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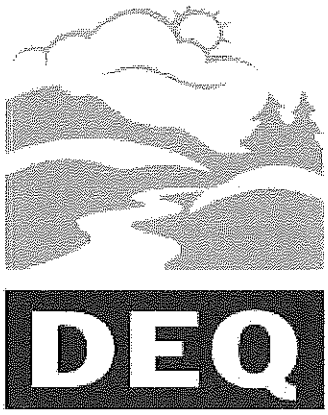
Part 2 of 3 Agenda Item A only

OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 12/12/2002



State of Oregon
Department of Environmental Quality

Oregon Environmental Quality Commission Meeting
December 12-13, 2002

Oregon Department of Environmental Quality (DEQ)
Headquarters Building, Room 3A
811 SW Sixth Avenue, Portland, Oregon

Thursday, December 12, 2002

Prior to the regular meeting, the Commission will hold an executive session beginning at 10:00 a.m., as allowed by ORS 192.660(1)(i), to review and evaluate the employment-related performance of the Director pursuant to the standards, criteria and policy directives adopted by the Commission in January 2002.

The regular Commission meeting will begin at 1:00 p.m. in DEQ Room 3A

A. Contested Case No. WPM/D-NWR-99-186 regarding Caleb Siaw, M.D.
The Commission will consider a contested case between DEQ and Dr. Caleb Siaw, in which Dr. Siaw appealed a May 2002, proposed order assessing him a $317,700 civil penalty for violating a Commission order. The Commission order required Dr. Siaw to design and construct a new on-site sewage disposal system for a mobile home park he owned in Seaside, Oregon. The Commission will hear arguments from both parties on the case.

B. Director's Dialogue
Stephanie Hallock, DEQ Director, will discuss current events and issues involving the Department and state with the Commission.

C. Action Item: Vote on new Commission Chair
Commissioners will discuss and vote on a new Commission Chair person to replace outgoing Chair, Melinda Eden.

Joint meeting session with the
Oregon Economic and Community Development Commission

3:00 p.m., World Trade Center, Sky Bridge A & B, S.W. Second St., Portland Oregon

At approximately 3:00 p.m., the Environmental Quality Commission will join the Oregon Economic and Community Development Commission for a joint meeting session at the World Trade Center, Sky Bridge A&B, located at SW Second & Salmon Street in downtown Portland. The joint session will feature two discussion topics:

- Maximizing financial support to communities in need of wastewater treatment system improvements
- Removing barriers to economic development in Oregon

Following the meeting, Commissioners will hold a joint reception at the World Trade Center as an opportunity for informal discussion and relationship building.

Friday, December 13, 2002

At approximately 8:00 a.m., the Commission will hold an executive session 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, and media representatives may not report on any deliberations during the session.

The regular Commission meeting will begin at 8:30 a.m. in DEQ Room 3A

D. Approval of Minutes
The Commission will review, amend if necessary, and approve draft minutes of the October 3-4, 2002, Environmental Quality Commission meeting.

E. Action Item: Consideration of Pollution Control Facilities Tax Credit Requests
In 1967, the Oregon Legislature established the Pollution Control Facility Tax Credit Program to help businesses meet environmental requirements. The program was later expanded to encourage investment in technologies and processes that prevent, control or reduce significant amounts of pollution. In 1999, nonpoint source pollution control facilities were made eligible for the program. At this meeting, the Commission will consider tax credit applications for facilities that control air and water pollution, recycle solid and hazardous waste, reclaim plastic products, and control pollution from underground storage tanks.

F. Informational Item: Update on Status of Umatilla Chemical Agent Disposal Facility
Sue Oliver and Thomas Beam, DEQ Chemical Demilitarization Program staff, will update the Commission on the Umatilla Chemical Agent Disposal Facility, including the status of trail burns, an in-progress permit modification and a schedule for facility operation.

G. Public Comment Opportunity on Port Westward Energy Facilities Project and Proposed Wastewater Discharge Permit
The Commission will invite public comment on the proposed wastewater discharge permit for the Port Westward Energy Facilities Project. The proposed project includes construction of two natural gas fired power plants and one ethanol production plant on land owned by the Port of St. Helens adjacent to the Columbia River near Clatskanie. The Port has applied to DEQ for a wastewater permit for the collection and discharge of treated wastewater to the Columbia River from the new facilities. At a future meeting, DEQ will ask the Commission to make a determination about the impact of this project on Columbia River water quality. DEQ is in the process of soliciting public input on the proposed wastewater permit and other information that will support the Commission's determination.

H. *Rule Adoption: Total Maximum Daily Loads (TMDL) Rules
Since the early 1980s, DEQ has been establishing Total Maximum Daily Loads, or TMDLs, for waterbodies that do not meet water quality standards. A TMDL identifies the maximum amount of a pollutant a waterbody can receive and still meet water quality standards, and allocates portions of that amount to pollutant sources or groups of sources. A TMDL also includes a Water Quality Management Plan describing strategies that will achieve the targeted pollution inputs. TMDLs are implemented through permits and through implementation plans adopted by federal, state, or local governmental agencies with authority over contributing sources. At this meeting, Mike Llewelyn, DEQ Water Quality Division Administrator, will present rules to adopt the process DEQ has been using for the past few years to develop and implement TMDLs.

I. *Rule Adoption: Oil Spill Contingency Planning and Fees

In 2001, the Legislature changed requirements for the way in which large ships and other marine vessels plan for how they would respond to oil spills. At this meeting, Dick Pedersen, DEQ Land Quality Division Administrator, will propose rules to implement the legislative changes, including new fees for regulated vessels and facilities to support DEQ's Emergency Response program. The proposed rules would confirm DEQ as the lead agency for responding to hazardous chemical and oil spills, define "spill response zones" within the state's navigable waters, specify equipment requirements for those zones, and require spill contingency plans for all fuel pipelines (current rules only require plans for pipelines that transfer oil over certain state waters).

J. *Rule Adoption: Enforcement Procedures and Civil Penalties for Ballast Water Management, Oil Spill Planning, and Emergency Response to Hazardous Material Spills

Dick Pedersen, DEQ Land Quality Division Administrator, will propose rules that align state enforcement procedures and penalties with recent rule changes in DEQ's Emergency Response program. The proposed rules include revised enforcement classifications for ballast water management and planning requirements for oil and hazardous material spills.

K. Temporary Rule Adoption: Asbestos Requirements

Asbestos is a hazardous air pollutant and known carcinogen. To protect public health, DEQ regulates disposal of asbestos-containing materials from demolition, construction, repair, and maintenance of public and private buildings. DEQ's asbestos rules, designed to prevent asbestos fiber release and exposure, were modified in January 2002 to strengthen public health protection. At this meeting, Andy Ginsburg, DEQ Air Quality Division Administrator, will propose a temporary rule to provide relief from some relatively new asbestos requirements that have caused implementation problems for some Oregon businesses. After adoption of the temporary rule, DEQ plans to work with a stakeholder group on redefining those rule requirements to be easier to use.

L. Informational Item: Response to Commission Request for Analysis of Mercury Reduction Goals and Mixing Zones

In July 2002, the Commission requested information from DEQ on state mercury reduction goals and the discharge of toxics in water quality mixing zones. At this meeting, Dick Pedersen, DEQ Land Quality Division Administrator, and Mike Llewelyn, DEQ Water Quality Division Administrator, will lead a two-part presentation of information and analysis on current and potential state efforts to reduce mercury and other toxic substances.

M. Commissioners' Reports

Adjourn

Environmental Quality Commission Meetings scheduled for 2003:
January 30-31, March 20-21, May 8-9, June 26-27, August 14-15, October 9-10, December 4-5

Agenda Notes

*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 the Commission or Department on these items at any time during this meeting.

Copies of staff reports for individual agenda items are available by contacting Emma Snodgrass in the Director's Office of the Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon 97204; telephone 503-229-5990, toll-free 1-800-452-4011 extension 5990, or 503-229-6993 (TTY). Please specify the agenda item letter when requesting reports. If special physical, language or other accommodations are needed for this meeting, please advise Emma Snodgrass as soon as possible, but at least 48 hours in advance of the meeting.

Public Forum: The Commission will break the meeting at approximately 11:30 a.m. on Friday, December 13, to provide members of the public an opportunity to speak to the Commission on environmental issues not part of the agenda for this meeting. Individuals wishing to speak to the Commission must sign a request form at the meeting and limit presentations to five minutes. The Commission may discontinue public forum after a reasonable time if a large number of speakers wish to appear. In accordance with ORS 183.335(13), no comments may be presented on Rule Adoption items for which public comment periods have closed.

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.

Environmental Quality Commission Members

The Environmental Quality Commission is a five-member, all volunteer, citizen panel appointed by the governor for four-year terms to serve as DEQ's policy and rule-making board. Members are eligible for reappointment but may not serve more than two consecutive terms.

Melinda S. Eden, Chair
Melinda Eden is an attorney, farm owner and former reporter for the Associated Press. Her education includes a J.D. from the University of Oregon and a certificate in Natural Resources from the University of Oregon Law School. Chair Eden was appointed to the EQC in 1996 and reappointed for an additional term in 2000. She became vice chair in 1998 and chair in 1999. Chair Eden currently resides in Milton–Freewater.

Tony Van Vliet, Vice Chair
Tony Van Vliet received his B.S. and M.S. in Forest Production at Oregon State University. He has a Ph.D. from Michigan State University in Wood Industry Management. Commissioner Van Vliet served sixteen years as a member of the Public Lands Advisory Committee, has been a member of the Workforce Quality Council, served sixteen years as a State Representative on the Legislative Joint Ways and Means Committee, and served eighteen years on the Legislative Emergency Board. He currently resides in Corvallis. Commissioner Van Vliet was appointed to the EQC in 1995 and reappointed for an additional term in 1999.

Mark Reeve, Commissioner
Mark Reeve is an attorney with Reeve & Kearns in Portland. He received his A.B. at Harvard University and his J.D. at the University of Washington. Commissioner Reeve was appointed to the EQC in 1997 and reappointed for an additional term in 2001. He serves as the Commission's representative to the Oregon Watershed Enhancement Board, for which he is Co-Chair.

Harvey Bennett, Commissioner
Harvey Bennett is a retired educator. He has taught and administered at all levels of education, concluding as president emeritus of Rogue Community College. Commissioner Bennett has a B.S., M. Ed. and Ph.D. from the University of Oregon. Commissioner Bennett was appointed to the EQC in 1999 and he currently resides in Grants Pass.

Deirdre Malarkey, Commissioner
Deirdre Malarkey is a graduate of Reed College and has graduate degrees from the University of Oregon in library science, Middle Eastern urban and arid land geography, and a Ph.D. in geography. Commissioner Malarkey has served on the Water Resources Commission, the Governor's Watershed Enhancement Board, and the Natural Heritage Advisory Board for the State Land Board. Commissioner Malarkey was appointed to the EQC in 1999 and she currently resides in Eugene.

Stephanie Hallock, Director
Department of Environmental Quality
811 SW Sixth Avenue, Portland, OR 97204-1390
Telephone: (503) 229-5696 Toll Free in Oregon: (800) 452-4011
TTY: (503) 229-6993 Fax: (503) 229-6124
E-mail: deq.info@deq.state.or.us
Mikell O'Mealy, Assistant to the Commission
Telephone: (503) 229-5301

Oregon
DEPARTMENT OF
ENVIRONMENTAL
QUALITY
811 SW Sixth Ave.
Portland, OR 97204-1390

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DEQ-3

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RECEIVED
APR 17 2002
Employment Hearings

KEN BETTERTON
HEARING OFFICER PANEL
875 UNION STREET NE
SALEM, OR 97311

97311

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206

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2002

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150
PORTLAND OREGON
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Employment Hearings

Judge Ken Betterton
875 Union St. N.E.
P.O. Box 14020
Salem, Or. 97311

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Michael J. Kavanaugh
4930 SE Woodstock Blvd.
Portland, OR 97206

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X [signature] ☐ Agent ☐ Addressee

B. Received by (~~Printed Name~~) JOHANN JUHL C. Date of Delivery 1/13/03

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 7099 3220 0001 7183 2291

PS Form 3811, August 2001 Domestic Return Receipt 102595-01-M-25

EXHIBIT # 100

FOREST LAKE RESORT

Space 20

- 03-12-1999

Space 22

- 01-30-1998

Between Spaces 23 & 24

- 03-12-1999

Space 10

- 06-17-1999

Between Spaces 15 & 16

- 09-08-1997
- 11-13-1997
- 11-20-1997
- 12-09-1997
- 12-17-1997
- 12-18-1997
- 12-23-1997

Space 36B

- 02-06-1999
- 06-17-1999

Space 37

- 11-13-1997
- 11-20-1997
- 12-09-1997
- 12-30-1997
- 01-07-1998
- 01-15-1998
- 02-06-1998
- 09-15-1998

Space 38

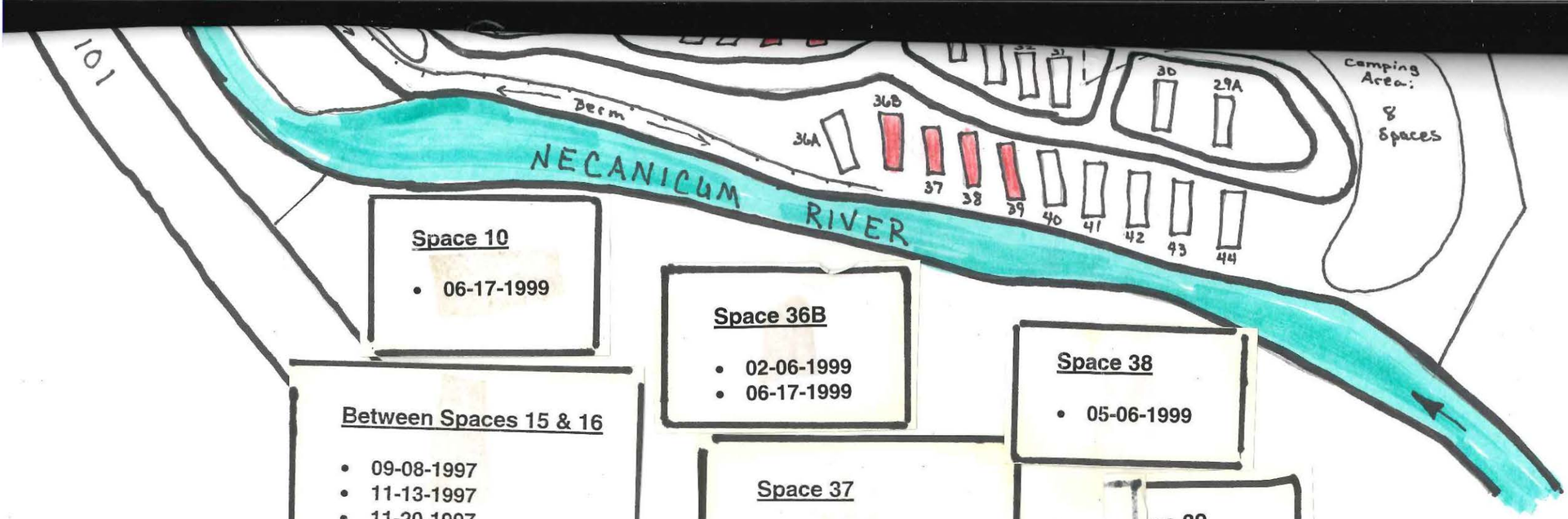
- 05-06-1999

ace 39

03-25-1999

0 100 200 300

1" = 100' (Approx.)



Space 10

- 06-17-1999

Between Spaces 15 & 16

- 09-08-1997
- 11-13-1997
- 11-20-1997
- 12-09-1997
- 12-17-1997
- 12-18-1997
- 12-23-1997

Space 36B

- 02-06-1999
- 06-17-1999

Space 37

- 11-13-1997
- 11-20-1997
- 12-09-1997
- 12-30-1997
- 01-07-1998
- 01-15-1998
- 02-06-1998
- 09-15-1998

Space 38

- 05-06-1999

ace 39

03-25-1999

0 100 200 300

1" = 100' (Approx.)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

Note: original removed to file from w/ exhibits - it's in the case file

In the Matter of	)	
	)	Final Contested
Caleb Siaw, M.D.	)	Case Hearing Order
	)	
	)	
Petitioner	)	No. WQ/D-NWR-99-186

On December 12, 2002, the Environmental Quality Commission considered the appeal of Caleb Siaw, M.D. to the Amended Proposed Order issued by Hearing Officer Ken L. Betterton on May 1, 2002 and incorporated herein as Attachment A. The Commission considered the exceptions and brief submitted by the Petitioner and the Response submitted on behalf of the Department of Environmental Quality. The Commission also heard oral argument presented by Michael J. Kavanaugh on behalf of the Petitioner and Jeff Bachman, Environmental Law Specialist on behalf of the Department.

The Commission affirms the Hearing Order of the Hearing Officer in all respects and incorporates by reference the Order herein as Attachment A.

Dated this 9th day of January, 2003.

Stephanie Hallock

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
GENE2291

Ref No.: G60602
Case No: 02-GAP-00014
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: 05/01/02
Mailed by: DVL

AMENDED HEARING DECISION

CALEB SIAW, MD
19075 SE FOSTER RD

BORING OR 97009 9653

DEPT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

MICHAEL J. KAVANAUGH
4930 SE WOODSTOCK BLVD

PORTLAND OR 97206 6163

JEFF BACHMAN
DEQ
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:	)	
	)	**AMENDED PROPOSED ORDER**
	)	
Caleb Siaw, M.D.,	)	Hearing Officer Panel Case No. G60602
	)	Agency Case No. WQ/D-NWR-99-186[1]
	)	CLATSOP COUNTY
Respondent.	)	

HISTORY OF THE CASE

The Department of Environmental Quality (DEQ) issued a Notice of Assessment of Civil Penalty pursuant to ORS 468.126 through 468.140, ORS Chapter 183, and OAR Chapter 340, Divisions 11 and 12, to respondent Caleb Siaw, M.D., on July 31, 2001. The notice alleges that from or about September 15, 1999 respondent violated ORS 468.140(1)(c) and committed two Class I violations by violating an order of the Environmental Quality Commission, by violating Paragraph 15.B(1) of a Mutual Agreement and Order (MAO), Case No. WQ/D-NWR-99-186 [*sic*], by failing to submit the information required to complete his application for a WPCF permit (violation 1), and that respondent violated Paragraph 15.A(4) of MAO Case No. WQ/D-NWR-99-212 [*sic*][2], by failing to submit holding tank pumping receipts for the previous month (violation 2). The notice assessed a civil penalty in the amount of $373,580 for violation 1.

On or about August 8, 2001 respondent filed a written request for hearing and answer. Respondent generally denied the allegations in the notice, and asserted as affirmative defenses that he had negotiated with DEQ to have the tanks pumped in accordance with the Mutual Agreement and Order, that he ceased to use the offending area for sewage disposal, removed the homes hooked up to the offending area and did not violate sewage disposal laws, and that on or about April 8, 1999 respondent sold the property on contract, and no longer owned the property.

On January 15, 2002 respondent filed a Motion to Join Indispensable Party/Motion to Postpone and Consolidate. Respondent sought to join A & D Trust, and/or Adrian and Danny Malo [*sic*] , the owners of the property. Respondent cited OAR 137-003-0520[3] and ORCP 29[4] to

[1] The Notice of Assessment of Civil Penalty incorrectly names the case number as "WQ/D-NWR-99-168." The correct case number is "WQ/D-NWR-99-186." The correction to the case number was made by interlineation at the beginning of the hearing on January 17, 2002.

[2]The July 31, 2001 notice incorrectly names the case number for the MAO. The correct case number is "WQ/D-NWR-98-212," not "WQ/D-NWR-99-186" or "WQ/D-NWR-99-212."

support his motion. The Oregon Rules of Civil Procedure (ORCP) do not apply to administrative proceedings in Oregon.[5] OAR 137-003-0520 addresses the filing of documents, motions, pleadings and orders, and the deadline for filing such papers with the Hearing Officer Panel, not joining other parties to contested case hearing. OAR 137-003-0005[6] does provide for the participation in a hearing by other persons who have an interest in the outcome of an agency's contested case. That other person must file a petition with the agency at least 21 days prior to the date set for the hearing. No such party filed a timely petition here, rather respondent filed a motion to join another party. Moreover, motions must be filed at least seven calendar days before the date set for the hearing (scheduled in this case for January 17, 2002). OAR 137-003-0630.[7] Respondent filed its motion two days before the hearing, and did not comply with the rule. Respondent's Motion to Join an Indispensable Party/Motion to Postpone and Consolidate was denied.

A hearing was held in Portland, Oregon on January 17, 2002 before Ken L. Betterton, administrative law judge. Jeff Bachman, environmental law specialist, represented DEQ. Respondent appeared and was represented by Michael J. Kavanaugh, attorney at law. Anne Cox and Les Carlough testified as witnesses for DEQ. Robert Sweeney, Adrian Malo and Caleb Siaw, M.D., testified as witnesses for respondent.

A telephone conference hearing was held on February 13, 2002 to address additional documents as exhibits for the record. Jeff Bachman represented DEQ at the telephone conference hearing. Michael J. Kavanaugh represented respondent.

The parties filed their written closing arguments on March 1, 2002, at which time the record closed.

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[3] OAR 137-003-0520 provides, in part:

> (1) Unless otherwise provided by these rules, any documents, correspondence, motions, pleadings, rulings and orders filed in the contested case shall be filed as follows:
> * * * * *
> (b) With the Hearing Officer Panel or assigned hearing officer after the agency has referred the case to the Panel and before the assigned hearing officer issues a proposed order,
> * * * * *.

[4] ORCP 29 provides for the "Joinder of Persons Needed for Just Adjudication."

[5] ORCP 1 provides:

> **A Scope.** These rules govern procedure and practice in all circuit courts of this state, * * *.

[6] OAR 137-003-0005 provides, in part:

> (1) Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.
> (2) A person requesting to participate as a party or limited party shall file a petition with the agency at least 21 calendar days before the date set for the hearing * * *.

[7] OAR 137-003-0630 provides, in part:

> (1) Unless otherwise provided by statute or rule, all motions shall be filed in writing at least seven days before the date of the hearing * * *.

A Proposed Order was mailed to the parties on April 5, 2002.

On April 17, 2002 DEQ filed a request for issuance of a revised or amended proposed order pursuant to OAR 137-003-0655.[8] DEQ presented the following questions with its request:

> "First, page 17 of the Order, in reference to the Department's decision to impose one daily civil penalty for each month in which a violation occurred, states 'Without statutory or administrative rule authority to impose penalties for each month, DEQ cannot impose such penalties.' Is it your decision that ORS 468.140 requires DEQ to assess a penalty for only one day of violation or for every day of violation, but does not confer discretion on the Department to assess penalties for an intermediate number of days of violation?"
>
> "Second, page 18 of the Proposed Order states 'Because the administrative rules provide for an enhanced penalty for a continuous violation, it is more appropriate to address the continuous nature of the violation in the penalty calculation, rather than impose a separate penalty for each day of violation.' Is it your decision that, when a violation spans more than one day, OAR 340-012-045(1)(c)(C) [*sic*] requires that the penalty be based on a single day as aggravated by the 'O' factor, or is this a case-specific decision? If it is case specific, what is your basis in fact and law that 'it is more appropriate to address the continuous nature of the violation in the penalty calculation. [*sic.*]"

DEQ's questions raise the relationship between ORS 468.140[9] and the allegations DEQ made in its Notice of Assessment of Civil Penalty and the proof of those allegations. ORS 468.140 mandates a civil penalty for each day of violation. The Violation Section of the Notice

---

[8] OAR 137-003-0655 provides, in part:

> (1) After issuance of the proposed order, if any, the hearing officer shall not hold further hearing or revise or amend the proposed order except at the request of the agency.
> * * * * *.

[9] ORS 468.140 provides, in part:

> (1) In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of violation in the amount prescribed by the schedule adopted under ORS 468.130.
> * * * * *
> (c) Any rule or standard or order of the Environmental Quality Commission adopted or issued pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.305 to 454.535, 454.605 to 454.755, ORS chapter 467 and ORS chapter 468, 468A and 468B.
> * * * * *
> (2) Each day of violation under subsection (1) of this section constitutes a separate offense.
> * * * * *.

of Assessment of Civil Penalty states: "From or about September 15, 1999, Respondent violated ORS 468.140(1)(c) by violating a Commission Order." (Ex. B at 2.) In its penalty calculation, Exhibit 1 to the Notice of Assessment of Civil Penalty, DEQ states: "Respondent has been in daily violation of the MAO since September 15, 1999. The Department elects to assess civil penalty for each month in which a daily violation occurred."[10] (*Id.* at 6.)

Imposing a separate penalty for each day of violation for about 20 months would result in a civil in the millions of dollars. DEQ correctly points out that such a penalty could be unrealistic for the violation, the value of the real property in question, and would be unenforceable as a practical matter.

The questions DEQ presented in its April 17 letter could have been easily resolved if DEQ had alleged in its Notice of Assessment of Civil Penalty violations only for the specific days on which it sought a civil penalty. Such an approach would have complied with the language of ORS 468.140 which mandates a civil penalty for each day of violation, and given DEQ the civil penalty outcome it desired (violations for about 20 days). The question is whether DEQ can achieve the outcome it seeks of a civil penalty for a specific number of days, given the allegations in its notice, its proof, and the statement in its civil penalty calculation that "[t]he Department elects to assess civil penalty for each month in which a daily violation occurred."

I conclude that DEQ can assess such a penalty. Although DEQ did not specify the day of each month on which it sought a penalty, it did state that it elected a penalty for each month in which a *daily* violation occurred. Essentially DEQ requested the same thing as seeking a civil penalty for, for example, December 15, 1999, January 15, 2000, February 15, 2000, and so on, until it specified the total number of days it wished to seek a penalty. Respondent was placed on notice in the Notice of Assessment of Civil Penalty that DEQ sought a penalty for one day each month from September 15, 1999. DEQ subsequently changed that request to lower the number of days of civil penalty to run from December 1999. Respondent has not been prejudiced by the change because it lowers the potential penalty, as opposed to where DEQ might try to increase the number of days of civil penalty from what it alleged in its notice.

The adjustment for the civil penalty for each day sought is made in the Civil Penalty portion of the amended proposed order.

Because of the change made in this decision as a result of the first question presented in DEQ's April 17 letter, DEQ's second question becomes moot.

EVIDENTIARY RULING

Administrative Law Judge Exhibits A through E, respondent Exhibits 1 through 7 from the hearing on January 17, 2002 and Exhibits 8 through 13 from the telephone hearing on

[10] The Notice of Assessment of Civil Penalty assesses a penalty for each month from October 1999. DEQ's closing argument contends a penalty should be imposed for each month from December 1999.

February 13, 2002, and DEQ Exhibits 100, 105 through 107, and 109 through 128 were admitted into the record without objection. Respondent objected to DEQ Exhibits 101, 102, 103 104, and 108 as not relevant. Those exhibits are relevant to DEQ's allegations. Respondent's objections were overruled and the exhibits were admitted into the record. Respondent objected to Exhibit 129 as repetitive, and to Exhibit 130 as cumulative and contradictory.[11] Exhibits 129 and 130 met the standards for admissibility in ORS 183.450 and were admitted into the record.

ISSUES

(1) Did respondent violate ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit information required to complete his application for a WPCF permit, and if so, what penalty should be imposed under OAR Chapter 340, Divisions 11 and 12?

(2) Did respondent violate ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit holding tank pumping receipts for the previous month?

FINDINGS OF FACT

(1) Respondent Caleb Siaw purchased real property in his own name in Clatsop County, Oregon, generally described as HCR 63, Box 225, Seaside, Oregon, from Sama H. Banki by warranty deed dated October 30, 1996, and recorded November 4, 1996 in Clatsop County land records. (Ex. 9.) The property consists of several acres near the Necanicum River, outside Seaside, Oregon, that had operated for many years as a mobile home and RV park (known as Forest Lake Resort), including about 44 spaces for mobile homes and RVs, and a laundry. (Ex. 100.) The owner of the property typically has rented the spaces to tenants and collected the rents for income. A space rents for about $200 per month.

(2) The resort operated for many years before April 1, 1995, when DEQ adopted OAR 340-071-0130, which requires a Water Pollution Control Facilities (WPCF) permit for any system or combination of systems with a total sewage flow design capacity greater than 2,500 gallons per day. The average sewage flow for a single family residence is 250 gallons per day. The resort used a collection of drain fields and septic tanks to dispose of sewage at the resort. Because the resort, as well as many other similar facilities, operated prior to the effective date of OAR 340-071-0130, those existing sewage disposal systems were "grandfathered in," without the need to apply for and obtain a WPCF permit, so long as the sewage system was not expanded or needed repairs.[12]

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[11] ORS 183.450 sets forth the standards for the admissibility of evidence in contested cases. ORS 183.450 states: In contested cases:

> (1) Irrelevant, immaterial or unduly repetitious evidence shall be excluded * * *. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible. * * *.

[12] OAR 340-071-0130(16) provides, in part:

(3) DEQ received complaints from tenants at Forest Park Resort as early as 1996 that the sewage disposal system at the resort property did not function properly, causing raw sewage to pond and spill onto the ground surface near tenants' residences. DEQ mailed notices of noncompliance to Sama Banki in June and in August 1996. On December 17, 1997, DEQ mailed a notice of noncompliance to respondent by certified mail, informing him of complaints from tenants about sewage spilling onto the ground surface, about repeated violations of environmental protection laws, and that he needed to apply for a WPCF permit no later than January 1, 1998 and submit plans and specifications for a sewage treatment system by February 1, 1998. (Ex. 101.)

(4) On February 5, 1998, DEQ mailed respondent another notice of noncompliance by certified mail, informing him that he still had not filed his application for a WPCF permit, and that DEQ inspectors had visited the resort on several recent occasions and seen evidence of continued sewage disposal system failures on the property. (Ex. 102.) Respondent submitted an incomplete application for a WPCF permit to DEQ on February 17, 1998. DEQ returned the application to respondent on March 13, 1998, with a letter explaining to him what he needed to submit in order to make his application complete. (Ex. 103.) On March 24, 1998 DEQ mailed respondent another notice of noncompliance by certified mail, reciting the prior notices of noncompliance and the numerous complaints and sewage disposal law violations at the resort. (Ex. 104.)

(5) Respondent submitted another application for a WPCF permit on March 31, 1998. (Ex. 105.) DEQ notified respondent in writing on April 30, 1998 that his application was

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> (a) Owners of existing systems meeting the system descriptions in (15)(a), (b), and (d) through (g) of this rule are not required to apply for a WPCF permit until such time as a system repair, or alternation is necessary;
> * * * * *.

OAR 340-071-0130(6) defines "alternation" as "expansion or change in location of the soil absorption facility or any part thereof. Minor alternation is the replacement or re-location of a septic tank or other components of the system other than the soil absorption facility."

OAR 340-071-0130(115) defines "repair" to mean:

> "[i]nstallation of all portions of a system necessary to eliminate a public health hazard or pollution of public waters created by a failing system. Major repair is defined as the replacement of the soil absorption system. Minor repair is defined as the replacement of a septic tank, broken pipe, or any part of the on-site sewage disposal system except the soil absorption system."

OAR 340-071-0130(15) provides:

> Operating Permit Requirements. The following systems shall be constructed and operated under a renewable EPCF permit, issued pursuant to OAR 340-071-0162.
>
> > (a) Any system or combination of systems located on the same property or serving the same facility with a total sewage flow design capacity greater than 2,500 gallons per day.
> > * * * * *.

incomplete because he failed to submit an approvable plan for the upgrade and repair of the sewage disposal system. (Ex. 106.)

(6) Respondent and Richard Johnson, who was in the process of purchasing the resort property from respondent, met with DEQ natural resource specialist Anne Cox on August 27, 1998 to discuss the resort and what needed to be done to bring the sewage disposal system into compliance. DEQ outlined the various options for correcting the sewage disposal system and confirmed the options in a letter to respondent and to Johnson on September 1, 1998. (Ex. 107.) No contract of sale or other document of conveyance from respondent to Johnson was recorded in county deed records at that time. On July 30, 1998, Caleb Siaw, Trustee for Caleb Siaw, P.C., Trust, signed a memorandum of sale to sell the Forest Lake resort property Richard K. Johnson and Joyce M. Johnson, husband and wife. (Ex. 13.) The Johnsons made a few payments on the contract, then stopped, and let the property go back to respondent. The memorandum of sale was recorded in Clatsop County land records on October 8, 1998. (*Id.*) On August 16, 2000, the Johnsons signed a bargain and sale deed, deeding the property back to Caleb Siaw, P.C., Trust. (Ex. 12.) That deed was recorded in the Clatsop County land records on August 25, 2000. (*Id.*)

(7) DEQ mailed another notice of noncompliance by certified mail to respondent on September 21, 1998, again outlining the past notices of noncompliance of DEQ statutes and administrative rules, and requesting that respondent submit a completed application for a WPCF permit. (Ex. 108.)

(8) During the late summer of 1998, DEQ referred environmental law violations at Forest Lake Resort to the Clatsop County District Attorney for criminal prosecution. The Clatsop County grand jury indicted respondent for water pollution in the first degree on September 10, 1998. Respondent entered a plea of no contest to water pollution in the second degree in Clatsop County Circuit Court on January 22, 1999. The court sentenced respondent to probation, with conditions, among others, that he pay a fine of $10,060 and "make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material." (Ex. 110.)

(9) On December 9, 1998 DEQ received a copy of a rough drawing of a plan for a sewage disposal treatment plant at Forest Lake Resort from Robert Sweeney, a consultant with Environmental Management Systems, on respondent's behalf. DEQ could not accept the plans because they lacked a site evaluation.

(10) On December 15, 1998 DEQ issued and served respondent with a Notice of Violation Department Order and Assessment of Civil Penalty, Case No. WQ/D-NWR-98-212, alleging three violations of environmental laws and seeking, among other relief, civil penalties in the amount of $6,291, and requiring respondent to submit to DEQ by the 15th of each month the temporary holding tank pumping records for the preceding month. (Ex. 109.) Respondent requested a hearing on the notice, but did not appear at the hearing scheduled for July 8, 1999. A default order was taken against respondent on August 25, 1999. (Ex. 130.) The order established one Class I and two Class II violations. (*Id.*)

(11) DEQ's Anne Cox met with respondent and Sweeney on February 23, 1999, to explain to them what respondent needed to do to bring the sewage disposal system at Forest Lake Resort into compliance with the law. The February 23, 1999 meeting led to DEQ and respondent entering into a Mutual Agreement and Order (MAO), Case No. WQ/D-NWR-98-212, signed by respondent on May 10, 1999, and adopted as a Final Order by the Environmental Quality Commission on May 20, 1999. (Ex. 114.) On page 1 of the MAO, respondent acknowledged that he owned or operated Forest Lake Resort, although he wrote the words "former owner" below his signature on the last page of the order. (*Id.* at 7.) Respondent wrote in some changes on the MAO, and initialed those changes. (*Id.* at 1, 3, 5-6.) The signatory for DEQ did not initial the changes made by respondent when the signatory signed the MAO.[13]

(12) The MAO did not resolve the Notice of Assessment of Civil Penalty and Department Order in Case No. WQ/D-NWR-98-212, that DEQ issued to respondent on December 15, 1998. (*Id.* at 2.) The MAO authorized respondent to construct and use holding tanks for temporary sewage collection until such time as respondent could install a DEQ approved permanent sewage disposal system with a WPCF permit. (*Id.* at 3-4.) The MAO ordered respondent in Paragraph 15.B(1) to complete a WPCF permit within 30 days of being notified by DEQ if DEQ determined a WPCF permit was needed based on a soil evaluation. Respondent also had the responsibility pursuant to the terms of the MAO to provide a groundwater study and a narrative and conceptual plan for the upgrade. (*Id.* at 4.) Within 30 days of submitting a complete WPCF permit application, respondent agreed to submit acceptable plans and specifications for a sewage system to serve the entire facility. (*Id.* at 5.) The MAO ordered respondent in Paragraph 15.A(4) to submit the holding tank pump records by the 15th day of the month for the preceding month. (*Id.* at 3-4.) Respondent acknowledged in the MAO that he had actual notice of the contents and requirements of the MAO, and that failure to fulfill any of the provisions of the MAO would constitute a violation of the MAO and subject himself to civil penalties. (*Id.* at 6.)

(13) On June 7, 1999, DEQ mailed a letter to respondent reminding him that he needed to get his temporary holding tanks approved by June 20, 1999, that he needed to submit his holding tank pump records for May by June 15, and that he needed to complete an application for a WPCF permit within 30 days of the signing of the MAO. (Ex. 115.)

(14) In August 1999, respondent provided DEQ with monthly pump receipts through June 1999. On August 16, 1999 DEQ mailed respondent a notice of noncompliance and notice of incomplete application for a WPCF permit. (Ex. 116.) DEQ noted in its August 16, 1999 notice that respondent had provided a soil evaluation report on July 22, 1999, nine weeks after the parties had signed the MAO. (*Id.*)

(15) On November 12, 1999 DEQ mailed respondent a notice that his application was incomplete, and that he still had not submitted a conceptual plan for the resort's system upgrade or a ground water report. (Ex. 117.) In the notice, DEQ reminded respondent that he was still

[13] Because both parties did not initial the changes respondent wrote on the MAO, those changes have no legal effect.

the only applicant on the application for the WPCF permit and that he still was the owner of record for Forest Lake Resort, but that if he had transferred ownership of the property, he needed to provide DEQ with proof of the transfer of ownership. (*Id.*)

(16) On March 10, 2000 DEQ mailed a notice of noncompliance to respondent, informing him that although he still had not submitted the required upgrade plans, DEQ had gone ahead and prepared a draft permit on review, to be followed by a period for public comment. The notice went on to inform respondent that his failure to submit the plans previously requested constituted a violation of the MAO, and that the violation had been referred for enforcement action by DEQ. (Ex. 118.)

(17) DEQ issued a notice of noncompliance to respondent by certified mail on April 10, 2001, informing respondent that he was in violation of the MAO for not submitting a complete application for a WPCF permit, and for not submitting the monthly pump receipts for the period July 1999 through March 2001. (Ex. 119.) In a telephone conversation with DEQ's Anne Cox on April 12, 2001, respondent stated that he no longer owned the Forest Lake Resort property. DEQ checked the county land records and could find no record that the property had been transferred out of respondent's name as an individual.

(18) During the spring of 1999, respondent told other individuals, including individuals with DEQ, that he was in the process of selling the Forest Lake Resort property. (Ex. 125.) Adrian Malo attended several meetings between DEQ and respondent during 1999 regarding the property, the WPCF permit, and the various sewage disposal problems on the property. Malo owned farm property across the highway from respondent's property. About May 1999, Malo told DEQ personnel that he was in the process of purchasing the Forest Lake Resort property from respondent, and that ownership transferred to him on May 1, 1999. (Ex. 126.) DEQ personnel asked Malo to provide them with documentation showing the transfer of ownership, but Malo never did so.

(19) About April 12, 1999, respondent signed a real estate contract as "Caleb Siaw/Trustee for Caleb Siaw, P.C. Trust," to sell the Forest Lake Resort property to "Danny Mal, Trustee for A & D Trust." (Ex. 1, 11.)[14] The contract recited that possession of the property would transfer to Mal on April 10, 1999. (*Id.*) The contract recited a purchase price for the property and terms as follows:

> "$900,000, with a $100,000 contract assignment paid on execution, and the $800,000 balance payable at $4,000 per month for 30 months at 6% interest, thereafter payable at 8% interest for the remainder of the contract, with the first payment due May 15, 1999, and a like payment each month thereafter." (*Id.*)

[14] Exhibit 1, submitted by respondent at the January 17, 2002 hearing, and Exhibit 11, submitted at the February 13, 2002 telephone hearing, differ. Exhibit 1 consists only of the first two pages of the real estate contract. Exhibit 11, also has the two Exhibits, "A and B," attached to it. Moreover, some unknown person wrote information on the first page of Exhibit 11 about "maps" and a "tax account" that does not appear on Exhibit 1.

Respondent received his first payment on the contract in November 2000, followed by a few sporadic later payments. An Exhibit B, "Stipulations to the Contract," provided, among other clauses, that "seller agrees to pay and obtain DEQ approval on all septic systems within described property." (Ex. 11 at 4.) The contract required the seller: [w]hen the purchase price is fully paid and upon request and upon surrender of this agreement, to deliver a good and sufficient deed conveying the premises in fee simply unto the buyer." (Ex. 1 at 2.)

(20) Danny Mal is the brother of Adrian Malo.[15] Adrian Malo had no ownership interest in A & D Trust, although he managed property for the trust. A & D Trust was set up for children of the Mal/Malo families. Neither respondent, Adrian Malo nor Danny Mal provided DEQ with a copy of the real estate contract of sale during the spring or summer of 1999. Respondent's wife provided a copy of the real estate contract, without the exhibits attached, to DEQ by fax in December 1999. (Ex. 128.)[16] No contract or memorandum of contract sale between respondent or Caleb Siaw, P.C., Trust and Danny Mal, Trustee for A & D Trust was filed in Clatsop County land records prior to December 2001.

(21) DEQ could have dealt with a purchaser of the Forest Lake Resort property on the WPCF permit and installation of a new sewage disposal system, if DEQ had been provided with documentary proof that respondent had actually sold the property to another party.

(22) Respondent had a stroke in November 1999. The stroke affected his memory and caused other health problems that limited respondent's ability to deal with the Forest Lake Resort property. Respondent lived in Boring, Oregon, southeast of Portland, between 1997 and 2002.

(23) On August 7, 2000 Caleb Siaw, as grantor, executed a quitclaim deed to "Caleb Siaw, Trustee for the Caleb Siaw, P.C. Trust, *nunc pro tunc*, July 1998." (Ex. 10.) That deed was recorded in Clatsop County land records on November 8, 2000. (*Id.*)

(24) Respondent spent between $18,000 and $20,000 to install temporary holding tanks for sewage on the resort property. Respondent spent approximately $20,000 prior to May 1, 1999 to pump sewage from the property. Respondent purchased two mobile homes from tenants and moved those homes from the property, thereby unhooking them from the existing sewage disposal system. Respondent also unhooked an additional eight dwellings from the disposal system, in an effort to try and relieve some of the problems with the existing system.

(25) Bob Sweeney submitted a report on December 14, 1999 to respondent estimating the total cost of $247,000 to complete a sewage treatment facility on the Forest Lake Resort property that would comply with the MAO and DEQ requirements. (Ex. 120.) The useful life of such a sewage treatment system is about 20 years.

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[15] It is unclear why the two brothers spell their last names differently.

[16] The copy of the real estate contract faxed by respondent's wife consists of the first two pages only, and appear identical to Exhibit 1.

(26) In October 2000, DEQ's Anne Cox received information that a local developer was negotiating to purchase the Forest Lake Resort property from respondent, but that respondent turned down the offer as too low.

(27) DEQ calculated the economic benefit ("EB") portion of the civil penalty by using the U.S. Environmental Protection Agency's BEN computer model, that calculates the economic benefit from the avoidance or delay gained by noncompliance. The BEN model uses a cost of money factor (i.e., interest rate), a tax rate, and the useful life the treatment facility to calculate the approximate dollar value of the economic benefit gained through noncompliance. DEQ calculated the EB value as $191,700.

(28) Respondent did not submit any receipts for the pumping of the temporary holding tanks for the resort property after the one submitted for the month of June 1999, submitted on July 11, 1999.

CONCLUSIONS OF LAW

(1) Respondent violated ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit information required by DEQ to complete his application for a WPCF permit. A civil penalty in the amount of $198,600 should be imposed against respondent for this violation.

(2) Respondent violated 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit holding tank pumping receipts for the previous month.

OPINION

DEQ alleges that respondent violated ORS 468.140(1)(c) by violating an Mutual Agreement and Order of the Environmental Quality Commission signed by respondent and DEQ in May 1999, by failing to submit the information required to complete his application for a WPCF permit, and by failing to submit holding tank pumping receipts for the previous month. ORS 468.140 provides:

> (1) In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of violation in the amount prescribed by the schedule adopted under ORS 468.130.
> * * * * *
> (c) Any rule or standard or order of the Environmental Quality Commission adopted or issued pursuant to * * * ORS chapters 468, 468A and 468B.
> * * * * *.

ORS 183.450(2) provides, in part, "The burden of presenting evidence to support a position in a contested case rests on the proponent of the fact or position." As set forth above,

DEQ allege that respondents violated ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit the information required to complete his application for a WPCF permit, and by failing to submit holding tank pumping receipts. The burden is on DEQ, as the state agency making the allegations, to prove the alleged violations. *Garton v. Real Estate Commissioner*, 127 Or App 340, 342 (1994).

Respondent argues that he did not own the property during the time period relevant to the violations, and hence, cannot be held liable for the civil penalty. DEQ brought the Notice of Assessment of Civil Penalty against respondent as an individual. Respondent held legal title to the real property in his own name starting in October 1996, when he purchased the property from Sama Banki. A warranty deed conveying the property to respondent was recorded in Clatsop County on November 4, 1999. Respondent Caleb Siaw, and Caleb Siaw, P.C., Trust, were and are two different legal entities. Caleb Siaw, P.C., Trust did not hold title to the Forest Lake Resort property in April 1999, when the purported sale occurred from Caleb Siaw, P.C., Trust to Danny Mal, Trustee for A & D Trust, as reflected by the real estate contract in Exhibit 1. A legal entity cannot convey title to or an interest in real estate that the entity does not own at the time of the purported transfer. On August 7, 2000, Caleb Siaw, as grantor, executed a quitclaim deed to "Caleb Siaw, Trustee for the Caleb Siaw, P.C., Trust, *nunc pro tunc*, July 1998." That deed was recorded in the Clatsop County land records on November 8, 2000. Respondent argues that this quitclaim deed established ownership in the real property in Caleb Siaw, P.C., Trust retroactively from August 2000 or November 2000 to July 1998, thereby giving Caleb Siaw, P.C., Trust title that the trust could then convey retroactively to Danny Mal, Trustee for A & D Trust, in April 1999.

The term *"nunc pro tunc"* refers to the power of a court to amend records of its judgments by correcting mistakes or supplying omissions in judgments, and to apply such amendments retroactively by an entry *nunc pro tunc*. A *nunc pro tunc* order merely recites court action previously taken, but not properly or adequately recorded. A *nunc pro tunc* order may not be used to accomplish something which ought to have done but was not done.[17] Respondent cites no authority, nor can the administrative law judge find any authority, for the proposition than an individual or a person, as opposed to a court, can execute documents *nunc pro tunc* to effectively transfer an interest in real property retroactively to an earlier date when the transferee had no legal interest whatsoever in the property. Such a power would allow an enormous opportunity for mischief. Caleb Siaw, P.C., Trust did not hold title to the property in April 1999 when the trust purportedly sold the property on contract to Danny Mal, Trustee for A & D Trust.

Moreover, the legal validity of the real estate contract for the purported sale from Caleb Siaw, P.C. Trust to Danny Mal, Trustee for A & D Trust is questionable. The sale supposedly took place in April 1999, yet the purchaser made no monthly payments on the contract until November 2000, about 18 months later. The terms of the contract called for a monthly payment of $4,000 at 6% interest for 30 months, then at 8% percent interest on a contract balance of $800,000. At 6% interest the monthly payments would just pay the interest on an annual basis

[17] 46 Am Jur 2d , *Judgments*, section 156 *et seq* (1994).

(6% x $800,000 = $48,000 a year interest = $4,000/month x 12 months = $48,000). At 8% interest the monthly payments would fall substantially short of meeting the interest payments on an annual basis (8% x $800,000 = $64,000 a year interest versus $4,000/month x 12 months = $48,000 payments). In other words, the contract would never pay out. Respondent signed the real estate contract in his name as an individual, not as trustee for his professional corporation. Below his signature is the space for the notary public to acknowledge his signature. Danny Mal signed his name as "trustee" in that space. Below Mal's signature is a stamp for the notary public, a Kristina Mae Long, Commission No. 056992, who did not sign in the space on the instrument where the acknowledgment before the notary public should have been made.

A real estate contract to convey fee title to real property at a time more than 12 months from the date of execution of the instrument must be acknowledged in the manner provided for acknowledging deeds, and must be recorded by the conveyor within 15 days after the instrument is executed.[18] A real estate contract to sell the property to Danny Mal was not recorded before December 2001. The real estate contract signed by respondent to sell the property from Caleb Siaw, P.C., Trust to Mal as trustee, contains language that "seller agrees when the purchase price is paid in full, to deliver a good and sufficient deed conveying the premises in fee simple to the buyer." (Ex. 1 at 2.) The real estate contract needed to be acknowledged in the manner provided for acknowledgement of deeds, in other words, before a notary public.[19] A county clerk shall not record an instrument that conveys an interest in real property unless the instrument contains the original signature of the officer before whom the acknowledgement was made.[20] The real estate

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[18] ORS 93.635 provides:

> (1) All instruments contracting to convey fee title to any real property, at a time more than 12 months from the date that the instrument is executed and the parties are bound, shall be acknowledged in the manner provided for acknowledgment of deeds, by the conveyor of the title to be conveyed. Except for those instruments listed in subsection (2) of this section, all such instruments, or a memorandum thereof, shall be recorded by the conveyor not later than 15 days after the instrument is executed and the parties are bound thereby.
>
> (2) The following instruments contracting to convey fee title to any real property may be recorded as provided in subsection (1) of this section, but that subsection does not require such recordation of:
>
> (a) Earnest money or preliminary sales agreements;
>
> (b) Options; or
>
> (c) Rights of first refusal.

[19] ORS 93.410 provides, in part:

> Except as otherwise provided by law, deeds executed within this state, * * * shall be signed by the grantor and shall be acknowledged before any judge of the Supreme Court, circuit judge, county judge, justice of the peace or notary public within the state.* * *.

[20] ORS 93.804 provides, in part:

> (1) * * * [w]hen any instrument presented for recording conveys an interest in real property and is required by law to be acknowledged or proved, a county clerk shall not record the instrument unless the instrument contains the original signature of the persons executing the instrument and the original signature of the officer before whom the acknowledgement was made.
>
> * * * * *.

contract between Caleb Siaw, P.C., Trust and Danny Mal, Trustee for A & D Trust was not properly acknowledged and could not have been recorded under Oregon law.

Moreover, respondent acted and conducted himself between 1999 and mid 2001 like he owned and operated the property. Respondent spent money to make improvements to the property and at least address some of the sewage disposal problems. Respondent signed the MAO on May 10, 1999 in his own name as an individual, not in a representative capacity as trustee for a trust. Respondent acknowledged in the MAO that he owned or operated the property. He acknowledge that the Environmental Quality Commission had the power to impose a civil penalty against him for violations of Oregon law. Respondent also acknowledged in the MAO that the Environmental Quality Commission could issue a final order against him requiring him to comply with the terms of the MAO. At no time during the spring or summer of 1999 did respondent provide DEQ with any evidence that he had sold the property, that he no longer had no legal interest in the property, or that he should no longer be bound by the terms of the MAO. DEQ had the authority to substitute a new owner into the WPCF permit process, if DEQ had received concrete evidence that a new owner had taken over the property. Neither respondent, Adrian Malo nor Danny Mal provided DEQ with any such evidence during 1999 or 2000. Further, even if the April 1999 contract of sale from Caleb Siaw, P.C., Trust to Danny Mal, Trustee for A & D Trust could be viewed as a bona fide sale at the time from the trust to a purchaser, respondent agreed in the stipulations in Exhibit B to the contract "to pay for and obtain DEQ approval on all septic systems within the described property." Finally, if respondent had truly sold the property to Danny Mal in April 1999, why would respondent try to sell the property to another buyer in October 2000?

As holder of legal title to the real property between 1998 and at least late 2001, respondent was the owner of the property for purposes of the onsite sewage disposal rules in OAR chapter 340, division 71, and the requirements in the MAO. OAR 340-071-0100(92) defines "owner" to mean any person who alone, or jointly, or severally with others:

> (a) Has legal title to any single lot, dwelling, dwelling unit, or commercial facility; or
> (b) Has care, charge, or control of any real property as agent, executor, executrix, administrator, administatrix, trustee, commercial lessee, or guardian of the estate of the holder of legal title; or
> (c) is the contract purchaser of real property.
> NOTE: Each such person as descried in subsections (b) and (c) of this section, thus representing the legal title holder, is bound to comply with the provision of theses rules as if he were the legal title holder.

DEQ proved that respondent had both legal title to the real property, as well as the care and control of the property, and that he is legally bound by the terms of the MAO he signed.

For all the above reasons, DEQ is not prevented from enforcing the MAO against respondent because of the purported sale of the property to Danny Mal, Trustee for A & D Trust

in April 1999. Respondent failed to establish that he did not own the property during the relevant time period, and that DEQ cannot enforce the MAO against him.

Paragraph 15.B(1) of the MAO required respondent to complete an application for a WPCF permit within 30 days of when DEQ notified him that it determined a WPCF permit was needed based on the soil evaluation. Respondent submitted a soil evaluation on July 22, 1999, nine weeks after he signing the MAO, and about five weeks after he should have submitted the evaluation. DEQ determined that a WPCF permit was necessary. On November 12, 1999 DEQ mailed a notice to respondent requesting him to submit a groundwater study and a conceptual plan for the resort, information also required by the MAO. Respondent never submitted the requested groundwater information, despite continued requests from DEQ on March 10, 2000 and April 10, 2001. Respondent violated Paragraph 15.B(1) of the MAO by not completing a WPCF permit application as required.

Respondent argues in his answer that he resolved the existing sewage disposal problem at the resort because he ceased to use offending areas for sewage disposal and removed some homes hooked up to the offending area. However, the MAO did not provide for permanent alternative ways to solve the problems at the resort. Respondent was not free to ignore terms of the MAO which he signed. Although the MAO allowed respondent to install holding tanks, those were temporary measures that did not relieve respondent from complying with the MAO to install a permanent sewage disposal system for the entire resort property. Arguably respondent solved some problems at the resort by removing some homes from the site and unhooking them from the existing sewage disposal system. However, that did not solve the problems for other sites and the overall system on the property. Terms of the MAO required respondent to complete an application for a WPCF permit, if certain written conditions were met. DEQ determined that those conditions were met. Respondent failed to comply with the terms of the MAO by not completing the WPCF permit application as he agreed to do.

The MAO required respondent to submit, on a monthly basis, receipts for the pumping of the temporary holding tanks on the resort property. Respondent did not submit any receipts after submitting the receipt for the month of June 1999 on July 11, 1999. Respondent presented no evidence as to why he did not submit the receipts that could have constituted a legitimate reason not to submit them. Respondent violated ORS 468.140(1)(c) by violating the MAO by not submitting the monthly pump receipts. A violation of an order of the Environmental Quality Commission is a Class I violation. However, DEQ did not seek to impose a civil penalty for violation 2 in the Notice of Assessment of Civil Penalty.

Civil Penalty

DEQ seeks a civil penalty against respondent in the amount of $335,700 for violation 1.[21] DEQ seeks no civil penalty for violation 2.

[21] *See* DEQ's closing argument submitted March 1, 2002. The Notice of Assessment of Civil Penalty sought a civil penalty against respondent in the amount of $373,580. (Ex. B.)

OAR 340-012-0045 sets forth the procedure and formula for calculating a civil penalty. 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. A violation of a term or condition of a Environmental Quality Commission Order for onsite sewage disposal is a Class I violation under OAR 340-012-0060(1)(a).[22] OAR 340-012-0045 addresses the magnitude for a violation.[23] If no selected magnitude for a specific violation is stated, the magnitude is moderate, unless DEQ can make specific findings. Here, DEQ made no specific findings for the magnitude of the violation. The magnitude is moderate. A Class I, moderate magnitude violation carries a base penalty of $3,000 under OAR 340-012-0042.[24]

"P" is respondent's prior significant action(s), and receives a value of 3 under to OAR 340-012-0045(1)(c)(A)(iv)[25] and OAR 340-012-0030(1)[26] and (14).[27] Respondents had two

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[22]OAR 340-012-0060 provides, in part:

> Violations pertaining to On-Site Sewage Disposal shall be classified as follows:
> (1) Class One:
> (a) Violation of a requirement or condition of a Commission or Department order;
> * * * * *.

[23] OAR 340-012-0045 provides, in part:

> (1) When determining the amount of civil penalty * * * the Director shall * * *:
> (a) Determine the class of a violation and the magnitude of each violation:
> (A) The class of a 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:
> * * * * *.

[24] OAR 340-012-0042 provides, in part:

> * * * [t]he amount of any civil penalty shall be determined through the use of the following matrices in conjunction with the formula contained in OAR 340-012-0045:
> (1)(a) $10,000 Matrix:
> (A) Class I:
> * * * * *
> (ii)Moderate--$3,000
> * * * * *.
> (b) * * *. This matrix shall apply to the following:
> * * * * *
> (B) Any violation related to ORS 164.785 and water quality statutes, rules, permits or orders, violations by a person having or needing a Water Pollution Control Facility Permit, violations of ORS Chapter 454 and on-site sewage disposal rules by a person performing sewage disposal services;
> * * * * *.

[25]OAR 340-012-0045 provides for determining the amount of civil penalty. Subsection (1)(c)(A) states:

> (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. * * *. The values for "P" and the findings which support each are as follows:

prior significant actions, the Environmental Quality Commission Order in Case No. WQ/D-NWR-98-212, issued August 25, 1999, and his criminal conviction for water pollution in the second degree. The Order established one Class I and two Class II violations, for a total of two Class I equivalent violations. OAR 340-012-0030(1). Respondent was convicted of water pollution in the second degree under ORS 468.943. OAR 340-012-0045(1)(c)(A)(v) assigns a value of 4 for a "P" factor if the prior significant actions consist of three Class I equivalent violations. Because DEQ failed to cite respondent's prior conviction as a prior significant action in the Notice of Assessment of Civil Penalty, citing only the Environmental Quality Commission Order instead, DEQ chooses to use 3 for the "P" factor because the prior actions cited in the Notice consisted of two Class I equivalent violations.

"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 according to OAR 340-012-0045(1)(c)(B)(ii)[28] because respondent failed to correct the problems of the failing sewage systems at the resort.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation, and receives a value of 0 according to OAR 340-012-0045(1)(c)(C)(i)[29] because respondent has been assessed separate penalties for separate days of the violation.

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* * * * *

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

* * * * *.

[26] OAR 340-012-0030 provides, in part:

Unless otherwise required by context, as used in this Division:

(1) "Class One Equivalent" or "Equivalent," which is used only for the purposes of determining the value of the "P" factor in the civil penalty formula, means two Class Two violations, one Class Two and two Class Three violations, or three Class Three violations.

* * * * *.

[27] OAR 340-012-0030(14) provides:

(14) "Prior Significant Action" means any violation established either with or without admission of a violation by payment of a civil penalty, or by a final order of the Commission or the Department, or by judgment of a court.

[28] OAR 340-012-0045(1)(c)(B) provides * * * 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.

[29] OAR 340-012-0045(1)(c)(C) provides * * *. 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.

"R" is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act by the respondent, and receives a value of 6 according to OAR 340-012-0045(1)(c)(D)(iii)[30] because respondent acted intentionally. "Intentional means conduct by a person with a conscious objective to cause the result of the conduct." OAR 340-012-0030(10). DEQ alleges in its Notice of Assessment of Civil Penalty that respondent acted flagrantly. "Flagrant means any documented violation where the Respondent had actual knowledge of the law and had consciously set out to commit the violation." OAR 340-012-0030(7). DEQ argues that its notifications to respondent on June 7, November 12, 1999, March 10, 2000 and April 10, 2000, that he had violated the MAO and needed to correct the sewage disposal system at the resort, support its contention that respondent acted flagrantly. However, respondent had a stroke in November 1999. DEQ mailed at least two of those notices after respondent had his stroke. The stroke affected respondent's memory and physical ability to deal with major problems like what existed at the resort property. Respondent lived southeast of Portland, many miles from the resort property on the Oregon coast. "Flagrant" conduct contemplates that a respondent knowingly sets out with the purpose of violating the law. Respondent's conduct was more consistent with that of a person who knew he had an obligation to correct the problem, became overwhelmed by the magnitude of the problem, in part due to his health problems, and knowingly failed to follow through like he should. DEQ failed to prove that respondent consciously *set out* to commit the violation. Respondent's conduct was more consistent with someone who acted intentionally.

"C" is respondent's cooperativeness in correcting the violation and receives a value of 2 according to OAR 340-012-0045(1)(c)(E)(iii)[31] because respondent was uncooperative and failed to correct the violation or minimize the effects of the violation. The violation continued for many months. Respondent had ample opportunity to correct the problem, although it may have been more difficult for him to do after he had his stroke.

"EB" is the approximate dollar sum of the economic benefit that the respondent gained through noncompliance according to OAR 340-012-0045(1)(c)(F) and receives a value of $191,700, based on the testimony DEQ presented at the hearing. Respondent argues that he

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[30] OAR 340-012-0045(1)(c)(D) provides * * *. 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.

[31] OAR 340-012-0045(1)(c)(E) provides * * *. 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.

spent money to pump tanks and perform other maintenance on the existing sewage disposal system at the resort. Those expenditures were not made in compliance with the terms and conditions of the MAO to install the total system for the resort consistent with a WPCF permit. Only costs expended in connection with the system to satisfy the WPCF permit could have reduced the EB calculation. The full EB value should be used in the penalty calculation.

The civil penalty is calculated as follows:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (3 + 0 + 0 + 6 + 2)] + $191,700
= $3,000 + ($300 x 11) + $191,700
= $3,000 + $3,300 + $191,700
= $6,300 per day x 20 separate days of violation (a day in each month from December 1999 through July 2001) = $126,000 + $191,700
= $317,700

AMENDED PROPOSED ORDER

I propose that the Commission enter an order as follows:

(1) Find that respondent violated ORS 468.140(1)(c) by violating Paragraph 15.B(1) of the Mutual Agreement and Order he signed in May 1999 by failing to submit the information required to complete his WPCF permit, and impose a civil penalty in the amount of $317,700 for this violation; and

(2) Find that respondent violated ORS 468.140(1)(c) by violating Paragraph 15.A(4) of the same Mutual Agreement and Order by failing to submit holding tank pump receipts for the previous month, but impose no civil penalty for this violation because DEQ requested none.

Dated this 1 day of May, 2002.

Ken L. Betterton
Administrative Law Judge
Hearing Officer Panel

Appeal Procedures

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:

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 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.*

STATE OF OREGON - HEARING OFFICER PANEL - EMPLOYMENT DEPARTMENT

CERTIFICATE OF SERVICE

RE: In the matter of CALEB SIAW, MD
Reference No. G60602

I HEREBY CERTIFY that I have made service of copies of the foregoing Amended Hearing Decision upon the following parties by causing them to be mailed in the United States Post Office at Salem, Oregon, on 04/04/02 by United States Mail and Certified Mail, a true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

VIA CERTIFIED MAIL & FIRST CLASS MAIL:

CALEB SIAW, MD
19075 SE FOSTER RD
BORING OR 97009 9653

MICHAEL J. KAVANAUGH
4930 SE WOODSTOCK BLVD
PORTLAND OR 97206 6163

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

JEFF BACHMAN
DEQ
811 SW 6TH AVE
PORTLAND OR 97204 1334

Denise Lewis
Contested Case Coordinator
Hearing Officer Panel
(503) 947-1313 (voice)
(503) 947-1795 (fax)

Oregon
John A. Kitzhaber, M.D., Governor

Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6993

December 10, 2002

Via Certified Mail

Michael J. Kavanaugh
4930 S.E. Woodstock Blvd.
Portland, OR 97206

Jeff Bachman
Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204-1334

RE: Case No. WQ/D-NWR-99-186

I discovered today that six exhibits were missing from the case record prepared for the Commission on November 25, 2002, for the above referenced case. Enclosed are those exhibits and an amended staff report for the case, which were overnight mailed to you and to the Commission today.

If you have any questions, 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

Oregon
John A. Kitzhaber, M.D., Governor

Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6993

December 2, 2002

Via Certified Mail

Michael J. Kavanaugh
4930 S.E. Woodstock Blvd.
Portland, OR 97206

Jeff Bachman
Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204-1334

RE: Case No. WQ/D-NWR-99-186

Enclosed is the meeting agenda and case record for the appeal in the above referenced case, which is set for the regularly scheduled Environmental Quality Commission meeting on Thursday, December 12, 2002. The matter will be heard in the regular course of the meeting. The meeting will be held at the Department of Environmental Quality, Room 3A, 811 S.W. Sixth Ave., Portland, Oregon.

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

If you have any 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

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 19, 2002

Via Certified Mail

Michael J. Kavanaugh
4930 S.E. Woodstock Blvd.
Portland, OR 97206

Jeff Bachman
Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204-1334

RE: Case No. WQ/D-NWR-99-186

The appeal in the above referenced matter has been set for the regularly scheduled Environmental Quality Commission meeting on Thursday, December 12, 2002. The matter will be heard in the regular course of the meeting. The meeting will be held at the Department of Environmental Quality, Room 3A, 811 S.W. Sixth Ave., Portland, Oregon. As soon as the meeting agenda and case record are available, I will forward those to you.

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

If you have any 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

EXHIBIT LIST
HEARING OFFICER PANEL

Agency: DEQ **Hearing Officer:** KMS

Case Name: Glen Spain II **Agency Rep:** Jeff Blackburn

Agency Case No.: _____ **Respondent's Rep:** _____

Panel Case No.: 060602 **Date of Hearing:** JAN 17 02

SIAW

Exhibit #	Description	Offered (✓)	Received (✓)
1	K	✓	✓
2	Oct 8 99 Ltr	✓	✓
3	Oct 11 99 Ltr	✓	✓
4	Spacer	✓	✓
5	Index	✓	✓
6	K for Pumping	✓	✓
7	K —	✓	✓
8	Deed	✓	✓
9		✓	✓
10		✓	✓
11		✓	✓
12		✓	✓
13		✓	✓

EXHIBIT LIST
HEARING OFFICER PANEL

Agency: DEQ **Hearing Officer:** ICB

Case Name: Caleb Shaw M.D. **Agency Rep:** Jeff Bachman ELS

Agency Case No.: _____ **Respondent's Rep:** _____

Panel Case No.: 660602 **Date of Hearing:** Jan 17 2002

ALJ

Exhibit #	Description	Offered (✓)	Received (✓)
A	Notice of Rights	✓	✓
B	Notice of Assessment	✓	✓
C	Answer - Request for Hearing	✓	✓
D	Notice of Hearing	✓	✓
E	July 31, 01 letter	✓	✓

h: exhibit list.doc

EXHIBIT LIST
HEARING OFFICER PANEL

Agency: DEQ **Hearing Officer:** KBS

Case Name: Caleb Slaw M.D. **Agency Rep:** Jeff Bachman

Agency Case No.: _____ **Respondent's Rep:** _____

Panel Case No.: 060602 **Date of Hearing:** Jan 17 '02

DEQ

Exhibit #	Description	Offered (✓)	Received (✓)

h: exhibit list.doc

Index of Exhibits
In the Matter of Dr. Caleb Siaw
Case No. WQ/D-NWR-99-168

R 100 Diagram

R 101. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated December 11, 1997.

R 102. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, date February 5, 1998.

R 103. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application No. 991481, dated March 13, 1998.

R 104. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated March 24, 1998.

R 105. Water Pollution Control Facilities Permit Application received by the Department of Environmental Quality from Caleb Siaw, March 31, 1998.

R 106. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Incomplete Application, dated April 30, 1998.

R 107. Letter from Department of Environmental Quality to Caleb Siaw and Richard Johnson regarding Permit Application 991481, Incomplete Application, dated September 1, 1998.

R 108. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated September 21, 1998.

R 109. Notice of Violation, Department Order, and Assessment of Civil Penalty issued by Department of Environmental Quality to Caleb Siaw, December 15, 1998.

R 110. Judgment of Conviction and Sentence Order in State of Oregon vs. Caleb Siaw, filed January 22, 1999.

R 111. Notice of Noncompliance and Incomplete Application, issued by Department of Environmental Quality to Caleb Siaw, February 2, 1999.

R 112. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, March 19, 1999.

R 113. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, April 29, 1999.

R 114. Mutual Agreement and Order (MAO) No. WQ/D-NWR-98-212, In the Matter of Caleb Siaw, executed May 20, 1999, and cover letter, dated May 21, 1999.

R **115.** Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Compliance with MAO, dated June 7, 1999.

R **116.** Notice of Noncompliance and Incomplete Application, issued by Department of Environmental Quality to Caleb Siaw, August 16, 1999.

R **117.** Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Incomplete Application, Conceptual Plans, November 12, 1999.

R **118.** Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, March 10, 2000.

R **119.** Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, April 10, 2001.

R **120.** Cover Page, Proposal for Wastewater Treatment Facility for Forest Lake Resort by Advanced Treatment Systems, Inc. (ATS), dated December 14, 1999, and fax from ATS to Anne Cox regarding "Option "Little SBR", undated.

R **121.** Letter sent by fax from Environmental Management Systems to Anne Cox regarding Forest Lakes Resort – Sewage System, dated April 27, 2000.

R **122.** Economic benefit analysis for Caleb Siaw, dated January 17, 2002.

R 123 (end)

R 124

R 125

R 126

R 127

R 128

R 129

R 130

State of Oregon
Department of Environmental Quality Memorandum

Date: November 25, 2002

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item A, Action Item: Appeal of Amended Proposed Order in the matter of Caleb Siaw, M.D., Case No. WQ/D-NWR-00-186
December 12, 2002 EQC Meeting

Appeal to EQC

Dr. Caleb Siaw appealed the Amended Proposed Order (Attachment H) dated May 1, 2002, that assessed him a $317,700 civil penalty for repeatedly violating an Environmental Quality Commission Order.

Background

On July 31, 2001, DEQ assessed Dr. Siaw a $373,580 civil penalty for multiple violations of an EQC Order that required Dr. Siaw to design and construct a new on-site sewage disposal system for a mobile home park he owned in Seaside, the Forest Lake Resort. Dr. Siaw appealed the penalty and a contested case hearing was held January 17, 2002. At hearing, DEQ reduced the penalty assessment to $335,700 based on new information concerning Dr. Siaw's economic benefit.

On April 5, 2002, the Hearing Officer issued a Proposed Order assessing Dr. Siaw a civil penalty of $198,600 (Attachment K). The reduction resulted chiefly from the Hearing Officer's decision that the Department did not have the statutory authority to assess Dr. Siaw penalties on a monthly basis, but only on a daily basis. On April 12, 2002, the Department formally requested, pursuant to Oregon Administrative Rule 137-003-0655, that the Hearing Officer clarify his ruling. On May 1, 2002, the Hearing Officer issued an Amended Proposed Order reversing his prior decision regarding multiple penalties, and assessed Dr. Siaw a civil penalty of $317,700. In his Amended decision, the Hearing Officer concluded that the Department had not assessed penalties on a monthly basis, but instead had assessed a single daily penalty for each month in which a violation occurred.

Findings of fact made by the Hearing Officer in his Amended Proposed Order are summarized as follows:

Dr. Siaw purchased the Forest Lake Resort property in his own name on October 30, 1996. The property contained 44 mobile home and RV spaces, as well as a laundry. The resort used a collection of drain fields and septic tanks to dispose of sewage. As a result of multiple incidents of raw sewage surfacing at the resort, the Department notified Dr. Siaw in December 1997 that he needed to repair or replace the failing sewage disposal systems and, as a consequence, obtain a Water

Pollution Control Facilities (WPCF) Permit for the resort.

On February 17, 1998, Dr. Siaw filed an incomplete WPCF permit application with the Department. On several occasions in 1998, the Department sent Dr. Siaw Notices of Noncompliance in response to incidents of surfacing sewage at the resort and/or requesting that he complete his WPCF application.

On June 30, 1998, Dr. Siaw, as Trustee for Caleb Siaw P.C. Trust, signed a memorandum of sale to sell the resort to Richard K. Johnson and Joyce M. Johnson, husband and wife. The Johnsons made a few payments on the contract and then let the property go back to Dr. Siaw. On August 16, 1999, the Johnsons signed a bargain and sale deed deeding the property back to Caleb Siaw P.C. Trust.

After ~~a~~ receiving a referral from DEQ, Dr. Siaw was prosecuted by the Clatsop County District Attorney for criminal violations of state water quality law. On January 22, 1999, Dr. Siaw pled no contest to a single count of Water Pollution in the Second Degree, and was sentenced to two years probation and a $10,600 fine. As a condition of his probation, Dr. Siaw was required to "make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material."

On May 10, 1999, Dr. Siaw signed a Mutual Agreement and Order (MAO) that was adopted as a Final Order by the Environmental Quality Commission on May 20, 1999. On page 1 of the MAO, Dr. Siaw acknowledged that he owned or operated Forest Lake Resort, although he wrote the words "former owner" below his signature on the last page of the Order. Dr. Siaw hand wrote in several other changes on the MAO and initialed those changes, but the changes were not initialed by the signatory for the Commission.

The MAO authorized Dr. Siaw to use temporary sewage holding tanks until such time as he could install a DEQ-approved sewage disposal system and obtain a WPCF permit. The MAO ordered Dr. Siaw to complete a WPCF permit application within 30 days of being notified by DEQ if DEQ determined that a soil evaluation demonstrated that a WPCF permitted system was feasible for the park. Dr. Siaw also had the obligation to complete a groundwater study and a narrative and conceptual plan for the new system. Within 30 days of submitting a complete WPCF permit application, Dr. Siaw agreed to submit acceptable plans and specifications for a new system. Dr. Siaw acknowledged in the MAO that he had actual notice of the contents and requirements of the MAO and that failure to fulfill

any of the provisions of the MAO would constitute a violation of the MAO and subject him to civil penalties. On August 16, 1999; November 12, 1999; March 12, 2000; and April 10, 2001, DEQ mailed Dr. Siaw notices that he had violated the MAO by failing to complete his WPCF application and requesting that he submit the necessary information.

