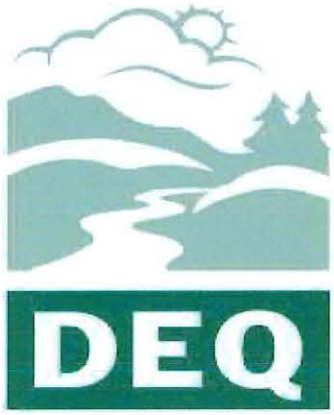
EQCMeeting1of1DOC20031204

Part 1 of 3

OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 12/04/2003



State of Oregon
Department of Environmental Quality

State of Oregon
Department of Environmental Quality Memorandum

To: Environmental Quality Commission **Date:** December 3, 2003

From: Mikell O'Mealy, Assistant to the Commission and Director

Subject: Meeting materials

Enclosed are additional materials for your EQC meeting, including:

- A **master agenda**, showing approximate timelines and presenters for each agenda item.
- Updated information for **Item F: Approval of Director's Financial Transactions**, including the Director's November 2003 time sheet and an updated summary of transactions. Please add these items to your materials for Item F.
- The **Director's Dialogue for Item C**, which Stephanie will present on Thursday afternoon.
- Travel expense forms
- Paper and pencil

Also enclosed is a letter to you from Laura Weiss, Oregon Environmental Council Program Director, regarding permit limits and DEQ's Toxics Strategy, along with a copy of OEC's newly released "The Toxic Gap" report.

Finally, I've included for your reference and use an updated DEQ Telephone Directory, which lists phone numbers for all DEQ offices and employees.

Please let me know if you have any needs or questions. Thanks.

State of Oregon
Department of Environmental Quality Memorandum

To: Environmental Quality Commission **Date:** November 26, 2003

From: Mikell O'Mealy, Assistant to the Commission and Director

Subject: Additional materials for the December 4-5 EQC meeting

Enclosed are additional materials for Items D and J, for your consideration before next week's Commission meeting. Specifically:

- *Item D. Rule Adoption: Water Quality Standards, Including Temperature Criteria*
  The Department recommends that you consider several minor revisions to the proposed water quality standard rules that were mailed to you on November 14. Enclosed is a cover memo explaining the revisions.

- *Item J. Rule Adoption: Oregon Regional Haze Section 309 Implementation Plan*
  Enclosed is the Presiding Officers Report and Response to Public Comments for the proposed Oregon Regional Haze implementation plan, as promised in the materials mailed to you on November 14. Please replace the previous Oregon Regional Haze Plan with this revised version.

If you have any questions about these materials or the meeting, please contact me at 503-229-5301, or toll-free at 1-800-452-4011 ext. 5301 in the state of Oregon.

Thank you.

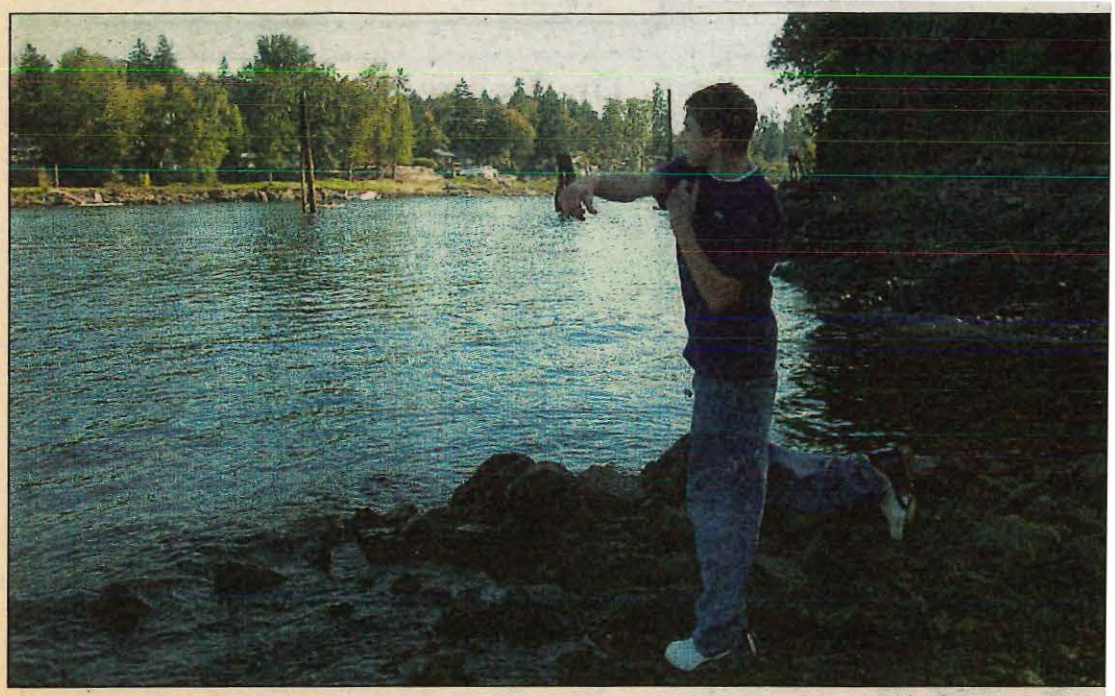


Photo by DEBRA MEADOW

A mild October day provides the backdrop for Sam Olson, 15, to skip stones on the water. Just behind him, Tryon Creek feeds into the Willamette River. Some environmental activists worry that Tryon Creek watershed's water quality problems are not being adequately addressed by city and state agencies.

Agencies, activists disagree on management of Tryon Creek

Snubbed at meeting, environmentalists question omission of water quality info from Tryon Creek Baseline Assessment report

By DEBRA MEADOW
For The Connection

Anger and distrust flared last month after several citizen activists were not allowed to ask questions at a public meeting about water quality concerns in the Tryon Creek Watershed.

Joe Higgins, a retired forester and resident of the Gabriel Park neighborhood, said, "I've been to thousands of meetings in my lifetime. That was the most blatant effort of a chair to control what was said and not said during a meeting. I am frustrated as a citizen activist."

West Multnomah Soil and Water Conservation District board chairman Brian Lightcap disallowed questions posed to him and to guest speaker Amin Wahab at an Oct. 7 meeting at the Tryon Creek Nature House. The event was an open WMSWCD board meeting preceded by an informational presentation by Wahab, the Fanno and Tryon Creek Watershed manager for Portland's Bureau of Environmental Services.

At the meeting, Wahab spoke about BES management of the 4,200-acre watershed for most of the allotted hour. Then, board director and Ashcreek resident Liz Callison asked him why BES has not been providing its Tryon Creek water quality data to the Oregon Department of Environmental Quality, so the state agency might consider listing the creek for other problems beside high temperature.

Tryon Creek is "listed," or regulated, by the DEQ only for temperature, said Wahab, which can climb to unhealthy levels for fish in warm months. Callison, who has been on the board for seven years, and others believe there are high enough levels of other pollutants in the creek to warrant review and possible DEQ listing.

"By failing to give that data to DEQ, Tryon Creek is not listed for issues it should be," said Callison.

At that point Lightcap interrupted and told

Please see TRYON CREEK page 4

NEWS

TRYON CREEK

Continued from page 1

Callison she would need to take up her concerns with Wahab after the meeting, even though Callison had provided him an advance list of questions.

In response to Lightcap's rebuff, Callison said, "It is not an individual issue. It's a public issue and it would be advantageous if Amin (Wahab) would respond."

Others at the meeting agreed and Wahab briefly addressed the question, saying, "In terms of submitting water quality data to DEQ, we are not legally required," to do so. "If they ask for it, we'll give it."

BES has been gathering water samples monthly from Tryon Creek since 1997, according to Wahab. The samples are tested for 13 different "analytes," such as temperature, dissolved oxygen and suspended solids. The data is available on the BES Web site.

While his answer touched on one of the three advance questions, Wahab did not address the other two posed by Callison. She wanted to know about BES's past and future spending plans for the $1 million in "stormwater" fees it collects. The other question regarded what Callison termed a "conflict of interest" between BES's roles as both user of streams and watersheds for sewer and stormwater infrastructure and as manager and protector of the natural resource.

Amendment of report questioned

At the meeting, Callison also asked Lightcap, "Why did you take the water quality data out of the report?" referring to the Tryon Creek Baseline Assessment report. In 2001 Callison, under the auspices of the WMSWCD, secured a $20,000 grant from the Oregon Watershed Enhancement Board to compile a comprehensive report on the state of Tryon Creek Watershed.

In June of this year, the WMSWCD board voted to amend the 300-page assessment, and public input being kept out of a public meeting." She said, "I've seen it before in this body."

Corinne Weber of Hayhurst said she was "aghast" at the way Lightcap handled the meeting, "like a dictator. If I had my druthers I would recall him from his position."

District directors are elected to four-year terms. Lightcap's term ends in 2006. This is his 25th year on the board. Directors generally run unopposed.

