmental Quality - NWR (one copy)
Mr. Jim Duggan, City of Beaverton (three copies)
Mr. David King, Squier Associates (one copy)

CWW:SVM:kt

Two copies submitted

Document ID: Hagggen-5-110801-envl-Finalmethanerecs.doc

EXHIBIT 5



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

Northwest Region
2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5263 Voice
TTY (503) 229-5471

November 8, 2001

Fred Gast
Polygon Northwest
Andresen Plaza
2700 NE Andresen Road, Suite D-22
Vancouver, WA 98661-7343

Re: Subsurface Investigation – Proposed Sexton Crest Development
Former Cobb's Quarry Landfill (Sexton Mountain)

RECEIVED

NOV 11 2001

BALL

Dear Mr. Gast:

The Department of Environmental Quality (DEQ) reviewed the *Subsurface Investigation, Former Cobb Quarry, Proposed Sexton Crest Development* report dated August 28, 2001, and the revised report dated November 2, 2001. Both reports were submitted by GeoDesign, the latter following our meeting with you and GeoDesign in September. The revised report is approved by DEQ. In addition, DEQ reviewed the *Soil Sampling and Removal Report* dated May 16, 2001, previously submitted by GeoDesign.

While there were updates to methane monitoring in the report, any comments regarding methane will be addressed separately by Tim Spencer at a later date.

DEQ concurs with the findings that following the soil removals reported by GeoDesign, hazardous substances have not been detected in soil or groundwater at the Sexton Crest site at concentrations that exceed risk-based screening levels. In order to confirm that the contaminants which were detected in groundwater are consistently below concentrations of concern, DEQ requests one additional round of groundwater sampling from the existing wells. The follow-up sampling should conform to the June 2001 Work Plan and include the following:

- Monitoring and sampling of wells MW-SC1s (not previously sampled), MW-SC2s (not previously sampled), and MW-SC3i (or at which interval water is available).
- Analysis of all samples for total petroleum hydrocarbons (TPH) by NWTPH-Gx and NWTPH-Dx, volatile organic compounds (VOCs), polynuclear aromatic hydrocarbons (PAHs), and the leachate parameters listed in the Work Plan.

DEQ concurs with GeoDesign that given the consistency in groundwater occurrence in site borings there appears to be little benefit in waiting for the spring to sample. The additional sampling may proceed at your earliest convenience.



GeoDesign Inc.

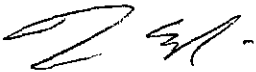
Page 2

Any residual petroleum-contaminated soil in the removal areas will have to be managed as solid waste during site grading activities. Because soil removals were conducted at two locations to address TPH-contaminated soils at the site, a 30-day public notice and comment period is required for DEQ approval of the cleanup. Consistent with how DEQ notifies the public at other sites where a cleanup has been conducted, we will issue a press release regarding the soil removals and submit a notice to the Secretary of State's Bulletin for publication December 1st.

If the additional water sampling data is consistent with previous results and below concentrations of concern, no additional groundwater sampling for hazardous substances will be required. DEQ will review any comments submitted regarding the cleanup. Following review and approval of the additional data, and pending substantive comments regarding the cleanup, DEQ will issue a "no further action" determination similar to that issued for Sexton Place, which did not apply to potential methane hazards.

If you have any questions about our review or the additional sampling requested, please call me at 503-229-5502.

Sincerely,



Thomas E. Roick, Project Manager
Voluntary Cleanup / Portland Harbor

Cc: Don Pettit / Tim Spencer, DEQ NWR
Bob Belding, GeoDesign
- Richard Allen, Ball Janik
- Joel Gordon, Buck & Gordon
- Mayor Rob Drake, City of Beaverton
- Elise Smith, CLEAN
- Chris Rich, Rycewicz & Chenoweth

State of Oregon
Department of Environmental Quality

Memorandum

To: Environmental Quality Commission

Date: November 19, 2001

From: Helen Lottridge

Subject: Agenda Item D, Discussion Item: *Strategic Directions through 2005*
December 6, 2001 EQC Meeting

The Agency's strategic plan is nearing completion. Since we last met, we have refined the proposed actions and measures and created our *Strategic Directions through 2005* for publication. We've attached this draft document.

Nina DeConcini, Director of DEQ Communications and Outreach, and I will present the document to you on December 6. The objective of our discussion is to receive Commission feedback on the draft document and to let you know about the Director's plans for implementation and communication.

We will integrate input from this discussion into the final document, which we hope to publish in early 2002.

12/6-7/01 EOC Meeting, Item D. Handout.

Comments Received from External Stakeholders on Strategic Directions Document

Status as of 12/5/2001

We provided copies of the Strategic Directions document to:

Oregon Tribes

EPA

Associated Oregon Industries

Oregon Environmental Council

Governor's office

Natural resource agency directors

Port of Portland

Oregon State University

League of Oregon Cities

Association of Clean Water Agencies

Northwest Food Processors

Northwest Pulp and Paper Association

Port of Morrow

Oregon Health Division

Oregon Refuse and Recycling Association

American Electronics Association

Local contacts in Southern Oregon

They are to provide comments by December 14; however, we have received some already. Comments came from Jeff Allen (OEC), Ted Loreson (Forestry), and Cheryl Koshuta (Port)

- 1) *Measurability*: Comment that the key actions and checkpoints, as articulate, weren't measurable enough. (JA, CK)

We plan to address this by adding language, either in the intro or in each Priority that clearly states we will have measures in place to gauge progress by a certain date (e.g., June 30, 2001).

- 2) *Environmental focus vs process focus*: Comment that the key actions are more process oriented about what we'll do rather than what we want to accomplish in terms of the environment. (JA, TL)

We plan to address by Stephanie repeating her view that how we do things is as important as what we do, and that we need to identify actions where we can evaluate if we're making process. No changes to the document.

- 3) *Order of the priorities*: Comment that the environmental priorities should come first. (CK, TL)

We plan to wait and see what other comments we receive in this area and then decide whether to reorder.

4) *Cross-program management detail*: Comment that the statement about 10 management actions for cross-program improvement leaves you wondering what they are. (CK)

We plan to address by changing the statement to identify the 3 high-priority projects (PBTs, sediments, mines) that are highlighted in the Toxics Priority.

5) *Toxics action specificity*: Comment that the action seemed torn between a general approach to toxics and a specific focus on mercury. (CK)

We plan to address by changing the action statement to eliminate the mercury reference and to have a reference to the list of toxics of focus (EPA's list, Governor's list)

6) *Mines and sediments*: Comment that these items don't really fit together. (CK)

We think the changes made under number 4 above will improve this.

7) *Mission statement*: Comment that the mission statement should describe how we do our work and the desired result of the triple bottom line. (TL)

We want a short, clear statement and don't plan to change it.

8) *Policy action*: Comment that we should have a key action relating to developing policies and rules with appropriate public participation. (TL)

This is an issue the EMT discussed, but determined that it was not an issue for the agency at this time, and therefore we don't plan to add it.

After we complete the Strategic Directions document, we will get back with those who commented to close the loop.

Timeline for completing the Strategic Directions document

December 6: EQC feedback

December 14: Final date for informal comments from stakeholders

December 18-21: Director review and evaluation of comments

January 8: EMT review of proposed changes; final decision on changes

January 15: Sent to printer

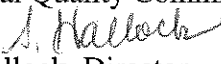
February 15: Estimated return of printed copies

Late February: Internal distribution

March, April, May: Director reviews with key stakeholders, editorial boards, etc.

State of Oregon
Department of Environmental Quality

Memorandum

Date: November 16, 2001
To: Environmental Quality Commission
From: 
Stephanie Hallock, Director
Subject: Agenda Item E, Informational Item: City of Portland Combined Sewer Overflow (CSO) Control Program Status Report
December 6, 2001 EQC Meeting

Purpose of Item To provide the Commission with up-to-date information on the status of the City of Portland's implementation of its Combined Sewer Overflow (CSO) control program.

The legal agreement between the Commission and the City pertaining to CSO control (Amended Stipulation and Final Order, or ASFO) requires the City to make a progress report to the Commission in a "public forum" in calendar year 2001.

**Background
Summary**

A large part of the City of Portland is served by a combined sewer system that historically discharged large quantities of untreated sanitary sewage and storm water to Columbia Slough and the Willamette River during most rain events. The overflows are a significant public health and water quality concern.

In 1991, the Commission and City entered into a legal agreement that established the framework for a twenty-year CSO control program to drastically reduce overflow frequency and volume. The agreement was amended in 1994 (the ASFO).

Now at the halfway point of the program, the City has made significant progress in controlling CSOs. All milestones and requirements of the ASFO have thus far been met on a timely basis.

The presentation by City staff will focus on the following aspects of the CSO control program:

- Implementation of the inflow control activities called the "Cornerstone Projects"
- Completion of facilities to control overflows to Columbia Slough
- Design and initiation of construction of facilities to control overflows to the Willamette River
- Additional activities to reduce overflows beyond the level required by the ASFO

- Attachments**
- A. Summary Report from the City to accompany the presentation
 - B. DEQ Fact Sheet on Portland CSOs giving additional background information

- Available Upon Request**
- 1994 ASFO and original 1991 agreement
 - CSO Management Plan (City of Portland, 1994), or Executive Summary
 - Numerous engineering and other technical analyses developed as part of the program

Approved:

Section:

Richard J. Santner

Division:

Neil Mullane

Report Prepared By: Richard J. Santner

Phone: 503-229-5219



CITY OF PORTLAND ENVIRONMENTAL SERVICES



1120 SW Fifth Avenue, Room 1000, Portland, Oregon 97204-1912

503-823-7740, FAX 503-823-6995

Dean Marriott, Director

November 15, 2001

Melinda Eden, Chair
Environmental Quality Commission
Oregon Department of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204

Subject: Progress Report to the EQC on Portland's Efforts to Control Combined Sewer Overflows

Dear Chair Eden:

The City of Portland is pleased to submit the enclosed Progress Report to the Commission for your consideration. City representatives will make a presentation to the Commission at your December 6, 2001 meeting, where we will describe what we have done to date to comply with the Amended Stipulated and Final Order of April 1994. We have made significant strides toward cleaning up the Willamette River, and we would like to share that information with you.

The Order requires that we report to the Commission in a public forum. I am looking forward to meeting with you and discussing what we have been able to accomplish, and the challenges that face us. As 2001 comes to a close, we reach the halfway mark of the twenty year combined sewer overflow control effort envisioned by the original Order. This is a good point to pause and reflect on how we have been able to attain the progress we have made, and what hurdles face us in the future.

I look forward to your reaction to the Report and guidance for the future.

Sincerely,

Dean C. Marriott

cc Stephanie Hallock, DEQ Director
Richard Santner, NW Region
Commissioner Dan Saltzman

A-1

Summary of BES Presentation to EQC on: Progress for Controlling Portland Combined Sewer Overflows

EQC Meeting Date: December 6-7, 2001

Presenters:

- Dean Marriott, BES Director
- Paul Gribbon, Program Manager for Westside CSO
- Virgil Adderley, CSO Program Manager

Purpose of Presentation

The Amended Stipulated Final Order (ASFO) requires the City of Portland to “report to the Commission in a public forum its progress for CSO reductions” that meet the specified levels of combined sewer overflow (CSO) control as well as working to achieve higher levels of control through other activities. This presentation will cover the work completed as of December 2001 in meeting and exceeding the ASFO requirements. We will also present the work underway to control the westside Willamette CSO discharges by 2006 and the eastside overflows by 2011. Finally, we will present the planned activities that will help the City continue to improve CSO control beyond the level required in the ASFO.

Status of Portland's CSO Program

We are at the halfway mark of the current 20-Year program begun in 1991. By December 2011, we will control CSO discharge volume by more than 96% from the original 6 billion gallons/year estimated in 1990

- Columbia Slough: Control CSO frequency to less than one overflow in ten years during the summer and one overflow in five years during the winter for a total 99% volume control - Completed December 2000
- Willamette River: Control CSO frequency to less than one overflow in three years during the summer and four overflows per year during the winter for a total 94% volume control by December 2011
 - Control seven Willamette River CSO outfalls by December 2001 – Completed.
 - Control 16 additional Willamette River CSO outfalls by December 2006 – Construction underway.

The CSO Program has currently achieved 99% CSO volume reduction in the Columbia Slough, 42% CSO volume reduction for the Willamette River and a total citywide volume reduction of 53%.

The cost of Portland's CSO Program is estimated to be one billion dollars over the 20-year period. Portland has invested about \$300 million since 1991 to achieve the current level of CSO control

Completed Cornerstone Projects

The Cornerstone Projects are a cost-effective method to reduce CSOs by keeping stormwater runoff out of the combined sewer system. Removing stormwater from the sewer system reduces the combined sewage flow and allows construction of smaller, less expensive pipes and treatment facilities, and helps hold down total program costs. To date, the Cornerstone Projects have removed about 1.8 billion gallons of stormwater annually from the combined sewer system at a cost of approximately \$85 million.

There are four categories of Cornerstone Projects designed to address stormwater at the source – Sewer separation, Stormwater Sumps, Roof Downspout Disconnection, and Stream Diversion. These projects help with two major challenges in Portland's combined sewer system – they reduce CSO and significantly reduce basement flooding. A map of the combined sewer areas served by the Cornerstone Projects is provided as an attachment.