On April 12, 1999, Dr. Siaw signed a real estate contract as "Caleb Siaw/Trustee for Caleb Siaw, P.C. Trust" to sell the resort to "Danny Mal, Trustee for A & D Trust." No contract or memorandum of contract sale between Dr. Siaw or Caleb Siaw, P.C. Trust and Danny Mal, Trustee for A & D Trust, was filed in Clatsop County land records prior to December 2001.

On August 7, 2000, Caleb Siaw, as grantor, executed a quitclaim deed to "Caleb Siaw, Trustee for Caleb Siaw, P.C. Trust, nunc pro tunc, July 1998." That deed was recorded in Clatsop County land records on November 8, 2000.

In his Conclusions of Law, the Hearing Officer found that the Dr. Siaw had violated the MAO by failing to submit information required by DEQ to complete his application for a WPCF permit.

Dr. Siaw appealed the Hearing Officer's Amended Proposed Order to the Commission on May 29, 2001.

In his appeal to the Commission (Attachment G), Dr. Siaw took the following exceptions to the Amended Proposed Order:

1. The Hearing Officer erred in finding that "DEQ proved that respondent had both legal title to the real property, as well as the care and control of the property, and that he is legally bound by the terms of the MAO he signed."
2. The Hearing Officer erred in finding that "[T]he real estate contract between Caleb Siaw P.C. Trust and Danny Mal, Trustee for the A & D Trust, was not properly acknowledged and could not be recorded under Oregon law."
3. The Hearing Officer erred in finding that as legal owner between 1998 and at least late 2001, Dr. Siaw was owner of the property for the purposes of the onsite sewage disposals rules in OAR Chapter 340, Division 71, and the requirements in the MAO.
4. The Hearing Officer erred in finding that because both parties did not initial Dr. Siaw's handwritten changes to the MAO, the changes had no legal effect.
5. The Hearing Officer erred in finding that DEQ was not estopped from enforcing the MAO after presenting an alternative to Dr. Siaw that Dr. Siaw

relied on and complied with.

6. The Hearing Officer erred in finding that Dr. Siaw's closure of eight mobile home spaces in an effort to relieve some of the problems with the existing sewage disposal system was a mere effort and not a solution.
7. The Hearing Officer erred in calculating the civil penalty.

In its reply brief (Attachment A), the Department supported the Hearing Officer's Amended Proposed Order.

EQC Authority

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

Alternatives

The Commission may:

1. As requested by the Dr. Siaw, dismiss the penalty by adopting one or more of Dr. Siaw's exceptions regarding his liability for compliance with the MAO.
2. Reduce the penalty by adopting one or more of Dr. Siaw's exceptions to the penalty calculation.
3. As requested by the Department, uphold the Hearing Officer's Amended Proposed Order.

In the Commission's review of the proposed order, including the recommended findings of fact and conclusions of law, the EQC may substitute its judgment for that of the Hearing Officer except as noted below.[1] The proposed order was issued under the new statutes and rules governing the Hearing Officer Panel Pilot Project.[2] Under these 1999 statutes, DEQ's contested case hearings must be conducted by a hearing officer appointed to the panel, and the EQC'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

[1] OAR 340-011-0132.
[2] Oregon Laws 1999 Chapter 849.
[3] *Id.* at § 5(2); § 9(6).
[4] *Id.* at § 12(2).

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 the new 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, there are a number of procedural provisions that have been 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. Department's Amended Brief in Reply to Petitioners Exceptions and Brief, dated August 22, 2002.
B. Cover letter to Department's Amended Brief, dated August 22, 2002.
C. Department's Brief in Reply to Petitioners Exceptions and Brief, dated August 15, 2002.
D. Petitioner's Brief, dated July 15, 2002.
E. Letter from Stephanie Hallock, granting Petitioner an extension of the deadline for filing his brief, dated June 27, 2002.
F. Letter from Mikell O'Mealy, dated June 3, 2002.
G. Petitioner's Petition for Review of the Amended Proposed Order, dated May 29, 2002.
H. Hearing Officer's Amended Hearing Decision and Proposed Order for Assessment of Civil Penalty, dated May 1, 2002.
I. Petitioner's Petition for Review of the Proposed Order, dated April 23, 2002.
J. Letter from Jeff Bachman, DEQ, to Hearing Officer requesting clarification of

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[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).

two rulings in Proposed Order, dated April 15, 2002.

K. Hearing Officer's Hearing Decision and Proposed Order, dated April 5, 2002.
L. Department's Hearing Memorandum, dated March 1, 2002.
M. Dr. Siaw's Closing Argument, dated February 28, 2002.
N. Hearing Exhibits

Hearing Officer Exhibits

A. Notice of Contested Case Rights and Responsibilities.
B. Notice of Assessment of Civil Penalty, dated July 31, 2001.
C. Answer and Request for Hearing, dated August 8, 2001.
D. Notice of Hearing, dated November 13, 2001.
E. Cover Letter to Notice of Assessment of Civil Penalty, dated July 31, 2001.

Department Exhibits

100. Diagram of Forest Lake Resort.
101. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated December 11, 1997.
102. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated February 5, 1998.
103. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application No. 991481, dated March 13, 1998.
104. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated March 24, 1998.
105. Water Pollution Control Facilities Permit Application received by the Department of Environmental Quality from Caleb Siaw, received March 31, 1998.
106. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Incomplete Application, dated April 30, 1998.
107. Letter from Department of Environmental Quality to Caleb Siaw and Richard Johnson regarding Permit Application 991481, Incomplete Application, dated September 1, 1998.
108. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated September 21, 1998.
109. Notice of Violation, Department Order, and Assessment of Civil Penalty issued by Department of Environmental Quality to Caleb Siaw, December 15, 1998.
110. Judgment of Conviction and Sentence Order in State of Oregon vs. Caleb Siaw, filed January 22, 1999.
111. Notice of Noncompliance and Incomplete Application, issued by

Department of Environmental Quality to Caleb Siaw, February 2, 1999.

112. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, March 19, 1999.
113. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, April 29, 1999.
114. Mutual Agreement and Order (MAO) No. WQ/D-NWR-98-212, In the Matter of Caleb Siaw, executed May 20, 1999, and cover letter, dated May 21, 1999.
115. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Compliance with MAO, dated June 7, 1999.
116. Notice of Noncompliance and Incomplete Application, issued by Department of Environmental Quality to Caleb Siaw, August 16, 1999.
117. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Incomplete Application, Conceptual Plans, November 12, 1999.
118. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, March 10, 2000.
119. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, April 10, 2001.
120. Cover Page, Proposal for Wastewater Treatment Facility for Forest Lake Resort by Advanced Treatment Systems, Inc. (ATS), dated December 14, 1999, and fax from ATS to Anne Cox regarding "Option "Little SBR", undated.
121. Letter sent by fax from Environmental Management Systems to Anne Cox regarding Forest Lakes Resort – Sewage System, dated April 27, 2000.
122. Economic benefit analysis for Caleb Siaw, dated January 17, 2002.
123 Electronic Mail from Anne Cox, Subject: "Caleb Siaw Talks About a Different Buyer", dated October 15, 1999.
124. Electronic mail from Anne Cox, Subject: "Caleb Siaw is selling Forest Lake Resort," dated April 2, 1999.
125. Electronic mail string from Dewey Darold, Subject: "Forest Lake Resort Inspection," dated April 26, 1999.
126. Electronic mail string from Dewey Darold, Subject: "Forest Lake RV Park," dated May 3, 1999.
127. Electronic mail from Anne Cox, Subject: "Meeting with Mr. Malo, new buyer, Forest Lake Resort," dated May 10, 1999.

128-1. Facsimile from Brenda Siaw to Charlie Herdener, DEQ

Enforcement, dated December 13, 1999.

129. Electronic mail from Anne Cox, Subject: "Siaw to sell Forest Lake Resort ... to Malo?," October 24, 2000.
130. Hearing Decision, Case No. WQ/D-NWR-98-212, In the Matter of Caleb Siaw.

Dr. Siaw's Exhibits

1. Real Estate Contract, dated April 12, 1999.
2. Letter from Anne Cox to Adrian Malo, dated October 8, 1999.
3. Letter from Robert Sweeney to Dr. Caleb Siaw, dated October 11, 1999.
4. Memo, signed by Adrian Malo, dated January 10, 2002.
5. Judgment, Forest Lake Resort By and Through A & D Trust vs. Peggy Allen, dated December 6, 2001.
6. Holding Tank Pumping Contract, undated.
7. Owner's Sale and Earnest Money Agreement, undated.

O. Caleb Siaw's Pre-Hearing Memorandum, dated January 16, 2002.
P. Caleb Siaw's Motion to Join Indispensable Party and Motion to Postpone and Consolidate, dated January 12, 2002.

Documents 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

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: Caleb Siaw, M.D., Petitioner,	Case No. G60602 AMENDED RESPONSE OF OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY TO PETITIONER'S BRIEF AND EXCEPTIONS AND BRIEF TO THE RULINGS AND PROPOSED ORDER OF HEARINGS OFFICER

This Response is offered in opposition to Petitioner's Brief appealing the Hearing Officers Amended Proposed Order (Proposed Order) in Case No. WQ/D-NWR-99-186, issued May 1, 2002, to Caleb Siaw, M.D., by the Department of Environmental Quality (the Department).

INTRODUCTION

Petitioner, Dr. Caleb Siaw, appeals a Hearing Officer's Proposed Order assessing Dr. Siaw a $317,700 civil penalty for violating a Mutual Agreement and Order (MAO) he entered into with the Department of Environmental Quality (the Department) on May 20, 1999. The MAO required Dr. Siaw to obtain a Water Pollution Control Facilities Permit (WPCF) and construct a new on-site sewage disposal system for the Forest Lake Resort mobile home park (the park) near Seaside, Oregon.

Dr. Caleb Siaw acquired the park in 1997. During 1997, after Dr. Siaw purchased the park, and in early 1998, the Department documented that one or more of the on-site sewage disposal systems at the park were failing and required repair or alteration. As a result of the failures, Dr. Siaw was required, pursuant to Oregon Administrative Rule (OAR) 340-071-0130(16)(a) and 15(a), to obtain a Water Control Pollution Facility (WPCF) permit that would

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cover all of the on-site sewage disposal systems at the park.[1] Dr. Siaw has never obtained the required permit.

From late December 1997 through September 1998, the Department issued Dr. Siaw four separate Notices of Noncompliance (NONs) each citing multiple violations of on-site sewage disposal regulations.[2] On January 22, 1999, Dr. Siaw pled no contest to a criminal charge of water pollution in the second degree stemming from an incident where sewage from the park discharged to the Necanicum River. The Court's Order of Conviction and Sentence stated that as a condition of his probation, Dr. Siaw was required "to make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material."

In order to specifically identify for Dr. Siaw the tasks necessary to bring the park into compliance, and establish an enforceable schedule for completing those tasks, the Department negotiated and entered into the MAO with Dr. Siaw on May 20, 1999. The MAO is a Final Order of the Environmental Quality Commission. Paragraph 15(B)(1) of the MAO required Dr. Siaw to "complete a WPCF permit application within 30 days of being notified by DEQ if DEQ determines a WPCF permit is needed based on the soil evaluation." On November 12, 1999, the Department sent Dr. Siaw a letter indicating that, based on a proposal submitted by Dr. Siaw's consultant, Robert Sweeney, a WPCF permit was feasible for the park. The letter further instructed Dr. Siaw to submit additional information in order to complete his WPCF application. Specifically, the letter requested the groundwater information described in, and required by,

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[1] OAR 340-071-0160(16)(a) states that "owners of existing systems meeting the system descriptions in (15)(a), (b), and (d) through (g) are not required to apply for a WPCF permit until *such time as a system repair or alteration is necessary.*" (Empahsis added). "Alteration" and "Repair" are defined in OAR 340-071-0100(6) and (115), respectively, and clearly encompass the work necessary to stop the surfacing of sewage at the park. Dr. Siaw was required to put all the systems at the park under one permit pursuant to OAR 340-071-130(15)(a), which states that an operating permit (WPCF) is required for "any system or *combination of systems* located on the same property or serving the same facility with a total sewage flow design capacity greater than 2,500 gallons per day." DEQ Environmental Specialist Anne Cox testified that the average sewage flow for a single family residence is 250 gallons per day and that the park has spaces for 44 mobile homes and a laundry facility.

[2] Hearing Exhibits 101, 102, 104, and 108.

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Paragraph 15(B)(1)(a)(i) of the MAO. Despite further requests from the Department, Dr. Siaw never submitted the groundwater data necessary to complete his permit application and comply with the MAO.

On July 31, 2001, the Department assessed Dr. Siaw a civil penalty for failing to comply with the MAO. Dr. Siaw appealed, and, after hearing, the Hearing Officer issued an Amended Proposed Order assessing Dr. Siaw a $317,700 civil penalty. Dr. Siaw then appealed the Hearing Officer's Proposed Order.

Dr. Siaw's exceptions to the Proposed Order can be boiled down to two primary arguments: 1) that he did not own Forest Lake Resort at the time he entered into the MAO and therefore has no obligation to comply with the terms of the MAO, and 2) the Department is estopped from compelling Dr. Siaw's compliance with the MAO because a staff member allegedly told Dr. Siaw's consultant, Mr. Sweeney, that Dr. Siaw could achieve compliance with on-site sewage disposal regulations through measures other than those specified in the MAO.

DISCUSSION

I. Petitioner's Exceptions A.1 and 3: Ownership of the Property

Exceptions A.1 and A.3 both relate to whether the hearings officer was correct in determining that Dr. Siaw was the "owner" of the park for purposes of the violations cited. Dr. Siaw seeks refuge in an April 1999 real estate contract between the Caleb Siaw P.C., Trust and the A & D Trust, which he claims rendered him a nonowner as of April 1999.

As is readily apparent, the real estate issues at the park are a mess. Fortunately, it is not necessary to untangle the various real estate transactions to resolve this issue. Dr. Siaw has already waived his right to challenge the Mutual Agreement and Order (MAO). When he executed the MAO, he expressly acknowledged the authority of the Environmental Quality Commission to issue an abatement order that addressed future violations. (Ex. 114, ¶ 13). He also waived his right to a contested case on the future violations addressed in the MAO. (Ex.

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114, ¶ 17.) By arguing that the contract with the A&D Trust rendered him a nonowner, he is really arguing that he is not liable for the violations resolved by the MAO. Again, he has waived that argument.

Nonetheless, Dr. Siaw did and still does retain legal title to the property. The contract upon which Dr. Siaw relies was unperformed, or executory, when the MAO was signed. It is still unperformed. Dr. Siaw will retain legal title to the property until the purchase price is paid in full. *See e.g., Bedortha v. Sunridge Land Co., Inc.*, 312 Or 307, 311 (1991); *Ochs v. Albin*, 137 Or App 213, 220 (1995). The cases cited in Dr. Siaw's brief state as much (i.e. the buyer has equitable title, the owner retains legal title).[3]

As the holder of legal title, Dr. Siaw has at all relevant times been the "owner" of the property for purposes of the on-site sewage disposal rules in OAR 340, Division 71. Pursuant to OAR 340-071-0100(92), the "owner" includes "any person who, alone or jointly, or severally with others:

> "(a) Has legal title to any single lot, dwelling unit, or commercial facility; *or*
>
> (b) Has care, charge, or control of any real property * * *; *or*
>
> (c) Is the contract purchaser of the real property.
>
> NOTE: Each such person as described in subsections (b) and (c) of this section, thus representing the legal title holder, is bound to comply with these rules as if he were the legal title holder." (Emphasis added.)

Although a contract purchaser is bound to comply with the on-site sewage disposal rules to the same extent as the holder of legal title, the holder of legal title is *not* relieved of his obligations under Division 71 merely by entering into the contract. Thus, even taking Dr. Siaw's assertions about the April 1999 contract as true, Dr. Siaw is still liable as an "owner" under Division 71.

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[3] Counsel for petitioner argues that "Caleb Siaw was not the 'owner' of the property" based on cases interpreting ORS 88.110. (Pet. Brief at 8-9). Here, however, we are not interpreting ORS 88.110, but rather OAR Chapter 340, Division 71.

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Regardless of whether Dr. Siaw owned the property when the MAO was executed, however, there is no question that Dr. Siaw owned the property when the violations occurred. Even if one could evade his or her responsibilities under Division 71 by the simple expedient of signing a contract (a proposition the Department rejects), the MAO resolved the violations occurring after September 1998, including the ongoing violations that would continue to occur until the tasks in the MAO were accomplished. Dr. Siaw does not dispute that he owned the property until at least April 1999.

Dr. Siaw's undisputed status as the holder of legal title should resolve the question of "ownership" for purposes of Division 71. For that reason, it would ordinarily be unnecessary to delve into the real estate issues. But this case illustrates precisely *why* DEQ employs the type of liability framework found in Division 71.

Take first the contract with the Johnsons. Although it was entered into in July 1998, the Johnsons had abandoned the contract, and the property, by November 1998. Dr. Siaw asserts that this failed contract prevented him from owning the property after July 1998. (Pet. Brief at 7). It did not, however, prevent him from acting as the owner in his dealings with DEQ or prospective purchasers throughout 1999. In fact, he entered the A & D contract in April 1999--by which point he now claims that he did not own the property.

This is the contract that serves as Dr. Siaw's primary defense. The hearings officer correctly noted that this contract was invalid from the outset because, among other things, the purported seller was not Dr. Siaw, but rather Caleb Siaw, P.C. Trust, which did not actually own the property.[4] (Proposed Order at 12). Dr. Siaw does not challenge this conclusion.[5]

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[4] As the Hearings Officer noted, "Respondent Caleb Siaw and Caleb Siaw, P.C. Trust were and are two different legal entities. Caleb Siaw, P.C., Trust did not hold title to the Forest Lake Resort Property in April 1999 when the purported sale occurred.... A legal entity cannot convey title to or an interest in real estate that the entity does not own at the time of the purported transfer." (Proposed Order at 12.)

[5] Instead, Dr. Siaw relies on his August 2000 effort to convey the property from himself to the trust, retroactive to 1998. The hearings officer concluded that this effort was ineffective to rectify the issue. (Proposed Order at 12.) Dr. Siaw does not challenge this conclusion either.

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Moreover, even if the April 1999 contract had been valid when executed (which DEQ denies), its continued validity is questionable. The purchaser made no monthly payments until November 2000, eighteen months after the contract was executed. The purchaser was clearly in default (and had been for well over a year). Dr. Siaw apparently opted to ignore his remedies against his defaulting purchaser (e.g. forfeiture, foreclosure) to avoid retaking the property. At the same time, he presented himself as the owner of the property by continuing to market the property to another buyer (in October 2000) and by failing to record the contract with A & D Trust until January 10, 2002 (midway through this contested case proceeding).[6]

In addition, Dr. Siaw committed to make the required improvements to the system in the very same contract he now claims prevents him from performing the MAO. Stipulation B to the April 1999 contract expressly provides that "Seller agrees to *pay for and obtain* DEQ approval on all septic systems within the described property." (Ex. 11.) Having represented to his purchaser that he would in fact do the required work, he cannot reasonably argue that he was not in control of nor had a right to improve the sewer system on the property.[7]

In sum, Dr. Siaw seeks to avoid obligations under both Division 71 and the MAO using a invalid contract (1) that he and his purchaser both ignored throughout 1999 and much of 2000, (2) that he failed to record (i.e. apprise the public of) until 2002, and (3) in which he had expressly assumed the obligations he now seeks to avoid. On these facts, the hearings officer correctly determined that Dr. Siaw was the owner of the property during the relevant period.

II. Petitioner's Exception A.2 (Improper Acknowledgment of Contract)

Dr. Siaw takes issue with the hearings officer's determination that the April 1999 contract was not properly acknowledged and should not have been recorded under Oregon law.

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[6] As the Hearings Officer correctly noted, neither Dr. Siaw nor his purported purchaser(s) delivered any concrete evidence that a new owner had taken over the property throughout this period. (Proposed Order at 14.)

[7] In addition, the MAO itself included a force majeure provision by which the time for performance would be extended if Dr. Siaw demonstrated that an event beyond his reasonable control caused or might cause a delay or deviation in the work. (MAO ¶ 16.) There is no indication that the necessary work was impeded by the purchaser or any other event outside of Dr. Siaw's control.

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(Proposed Order at 13-14.) The hearings officer was, however, right on this point.[8] The fact that a Clatsop County clerk recorded the improperly acknowledged contract does not correct that deficiency.

With that said, this issue is irrelevant. The hearings officer based his determination regarding ownership of the property on several factors. Even Dr. Siaw refers to this determination as merely bolstering the hearings officer's decision regarding ownership. (Pet. Brief at 9.) For the many reasons outlined in Section I, above, the hearings officer properly recognized Dr. Siaw as the owner of the property for purposes of on-site sewage obligations.

III. Petitioner's Exceptions B and F (Effect of Revisions to the MAO)

Before returning the MAO to DEQ, Dr. Siaw inserted the words "former owner" under his signature. (Ex. 114.) Dr. Siaw now argues that his hand-written amendment to the MAO constituted a counter-offer that was accepted by DEQ when DEQ signed the amended form. He then takes an extraordinary leap to argue that DEQ's mere execution of the altered agreement "establishes that Caleb Siaw is a 'former owner.'" (Pet Brief at 10.) Under this theory, if Dr. Siaw had signed the MAO as the "Mayor of Portland" or "President of the United States," DEQ's signing would make him so. That is obviously not the case.

As an initial matter, Dr. Siaw's revision did not create a counter-offer. It might have been viewed as a counter-offer, if it went to a material term. The addition of a new condition by the offeree in response to an offer would render the response a counter-offer. *See e.g. D'Angelo v. Schultz*, 110 Or App 445, 450, 823 P2d 997 (1992). Here, however, Dr. Siaw did not revise the MAO in a manner that affected either his obligations or those of DEQ. He did not change, add to, or modify any of its essential or material terms (i.e. compliance schedule and conditions).[9]

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[8] The real estate contract was not properly acknowledged. The contract shows an unexecuted notary block. Moreover, the unexecuted notary block purports to acknowledge the signature of the *buyer*. The contract should have been acknowledged by the *seller*. (See ORS 93.410, 93.635, 93.804).

[9] Moreover, in paragraph 1, the MAO identifies Caleb Siaw as the owner of the mobile home park. Dr. Siaw did not revise this recital.

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The principles of contract law are not, however, irrelevant here. Regardless of whether one characterizes the sequence of events as Dr. Siaw accepting DEQ's initial "offer" or DEQ accepting Dr. Siaw's "counter-offer," the outcome is the same. The parties had a signed agreement. The MAO itself is clear. Among other things, Dr. Siaw expressly agreed to a compliance schedule and set of conditions. Dr. Siaw's failure to comply, as agreed in the MAO, is the subject of this enforcement matter. In his appeal, Dr. Siaw neither claims to have complied with the MAO nor claims that its *material* terms were modified in a way that made compliance unnecessary.

In short, exceptions B and F fail. Exception B challenges the hearings officer's observation that the revision needed to be initialed by both parties to be effective. (Proposed Order at 8, fn 13). It is, however, irrelevant whether this statement was right or wrong. Whether characterized as an offer or counter-offer, the outcome is the same. Exception F goes to the hearings officer's finding that Dr. Siaw violated ORS 468.140(1)(c) by violating paragraph 15.B.(1) of the MAO. (Proposed Order at 19.)[10] Regardless of whether Dr. Siaw's revisions are characterized as a "counter-offer" or not, his argument does nothing to undermine the validity of the subject "contract."

IV. Petitioner's Exception C (Estoppel)

Dr. Siaw argues that DEQ should be estopped (prevented) from using his failure to get a WPCF permit as a basis for this enforcement action. To establish estoppel against a state agency, Dr. Siaw must not only establish that DEQ has taken inconsistent positions, but also (1) that he relied on the agency's earlier position and (2) that his reliance was reasonable. *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995); *State ex rel SOSCF v. Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001). DEQ disagrees with Dr. Siaw's

[10] Dr. Siaw does not challenge the hearings officer's finding that Dr. Siaw violated ORS 468.140(1)(c) by violating paragraph 15.A.(4) of the MAO. (Proposed Order at 19.) Paragraph 15.B.(1) is effective and enforceable for the same reason and to the same extent as paragraph 15.A(4).

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characterization of the October 6, 1999 meeting. The EQC need not, however, resolve that disagreement because Dr. Siaw's estoppel argument fails for other reasons, as well.

In his brief to the Commission, Dr. Siaw recites the elements of estoppel, but he neither alleges nor establishes that he relied on the summary of the October 6, 1999 meeting or that his reliance was reasonable. Dr. Siaw in fact never even claimed such reliance until he filed his Exceptions and Brief pursuant to his appeal of the hearing officer's Amended Proposed Order. Dr. Siaw did not raise estoppel as a defense in his Answer to the Notice of Assessment of Civil Penalty or in his pre- and post-hearing memoranda, probably because, on this record, Dr. Siaw could not possibly establish such reliance. The correspondence from DEQ to Dr. Siaw between the October 1999 meeting and commencement of this action made clear that a WPCF permit was required.

For example, on November 12, 1999, Anne Cox of DEQ advised Dr. Siaw in writing of deficiencies in the conceptual plans submitted for the system upgrade. (Ex. 117.) She reminded Dr. Siaw that the WPCF permit could not be issued until the plans were approved. Her letter closed by directing Dr. Siaw to call her if he had any questions regarding the WPCF permit application.[11] In March 2000, DEQ delivered Dr. Siaw a draft WPCF permit for his review and comment, together with a Notice of Noncompliance (NON) citing him for failure to submit the required plans. (Ex. 118.) The NON stated that action on the draft WPCF permit would be suspended until the plans were received. In April 2001, DEQ delivered another NON citing Dr. Siaw for violation of the MAO and directing Dr. Siaw to, among other things, complete his WPCF permit application by submitting the required plans.[12] (Ex. 119.)

This enforcement action was not commenced until July 31, 2001, almost two years after the meeting in question. Regardless of any misunderstanding created by his consultant's October

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[11] Dr. Siaw and his consultant had already been copied on Ms. Cox's written follow-up to the October 6, 1999 meeting. (Ex. 2.) In her letter, Ms. Cox made clear that Dr. Siaw was still bound by the terms of the MAO, which required that he apply for a WPCF permit. The letter, to Adrian Malo, clearly reflects that someone needed to have a permit for the system.

[12] Dr. Siaw's consultant was also copied on both the March 2000 and April 2001 NONs.

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1999, letter, Dr. Siaw was repeatedly advised after that letter that DEQ expected a complete WPCF permit application, including plans for a system upgrade. Under the circumstances, reliance on the position outlined in his consultant's letter is not only unreasonable, but also unlikely. His estoppel argument necessarily fails.

V. Petitioner's Exceptions C.1 and F (Installation of Holding Tanks)

Dr. Siaw argues that he was never required to comply with the terms of the MAO by obtaining a WPCF permit and constructing a new on-site disposal system. Dr. Siaw claims that all the law required him to do was disconnect and abandon the particular failed sewage disposal system at the park that was the source of the majority of the illegal discharges. Dr. Siaw ignores the clear and unequivocal language of the MAO.

The Environmental Quality Commission ordered Dr. Siaw to undertake the compliance measures set forth in the MAO, and Dr. Siaw expressly waived his right to contest that Order. Dr. Siaw is not at liberty to treat the requirements of the Commission Order as if they were suggestions, nor is he entitled to unilaterally change the terms of the Order.

Even assuming for the sake of argument that Dr. Siaw was free to implement other measures in lieu of those mandated by the MAO, those actions he did take have not brought the park into compliance. Specifically, Dr. Siaw installed two holding tanks as interim replacements for two disposal systems, each of which served four trailer spaces, that had completely failed. The leases for the tenants of the spaces were later terminated and the spaces are allegedly now vacant. Abating the problem at these eight spaces, however, does not obviate Dr. Siaw's obligation to obtain a WPCF permit for the entire park. Pursuant to OAR 340-071-0130(16)(a) and (15)(a), once any one system at the park required repair or alteration, the entire park had to be brought under a single WPCF permit.[13]

[13] In his brief, Dr. Siaw cites OAR 340-040-0050 and OAR 340-130-0100(115) in support of his argument that he was not required, independent of the MAO, to obtain a WPCF permit for the park. These rules, however, do not bolster his argument. OAR 340-040-0050 applies to the selection of remedies for the clean up of chemically contaminated groundwater, e.g. groundwater that has been contaminated with gasoline constituents as a result of an

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Under OAR 340-071-0130(1), the Department has the discretion to require Dr. Siaw to replace all of the systems at the park with a new on-site sewage disposal system before issuing the required WPCF operating permit.[14] Because (1) the systems at the park are at the end of, or past, the average useful life of an on-site sewage disposal system; (2) there are chronic problems with multiple systems at the park, not just those replaced by the holding tanks; and (3) Dr. Siaw's history of noncompliance with on-site sewage disposal regulations, the Department determined that repair of the existing systems was insufficient to protect water quality and public health and that complete replacement was required.

In conclusion, Dr. Siaw is not in compliance with the on-site sewage disposal rules for the park because he has not obtained the required WPCF permit.

V. Petitioner's Exceptions D and E (Application of the Penalty Factors)

After determining that Dr. Siaw had violated the terms of the Department Order, the hearing officer assessed Dr. Siaw a civil penalty $317,700. In his Amended Proposed Order, the hearing officer noted that Dr. Siaw was potentially liable for millions of dollars in civil penalties, given that he had been in intentional violation of the MAO for a period of 20 months. The hearing officer, however, adopted the Department's decision in the Notice of Civil Penalty to limit the penalty to one day in each month that a daily violation occurred. (See Amended Proposed Order at p. 4). The gravity based portion of the penalty, based on twenty days violation, totaled $126,000. In addition, the hearing officer adopted the economic benefit assessed by the Department, $191,700. The economic benefit was based on the cost of

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underground storage tank leak, not to the permitting and operation of on-site sewage disposal systems. OAR 340-071-0100(115) defines the word "repair" as applied to on-site sewage disposal systems. The rule says nothing regarding the circumstances under which operation of a system or combination of systems requires a WPCF permit. OAR 340-071-0130(15) and (16) unambiguously state that once any one of a combination of on-site sewage systems serving a single property requires repair, the combination of systems must be brought under a single WPCF permit.

[14] OAR 340-071-0130(1) states that "If, in the judgment of the [Department], proposed operation of a system would cause pollution of public waters or create a public health hazard, system installation or use shall not be authorized."

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constructing a new on-site disposal system at the park, a cost Dr. Siaw avoided paying by never building the system as he was required to by the MAO.

In his Exceptions and Brief, Dr. Siaw also takes issue with the findings and determinations made by the Hearing Officer in calculating the civil penalty, including the magnitude of the violation, the "P", "H", "R", and "C" factors, and the economic benefit component. The arguments relating to the penalty calculation are generally premised upon the purported confusion created by the October 6, 1999 letter from Dr. Siaw's consultant and actions taken by Dr. Siaw that were neither required nor consistent with the MAO. These substantive arguments are addressed above. Neither justifies a reduction in penalty.

Magnitude – There is no selected magnitude for violating a Department Order. For that reason, the Hearing Officer relied on OAR 340-012-0045(1)(a)(B) to determine magnitude, which states the magnitude of the violation is moderate unless specific findings can be made which would support a major or minor magnitude.[15] The Hearing Officer decided that there was insufficient evidence to find that the magnitude was major or minor and so determined the magnitude was moderate.

Dr. Siaw argues that the magnitude should be minor because he ceased using the failing on-site system that was responsible for most of the violations. The Department disputes, however, that Dr. Siaw's failure to obtain a WPCF permit and construct a new disposal system presented no threat to public health or the environment, which is the finding that must be made before a magnitude of minor can be assigned to the violation. Because (1) the systems at the park are at the end of, or past, the average useful life of an on-site sewage disposal system; (2) there are chronic problems with multiple systems at the park, not just the abandoned system; and

[15] OAR 340-012-0045(1)(a)(B) provides that "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:" the Department finds that the violation had a "significant adverse impact on the environment" or "posed a significant threat to public health", in which case the magnitude is major, or "the violation had no potential for or actual adverse impact on the environment, nor posed any threat to public health" in which case the magnitude is minor.

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(3) Dr. Siaw's history of noncompliance with on-site sewage disposal regulation; Dr. Siaw's noncompliance with the MAO does create a risk of harm to the environment and public health.

The "P" (Prior Significant Actions) Factor – Dr. Siaw's argument on the "P" factor is without merit because he misunderstood how the Department arrived at the value for the factor. The Hearing Officer, at the Department's request, did not consider Dr. Siaw's criminal conviction in determining the P factor. The hearing record establishes that Dr. Siaw's prior significant actions consist of two Class I equivalent violations[16] for a P factor of 3, pursuant to OAR 340-012-0045(1)(c)(A)(iv).

The "H" (History of Correcting Problems) and "C" (Cooperativeness) Factors – Dr. Siaw argues that his abandonment of the failed system responsible for most of the violations requires that a value of -2 be assigned for both the "H" and "C" factors.[17] The Hearing Officer, who was fully aware of the abandonment of the failed system, nevertheless found that Dr. Siaw was not entitled to the H and C factor credits because of Dr. Siaw's recalcitrance in failing to perform his obligations under the MAO. That determination was correct. The Department issued Dr. Siaw at least 10 notices of noncompliance between 1997 and 2001, and sought to bring Dr. Siaw into compliance through the 1999 MAO. The issues still have not been resolved. This history does not reflect an effort to correct the violations cited but rather a continuing unwillingness to acknowledge the obligations in the MAO.

The "R" (Causation) Factor – The Hearing Officer assigned a value of 6 to the "R" factor, finding that Dr. Siaw had acted intentionally in causing the violation. Dr. Siaw argues that at most he should be held to negligence because of his alleged confusion over what he had to

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[16] Dr. Siaw's prior action consisted of one Class I and two Class II violations. See Hearing Decision in the Matter of Caleb Siaw, Case No. WQ/D-NWR-98-212, dated August 25, 1999, and OAR 340-012-0030(1).

[17] "H" is a civil penalty respondent's history in correcting prior significant actions. Pursuant to OAR 340-012-0045(1)(c)(B)(i), the H factor is assigned a value of -2 if the Respondent took all feasible steps to correct the majority of all prior significant actions. "C" is the Respondent's cooperativeness and efforts to correct the violation. Pursuant to OAR 340-012-0045(1)(c)(E)(i), the C factor is assigned a value of -2 if the Respondent was cooperative and took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the event would not be repeated.

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do to comply. As discussed in Section IV above, even if Dr. Siaw was confused by Mr. Sweeney's October 6, 1999 letter, that confusion was eliminated by the Department's communications to Dr. Siaw in November 1999, March 2000, and April 2001 that he was in violation of the MAO.

Economic Benefit - The Hearing Officer found that DEQ provided sufficient evidence to prove that Dr. Siaw avoided $191,700 in compliance costs by violating the MAO.[18] Dr. Siaw argues he lost revenue from the closure of the eight spaces at the park and that loss should offset his economic benefit. Even assuming that Dr. Siaw's highly speculative estimate of his lost revenue is remotely accurate, any lost revenue is irrelevant to the economic benefit portion of his penalty. At hearing, Dr. Siaw argued that his cost in installing and servicing interim holding tanks should be offset against his avoided cost of constructing a system. The Hearing Officer found "that only costs expended in connection with the system to satisfy the WPCF permit could have reduced the EB calculation." See Proposed Order at 19. The Hearing Officer is correct. Only Dr. Siaw's expenses in complying with the MAO are relevant. Closing spaces was not required by, and did not constitute compliance with, the MAO and any lost revenues arising from those closures are irrelevant to the economic benefit calculation.

CONCLUSION

For the reasons cited herein, Dr. Siaw's Exceptions should be denied and the Amended Proposed Order finalized.

DATED this 19th day of August 2002.

Respectfully submitted,

[18] The Department provided documentation that constructing the on-site sewage disposal system designed by Dr. Siaw's consultant Mr. Sweeney, and approved by the Department, would have cost Dr. Siaw $247,000. In rariving at the final economic benefit figure, the Department employed the "BEN" computer model, pursuant to OAR 340-012-0045(1)(c)(F)(iii).

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HARDY MYERS
Attorney General

Lynne Perry, #90456
Assistant Attorney General
Of Attorneys for Department of
Environmental Quality

Jeff Bachman
Environmental Law Specialist
Department of Environmental Quality

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4409

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

August 22, 2002

Oregon Environmental Quality Commission
Attn. Mikell O'Meally
811 SW Sixth Avenue
Portland, OR 97204

By Hand Delivery

Re: Amended Response Brief
In the Matter of:
Caleb Siaw, M.D.
Case No. WQ/D-NWR-99-186
Clatsop County

Dear Ms. O'Meally:

On August 15, 2002, the Department of Environmental Quality submitted a Response Brief in the referenced case. That brief contained a number of typographical errors. The Department now submits the enclosed Amended Response Brief.

There are no substantive changes in the Amended Response Brief. Only typographical errors are corrected. If Dr. Siaw objects to the Commission's acceptance of the Amended Brief, the Department will file a written request for an extension on the deadline for filing its Brief

If you have any questions, please contact me at (503) 229-5950.

Sincerely,

Jeff Bachman
Environmental Law Specialist

Enclosure
cc: Michael J. Kavanaugh, Attorney for Caleb Siaw, M.D., by Certified Mail
Lynne Perry, Oregon Department of Justice

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF:	Case No. G60602
Caleb Siaw, M.D.,	RESPONSE OF OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY TO PETITIONER'S EXCEPTIONS AND BRIEF TO THE RULINGS AND PROPOSED ORDER OF HEARINGS OFFICER
Petitioner,	

This Response is offered in opposition to Petitioner's Brief appealing the Hearing Officers Amended Proposed Order in Case No. WQ/D-NWR-99-186, issued May 1, 2002.July 31, 2001, to Caleb Siaw, M.D., by the Department of Environmental Quality (the Department).

INTRODUCTION

Petitioner, Dr. Caleb Siaw, appeals a Hearing Officer's Proposed Order assessing Dr Siaw a $317,700 civil penalty for violating a Mutual Agreement and Order (MAO) he entered into with the Department of Environmental Quality (the Department) on May 20, 1999. The MAO required Dr. Siaw to obtain a Water Pollution Control Facilities Permit and construct a new on-site sewage disposal system for the Forest Lake Resort mobile home park (the park) near Seaside, Oregon.

Dr. Caleb Siaw acquired the park in 1997. During 1997, after Dr. Siaw purchased the park, and in early 1998, the Department documented that one or more of the on-site sewage disposal systems at the park were failing and required repair or alteration. As a result of the failures, Dr. Siaw was required, pursuant to Oregon Administrative Rule (OAR) 340-071-0130(16)(a) and 15(a), to obtain a Water Control Pollution Facility (WPCF) permit that would

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cover all of the on-site sewage disposal systems at the park.[1] Dr. Siaw has never obtained the required permit.

From late December 1997 through September 1998, the Department issued Dr. Siaw four separate Notices of Noncompliance each citing multiple violations of on-site sewage disposal regulations[2]. On January 22, 1999, Dr. Siaw pled no contest to a criminal charge of water pollution in the second degree stemming from an incident where sewage from the park discharged to the Necanicum River. The Court's Order of Conviction and Sentence stated that as a condition of his probation, Dr. Siaw was required "to make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material."

In order to specifically identify for Dr. Siaw the tasks necessary to bring the park into compliance, and establish an enforceable schedule for completing those tasks, the Department negotiated and entered into the MAO with Dr. Siaw on May 20, 1999. The MAO is a Final Order of the Environmental Quality Commission. Paragraph 15(B)(1) of the MAO required Dr. Siaw to "complete a WPCF permit application within 30 days of being notified by DEQ if DEQ determines a WPCF permit is needed based on the soil evaluation." On November 12, 1999, the Department sent Dr. Siaw a letter indicating that, based on a proposal submitted by Dr. Siaw's consultant, Robert Sweeney, a WPCF permit was feasible for the park. The letter further instructed Dr. Siaw to submit additional information in order to complete his WPCF application. Specifically, the letter requested the groundwater information described in, and required by,

---

[1] OAR 340-071-0160(16)(a) states that "owners of existing systems meeting the system descriptions in (15)(a),(b), and (d) through (g) are not required to apply for a WPCF permit until *such time as a system repair or alteration is necessary."* (Empahsis added). "Alteration" and "Repair" are defined in OAR 340-071-0100(6) and (115), respectively, and clearly encompass the work necessary to stop the surfacing of sewage at the park. Dr. Siaw was required to put all the systems at the park under one permit pursuant to OAR 340-071-130(15)(a), which states that an operating permit (WPCF) is required for "any system or *combination of systems* located on the same property or serving the same facility with a total sewage flow design capacity greater than 2,500 gallons per day." DEQ Environmental Specialist Anne Cox testified that the average sewage flow for a single family residence is 250 gallons per day and that the park has spaces for 44 mobile homes and a laundry facility.

[2] Hearing Exhibits 101, 102, 104, and 108.

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Paragraph 15(B)(1)(a)(i) of the MAO. Despite further requests from the Department, Dr. Siaw never submitted the groundwater data necessary to complete his permit application and comply with the MAO.

On July 31, 2001, the Department assessed Dr. Siaw a civil penalty for failing to comply with the MAO. Dr. Siaw appealed, and, after hearing, the Hearing Officer issued an Amended Proposed Order assessing Dr. Siaw a $317,700 civil penalty. Dr. Siaw then appealed the Hearing Officer's Proposed Order.

Dr. Siaw's exceptions to the Proposed Order can be boiled down to two primary arguments: 1) that he did not own Forest Lake Resort at the time he entered into the MAO and therefore has no obligation to comply with the terms of the MAO, and 2) the Department is estopped from compelling Dr. Siaw's compliance with the MAO because a staff member allegedly told Dr. Siaw's consultant, Mr. Sweeney, that Dr. Siaw could achieve compliance with on-site sewage disposal regulations through measures other than those specified in the MAO.

DISCUSSION

I. Petitioner's Exceptions A.1 and 3: (Ownership of the Property)

Exceptions A.1 and A.3 both relate to whether the hearings officer was correct in determining that Dr. Siaw was the "owner" of the park for purposes of the violations cited. Dr. Siaw seeks refuge in an April 1999 real estate contract between the Caleb Siaw P.C., Trust and the A & D Trust, which he claims rendered him a nonowner as of April 1999.

As is readily apparent, the real estate issues at the park are a mess. Fortunately, it is not necessary to untangle the various real estate transactions to resolve this issue. Dr. Siaw has already waived his right to challenge the Mutual Agreement and Order (MAO). When he executed the MAO, he expressly acknowledged the authority of the Environmental Quality Commission to issue an abatement order that addressed future violations. (Ex. 114, ¶ 13). He also waived his right to a contested case on the future violations addressed in the MAO. (Ex.

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114, ¶ 17.) By arguing that the contract with the A&D Trust rendered him a nonowner, he is really arguing that he is not liable for the violations resolved by the MAO. Again, he has waived that argument.

Nonetheless, Dr. Siaw did and still does retain legal title to the property. The contract upon which Dr. Siaw relies was unperformed, or executory, when the MAO was signed. It is still unperformed. Dr. Siaw will retain legal title to the property until the purchase price is paid in full. *See e.g., Bedortha v. Sunridge Land Co., Inc.*, 312 Or 307, 311 (1991); *Ochs v. Albin*, 137 Or App 213, 220 (1995). The cases cited in Dr. Siaw's brief state as much (i.e. the buyer has equitable title, the owner retains legal title).[3]

As the holder of legal title, Dr. Siaw has at all relevant times been the "owner" of the property for purposes of the on-site sewage disposal rules in OAR 340, Division 71. Pursuant to OAR 340-071-0100(92), the "owner" includes "any person who, alone or jointly, or severally with others:

> "(a) Has legal title to any single lot, dwelling unit, or commercial facility; *or*
>
> (b) Has care, charge, or control of any real property * * *; *or*
>
> (c) Is the contract purchaser of the real property.
>
> NOTE: Each such person as described in subsections (b) and (c) of this section, thus representing the legal title holder, is bound to comply with these rules as if he were the legal title holder." (Emphasis added.)

Although a contract purchaser is bound to comply with the on-site sewage disposal rules to the same extent as the holder of legal title, the holder of legal title is *not* relieved of his obligations under Division 71 merely by entering into the contract. Thus, even taking Dr. Siaw's assertions about the April 1999 contract as true, Dr. Siaw is still liable as an "owner" under Division 71.

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[3] Counsel for petitioner argues that "Caleb Siaw was not the 'owner' of the property" based on cases interpreting ORS 88.110. (Pet. Brief at 8-9). Here, however, we are not interpreting ORS 88.110, but rather OAR Chapter 340, Division 71.

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Regardless of whether Dr. Siaw owned the property when the MAO was executed, however, there is no question that Dr. Siaw owned the property when the violations occurred. Even if one could evade his or her responsibilities under Division 71 by the simple expedient of signing a contract (a proposition the Department rejects), the MAO resolved the violations occurring after September 1998, including the ongoing violations that would continue to occur until the tasks in the MAO were accomplished. Dr. Siaw does not dispute that he owned the property until at least April 1999.

Dr. Siaw's undisputed status as the holder of legal title should resolve the question of "ownership" was for purposes of Division 71. For that reason, it would ordinarily be unnecessary to delve into the real estate issues. But this case illustrates precisely *why* DEQ would employ the type of liability framework found in Division 71.

Take first the contract with the Johnsons. Although it was entered into in July 1998, the Johnsons had abandoned the contract, and the property, by November 1998. Dr. Siaw asserts that this failed contract prevented him from owning the property after July 1998. (Pet. Brief at 7). It did not, however, prevent him from acting as the owner in his dealings with DEQ or prospective purchasers throughout 1999. In fact, he entered the A & D contract in April 1999--by which point he now claims that he did not own the property.

This is the contract that serves as Dr. Siaw's primary defense. The hearings officer correctly noted that this contract was invalid from the outset because, among other things, the purported seller was not Dr. Siaw, but rather Caleb Siaw, P.C. Trust, which did not actually own the property.[4] (Proposed Order at 12). Dr. Siaw does not challenge this conclusion.[5]

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[4] As the Hearings Officer noted, "Respondent Caleb Siaw and Caleb Siaw, P.C. Trust were and are two different legal entities. Caleb Siaw, P.C., Trust did not hold title to the Forest Lake Resort Property in April 1999 when the purported sale occurred.... A legal entity cannot convey title to or an interest in real estate that the entity does not own at the time of the purported transfer." (Proposed Order at 12.)

[5] Instead, Dr. Siaw relies on his August 2000 effort to convey the property from himself to the trust, retroactive to 1998. The hearings officer concluded that this effort was ineffective to rectify the issue. (Proposed Order at 12.) Dr. Siaw does not challenge this conclusion either.

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Moreover, even if the April 1999 contract had been valid when executed (which DEQ denies), its continued validity is questionable. The purchaser made no monthly payments until November 2000, eighteen months after the contract was executed. The purchaser was clearly in default (and had been for well over a year). Dr. Siaw apparently opted to ignore his remedies against his defaulting purchaser (e.g. forfeiture, foreclosure) to avoid retaking the property. At the same time, he presented himself as the owner of the property by continuing to market the property to another buyer (in October 2000) and by failing to record the contract with A & D Trust until January 10, 2002 (midway through this contested case proceeding).[6]

In addition, Dr. Siaw committed to make the required improvements to the system in the very same contract he now claims prevents him from performing the MAO. Stipulation B to the April 1999 contract expressly provides that "Seller agrees to *pay for and obtain* DEQ approval on all septic systems within the described property." (Ex. 11.) Having represented to his purchaser that he would in fact do the required work, he cannot reasonably argue that he was not in control of nor had a right to improve the sewer system on the property.[7]

In sum, Dr. Siaw seeks to avoid obligations under both Division 71 and the MAO using a invalid contract (1) that he and his purchaser both ignored throughout 1999 and much of 2000, (2) that he failed to record (i.e. apprise the public of) until 2002, and (3) in which he had expressly assumed the obligations he now seeks to avoid. On these facts, the hearings officer correctly determined that Dr. Siaw was the owner of the property during the relevant period.

II. Petitioner's Exception A.2 (Improper Acknowledgment of Contract)

Dr. Siaw takes issue with the hearings officer's determination that the April 1999 contract was not properly acknowledged and should not have been recorded under Oregon law.

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[6] As the Hearings Officer correctly noted, neither Dr. Siaw nor his purported purchaser(s) delivered any concrete evidence that a new owner had taken over the property throughout this period. (Proposed Order at 14.)

[7] In addition, the MAO itself included a force majeure provision by which the time for performance would be extended if Dr. Siaw demonstrated that an event beyond his reasonable control caused or might cause a delay or deviation in the work. (MAO ¶ 16.) There is no indication that the necessary work was impeded by the purchaser or any other event outside of Dr. Siaw's control.

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(Proposed Order at 13-14.) The hearings officer was, however, right on this point.[8] The fact that a Clatsop County clerk recorded the improperly acknowledged contract does not correct that deficiency.

With that said, this issue is irrelevant. The hearings officer based his determination regarding ownership of the property on several factors. Even Dr. Siaw refers to this determination as merely bolstering the hearings officer's decision regarding ownership. (Pet Brief at 9.) For the many reasons outlined in Section I, above, the hearings officer properly recognized Dr. Siaw as the owner of the property for purpose of on-site sewage obligations.

III. Petitioner's Exceptions B and F (Effect of Revisions to the MAO)

Before returning the MAO to DEQ, Dr. Siaw inserted the words "former owner" under his signature. (Ex. 114.) Dr. Siaw now argues that his hand-written amendment to the MAO constituted a counter-offer that was accepted by DEQ when DEQ signed the amended form. He then takes an extraordinary leap to argue that DEQ's mere execution of the altered agreement "establishes that Caleb Siaw is a 'former owner.'" (Pet Brief at 10.) Under this theory, if Dr. Siaw had signed the MAO as the "Mayor of Portland" or "President of the United States," DEQ's signing would make him so. That is obviously not the case.

As an initial matter, Dr. Siaw's revision did not create a counter-offer. It might have been viewed as a counter-offer, if it went to a material term. The addition of a new condition by the offeree in response to an offer would render the response a counter-offer. *See e.g. D'Angelo v. Schultz*, 110 Or App 445, 450, 823 P2d 997 (1992). Here, however, Dr. Siaw did not revise the MAO in a manner that affected either his obligations or those of DEQ. He did not change, add to, or modify any of its essential or material terms (i.e. compliance schedule and conditions).[9]

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[8] The real estate contract was not properly acknowledged. The contract shows an unexecuted notary block. Moreover, the unexecuted notary block purports to acknowledge the signature of the *buyer*. The contract should have been acknowledged by the *seller*. (See ORS 93.410, 93.635, 93.804).

[9] Moreover, in paragraph 1, the MAO identifies Caleb Siaw as the owner of the mobile home park. Dr. Siaw did not revise this recital.

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The principles of contract law are not, however, irrelevant here. Regardless of whether one characterizes the sequence of events as Dr. Siaw accepting DEQ's initial "offer" or DEQ accepting Dr. Siaw's "counter-offer," the outcome is the same. The parties had a signed agreement. The MAO itself is clear. Among other things, Dr. Siaw expressly agreed to a compliance schedule and set of conditions. Dr. Siaw's failure to comply, as agreed in the MAO, is the subject of this enforcement matter. In his appeal, Dr. Siaw neither claims to have complied with the MAO nor claims that its *material* terms were modified in a way that made compliance unnecessary.

In short, exceptions B and F fail. Exception B challenges the hearings officer's observation that the revision needed to be initialed by both parties to be effective. (Proposed Order at 8, fn 13). It is, however, irrelevant whether this statement was right or wrong. Whether characterized as an offer or counter-offer, the outcome is the same. Exception F goes to the hearings officer's finding that Dr. Siaw violated ORS 468.140(1)(c) by violating paragraph 15.B.(1) of the MAO. (Proposed Order at 19.)[10] Regardless of whether Dr. Siaw's revisions are characterized as a "counter-offer" or not, his argument does nothing to undermine the validity of the subject "contract."

IV. Petitioner's Exception C (Estoppel)

Dr. Siaw argues that DEQ should be estopped (prevented) from using his failure to get a WPCF permit as a basis for this enforcement action. To establish estoppel against a state agency, Dr. Siaw must not only establish that DEQ has taken inconsistent positions, but also (1) that he relied on the agency's earlier position and (2) that his reliance was reasonable. *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995); *State ex rel SOSCF v. Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001). DEQ disagrees with Dr. Siaw's

[10] Dr. Siaw does not challenge the hearings officer's finding that Dr. Siaw violated ORS 468.140(1)(c) by violating paragraph 15.A.(4) of the MAO. (Proposed Order at 19.) Paragraph 15.B.(1) is effective and enforceable for the same reason and to the same extent as paragraph 15.A(4).

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characterization of the October 6, 1999 meeting. The EQC need not, however, resolve that disagreement because Dr. Siaw's estoppel argument fails for other reasons, as well.

In his brief to the Commission, Dr. Siaw recites the elements of estoppel, but he neither alleges nor establishes that he relied on the summary of the October 6, 1999 meeting or that his reliance was reasonable. Dr. Siaw in fact never even claimed such reliance until he filed his Exceptions and Brief pursuant to his appeal of the hearing officer's Amended Proposed Order. Dr. Siaw did not raise estoppel as a defense in his Answer to the Notice of Assessment of Civil Penalty or in his pre- and post-hearing memorandums, probably because, on this record, Dr. Siaw could not possibly establish such reliance. The correspondence from DEQ to Dr. Siaw between the October 1999 meeting and commencement of this action made clear that a WPCF permit was required.

For example, on November 12, 1999, Anne Cox of DEQ advised Dr. Siaw in writing of deficiencies in the conceptual plans submitted for the system upgrade. (Ex. 117.) She reminded Dr. Siaw that the WPCF permit could not be issued until the plans were approved. Her letter closed by directing Dr. Siaw to call her if he had any questions regarding the WPCF permit application.[11] In March 2000, DEQ delivered Dr. Siaw a draft WPCF permit for his review and comment, together with a Notice of Noncompliance (NON) citing him for failure to submit the required plans. (Ex. 118.) The NON stated that action on the draft WPCF permit would be suspended until the plans were received. In April 2001, DEQ delivered another NON citing Dr. Siaw for violation of the MAO and directing Dr. Siaw to, among other things, complete his WPCF permit application by submitting the required plans.[12] (Ex. 119.)

This enforcement action was not commenced until July 31, 2001, almost two years after the meeting in question. Regardless of any misunderstanding created by his consultant's October

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[11] Dr. Siaw and his consultant had already been copied on Ms. Cox's written follow-up to the October 6, 1999 meeting. (Ex. 2.) In her letter, Ms. Cox made clear that Dr. Siaw was still bound by the terms of the MAO, which required that he apply for a WPCF permit. The letter, to Adrian Malo, clearly reflects that someone needed to have a permit for the system.

[12] Dr. Siaw's consultant was also copied on both the March 2000 and April 2001 NONs.

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1999, letter, Dr. Siaw was repeatedly advised after that letter that DEQ expected a complete WPCF permit application, including plans for a system upgrade. Under the circumstances, reliance on the position outlined in his consultant's letter is not only unreasonable, but also unlikely. His estoppel argument necessarily fails.

V. Petitioner's Exceptions C.1 and F (Installation of Holding Tanks)

Dr. Siaw argues that he was never required to comply with the terms of the MAO by obtaining a WPCF permit and constructing a new on-site disposal system. Dr. Siaw claims that all the law required him to do was disconnect and abandon the particular failed sewage disposal system at the park that was the source of the majority of the illegal discharges. Dr. Siaw ignores the clear and unequivocal language of the MAO.

The Environmental Quality Commission ordered Dr. Siaw to undertake the compliance measures set forth in the MAO, and Dr. Siaw expressly waived his right to contest that Order. Dr. Siaw is not at liberty to treat the requirements of the Commission Order as if they were suggestions, nor is he entitled to unilaterally change the terms of the Order.

Even assuming for the sake of argument that Dr. Siaw was free to implement other measures in lieu of those mandated by the MAO, those actions he did take have not brought the park into compliance. Specifically, Dr. Siaw installed two holding tanks as interim replacements for two disposal systems, each of which served four trailer spaces, that had completely failed. The leases for the tenants of the spaces were later terminated and the spaces are allegedly now vacant. Abating the problem at these eight spaces, however, does not obviate Dr. Siaw's obligation to obtain a WPCF permit for the entire park. Pursuant to OAR 340-071-0130(16)(a) and (15)(a), once any one system at the park required repair or alteration, the entire park had to be brought under a single WPCF permit.[13]

[13] In his brief, Dr. Siaw cites OAR 340-040-0050 and OAR 340-130-0100(115) in support of his argument that he was not required, independent of the MAO, to obtain a WPCF permit for the park. These rules, however, do not bolster his argument. OAR 340-040-0050 applies to the selection of remedies for the clean up of chemically contaminated groundwater, e.g. groundwater that has been contaminated with gasoline constituents as a result of an

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Under OAR 340-071-0130(1), the Department has the discretion to require Dr. Siaw to replace all of the systems at the park with a new on-site sewage disposal system before issuing the required WPCF operating permit.[14] Because (1) the systems at the park are at the end of, or past, the average useful life of an on-site sewage disposal system; (2) there are chronic problems with multiple systems at the park, not just those replaced by the holding tanks; and (3) Dr. Siaw's history of noncompliance with on-site sewage disposal regulations, the Department determined that repair of the existing systems was insufficient to protect water quality and public health and that complete replacement was required.

In conclusion, Dr. Siaw is not in compliance with the on-site sewage disposal rules for the park because he has not obtained the required WPCF permit.

V. Petitioner's Exceptions D and E (Application of the Penalty Factors)

After determining that Dr. Siaw had violated the terms of the Department Order, the hearing officer assessed Dr. Siaw a civil penalty $317,700. In his Amended Proposed Order, the hearing officer noted that Dr. Siaw was potentially liable for millions of dollars in civil penalties, given that he had been in intentional violation of the MAO for a period of 20 months. The hearing officer, however, adopted the Department's decision in the Notice of Civil Penalty to limit the penalty to one day in each month that a daily violation occurred. (See Amended Proposed Order at p. 4). The gravity based portion of the penalty, based on twenty days violation, totaled $126,000. In addition, the hearing officer adopted the economic benefit assessed by the Department, $191,700. The economic benefit was based on the cost of

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underground storage tank leak, not to the permitting and operation of on-site sewage disposal systems. OAR 340-071-0100(115) defines the word "repair" as applied to on-site sewage disposal systems. The rule says nothing regarding the circumstances under which operation of a system or combination of systems requires a WPCF permit. OAR 340-071-0130(15) and (16) unambiguously state that once any one of a combination of on-site sewage systems serving a single property requires repair, the combination of systems must be brought under a single WPCF permit.

[14] OAR 340-071-0130(1) states that "If, in the judgment of the [Department], proposed operation of a system would cause pollution of public waters or create a public health hazard, system installation or use shall not be authorized."

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constructing a new on-site disposal system at the park, a cost Dr. Siaw avoided paying by never building the system as he was required to by the MAO.

In his Exceptions and Brief, Dr. Siaw also takes issue with the findings and determinations made by the Hearing Officer in calculating the civil penalty, including the magnitude of the violation, the "P", "H", "R", and "C" factors, and the economic benefit component The arguments relating to the penalty calculation are generally premised upon the purported confusion created by the October 6, 1999 letter from Dr. Siaw's consultant and actions taken by Dr. Siaw that were neither required nor consistent with the MAO. These substantive arguments are addressed above. Neither justifies a reduction in penalty..

Magnitude - Because there is no selected magnitude for violating a Department Order. For that reason, the Hearing Officer relied on OAR 340-012-0045(1)(a)(B) to determine magnitude, which states the magnitude of the violation is moderate unless specific findings can be made which would support a major or minor magnitude.[15]. The Hearing Officer decided that there was insufficient evidence to find that the magnitude was major or minor and so determined the magnitude was moderate.

Dr. Siaw argues that the magnitude should be minor because he ceased using the failing on-site system that was responsible for most of the violations. The Department disputes, however, that Dr. Siaw's failure to obtain a WPCF permit and construct a new disposal system presented no threat to public health or the environment, which is the finding that must be made before a magnitude of minor can be assigned to the violation. Because (1) the systems at the park are at the end of, or past, the average useful life of an on-site sewage disposal system; (2) there are chronic problems with multiple systems at the park, not just the abandoned system; and

[15] OAR 340-012-0045(1)(a)(B) provides that "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:" the Department finds that the violation had a "significant adverse impact on the environment" or "posed a significant threat to public health", in which case the magnitude is major, or "the violation had no potential for or actual adverse impact on the environment, nor posed any threat to public health" in which case the magnitude is minor.

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(3) Dr. Siaw's history of noncompliance with on-site sewage disposal regulation; Dr. Siaw's noncompliance with the MAO does create a risk of harm to the environment and public health.

The "P" (Prior Significant Actions) Factor – Dr. Siaw's argument on the "P" factor is is premised upon a misunderstanding as to without merit because he misunderstood how the factor was arrived at and without merit. The Hearing Officer, at the Department's request, did not consider Dr. Siaw's criminal conviction in determining the P factor. The hearing record establishes that Dr. Siaw's prior significant actions consist of two Class I equivalent violations[16] for a P factor of 3, pursuant to OAR 340-012-0045(1)(c)(A)(iv).[17]

The "H" (History of Correcting Problems) and "C" (Cooperativeness) Factors – Dr. Siaw argues that his abandonment of the failed system responsible for most of the violations requires that he receive a value of -2 credit be assigned for both the "H" and "C" factors.[18] The Hearing Officer, who was fully aware of the abandonment of the failed system, nevertheless found that Dr. Siaw was not entitled to the H and C factor credits because of Dr. Siaw's recalcitrance in failing to perform his obligations under the MAO. That determination was correct. The Department issued Dr. Siaw at least 10 notices of noncompliance between 1997 and 2001, and sought to bring Dr. Siaw into compliance through the 1999 MAO. The issues still have not been resolved. This history does not reflect an effort to correct the violations cited but rather a continuing unwillingness to acknowledge the obligations in the MAO.

The "R" (Causation) Factor – The Hearing Officer assigned a value of 6 to the "R" factor, finding that Dr. Siaw had acted intentionally in causing the violation. Dr. Siaw argues

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[16] Dr. Siaw's prior action consisted of one Class I and two Class II violations. See Hearing Decision in the Matter of Caleb Siaw, Case No. WQ/D-NWR-98-212, dated August 25, 1999, and OAR 340-012-0030(1).

[17] Dr. Siaw's prior action consisted of one Class I and two Class II violations. See Hearing Decision in the Matter of Caleb Siaw, Case No. WQ/D-NWR-98-212, dated August 25, 1999, and OAR 340-012-0030(1).

[18] "H" is a civil penalty respondent's history in correcting prior significant actions. Pursuant to OAR 340-012-0045(1)(c)(B)(i), the H factor is assigned a value of -2 if the Respondent took all feasible steps to correct the majority of all prior significant actions. "C" is the Respondent's cooperativeness and efforts to correct the violation. Pursuant to OAR 340-012-0045(1)(c)(E)(i), the C factor is assigned a value of -2 if the Respondent was cooperative and took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the event would not be repeated.

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that at most he should be held to negligence because of his alleged confusion over what he had to do to comply. As discussed in Section IV above, even if Dr. Siaw was confused by Mr. Sweeney's October 6, 1999 letter, that confusion was eliminated by the Department's communications to Dr. Siaw in November 1999, March 2000, and April 2001 that he was in violation of the MAO.

Economic Benefit - The Hearing Officer found that DEQ provided sufficient evidence to prove that Dr. Siaw avoided $191,700 in compliance costs[19] by violating the MAO.[20] Dr. Siaw argues that his prospective lost revenue from the closure of eight spaces at the park should offset his economic benefit. Even assuming that Dr. Siaw's highly speculative estimate of his lost revenue is remotely accurate, any lost revenue is irrelevant to the economic benefit portion of his penalty. At hearing, Dr. Siaw argued that his cost in installing and servicing interim holding tanks should be offset against his avoided cost of constructing a system. The Hearing Officer found "that only costs expended in connection with the system to satisfy the WPCF permit could have reduced the EB calculation." See Proposed Order at 19. The Hearing Officer is correct. Only Dr. Siaw's expenses in complying with the MAO are relevant. Closing spaces was not required by, and did not constitute compliance with, the MAO and any lost revenues arising from those closures are irrelevant to the economic benefit calculation.

CONCLUSION

For the reasons cited herein, Dr. Siaw's Exceptions should be denied and the Amended Proposed Order finalized.

---

[19] The Department provided documentation that constructing the on-site sewage disposal system designed by Dr. Siaw's consultant Mr. Sweeney, and approved by the Department, would have cost Dr. Siaw $247,000. In rariving at the final economic benefit figure, the Department employed the "BEN" computer model, pursuant to OAR 340-012-0045(1)(c)(F)(iii).

[20] The Department provided documentation that constructing the on-site sewage disposal system designed by Dr. Siaw's consultant Mr. Sweeney, and approved by the Department, would have cost Dr. Siaw $247,000. In ariving at the final economic benefit figure, the Department employed the "BEN" computer model, pursuant to OAR 340-012-0045(1)(c)(F)(iii).

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Salem, OR 97301-4096
(503) 378-4409

DATED this 16th day of August 2002.

Respectfully submitted,

HARDY MYERS
Attorney General

Lynne Perry, #90456
Assistant Attorney General
Of Attorneys for Department of
Environmental Quality

Jeff Bachman
Environmental Law Specialist
Department of Environmental Quality

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4409

CERTIFICATE OF SERVICE

I, [signature], hereby certify that I served the RESPONSE within on the 15th day of August, 2002 upon

Mikell O'Meally
Assistant, Oregon Environmental Quality Commission
811 SW Sixth Avenue
Portland, Oregon, 97204

by personal service,

and upon

Michael J. Kavanaugh
Attorney for Respondent
4930 SE Woodstock Blvd.
Portland, OR 97206

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at the U.S. Post Office in Portland, Oregon, on August 15, 2002

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1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4409

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

	)
	)
In the Matter of	) No. WQ/D-NWR-99-186
	) Hearings Officer Panel Case No. G60602
CALEB SIAW	)
	)
Petitioner.	)

PETITIONER'S BRIEF

Appeal from the Amended Proposed Order of the Administrative Law Judge, Ken L. Betterton, decided May 1, 2002.

Michael J. Kavanaugh
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639

Attorney for Petitioner

Jeff Bachman
Dept. of Environmental Quality
811 S.W. Sixth Ave.
Portland, Or. 97204
(503) 229-5950

Attorney for Department of Environmental Quality

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

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INDEX

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(Page 8, Amended Proposed Order)

C. The Hearings Officer erred in reaching his First Conclusion of Law and in reaching his First Proposed Order in failing to find that the DEQ was not estopped from enforcing the MAO after presenting an alternative to Respondent which Respondent relied upon and complied with. Page 5
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C. 1 The Hearings Officer erred in part, in finding No. 24: "[R]espondent also unhooked an additional eight dwellings from the disposal system, in an effort to try and relieve some of the problems with the existing system," was a mere effort and not a solution. Page 5
(Page 10, Amended Proposed Order)

D. The Hearings Officer erred in finding a penalty of $198,600.00. Page 5
(Page 10, Amended Proposed Order)

D. 1 The Hearings Officer erred in finding: "'P' is respondent's prior significant action(s), and receives a value of 3 under OAR 340-012-0045(1)(c)(A)(iv) and OAR 340-012-0030(1) and (14). Page 6
(Page 16, Amended Proposed Order)

D. 2 The Hearings Officer erred in finding: "'H' is the past history of respondent in taking all feasible steps or procedures necessary to correct any prior significant actions(s), and receives a value of 0 according to OAR 340-012-0045(1)(c)(B)(ii) because respondent failed to correct the problems of the failing sewage systems at the resort." Page 6
(Page 17, Amended Proposed Order)

D. 3 The Hearings Officer erred in finding: "'R' is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act by respondent, and receives a value of 6 according to OAR 340-012-0045(1)(c)(D)(iii) because respondent acted intentionally." Page 6

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

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PETITIONER'S BRIEF

I.

OVERVIEW

In the interplay between the argument over ownership of the property, the interaction between the DEQ and the various participants and the amount of the fine, the forest has been lost through the trees.

Dr. Siaw bought the property from one Sam Banki by Warranty Deed with a trust deed given for security on or about Nov. 1, 1996. At that time there was an outstanding notice against the property. See the testimony of Ann Cox who described the park as a "hodgepodge of systems" and testified that Sam Banki was told to obtain a WPCF permit. See also Finding of Fact, #3. Sam Banki had done nothing to deal with the problems. Ms. Cox had been dealing with the property because she stated that she became "aware of" Caleb Siaw in September of 1997.

Caleb Siaw operated the property for approximately 21 months from Portland. There were sewage problems at that time emanating from one separate section of the park. Caleb Siaw did not adequately deal with the problems at that time. Caleb Siaw sold the property to Richard and Joyce Johnson, on or about July 30, 1998. A memorandum of contract was recorded October 8, 1998. The Johnson's had taken over the operation of the park and moved in as on-site

operators as of August 1, 1998. The Johnson's failed to make the down payment and failed to make the November, 1988 payment thereafter abandoning the property and ceasing to operate it. Despite a foreclosure action being filed, No. 99-2104, Clatsop County Circuit Court, the Johnsons' remained the owners of the property, as the contract purchasers, until they signed a Bargain and Sale Deed canceling their contract on August 16, 2000, recorded August 25, 2000. The Johnsons' were in title, equitable title, for just over two years and were the owners of the property.

While this was going on, the DEQ notified Caleb Siaw and eventually the Johnsons of sewage discharge problems in the Park between Nov. 1997 and the Notice of Violation of December 1998, Ex. 101 - 109. Thereafter, Ex. 110, the State brought a criminal proceeding against the security interest (bare legal title) holder, Caleb Siaw and not against the contract purchasers, the equitable owners, nor was any action brought against Sam Banki.

The Notice, Ex. 109, the testimony of Anne Cox, the maps, as well as Ex. 3, establish that the sewage problems in the park were coming from one area in particular (over 90% per the map introduced by the State), around spaces 15, 16, and 37 all of which are in close proximity to one another. This is the area in which Caleb Siaw installed the two 3000 gallon concrete holding tanks (in early 1999) to eliminate the existing sewage discharge problems.

The criminal matter was prosecuted to judgment in January of 1999, and Caleb Siaw was fined. To wrap up the criminal action, Caleb Siaw entered into the MAO on or about May 20, 1999. Caleb Siaw was not represented by an attorney at this time.

Into this mix came the sale on April 12, 1999, of the park to "Danny Mal Trustee for A&D Trust". A&D Trust acquired equitable title and became the owners of the park. This contract was not recorded until January 10, 2002. The Mal's however, took possession of the

property in April 1999 and began collecting rents and running the property.

The DEQ began working with Adrian Mal and continued working with Bob Sweeney, Environmental Management Systems, around that time and the DEQ's e-mails, Ex. 124 - 129 and Ex. 119, reflect that fact. Mr. Mal introduced himself as a buyer of the property, was pumping the tanks and actively worked with Mr. Sweeney and the DEQ to comply with the WPCF permit requirements and the DEQ, in turn, worked with Mr. Mal. In fact, the court records of Clatsop county reflect that Forest Lake Resort By & Through A&D Trust, evicted Peggy Allen from space 36-A in December, 2001, case no. 01-8252, Clatsop County, State of Oregon.

The record reflects that efforts were made to complete the permit and install a new sewage system for the entire park until October of 1999, when the DEQ indicated that a compete new system was unnecessary. Bob Sweeney testified by phone and his letter of October 11, 1999,, Ex. 3, states, in pertinent part:

"Based on the statements made by DEQ's Robert Baumgartner and his staff, your options appear to be as follows:

*****

6. Remove the problem units. Landlord-Tenant issues would have to be taken into consideration. While DEQ would not then have a permit to review, staff has indicated that frequent visits would be made to ensure that there were no discharges."

Thereafter, the offending units were removed, with Caleb Siaw actually buying two of the mobile homes, at a testified cost of $32,000.00. The contents of this letter were never disputed nor contested by the DEQ.

After that letter the record reflects no further activity to obtain or complete the WPCF permit for the entire facility but instead, the record reflects compliance with option 6 of Bob

Sweeney's letter. The DEQ acquiesced (joined?) in this lack of action on the WPCF permit as the record also reflects but a single letter from the DEQ in Nov. of 1999, Ex. 117, a single letter in all of 2000, Ex. 118, and the notice of non-compliance of April 2001, regarding the WPCF permit. The DEQ has never acknowledge the compliance by Caleb Siaw in ceasing to use the offending spaces.

Yet the findings of the hearings officer and the size of the fine mistakenly extrapolate two primary conclusions: a single responsible owner and a problem that was ongoing, unresolved and $300,000.00 serious. Nowhere is the fact reflected, factored in, or dealt with in the Hearing Officers Proposed Order or the State's thinking, that for the last two and one-half years (since Oct. 1999), the WPCF permit has not been obtained and the "entire" sewage system has not been replaced because the DEQ told the owner he didn't have to do that. The owner did remove the offending homes, and with the exception of the last one, very quickly according to the testimony of Caleb Siaw. Why is complying with the suggestion of the DEQ, stopping the flow of sewage, installing tanks, pumping those tanks and removing the cause of the sewage overflow, a basis for a $317,700.00 fine.