In an interview following the meeting, Lightcap said he "was really sorry. I was running out of time and under pressure I was a little discourteous."

'Skimpy' document

Higgins, who sits on a BES citizen advisory panel to review the Bureau's own report on water quality in Tryon Creek, said the data in the BES's document is "skimpy" and he came to the meeting to ask Wahab why additional information is not being used in the management of the watershed, particularly data from the Tryon Creek Baseline Assessment.

"If we have one report [the BES report] that says the only problem is temperature and other data seems to indicate there are other water quality criteria that should be looked at, we should err toward the all-inclusive,"said Higgins, who managed forests, watersheds and streams for the U.S. Forest Service for 33 years.

He said he was led to believe by BES that "we don't have any other serious problems in Tryon Creek," than temperature. Yet, he said the Baseline Assessment data show occasional high levels of pollutants, poor stream conditions — including eroding banks — and poor habitat for fish.

According to Wahab, Tryon Creek's water quality ranks high among other urban streams, rating 65 or 70 out of 100 on the DEQ water quality index, where 100 represents a pristine stream.

the Multnomah County Health Department in September, but has not yet received a response.

Wahab pointed out that the raw data shown in reports does not necessarily tell the whole story. Given that water samples are only taken once a month and in a single location, a storm event that has washed horse or dog droppings into the stream near the sample site might cause the reading for E. coli — a bacteria found in fecal matter — to peak that month.

"It's not necessarily an indication that the creek is in violation 24 hours a day," Wahab said.

The BES water quality document, available on its Web site *(see information box)*, says that although Tryon Creek is not currently listed by the DEQ as exceeding the minimum standard for bacteria levels, some of the water quality test results do, "meet the DEQ criteria ... required for listing," as unsafe.

Scientific validity at issue

Callison asserts that she has a copyright on the material in the Tryon Creek Baseline Assessment and that the board infringed on that copyright when it published the shortened report on its Web site. She wants the report removed from the district's Web site.

INFO ON THE WEB

West Multnomah Soil and Water Conservation District: www.westmultconserv.org
BES: general site: www.cleanrivers-pdx.org
Tryon Creek Watershed Water Quality Characterization report: http://www.cleanrivers-pdx.org/pdf/quality_tryon.pdf
Liz Callison's site where she plans to publish the original Tryon Creek Baseline Assessment: www.tryon-creekreport.com

As for why the board voted to truncate the Tryon Creek Baseline Assessment, Lightcap, a retired Corps of Engineers ecologist, said one of the purposes of the grant money awarded to the WMSWCD was to produce a "scientifically publishable report." He said he did not think Callison's original report was, "scientifically credible." Lightcap said the report contained, "unprofessionally critical and sarcastic remarks. That is not something you can do in a report."

He said that Callison, "had a lot of scientists' contributions, but well over half of the report was written by her."

Callison wrote about 80 pages of the 300 in the original assessment.

Lightcap also said some information was excluded because, "it wasn't referenced."

Carving up a good time in Hillsdale

Creek since 1997,
samples are tested
" such as tempera-
d suspended solids.
ıe BES Web site.
hed on one of the
Wahab did not
ed by Callison. She
ES's past and future
e $1 million in
ts. The other ques-
on termed a "con-
BES's roles as both
heds for sewer and
and as manager
al resource.

t questioned

lison also asked
ıke the water qual-
?" referring to the
essment report. In
e auspices of the
0,000 grant from
hancement Board
ive report on the
shed.
WMSWCD board
ge assessment, and
ion of about 115
s, several pages of
nissing from the
said she is angry
le without her

lison to "take it up

ınce also tried to
uestion, including
Cardley, a land-use
d "concerns about

Higgins, who sits on a BES citizen advisory panel to review the Bureau's own report on water quality in Tryon Creek, said the data in the BES's document is "skimpy" and he came to the meeting to ask Wahab why additional information is not being used in the management of the watershed, particularly data from the Tryon Creek Baseline Assessment.

"If we have one report [the BES report] that says the only problem is temperature and other data seems to indicate there are other water quality criteria that should be looked at, we should err toward the all-inclusive," said Higgins, who managed forests, watersheds and streams for the U.S. Forest Service for 33 years.

He said he was led to believe by BES that "we don't have any other serious problems in Tryon Creek," than temperature. Yet, he said the Baseline Assessment data show occasional high levels of pollutants, poor stream conditions — including eroding banks — and poor habitat for fish.

According to Wahab, Tryon Creek's water quality ranks high among other urban streams, rating 65 or 70 out of 100 on the DEQ water quality index, where 100 represents a pristine stream.

E. coli a concern

Callison is planning to publish the assessment in its original form on its own Web site because she believes the public has a right to the information, especially the water quality data. For instance, Callison said the assessment shows that the levels of E. coli, a potentially harmful bacteria, rose above safe levels at least six times between 1997 and 2001. This information was not included in the approved version of the report.

Callison sent water quality information to

(see information box), says that although Tryon Creek is not currently listed by the DEQ as exceeding the minimum standard for bacteria levels, some of the water quality test results do, "meet the DEQ criteria ... required for listing," as unsafe.

Scientific validity at issue

Callison asserts that she has a copyright on the material in the Tryon Creek Baseline Assessment and that the board infringed on that copyright when it published the shortened report on its Web site. She wants the report removed from the district's Web site.

tifically publishable report." He said
not think Callison's original report w
entifically credible." Lightcap said th
contained, "unprofessionally critical
castic remarks. That is not something
do in a report."

He said that Callison, "had a lot
tists' contributions, but well over hal
report was written by her."

Callison wrote about 80 pages of
in the original assessment.

Lightcap also said some informat
excluded because, "it wasn't reference

Carving up a good time in Hillsdale

Photo by TRACY STEPP

Genmae Rianelli, 9, left, and Cassi Van Skike, 9, watch intently as Jonathan Barwood carves his "inner child" on a pumpkin at the Hillsdale Farmers' Mar Oct. 26. Barwood carved three pumpkins on the day, weighing 92, 125 and 1 pounds each. The Hillsdale Farmers' Market will extend through Nov. 16 and Winter Harvest Farmers' Market will be held as well. For info: 503-475-6555.

12/4-5/03 EQC Meeting, Public Forum.

Clean air
Clean water
Clear thinking

Oregon Environmental Council

December 3, 2003

TO: Members of the Environmental Quality Commission

FROM: Laura Weiss, M.P.H, OEC Program Director LW

CC: Stephanie Hallock, Director

RE: Permit Limits and DEQ's Toxics Strategy

Earlier this week, the Oregon Environmental Council released a report that found that DEQ is allowing dozens of facilities to release highly toxic pollutants without any regulatory oversight (see attached "Toxic Gap" report). Our investigation of dozens of DEQ-issued air and water permits found that most industrial sources of three highly toxic chemicals -- dioxin, lead and mercury – are releasing these chemicals without permit limits or monitoring requirements for the toxic compounds.

We urge you to direct DEQ to fill this toxic permit gap. DEQ has the authority under existing clean air and water laws and regulations to regulate emissions of these toxic chemicals, but the agency has failed to use it. For example, OAR 340-24-0010 states that it "shall be the policy of the Commission that no person may cause, allow or permit emissions into the ambient air of any hazardous substance in such quantity, concentration or duration determined by the Commission to be injurious to public health or the environment."

Given that chemicals such as dioxin, lead and mercury persist in the environment for generations and can cause cancer, neurological damage, lowered intelligence and other serious health problems in people, actions to reduce the release of these chemicals is critical to the health and well-being of all Oregonians.

At the December 5th EQC meeting, DEQ will present an update on the agency's Mercury Reduction Strategy and what is being called a "New Framework for Reducing Toxics." Unfortunately, neither of these documents includes a plan for addressing this toxic permit gap.

OEC commends DEQ for some of the advances made reducing mercury releases in the last few years. However, most, if not all, of those reductions have resulted from activities related to reducing mercury in products such as thermostats, automotive switches, fluorescent light tubes and mercury from dental offices.

DEQ estimates that roughly one third of all mercury sources in the state originate from "point sources" or industries that release mercury to the air or water. Despite point sources' significant contribution to the problem, DEQ has made NO progress in the last few years achieving reductions of mercury from these point sources, as far as we can tell.

520 SW 6th Avenue, Suite 940
Portland, Oregon 97204-1535
Voice (503) 222-1963 Fax (503) 222-1405
oec@orcouncil.org www.orcouncil.org

Mercury pollution is a documented problem today in Oregon; at least 435 river miles are so contaminated with mercury that the fish are unsafe to eat, and pregnant women and children are at highest risk. Yet if you look closely at DEQ's current plans to address mercury via a mercury TMDL for the Willamette River, their plans are clearly inadequate. Current plans for addressing mercury from point sources call for waiting ***five more years*** before including mercury limits in NPDES permits, for example.