1. Sewer Separation

In specific Portland neighborhoods, Environmental Services installed new pipes to separate stormwater from sewage and remove stormwater runoff from the combined sewer system. Sewer separation projects are complete in some areas of west and north Portland.

2. Stormwater Sump Installation

Environmental Services has installed sumps in North/Northeast Portland to collect street runoff and allow stormwater to seep into the ground, rather than flow into the combined sewer system. More than 2,800 sumps have been installed in areas served by combined sewers. Sump installation projects will be substantially completed by the end of 2001.

3. Downspout Disconnection

The Downspout Disconnection Program works with residents of selected east Portland neighborhoods to disconnect their downspouts from the combined sewer system and allow their roof water to drain to their gardens and lawns. Nearly 24,000 residential downspouts have been disconnected through the Program, removing more than 200 million gallons of stormwater per year from the combined sewer system.

4. Stream Diversion

Environmental Services is building new pipelines to divert Tanner Creek and smaller West Hills streams from the combined sewer system. These creeks were piped into the sewer system decades ago. Today, this relatively clean runoff contributes to combined sewer overflows.

Completed Columbia Slough Projects

Environmental Services completed a series of projects in north Portland to reduce combined sewer overflows to the Columbia Slough by more than 99 percent as of December 2000. The projects include the Cornerstone Projects described earlier and the Columbia Slough CSO Facilities. A map of the Columbia Slough CSO projects is provided as an attachment. BES staff is currently evaluating the improvements in bacteria water quality in the area of the CSO outfalls. A summary of this information may be available for presenting at the EQC meeting.

The Cornerstone Projects completed in the Columbia Slough consist of sumps, downspout disconnection and sewer separation in the St Johns, Oswego and Oregonian basins. The stormwater separated from the combined system is treated at the Ramsey Lake constructed wetland that has been constructed specifically to treat runoff from these Columbia Slough basins.

The second phase of the Columbia Slough projects was the large scale CSO Facilities that consisted of the Columbia Slough Consolidation Conduit (CSCC) and the Columbia Boulevard Treatment Plant (CBWTP) Additions. These projects were constructed and placed in service by December 2000. The total estimated cost of the Columbia Slough CSO Facilities was \$195 million.

Columbia Slough Consolidation Conduit

Construction on the Columbia Slough Consolidation Conduit, also known as the Big Pipe, was finished in October 2000. It took Environmental Services three years to build the 3.5-mile, 6-foot and 12-foot diameter, reinforced concrete pipeline. In October, the CSCC began collecting and transporting combined sewage to the Columbia Boulevard Wastewater Treatment Plant. The cost of the conduit was about \$73 million.

Columbia Boulevard Treatment Plant Additions

In conjunction with Big Pipe construction, Environmental Services completed several significant additions to the Columbia Boulevard plant to accommodate the new flows collected by the CSCC.

- The influent pump station (IPS) was constructed to pump out up to 105 million gallons per day of combined sewage from the CSCC for treatment. Cost for the IPS was approximately \$12 million.

- New primary clarifiers were constructed and older primary tanks were refurbished to provide significant wet weather treatment capacity at the plant for the potential peak flows from the Columbia Slough CSO system. The cost of the new and refurbished clarifiers was about \$26 million.
- Construction was completed on a second outfall pipe, 72-inches in diameter, to transport the treated wastewater effluent to the Columbia River. Cost of the new outfall was about \$18 million.
- New Dechlorination Facility was constructed to reduce chlorine residual from disinfected effluent to less than one part per million before the flow is discharged to the Columbia River. Cost of the new dechlorination facility was \$8 million.

Willamette River Projects

Environmental Services has completed several specific projects in the Willamette basin designed to control seven CSO outfalls by December 1, 2001 as required by the ASFO. All seven outfalls are now stormwater-only pipes and will no longer discharge sanitary or CSO flow.

The large scale Willamette River CSO Projects will be implemented in two phases to control all of the CSO outfalls on the Willamette River by the Year 2011. The first phase will focus on controlling 16 outfalls (mostly on the westside of the Willamette) by December 2006. This phase is already underway with design and construction projects. The second phase will focus on controlling the remaining CSO outfalls on the eastside by December 2011.

During the first phase of the large Willamette CSO facilities, Environmental Services will build large pipes, deep tunnels, a large pump station and additional Columbia Boulevard treatment facilities to control, transport and treat the westside Willamette CSO flows. These facilities will be constructed by December 2006. After that time, construction will begin for the eastside Willamette CSO facilities. The eastside will also include new pipes, tunnel, pump station expansion and additional treatment facilities. All CSO construction will be completed by 2011. By that time, the CSO volume discharged to the Willamette River will have been reduced by 94% and overflow events will occur less than once in three years during the summer and four times per year during the winter.

Westside CSO Facilities

Southwest Parallel Interceptor

The Southwest Parallel Interceptor (SWPI) will be a 15,000 foot pipeline three to six feet in diameter that will run parallel to the river and collect wastewater and CSO flows from the southwest area of the combined system. The current interceptor pipe, built in the 1950's, is too small to handle both wastewater and storm flows. The new interceptor will add capacity so the system will be able to handle existing and future combined flows from the westside of the Willamette and transport them to the Columbia Boulevard Wastewater Treatment Plant. Design of the new pipeline is completed and construction is about to begin and will be finished in 2003. The cost of the Southwest Parallel Interceptor is estimated to be \$21 million.

Westside CSO Tunnel

The City will bore and construct a large, deep tunnel pipeline from SW Clay Street to the northwest industrial area and then cross under the Willamette River to carry combined sewer flows to the new Swan Island Pump Station. The tunnel will be 22,000 feet in length, 14-feet in diameter, approximately 120 feet underground. The tunnel is estimated to cost approximately \$125 million.

Swan Island Pump Station

This facility on Swan Island will pump combined sewage from both sides of the Willamette to existing sewers in north Portland. In 2006, this station will pump 100 million gallons per day (MGD) from the westside tunnel into the existing interceptor to deliver the flows to the Columbia Boulevard Wastewater Treatment Plant. In 2011, this station will be expanded to pump 220 MGD to drain the combined sewer flows from both the westside and the eastside tunnels. The pump station is estimated to cost \$80 million to manage the 2006 flows.

Columbia Boulevard Treatment Plant Additions

The Columbia Boulevard plant will require additional facilities and improvements to accommodate and treat the projected flows from the westside system in 2006. The new facilities and upgrades include:

- New wet weather headworks that will allow 150 MGD more flow to enter the wet weather treatment facilities. The new facility is estimated to cost \$13 million.
- Expanded pumping capacity at the Columbia Slough Inflow Pump Station up to 135 MGD. Upgrading the pump station capacity is estimated to cost approximately \$3 million.

Eastside CSO Facilities

In addition to the westside CSO facilities, the projects that will be completed for the 2011 target include:

Eastside CSO Tunnel

This deep, 17-foot diameter tunnel will collect combined sewage from southeast Portland and northeast Portland and deliver the flows to the Swan Island Pump Station. The tunnel will be approximately 30,000 feet in length and is estimated at this early stage to cost \$270 million. BES will begin a pre-design of this facility next year.

Activities to Achieve CSO Reductions Beyond ASFO Level

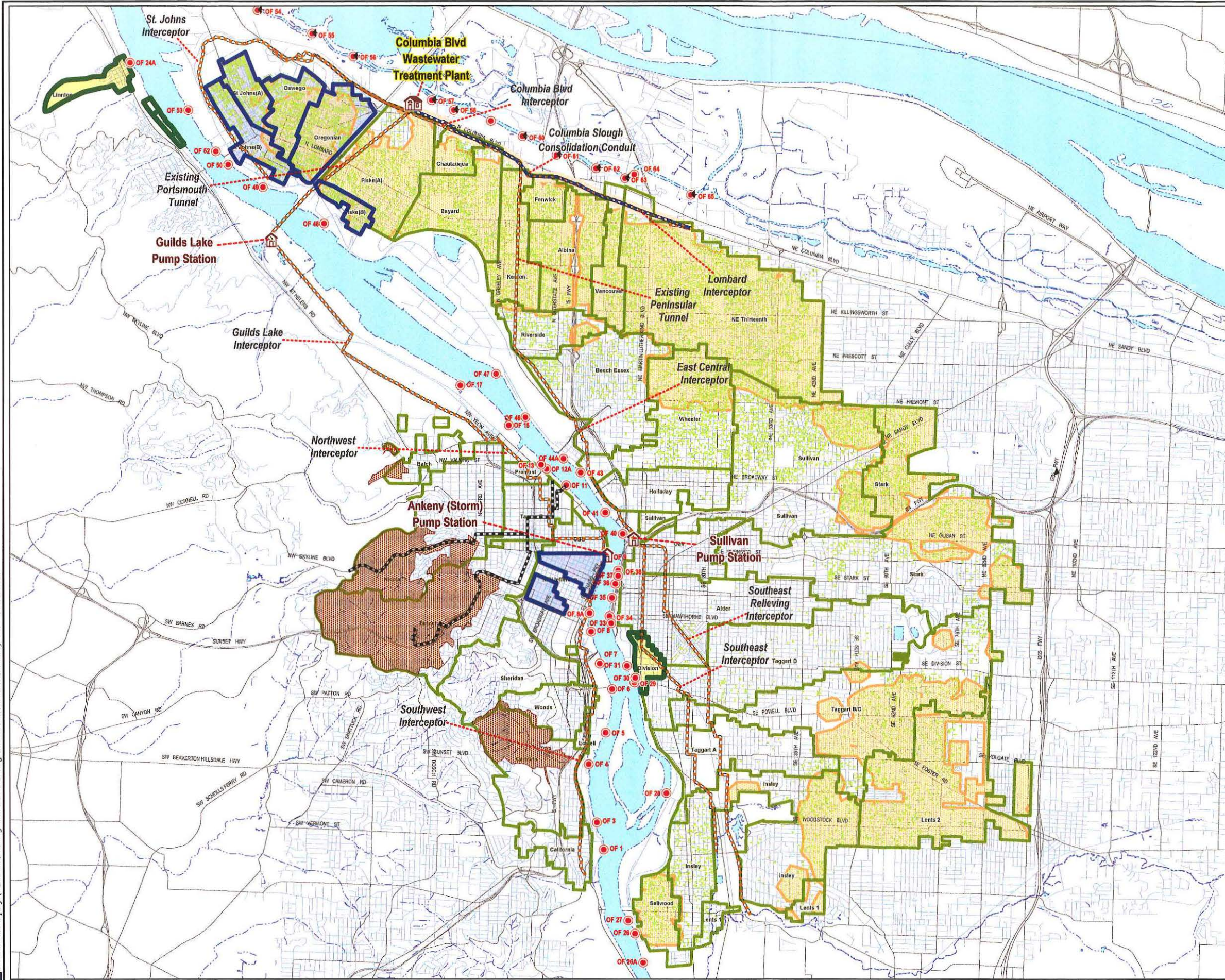
BES is committed to improving water quality and watershed health in the Portland service area. That commitment is reflected in integration of planning and design of surface water and sewer facilities to provide increased reduction in CSO and improved water quality. BES is pursuing specific activities that will provide multiple benefits for addressing sewer service needs, improved watershed functions, and reductions in CSO beyond that which is required for the ASFO frequency control. These activities include:

Residential Downspout Disconnection Program – This program is now moving beyond the Cornerstone Project area and has begun disconnections in areas not previously sumped or separated. Residential roofs will be disconnected from the sewer system and directed to the lawns and gardens. Under large storms, a portion of the roof water may runoff the lawns to the street and into the inlet. In areas that have sumps or have been separated, this excess runoff is completely removed from the combined system. In these new expanded areas that are not sumped or separated, the excess flow will drain back into the combined at a much slower rate.

System Capacity / Basement Flooding Control Projects – The Sewer Relief and Reconstruction projects implemented by BES in the combined system will often incorporate inline storage to dampen peak flow rates and prevent downstream flooding. Where feasible, the inline storage will also be used to help reduce CSO by restricting the release rate and storing flows that would normally be discharged to the river or the CSO facilities.

Inflow Control Program – BES is currently working with public and private property owners to modify existing drainage systems on their property or to re-design future improvements to direct roof and parking lot runoff to vegetated areas. BES has also launched the Eastside Inflow Control Predesign Project to determine the full extent that inflow controls can be cost-effectively implemented in the eastside combined sewer basin to provide critical basement flooding control and further reduce CSO flows.