II

EXCEPTIONS

A.

> The Hearings Officer erred in finding in his opinion: "DEQ proved that respondent had both legal title to the real property, as well as the care and control of the property, and that he is legally bound by the terms of the MAO he signed."
> (Page 14, Amended Proposed Order)

A. 1

The Hearings Officer erred in reaching his First Conclusion of Law.

A. 2

The Hearings Officer erred in finding: '[T]he real estate contract between Caleb Siaw, P.C., Trust and Danny Mal, Trustee for A&D Trust was not properly acknowledged and could not have been recorded under Oregon law." (Page 13 -14, Amended Proposed Order).

A. 3

The Hearings Officer erred in finding: "As holder of legal title to the real property between 1998 and at least late 2001, respondent was the owner of the property for purposes of the onsite sewage disposal rules in OAR Chapter 340, division 71, and the requirements in the MAO."
(Page 14, Amended Proposed Order)

B.

The Hearings Officer erred in finding No. 11, Ftnt. 13: "Because both parties did not initial the changes respondent wrote on the MAO, those changes have no legal effect."
(Page 8, Amended Proposed Order)

C.

The Hearings Officer erred in reaching his First Conclusion of Law and in reaching his First Proposed Order in failing to find that the DEQ was not estopped from enforcing the MAO after presenting an alternative to Respondent which Respondent relied upon and complied with.
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C. 1

The Hearings Officer erred in part, in finding No. 24: "[R]espondent also unhooked an additional eight dwellings from the disposal system, in an effort to try and relieve some of the problems with the existing system," was a mere effort and not a solution.
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The Hearings Officer erred in finding: "'P' is respondent's prior significant action(s), and receives a value of 3 under OAR 340-012-0045(1)(c)(A)(iv) and OAR 340-012-0030(1) and (14).
(Page 16, Amended Proposed Order)

D. 2

The Hearings Officer erred in finding: "'H' is the past history of respondent in taking all feasible steps or procedures necessary to correct any prior significant actions(s), and receives a value of 0 according to OAR 340-012-0045(1)(c)(B)(ii) because respondent failed to correct the problems of the failing sewage systems at the resort."
(Page 17, Amended Proposed Order)

D. 3

The Hearings Officer erred in finding: "'R' is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act by respondent, and receives a value of 6 according to OAR 340-012-0045(1)(c)(D)(iii) because respondent acted intentionally."
(Page 18, Amended Proposed Order)

D. 4

The Hearings Officer erred in finding: "'C' is respondent's cooperativeness in correcting the violation and receives a value of 2 according to OAR 340-012-0045(1)(c)(E)(iii) because respondent was uncooperative and failed to correct the violation or minimize the effects of the violation."
(Page 18, Amended Proposed Order)

E.

The Hearings Officer erred in assessing an Economic Benefit penalty of $191,700.00.
(Page 18, Amended Proposed Order)

F.

The Hearings Officer erred in his Amended Proposed Order No. 1: "(1) Find that respondent violated ORS 468.140(1)(c) by violating Paragraph 15.B(1) of the Mutual Agreement and Order he signed in May 1999 by failing

to submit the information required to complete his WPCF permit, and impose a civil penalty in the amount of $317,000 for this violation;..." (Page 19, Amended Proposed Order)

III

ARGUMENT

Exceptions A, A1 and A3 -- Ownership of Property

Caleb Siaw was the sole owner of the property from October 30, 1996, the purchase from Sam Banki, to July 30, 1998 and at no other time. From July 30, 1998, until August 16, 2000, Richard K and Joyce M. Johnson were the equitable owners of, i.e., had equitable title to, the property. From April 12, 1999 until the Johnson deed of August 2000, the A & D Trust had all of Caleb Siaw's rights, with the exception of his security interest, based upon a pending foreclosure action, and had possession, which ripened into equitable title and ownership as the contract purchaser (vendee), with the after acquired title obtained from the Johnsons in August, 2000.

The doctrine of "equitable conversion" is the law in Oregon. In Security State Bank v. Luebke, 80 Or App 669, 673-674, 723 P2d 369, 371 (1986) the court stated the doctrine in a case involving third party creditors as follows:

> Despite the absence of legislative history, it is possible to determine the meaning that the legislature intended the term "owns" to have. See ORS 174.020; Duncan v. Dubin, 276 Or. 631, 636, 556 P.2d 105 (1976). The original versions of ORS 88.110 and ORS 88.120 were adopted in 1913 and 1917, respectively. (FN5) At that time, the term "owner" in a land sale contract had a clear meaning in case law. In Walker v. Goldsmith, 14 Or. 125, 137, 12 P. 537 (1886), explaining the doctrine of equitable conversion, the Supreme Court stated that the purchaser under a land sale contract
>
> "[i]s treated as the owner of the land, and it is devisable and descendible as his real estate. On the other hand, the money is treated as the personal estate of the vendor, and is subject to the like mode of disposition by him." (Quoting 2 Story's Equity Jurisprudence, § 1212.)

In Sheehan v. McKinstry, et al, 105 Or. 473, 483, 210 P. 167, 1922), decided not long after the enactment of ORS 88.120, the Supreme Court explained:

"Under an executory contract for the sale of realty, equity regards the real beneficial and equitable ownership of the land as vested in the vendee, the vendor merely holding the legal title as security for the purchase price."

Words used in a statute which have a settled meaning are presumed to be used in that sense. See State v. Keys, 244 Or. 606, 609-10, 419 P.2d 943 (1966); State v. Tauscher, 227 Or. 1, 10, 360 P.2d 764 (1961). Further, a seller in a land sale contract retains legal title only as security for the payment of the contract debt. Generally, the seller has no right to exercise any of the incidents of ownership. It would not further the legislative purpose in enacting ORS 88.120 to treat a seller of real property as the owner, nor would it be consistent with the meaning courts previously had given the term "owner." In the absence of legislative history to the contrary, we conclude that the legislature intended the word "owns" to have that same meaning.

And in the Supreme Court, Luebke, 303 Or 418, 423, 737 P2d 586, 588 (1987), the court reiterated:

The doctrine of equitable conversion was firmly entrenched in Oregon law when ORS 88.120 was enacted. See, e.g., Walker v. Goldsmith, 14 Or. 125, 137, 12 P. 537 (1886). Under it, the bundle of rights known as ownership is divided between the parties to an executory land sale contract. The purchaser is regarded as the owner and generally has the right to full possession and enjoyment of the property. Senior Estates v. Bauman Homes, 272 Or. 577, 583-84, 539 P.2d 142 (1975); Bembridge v. Miller, 235 Or. 396, 408-409, 385 P.2d 172 (1963). The vendor's position is analogous to that of a mortgagee who retains legal title as security for the purchase price. Sievers v. Brown, 34 Or. 454, 457-58, 56 P. 171 (1899); 3 American Law of Property § 11.22, 62 (Casner ed. 1974).

Thus the decision of the Hearings officer that Caleb Siaw was "holder of legal title to the real property between 1998 and at least late 2001" is error, so too then is his First Conclusion of law. OAR 340-071-0100 (92) was clearly drafted with this principal of law in mind. The State's in its closing, misconstrues this doctrine arguing that the vendor and vendee are "joint owners". The hearings officer either similarly misconstrues the concept of joint ownership (husband and wife, for example) or failed to recognize the doctrine of equitable conversion.

Caleb Siaw was not the "owner" of the property within the meaning of Oregon case law,

the statute and regulations. He had a security interest in his "vendor's title" (or portion of the title) and not that part of the title which is the basis of responsibility in the statute and regulations, a mere "a security interest". If it were otherwise, there would be no need to define "...the contract purchaser of real property" as an owner in the regulations.

Exception A2 -- A & D Trust Contract

In conjunction with his finding on "legal title", the Hearings Officer sought to bolster his position and found the contract between Caleb Siaw and the A & D Trust "was not properly acknowledged and could not have been recorded under Oregon law." There is a problem with this finding, *the contract was recorded in its original form.* On January 10, 2002, the contract, as originally acknowledged, was recorded as fee no. 200200315. The Hearings Officer ignored the evidence. Compare Ex. 1 with the submission of January 23, 2002 and one can determine that there is no difference in the acknowledgment.

Further, that is not the test in Oregon. Recording is for the purpose of notice. ORS 93.640 and see Williams v. First National Bank of Ontario 48 Or 571, 576-577, 87 P 890 (1906). Musgrove v. Bonser 5 Or 313, 316 (1874) first established that recording is not necessary to transfer and interest in property but it was most succinctly put in Manaudas v. Mann 14 Or 450, 452, 13 P 449 (1887):

> ...the want of the acknowledgment, or the proof which may authorize the admission of the deed to record, does not invalidate the deed as between grantor and grantee, and that it is good as to all persons who are chargeable with actual notice. Blain v. Stewart 2 Iowa 378. The courts in this state have given it the same construction.

The DEQ had notice from the purchaser as shown in their e-mails, Ex. 124, et seq. Caleb Siaw testified he sent them a copy of the contract in April or May of 1999. The Hearings Officer found that Petitioner's wife provided a copy of the contract, without exhibits, to the DEQ in

December, 1999, Finding of Fact 20.

The conclusion to be drawn is singular, Caleb Siaw was only the "legal title" holder, i.e., the "legal owner" for 21 months and never during the time period of the MAO.

Exceptions B and F -- Effect of the MAO

The hearings officer found "Because both parties did not initial the changes respondent wrote on the MAO, those changes have no legal effect." That is legally incorrect. Exhibit 114, the Mutual Agreement and Order was signed first, by Caleb Siaw and altered. It was then delivered to the DEQ and signed, *as altered.* There was an offer, the original typed MAO; a counter-offer, the altered MAO; and an acceptance of the counter-offer, by signing the altered MAO. The law is well settled that adding terms to an offer and returning it to the offerree is not an acceptance, but a counter-offer. Caleb Siaw's adding and amending terms to the MAO was not an acceptance of the MAO, but a counter-offer. Cf. D'Angelo v. Schultz 110 Or App 445, 450, 823 P2d 997, 1000 (1992); Lang v. Oregon Idaho Annual Conf. Of United Methodist Church 173 Or App 389, 395, 21 P3d 1116 (2001). This is a fundamental principal of contract law.

Thus the signing by the DEQ of the "altered" MAO establishes that Caleb Siaw is a "former owner".

Exception C, Failure to Find Estoppel

In State, By and Through Dept. of Transportation v. Hewett Prof. Group, 321 Or 118, 126, 895 P2d 855, 860 (1995) the Court reiterated the principal of estoppel against the government:

> This court previously has accepted the general proposition that, under appropriate circumstances, an agency of the government may be estopped to assert a claim inconsistent with a previous position taken by it. See Belton v. Buesing, 240 Or. 399, 411, 402 P.2d 98

(1965) (accepting abstract proposition, but finding no basis for application of doctrine under the specific facts of that case). For estoppel to be established, the party claiming it must (among other things) have relied on the governmental agency's misstatements, and the party's reliance must have been reasonable. > Committee in Opposition v. Oregon Emergency Correc., 309 Or. 678, 686, 792 P.2d 1203 (1990). (FN4) See also Wiggins v. Barrett & Associates, Inc., 295 Or. 679, 697, 669 P.2d 1132 (1983) (one element necessary for reasonable reliance in a claim for equitable estoppel was that it "was within the lawful powers of the [agency]" to make the statements relied on).

The State is estopped to deny its own alternative performance, to wit:

Ex. 3, states, in pertinent part:

"Based on the statements made by DEQ's Robert Baumgartner and his staff, your options appear to be as follows:

*****

6. Remove the problem units. Landlord-Tenant issues would have to be taken into consideration. While DEQ would not then have a permit to review, staff has indicated that frequent visits would be made to ensure that there were no discharges."

after reasonable compliance by the Respondent in complying with the alternative, and the State should be estopped from asserting the lack of obtaining the WPCF permit as the basis for any action herein. In accord: Employment Div. v. Western Graphics Corp. 76 Or App 608, 614, 710 P2. 788, 791 (1985).

Exception C. 1, F - Effect of Removal of Mobile Homes

Once again, we have identified all of the trees and missed the forest. Caleb Siaw is not the owner for purposes of liability for a fine except for a brief period of time. He is not the owner, under the statute, responsible for correcting the system nor for purposes of the economic benefit analysis for any material period of time. He did, however, agree with the A & D Trust, to be at least financially responsible for "obtaining DEQ approval". The agreement with the DEQ under the MAO, is less clear, given the alterations. The DEQ resisted joining the A & D Trust

in this matter for no discernable reason unless it was to punish Caleb Siaw. (It should be noted, Anne Cox and Caleb Siaw had a prior history.) Is this a vendetta? If the protection of the public is the ultimate goal, all owners who have permitted sewage discharge should be named.

Nevertheless, regardless of who is legally responsible, all of the activity of the various property owners regarding completing the WPCF permit came to a screeching halt with the DEQ's suggestion that removal of the homes would solve the problem.

Ex. 3, states, in pertinent part:

"Based on the statements made by DEQ's Robert Baumgartner and his staff, your options appear to be as follows:

*****

6. Remove the problem units. Landlord-Tenant issues would have to be taken into consideration. While DEQ would not then have a permit to review, staff has indicated that frequent visits would be made to ensure that there were no discharges."

Which makes perfect sense when only one system (of three separate systems) in the park is broken. The cessation of the use of that system, solves the problem. Why is the DEQ blindly pursuing Caleb Siaw, when the "broken system" has ceased to be utilized?

The Mal's, with Caleb Siaw's financing, complied with "option 6" in Bob Sweeney's letter, Ex. 3 and thus Caleb Siaw "obtained DEQ approval". Caleb Siaw "achieved" DEQ approval by stopping the flow of sewage and removing the mobile homes that were causing the problem. And this was done at the DEQ's direction. Isn't it the policy of the DEQ to endeavor by conference, conciliation and persuasion to solicit compliance. OAR 340-012-0026(2). The concept is simple, the groundwater can't be contaminated by sewage if no sewage discharge occurs in the area. Doesn't this cessation of use amount to a solution:

340-040-0050 Selection of the Remedial Action

(1) Requirements: After opportunity for public review and comment, the Director shall select a remedial action. Such remedial action shall meet the following requirements:

(a) Be protective of present and future public health, safety, and welfare and the environment; and

(b) To the maximum extent practicable:

(A) Be cost effective;

(B) Use permanent solutions and alternative technologies or resource recovery technologies;

(C) Be implementable; and

(D) Be effective.

The action, then, of the A& D Trust, and Caleb Siaw in implementing "option 6" complies with the regulatory requirements of a "Remedial Action". OAR 340-071-0130(1) includes "...use shall not be authorized..." as an action regarding a system.

The DEQ and the Hearings officer exceed their authority when they prosecute Caleb Siaw for not replacing all three systems in the entire park. The DEQ implicitly recognized in option 6, that remedial action, short of re-doing the "hodgepodge of systems" in the entire park, was a solution. The "system" that is subject to being treated here, does not necessarily include the entire park. The park is composed of separate systems, cf. Ex. 109, the maps introduced and the testimony of Anne Cox. The desire to improve the entire park may have public benefits but is not necessary to effect a remedial solution. The definition of "repair" cited by the Hearings Officer, confirms the availability of that remedy:

OAR 340-071-0100:

(115) "Repair" means installation of all **portions** of a system <u>necessary</u> to eliminate a public health hazard or pollution of public waters created by a failing system. Major repair is defined as the replacement of the soil absorption system. Minor repair is defined as the replacement of a septic tank, broken pipe, **or any part** of the on-site sewage disposal

system except the soil absorption system. (Emphasis added)

It is clear in the statute, that portions of a system can be repaired or corrected. The DEQ in the field knew that, see Ex. 3, why didn't the DEQ in court, know that. The Hearing's Officer's implied finding that all of the park's multiple systems is not supported by the evidence of failure in one separate system.

The basis for the fine must be reviewed and reconsidered in light of the above. The actual flow of sewage pre-dates the MAO and has already been the subject of a fine. The balance of the fine, directed at not completing the permit process, is without legal foundation in light of the actions of the DEQ and remedial actions of the owner.

Exceptions D, D1 - 4 — Penalty

Given the above analysis, the time frame over which the fine was measured as well as the values assigned to the components are in error.

Simply, put the fine is excessive and vindictive. There is not a single effort made by the state in this proceeding to either recognize its own complicity in dissuading the owner from completing the permit process or recognizing the permit was no longer necessary.

Again, I cannot emphasize strongly enough the basic reason the permit process was abaondoned:

Ex. 3, states, in pertinent part:

"Based on the statements made by DEQ's Robert Baumgartner and his staff, your options appear to be as follows:

*****

6. Remove the problem units. Landlord-Tenant issues would have to be taken into consideration. While DEQ would not then have a permit to review, staff has indicated that frequent visits would be made to ensure that there were no discharges."

There should be no fine. If there is a fine, it should be based upon the time it took to remove all of the offending homes and reflect that process, not the alleged failure to complete the permit process.

Any fine should reflect that the actual charge, of not obtaining a permit, "...had no potential for or actual adverse impact on the environment, nor posed any threat to public health,..." OAR 340-12-0045(1)(a)(B)(ii) because a different remedial action was undertaken and completed.

When in fact there was a sewage discharge, from Nov. of 1997 until Oct. of 1998, which culminated in the first violation notice, Ex. 109, the assessed penalty for an actual spill was $6,291.00. The assessment for failing to complete the permit process and install an unnecessary system is $317,700.00. Am I the only person who sees the incongruity in these numbers.

The Base Penalty should be found to be minor. OAR 340-012-0045(1)(B)(ii):

(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.

The Respondent and the A & D Trust, did not deviate from the Department's request, but complied with "option 6". The penalty base should be minor.

The "prior" significant actions "P" should be "2" at worst. The treating of the original department penalty and criminal action as two separate instances is double jeopardy. They are two separate penalties for one action. The statute refers to actions and cannot be read to

multiply occurrences because different tribunals punished the same activity.

The "past history", "H",should be rated a "-2". The DEQ applies a value for no action. Respondent installed holding tanks. Respondent payed the engineer, Robert Sweeney's fees. Respondent bought tow mobile homes and in conjunction with the A & D Trust ceased using the offending homes. The Respondent spent $144,000.00. The park will lose $384,000.00 in revenues over the next 20 years. The Hearings Officer's finding is not supported by the evidence.

The source of the violation, the "R" factor is likewise misconstrued. The Mutual Agreement and Order was signed and was not complied with but due to the alternative proposed by the DEQ, the other party to the MAO. Further Respondent and the A & D Trust did comply with the alternative, "option 6. Any delay in completing the home removals, resulted from the sale of the park to the A & D Trust and we are dealing with a factor that should be 0 or 2 at worst.

The "cooperation" index "C" likewise ignores the Respondent's actions, ignores the sale, and ignores "option 6" and ignores the money spent by Respondent to solve the sewage problem. The leaks were stopped, efforts (expensive efforts) were made to find a solution and steps were taken to solve the problem. This should be a negative 2.

Exception E — Economic Benefit

The Hearings Officer found that a space rents for $200.00 per month and had operated for many years. (Finding of Fact 1). The DEQ was recommending a sewage system with a useful life of 20 years. (F/F 25). Respondent unhooked eight homes. (F/F 24). The cost of unhooking eight homes is $1,600.00 per month in lost revenues. Over 20 years that amounts to $384,000.00 in lost potential revenues. That is a substantial amount of money never addressed

by the hearings office. OAR 340-012-0045(1)(F):

(F) "EB" is the approximated dollar sum of the economic benefit that the Respondent gained through noncompliance.

What has the Respondent or the owner "gained?" There has been no economic gain from noncompliance with the MAO. The hearings officer's findings that the money spent was not spent toward a permanent solution ignores "option 6" of Exhibit 3, which was unrefuted and was never denied by anyone on behalf of the DEQ.

IV

PROPOSED ALTERNATIVE FINDINGS AND ORDERS

A. The DEQ proved that Respondent was the owner of the property from October 31, 1996 until July 30, 1998, and thereafter held title as security only.

A. 1 Respondent did not violate ORS 468.140(1)(c) by failing to comply with the MAO and in not submitting a complete application for a WPCF permit. Respondent complied with an alternative method of performance offered by the DEQ and no fine should be imposed.

A. 2 The contract between Respondent and Caleb Siaw was properly acknowledged and was later recorded. The contract was a valid sale of the property from Respondent to the A & D Trust.

A. 3. As the owner of the property, Respondent was owner for purposes of the onsite sewage disposal rules in OAR Chapter 340, division 71, from October 30, 1996 until July 30, 1998.

B. The Mutual Agreement and Order was signed by Respondent as a "former owner".

C, C-1. The DEQ is estopped from denying the Respondent's compliance with its alternative method of solving the sewage problem. By removing the eight mobile homes and ceasing to use the failing septic system thereby complying with the alternative method of resolution proposed by the DEQ, the MAO was superceded and rendered moot.

D. No penalty is warranted under the circumstances of this case.

D. 1. The value for "P" should be 2.

D. 2 The value for "H" should be -2.

D. 3 The value for "R" should be 0.

D. 4 The value for "C" should be -2.

E. No economic benefit penalty is assessable in this case.

F. Order No. 1. Find that respondent complied with an alternative method of resolution of the sewage discharge problem and no violation of ORS 468.140(1)(c) occurred for failing to comply with the precise terms of the MAO.

Respectfully submitted this 15th day of July, 2002.

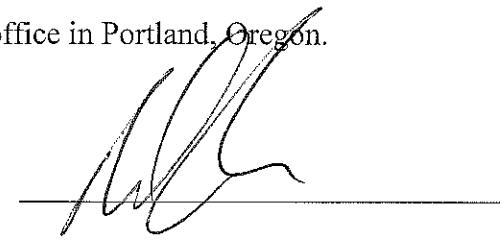
Michael J. Kavanaugh OSB 75205
Attorney for Petitioner on Review

CERTIFICATE OF MAILING

I hereby certify that I served the Petitioner's Brief, on the following persons:

Jeff Bachman
Dept. of Environmental Quality
811 S.W. Sixth Ave.
Portland, Or. 97204

on July 15, 2002, by depositing a true copy of the above item, addressed as shown above, on said date in the U.S. Mail, postage prepaid, at the post office in Portland, Oregon.



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

June 27, 2002

Michael J. Kavanaugh Esq.
Attorney at Law
4930 SE Woodstock Blvd.
Portland, OR 97206

RE: Caleb Siaw
WQ/D-NWR-99-186

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 June 29, 2002. An extension of the deadline to July 13, 2002, 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 extension 5301 within the state of Oregon.

Sincerely,

Stephanie Hallock

Stephanie Hallock
Director

cc: Jeffrey R. Bachman, Environmental Law Specialist

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639/Fax (503) 788-5345

June 27, 2002

Dept. of Environmental Quality
Emma Snodgrass
811 S.W. Sixth Ave.
Portland, Or. 97204

Re: WQ/D-NWR-99-186 Caleb Siaw

Dear Ms. Snodgrass,

Pursuant to our phone conversation, I am requesting a two week extension in which to file exceptions and a brief. My scheduled has peaked at this point in the year and time is at a premium. I have been in court or at a hearing everyday this week, even if only for brief periods. I have an asylum hearing on Monday, July 1 and a pre-trial conference scheduled in federal court for July 8, 2002.

The previous week wasn't much better as I was in court twice and prepared for three other matters, an arbitration and hearing among them, all of which were setover at the last minute.

A two week extension will allow me to adequately address the points I wish to raise.

Thank you.

Very truly yours,

Michael J. Kavanaugh

cc: Jeff Bachman
By Fax

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

June 3, 2002

Via Certified Mail

Michael J. Kavanaugh
4930 S.E. Woodstock Blvd.
Portland, OR 97206

RE: Case No. WQ/D-NWR-99-186

Dear Mr. Kavanaugh:

On May 29, 2002, the Environmental Quality Commission received your timely request for Commission review of the (second) Proposed Order for the above referenced case.

The hearings decision for this case outlined appeal procedures, including filing of exceptions and briefs. The hearing decision and Oregon Administrative Rules (OAR 340-011-0132) state that you must file exceptions and brief within thirty days from the filing of your request for Commission review. Your exceptions should specify the findings and conclusions that you object to in the Proposed Order and include alternative proposed findings. Once your exceptions have been received, or, if no exceptions have been received by June 29, 2002, the Department will file an answer brief within thirty days. I have enclosed a copy of the applicable administrative rules.

To file exceptions and briefs, please mail these documents to Mikell O'Mealy, on behalf of the Environmental Quality Commission, at 811 SW 6th Avenue, Portland, Oregon, 97204, with copies to Jeff Bachman, Department of Environmental Quality, at 811 SW 6th Avenue, Portland, Oregon, 97204.

After both parties file exceptions and briefs, this item will be set for Commission consideration at a regularly scheduled Commission meeting, and I will notify you of the date and location. If you have any questions about this process, or need additional time to file exceptions and briefs, please call me at 503-229-5301 or 800-452-4011 ext. 5301 within the state of Oregon.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Jeff Bachman

Oregon Administrative Rules 340-011-0132

Alternative Procedure for Entry of a Final Order in Contested Cases Resulting from Appeal of Civil Penalty Assessments

(1) Commencement of Review by the Commission:

(a) Copies of the hearing officer's Order will be served on each of the participants in accordance with OAR 340-011-0097. The hearing officer's Order will be the final order of the Commission unless within 30 days from the date of service, a participant or a member of the Commission files with the Commission and serves upon each participant a Petition for Commission Review. A proof of service should also be filed, but failure to file a proof of service will not be a ground for dismissal of the Petition.

(b) The timely filing of a Petition is a jurisdictional requirement and cannot be waived.

(c) The timely filing of a Petition will automatically stay the effect of the hearing officer's Order.

(d) In any case where more than one participant timely serves and files a Petition, the first to file will be the Petitioner and the latter the Respondent.

(2) Contents of the Petition for Commission Review. A Petition must be in writing and need only state the participant's or a Commissioner's intent that the Commission review the hearing officer's Order.

(3) Procedures on Review:

(a) Petitioner's Exceptions and Brief: Within 30 days from the filing of the Petition, the Petitioner must file with the Commission and serve upon each participant written exceptions, brief and proof of service. The exceptions must specify those findings and conclusions objected to, and also include proposed alternative findings of fact, conclusions of law, and order with specific references to the parts of the record upon which the Petitioner relies. Matters not raised before the hearing officer will not be considered except when necessary to prevent manifest injustice.

(b) Respondent's Brief: Each participant will have 30 days from the date of filing of the Petitioner's exceptions and brief, in which to file with the Commission and serve upon each participant an answering brief and proof of service. If multiple Petitions have been filed, the Respondent must also file exceptions as required in (3)(a) at this time.

(c) Reply Brief: Each participant will have 20 days from the date of filing of a Respondent's brief, in which to file with the Commission and serve upon each participant a reply brief and proof of service.

(d) Briefing on Commission Invoked Review: When one or more members of the Commission wish to review a hearing officer's Order, and no participant has timely filed a Petition, the Chairman will promptly notify the participants of the issue that the Commission desires the participants to brief . The Chairman will also establish the schedule for filing of briefs. The participants must limit their briefs to those issues. When the Commission wishes to review a hearing officer's Order and a participant also requested review, briefing will follow the schedule set forth in subsections (a), (b), and (c) of this section.

(e) Extensions: The Chairman or the Director, may extend any of the time limits contained in this rule except for the filing of a Petition under subsection (1) of this rule. Each extension request must be in writing and be served upon each participant. Any request for an extension may be granted or denied in whole or in part.

(f) Dismissal: The Commission may dismiss any Petition if the Petitioner fails to timely file and serve any exceptions or brief required by this rule.
(g) Oral Argument: Following the expiration of the time allowed the participants to present exceptions and briefs, the Chairman will schedule the appeal for oral argument before the Commission.
(4) Additional Evidence: A request to present additional evidence will be submitted by motion and be accompanied by a statement specifying the reason for the failure to present the evidence to the hearing officer. If the Commission grants the motion or decides on its own motion that additional evidence is necessary, the matter will be remanded to a hearing officer for further proceedings.
(5) Scope of Review: The Commission may substitute its judgment for that of the hearing officer in making any particular finding of fact, conclusion of law, or order except as limited by OAR 137-003-0665.

Stat. Auth.: ORS 183.335 & ORS 468.020
Stats. Implemented: ORS 183.430 & ORS 183.435
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 115, f. & ef. 7-6-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

	)
	)
In the Matter of	) No. WQ/D-NWR-99-186
	) Hearings Officer Panel Case No. G60602
CALEB SIAW	)
	) PETITION FOR REVIEW
Respondent.	)

Respondent Caleb Siaw hereby requests review by the Commission of the Proposed Order and decision of Ken L. Betterton, Administrative Law Judge, dated April 5, 2002.

Dated this 29th day of May, 2002.

Michael J. Kavanaugh OSB 75205
Attorney for Caleb Siaw

CERTIFICATE OF MAILING

I hereby certify that I served the Petition for Review, on the following persons:

Jeff Bachman
Dept. of Environmental Quality
811 S.W. Sixth Ave.
Portland, Or. 97204

on May 29, 2002, by depositing a true copy of the above item, addressed as shown above, on said date in the U.S. Mail, postage prepaid, at the post office in Portland, Oregon.

Ref No.: G60602
Case No: 02-GAP-00014
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: 05/01/02
Mailed by: DVL

AMENDED HEARING DECISION

CALEB SIAW, MD
19075 SE FOSTER RD

BORING OR 97009 9653

DEPT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

MICHAEL J. KAVANAUGH
4930 SE WOODSTOCK BLVD

PORTLAND OR 97206 6163

JEFF BACHMAN
DEQ
811 SW 6TH AVE
PORTLAND OR 97204 1334

Orig is in case file — was recas judgement in Clat Co

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

This hearing decision has been copied to: field person & his/her mngr, Les and Anne & staff the EQC, the DA, the Business Office, West Publishing, and LexusNexus. Let me know if anyone else needs a copy. Deb

Amended CP Amount.

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

IN THE MATTER OF:	)	
	)	**AMENDED PROPOSED ORDER**
	)	
Caleb Siaw, M.D.,	)	Hearing Officer Panel Case No. G60602
	)	Agency Case No. WQ/D-NWR-99-186[1]
	)	CLATSOP COUNTY
Respondent.	)	

HISTORY OF THE CASE

The Department of Environmental Quality (DEQ) issued a Notice of Assessment of Civil Penalty pursuant to ORS 468.126 through 468.140, ORS Chapter 183, and OAR Chapter 340, Divisions 11 and 12, to respondent Caleb Siaw, M.D., on July 31, 2001. The notice alleges that from or about September 15, 1999 respondent violated ORS 468.140(1)(c) and committed two Class I violations by violating an order of the Environmental Quality Commission, by violating Paragraph 15.B(1) of a Mutual Agreement and Order (MAO), Case No. WQ/D-NWR-99-186 [*sic*], by failing to submit the information required to complete his application for a WPCF permit (violation 1), and that respondent violated Paragraph 15.A(4) of MAO Case No. WQ/D-NWR-99-212 [*sic*][2], by failing to submit holding tank pumping receipts for the previous month (violation 2). The notice assessed a civil penalty in the amount of $373,580 for violation 1.

On or about August 8, 2001 respondent filed a written request for hearing and answer. Respondent generally denied the allegations in the notice, and asserted as affirmative defenses that he had negotiated with DEQ to have the tanks pumped in accordance with the Mutual Agreement and Order, that he ceased to use the offending area for sewage disposal, removed the homes hooked up to the offending area and did not violate sewage disposal laws, and that on or about April 8, 1999 respondent sold the property on contract, and no longer owned the property.

On January 15, 2002 respondent filed a Motion to Join Indispensable Party/Motion to Postpone and Consolidate. Respondent sought to join A & D Trust, and/or Adrian and Danny Malo [*sic*] , the owners of the property. Respondent cited OAR 137-003-0520[3] and ORCP 29[4] to

[1] The Notice of Assessment of Civil Penalty incorrectly names the case number as "WQ/D-NWR-99-168." The correct case number is "WQ/D-NWR-99-186." The correction to the case number was made by interlineation at the beginning of the hearing on January 17, 2002.

[2]The July 31, 2001 notice incorrectly names the case number for the MAO. The correct case number is "WQ/D-NWR-98-212," not "WQ/D-NWR-99-186" or "WQ/D-NWR-99-212."

support his motion. The Oregon Rules of Civil Procedure (ORCP) do not apply to administrative proceedings in Oregon.[5] OAR 137-003-0520 addresses the filing of documents, motions, pleadings and orders, and the deadline for filing such papers with the Hearing Officer Panel, not joining other parties to contested case hearing. OAR 137-003-0005[6] does provide for the participation in a hearing by other persons who have an interest in the outcome of an agency's contested case. That other person must file a petition with the agency at least 21 days prior to the date set for the hearing. No such party filed a timely petition here, rather respondent filed a motion to join another party. Moreover, motions must be filed at least seven calendar days before the date set for the hearing (scheduled in this case for January 17, 2002). OAR 137-003-0630.[7] Respondent filed its motion two days before the hearing, and did not comply with the rule. Respondent's Motion to Join an Indispensable Party/Motion to Postpone and Consolidate was denied.

A hearing was held in Portland, Oregon on January 17, 2002 before Ken L. Betterton, administrative law judge. Jeff Bachman, environmental law specialist, represented DEQ. Respondent appeared and was represented by Michael J. Kavanaugh, attorney at law. Anne Cox and Les Carlough testified as witnesses for DEQ. Robert Sweeney, Adrian Malo and Caleb Siaw, M.D., testified as witnesses for respondent.

A telephone conference hearing was held on February 13, 2002 to address additional documents as exhibits for the record. Jeff Bachman represented DEQ at the telephone conference hearing. Michael J. Kavanaugh represented respondent.

The parties filed their written closing arguments on March 1, 2002, at which time the record closed.

---

[3] OAR 137-003-0520 provides, in part:

> (1) Unless otherwise provided by these rules, any documents, correspondence, motions, pleadings, rulings and orders filed in the contested case shall be filed as follows:
> * * * * *
> (b) With the Hearing Officer Panel or assigned hearing officer after the agency has referred the case to the Panel and before the assigned hearing officer issues a proposed order,
> * * * * *.

[4] ORCP 29 provides for the "Joinder of Persons Needed for Just Adjudication."

[5] ORCP 1 provides:

> **A Scope.** These rules govern procedure and practice in all circuit courts of this state, * * *.

[6] OAR 137-003-0005 provides, in part:

> (1) Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.
> (2) A person requesting to participate as a party or limited party shall file a petition with the agency at least 21 calendar days before the date set for the hearing * * *.

[7] OAR 137-003-0630 provides, in part:

> (1) Unless otherwise provided by statute or rule, all motions shall be filed in writing at least seven days before the date of the hearing * * *.

A Proposed Order was mailed to the parties on April 5, 2002.

On April 17, 2002 DEQ filed a request for issuance of a revised or amended proposed order pursuant to OAR 137-003-0655.[8] DEQ presented the following questions with its request:

> "First, page 17 of the Order, in reference to the Department's decision to impose one daily civil penalty for each month in which a violation occurred, states 'Without statutory or administrative rule authority to impose penalties for each month, DEQ cannot impose such penalties.' Is it your decision that ORS 468.140 requires DEQ to assess a penalty for only one day of violation or for every day of violation, but does not confer discretion on the Department to assess penalties for an intermediate number of days of violation?"
>
> "Second, page 18 of the Proposed Order states 'Because the administrative rules provide for an enhanced penalty for a continuous violation, it is more appropriate to address the continuous nature of the violation in the penalty calculation, rather than impose a separate penalty for each day of violation.' Is it your decision that, when a violation spans more than one day, OAR 340-012-045(1)(c)(C) [*sic*] requires that the penalty be based on a single day as aggravated by the 'O' factor, or is this a case-specific decision? If it is case specific, what is your basis in fact and law that 'it is more appropriate to address the continuous nature of the violation in the penalty calculation. [*sic.*]"

DEQ's questions raise the relationship between ORS 468.140[9] and the allegations DEQ made in its Notice of Assessment of Civil Penalty and the proof of those allegations. ORS 468.140 mandates a civil penalty for each day of violation. The Violation Section of the Notice

---

[8] OAR 137-003-0655 provides, in part:

> (1) After issuance of the proposed order, if any, the hearing officer shall not hold further hearing or revise or amend the proposed order except at the request of the agency.
> * * * * *.

[9] ORS 468.140 provides, in part:

> (1) In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of violation in the amount prescribed by the schedule adopted under ORS 468.130.
> * * * * *
>
> (c) Any rule or standard or order of the Environmental Quality Commission adopted or issued pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.305 to 454.535, 454.605 to 454.755, ORS chapter 467 and ORS chapter 468, 468A and 468B.
> * * * * *
>
> (2) Each day of violation under subsection (1) of this section constitutes a separate offense.
> * * * * *.

of Assessment of Civil Penalty states: "From or about September 15, 1999, Respondent violated ORS 468.140(1)(c) by violating a Commission Order." (Ex. B at 2.) In its penalty calculation, Exhibit 1 to the Notice of Assessment of Civil Penalty, DEQ states: "Respondent has been in daily violation of the MAO since September 15, 1999. The Department elects to assess civil penalty for each month in which a daily violation occurred."[10] (*Id.* at 6.)

Imposing a separate penalty for each day of violation for about 20 months would result in a civil in the millions of dollars. DEQ correctly points out that such a penalty could be unrealistic for the violation, the value of the real property in question, and would be unenforceable as a practical matter.

The questions DEQ presented in its April 17 letter could have been easily resolved if DEQ had alleged in its Notice of Assessment of Civil Penalty violations only for the specific days on which it sought a civil penalty. Such an approach would have complied with the language of ORS 468.140 which mandates a civil penalty for each day of violation, and given DEQ the civil penalty outcome it desired (violations for about 20 days). The question is whether DEQ can achieve the outcome it seeks of a civil penalty for a specific number of days, given the allegations in its notice, its proof, and the statement in its civil penalty calculation that "[t]he Department elects to assess civil penalty for each month in which a daily violation occurred."

I conclude that DEQ can assess such a penalty. Although DEQ did not specify the day of each month on which it sought a penalty, it did state that it elected a penalty for each month in which a *daily* violation occurred. Essentially DEQ requested the same thing as seeking a civil penalty for, for example, December 15, 1999, January 15, 2000, February 15, 2000, and so on, until it specified the total number of days it wished to seek a penalty. Respondent was placed on notice in the Notice of Assessment of Civil Penalty that DEQ sought a penalty for one day each month from September 15, 1999. DEQ subsequently changed that request to lower the number of days of civil penalty to run from December 1999. Respondent has not been prejudiced by the change because it lowers the potential penalty, as opposed to where DEQ might try to increase the number of days of civil penalty from what it alleged in its notice.

The adjustment for the civil penalty for each day sought is made in the Civil Penalty portion of the amended proposed order.

Because of the change made in this decision as a result of the first question presented in DEQ's April 17 letter, DEQ's second question becomes moot.

EVIDENTIARY RULING

Administrative Law Judge Exhibits A through E, respondent Exhibits 1 through 7 from the hearing on January 17, 2002 and Exhibits 8 through 13 from the telephone hearing on

[10] The Notice of Assessment of Civil Penalty assesses a penalty for each month from October 1999. DEQ's closing argument contends a penalty should be imposed for each month from December 1999.

February 13, 2002, and DEQ Exhibits 100, 105 through 107, and 109 through 128 were admitted into the record without objection. Respondent objected to DEQ Exhibits 101, 102, 103 104, and 108 as not relevant. Those exhibits are relevant to DEQ's allegations. Respondent's objections were overruled and the exhibits were admitted into the record. Respondent objected to Exhibit 129 as repetitive, and to Exhibit 130 as cumulative and contradictory.[11] Exhibits 129 and 130 met the standards for admissibility in ORS 183.450 and were admitted into the record.

ISSUES

(1) Did respondent violate ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit information required to complete his application for a WPCF permit, and if so, what penalty should be imposed under OAR Chapter 340, Divisions 11 and 12?

(2) Did respondent violate ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit holding tank pumping receipts for the previous month?

FINDINGS OF FACT

(1) Respondent Caleb Siaw purchased real property in his own name in Clatsop County, Oregon, generally described as HCR 63, Box 225, Seaside, Oregon, from Sama H. Banki by warranty deed dated October 30, 1996, and recorded November 4, 1996 in Clatsop County land records. (Ex. 9.) The property consists of several acres near the Necanicum River, outside Seaside, Oregon, that had operated for many years as a mobile home and RV park (known as Forest Lake Resort), including about 44 spaces for mobile homes and RVs, and a laundry. (Ex. 100.) The owner of the property typically has rented the spaces to tenants and collected the rents for income. A space rents for about $200 per month.

(2) The resort operated for many years before April 1, 1995, when DEQ adopted OAR 340-071-0130, which requires a Water Pollution Control Facilities (WPCF) permit for any system or combination of systems with a total sewage flow design capacity greater than 2,500 gallons per day. The average sewage flow for a single family residence is 250 gallons per day. The resort used a collection of drain fields and septic tanks to dispose of sewage at the resort. Because the resort, as well as many other similar facilities, operated prior to the effective date of OAR 340-071-0130, those existing sewage disposal systems were "grandfathered in," without the need to apply for and obtain a WPCF permit, so long as the sewage system was not expanded or needed repairs.[12]

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[11] ORS 183.450 sets forth the standards for the admissibility of evidence in contested cases. ORS 183.450 states: In contested cases:

> (1) Irrelevant, immaterial or unduly repetitious evidence shall be excluded * * *. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible. * * *.

[12] OAR 340-071-0130(16) provides, in part:

(3) DEQ received complaints from tenants at Forest Park Resort as early as 1996 that the sewage disposal system at the resort property did not function properly, causing raw sewage to pond and spill onto the ground surface near tenants' residences. DEQ mailed notices of noncompliance to Sama Banki in June and in August 1996. On December 17, 1997, DEQ mailed a notice of noncompliance to respondent by certified mail, informing him of complaints from tenants about sewage spilling onto the ground surface, about repeated violations of environmental protection laws, and that he needed to apply for a WPCF permit no later than January 1, 1998 and submit plans and specifications for a sewage treatment system by February 1, 1998. (Ex. 101.)

(4) On February 5, 1998, DEQ mailed respondent another notice of noncompliance by certified mail, informing him that he still had not filed his application for a WPCF permit, and that DEQ inspectors had visited the resort on several recent occasions and seen evidence of continued sewage disposal system failures on the property. (Ex. 102.) Respondent submitted an incomplete application for a WPCF permit to DEQ on February 17, 1998. DEQ returned the application to respondent on March 13, 1998, with a letter explaining to him what he needed to submit in order to make his application complete. (Ex. 103.) On March 24, 1998 DEQ mailed respondent another notice of noncompliance by certified mail, reciting the prior notices of noncompliance and the numerous complaints and sewage disposal law violations at the resort. (Ex. 104.)

(5) Respondent submitted another application for a WPCF permit on March 31, 1998. (Ex. 105.) DEQ notified respondent in writing on April 30, 1998 that his application was

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(a) Owners of existing systems meeting the system descriptions in (15)(a), (b), and (d) through (g) of this rule are not required to apply for a WPCF permit until such time as a system repair, or alternation is necessary;
* * * * *.

OAR 340-071-0130(6) defines "alternation" as "expansion or change in location of the soil absorption facility or any part thereof. Minor alternation is the replacement or re-location of a septic tank or other components of the system other than the soil absorption facility."

OAR 340-071-0130(115) defines "repair" to mean:

"[i]nstallation of all portions of a system necessary to eliminate a public health hazard or pollution of public waters created by a failing system. Major repair is defined as the replacement of the soil absorption system. Minor repair is defined as the replacement of a septic tank, broken pipe, or any part of the on-site sewage disposal system except the soil absorption system."

OAR 340-071-0130(15) provides:

Operating Permit Requirements. The following systems shall be constructed and operated under a renewable EPCF permit, issued pursuant to OAR 340-071-0162.

(a) Any system or combination of systems located on the same property or serving the same facility with a total sewage flow design capacity greater than 2,500 gallons per day.
* * * * *.

incomplete because he failed to submit an approvable plan for the upgrade and repair of the sewage disposal system. (Ex. 106.)

(6) Respondent and Richard Johnson, who was in the process of purchasing the resort property from respondent, met with DEQ natural resource specialist Anne Cox on August 27, 1998 to discuss the resort and what needed to be done to bring the sewage disposal system into compliance. DEQ outlined the various options for correcting the sewage disposal system and confirmed the options in a letter to respondent and to Johnson on September 1, 1998. (Ex. 107.) No contract of sale or other document of conveyance from respondent to Johnson was recorded in county deed records at that time. On July 30, 1998, Caleb Siaw, Trustee for Caleb Siaw, P.C., Trust, signed a memorandum of sale to sell the Forest Lake resort property Richard K. Johnson and Joyce M. Johnson, husband and wife. (Ex. 13.) The Johnsons made a few payments on the contract, then stopped, and let the property go back to respondent. The memorandum of sale was recorded in Clatsop County land records on October 8, 1998. (*Id.*) On August 16, 2000, the Johnsons signed a bargain and sale deed, deeding the property back to Caleb Siaw, P.C., Trust. (Ex. 12.) That deed was recorded in the Clatsop County land records on August 25, 2000. (*Id.*)

(7) DEQ mailed another notice of noncompliance by certified mail to respondent on September 21, 1998, again outlining the past notices of noncompliance of DEQ statutes and administrative rules, and requesting that respondent submit a completed application for a WPCF permit. (Ex. 108.)

(8) During the late summer of 1998, DEQ referred environmental law violations at Forest Lake Resort to the Clatsop County District Attorney for criminal prosecution. The Clatsop County grand jury indicted respondent for water pollution in the first degree on September 10, 1998. Respondent entered a plea of no contest to water pollution in the second degree in Clatsop County Circuit Court on January 22, 1999. The court sentenced respondent to probation, with conditions, among others, that he pay a fine of $10,060 and "make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material." (Ex. 110.)

(9) On December 9, 1998 DEQ received a copy of a rough drawing of a plan for a sewage disposal treatment plant at Forest Lake Resort from Robert Sweeney, a consultant with Environmental Management Systems, on respondent's behalf. DEQ could not accept the plans because they lacked a site evaluation.

(10) On December 15, 1998 DEQ issued and served respondent with a Notice of Violation Department Order and Assessment of Civil Penalty, Case No. WQ/D-NWR-98-212, alleging three violations of environmental laws and seeking, among other relief, civil penalties in the amount of $6,291, and requiring respondent to submit to DEQ by the 15th of each month the temporary holding tank pumping records for the preceding month. (Ex. 109.) Respondent requested a hearing on the notice, but did not appear at the hearing scheduled for July 8, 1999. A default order was taken against respondent on August 25, 1999. (Ex. 130.) The order established one Class I and two Class II violations. (*Id.*)

(11) DEQ's Anne Cox met with respondent and Sweeney on February 23, 1999, to explain to them what respondent needed to do to bring the sewage disposal system at Forest Lake Resort into compliance with the law. The February 23, 1999 meeting led to DEQ and respondent entering into a Mutual Agreement and Order (MAO), Case No. WQ/D-NWR-98-212, signed by respondent on May 10, 1999, and adopted as a Final Order by the Environmental Quality Commission on May 20, 1999. (Ex. 114.) On page 1 of the MAO, respondent acknowledged that he owned or operated Forest Lake Resort, although he wrote the words "former owner" below his signature on the last page of the order. (*Id.* at 7.) Respondent wrote in some changes on the MAO, and initialed those changes. (*Id.* at 1, 3, 5-6.) The signatory for DEQ did not initial the changes made by respondent when the signatory signed the MAO.[13]

(12) The MAO did not resolve the Notice of Assessment of Civil Penalty and Department Order in Case No. WQ/D-NWR-98-212, that DEQ issued to respondent on December 15, 1998. (*Id.* at 2.) The MAO authorized respondent to construct and use holding tanks for temporary sewage collection until such time as respondent could install a DEQ approved permanent sewage disposal system with a WPCF permit. (*Id.* at 3-4.) The MAO ordered respondent in Paragraph 15.B(1) to complete a WPCF permit within 30 days of being notified by DEQ if DEQ determined a WPCF permit was needed based on a soil evaluation. Respondent also had the responsibility pursuant to the terms of the MAO to provide a groundwater study and a narrative and conceptual plan for the upgrade. (*Id.* at 4.) Within 30 days of submitting a complete WPCF permit application, respondent agreed to submit acceptable plans and specifications for a sewage system to serve the entire facility. (*Id.* at 5.) The MAO ordered respondent in Paragraph 15.A(4) to submit the holding tank pump records by the 15th day of the month for the preceding month. (*Id.* at 3-4.) Respondent acknowledged in the MAO that he had actual notice of the contents and requirements of the MAO, and that failure to fulfill any of the provisions of the MAO would constitute a violation of the MAO and subject himself to civil penalties. (*Id.* at 6.)

(13) On June 7, 1999, DEQ mailed a letter to respondent reminding him that he needed to get his temporary holding tanks approved by June 20, 1999, that he needed to submit his holding tank pump records for May by June 15, and that he needed to complete an application for a WPCF permit within 30 days of the signing of the MAO. (Ex. 115.)

(14) In August 1999, respondent provided DEQ with monthly pump receipts through June 1999. On August 16, 1999 DEQ mailed respondent a notice of noncompliance and notice of incomplete application for a WPCF permit. (Ex. 116.) DEQ noted in its August 16, 1999 notice that respondent had provided a soil evaluation report on July 22, 1999, nine weeks after the parties had signed the MAO. (*Id.*)

(15) On November 12, 1999 DEQ mailed respondent a notice that his application was incomplete, and that he still had not submitted a conceptual plan for the resort's system upgrade or a ground water report. (Ex. 117.) In the notice, DEQ reminded respondent that he was still

[13] Because both parties did not initial the changes respondent wrote on the MAO, those changes have no legal effect.

the only applicant on the application for the WPCF permit and that he still was the owner of record for Forest Lake Resort, but that if he had transferred ownership of the property, he needed to provide DEQ with proof of the transfer of ownership. (*Id.*)

(16) On March 10, 2000 DEQ mailed a notice of noncompliance to respondent, informing him that although he still had not submitted the required upgrade plans, DEQ had gone ahead and prepared a draft permit on review, to be followed by a period for public comment. The notice went on to inform respondent that his failure to submit the plans previously requested constituted a violation of the MAO, and that the violation had been referred for enforcement action by DEQ. (Ex. 118.)

(17) DEQ issued a notice of noncompliance to respondent by certified mail on April 10, 2001, informing respondent that he was in violation of the MAO for not submitting a complete application for a WPCF permit, and for not submitting the monthly pump receipts for the period July 1999 through March 2001. (Ex. 119.) In a telephone conversation with DEQ's Anne Cox on April 12, 2001, respondent stated that he no longer owned the Forest Lake Resort property. DEQ checked the county land records and could find no record that the property had been transferred out of respondent's name as an individual.

(18) During the spring of 1999, respondent told other individuals, including individuals with DEQ, that he was in the process of selling the Forest Lake Resort property. (Ex. 125.) Adrian Malo attended several meetings between DEQ and respondent during 1999 regarding the property, the WPCF permit, and the various sewage disposal problems on the property. Malo owned farm property across the highway from respondent's property. About May 1999, Malo told DEQ personnel that he was in the process of purchasing the Forest Lake Resort property from respondent, and that ownership transferred to him on May 1, 1999. (Ex. 126.) DEQ personnel asked Malo to provide them with documentation showing the transfer of ownership, but Malo never did so.

(19) About April 12, 1999, respondent signed a real estate contract as "Caleb Siaw/Trustee for Caleb Siaw, P.C. Trust," to sell the Forest Lake Resort property to "Danny Mal, Trustee for A & D Trust." (Ex. 1, 11.)[14] The contract recited that possession of the property would transfer to Mal on April 10, 1999. (*Id.*) The contract recited a purchase price for the property and terms as follows:

> "$900,000, with a $100,000 contract assignment paid on execution, and the $800,000 balance payable at $4,000 per month for 30 months at 6% interest, thereafter payable at 8% interest for the remainder of the contract, with the first payment due May 15, 1999, and a like payment each month thereafter." (*Id.*)

[14] Exhibit 1, submitted by respondent at the January 17, 2002 hearing, and Exhibit 11, submitted at the February 13, 2002 telephone hearing, differ. Exhibit 1 consists only of the first two pages of the real estate contract. Exhibit 11, also has the two Exhibits, "A and B," attached to it. Moreover, some unknown person wrote information on the first page of Exhibit 11 about "maps" and a "tax account" that does not appear on Exhibit 1.

Respondent received his first payment on the contract in November 2000, followed by a few sporadic later payments. An Exhibit B, "Stipulations to the Contract," provided, among other clauses, that "seller agrees to pay and obtain DEQ approval on all septic systems within described property." (Ex. 11 at 4.) The contract required the seller: [w]hen the purchase price is fully paid and upon request and upon surrender of this agreement, to deliver a good and sufficient deed conveying the premises in fee simply unto the buyer." (Ex. 1 at 2.)

(20) Danny Mal is the brother of Adrian Malo.[15] Adrian Malo had no ownership interest in A & D Trust, although he managed property for the trust. A & D Trust was set up for children of the Mal/Malo families. Neither respondent, Adrian Malo nor Danny Mal provided DEQ with a copy of the real estate contract of sale during the spring or summer of 1999. Respondent's wife provided a copy of the real estate contract, without the exhibits attached, to DEQ by fax in December 1999. (Ex. 128.)[16] No contract or memorandum of contract sale between respondent or Caleb Siaw, P.C., Trust and Danny Mal, Trustee for A & D Trust was filed in Clatsop County land records prior to December 2001.

(21) DEQ could have dealt with a purchaser of the Forest Lake Resort property on the WPCF permit and installation of a new sewage disposal system, if DEQ had been provided with documentary proof that respondent had actually sold the property to another party.

(22) Respondent had a stroke in November 1999. The stroke affected his memory and caused other health problems that limited respondent's ability to deal with the Forest Lake Resort property. Respondent lived in Boring, Oregon, southeast of Portland, between 1997 and 2002.

(23) On August 7, 2000 Caleb Siaw, as grantor, executed a quitclaim deed to "Caleb Siaw, Trustee for the Caleb Siaw, P.C. Trust, *nunc pro tunc*, July 1998." (Ex. 10.) That deed was recorded in Clatsop County land records on November 8, 2000. (*Id.*)

(24) Respondent spent between $18,000 and $20,000 to install temporary holding tanks for sewage on the resort property. Respondent spent approximately $20,000 prior to May 1, 1999 to pump sewage from the property. Respondent purchased two mobile homes from tenants and moved those homes from the property, thereby unhooking them from the existing sewage disposal system. Respondent also unhooked an additional eight dwellings from the disposal system, in an effort to try and relieve some of the problems with the existing system.

(25) Bob Sweeney submitted a report on December 14, 1999 to respondent estimating the total cost of $247,000 to complete a sewage treatment facility on the Forest Lake Resort property that would comply with the MAO and DEQ requirements. (Ex. 120.) The useful life of such a sewage treatment system is about 20 years.

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[15] It is unclear why the two brothers spell their last names differently.

[16] The copy of the real estate contract faxed by respondent's wife consists of the first two pages only, and appear identical to Exhibit 1.

(26) In October 2000, DEQ's Anne Cox received information that a local developer was negotiating to purchase the Forest Lake Resort property from respondent, but that respondent turned down the offer as too low.

(27) DEQ calculated the economic benefit ("EB") portion of the civil penalty by using the U.S. Environmental Protection Agency's BEN computer model, that calculates the economic benefit from the avoidance or delay gained by noncompliance. The BEN model uses a cost of money factor (i.e., interest rate), a tax rate, and the useful life the treatment facility to calculate the approximate dollar value of the economic benefit gained through noncompliance. DEQ calculated the EB value as $191,700.

(28) Respondent did not submit any receipts for the pumping of the temporary holding tanks for the resort property after the one submitted for the month of June 1999, submitted on July 11, 1999.

CONCLUSIONS OF LAW

(1) Respondent violated ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit information required by DEQ to complete his application for a WPCF permit. A civil penalty in the amount of $198,600 should be imposed against respondent for this violation.

(2) Respondent violated 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit holding tank pumping receipts for the previous month.

OPINION

DEQ alleges that respondent violated ORS 468.140(1)(c) by violating an Mutual Agreement and Order of the Environmental Quality Commission signed by respondent and DEQ in May 1999, by failing to submit the information required to complete his application for a WPCF permit, and by failing to submit holding tank pumping receipts for the previous month. ORS 468.140 provides:

> (1) In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of violation in the amount prescribed by the schedule adopted under ORS 468.130.
> * * * * *
> (c) Any rule or standard or order of the Environmental Quality Commission adopted or issued pursuant to * * * ORS chapters 468, 468A and 468B.
> * * * * *.

ORS 183.450(2) provides, in part, "The burden of presenting evidence to support a position in a contested case rests on the proponent of the fact or position." As set forth above,

DEQ allege that respondents violated ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit the information required to complete his application for a WPCF permit, and by failing to submit holding tank pumping receipts. The burden is on DEQ, as the state agency making the allegations, to prove the alleged violations. *Garton v. Real Estate Commissioner*, 127 Or App 340, 342 (1994).

Respondent argues that he did not own the property during the time period relevant to the violations, and hence, cannot be held liable for the civil penalty. DEQ brought the Notice of Assessment of Civil Penalty against respondent as an individual. Respondent held legal title to the real property in his own name starting in October 1996, when he purchased the property from Sama Banki. A warranty deed conveying the property to respondent was recorded in Clatsop County on November 4, 1999. Respondent Caleb Siaw, and Caleb Siaw, P.C., Trust, were and are two different legal entities. Caleb Siaw, P.C., Trust did not hold title to the Forest Lake Resort property in April 1999, when the purported sale occurred from Caleb Siaw, P.C., Trust to Danny Mal, Trustee for A & D Trust, as reflected by the real estate contract in Exhibit 1. A legal entity cannot convey title to or an interest in real estate that the entity does not own at the time of the purported transfer. On August 7, 2000, Caleb Siaw, as grantor, executed a quitclaim deed to "Caleb Siaw, Trustee for the Caleb Siaw, P.C., Trust, *nunc pro tunc*, July 1998." That deed was recorded in the Clatsop County land records on November 8, 2000. Respondent argues that this quitclaim deed established ownership in the real property in Caleb Siaw, P.C., Trust retroactively from August 2000 or November 2000 to July 1998, thereby giving Caleb Siaw, P.C., Trust title that the trust could then convey retroactively to Danny Mal, Trustee for A & D Trust, in April 1999.

The term *"nunc pro tunc"* refers to the power of a court to amend records of its judgments by correcting mistakes or supplying omissions in judgments, and to apply such amendments retroactively by an entry *nunc pro tunc*. A *nunc pro tunc* order merely recites court action previously taken, but not properly or adequately recorded. A *nunc pro tunc* order may not be used to accomplish something which ought to have done but was not done.[17] Respondent cites no authority, nor can the administrative law judge find any authority, for the proposition than an individual or a person, as opposed to a court, can execute documents *nunc pro tunc* to effectively transfer an interest in real property retroactively to an earlier date when the transferee had no legal interest whatsoever in the property. Such a power would allow an enormous opportunity for mischief. Caleb Siaw, P.C., Trust did not hold title to the property in April 1999 when the trust purportedly sold the property on contract to Danny Mal, Trustee for A & D Trust.

Moreover, the legal validity of the real estate contract for the purported sale from Caleb Siaw, P.C. Trust to Danny Mal, Trustee for A & D Trust is questionable. The sale supposedly took place in April 1999, yet the purchaser made no monthly payments on the contract until November 2000, about 18 months later. The terms of the contract called for a monthly payment of $4,000 at 6% interest for 30 months, then at 8% percent interest on a contract balance of $800,000. At 6% interest the monthly payments would just pay the interest on an annual basis

[17] 46 Am Jur 2d , *Judgments*, section 156 *et seq* (1994).

(6% x $800,000 = $48,000 a year interest = $4,000/month x 12 months = $48,000). At 8% interest the monthly payments would fall substantially short of meeting the interest payments on an annual basis (8% x $800,000 = $64,000 a year interest versus $4,000/month x 12 months = $48,000 payments). In other words, the contract would never pay out. Respondent signed the real estate contract in his name as an individual, not as trustee for his professional corporation. Below his signature is the space for the notary public to acknowledge his signature. Danny Mal signed his name as "trustee" in that space. Below Mal's signature is a stamp for the notary public, a Kristina Mae Long, Commission No. 056992, who did not sign in the space on the instrument where the acknowledgment before the notary public should have been made.

A real estate contract to convey fee title to real property at a time more than 12 months from the date of execution of the instrument must be acknowledged in the manner provided for acknowledging deeds, and must be recorded by the conveyor within 15 days after the instrument is executed.[18] A real estate contract to sell the property to Danny Mal was not recorded before December 2001. The real estate contract signed by respondent to sell the property from Caleb Siaw, P.C., Trust to Mal as trustee, contains language that "seller agrees when the purchase price is paid in full, to deliver a good and sufficient deed conveying the premises in fee simple to the buyer." (Ex. 1 at 2.) The real estate contract needed to be acknowledged in the manner provided for acknowledgement of deeds, in other words, before a notary public.[19] A county clerk shall not record an instrument that conveys an interest in real property unless the instrument contains the original signature of the officer before whom the acknowledgement was made.[20] The real estate

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[18] ORS 93.635 provides:

> (1) All instruments contracting to convey fee title to any real property, at a time more than 12 months from the date that the instrument is executed and the parties are bound, shall be acknowledged in the manner provided for acknowledgment of deeds, by the conveyor of the title to be conveyed. Except for those instruments listed in subsection (2) of this section, all such instruments, or a memorandum thereof, shall be recorded by the conveyor not later than 15 days after the instrument is executed and the parties are bound thereby.
>
> (2) The following instruments contracting to convey fee title to any real property may be recorded as provided in subsection (1) of this section, but that subsection does not require such recordation of:
>
> (a) Earnest money or preliminary sales agreements;
>
> (b) Options; or
>
> (c) Rights of first refusal.

[19] ORS 93.410 provides, in part:

> Except as otherwise provided by law, deeds executed within this state, * * * shall be signed by the grantor and shall be acknowledged before any judge of the Supreme Court, circuit judge, county judge, justice of the peace or notary public within the state.* * *.

[20] ORS 93.804 provides, in part:

> (1) * * * [w]hen any instrument presented for recording conveys an interest in real property and is required by law to be acknowledged or proved, a county clerk shall not record the instrument unless the instrument contains the original signature of the persons executing the instrument and the original signature of the officer before whom the acknowledgement was made.
>
> * * * * *.

contract between Caleb Siaw, P.C., Trust and Danny Mal, Trustee for A & D Trust was not properly acknowledged and could not have been recorded under Oregon law.

Moreover, respondent acted and conducted himself between 1999 and mid 2001 like he owned and operated the property. Respondent spent money to make improvements to the property and at least address some of the sewage disposal problems. Respondent signed the MAO on May 10, 1999 in his own name as an individual, not in a representative capacity as trustee for a trust. Respondent acknowledged in the MAO that he owned or operated the property. He acknowledge that the Environmental Quality Commission had the power to impose a civil penalty against him for violations of Oregon law. Respondent also acknowledged in the MAO that the Environmental Quality Commission could issue a final order against him requiring him to comply with the terms of the MAO. At no time during the spring or summer of 1999 did respondent provide DEQ with any evidence that he had sold the property, that he no longer had no legal interest in the property, or that he should no longer be bound by the terms of the MAO. DEQ had the authority to substitute a new owner into the WPCF permit process, if DEQ had received concrete evidence that a new owner had taken over the property. Neither respondent, Adrian Malo nor Danny Mal provided DEQ with any such evidence during 1999 or 2000. Further, even if the April 1999 contract of sale from Caleb Siaw, P.C., Trust to Danny Mal, Trustee for A & D Trust could be viewed as a bona fide sale at the time from the trust to a purchaser, respondent agreed in the stipulations in Exhibit B to the contract "to pay for and obtain DEQ approval on all septic systems within the described property." Finally, if respondent had truly sold the property to Danny Mal in April 1999, why would respondent try to sell the property to another buyer in October 2000?

As holder of legal title to the real property between 1998 and at least late 2001, respondent was the owner of the property for purposes of the onsite sewage disposal rules in OAR chapter 340, division 71, and the requirements in the MAO. OAR 340-071-0100(92) defines "owner" to mean any person who alone, or jointly, or severally with others:

> (a) Has legal title to any single lot, dwelling, dwelling unit, or commercial facility; or
> (b) Has care, charge, or control of any real property as agent, executor, executrix, administrator, administatrix, trustee, commercial lessee, or guardian of the estate of the holder of legal title; or
> (c) is the contract purchaser of real property.
> NOTE: Each such person as descried in subsections (b) and (c) of this section, thus representing the legal title holder, is bound to comply with the provision of theses rules as if he were the legal title holder.

DEQ proved that respondent had both legal title to the real property, as well as the care and control of the property, and that he is legally bound by the terms of the MAO he signed.

For all the above reasons, DEQ is not prevented from enforcing the MAO against respondent because of the purported sale of the property to Danny Mal, Trustee for A & D Trust

in April 1999. Respondent failed to establish that he did not own the property during the relevant time period, and that DEQ cannot enforce the MAO against him.

Paragraph 15.B(1) of the MAO required respondent to complete an application for a WPCF permit within 30 days of when DEQ notified him that it determined a WPCF permit was needed based on the soil evaluation. Respondent submitted a soil evaluation on July 22, 1999, nine weeks after he signing the MAO, and about five weeks after he should have submitted the evaluation. DEQ determined that a WPCF permit was necessary. On November 12, 1999 DEQ mailed a notice to respondent requesting him to submit a groundwater study and a conceptual plan for the resort, information also required by the MAO. Respondent never submitted the requested groundwater information, despite continued requests from DEQ on March 10, 2000 and April 10, 2001. Respondent violated Paragraph 15.B(1) of the MAO by not completing a WPCF permit application as required.

Respondent argues in his answer that he resolved the existing sewage disposal problem at the resort because he ceased to use offending areas for sewage disposal and removed some homes hooked up to the offending area. However, the MAO did not provide for permanent alternative ways to solve the problems at the resort. Respondent was not free to ignore terms of the MAO which he signed. Although the MAO allowed respondent to install holding tanks, those were temporary measures that did not relieve respondent from complying with the MAO to install a permanent sewage disposal system for the entire resort property. Arguably respondent solved some problems at the resort by removing some homes from the site and unhooking them from the existing sewage disposal system. However, that did not solve the problems for other sites and the overall system on the property. Terms of the MAO required respondent to complete an application for a WPCF permit, if certain written conditions were met. DEQ determined that those conditions were met. Respondent failed to comply with the terms of the MAO by not completing the WPCF permit application as he agreed to do.

The MAO required respondent to submit, on a monthly basis, receipts for the pumping of the temporary holding tanks on the resort property. Respondent did not submit any receipts after submitting the receipt for the month of June 1999 on July 11, 1999. Respondent presented no evidence as to why he did not submit the receipts that could have constituted a legitimate reason not to submit them. Respondent violated ORS 468.140(1)(c) by violating the MAO by not submitting the monthly pump receipts. A violation of an order of the Environmental Quality Commission is a Class I violation. However, DEQ did not seek to impose a civil penalty for violation 2 in the Notice of Assessment of Civil Penalty.

Civil Penalty

DEQ seeks a civil penalty against respondent in the amount of $335,700 for violation 1.[21] DEQ seeks no civil penalty for violation 2.

[21] *See* DEQ's closing argument submitted March 1, 2002. The Notice of Assessment of Civil Penalty sought a civil penalty against respondent in the amount of $373,580. (Ex. B.)

OAR 340-012-0045 sets forth the procedure and formula for calculating a civil penalty. 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. A violation of a term or condition of a Environmental Quality Commission Order for onsite sewage disposal is a Class I violation under OAR 340-012-0060(1)(a).[22] OAR 340-012-0045 addresses the magnitude for a violation.[23] If no selected magnitude for a specific violation is stated, the magnitude is moderate, unless DEQ can make specific findings. Here, DEQ made no specific findings for the magnitude of the violation. The magnitude is moderate. A Class I, moderate magnitude violation carries a base penalty of $3,000 under OAR 340-012-0042.[24]

"P" is respondent's prior significant action(s), and receives a value of 3 under to OAR 340-012-0045(1)(c)(A)(iv)[25] and OAR 340-012-0030(1)[26] and (14).[27] Respondents had two

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[22]OAR 340-012-0060 provides, in part:

> Violations pertaining to On-Site Sewage Disposal shall be classified as follows:
> (1) Class One:
> (a) Violation of a requirement or condition of a Commission or Department order;
> * * * * *.

[23] OAR 340-012-0045 provides, in part:

> (1) When determining the amount of civil penalty * * * the Director shall * * *:
> (a) Determine the class of a violation and the magnitude of each violation:
> (A) The class of a 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:
> * * * * *.

[24] OAR 340-012-0042 provides, in part:

> * * * [t]he amount of any civil penalty shall be determined through the use of the following matrices in conjunction with the formula contained in OAR 340-012-0045:
> (1)(a) $10,000 Matrix:
> (A) Class I:
> * * * * *
> (ii)Moderate--$3,000
> * * * * *.
> (b) * * *. This matrix shall apply to the following:
> * * * * *
> (B) Any violation related to ORS 164.785 and water quality statutes, rules, permits or orders, violations by a person having or needing a Water Pollution Control Facility Permit, violations of ORS Chapter 454 and on-site sewage disposal rules by a person performing sewage disposal services;
> * * * * *.

[25]OAR 340-012-0045 provides for determining the amount of civil penalty. Subsection (1)(c)(A) states:

> (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. * * *. The values for "P" and the findings which support each are as follows:

prior significant actions, the Environmental Quality Commission Order in Case No. WQ/D-NWR-98-212, issued August 25, 1999, and his criminal conviction for water pollution in the second degree. The Order established one Class I and two Class II violations, for a total of two Class I equivalent violations. OAR 340-012-0030(1). Respondent was convicted of water pollution in the second degree under ORS 468.943. OAR 340-012-0045(1)(c)(A)(v) assigns a value of 4 for a "P" factor if the prior significant actions consist of three Class I equivalent violations. Because DEQ failed to cite respondent's prior conviction as a prior significant action in the Notice of Assessment of Civil Penalty, citing only the Environmental Quality Commission Order instead, DEQ chooses to use 3 for the "P" factor because the prior actions cited in the Notice consisted of two Class I equivalent violations.

"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 according to OAR 340-012-0045(1)(c)(B)(ii)[28] because respondent failed to correct the problems of the failing sewage systems at the resort.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation, and receives a value of 0 according to OAR 340-012-0045(1)(c)(C)(i)[29] because respondent has been assessed separate penalties for separate days of the violation.

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* * * * *

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

* * * * *.

[26] OAR 340-012-0030 provides, in part:

Unless otherwise required by context, as used in this Division:

(1) "Class One Equivalent" or "Equivalent," which is used only for the purposes of determining the value of the "P" factor in the civil penalty formula, means two Class Two violations, one Class Two and two Class Three violations, or three Class Three violations.

* * * * *.

[27] OAR 340-012-0030(14) provides:

(14) "Prior Significant Action" means any violation established either with or without admission of a violation by payment of a civil penalty, or by a final order of the Commission or the Department, or by judgment of a court.

[28] OAR 340-012-0045(1)(c)(B) provides * * * 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.

[29] OAR 340-012-0045(1)(c)(C) provides * * *. 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.

"R" is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act by the respondent, and receives a value of 6 according to OAR 340-012-0045(1)(c)(D)(iii)[30] because respondent acted intentionally. "Intentional means conduct by a person with a conscious objective to cause the result of the conduct." OAR 340-012-0030(10). DEQ alleges in its Notice of Assessment of Civil Penalty that respondent acted flagrantly. "Flagrant means any documented violation where the Respondent had actual knowledge of the law and had consciously set out to commit the violation." OAR 340-012-0030(7). DEQ argues that its notifications to respondent on June 7, November 12, 1999, March 10, 2000 and April 10, 2000, that he had violated the MAO and needed to correct the sewage disposal system at the resort, support its contention that respondent acted flagrantly. However, respondent had a stroke in November 1999. DEQ mailed at least two of those notices after respondent had his stroke. The stroke affected respondent's memory and physical ability to deal with major problems like what existed at the resort property. Respondent lived southeast of Portland, many miles from the resort property on the Oregon coast. "Flagrant" conduct contemplates that a respondent knowingly sets out with the purpose of violating the law. Respondent's conduct was more consistent with that of a person who knew he had an obligation to correct the problem, became overwhelmed by the magnitude of the problem, in part due to his health problems, and knowingly failed to follow through like he should. DEQ failed to prove that respondent consciously *set out* to commit the violation. Respondent's conduct was more consistent with someone who acted intentionally.

"C" is respondent's cooperativeness in correcting the violation and receives a value of 2 according to OAR 340-012-0045(1)(c)(E)(iii)[31] because respondent was uncooperative and failed to correct the violation or minimize the effects of the violation. The violation continued for many months. Respondent had ample opportunity to correct the problem, although it may have been more difficult for him to do after he had his stroke.

"EB" is the approximate dollar sum of the economic benefit that the respondent gained through noncompliance according to OAR 340-012-0045(1)(c)(F) and receives a value of $191,700, based on the testimony DEQ presented at the hearing. Respondent argues that he

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[30] OAR 340-012-0045(1)(c)(D) provides * * *. 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.