Furthermore, other persistent toxins such as lead and dioxin are also poorly controlled in Oregon. For example, we found that of the 20 facilities reporting dioxin releases to the air and/or water, ***only one*** holds a permit that limits its release of dioxin.

There is plenty of room for improvement here. As you will see in the enclosed report, our review of DEQ-issued air and water permits found that, in addition to the dioxin gap described above:

- Of the 48 facilities reporting lead releases to the air, only 40 percent are permitted to release lead to the air. Of the 18 facilities reporting lead releases to water, less than one third are permitted to release lead to water.

- Of the 10 facilities reporting mercury releases to the air and/or water, not one is permitted to release mercury.

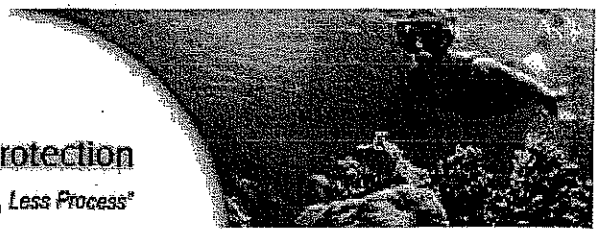
Our report found that while water and fish contamination are the primary exposure pathways for these contaminants, many of these unregulated discharges are actually ***air*** releases. It is worth noting that while DEQ's new air toxics rule will address air toxics that exceed atmospheric benchmarks, the rules are not designed to address air toxins that pose a threat to people primarily via the consumption of fish.

We urge you to direct DEQ to fill this toxic permit gap. OEC recommends that specific changes be made to the state's regulatory system so that these chemical releases are monitored and controlled. Specifically, OEC recommends that:

1. DEQ should immediately ensure that limits for persistent pollutants like dioxin, lead and mercury are included in all applicable air and water permits and require regular monitoring for these pollutants;
2. DEQ should develop an electronic emissions database searchable by chemical;
3. DEQ staff should be required to refer to TRI reports for all of the facilities they permit.

Recent findings from a decade-long study of southern Florida and the Everglades show that tough regulations of airborne mercury emissions have a profound and almost immediate effect in removing the toxic pollutant from the environment and the food chain (see attached news release from the Florida Department of Environmental Protection). This demonstrates that actions that reduce mercury from point sources can significantly reduce the risk to human health and the environment. We urge you to take this finding to heart and move swiftly to remedy this problem here in Oregon.

Thank you.



Florida
Department of Environmental Protection
"More Protection, Less Process"

Programs

Administrative Services
Air
Beaches
Cabinet Affairs
Clean Marina Program
Coastal & Aquatic
Districts
Energy
General Counsel
Geology
Greenways & Trails
Inspector General
Intergovernmental Programs
Laboratories
Law Enforcement
Siting
Springs
State Lands
State Parks
Waste
Wastewater
Water

Quick Topics

Agency Information
Brownfields Redevelopment
Coastal Management Program
DEP e-Newsletters
Education
Emergency Response
Employee Directory
Environmental Problem Solving
Environmental Regulation Commission

Everglades

Home | Contact DEP | Search DEP | DEP Site Map

FOR IMMEDIATE RELEASE: November 6, 2003
CONTACT: Deena Wells, (850) 245-2112

Florida Everglades Study Reveals Decline In Mercury Levels

–Cost-effective, long-term solutions protect public health and wildlife–

AMERICA'S EVERGLADES - Over a single generation, mercury concentrations found in fish and wading birds in America's Everglades have dropped by 60 to 70 percent. The drastic reductions are directly linked to the installation of technology that reduced mercury in emissions from industries in South Florida by a 100-fold during the last two decades.

Quick Links
- Full Mercury Report
- Report Summary
- South Florida Mercury Science Program
- Mercury Pollution Prevention Brochure

"Pollution controls introduced two decades ago to limit mercury emissions are delivering dramatic results in our lifetime – similar to the environmental gains made with the elimination of lead in gasoline," said Florida Department of Environmental Protection Secretary David B. Struhs. "Florida is again leading the charge to find cost-effective, long-term solutions that reduce pollution and restore the environment."

A multi-agency study launched in 1994 compared mercury levels in the Everglades before and after pollution controls were installed at municipal and medical waste combustors in South Florida. Since the 1980s, mercury emissions from waste incinerators close to the Everglades have dropped nearly 99 percent. Over the last ten years, scientists documented a 70 percent decline in mercury in bird feathers and a 60 percent decrease in fish tissue.

"Mercury levels in the natural environment are a worldwide concern but local investments can yield local results," said Secretary Struhs. "This is sound scientific evidence that advances in cleanup technologies can significantly reduce pollutants, improve water quality and recover wildlife."

Significant reductions in concentrations led the Department of Health to downgrade fish consumption advisories in central and northern areas of the Everglades this year. Although mercury will never be completely removed from the environment, scientists expect continued reductions in fish and wildlife over the next two decades - achieving a 50 percent reduction within 10 years and 90 percent reduction within 30 years.

Monitoring, modeling and research by the South Florida Mercury Science Program demonstrates the relationship between mercury detected in the air, deposition in waterways and sediments through rainfall and concentrations found in fish and wildlife in the Everglades. While natural systems respond differently to the installation of pollution controls, research indicates the potential for successfully reducing mercury in the environment throughout the nation.

The South Florida Mercury Science Program is a collaboration of experts from the Department of Environmental Protection, U. S. Environmental Protection Agency, South Florida Water Management District, U.S. Department of Interior and other public and private organizations.

-30-

12/4-5/03 EQC Meeting, Public Forum

1149 Court Street NE
Salem, OR 97301-4030

Telephone:
Salem 503/588-0050
Portland 503/227-5636
Oregon 800/452-7862
FAX 503/588-0052
E-mail: aoi@aoi.org
Web page: http://www.aoi.org

ASSOCIATED OREGON INDUSTRIES

December 4, 2003

Mr. Mark Reeve
Department of Environmental Quality
811 SW Sixth Avenue
Portland OR 97204 **Sent Via Fax: 503-229-6762**

Dear Chairman Reeve and Commissioners:

As you are aware, the business community, through AOI, has supported many DEQ initiatives, both regulatory and legislative over the years. Nearly all of these initiatives involved broad workgroups addressing a common issue, an approach long and successfully used by the DEQ.

Many of these groups dealt, in one way or the other, with toxics, to which DEQ has responded with air rules (that we supported), revamping water criteria and countless other rules. The issue of toxics was inspected and analyzed for four years by the air workgroup, leading to a useful rulemaking. The Policy Advisory Committee and numerous other workgroups grappled with similar issues. While no one group may be completely pleased with the outcomes, they are thorough, reasonable and complete.

The system has worked to be successful because various groups agree to focus on common issues, at least attempt to adhere to fact, and avoid inflammatory rhetoric. Therefore, it was with great dismay that I read the Oregon Environmental Council Report, *"Toxic Gap"*, which portrays both the business community and the department, at best, as negligent and, at worst, outright dangerous to the public health. Not only does this approach make the department's job of forging agreements between groups more difficult, it seems designed to alarm the public and impugn what small manufacturing base the state has left. Worst, it polarizes discussions.

Oregon has a unique approach to environmental issues. The working relationship between parties has been reposeful and cooperative. To some, this is viewed as "soft" on business. To others, it is viewed as catering to the environmental advocacy groups, but it is diametrical opposed to the sort of inflammatory "scorched earth" approach found in so many other states.

Sincerely,

John Ledger
Director, External Affairs

State of Oregon

Department of Environmental Quality Memorandum

To: Environmental Quality Commission **Date:** November 14, 2003

From: Mikell O'Mealy, Assistant to the Commission and Director

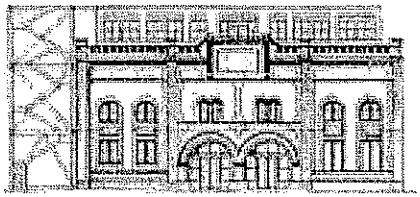
Subject: December 4-5, 2003 EQC meeting materials

Enclosed are your materials for the December 4-5 EQC meeting, which will start at 11:00 a.m. on Thursday and conclude on Friday afternoon. We will be meeting at the **Jean Vollum Natural Capital Center in downtown Portland,** located at 721 NW Ninth Avenue, in the Ecotrust Conference Center on the 2nd floor. Driving directions to the Natural Capital Center are attached, including information on pay-parking lots in the area and public transportation options.

Approximately one week before the meeting, you will receive additional materials for *Agenda Item J, Rule Adoption: Oregon Regional Haze Section 309 Implementation Plan.* As explained in the enclosed staff report for this item, the schedule for completing this rulemaking was compressed to meet an end-of-the-year deadline for submitting the rule to EPA. To meet the deadline, the Department shortened the regular amount of time planned between the end of the public comment period and the Commission's consideration of the rule. As a result, the Department's response to public comments and the hearing officer's report for this rule are not included in the enclosed staff report. Instead, we will send them to you separately along with any rulemaking changes made in response to public comments. You will receive this additional information during the week of November 24.