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Completed Cornerstone Projects

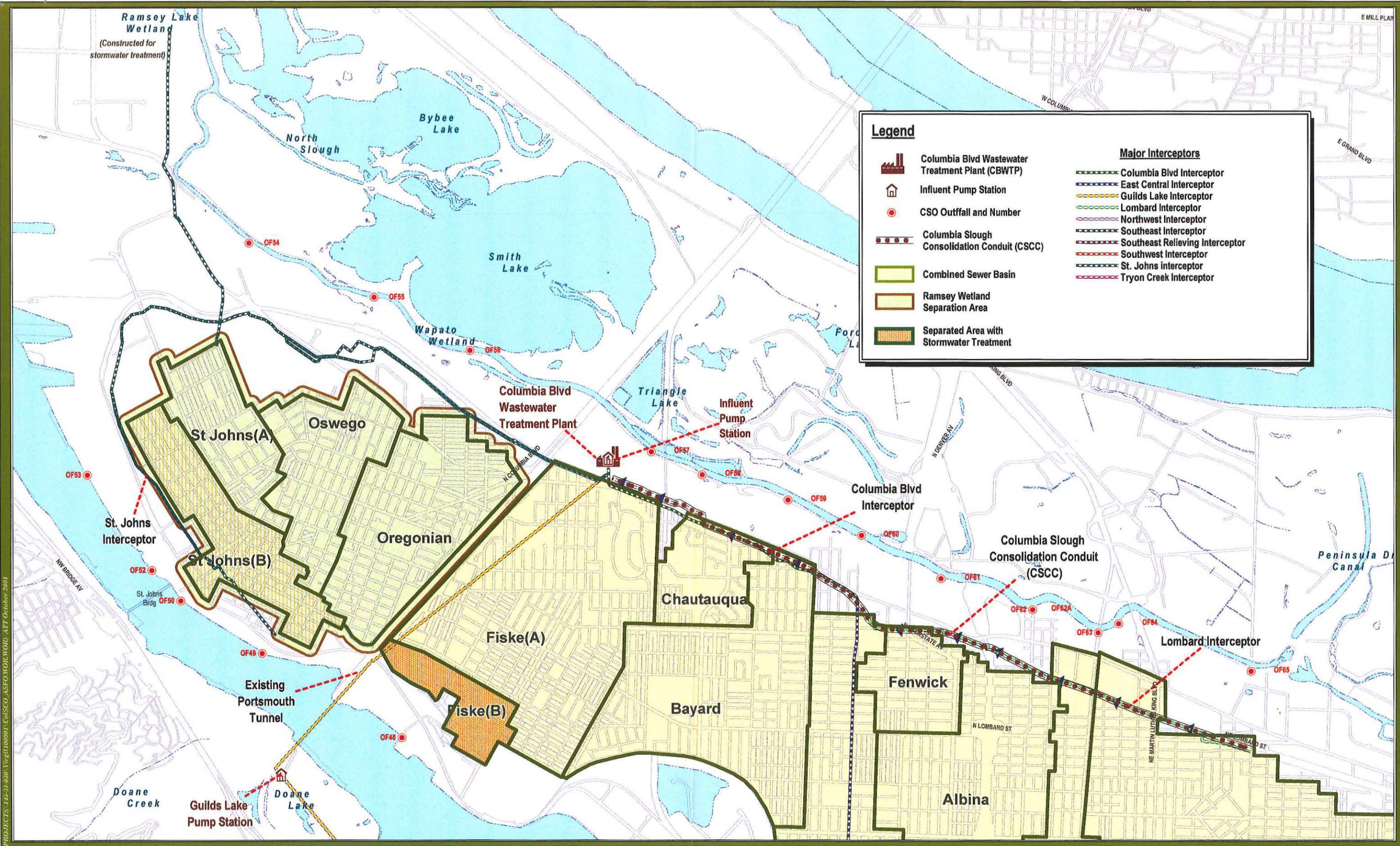
Legend

- CSO Outfall and Number
- Columbia Blvd Wastewater Treatment Plant
- Major Pump Stations
- Existing Interceptors
- Tanner Creek Separation System
- Columbia Slough Consolidation Conduit (CSCC)
- Combined Sewer Basin Boundary
- System Improvement Areas
- Separated Basins
- Sumped Area
- Stream Separation Area (To be completed by 2006)
- All Properties Inspected by Downspout Disconnection Program During 07/01/2000 - 06/30/2001



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ConerStone01.WOR

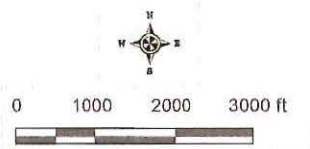




Legend

	Columbia Blvd Wastewater Treatment Plant (CBWTP)	Major Interceptors	
	Influent Pump Station		Columbia Blvd Interceptor
	CSO Outfall and Number		East Central Interceptor
	Columbia Slough Consolidation Conduit (CSCC)		Guilds Lake Interceptor
	Combined Sewer Basin		Lombard Interceptor
	Ramsey Wetland Separation Area		Northwest Interceptor
	Separated Area with Stormwater Treatment		Southeast Interceptor
			Southeast Relieving Interceptor
			Southwest Interceptor
			St. Johns Interceptor
			Tryon Creek Interceptor

Completed Columbia Slough CSO Facilities



Produced In MapInfo (PROJECTS: 116-91-030_Virgin100901_ColSCO_ASFO_V02.WOR) ATT October 2001



State of Oregon
Department of
Environmental
Quality

Portland Combined Sewer Overflow (CSO) Management

Background

A large part of the City of Portland, about 30,000 acres, is served by a combined sewer system in which sanitary sewage from homes and businesses, and stormwater from streets, roofs and driveways flow into a single set of sewer pipes. During periods of dry weather, all of the sanitary sewage is delivered by the sewer system to the Columbia Boulevard Wastewater Treatment Plant (CBWTP) for proper treatment and discharge to the Columbia River.

However, almost any time it rains, the capacity of the large interceptor sewers that run along the Willamette River is exceeded, and a combination of stormwater and untreated sanitary sewage is discharged to the river. (The formerly frequent CSO discharges to Columbia Slough have been virtually eliminated as of December 2000.)

The CSO discharges result in violation of the Water Quality Standards established by the Environmental Quality Commission (EQC) for bacteria, floatables and solids, and possibly other pollutants. The Wastewater Discharge Permit issued to Portland by DEQ for the treatment plant expressly prohibits violation of Water Quality Standards by the CSO discharges.

To address these violations, the EQC and Portland entered into a mutually agreed upon enforcement order called a Stipulation and Final Order (SFO) in August of 1991. The SFO was amended in August 1994.

The Amended Stipulation and Final Order (ASFO) requires that the frequency of CSOs to the Willamette River be drastically reduced by the year 2011. A detailed compliance schedule of implementation milestones is set forth, with stipulated penalties identified for failure to meet the schedule or to attain the level of CSO control required.

Portland complies with CSO Order

The City of Portland has thus far met all CSO compliance schedule milestones set forth in the original and amended versions of the order.

The City has made substantial progress constructing the stormwater inflow reduction facilities that are intended to reduce combined sewage volume. These "Cornerstone Projects" include stormwater infiltration sumps, down spout disconnections, sewer separations and stream diversions.

Construction of the CSO control facilities for the Columbia Slough sewer basins was completed at the end of 2000. Detailed planning and pre-design for the major CSO control facilities for the Willamette River sewer basins is well advanced and construction began in October 2001.

The City also has undertaken other activities to improve water quality and habitat in the main stem Willamette River, Johnson Creek, Tryon Creek and Columbia Slough, including implementation of the TMDL for Columbia Slough.

Over the past several years, the City has undertaken a process to address water quality and habitat issues on an integrated watershed basis for these water bodies. This focus takes on special importance with recent Endangered Species Act listings of salmon and steelhead in the Willamette Basin and lower Columbia River.

EQC/Portland CSO chronology

August 1991

The EQC and the City execute original SFO to address violations caused by CSOs. SFO requires that CSOs to Columbia Slough and Willamette River be controlled except when 10 year return summer storm/5 year return winter storm or larger occur. Development of CSO Management Plan is required.

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Richard J. Santner
(503) 229-5219
santner.richard@deq.state.or.us

Last Updated 11-15-01
By: Richard J. Santner

June 1993

Draft Plan is completed. It analyzes facilities and costs needed to meet level of CSO control specified in SFO, and other more and less stringent levels of control for the Willamette.

November 1993-March 1994

The non-decision making "Collaborative Process" Committee consisting of 2 EQC members, 2 City Council members, DEQ Director, a Portland Bureau of Environmental Services senior manager hold a series of well-attended public meetings to evaluate options identified in Plan. Committee recommends to EQC and Council that the less stringent "Enhanced Federal Level" of CSO control be adopted for Willamette discharges, but that Columbia Slough control requirement remain as in SFO.

June-August 1994

EQC and Council concur in Collaborative Process recommendation and execute ASFO. CSO control requirement for Willamette is set at 3 year return summer storm and 4-in-year winter storm because it is the most "cost effective" level of control. This reduces estimated overall CSO control program cost from about \$1billion to about \$700million (in 1993 dollars).

December 1994

City completes Final CSO Management Plan, which elaborates on facilities needed to meet ASFO. EQC approves "Schedule and Control Strategy" set forth in Final Plan in April 1995.

January 1996

EQC adopts new "Bacteria Rule" Water Quality Standard which establishes 10 year summer/5 year winter storm prohibition of raw sewage discharges as regulatory standard, but allows EQC to approve less stringent standard for individual CSO systems. DEQ considers prior EQC concurrence in ASFO and Final Management Plan to constitute such approval for Portland's CSOs to Willamette.

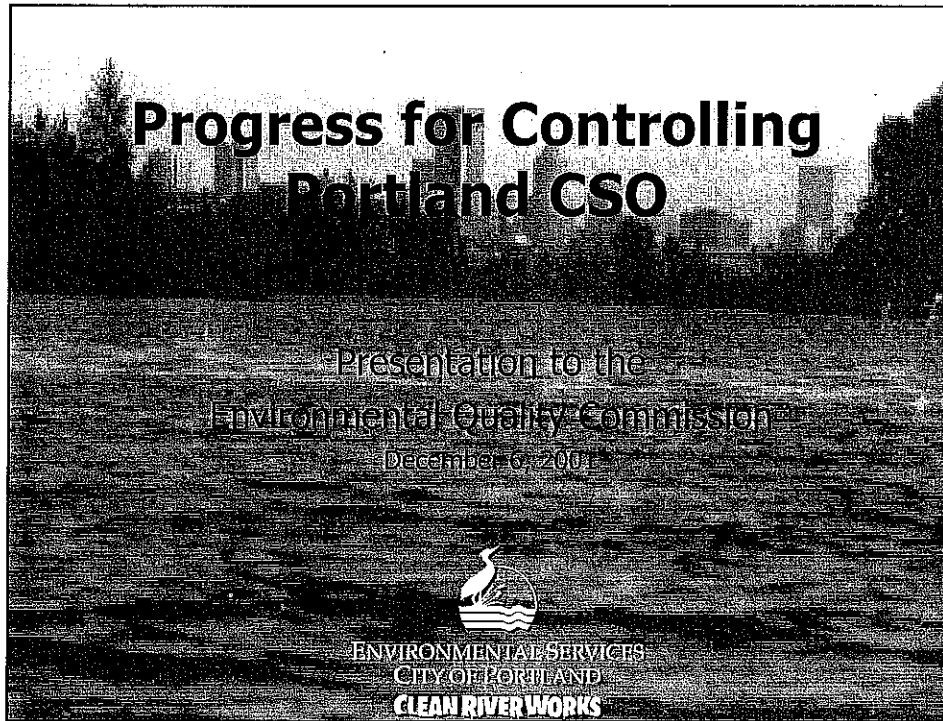
1995-2001

1. "Cornerstone Projects" (sewer separations, storm water sumps, down spout disconnections, stream diversions, sewer system inline storage optimization) make significant progress to remove storm water from combined sewer system and reduce CSO volume.
2. Willamette River CSO Predesign Project to define precise sizing and configuration of Willamette CSO control facilities carried out. Construction of major west side Willamette control facilities begun in 2001 with completion in 2006. Construction of major east side control facilities to follow with completion by 2011.
3. March 1998: NWEA and City settle citizen lawsuit on CSOs. Terms of settlement include commitment by City to implement ASFO and plaintiffs standing to seek relief from court for City's failure to comply with ASFO schedule.
4. City begins working on a comprehensive Clean River Plan in 1999. It looks at CSO Control Program in that context.
5. Columbia Slough CSO control facilities completed December 2000. Seven CSO discharge points on the Willamette to be controlled by December 2001.

Alternative Formats

Alternative formats of this document can be made available. Contact DEQ Public Affairs for more information (503) 229-5696.