[31] OAR 340-012-0045(1)(c)(E) provides * * *. 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.

spent money to pump tanks and perform other maintenance on the existing sewage disposal system at the resort. Those expenditures were not made in compliance with the terms and conditions of the MAO to install the total system for the resort consistent with a WPCF permit. Only costs expended in connection with the system to satisfy the WPCF permit could have reduced the EB calculation. The full EB value should be used in the penalty calculation.

The civil penalty is calculated as follows:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (3 + 0 + 0 + 6 + 2)] + $191,700
= $3,000 + ($300 x 11) + $191,700
= $3,000 + $3,300 + $191,700
= $6,300 per day x 20 separate days of violation (a day in each month from December 1999 through July 2001) = $126,000 + $191,700
= $317,700

AMENDED PROPOSED ORDER

I propose that the Commission enter an order as follows:

(1) Find that respondent violated ORS 468.140(1)(c) by violating Paragraph 15.B(1) of the Mutual Agreement and Order he signed in May 1999 by failing to submit the information required to complete his WPCF permit, and impose a civil penalty in the amount of $317,700 for this violation; and

(2) Find that respondent violated ORS 468.140(1)(c) by violating Paragraph 15.A(4) of the same Mutual Agreement and Order by failing to submit holding tank pump receipts for the previous month, but impose no civil penalty for this violation because DEQ requested none.

Dated this 1 day of May, 2002.

Ken L. Betterton
Administrative Law Judge
Hearing Officer Panel

Appeal Procedures

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:

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 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.*

STATE OF OREGON - HEARING OFFICER PANEL - EMPLOYMENT DEPARTMENT

CERTIFICATE OF SERVICE

RE: In the matter of CALEB SIAW, MD
Reference No. G60602

I HEREBY CERTIFY that I have made service of copies of the foregoing Amended Hearing Decision upon the following parties by causing them to be mailed in the United States Post Office at Salem, Oregon, on 04/04/02 by United States Mail and Certified Mail, a true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

VIA CERTIFIED MAIL & FIRST CLASS MAIL:

CALEB SIAW, MD
19075 SE FOSTER RD
BORING OR 97009 9653

MICHAEL J. KAVANAUGH
4930 SE WOODSTOCK BLVD
PORTLAND OR 97206 6163

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

JEFF BACHMAN
DEQ
811 SW 6TH AVE
PORTLAND OR 97204 1334

Denise Lewis
Contested Case Coordinator
Hearing Officer Panel
(503) 947-1313 (voice)
(503) 947-1795 (fax)

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6

CERTIFIED MAIL

7001 1940 0004 9765 7835

PORTLAND APR 23'02 OR

PB METER 8-181068

$ 0.34

U.S. POSTAGE

Stephanie Hallock, Director
Dept. of Environmental Quality
811 S.W. Sixth Ave.
Portland, Or. 97204

97204-1334 23

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

	)
	)
In the Matter of	) No. WQ/D-NWR-99-186
	) Hearings Officer Panel Case No. G60602
CALEB SIAW	)
	) PETITION FOR REVIEW
Respondent.	)

Respondent Caleb Siaw hereby requests review by the Commission of the Proposed Order and decision of Ken L. Betterton, Administrative Law Judge, dated April 5, 2002.

Dated this 23rd day of April, 2002.

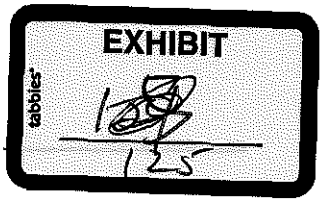
Michael J. Kavanaugh OSB 75205
Attorney for Caleb Siaw

CERTIFICATE OF MAILING

I hereby certify that I served the Petition for Review, on the following persons:

Jeff Bachman
Dept. of Environmental Quality
811 S.W. Sixth Ave.
Portland, Or. 97204

on April 23, 2002, by depositing a true copy of the above item, addressed as shown above, on said date in the U.S. Mail, postage prepaid, at the post office in Portland, Oregon.



COX Anne

From: DAROLD Dewey
Sent: Monday, April 26, 1999 4:12 PM
To: BACHMAN Jeff; CARLOUGH Les; ASLA Lynn; BAUMGARTNER Robert P; COX Anne
Cc: DAROLD Dewey
Subject: RE: Forest Lake Resort Inspection

FYI,
I just got off the phone with Mr. Siaw. Mr. Siaw is still the owner of the park. Mr. Siaw says if everything goes as planned, the park will change ownership on May 1, 1999. Mr. Siaw will be carrying the contract. I asked for Caleb to provide us with documentation showing the park has sold when it does sell.

I discussed with Mr. Siaw my latest site visits. Caleb says he has an appointment with Seacoast Nursery this Wednesday. I requested that Caleb call Mr. Foster to check when holding tanks were last pumped. I also told Caleb to have both alarms fixed ASAP. Caleb said that Adrian, the prospective buyer, called him on Sunday and Caleb thought the tanks were partly pumped-out on Friday. I told Caleb the tanks were still full as of 1:00 p.m. on Friday, April 23, 1999. Caleb says the prospective buyers name is spelled Mal and not Malo.

From: COX Anne
Sent: Monday, April 26, 1999 04:39 PM
To: BACHMAN Jeff; CARLOUGH Les; ASLA Lynn; DAROLD Dewey; BAUMGARTNER Robert P
Subject: RE: Forest Lake Resort Inspection

I have already sent a second referral NON--about a month ago. If Caleb Siaw still owns the park, I think we could just go forward with enforcement, based on that NON. We'll just update things in the enforcement.

If we have new owners, they.....are operating without permits, have surfacing sewage, etc. If Dr. Siaw sends us documentation of the sale, I'll get started on NON/enforcement for the new people.

Anne Cox
229-6653

From: BAUMGARTNER Robert P
Sent: Monday, April 26, 1999 2:43 PM
To: BACHMAN Jeff; CARLOUGH Les; ASLA Lynn; DAROLD Dewey
Cc: COX Anne
Subject: RE: Forest Lake Resort Inspection

Dewey - Les, can we start, yet another, enforcement action against Caleb

Ann and Dewey, can we find out who the new owner is, call Caleb, and send them a copy of all enforcement orders.

Jeff and Les, if Caleb sells the Park, we need to make certain that the new owner undertakes the compliance schedule we have established. How best do we do that?

From: DAROLD Dewey
Sent: Monday, April 26, 1999 10:09 AM
To: BACHMAN Jeff; CARLOUGH Les; ASLA Lynn
Cc: BAUMGARTNER Robert P; COX Anne; DAROLD Dewey
Subject: Forest Lake Resort Inspection

FYI,

Find attached a memo describing the results of an inspection made on April 23, 1999, at Forest Lake

Resort.

Dave Johns has checked with the Assessor's office in Clatsop County and they still have Mr. Siaw on the tax rolls and owner of the property.

<<File: Forest_lake_ Resort_4-23-99_SITE_investigation.doc>>

COX Anne

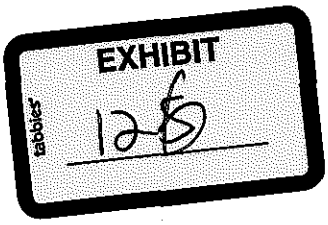
From: DAROLD Dewey
Sent: Monday, May 03, 1999 9:30 AM
To: CARLOUGH Les; BACHMAN Jeff; HERDENER Charley
Cc: BAUMGARTNER Robert P; COX Anne; DAROLD Dewey
Subject: FW: Forest Lake RV park

FYI,
Adrian Malo called and says he is now the owner of Forest Lake Resort. The ownership transfered May 1, 1999. Adrian will fax me documentation showing he is the owner of ther Park. Also, Adrian has discussed with Chris Davies, City of Seaside, the feasibility of connecting to Seaside's wastewater treatement plant. This will involve an application for annexation and some land use issues need to be worked-out. Adrian requested on behalf of the City that we write to the City supporting the extension of city sewer to the park.

From: JOHNS Dave
Sent: Thursday, April 29, 1999 02:41 PM
To: COX Anne
Cc: DAROLD Dewey; JOHNS Dave
Subject: Forest Lake RV park

Anne,
Adrian Malo stopped in this morning to indicate that he was purchasing the RV park from Caleb Siaw. It wasn't clear when the deed would be recorded and as mentioned in a prior e-mail, the courthouse still shows Caleb as owner. Adrian was in to see what he had to do about the park's sewage problems. He spoke to Dewey while here and will probably give you a call in near future. He is talking about 2 options for sewage disposal. Option 1 is that he has been engaged in talks with city of Seaside to get sewage to a pump station and get on city's system. Option 2 is that he owns approx. 30 acres across road and has mentioned trying to utilize that area for disposal. In any case, just an advance notice concerning possible new park ownership.

Adrian Malo
HCR 63, Box 260
Seaside, OR 97138
503-717-9365
260-7629 (Mobile phone)



COX Anne

From: COX Anne
Sent: Monday, May 10, 1999 4:36 PM
To: BAUMGARTNER Robert P; ILLINGWORTH Dennis; SCHAEDEL Andrew L; CARLOUGH Les; HERDENER Charley; BACHMAN Jeff
Cc: DAROLD Dewey; COX Anne; BIDLEMAN Lucinda
Subject: Meeting with Mr. Malo new buyer--Forest Lake Resort

Met with Bob Sweeney, Mr. Malo and his wife(?) today at 2:30 p.m. Mr. Malo thinks he might be able to get the park connected to sewer. I told him I would support that proposal.

Meanwhile Bob Sweeney submitted soil report and conceptual plans and water usage. max usage appears to be 9900 gpd, he's proposing
1. 10,000 gpd RGF, with 2,000 lf of gravelless shallow trenches, pressurized distribution--I told him we'd have to have 3,000 lf, because I think 5 gallons per square foot of bottom area is excessive, even dosed over a 24 hour period. So Bob will get that third 1000 lf.

2. Phased connection to the RGF and drainfield.

3. Professional evaluation of the remaining existing park systems.

4. He promised a groundwater workup, including testing the existing well on the property, depth to water, do a test for nitrates and bacteria. The well is not registered with Water Resources. He can't find any wells registered in any of the adjoining sections. Seaside provides city water to the area, no one has a well. I told him our GW person would have to review what he submits for adequacy.

Then I told Mr. Malo:

1. Control the situation at the park. Do not allow any sewage to surface. Keep the holding tanks pumped.

2. Conduct daily walks in the park to make sure that there are no sewage problems.

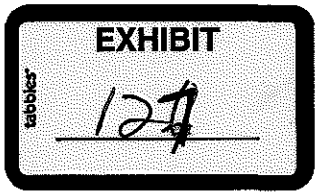
3. Tell me within 30 days if going to sewer or to the WPCF permit. Circle Creek Campground is about 1.5 miles away and is on sewer. Mr. Malo says he owns the land between Forest Lake and Circle Creek Campground.

Mr. Malo agreed to all of the above.

We discussed the permit application and responsibility. I said that our understanding is that Dr. Siaw is still owner of record until he clears some legal affairs from the last attempted sale of the park. I did not think we could issue a permit to Malos until they are clear contract buyers. So the permit may be issued to Siaw, and later be transferred to Malos. They asked about DEQ contractors. I told them to check the references, make sure the contractor has has experience in doing RGFs, or at least sand filters.

The meeting seemed to be productive. With any luck, they'll connect to sewer

Anne Cox
229-6653



C

DEQ Enforcement
% Charlie Herdener

This is just a repeat of what I talked to you about on the phone Dec 13.99 Caleb had a Stroke a month ½ ago I've been doing the bunes we did find the letter I signed it for Caleb but we don't have the $500.00 to send at this time because we are paying on the DEQ Fine from Sea Side Caleb said he would Start paying on this one as soon as that one at Seaside is paid off we are Short on fund because of Medical. we are doing the best we can.

Thanks
Brenda Siaw

EXHIBIT # 128-1

128-3

The seller agrees that at seller's expense and within 10 days from the date hereof, seller will furnish unto buyer a title insurance policy insuring (in an amount equal to the purchase price) marketable title in and to the premises in the seller on or subsequent to the date of this agreement, save and except the usual printed exceptions and the building and other restrictions and easements now of record, if any. Seller also agrees that when the purchase price is fully paid and upon request and upon surrender of this agreement, seller will deliver a good and sufficient deed conveying the premises in fee simple unto the buyer, buyer's heirs and assigns, free and clear of encumbrances as of the date hereof and free and clear of all encumbrances since the date placed, permitted or arising by, through or under seller, excepting, however, the easements, restrictions and the taxes, municipal liens, water rents and public charges so assumed by the buyer and further excepting all liens and encumbrances created by the buyer or buyer's assigns.

And it is understood and agreed between the parties that time is of the essence of this contract, and in case the buyer shall fail to make the payments above required, or any of them, punctually within 20 days of the time limited therefor, or fail to keep any agreement herein contained, then the seller shall have the following rights and options:

(1) To declare this contract cancelled for default and null and void, and to declare the purchaser's rights forfeited and the debt extinguished, and to retain sums previously paid hereunder by the buyer;*
(2) To declare the whole unpaid principal balance of the purchase price with the interest thereon at once due and payable; and/or
(3) To foreclose this contract by suit in equity.

In any of such cases, all rights and interest created or then existing in favor of the buyer as against the seller hereunder shall utterly cease and the right to the possession of the premises above described and all other rights acquired by the buyer hereunder shall revert to and revest in the seller without any act of re-entry, or any other act of the seller to be performed and without any right of the buyer of return, reclamation or compensation for moneys paid on account of the purchase of the property as absolutely, fully and perfectly as if this contract and such payments had never been made; and in case of such default all payments theretofore made on this contract are to be retained by and belong to the seller as the agreed and reasonable rent of the premises up to the time of such default. And the seller, in case of such default, shall have the right immediately, or at any time thereafter, to enter upon the land aforesaid, without any process of law, and take immediate possession thereof, together with all the improvements and appurtenances thereon or thereto belonging.

The buyer further agrees that failure by the seller at any time to require performance by the buyer of any provision hereof shall in no way affect seller's right hereunder to enforce the same, nor shall any waiver by the seller of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision, or as a waiver of the provision itself.

DANNY MAL TRUSTEE IS A LICENSED REAL ESTATE AGENT IN THE STATE OF OREGON & IS REPRESENTING AD TRUST,

The true and actual consideration paid for this transfer, stated in terms of dollars, is $ ..... ① However, the actual consideration consists of or includes other property or value given or promised which is part of the whole consideration (indicate which). ①

In case suit or action is instituted to foreclose this contract or to enforce any provision hereof, the losing party in the suit or action agrees to pay such sum as the trial court may adjudge reasonable as attorney's fees to be allowed the prevailing party in the suit or action and if an appeal is taken from any judgment or decree of the trial court, the losing party further promises to pay such sum as the appellate court shall adjudge reasonable as the prevailing party's attorney's fees on such appeal.

In construing this contract, it is understood that the seller or the buyer may be more than one person or a corporation; that if the context so requires, the singular pronoun shall be taken to mean and include the plural and the neuter, and that generally all grammatical changes shall be made, assumed and implied to make the provisions hereof equally to corporations and to individuals.

This agreement shall bind and inure to the benefit of, as the circumstances may require, not only the immediate parties hereto but their respective heirs, executors, administrators, personal representatives, successors in interest and assigns as well.

IN WITNESS WHEREOF, the parties have executed this instrument in duplicate; if either of the undersigned is a corporation, it has caused its name to be signed and its seal, if any, affixed by an officer or other person duly authorized to do so by order of its board of directors.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES.

.....

.....

.....

.....

* SELLER: Comply with ORS 93.905 et seq prior to exercising this remedy.

NOTE—The sentence between the symbols ①, if not applicable, should be deleted. See ORS 93.030.

STATE OF OREGON, County of Multnomah) ss.

This instrument was acknowledged before me on Sept 12th, 19 92,

by Danny Mal, Trustee

This instrument was acknowledged before me on ....., 19.....,

by .....

as .....

of .....

OFFICIAL SEAL
KRISTINA MAE LONG
NOTARY PUBLIC-OREGON
COMMISSION NO. 056992
MY COMMISSION EXPIRES NOV 22, 2000

.....
Notary Public for Oregon

My commission expires .....

ORS 93.636 (1) All instruments contracting to convey fee title to any real property, at a time more than 12 months from the date that the instrument is executed and the parties are bound, shall be acknowledged, in the manner provided for acknowledgment of deeds, by the conveyor of the title to be conveyed. Such instruments, or a memorandum thereof, shall be recorded by the conveyor not later than 15 days after the instrument is executed and the parties are bound thereby.

ORS 93.990 (3) Violation of ORS 93.635 is punishable, upon conviction, by a fine of not more than $100.

(Description Continued)

FORM No. 706—CONTRACT—REAL ESTATE—Monthly Payments.

NL

CONTRACT—REAL ESTATE

THIS CONTRACT, Made this Eighth *day of* April, *199*9, *between* Caleb Siaw /Trustee for ~~Ten Thirty One LLC, Beneficiary~~ CALEB SIAW P.C. Trust, *hereinafter called the seller, and* Danny Mal Trustee for A&D TRUST, *hereinafter called the buyer,*

WITNESSETH: That in consideration of the mutual covenants and agreements herein contained, the seller agrees to sell unto the buyer and the buyer agrees to purchase from the seller all of the following described lands and premises situated in Clatsop *County, State of* Oregon, *to-wit:*

Property : HCR 63 Box 255
Seaside, Oregon 97138

See Exhibit A, Legal Description

See Exhibit B, Stipulations

128-V

for the sum of Nine hundred Thousand *Dollars ($900,000.00), hereinafter called the purchase price, on account of which* One hundred Thousand (Contract Pmt Assgnmt) *Dollars ($100,000.00) is paid on the execution hereof (the receipt of which is hereby acknowledged by the seller); the buyer agrees to pay the remainder of the purchase price (to-wit: $800,000.00) to the order of the seller in monthly payments of not less than* Four Thousand *Dollars ($4,000.00) each* Month, for a period of 30 months @ 6% interest, thereafter 8% interest shall be paid for the remainder of the contract *payable on the* 15th *day of each month hereafter beginning with the month of* May, *19*99, *and continuing until the purchase price is fully paid. All of the purchase price may be paid at any time; all of the deferred payments shall bear interest at the rate of* ~~.....~~ *percent per annum from* SEE STIPULATIONS *until paid; interest to be paid* ..... *and* * { in addition to / to be included in } *the minimum monthly payments above required. Taxes on the premises for the current tax year shall be prorated between the parties hereto as of the date of this contract.*

The buyer warrants to and covenants with the seller that the real property described in this contract is
** (A) primarily for buyer's personal, family or household purposes,*
(B) for an organization or (even if buyer is a natural person) is for business or commercial purposes.

The buyer shall be entitled to possession of the lands on April 10, ..., *19*99, *and may retain such possession so long as buyer is not in default under the terms of this contract. The buyer agrees that at all times buyer will keep the premises and the buildings, now or hereafter erected thereon, in good condition and repair and will not suffer or permit any waste or strip thereof; that buyer will keep the premises free from construction and all other liens and save the seller harmless therefrom and reimburse seller for all costs and attorney's fees incurred by seller in defending against any such liens; that buyer will pay all taxes hereafter levied against the property, as well as all water rents, public charges and municipal liens which hereafter lawfully may be imposed upon the premises, all promptly before the same or any part thereof become past due; that at buyer's expense, buyer will insure and keep insured all buildings now or hereafter erected on the premises against loss or damage by fire (with extended coverage) in an amount not less than $ ..... in a company or companies satisfactory to the seller, specifically naming the seller as an additional insured, with loss payable first to the seller and then to the buyer as their respective interests may appear and all policies of insurance to be delivered to the seller as soon as insured. Now if the buyer shall fail to pay any such liens, costs, water rents, taxes or charges or to procure and pay for such insurance, the seller may do so and any payment so made shall be added to and become a part of the debt secured by this contract and shall bear interest at the rate aforesaid, without waiver, however, of any right arising to the seller for buyer's breach of contract.*

(Continued on Reverse)

* IMPORTANT NOTICE: Delete, by lining out, whichever phrase and whichever warranty (A) or (B) is not applicable. If warranty (A) is applicable and if the seller is a creditor, as such word is defined in the Truth-in-Lending Act and Regulation Z, the seller MUST comply with the Act and Regulation by making required disclosures; for this purpose, use Stevens-Ness Form No. 1319 or equivalent.

A&D trust by Danny Mal
1716 S.E. Dogwood Way
Gresham, Ore. 97080
Grantee Name and Address

Caleb Siaw P.C. Trust
19075 S.E. Foster Rd.
Boring, Ore. 97009
Grantor Name and Address

After recording return to (Name, Address, Zip):

Caleb Siaw P.C. Trust
19075 S.E. Foster Rd.
Boring, Ore. 97009

Until requested otherwise send all tax statements to (Name, Address, Zip):

A&D Trust Danny Mal trustee
1716 S.E. Dogwood Way
Gresham, Ore. 97080

SPACE RESERVED FOR RECORDER'S USE

STATE OF OREGON, } ss.
County of .....

I certify that the within instrument was received for record on the ..... day of ....., 19....., at ..... o'clock .....M., and recorded in book/reel/volume No..... on page ..... or as fee/file/instrument/microfilm/reception No....., Record of Deeds of said County.

Witness my hand and seal of County affixed.

NAME TITLE

By ....., *Deputy*

COX Anne

From: COX Anne
Sent: Tuesday, October 24, 2000 2:06 PM
To: COX Anne; CARLOUGH Les; HERDENER Charley; BAUMGARTNER Robert P
Cc: ILLINGWORTH Dennis; BIDLEMAN Lucinda
Subject: RE: Siaw to sell Forest lake Resort..to Malo?

Les, Bob,

Charley informs me that he has been notified of a pending sale of Forest Lake Resort to Adrian Malo. Mr. Malo is currently under pending enforcement action for sewage violations we allege him to have committed at Forest Lake Resort in 1999. He deliberately pumped sewage (septic tank effluent) onto the ground surface from a dosing tank.

I am requesting that we go forward with enforcement against Dr. Siaw with no further delays. See below. This may be what Dr Siaw meant when he told the other buyer's realtor that he would handle the septic situation. He'll get DEQ to back off from enforcement again, by pretending to sell to Malo.

Dr. Siaw has been in violation of State laws and regulations since 1998--or was it 1997?--and he has been in violation of his May 1999 MAO with the Department since just a couple of months after its execution.

Anne Cox
(503) 229-6653

-----Original Message-----
From: COX Anne
Sent: Tuesday, October 24, 2000 08:41 AM
To: CARLOUGH Les; HERDENER Charley
Subject: Siaw refuses to sell Forest lake Resort

The interested buyer (A contractor who has put in large complex sewage systems)--called me this morning. he said that they came up to Siaw's asking price, offered him the cash bid, and Siaw refused it. The broker asked Siaw what he was going to do about "the septic" and Siaw said "I will handle it."

It is really too bad that Siaw did not sell the park. The prospective buyer is a well-known contractor who is well able to build the upgrade needed at the park. Because Dr. Siaw is still the owner, the resolution of violations remains remote.

How is the enforcement action coming against Dr. Siaw?

Anne Cox
(503) 229-6653

Ref No.: G60173
Case No: 99-GAP-00032
Case Type: DEQ

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

Dec Mailed: 08/25/99
Mailed by: SLS

HEARING DECISION

CALEB SIAW
19075 SE FOSTER RD

BORING OR 97009 9653

DEPARTMENT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

CHARLES HERDENER
2020 SW 4TH AVE STE 400

PORTLAND OR 97201 4959

True & Certified Copy of Original
Rebecca Lawrence OSB 89104
Hearing Section Manager

EXHIBIT # 130

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

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

IN THE MATTER OF:	)	DEFAULT HEARING
	)	ORDER REGARDING
Caleb Siaw,	)	ASSESSMENT OF
	)	CIVIL PENALTY
Respondent	)	NO. WQ/D-NWR-98-212
	)	CLATSOP COUNTY

BACKGROUND

A Notice of Violation, Department Order and Assessment of Civil Penalty was issued December 15, 1998, under Oregon Revised Statutes (ORS) Chapter 183 and 468 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. On January 5, 1999, respondent Caleb Siaw appealed the Notice.

A hearing was held in Portland, Oregon, on July 8, 1999, before Hearings Officer Lawrence S. Smith. Respondent Caleb Siaw did not appear. Charles Herdener, environmental law specialist, represented DEQ, with one witness.

ISSUES

1. Did respondent Caleb Siaw violate OAR 340-071-130(3) by discharging untreated or partially-treated sewage directly or indirectly onto the ground surface and causing a public health hazard?

2. Did respondent Caleb Siaw violate OAR 340-071-0215(1) by failing to immediately repair the failing on-site system at the Forest Lake Resort owned by respondent?

3. Did respondent Caleb Siaw violate ORS 468B.080(1) by failing to obtain DEQ's approval for a septic system, sewerage system, septic tank system, or other disposal system or parts thereof for Forest Lake Resort?

4. Should respondent Caleb Siaw be ordered to take the steps outlined in the Department Order contained in the Notice of Violation, Department Order and Assessment of Civil Penalty issued December 15, 1998?

5. If respondent Caleb Siaw violated the above law, were the resultant civil penalties appropriate under OAR chapter 340, division 12, and OAR 340-12-060?

FINDINGS OF FACT

1. Respondent Caleb Siaw (Siaw) owns and operates Forest Lake Resort, a mobile home park (park), located at T5N, R10W, Section 4A, Tax Lot 1100, Clatsop County, Seaside, Oregon.

2. In November 1997, sewage and water from two septic systems in the park overflowed and ponded on the ground (Exhibits 8 and 9). On November 14, 1997, an environmental specialist for DEQ told Siaw to fix the sewage treatments and to obtain a repair permit from DEQ before doing so. A follow-up inspection on November 20, 1997, revealed ponding still in the two areas.

3. On December 11, 1997, a Notice of Noncompliance was mailed to Siaw, advising him that DEQ would take enforcement action if it did not receive a plan and application from Siaw to correct the ponding (Exhibit 10). The Notice also advised Siaw that he needed to take measures to safeguard public health, such as disinfecting the areas with bleach or lime and fencing them off.

4. On December 17, 1997, DEQ's environmental specialist saw Siaw working on the septic systems without getting a permit from DEQ. The specialist told Siaw to stop working until he got a permit. The inspector saw the same ponding in the two spots.

5. On January 7, 1998, Siaw pumped out some of the ponding without getting a permit from DEQ. Pets and children were present when he did the pumping.

6. On January 15, 1998, DEQ's environmental specialist inspected the two septic systems again and saw ponding (Exhibit 11). The specialist took a sewage sample that revealed a large concentration of E. Coli and Fecal Coliform, bacteria that are harmful to humans and animals (Exhibit 13). A test of sewage taken from one of the ponds on March 12, 1998, revealed a large concentration of E. Coli and Fecal Coliform, elements of human waste (Exhibit 14).

7. On March 24, 1998, a Notice of Noncompliance was mailed to Siaw, noting that his application for a permit was incomplete and telling him again to take measures to safeguard public health, such as disinfecting the areas with bleach or lime and fencing them off (Exhibit 15). The Notice advised him that he had violated ORS 468B.025 and 468B.080 by polluting the waters of the state and not getting his septic systems approved.

8. Sewage continued to discharge on the ground surface on September 3, 1998 (Exhibit 16).

9. On September 21, 1998, a Notice of Noncompliance was mailed to Siaw, advising Siaw that he needed to take measures to safeguard public health, such as disinfecting the areas with bleach or lime and covering them. The Notice advised him that he had violated ORS 468B.025 and 468B.080 by polluting the waters of the state and not getting his septic systems approved.

10. On October 23, 1998, DEQ's inspector continued to note ponding in the two areas (Exhibits 17 and 18).

11. Siaw saved $291 by delaying repairs of the two on-site septic systems that caused the ponding (Exhibit 21).

12. DEQ and Siaw have reached an agreement on the Department Order in the Notice of Violation and DEW withdraws that portion.

ULTIMATE FINDINGS

For almost a year, Siaw repeatedly violated OAR 340-071-0130(3) by discharging untreated or partially-treated sewage directly or indirectly on the ground, which constituted a public health hazard.

For almost a year, Siaw repeatedly violated OAR 340-071-0215(1) by failing to immediately repair the failing on-site systems at the park.

For almost a year, Siaw repeatedly violated ORS 468B.080(1) by failing to obtain DEQ's approval for a septic system, sewerage system, septic tank system, or other disposal system before working on the failed systems in the park.

The assessed penalties were appropriate because Siaw's violations were flagrant.

APPLICABLE LAW

ORS 468B.025 states in part that no person shall 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.080 requires all plumbing fixtures in buildings or structures from which waste water or sewage is or may be discharged to be connected to a sewerage system, septic tank system or other disposal system approved by the Department.

OAR 340-71-120(2) states that each and every owner of real property is jointly and severally responsible for:

1) disposing of sewage on the property in conformance with the rules of the Department;
2) connecting all plumbing fixtures on the property from which sewage is or may be discharged to a sewerage facility or on-site sewage disposal system approved by the Department; and
3) maintaining, repairing, and/or replacing the system as necessary to assure proper operation of the system.

OAR 340-71-130(3) prohibits allowing the discharge of untreated or partially treated sewage or septic tank effluent directly or indirectly onto the ground surface or into public waters.

OAR 340-71-160(1) prohibits causing or allowing construction, alteration or repair of a system, or part thereof, without first applying for and obtaining a permit.

OAR 340-71-215(1) requires the immediate repair of a failing system.

CONCLUSIONS AND REASONS

DEQ's evidence was direct and detailed, supported by photos and video. Siaw did not appear at the hearing to rebut it. DEQ's evidence is accepted as a prima facie case of alleged violations. Siaw violated OAR 340-071-130(3) by discharging untreated or partially-treated sewage directly or indirectly onto the ground surface repeatedly from November 20, 1997, until at least September 3, 1998. He violated OAR 340-071-0215(1) by failing to immediately repair the failing on-site system at the Forest Lake Resort he owned, even after direction to do so. He violated ORS 468B.080(1) by failing to obtain DEQ's approval for a septic system, sewerage system, septic tank system, or other disposal system or parts thereof before attempting any repairs.

CIVIL PENALTY

Siaw violated the above laws and is liable for appropriate penalties under OAR Chapter 340, division 12, and OAR 340-12-060. DEQ's calculation of the penalties (Exhibits 1, 2 and 3 of the Notice of Violation, Department Order, and Assessment of Civil Penalty issued December 15, 1998 (Exhibit 2)) are accepted and made part of this order. DEQ correctly assessed the correct base penalty and correctly calculated the "R" factor as 10 because Siaw's violation was repeated after written notice and must have been flagrant. DEQ's assessment of $291 for the "EB" factor seems a bit low, but is accepted. Siaw is liable for civil penalties totaling $6,291.

COMPLIANCE ORDER

At the hearing, DEQ withdrew the Department Order part of the Notice because DEQ and Siaw have reached an agreement on future compliance. The Department Order is therefore withdrawn.

Dated this 25th day of August, 1999.

Lawrence S. Smith
Hearings Officer

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:	)	**ORDER**
	)	**ASSESSING**
Caleb Siaw,	)	**CIVIL PENALTY**
	)	**NO. WQ/D-NWR-98-212**
Respondent	)	**CLATSOP COUNTY**

ORDER

IT IS HEREBY ORDERED that respondent Caleb Siaw is liable for a total civil penalty of $6,291, plus interest pursuant to Oregon Revised Statute (ORS) 82.010, from the date this order is signed below until paid; and that if the civil penalty remains unpaid for more than ten (10) days, this order may be filed with each County Clerk and execution shall issue therefor.

If you are not satisfied with this decision, you have 30 days to appeal it to the Environmental Quality Commission. See Oregon Administrative Rule (OAR) 340-11-132. If you wish to appeal the Commission's 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.

Dated this 25th day of August, 1999.

Lawrence S. Smith
Hearings Officer

Return to:
Enforcement Section
Department of Environmental Quality
2020 SW 4th Avenue, Suite 400
Portland, OR 97201-4987

STATEMENT OF MAILING

AGENCY CASE NO. WQ/D-NWR-98-212
HEARINGS CASE NO. G60173

I certify that the attached Order was served through the mail to the following parties in envelopes addressed to each at their respective addresses, with postage fully prepaid (certified mail to respondent, regular mail to DEQ):

Caleb Siaw, Respondent
19075 SE Foster Rd.
Boring, OR 97009-9653

Susan Greco, Rules Coordinator
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1334

Charles Herdener, environmental law specialist
DEQ enforcement
2020 SW 4th Avenue
Portland, OR 97201-4987

Mailing/Delivery Date:
Hearings Clerk:

NL

CONTRACT—REAL ESTATE

THIS CONTRACT, Made this Eighth *day of* April, *1999, between* Caleb Siaw /Trustee for ~~Ten Thirty One LLC,~~ Beneficiary CALEB SIAW P.C. Trust, *hereinafter called the seller, and* Danny Mal Trustee FOR A&D TRUST, *hereinafter called the buyer,*

WITNESSETH: That in consideration of the mutual covenants and agreements herein contained, the seller agrees to sell unto the buyer and the buyer agrees to purchase from the seller all of the following described lands and premises situated in Clatsop *County, State of* Oregon, *to-wit:*

Property : HCR 63 Box 255
Seaside, Oregon 97138

See Exhibit A, Legal Description

See Exhibit B, Stipulations

for the sum of Nine-hundred Thousand *Dollars ($900,000.00), hereinafter called the purchase price, on account of which* One-hundred Thousand(Contract Pmt. Assgnmt) *Dollars ($100,000.00) is paid on the execution hereof (the receipt of which is hereby acknowledged by the seller); the buyer agrees to pay the remainder of the purchase price (to-wit: $800,000.00) to the order of the seller in monthly payments of not less than* Four Thousand *Dollars ($4,000.00) each* Month, for a period of 30 months@ 6% interest,thereafter 8% interest shall be paid for the remainder of the contract. *payable on the* 15th *day of each month hereafter beginning with the month of* May, *1999, and continuing until the purchase price is fully paid. All of the purchase price may be paid at any time; all of the deferred payments shall bear interest at the rate of* ~~ten~~ *percent per annum from* SEE STIPULATIONS *until paid; interest to be paid* ~~monthly~~ *and* * { in addition to / to be included in } *the minimum monthly payments above required. Taxes on the premises for the current tax year shall be prorated between the parties hereto as of the date of this contract.*

The buyer warrants to and covenants with the seller that the real property described in this contract is
** (A) primarily for buyer's personal, family or household purposes,*
(B) for an organization or (even if buyer is a natural person) is for business or commercial purposes.

The buyer shall be entitled to possession of the lands on April 10, *1999, and may retain such possession so long as buyer is not in default under the terms of this contract. The buyer agrees that at all times buyer will keep the premises and the buildings, now or hereafter erected thereon, in good condition and repair and will not suffer or permit any waste or strip thereof; that buyer will keep the premises free from construction and all other liens and save the seller harmless therefrom and reimburse seller for all costs and attorney's fees incurred by seller in defending against any such liens; that buyer will pay all taxes hereafter levied against the property, as well as all water rents, public charges and municipal liens which hereafter lawfully may be imposed upon the premises, all promptly before the same or any part thereof become past due; that at buyer's expense, buyer will insure and keep insured all buildings now or hereafter erected on the premises against loss or damage by fire (with extended coverage) in an amount not less than $ in a company or companies satisfactory to the seller, specifically naming the seller as an additional insured, with loss payable first to the seller and then to the buyer as their respective interests may appear and all policies of insurance to be delivered to the seller as soon as insured. Now if the buyer shall fail to pay any such liens, costs, water rents, taxes or charges or to procure and pay for such insurance, the seller may do so and any payment so made shall be added to and become a part of the debt secured by this contract and shall bear interest at the rate aforesaid, without waiver, however, of any right arising to the seller for buyer's breach of contract.*

(Continued on Reverse)

*** IMPORTANT NOTICE: Delete, by lining out, whichever phrase and whichever warranty (A) or (B) is not applicable. If warranty (A) is applicable and if the seller is a creditor, as such word is defined in the Truth-in-Lending Act and Regulation Z, the seller MUST comply with the Act and Regulation by making required disclosures; for this purpose, use Stevens-Ness Form No. 1319 or equivalent.**

A&D trust by Danny Mal
1716 S.E. Dogwood Way
Gresham, Ore. 97080
Grantee — Name and Address

Caleb Siaw P.C. Trust
19075 S.E. Foster Rd.
Boring, Ore. 97009
Grantor — Name and Address

After recording return to (Name, Address, Zip):

Caleb Siaw P.C. Trust
19075 S.E. Foster Rd.
Boring, Ore. 97009

Until requested otherwise send all tax statements to (Name, Address, Zip):

A&D Trust- Danny Mal, trustee
1716S.E. Dogwood Way
Gresham, Ore. 97080

SPACE RESERVED FOR RECORDER'S USE

STATE OF OREGON, } ss.
County of .....

I certify that the within instrument was received for record on the ..... *day of* ....., *19*....., *at* ..... *o'clock* .....*M., and recorded in book/reel/volume No*..... *on page* ..... *or as fee/file/instrument/microfilm/reception No*....., *Record of Deeds of said County.*

Witness my hand and seal of County affixed.

NAME TITLE

By ....., *Deputy*

EXHIBIT 1

The seller agrees that at seller's expense and within 10 *days from the date hereof, seller will furnish unto buyer a title insurance policy insuring (in an amount equal to the purchase price) marketable title in and to the premises in the seller on or subsequent to the date of this agreement, save and except the usual printed exceptions and the building and other restrictions and easements now of record, if any. Seller also agrees that when the purchase price is fully paid and upon request and upon surrender of this agreement, seller will deliver a good and sufficient deed conveying the premises in fee simple unto the buyer, buyer's heirs and assigns, free and clear of encumbrances as of the date hereof and free and clear of all encumbrances since the date placed, permitted or arising by, through or under seller, excepting, however, the easements, restrictions and the taxes, municipal liens, water rents and public charges so assumed by the buyer and further excepting all liens and encumbrances created by the buyer or buyer's assigns.*

And it is understood and agreed between the parties that time is of the essence of this contract, and in case the buyer shall fail to make the payments above required, or any of them, punctually within 20 days of the time limited therefor, or fail to keep any agreement herein contained, then the seller shall have the following rights and options:

*(1) To declare this contract cancelled for default and null and void, and to declare the purchaser's rights forfeited and the debt extinguished, and to retain sums previously paid hereunder by the buyer;**

(2) To declare the whole unpaid principal balance of the purchase price with the interest thereon at once due and payable; and/or

(3) To foreclose this contract by suit in equity.

In any of such cases, all rights and interest created or then existing in favor of the buyer as against the seller hereunder shall utterly cease and the right to the possession of the premises above described and all other rights acquired by the buyer hereunder shall revert to and revest in the seller without any act of re-entry, or any other act of the seller to be performed and without any right of the buyer of return, reclamation or compensation for moneys paid on account of the purchase of the property as absolutely, fully and perfectly as if this contract and such payments had never been made; and in case of such default all payments theretofore made on this contract are to be retained by and belong to the seller as the agreed and reasonable rent of the premises up to the time of such default. And the seller, in case of such default, shall have the right immediately, or at any time thereafter, to enter upon the land aforesaid, without any process of law, and take immediate possession thereof, together with all the improvements and appurtenances thereon or thereto belonging.

The buyer further agrees that failure by the seller at any time to require performance by the buyer of any provision hereof shall in no way affect seller's right hereunder to enforce the same, nor shall any waiver by the seller of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision, or as a waiver of the provision itself.

DANNY MAL TRUSTEE IS A LICENSED REAL ESTATE AGENT IN THE STATE OF OREGON & IS REPRESENTING A FD TRUST,

The true and actual consideration paid for this transfer, stated in terms of dollars, is $ ..... ① *However, the actual consideration consists of or includes other property or value given or promised which is* part of the whole *consideration (indicate which).* ①

In case suit or action is instituted to foreclose this contract or to enforce any provision hereof, the losing party in the suit or action agrees to pay such sum as the trial court may adjudge reasonable as attorney's fees to be allowed the prevailing party in the suit or action and if an appeal is taken from any judgment or decree of the trial court, the losing party further promises to pay such sum as the appellate court shall adjudge reasonable as the prevailing party's attorney's fees on such appeal.

In construing this contract, it is understod that the seller or the buyer may be more than one person or a corporation; that if the context so requires, the singular pronoun shall be taken to mean and include the plural and the neuter, and that generally all grammatical changes shall be made, assumed and implied to make the provisions hereof equally to corporations and to individuals.

This agreement shall bind and inure to the benefit of, as the circumstances may require, not only the immediate parties hereto but their respective heirs, executors, administrators, personal representatives, successors in interest and assigns as well.

IN WITNESS WHEREOF, the parties have executed this instrument in duplicate; if either of the undersigned is a corporation, it has caused its name to be signed and its seal, if any, affixed by an officer or other person duly authorized to do so by order of its board of directors.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES.

.....

.....

.....

.....

*** SELLER: Comply with ORS 93.905 et seq prior to exercising this remedy.**

NOTE—The sentence between the symbols ①, if not applicable, should be deleted. See ORS 93.030.

STATE OF OREGON, County of Multnomah) ss.

This instrument was acknowledged before me on April 12th, 19 99.,

by Danny Mal Trustee

This instrument was acknowledged before me on ....., 19.....,

by .....

as .....

of .....

OFFICIAL SEAL
KRISTINA MAE LONG
NOTARY PUBLIC-OREGON
COMMISSION NO. 056992
MY COMMISSION EXPIRES NOV 22, 2000

.....

Notary Public for Oregon

My commission expires .....

ORS 93.635 (1) All instruments contracting to convey fee title to any real property, at a time more than 12 months from the date that the instrument is executed and the parties are bound, shall be acknowledged, in the manner provided for acknowledgment of deeds, by the conveyor of the title to be conveyed. **Such instruments, or a memorandum thereof, shall be recorded by the conveyor not later than 15 days after the instrument is executed and the parties are bound thereby.**

ORS 93.990 (3) Violation of ORS 93.635 is punishable, upon conviction, by a fine of not more than $100.

(Description Continued)

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

October 8, 1999

ADRIAN MALO
HCR 63, BOX 260
SEASIDE, OR 97138

Re: WQ - Clatsop County
Forest Lake Resort
File No. 109808
WPCF Application

Dear Mr. Malo:

You requested a meeting with a DEQ hydrogeologist regarding issues at the Forest Lake Resort. On October 6, 1999, you and Bob Sweeney met with Bob Baumgartner, Lucinda Bidleman and me. At that meeting you agreed to respond back to us by October 18, 1999, to let us know who is to be the WPCF applicant and permittee. You also promised to give your decision on your course of action and timelines for accomplishing it. We have tentatively agreed to meet again on October 21.

There is an existing Mutual Agreement and Order (MAO) with Caleb Siaw, and Dr. Siaw also submitted an incomplete WPCF permit application. Until the current MAO is terminated, Dr. Siaw is bound by its terms, and we cannot make agreements with you or issue a WPCF permit to you.

If you propose to construct and operate the park's systems, you need to be the applicant/permittee. You can either have the Siaw application transferred to you or you can fill out a new application and pay the associated fees. You need to submit a written proposal in full of your schedule for development including time lines for completion of interim tasks.

At our meeting, you requested to be able to install a temporary septic system to serve the spaces currently connected to holding tanks. Dr. Siaw is bound by the MAO until such time as the Order is terminated or modified. The park is currently out of compliance. For us to consider your request we will need to issue both a new permit and either modify the existing order or issue a new order. It should be obvious that we can not have two orders with conflicting requirements and schedules. For us to proceed, you need to either demonstrate

EXHIBIT
2

that you are the owner of the Park thereby eliminating Dr. Siaw's interest or have Dr. Siaw request modification of the Order.

When you have verified who is to be the applicant and we have a complete application from that party and a clear proposal for development, we can draft a permit for review as well as a MAO to be issued with the permit. The permit and MAO will contain compliance schedules for providing additional information as well as for constructing the proposed upgrades.

If you have any questions about the WPCF permit application, you can contact me at (503) 229-6653 or toll free at 1-800-452-4011x6653. For questions about groundwater issues, contact Lucinda Bidleman at (503) 229-5273 on Tuesdays or Wednesdays.

Sincerely,

Anne Cox, R.S.
Natural Resource Specialist
Water Quality Source Control
Northwest Region

cc: DEQ/Regional Operations/Charley Herdener
DEQ/NCBO
DEQ/NWR/Lucinda Bidleman
Dr. Caleb Siaw
19075 SE Foster Road
Boring, Oregon 97009
Environmental Management Systems, Inc.
4080 SE International Way Suite B106
Milwaukie, Oregon 97222

Environmental Management Systems

11 October 1999

Dr. Caleb Siaw
19075 SE Foster Road
Boring, Oregon 97009

Adrian Malo
HCR 63, Box 260
Seaside, Oregon 97138

REGARDING: Forest Lakes Resort On-Site Sewage System

Mr. Malo and I met with DEQ Staff, including: Robert Baumgartner, Anne Cox and Lucinda Bidleman. DEQ needs resolution of ownership as stated in their letter of 8 October 99.

The Department of Environmental Quality has approved the soils for a site on Mr. Malo's property, across Highway 101. DEQ has also decided that a Ground Water Study prepared by a Registered Geologist is now required. Rough estimates for drilling under the highway ($140 / linear foot x 100') and for the Gound Water Study ($20,000) amount to $34,000. I would estimate that the cost of the Recirculating Gravel Filter and associated Tanks, fittings and collections systems could run between $100,000 and $125,000. The actual cost would need to be based on an approved design and subsequent bids by at least 3 competent installers. Regardless of whether an interim repair or complete upgrade are proposed, DEQ will insist on the Ground Water Study.

Based on the statements made by DEQ's Robert Baumgartner and his staff, your options appear to be as follows:

1. Continue with the Holding Tanks. This is expensive, especially with the lack of water meters and the tendency of some tenants to fail to conserve water or fix leaky fixtures.
2. Water Pollution Control Facility (WPCF) permit for a complete upgrade of the park's sewage system. Also expensive as discussed above.
3. Water Pollution Control Facility permit for an interim or partial installation serving 7 spaces 14, 15, 16, 36A, 36B, 37 & 38 which are connected to the holding tanks. May be feasible, but would still require the Ground Water Study. The study may reveal additional concerns or may demonstrate that no problem exists.
4. Connection to Public Sewer. According to the City of Seaside, an annexation would be required with the process taking several months with no guarantee of successful annexation.
5. National Pollution Discharge Elimination System (NPDES) permit for discharge into surface water. The process would take several months and there would be no guarantee of success. Also, this would require a licensed operator, frequent testing and is likely to be as or more expensive than other options.
6. Remove the problem units. Landlord-Tenant issues would have to be taken into consideration. While DEQ would not then have a permit to review, staff has indicated that frequent visits would be made to ensure that there were no discharges.

As you know, the process to obtain approval for an on-site sewage system for the park has been long and frustrating. I have held off on billing you, with the hope that a breakthrough with DEQ would occur at several points. I have designed both a complete upgrade (#2) and a partial interim solution (#3) as outlined above. In order to proceed, however, I must cover my costs and have included a bill which is reduced to half of what normal charges would be to date.

Sincerely,

Robert F. Sweeney, RS
President, Environmental Management Systems, Inc.

EXHIBIT
3

4080 SE INTERNATIONAL WAY, SUITE B106 • MILWAUKIE, OREGON 97222 • (503) 353-9691 • FAX (503) 353-9695

Forest Lake Management
Seaside, OR 97138
(503) 738-6779

Regarding the vacating of the trailer spaces,

Space 11 was moved August of 1999.
Space 12 was moved August of 1999.
Spaces 13, 14, 15, and 16 were moved out in January of 2000.
Spaces 36B, 37, and 38 were moved out in March of 2000.
Space 36A refused to move and was evicted through the court by January 31st of 2002.

All of the spaces with two three thousand gallon tanks were forced to move out. There are no units on 10 spaces. The holding tanks have been pumped to 70% capacity so they do not float. We are not going to put any new units on those two three- thousand gallon-holding tanks. Those spaces will be used as parking and open space. The rest of the park is functioning well and there is no pollution or harm being done to the environment.

Sincerely, Forest Lake Management

Adrian Malo 10 Jan. 2002

EXHIBIT # 4

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

FOREST LAKE RESORT BY & THROUGH A & D TRUST,
Plaintiff(s),

vs.

PEGGY ALLEN & ALL OTHERS,
Defendant(s).

JUDGMENT/
~~**STIPULATED JUDGMENT**~~
(RETURN OF PERSONAL PROPERTY/FED)

CASE NO.: 01-8252

EXHIBIT # 5

On **December 6, 2001**, this case came for trial in an FED action.
The following parties appeared:
(✓) Plaintiff(s) per Don Bauske (✓) Defendant(s) per in person ( )Neither

(✓) Judgment of restitution for possession of premises for plaintiff(s)
Address: **85203 HWY 101 SPACE 36-A, SEASIDE, OREGON 97138**

( ) Effective Immediately (✓) Effective January 31, 2002

( ) Return of personal property. It is hereby ordered that the Sheriff seize and deliver to the Plaintiff/Defendant the property: ( ) Listed on attached sheet
( ) Described as follows: _____

( ) Judgment of dismissal ( ) with ( ) without prejudice.
Findings: Defendant testified that she did not have problems with septic/sewer system although other tenants had problems. Plaintiff testified through Mr. Malo he provided notice to vacate on August 1st, 2000 and also discussed moving Defendants home to another space in the park. Defendant acknowledges the discussion of moving the home but denies notice of August 1, 2000.
(✓) ~~Stipulated Judgment~~:
( ) Case continued to _____ at _____ A.M. / P.M., Room _____
( ) It is further ordered: _____

( ) Defendant shall file an Answer no later than _____ A.M. / P.M. on _____, 2_____. If an Answer is not filed by the above stated time a Judgment for Restitution of Premises will issue effective _____ A.M. / P.M. on _____, 2_____.

MONEY JUDGMENT

Judgment Creditor: Forest Lake Resort REO Trust Attorney: Don Bauske
Judgment Debtor: Peggy Allen Attorney: _____
Amount of Money Judgment: _____ Prevailing Party Fee: 85.00
Costs and Disbursements: 75.00 Interest Rate: 9.00 %

Dated this 6TH day of December, 2001. Philip T. Nelson
Circuit Court Judge

* Other tenants who were in the closed portion of the park received notice and moved their homes. The court finds that defendant received the written notice, Ex 1, on August 1, 2000. Pursuant to ORS 90.630 (8), she had 365 days to vacate. She did not do so. Defendant had her home listed for sale during the one year period but was not successful in selling it.

HOLDING TANK PUMPING CONTRACT

Pursuant to OAR Chapter 340-71-340(3)

Reference Information: (please print)

1) Sewage Disposal Service Company

Name: Seacoast Nursery Construction Inc DEQ license No. 33079

Name of Service Company Owner or Representative legally authorized to sign this Contract: David Darling

2) Facility with Holding Tank to be Serviced: Forest Lake Resort

Location: Township 5N ;Range 10W; Section 14 ; Tax lot 1100

Street address: Hunter Rt or HCR 63 Box 255 County: Clatsop

Describe sewage-generating facility (i.e. outdoor movie theatre, etc.)
Trailer park, multi septic systems

I, _____ (signature), legally authorized representative of the above referenced facility, do herewith contract with the above referenced sewage disposal service company to periodically pump out the contents of the holding tank at regular intervals or as needed to allow proper operation of the holding tank.

I, _____ (signature), legally authorized representative of the above referenced sewage disposal service company, do herewith accept the responsibilities as contractor to periodically pump out the contents of the above referenced facility's sewage holding tank as needed and to dispose of the contents at Astoria Treatment Plant in a manner approved by the Department of Environmental Quality and will notify the Department in the event this contract is terminated.

Approved by Licensor: _____ _____ / _____
(DEQ or Contract County) (Date)

7304

PM 9:21 98-11-71

EXHIBIT 6

FORM No. 18 © 1990
Stevens-Ness Law Publishing Co.
Portland, Oregon 97204 NE

OWNER'S SALE AGREEMENT AND EARNEST MONEY RECEIPT

Seaside, Oregon 16 - 19

RECEIVED OF A. & D. Revocable Trust D. ... Trustee hereinafter called purchaser, $ 1000 — as earnest money and in part payment for the following described real estate situated in the City of .... County of Clatsop State of Oregon, described as follows, to-wit:

First Lane Trailer Park

Legal to follow

which we have this day sold to the purchaser for the sum of .... Dollars $ 550,000

on the following terms, to-wit: The earnest money hereinabove receipted for . . . . . $ 1000 —

upon acceptance of title and delivery of deed or delivery of contract . . . . * $ 160,000 ; $ 161,000

balance of .... Dollars $ 389,000

payable as follows: 3000 per month @ 9% interest & 240,000 balloon payment on or before 1 year from the date of the contract. The [illegible] ... at the end of 4 years.

* 160,000 to consist of the net equities on two real estate contracts to be assigned on the closing of this transaction

If this transaction includes dwelling units, buyer and seller certify that a working smoke detector shall be installed in each unit according to applicable law, prior to closing. (Delete if inapplicable.)

A title insurance policy from a reliable company insuring marketable title in the seller in an amount equal to said purchase price is to be furnished purchaser in due course at seller's expense; preliminary to closing, seller may furnish a title insurance company's title report showing its willingness to issue title insurance, and such report shall be conclusive evidence as to status of seller's record title.

It is agreed that if the title to the said premises is not marketable, or cannot be made so within thirty days after a written notice of defects is delivered to seller, the earnest money herein receipted for shall be refunded. But if the title to the said premises is marketable, and the purchaser neglects or refuses to comply with any of the conditions of this sale within 30 days and to make payments promptly, as hereinabove set forth, then the earnest money herein receipted for shall be forfeited to the seller as liquidated damages, and this contract shall thereupon be of no further binding effect.

The property is to be conveyed by good and sufficient deed free and clear of all liens and encumbrances except zoning ordinances, building restrictions, taxes due and payable for the current tax year, reservations in federal patents and state deeds, easements of record and ....

All irrigation, ventilating, cooling, plumbing and heating fixtures and equipment (including stoker and oil tanks but excluding fire place fixtures and equipment), water heaters, electric light and bathroom fixtures, light bulbs and fluorescent lamps, venetian blinds, wall-to-wall carpeting, awnings, window and door screens, storm doors and windows, attached floor coverings, attached television antenna, all plants, shrubs and trees and all fixtures except .... are to be left upon the premises as part of the property purchased.

The following personal property is also included as part of the property sold for said price: ....

Seller and purchaser agree to pro rate the taxes which become due and payable for the current tax fiscal year on a fiscal year basis. Rents, interest, premiums for existing insurance, and other matters shall be pro rated on a calendar year basis. Purchaser agrees to pay for fuel on hand including oil in tank, if any, and, at closing, shall reimburse seller for sums, if any, held in any reserve account relating to any encumbrances on said property. Adjustments are to be made as of the date of the consummation of the sale herein or delivery of possession, which ever first occurs.

Possession of said premises is to be delivered to purchaser on or before ...., 19 ...... Time is of the essence hereof. This contract is binding upon the heirs, executors, administrators, successors and assigns of the purchaser and seller. However, the purchaser's rights herein are not assignable without written consent of seller. In any suit or action brought on this contract, the losing party agrees to pay the prevailing party's reasonable attorney's fees to be fixed by the trial court, and on appeal the prevailing party's reasonable attorney's fees to be fixed by the appellate court.

Further conditions: ....

THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS, WHICH, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND EXISTENCE OF FIRE PROTECTION FOR STRUCTURES.

x Caleb Siaw
X................ Owner

I hereby agree to purchase the above property and to pay the price of Five hundred fifty Thousand 00/100 ($ 550,000) Dollars as specified above

Address .... Purchaser X

Phone ....

EXHIBIT 7

State of Oregon

Department of Environmental Quality Memorandum

Date: December 10, 2002

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item A, Action Item: Appeal of Amended Proposed Order in the matter of Caleb Siaw, M.D., Case No. WQ/D-NWR-00-186 (Amended staff report) December 12, 2002 EQC Meeting

Appeal to EQC

Dr. Caleb Siaw appealed the Amended Proposed Order (Attachment H) dated May 1, 2002, that assessed him a $317,700 civil penalty for repeatedly violating an Environmental Quality Commission Order.

Background

On July 31, 2001, DEQ assessed Dr. Siaw a $373,580 civil penalty for multiple violations of an EQC Order that required Dr. Siaw to design and construct a new on-site sewage disposal system for a mobile home park he owned in Seaside, the Forest Lake Resort. Dr. Siaw appealed the penalty and a contested case hearing was held January 17, 2002. At hearing, DEQ reduced the penalty assessment to $335,700 based on new information concerning Dr. Siaw's economic benefit.

On April 5, 2002, the Hearing Officer issued a Proposed Order assessing Dr. Siaw a civil penalty of $198,600 (Attachment K). The reduction resulted chiefly from the Hearing Officer's decision that the Department did not have the statutory authority to assess Dr. Siaw penalties on a monthly basis, but only on a daily basis. On April 12, 2002, the Department formally requested, pursuant to Oregon Administrative Rule 137-003-0655, that the Hearing Officer clarify his ruling. On May 1, 2002, the Hearing Officer issued an Amended Proposed Order reversing his prior decision regarding multiple penalties, and assessed Dr. Siaw a civil penalty of $317,700. In his Amended decision, the Hearing Officer concluded that the Department had not assessed penalties on a monthly basis, but instead had assessed a single daily penalty for each month in which a violation occurred.

Findings of fact made by the Hearing Officer in his Amended Proposed Order are summarized as follows:

Dr. Siaw purchased the Forest Lake Resort property in his own name on October 30, 1996. The property contained 44 mobile home and RV spaces, as well as a laundry. The resort used a collection of drain fields and septic tanks to dispose of sewage. As a result of multiple incidents of raw sewage surfacing at the resort, the Department notified Dr. Siaw in December 1997 that he needed to repair or replace the failing sewage disposal systems and, as a consequence, obtain a Water

Pollution Control Facilities (WPCF) Permit for the resort.

On February 17, 1998, Dr. Siaw filed an incomplete WPCF permit application with the Department. On several occasions in 1998, the Department sent Dr. Siaw Notices of Noncompliance in response to incidents of surfacing sewage at the resort and/or requesting that he complete his WPCF application.

On June 30, 1998, Dr. Siaw, as Trustee for Caleb Siaw P.C. Trust, signed a memorandum of sale to sell the resort to Richard K. Johnson and Joyce M. Johnson, husband and wife. The Johnsons made a few payments on the contract and then let the property go back to Dr. Siaw. On August 16, 1999, the Johnsons signed a bargain and sale deed deeding the property back to Caleb Siaw P.C. Trust.

After a receiving a referral from DEQ, Dr. Siaw was prosecuted by the Clatsop County District Attorney for criminal violations of state water quality law. On January 22, 1999, Dr. Siaw pled no contest to a single count of Water Pollution in the Second Degree, and was sentenced to two years probation and a $10,600 fine. As a condition of his probation, Dr. Siaw was required to "make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material."

On May 10, 1999, Dr. Siaw signed a Mutual Agreement and Order (MAO) that was adopted as a Final Order by the Environmental Quality Commission on May 20, 1999. On page 1 of the MAO, Dr. Siaw acknowledged that he owned or operated Forest Lake Resort, although he wrote the words "former owner" below his signature on the last page of the Order. Dr. Siaw hand wrote in several other changes on the MAO and initialed those changes, but the changes were not initialed by the signatory for the Commission.

The MAO authorized Dr. Siaw to use temporary sewage holding tanks until such time as he could install a DEQ-approved sewage disposal system and obtain a WPCF permit. The MAO ordered Dr. Siaw to complete a WPCF permit application within 30 days of being notified by DEQ if DEQ determined that a soil evaluation demonstrated that a WPCF permitted system was feasible for the park. Dr. Siaw also had the obligation to complete a groundwater study and a narrative and conceptual plan for the new system. Within 30 days of submitting a complete WPCF permit application, Dr. Siaw agreed to submit acceptable plans and specifications for a new system. Dr. Siaw acknowledged in the MAO that he had actual notice of the contents and requirements of the MAO and that failure to fulfill

any of the provisions of the MAO would constitute a violation of the MAO and subject him to civil penalties. On August 16, 1999; November 12, 1999; March 12, 2000; and April 10, 2001, DEQ mailed Dr. Siaw notices that he had violated the MAO by failing to complete his WPCF application and requesting that he submit the necessary information.

On April 12, 1999, Dr. Siaw signed a real estate contract as "Caleb Siaw/Trustee for Caleb Siaw, P.C. Trust" to sell the resort to "Danny Mal, Trustee for A & D Trust." No contract or memorandum of contract sale between Dr. Siaw or Caleb Siaw, P.C. Trust and Danny Mal, Trustee for A & D Trust, was filed in Clatsop County land records prior to December 2001.

On August 7, 2000, Caleb Siaw, as grantor, executed a quitclaim deed to "Caleb Siaw, Trustee for Caleb Siaw, P.C. Trust, nunc pro tunc, July 1998." That deed was recorded in Clatsop County land records on November 8, 2000.

In his Conclusions of Law, the Hearing Officer found that the Dr. Siaw had violated the MAO by failing to submit information required by DEQ to complete his application for a WPCF permit.

Dr. Siaw appealed the Hearing Officer's Amended Proposed Order to the Commission on May 29, 2001.

In his appeal to the Commission (Attachment G), Dr. Siaw took the following exceptions to the Amended Proposed Order:

1. The Hearing Officer erred in finding that "DEQ proved that respondent had both legal title to the real property, as well as the care and control of the property, and that he is legally bound by the terms of the MAO he signed."
2. The Hearing Officer erred in finding that "[T]he real estate contract between Caleb Siaw P.C. Trust and Danny Mal, Trustee for the A & D Trust, was not properly acknowledged and could not be recorded under Oregon law."
3. The Hearing Officer erred in finding that as legal owner between 1998 and at least late 2001, Dr. Siaw was owner of the property for the purposes of the onsite sewage disposals rules in OAR Chapter 340, Division 71, and the requirements in the MAO.
4. The Hearing Officer erred in finding that because both parties did not initial Dr. Siaw's handwritten changes to the MAO, the changes had no legal effect.
5. The Hearing Officer erred in finding that DEQ was not estopped from enforcing the MAO after presenting an alternative to Dr. Siaw that Dr. Siaw

relied on and complied with.

6. The Hearing Officer erred in finding that Dr. Siaw's closure of eight mobile home spaces in an effort to relieve some of the problems with the existing sewage disposal system was a mere effort and not a solution.
7. The Hearing Officer erred in calculating the civil penalty.

In its reply brief (Attachment A), the Department supported the Hearing Officer's Amended Proposed Order.

EQC Authority

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

Alternatives

The Commission may:

1. As requested by the Dr. Siaw, dismiss the penalty by adopting one or more of Dr. Siaw's exceptions regarding his liability for compliance with the MAO.
2. Reduce the penalty by adopting one or more of Dr. Siaw's exceptions to the penalty calculation.
3. As requested by the Department, uphold the Hearing Officer's Amended Proposed Order.

*In t*he Commission*'s review of* the proposed order, including the recommended findings of fact and conclusions of law, *the EQC* may substitute its judgment for that of the Hearing Officer except as noted below.[1] T*he* proposed order was issued under the new statutes and rules governing the Hearing Officer Panel Pilot Project.[2] Under these 1999 statutes, DEQ's contested case hearings must be conducted by a hearing officer appointed to the panel, and the EQC'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

[1] OAR 340-011-0132.
[2] Oregon Laws 1999 Chapter 849.
[3] *Id.* at § 5(2); § 9(6).
[4] *Id.* at § 12(2).

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 the new 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, there are a number of procedural provisions that have been 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. Department's Amended Brief in Reply to Petitioners Exceptions and Brief, dated August 22, 2002.
B. Cover letter to Department's Amended Brief, dated August 22, 2002.
C. Department's Brief in Reply to Petitioners Exceptions and Brief, dated August 15, 2002.
D. Petitioner's Brief, dated July 15, 2002.
E. Letter from Stephanie Hallock, granting Petitioner an extension of the deadline for filing his brief, dated June 27, 2002.
F. Letter from Mikell O'Mealy, dated June 3, 2002.
G. Petitioner's Petition for Review of the Amended Proposed Order, dated May 29, 2002.
H. Hearing Officer's Amended Hearing Decision and Proposed Order for Assessment of Civil Penalty, dated May 1, 2002.
I. Petitioner's Petition for Review of the Proposed Order, dated April 23, 2002.
J. Letter from Jeff Bachman, DEQ, to Hearing Officer requesting clarification of

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[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).

two rulings in Proposed Order, dated April 15, 2002.

K. Hearing Officer's Hearing Decision and Proposed Order, dated April 5, 2002.
L. Department's Hearing Memorandum, dated March 1, 2002.
M. Dr. Siaw's Closing Argument, dated February 28, 2002.
N. Hearing Exhibits

Hearing Officer Exhibits

A. Notice of Contested Case Rights and Responsibilities.
B. Notice of Assessment of Civil Penalty, dated July 31, 2001.
C. Answer and Request for Hearing, dated August 8, 2001.
D. Notice of Hearing, dated November 13, 2001.
E. Cover Letter to Notice of Assessment of Civil Penalty, dated July 31, 2001.

Department Exhibits

100. Diagram of Forest Lake Resort.
101. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated December 11, 1997.
102. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated February 5, 1998.
103. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application No. 991481, dated March 13, 1998.
104. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated March 24, 1998.
105. Water Pollution Control Facilities Permit Application received by the Department of Environmental Quality from Caleb Siaw, received March 31, 1998.
106. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Incomplete Application, dated April 30, 1998.
107. Letter from Department of Environmental Quality to Caleb Siaw and Richard Johnson regarding Permit Application 991481, Incomplete Application, dated September 1, 1998.
108. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, dated September 21, 1998.
109. Notice of Violation, Department Order, and Assessment of Civil Penalty issued by Department of Environmental Quality to Caleb Siaw, December 15, 1998.
110. Judgment of Conviction and Sentence Order in State of Oregon vs. Caleb Siaw, filed January 22, 1999.
111. Notice of Noncompliance and Incomplete Application, issued by

Department of Environmental Quality to Caleb Siaw, February 2, 1999.

112. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, March 19, 1999.
113. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, April 29, 1999.
114. Mutual Agreement and Order (MAO) No. WQ/D-NWR-98-212, In the Matter of Caleb Siaw, executed May 20, 1999, and cover letter, dated May 21, 1999.
115. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Compliance with MAO, dated June 7, 1999.
116. Notice of Noncompliance and Incomplete Application, issued by Department of Environmental Quality to Caleb Siaw, August 16, 1999.
117. Letter from Department of Environmental Quality to Caleb Siaw regarding Permit Application 991481, Incomplete Application, Conceptual Plans, November 12, 1999.
118. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, March 10, 2000.
119. Notice of Noncompliance issued by Department of Environmental Quality to Caleb Siaw, April 10, 2001.
120. Cover Page, Proposal for Wastewater Treatment Facility for Forest Lake Resort by Advanced Treatment Systems, Inc. (ATS), dated December 14, 1999, and fax from ATS to Anne Cox regarding "Option "Little SBR", undated.
121. Letter sent by fax from Environmental Management Systems to Anne Cox regarding Forest Lakes Resort – Sewage System, dated April 27, 2000.
122. Economic benefit analysis for Caleb Siaw, dated January 17, 2002.
123 Electronic Mail from Anne Cox, Subject: "Caleb Siaw Talks About a Different Buyer", dated October 15, 1999.
124. Electronic mail from Anne Cox, Subject: "Caleb Siaw is selling Forest Lake Resort," dated April 2, 1999.
125. Electronic mail string from Dewey Darold, Subject: "Forest Lake Resort Inspection," dated April 26, 1999.
126. Electronic mail string from Dewey Darold, Subject: "Forest Lake RV Park," dated May 3, 1999.
127. Electronic mail from Anne Cox, Subject: "Meeting with Mr. Malo, new buyer, Forest Lake Resort," dated May 10, 1999.

128-1. Facsimile from Brenda Siaw to Charlie Herdener, DEQ

Enforcement, dated December 13, 1999.

129. Electronic mail from Anne Cox, Subject: "Siaw to sell Forest Lake Resort ... to Malo?," October 24, 2000.
130. Hearing Decision, Case No. WQ/D-NWR-98-212, In the Matter of Caleb Siaw.

Dr. Siaw's Exhibits

1. Real Estate Contract, dated April 12, 1999.
2. Letter from Anne Cox to Adrian Malo, dated October 8, 1999.
3. Letter from Robert Sweeney to Dr. Caleb Siaw, dated October 11, 1999.
4. Memo, signed by Adrian Malo, dated January 10, 2002.
5. Judgment, Forest Lake Resort By and Through A & D Trust vs. Peggy Allen, dated December 6, 2001.
6. Holding Tank Pumping Contract, undated.
7. Owner's Sale and Earnest Money Agreement, undated.
8. Warranty Deed conveying property from Majorie P. Stanton to Sam H. Banki, dated July 31, 1992.
9. Warranty deed conveying property from Sam H. Banki to Caleb Siaw, dated October 30, 1996.
10. Quitclaim deed from CalebSiaw to Caleb Siaw P.C. Trust, dated August 7, 2000.
11. Real estate contract between Caleb Siaw P.C. Trust and A & D Trust, Danny Mal, Trustee.
12. Bargain and sale deed from Richard K. Johnson and Joyce M. Johnson to Caleb Siaw P.C. Trust, dated August 16, 2000.
13. Memorandum of Sale from Caleb Siaw P.C. Trust to Richard K. Johnson and Joyce M. Johnson, dated July 30, 1998.

O. Caleb Siaw's Pre-Hearing Memorandum, dated January 16, 2002.
P. Caleb Siaw's Motion to Join Indispensable Party and Motion to Postpone and Consolidate, dated January 12, 2002.

Documents 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

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639/Fax (503) 788-5345

January 31, 2002

Ken L. Betterton
Hearings Officer
875 Union St. N.E.
P.O. Box 14020
Salem, Or. 97311

Re: In the Matter of Caleb Siaw
WQ/D-NWR-99-168

Dear Judge Betterton,

I am enclosing two sets of documents, the first are the recorded documents provided by the title company which reflect who was in title from July of 1992 through January of 2002. They are clipped together in reverse chronological order.

I am also offering the two exhibits which are referenced on the Siaw/A&D Trust Contract in order to complete the record regarding that document.

I sent these documents to Mr. Bachman within seven days of the hearing and asked whether he had any objection. I have also left two phone messages and he has not indicated one way or the other. Mr. Bachman has always been easy to contact before and courteous in responding and I can only assume that he has had a horrendous schedule.

If a phone conference is needed, I am not in court next week.

Very truly yours,

Michael J. Kavanaugh

cc: Jeff Bachman
C. Siaw

3

WARRANTY DEED
(Statutory Form)

BOOK 791 PAGE 620

GRANTOR: Marjorie P. Stanton formerly known as Marjorie P. Paul

CONVEYS AND WARRANTS TO

GRANTEE: Sam H. Banki

the following described real property free of encumbrances except as specifically set forth herein:

EXHIBIT # 8

14-17070

* SEE REVERSE FOR LEGAL DESCRIPTION

SUBJECT TO ANY LIENS OR ENCUMBRANCES PLACED OR SUFFERED TO BE PLACED ON THE PREMISES HEREIN DESCRIBED BY THE GRANTEES OF THIS FULFILLMENT DEED ON OR AFTER MAY 22, 1981

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES.

The true and actual consideration for this transfer stated in terms of dollars is $ 415,000.00 . However, if the actual consideration consists of or includes other property or other value given or promised, such other property or value was part of the / the whole of the (indicate which) consideration.

If grantor is a corporation, this has been signed by authority of the Board of Directors.

DATED: .

GRANTOR: Marjorie P. Stanton
Marjorie P. Stanton

1002-51004-01100, 63317 1003-51004A-01100, #63674 Hamlet Rt Box 255 Seaside
Until a change is requested, all tax statements shall be sent to the following address:
Sam H. Banki Hamlet Rt Box 255 Seaside, OR 97138

STATE OF OREGON, County of ss. Date: Personally appeared the above named Marjorie P. Stanton and acknowledged the foregoing instrument to be Her voluntary act and deed. Before me: Notary Public for Oregon My commission expires:	STATE OF OREGON, County of Malh[illegible] ss. Date 7-31-92. Personally appeared Marjorie O. Stanton who being sworn, stated that he/she is the [illegible] of grantor corporation and that this instrument was voluntarily signed on behalf of the corporation. Before me: Kathy J. Davidson Notary Public for Oregon My commission expires: May 9, 1992 OFFICIAL SEAL KATHY J. DAVIDSON NOTARY PUBLIC-OREGON COMMISSION NO. [illegible] MY COMMISSION EXPIRES MAY 9, 19[illegible]

WARRANTY DEED TO AFTER RECORDING RETURN TO Sam Banki Hamlet Rt Box 255 Seaside, OR 97138	(DON'T USE THIS SPACE: RESERVED FOR RECORDING LABEL IN COUNTIES WHERE USED.)	STATE OF OREGON, County of ss. I certify that the within instrument was received for record on the day of , 19 , at o'clock M., and recorded in book on page Witness my hand and seal of County affixed. County Clerk By Deputy.

40

1

D-3 ... 197 ...