If you have any questions about the meeting or these materials, please contact me at 503-229-5301, or toll-free at 1-800-452-4011 ext. 5301 in the state of Oregon.

I look forward to seeing you soon.



DRIVING DIRECTIONS

FROM THE NORTH:

- ▶ I-5 South ▶ I-405 South
- ▶ Exit# 2B towards Everett Street
- ▶ Straight (South) on 16th Avenue
- ▶ Left onto NW Everett Street
- ▶ Left onto NW 9th Avenue

FROM THE EAST/AIRPORT
(11 MILES, 23 MINUTES):

- ▶ Airport Way ▶ I-205 South
- ▶ I-84 West ▶ I-5 North
- ▶ I-405 Fremont Bridge
- ▶ Exit #2B towards Everett Street
- ▶ Straight (South) on 16th Avenue
- ▶ Left onto NW Everett Street
- ▶ Left onto NW 9th Avenue

FROM THE SOUTH:

- ▶ I-5 North ▶ I-405 North
- ▶ Exit #2B
- ▶ Left (North) onto NW 14th Avenue
- ▶ Right onto NW Everett Street
- ▶ Left onto NW 9th Avenue

FROM THE WEST:

- ▶ US-26 East (Sunset Highway)
- ▶ North on I-405 ▶ Exit #2B
- ▶ Left (North) onto NW 14th Avenue
- ▶ Right onto NW Everett Street
- ▶ Left onto NW 9th Avenue

FOR MORE INFORMATION, PLEASE CALL
503.227.6225

ecotrust

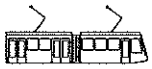
JEAN VOLLUM NATURAL CAPITAL CENTER
721 NW 9TH AVENUE, SUITE 200
PORTLAND, OREGON 97209
TEL 503.227.6225 | FAX 503.222.1517
WWW.ECOTRUST.ORG

PRINTED ON 100% RECYCLED PAPER, 100% POST-CONSUMER WASTE

DIRECTIONS

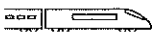
TO THE JEAN VOLLUM NATURAL CAPITAL CENTER
721 NW 9TH AVENUE, PORTLAND, OREGON

Ecotrust's Jean Vollum Natural Capital Center is centrally located in Portland's Pearl district between NW 9th and 10th Avenues, and Irving and Johnson Streets. The Center is accessible by:



PORTLAND STREETCAR Running from Portland State University (PSU) through downtown and the Pearl district, the Portland Streetcar stops at the Natural Capital Center (exit at NW 10th Ave. and Johnson St.). Visit www.portlandstreetcar.org for more information.

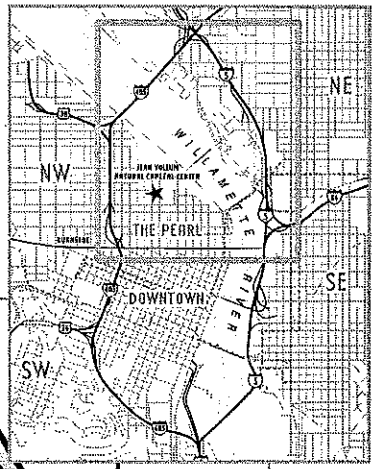
TRI-MET BUS Ride the #77 Broadway to NW 9th & Hoyt and walk one block north. Visit www.tri-met.org for more information.

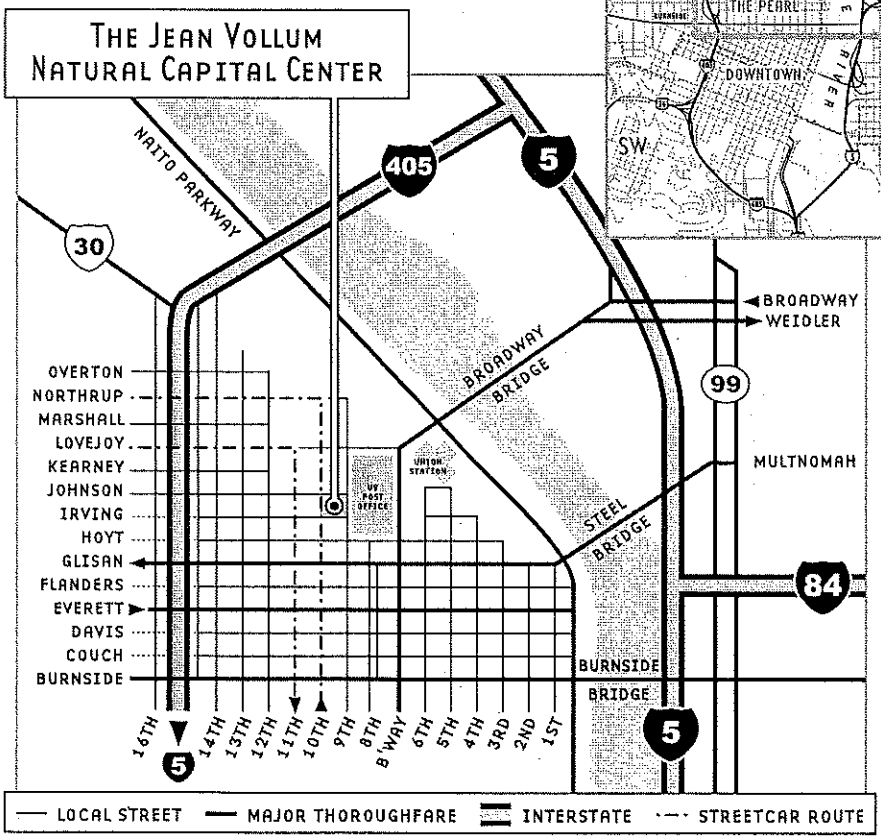


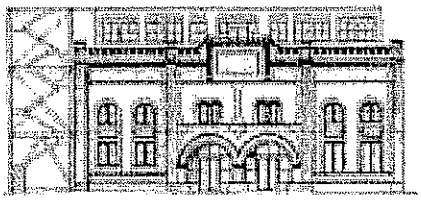
UNION STATION Within walking distance from the Center, Portland's Union Station services Amtrak trains from a variety of origins. From the station, walk south to NW Hoyt, turn right, walk west to NW 9th Ave., turn right, and walk one block to the Center. Visit www.amtrak.com for more information.

BICYCLE The Center has ample bike parking at the NW 10th Avenue entrance.

CAR There are public-pay lots available at NW 12th and Hoyt, NW 10th and Hoyt, NW 14th and Kearney, and NW 8th and Flanders, as well as on-street parking nearby. See directions at left.







A GREEN MAKEOVER

Ecotrust's green renovation of the brick and timber Jean Vollum Natural Capital Center has maintained the character of the original 1895 structure while incorporating environmentally innovative techniques. Some highlights include:

- 98% of construction debris reclaimed and recycled.
- 20% energy savings achieved via efficient windows, fixtures and ventilation system.
- FSC-certified, sustainably harvested wood used throughout – on the outdoor terrace, in construction plywood and in new windows and furniture.
- Willamette River protected from stormwater runoff: rainwater is filtered and absorbed through bioswales and an ecoroof.
- Environmentally innovative interior materials: recycled paint, wheatboard cabinets and rubber flooring from recycled tires.

FOR MORE INFORMATION, CONTACT
SYDNEY MEAD
NATURAL CAPITAL CENTER MANAGER
SYDNEY@ECOTRUST.ORG
503.467.0767

BETTINA VON HAGEN, PROJECT MANAGER
BETTINA@ECOTRUST.ORG
503.467.0756

ecotrust

JEAN VOLLUM NATURAL CAPITAL CENTER
721 NW 9TH AVENUE, SUITE 200
PORTLAND, OREGON 97209
TEL 503.227.6225 | FAX 503.222.1517
WWW.ECOTRUST.ORG

PRINTED ON 100% RECYCLED PAPER, 100% POST-CONSUMER WASTE

BUILT 1895 | RESTORED 2000

ECOTRUST'S JEAN VOLLUM NATURAL CAPITAL CENTER

A VENUE WHERE IDEAS FOR A CONSERVATION ECONOMY TAKE HOLD AND FLOURISH

In the midst of Portland's revitalizing Pearl District, Ecotrust has restored a historic 1895 warehouse to create a vibrant gathering place for environmentally and socially responsible ideas, goods and services. This environmental restoration initiates a larger vision of bringing together a community of tenants and inviting the public to share in the goals of encouraging a conservation economy.