Purpose

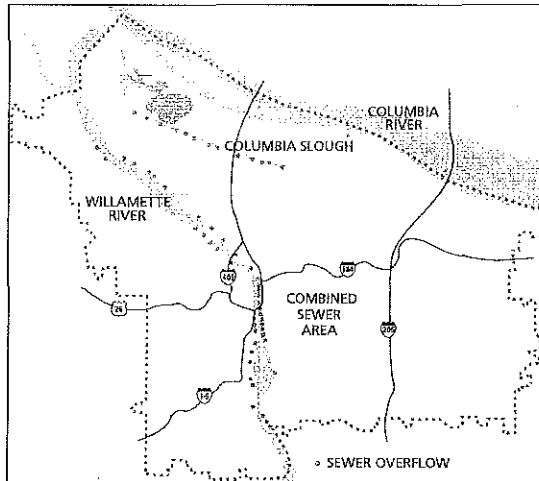
- Report to EQC in public forum on progress for reducing combined sewer overflows (CSO)
 - Part of our agreement in the Amended Stipulated and Final Order (ASFO)
 - First half of 20-year Program is completed
 - Next phase - Willamette CSO - is underway
- Present program results and new information
- Present Willamette CSO Projects
- Present on-going CSO reduction activities

Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Portland's Combined Sewer Area

- Oldest City Area
 - Combined Sewers first installed 1860
- Represents 35% of the City area (42 square miles)
- Serves 60% of the population

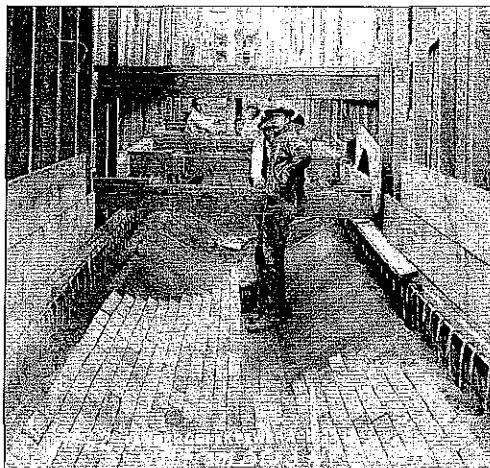


Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Portland's Combined Sewer System

- Constructed to collect sanitary sewage and street runoff
- Designed to discharge to River & Slough
- 55 CSO outfalls
 - 13 Columbia Slough
 - 42 Willamette River
- Interceptor & Treatment System
 - Constructed by 1952

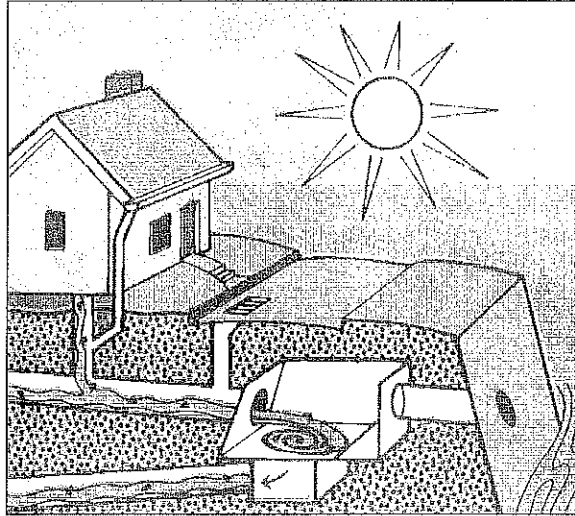


Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Dry Weather Operation

- Diversion structures send flow to interceptor & treatment
- Interceptor system conveys peak sanitary and small storm flows

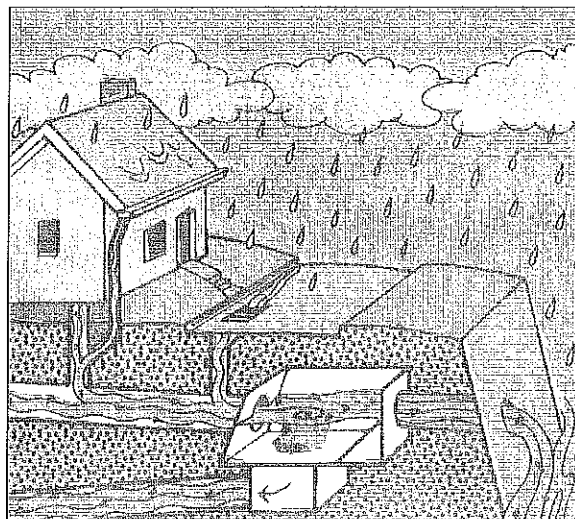


Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Wet Weather Operation

- Combined sewage overflows (CSO) the diversion dams
- Interceptor system is surcharged
- Treatment plant is fully utilized



Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Portland's CSO Issues

- 1990 Estimated CSO Discharges
 - 6 billion gallons per year
 - 1.2 billion gallons to the Columbia Slough
 - 4.8 billion gallons to the Willamette River
 - 50 CSO Events per year (100 calendar days)
- CSO discharges did not meet water quality standards under the Clean Water Act
- 1991 Stipulated Final Order (SFO)
- 1994 Amended Stipulated Final Order (ASFO)

Dec 6, 2001 Presentation to EQC

Portland CSO Progress

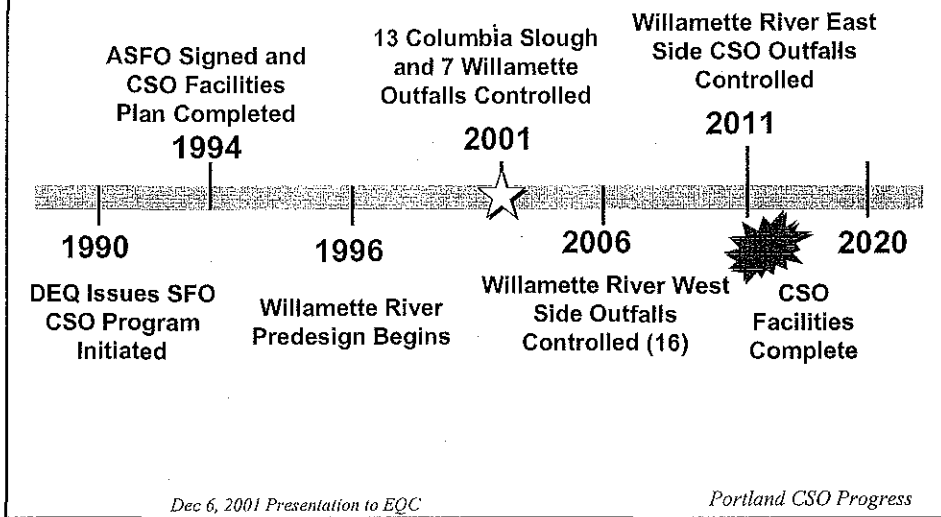
Portland's CSO Program: Three Major Efforts

- Cornerstone Projects
 - Cost-effective stormwater inflow control measures
 - Infiltration Sumps, Downspout Disconnection, Sewer Separation, and Stream Diversion
- Columbia Slough CSO Projects
 - Large storage conduit, pumping and treatment
- Willamette River CSO Projects
 - Deep tunnel storage, pumping and treatment

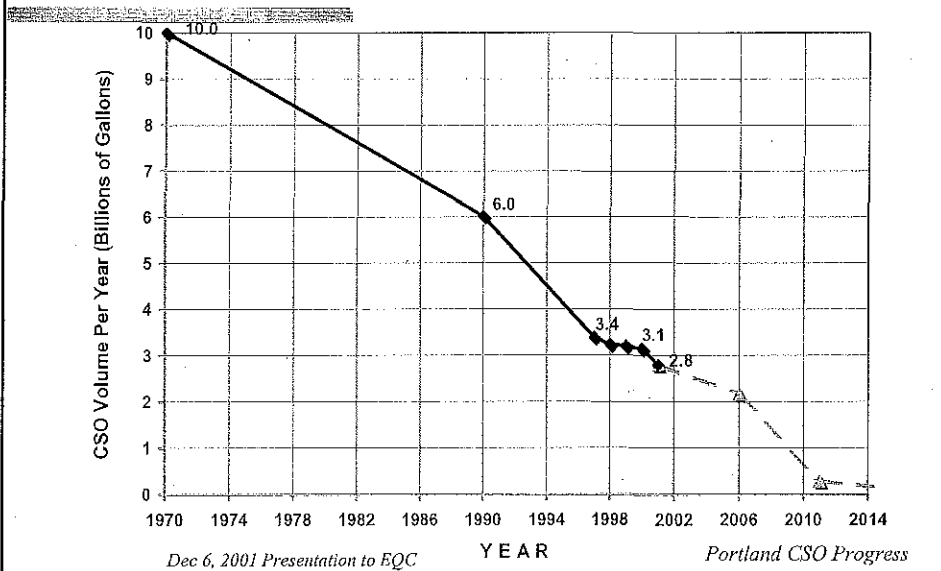
Dec 6, 2001 Presentation to EQC

Portland CSO Progress

CSO Program Schedule

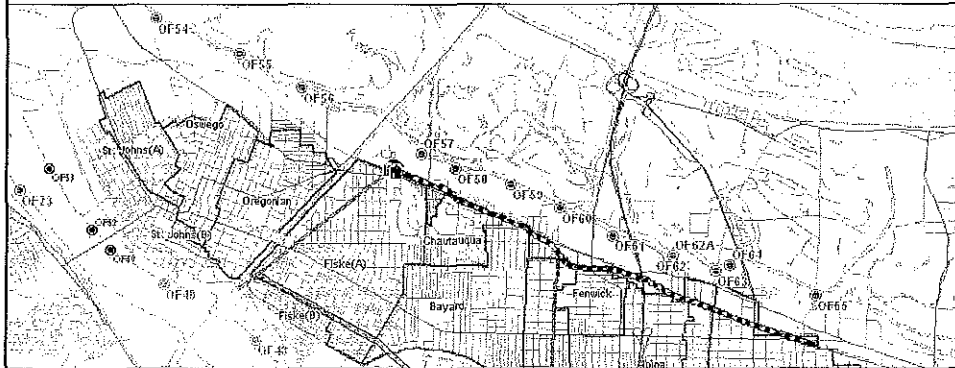


Portland's CSO Reductions



Milestones in Eliminating Outfalls

- All 13 Columbia Slough Outfalls Controlled by Dec. 2000
 - 99.6% Volume Reduction
- First 7 Willamette River Outfalls Controlled by Dec. 2001
 - 42% Volume Reduction for entire Willamette System



Cornerstone Projects Success

- Removed 1.8 billion gallons stormwater per year
- Cost to date: \$85 million
- Cornerstone Projects Consist of:
 - Stormwater Infiltration Sumps
 - Downspout Disconnection
 - Sewer Separation
 - Stream Diversion Projects

Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Stormwater Infiltration Sumps

- Over 2,800 sumps installed in Combined Sewer Area
- Sedimentation manholes installed upstream of sump for treatment



Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Downspout Disconnection

- Over 32,000 homes have disconnected downspouts in CSO area
- About 250 million gallons per year of CSO reduced
- Program expanding to include additional areas

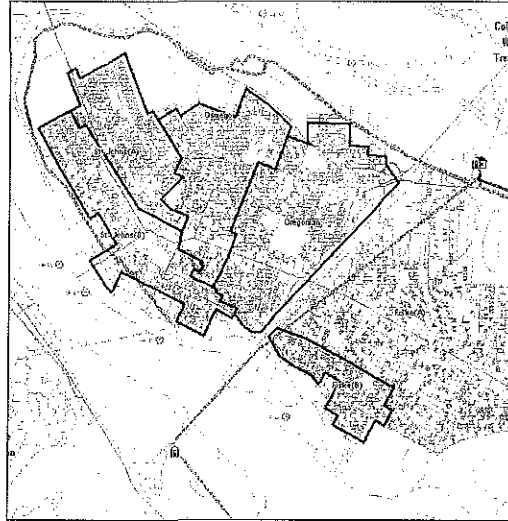


Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Sewer Separation

- Seven basins separated to remove stormwater from combined system
- Integrated with sumps and downspout disconnection
- Stormwater treated water quality ponds, swales and constructed wetlands

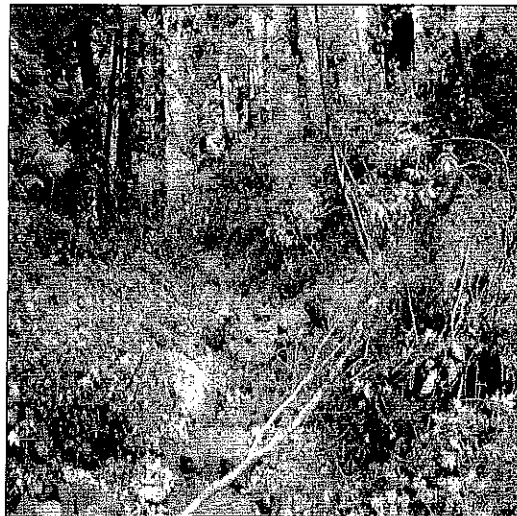


Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Stream Diversion

- Two large stream areas to be removed from combined system
- Tanner Creek Stream Diversion is in construction phase
- Carolina Stream Diversion is in early design phase



Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Columbia Slough CSO Projects

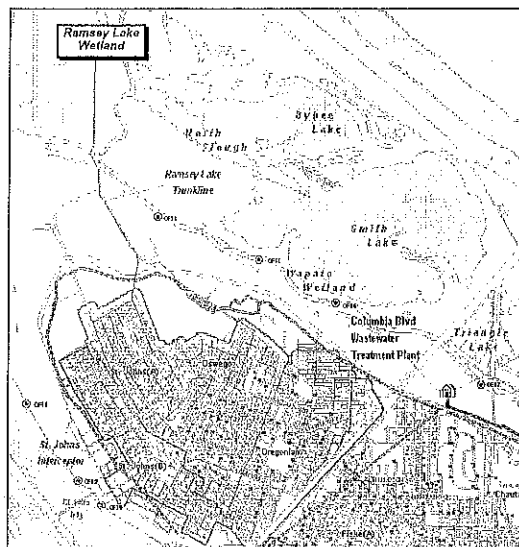
- Eliminated combined sewage into the Columbia Slough to 99.6% of 1990 volume
- 13 overflow points controlled by Dec 2000 to required ASFO level or higher
- Total Cost (including sewer separation projects) was \$195 million
- Columbia Slough Projects Include:
 - Sewer Separation (Cornerstone Projects)
 - Consolidation Conduit
 - Pumping and Treatment Improvements