BOOK 791 PAGE 621

Beginning at a point in the center of the Necanicum River, said point being 1040 feet North and 1280 feet West of the quarter corner between Sections 3 and 4, Township 5 North, Range 10 West, Willamette Meridian, in the County of Clatsop and State of Oregon, said point being the Northeast corner of that certain tract of land conveyed to Howard E. Johnson, et ux, by Deed recorded March 29, 1965, in Book 278, Page 489, Clatsop County Deed Records; thence West along the North line of the said Johnson Tract 330 feet to the Easterly right of way line of Highway 101; thence Northerly along said right of way line 1100 feet to the center of the said Necanicum River; thence South 78° 28' East 348.2 feet to a point; thence South 54° East 174.8 feet to a point; thence South 07° 34' East 22.9 feet to a point; thence North 2° 26' East 89.2 feet to a point on the Southerly edge of an existing rocked road; thence South 43° 30' East 81.0 feet to a point; thence South 48° 30' East 269.0 feet to a point; thence South 18° 30' East 91.0 feet to a point; thence South 1° 30' West 171.0 feet to a point; thence South 1° West 91.6 feet to a point; thence South 2° 30' East 59.0 feet to a point; thence South 8° 30' East 80.0 feet to a point; thence South 70° 30' East 93.0 feet to a point; thence South 64° 30' East 64.0 feet to a point; thence South 24° East 30.0 feet to a point; thence North 81° 30' East 63.0 feet to a point; thence South 6° East 83.0 feet to a point; thence South 11° East 138.0 feet to a point; thence South 27° 30' West 153.0 feet to a point in the center of said river; thence Northwesterly along the center of said river to the point of beginning.

EXCEPTING THEREFROM that conveyed to Laurel Hide Underhill, et ux, by Deed recorded October 5, 1955, in Book 233, Page 029, Clatsop County Deed Records.

I hereby certify that the within instrument was received for record and recorded in Clatsop County, State of Oregon, Book of Records as indicated hereon

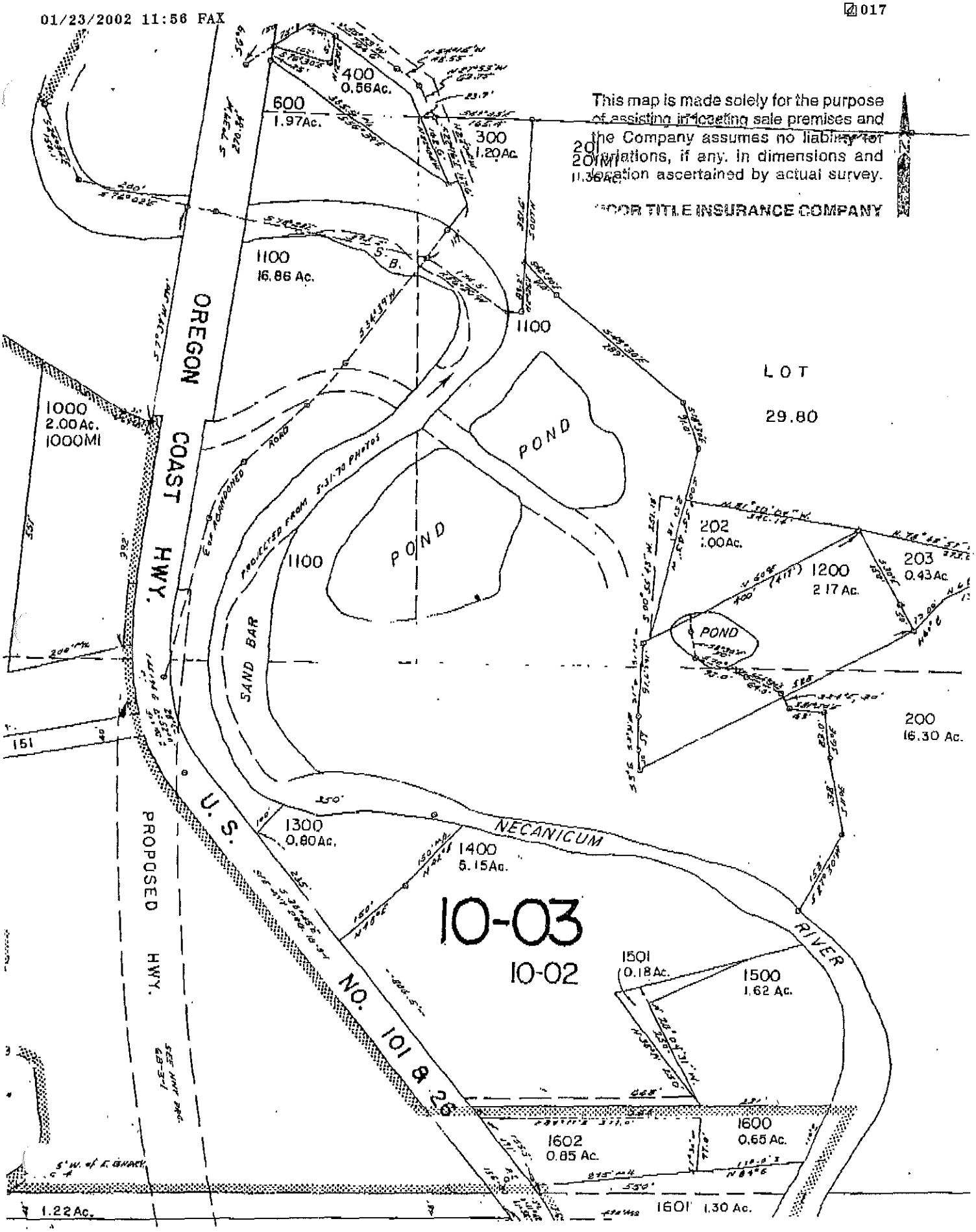
'92 NOV -7 10:00

9262221

LORI D DAVIDSON, County Clerk

Lori D. Davidson

Fee $10.00 40.


This map is made solely for the purpose of assisting in locating sale premises and the Company assumes no liability for variations, if any, in dimensions and location ascertained by actual survey.
COR TITLE INSURANCE COMPANY
400
0.56Ac.
600
1.97Ac.
300
1.20Ac.
201
201MI
1.36Ac.
1100
16.86 Ac.
1100
1000
2.00Ac.
1000MI
OREGON COAST HWY.
ROAD ABANDONED
PROJECTED FROM 5-31-70 PHOTOS
POND
POND
1100
SAND BAR
LOT
29.80
202
1.00Ac.
203
0.43Ac.
1200
2.17 Ac.
POND
200
16.30 Ac.
151
PROPOSED HWY.
U. S.
NO. 101 & 25
1300
0.80Ac.
NECANICUM
1400
5.15Ac.
10-03
10-02
1501
(0.18Ac.
1500
1.62 Ac.
RIVER
1602
0.85 Ac.
1600
0.65 Ac.
1.22Ac.
1601 1.30 Ac.

Sama H. Banki
Grantor
Dr. Caleb Siaw
Grantee

09610515 REC'D BY: LORI DAVIDSON.

96 NOV -4 AM 11:03 CLATSOP COUNTY CLERK

B0916P586

After recording return to:
KEY TITLE COMPANY
P O BOX 760
TILLAMOOK, OR 97141-0760

EXHIBIT # 9

All tax statements sent to:
Dr. Caleb Siaw
19075 SE Foster
Boring, OR 97009

Clatsop County Assessor's Account No. 000300640801, ID# 29925

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, that Sam H. Banki, ("Grantor") for the consideration hereinafter stated, as paid in part to an accommodator pursuant to an IRC Section 1031 Exchange, by Caleb Siaw ("Grantee"), does hereby grant, bargain, sell and convey unto the Grantee and Grantee's heirs, successors and assigns, that certain real property, with the tenements, hereditaments and appurtenances thereto belonging or in any way appertaining, situated in Clatsop County, State of Oregon, described as follows:

Beginning at a point in the center of the Necanicum River, said point being 1040 feet North and 1280 feet West of the quarter corner between Sections 3 and 4, Township 5 North, Range 10 West, Willamette Meridian, in the County of Clatsop and State of Oregon, said point being the Northeast corner of that certain tract of land conveyed to Howard E. Johnson, et ux, by Deed recorded March 29, 1965, in Book 278, Page 489, Clatsop County Deed Records; thence West along the North line of the said Johnson Tract 350 feet to the Easterly right of way line of Highway 101; thence Northerly along said right of way line 1100 feet to the center of the said Necanicum River; thence South 78° 28' East 348.2 feet to a point; thence South 54° East 174.8 feet to a point, thence South 87° 34' East 22.9 feet to a point; thence North 2° 26' East 89.2 feet to a point on the Southerly edge of an existing rocked road; thence South 42° 30' East 81.0 feet to a point; thence South 49° 30' East 289.0 feet to a point; thence South 18° 30' East 91.0 feet to a point; thence South 1° 30' West 171.0 feet to a point; thence South 1° West 91.6 feet to a point; thence South 2° 30' East 59.0 feet to a point; thence South 8° 30' East 50.0 feet to a point; thence South 70° 30' East 93.0 feet to a point, thence South 64° 30' East 64.0 feet to a point; thence South 24° East 30.0 feet to a point; thence North 81° 30' East 68.0 feet to a point; thence South 6° East 83.0 feet to a point; thence South 11° East 138.0 feet to a point; thence South 27° 30' West 153.0 feet to a point in the center of said river; thence Northwesterly along the center of said river to the point of beginning.

EXCEPTING THEREFROM that parcel conveyed to Laurel Eldo Underhill, et ux, by Deed recorded October 5, 1955, in Book 233, Page 029, Clatsop County Deed Records.

14-25726

To Have and to Hold the same unto the Grantee and Grantee's heirs, successors and assigns forever.

And Grantor hereby covenants to and with Grantee and Grantee's heirs, successors and assigns, that Grantor is lawfully seized in fee simple of the above-granted premises, free from all encumbrances except:

1) Regulations, including levies, liens, assessments, rights of way, and easements of Sunset Empire Parks and Recreation District.

2) The rights of the public in and to that portion of the premises herein described lying within the limits of streets, roads and highways.

3) Rights of the public and governmental bodies (including claims of ownership) to that portion of the premises lying below the high water mark of the Necanicum River and un-named ponds as it now exists or has existed.

TMC\rla1001.war

4) Any adverse claim based on the assertion that:
   a) Some portion of said land has been created by artificial means, or has accreted to such portion so created.
   b) Some portion of said land has been brought within the boundaries thereof by an avulsive movement of the Necanicum River and un-named ponds or has been formed by accretion to such portion.
   c) Any adverse claim based upon the assertion that the Necanicum River and un-named ponds has changed in location.

5) An easement created by instrument, including the terms and provisions thereof, recorded December 5, 1924, in Book 115, Page 537, Deed Records of Clatsop County, Oregon, in favor of The City of Seaside for water pipelines and related appurtenances.

6) An easement created by instrument, including the terms and provisions thereof, recorded June 10, 1926, in Book 119, Page 457, Deed Records of Clatsop County, Oregon, in favor the City of Seaside for right of way.

7) An easement created by instrument including the terms and provision thereof, recorded May 28, 1948, in Book 198, Page 619, Deed Records of Clatsop County, Oregon, in favor of Pacific Power & Light Company, for electrical transmission and distribution lines.

8) An easement created by instrument, including the terms and provision thereof, recorded January 26, 1954, in Book 225, Page 055, Deed Records of Clatsop County, Oregon, in favor the City of Seaside for water pipelines and right of way.

9) An easement created by instrument, including the terms and provisions thereof, recorded June 18, 1956, in Book 236, Page 138, Deed Records of Clatsop County, Oregon, in favor of Pacific Power & Light Company for electrical transmission and distribution lines.

10) An easement created by instrument, including the terms and provisions thereof, recorded July 30, 1968, in Book 308, Page 481, Deed Records of Clatsop County, Oregon, in favor of Lauren Underhill and Howard E. Johnson, for access across existing gravel road to Highway 101.

11) An easement created by instrument, including the terms and provisions thereof, recorded August 14, 1969, in Book 309, Page 122, Deed Records of Clatsop County, Oregon, in favor of The City of Seaside for water pipelines.

12) An easement, as referenced in instrument, including the terms and provisions thereof, recorded August 29, 1972, in Book 367, Page 047, in favor of the City of Seaside for water line.

13) An easement, as referenced in instrument, including the terms and provisions thereof, recorded August 29, 1972, in Book 367, Page 047, Deed Records of Clatsop County, Oregon, in favor of Howard E. Johnson and Sons for access across existing gravel road to Highway 101.

14) Any adverse claims or boundary disputes which may arise as a result of the use of a vague and ambiguous description in the instruments which make up the chain of title upon which the rights of the vestee herein are based. The description set forth in this title report/policy is taken from said instruments, and no better description appears of record.

15) Any claims, liens, assessments, or liabilities arising from non-compliance with state, county or city regulations, or orders, including but not limited to the requirement to plant trees and shrubs and the requirements to repair or replace the rest room and washroom pursuant to an Oregon Department of Health license report dated September 24, 1996.

16) Trust Deed, including the terms and provisions thereof, given to secure an indebtedness with interest thereon and such future advances as may be provided therein, dated August 7, 1992, recorded August 7, 1992, in Book 791, Page 622, Records of Clatsop County, Oregon, in the amount of $350,000.00, between Sam H. Banki, Grantor, George C. Fulton, Trustee, and Bank of Astoria as Beneficiary.

B0916P588

That Grantor will warrant and forever defend the premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever, except those claiming under the above-described encumbrances.

The true and actual consideration paid for this transfer, stated in terms of dollars, is $275,000. However, the actual consideration consists of or includes other property or value given or promised which is part of the consideration.

In construing this deed, where the context so requires, the singular includes the plural and all grammatical changes shall be made so that this deed shall apply equally to corporations and to individuals.

IN WITNESS WHEREOF, the Grantor has executed this instrument this 30 day of oct, 1996; if a corporate grantor, it has caused its name to be signed and its seal, if any, affixed by an officer or other person duly authorized to do so by order of its Board of Directors.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

Sam H. Banki

STATE OF OREGON, County of Clatsop) ss.

This instrument was acknowledged before me on Oct. 30, 1996, by Sam H. Banki.

OFFICIAL SEAL
JANE NEWTON
NOTARY PUBLIC-OREGON
COMMISSION NO. 051057
MY COMMISSION EXPIRES FEB. 7, 2000

Notary Public for Oregon
My commission expires: 02-07-00

QUITCLAIM DEED

CALEB SIAW

Grantor

CALEB SIAW, TRUSTEE for the CALEB SIAW P.C., TRUST,
Grantee

After Recording Return to
Michael J. Kavanaugh
4930 S.E. Woodstock Blvd.
Portland, Or. 97206

STATE OF OREGON, }

Recording Instrument Number 200009803
Recorded By: Clatsop County Clerk
Document Category: D No situs
# of Pages 2 Fee $51 No tax
Payment CK 8272 Deputy

By_____ Deputy

EXHIBIT # 10

00 NOV -8 AM 11:49 CLATSOP COUNTY CLERK

QUITCLAIM DEED

Caleb Siaw, **Grantor**, releases and quitclaims to Caleb Siaw, Trustee for the Caleb Siaw P.C. Trust, **Grantee**, all right, title and interest in and to the following described real property in the County of Clatsop, State of Oregon:

Beginning at a point in the center of the Necanicum River, said point being 1040 feet North and 1280 feet West of the quarter corner between Sections 3 and 4, Township 5 North, Range 10 West, Willamette Meridian, Clatsop County , Oregon, said point being the Northeast corner of that certain tract of land conveyed to Howard E. Johnson, et ux, by deed recorded March 29, 1965 in Book 278, page 489, Deed Records, Clatsop County Oregon; thence West along the North line of said Johnson Tract, 350 feet to the Easterly right of way line of Highway 101; thence Northerly along said right of way line, 1100 feet to the center of said Necanicum River; thence South 78 degrees 28 minutes East, 348.2 feet to a point; thence South 54 degrees East, 174.8 feet to a point; thence South 87 degrees 34 minutes East, 22.9 feet to a point; thence North 2 degrees 26 minutes East, 89.2 feet to a point on the Southerly edge of an existing rocked road; thence South 42 degrees 30 minutes East, 81.0 feet to a point; thence South 49 degrees 30 minutes East, 289.0 feet to a point; thence South 18 degrees 30 minutes East, 91.0 feet to a point; thence South 1 degree 30 minutes West, 171.0 feet to a point; thence South 1 degree West, 91.6 feet to a point; thence South 2 degrees 30 minutes East, 59.0 feet to a point; thence South 8 degrees 30 minutes East, 50.0 feet to a point; thence South 70 degrees 30 minutes East, 93.0 feet to a point; thence South 64 degrees 30 minutes East, 64.0 feet to a point; thence South 24 degrees East, 30.0 feet to a point; thence North 81 degrees 30 minutes East, 63.0 feet to a point; thence South 6 degrees East, 83.0 feet to a point; thence South 11 degrees East, 138.0 feet to a point; thence South 27 degrees 30 minutes West, 153.0 feet to a point in the center of said river;

EXCEPTING THEREFROM that portion in deed Recorded April 5, 1989 in Book 714, page 508 Records of Clatsop County , Oregon.

EXCEPTING THEREFROM that portion in deed Recorded June 30, 1955 in Book 233, page 29 Records of Clatsop County , Oregon.

EXCEPTING THEREFROM that portion in deed Recorded November 13, 1973 in Book 388, page 643 Records of Clatsop County , Oregon

This instrument will not allow use of the property described in this instrument in violation of applicable land use laws and regulations. Before signing or accepting this instrument, the person acquiring fee title to the property should check with the appropriate city or county planning department to verify approved uses.

The property described in this instrument may not be within a fire protection district protecting structures. The property is subject to land use laws and regulations, which, in farm or forest zones, may not authorize construction or siting of a residence and which limit lawsuits against farming or forest practices as defined in ORS 30.930 in all zones. Before signing or accepting this instrument, the person acquiring fee title to the property should check with the appropriate city or county planning department to verify approved uses and existence of fire

protection for structures.

The true consideration for this conveyance is $ 1,100,000.00

Dated this 2nd day of August, 2000, nunc pro tunc, July, 1998.

Caleb Siaw

State of Oregon)
)
County of _____) ss.

August, 2nd 2000.

Personally appeared the above named Caleb Siaw, and acknowledged the foregoing instrument to his voluntary act and deed.

Before me:

OFFICIAL SEAL
MICHAEL J KAVANAUGH
NOTARY PUBLIC-OREGON
COMMISSION NO. 058710
MY COMMISSION EXPIRES OCT 21, 2000

Notary Public for Oregon
My commission expires: 10/21/00

Until a change is requested all tax statements shall be sent to the following address:
Caleb Siaw P.C. Trust
19075 S.E. Foster Rd.
Portland, Or. 97009

NL

CONTRACT—REAL ESTATE

THIS CONTRACT, Made this Eighth *day of* April, *1999, between* Caleb Siaw /Trustee for Ten Thirty One LLC, Beneficiary CALEB Siaw/ P.C. Trust, *hereinafter called the seller,* and Danny Mal Trustee A&D TRUST, *hereinafter called the buyer,*

WITNESSETH: That in consideration of the mutual covenants and agreements herein contained, the seller agrees to sell unto the buyer and the buyer agrees to purchase from the seller all of the following described lands and premises situated in Clatsop *County, State of* Oregon, *to-wit:*

Property : HCR 63 Box 255
Seaside, Oregon 97138

Map: 510 4A - 1100
Acct#: 4509 & 4510

~~See Exhibit A, Legal Description~~ A

~~See Exhibit B, Stipulations~~

for the sum of Nine-hundred Thousand *Dollars ($900,000.00), hereinafter called the purchase price, on account of which* One-hundred Thousand (Contract Pmt. Assgnmt *Dollars ($100,000.00) is paid on the execution hereof (the receipt of which is hereby acknowledged by the seller); the buyer agrees to pay the remainder of the purchase price (to-wit: $800,000.00) to the order of the seller in monthly payments of not less than* Four Thousand *Dollars ($4,000.00) each* Month, for a period of 30 months@ 6% interest, thereafter 8% interest shall be paid for the remainder of the contract *payable on the* 15th *day of each month hereafter beginning with the month of* May, *19 99, and continuing until the purchase price is fully paid. All of the purchase price may be paid at any time; all of the deferred payments shall bear interest at the rate of* ~~.....~~ *percent per annum from* SEE STIPULATIONS *until paid; interest to be paid* ~~.....~~ *and* ~~*~~ } in addition to / to be included in *the minimum monthly payments above required. Taxes on the premises for the current tax year shall be prorated between the parties hereto as of the date of this contract.*

The buyer warrants to and covenants with the seller that the real property described in this contract is
*~~(A)~~ *primarily for buyer's personal, family or household purposes,*
(B) for an organization or (even if buyer is a natural person) is for business or commercial purposes.

The buyer shall be entitled to possession of the lands on April 10, 19 99, *and may retain such possession so long as buyer is not in default under the terms of this contract. The buyer agrees that at all times buyer will keep the premises and the buildings, now or hereafter erected thereon, in good condition and repair and will not suffer or permit any waste or strip thereof; that buyer will keep the premises free from construction and all other liens and save the seller harmless therefrom and reimburse seller for all costs and attorney's fees incurred by seller in defending against any such liens; that buyer will pay all taxes hereafter levied against the property, as well as all water rents, public charges and municipal liens which hereafter lawfully may be imposed upon the premises, all promptly before the same or any part thereof become past due; that at buyer's expense, buyer will insure and keep insured all buildings now or hereafter erected on the premises against loss or damage by fire (with extended coverage) in an amount not less than $..... in a company or companies satisfactory to the seller, specifically naming the seller as an additional insured, with loss payable first to the seller and then to the buyer as their respective interests may appear and all policies of insurance to be delivered to the seller as soon as insured. Now if the buyer shall fail to pay any such liens, costs, water rents, taxes or charges or to procure and pay for such insurance, the seller may do so and any payment so made shall be added to and become a part of the debt secured by this contract and shall bear interest at the rate aforesaid, without waiver, however, of any right arising to the seller for buyer's breach of contract.*

(Continued on Reverse)

~~*~~ IMPORTANT NOTICE: Delete, by lining out, whichever phrase and whichever warranty (A) or (B) is not applicable. If warranty (A) is applicable and if the seller is a creditor, as such word is defined in the Truth-in-Lending Act and Regulation Z, the seller MUST comply with the Act and Regulation by making required disclosures; for this purpose, use Stevens-Ness Form No. 1319 or equivalent.

A&D trust by Danny Mal
1716 S.E. Dogwood Way
Gresham, Ore. 97080
Grantee's Name and Address

Caleb Siaw P.C. Trust
19075 S.E. Foster Rd.
Boring, Ore. 97009
Grantor's Name and Address

After Recording, return to (Name, Address, Zip):

Caleb Siaw P.C. Trust
19075 S.E. Foster Rd.
Boring, Ore. 97009

Until requested otherwise, send all tax statements to (Name, Address, Zip):

A&D Trust- Danny Mal, trustee
1716 S.E. Dogwood Way
Gresham, Ore. 97080

SPACE RESERVED FOR RECORDER'S USE

Recording Instrument #: 200200315
Recorded By: Clatsop County Clerk
# of Pages: 2 Fee: 31.00
Transaction date: 1/10/02 10:29:05
Deputy: kkelso

ss.

at ..... o'clock .....M., and recorded in book/reel/volume No. ..... on page ..... or as fee/file/instrument/microfilm/reception No. ....., Record of Deeds of said County.

Witness my hand and seal of County affixed.

NAME TITLE

By ....., Deputy

The seller agrees that at seller's expense and within 10 days from the date hereof, seller will furnish unto buyer a title insurance policy insuring (in an amount equal to the purchase price) marketable title in and to the premises in the seller on or subsequent to the date of this agreement, save and except the usual printed exceptions and the building and other restrictions and easements now of record, if any. Seller also agrees that when the purchase price is fully paid and upon request and upon surrender of this agreement, seller will deliver a good and sufficient deed conveying the premises in fee simple unto the buyer, buyer's heirs and assigns, free and clear of encumbrances as of the date hereof and free and clear of all encumbrances since the date placed, permitted or arising by, through or under seller, excepting, however, the easements, restrictions and the taxes, municipal liens, water rents and public charges as assumed by the buyer and further excepting all liens and encumbrances created by the buyer or buyer's assigns.

And it is understood and agreed between the parties that time is of the essence of this contract, and in case the buyer shall fail to make the payments above required, or any of them, punctually within 20 days of the time limited therefor, or fail to keep any agreement herein contained, then the seller shall have the following rights and options:

(1) To declare this contract cancelled for default and null and void, and to declare the purchaser's rights forfeited and the debt extinguished, and to retain sums previously paid hereunder by the buyer;*
(2) To declare the whole unpaid principal balance of the purchase price with the interest thereon at once due and payable; and/or
(3) To foreclose this contract by suit in equity.

In any of such cases, all rights and interest created or then existing in favor of the buyer as against the seller hereunder shall utterly cease and the right to the possession of the premises above described and all other rights acquired by the buyer hereunder shall revert to and revest in the seller without any act of re-entry, or any other act of the seller to be performed and without any right of the buyer of return, reclamation or compensation for moneys paid on account of the purchase of the property as absolutely, fully and perfectly as if this contract and such payments had never been made; and in case of such default all payments theretofore made on this contract are to be retained by and belong to the seller as the agreed and reasonable rent of the premises up to the time of such default. And the seller, in case of such default, shall have the right immediately, or at any time thereafter, to enter upon the land aforesaid, without any process of law, and take immediate possession thereof, together with all the improvements and appurtenances thereon or thereto belonging.

The buyer further agrees that failure by the seller at any time to require performance by the buyer of any provision hereof shall in no way affect seller's right hereunder to enforce the same, nor shall any waiver by the seller of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision, or as a waiver of the provision itself.

DANNY HM. TRUSTEE IS A LICENSED REAL ESTATE AGENT IN THE STATE OF OREGON & IS REPRESENTING A ID TRUST,

The true and actual consideration paid for this transfer, stated in terms of dollars, is $ ..... ① However, the actual consideration consists of or includes other property or value given or promised which is part of the whole consideration (indicate which). ①

In case suit or action is instituted to foreclose this contract or to enforce any provision hereof, the losing party in the suit or action agrees to pay such sum as the trial court may adjudge reasonable as attorney's fees to be allowed the prevailing party in the suit or action and if an appeal is taken from any judgment or decree of the trial court, the losing party further promises to pay such sum as the appellate court shall adjudge reasonable as the prevailing party's attorney's fees on such appeal.

In construing this contract, it is understood that the seller or the buyer may be more than one person or a corporation; that if the context so requires, the singular pronoun shall be taken to mean and include the plural and the neuter, and that generally all grammatical changes shall be made, assumed and implied to make the provisions hereof equally to corporations and to individuals.

This agreement shall bind and inure to the benefit of, as the circumstances may require, not only the immediate parties hereto but their respective heirs, executors, administrators, personal representatives, successors in interest and assigns as well.

IN WITNESS WHEREOF, the parties have executed this instrument in duplicate; if either of the undersigned is a corporation, it has caused its name to be signed and its seal, if any, affixed by an officer or other person duly authorized to do so by order of its board of directors.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES.

..... Seller

..... Seller

..... Buyer

..... Buyer

*SELLER: Comply with ORS 93.905 et seq prior to exercising this remedy.

NOTE—The sentence between the symbols ①, if not applicable, should be deleted. See ORS 93.030.

STATE OF OREGON, County of Multnomah) ss.

This instrument was acknowledged before me on 12th, 1997,

by Danny HM Trustee

This instrument was acknowledged before me on ....., 19....,

by .....

as .....

of .....

OFFICIAL SEAL
KRISTINA MAE LONG
NOTARY PUBLIC-OREGON
COMMISSION NO. 058982
MY COMMISSION EXPIRES NOV 22, 2000

..... Notary Public for Oregon

My commission expires .....

ORS 93.635 (1) All instruments contracting to convey fee title to any real property, at a time more than 12 months from the date that the instrument is executed and the parties are bound, shall be acknowledged, in the manner provided for acknowledgment of deeds, by the conveyor of the title to be conveyed. Such instruments, or a memorandum thereof, shall be recorded by the conveyor not later than 15 days after the instrument is executed and the parties are bound thereby.

ORS 93.990 (3) Violation of ORS 93.635 is punishable, upon conviction, by a fine of not more than $100.

(Description Continued)

EXHIBIT A

That certain real property situated in Clatsop County, Oregon, described as follows:

Beginning at a point in the center of the Necanicum River, said point being 1040 feet North and 1280 feet West of the quarter corner between Sections 3 and 4, Township 5 North, Range 10 West, Willamette Meridian, Clatsop County, Oregon, said point being the Northeast corner of that certain tract of land conveyed to Howard E. Johnson, et ux, by deed recorded March 29, 1965, in Book 278, page 489, Clatsop County Deed Records;

thence West along the North line of said Johnson Tract, 350 feet to the Easterly right of way line of Highway 101

thence Northerly along said right of way line 1100 feet to the center of said Necanicum River;

thence South 78 degrees 28 minutes East, 348.2 feet to a point;

thence South 54 degrees East, 174.8 feet to a point;

thence South 87 degrees 34 minutes East, 22.9 feet to a point;

thence North 2 degrees 26 minutes East, 89.2 feet to a point on the Southerly edge of an existing rocked road;

thence South 42 degrees 30 minutes East, 81.00 feet to a point;

thence South 49 degrees 30 minutes East, 289.0 feet to a point;

thence South 18 degrees 30 minutes East, 91.0 feet to a point;

thence South 1 degree 30 minutes West, 171.0 feet to a point;

thence South 1 degree West, 91.6 feet to a point;

thence South 2 degrees 30 minutes East 59.0 feet to a point;

thence South 8 degrees 30 minutes East, 50.0 feet to a point;

thence South 70 degrees 30 minutes East, 93.0 feet to a point;

thence South 64 degrees 30 minutes East, 64.0 feet to a point;

thence South 24 degrees East, 30.0 feet to a point;

thence North 81 degrees 30 minutes East, 63.0 feet to a point;

thence South 6 degrees East 83.0 feet to a point;

thence South 11 degrees East, 138.0 feet to a point'

thence South 27 degrees 30 minutes West, 153.0 feet to a point in the center of said river;

thence Northwesterly along the center of said river to the point of beginning.

EXCEPTING THEREFROM that portion described in deed recorded June 30, 1955, in Book 233, page 29, Clatsop County Deed Records.

EXCEPTING THEREFROM that portion described in deed recorded November 13, 1973, in Book 388, page 643, Clatsop County Deed Records.

EXCEPTING THEREFROM that portion described in deed recorded April 5, 1989, in Book 714, page 508, Clatsop County Deed Records.

EXHIBIT B
STIPULATIONS

Seller agrees that the interest rate on any and all deffered payments after the first thirty months from date of contract shall not exceed 10% annum.

Buyer agrees to pay said contract in full within Seven(7) years of the date of Original contract.

Seller agrees to, within 120 days of contract, remove any and all names including, Richard K. Johnson and Joyce M.Johnson as purchasers holding Title, Interest, or Claim on said property per contract recorded on October 8,1998 as instrument number9811024, in Book984, page871, Clatsop County Deed Records.

Seller agrees that Buyer may reassign contract at any time at Buyers discretion.

Seller agrees that Buyer reserves the right to pay the contract in full at any time without incurring any penalties.

Seller agrees to pay for and obtain DEQ approval on all septic systems within described property.

Seller agrees to assist Buyer and any persons assigned by the Buyer with the transition of ownership, management records, tenant records, and any past and present legal records pertaining to tenants.

If Seller fails to pay any Lien amounts or payments against said property, Buyer has the option to pay Lien amounts or payment obligations and to deduct those specific amounts from the purchase price.

All personal property included in contract are as follows.
Any and all trailers/mobile homes held or owned by Caleb Siaw/Trustee for Thirty One LLC in association with said property.

Any and all equipment presently at said property, i.e. washer and dryers,cleaning and maintenance equipment, vending machines,cash registers, etc.

Excluding, John Deer Tractor.

Any and all contracts held or owned by Caleb Siaw/ Trustee for Ten Thirty One LLC in association with said property.

EXHIBIT # 12

00 AUG 25 AM 10:49

BARGAIN & SALE DEED	STATE OF OREGON, } CLATSOP COUNTY CLERK
RICHARD K. JOHNSON JOYCE M. JOHNSON, Grantors	Recording Instrument Number 200007134 Recorded By: Clatsop County Clerk Document Category D No situs and # of Pages 2 Fee $31 no tax # Payment CK 8202 Deputy
CALEB SIAW P.C., TRUST, Grantee	
After Recording Return to Michael J. Kavanaugh 4930 S.E. Woodstock Blvd. Portland, Or. 97206	By Deputy

BARGAIN AND SALE DEED

Richard K. Johnson and Joyce M. Johnson, husband and wife, GRANTORS, conveys to Caleb Siaw P.C., Trust, GRANTEE, all of their interest in and to the following described real property situated in Clatsop County, State of Oregon:

Beginning at a point in the center of the Necanicum River, said point being 1040 feet North and 1280 feet West of the quarter corner between Sections 3 and 4, Township 5 North, Range 10 West, Willamette Meridian, Clatsop County , Oregon, said point being the Northeast corner of that certain tract of land conveyed to Howard E. Johnson, et ux, by deed recorded March 29, 1965 in Book 278, page 489, Deed Records, Clatsop County Oregon;

thence West along the North line of said Johnson Tract, 350 feet to the Easterly right of way line of Highway 101;

thence Northerly along said right of way line, 1100 feet to the center of said Necanicum River;

thence South 78 degrees 28 minutes East, 348.2 feet to a point;

thence South 54 degrees East, 174.8 feet to a point;

thence South 87 degrees 34 minutes East, 22.9 feet to a point;

thence North 2 degrees 26 minutes East, 89.2 feet to a point on the Southerly edge of an existing rocked road;

thence South 42 degrees 30 minutes East, 81.0 feet to a point;

thence South 49 degrees 30 minutes East, 289.0 feet to a point;

thence South 18 degrees 30 minutes East, 91.0 feet to a point;

thence South 1 degree 30 minutes West, 171.0 feet to a point;

thence South 1 degree West, 91.6 feet to a point;

thence South 2 degrees 30 minutes East, 59.0 feet to a point;

thence South 8 degrees 30 minutes East, 50.0 feet to a point;

thence South 70 degrees 30 minutes East, 93.0 feet to a point; thence South 64 degrees 30 minutes East, 64.0 feet to a point;

thence South 24 degrees East, 30.0 feet to a point;

thence North 81 degrees 30 minutes East, 63.0 feet to a point;

thence South 6 degrees East, 83.0 feet to a point;

thence South 11 degrees East, 138.0 feet to a point;

thence South 27 degrees 30 minutes West, 153.0 feet to a point in the center of said river;

thence Northwesterly along the center of said river to the point of beginning.

EXCEPTING THEREFROM that portion in deed Recorded April 5, 1989 in Book 714, page 508 Records of Clatsop County , Oregon.

EXCEPTING THEREFROM that portion in deed Recorded June 30, 1955 in Book 233, page 29 Records of Clatsop County , Oregon.

EXCEPTING THEREFROM that portion in deed Recorded November 13, 1973 in Book 388, page 643 Records of Clatsop County , Oregon.

Such property is referred to herein as "the Property" and includes certain mobile homes , to wit: those certain mobile homes owned by Caleb Siaw or Caleb Siaw PC Trust on Lots 1, 11, 12, 36B, 38 and 39 of the Property.

This instrument will not allow use of the property described in this instrument in violation of applicable land use laws and regulations. Before signing or accepting this instrument, the person acquiring fee title to the property should check with the appropriate city or county planning department to verify approved uses.

The property described in this instrument may not be within a fire protection district protecting structures. The property is subject to land use laws and regulations, which, in farm or forest zones, may not authorize construction or siting of a residence and which limit lawsuits against farming or forest practices as defined in ORS 30.930 in all zones. Before signing or accepting this instrument, the person acquiring fee title to the property should check with the appropriate city or county planning department to verify approved uses and existence of fire protection for structures.

The true consideration for this conveyance is the sum of cancellation of that certain contract of sale between the parties, dated July 30, 1998, which has been the subject of a foreclosure suit in Caleb Siaw PC Trust v. Richard K. Johnson and Joyce M. Johnson, No. 99-2104, in Clatsop County, State of Oregon.

Dated this 16th day of ~~April~~ August, 2000.

Richard K. Johnson

Joyce M. Johnson

State of Oregon)
)
County of Lincoln) ss.

~~April~~ August 16, 2000.

Personally appeared the above named Richard K. Johnson and Joyce M. Johnson, and acknowledged the foregoing instrument to their voluntary act and deed.

Before me:

OFFICIAL SEAL
LOIS HOWELL-JESSEE
NOTARY PUBLIC-OREGON
COMMISSION NO. 330204
MY COMMISSION EXPIRES JAN 10, 2004

Notary Public for Oregon
My commission expires: 1-10-2004

Until a change is requested all tax statements shall be sent to the following address:
Caleb Siaw P.C. Trust
19075 S.E. Foster Rd.
Portland, Or. 97009

B0984P872

EXHIBIT # 13

STATE OF OREGON)
Multnomah) ss
County of ~~Marion~~)

On this 30th day of July, 1998, before me personally appeared **CALEB SIAW**, who being sworn, stated that he is the **TRUSTEE** for **CALEB SIAW, P.C., TRUST** and that he executed the foregoing instrument by authority of and in behalf of the said Trust; and acknowledged their act.

GIVEN UNDER MY HAND AND OFFICIAL SEAL the day and year in this certificated first above written.

OFFICIAL SEAL
DAWN L MILLER
NOTARY PUBLIC - OREGON
COMMISSION NO. 058153
MY COMMISSION EXPIRES OCT. 2, 2000

STATE OF OREGON)
Multnomah) ss
County of ~~Marion~~)

On this 30th day of July, 1998, before me personally appeared **RICHARD K. JOHNSON**, known to be the individual described in and who executed the foregoing instrument and acknowledged that he signed and sealed the same as his own free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN UNDER MY HAND AND OFFICIAL SEAL the day and year in this certificated first above written.

OFFICIAL SEAL
DAWN L MILLER
NOTARY PUBLIC - OREGON
COMMISSION NO. 058153
MY COMMISSION EXPIRES OCT. 2, 2000

STATE OF OREGON)
Multnomah) ss
County of ~~Marion~~)

On this 30th day of July, 1998, before me personally appeared **JOYCE M. JOHNSON**, known to be the individual described in and who executed the foregoing instrument and acknowledged that she signed and sealed the same as her own free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN UNDER MY HAND AND OFFICIAL SEAL the day and year in this certificated first above written.

OFFICIAL SEAL
DAWN L MILLER
NOTARY PUBLIC - OREGON
COMMISSION NO. 058153
MY COMMISSION EXPIRES OCT. 2, 2000

98111024 DFM 45 98 OCT -8 AM 9:04 B0984P871
REC'D BY: LORI DAVIDSON. CLATSOP COUNTY CLERK D

MEMORANDUM OF SALE

Notice is hereby given that **CALEB SIAW, P.C., TRUST**, under agreement dated June 1, 1991, Transferor, whose address is 19075 SE Foster, Boring, Oregon 97009 on the 30th day of July, 1998 entered into a Contract of Sale by the terms of which he agreed to sell to **RICHARD K. JOHNSON** and **JOYCE M. JOHNSON**, husband and wife, Transferees, whose address is Forest Lake, HC 63, Box 255, Seaside, Oregon 97138, all of Transferor's interest in that certain real property described in Exhibit A attached hereto and by this reference made a part hereof.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

The true and actual consideration for this transfer is $1,100,00.

The parties hereby direct that all future tax statements shall be sent to the Transferee at the following address:

Richard K. Johnson
Forest Lake
HC 63, Box 255
Seaside OR 97138

DATED this 30th day of July, 1998.

CALEB SIAW, P.C., TRUST

By _____
Caleb Siaw, Trustee
Transferor

_____
RICHARD K. JOHNSON

_____
JOYCE M. JOHNSON
Transferees

After recording return to:
Richard K. Johnson
Forest Lake
Seaside OR 97138

Tax Assessor # 510-4A-1100

EXHIBIT A

That certain real property, and all improvements thereon, situated in Clatsop County, State of Oregon, described as follows:

Beginning at a point in the center of the Necanicum River, said point being 1040 feet North and 1280 feet West of the quarter corner between Sections 3 and 4, Township 5 North, Range 10 West, Willamette Meridian, Clatsop County, Oregon, said point being the Northeast corner of that certain tract of land conveyed to Howard E. Johnson, et ux, by deed recorded March 29, 1965 in Book 278, page 489, Deed Records, Clatsop County Oregon;

thence West along the North line of said Johnson Tract, 350 feet to the Easterly right of way line of Highway 101;

thence Northerly along said right of way line, 1100 feet to the center of said Necanicum River;

thence South 78 degrees 28 minutes East, 348.2 feet to a point;

thence South 54 degrees East, 174.8 feet to a point;

thence South 87 degrees 34 minutes East, 22.9 feet to a point;

thence North 2 degrees 26 minutes East, 89.2 feet to a point on the Southerly edge of an existing rocked road;

thence South 42 degrees 30 minutes East, 81.0 feet to a point;

thence South 49 degrees 30 minutes East, 289.0 feet to a point;

thence South 18 degrees 30 minutes East, 91.0 feet to a point;

thence South 1 degree 30 minutes West, 171.0 feet to a point;

thence South 1 degree West, 91.6 feet to a point;

thence South 2 degrees 30 minutes East, 59.0 feet to a point;

thence South 8 degrees 30 minutes East, 50.0 feet to a point;

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thence South 24 degrees East, 30.0 feet to a point;

thence North 81 degrees 30 minutes East, 63.0 feet to a point;

thence South 6 degrees East, 83.0 feet to a point;

thence South 11 degrees East, 138.0 feet to a point;

thence South 27 degrees 30 minutes West, 153.0 feet to a point in the center of said river,

thence Northwesterly along the center of said river to the point of beginning.

EXCEPTING THEREFROM that portion in deed Recorded April 5, 1989 in Book 714, page 508 Records of Clatsop County, Oregon.

EXCEPTING THEREFROM that portion in deed Recorded June 30, 1955 in Book 233, page 29 Records of Clatsop County, Oregon.

EXCEPTING THEREFROM that portion in deed Recorded November 13, 1973 in Book 388, page 643 Records of Clatsop County, Oregon.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of	)	
	)	No. WQ/D-NWR-99-168
CALEB SIAW	)	
Respondent.	)	MEMORANDUM

This is a matter which arises on the DEQ's contention that Respondent failed to comply with a Mutual Agreement and Order. I note from the outset, the MAO, signed May 10, 1999, should never have been signed between the state and Mr. Siaw and secondly, that the proposed fine for failing to comply with paperwork[1] is 59.38 times greater than the fine for an actual discharge of sewage.

Mutual Agreement and Order

The State's premise for this case and for the Order (MAO) fails, based upon a fundamental misconception reflected in its letters, statements and position in this case.

At the time the MAO was signed, Mr. Siaw was not the owner of the property. The State knew or should have know that this was the situation or was soon to be the situation as Mr. Malo had been involved in previous DEQ hearings and identified as the purchaser.

The A&D Trust, Adrian and Danny Malo's trust, is the contract purchaser of the Forest Lake Resort. The contract was executed and acknowledged on April 12, 1999. It was not

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

recorded until last week.

The DEQ, in its letter of April 29, 1999, states at page 2, that "If you have sold the park,.... please provide....written documentation...names and full addresses..." See Exhibit A.

In response to that letter, Mr. Siaw sent a copy of the contract.

On October 8, 1999, the DEQ demanded Mr. Malo "...demonstrate that you are the owner of the Park..." See Exhibit B. The DEQ had a copy of the contract.

On November 12, 1999, the DEQ sent Mr. Siaw a letter indicating Mr. Malo and Environmental Management Systems has submitted a conceptual plan, but chose to ignore Mr. Malo and continued to refer to Mr. Siaw as the owner (first sentence & par. 4.). See Exhibit C. In fact, they referred to Mr. Siaw as the "owner of record", hence the misconception and problem in this case.

The only reference to "Owner" in the DEQ regulations that I could find is contained in OAR 340-44-0005 (31) regarding Individual On-Site Systems and states that an owner or operator includes a "contract purchaser." That definition is repeated in OAR 344-071-0100(92) under a subsection for Wells. The only reference that I was able to find to "record owner" occurred in OAR 690-017-0010(14) regarding water rights. That section should be referred to for comparison and to distinguish it from the section under Ch. 340.

There is no requirement that the contract purchaser be an owner of record. That concept is not good law. ORS 93.020 states that an instrument creating an interest in real property is created by a writing, subscribed by the parting creating the instrument and "executed" as required by law. The only execution required is an acknowledgment, which this contract contained. ORS 93.030(2) requires the consideration to be stated, which this instrument does.

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

ORS 93.640 states the effect of not recording a contract or conveyance but it does not void the transfer except as to "subsequent purchaser in good faith and for a valuable consideration..." Thus the conveyance is valid as between Caleb Siaw and the A&D Trust. In accord see: *Williams v. First Nat. Bank of Ontario*, 48 Or 571, 576-577, 87 P 890 (1906):

> [R]ecording acts are for the purpose of giving notice to those who have none, and thereby preventing wrong, and not for the purpose of giving undue advantage to those who have notice and thus enabling them to perpetrate wrong. The defendant, having notice, was not a mortgagee in good faith, and could gain no advantage by recording its mortgage in Grant county after the removal of the sheep to that county.

That is still good law today and cases discuss the effects of not having recorded the conveyance as against subsequent lien holders, etc.

The result is that the DEQ's position that it would not deal with the A&D Trust is incorrect. It also renders the MAO a nullity. The DEQ and Mr. Siaw signed the agreement by mistake, clearly in an effort to finalize the situation. But consider what that Order accomplished: a) it required, Respondent, a non-owner to obtain a permit to improve the sewer system on property he was not in control of nor had a right to improve; b) it required, Respondent, a non-owner, to supply proof of pumping of tanks when he no longer was in control of pumping. The MAO was, from its inception, impossible to perform. It should be considered a nullity as outside the authority of the DEQ to require a non-owner to perform the tasks set forth therein.

I will say again, that in hindsight, both parties were in a hurry to finalize the matter left hanging form the misdemeanor case and neither side stopped to consider what they were signing. Where a court, here a state department, lacks authority to enter an order, it is a nullity. State ex rel. Juvenile Dept. v. Dreyer 328 Or 332, 339, 976 P2d 1123, 1127 (1999).

Michael J. Kavanaugh
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4930 S.E. Woodstock Blvd.
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Even if it has some effect in this case, it must be considered in the light of the obvious confusion and misunderstanding out of which it arose.

What the MAO amounts to legally, in my opinion, is a mutual mistake of law, an agreement where neither side truly understood the application of the concept "owner" in this unusual situation. In Taylor v. McCollom 153 Or App 670, 684, 958 P2d 214 (1998) the court stated, in a case involving an attorney fees provision:

> "The recognized grounds for reformation are: (1) A mutual mistake of fact. See, e.g., > Ray v. Ricketts, 235 Or. 243, 383 P.2d 52 (1963). (2) Mistake of law where both parties misapprehend the legal import of the words used or use words through mutual mistake or inadvertence. See, e.g., Harris Pine Mills v. Davidson, 248 Or. 528, 435 P.2d 310 (1968). (3) Mistake of one party and fraud on the part of the other party. > Markwart v. Kliewer, 75 Or. 574, 147 P. 553 (1915)." (Citations omitted.)
>
> [7] Here, we conclude that, in the context of the CC & Rs, use of the phrase "to be set by the appellate court" clearly and convincingly evinces a "[m]istake of law where both parties misapprehend the legal import of the words used or use words through mutual mistake or inadvertence." > Sea Fare, 6 Or.App. at 611, 488 P.2d 840.

Further, the DEQ failed to recognize the rightful owner as defined in its own regulations. They are in breach and should not be allowed to enforce this agreement.

Fine

Assuming the hearings officer proceeds to consider a fine, the amount claim by the DEQ is flawed and truly fails to consider the facts and circumstances of this case. The determination of a base penalty is vague and unexplained in the Notice of Assessment. The use of a "4" factor for the prior significant actions criteria is questioned, as the default order in the records reflects a single fine amount.

Additionally, the values for conduct and cooperation are grossly overstated given the non-ownership by Respondent and the DEQ's refusal to deal with Mr. Malo at a time he

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

proposed to fix the sewage disposal problem. Those figures should be "0".

Finally, the economic benefit figure is meaningless, avoided costs alone are not an economic benefit. Whose avoided costs are they? Not the Respondents. Not expending money to install a sewage disposal system may or may not be an economic benefit. The DEQ's figure is based upon an assumption. No cost/benefit analysis is done. The cost of money is not included nor is the financial impact of eliminating the spaces nor the cost of continuing to pump tanks. Unless the DEQ can show an increase in profits could have been obtained, no economic benefit is shown. The OAR's contemplate more.

Dated: January 16, 2002

Michael J. Kavanaugh OSB 75205
Attorney for Respondent

1.My understanding is that the allegation is not that the property has not been improved but that the permit has not been issued. The fine for the discharge in 1998 was $6,291. The proposed fine here is $373,580.00.

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

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

CERTIFIED MAIL RETURN RECEIPT

April 29, 1999

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
WQ/NWR-99-054
NOTICE OF NONCOMPLIANCE

By Notice of Noncompliance dated March 19, 1999, the Department of Environmental Quality (DEQ or Department) notified you of continuing and new sewage violations at Forest Lake Resort. Since that time more violations have been documented by site visits on March 25 and again on April 23, 1999.

The violations of Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) are as follows:

- Allowing sewage to discharge to ground surface (ORS 164.785 and OAR 340-71-130(3))
- Operation of the park's sewage systems without a permit (ORS 468B.050)
- Operation of the holding tanks without DEQ approval of their installation (ORS 468B.080, ORS 454.605 to 454.745, and OAR 340-71-175(5).

These are Class I violations and are considered to be serious violations of Oregon environmental law. The terms of your probation for your recent conviction on the criminal charge of water pollution in the second degree requires that Forest Lake Resort be in compliance with all state water quality regulations. We are therefore referring these additional violations to the Clatsop County District Attorney for his consideration as possible probation violations. The Department is also considering taking formal enforcement action, which may include assessment of civil penalties.

Exhibit A

If you have sold the park, please provide the Department with written documentation of the sale including the names and full addresses of the new owners.

If you have any questions, you can contact Anne Cox at (503) 229-6653.

Sincerely,

For Bob Baumgartner

Robert P. Baumgartner
Manager
Water Quality Source Control
Northwest Region

cc: DEQ/Enforcement
DEQ/NCBO
DEQ/NWR/Dewey Darold
Joshua Marquis, Clatsop County District Attorney

Exhibit A

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

October 8, 1999

ADRIAN MALO
HCR 63, BOX 260
SEASIDE, OR 97138

Re: WQ - Clatsop County
Forest Lake Resort
File No. 109808
WPCF Application

Dear Mr. Malo:

You requested a meeting with a DEQ hydrogeologist regarding issues at the Forest Lake Resort. On October 6, 1999, you and Bob Sweeney met with Bob Baumgartner, Lucinda Bidleman and me. At that meeting you agreed to respond back to us by October 18, 1999, to let us know who is to be the WPCF applicant and permittee. You also promised to give your decision on your course of action and timelines for accomplishing it. We have tentatively agreed to meet again on October 21.

There is an existing Mutual Agreement and Order (MAO) with Caleb Siaw, and Dr. Siaw also submitted an incomplete WPCF permit application. Until the current MAO is terminated, Dr. Siaw is bound by its terms, and we cannot make agreements with you or issue a WPCF permit to you.

If you propose to construct and operate the park's systems, you need to be the applicant/permittee. You can either have the Siaw application transferred to you or you can fill out a new application and pay the associated fees. You need to submit a written proposal in full of your schedule for development including time lines for completion of interim tasks.

At our meeting, you requested to be able to install a temporary septic system to serve the spaces currently connected to holding tanks. Dr. Siaw is bound by the MAO until such time as the Order is terminated or modified. The park is currently out of compliance. For us to consider your request we will need to issue both a new permit and either modify the existing order or issue a new order. It should be obvious that we can not have two orders with conflicting requirements and schedules. For us to proceed, you need to either demonstrate

Exhibit B

that you are the owner of the Park thereby eliminating Dr. Siaw's interest or have Dr. Siaw request modification of the Order.

When you have verified who is to be the applicant and we have a complete application from that party and a clear proposal for development, we can draft a permit for review as well as a MAO to be issued with the permit. The permit and MAO will contain compliance schedules for providing additional information as well as for constructing the proposed upgrades.

If you have any questions about the WPCF permit application, you can contact me at (503) 229-6653 or toll free at 1-800-452-4011x6653. For questions about groundwater issues, contact Lucinda Bidleman at (503) 229-5273 on Tuesdays or Wednesdays.

Sincerely,

Anne Cox, R.S.
Natural Resource Specialist
Water Quality Source Control
Northwest Region

cc: DEQ/Regional Operations/Charley Herdener
DEQ/NCBO
DEQ/NWR/Lucinda Bidleman
Dr. Caleb Siaw
19075 SE Foster Road
Boring, Oregon 97009
Environmental Management Systems, Inc.
4080 SE International Way Suite B106
Milwaukie, Oregon 97222

Exhibit B

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 12, 1999

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
INCOMPLETE APPLICATION
CONCEPTUAL PLANS

You are still the owner of record for Forest Lake Resort. If someone else is the owner, please provide us with documentation of the transfer of ownership. You are also the only applicant for the Water Pollution Control Facilities Permit that is required for the repair and operation of the park's sewage disposal systems. The application is still incomplete. This letter addresses only the issues pertaining to your incomplete application.

By Notice dated August 16, 1999, you were requested to submit a conceptual plan for the park system upgrade and a hydrogeologic characterization. We have not received from a qualified professional any information pertaining to groundwater issues.

Bob Sweeney, Environmental Management Systems, recently submitted a conceptual plan on behalf of Adrian Malo for a 2000 square foot recirculating gravel filter (RGF) followed by a 2,000 square foot bottomless sand filter (BSF) to be constructed in the tent area between the road and berm in the southwest corner of the park. This has been proposed as a system to serve the full park, with units to be connected to the system over a 5 year period.

There is no indication that you were involved with the attached conceptual plan or that you would agree to construct or operate such a system. However, since you are the permit applicant and owner of the park, we are responding back to you with our evaluation of this concept. We have the following comments:

- There is not sufficient area for placement of both the RGF and the BSF in this area. We confirmed this by site visit. The RGF would need to be located elsewhere in the park.

- The site for the BSF will need to be surveyed to demonstrate that the 50 foot setback from the river can be met. To show this, you will need to submit a to-scale map showing the surveyed

Exhibit C

locations of the BSF site, berm, Necanicum River, flood plain, channels and high water line adjacent to the site. We cannot permit a BSF here until this work is completed.

- The BSF at 2,000 square feet would be loaded at a rate of 5 gallons per square foot per day. The BSF size needs to be maximized in order to reduce the potential for hydraulic overloading of the filter. In fact, we would expect little or no treatment of the RGF filtrate to occur at the proposed loading rate.

- We are requiring that the influent to the BSF be denitrified and disinfected, as the BSF cannot be expected to provide significant treatment. The BSF and RGF are essentially aerobic systems and cannot be expected to denitrify, as this requires anaerobic conditions. The construction plans will need to include post RGF treatment to reduce total nitrogen to no more than 5 mg/l and to disinfect, probably via ultra violet (UV) disinfection or other means.

- The Department expects the full park to be connected to the proposed upgrade upon completion of construction.

With the above stated levels of required treatment, we can reduce the requested groundwater information to that found in a Preliminary Groundwater Assessment. Such an assessment will necessarily include, however, a determination of the seasonal variations of both depth to and quality of the groundwater at the site. If you propose and build a system that adequately reduces or removes pollutants to the point that the hydrogeological assessment demonstrates it will comply with OAR 340-40-030, the Department may determine that groundwater concentration limits and ongoing monitoring of groundwater will not be required.

Submit detailed plans for construction of the proposed upgrade and a Preliminary Groundwater Assessment within 30 days of the date of this letter. The WPCF permit cannot be issued until these exhibits have been submitted and approved.

If you have any questions about the WPCF permit application, you can contact me at (503) 229-6653. For questions about groundwater issues, please contact Lucinda Bidleman at (503) 229-5273 on Tuesdays or Wednesdays.

Sincerely,

Anne Cox

Anne Cox, R.S.
Natural Resource Specialist
Water Quality Source Control
Northwest Region

Enclosures—conceptual plan

Exhibit C

cc: DEQ/Enforcement
DEQ/NCBO
DEQ/NWR/Lucinda Bidleman
Environmental Management Systems, Inc.
4080 SE International Way Suite B106
Milwaukie, Oregon 97222
Adrian Malo
HCR 63 Box 260
Seaside, Oregon 97138

Exhibit C

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of	)
	) No. WQ/D-NWR-99-168
CALEB SIAW	) MOTION TO JOIN INDISPENSABLE PARTY
	) MOTION TO POSTPONE AND CONSOLIDATE
Respondent.	)

Comes now Respondent Caleb Siaw, by and through his attorney, Michael J. Kavanaugh, and moves this court to join A&D Trust, and/or Adrian and Danny Malo, the owners of the property. Respondent relies upon OAR 137-003-0520 and ORCP 29.

Currently, the DEQ seeks to enforce an agreement which requires a non-owner of the property, Respondent, to obtain a permit to construct a sewage treatment facility on property he no longer owns and to make monthly reports which the trust was in control of and for work which the trust actually performed.

The DEQ has been aware of the sale of the property to the trust since the meetings leading to the execution of the MAO before the court at this time. Respondent was unrepresented by an attorney when he signed the MAO as an "owner", *after* the sale of the property.

Without the addition of the current owner(s) of the property complete relief cannot be

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

granted. As late as Friday, January 11, 2002, Jeff Bachman indicated the DEQ was still looking for a resolution of the sewage problem as the best outcome of the hearing. In fact, it is the policy of the State to encourage and move toward improvement. ORS 454.607.

Without the owner(s) involvement in any decision, the property cannot be affected and multiple litigation is probable. While Respondent is the legal title holder, A&D Trust is the equitable title holder and both parties are necessary for a determination. Cf. Egaas v. Columbia County, 66 Or App 196, 673 P2d 1372 (1983).

The A&D Trust should be served and joined in this action.

Postponement & Consolidation

Currently, a hearing of some type is set with respect to the A&D Trust in March, 2002, I believe. This matter should be consolidated with that hearing.

In the alternative, Respondent moves to postpone the current hearing to allow it to join the A&D Trust in this matter.

Respondent further relies upon the affidavit attached hereto.

Dated this 12th day of January, 2002.

Michael J. Kavanaugh OSB 75205
Attorney for Respondent

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of	) No. WQ/D-NWR-99-168
CALEB SIAW	) AFFIDAVIT OF CALEB SIAW
Respondent.	

STATE OF OREGON)
) ss.
County of Multnomah)

I, Caleb Siaw, do on oath depose and state as follows:

1) I was the owner of the Forest Lake Resort originally the Riverside Lake Resort, from approximately Nov., 1997, to April 12, 1999 when the property was sold on contract to A&D Trust, Danny Mal Trustee.

2) This sale had been in the works for three months. Adrian Malo had in fact attended all of the meetings with the DEQ regarding sewer improvements that had occurred up to that time.

3) The State, DEQ, was aware that the property was being sold to the Malo's as his presence at the meetings had been explained, naming him the purchaser.

4) Since April, 1999, the Malo's Trust has collected the rents, paid the taxes, and to the best of my knowledge, done the tank pumping required for the temporary tanks.

5) As the offending use has been eliminated, the Malo Trust has been the entity which has

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

evicted or moved out the three (of eight) remaining tenants that utilized the leaking portion of the system. See FED Judgment attached regarding last tenant - unit 36A.

6) The Trust began paying me on the contract of sale in November, 2000. At or about that time, the purchaser price was renegotiated downward from $900,000 to $550,000.00 to allow the Trust to repair the sewage system.

7) I have tried personally and through my attorney to work with the State and the Trust to resolve the situation, but have met with little help from the Trust.

I am unable to make any needed repairs to the property as I am no longer the owner.

8) When I signed the MAO in May, 1999, I was not represented by an attorney. I did not realize that the State would ignore my sale of the property. I did not intend to mislead the State in any way in executing the document as the "owner" as I believed everyone was fully aware of the sale of the property based on Adrian Malo's involvement as the purchaser. I signed the document because I thought I had to do so based upon my earlier misdemeanor criminal conviction sentence.

Caleb Siaw

Subscribed and Sworn to before me this 12th day of January, 2002.

Notary Public for Oregon

OFFICIAL SEAL
MICHAEL J. KAVANAUGH
NOTARY PUBLIC-OREGON
COMMISSION NO. 341127
MY COMMISSION EXPIRES DEC. 12, 2004

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

FOREST LAKE RESORT BY & THROUGH A & D TRUST,
Plaintiff(s);

vs.

PEGGY ALLEN & ALL OTHERS,
Defendant(s).

JUDGMENT/
~~**STIPULATED JUDGMENT**~~
(RETURN OF PERSONAL PROPERTY/FED)

CASE NO.: 01-8252

On **December 6, 2001**, this case came for trial in an FED action.
The following parties appeared:
(✓) Plaintiff(s) per Don Bauske (✓) Defendant(s) per in person ( )Neither

(✓) Judgment of restitution for possession of premises for plaintiff(s)
Address: **85203 HWY 101 SPACE 36-A, SEASIDE, OREGON 97138**

( ) Effective Immediately (✓) Effective January 31, 2002

( ) Return of personal property. It is hereby ordered that the Sheriff seize and deliver to the Plaintiff/Defendant the property: ( ) Listed on attached sheet
( ) Described as follows: _____

( ) Judgment of dismissal ( ) with ( ) without prejudice.

Findings: Defendant testified that she did not have problems with septic/sewer system although other tenants had problems. Plaintiff testified through Mr. Malo he provided notice to vacate on August 1st, 2000 and also discussed moving defendants home to another space in the park. Defendant acknowledges the discussion of moving the home but denies notice of August 1, 2000.

(✓) ~~Stipulated Judgment~~:

( ) Case continued to _____ at _____ A.M. / P.M., Room _____
( ) It is further ordered: _____

( ) Defendant shall file an Answer no later than _____ A.M. / P.M. on _____, 2_____. If an Answer is not filed by the above stated time a Judgment for Restitution of Premises will issue effective _____ A.M. / P.M. on _____, 2_____.

MONEY JUDGMENT

Judgment Creditor: Forest Lake Resort/A&D Trust Attorney: Don Bauske
Judgment Debtor: Peggy Allen Attorney: _____
Amount of Money Judgment: _____ Prevailing Party Fee: 85.00
Costs and Disbursements: 75.00 Interest Rate: 9% %

Dated this 6TH day of December, 2001.

Philip T. Nelson
Circuit Court Judge

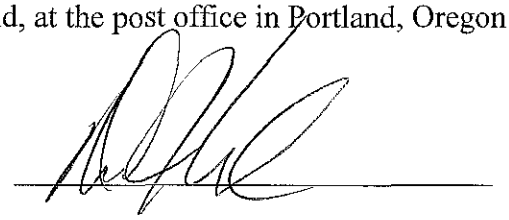
* Other tenants who were in the closed portion of the park received notice and moved their homes. The court finds that Defendant received the written notice, Ex 1, on August 1, 2000. Pursuant to ORS 90.630(8), she had 365 days to vacate. She did not do so. Defendant had her home listed for sale during the one year period but was not [illegible]

CERTIFICATE OF MAILING

I hereby certify that I served the Motion to Join Indispensable Party, Motion to Consolidate or Postpone and Affidavit, on the following persons:

Jeff Bachman
Dept. of Environmental Quality
811 S.W. Sixth Ave.
Portland, Or. 97204

on January 15, 2002, by fax and by depositing a true copy of the above item, addressed as shown above, on said date in the U.S. Mail, postage prepaid, at the post office in Portland, Oregon.



Oregon
John A. Kitzhaber, M.D., Governor

Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6993

April 15, 2002

Ken L. Betterton
Hearing Officer Panel
875 Union Street NE
Salem, OR 97311

In the matter of: Caleb Siaw, M.D.
Case No. WQ/D-NWR-01-99-186

Dear Mr. Betterton:

The Department is in receipt of your Proposed Order dated April 5, 2002. The Department, under Oregon Administrative Rule (OAR) 137-003-0655, requests that you revise and reissue the Proposed Order to clarify two of the rulings.

First, page 17 of the Order, in reference to the Department's decision to impose one daily civil penalty for each month in which a violation occurred, states "Without statutory or administrative rule authority to impose penalties for each month, DEQ cannot impose such penalties." Is it your decision that ORS 468.140 requires DEQ to assess a penalty for only one day of violation or for every day of violation, but does not confer discretion on the Department to assess penalties for an intermediate number of days of violation?

Second, page 18 of the Proposed Order states "Because the administrative rules provide for an enhanced penalty for a continuous violation, it is more appropriate to address the continuous nature of the violation in the penalty calculation, rather than impose a separate penalty for each day of violation." Is it your decision that, when a violation spans more than one day, OAR 340-012-045(1)(c)(C) requires that the penalty be based on a single day as aggravated by the "O" factor, or is this a case-specific decision? If it is case specific, what is your basis in fact and law that "it is more appropriate to address the continuous nature of the violation in the penalty calculation."

The time requirements to appeal the Order to the Environmental Quality Commission should run from the date the revised Order is issued. If you have any questions, please feel free to call me at (503) 229-5950.

Sincerely,

Jeff Bachman
Environmental Law Specialist

cc: Michael J. Kavanaugh, 4930 SE Woodstock, Portland, OR 97206

Ref No.: G60602
Case No: 02-GAP-00014
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: 04/05/02
Mailed by: DVL

HEARING DECISION

CALEB SIAW, MD
19075 SE FOSTER RD

BORING OR 97009 9653

DEPT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

MICHAEL J. KAVANAUGH
4930 SE WOODSTOCK BLVD

PORTLAND OR 97206 6163

JEFF BACHMAN
DEQ
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:	)	
	)	**PROPOSED ORDER**
	)	
Caleb Siaw, M.D.,	)	Hearing Officer Panel Case No. G60602
	)	Agency Case No. WQ/D-NWR-99-186[1]
	)	CLATSOP COUNTY
Respondent.	)	

HISTORY OF THE CASE

The Department of Environmental Quality (DEQ) issued a Notice of Assessment of Civil Penalty pursuant to ORS 468.126 through 468.140, ORS Chapter 183, and OAR Chapter 340, Divisions 11 and 12, to respondent Caleb Siaw, M.D., on July 31, 2001. The notice alleges that from or about September 15, 1999 respondent violated ORS 468.140(1)(c) and committed two Class I violations by violating an order of the Environmental Quality Commission, by violating Paragraph 15.B(1) of a Mutual Agreement and Order (MAO), Case No. WQ/D-NWR-99-186 (*sic*), by failing to submit the information required to complete his application for a WPCF permit (violation 1), and that respondent violated Paragraph 15.A(4) of MAO Case No. WQ/D-NWR-99-212 (*sic*)[2], by failing to submit holding tank pumping receipts for the previous month (violation 2). The notice assessed a civil penalty in the amount of $373,580 for violation 1.

On or about August 8, 2001 respondent filed a written request for hearing and answer. Respondent generally denied the allegations in the notice, and asserted as affirmative defenses that he had negotiated with DEQ to have the tanks pumped in accordance with the Mutual Agreement and Order, that he ceased to use the offending area for sewage disposal, removed the homes hooked up to the offending area and did not violate sewage disposal laws, and that on or about April 8, 1999 respondent sold the property on contract, and no longer owned the property.

On January 15, 2002 respondent filed a Motion to Join Indispensable Party/Motion to Postpone and Consolidate. Respondent sought to join A & D Trust, and/or Adrian and Danny Malo (*sic*) , the owners of the property. Respondent cited OAR 137-003-0520[3] and ORCP 29[4] to

---

[1] The Notice of Assessment of Civil Penalty incorrectly names the case number as "WQ/D-NWR-99-168." The correct case number is "WQ/D-NWR-99-186." The correction to the case number was made by interlineation at the beginning of the hearing on January 17, 2002.

[2]The July 31, 2001 notice incorrectly names the case number for the MAO. The correct case number is "WQ/D-NWR-98-212," not "WQ/D-NWR-99-186" or "WQ/D-NWR-99-212."

support his motion. The Oregon Rules of Civil Procedure (ORCP) do not apply to administrative proceedings in Oregon.[5] OAR 137-003-0520 addresses the filing of documents, motions, pleadings and orders, and the deadline for filing such papers with the Hearing Officer Panel, not joining other parties to contested case hearing. OAR 137-003-0005[6] does provide for the participation in a hearing by other persons who have an interest in the outcome of an agency's contested case. That other person must file a petition with the agency at least 21 days prior to the date set for the hearing. No such party filed a timely petition here, rather respondent filed a motion to join another party. Moreover, motions must be filed at least seven calendar days before the date set for the hearing (scheduled in this case for January 17, 2002). OAR 137-003-0630.[7] Respondent filed its motion two days before the hearing, and did not comply with the rule. Respondent's Motion to Join an Indispensable Party/Motion to Postpone and Consolidate was denied.

A hearing was held in Portland, Oregon on January 17, 2002 before Ken L. Betterton, administrative law judge. Jeff Bachman, environmental law specialist, represented DEQ. Respondent appeared and was represented by Michael J. Kavanaugh, attorney at law. Anne Cox and Les Carlough testified as witnesses for DEQ. Robert Sweeney, Adrian Malo and Caleb Siaw, M.D., testified as witnesses for respondent.

A telephone conference hearing was held on February 13, 2002 to address additional documents as exhibits for the record. Jeff Bachman represented DEQ at the telephone conference hearing. Michael J. Kavanaugh represented respondent.

The parties filed their written closing arguments on March 1, 2002, at which time the record closed.

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[3] OAR 137-003-0520 provides, in part:

> (1) Unless otherwise provided by these rules, any documents, correspondence, motions, pleadings, rulings and orders filed in the contested case shall be filed as follows:
> * * * * *
> (b) With the Hearing Officer Panel or assigned hearing officer after the agency has referred the case to the Panel and before the assigned hearing officer issues a proposed order,
> * * * * *.

[4] ORCP 29 provides for the "Joinder of Persons Needed for Just Adjudication."

[5] ORCP 1 provides:

> **A Scope**. These rules govern procedure and practice in all circuit courts of this state, * * *.

[6] OAR 137-003-0005 provides, in part:

> (1) Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties.
> (2) A person requesting to participate as a party or limited party shall file a petition with the agency at least 21 calendar days before the date set for the hearing * * *.

[7] OAR 137-003-0630 provides, in part:

> (1) Unless otherwise provided by statute or rule, all motions shall be filed in writing at least seven days before the date of the hearing * * *.

EVIDENTIARY RULING

Administrative Law Judge Exhibits A through E, respondent Exhibits 1 through 7 from the hearing on January 17, 2002 and Exhibits 8 through 13 from the telephone hearing on February 13, 2002, and DEQ Exhibits 100, 105 through 107, and 109 through 128 were admitted into the record without objection. Respondent objected to DEQ Exhibits 101, 102, 103 104, and 108 as not relevant. Those exhibits are relevant to DEQ's allegations. Respondent's objections were overruled and the exhibits were admitted into the record. Respondent objected to Exhibit 129 as repetitive, and to Exhibit 130 as cumulative and contradictory.[8] Exhibits 129 and 130 met the standards for admissibility in ORS 183.450 and were admitted into the record.

ISSUES

(1) Did respondent violate ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit information required to complete his application for a WPCF permit, and if so, what penalty should be imposed under OAR Chapter 340, Divisions 11 and 12?

(2) Did respondent violate ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit holding tank pumping receipts for the previous month?

FINDINGS OF FACT

(1) Respondent Caleb Siaw purchased real property in his own name in Clatsop County, Oregon, generally described as HCR 63, Box 225, Seaside, Oregon, from Sama H. Banki by warranty deed dated October 30, 1996, and recorded November 4, 1996 in Clatsop County land records. (Ex. 9.) The property consists of several acres near the Necanicum River, outside Seaside, Oregon, that had operated for many years as a mobile home and RV park (known as Forest Lake Resort), including about 44 spaces for mobile homes and RVs, and a laundry. (Ex. 100.) The owner of the property typically has rented the spaces to tenants and collected the rents for income. A space rents for about $200 per month.

(2) The resort operated for many years before April 1, 1995, when DEQ adopted OAR 340-071-0130, which requires a Water Pollution Control Facilities (WPCF) permit for any system or combination of systems with a total sewage flow design capacity greater than 2,500 gallons per day. The average sewage flow for a single family residence is 250 gallons per day. The resort used a collection of drain fields and septic tanks to dispose of sewage at the resort. Because the resort, as well as many other similar facilities, operated prior to the effective date of

---

[8] ORS 183.450 sets forth the standards for the admissibility of evidence in contested cases. ORS 183.450 states: In contested cases:

> (1) Irrelevant, immaterial or unduly repetitious evidence shall be excluded * * *. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible. * * *.

OAR 340-071-0130, those existing sewage disposal systems were "grandfathered in," without the need to apply for and obtain a WPCF permit, so long as the sewage system was not expanded or needed repairs.[9]

(3) DEQ received complaints from tenants at Forest Park Resort as early as 1996 that the sewage disposal system at the resort property did not function properly, causing raw sewage to pond and spill onto the ground surface near tenants' residences. DEQ mailed notices of noncompliance to Sama Banki in June and in August 1996. On December 17, 1997, DEQ mailed a notice of noncompliance to respondent by certified mail, informing him of complaints from tenants about sewage spilling onto the ground surface, about repeated violations of environmental protection laws, and that he needed to apply for a WPCF permit no later than January 1, 1998 and submit plans and specifications for a sewage treatment system by February 1, 1998. (Ex. 101.)