Patagonia, the outdoor clothing company known for its environmental ethic, serves as retail anchor. The Center is also home to a mix of non-profit, agency and business tenants gathered around the themes of green building, socially responsible investing, and sustainable forestry and fisheries. Tenants include Ecotrust, the City of Portland's Office of Sustainable Development, the Certified Forest Products Council, Progressive Investment Management, the Wild Salmon Center, Hot Lips Pizza, and ShoreBank Pacific, the nation's first environmental bank. The building also includes the Ecotrust Conference Center, a venue for business and community events.

Opened in September 2001, the Jean Vollum Natural Capital Center has gained recognition from both civic leaders and the media as an important contribution to the city's landscape. Mayor Vera Katz has heralded the building as "embodying the spirit, character and values of Portland."

The Center welcomes the public to wander through the atrium, mezzanine and other public spaces, to inquire about event space, or to join a tour. Free tours are held every Wednesday at noon.

"...a place where the city's vitality and environmental sensibilities meet."

– Jean Vollum

REDEVELOPMENT OVERVIEW

PROJECT TYPE:
Green restoration of a historic 1895 building

CONCEPT:
Encourage the exchange of environmentally and socially responsible ideas, goods and services

SPACE:
70,000 sq. ft. total; includes retail, office, display and event space

CERTIFICATION:
Gold-certified under the U.S. Green Building Council's LEED rating system. First LEED "Gold"-rated historic building in the country. PGE Earth Advantage green certified.

COST:
$12.4 million (approx. $140/sq. ft.)

OWNER:
Ecotrust, a Portland based non-profit organization

DEVELOPER:
Heritage Consulting Group

ARCHITECT:
Holst Architecture PC

CONTRACTOR:
Walsh Construction Co.

INTERIOR ARCHITECTS FOR ECOTRUST SPACE:
Edelman Soljaga Watson

Oregon Environmental Quality Commission Meeting
December 4-5, 2003

Ecotrust Conference Center, 2nd Floor
Jean Vollum Natural Capital Center[1]
721 NW Ninth Avenue, Portland, OR 97209

Thursday, December 4, beginning at 11:00 a.m. and including a working lunch

A. **Contested Case No. LQ/HW-ER-01-275 regarding Luhr Jensen & Sons, Inc.**
The Commission will consider a contested case between DEQ and Luhr Jensen & Sons, Inc., in which the company appealed a proposed order and $34,801 civil penalty for hazardous waste management violations and water quality permit violations.

B. **Contested Case No. AQ/A-WR-98-186 regarding American Exchange Services**
The Commission will consider a contested case between DEQ and American Exchange Services, Inc., in which the corporation appealed a proposed order and $7,200 civil penalty for the open accumulation of friable asbestos-containing material or waste, and for failing to properly package, store and dispose of the asbestos-containing material.

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

D. ***Rule Adoption: Water Quality Standards, Including Temperature Criteria**
Mike Llewelyn, DEQ Water Quality Division Administrator, and Mark Charles, DEQ Water Quality Policy and Program Manager, will propose new water quality rules to set standards for the protection of aquatic life, including temperature criteria, intergravel dissolved oxygen standards and antidegradation provisions. This rulemaking stems from a March 2003 Oregon District Court decision that overturned the federal Environmental Protection Agency's 1999 approval of Oregon's existing temperature criteria and ruled that the intergravel dissolved oxygen criteria were not protective of salmonid spawning activities. The proposed rules incorporate recent guidance that the EPA provided to States and Tribes for developing temperature criteria.

Friday, December 5, beginning at 9:00 a.m. and including a working lunch

Prior to the regular meeting, the Commission will hold an executive session at 8:00 a.m. to consult with counsel concerning legal rights and duties regarding current and potential litigation against the

[1] Ecotrust's Natural Capital Center is a "green" building. To learn more see http://www.ecotrust.org/NCC/.

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.

E. Approval of Minutes
The Commission will review, amend if necessary, and approve draft minutes of the October 9-10, 2003, Environmental Quality Commission meeting.

F. Action Item: Annual Approval of Director's Financial Transactions
In 2001, the Oregon Department of Administrative Services adopted a policy requiring Commission-level review and approval of agency Directors' financial transactions, including monthly time reports, vacation pay, travel expenses, and state credit card use. In September 2001, the EQC delegated review and approval of these transactions to the DEQ Management Services Division Administrator, with annual Commission review of the approved transactions. At this meeting, Helen Lottridge, DEQ Management Services Division Administrator, will present a summary of DEQ Director Stephanie Hallock's 2003 financial transactions, as required by state accounting and DEQ policy.

G. 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, facilities that control nonpoint sources of pollution (such as wood chippers) were made eligible for the program. At this meeting, Helen Lottridge, DEQ Management Division Services Administrator, and Maggie Vandehey, DEQ Tax Credit Program Coordinator, will present recommendations on tax credit applications for facilities that control air and water pollution, recycle solid and hazardous waste, reclaim plastic products, and control pollution from underground fuel tanks.

H. Action Item: Consider Authorization of Clean Water State Revolving Fund Bond Sale
DEQ's Clean Water State Revolving Fund program provides loans to public agencies for water pollution control projects, such as upgrades for sewage treatment systems and nonpoint source pollution reduction. This program relies on the sale of Pollution Control Bonds to match federal funds that support the loans. At this meeting, Lauri Aunan, DEQ Legislative and Budget Office Manager, and Jim Roys, DEQ Budget Manager, will ask the Commission to authorize DEQ and the State Treasurer to issue and sell up to $10 million in state bonds to fund the clean water loan program, as approved by the 2003 Legislature.

I. Informational Item: Status Update on the Umatilla Chemical Agent Disposal Facility
Dennis Murphey, DEQ Chemical Demilitarization Program Administrator, will update the Commission on the status of trial burns, public outreach efforts, legal proceedings, and other issues related to the Umatilla Chemical Agent Disposal Facility.

J. *Rule Adoption: Oregon Regional Haze Section 309 Implementation Plan

In 1999, the federal Environmental Protection Agency adopted a new Regional Haze Rule directing states to adopt regional plans to control widespread air pollution that forms "haze" and affects visibility in national parks and other scenic areas. States have two options for reducing air pollution under Section 308 or 309 of the rule. At this meeting, Andy Ginsburg, DEQ Air Quality Division Administrator, and Brian Finneran, DEQ Air Quality Specialist, will summarize public input, present the Department's evaluation of options, and recommend implementation measures for controlling regional haze.

K. *Rule Adoption: Revisions to Contested Case Hearing Rules

Anne Price, DEQ Office of Compliance and Enforcement Administrator, and Susan Greco, DEQ Environmental Law Specialist, will propose revisions to the Commission's rules for contested case hearings to maintain consistency with the Attorney General's Hearing Panel Rules. The Attorney General's office made changes to these procedural rules in July 2003.

L. Informational Item: Update on DEQ's Mercury Reduction Strategy and a New Framework for Reducing Toxics

One of DEQ's Strategic Directions is to protect human health and the environment from toxics, including mercury. Toxics tend to be long-lived in the environment, readily move from one media to another and may accumulate in sediments and fish tissue at concentrations that represent a threat to human health or the environment. In December 2002, the Department presented to the Commission a strategy for reducing mercury in Oregon's environment, and committed to report back on the development of performance measures and targets for assessing the effectiveness of mercury reduction activities. At that time, the Commission also asked for recommendations for addressing other toxic chemicals beyond mercury. At this meeting, Dick Pedersen, DEQ Land Quality Division Administrator, and Keith Johnson, DEQ Cross-Program Coordinator, will provide an update on mercury reduction activities, outline a plan to measure the success of these activities in the future, and present a framework for reducing toxics beyond mercury.

M. Informational Item: Developing DEQ's Sustainability Plan

The Department will seek the Commission's input and guidance on developing an agency Sustainability Plan, as required by Governor Kulongoski's Executive Order for a Sustainable Oregon for the 21st Century. The Order is a commitment to lasting solutions that simultaneously address economic, environmental and community well being. Andy Ginsburg, DEQ Air Quality Division Administrator and Sustainability Coordinator, will present elements of DEQ's draft plan and lead the Commission's discussion.

N. Commissioners' Reports

Adjourn

Environmental Quality Commission meeting dates for 2004 include:
February 5-6, April 8-9, May 20-21, July 15-16, September 9-10, October 28-29, December 9-10

Agenda Notes

***Rule Adoptions**: 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 Andrea Bonard 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 Andrea Bonard 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 5 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.

Mark Reeve, Chair
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 a second term in 2001. He became Chair of the EQC in 2003. Commissioner Reeve also serves as Co-Chair of the Oregon Watershed Enhancement Board.

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.

Deirdre Malarkey, Commissioner
Deirdre Malarkey is a graduate of Reed college, with graduate degrees from the University of Oregon. She has served previously on two state natural resource boards and on the Water Resources Commission and retired as a land use planner. Commissioner Malarkey was appointed to the EQC in 1999 and lives in Eugene.