Dec 6, 2001 Presentation to EQC

Portland CSO Progress

West Columbia Slough CSO Projects

- Sewer Separation with Stormwater Treatment
 - Separated three northwest basins
 - Treatment at Ramsey Lake Constructed Wetland
- Installed sumps where soils allowed
- High level downspout disconnection (>80%)



Dec 6, 2001 Presentation to EQC

Ramsey Lake Wetland

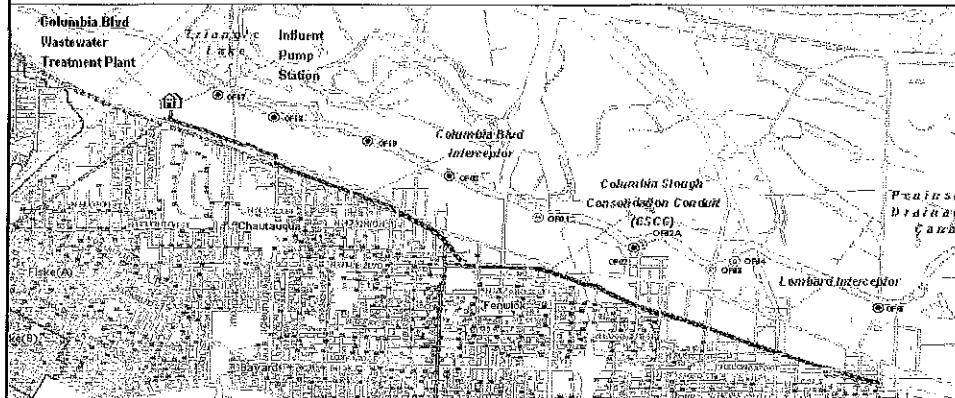
- Constructed to treat North Portland separated stormwater
- Provides diverse wildlife habitats
- Provides opportunities for Public Education



Dec 6, 2001 Presentation to E

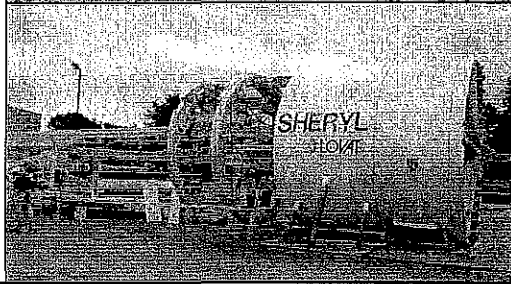
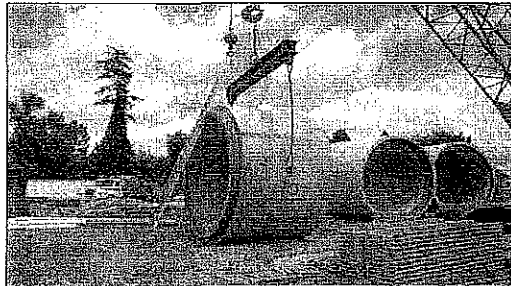
East Columbia Slough Projects

- Consolidation Conduit
- Influent Pump Station
- Columbia Boulevard Treatment Plan Expansion



Consolidation Conduit - "The Big Pipe"

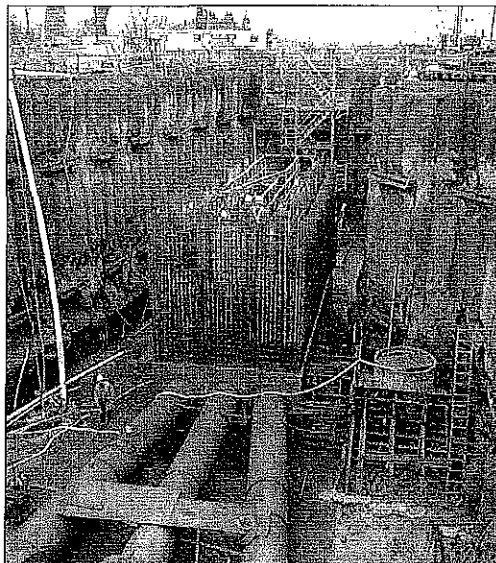
- 3.5 Mile, 12-foot and 6-foot conduit
- Tunnel and open-cut techniques
- Completed Oct 2000
- Cost was \$73 million
- Controls 10 outfalls



Dec 6, 2001 Presentation to EQC

Influent Pump Station

- New 105 MGD Station
- Dewateres the Consolidation Conduit
- Pumps to Treatment Plant
- Cost was \$12 million

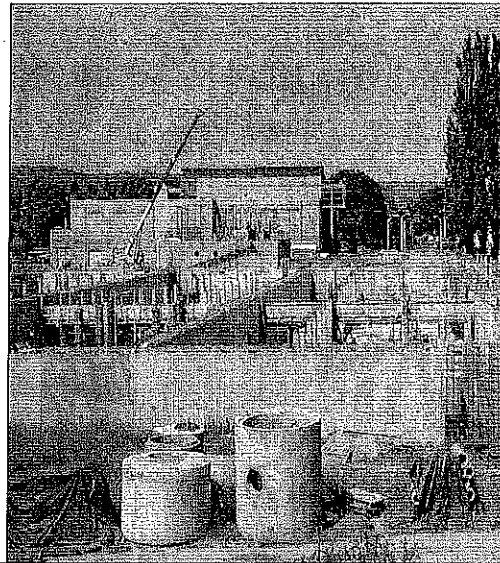


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New Primary Clarifiers

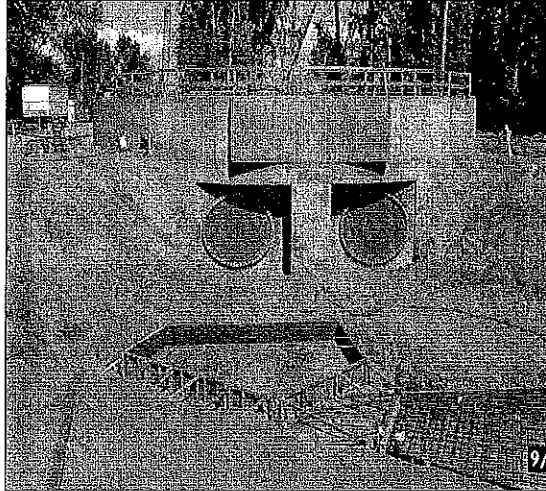
- Constructed 3 new dry weather primary clarifiers
- Converted existing clarifiers to wet weather primaries
- 300 MGD wet weather treatment capacity
- Total Cost - \$26 million



Dec 6, 2001 Presentation to EQC

New Dechlorination Facility

- Reduces chlorine residual in wet weather flows to 1 part per million
- Protects Columbia River water quality
- Cost was \$8 million

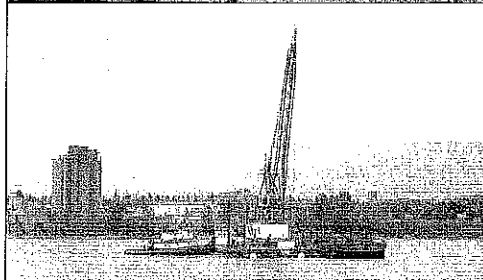
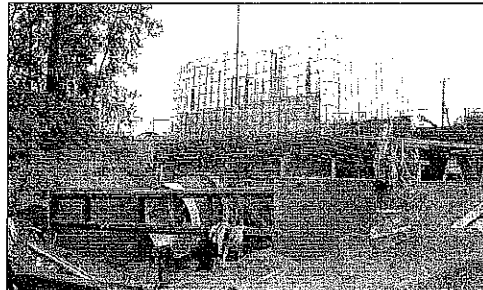


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Portland CSO Progress

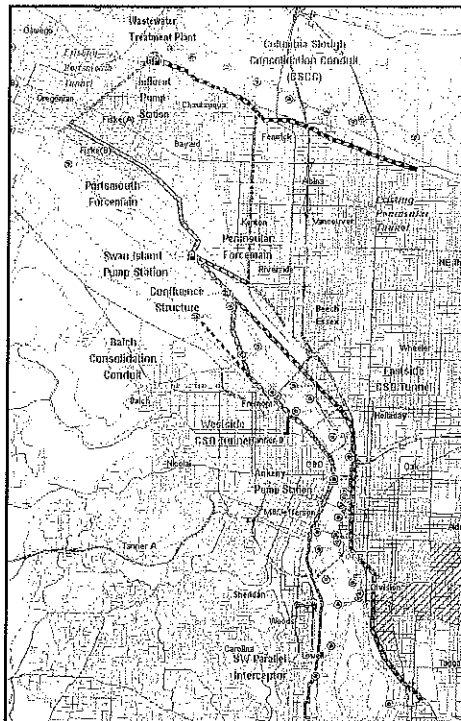
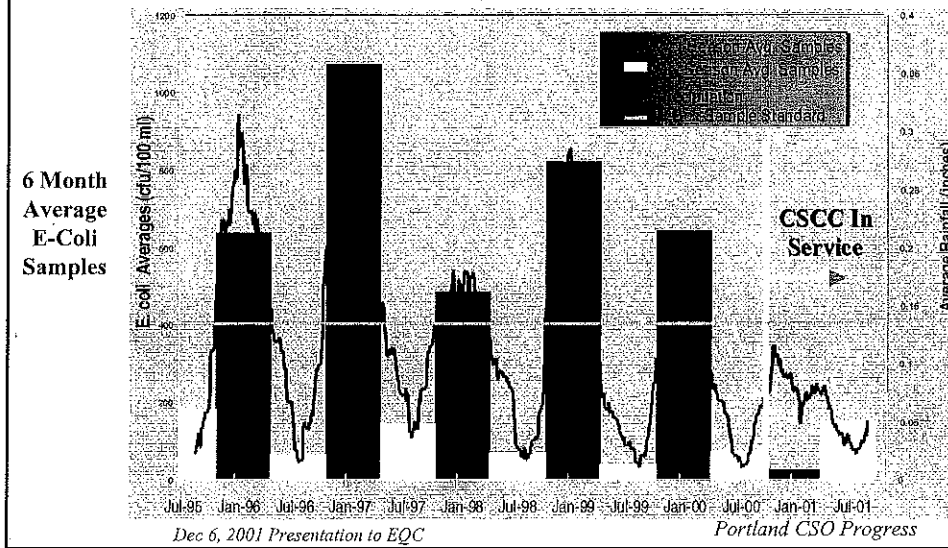
New Treatment Plant Outfall

- New 84" - 96" Conduit
- Over one mile long
- Discharges into Columbia River
- Second outfall for CBWTP
- Cost was \$18 million



Dec 6, 2001 Presentation to EQC

Improvements in Lower Columbia Slough Bacteria Water Quality



Willamette River CSO Projects

- Early Willamette Cornerstone Projects
 - 7 Outfalls Controlled by Dec 2001
- West Side Projects
 - Control 16 Outfalls by Dec 2006
- East Side Projects
 - Control All Outfalls by Dec 2011

Portland CSO Progress

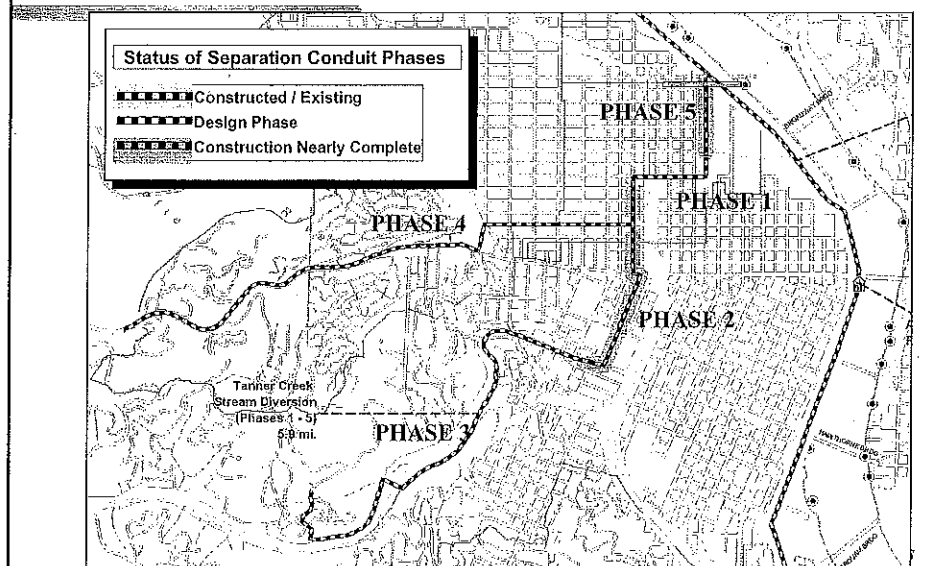
West Side Willamette CSO Projects

- Stream Diversion
 - Tanner Creek and Carolina Basin
- Southwest Parallel Interceptor
- West Side CSO Tunnel
- Swan Island Pump Station
- Peninsular Forcemain
- CBWTP Expanded Facilities