(4) On February 5, 1998, DEQ mailed respondent another notice of noncompliance by certified mail, informing him that he still had not filed his application for a WPCF permit, and that DEQ inspectors had visited the resort on several recent occasions and seen evidence of continued sewage disposal system failures on the property. (Ex. 102.) Respondent submitted an incomplete application for a WPCF permit to DEQ on February 17, 1998. DEQ returned the application to respondent on March 13, 1998, with a letter explaining to him what he needed to submit in order to make his application complete. (Ex. 103.) On March 24, 1998 DEQ mailed respondent another notice of noncompliance by certified mail, reciting the prior notices of

---

[9] OAR 340-071-0130(16) provides, in part:

> (a) Owners of existing systems meeting the system descriptions in (15)(a), (b), and (d) through (g) of this rule are not required to apply for a WPCF permit until such time as a system repair, or alternation is necessary;
> * * * * *.

OAR 340-071-0130(6) defines "alternation" as "expansion or change in location of the soil absorption facility or any part thereof. Minor alternation is the replacement or re-location of a septic tank or other components of the system other than the soil absorption facility."

OAR 340-071-0130(115) defines "repair" to mean:

> "[i]nstallation of all portions of a system necessary to eliminate a public health hazard or pollution of public waters created by a failing system. Major repair is defined as the replacement of the soil absorption system. Minor repair is defined as the replacement of a septic tank, broken pipe, or any part of the on-site sewage disposal system except the soil absorption system."

OAR 340-071-0130(15) provides:

> Operating Permit Requirements. The following systems shall be constructed and operated under a renewable EPCF permit, issued pursuant to OAR 340-071-0162.
>
> > (a) Any system or combination of systems located on the same property or serving the same facility with a total sewage flow design capacity greater than 2,500 gallons per day.
> > * * * * *.

noncompliance and the numerous complaints and sewage disposal law violations at the resort. (Ex. 104.)

(5) Respondent submitted another application for a WPCF permit on March 31, 1998. (Ex. 105.) DEQ notified respondent in writing on April 30, 1998 that his application was incomplete because he failed to submit an approvable plan for the upgrade and repair of the sewage disposal system. (Ex. 106.)

(6) Respondent and Richard Johnson, who was in the process of purchasing the resort property from respondent, met with DEQ natural resource specialist Anne Cox on August 27, 1998 to discuss the resort and what needed to be done to bring the sewage disposal system into compliance. DEQ outlined the various options for correcting the sewage disposal system and confirmed the options in a letter to respondent and to Johnson on September 1, 1998. (Ex. 107.) No contract of sale or other document of conveyance from respondent to Johnson was recorded in county deed records at that time. On July 30, 1998, Caleb Siaw, Trustee for Caleb Siaw, P.C., Trust, signed a memorandum of sale to sell the Forest Lake resort property Richard K. Johnson and Joyce M. Johnson, husband and wife. (Ex. 13.) The Johnsons made a few payments on the contract, then stopped, and let the property go back to respondent. The memorandum of sale was recorded in Clatsop County land records on October 8, 1998. (*Id.*) On August 16, 2000, the Johnsons signed a bargain and sale deed, deeding the property back to Caleb Siaw, P.C., Trust. (Ex. 12.) That deed was recorded in the Clatsop County land records on August 25, 2000. (*Id.*)

(7) DEQ mailed another notice of noncompliance by certified mail to respondent on September 21, 1998, again outlining the past notices of noncompliance of DEQ statutes and administrative rules, and requesting that respondent submit a completed application for a WPCF permit. (Ex. 108.)

(8) During the late summer of 1998, DEQ referred environmental law violations at Forest Lake Resort to the Clatsop County District Attorney for criminal prosecution. The Clatsop County grand jury indicted respondent for water pollution in the first degree on September 10, 1998. Respondent entered a plea of no contest to water pollution in the second degree in Clatsop County Circuit Court on January 22, 1999. The court sentenced respondent to probation, with conditions, among others, that he pay a fine of $10,060 and "make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material." (Ex. 110.)

(9) On December 9, 1998 DEQ received a copy of a rough drawing of a plan for a sewage disposal treatment plant at Forest Lake Resort from Robert Sweeney, a consultant with Environmental Management Systems, on respondent's behalf. DEQ could not accept the plans because they lacked a site evaluation.

(10) On December 15, 1998 DEQ issued and served respondent with a Notice of Violation Department Order and Assessment of Civil Penalty, Case No. WQ/D-NWR-98-212, alleging three violations of environmental laws and seeking, among other relief, civil penalties in

the amount of $6,291, and requiring respondent to submit to DEQ by the 15th of each month the temporary holding tank pumping records for the preceding month. (Ex. 109.) Respondent requested a hearing on the notice, but did not appear at the hearing scheduled for July 8, 1999. A default order was taken against respondent on August 25, 1999. (Ex. 130.) The order established one Class I and two Class II violations. (*Id.*)

(11) DEQ's Anne Cox met with respondent and Sweeney on February 23, 1999, to explain to them what respondent needed to do to bring the sewage disposal system at Forest Lake Resort into compliance with the law. The February 23, 1999 meeting led to DEQ and respondent entering into a Mutual Agreement and Order (MAO), Case No. WQ/D-NWR-98-212, signed by respondent on May 10, 1999, and adopted as a Final Order by the Environmental Quality Commission on May 20, 1999. (Ex. 114.) On page 1 of the MAO, respondent acknowledged that he owned or operated Forest Lake Resort, although he wrote the words "former owner" below his signature on the last page of the order. (*Id.* at 7.) Respondent wrote in some changes on the MAO, and initialed those changes. (*Id.* at 1, 3, 5-6.) The signatory for DEQ did not initial the changes made by respondent when the signatory signed the MAO.[10]

(12) The MAO did not resolve the Notice of Assessment of Civil Penalty and Department Order in Case No. WQ/D-NWR-98-212, that DEQ issued to respondent on December 15, 1998. (*Id.* at 2.) The MAO authorized respondent to construct and use holding tanks for temporary sewage collection until such time as respondent could install a DEQ approved permanent sewage disposal system with a WPCF permit. (*Id.* at 3-4.) The MAO ordered respondent in Paragraph 15.B(1) to complete a WPCF permit within 30 days of being notified by DEQ if DEQ determined a WPCF permit was needed based on a soil evaluation. Respondent also had the responsibility pursuant to the terms of the MAO to provide a groundwater study and a narrative and conceptual plan for the upgrade. (*Id.* at 4.) Within 30 days of submitting a complete WPCF permit application, respondent agreed to submit acceptable plans and specifications for a sewage system to serve the entire facility. (*Id.* at 5.) The MAO ordered respondent in Paragraph 15.A(4) to submit the holding tank pump records by the 15th day of the month for the preceding month. (*Id.* at 3-4.) Respondent acknowledged in the MAO that he had actual notice of the contents and requirements of the MAO, and that failure to fulfill any of the provisions of the MAO would constitute a violation of the MAO and subject himself to civil penalties. (*Id.* at 6.)

(13) On June 7, 1999, DEQ mailed a letter to respondent reminding him that he needed to get his temporary holding tanks approved by June 20, 1999, that he needed to submit his holding tank pump records for May by June 15, and that he needed to complete an application for a WPCF permit within 30 days of the signing of the MAO. (Ex. 115.)

(14) In August 1999, respondent provided DEQ with monthly pump receipts through June 1999. On August 16, 1999 DEQ mailed respondent a notice of noncompliance and notice of incomplete application for a WPCF permit. (Ex. 116.) DEQ noted in its August 16, 1999

[10] Because both parties did not initial the changes respondent wrote on the MAO, those changes have no legal effect.

notice that respondent had provided a soil evaluation report on July 22, 1999, nine weeks after the parties had signed the MAO. (*Id.*)

(15) On November 12, 1999 DEQ mailed respondent a notice that his application was incomplete, and that he still had not submitted a conceptual plan for the resort's system upgrade or a ground water report. (Ex. 117.) In the notice, DEQ reminded respondent that he was still the only applicant on the application for the WPCF permit and that he still was the owner of record for Forest Lake Resort, but that if he had transferred ownership of the property, he needed to provide DEQ with proof of the transfer of ownership. (*Id.*)

(16) On March 10, 2000 DEQ mailed a notice of noncompliance to respondent, informing him that although he still had not submitted the required upgrade plans, DEQ had gone ahead and prepared a draft permit on review, to be followed by a period for public comment. The notice went on to inform respondent that his failure to submit the plans previously requested constituted a violation of the MAO, and that the violation had been referred for enforcement action by DEQ. (Ex. 118.)

(17) DEQ issued a notice of noncompliance to respondent by certified mail on April 10, 2001, informing respondent that he was in violation of the MAO for not submitting a complete application for a WPCF permit, and for not submitting the monthly pump receipts for the period July 1999 through March 2001. (Ex. 119.) In a telephone conversation with DEQ's Anne Cox on April 12, 2001, respondent stated that he no longer owned the Forest Lake Resort property. DEQ checked the county land records and could find no record that the property had been transferred out of respondent's name as an individual.

(18) During the spring of 1999, respondent told other individuals, including individuals with DEQ, that he was in the process of selling the Forest Lake Resort property. (Ex. 125.) Adrian Malo attended several meetings between DEQ and respondent during 1999 regarding the property, the WPCF permit, and the various sewage disposal problems on the property. Malo owned farm property across the highway from respondent's property. About May 1999, Malo told DEQ personnel that he was in the process of purchasing the Forest Lake Resort property from respondent, and that ownership transferred to him on May 1, 1999. (Ex. 126.) DEQ personnel asked Malo to provide them with documentation showing the transfer of ownership, but Malo never did so.

(19) About April 12, 1999, respondent signed a real estate contract as "Caleb Siaw/Trustee for Caleb Siaw, P.C. Trust," to sell the Forest Lake Resort property to "Danny Mal, Trustee for A & D Trust." (Ex. 1, 11.)[11] The contract recited that possession of the property would transfer to Mal on April 10, 1999. (*Id.*) The contract recited a purchase price for the property and terms as follows:

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[11] Exhibit 1, submitted by respondent at the January 17, 2002 hearing, and Exhibit 11, submitted at the February 13, 2002 telephone hearing, differ. Exhibit 1 consists only of the first two pages of the real estate contract. Exhibit 11, also has the two Exhibits, "A and B," attached to it. Moreover, some unknown person wrote information on the first page of Exhibit 11 about "maps" and a "tax account" that does not appear on Exhibit 1.

"$900,000, with a $100,000 contract assignment paid on execution, and the $800,000 balance payable at $4,000 per month for 30 months at 6% interest, thereafter payable at 8% interest for the remainder of the contract, with the first payment due May 15, 1999, and a like payment each month thereafter." (*Id.*)

Respondent received his first payment on the contract in November 2000, followed by a few sporadic later payments. An Exhibit B, "Stipulations to the Contract," provided, among other clauses, that "seller agrees to pay and obtain DEQ approval on all septic systems within described property." (Ex. 11 at 4.) The contract required the seller: [w]hen the purchase price is fully paid and upon request and upon surrender of this agreement, to deliver a good and sufficient deed conveying the premises in fee simply unto the buyer." (Ex. 1 at 2.)

(20) Danny Mal is the brother of Adrian Malo.[12] Adrian Malo had no ownership interest in A & D Trust, although he managed property for the trust. A & D Trust was set up for children of the Mal/Malo families. Neither respondent, Adrian Malo nor Danny Mal provided DEQ with a copy of the real estate contract of sale during the spring or summer of 1999. Respondent's wife provided a copy of the real estate contract, without the exhibits attached, to DEQ by fax in December 1999. (Ex. 128.)[13] No contract or memorandum of contract sale between respondent or Caleb Siaw, P.C., Trust and Danny Mal, Trustee for A & D Trust was filed in Clatsop County land records prior to December 2001.

(21) DEQ could have dealt with a purchaser of the Forest Lake Resort property on the WPCF permit and installation of a new sewage disposal system, if DEQ had been provided with documentary proof that respondent had actually sold the property to another party.

(22) Respondent had a stroke in November 1999. The stroke affected his memory and caused other health problems that limited respondent's ability to deal with the Forest Lake Resort property. Respondent lived in Boring, Oregon, southeast of Portland, between 1997 and 2002.

(23) On August 7, 2000 Caleb Siaw, as grantor, executed a quitclaim deed to "Caleb Siaw, Trustee for the Caleb Siaw, P.C. Trust, *nunc pro tunc*, July 1998." (Ex. 10.) That deed was recorded in Clatsop County land records on November 8, 2000. (*Id.*)

(24) Respondent spent between $18,000 and $20,000 to install temporary holding tanks for sewage on the resort property. Respondent spent approximately $20,000 prior to May 1, 1999 to pump sewage from the property. Respondent purchased two mobile homes from tenants and moved those homes from the property, thereby unhooking them from the existing sewage

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[12] It is unclear why the two brothers spell their last names differently.

[13]The copy of the real estate contract faxed by respondent's wife consists of the first two pages only, and appear identical to Exhibit 1.

disposal system. Respondent also unhooked an additional eight dwellings from the disposal system, in an effort to try and relieve some of the problems with the existing system.

(25) Bob Sweeney submitted a report on December 14, 1999 to respondent estimating the total cost of $247,000 to complete a sewage treatment facility on the Forest Lake Resort property that would comply with the MAO and DEQ requirements. (Ex. 120.) The useful life of such a sewage treatment system is about 20 years.

(26) In October 2000, DEQ's Anne Cox received information that a local developer was negotiating to purchase the Forest Lake Resort property from respondent, but that respondent turned down the offer as too low.

(27) DEQ calculated the economic benefit ("EB") portion of the civil penalty by using the U.S. Environmental Protection Agency's BEN computer model, that calculates the economic benefit from the avoidance or delay gained by noncompliance. The BEN model uses a cost of money factor (i.e., interest rate), a tax rate, and the useful life the treatment facility to calculate the approximate dollar value of the economic benefit gained through noncompliance. DEQ calculated the EB value as $191,700.

(28) Respondent did not submit any receipts for the pumping of the temporary holding tanks for the resort property after the one submitted for the month of June 1999, submitted on July 11, 1999.

CONCLUSIONS OF LAW

(1) Respondent violated ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit information required by DEQ to complete his application for a WPCF permit. A civil penalty in the amount of $198,600 should be imposed against respondent for this violation.

(2) Respondent violated 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit holding tank pumping receipts for the previous month.

OPINION

DEQ alleges that respondent violated ORS 468.140(1)(c) by violating an Mutual Agreement and Order of the Environmental Quality Commission signed by respondent and DEQ in May 1999, by failing to submit the information required to complete his application for a WPCF permit, and by failing to submit holding tank pumping receipts for the previous month. ORS 468.140 provides:

> (1) In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of violation in the amount prescribed by the schedule adopted under ORS 468.130.

* * * * *

(c) Any rule or standard or order of the Environmental Quality Commission adopted or issued pursuant to * * * ORS chapters 468, 468A and 468B.

* * * * *.

ORS 183.450(2) provides, in part, "The burden of presenting evidence to support a position in a contested case rests on the proponent of the fact or position." As set forth above, DEQ allege that respondents violated ORS 468.140(1)(c) by violating an order of the Environmental Quality Commission by failing to submit the information required to complete his application for a WPCF permit, and by failing to submit holding tank pumping receipts. The burden is on DEQ, as the state agency making the allegations, to prove the alleged violations. *Garton v. Real Estate Commissioner*, 127 Or App 340, 342 (1994).

Respondent argues that he did not own the property during the time period relevant to the violations, and hence, cannot be held liable for the civil penalty. DEQ brought the Notice of Assessment of Civil Penalty against respondent as an individual. Respondent held legal title to the real property in his own name starting in October 1996, when he purchased the property from Sama Banki. A warranty deed conveying the property to respondent was recorded in Clatsop County on November 4, 1999. Respondent Caleb Siaw, and Caleb Siaw, P.C., Trust, were and are two different legal entities. Caleb Siaw, P.C., Trust did not hold title to the Forest Lake Resort property in April 1999, when the purported sale occurred from Caleb Siaw, P.C., Trust to Danny Mal, Trustee for A & D Trust, as reflected by the real estate contract in Exhibit 1. A legal entity cannot convey title to or an interest in real estate that the entity does not own at the time of the purported transfer. On August 7, 2000, Caleb Siaw, as grantor, executed a quitclaim deed to "Caleb Siaw, Trustee for the Caleb Siaw, P.C., Trust, *nunc pro tunc*, July 1998." That deed was recorded in the Clatsop County land records on November 8, 2000. Respondent argues that this quitclaim deed established ownership in the real property in Caleb Siaw, P.C., Trust retroactively from August 2000 or November 2000 to July 1998, thereby giving Caleb Siaw, P.C., Trust title that the trust could then convey retroactively to Danny Mal, Trustee for A & D Trust, in April 1999.

The term *"nunc pro tunc"* refers to the power of a court to amend records of its judgments by correcting mistakes or supplying omissions in judgments, and to apply such amendments retroactively by an entry *nunc pro tunc*. A *nunc pro tunc* order merely recites court action previously taken, but not properly or adequately recorded. A *nunc pro tunc* order may not be used to accomplish something which ought to have done but was not done.[14] Respondent cites no authority, nor can the administrative law judge find any authority, for the proposition than an individual or a person, as opposed to a court, can execute documents *nunc pro tunc* to effectively transfer an interest in real property retroactively to an earlier date when the transferee had no legal interest whatsoever in the property. Such a power would allow an enormous opportunity for mischief. Caleb Siaw, P.C., Trust did not hold title to the property in April 1999 when the trust purportedly sold the property on contract to Danny Mal, Trustee for A & D Trust.

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[14] 46 Am Jur 2d , *Judgments*, section 156 *et seq* (1994).

Moreover, the legal validity of the real estate contract for the purported sale from Caleb Siaw, P.C. Trust to Danny Mal, Trustee for A & D Trust is questionable. The sale supposedly took place in April 1999, yet the purchaser made no monthly payments on the contract until November 2000, about 18 months later. The terms of the contract called for a monthly payment of $4,000 at 6% interest for 30 months, then at 8% percent interest on a contract balance of $800,000. At 6% interest the monthly payments would just pay the interest on an annual basis (6% x $800,000 = $48,000 a year interest = $4,000/month x 12 months = $48,000). At 8% interest the monthly payments would fall substantially short of meeting the interest payments on an annual basis (8% x $800,000 = $64,000 a year interest versus $4,000/month x 12 months = $48,000 payments). In other words, the contract would never pay out. Respondent signed the real estate contract in his name as an individual, not as trustee for his professional corporation. Below his signature is the space for the notary public to acknowledge his signature. Danny Mal signed his name as "trustee" in that space. Below Mal's signature is a stamp for the notary public, a Kristina Mae Long, Commission No. 056992, who did not sign in the space on the instrument where the acknowledgment before the notary public should have been made.

A real estate contract to convey fee title to real property at a time more than 12 months from the date of execution of the instrument must be acknowledged in the manner provided for acknowledging deeds, and must be recorded by the conveyor within 15 days after the instrument is executed.[15] A real estate contract to sell the property to Danny Mal was not recorded before December 2001. The real estate contract signed by respondent to sell the property from Caleb Siaw, P.C., Trust to Mal as trustee, contains language that "seller agrees when the purchase price is paid in full, to deliver a good and sufficient deed conveying the premises in fee simple to the buyer." (Ex. 1 at 2.) The real estate contract needed to be acknowledged in the manner provided for acknowledgement of deeds, in other words, before a notary public.[16] A county clerk shall not record an instrument that conveys an interest in real property unless the instrument contains the

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[15]ORS 93.635 provides:

> (1) All instruments contracting to convey fee title to any real property, at a time more than 12 months from the date that the instrument is executed and the parties are bound, shall be acknowledged in the manner provided for acknowledgment of deeds, by the conveyor of the title to be conveyed. Except for those instruments listed in subsection (2) of this section, all such instruments, or a memorandum thereof, shall be recorded by the conveyor not later than 15 days after the instrument is executed and the parties are bound thereby.
>
> (2) The following instruments contracting to convey fee title to any real property may be recorded as provided in subsection (1) of this section, but that subsection does not require such recordation of:
>
> (a) Earnest money or preliminary sales agreements;
>
> (b) Options; or
>
> (c) Rights of first refusal.

[16] ORS 93.410 provides, in part:

> Except as otherwise provided by law, deeds executed within this state, * * * shall be signed by the grantor and shall be acknowledged before any judge of the Supreme Court, circuit judge, county judge, justice of the peace or notary public within the state.* * *.

original signature of the officer before whom the acknowledgement was made.[17] The real estate contract between Caleb Siaw, P.C., Trust and Danny Mal, Trustee for A & D Trust was not properly acknowledged and could not have been recorded under Oregon law.

Moreover, respondent acted and conducted himself between 1999 and mid 2001 like he owned and operated the property. Respondent spent money to make improvements to the property and at least address some of the sewage disposal problems. Respondent signed the MAO on May 10, 1999 in his own name as an individual, not in a representative capacity as trustee for a trust. Respondent acknowledged in the MAO that he owned or operated the property. He acknowledge that the Environmental Quality Commission had the power to impose a civil penalty against him for violations of Oregon law. Respondent also acknowledged in the MAO that the Environmental Quality Commission could issue a final order against him requiring him to comply with the terms of the MAO. At no time during the spring or summer of 1999 did respondent provide DEQ with any evidence that he had sold the property, that he no longer had no legal interest in the property, or that he should no longer be bound by the terms of the MAO. DEQ had the authority to substitute a new owner into the WPCF permit process, if DEQ had received concrete evidence that a new owner had taken over the property. Neither respondent, Adrian Malo nor Danny Mal provided DEQ with any such evidence during 1999 or 2000. Further, even if the April 1999 contract of sale from Caleb Siaw, P.C., Trust to Danny Mal, Trustee for A & D Trust could be viewed as a bona fide sale at the time from the trust to a purchaser, respondent agreed in the stipulations in Exhibit B to the contract "to pay for and obtain DEQ approval on all septic systems within the described property." Finally, if respondent had truly sold the property to Danny Mal in April 1999, why would respondent try to sell the property to another buyer in October 2000?

As holder of legal title to the real property between 1998 and at least late 2001, respondent was the owner of the property for purposes of the onsite sewage disposal rules in OAR chapter 340, division 71, and the requirements in the MAO. OAR 340-071-0100(92) defines "owner" to mean any person who alone, or jointly, or severally with others:

> (a) Has legal title to any single lot, dwelling, dwelling unit, or commercial facility; or
> (b) Has care, charge, or control of any real property as agent, executor, executrix, administrator, administratrix, trustee, commercial lessee, or guardian of the estate of the holder of legal title; or
> (c) is the contract purchaser of real property.

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[17] ORS 93.804 provides, in part:

> (1) * * * [w]hen any instrument presented for recording conveys an interest in real property and is required by law to be acknowledged or proved, a county clerk shall not record the instrument unless the instrument contains the original signature of the persons executing the instrument and the original signature of the officer before whom the acknowledgement was made.
> * * * * *.

NOTE: Each such person as descried in subsections (b) and (c) of this section, thus representing the legal title holder, is bound to comply with the provision of theses rules as if he were the legal title holder.

DEQ proved that respondent had both legal title to the real property, as well as the care and control of the property, and that he is legally bound by the terms of the MAO he signed.

For all the above reasons, DEQ is not prevented from enforcing the MAO against respondent because of the purported sale of the property to Danny Mal, Trustee for A & D Trust in April 1999. Respondent failed to establish that he did not own the property during the relevant time period, and that DEQ cannot enforce the MAO against him.

Paragraph 15.B(1) of the MAO required respondent to complete an application for a WPCF permit within 30 days of when DEQ notified him that it determined a WPCF permit was needed based on the soil evaluation. Respondent submitted a soil evaluation on July 22, 1999, nine weeks after he signing the MAO, and about five weeks after he should have submitted the evaluation. DEQ determined that a WPCF permit was necessary. On November 12, 1999 DEQ mailed a notice to respondent requesting him to submit a groundwater study and a conceptual plan for the resort, information also required by the MAO. Respondent never submitted the requested groundwater information, despite continued requests from DEQ on March 10, 2000 and April 10, 2001. Respondent violated Paragraph 15.B(1) of the MAO by not completing a WPCF permit application as required.

Respondent argues in his answer that he resolved the existing sewage disposal problem at the resort because he ceased to use offending areas for sewage disposal and removed some homes hooked up to the offending area. However, the MAO did not provide for permanent alternative ways to solve the problems at the resort. Respondent was not free to ignore terms of the MAO which he signed. Although the MAO allowed respondent to install holding tanks, those were temporary measures that did not relieve respondent from complying with the MAO to install a permanent sewage disposal system for the entire resort property. Arguably respondent solved some problems at the resort by removing some homes from the site and unhooking them from the existing sewage disposal system. However, that did not solve the problems for other sites and the overall system on the property. Terms of the MAO required respondent to complete an application for a WPCF permit, if certain written conditions were met. DEQ determined that those conditions were met. Respondent failed to comply with the terms of the MAO by not completing the WPCF permit application as he agreed to do.

The MAO required respondent to submit, on a monthly basis, receipts for the pumping of the temporary holding tanks on the resort property. Respondent did not submit any receipts after submitting the receipt for the month of June 1999 on July 11, 1999. Respondent presented no evidence as to why he did not submit the receipts that could have constituted a legitimate reason not to submit them. Respondent violated ORS 468.140(1)(c) by violating the MAO by not submitting the monthly pump receipts. A violation of an order of the Environmental Quality

Commission is a Class I violation. However, DEQ did not seek to impose a civil penalty for violation 2 in the Notice of Assessment of Civil Penalty.

Civil Penalty

DEQ seeks a civil penalty against respondent in the amount of $335,700 for violation 1.[18] DEQ seeks no civil penalty for violation 2.

OAR 340-012-0045 sets forth the procedure and formula for calculating a civil penalty. 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. A violation of a term or condition of a Environmental Quality Commission Order for onsite sewage disposal is a Class I violation under OAR 340-012-0060(1)(a).[19] OAR 340-012-0045 addresses the magnitude for a violation.[20] If no selected magnitude for a specific violation is stated, the magnitude is moderate, unless DEQ can make specific findings. Here, DEQ made no specific findings for the magnitude of the violation. The magnitude is moderate. A Class I, moderate magnitude violation carries a base penalty of $3,000 under OAR 340-012-0042.[21]

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[18] *See* DEQ's closing argument submitted March 1, 2002. The Notice of Assessment of Civil Penalty sought a civil penalty against respondent in the amount of $373,580. (Ex. B.)

[19] OAR 340-012-0060 provides, in part:

> Violations pertaining to On-Site Sewage Disposal shall be classified as follows:
> (1) Class One:
> (a) Violation of a requirement or condition of a Commission or Department order;
> * * * * *.

[20] OAR 340-012-0045 provides, in part:

> (1) When determining the amount of civil penalty * * * the Director shall * * *:
> (a) Determine the class of a violation and the magnitude of each violation:
> (A) The class of a 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:
> * * * * *.

[21] OAR 340-012-0042 provides, in part:

> * * * [t]he amount of any civil penalty shall be determined through the use of the following matrices in conjunction with the formula contained in OAR 340-012-0045:
> (1)(a) $10,000 Matrix:
> (A) Class I:
> * * * * *
> (ii)Moderate--$3,000
> * * * * *.
> (b) * * *. This matrix shall apply to the following:
> * * * * *

"P" is respondent's prior significant action(s), and receives a value of 3 under to OAR 340-012-0045(1)(c)(A)(iv)[22] and OAR 340-012-0030(1)[23] and (14).[24] Respondents had two prior significant actions, the Environmental Quality Commission Order in Case No. WQ/D-NWR-98-212, issued August 25, 1999, and his criminal conviction for water pollution in the second degree. The Order established one Class I and two Class II violations, for a total of two Class I equivalent violations. OAR 340-012-0030(1). Respondent was convicted of water pollution in the second degree under ORS 468.943. OAR 340-012-0045(1)(c)(A)(v) assigns a value of 4 for a "P" factor if the prior significant actions consist of three Class I equivalent violations. Because DEQ failed to cite respondent's prior conviction as a prior significant action in the Notice of Assessment of Civil Penalty, citing only the Environmental Quality Commission Order instead, DEQ chooses to use 3 for the "P" factor because the prior actions cited in the Notice consisted of two Class I equivalent violations.

"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 according to OAR 340-012-0045(1)(c)(B)(ii)[25] because respondent failed to correct the problems of the failing sewage systems at the resort.

(B) Any violation related to ORS 164.785 and water quality statutes, rules, permits or orders, violations by a person having or needing a Water Pollution Control Facility Permit, violations of ORS Chapter 454 and on-site sewage disposal rules by a person performing sewage disposal services;
* * * * *.

[22]OAR 340-012-0045 provides for determining the amount of civil penalty. Subsection (1)(c)(A) states:
(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. * * *. The values for "P" and the findings which support each are as follows:
* * * * *
(iv) 3 if the prior significant actions are two Class One or equivalents;
* * * * *.

[23] OAR 340-012-0030 provides, in part:
Unless otherwise required by context, as used in this Division:
(1) "Class One Equivalent" or "Equivalent," which is used only for the purposes of determining the value of the "P" factor in the civil penalty formula, means two Class Two violations, one Class Two and two Class Three violations, or three Class Three violations.
* * * * *.

[24] OAR 340-012-0030(14) provides:
(14) "Prior Significant Action" means any violation established either with or without admission of a violation by payment of a civil penalty, or by a final order of the Commission or the Department, or by judgment of a court.

[25] OAR 340-012-0045(1)(c)(B) provides * * * 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.

"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 according to OAR 340-012-0045(1)(c)(C)(ii)[26] because the violation existed for more than one day.

"R" is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act by the respondent, and receives a value of 6 according to OAR 340-012-0045(1)(c)(D)(iii)[27] because respondent acted intentionally. "Intentional means conduct by a person with a conscious objective to cause the result of the conduct." OAR 340-012-0030(10). DEQ alleges in its Notice of Assessment of Civil Penalty that respondent acted flagrantly. "Flagrant means any documented violation where the Respondent had actual knowledge of the law and had consciously set out to commit the violation." OAR 340-012-0030(7). DEQ argues that its notifications to respondent on June 7, November 12, 1999, March 10, 2000 and April 10, 2000, that he had violated the MAO and needed to correct the sewage disposal system at the resort, support its contention that respondent acted flagrantly. However, respondent had a stroke in November 1999. DEQ mailed at least two of those notices after respondent had his stroke. The stroke affected respondent's memory and physical ability to deal with major problems like what existed at the resort property. Respondent lived southeast of Portland, many miles from the resort property on the Oregon coast. "Flagrant" conduct contemplates that a respondent knowingly sets out with the purpose of violating the law. Respondent's conduct was more consistent with that of a person who knew he had an obligation to correct the problem, became overwhelmed by the magnitude of the problem, in part due to his health problems, and knowingly failed to follow through like he should. DEQ failed to prove that respondent consciously *set out* to commit the violation. Respondent's conduct was more consistent with someone who acted intentionally.

"C" is respondent's cooperativeness in correcting the violation and receives a value of 2 according to OAR 340-012-0045(1)(c)(E)(iii)[28] because respondent was uncooperative and failed

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[26] OAR 340-012-0045(1)(c)(C) provides * * *. 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.

[27] OAR 340-012-0045(1)(c)(D) provides * * *. 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.

[28] OAR 340-012-0045(1)(c)(E) provides * * *. The values for "C" and the finding which supports each are as follows:

to correct the violation or minimize the effects of the violation. The violation continued for many months. Respondent had ample opportunity to correct the problem, although it may have been more difficult for him to do after he had his stroke.

DEQ elected in its Notice of Assessment of Civil Penalty to impose separate penalties for each month of violation.[29] ORS 468.140 provides for a civil penalty for each day of violation (here about $7,000 a day).[30] DEQ correctly points out that imposing a separate penalty for each day of violation for about 18 months would result in a civil penalty in the millions of dollars. Such a penalty would be unrealistic for the violation, the value of the real property in question, and would be unenforceable as a practical matter. DEQ contends such a penalty would be inconsistent with DEQ's enforcement policy goals in OAR 340-012-0026.[31] DEQ acknowledges that it has no statutory or administrative rule authority to impose a separate penalty for each month, but argues it can do so because "nothing in statute or rule prohibits it either." (DEQ closing argument at 13.) If DEQ can without any statutory or rule authority select each month for a separate penalty in this case, nothing would prevent DEQ from selecting in another case to impose a penalty on a weekly, biweekly, bimonthly, quarterly or annual basis. The regulated community would have no way of knowing on what basis in a particular case DEQ would choose to impose a penalty. DEQ could impose civil penalties on an *ad hoc* basis. Without statutory or administrative rule authority to impose separate penalties for each month, DEQ cannot impose such penalties.

(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.

[29] The Notice of Assessment of Civil Penalty assesses a penalty for each month from September 15, 1999. DEQ's closing argument contends a penalty should be imposed for each month from December 1999.

[30] ORS 468.140 provides, in part:

(1) In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of violation in the amount prescribed by the schedule adopted under ORS 468.130.
* * * * *
(c) Any rule or standard or order of the Environmental Quality Commission adopted or issued pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.305 to 454.535, 454.605 to 454.755, ORS chapter 467 and ORS chapters 468, 468A and 468B.
* * * * *
(2) Each day of violation under subsection (1) of this section constitutes a separate offense.
* * * * *.

[31] OAR 340-012-0026 provides:

(a) Obtain and maintain compliance with the Department's statutes, rules, permits and orders;
(b) Protect the public health and the environment;
(c) Deter future violators and violations; and
(d) Ensure an appropriate and consistent statewide enforcement program.

DEQ chose in its Notice of Assessment of Civil Penalty not to impose a penalty for each day, as it had statutory authority to do under ORS 468.140. Respondent was not put on notice that such an enormous penalty for each day of violation would be sought against him. OAR 340-012-0045(1)(c)(C) allows DEQ in the penalty calculation for the "O" factor to consider whether the violation was repeated or continuous, with a value of 0 for a violation that existed for one day (OAR 340-012-0045(1)(c)(C)(i)), or a value of 2 for a violation that existed for more than one day (OAR 34-012-0045(1)(c)(C)(ii)). Because the administrative rules provide for an enhance penalty for a continuous violation, it is more appropriate to address the continuous nature of the violation in the penalty calculation, rather than impose a separate penalty for each day of violation.

"EB" is the approximate dollar sum of the economic benefit that the respondent gained through noncompliance according to OAR 340-012-0045(1)(c)(F) and receives a value of $191,700, based on the testimony DEQ presented at the hearing. Respondent argues that he spent money to pump tanks and perform other maintenance on the existing sewage disposal system at the resort. Those expenditures were not made in compliance with the terms and conditions of the MAO to install the total system for the resort consistent with a WPCF permit. Only costs expended in connection with the system to satisfy the WPCF permit could have reduced the EB calculation. The full EB value should be sued in the penalty calculation.

The civil penalty is calculated as follows:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (3 + 0 + 2 + 6 + 2)] + $191,700
= $3,000 + ($300 x 13) + $191,700
= $3,000 + $3,900 + $191,700
= $198,600

PROPOSED ORDER

I propose that the Commission enter an order as follows:

(1) Find that respondent violated ORS 468.140(1)(c) by violating Paragraph 15.B(1) of the Mutual Agreement and Order he signed in May 1999 by failing to submit the information required to complete his WPCF permit, and impose a civil penalty in the amount of $198,600 for this violation; and

(2) Find that respondent violated ORS 468.140(1)(c) by violating Paragraph 15.A(4) of the same Mutual Agreement and Order by failing to submit holding tank pump receipts for the previous month, but impose no civil penalty for this violation because DEQ requested none.

Dated this 5 day of April, 2002.

Ken L. Betterton
Administrative Law Judge
Hearing Officer Panel

Appeal Procedures

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:

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 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.*

STATE OF OREGON - HEARING OFFICER PANEL - EMPLOYMENT DEPARTMENT

CERTIFICATE OF SERVICE

RE: In the matter of CALEB SIAW, MD
Reference No. G60602

I HEREBY CERTIFY that I have made service of copies of the foregoing Notice of Hearing upon the following parties by causing them to be mailed in the United States Post Office at Salem, Oregon, on 04/05/02 by United States Mail and Certified Mail, a true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

VIA CERTIFIED MAIL & FIRST CLASS MAIL:

CALEB SIAW, MD
19075 SE FOSTER RD
BORING OR 97009 9653

MICHAEL J. KAVANAUGH
4930 SE WOODSTOCK BLVD
PORTLAND OR 97206 6163

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

JEFF BACHMAN
DEQ
811 SW 6TH AVE
PORTLAND OR 97204 1334

Denise Lewis
Contested Case Coordinator
Hearing Officer Panel
(503) 947-1313 (voice)
(503) 947-1795 (fax)

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: CALEB SIAW, M.D. Respondent.	)	HEARING MEMORANDUM No. WQ/D-NWR-99-186 CLATSOP COUNTY

This Hearing Memorandum is offered in support of Notice of Assessment of Civil Penalty (Notice) No. WQ/D-NWR-99-186, issued July 31, 2001, to Caleb Siaw, M.D., by the Department of Environmental Quality (the Department).

INTRODUCTION

Dr. Siaw acquired the Forest Lake Resort mobile home park (the park) in 1997. During 1997, after Dr. Siaw acquired the park, and in early 1998, the Department documented that one or more of the on-site sewage disposal systems at the park were failing and required repair or alteration. See Exhibits 101 through 104. As a result of the failures, Dr. Siaw was required, pursuant to Oregon Administrative Rule (OAR) 340-071-0130(16)(a) and 15(a), to obtain a Water Control Pollution Facility (WPCF) permit that would cover all of the on-site sewage disposal systems at the park.[1] On March 31, 1998, Dr. Siaw filed an application for a WPCF permit for the

[1] OAR 340-071-0160(16)(a) states that "owners of existing systems meeting the system descriptions in (15)(a),(b), and (d) through (g)are not required to apply for a WPCF permit until *such time as a system repair or alteration is necessary.*" (Empahsis added). "Alteration" and "Repair" are defined in OAR 340-071-0100(6) and (115), respectively, and clearly encompass the work necessary to stop the surfacing of sewage at the park. Dr. Siaw was required to put all the systems at the park under one permit pursuant to OAR 340-071-130(15)(a), which states that an operating permit (WPCF) is required for "any system or *combination of systems* located on the same property or serving the same facility with a total sewage flow design capacity greater than 2,500 gallons per day." DEQ Environmental Specialist Anne Cox testified that the average sewage flow for a single family residence is 250 gallons per day and that the park has spaces for 44 mobile homes and a laundry facility.

park. The Department determined that the application was incomplete and repeatedly requested that Dr. Siaw submit the information necessary to complete the application. See Exhibits 106, 107, and 111.

On January 22, 2000, Dr. Siaw pled guilty in Clatsop County Circuit Court to a criminal charge of water pollution in the second degree stemming from a violation occurring as a result of the failing sewage disposal systems at the park. The Court sentenced Dr. Siaw to probation and a fine. See Exhibit 110. Paragraph 3 of the Court's Order of Conviction and Sentence stated that as a condition of his probation, Dr. Siaw was required "to make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material."

In order to specifically identify for Dr. Siaw the tasks necessary to bring the park into compliance, and establish an enforceable schedule for completing those tasks, the Department negotiated and entered into Mutual Agreement and Order No. WQ/D-NWR-99-186 (the MAO) with Dr. Siaw on May 20, 1999. See Exhibit 114. The MAO is a Final Order of the Environmental Quality Commission. Paragraph 15(B)(1) of the MAO required Dr. Siaw to "complete a WPCF permit application within 30 days of being notified by DEQ if DEQ determines a WPCF permit is needed based on the soil evaluation." On November 12, 1999, the Department sent Dr. Siaw a letter indicating that, based on a proposal submitted by Dr. Siaw's consultant, Robert Sweeney, a WPCF permit was feasible for the park. The letter further instructed Dr. Siaw to submit additional information in order to complete his WPCF application. See Exhibit 117. Specifically, the letter requested the groundwater information described in, and required by, Paragraph 15(B)(1)(a)(i) of the MAO. Despite further requests from the Department (See Exhibits 118 and 119), Dr. Siaw never submitted the groundwater data necessary to complete his permit application and to comply with the MAO.

On July 31, 2001, the Department assessed Dr. Siaw a $373,580 civil penalty for failing to comply with the Mutual Agreement and Order.

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DISCUSSION

Dr. Siaw does not contest the fact that he did not submit the information required to complete his WPCF permit application in accordance with Paragraph 15(B)(1) of the MAO. In his answer to the Notice, Dr. Siaw instead raised two defenses. First, he argued that he sold the park to the A & D Trust on April 8, 1999, and therefore was never required to comply with the MAO. See Exhibit C, Answer and Request for Hearing, Paragraphs 6 and 7. Second, Dr. Siaw alleges that he was not required to comply with the terms of the MAO because he has brought the park into compliance by measures other than those set forth in the MAO. Exhibit C, Paragraphs 2, 4, and 5.

Ownership of the Park

Dr. Siaw asserts that the MAO is a nullity. He argues that the Department was without authority to require Dr. Siaw to perform the obligations in the MAO because Dr. Siaw neither owned nor controlled the property when the MAO was signed.[2] He further argues that a mistake of law was made because neither Dr. Siaw nor the Department properly considered what they were signing in their haste to resolve the matter.

As an initial matter, the Department gives full consideration to all orders it enters. Dr. Siaw's admitted failure to do the same does not create a mistake of law. From the Department's perspective, no mistake was made. Furthermore, Dr. Siaw clearly read the MAO closely enough to make several small handwritten notations and changes to the MAO (MAO Paragraphs 4, 5, 14, and 16). Dr. Siaw also acknowledged that he had "actual notice of the contents and requirements of this MAO and that failure to fulfill any of the requirements of the MAO" would subject him to civil penalty. (MAO Paragraph 18).

Moreover, Dr. Siaw has already waived his right to challenge the MAO. He expressly acknowledged the authority of the Environmental Quality Commission to issue an abatement

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[2] Suffice it to say that the parties do not agree regarding when Dr. Siaw delivered actual or meaningful notice of the April 1999 real estate contract to the Department. That issue need not be resolved here.

order that addressed future violations when he executed the MAO. (MAO Paragraph 13). Having done so, he should not be allowed to challenge that authority now.

Nonetheless, Dr. Siaw did and still does own the property. The real estate contract upon which Dr. Siaw relies was unperformed, or executory, when the MAO was signed. It is still unperformed. Dr. Siaw will retain legal title to the property until the purchase price is paid in full. *See e.g., Bedortha v. Sunridge Land Co., Inc.*, 312 Or 307, 311 (1991); *Ochs v. Albin*, 137 Or App 213, 220 (1995).

As the holder of legal title, Dr. Siaw has at all relevant times been the "owner" of the property for purposes of the on-site sewage disposal rules in OAR 340, Division 71. Pursuant to OAR 340-071-0100(92), the "owner" includes "any person who, alone or jointly, or severally with others:

> "(a) Has legal title to any single lot, dwelling unit, or commercial facility; *or*
> (b) Has care, charge, or control of any real property * * *; *or*
> (c) Is the contract purchaser of the real property.
> NOTE: Each such person as described in subsections (b) and (c) of this section, thus representing the legal title holder, is bound to comply with these rules as if he were the legal title holder." (Emphasis added.)

Although a contract purchaser or commercial tenant is bound to comply with the on-site sewage disposal rules to the same extent as the holder of legal title, the holder of legal title is *not* relieved of his obligations under Division 71 merely by entering into the operative contract or lease. In fact, this joint and several liability framework seeks to avoid precisely the problem identified here. An owner is not entitled to hide behind a wholly unperformed contract to avoid his obligations. Here, the record reflects that as few as four or five monthly payments have been made in the three years since it was purportedly executed.[3] The purchaser is clearly in default

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[3] Frankly, it is not even clear that there was a final contract in place before the MAO was signed. There may not be a final contract in place now. The record does not appear to include a contract signed by both parties and the terms of the contracts delivered to the Department in December 1999 and January 2002 appear to differ. Further, the terms of the "contract" more accurately reflect a lease, not a sale. (The purchaser's monthly payments do not even cover the interest due.) In addition, Dr. Siaw's continued efforts to sell the property after the contract

(and has been for well over two years). Dr. Siaw cannot evade his obligations under the MAO or the on-site sewage disposal rules simply by avoiding his contractual remedies against his purchaser (e.g. forfeiture, foreclosure) and retaking the property.

In addition, Dr. Siaw and his contract purchaser (or lessee) have already established that, as between the two of them, Dr. Siaw will be responsible for bringing the park in to compliance with the on-site sewage disposal rules. Dr. Siaw committed to make the required improvements to the system in the very same contract he now claims prevents him from performing the MAO. Stipulation B to the real estate contract expressly provides that "Seller agrees to *pay for and obtain* DEQ approval on all septic systems within the described property." See Exhibit 1. Having represented to his purchaser that he would in fact do the required work, he cannot reasonably argue that "he was not in control of nor had a right to improve" the sewer system on the property.[4] (Respondent's memo at 3.)

Furthermore, Respondent introduced no evidence at hearing that he was excluded from the property or otherwise prevented from taking the action necessary to comply with the MAO. On the contrary, Dr. Siaw's consultant, Robert Sweeney, continued to work on developing plans for a new on-site sewage disposal at the park until at least November 1999, some seven months after the land sale contract was allegedly executed. At hearing, Dr. Siaw testified that he continued to pay the consultant because that was the arrangement he had with the trustee.

Finally, regardless of whether Dr. Siaw owned the property at the time the MAO was executed, there is no question that Dr. Siaw owned the property when the violations occurred.

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was purportedly signed further undermine his argument that he was not the "owner" of the subject property.

[4] In addition, the MAO itself included a force majeure provision by which the time for performance would be extended if Dr. Siaw demonstrated that an event beyond his reasonable control caused or might cause a delay or deviation in the work. (MAO Paragraph 16.) There is no indication that the necessary work was impeded by the purchaser or any other event outside of Dr. Siaw's control.

Even if one could evade his or her responsibilities under Division 71 by the simple expedient of signing a lease or contract (a proposition the Department rejects), the MAO resolved the violations occurring after September 1998 (i.e. after those cited in the December 15, 1998 Notice of Noncompliance), including the ongoing violations that would continue to occur until the tasks in the MAO were accomplished. Dr. Siaw does not dispute that he owned the property until at least April 1999.

In sum, the Department had the authority to enter into the MAO. By voluntarily entering into an agreement to abate ongoing violations attributable to his historic failure to repair and maintain the system, Dr. Siaw waived both his opportunity to challenge the Department's authority to enter the MAO and his opportunity to contest the violations resolved by the MAO. By voluntarily entering into the agreement, he also undertook personal, contractual obligations that he has failed to perform. As a result, the Department is entitled to enforce the order and to seek payment of civil penalties. (MAO Paragraphs 17 and 18.)

Compliance with On-Site Sewage Disposal Rules

In his Answer to the Notice, Dr. Siaw alleges that the MAO does not "contain all of the solutions and or alternatives to solving the existing [sewage disposal] problem" at the park. See Exhibit C, Paragraph 2. In furtherance of this claim, Siaw alleges he has "ceased the use of the offending area for sewage disposal, removed the homes hooked up to the offending area, and now maintains a manufactured home park which does not violate sewage discharge laws, rules and regulations." Exhibit C, Paragraph 5.

Whether there may have been another means of bringing the park into compliance with the on-site sewage disposal rules is irrelevant. The fact is that the Environmental Quality Commission ordered Dr. Siaw to undertake the compliance measures set forth in the MAO and Dr. Siaw expressly waived his right to contest that Order. Dr. Siaw is not at liberty to treat the requirements of the Commission Order as if they were mere suggestions, nor is he entitled to unilaterally change the terms of the Order.

Even assuming for the sake of argument that Dr. Siaw was free to implement other measures in lieu of those mandated by the MAO, those actions he did take have not brought the park into compliance. Specifically, Dr. Siaw installed two holding tanks as interim replacements for two disposal systems, each of which served four trailer spaces, that had completely failed. The leases for the tenants of the spaces were later terminated and the spaces are allegedly now vacant. Abating the problem at these eight spaces, however, does not obviate Dr. Siaw's obligation to obtain a WPCF permit for the entire park. Pursuant to OAR 340-071-0130(16)(a) and (15)(a), once any one system at the park required repair or alteration, the entire park had to be brought under a single WPCF permit.

Under OAR 340-071-0130(1), the Department has the discretion to require Dr. Siaw to replace all of the systems at the park with a new on-site sewage disposal system before issuing the required WPCF operating permit.[5] Because (1) the systems at the park are at the end of, or past, the average useful life of an on-site sewage disposal system; (2) there are chronic problems with multiple systems at the park, not just those replaced by the holding tanks; and (3) Dr. Siaw's history of noncompliance with on-site sewage disposal regulations, the Department determined that repair of the existing systems was insufficient to protect water quality and public health and that complete replacement was required.

In conclusion, Dr. Siaw is not in compliance with the on-site sewage disposal rules for the park because he has not obtained the required WPCF permit.

CIVIL PENALTY CALCULATION

The Notice assessed a civil penalty of $373,580. In preparation for the contested case hearing, and at the hearing itself, the Department became aware of several errors in how it calculated the penalty. What follows is an explanation of how the civil penalty was calculated and what revisions to the original penalty the Department suggests the Hearing Officer adopt in

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[5] OAR 340-071-0130(1) states that "If, in the judgment of the [Department], proposed operation of a system would cause pollution of public waters or create a public health hazard, system installation or use shall not be authorized."

his Proposed Order. Attached to this Memorandum is an Amended Exhibit 1 setting forth a revised civil penalty calculation.

Base Penalty

OAR 340-012-0045 establishes the procedure for determining a civil penalty. The first step in the process is to arrive at a base penalty by determining the class of the violation, the magnitude of the violation, and the appropriate civil penalty matrix to apply. Violating a term of a Commission Order addressing on-site sewage disposal is a Class I violation. OAR 340-012-0060(1)(a). OAR 340-012-0045(1)(a)(B) states the magnitude of the violation is determined by consulting the selected magnitudes in OAR 340-012-0090. If there is no selected magnitude for the specific violation, the magnitude is moderate, unless the Department can make specific findings. If the Department determines that that the violation had a significant adverse impact on the environment or posed a significant risk to public health, the magnitude is major. If, however, the Department finds the violation had no potential for or actual adverse impact on the environment, nor posed any risk to public health, or other environmental receptors, the magnitude is minor.

In this case, there is as yet no evidence of significant adverse environmental impact or significant risk to public health based on Dr. Siaw's failure to complete his WPCF application and build a new sewage disposal at the park. On the other hand, the Department could not find, for the same reasons that it is requiring Dr. Siaw to construct a new system[6], that his failure to obtain a WPCF permit and build a new system posed no risk of harm to the environment or public health. Therefore the Department found the magnitude of the violation to be moderate. Under OAR 340-012-0042(1)(b)(B), a Class I, moderate magnitude violation by a person having or needing a WPCF permit is assigned a base penalty of $3,000.

[6] Namely the age of the old systems, the past history of system failures, and Dr. Siaw's poor compliance record.

Aggravating and Mitigating Factors

To the base penalty are applied five potentially aggravating or mitigating factors, Dr. Siaw's prior enforcement history, his history in correcting prior violations, whether or not the violation was repeated or continuous, the cause of the violation, and Dr. Siaw's cooperativeness and efforts to correct the violation, minimize the effects of the violation, or his extraordinary efforts to prevent a recurrence of the violation.

The "P" or prior significant action factor is based on Dr. Siaw's past violations that have been determined by payment of a civil penalty, by final order of the Commission or the Department, or by the judgment of a court. OAR 340-012-0030(14). Dr. Siaw has two prior significant actions, the attached Commission Order in Case No. WQ/D-NWR-99-212, issued August 25, 1999, by Lawrence S. Smith, Hearing Officer, and his criminal conviction. The Order establishes one Class I and two Class II violations[7] for a total of two Class I equivalent violations. OAR 340-012-0030(1). Dr. Siaw was also convicted of Water Pollution in the Second Degree, ORS 468.943, which would be a Class I equivalent violation. See Exhibit 110. OAR 340-012-0045(1)(c)(A)(v) assigns a value of 4 for the P factor if the prior significant actions consist of three Class I equivalent violations. The Department, however, neglected to cite Dr. Siaw's conviction as a prior significant action, citing only the Commission Order. Therefore the appropriate value for the P factor should be 3 pursuant to OAR 340-012-0045(1)(c)(A)(iv), because the only prior action cited in the Notice consisted of two Class I equivalent violations.

The "H" or history factor is Dr. Siaw's "history in correcting prior significant actions or taking reasonable efforts to minimize the effects of the violation. OAR 340-012-0045(1)(c)(B).

[7] OAR 340-071-0130(3), discharging sewage directly or indirectly on the ground, a Class I violation pursuant to OAR 340-012-0060(1)(d). OAR 340-071-0215(1), failure to immediately repair a failing on-site sewage disposal system, a Class II violation pursuant to OAR 340-012-0060(2)(h). ORS 468B.080(1), failing to obtain DEQ approval for a sewage disposal system repair, a Class II violation pursuant to OAR 340-012-0060(2)(g).

The Department assigned a value of 0 to the H factor because of Dr. Siaw's failure to correct the problems of failing sewage systems at the park.

The "O" or occurrence factor is whether the violation is repeated or continuous. OAR 340-012-0045(1)(c)(C). The Department assigned a value of 0 for the O factor because it assessed separate penalties for multiple occurrences of the violation.

The "R" or causation factor is whether the violation resulted from an unavoidable accident, or Dr. Siaw's negligent, intentional, or flagrant conduct. OAR 340-012-0045(1)(c)(D). The Department assigned a value of 10 for the R factor because the violation was the result of Dr. Siaw's flagrant conduct. OAR 340-012-0030(7) defines "flagrant" as "any documented violation where the Respondent had actual knowledge of the law and had consciously set out to commit the violation."

Dr. Siaw's knowledge of the law is evidenced by his signing of the MAO, which included his express acknowledgement that he had actual knowledge of the contents of the MAO and that failure to comply with its requirements would subject him to civil penalty. See MAO Paragraph 18. The Department sent letters to Dr. Siaw on June 7 and November 12, 1999, reminding of his obligations under the MAO. See Exhibits 115 and 117. On March 10, 2000, and April 10, 2001, the Department notified Dr. Siaw that he was in violation of the MAO and requested that he take action to comply. Dr. Siaw failed to take any action. From these facts, the Department submits that it is more likely than not Dr. Siaw had actual knowledge of the law and that he consciously chose to ignore his legal obligations, thereby consciously setting out to commit the violation.

The "C" or cooperativeness factor is based on Dr. Siaw's cooperativeness and efforts to correct the violation. OAR 340-012-0045(1)(c)(E). The Department assigned a value of 2 for the C factor, pursuant to OAR 340-012-0045(1)(c)(E)(iii) as Dr. Siaw was uncooperative and he did not take reasonable efforts to correct the violation or minimize the effects of the violation. The uncontroverted evidence at hearing is that Dr. Siaw was given multiple opportunities to cooperate with the Department and correct the violation, but failed to do so.

The sum of the values for the five aggravating and mitigating factors is 15. In performing the calculation for the penalty assessed in the Notice, the Department made a math error and arrived at a sum of 14 for all factors. The Department will be bound by the sum used in its original calculation and use a total of 14.

Economic Benefit

The final step in the civil penalty is to calculate the economic benefit, if any, of the violation. OAR 340-012-0045(1)(c)(F) states that economic benefit is the "approximated" dollar sum of the economic benefit the Respondent gained through noncompliance. OAR 340-012-0045(1)(c)(F)(iii) allows the Department to determine a Respondent's economic benefit by using the U.S. Environmental Protection Agency's BEN computer model, and the Department elected to do so in Dr. Siaw's case.

BEN calculates economic benefit as either the avoided or delayed cost of compliance. In this case, Dr. Siaw failed to comply with the requirements set forth in Paragraph 15(B)(1), which required him to submit the information necessary to complete his application, submit plans and specifications for a sewage disposal system to serve the park, and construct the new system. If Dr. Siaw had complied with the first requirement he would then have been required to submit the plans and build a new system. By failing to complete his application, Dr. Siaw avoided the cost of constructing a new on-site disposal system for the park.

At hearing, the Department introduced evidence that Dr. Siaw's consultant, Robert Sweeney, in a letter dated April 27, 2000, provided Dr. Siaw with two options for a new system. See Exhibit 121. The costs of the two options were estimated at $206,700 and $248,200. Advanced Treatment Systems (ATS), Inc., developed detailed construction plans and specifications for the second system mentioned in Sweeney's letter and estimated the construction cost at $247,000. See Exhibit 120. In determining the economic benefit, the Department used the $247,000 avoided cost of constructing the ATS system. The Department selected the ATS estimate because it was based on fully developed plans and specifications, and

because it was somewhat conservative in that it did not take into account the additional avoided costs of permitting and operation and maintenance of the new system.

Initial application of the BEN model to the estimated avoided cost of $247,000 resulted in an economic benefit value of $215,180. In preparing for hearing, the Department recalculated the economic benefit and revised its assumption of the useful life of a new on-site disposal system from 15 years to 20 years. This revision reduced the economic benefit from $215,180 to $191,700.

It is important to note that the rules do not require the Department to determine economic benefit with a high degree of accuracy. Given the many variables in arriving at an avoided or delayed cost, the Commission has declared that economic benefit need only be the "approximated dollar sum of the economic benefit gained through noncompliance." OAR 340-12-0045(1)(c)(F). Based on the evidence entered into the record, the Department has established a credible and defensible economic benefit of $191,700.

At hearing and in his memorandum, Dr. Siaw argued that the Department overestimated economic benefit by failing to take into account amounts he expended to pump the holding tanks and perform other maintenance of the sewage disposal systems at the park. These expenses are irrelevant as they are not costs Dr. Siaw would have incurred in complying with the requirements of Paragraph 15(B)(1). Nor were they included as costs avoided in determining his economic benefit. The only avoided cost included in his economic benefit was the cost of constructing the ATS system. The only way to reduce the economic benefit is to show that Dr. Siaw paid some of or all of that specific cost. It is undisputed, however, that Dr. Siaw has failed to take any action whatsoever to physically construct the system designed by Mr. Sweeney and ATS and that expense is the only relevant cost in determining economic benefit.

Separate Penalties for Multiple Occurrences

Exhibit 1 of the Notice states that "Respondent has been in daily violation of the MAO since September 15, 1999. The Department elects to assess [a] civil penalty for each month in which a daily violation occurred." At hearing, the Hearing Officer questioned whether the

Department had the authority to assess a penalty for each month in which a daily violation occurred. ORS 468.140(2) states that each day of violation constitutes a separate offense, delegating to the Department the authority to treat each day of violation as a separate violation for which a separate penalty can be assessed. While there is nothing in statute or rule that specifically authorizes the Department to assess penalties on a monthly basis, there is nothing expressly prohibiting it either. There is nothing in statute or rule that states that the Department can elect to assess just a single daily penalty for multiple occurrences of the same violation, yet it often does so.

The Department has been vested with enforcement discretion to craft penalties that further the enforcement goals set forth by the Commission in OAR 340-012-0026(1). This rule states that that goal of enforcement is to (a) obtain and maintain compliance with the Department's statutes, rules, permits and orders; (b) protect the public health and the environment; (c) deter future violators and violations; and (d) ensure an appropriate and consistent statewide enforcement program." If the Department were required to assess a civil penalty for each occurrence of a violation this would result in civil penalties far in excess of what is necessary to achieve the Commission enforcement goals.

In Dr. Siaw's, case the Department elected to assess multi-day penalties because of his past history of noncompliance and his failure to take any meaningful steps towards compliance. At the same time, the Department did not assess a penalty for each occurrence of the violation because, in its judgment, the multi-million dollar penalty that would have resulted was not necessary to further the Commission's enforcement goals. Unless it can be proven that the Department abused its discretion in arriving at the civil penalty in this case, its decision to assess separate penalties for each month in which a violation occurred must be upheld.

///

///

///

///

Finally, in determining the number of months in which a daily violation occurred, the Department began with October 1999 in the civil penalty calculation attached to the Notice. The correct month is December 1999.[8]

CONCLUSION

For the reasons cited herein, the Hearing Officer should issue a Proposed Order assessing Dr. Siaw a $335,700 as calculated in the attached Amended Exhibit 1.

DATED this 1st day of March 2002.

Respectfully submitted,

HARDY MYERS
Attorney General

Lynne Perry, #90456
Assistant Attorney General
Of Attorneys for Department of Environmental Quality

Jeff Bachman,
Environmental Law Specialist
Office of Compliance and Enforcement
Department of Environmental Quality

[8] Based on proposal submitted to the Department on July 22, 1999, by Robert Sweeney, the Department issued a letter to Dr. Siaw on August 16, 1999, indicating that WPCF permitted facility at the park was feasible. Paragraph 15(B)(1) required Dr. Siaw to submit the information needed to complete his application within 30 days of receiving such notice. For that reason, the Department began with October 1999. However, the July 22, 1999 proposal later became unfeasible due to failure to acquire the right to use a neighboring property for a drainfield. Mr. Sweeney then submitted another proposal. On November 12, 1999, the Department notified Dr. Siaw that the new proposal could be permitted and requested that he complete his application within 30 days.

AMENDED EXHIBIT 1

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

VIOLATION: Violation of an Environmental Quality Commission Order in violation of Oregon Revised Statute 468140(1)(c).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0060(1)(a).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0045(1)(a)(B) as there is no selected magnitude in OAR 340-012-0090 for this violation

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 $3,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0042(1).

"P" is Respondent's prior significant action(s) and receives a value of 3, pursuant to OAR 340-012-0045(1)(c)(A)(v) because Respondent's prior significant action, Case No. WQ/D-NWR-98-212, consists of two Class I equivalent violations.

"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 did not take all feasible steps to correct a majority of all 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 0 as Respondent is being assessed separate penalties for separate occurrences of the violation.

"R" is the cause of the violation and receives a value of 10 as the violation was caused by flagrant conduct. Respondent negotiated the terms and voluntarily entered into the Mutual Agreement and Order (MAO) which is the subject of this penalty. The Department engaged in both written and verbal communication with Respondent regarding his noncompliance with the terms of the MAO. Respondent had actual knowledge of the law and consciously set out to commit the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 as Respondent was not cooperative and did not make reasonable efforts to correct the violation or minimize the effects of the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of $191,700. The economic benefit portion of the civil penalty formula is simply the monetary benefit the Respondent gained by not complying with the law. Economic benefit is not designed to punish the Respondent, but to (1) "level the playing field" by taking away any economic advantage the violator gained over its competitors through

Ref No.: G60173
Case No: 99-GAP-00032
Case Type: DEQ

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

Dec Mailed: 08/25/99
Mailed by: SLS

HEARING DECISION

CALEB SIAW
19075 SE FOSTER RD

BORING OR 97009 9653

DEPARTMENT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVE

PORTLAND OR 97204 1334

CHARLES HERDENER
2020 SW 4TH AVE STE 400

PORTLAND OR 97201 4959

True & Certified Copy of Original
Rebecca Lawrence OSB 89104
Hearing Section Manager

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

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

IN THE MATTER OF:	)	DEFAULT HEARING
	)	ORDER REGARDING
Caleb Siaw,	)	ASSESSMENT OF
	)	CIVIL PENALTY
Respondent	)	NO. WQ/D-NWR-98-212
	)	CLATSOP COUNTY

BACKGROUND

A Notice of Violation, Department Order and Assessment of Civil Penalty was issued December 15, 1998, under Oregon Revised Statutes (ORS) Chapter 183 and 468 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. On January 5, 1999, respondent Caleb Siaw appealed the Notice.

A hearing was held in Portland, Oregon, on July 8, 1999, before Hearings Officer Lawrence S. Smith. Respondent Caleb Siaw did not appear. Charles Herdener, environmental law specialist, represented DEQ, with one witness.

ISSUES

1. Did respondent Caleb Siaw violate OAR 340-071-130(3) by discharging untreated or partially-treated sewage directly or indirectly onto the ground surface and causing a public health hazard?

2. Did respondent Caleb Siaw violate OAR 340-071-0215(1) by failing to immediately repair the failing on-site system at the Forest Lake Resort owned by respondent?

3. Did respondent Caleb Siaw violate ORS 468B.080(1) by failing to obtain DEQ's approval for a septic system, sewerage system, septic tank system, or other disposal system or parts thereof for Forest Lake Resort?

4. Should respondent Caleb Siaw be ordered to take the steps outlined in the Department Order contained in the Notice of Violation, Department Order and Assessment of Civil Penalty issued December 15, 1998?

5. If respondent Caleb Siaw violated the above law, were the resultant civil penalties appropriate under OAR chapter 340, division 12, and OAR 340-12-060?

FINDINGS OF FACT

1. Respondent Caleb Siaw (Siaw) owns and operates Forest Lake Resort, a mobile home park (park), located at T5N, R10W, Section 4A, Tax Lot 1100, Clatsop County, Seaside, Oregon.

2. In November 1997, sewage and water from two septic systems in the park overflowed and ponded on the ground (Exhibits 8 and 9). On November 14, 1997, an environmental specialist for DEQ told Siaw to fix the sewage treatments and to obtain a repair permit from DEQ before doing so. A follow-up inspection on November 20, 1997, revealed ponding still in the two areas.

3. On December 11, 1997, a Notice of Noncompliance was mailed to Siaw, advising him that DEQ would take enforcement action if it did not receive a plan and application from Siaw to correct the ponding (Exhibit 10). The Notice also advised Siaw that he needed to take measures to safeguard public health, such as disinfecting the areas with bleach or lime and fencing them off.

4. On December 17, 1997, DEQ's environmental specialist saw Siaw working on the septic systems without getting a permit from DEQ. The specialist told Siaw to stop working until he got a permit. The inspector saw the same ponding in the two spots.

5. On January 7, 1998, Siaw pumped out some of the ponding without getting a permit from DEQ. Pets and children were present when he did the pumping.

6. On January 15, 1998, DEQ's environmental specialist inspected the two septic systems again and saw ponding (Exhibit 11). The specialist took a sewage sample that revealed a large concentration of E. Coli and Fecal Coliform, bacteria that are harmful to humans and animals (Exhibit 13). A test of sewage taken from one of the ponds on March 12, 1998, revealed a large concentration of E. Coli and Fecal Coliform, elements of human waste (Exhibit 14).

7. On March 24, 1998, a Notice of Noncompliance was mailed to Siaw, noting that his application for a permit was incomplete and telling him again to take measures to safeguard public health, such as disinfecting the areas with bleach or lime and fencing them off (Exhibit 15). The Notice advised him that he had violated ORS 468B.025 and 468B.080 by polluting the waters of the state and not getting his septic systems approved.

8. Sewage continued to discharge on the ground surface on September 3, 1998 (Exhibit 16).

9. On September 21, 1998, a Notice of Noncompliance was mailed to Siaw, advising Siaw that he needed to take measures to safeguard public health, such as disinfecting the areas with bleach or lime and covering them. The Notice advised him that he had violated ORS 468B.025 and 468B.080 by polluting the waters of the state and not getting his septic systems approved.

10. On October 23, 1998, DEQ's inspector continued to note ponding in the two areas (Exhibits 17 and 18).

11. Siaw saved $291 by delaying repairs of the two on-site septic systems that caused the ponding (Exhibit 21).

12. DEQ and Siaw have reached an agreement on the Department Order in the Notice of Violation and DEW withdraws that portion.

ULTIMATE FINDINGS

For almost a year, Siaw repeatedly violated OAR 340-071-0130(3) by discharging untreated or partially-treated sewage directly or indirectly on the ground, which constituted a public health hazard.

For almost a year, Siaw repeatedly violated OAR 340-071-0215(1) by failing to immediately repair the failing on-site systems at the park.

For almost a year, Siaw repeatedly violated ORS 468B.080(1) by failing to obtain DEQ's approval for a septic system, sewerage system, septic tank system, or other disposal system before working on the failed systems in the park.

The assessed penalties were appropriate because Siaw's violations were flagrant.

APPLICABLE LAW

ORS 468B.025 states in part that no person shall 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.080 requires all plumbing fixtures in buildings or structures from which waste water or sewage is or may be discharged to be connected to a sewerage system, septic tank system or other disposal system approved by the Department.

OAR 340-71-120(2) states that each and every owner of real property is jointly and severally responsible for:

> 1) disposing of sewage on the property in conformance with the rules of the Department;
> 2) connecting all plumbing fixtures on the property from which sewage is or may be discharged to a sewerage facility or on-site sewage disposal system approved by the Department; and
> 3) maintaining, repairing, and/or replacing the system as necessary to assure proper operation of the system.

OAR 340-71-130(3) prohibits allowing the discharge of untreated or partially treated sewage or septic tank effluent directly or indirectly onto the ground surface or into public waters.

OAR 340-71-160(1) prohibits causing or allowing construction, alteration or repair of a system, or part thereof, without first applying for and obtaining a permit.

OAR 340-71-215(1) requires the immediate repair of a failing system.

CONCLUSIONS AND REASONS

DEQ's evidence was direct and detailed, supported by photos and video. Siaw did not appear at the hearing to rebut it. DEQ's evidence is accepted as a prima facie case of alleged violations. Siaw violated OAR 340-071-130(3) by discharging untreated or partially-treated sewage directly or indirectly onto the ground surface repeatedly from November 20, 1997, until at least September 3, 1998. He violated OAR 340-071-0215(1) by failing to immediately repair the failing on-site system at the Forest Lake Resort he owned, even after direction to do so. He violated ORS 468B.080(1) by failing to obtain DEQ's approval for a septic system, sewerage system, septic tank system, or other disposal system or parts thereof before attempting any repairs.

CIVIL PENALTY

Siaw violated the above laws and is liable for appropriate penalties under OAR Chapter 340, division 12, and OAR 340-12-060. DEQ's calculation of the penalties (Exhibits 1, 2 and 3 of the Notice of Violation, Department Order, and Assessment of Civil Penalty issued December 15, 1998 (Exhibit 2)) are accepted and made part of this order. DEQ correctly assessed the correct base penalty and correctly calculated the "R" factor as 10 because Siaw's violation was repeated after written notice and must have been flagrant. DEQ's assessment of $291 for the "EB" factor seems a bit low, but is accepted. Siaw is liable for civil penalties totaling $6,291.

COMPLIANCE ORDER

At the hearing, DEQ withdrew the Department Order part of the Notice because DEQ and Siaw have reached an agreement on future compliance. The Department Order is therefore withdrawn.

Dated this 25th day of August, 1999.

Lawrence S. Smith
Hearings Officer

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:	)	**ORDER**
	)	**ASSESSING**
Caleb Siaw,	)	**CIVIL PENALTY**
	)	**NO. WQ/D-NWR-98-212**
Respondent	)	**CLATSOP COUNTY**

ORDER

IT IS HEREBY ORDERED that respondent Caleb Siaw is liable for a total civil penalty of $6,291, plus interest pursuant to Oregon Revised Statute (ORS) 82.010, from the date this order is signed below until paid; and that if the civil penalty remains unpaid for more than ten (10) days, this order may be filed with each County Clerk and execution shall issue therefor.

If you are not satisfied with this decision, you have 30 days to appeal it to the Environmental Quality Commission. See Oregon Administrative Rule (OAR) 340-11-132. If you wish to appeal the Commission's 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.

Dated this 25th day of August, 1999.

Lawrence S. Smith
Hearings Officer

Return to:
Enforcement Section
Department of Environmental Quality
2020 SW 4th Avenue, Suite 400
Portland, OR 97201-4987

STATEMENT OF MAILING

AGENCY CASE NO. WQ/D-NWR-98-212
HEARINGS CASE NO. G60173

I certify that the attached Order was served through the mail to the following parties in envelopes addressed to each at their respective addresses, with postage fully prepaid (certified mail to respondent, regular mail to DEQ):

Caleb Siaw, Respondent
19075 SE Foster Rd.
Boring, OR 97009-9653

Susan Greco, Rules Coordinator
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1334

Charles Herdener, environmental law specialist
DEQ enforcement
2020 SW 4th Avenue
Portland, OR 97201-4987

Mailing/Delivery Date:
Hearings Clerk:

CERTIFICATE OF SERVICE

I hereby certify that I served the Hearing Memorandum within on the 1st day of March, 2002 upon

Ken L. Betterton,
Administrative Law Judge
Oregon Employment Department
875 Union Street, NE
Salem, OR 97311
Fax: (503) 947-1531

Michael J. Kavanaugh
Attorney for Respondent
4930 SE Woodstock Blvd.
Portland, OR 97206
Fax: (503) 788-5345

by facsimile and by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at the U.S. Post Office in Portland, Oregon, on March , 2002

Department of Environmental Quality

Ken L. Betterton
Hearings Officer
875 Union St. N.E.
P.O. Box 14020
Salem, Or. 97311

MAR 05 2002
Hearings Div

RECEIVED
MAR 05 2002
Employment Hearings

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of	)
	) No. WQ/D-NWR-99-186
CALEB SIAW	)
	) CLOSING ARGUMENT
Respondent.	)

The DEQ does not seek to enforce the policies of the State of Oregon, but to penalize, fine, punish and bankrupt Respondent, Caleb Siaw. Their action should fail for reasons which appear from the record before the hearings officer which include Respondent's lack of ownership of the property, the implicit bad faith on the part of the DEQ in assessing a fine of this magnitude and the successful efforts of Respondent and various non-parties which have resulted in the implementation of a solution to the extant problem which existed in 1997 -1998 and had resulted in sewage spills.