Lynn Hampton, Commissioner
Lynn Hampton serves as Tribal Prosecutor for the Confederated Tribes of the Umatilla Indian Reservation and previously was Deputy District Attorney for Umatilla County. She received her B.A. at University of Oregon and her J.D. at University of Oregon School of Law. Commissioner Hampton was appointed to the EQC in July 2003 and lives in Pendleton.

The fifth Commission seat is currently vacant.

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
Theodore R. Kulongoski, Governor

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

January 5, 2004

Phil Jensen
Luhr Jensen & Sons, Inc.
P.O. Box 297
Hood River, OR 97031

On December 4, 2003, the Environmental Quality Commission issued the attached Final EQC Order in Case No. LQ/HQ-ER-01-275. The Final Order found that Luhr Jensen & Sons, Inc., is liable for a civil penalty of $34,401, to be paid to the State of Oregon. While you have 60 days to seek judicial review of the decision, the penalty is due and payable 10 days after the date of the Final Order, pursuant to Oregon Revised Statute (ORS) 183.090.

Please immediately send a check or money order in the amount of $34,401, made payable to "State Treasurer, State of Oregon," to the Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.

If we do not receive payment in full by January 15, 2004, we will file the Final Order with the appropriate counties, thereby placing a lien on any property Luhr Jensen & Sons, Inc., owns within Oregon. We will also refer the Final Order to the Department of Revenue and/or a private collection agency for collection, pursuant to ORS 293.231. Statutory interest on judgments is nine percent per annum.

If you have any questions, please call Deborah Nesbit at DEQ's Office of Compliance and Enforcement in Portland, (503) 229-5340.

Sincerely,

Mikell O'Mealy
Assistant to the Commission

cc: Business Office, DEQ
Jeff Bachman, OCE, OD, DEQ
Deborah Nesbit, OCE, OD, DEQ
Jeff Ingalls, Bend Office, Eastern Region, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of	)	
	)	Final Contested
Luhr Jensen & Sons, Inc.,	)	Case Hearing Order
	)	
Petitioner	)	No. LQ/HW-ER-01-275

On December 4, 2003, the Environmental Quality Commission considered the appeal of Luhr Jensen & Sons, Inc. to the Proposed Order issued by Administrative Law Judge Andrea H. Sloan on June 16, 2003 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 Phil Jensen, owner and president on behalf of the Petitioner and Jeff Bachman, Environmental Law Specialist on behalf of the Department.

The Commission excluded certain documents previously offered by the Petitioner on the grounds that they constituted new evidence not presented to the Administrative Law Judge. Other documents were excluded because they were not filed in a timely manner. During the argument, the Department agreed with the Petitioner to change the "R" factor in the penalty calculation for Violation A1 of the Notice of Assessment of Civil Penalty, which had been adopted by the Administrative Law Judge, from "intentional" to "negligent." This change reduces the assessed civil penalty from $34,801 to $34,401. The amended civil penalty calculation is Attachment B to this Order.

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

Dated this 5th day of January, 2004.

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.

Attachments A and B
GENH8153.DOC

Attachment A

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
ENVIRONMENTAL QUALITY COMMISSION

IN THE MATTER OF:	)**PROPOSED ORDER**
	)
LUHR JENSEN & SONS, INC.,	)
Respondent,	)
	)Office of Administrative Hearings
	)Case Number 104220
	)Agency Case Number LQ/HW-ER-01-275
	)Hood River County

HISTORY OF THE CASE

On April 17, 2002, the Department of Environmental Quality (Department) issued a Notice of Assessment of Civil Penalty (Notice) to Respondent Luhr Jensen & Sons, Inc. The Notice alleged that Respondent violated ORS 466.095, 40 CFR 262.3(d), 40 CFR 262.34(a)(1)(ii), 40 CFR 265.31, 40 CFR 263.11, 40 CFR 262.20(a), 40 CFR 268.7(a), OAR 340-102-0041, OAR 340-102-0011, 40 CFR 262.34(a)(1)(i), 40 CFR 265.173(a), ORS 468B.025(1)(a), and ORS 468B.025(2).

On May 8, 2002, Respondent requested a hearing. The matter was referred to the Office of Administrative Hearings (OAH) on November 7, 2002.

A hearing was held on March 18, 2003, at the Department offices in Portland, Oregon. Andrea H. Sloan, from the Office of Administrative Hearings, presided as the Administrative Law Judge (ALJ). Respondent was represented by Phil Jensen, President and CEO of Luhr Jensen & Sons, Inc. Mr. Jensen was the authorized representative of Luhr Jensen & Sons, Inc. (OAR 340-011-0106). Respondent appeared in person without counsel. Environmental Law Specialist Jeff Bachman represented the Department. Jeff Ingalls, DEQ Natural Resource Specialist, testified on behalf of the Department. Testifying on behalf of Respondent were: Mark Wiltz, Environmental Manager; Fred VanDomelon, Engineering Consultant with VLMK Engineering; Ed Farrell, Maintenance Team Supervisor; and Phil Jensen.

The record was left open for additional testimony and for both the Department and Respondent to submit written comments. On April 17, 2003, Mr. Ingalls offered additional testimony for the Department. The evidentiary record closed on April 17, 2003.

ISSUES

(1) Whether on or before August 14, 2001, Respondent illegally stored hazardous wastes[1] at its Portway facility.

(2) Whether on or before August 14, 2001 through March 20, 2002, Respondent stored hazardous wastes at its Portway facility in excess of 180 days.

(3) Whether on or before August 14, 2001, Respondent stored hazardous wastes in a tank that did not meet the requirements of Subpart J of 40 CFR Part 265.

(4) Whether on or before August 14, 2001, Respondent failed to maintain and operate its Portway facility in a manner that minimized the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the air, soil or water, or that could threaten human health and the environment.

(5) Whether on or about July 1, 1994 and each successive July 1st through 2001, Respondent violated Schedule B, Condition 3 of its National Pollutant Discharge Elimination System General Permit 1200-Z, by failing to perform twice annual storm water monitoring during the previous monitoring year.

(6) Whether on or about July 15, 1994, and each successive July 15th through 2001, Respondent violated Schedule B, Condition 3 of its National Pollutant Discharge Elimination System General Permit 1200-Z, by failing to submit annual storm water monitoring reports.

(7) Whether the civil penalty assessment proposed by the Department is warranted.

---

[1] ORS 466.005(7) provides as follows:

> Hazardous waste does include all of the following which are not declassified by the commission under ORS 466.015 (3):
> (a) Discarded, useless or unwanted materials or residues resulting from any substance or combination of substances intended for the purpose of defoliating plants or for the preventing, destroying, repelling or mitigating of insects, fungi, weeds, rodents or predatory animals, including but not limited to defoliants, desiccants, fungicides, herbicides, insecticides, nematocides and rodenticides.
> (b) Residues resulting from any process of industry, manufacturing, trade or business or government or from the development or recovery of any natural resources, if such residues are classified as hazardous by order of the commission, after notice and public hearing. For purposes of classification, the commission must find that the residue, because of its quantity, concentration, or physical, chemical or infectious characteristics may:
> (A) Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
> (B) Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
> (c) Discarded, useless or unwanted containers and receptacles used in the transportation, storage, use or application of the substances described in paragraphs (a) and (b) of this subsection."

EVIDENTIARY RULINGS

Exhibits

OAH Exhibits P1 through P5, Department Exhibits A1 through A13, and Respondent Exhibits R1 through R3, R7, R9 and the timeline portion of R4 were admitted into the record without objection. The cassette tape recording of the prehearing conference was incorporated by reference into this hearing record.

An attorney licensed by the Oregon State Bar prepared Respondent's Answer.[2] In the Answer, Respondent admitted part of violations A5, A6 and A7,[3] and all of violations A10, A11, B2 and B3.[4] At hearing, Respondent appeared without counsel, and specifically withdrew its admission to violations B2 and B3. Respondent did not, however, withdraw its partial admissions to violations A5, A6 and A7. In addition, Respondent admitted violations A8 through A11, and B1.

At one point during the March 18, 2003 hearing I asked for clarification of the outstanding issues. I advised that my notes reflected that the only issues remaining were alleged violations A1 through A4, B2 and B3. Mr. Bachman concurred. Mr. Jensen did not object or comment. Further, during the hearing Mr. Bachman noted that because Respondent had admitted the violations relating to the illegal transport of hazardous waste, the Department was not prepared to offer any evidence in support of these violations.[5] Again, Respondent did not object or comment.

In its written summation, the Department reiterated its understanding that Respondent had admitted all violations except A1 through A4, B2 and B3. In Respondent's written summation, Mr. Jensen argued that Respondent had not admitted violations A1 through A7, B2 or B3.