Dec 6, 2001 Presentation to EQC

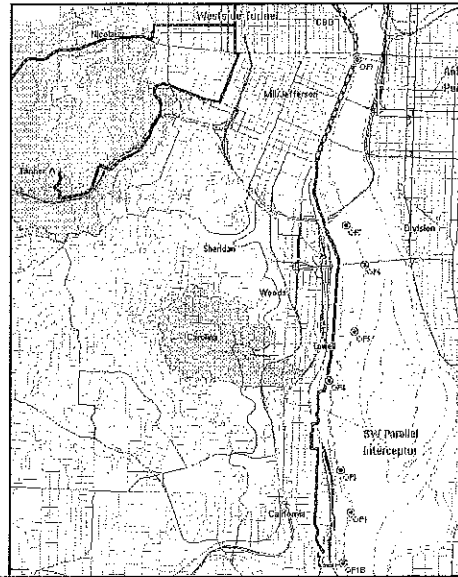
Portland CSO Progress

Tanner Creek Stream Separation



Southwest Parallel Interceptor

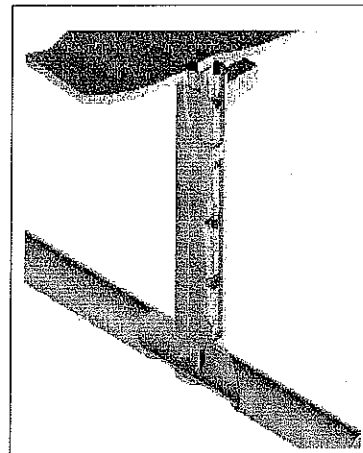
- 3 to 6-ft diameter pipe
- 2.7 miles long
- SW Taylors Ferry Road to Clay Street on Front Ave
- Open-cut & tunnel construction
- Provides CSO control and new sanitary capacity



Dec 6, 2001 Presentation to EQC

Westside CSO Tunnel

- 14 foot diameter deep tunnel
- 4 miles long
- 120 feet deep
- Connects into SW Parallel Interceptor at SW Clay Street
- Conveys CSO to Swan Island
- Aligned under Naito Parkway



Dec 6, 2001 Presentation to EQC

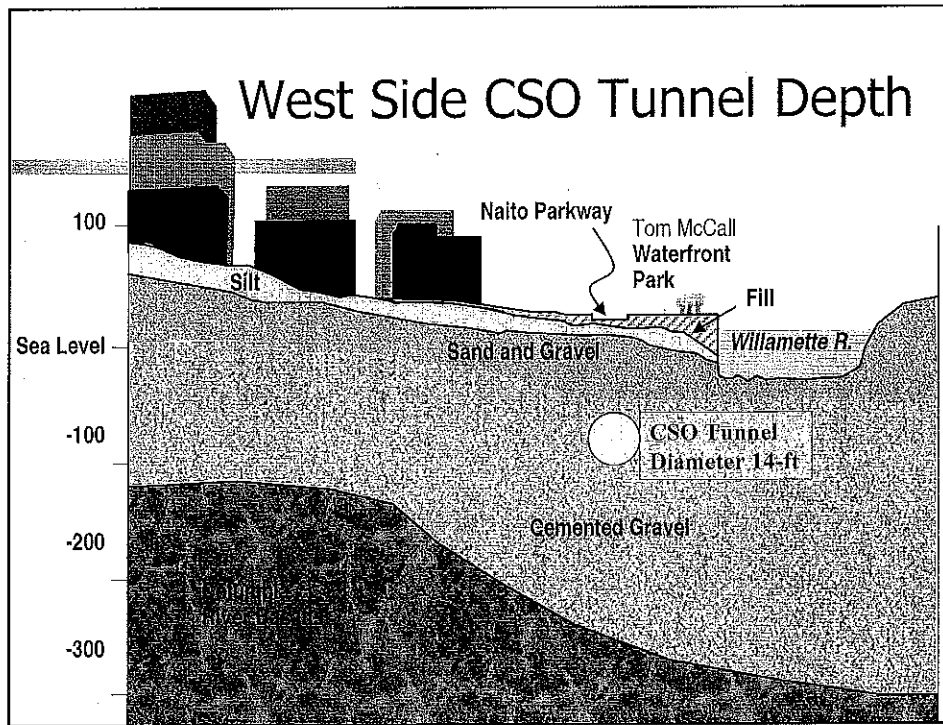
Portland CSO Progress

West Side CSO Tunnel Alignment



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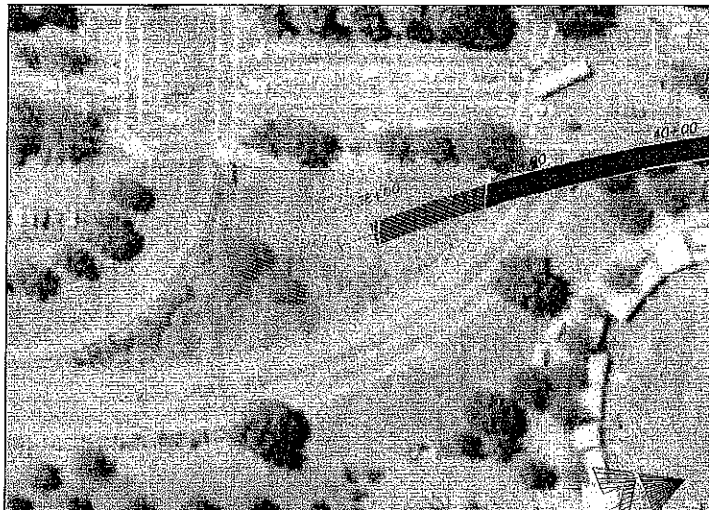
Portland CSO Progress





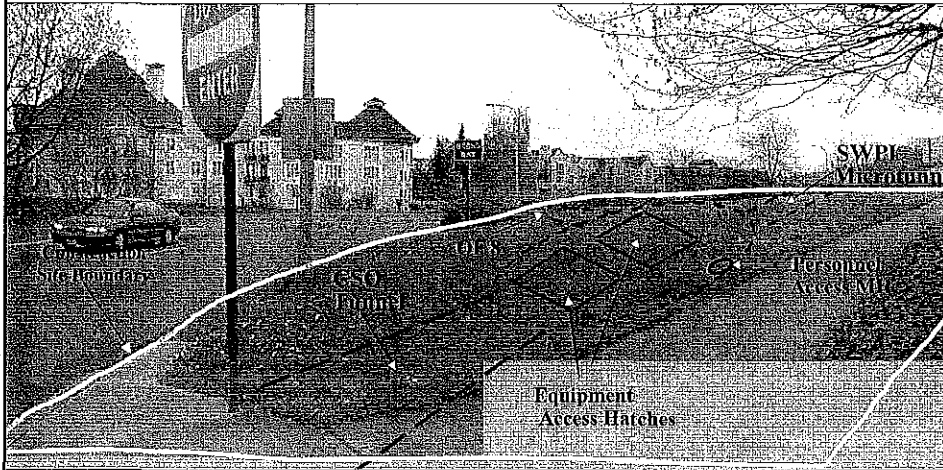
Upstream End of West Side Tunnel Clay Street Shaft - Aerial View

South of Waterfront Park Amphitheater



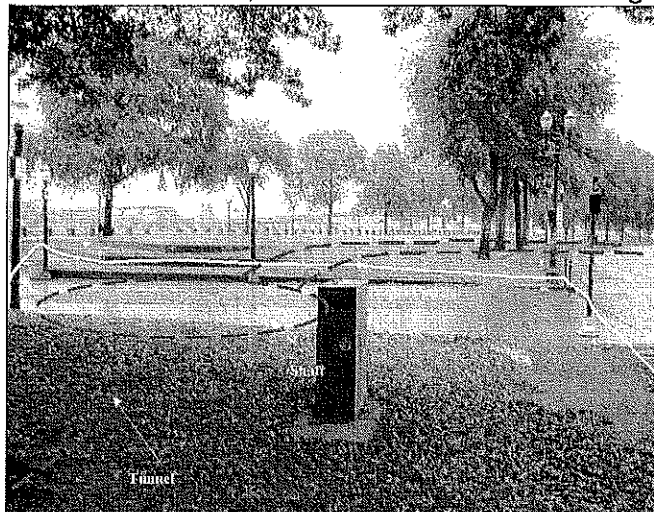
Clay Street Shaft: Ground View

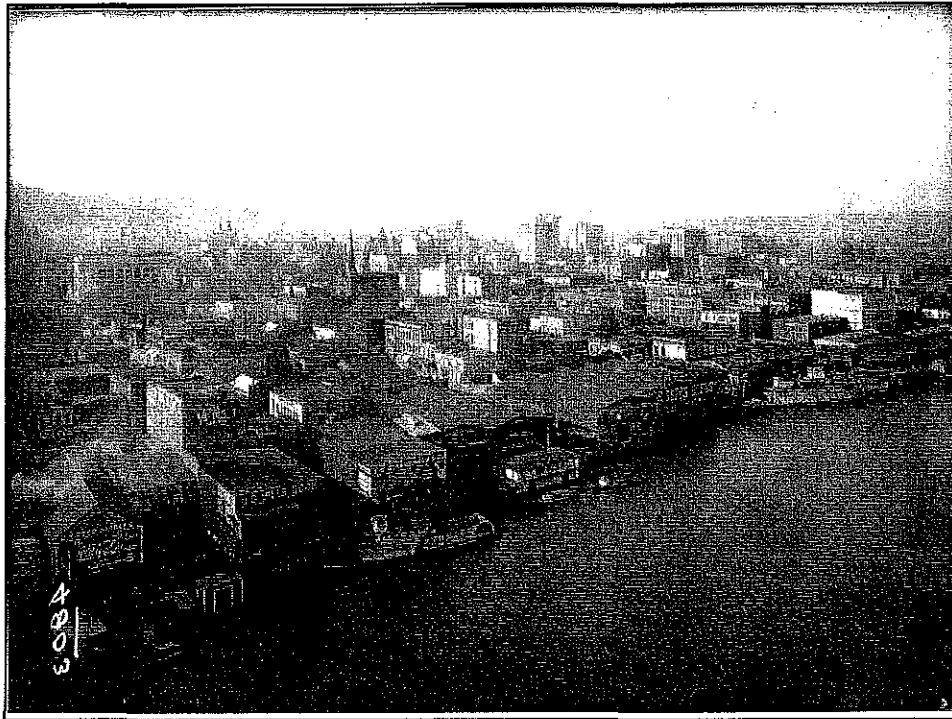
Clay St Shaft on Island between Clay and Market Street Ramps