Ownership of Property

The DEQ may concede ownership but the record implies that they will contest the effect of the documents submitted to them in 1999 and made a part of this record as Respondent's #2(or 3), the Real Estate Contract of April, 1999, whereby Claeb Siaw P.C. Trust conveyed the property to Danny Mal, Trustee for A&D Trust. Remember also that this document was drafted and negotiated by the individuals involved and did not have the input of attorneys or realtors.

///

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

The lack of precision and formality is a result of "amateurs" drafting legal documents.

The original memorandum submitted by Respondent deals with this issue. However, the legal basis for Respondent's position is not as clear, perhaps, as it should be.

It has been the law in Oregon since the late 1800's that recording of a deed (or conveyance) is not necessary to pass title between the parties affected thereby. In Musgrove v. Bonser 5 Or 313, 316 (1874) the court held:

> This deed not having this certificate attached thereto, though copied by the clerk upon the record, was not entitled to be there. It being to all intents and purposes an unrecorded deed at the time appellant took his conveyance from Armstrong and wife, it did not operate as constructive notice to appellant. The only effect of such deed was to carry the legal title as against all persons having actual notice of its existence.
>
> By our statute, every deed not recorded as required by law is void, as against a subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first recorded. It seems to be well settled in this country, "both in law and equity, that our recording acts only apply in favor of parties who have acted in good faith," and it is therefore generally held that a conveyance, duly recorded, passes no title whatever, when taken with a knowledge of the existence of a prior unrecorded deed. (2 Ld. Cases in Equity, 183; 9 John. 163; 4 Mass. 637.)

And in Manaudas v. Mann, 14 Or. 450, 451, 452, 13 P. 449 (1887) the court reasoned:

> Both parties claimed title from the same grantor,--the respondent by quitclaim deed executed to him, in the fall of 1885, by Heilner & Cohen, in accordance with a decree of this court rendered in the case of Manaudas v. Heilner, reported in 25 Or. 335, 7 Pac.Rep. 347; the appellant by a deed executed to him by the same parties long prior to that executed to the respondent. The deed to the appellant, however, although recorded, was not properly acknowledged so as to entitle it to record, and its admission in evidence was objected to by the respondent's counsel. The appellant's counsel offered proper proof of its execution, and offered to show that the respondent, when the deed to him was executed, had knowledge of the deed to appellant; but the court refused to receive it in evidence, and the appellant's counsel excepted to the ruling. The deed appears to have been regularly executed, aside from the defectiveness of the certificate of acknowledgment. The ruling was clearly erroneous. A deed in this state, duly signed, sealed, and witnessed, conveys the title of the grantor, as between the parties, and as to every one else by title subsequent, except a bona fide purchaser for a valuable consideration. Section 26, tit. 1, c. 6, Misc.Laws.
>
> Our statute of conveyances of real property was taken from the Iowa statute, and the construction which the courts of that state have invariably given it has been that the want of the acknowledgment, or the proof which may authorize the admission of the deed to record, does not invalidate the deed as between grantor and grantee, and that it is good as to all persons who are .

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

chargeable with actual notice. Blain v. Stewart, 2 Iowa, 378. The courts in this state have given it the same construction

That doctrine was recently followed in Chaffin v. Solomon, 255 Or 141, 146-149, 465 P2d 220 (1970). Notwithstanding these cases deal with deeds, this is a doctrine on conveyances. This principle was applied to contracts of sale in Nelson v. Hughes 290 Or 653, 655, 625 P2d 643 (1981):

> This quiet title suit involves a dispute between contract purchasers whose land sale contract was prior in time, but unrecorded, and a subsequent purchaser a grantee under a deed whose deed, though subsequent in time, was recorded. The disposition of the case turns on the allocation of the burden of proof to establish that the subsequent purchaser was or was not a bona fide purchaser for value without notice of the prior purchaser's claim. The Court of Appeals imposed the burden of proof upon the subsequent purchaser and reversed the lower court. We affirm the Court of Appeals.

The result of all of this is the conclusive establishment of the legal owner of the property, since April 12, 1999, the date of the notarization and delivery, as the A&D Trust.

Further, the doctrine of "after acquired title" establishes the owner of the property as the Caleb Siaw PC Trust and not Caleb Siaw, personally.

I noted that certain questions were asked regarding Mr. Siaw's conduct with respect to the property. There are also certain comments in the DEQ's documents and allegations that were made regarding the implication to be drawn from Mr. Siaw's attempt to sell the property after this contract was entered into. I "chalk up" those comments in the documents and e-mails of the DEQ to the ignorance of the authors of those comments about the law of real property and a lack of understanding of real property in general. Further, it is clear that Mr. Siaw remained involved in the property since he had a security interest as the contract vendor. He also testified that he had agreed to pay Mr. Sweeney's (Environmental Management Systems) fees for finding a solution to the sewage system problem for the entire park. Mr. Siaw's interest was monetary.

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

He was paying Sweeney and trying to protect his $775,000.00 (See Ex. 9) investment in the property. He even testified he is still trying to find a buyer for A&D Trust and for himself.

This state of affairs, while somewhat unusual, is not unheard of and is consistent with the facts. Mr. Siaw is not being adequately paid by the purchasers, but has no interest in foreclosing due to the environmental problems and expenses. Any buyer he finds or talks to is still subject to an agreement with the A&D Trust. The trust also has an interest in selling the property. Adrian Mal's testimony clearly indicated that the bids they had to repair the septic system for the entire park exceeded $400,000.00 and were not economically feasible. Essentially, that was an admission that the contract purchasers are financially unable to live up to the terms of the contract and comply with present (current) DEQ requirements.

Thus all that Respondent's attempts to sell the property amount to are offers, subject to approval by the contract purchaser.

Further, it is clear that the DEQ knew of the sale to Mal. The e-mails offered by the state, exhibits 124 to 129 demonstrate that fact, to wit:

#124 04/02/99 Anne Cox e-mail, ACKNOWLEDGES Siaw selling, working with Sweeney on tank alarms.
#125 04/26/99 combination of Dew, Cox and Baumgartner e-mails, are an internal memo on ownership. COX AND DEQ admit that on change of ownership should deal with new party; Baugmartner tells Cox to find out who new owner is. (NOTE mistaken belief that tax records control as determinative of ownership.)
#127 (#126?) 05/10/99 Cox memo where she is working with Malo and Sweeney and treating Malo as the owner.
#128 10/15/99 Cox now second guessing herself; ownership claims based upon Sweeney statement, (BUT Sweeney testified Malo was purchaser.)
#129 10/24/99 Blames Malo for sewage spill but wants to enforce against Siaw, comments on proposed sale to 3rd party contractor, neglects to mention he worked for DEQ previously.

The State had what the case law would refer to as constructive knowledge. Further, at

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

least as of December 12, 1999, they had a received a copy of the contract by fax. Respondent testified that he sent a copy to the DEQ in April or May of 1999.

The critical facts are the clear indication both from the e-mails, the testimony of Adrian Malo and Robert Sweeney that the DEQ recognized Malo as the purchaser and worked with him on solving the problem.

OAR 340-44-005(31) defines who the owner of the property is:

> (31) "Owner or Operator" means any person who alone, or jointly, or severally with others:
>
> (a) Owned, leased, operated, controlled or exercised significant control over the operation of a facility;
>
> (b) Has legal title to any lot, dwelling, or dwelling unit;
>
> (c) Has care, charge, or control of any real property as agent, executor, executrix, administrator, administratix, trustee, lessee or guardian of the estate of the holder of legal title; or
>
> (d) **Is the contract purchaser of real property**. (emphasis added)

It is axiomatic that absent a person, or the person in charge, actually committing the acts complained of, the owner of the property is responsible under the DEQ statutes. Respondent was not the person in charge of the property. He did not operate it after April of 1999. He did not retain control over it after April of 1999. His only connection to the property, other than as the contract vendor (a monetary security interest) is the DEQ's allegation that he was the owner of the property – because he had not recorded the contract or changed the tax records.

That position of the DEQ is flawed as a matter of law. It is based, in part, upon Respondent's signing the Mutual Agreement and Order because he was viewed as the owner of the property. That action (and this) was predicated on the incorrect assumption of the DEQ that the ownership listing on the tax records controls who is the owner of the property. In fact,

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

Richard Johnson was listed as the contract purchaser/owner on the real property and should have been listed on the tax rolls pursuant to the memorandum of contract (Ex. 13) until August 25, 2000.

This matter should be dismissed as to Caleb Siaw. [1]

MAO

The Mutual Agreement and Order (MAO) (Ex. 114) dated May 10 & 20, 1999, recites as follows:

1. Caleb Siaw owns or operates Forest Lake Resort.....

The basic premise of the MAO is not true and both parties knew or had reason to know what the true status of the ownership of the property was at that time. Respondent wanted to complete what he thought had to be done from his previous court proceeding. He testified he signed the agreement to be done with the matter. The DEQ was operating under an incorrect legal theory as to ownership. That mistake is clear and unambiguous. What should have occurred at that time was a substitution of the person or entity responsible for finishing the work begun by Respondent, i.e. the A&D Trust.

The result was an Order requiring a secured party, who no longer had control, to do the work of the owner. Where a court, here a state department, lacks authority to enter an order, it is a nullity. State ex rel. Juvenile Dept. v. Dreyer 328 Or 332, 339, 976 P2d 1123, 1127 (1999).

The MAO also requires a WPCF permit to be taken out but the DEQ never permitted it to be transferred to the A&D Trust as allowed by OAR 340-045-0045. Ms. Cox of the DEQ was constantly at odds with Respondent attempting in all of her letters to ignore the sale, to ignore what was transpiring at meetings and in the field, and to force Respondent to perform at a time

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

the entire matter should have been transferred to the A&D trust.

Allegations

The Notice of Assessment of Civil Penalties, i.e. the allegations of the DEQ, are limited to the failure of Caleb Siaw, personally, to complete a Water Pollution Control Facility permit and failure to submit pumping receipts after 09/15/99. Both allegations are tied to ownership of the property.

The permit has to be obtained by an owner or operator. Respondent was neither.

The basic premise is statutory:

> **454.635. Notice of violation; service; request for hearing; conduct of hearing; order.**
>
> (1) Whenever the Department of Environmental Quality has reasonable grounds for believing that any subsurface sewage disposal system, alternative sewage disposal system or nonwater-carried sewage disposal facility or part thereof is being operated or maintained in violation of any rule adopted pursuant to ORS 454.625, it shall give written notice to the person or persons in control of such system or facility. (emphasis added)

The violation cited by the DEQ states that Respondent violated ORS 468.140(1)(c). That statute reads:

> (1) In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of violation in the amount prescribed by the schedule adopted under ORS 468.130:
>
> *****
>
> (c) Any rule or standard or order of the Environmental Quality Commission adopted or issued pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.505 to 454.535, 454.605 to 454.755, ORS chapter 467 and ORS chapters 468, 468A and 468B.

Thus the violation relates back to ORS 454.635. Respondent did not "operate or maintain" the sewage disposal system after the sale to the A&D Trust.

The same is true as to the tank pumping receipts. The pleadings show that receipts were provided to the DEQ through September 15, 1999, long after Respondent had sold the property

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

and long after the DEQ was dealing directly with Adrian Malo. Respondent testified he had the pumping company turn in receipts which ran through May of 1999. The other receipts had to continue to be received from the same company. At whatever time Adrian Malo changed pumping companies receipts may have ceased. But the DEQ was visiting directly with Mr. Malo by that time and there is no testimony that Mr. Malo was asked for receipts or had any problem in supplying them.

Further, the alleged violation here is without any substantive foundation. Procedurally, the DEQ may want to have pumping receipts, but substantively, the nature of the tanks is such that had they not been pumped, they would have overflowed. There was no testimony to that effect and thus the tanks were pumped. Additionally, Adrian Malo testified he had the tanks pumped on a regular basis.

Thus the alleged violations on page 2 of the Notice of Assessment are fatally flawed as the statute cited does not rely upon the MAO for its validity but upon the statutory scheme. That scheme in turn relies upon the "operator or maintainor" being the responsible person. Except for the time period before May 10, 1999, Caleb Siaw was not the "operator or maintainor".

Penalty

The penalty requested by the DEQ bears no relationship to the severity of the actions or inaction. It seems almost to be based upon personal animosity, which I believe was exhibited by Anne Cox at the hearing and is implicit in her position, see Ex. 117. Despite the e-mails showing that the DEQ field people were meeting and dealing with Adrian Malo, which is supported by the testimony of Malo, Robert Sweeny and Respondent, Ms. Cox steadfastly refused to recognize the transfer of control and ownership. There is no logical reason for intentionally ignoring someone

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

who was operating the facility, indicated he represented the buyer and was trying to solve the problem.

There was even an attempt to detail a prior "unforgiven" relationship between Ms. Cox and Caleb Siaw. I think that history was the impetus for assessing such an outrageously excessive fine. Is this a deplorable effort to bankrupt the Respondent or a form of extortion to install a drainfield that is not economically feasible for this property?

The DEQ uses a formula in a vacuum to determine this fine. Why weren't the admonitions of the statute, ORS 468.130 applied?

Respondent's Actions

First, let's examine what Caleb Siaw actually did in response to the ongoing relationship with the DEQ. Note that the DEQ considers this a second violation incorrectly as the MAO arose out of the original proceeding and this is but a continuation of that proceeding.

Respondent paid a civil penalty for the actual spills he was unable to deal with as an absentee landlord in 1997 and 1998.

He took out a WPCF permit in 1998.

He testified he spent $18,000.00 to $20,000.00 installing two tanks to cure the problem he was first cited for. That cure worked and still works.

He ceased renting the spaces as the tenants moved or were evicted thereby losing revenue.

He testified he paid $32,000.00 for one of the mobile homes in order to alleviate its use as a source of pollution.

He testified he spent $20,000.00 pumping the tanks.

He testified that as a part of the sale, he would continue to pay the expenses of Robert

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

Sweeney of Environmental Management Systems which came to $22,000.00.

He allowed the buyers to delay making monthly payments in an effort to help them resolve the sewage problem. That has cost him in excess of $50,000.00.

Respondent testified he offered to lower the price of the contract to $500,000.00 in order to allow the buyers to repair the sewage system.

Further, it is apparent from the testimony that the current contract buyers have neither the incentive nor the means to correct the problem. Respondent is in danger of losing a substantial portion of his $775,000.00 investment. (See Ex. 9).

Respondent's Inaction

Respondent, after selling the property, relied upon Adrian Malo to deal with DEQ. That in fact occurred as the testimony shows Mr. Malo made efforts in conjunction with Robert Sweeney to correct the situation.

Respondent ceased providing pumping receipts because he was no longer employing the pumping company, Mr. Malo was.

Respondent did not complete the permit, as Robert Sweeney made efforts to do that on behalf of Mr. Malo.

Inaction in general

Everyone, including the DEQ, ceased any active efforts on the property after October of 1999. There is one letter in 2000 and one letter in 2001 after the flurry of activity in 1998 and 1999. Why?

Respondent's exhibit 3 gives the answer, i.e. the letter of Robert Sweeney to Respondent and Adrian Malo of October 11, 1999 where he states:

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

6. Remove the problem units. Landlord-Tenant issues would have to be taken into consideration. While DEQ would not then have a permit to review, staff has indicated that frequent visits would be made to ensure there were no discharges.

That is what has happened here. The DEQ conveniently ignores that in this proceeding. It is obvious to anyone looking at the record that the reason this matter was not more actively pursued after that time is due to the reduction in use of the spaces using the tanks. Further the mobile homes were being removed and the testimony does not disclose any additional leaks of any significance.

If we apply the factors set out in ORS 468.130(2) to the facts of this case, everyone of the mitigating factors are in play here.

Respondent took $140,000.00± of steps to solve problems in this case. He is financially strapped, as is the property. His past history on this property is minor and in putting in the tanks he took those steps which were necessary to resolve the leaks.

The violations now are not for more spills but for failing to finalize a permit in the midst of a sale of the property wrongfully ignored by the DEQ.

Had the DEQ staff not suggested removal of the problem units, some other solution would have been reached which would have included finalizing the permit.

Is Respondent now at fault for not finalizing the WPCF permit at the suggestion of the DEQ? Is Respondent required to pay a penalty because he sold the property and because the contract buyer took the DEQ's suggestion to heart. The problem units are gone. The problem which the WPCF permit was first taken out for is no longer a problem.

If we review the DEQ's penalty analysis we can readily see its failure to apply the facts.

The Base Penalty is a guess. There is no basis testified to why it should be assessed as

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

moderate when no spill is involved. OAR 340-012-0045(1) has a $1,000 BP for minor violations and under subsection (1)(b) the BP can be as low as $50.00. Any base here should be close to $50.00

The "prior" significant actions should be "0" for none. How can they treat the first civil penalty action as a prior action when that ended with the MAO. This is one continuous action.

The "past history" should be rated a "-2". The DEQ applies a value for no action. What do they call installing the tanks? What do they call paying Robert Sweeney's fees? What do they call buying a mobile home so it can be removed? The DEQ's vision is completely one-sided and makes absolutely no effort to be fair or reasonable.

The source of the violation, the "R" factor is likewise construed in a twisted, strained construction of the actions of Respondent. The Mutual Agreement and Order was a mistake, true, but the obligations therein were transferrable but for the resistence of the DEQ to the change in ownership. Further the failure to obtain the WPCF permit resulted from the suggestion of an alternative from the DEQ (Ex. 3). We are dealing with a factor that should be 0 or 1.

The "cooperation" index likewise ignores the Respondent's actions, ignores the sale, and ignores the DEQ's own actions. The leaks were stopped, efforts (expensive efforts) were made to find a solution which would have included a permit and steps were taken to solve the problem. This should be a negative 2 or 1 finding.

The "economic benefit" value should be $0.00. The economic benefit ignores the money spent by Respondent, the loss of income from the property, and the removal of the problem units. There is no economic benefit to be applied for not installing a new system if one is not required.

Further, the concept that Respondent has obtained an economic benefit is ludicrous.

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

There was testimony that Mr. Siaw had sought out buyers for the property recently. The purchaser price that was in the letter of intent netted $475,000.00 to Respondent after $250,000.00 was used to fix the DEQ problems. That is a potential loss to Respondent's pension trust of $300,000.00. That doesn't take into consideration any money that will have to be paid to the A&D Trust. Caleb Siaw has already paid dearly for his poor choice of investments in purchasing Forest Lake Resort. To claim there is any economic benefit to Respondent is penurious and churlish. It serves no legitimate purpose. The market place will exact it's own "economic benefit" from Mr. Siaw. The purchase price of the sale to the A&D Trust will never be met and Respondent is receiving no economic benefit. The only prospect he has is to reduce his losses.

Dated this 28th day of February, 2002.

Michael J. Kavanaugh OSB 75205
Attorney for Respondent Caleb Siaw

1.

Compare the reference to "owner" in two other DEQ penalty cases. *Mays v. Transamerica Ins. Co.* 799 P.2d 653, 103 Or.App. 578, 583 (1990); *Department of Environmental Quality Of State v. Hayworth Farms, Inc.* 728 P.2d 905, 82 Or.App. 503, ftnt. 1 (1986).

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

CERTIFICATE OF MAILING

I hereby certify that I served the Closing Argument, on the following persons:

Jeff Bachman
Dept. of Environmental Quality
811 S.W. Sixth Ave.
Portland, Or. 97204

on February 28, 2002, by depositing a true copy of the above item, addressed as shown above, on said date in the U.S. Mail, postage prepaid, at the post office in Portland, Oregon.

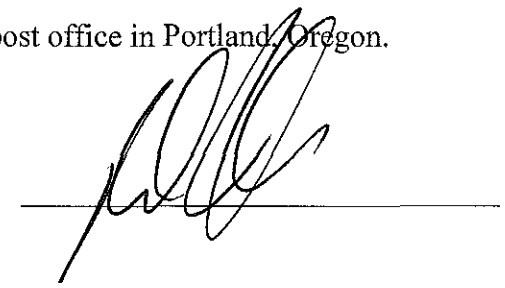

EXHIBIT # A

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 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.

2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized 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. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.

3. Hearings officer. The person presiding at the hearing is known as the hearings officer. The hearings officer is an employee of the Central Hearing Officer Panel under contract with the Environmental Quality Commission. The hearings officer is not an employee, officer or representative of the agency.

4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the hearing officer that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.

5. Address change or change of representative. It is your responsibility to notify DEQ and the hearings officer of any change in your address or a withdrawal or change of your representative.

6. Interpreters. If you have a disability or do not speak English, the hearings officer will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the hearings officer a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.

7. 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 or the hearings officer 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. You are not required to

issue subpoenas for appearance of your own witnesses. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

8. 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.

9. 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, oral or written evidence, as well as your own testimony.

10. 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 Commission will rely on it in reaching a decision.

There are four kinds of evidence:

a. Knowledge of DEQ and the hearings officer. DEQ or the hearings officer 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 or the hearings officer 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 materials 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 if they are reliable.

11. 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.

12. 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.

13. 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 DEQ. A transcript of the record will not normally be prepared, unless there is an appeal to the Court of Appeals.

14. Proposed and Final Order. The hearing officer has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

EXHIBIT # B

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: CALEB SIAW, M.D. Respondent.	)	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. WQ/D-NWR-99-~~168~~ 186 CLATSOP COUNTY

I. AUTHORITY

This Notice of Assessment of Civil Penalty (Notice) is issued to Respondent, Caleb Siaw, M.D. (Dr. Siaw), by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.126 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. FINDINGS

1. On December 15, 1998, the Department issued Notice of Assessment of Civil Penalty No. WQ/D-NWR-98-212 to Caleb Siaw for alleged violations, occurring in 1997, of on-site sewage disposal regulations at the Forest Lake Resort mobile home park, which was owned and operated by Dr. Siaw at Township 5 North, Range 10 West, Section 4 A, Tax Lot 1100, Clatsop County, Oregon.

2. On January 22, 1999, Dr. Siaw pled guilty in Clatsop County Court to the crime of Water Pollution in the Second Degree for violations stemming from the failure of the on-site sewage disposal system at Forest Lake Resort in September 1998. Dr. Siaw was sentenced to a $10,600 fine and two years probation. Among the terms of Dr. Siaw's probation was a condition that he make a good faith effort to comply with all requirements necessary to bring Forest Lake Resort into compliance with state law regulating on-site sewage disposal.

3. On May 20, 1999, Dr. Siaw entered into Mutual Agreement and Order No. WQ/D-NWR-98-212 (MAO) with the Department for the purpose of establishing the tasks necessary to bring Forest Lake Resort into compliance and a schedule for completing those tasks.

4. On July 8, 1999, Dr. Siaw defaulted on Notice of Civil Penalty Assessment No. WQ/D-NWR-98-212 and judgment was entered on behalf of the Department.

5. On August 16, 1999, in accordance with the terms of the Mutual Agreement and Order, the Department notified Dr. Siaw by letter that based on information submitted by Dr. Siaw's consultant, the Department had determined that Forest Lake Resort needed to construct a new on-site sewage disposal system in order to bring Forest Lake Resort into compliance. The letter further advised Dr. Siaw that, as required by Paragraph 15(B)(1) of the MAO, he needed to submit, within 30 days, further information to complete his application for the Water Pollution Control Facilities Permit necessary to construct the new system.

6. On November 12, 1999, the Department issued a second letter to Dr. Siaw informing him that he had still not submitted the required information needed to complete the WPCF application.

7. On August 7, 2000, Dr. Siaw transferred title to the property by quitclaim deed to Caleb Siaw PC Trust, for which he is the trustee.

8. On April 10, 2001, the Department issued Dr. Siaw a Notice of Noncompliance, informing him that he continued to be in violation of the MAO and requesting that he make contact with the Department within 30 days in order to resolve the violations.

III. VIOLATIONS

1. From or about September 15, 1999, Respondent violated ORS 468.140(1)(c) by violating a Commission Order. Specifically, Respondent violated Paragraph 15.B(1) of MAO No. WQ/D-NWR-99-186 by failing to submit the information required to complete his WPCF permit application. These are Class I violations pursuant to OAR 340-012-0060(1)(a).

2. From or about September 15, 1999, Respondent violated ORS 468.140(1)(c) by violating a Commission Order. Specifically, Respondent violated Paragraph 15.A(4) of MAO No. WQ/D-NWR-99-212 by failing to submit holding tank pumping receipts for the previous month. These are Class I violations pursuant to OAR 340-012-0060(1)(a).

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III. ASSESSMENT OF CIVIL PENALTIES

The Department imposes a civil penalty of $373,580 for Violation 1, above. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-12-045, are attached and incorporated as Exhibit 1.

IV. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right to have a formal contested case hearing before the Environmental Quality Commission (Commission) or its hearings officer regarding the matters set out above, at which 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 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.**

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

1. Factual matters not controverted shall be presumed admitted;

2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or defense;

3. New matters alleged in the Answer shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

Send the request for hearing and Answer to: **Deborah Nesbit, Department of Environmental Quality, 811 SW Sixth Avenue, Portland OR.** Following receipt of a request for hearing and an Answer, Respondent will be notified of the date, time and place of the hearing.

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

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

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

V. OPPORTUNITY FOR INFORMAL DISCUSSION

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

VI. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after an Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of $373,580 should be made payable to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

7-31-01
Date

Stephanie Hallock
Stephanie Hallock, Director

EXHIBIT 1

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

VIOLATION: Violation of an Environmental Quality Commission Order in violation of Oregon Revised Statute 468140(1)(c).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0060(1)(a).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0045(1)(a)(B) as there is no selected magnitude in OAR 340-012-0090 for this violation

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 $3,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0042(1).

"P" is Respondent's prior significant action(s) and receives a value of 4, pursuant to OAR 340-012-0045(1)(c)(A)(v) because Respondent's prior significant action, Case No. WQ/D-NWR-98-212, consists of three Class I equivalent violations.

"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 did not take all feasible steps to correct a majority of all 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 0 as Respondent is being assessed separate penalties for separate occurrences of the violation.

"R" is the cause of the violation and receives a value of 10 as the violation was caused by flagrant conduct. Respondent negotiated the terms and voluntarily entered into the Mutual Agreement and Order (MAO) which is the subject of this penalty. The Department engaged in both written and verbal communication with Respondent regarding his noncompliance with the terms of the MAO. Respondent had actual knowledge of the law and consciously set out to commit the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 as Respondent was not cooperative and did not make reasonable efforts to correct the violation or minimize the effects of the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of $215,180. The economic benefit portion of the civil penalty formula is simply the monetary benefit the Respondent gained by not complying with the law. Economic benefit is not designed to punish the Respondent, 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 calculates economic benefit using 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).

By failing to comply with the MAO, Respondent has avoided the cost of installing a new on-site sewage disposal system. Respondent's consultant estimated the cost of constructing a new system as $247,000. Through avoiding this cost, Respondent obtained an approximate economic benefit of $215,180.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (4 + 0 + 0 + 10 + 2)] + EB
= $3,000 + [($300 x 14)] + EB
= $3,000 + $4,200 + $EB
= $7,200 x Violations + EB

Respondent has been in daily violation of the MAO since September 15, 1999. The Department elects to assess civil penalty for each month in which a daily violation occurred. Respondent's civil penalty is calculated as follows:

($7,200 x 22) + $215,180 = $373,580

Respondent's total civil penalty is $373,580.

I hereby cert

Notice of As

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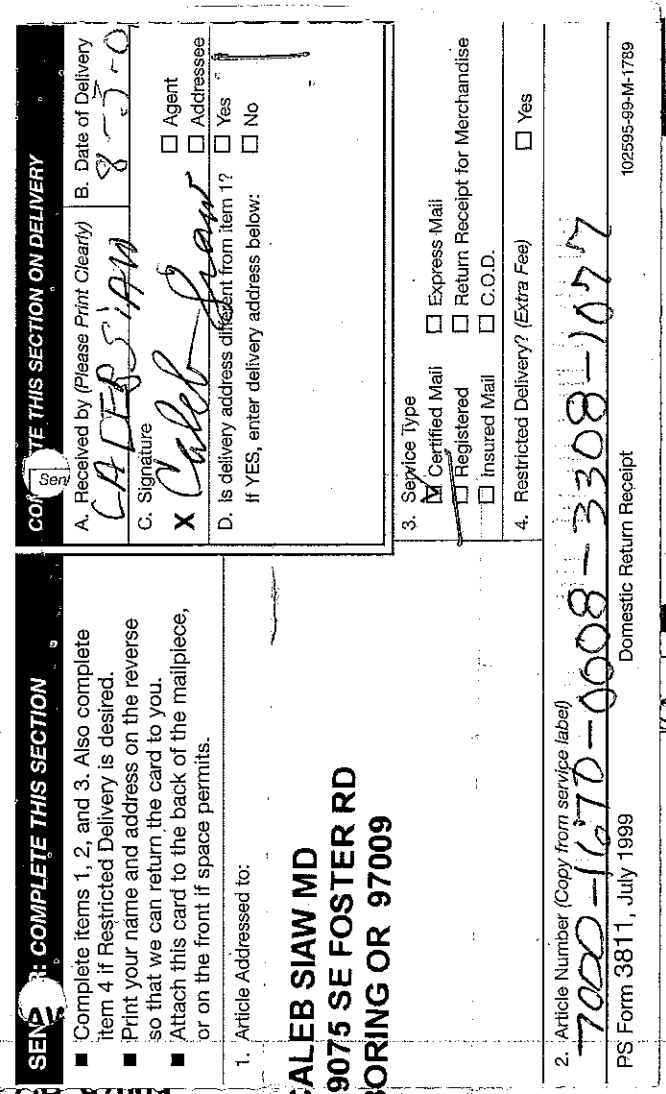
19075 S
BORING OR 97009



2/D-NWR-99-186

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid, at the U.S. Post Office in Portland, Oregon, on 8/2/01

Department of Environmental Quality

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

EXHIBIT # B C

IN THE MATTER OF:	)	
	)	
CALEB SIAW, M.D.	)	REQUEST FOR HEARING
	)	ANSWER
Respondent.	)	NO.: WQ/D-NWR-99-168

Comes now Caleb Siaw, M.D. and requests a formal hearing in the matter of the Notice of Assessment of Civil Penalty proposed by notice dated July 31, 2001.

For Answer, Caleb Siaw M.D., admits and denies as follows:

1.

Siaw admits in Section II, paragraph 1, admits so much of paragraph 2, 4, 5, 6, and 7 as accurately reflects the public record, and is not hearsay or conclusions of fact.

2.

Siaw admits entering into a Mutual Agreement and Order, but denies that it contains all of the solutions or alternatives to solving the existing problem.

3.

Siaw denies all of Sections III and IV.

For a First Affirmative Defense, Caleb Siaw, M.D. alleges:

4.

Siaw entered into good faith negotiation with the DEQ, through his representative, Robert Sweeney of Environmental Management Systems to solve the existing problem.

5.

As a result of those negotiations, Siaw, in addition to having the tanks pumped in accord with

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

the MAO, cease the use of the offending area for sewage disposal, removed the homes hooked up to the offending area and now maintains a manufacturede home park which does not violate sewage discharge laws, rules and regulations.

For a Second Affirmative Defense, Caleb Siaw, M.D. alleges:

6.

On or about April 8, 1999, Siaw sold the property on contract, to Danny Mal as trustee for the A&D Trust, who has operated the property since said time.

7.

Mal has operated the property for the equitable owners since that time and has eliminated the offending manufactured homes and eliminated any use of the property which resulted in sewage discharge violations. Pumping of the tanks as called for in the MAO ceased when the tanks ceased to be utilized.

WHEREFORE Caleb Siaw, M.D., prays that the State take nothing by its notice of assessment and that Siaw recover his costs and attorney fees incurred herein.

Dated this 8th day of August, 2001.

Michael J. Kavanaugh OSB 75205
Attorney for Caleb Siaw, Respondent

Michael J. Kavanaugh
Attorney at Law
4930 S.E. Woodstock Blvd.
Portland, Or. 97206
(503) 788-3639 Fax (503) 788-5345

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF:	)	
	)	
CALEB SIAW, M.D.	)	
	)	
Respondent.	)	NO.: WQ/D-NWR-99-168

Respondent hereby requests an informal discussion with the Department in the matter of the Notice of Assessment of a Civil Penalty.

Dated this 8th day of August, 2001.

Michael J. Kavanaugh OSB 75205
Attorney for Respondent

Ref No: G60602
Agency Case No: WQDNWR99186
Case Type: DEQ

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

Date Mailed: 11/13/01
Mailed By: RAB

NOTICE OF HEARING

CALEB SIAW, MD
19075 SE FOSTER RD
BORING OR 97009 9653

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

EXHIBIT D

MICHAEL J. KAVANAUGH
4930 SE WOODSTOCK BLVD

PORTLAND OR 97206 6163

JEFF BACHMAN
DEQ
811 SW 6TH AVE
PORTLAND OR 97204 1334

HEARING DATE AND TIME	*HEARING PLACE*	*ADMINISTRATIVE LAW JUDGE*
THURSDAY, JANUARY 17, 2002 9:30 AM PT	DEPT OF ENVIRONMENTAL QUALITY 811 SW 6TH AVE PORTLAND OREGON	BETTERTON

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:

SHALL THE DEPARTMENT OF ENVIRONMENTAL QUALITY NOTICE OF CIVIL PENALTY ASSESSMENT DATED JULY 31, 2001 BE AFFIRMED, MODIFIED OR VACATED?

CERTIFICATE OF SERVICE

RE: In the Matter of Caleb Siaw, MD, Notice of Assessment of Civil Penalty Case No. G60602

I HEREBY CERTIFY that I have made service of copies of the foregoing Notice of Hearing and Notice of Contested Case Rights upon the following parties by causing them to be mailed in the United States Post Office at Salem, Oregon, on the 13th day of November 2001, by United States Mail and Certified Mail, a true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

VIA CERTIFIED MAIL & FIRST CLASS MAIL:

CALEB SIAW, MD
19075 SE FOSTER RD
BORING OR 97009 9653

MICHAEL J. KAVANAUGH, ATTORNEY

4930 SE WOODSTOCK BLVD.
PORTLAND OR 97206 6163

Jeff Bachman
DEQ
811 SW 6th Avenue
Portland, OR 97204 1334

DEQ
811 SW 6th Avenue
Portland, OR 97204 1334

Rema A. Bergin, Assistant to Thomas E. Ewing
Chief Hearing Officer
(503) 378-5070

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

July 31, 2001

Orig in Case S.2

EXHIBIT # E

CERTIFIED MAIL No. 7000 1670 0008 3308 1077

Caleb Siaw, M.D.
19075 SE Foster Road
Boring, OR 97009

Re: Notice of Assessment of Civil Penalty
No. WQ/D-NWR-99-186
Clatsop County

Dear Dr. Siaw:

On May 20, 1999, you entered into a Mutual Agreement and Order (MAO) with the Department in order to comply with the terms of your probation following your criminal conviction for unlawful water pollution. The criminal conviction stemmed from your failure to repair or replace the on-site sewage disposal system at the Forest Lake Resort in Seaside, Clatsop County.

Specifically, your probation required to you to make good faith efforts to bring Forest Lake Resort into compliance with on-site sewage disposal regulations. To that end, the MAO set forth a schedule for determining the appropriate sewage disposal system for Forest Lake, and for designing and constructing the system. Paragraph 15.B(1) of the MAO required you to submit information necessary to complete your application for a Water Pollution Control Facilities (WPCF) Permit within 30 days of the Department issuing notice that a WPCF system was appropriate for Forest Lake.

Based on your proposal to use another person's land across Highway 101 for sewage disposal, the Department sent you such notice on August 16, 1999, and directed you to submit groundwater information and a conceptual design of your proposed system in order to complete your WPCF permit application. The property owner subsequently refused the use of that land for sewage disposal, and on November 1, 1999, your consultant submitted a conceptual proposal for system installation on the Forest Lake Resort property. The required groundwater information was not submitted. On November 12, 1999, the Department again informed you by letter that a WPCF permit was feasible, and requested that you submit the groundwater information and construction plans.

To date, these documents have not been received by the Department. Furthermore, Paragraph 15.A(4) required you to submit, on a monthly basis, receipts for the pumping of the temporary holding tanks at Forest Lake. No receipts have been received since July 11, 1999. These violations of the MAO are Class I violations of Oregon environmental law. On April 10, 2001, the Department sent you another letter requesting that you take action to comply with the MAO within 30 days. No such action has been taken.

Since the Department's August 16, 1999 letter, you have attempted to excuse your noncompliance with the MAO by claiming to have sold the Forest Lake property to various other persons. No transfer of ownership, however, was recorded until August 7, 2000, at which time ownership was transferred from you to a trust, Caleb Siaw PC Trust, for which you are the trustee. Regardless of who owns the property, the terms of the MAO are binding on you personally and you cannot unilaterally divest yourself of liability for compliance with the MAO by transferring title to the property to a trust controlled by you or to a third party.

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 $373,580. In determining the amount of the penalty, I used the procedures set forth in Oregon Administrative Rule (OAR) 340-012-0045. The Department's findings and civil penalty determination are attached to the Notice as Exhibit 1.

A substantial portion of the penalty, $215,180, represents the economic benefit you have received by avoiding the cost of installing a new on-site sewage disposal system. Prompt compliance with the terms of the MAO may result in the Department recalculating your economic benefit as a cost delayed rather than as a cost avoided, which would result in substantial penalty reduction.

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. A request to discuss this matter with the Department will not waive your right to a contested case hearing.

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. If you have any questions about this action, please contact Jeff Bachman with the Department's Office of Compliance and Enforcement in Portland at (503) 229-5950 or toll-free at 1-800-452-4011.

Sincerely,

Stephanie Hallock

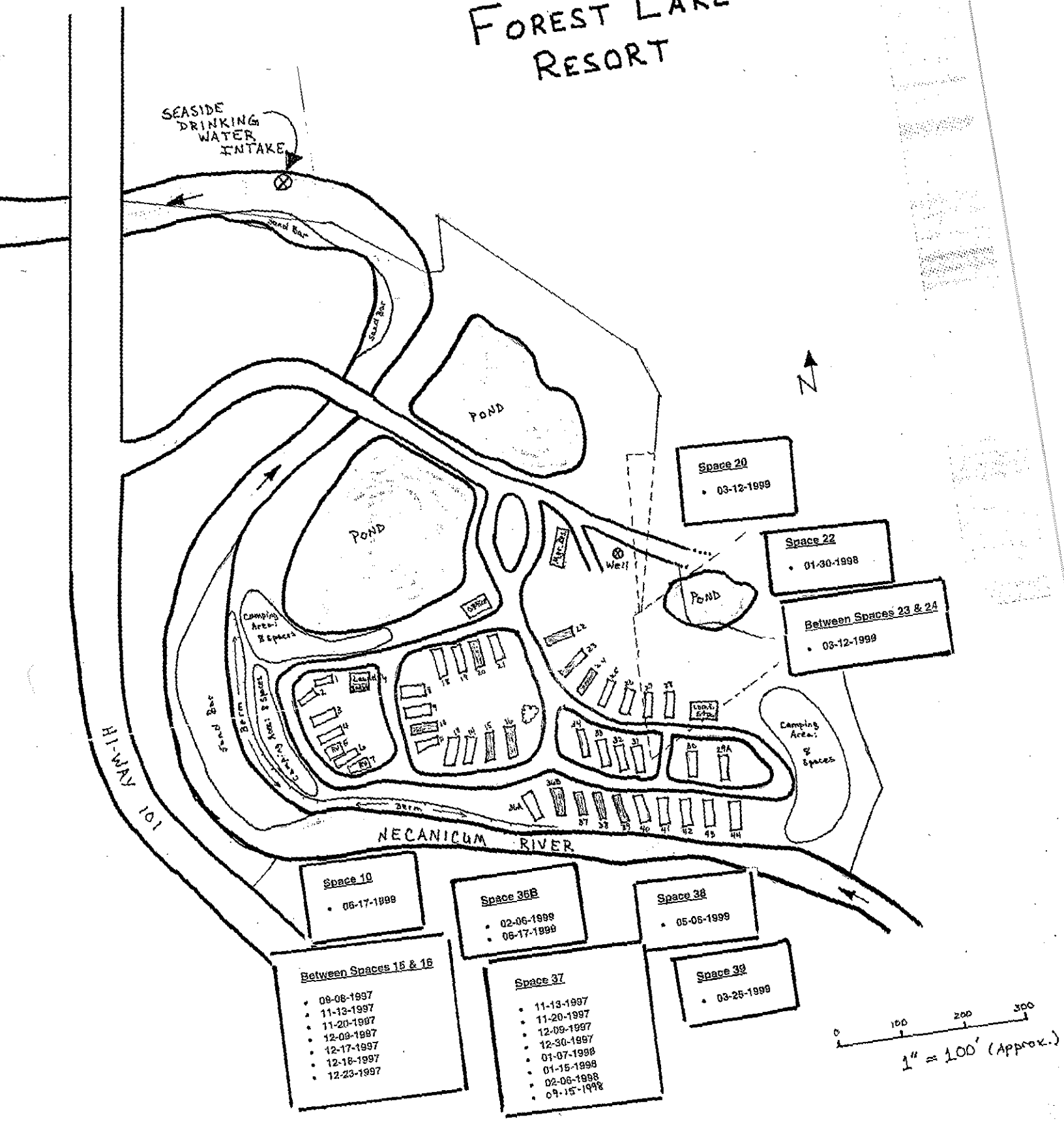
Stephanie Hallock
Director

e:\winwordletters\siawltr.doc
Enclosures
cc: Anne Cox, Northwest Region, DEQ
Water Quality Division, HQ, DEQ
North Coast Branch Office, DEQ

Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Clatsop County District Attorney

EXHIBIT #

FOREST LAKE RESORT



Oregon

December 11, 1997

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

NORTHWEST REGION

CERTIFIED MAIL
Caleb Siaw
Forest Lake Resort
19075 SE Foster Road
Boring, OR 97009

Re: OSS- NWR-97-127: Clatsop County: Twn 5N, Rng 10W, Section 4A, Tax Lot 1100
Notice of Noncompliance

Dear Mr. Caleb:

On November 13, 1997, Dewey W. Darold, R.S., from the Department of Environmental Quality (DEQ) conducted a site visit to Forest Lake Resort where your manager, Jackie Miller, and assistant manager, Tony Foster accompanied me during the inspection of the existing on-site sewage disposal systems serving the park. During the visit, sewage was observed ponding above or next to a concrete septic tank located between space #15 and #16. An area west of space # 37 also had sewage ponding in an open hole 7 inches below the ground surface. Soils around the open hole showed sewage had spilled out onto the ground surface in the past.

On November 14, 1997, Mr. Darold called and spoke with you about the inspection and advised you to start seriously considering a full upgrade to the existing sewage disposal systems at the park. Mr. Darold explained the septic tank is not the problem, as you indicated. Mr. Darold believes the problem is a failing drainfield. Retrofitting an existing septic tank is not only difficult but may not be effective. You are encouraged to contact a sewage disposal service company to asses the situation and determine cause for malfunction. From conservation with Mr. Darold I understand you would contact a company. This letter is being sent to you since you are the current owner of the park.

On November 20, 1997, another inspection was made to the park and sewage was again ponding in the areas previously noted above. A new large excavated hole was dug about 15 feet north of the ponding sewage between space # 15 and # 16. This rather large hole contained a pool of sewage and was not covered or fenced-off.

John A. Kitzhaber
Governor

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

DEQ-1

The file for this property shows previous owner, Sam Banki was sent a Notice of Noncompliance (NON) on June 14, 1996. Mr. Banki was advised to correct the violation by completing two items; 1) temporarily correct the violation of the existing septic tank located between space # 15 and #16 within 7 days from date of letter and 2) submit a complete application for a Water Pollution Control Facilities (WPCF) permit within 90 days and also replace the existing septic tank after receiving Department concurrence.

On August 1, 1996, Sam Banki was sent another letter with the June 14, 1996, NON enclosed. Mr. Banki mentioned to Dennis Illingworth from the Department that he had completed the lid replacement and buried the septic tank. The NON further directed Mr. Banki to apply for a WPCF permit. To this date, our office has not received a completed WCPF permit application. An application for a WPCF permit is enclosed. It is recommended you retain the services of a qualified consultant to assist you in the design and construction of the system upgrade.

On October 8, 1997, Mary King from the DEQ North Coast Branch Office (NCBO) wrote to you requesting a written summary of the repairs made to the existing septic tank. On October 15, 1997, the NCBO received a letter from you addressing the action taken to repair the septic tank.

Allowing sewage effluent to continue to discharge to the ground surface is a violation of Oregon Administrative Rule (OAR) 340-71-130(3) and is prohibited. This is a Class II violation and is considered to be a significant violation of Oregon environmental law. As a result, we will refer this violation to the Department's Enforcement Section with recommendation to initiate a formal enforcement action if you do not submit a WPCF application by **January 1, 1998. Plans and specifications should be submitted by February 1, 1998, and system construction taking place as soon as possible after permit has been issued.**

The discharge of untreated sewage to the ground surface presents a public health hazard to occupants of the park as well as visitors and the surrounding neighbors. Pets or insects that have been in contact with sewage can act as carriers of infectious disease organisms and transmit them to humans. There are human diseases present in sewage as well as normal intestinal bacteria. The degree of risk and the number of diseases present in sewage increase with the number of people contributing to the sewage pool. It is of extreme importance to human health that you prevent the surfacing of sewage at the facility.

Until the system(s) can be repaired, measures must be taken to safeguard public health and the environment by maintaining sewage below the ground surface. The areas of ponded effluent must be kept covered and periodically disinfected with lime, bleach, or a suitable equivalent. The affected areas should also be fenced-off and posted to prevent exposure and alert tenants. Installation of a temporary holding tank can be authorized if this is the only way to keep sewage from discharging to the ground surface. This requires a permit from the DEQ North Coast Branch Office, plans and specifications, fee, land use compatibility statement and a contract with a licensed sewage disposal service company.

The Department is unaware of any plans to extend a community sewer system to this property. As you know, this property is severally limited for any type of on-site sewage disposal system. To further complicate matters, the location of the existing systems and which systems serve what spaces is unknown and/or as-built plans are lacking. By probing, digging and exposing certain components of the system, one can start to develop plans. Be careful to not damage the systems while digging.

Your prompt response in resolving the sewage problem on this property is imperative. If you have any questions regarding this letter, please contact Dewey Darold at 503-229-6313. Otherwise, you can reach Ms. Anne Cox from our Northwest Region office at 503-229-6653 for information about the WPCF permit application process.

Sincerely,

Robert Baumgartner, Manager
Technical Services Section
Water Quality, Northwest Region

DWD:dwd
Enclosure: WPCF permit application packet
cc: DEQ/Enforcement Section
DEQ/NWR
DEQ/NCBO

Clatsop County Planning Department
800 Exchange Street, Suite 100
Astoria, OR 97103

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

February 5, 1998

CERTIFIED MAIL

Caleb Siaw
Forest Lake Resort
19075 SE Foster Road
Boring, OR 97009

Re: OSS-NWR-98-009: Clatsop County: Twn 5N, Rng 10W, Section 4A, Tax Lot 1100
Notice of Noncompliance

Dear Mr. Siaw:

On December 11, 1997, the Department of Environmental Quality (DEQ) sent you a notice of noncompliance (NON) for sewage disposal violations occurring at Forest Lake Resort in Seaside, Oregon. The notice directed you to submit to the Department a completed WPCF application by January 1, 1998, and plans and specifications by February 1, 1998. To this date, the Department has not received an application or plans and specifications for the sewage system upgrade. Since December 11, 1997, Mr. Dewey W. Darold, R.S., has made numerous site inspections to the park and has observed continued sewage failures at space # 16 and # 37. Also, there have been several pollution complaints filed with the Department regarding the unsanitary conditions at the park.

Mr. Darold spoke to you while conducting an inspection at the park on December 17, 1997. You were working on the sewage system at space # 16, when he advised you to not do any work on the system since permits are required and for you to seek advice from qualified consultants for technical assistance on septic system upgrade. Repairing any portion of an on-site sewage disposal system without first applying for and obtaining a permit is a Class I violation of Oregon Administrative Rules. Disposing of sewage in a location not authorized by the Department is also a Class I violation. Operating an on-site sewage disposal system that is failing is a Class II violation. Further, Mr. Darold observed sewage being pumped on to the ground surface from the open sewage pit next to space # 16. This illegal pumping occurred on December 9 and December 17, 1997. This type of activity is considered a significant violation of Oregon Environmental Laws.

It must be understood that repeated sewage failures at the park cannot continue. Your efforts to remedy the situation is lacking and it's apparent you have neglected the sewage disposal problems at the park. The Department has warned you in the past about sewage disposal violations at another park you owned.

The Department requests you immediately address these violations with a corrective action plan which you must submit to the Department by February 15, 1998, in order to insure that the violations will be corrected.

If you have any questions about this letter, please contact Mr. Darold at 229-6313. For questions pertaining to the WPCF permitting process, you can contact Ms. Anne Cox at 503-229-6653.

Sincerely,

Robert Baumgartner, Manager
Source Control Section
Water Quality, Northwest Region

DWD:dwd
cc: DEQ/Enforcement Section
DEQ/NWR
DEQ/NCBO

Clatsop County Planning Department
800 Exchange Street, Suite 100
Astoria, OR 97103

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

March 13, 1998

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Clatsop County

The Department of Environmental Quality received your application for a waste discharge permit on February 17, 1998. However, we are unable to consider your application complete and are returning it to you for completion. Please take care of the following items:

_X_ No latitude/longitude provided for the center of site. (Include DEGREES, MINUTES and SECONDS TO THE NEAREST 15 SECONDS.)
_X_ LUCS not approved and signed by local land use authority
_X_ No Tax lot map.
_X_ No plan submitted for repairing/upgrading the sewage disposal systems

Please send a tax lot map showing the Forest Lake Resort property highlighted. If you can also submit a topographical map with the site location highlighted, I can calculate the latitude and longitude for you.

The approval signature on the Land Use Compatibility Statement (LUCS) has to be that of an official of the local planning agency with jurisdiction over this property. Enclosed is the land use application you submitted to DEQ. Please have it filled out and signed by Clatsop County Planning Department.

Your application is missing a very crucial component: a preliminary engineering report or facility plan report showing the existing facilities along with your proposal for providing a satisfactory means of sewage disposal for Forest Lake Resort. Please refer to Part C of the application and the explanation on the back of the application for help in completing this part of your application. Your proposal to pump sewage from one failed system to another one as a means of solving the sewage system failures is completely unacceptable.

It is recommended that you use the services of a qualified consultant experienced with large onsite sewage disposal facilities to help you in complying with the above requests. A qualified professional will be required to inspect the completed system repair and certify that it was installed according to the approved plans. The qualified professional is also required to submit as-built drawings of the installed

system. A partial list of consultants who are known to work in on-site disposal is enclosed for your convenience, or you may select someone else.

Forest Lake Resort has continuing reports of failed septic systems and sewage discharging to ground surface or to waters of the state. It is imperative that you control and eliminate any sewage discharges or surfacing of sewage at the facility until a permanent solution can be implemented. Allowing partially treated sewage to discharge to ground surface presents a potential public health hazard to the park residents as well as to visitors and those exposed through direct contact, or through contact with pets or insects that have been in contact with the sewage. There are human disease organisms present in sewage as well as normal intestinal bacteria. It is of extreme importance to human health to prevent the surfacing of partially treated sewage.

Until a permanent solution is in place (construction of a sewage treatment and disposal system to serve the park), you must prevent the further discharge of sewage. This may be accomplished by frequent pumping of the septic tanks. Any new sewage spills or discharges must be contained. Any excess liquids shall be removed by a DEQ licensed septage hauler, and the area of the spill/discharge shall be disinfected. The limed area is then covered with soil. Any areas of sewage discharges shall be fenced to prevent access by children or pets and shall be posted as being contaminated by sewage. Under no circumstances are you to dispose of sewage or septage other than by calling the septage pumper truck to remove ponded sewage, septage or effluent.

You cannot construct a sewage treatment and disposal system for the park until a WPCF permit has been issued. You cannot obtain a permit if you have not yet submitted a complete application. Enclosed is your application and a list of consultants. Please provide the Department with the necessary items as soon as possible. We will then be able to move forward with processing your application.

Should you have any questions about this letter, please contact me at (503) 229-6653.

Sincerely,

Anne Cox

Anne Cox, R.S.
Environmental Specialist
Water Quality Source Control
Northwest Region

AVC/avc
Enclosures: Consultant list, WPCF application

cc: DEQ/NCBO

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

March 24, 1998

CERTIFIED MAIL
Z 764 753 813

Caleb Siaw
Forest Lake Resort
19075 SE Foster Road
Boring, OR 97009

Re: OSS-NWR-98-024: Clatsop County: Twn 5N, Rng 10W, Section 4A, Tax Lot 1100
NOTICE OF NONCOMPLIANCE

Dear Mr. Siaw:

On December 11, 1997, and again on February 5, 1998, the Department of Environmental Quality (DEQ) sent you notices of noncompliance (NON) for repeated sewage disposal violations occurring at Forest Lake Resort in Seaside, Oregon. The first NON directed you to submit a Water Pollution Control Facilities (WPCF) application by January 1, 1998, and plans and specifications by February 1, 1998. To this date, you have submitted an incomplete WPCF application without plans and specifications for the sewage system upgrade. Further, the notice required you to maintain the sewage below the ground surface and to fence-off, disinfect the area, and post the affected area to alert the tenants of the park. On December 17, 1997, Mr. Darold spoke with you at the park and again informed you that you must obtain appropriate permits prior to doing any work on the septic system. On this visit Mr. Darold observed you working on the septic system by replacing pipe and gravel in the disposal trench between space # 15 and # 16. Mr. Darold had informed you previously on November 14, 1997, following the first complaint, not to do any modifications or alterations to this system without first obtaining the necessary permits.

Mr. Darold again spoke to you on December 19, 1997, and once again told you to obtain the required permits prior to doing any work on the septic system and to immediately take action to prevent the sewage failures at the park.

On January 7, 1998, Mr. Darold visited the park again and sewage was surfacing next to space # 37. This surfacing sewage was first observed back on November 20, 1997.

On February 6, 1998, Mr. Darold visited the park and once again observed sewage ponding to the ground surface at space # 37. On February 11, 1998, Mr. Darold spoke to you and told you to take immediate action to eliminate the continuing sewage failures at the park. Mr. Darold advised you to install a temporary holding tank to contain the sewage and haul it off site for proper disposal until a complete replacement on-site sewage disposal system could be installed. You indicated to Mr. Darold that you were doing everything you could to correct the problem and that you were meeting with a consultant the following day. But as of March 24, 1998, you still have not taken the steps Mr. Darold advised you to do to correct the sewage disposal violations at the park.

On February 17, 1998, the Department received another complaint from a park tenant that sewage had backed-up into a shower in the mobile home. Information provided by this tenant shows that sewage backed up into his mobile home on at least two occasions; January 2 and again on January 8, 1998. On January 26, 1998, raw sewage surfaced at the east side next to space # 22 and on February 16, 1998, sewage surfaced on the west side of space # 22. On January 27, 1998, the tenant called DEQ and stated the manager was notified about the sewage problems and had not responded back. On January 30, 1998, Mr. Darold visited the park at space # 22. Although it appeared sewage had surfaced recently in the past due to a sewage debris/scum line present around the building sewer line, sewage was not surfacing during the visit. On February 6, 1998, Mr. Darold again visited space # 22. The affected area had been cleaned up and was not surfacing sewage during the visit.

On March 9, 1998, the Department received a phone call from a park tenant that sewage was ponding in a large area next to space # 37, and flowing to a low area in the middle of the park. Recently, on March 12, 1998, Mr. Darold once again visited the park. Sewage was observed just below a concrete lid next to space # 37. A dye test revealed sewage ponding below a mobile home at space # 27. Further examination inside the building sewer clean-outs and septic tank riser lids showed elevated sewage levels indicating improper operation of the soil absorption field. There may be other sewage failures at the park the Department has been unable to detect.

It is very apparent that you have neglected the unsanitary conditions at the park. This constitutes a public health hazard and is prohibited. You continue to allow untreated or partially treated sewage to discharge to ground surface even after repeated communication from the Department directing you to take action to element the discharge of human waste.

The Department is very concerned that you have not taken the required action to comply with the previous NON letters. The Department is also concerned about the human health and environmental impacts sewage poses to the park tenants. You are again directed to take immediate action to fence off the area where sewage is surfacing, to immediately eliminate the surfacing sewage including, if needed, installing a temporary holding tank, to disinfect the area if surfacing sewage with lime, to post the area providing warning of untreated human waste. Also, Mr. Siaw, you need to provide the Department a complete WPCF permit as described to the letter sent by Ms. Anne Cox of our office. Mr. Siaw, you also need to obtain the necessary permit prior to altering or repairing these failing systems. Repeated sewage failures and unsanitary conditions at the park must be corrected immediately.

As described above you have violated the following Oregon Revised Statutes (ORS):

ORS 468B.025, states in part that no person shall 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. The sewage from these failing septic systems may be entering waters of the state.

ORS 468B.080, requires all plumbing fixtures in buildings or structures from which waste water or sewage is or may be discharged, to be connected to and all waste water or sewage from such buildings or structures to be discharged into a sewerage system, septic tank system or other disposal system approved by the Department. The failing on-site septic systems are unapproved systems.

In addition to the above violations, several Oregon Administrative Rules (OAR) have been violated. They are as follows:

OAR 340-71-120(2) states that each and every owner of real property is jointly and severally responsible for: 1) disposing of sewage on the property in conformance with the rules of the Department, 2) connecting all plumbing fixtures on the property from which sewage is or may be discharged to a sewerage facility or on-site sewage disposal system approved by the Department, and 3) maintaining, repairing, and/or replacing the system as necessary to assure proper operation of the system.

OAR 340-71-130(3) prohibits allowing the discharge of untreated or partially treated sewage or septic tank effluent directly or indirectly onto the ground surface or into public waters. You have allowed sewage to surface at the park in several areas over a period of several months.

OAR 340-71-160(1) prohibits causing or allowing construction, alteration or repair of a system, or any part thereof, without first applying for and obtaining a permit. You have not obtained the proper permits and you have worked on the septic system.

OAR 340-71-215(1) requires the immediate repair of a failing system. You have not taken responsible action to immediately repair a failing system.

These violations are significant violations of Oregon's Environmental laws and regulations, and must be corrected immediately. This NON is being forwarded to the Department's Enforcement Section for appropriate action. Please contact our office immediately and advise us on how you will correct the sewage problems at the park.

If you have any questions about this letter, please contact Mr. Darold at 229-6313. For questions pertaining to the WPCF permitting process, you can contact Ms. Anne Cox at 503-229-6653.

Sincerely,

Robert Baumgartner, Manager
Source Control Section
Water Quality, Northwest Region

RPB:dwd

cc: DEQ/Enforcement Section
DEQ/NWR
DEQ/NCBO

Clatsop County Planning Department
800 Exchange Street, Suite 100
Astoria, OR 97103

DEQ USE ONLY – REGIONAL OFFICE

Received: 2-17-98
Application No.: 997481
File No.: 109808
PA No.: 98-WQ-[illegible]
Mail ID #2/#9: 181411
Hydrocode: 11C-NCGA 6.5N
DOC Conf.: N/LC Nacimiento

APPLICATION FOR WATER POLLUTION CONTROL FACILITIES GENERAL PERMIT (WPCF-N)

STATE OF OREGON

(Attach additional sheets if necessary.)

DEQ USE ONLY – BUSINESS O

Date Received: 2-17-98
Amount Received: 3200.00
Check No.:
Deposit No.:
NOTES:

DEPT OF ENVIRONMENTAL QUA
RECEIVED
MAR 31 1998
NORTHWEST REGION

A. REFERENCE INFORMATION

SIC = 6515

1. CALEB SIAW
Legal Name of Applicant

Forest Lake Resort
Facility Name

2. Hamlet RT. Box 255
Mailing Address

Seaside | Or | 97138
City | State | Zip

3. CALEB SIAW
Responsible Official

owner
Title

19875 S.E Foster Rd. Boring Or 97009 | 503-658-5914
Address or Location | Phone

4.
Alternate Responsible Official

Title

Address or Location | Phone

5. Facility Location if **different** from Mailing Address:

Mail ID 2&9 = 181411

6. Enter Site Location by **Latitude** and **Longitude**:

LATITUDE			LONGITUDE		
1. Deg.	2. Min.	3. Sec.	1. Deg.	2. Min.	3. Sec.
45			123		

B. GENERAL DESCRIPTION OF FACILITY

Briefly summarize the facility and primary method of wastewater treatment and disposal.

Mobile Home park. with Septic and drainage field 45 57 4 123 55 28

C. REQUIRED EXHIBIT

As EXHIBIT A, attach two (2) copies of a Preliminary Engineering Report or Facility Plan Report that fully describes the proposed project, using written discussion, maps, diagrams, and any other necessary materials. Specific items contained in the report should include:

1. A complete description of the proposal.
2. The location of the project and adjacent facilities and waterways.
3. Schedule for development.
4. Schematic diagrams of waste streams, and treatment and disposal facilities.
5. Site Evaluation Report.
6. Operation and Maintenance Plan:
   a. Report Form.
   b. Spill Contingency Plan.
   c. Disposal of solid waste and sludges.
7. Groundwater information.
8. Evaluation of groundwater and surface water impacts.

D. LAND USE APPROVAL

LAND USE COMPATIBILITY STATEMENT: is attached ☒ is coming ☐ N/A ☐

E. OTHER PERMITS

Attach a list of other permits issued or applied for.

F. FEES — MUST ACCOMPANY THIS APPLICATION

DEPARTMENT OF ENVIRONMENTAL QUALITY
RECEIVED
MAR 31 1998
NORTHWEST REGION

Filing Fee	$	
Surcharge Fee		
Registration Fee		
Site Evaluation Confirmation Fee*		
Plan Review Fee		
Compliance Determination Fee		
TOTAL	$	

*Required if a qualified consultant performed the site evaluation and prepared the evaluation report, but through the review process a site visit is still required by the Department or Agent.

I HEREBY CERTIFY THAT THE INFORMATION CONTAINED IN THIS APPLICATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Signature of Legally Authorized Representative (See Instructions) | Title: Own | Date: 2/13/98

INSTRUCTIONS FOR FILING FOR NEW WATER POLLUTION CONTROL FACILITIES GENERAL PERMIT

A. REFERENCE INFORMATION:

1. Enter the applicant's official or legal name. Do not use a colloquial name. If a partnership, list each partner.
2. Enter the mailing address where the permit and related correspondence should go.
3. Give the name of the responsible official we should contact if we have questions about the application or the facility.
4. List an alternate to the official name in item '3'.
5. Enter the address of the facility if different from the mailing address in item '2'.
6. Enter site location by latitude and longitude.

B. GENERAL DESCRIPTION OF FACILITY:

Please enter a general description of the facility and the primary method of handling wastewaters.

C. REQUIRED EXHIBIT:

NOTE:

Exhibit A is the most important part of the application. Failure to provide the required information will delay processing the application and final action on permit issuance.

1. A facility description should include all aspects of the facility including, services to be rendered, or activities to be conducted.
2. A facility description should include a map which not only shows the location and expanse of the project but also the location of adjacent waterways, drainage ways, residential areas and industrial or commercial facilities. Please locate project by Township, Range, and 1/4 - 1/4 section.
3. The proposed development and construction schedule should be as complete and accurate as possible. This should include future expansion plans or potential.
4. Schematics should include each waste stream (including a water balance), collection facilities, treatment and control facilities, and ultimate disposal means of each waste product or effluent. Alternatives for treatment, if being considered, should also be included. Where possible, the quantity and quality of each waste stream should be noted.
5. The site evaluation report should be prepared by the Agent, or a qualified Consultant. The report shall contain, at a minimum, a site diagram and observations of the site characteristics as outlined in OAR 340-71-150(3)(c).
6. Operation and Maintenance Plan should specify the normal operating parameters of the system(s). Include, for example, the length and spacing of dose cycles, gallonage of a dose cycle, and calibration of flow meters or elapsed time meters. The maintenance schedule should address **ALL** components to be inspected and maintained, together with procedures for doing so. For each item, include the frequency for inspecting it and the maintenance procedure. If available, include the manufacturer's O&M literature for system components.
   a. The WPCF permit requires that monitoring reports and maintenance reports be submitted. The O&M Plan must include a report form developed for Schedule B reporting requirements.
   b. Describe the spill contingency plan, including procedures or containment and remediation, and phone numbers to call for help.
   c. The collection, storage, and disposal of solids waste and sludges should be addressed, including volume and quality where possible.
7. Groundwater information must be provided for all areas where wastewater or sludge will be stored or disposed. The following minimum information is required: (In areas of shallow, unprotected aquifers or other areas with high potential for groundwater contamination, additional information may be required.)
   a. Climatic information.
   b. Topography and soil profile description.
   c. Flooding and erosion potential.
   d. Groundwater aquifer characteristics, including quality and gradient.
   e. Location of all wells and springs within 1/2-mile radius.
8. Provide information detailing steps to be taken in protecting surface and groundwaters during construction and operation of the facility.

D. LAND USE APPROVAL:

The Department will not process a permit application without evidence that the proposal is approved by local land use planning agencies and meets statewide planning goals. The attached compatibility statement may be used for that evidence.

E. OTHER PERMITS:

In order for the Department to coordinate with other agencies and other Divisions within the agency, it is important to provide information regarding the status of other applications or permits.

F. FEES:

Appropriate fees must accompany every application. Please see attached fee schedule.

DEFINITION:

Signature Line — "Legally Authorized Representative"

- **Corporation** — By a principal executive officer of at least the level of vice president;
- **Partnership or Sole Proprietorship** — By a general partner or the proprietor (owner), respectively; or
- **Municipality, State, Federal, or other Public Facility** — By either a principal executive officer or ranking elected official.

Please return Application Fee and Application to: Department of Environmental Quality, Business Office, 811 SW 6th Avenue, Portland, OR 97204

FYI FK

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

April 30, 1998

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
Incomplete Application

You were informed of sewage discharges at the Forest Lake Resort through a Notice of Noncompliance dated December 11, 1997. You were required by that Notice to submit a complete application by January 1, 1998, and approvable plans by February 1, 1998. The Department of Environmental Quality received your incomplete application for a waste discharge permit on February 17, 1998, without adequate plans, tax lot map, or signed land use compatibility statement. By letter dated March 13, 1998, we asked you to complete the application. You submitted a signed land use compatibility statement, received on March 31, 1998. We have obtained a tax lot map of the property. However, you still have not submitted an approvable plan for the upgrade and repair of the sewage disposal systems serving the Forest Lake Resort.

You still need to obtain this permit. Your application is still incomplete because you have not submitted the required plans. These systems have NOT been adequately repaired, nor did you obtain any permits for the work you did. As per Oregon Administrative Rule (OAR) 340 71-130, Forest Lake Resort must have a DEQ Water Pollution Control Facilities (WPCF) permit in order to operate.

Your previous violations have already been referred for formal enforcement action. Each day that you continue to operate the park without a permit constitutes a separate Class II violation of Oregon Revised Statute (ORS) 468B.050. Each day of violation is subject to an additional day of civil penalty assessment, until the Department has received suitable plans from you.

Please submit the requested plans. Refer to the Department's March 13, 1998, letter regarding the plans you must submit. Should you have any questions about this letter, you can contact me at (503) 229-6653.

Sincerely,

Anne Cox

Anne Cox, R.S.
Natural Resource Specialist
Water Quality Source Control
Northwest Region

cc: DEQ/Enforcement
DEQ/NCBO

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 1, 1998

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

RICHARD JOHNSON
FOREST LAKE RESORT
8CR63 255 SP 45
SEASIDE OR 97138

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
Incomplete Application

Thank you for coming to the Department's Northwest Regional Office on August 27, 1998, to discuss the Forest Lake Resort and what needs to be done.

You both stated at the meeting that Mr. Johnson is contract purchasing the park from Dr. Siaw. Dr. Siaw is still the owner of record according to the county, and we were not presented with any documentation that ownership of the property has changed. Based on your statements at the meeting, the Department will hold both of you responsible for the sewage disposal systems at Forest Lake Resort.

You both stated that you believe all of the septic systems at the park to be in good working order again, due to your efforts to flush or pump the systems. You are personally unaware of any current upsets or surface discharges of effluent.

The Department recently received a complaint of ponding effluent in the area of the drainfield near spaces 16 and 17, and we will be investigating that complaint in the near future.

Oregon Administrative Rule (OAR) 340 71-130(16) requires you to obtain a DEQ operational permit when it becomes necessary to repair (replace) an existing system in a facility of this size. The department has informed Dr. Siaw of this requirement through Notices of Noncompliance on several occasions. As we discussed, you must either obtain a DEQ permit or downsize the park by abandoning the systems that have failed. Dr. Siaw has been previously informed by phone call and letter that the WPCF application we received is incomplete.

You must complete the application, obtain the permit, and construct the needed upgrade.

Dr. Siaw expressed the wish to repair only the failed drainfield. It is the opinion of Department staff that the several systems serving the park are old and undersized, and that one or more of them is likely to fail again this winter. Because of the age of the systems, many of them may not be functioning properly and may be discharging to ground surface or to groundwater. Our strong recommendation is that an upgrade for the entire park be done, not just part.

At the meeting we discussed several options. You should investigate the option of connecting to Seaside city sewer, although that is a remote possibility. Here is a summary of your other options:

1. When a septic system fails, you must either get the required DEQ permit, or you must decommission that system and permanently remove from service all structures that were connected to that system. The Department will NOT give you authorization to connect those structures to any of the remaining septic systems. For example, if this week's site visit confirms another discharge of sewage or effluent, you must either take the connected uses permanently out of service, or you must obtain a DEQ permit.

2. You can apply for a National Pollutant Discharge Elimination Systems (NPDES) permit for either year round discharge, or possibly for winter discharge with summer onsite subsurface disposal depending on site and soil conditions. Dr. Siaw's engineering firm recommended this course of action. The cost of an NPDES permit is roughly $7,000 with annual fees and monthly reporting requirements. You would be required to retain the services of a certified sewage treatment plant operator. The discharge to the river would require close monitoring, sampling and testing. If you decide to proceed with this alternative, you can contact me at (503) 229-6653 for an NPDES application packet.

3. You can complete the application for a Water Pollution Control Facilities (WPCF) permit for either full upgrade of whole park, or a "piecework" repair of only the failed system. We strongly recommend the full upgrade. The area available for potential drainfield use is limited, and it is advisable to consider that sooner or later a full upgrade will be required. Soils, however, may not be suitable for subsurface disposal. In order to see if WPCF is even an option, you need to complete and submit the following:

    a. A soil evaluation report, done by DEQ's North Coast Branch Office or by a qualified consultant;

    b. A groundwater study showing depth to groundwater, gradient (direction) and groundwater quality. The park is in an area of a shallow, unprotected aquifer and there is a high potential for groundwater contamination. The enclosed Department guidelines for doing a preliminary groundwater assessment will help you to understand what information is needed;

c. A narrative and conceptual plan for the upgrade. Please refer to the application instructions and the checklist. The conceptual plan must include a layout of the park, showing all of the mobile home spaces and RV spaces, and indicating which RV spaces have sewer connections. The plan should indicate the location of each septic tank, dosing tank and drainfield, and the narrative should describe what is connected to each system; and

d. A description and evaluation by a qualified professional of each existing septic system at the facility (especially if full upgrade is not proposed).

Complete the WPCF application within the next thirty days or submit a complete application for an NPDES (surface water discharge) permit within the next thirty days. If we do not have a completed application on file by the time one or more of the systems fails again, the resulting and past violations will be referred to the Department's enforcement section for formal enforcement.

If you have any questions, you can contact me at (503) 229-6653. In order to help you complete the application, I am enclosing a copy of the instructions that accompanied the application we originally sent to Dr. Siaw, as well as the other documents in the application packet.

Sincerely,

Anne Cox

Anne Cox, R.S.
Natural Resource Specialist
Water Quality Source Control
Northwest Region

Enclosure: DEQ Guidelines for Preliminary Groundwater Assessment, WPCF application packet

cc: DEQ/Enforcement
DEQ/NCBO
DEQ/NWR/Dewey Darold

Check List

If you do not submit all the necessary information with your WPCF application, it cannot be processed, and your application may be returned to you. Please make sure you have included the following (for all WPCF applications):

1. Applicant line/signature line. Be sure that you enter on the applicant line the exact name of the party in whose name you want the permit issued: individual, partnership, corporation, etc. The person signing the application for a corporation or partnership must be a legal representative of that entity. An individual applicant must sign his/her application.

2. Responsible parties. Please indicate the name and address of the party who is the legal contact for correspondence regarding the permit, and the name and address of the party who should receive invoices. You can assign both responsibilities to a single party.

3. Tax lot map. Show locations of all wells on the property and within 1/4 mile of the property.

4. Site plans, drawn to scale, showing buildings, plumbing, utilities, proposed sewage treatment and disposal system.

5. Site evaluation/soils report, done by either a DEQ office, DEQ contract county, or a consultant. If the evaluation is done by a consultant, DEQ will charge an additional WPCF fee of $350 for site visit (site evaluation confirmation fee).

6. Land Use Compatibility Statement (LUCS)

7. Latitude/Longitude (enter it on the application page)

8. Facility description: with diagrams and narrative, describe the existing situation, proposed changes, flows, characteristics.

Facilities with a projected flow or design flow of over 5,000 gallons a day will need to submit detailed information on groundwater aquifer characteristics, including quality and gradient.