There is, obviously, some confusion about which violations Respondent believes it has admitted and which violations remain contested. A large part of the confusion stems from Respondent's written material, which is, at times, contradictory. For example, the written Answer, prepared by counsel, conflicts with portions of Exhibit R1. In Exhibit R1, a document offering Respondent's explanations, Respondent wrote: "Luhr Jensen understands and will agree to the assessment of this fine." The term, "this fine" relates to penalty assessments for items "#9, #5, #6, #7 and #1," which were classified by Mr. Jensen as part of the "first 'event'." These penalty assessment items correspond to violations A9, A5, A6, A7 and A1. Despite this apparent admission to these violations, Respondent asked elsewhere in the document that the charges and fines for #5, #6, #7 and #1 be rescinded.

---

[2] Jerry Hodson of Miller Nash LLP prepared respondent's Answer. Mr. Hodson identified himself in the Answer as Respondent's attorney. (Ex. P4.)

[3] For example, Respondent admitted that it did not obtain a transporter identification number (violation A5), that it did not prepare a hazardous waste manifest (violation A6) and that it did not provide a land disposal restriction notification for the shipment of hazardous waste (violation A7).

[4] The designations relating to violations are taken from the Notice. For example, violation A1 refers to the first numbered paragraph within the "A" subheading. The violations starting with the letter "A" refer to hazardous waste management, storage and treatment violations. The violations starting with the letter "B" refer to water quality violations.

[5] Violations A5, A6 and A7 relate to the transportation of hazardous waste materials.

Given Respondent's initial admissions in the Answer, and the ambiguous admissions/denials in Exhibit R1, it is understandable that both the Department and I would be confused about Respondent's position on these violations. Nonetheless, Respondent did not object or offer any comment during the hearing when both the Department and I clarified the remaining unresolved issues. Relying on Respondent's admissions in the Answer, the Department did not present any evidence in support of several of the violations. Respondent did not withdraw its partial admissions to A5 through A7, although Respondent did amend other prior admissions and denials.

Respondent cannot now, after the evidentiary record has closed, withdraw its prior admissions. In reliance on Respondent's admissions to the violations, the Department did not present evidence on the issues at either the March 18, 2003 or April 17, 2003 hearings. By not objecting to either my recitation of the outstanding issues, or the Department's objection to Respondent presenting evidence on previously admitted violations, Respondent has waived its right to amend the Answer.

Amendments

At hearing, the Department moved to amend the language of violation A2 as follows:

> On or about August 14, 2001 through March 20, 2002, Respondent violated Code of Federal Regulations (CFR) 262.34(d), adopted pursuant to OAR 340-100-0002, by storing hazardous waste in excess of 180 days. Specifically, Respondent caused or allowed approximately 550 gallons of chrome plating sludge, a toxicity characteristic hazardous waste for chromium (D0007) and a listed hazardous waste (F006), to be stored in a sump under its plating room at its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(e).

Respondent did not object to the amendment and the language of violation A2 was amended as proposed. In addition, the Department amended its penalty assessment calculation for violations A1 through A5 and A8 through A10. There was no objection to the amended penalty assessment calculations and the amendment was accepted.

FINDINGS OF FACT

(1) Respondent is in the business of manufacturing various products used in fishing, including tackle and accessories. Respondent operates at least two manufacturing facilities in Hood River, Oregon: Portway and Oak Grove. (Ex. P2; testimony of Ingalls.)

(2) Respondent operates an electroplating room at the Portway facility. The Portway facility is a registered small quantity generator of hazardous waste. The Portway facility's registration number is ORD 99751414. A small quantity generator is a facility that produces between 220 and 2200 pounds of hazardous waste each month. As a small quantity generator, Respondent was required to ship hazardous wastes offsite to a permitted treatment, storage and disposal (TSD) facility. (Ex. P2; testimony of Ingalls.)

(3) On August 14, 2001, Mr. Ingalls conducted an unannounced compliance inspection of the Portway facility. The inspection was done within Mr. Ingalls' duties as a Natural Resource Specialist with the Department's Hazardous Waste Compliance Program. The federal Environmental Protection Agency requires these compliance inspections. The purpose of the inspection was to identify waste streams within the facility and see how the company is managing the wastes generated by its manufacturing process. (Testimony of Ingalls.)

(4) Mr. Ingalls had previously inspected the Portway facility in 1997. At that time, he identified some areas of concern. As a result of the 1997 inspection, Respondent entered into a Mutual Agreement and Order with the Department, and agreed to pay civil penalties and take corrective action. (Ex. A10; testimony of Ingalls.)

(5) During the August 14, 2001 inspection of the Portway facility, Mr. Ingalls met with Mr. Wiltz, Respondent's Environmental Manager. After an initial interview, Mr. Wiltz took Mr. Ingalls to the acid storage room. Mr. Ingalls observed four 55-gallon blue drums with hazardous waste labels on them. The labels indicated that the wastes were accumulated in these drums starting on July 6, 2001, and that the drums contained tin plating solution. The plating solution was generated at Respondent's Oak Grove facility. Mr. Ingalls asked Mr. Wiltz why the drums were at the Portway facility, and Mr. Wiltz explained that he was storing them because the drums were easier to deal with at Portway than at Oak Grove. The drums were transported from Oak Grove to Portway by truck. Mr. Wiltz did not think that the tin plating solution was a hazardous waste, but he did not check the pH of the plating solution. Mr. Ingalls used pH strips to field test the contents of the drums. According to the test strips, the pH of the solution was between 0.5 and 1. A pH less than or equal to 2 is a corrosivity characteristic hazardous waste.[6] (Testimony of Ingalls.)

(6) At the time of the August 14, 2001 inspection, the Department had not issued a hazardous waste TSD permit to Respondent. Mr. Ingalls checked the Department's database of all TSD permitees, and confirmed that Respondent did not have a TSD permit to store hazardous waste. (Testimony of Ingalls.)

(7) After inspecting the acid storage room, Mr. Ingalls inspected the electroplating room. This room contained nickel plating baths, two cyanide plating baths, and chrome plating baths. In addition, the room contains rinsing baths. The walking surface of this room was covered with slatted wooden boards. The boards covered concrete sumps, or compartmentalized containment tanks built above the actual concrete floor. The sumps were approximately 24 inches tall and were built above a concrete slab. The sumps were designed to catch drag out and drippage from the electroplating baths as items were moved from bath to bath within the room. (Ex. A5, 1-4; R7; testimony of Ingalls and VanDomelon.)

---

[6] There are four general characteristics of hazardous wastes: 1) ignitability, which means that the material has a flash point of less than 140 degrees Fahrenheit (40 CFR 261.21); 2) corrosivity, which means that the material has a pH less than or equal to 2 or greater than or equal to 12.5 (40 CFR 261.22); 3) reactivity, which means that the waste could react violently, without detonation, upon exposure to air or water (40 CFR 261.23); and 4) toxicity, which is determined by using the Toxicity Characteristics Leaching Procedure (40 CFR 261.24).

(8) On August 14, 2001, Mr. Ingalls saw that the floorboards in several areas in the electroplating room were sodden and saturated with moisture. Mr. Ingalls tried unsuccessfully to pull up boards to look in the sump, but most of the boards were too swollen to be removed. Mr. Ingalls did find a board that he could pick up and he saw what looked to be two to three inches of green colored liquid in the sump below the board. Mr. Ingalls knew that there was not supposed to be any liquid in these sumps. Mr. Wiltz was surprised to find the green liquid in the sumps. (Ex. A5, 1-4; testimony of Ingalls.)

(9) Respondent released water into the electroplating room in June 2001, while Respondent was installing new welding equipment in an adjoining room of the Portway facility. Mr. Farrell, Respondent's maintenance manager, saw the wooden slats on the electroplating room floor and erroneously concluded that there was a drain beneath the flooring. Over the course of about one week, Mr. Farrell pumped between 500 and 600 gallons of clean water onto the electroplating room floor, believing that the water would be drained away. Instead, the water collected in the sumps in the electroplating room. Mr. Farrell stopped pumping water into the electroplating room on approximately June 18, 2001, when he discovered that there was no drain in the floor. (Testimony of Farrell, Ingalls and Wiltz.)

(10) On August 30, 2001, Mr. Ingalls returned to Portway to conduct an additional inspection. He collected samples from three of the 55-gallon drums in the acid storage room, and from two sumps in the electroplating room. One of these samples was taken near the chrome plating bath, and the other was taken near the nickel plating bath. An additional sample was taken from the storm drain in the breezeway area of the Portway facility. The samples were submitted to the Department's laboratory for analysis. (Ex. A2; testimony of Ingalls.)

(11) Every day that the electroplating room is operating, plating bath solution drips from the equipment down the side of the baths and onto the floorboards. Most of these drips evaporate during the day, leaving crystals or salts behind. (Testimony of Wiltz.)

(12) Respondent did not have a procedure for cleaning up these salts. Respondent did not have a procedure for inspecting the baths and sumps, and the sumps were not inspected every day for the presence of hazardous waste, other liquids or imperfections. (Testimony of Wiltz and Ingalls.)