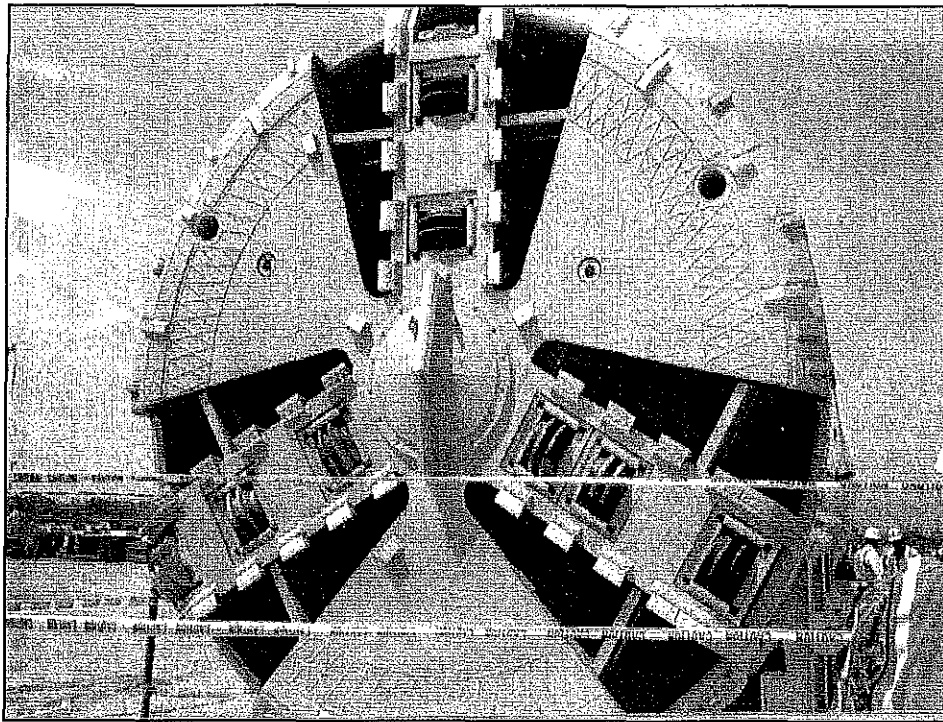


Ankeny Shaft - Ground View

Waterfront Park, south of the Burnside Bridge

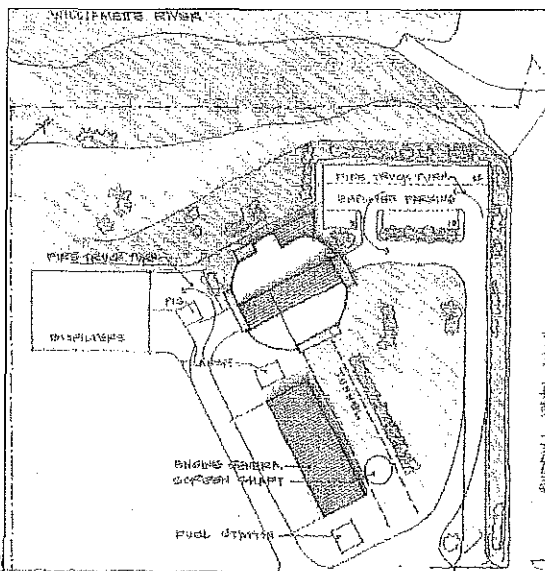






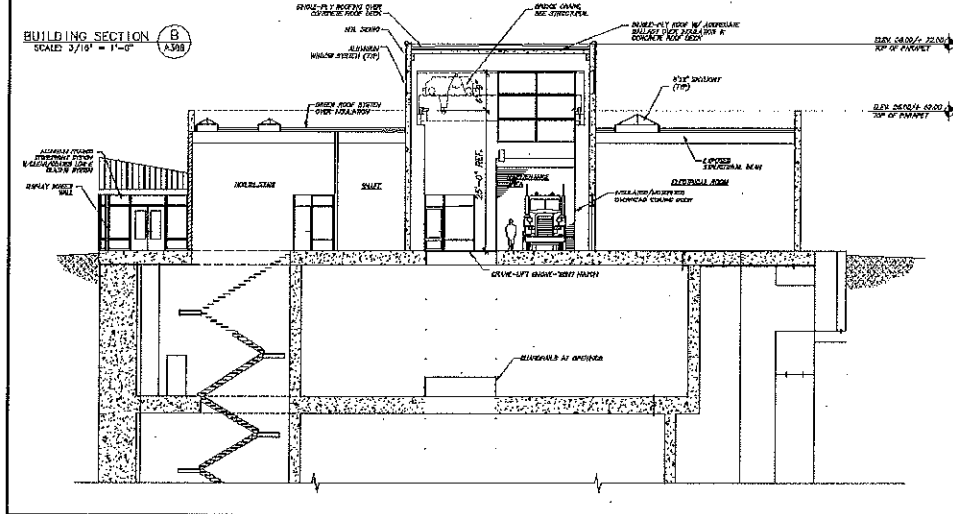
Swan Island Pump Station

- New 220 MGD Pump Station
- Pump Station Structure
 - 124 foot diameter
 - 150 feet deep
- Two forcemains to Peninsular Interceptor

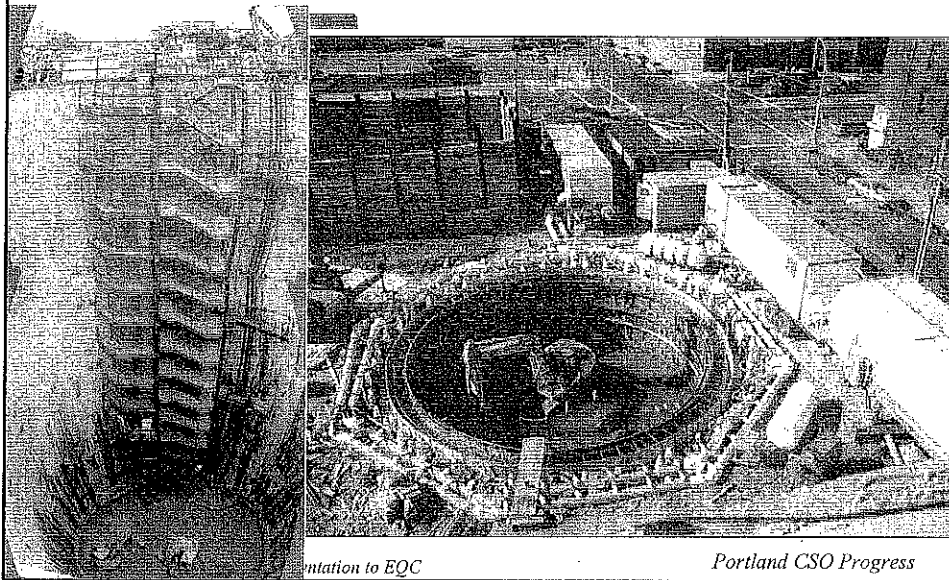


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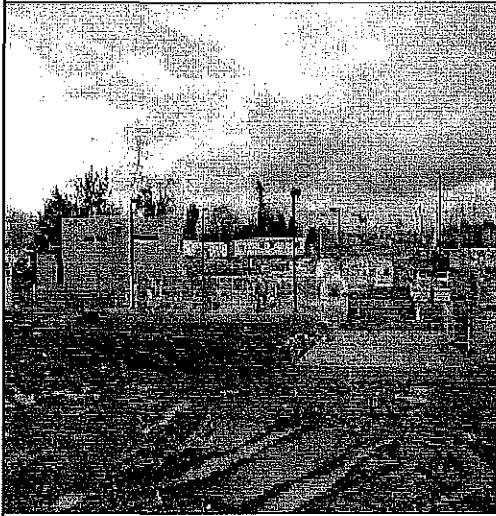
Swan Island Pump Station Ground Level Building Section



Shaft & PS Construction



CBWTP CSO Improvements



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- Upgrade CSCC Influent Pump Station
 - Increase from 105 to 135 MGD
- New 150 MGD Wet Weather Headworks
 - Screening
 - Grit Removal
 - Odor Control

Portland CSO Progress

Program Challenges

- West Side CSO Tunnel
 - Large Tunnel Located in a Heavily Urbanized Area
 - Avg.. depth 120 feet below ground level
 - Historical Development
 - Geologic Conditions
- Large Shaft Construction
 - Shaft Diameters ranging from 40 to 145 feet in diameter
 - Shaft Depths up to 160 feet
 - Soft Soils with High Groundwater

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Portland CSO Progress

West Side CSO Estimated Costs

■ Tunnel	\$192M
■ Swan Island PS	82M
■ Peninsular Forcemain	18M
■ SW Parallel Interceptor	18M
<hr/>	
■ Total	\$310M

Cornerstone Projects:

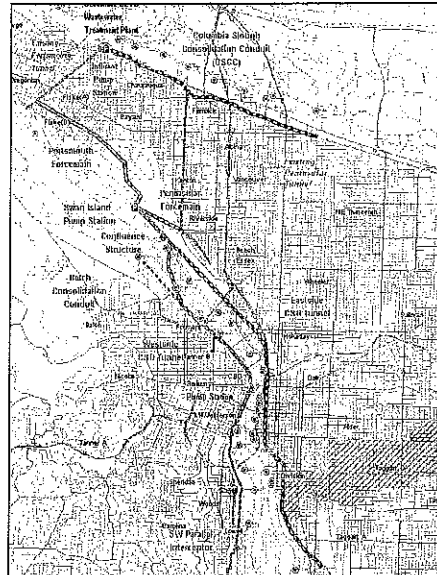
■ Tanner & Carolina Streams	\$ 58M
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Portland CSO Progress

East Side Willamette CSO Program

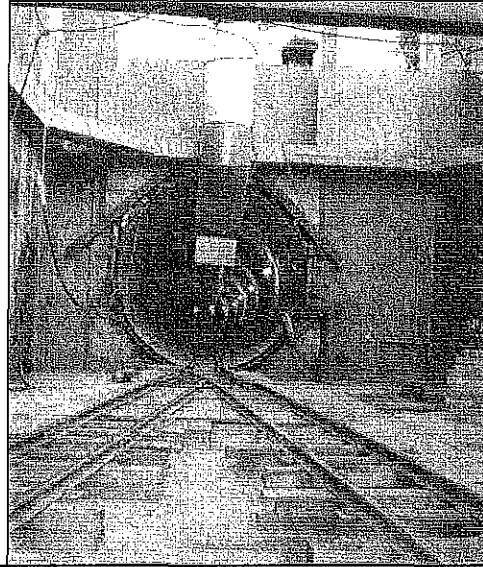
- Control all remaining outfalls by Dec 2011
- Eastside Willamette CSO Tunnel
- Swan Island Pump Station Expansion
- CBWTP Expansion



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East Side CSO Tunnel

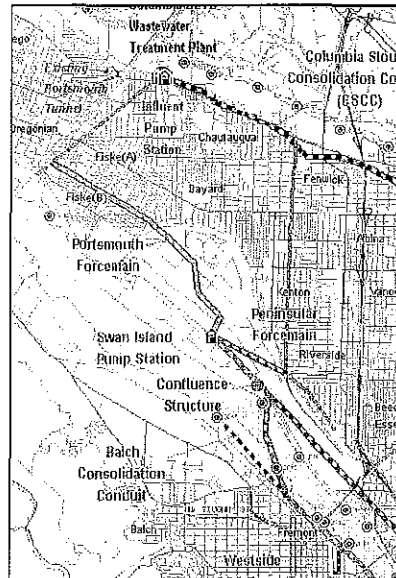
- 17-foot diameter
- 5+ miles long from SE Portland to Swan Island
- 100+ feet deep
- Connects to West Side Tunnel at Confluence Structure



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Expanded Swan Island Pump Station

- Increase Pumping Capacity from 100 to 220 MGD
 - Add pumps, generators and electrical equipment
- Construct Portsmouth Forcemain
- Interceptor System Optimized to Maximum Capacity



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CBWTP CSO Expansion

- Add primary clarifier for dry and wet weather treatment
- Upgrade Effluent Pump Station to 450 MGD
- Peak Total Flow 450 MGD uses all capacity at CBWTP without adding another outfall

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Portland CSO Progress

Activities for CSO Control Beyond ASFO Levels

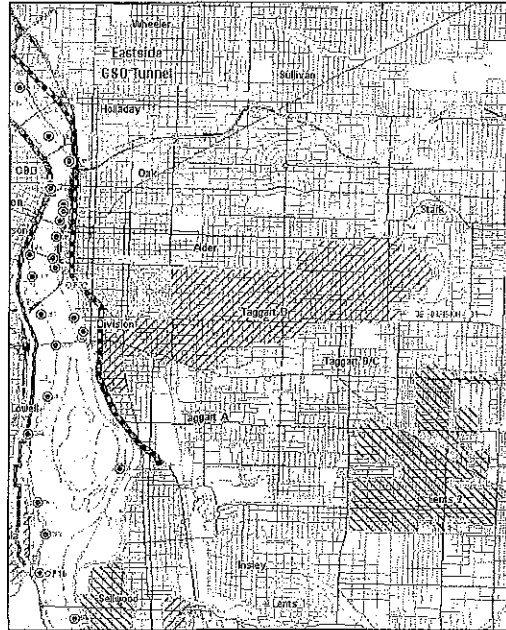
- CSO reduction to continue, even beyond 2011
- 3 major efforts to accomplish on-going reduction
 - Basement Flooding Control Projects
 - Expanded Downspout Disconnection Program
 - Eastside Inflow Control Projects
- Activities are in Portland's Clean River Plan

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Portland CSO Progress

Basement Flooding Control Projects

- East Side sewer backup and pipe capacity problems
- Pipe structural condition problems
- Many projects reduce CSO
 - Sewer Separation
 - Inline Storage



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Expanded Downspout Disconnection

- Program Expanding to include 20,000 more properties
- Brings Program to areas outside of previous Cornerstone Project Area
- Limited to areas with good drainage, lawns or gardens

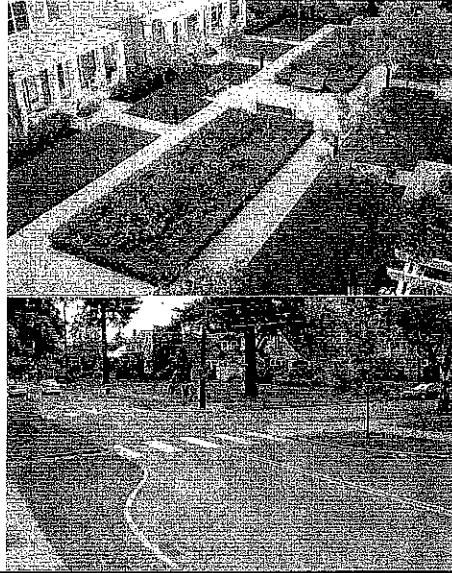


Portland CSO Progress

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Eastside Inflow Controls Project

- Implement stormwater management projects to reduce inflow
 - Disconnect Impervious surfaces to vegetated areas
 - Eco-Roofs
 - Water Quality Friendly Streets
- East Side basins generate majority of CSO
- Reduces basement flooding and CSO volume



Dec 6, 2001 Presentation to EQC

Wrap Up

- Portland CSO Program to Date:
 - Removed 3.2 billion gallons / year
 - Columbia Slough Projects completed on schedule eliminating CSO to the Slough by 99.6%
 - Program cost thus far almost \$300 million
- Estimated Total CSO Program Cost
 - Approximately \$1 billion over the full 20 years
 - Significant financial burden for Portland ratepayers
 - BES continues to pursue grants and additional funding

Dec 6, 2001 Presentation to EQC

Portland CSO Progress

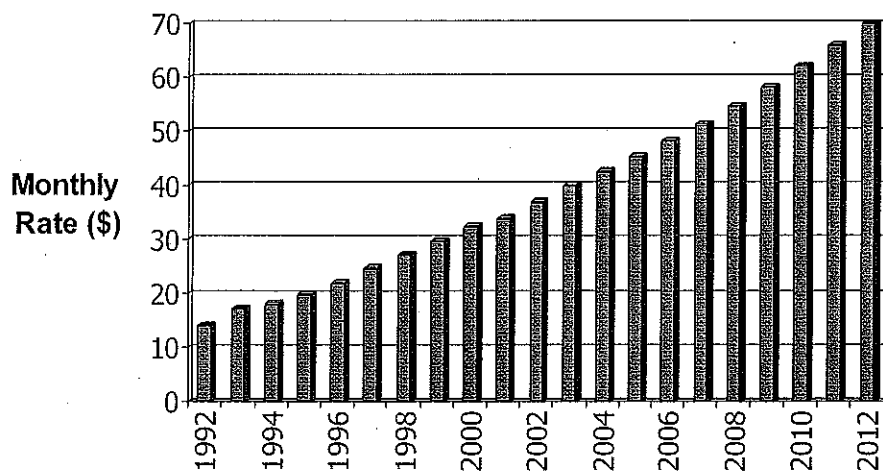
CSO Program Estimated Costs

■ Cornerstone	\$189M
■ Columbia Slough	\$175M
■ Willamette River	\$670M
<hr/>	
■ Total Estimated	\$1.03B

Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Portland Residential Sewer Rates



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Portland CSO Progress



Questions & Answers

Dec 6, 2001 Presentation to EQC

Portland CSO Progress

Minutes are not final until approved by the Commission.