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 21, 1998

CERTIFIED MAIL Z 764 753 816

Caleb Siaw
19075 SE Foster Road
Boring, OR 97009

Re: OSS-NWR-WQ-98-067: Clatsop County: Twn 5N, Rng 10W, Section 4A, Tax Lot 1100
Forest Lake Resort
NOTICE OF NONCOMPLIANCE

Dear Dr. Siaw:

In response to a sewage disposal complaint filed with the Department of Environmental Quality (DEQ), on August 11, 1998, Dewey Darold from the DEQ visited Forest Lake Resort on September 3, 1998, at about 5:15 pm. Two separate areas within the park were inspected for sewage failures; area between space 15 and 16 and area west of space 37. Mr. Darold did not observe sewage surfacing between space 15 and 16 at the time of the visit. A clean-out cap extending to the ground surface in the drainfield (space 16) showed residue had accumulated around the four-inch ABS pipe. The cap was removed and sewage was ponding at about 8 inches below the top of the cap. Mr. Darold proceeded to space 37 where he observed sewage surfacing west of space 37. The affected area was about three feet in diameter and easily accessible to humans, pets, or insects and other vectors of disease. The area was not adequately cordoned-off and the plastic orange fencing had fallen down and was lying in the sewage. A tenant who lives next to the malfunctioned system has children. The tenants said they painted a white line on the ground surface to delineate the boundaries of the sewage discharge area. They instructed their children to not cross over the white line. According to the tenants, the discharge has occurred for a month or so.

Mr. Darold met with the contract purchaser, Mr. Johnson, and showed him the area where sewage was surfacing. Mr. Darold advised him that immediate action must be taken to alleviate the surfacing sewage. Mr. Darold requested the tank be pumped out at once and the area disinfected with lime or other suitable chemical and covered with clean topsoil. Mr. Darold instructed that the discharge area also needs to be posted to alert tenants and fenced off in a manner that prevents access.

Over the past several months the Department has sent you three previous notices of noncompliance (NON) for repeated sewage disposal violations occurring at Forest Lake Resort in Seaside, Oregon. The first NON directed you to submit a Water Pollution Control Facilities (WPCF) application by January 1, 1998 and plans and specifications by February 1, 1998.

To this date, you have submitted an incomplete WPCF application and no plans and specifications for the sewage system upgrade have been provided. Further, the notice required you maintain the sewage below the ground surface and to fence-off and post the affected area to alert tenants of the park. It is very apparent that you have neglected the unsanitary conditions at the park.

As described below, you have violated the following Oregon Revised Statutes (ORS):

ORS 468B.025, states in part that no person shall 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. The sewage from these failing septic systems may be entering waters of the state.

ORS 468B.080, requires all plumbing fixtures in buildings or structures from which waste water or sewage is or may be discharged, to be connected to and all waste water or sewage from such buildings or structures to be discharged into a sewerage system, septic tank system or other disposal system approved by the Department. The failing on-site septic systems are unapproved systems.

ORS 164.785, placing offensive substances in waters, on highways or other property. (1) It is unlawful for any person, including a person in the possession or control of any land, to discard any dead animal carcass or part thereof, excrement, putrid, nauseous, noisome, decaying, deleterious or offensive substance into or in any other manner befoul, pollute or impair the quality of any spring, river, brook, creek, branch, well, irrigation drainage ditch, irrigation ditch, cistern or pond of water.

(2) It is unlawful for any person to place or cause to be placed any polluting substance listed in subsection (1) of this section into any road, street, alley, lane, railroad right of way, lot, field, meadow or common. It is unlawful for an owner thereof to knowingly permit any polluting substances to remain in any of the places described in this subsection to the injury of the health or to the annoyance of any citizen of this state.

In addition to the above violations, several Oregon Administrative Rules (OAR) have been violated. They are as follows:

OAR 340-71-130(3) prohibits allowing the discharge of untreated or partially treated sewage or septic tank effluent directly or indirectly onto the ground surface or into public waters. You have allowed sewage to surface at the park in several areas over a period of several months.

OAR 340-71-160(1) prohibits causing or allowing construction, alteration or repair of a system, or any part thereof, without first applying for and obtaining a permit. You have not obtained the proper permits and you have worked on the septic system.

OAR 340-71-215(1) requires the immediate repair of a failing system. You have not taken responsible action to immediately repair a failing system.

Please be aware that in accordance with OAR 340-71-120(2), each and every owner of real property is jointly and severally responsible for: 1) disposing of sewage on the property in conformance with the rules of the Department, 2) connecting all plumbing fixtures on the property from which sewage is or may be discharged to a sewerage facility or on-site sewage disposal system approved by the Department, and 3) maintaining, repairing, and/or replacing the system as necessary to assure proper operation of the system.

The Department is concerned that you have not taken the required action to comply with the previous NON letters. The Department is also very concerned about the human health and environmental impacts sewage poses to the park tenants. Repeated sewage failures and unsanitary conditions at the park must be corrected immediately and cannot continue. In order to repair or replace any portion of the sewage disposal systems at the park, you must obtain a WPCF permit.

Until the system(s) can be repaired, as noted above, you must take the following action:

> You must immediately remove and dispose of any ponded sewage. Prevent any sewage or effluent from leaving your property. I recommend that you have the septic tank pumped frequently. Cover the affected area with lime, followed by at least six inches of topsoil. Fence the area to prevent access by people and pets, and post the area to alert residents to the potential public health hazard. The site will be revisited within 5 days of the date of this letter to verify that this has been done.

This is your fourth notification of a Class II violation and is conside
of Oregon environmental law. Therefore, we are referring this viol
Enforcement Section with a recommendation to initiate a formal en
enforcement action may include a civil penalty assessment for each

If you have any questions about this letter, please contact Mr. Daro
For questions pertaining to the WPCF permitting process, you can
229-6653.

Sincerely,

Robert Baumgartner, Man
Source Control Section
Water Quality, Northwest

RPB:avc

cc: DEQ/Enforcement Section
DEQ/NWR
DEQ/NCBO

Print your name, address and ZIP Code here
STATE OF OREGON
DEPARTMENT OF ENVIRONMENTAL QUALITY

Z 764 753 816

Receipt for Certified Mail
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to Caleb Siaw	
Street and No. 19075 SE Foster Road	
P.O., State and ZIP Code Gresham OR. 97009	
Postage	$
Certified Fee	

Vi please make a note to file that you also mailed copies NON-certified. (Dr Siaw forgets to pick up his mail)
Mailed 9/22/98 Cert & Non Cert.

Oregon

December 15, 1998

DEPARTMENT OF ENVIRONMENTAL QUALITY

CERTIFIED MAIL P 530 076 928

Caleb Siaw
19075 SE Foster Road
Boring OR 97009-9653

Re: Notice of Violation, Department Order, and Assessment of Civil Penalty
No. WQ/D-NWR-98-212
Clatsop County

The Department of Environmental Quality (DEQ) has received several complaints of sewage discharging from tanks of an on-site sewage disposal system serving Forest Lake Resort, your mobile home park in Seaside, Oregon. In response DEQ inspectors visited your property on many dates over the past two (2) years and identified your failing septic system. The sewage surfacing from this failing system creates ponds which are easily accessible to residents, their children and pets, as well as to insects and other vectors of disease. Any sewage discharge constitutes a public health hazard and is a serious violation of environmental law..

DEQ has issued numerous letters notifying you of your violations of the on-site sewage disposal rules. You were advised to apply for a Water Pollution Control Facilities (WPCF) permit, acquire DEQ approved drawings and construct a DEQ approved sewage disposal system. As of this date none of the above have been completed.

You were also notified in a Notice of Noncompliance, dated September 21, 1998, of the prohibition against the discharge of untreated or partially treated sewage or septic tank effluent directly onto the ground surface. You are required by rule to immediately repair the failing system. You were advised that your on-site system (repaired or installed) needed approval from DEQ. Your system has not been approved by DEQ. I am especially concerned that you have not taken appropriate steps to stop the ponding sewage.

You are liable for a civil penalty assessment because you violated Oregon environmental law. In the enclosed Notice, I have assessed a total civil penalty of $6,291. 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 Exhibits No.1, No.2 and No.3.
DEQ is also issuing an Order requiring you to properly repair, construct or abandon the existing on-site system within specific time

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

frames. Time is of the essence for the first eight (8) paragraphs of the order.

Within twenty (20) days receipt of this Notice, you must provide documentation how you will comply with the Order.

DEQ personnel will cooperate fully and in a timely manner with the appropriate approvals and inspections.

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 DEQ 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.

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. If you have any questions about this action, please contact Charles Herdener with the Department's Enforcement Section in Portland at (503) 229-6839 or toll-free at 1-800-452-4011, enforcement extension 6839.

Sincerely,

Langdon Marsh
Director

Enclosures
cc: Anne Cox, Northwest Region, DEQ
Dewey Darold, Northwest Region. DEQ
Water Quality Division, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Clatsop County District Attorney
Clatsop County Health Department
857 Commercial, Astoria, Oregon 97103

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: CALEB SIAW, Respondent.	)	NOTICE OF VIOLATION DEPARTMENT ORDER AND ASSESSMENT OF CIVIL PENALTY No.WQ/D-NWR-98-212 CLATSOP COUNTY

I. AUTHORITY

This Notice of Violation, Department Order, and Assessment of Civil Penalty (Notice and Order) is issued to Respondent, Caleb Siaw, by the Department of Environmental Quality (DEQ) pursuant to Oregon Revised Statutes (ORS) Chapters 183 and 468, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. FINDINGS

1. Respondent owns or operates Forest Lake Resort, mobile home park (park) located at T5N, R 10 W, Section 4 A, Tax Lot 1100, Clatsop County, Seaside, Oregon.

2. On or about November 11, 1997, Dewey Darold, a DEQ inspector, instructed the Respondent about the mechanics of a septic system operation. Respondent was also informed that without a repair permit from DEQ, he cannot perform any modifications or alterations to the septic system, or parts of the system.

3. The inspector observed sewage discharging to ground surface at the park on the following dates: November 20, December 9, December 17 and December 18, 1997; and January 15, February 6, March 12, and September 3, 1998.

4. The inspector examined Respondent's subsurface sewage disposal system (on-site system) on September 3, 1998, in response to a complaint from a tenant of the park. The inspector observed sewage discharging onto the ground surface between spaces 15 and 16.

\\\

5. On September 3, 1998, the inspector observed sewage surfacing near space 37. The affected area was approximately three (3) feet in diameter and accessible to the residents, their children, and pets.

6. On or about September 3, 1998, the DEQ inspector advised Respondent to take immediate action to repair the failing system including the control and elimination of the source of the discharge. Respondent was advised to take immediate steps to pump, disinfect, fence and post signs at space 37.

7. Respondent allowed sewage to continue discharging to the ground surface.

8. Respondent has failed to submit a complete application for a Water Pollution Control Facilities (WPCF) permit and repair the system in accordance with the rules.

9. Respondent has received three (3) Notices of Noncompliance (NONs) dated December 11, 1997, March 24 and September 21, 1998. The NONs itemized the violations and the specific action required to comply with the on-site sewage rules.

III. VIOLATIONS

Based upon the above, DEQ finds that Respondent has violated Oregon's laws and rules as follows:

1. On or about November 20, 1997, through September 3, 1998, Respondent violated OAR 340-071-130(3) by discharging untreated or partially-treated sewage directly or indirectly onto the ground surface constituting a public health hazard. According to OAR 340-12-060(2)(h) this is a Class II violation.

2. On or about November 20, 1997, through September 3, 1998, Respondent violated OAR 340-071-0215(1) by failing to immediately repair the failing on-site system at the park. According to OAR 340-12-060(1)(f), this is a Class I violation.

3. On or about November 20, 1997, through September 3, 1998, Respondent failed to obtain DEQ's approval for a septic system, sewerage system, septic tank system, or other disposal system or parts thereof, in violation of ORS 468B.080 (1). According to OAR 340-12-060(1)(c), this is a Class I violation.

IV. DEPARTMENT ORDER

Based upon the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

1. Respondent shall immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon state law.

2. Respondent shall immediately disinfect and cover any existing or any new areas of ponding sewage or effluent.

3. Respondent shall immediately fence each contaminated area and post legible warning signs which can be understood by children.

4. Within 24 hours of receipt of this order, Respondent shall pump the septic tanks at space 37 and between spaces 15 and 16.

5. Within 7 days of receipt of this order, Respondent shall submit a complete application for a repair permit to DEQ's North Coast Branch Office in Warrenton, Oregon, to install two (2) 3,000 gallon DEQ-approved septic tanks with the outlets temporarily plugged. Respondent shall submit with the repair application a signed contract between Respondent and a DEQ licensed sewage disposal service.

6. Within 7 days of issuance of DEQ repair permit, Respondent shall decommission the septic tanks at space 37 and between spaces 15 and 16. Respondent shall install the new tanks in accordance with the terms of the repair permit and in compliance with the rules pertaining to the installation and operation of holding tanks (OAR 340-71-340.) Respondent shall also install appropriate alarms.

7. Respondent shall request from DEQ an inspection of the tank installations upon completion of the installations.

8. Respondent shall operate the new tanks located at space 37 and between 15 and 16 in accordance with DEQ's holding tank regulations until such time as a DEQ-approved permanent sewage disposal system has been installed with a DEQ permit, certified by Respondent's designer, and approved by DEQ.

9. Respondent shall submit to DEQ by the 15th of each month the tank pumping records of the preceding month.

10. Within 30 days of service of this order Respondent shall complete Respondent's WPCF application and shall submit acceptable plans and drawings including drainfields, for a sewage system to serve the entire park. The plans and specifications shall be designed by a qualified consultant.

11. Within 30 days of plan approval, Respondent shall begin construction of the system as approved by the Department.

12. Within 180 days of plan approval, Respondent shall complete the construction of the system in accordance with the submitted plans and in compliance with the conditions of the DEQ's approval of plans.

V. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the violations cited in Section II as follows:

Violation	Penalty Amount
No. 1	$1,491
No. 2	$2,400
No. 3	$2,400

Respondent's total civil penalty is $6,291. The findings and determination of Respondent's civil penalty pursuant to OAR 340-12-045 are attached and incorporated as Exhibits No. 1, No. 2 and No. 3.

VI. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right to have a formal contested case hearing before the Environmental Quality Commission (Commission) or its hearings officer regarding the matters set out above, at which 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 Order, and must be accompanied by a written "Answer" to the charges contained in this Notice and Order.

In the written Answer, Respondent shall admit or deny each allegation of fact contained in this Notice and Order, and shall affirmatively allege any and all affirmative claims or defenses to the assessment of this civil penalty that Respondent may have and the reasoning in support thereof.

Except for good cause shown:

1. Factual matters not controverted shall be presumed admitted;

2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or defense;

3. New matters alleged in the Answer shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

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

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

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

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

VII. OPPORTUNITY FOR INFORMAL DISCUSSION

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

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VIII. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after the Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of $6,291 should be made payable to "State Treasurer, State of Oregon" and sent to the Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.

12-15-98
Date

Langdon Marsh
Langdon Marsh, Director

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION: Discharge of untreated or partially treated sewage onto ground surface is prohibited.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-12-060(2)(h).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 3430-12-045(1)(a)(ii), because there is no selected magnitude for this violation.

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 $500 for a Class II moderate magnitude violation in the matrix listed in OAR 340-12-042(3)(b).

"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 because 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 according because the violation existed for more than one day.

R" is the cause of the violation and receives a value of 10 because Respondent's conduct was flagrant. Respondent was repeatedly advised by DEQ to repair the septic system. DEQ inspectors on eight (8) different dates from November 20, 1997 to September 3, 1998 have observed discharging sewage from Respondent's park. Within the past year Respondent has received three (3) Notices of Noncompliance (NON). These NONs itemized what Respondent had to do to comply with the rules. Respondent was advised to repair/install a system which does not endanger public health. The DEQ inspectors, both by mail and in person, advised Respondent what needs to be done and not to modify the system without DEQ's approval. Respondent had actual knowledge of the law and consciously set out to commit the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 because Respondent was uncooperative and did not take reasonable steps to minimize the effects of the violation by preventing the discharge of sewage onto the ground surface and by such misconduct created a health hazard.

"EB" is the approximate dollar sum of the economic benefit that Respondent gained through noncompliance, and receives a value of $291 which is the repair cost Respondent avoided by not replacing the septic tanks which caused the sewage discharge.

PENALTY CALCULATION:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $500 + [(0.1 x $500) x (0 + 0 + 2 + 10 + 2)] + $291
= $500 + ($50 x 14) + $291
= $500 + $700 + $291
= $1,200 + $291
= $1,491

EXHIBIT 2

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION: Failure to immediately repair a failing on-site system.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-12-060(1)(f)

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-12-045(1)(a)(ii) because there is no selected magnitude for this violation.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:
BP + [(0.1 x BP) x (P + H + O + R + C)] + EB

"BP" is the base penalty which is $1,000 for a Class I moderate magnitude violation in the matrix listed in OAR 340-12-042(3)(b).

"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 because 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 because the violation existed for more than one day.

""R" is the cause of the violation and receives a value of 10 because Respondent's conduct was flagrant. Respondent has been repeatedly advised by DEQ to repair the septic system. DEQ inspectors on eight (8) different dates from November 20, 1997 to September 3, 1998, have observed discharging sewage from Respondent's park. Within the past year Respondent has received three (3) Notices of Noncompliance(NONs). The NONs itemized what Respondent had to do to comply with the rules. Respondent was advised to repair/install a system which would not endanger public health. The DEQ inspectors, both by mail and in person, advised Respondent what had to be done and not to modify the system without DEQ's approval. Respondent had actual knowledge of the law and consciously set out to commit the violation.

"C is Respondent's cooperativeness in correcting the violation and receives a value of 2 because Respondent disregarded repeated compliance warnings which would have corrected the violation.

"EB" is the approximate dollar sum of economic benefit the Respondent gained through noncompliance, and receives a value of 0 because the EB was only applied in Exhibit No.1 because had Respondent repaired the system he would have been in compliance.

PENALTY CALCULATION:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $1,000 + [(0.1 x $1,000) x (0 +0+2 +10+2)] + 0
= $1,000 + [($100) x (14) + 0
= $1,000 + $1,400
= $2,400

EXHIBIT 3

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION: Failure to obtain Departmental approval for a septic system, sewerage system, septic tank system, or other disposal system or parts thereof.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-12-060(1)(c).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 3430-12-045(1)(a)(ii) because there is no selected magnitude for this violation.

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 $1,000 for a Class I moderate magnitude violation in the matrix listed in OAR 340-12-042(3)(b).

"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, because 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 because the violation existed for more than one day.

"R" is the cause of the violation and receives a value of 10 because Respondent's conduct was flagrant. Respondent has been repeatedly advised by DEQ to repair the septic system. DEQ inspectors on eight (8) different dates from November 20, 1997 to September 3, 1998 have observed discharging sewage from Respondent's park. Within the past year Respondent has received three (3) Notices of Noncompliance (NONs). The NONs itemized what Respondent had to do to comply with the rules. Respondent was advised to repair/install a system which would not endanger public health. The DEQ inspectors, both by mail and in person, advised Respondent what had to be done and not to modify the system without DEQ's approval. Respondent had actual knowledge of the law and consciously set out to commit the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 because Respondent persisted in disregarding repeated compliance guidance to minimize the effects of the violation.

"EB" is the approximate dollar sum of the economic benefit (EB) that Respondent gained through noncompliance and receives a value of 0 because the Respondent has paid the Water Pollution Control Facility permit application fee, but the application was incomplete.

PENALTY CALCULATIO

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $1,000 + [(0.1 x $1,000) x (0 + 0 + 2 +10 +2] + 0
= $1,000 + [($100) x (14)] + 0
= $1,000 + $1400 + 0
= $2,400

CLEARANCE		
To	Initial	Date
Lee Carlough	LAC	11/16
RBR/Andy	ala	11/16
Anne Cox	AC	11/16
Neil Mullane	NJM	11/25

ENFORCEMENT TIMELINESS

File Name: SIAW, CALEB

1. **Date of Initial Discovery/Inspection:**

2. **Date Investigation Completed:** 9-3-'98
(Provide adequate justification below if the time between 1 & 2 exceeds 10 days)

3. **Date Referral Sent to Enforcement Section:** 10/26/'98
(Provide adequate justification below if the time between 2 & 3 exceeds 25 days)

4. **Date FEA Sent to Director's Office:** 11/17/'98
(Provide adequate justification below if the time between 3 & 4 exceeds 20 days)

5. **Timeliness Summary:**
# of days from Completed Investigation to FEA Sent to Director (2 to 4): 11-25-'98

Director's Expectation:

45

Days Over/(Under) Director's Expectation: 11 days under expectation

INVESTIGATION DETAILS: [Note: If you have prepared and attached an inspection report or memo that details any of the following questions, you do not have to repeat the information below. However, you do need to specify under each question, by reference, exactly where the information is located in the attachments.]

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLATSOP

STATE OF OREGON, Plaintiff, vs. CALEB SIAW, Defendant.	Case No. 98-1359 **JUDGMENT OF CONVICTION AND SENTENCE ORDER** Date: 1/22/99 Judge: David Hantke DA: Joshua Marquis Defense: Stephen Roman Reporter: Paula Kidder

COUNT: 1
CHARGE: Unlawful Water Pollution in the First Degree
CLASS: Class B Felony
INCIDENT DATE: September 10, 1998
PLEA TO LESSER-INCLUDED

COUNT: 2
CHARGE: Unlawful Water Pollution in the Second Degree
CLASS: Class A Misdemeanor
INCIDENT DATE: September 10, 1998
CONVICTED

Finding of guilt following a No Contest Plea on Count 2.

IT IS THE JUDGMENT OF THIS COURT that the defendant is convicted of the above listed crime, that imposition of sentence is suspended and that the defendant shall be placed upon bench probation for 24 months, subject to the following terms of probation:

1. Defendant shall immediately notify the Court of any change of address.

2. Defendant shall obey all criminal laws, state, federal, county and municipal.

VBL 192320/321/322
C-R 83918 G1G

31-35

3. Defendant shall be required to make a good faith effort to comply with all DEQ requirements necessary to bring the property known generally as Forest Lake Resort into compliance with DEQ rules and regulations regarding waste material.

4. Defendant is sentenced to pay and shall pay to the Clerk of the Circuit Court as a condition of probation the financial obligations in the manner designated under the Money Judgment section set forth below.

MONEY JUDGMENT

The **STATE OF OREGON** is the judgment creditor. The **DEFENDANT** is the judgment debtor. Failure to pay financial obligations will cause the defendant's financial obligation being referred to the Department of Revenue or some other collection agency for action.

COMPENSATORY FINE	**$10,000.00**
UNITARY ASSESSMENT	**$ 60.00**
TOTAL AMOUNT OF MONEY JUDGMENT	**$10,060.00**

The compensatory fine shall be paid to the Oregon Department of Environmental Quality.

Defendant shall pay the money judgment in installments of not less than $1,500.00 per month, beginning October 31, 1999 and with a like payment on the same day of each month thereafter until the entire balance is paid in full. All financial obligations shall be paid in full 60 days prior to termination of defendant's probation.

IT IS FURTHER ORDERED that any Bail/Security shall be applied to the court-ordered obligation owed by the defendant in this case, then to any other financial obligations defendant owes to this Court.

PAYMENT OF THE ABOVE FINANCIAL OBLIGATIONS SHALL BE MADE TO: TRIAL COURT CLERK, CLATSOP COUNTY CIRCUIT COURT, P. O. BOX 659 ASTORIA, OREGON 97103

JANUARY 22, 1999
DATE

DAVID HANTKE
CIRCUIT COURT JUDGE

THIS IS TO CERTIFY THAT ON 1-22-99
A COPY OF THE ABOVE WAS
MAILED / DELIVERED TO: DA | Roman
PK
COURT CLERK
1-22-99
DATE

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

February 2, 1999

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
WQ/NWR-99-010
NOTICE OF NONCOMPLIANCE
INCOMPLETE APPLICATION

Oregon Administrative Rule (OAR) 340 71-130(16) requires you to obtain a DEQ Water Polllution Control Facilities (WPCF) permit when it becomes necessary to repair (replace) an existing system in a facility the size of Forest Lake Resort. You have been required by law and rule to obtain this permit and to upgrade or repair the park's systems since the first documentation of septic system failure at the Forest Lake Resort in the fall of 1997.

The operation of the park's sewage disposal systems without either a Water Pollution Control Facilities (WPCF) permit or a National Pollutant Discharge Elimination Systems (NPDES) permit is a Class I violation and is considered to be a serious violation of Oregon environmental law. The terms of your probation for your recent conviction on the criminal charge of water pollution in the second degree requires that Forest Lake Resort be in compliance with all state water quality regulations. If you fail to submit a complete permit application in accordance with the schedule set forth below, we will refer this matter to the Clatsop County District Attorney for possible prosecution as a probation violation.

You have submitted an incomplete application for a WPCF permit. This type of permit authorizes onsite, usually subsurface disposal of sewage. In order to go forward, you need to complete the application, obtain the permit, submit approvable upgrade plans, and construct the needed upgrade.

We strongly recommend that you construct a full upgrade of the park's wastewater disposal system. The area available for potential drainfield use is limited, and it is advisable to consider that sooner or later a full upgrade will be

required. However, some sites may not be suitable for subsurface disposal due to poor soils, topographical features and/or inadequate disposal area.

In order to see if a WPCF (on-site) permit is even an option for your facility, you need to complete your WPCF application by submitting the following items, previously requested in my letter to you dated September 1, 1998:

a. A soil evaluation report by DEQ's North Coast Branch Office or by a qualified consultant;

b. A groundwater study showing depth to groundwater, gradient (direction) and groundwater quality. The park is in an area of a shallow, unprotected aquifer and there is a high potential for groundwater contamination. The Department groundwater assessment guidelines that I mailed you on September 1,1998, will help you to understand what information is needed;

c. A narrative and conceptual plan for the upgrade. Please refer to the application instructions and the checklist sent to you previously. The conceptual plan must include a layout of the park, showing all of the mobile home spaces and RV spaces, and indicating which RV spaces have sewer connections. The plan should indicate the location of each septic tank, dosing tank and drainfield, and the narrative should describe what is connected to each system; and

d. A description and evaluation by a qualified professional of each existing septic system at the facility (especially if full upgrade is not proposed).

If a WPCF permit is found to be not feasible, you will need to apply for an NPDES permit for either year round discharge, or possibly for winter discharge with summer onsite subsurface disposal depending on site and soil conditions. Several months ago your engineering firm recommended this course of action. The cost of an NPDES permit is roughly $7,000 with annual fees and monthly reporting requirements. You would be required to retain the services of a certified sewage treatment plant operator. The discharge to the river would require close monitoring, sampling and testing. If you decide to proceed with this alternative, you can contact me at (503) 229-6653 for an NPDES application packet.

You have obtained a repair permit from DEQ's North Coast Branch Office authorizing installation of two holding tanks at the park. The holding tank installation is an interim measure to prevent sewage or effluent discharges until there is an approved means of sewage disposal for the units connected to these tanks. You must continuously operate these holding tanks as well as all other systems at the park in such a manner that no more discharges of sewage or effluent occur. Any such discharge to ground surface or to surface waters of the state would constitute a Class I violation of Oregon environmental law. Should a discharge occur, you must take immediate action to protect the park residents from exposure to the

sewage or effluent. All ponded wastewater must be removed by a licensed sewage disposal service. The contaminated area must be limed to disinfect it. If feasible, the limed area should be covered with six inches of soil to protect residents from coming into contact with the lime. In any case the area should then be fenced and posted to keep residents and pets out of that area.

Please submit a complete WPCF application or notify the Department that you require an NPDES permit by March 5, 1999. If it is determined that an NPDES permit is required, please submit a complete NPDES application by April 5, 1999.

If you have any questions, you can contact me at (503) 229-6653.

Sincerely,

Anne Cox, R.S.
Natural Resource Specialist
Water Quality Source Control
Northwest Region

cc: DEQ/Enforcement
DEQ/NCBO
DEQ/NWR/Dewey Darold
Clatsop County District Attorney

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

CERTIFIED MAIL RETURN RECEIPT - Z 004 366 675

March 19, 1999

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
WQ/NWR-99-030
NOTICE OF NONCOMPLIANCE

On February 2, 1999, you were sent a Notice of Noncompliance listing the continuing violations at Forest Lake Resort at the time of the letter. The missing items from your application for a DEQ permit to authorize upgrade of the sewage system at the park were also listed. The Notice stated that discharges of sewage or effluent to ground surface or to waters of the state constitute Class I violations of Oregon Environmental Law.

On March 8, 1999, DEQ's North Coast Branch office received a sewage discharge complaint from one of the tenants at the park. The complainant told our office that she had already notified the park manager of the problem. In response to the complaint Dewey Darold, DEQ staff, visited Forest Lake Resort on March 12, 1999. He found sewage discharges in two new locations in the park: a past discharge as evidenced by fecal material and toilet paper that occurred between spaces 23 and 24; and a current discharge of both solids and liquids between spaces 19 and 20. He also noted that water was leaking into the tank at the tank/riser interface of the holding tank that was recently installed near space 15.

By phone call on March 12, Mr. Darold notified Brenda Siaw of the sewage discharge violations. Mr. Darold received a voice mail message from Brenda Siaw at 7:45 a.m. on March 15, stating that Seacoast Nursery had responded to the problem, pumped the tank, put lime down, and that the problem was taken care of.

However, Dave Darling of Seacoast Nursery stated by phone on March 15, 1999, that these areas of sewage discharge were **not** serviced last week by Seacoast Nursery. Company records for the week of March 8-12 indicate that Seacoast worked on a clogged line at space 40, and that the company pumped the following tanks that week: a septic tank near space 32, the holding tank at space 15, and the septic tank/dosing tank complex in the open grassy area.

Mr. Darold left you a voice mail message at 3:21 p.m. on March 15 to let you know that Seacoast Nursery had **not** corrected the sewage problems at spaces 23-24 and 19-20.

Seacoast confirmed by phone on March 16 that they had within the past few hours been authorized by you to correct the problems at spaces 23-24 and 19-20, and that they were at the park that day working on the problems in those locations.

The above documented sewage discharges represent Class I violations of Oregon Administrative Rule (OAR) 340-71-130(3) and Oregon Revised Statute (ORS) 164.785.

As noted in the Notice of Noncompliance of February 2, 1999, you are continuing to operate the park's sewage disposal systems without a DEQ Water Pollution Control Facilities (WPCF) permit or National Pollutant Discharge Elimination Systems (NPDES) permit to do so. This is a Class I violation of OAR 340-71-130(16) and ORS 468B.050. We still have not received a completed application from you.

These Class I violations are considered to be serious violations of Oregon environmental law. The terms of your probation for your recent conviction on the criminal charge of water pollution in the second degree requires that Forest Lake Resort be in compliance with all state water quality regulations. We are therefore referring these violations to the Clatsop County District Attorney for his consideration as possible probation violations. The Department is also considering taking formal enforcement action, which may include assessment of civil penalties.

You are to take immediate action to protect the park residents from exposure to the sewage or effluent. All ponded wastewater must be removed by a licensed sewage disposal service. The contaminated area must be limed to disinfect it. If feasible, the limed area should be covered with six inches of soil to protect residents from coming into contact with the lime. In any case the area should then be fenced and posted to keep residents and pets out of that area. It is a violation of ORS 164.785 to allow the exposed sewage to remain at the park.

You need to determine the cause of the new sewage discharges. If a discharge is due to a broken or clogged sewer line, this can be remedied by replacing the broken line (plumbing permit required) or by clearing the clog. If the discharge is due to drainfield failure, the Department may require you to obtain another repair permit and to install holding tanks in each of these locations as an interim measure to protect public health until a full upgrade for the park is constructed.

I recommend that you have your park manager make daily inspections of the park's sewer systems to assure that there are no further sewage discharges. If there are further discharges, he needs to contact DEQ immediately and to also take steps to remedy the problem.

You also need to make the necessary corrections on the two holding tank installations authorized under Permit 99-03 so that the Department can issue a Certificate of Satisfactory Completion. The correct electrical alarms/floats must be installed by a licensed electrician (electrical permit required), and the tanks need to be made water tight to ground surface. Operation of an unapproved sewage system is a violation of ORS 468B.080, ORS 454.605 to 454.745, and OAR 340-71-175(5).

If you have any questions, you can contact Anne Cox at (503) 229-6653.

Sincerely,

Robert P. Baumgartner
Manager
Water Quality Source Control
Northwest Region

cc: DEQ/Enforcement
DEQ/NCBO
DEQ/NWR/Dewey Darold
Joshua Marquis, Clatsop County District Attorney

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

CERTIFIED MAIL RETURN RECEIPT

April 29, 1999

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
WQ/NWR-99-054
NOTICE OF NONCOMPLIANCE

By Notice of Noncompliance dated March 19, 1999, the Department of Environmental Quality (DEQ or Department) notified you of continuing and new sewage violations at Forest Lake Resort. Since that time more violations have been documented by site visits on March 25 and again on April 23, 1999.

The violations of Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) are as follows:

- Allowing sewage to discharge to ground surface (ORS 164.785 and OAR 340-71-130(3))
- Operation of the park's sewage systems without a permit (ORS 468B.050)
- Operation of the holding tanks without DEQ approval of their installation (ORS 468B.080, ORS 454.605 to 454.745, and OAR 340-71-175(5).

These are Class I violations and are considered to be serious violations of Oregon environmental law. The terms of your probation for your recent conviction on the criminal charge of water pollution in the second degree requires that Forest Lake Resort be in compliance with all state water quality regulations. We are therefore referring these additional violations to the Clatsop County District Attorney for his consideration as possible probation violations. The Department is also considering taking formal enforcement action, which may include assessment of civil penalties.

If you have sold the park, please provide the Department with written documentation of the sale including the names and full addresses of the new owners.

If you have any questions, you can contact Anne Cox at (503) 229-6653.

Sincerely,

For B. L. Baumgartner

Robert P. Baumgartner
Manager
Water Quality Source Control
Northwest Region

cc: DEQ/Enforcement
DEQ/NCBO
DEQ/NWR/Dewey Darold
Joshua Marquis, Clatsop County District Attorney

Anne's Copy

Oregon

May 21,1999

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

ENFORCEMENT SECTION

Caleb Siaw
19075 SE Foster Rd.
Boring, OR 97009

Re: Mutual Agreement and Order
In the Matter of:
Caleb Siaw
Case No. WQ/D-NWR-98-212
Clatsop County

Dear Dr. Siaw:

The Mutual Agreement and Order (MAO) in the above case has been approved by the Director of the Department of Environmental Quality on behalf of the Environmental Quality Commission. A copy of the signed order is enclosed. If you have any questions please contact Anne Cox at (503)-229-6653.

Thank you for your cooperation and your full compliance is expected.

Sincerely,

Les Carlough, Manager
Enforcement Section

LAC:
Enclosure
cc: Rules Coordinator, DEQ
Anne Cox, NWR Region, DEQ
Dewey Darold, NWR Region, DEQ
WQ Division, HQ, DEQ
Business Office, DEQ
(GC.8 06/98)

2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5528
TTY (503) 229-5471

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: CALEB SIAW	)	MUTUAL AGREEMENT AND ORDER No.WQ/D-NWR-98-212 CLATSOP COUNTY

WHEREAS:

1. Caleb Siaw (Siaw) owns or operates Forest Lake Resort, a mobile home park (park) located at T5N, R 10 W, Section 4 A, Tax Lot 1100, Clatsop County, Seaside, Oregon.

2. On or about November 11, 1997, Dewey Darold (Darold), a Department of Environmental Quality (DEQ or Department) inspector, instructed Siaw about the mechanics of a septic system operation. Siaw was also informed that without a repair permit from DEQ, he cannot perform any modifications or alterations to the on-site sewage disposal system or part thereof (system).

3. Darold observed sewage discharging to ground surface at the park on the following dates: November 20, December 9, December 17 and December 18, 1997; and January 15, February 6, March 12 and September 3, 1998.

4. Darold examined Siaw's system on September 3, 1998, and observed sewage discharging onto the ground surface between spaces 15 and 16 and space 37. untrue and denied.

5. On or about September 3, 1998, Darold advised Siaw to take immediate action to repair the failing system including the control and elimination of the source of the discharge. Siaw was advised to take immediate steps to pump, disinfect, fence and post signs warning of the surfacing sewage. untrue and denied

6. Siaw has not submitted a complete application for a Water Pollution Control Facilities (WPCF) permit and repair the system in accordance with the rules.

7. Siaw received three (3) Notices of Noncompliance (NONs) dated December 11, 1997, March 24 and September 21, 1998, citing the violations listed above.

8. On December 15, 1998, DEQ issued Notice of Assessment of Civil Penalty and Department Order No. WQ/D-NWR-98-212 (Notice) to Siaw. The Notice assessed a $6,291 civil penalty against Siaw for three (3) violations alleged in the Notice. The Order required Siaw to: 1) disinfect the areas where sewage was discharging onto the ground surface at the park; 2) fence the affected areas; 3) pump the tanks when required; 4) install and complete the repairs for the new tanks; and 5) submit to DEQ the pumping records of the tank pumping by the 15th of each month of the preceding month.

9. By letter dated January 4, 1999, Siaw filed a request for hearing and an Answer to the Notice.

10. DEQ sent a NON on February 2, 1999, citing repeated occurrences of the same violations cited in the Notice.

11. DEQ and Siaw recognize that Siaw will continue to violate ORS 454.665 and OAR 340-71-175 until the interim holding tank systems have been properly constructed and the Department issues a Certificate of Satisfactory Completion.

12. DEQ and Siaw recognize that Siaw will continue to violate ORS 468B.050, OAR 340-71-130(15) and (16) until Siaw is issued either a WPCF or NPDES Permit by DEQ, and completes the construction required under either permit.

13. DEQ and Siaw recognize that the Environmental Quality Commission has the power to impose a civil penalty and to issue an abatement order for violations of Oregon law. Therefore, pursuant to ORS 183.415(5), DEQ and Siaw

wish to limit and resolve the future violations referred to in Paragraph 11 and 12 in advance by this Mutual Agreement and Order (MAO).

14. This MAO is not intended to settle the violations cited in paragraphs 2 through 8, for which Siaw has requested a contested case hearing. This MAO is not intended to limit, in any way, DEQ's right to proceed against Siaw in any forum for any past or future violations not expressly settled herein.

NOW THEREFORE, it is stipulated and agreed that:

15. The Environmental Quality Commission shall issue a final order:

A. Requiring Siaw to comply with the following schedule and conditions:

(1) Siaw shall monitor the park daily for sewage discharges. Within six (6) hours of discovering a discharge of on-site sewage to the ground surface or receiving notification of a discharge of on-site sewage to the ground surface, Siaw shall: 1) disinfect the areas where sewage was discharging to the ground surface at the park; 2) cover any existing or any new areas of ponding sewage effluent; 3) fence the contaminated area; and 4) post legible warning signs that can be understood by children. Siaw shall also telephone DEQ's North Coast Office in Warrenton, Oregon at (503) 861-3280 (or leave a message) reporting the discharge and state what corrective action Siaw shall take and the timetable that Siaw proposes to accomplish such measures.

(2) Siaw shall complete the repair construction authorized by Repair Permit #99-03. Siaw shall qualify for and request from DEQ a signed Certificate of Satisfactory Completion within 30 days of signing this MAO.

(3) Siaw shall operate the new holding tanks located at space 37 and between spaces 15 and 16 in accordance with DEQ's holding tank regulations until such time as a DEQ-approved permanent sewage disposal system

has been installed with a DEQ WPCF permit or National Pollution Discharge Elimination System (NPDES) permit.

(4) Siaw shall submit to DEQ's North Coast Office located at 65 N.Hwy 101, Suite G, Warrenton, OR 97146, by the 15th of each month, the tank pumping records of the preceding month. The records shall be from a DEQ licensed sewage pumper. If Siaw enters into a new contract, with a DEQ licensed sewage pumper, within seven (7) days of entering into that contract, Siaw shall submit a copy of that contract to DEQ's North Coast Office.

(5) Siaw shall submit within four (4) weeks of the signing of this MAO a soil evaluation report (report) for the park to DEQ's North Coast Branch Office. The report should be performed by a qualified consultant. Based on that report DEQ will determine if a WPFC or NPDES permit is needed.

B. (1) Siaw shall complete a WPCF application within 30 days of being notified by DEQ if DEQ determines a WPCF permit is needed based on the soil evaluation.

(a) Siaw shall complete the following items for the application if a WPCF permit is required:

(i) A groundwater study showing depth to groundwater, gradient (direction) and groundwater quality.

(ii) A narrative and conceptual plan for the upgrade is required. Refer to the WPCF application instructions and checklist. The conceptual plan must include a layout of the park, showing all of the mobile home spaces and Recreational Spaces (RV), and indicating which RV spaces have sewer connections. The plan shall indicate the location of each septic tank, dosing tank and drainfield. The narrative shall describe what is connected to each system, a description and an evaluation by a qualified professional of each existing septic system at the facility.

(b) Within 30 days of submitting a complete WPCF permit application, Siaw shall submit acceptable plans and specifications as per OAR 340-52 for a sewage system to serve the entire facility.

(c) Within 30 days of DEQ issuing the WPCF permit and approving the plans, Siaw shall begin construction of the upgrade. The construction shall be in accordance with all applicable construction codes, ordinances, rules or statutes from the appropriate authority.

(d) Within 180 days of plan approval, Siaw shall complete the construction of the upgrade system in accordance with the submitted plans and in compliance with the conditions of the DEQ's approval of plans.

B. (2) If a NPDES permit is required the NPDES application shall be completed within 120 days of the decision by DEQ that such a permit is required.

16. If any event occurs that is beyond Siaw's reasonable control and that causes or may cause a delay or deviation in performance of the requirements of this MAO, Siaw shall immediately notify the Department verbally of the cause of delay or deviation and its anticipated duration, the measures that have been or will be taken to prevent or minimize the delay or deviation, and the timetable by which Siaw proposes to carry out such measures. Siaw shall confirm in writing this information within five (5) working days of the onset of the event. It is Siaw's responsibility in the written notification to demonstrate to the Department's satisfaction that the delay or deviation has been or will be caused by circumstances beyond the control and despite due diligence of Siaw. If Siaw so demonstrates, the Department shall extend times of performance of related activities under this MAO as appropriate. Circumstances or events beyond Siaw's control include, but are not limited to, acts of nature, unforeseen strikes, work stoppages, fires, explosion, riot, sabotage, or war. ~~Increased cost of performance~~

~~or consultant's failure to provide timely reports may not be considered circumstances beyond Siaw's control~~.

17. Regarding the violations set forth in Paragraph 11 and 12 above, which are expressly settled herein, Siaw and the DEQ hereby waive any and all of their rights to any and all notices, contested hearing, judicial review, and to service of a copy of the final order herein. The DEQ reserves the right to enforce this order through appropriate administrative and judicial proceedings.

18. Siaw acknowledges that he has actual notice of the contents and requirements of this MAO and that failure to fulfill any of the requirements hereof would constitute a violation of this MAO and subject Siaw to payment of civil penalties.

19. The Department may amend the compliance schedule and conditions in this Order upon finding that such modification is necessary because of changed circumstances or to protect public health and the environment. The Department shall provide Siaw a minimum of thirty (30) days written notice prior to issuing an Amended Order modifying any compliance schedules or conditions.

20. This MAO shall terminate 60 days after the completion of the construction of the upgraded system in accordance with the DEQ approved plans, schedules, conditions and permit.

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Caleb Siaw

5/10/99
Date

(Name) CALEB SIAW
(Owner) ~~Former owner~~

DEPARTMENT OF ENVIRONMENTAL QUALITY

5/20/99
Date

Andrew Z Schaedel
for Langdon Marsh, Director

FINAL ORDER

IT IS SO ORDERED:

ENVIRONMENTAL QUALITY COMMISSION

5/7/99
Date

By: Andrew Z Schaedel
for Langdon Marsh, Director
Department of Environmental Quality
Pursuant to OAR 340-11-136(1)

Dewey

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

June 7, 1999

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
Compliance with MAO

On May 20, 1999, you and the Department executed a Mutual Agreement and Order. Please note the following:

1. The MAO requires that you satisfactorily complete construction of the holding tanks within 30 days of the signing date of the MAO. Enclosed is a copy of DEQ's correction notice dated March 12, 1999. The requested corrections have not been made. If you don't get the holding tanks approved by June 20, 1999, this will constitute a violation of the MAO.
2. The MAO requires you to submit by the 15th of each month the holding tank pumping records for the previous month. May's records are due by June 15.
3. The MAO requires you to complete a WPCF application within 30 days of signing of the MAO. No groundwater studies have been submitted nor has a satisfactory narrative and conceptual plan been submitted. Please refer to previous letters specifying the items needed to complete your application.

Also enclosed are portions of the signed MAO indicating the above items you agreed to complete. If you have any questions, please contact me at (503) 229-6653.

Sincerely,

Anne Cox

Anne Cox, R.S.
Natural Resource Specialist
Water Quality Source Control
Northwest Region

Enclosure: Correction Notice, portion of MAO

cc: DEQ/Enforcement/Charley Herdener
DEQ/NCBO
DEQ/NWR/Dewey Darold
Bob Sweeney, Environmental Management Systems
4080 SE International Way, Suite B106
Milwaukie, Oregon 97222

STATE OF OREGON
DEPARTMENT OF ENVIRONMENTAL QUALITY
ON-SITE SEWAGE SYSTEM INSTALLATION

CORRECTION NOTICE

An Inspection of this On-Site Sewage System has identified the following deficiencies:

HOLDING TANK SPACE 15 & 16

1) Water leaking into holding tank at point where riser connects to top of tank. Make riser connection water tight. Seal, caulk, etc. Interior of riser (not sure which one) has ~2" opening to accommodate pressure pipe. This opening must be effectively seale off

2.) The incoming flow to both tanks appeared suspect due to characteristics of liquids. All building sewer piping to both tanks must be watertight. Please test all building sewer plumbing connected to both temporary holding tank. Provide certification that watertight testing has taken place.

Under the provisions of the OREGON ADMINISTRATIVE RULES, all deficiencies listed above must be corrected within 30 days, and a CERTIFICATE OF SATISFACTORY COMPLETION must be issued prior to use of this system. When corrections have been completed, call for inspection.

PERMIT NO. 99-03	5N	10W	4A	1100
	Township	Range	Section	Tax Lot / Acct. No.

INSPECTION:

TIME 2:00 P.M.

DATE 3-12-99

BY _____
(Signature)

CONTACT: North Coast Branch Office @ 503-861-3280 or N.W. Region Office at 229-6313

DO NOT REMOVE THIS NOTICE FROM SITE

has been installed with a DEQ WPCF permit or National Pollution Discharge Elimination System (NPDES) permit.

(4) Siaw shall submit to DEQ's North Coast Office located at 65 N.Hwy 101, Suite G, Warrenton, OR 97146, by the 15th of each month, the tank pumping records of the preceding month. The records shall be from a DEQ licensed sewage pumper. If Siaw enters into a new contract, with a DEQ licensed sewage pumper, within seven (7) days of entering into that contract, Siaw shall submit a copy of that contract to DEQ's North Coast Office.

(5) Siaw shall submit within four (4) weeks of the signing of this MAO a soil evaluation report (report) for the park to DEQ's North Coast Branch Office. The report should be performed by a qualified consultant. Based on that report DEQ will determine if a WPFC or NPDES permit is needed.

B. (1) Siaw shall complete a WPCF application within 30 days of being notified by DEQ if DEQ determines a WPCF permit is needed based on the soil evaluation.

(a) Siaw shall complete the following items for the application if a WPCF permit is required:

(i) A groundwater study showing depth to groundwater, gradient (direction) and groundwater quality.

(ii) A narrative and conceptual plan for the upgrade is required. Refer to the WPCF application instructions and checklist. The conceptual plan must include a layout of the park, showing all of the mobile home spaces and Recreational Spaces (RV), and indicating which RV spaces have sewer connections. The plan shall indicate the location of each septic tank, dosing tank and drainfield. The narrative shall describe what is connected to each system, a description and an evaluation by a qualified professional of each existing septic system at the facility.

wish to limit and resolve the future violations referred to in Paragraph 11 and 12 in advance by this Mutual Agreement and Order (MAO).

14. This MAO is not intended to settle the violations cited in paragraphs 2 through 8, for which Siaw has requested a contested case hearing. This MAO is not intended to limit, in any way, DEQ's right to proceed against Siaw in any forum for any past or future violations not expressly settled herein.

NOW THEREFORE, it is stipulated and agreed that:

15. The Environmental Quality Commission shall issue a final order:

A. Requiring Siaw to comply with the following schedule and conditions:

(1) Siaw shall monitor the park daily for sewage discharges. Within six (6) hours of discovering a discharge of on-site sewage to the ground surface or receiving notification of a discharge of on-site sewage to the ground surface, Siaw shall: 1) disinfect the areas where sewage was discharging to the ground surface at the park; 2) cover any existing or any new areas of ponding sewage effluent; 3) fence the contaminated area; and 4) post legible warning signs that can be understood by children. Siaw shall also telephone DEQ's North Coast Office in Warrenton, Oregon at (503) 861-3280 (or leave a message) reporting the discharge and state what corrective action Siaw shall take and the timetable that Siaw proposes to accomplish such measures.

(2) Siaw shall complete the repair construction authorized by Repair Permit #99-03. Siaw shall qualify for and request from DEQ a signed Certificate of Satisfactory Completion within 30 days of signing this MAO.

(3) Siaw shall operate the new holding tanks located at space 37 and between spaces 15 and 16 in accordance with DEQ's holding tank regulations until such time as a DEQ-approved permanent sewage disposal system

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

August 16. 1999

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
WQ/NWR/99-085
NOTICE OF NONCOMPLIANCE, INCOMPLETE APPLICATION

On May 20, 1999, you entered into a Mutual Agreement and Order (MAO) with the Department of Environmental Quality (DEQ). You have violated that MAO as follows:

15A(1) Failure to monitor daily and/or notify the Department of further sewage discharges at the park. Department staff have found sewage discharges since the signing of the MAO. On July 20 and July 21, Mr. Malo was witnessed pumping septic tank effluent out of a tank onto ground surface. You are responsible for the park and should have known about these occurrences and have reported them to DEQ.

15A(4) Failure to submit monthly holding tank pump records by the fifteenth of the following month to DEQ's North Coast Branch Office. May's records were submitted six days late on June 21, 1999. No pump records have been received for June or July.

15A(4)—Failure to inform DEQ if you change pumpers. You have had Ed's Septic pump your holding tanks on several occasions. However, you have not notified the Department of this change, nor have you submitted a contract with Ed's Septic.

15A(5)—Failure to submit a soil evaluation report within four weeks of the signing of the MAO. DEQ did not receive this report until July 22, 9 weeks after execution of the MAO.

By these omissions and late submittals, you continue to delay the process of bringing the park into compliance. Therefore, I am referring these MAO violations to DEQ's enforcement section with a recommendation that DEQ send you a penalty demand notice.

Also, Dr. Siaw, I will take this opportunity to inform you of the Department's review of the soil report submitted on July 22, 1999, by your system designer Bob Sweeney. Based on the soil report, we have determined that a WPCF permit is feasible and is required for your wastewater system upgrade. As per the terms of the MAO, you have 30 days from this notice to complete your WPCF permit application.

The proposed area for post treatment subsurface disposal is across Hwy 101 and on the property of Mr. Malo. The site suitability has been confirmed by DEQ staff's evaluation of test pits. To use this area, you will need to have the required septic easement recorded before plans can be approved, and you will need to determine that there is a lawful method for transporting the RGF filtrate from the park's treatment plant to the disposal area. The subsurface disposal options on the actual park property have been found to be unsuitable due to lack of area, area prone to flooding, and shallow depth to the permanent groundwater table.

In order to complete your WPCF application, you need to submit exhibits providing groundwater information and an evaluation of groundwater and surface water impacts. The preliminary groundwater assessment submitted to DEQ June 21, 1999 by your consultant was insufficient to demonstrate groundwater quality will not be degraded by the proposed disposal system. Groundwater information should be specific to the proposed disposal area and include well logs, a description of the surface geology, general hydrogeology or hydrology, a summary of water rights (surface or groundwater) in the area, and a basis for conclusions given with regard to direction of groundwater flow. Information available to the DEQ indicates the aquifer underlying the disposal area is shallow, unprotected, and interconnected with surface water in the immediate area.

The DEQ's Groundwater Rules (OAR 340-40) require a groundwater quality protection program be implemented where permitted sources have the potential to adversely impact groundwater quality. Because of the known hydrologic characteristics in the area, the presence of nearby municipal and private water uses, and the design flow of the proposed system, a Hydrogeologic Characterization report and Groundwater Monitoring Program will be required prior to permitting the disposal system. A copy of the Groundwater Rules as well as guidance documents for the submittal of both the characterization and monitoring plan is enclosed. I recommend that you engage the services of a registered professional geologist, engineering geologist, or engineer qualified to perform hydrogeologic investigations to do this work. The consulting groundwater professional you choose should review these guidance documents and meet with DEQ staff to propose an approvable workplan and time schedule for completion of the necessary work. The permit cannot be issued before the Hydrogeologic Characterization, including initial groundwater monitoring data and estimates of impacts to surface water and groundwater, has been submitted.

We will evaluate the completed Hydrogeologic Characterization to determine future groundwater monitoring requirements and to begin the process of establishing groundwater Concentration Limits as per OAR 340-40-030. You may be required to install additional or

substitute monitoring wells to demonstrate compliance with permit limits, depending on initial well placement and construction. Over the course of the first three years of operation of the disposal system, you will need to gather groundwater quality data and provide appropriate data analysis upon which we will base the groundwater Concentration Limits in the permit. No increases in contaminant concentrations above background groundwater quality levels are permitted without a Concentration Limit Variance as per OAR 340-40-030.

Please submit conceptual plans for your designer's current proposal within the next three weeks. Your groundwater consultant will need to know the location and size of the disposal area, depth of trenches/piping and configuration, the anticipated wastewater quality including total nitrogen and bacteria, and the quantity of the daily discharge. Submit the Hydrogeologic Characterization within 30 days of the date of this Notice. The WPCF permit cannot be issued until these exhibits have been submitted and approved. Failure on your part to submit the items needed to complete your WPCF application within the next 30 days will result in more violations of the MAO. If you cannot comply with this or any other condition of the MAO, you need to notify the Department and request an extension in accordance with Condition 16 of the MAO.

If you propose and build a system that adequately reduces or removes pollutants to the point that the hydrogeological characterization demonstrates it will comply with OAR 340-40-030, the Department may determine that you may not be required to perform ongoing monitoring of the groundwater.

If you have any questions about the WPCF permit application, you can contact Anne Cox at (503) 229-6653. For questions about groundwater issues, please contact Lucinda Bidleman at (503) 229-5273 on Tuesdays or Wednesdays.

Sincerely,

Robert P Baumgartner

Robert Baumgartner
Manager
Water Quality Source Control
Northwest Region

Enclosures—groundwater rules, guidance document

cc: DEQ/Enforcement
Clatsop County District Attorney
DEQ/NCBO
DEQ/NWR/Dewey Darold

Environmental Management Systems, Inc.
4080 SE International Way Suite B106
Milwaukie, Oregon 97222

F;L

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 12, 1999

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Permit Application 991481
File No. 109808
Forest Lake Resort
Clatsop County
INCOMPLETE APPLICATION
CONCEPTUAL PLANS

You are still the owner of record for Forest Lake Resort. If someone else is the owner, please provide us with documentation of the transfer of ownership. You are also the only applicant for the Water Pollution Control Facilities Permit that is required for the repair and operation of the park's sewage disposal systems. The application is still incomplete. This letter addresses only the issues pertaining to your incomplete application.

By Notice dated August 16, 1999, you were requested to submit a conceptual plan for the park system upgrade and a hydrogeologic characterization. We have not received from a qualified professional any information pertaining to groundwater issues.

Bob Sweeney, Environmental Management Systems, recently submitted a conceptual plan on behalf of Adrian Malo for a 2000 square foot recirculating gravel filter (RGF) followed by a 2,000 square foot bottomless sand filter (BSF) to be constructed in the tent area between the road and berm in the southwest corner of the park. This has been proposed as a system to serve the full park, with units to be connected to the system over a 5 year period.

There is no indication that you were involved with the attached conceptual plan or that you would agree to construct or operate such a system. However, since you are the permit applicant and owner of the park, we are responding back to you with our evaluation of this concept. We have the following comments:

- There is not sufficient area for placement of both the RGF and the BSF in this area. We confirmed this by site visit. The RGF would need to be located elsewhere in the park.

- The site for the BSF will need to be surveyed to demonstrate that the 50 foot setback from the river can be met. To show this, you will need to submit a to-scale map showing the surveyed

locations of the BSF site, berm, Necanicum River, flood plain, channels and high water line adjacent to the site. We cannot permit a BSF here until this work is completed.

- The BSF at 2,000 square feet would be loaded at a rate of 5 gallons per square foot per day. The BSF size needs to be maximized in order to reduce the potential for hydraulic overloading of the filter. In fact, we would expect little or no treatment of the RGF filtrate to occur at the proposed loading rate.

- We are requiring that the influent to the BSF be denitrified and disinfected, as the BSF cannot be expected to provide significant treatment. The BSF and RGF are essentially aerobic systems and cannot be expected to denitrify, as this requires anaerobic conditions. The construction plans will need to include post RGF treatment to reduce total nitrogen to no more than 5 mg/l and to disinfect, probably via ultra violet (UV) disinfection or other means.

- The Department expects the full park to be connected to the proposed upgrade upon completion of construction.

With the above stated levels of required treatment, we can reduce the requested groundwater information to that found in a Preliminary Groundwater Assessment. Such an assessment will necessarily include, however, a determination of the seasonal variations of both depth to and quality of the groundwater at the site. If you propose and build a system that adequately reduces or removes pollutants to the point that the hydrogeological assessment demonstrates it will comply with OAR 340-40-030, the Department may determine that groundwater concentration limits and ongoing monitoring of groundwater will not be required.

Submit detailed plans for construction of the proposed upgrade and a Preliminary Groundwater Assessment within 30 days of the date of this letter. The WPCF permit cannot be issued until these exhibits have been submitted and approved.

If you have any questions about the WPCF permit application, you can contact me at (503) 229-6653. For questions about groundwater issues, please contact Lucinda Bidleman at (503) 229-5273 on Tuesdays or Wednesdays.

Sincerely,

Anne Cox, R.S.
Natural Resource Specialist
Water Quality Source Control
Northwest Region

Enclosures—conceptual plan

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

March 10, 2000

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Final Date for Submission of
Written Comments: March 24, 2000

Re: Waste Disposal Permit
File No.109808
Forest Lake Resort
Application No. 991481
Clatsop County
WQ-NWR-00-023
NOTICE OF NONCOMPLIANCE

Although you have not yet submitted the required upgrade plans requested last November, the Department of Environmental Quality (DEQ) is expediting the permit process by placing the draft permit on applicant review, followed afterward by the mandatory 30 day public comment period. We have reviewed your application for a Water Pollution Control Facilities (WPCF) permit and have drafted a proposed WPCF permit. You are invited to review the attached copy and submit any comments you may have in writing prior to the date indicated above. A copy of the permit evaluation report is also enclosed.

Other information which will be distributed to the public is enclosed for your review. Your comments on the content of this information will also be appreciated.

After your comments, if any, have been received, the 30 day public notice regarding your application will be circulated to interested individuals and organizations. The proposed permit will also be made available to those persons requesting it.

You have not yet submitted the detailed final plans we requested on November 12, 1999, for the required full upgrade to the park. This constitutes a further violation of Condition 15 B (1)(b) of the Mutual Agreement and Order (MAO) No. WQ/D-NWR-98-212 that you signed last May. This violation has been referred for further formal enforcement action.

After the public review and participation period is over, we will pend the final action on your application until you have submitted the required plans.

If you have any comments or questions, please call Anne Cox at (503) 229-6653.

Sincerely,

Robert Baumgartner, Manager
Water Quality Source Control
Northwest Region

RB/avc
Enclosures

Cc: DEQ/NWR/file
DEQ/NWR/Regional Operations/Les Carlough, Charley Herdener, Jeff Bachman
DEQ/NCBO
City of Seaside
Environmental Management Systems
4080 SE International Way, Suite B106
Milwaukie, Oregon 97222
Adrian Malo
260 Hamlet Route
Seaside, Oregon 97138

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

REGISTERED MAIL Z 213 109 217
RETURN RECEIPT

April 10, 2001

CALEB SIAW
19075 SE FOSTER ROAD
BORING OR 97009

Re: Waste Disposal Permit
File No.109808
Forest Lake Resort
Clatsop County
WQ/D-NWR-01-038
NOTICE OF NONCOMPLIANCE

Dear Dr. Siaw:

You have been previously cited for violations of Water Quality laws and regulations and for violations of the Mutual Agreement and Department Order (MAO) you entered into with the Department in May of 1999. We have had no communication from you since December of 1999, nor have you made any progress toward correction of any of these violations. Your continuing violations are as follows:

Violations of Statute and Regulation:

- In 1998 two of the septic systems in the park had failed, and you had to install holding tanks as a temporary measure until you obtained the required Water Pollution Control Facilities (WPCF) permit to build and operate a new sewage treatment and disposal system to serve Forest Lake Resort. Your failure to obtain that permit is a Class I violation of Oregon Revised Statute (ORS) 468B.050 and Oregon Administrative Rules (OAR) 340-71-130(16) and 340-71-162.

Violations of MAO (all are Class I violations):

- 15. A(1)Monitor the park daily for sewage discharges. Correct, disinfect, cover. Notify DEQ. There have been several sewage discharges at the park since you signed the MAO. You did not respond to them or notify the Department when they occurred.

- 15. A(4)—Submit by the 15th of each month, the pumping receipts for the previous month. No pump records have been submitted since the tanks were pumped on July 11, 1999. No reports were received for the full month of July, nor for the remainder of 1999, nor for the year 2000, nor for January or February or March of 2001.

- 15. A(4)—Notify DEQ within 7 days if entering into a contract with a new pumper and submit a copy of new pumper contract. The pumper contract submitted with the holding tank application was with Seacoast Nurseries. We were never informed that you changed to Ed's Septic, nor were we provided with a new contract with Ed's Septic. According to the receipts we received, Ed's Septic began pumping the holding tanks on May 30, 1999, shortly after the MAO was executed. We have receipts from Ed's Septic up through July 11, 1999. At some point Mr. Malo began pumping the tanks using the pumper truck and business licensed to his wife by DEQ: Freshway Sanitation (License No. 38032). We have not received any pumper receipts from you regarding Freshway Sanitation's pumping activities at the park. We do not have a pumper contract between you and Freshway Sanitation, nor did you inform us that Freshway Sanitation was servicing the holding tanks.

- 15. B(1) Complete a WPCF application within 30 days of notification from DEQ that a WPCF permit is feasible. You were informed in the Notice of Noncompliance dated August 16, 1999, that a WPCF permit was feasible. Your WPCF application is still incomplete as of today's date. You have not submitted the required application exhibits listed in the MAO or the August 16, 1999 Notice of Noncompliance.

You need to provide this office with the pump records for the two holding tanks from July 11, 1999 through March of 2001. You need to complete your WPCF application by submitting plans and groundwater information as previously requested. We understand that you had detailed construction plans developed for the park upgrade, but you did not submit them to DEQ.

If you have not contacted this office and resolved the violations within 30 days, we will proceed with formal enforcement action. If you have any comments or questions, please call Anne Cox at (503) 229-6653.

Sincerely,

Robert Baumgartner, Manager
Water Quality Source Control
Northwest Region

RB/avc

Cc: DEQ/NWR/file
DEQ/NWR/Regional Operations/Les Carlough, Jeff Bachman
DEQ/NCBO
Environmental Management Systems
4080 SE International Way, Suite B106
Milwaukie, Oregon 97222
Caleb Siaw
19075 SE Foster Road
Boring Oregon 97009

FOREST LAKES RESORT - W.W.T.F.

Seaside, Oregon

SBR Wastewater Treatment Facility
December 14, 1999

ENGINEER:

Environmental Management Systems
Bob Sweeney
4080 S.E. International Way, Suite #B106
Milwaukie, Oregon 97222

PH: (503) 353-9691
FAX: (503) 353-9695

ATS SALES/TECHNICAL REPRESENTATIVE:

Jim Allred
Advanced Treatment Systems, Inc.
10600 S.E. McLoughlin Blvd
Milwaukie, Oregon 97222 U.S.A.

PH: (503) 654-3061
FAX: (503) 652-8584
Email: ADVTRTSYS@MSN.COM

Option "Little SBR", Advanced Treatment Systems, Inc.

Treatment Process

The "Little SBR" is a quasi Sequencing Batch Reactor (SBR). The influent from each mobile will be collected in one of a total of nine (approximate) septic tanks that will pump (if necessary) to an equalization tank at the influent end of the SBR. The SBR will run for 18 hours and cycle doses of influent into the system. Each dose will be aerated and mixed to reduce BOD and TSS. After the aeration step the "batch" is allowed to go septic (anoxic) to reduce the nitrates produced in the aeration step. As the "batch" goes septic, the next batch of influent is slowly pumped in at the bottom of the tank to provide raw carbon necessary for denitrification. Finally, the supernatent is drawn off and the process starts over again. The supernatent will proceed to a chlorination contact chamber (available if needed) and then flow through a UV contact chamber prior to being discharged to the BSF. The entire system will be controlled by a centrally located panel.

Installation.

Installation will be by a qualified & licensed installer of the client's choice. The manufacturer's representative will be on site for installation, start-up and initial training.

Operation & Maintenance (fill in blanks).

Park management will be expected to perform operation and maintenance, which are estimated to require 1/2 hours/ DAY (day / month).

The manufacturer's representative will need to be on contract for maintenance & monitoring visits of about 24 year / month at a rate of $ 321.00 (MAX) /visit. (see ATTACHED LETTER).

Estimated Construction Costs:

			Option ATS-BSF	
Description of Items that vary with Options:	Equip	Install	Quantity	Cost
ATS w/ Disinfect	$126,000	$5,000	1	$131,000
Items common to all Options: Collection Piping, Septic Tanks, Transport Lines, Control Panel and disposal components				$116,000
Total Construction Costs (Not including permits)			Total	$247,000

Environmental Management Systems

27 April 2000

Dr. Caleb Siaw
19075 SE Foster Road
Boring, Oregon 97009

CERTIFIED MAIL

Adrian Malo
HCR 63 Box 260
Seaside, OR 97138

REGARDING: FOREST LAKES RESORT – SEWAGE SYSTEM
Seaside Oregon

Dear Dr. Siaw and Mr. Malo:

As you are aware, on 17 March 2000, Environmental Management Systems, Inc. provided you both with 4 options for sewage treatment at Forest Lakes Mobile Home Park. At that time, you were advised as to contacts where these systems have been installed and the manufacturer's points of contact. Mr. Malo seemed to have the burden of action, since Dr. Siaw indicated that he cannot afford to pay for the system. Together you were to review the information and let us know which option to pursue. To date, neither of you have provided any direction and Mr. Malo has not returned our calls.

Summary of Options Presented by EMS:

The effluent standards set by Anne Cox of DEQ are strict, particularly the requirement of achieving less than 5 mg/L of Total Nitrogen (TN). (Note: While the DEQ draft permit recently issued stated a less stringent TN standard of 10mg/L, the 5 mg/L standard should remain the target to ensure that the system consistently achieves the required quality.)

The 4 companies that have stated that they can provide treatment devices to achieve the TN standard are: FAST system produced by BioMicrobics, Inc., the "Little SBR" produced by Advanced Treatment Systems, Inc., Bio-Pure system produced by AquaClear Technologies, Inc. and Reactex System produced by Orenco Systems Inc. All systems should meet the requirements set by DEQ, and each manufacturer will provide limited guarantees to that effect. Maintenance requirements and manufacturers' estimated maintenance costs were also outlined.

Summaries and Schematic Drawings of each option were provided to you, including approximate itemized cost summaries. The estimated installation, supply, and construction costs of approximately $116,000 for the bottomless sand filter, control panel, and collection system (piping and septic tanks) will be incurred regardless of which system is chosen. The total estimated costs of the collection and treatment systems therefore ranged from $206,700 for the Reactex system to $248,200 for the ATS system. This does not include costs of DEQ Permits, surveys, design, groundwater study, testing or other requirements.

4080 SE INTERNATIONAL WAY, SUITE B106 • MILWAUKIE, OREGON 97222 • (503) 353-9691 • FAX (503) 353-9695

Our Recommended Course of Action at that time was:

In order to proceed, contact with customers and manufacturers was advised and one of the treatment options was to be chosen, IMMEDIATELY. As we have repeatedly advised you, a property line and topographical survey will need to be completed as soon as possible regardless of which system is proposed for final design and permitting purposes. In addition, DEQ will require you to contract with a qualified registered geologist to sign off on the groundwater monitoring port and proposed system to the effect that it will not significantly degrade the groundwater. Once the design is approved by DEQ, the plans should go out for bid by 3 qualified installers.

Current Status:

At your direction, we have tried many options to assist you with a treatment system. Unfortunately, we cannot proceed unless you decide which system you prefer. You have not responded, failed to pay for services rendered, have not hired the surveyor or geologist and have not met the timeline set by DEQ. Therefore, Environmental Management Systems, Inc. must consider the contract no longer valid and has regretfully ceased working on this project.

Enclosed is our statement of charges, due and payable immediately under the terms and conditions set forth in our Agreement for Professional Services.

Sincerely,

Robert F. Sweeney, R.S.
President, Environmental Management Systems, Inc.

Copies: Anne Cox, DEQ
Enclosure: Statement of Charges

Run Name =	one
Present Values as of Noncompliance Date (NCD),	12-Aug-2000
A) On-Time Capital & One-Time Costs	$165,509
B) Delay Capital & One-Time Costs	$0
C) Avoided Annually Recurring Costs	$0
D) Initial Economic Benefit (A-B+C)	$165,509
E) Final Econ. Ben. at Penalty Payment Date,	
17-Jan-2002	**$191,709**
For-Profit (not C-Corp.) w/ OR tax rates	
Discount/Compound Rate	10.8%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	10-Jan-2002
Capital Investment:	avoided
Cost Estimate	$247,000
Cost Estimate Date	27-Apr-2000
Cost Index for Inflation	PCI
# of Replacement Cycles; Useful Life	0; 20
Projected Rate for Future Inflation	N/A
One-Time, Nondepreciable Expenditure:	
Cost Estimate	$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Tax Deductible?	N/A
Annually Recurring Costs:	
Cost Estimate	$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	N/A
On-Time Compliance Capital Investment	
Delay Compliance Capital Investment	
On-Time Compliance Replacement Capital	
Delay Compliance Replacement Capital	
One-Time Compliance Nondepreciable	
Delay Compliance Nondepreciable	

COX Anne

From: COX Anne
Sent: Friday, October 15, 1999 12:39 PM
To: CARLOUGH Les; HERDENER Charley
Cc: BAUMGARTNER Robert P; SCHAEDEL Andrew L; BIDLEMAN Lucinda; COX Anne; ILLINGWORTH Dennis; MANN David S
Subject: Caleb Siaw talks about a different buyer

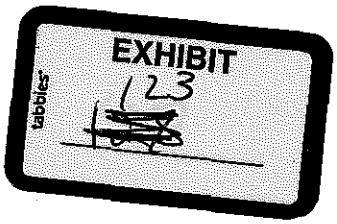
bob Sweeney called, said that in a recent conversation he had with Caleb Siaw, that Dr. Siaw talked about possibly selling the park to a third party from Rockaway Beach. This means a couple of things. Malo may be backing out or may be getting pushed out by Dr. Siaw. The other thing it could mean is that Malo's farm property may not be available for drainfield disposal.

Malo has had posession and has been acting as manager if not owner. From Mr. Sweeney's statements, I would assume that we should continue to deal with Dr. Siaw as the owner of record--which is what he is.

Of interest, Bob Sweeney ran the following conceptual plan past me--back to square 1--using just the park property. RGF followed by bottomless sand filter (BSF)(gallons per square foot? not determined yet)--in an area of the park where Bob says there are gravels and it is at least 50 feet from the river. I told Bob that we could explore this option--questions about hydraulic loading, how much treatment would a polishing sand filter have if we were running high amounts of RGF filtrate through it--would it just be a conduit to groundwater with no essential treatment happening in the sand filter? I don't know.

I asked Bob to fax me a conceptual layout of where the RGF and BSF would be in the park, size of the BSF, and the soil notes for any test pits he looked at in the area he's thinking of using for the BSF. I told him the GW impacts would still have to be figured out. Acknowledged. I also told him that it is still possible that there may not be an onsite (WPCF) solution for this property...might have to go NPDES now that we are back to using just the property.

Anne Cox
229-6653



COX Anne

From: COX Anne
Sent: Friday, April 02, 1999 8:12 AM
To: HERDENER Charley; CARLOUGH Les; BAUMGARTNER Robert P
Cc: COX Anne; DAROLD Dewey; JOHNS Dave; ASLA Lynn
Subject: Caleb Siaw is selling Forest Lake Resort

I talked by phone this morning with Bob Sweeney, consultant, regarding Forest Lake Resort.

1. Holding tank alarms are still not right--we cannot issue a cert of satis completion yet!

2. Caleb Siaw is selling the park, the deal is closing--buyer is Adrian Melo, who lives across the street from the park. Bob says that Mr. Melo is aware of the park's problems and DEQ's current enforcement actions. I did not ask for Mr. Melo's phone number or address.

3. Bob is coming in on April 6 at 1 p.m. and we will discuss the Forest Lake plans as well as plans for several other sites.

Anne Cox
229-6653