Environmental Quality Commission Minutes of the Two Hundred and Ninety-Eighth Meeting

**September 20-21, 2001
Regular Meeting¹**

The following Environmental Quality Commission members were present for the regular meeting, held at the Windmill Inns, 2525 Ashland Street, Ashland, Oregon.

Melinda Eden, Chair
Tony Van Vliet, Vice Chair
Harvey Bennett, Member
Deirdre Malarkey, Member
Mark Reeve, Member²

Also present were Larry Knudsen, Oregon Department of Justice (DOJ), Stephanie Hallock, Department of Environmental Quality (DEQ) Director, and DEQ staff.

Prior to calling the meeting to order on September 20, Chair Eden requested a moment of silence in remembrance of the victims of the tragic events of September 11, 2001. Chair Eden then called the meeting to order at approximately 10:00 a.m. Agenda items were taken in the following order.

A. Discussion Item: Development of Performance Appraisal Process for Director

Commissioner Bennett reported that since the August 9-10, 2001, EQC meeting, he and Commissioner Van Vliet had continued working on a potential performance appraisal process for the Director. The Commission discussed the frequency of evaluation and how to gain external input from the Governor's office, state leaders and DEQ staff during the appraisal process. Commissioner Bennett and Commissioner Van Vliet suggested scheduling a report to the Commission at the December 6-7, 2001, EQC meeting to consider their recommendation for an appraisal process. The Commission agreed to hold a discussion at the December meeting.

Helen Lottridge, DEQ Management Services Division Administrator, explained a new state requirement for Commission review and approval of agency head transactions. Ms. Lottridge requested the Commission adopt a policy delegating review and approval of certain financial transactions of the Director to the Management Services Division Administrator, with annual Commission review of the approved transactions. The Commission discussed the policy with Ms. Lottridge and Director Hallock. Commissioner Bennett moved the Commission approve the policy. Commissioner Malarkey seconded the motion and it passed with four "yes" votes.

B. Discussion Item: Strategic Doing and Performance Measures

Director Hallock introduced this item and asked Ms. Lottridge and Dawn Farr, Strategic Planning Coordinator, to facilitate discussion with the Commission. Ms. Lottridge explained DEQ's development of

¹ Staff reports and written material submitted at the meeting are made part of the record and available from DEQ, Office of the Director, 811 SW Sixth Avenue, Portland, Oregon 97204.

² Mark Reeve is also a member of the Oregon Watershed Enhancement Board (OWEB). He participated in parts of a concurrent OWEB meeting and was present for agenda items C and E of the EQC meeting.

strategic priorities and executive performance measures that the agency will use to track progress. Ms. Lottridge gave an overview of the timeline for completing this work and involving the Commission in final review of the agency strategic plan. Commissioners, the Director, and Ms. Lottridge discussed key actions for involving Oregonians in solving environmental problems, protecting Oregon's water, protecting public health from toxic chemicals, and achieving excellence in agency performance. Commissioners asked the Department to present a final draft of the strategic plan for discussion at the December 6-7, 2001, EQC meeting.

C. Contested Case No. WQ/I-NWR-00-125 regarding Reggie Huff

Larry Knudsen, Assistant Attorney General, introduced this item and explained that neither Reggie Huff nor the Department requested oral arguments to the Commission on this case. Mr. Knudsen summarized findings of fact made by the Hearing Officer and arguments made by Mr. Huff and the Department. Mr. Knudsen asked Commissioners to declare any ex parte contacts or conflicts of interest regarding this case. Commissioners declared none. The Commission discussed the case and considered setting this matter over to the December 6-7, 2001, meeting to provide Mr. Huff and the Department the opportunity to present oral argument on the issues of the proper interpretation of the phrase "likely to escape or be carried into waters of the state" in ORS 468B.025 and the hearing officer's application of that language. Commissioner Bennett moved to set the matter over to the December meeting for that purpose. Commissioner Van Vliet seconded the motion and it passed with five "yes" votes.

D. Informational Item: Geoff Huntington, OWEB Director

Chair Eden welcomed Geoff Huntington, Director of the Oregon Watershed Enhancement Board (OWEB), to describe the OWEB's structure and role. Mr. Huntington explained the OWEB's formation, membership and strategy for achieving healthy watersheds, drawing connections to DEQ's work. The Commission discussed with Mr. Huntington and Director Hallock ways for DEQ and OWEB to improve interagency coordination. Chair Eden thanked Mr. Huntington for his presentation.

E. Joint Discussion with the Oregon Watershed Enhancement Board

Commissioners joined the OWEB for a joint meeting and discussion of interagency coordination for achieving water quality standards, funding monitoring work, implementing Total Maximum Daily Loads (TMDLs) and addressing toxics in the Willamette River. Commissioners discussed issues and opportunities with Board member, OWEB and DEQ staff, and local watershed council representatives and stakeholders.

The meeting was adjourned at approximately 5:00 p.m. on September 20. That evening, the Commission held a joint reception with the OWEB at the Windmill Inns in Ashland, Oregon.

On September 21, the Commission held an executive session at 8:00 a.m., to consult with counsel concerning legal rights and duties with regard to current and potential litigation involving the Department. Executive session was held pursuant to ORS 192.660(1)(h).

Chair Eden called the meeting to order at approximately 8:30 a.m.

F. Approval of Minutes

August 9-10, 2001 Minutes: No changes were proposed to the draft minutes. Commissioner Van Vliet moved the Commission approve the minutes. Commissioner Malarkey seconded the motion and it passed with four "yes" votes.

C. Consideration of Tax Credit Requests

Ms. Lottridge introduced this item and asked Maggie Vandehey, Tax Credit Program coordinator, and Jim Roys, Management Services Division manager, to present pollution control tax credit requests. Chair Eden asked Commissioners to declare any conflicts of interests associated with the requests. Commissioner Van

Vliet stated a conflict of interest with application numbers 5573, 5574 and 5575, and abstained from discussion and decision on these requests.

Ms. Vandehey recommended the Commission approve forty-six applications and deny one application. Commissioners discussed the applications and Department recommendations. Commissioner Van Vliet moved the Commission approve applications as recommended by the Department with the exception of application numbers 5573, 5574 and 5575. Commissioner Bennett seconded the motion and it passed with four "yes" votes. Commissioner Bennett moved the Commission approve application numbers 5573, 5574 and 5575. Commissioner Malarkey seconded the motion and it passed with three "yes" votes. Commissioner Van Vliet abstained from this vote. Commissioner Malarkey moved the Commission deny application number 5498 as recommended by the Department. Commissioner Van Vliet seconded the motion and it passed with four "yes" votes.

M. Temporary Rule Adoption: Pollution Control Facilities Tax Credit

Ms. Lottridge introduced this item and explained implementation issues associated with the new Pollution Control Facilities Tax Credit law, effective on October 6, 2001. Ms. Lottridge requested the Commission adopt a temporary rule to clarify one section of the law with respect to a key provision that allows a fifty percent tax credit for facilities certified under the 1999 Edition of the law (ORS 468.150 to 468.190). The Commission discussed the need for the temporary rule with Ms. Lottridge. Commissioner Van Vliet moved the Commission adopt the temporary rule to clarify the new law. Commissioner Malarkey seconded the motion and it passed with four "yes" votes.

H. Action Item: Approval Process for Umatilla Chemical Agent Disposal Facility Operation

Wayne Thomas, DEQ Administrator of the Chemical Demilitarization Program, presented to the Commission a proposed modification to the Umatilla Chemical Agent Disposal Facility permit to require Department approval for the start of surrogate testing operations and Commission approval for the start of chemical agent operations. Mr. Thomas introduced Robert Nelson, Environmental Protection Specialist for the Umatilla Chemical Depot, who attended on behalf of L.T.C. Fred Pellisier, Commander of the Umatilla Chemical Depot. Mr. Nelson gave a status report on the Depot operations plan.

Mr. Thomas and Thomas Beam, DEQ Chemical Demilitarization Program staff, described key issues, alternatives for EQC action and next steps for the program. The Commission discussed Depot operations and the recommended permit modification. Commissioner Van Vliet moved the Commission approve the proposed modification. Commissioner Malarkey seconded the motion and it passed with 4 "yes" votes. Commissioner Van Vliet made a motion to clarify Commission approval of Alternative 3 as presented in the staff report: to direct the Department to prepare a proposed modification to the permit explicitly requiring Commission approval for the start of chemical agent operations, but deferring to the Department the decision to approve the start of surrogate testing operations. Commissioner Bennett seconded the motion and it passed with four "yes" votes.

I. Director's Report

Director Hallock gave the Director's report to the Commission and discussed with Commissioners current issues and recent events involving the Department.

Public Forum

At approximately 11:30 a.m., Chair Eden asked whether anyone wished to provide public comment. No public comment was provided.

J. Rule Adoption: On-Site Vehicle Testing Program for Auto Dealers

Ted Kotsakis, DEQ Vehicle Inspection Program manager introduced proposed rules to establish an On-Site Vehicle Testing program for auto dealers in the Portland and Medford areas. Jerry Coffey, Vehicle Inspection

Program staff, described the reasons for the rulemaking, stakeholder involvement in development of the proposed program and next steps. Commissioners discussed key issues with Mr. Kotsakis and Mr. Coffe. Commissioner Bennett moved the Commission adopt rules as proposed by the Department. Commissioner Van Vliet seconded the motion and it passed with four "yes" votes.

K. Rule Adoption: Water Quality General Permit Program Rule Amendments

Mike Llewelyn, DEQ Water Quality Division Administrator, introduced proposed rules to update parts of the water quality general permit program and adopt by reference twenty current general permits into rule. Mike Kortenhof and Ranei Nomura, Water Quality Division staff, explained the need for the amendments to maintain consistency with federal regulations and to provide a broader public participation process for general permit issuance by requiring adoption of general permits in rule. The Commission discussed the proposed rules and the general permit program. Commissioner Malarkey moved the Commission adopt amendments as proposed by the Department. Commissioner Van Vliet seconded the motion and it passed with four "yes" votes.

L. Action Item: Petition for Temporary and Permanent Rulemaking to Amend OAR 340-122-0115, regarding Hazardous Substances

Paul Slyman, DEQ Land Quality Division Administrator, presented this item. Mr. Slyman explained that an association of citizens concerned about issues regarding development of the former Cobb's Quarry Landfill in Beaverton, Oregon, called CLEAN, petitioned the Commission for temporary and permanent rulemaking to add methane to the list of hazardous substances subject to Oregon's environmental cleanup rules. Mr. Slyman discussed the petition with Commissioners and recommended the Commission (1) deny the petition for temporary rulemaking, and (2) direct DEQ to consult with stakeholders, initiate permanent rulemaking to address methane issues, and present a status report to the Commission at its meeting in December, 2001: The Commission discussed the possibilities for methane regulation and legal issues associated with adopting the temporary rule as requested by the petitioners. Commissioner Van Vliet moved the Commission deny the petition for temporary rulemaking and direct the Department to work with a stakeholder advisory committee on permanent rulemaking to address methane issues. Commissioner Malarkey seconded the motion and it passed with four "yes" votes.

N. Commissioners' Reports

Chair Eden reported the status of the Executive Review Panel, which was appointed by the Governor to report on the readiness of the Chemical Stockpile Emergency Preparedness Program.

Chair Eden adjourned the meeting at approximately 1:00 p.m. on September 21.