(13) No one knows for certain why the liquid in the sumps was green. Mr. Wiltz theorized that the green liquid was the product of rehydrated salts, created when Mr. Farrell pumped the 500 to 600 gallons of water into the electroplating room. Mr. Farrell did not know why the liquid was green, but assumed that the water he pumped into the room mixed with the dried green material that was on the floor. On one or two prior occasions, plating solution spilled into the sumps. (Testimony of Wiltz and Farrell.)

(14) On November 9, 2001, the Department's laboratory completed an analytical records report of the samples taken from the Portway facility. The report was sent to Mr. Ingalls. The laboratory concluded that the pH of the contents of the 55-gallon drums was less than 1. The laboratory also concluded that the green liquid in the sump near the chrome plating bath

contained, among other things, 1,580 milligrams per liter (mg/L)[7] of chromium. The sample of green liquid taken from the sump near the nickel-plating bath contained, *inter alia*, 743 mg/L of chromium. Waste that contains 5 mg/L or more of chromium is considered to be a hazardous waste with toxicity characteristics. (Ex. A2; testimony of Ingalls.)

(15) On March 20, 2002, Respondent contracted with WasteWatch, LLC to ship 11 55-gallon drums from the Portway facility. These drums contained the hazardous waste that had been pumped out of the sumps in the electroplating room. The drums were shipped to Pollution Control Industries of Tennessee for disposal. (Ex. A6.)

(16) The hazardous waste inside the concrete sumps was acidic. If left in the tank, the acidic liquid could compromise the integrity of the concrete, allowing the liquid to escape from imperfections or cracks in the sumps and enter the environment. The Portway facility is located approximately 100 yards from the banks of the Columbia River. (Testimony of Ingalls.)

(17) VLMK Engineering designed the concrete sumps in 1978. The concrete was coated to prevent leakage or absorption of material. The sumps were not designed to comply with the Resource Conservation and Recovery Act (RCRA). (Testimony of VanDomelon.)

(18) In 1997, the Department issued to Respondent a National Pollutant Discharge Elimination System Storm Water Discharge Permit. The permit expired on June 30, 2002. The permit required Respondent to perform biannual sampling of its storm water discharge. The sampling dates were not specified, but were to be 60 days apart. In addition, the permit required Respondent to submit annual monitoring reports, by July 15th of each year, reporting the results of the samplings conducted in the previous year. (Ex. A1.)

(19) According to the Department's databases, from 1993 until the time of the August 14, 2001 inspection, Respondent did not file annual storm water discharge monitoring reports with the Department. Petitioner also failed to perform twice annual sampling of its storm water discharge. Four storm drain outfall pipes at the Portway facility drain directly into the Columbia River. (Testimony of Ingalls and Wiltz.)

(20) Mr. Ingalls inspected one of the storm drain outfall pipes and found it to be "high and dry," with the end of the pipe above the level of the river.[8] Mr. Ingalls later checked with the

---

[7] "mg/L" is equivalent to "parts per million." (Testimony of Ingalls.)

[8] At the time of the August 14, 2001 inspection, Mr. Wiltz told Mr. Ingalls that Respondent had been unable to sample its storm water discharge because the storm drain outfall pipe extended below the level of the Columbia River. Mr. Wiltz also explained that because there had not been any storm events recently, there had been nothing to sample. Mr. Wiltz testified that he spoke with a DEQ employee, sometime in the past, and explained that Respondent's storm water discharge could not be sampled because the drainpipe was below the level of the river. According to Mr. Wiltz, this employee told Mr. Wiltz that he was not sure what to do, and that Respondent did not have to submit sampling reports. Mr. Wiltz did not know the name of this person, although he was thought that the person was male. Mr. Wiltz believed that he had this conversation sometime between 1993 and 2001. Because he did not detect any urgency from the Department about sampling, Mr. Wiltz concluded that sampling reports were not necessary. (Testimony of Wiltz.)

National Weather Service and determined that the Hood River area had received 0.31 inches of rain on July 21, 2001 and 0.47 inches of rain on July 30, 2001.[9] (Ex. A11; testimony of Ingalls.)

(21) On August 14, 2001, Mr. Ingalls suggested to Mr. Wiltz that he pierce the storm drain outfall pipe farther back from the end, creating a sampling port. This port would allow sampling in the event that the river ever covered the end of the pipe. During the fall of 2001, Respondent pierced the pipe and installed a rectangular plate to cover the sampling port. The contents of the pipe are now accessible, regardless of the level of water in the river. (Ex. R9; testimony of Ingalls and Jensen.)

(22) Respondent knew that its Storm Water Discharge Permit required annual reports and biannual sampling. (Testimony of Ingalls and Jensen.)

CONCLUSIONS OF LAW

(1) Respondent illegally stored hazardous wastes at its Portway facility on or before August 14, 2001.

(2) Respondent stored hazardous waste at its Portway facility for more than 180 days, between August 14, 2001 and March 20, 2002.

(3) Respondent stored hazardous waste in a tank that did not meet the requirements of Subpart J of 40 CFR 265.

(4) On or before August 14, 2001, Respondent failed to maintain and operate its Portway facility in a manner that minimized the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the soil or water, or that could threaten human health and the environment.

(5) Between July 1, 1994 and on each successive July 1st through 2001, Respondent failed to perform twice-annual storm water monitoring.

(6) Between July 15, 1994 and each successive July 15th through 2001, Respondent failed to submit annual storm water monitoring reports.

(7) The civil penalty assessment proposed by the Department is warranted for all violations alleged in the Notice.

OPINION

"The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position." ORS 183.450(2). Here, the Department has the burden of proving its allegations by a preponderance of the evidence. *See, Harris v. SAIF*, 292

[9] Mr. Jensen also testified that in the 25 years his company had been at the Portway location, the Department had never before mentioned Respondent's failure to monitor and file reports. According to Mr. Jensen, the level of water in the river can vary by as much as eight feet, depending on rainfall.

Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I find that the Department has met its burden with respect to all violations alleged. [10]

Illegal storage of hazardous wastes

Respondent denied that it knowingly stored hazardous waste at its Portway facility. In support, Respondent argued that Mr. Wiltz did not know that the tin plating solution in the four 55-gallon drums he brought to Portway from Oak Grove was considered a hazardous material. This record reflects that Respondent did not conduct a pH test on the contents of the drums prior to August 14, 2001.

Mr. Ingalls determined that Respondent had illegally transported four 55-gallon drums containing tin plating solution from Respondent's Oak Grove facility to Portway. Mr. Ingalls' initial pH testing of the solution inside the drums was confirmed on November 9, 2001 by the Department's laboratory. The solution inside the four 55-gallon drums had a pH of less than 1.

Under 40 CFR 261.22, any solid waste,[11] with a pH of less than or equal to 2, is a hazardous waste with corrosivity characteristics.[12] Thus, the solution in the drums found at the Portway facility was a hazardous waste. As such, only a permitted hazardous waste treatment, storage or disposal (TSD) site could lawfully store the tin plating solution found in the drums at the Portway facility. ORS 466.095(1)(a).[13] The fact that Respondent transported the hazardous

---

[10] Respondent admitted violations A5 through A11 and B1. I will not analyze violations that Respondent admitted prior to or at the time of hearing. These violations will be included in the penalty assessment calculation without further discussion.

[11] According to 40 CFR 261.2, hazardous waste liquids are considered to be solid wastes.

[12] 40 CFR 262.22 provides as follows:

> (a) A solid waste exhibits the characteristic of corrosivity if a representative sample of the waste has either of the following properties:
> (1) It is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using Method 9040 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter.
> (2) It is a liquid and corrodes steel (SAE 1020) at a rate greater than 6.35 mm (0.250 inch) per year at a test temperature of 55degreesC (130degreesF) as determined by the test method specified in NACE (National Association of Corrosion Engineers) Standard TM-01-69 as standardized in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter.
> (b) A solid waste that exhibits the characteristic of corrosivity has the EPA Hazardous Waste Number of D002.

[13] According to ORS 466.095(1), "[N]o person shall: (a) Store a hazardous waste anywhere in this state except at a permitted hazardous waste treatment, storage or disposal site."

waste from Oak Grove, where it was generated, to Portway, makes the exception of 466.075(2) inapplicable.[14] The Department has met its burden on this issue.

Storage of hazardous waste in excess of 180 days

According to 40 CFR 262.34(d), "A generator who generates greater than 100 kilograms but less than 1000 kilograms[15] of hazardous waste in a calendar month may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status, * * *." This provision applies to small quantity generators such as Respondent.

In the Notice, the Department alleges that Respondent allowed approximately 1600 gallons of hazardous waste to accumulate in its sumps for a period of eight years. The facts adduced at hearing do not support these factual allegations. For example, approximately 550 gallons of liquid was pumped out of the sumps following the August 14, 2001 inspection. Further, the evidence in this record does not establish that the hazardous waste remained in the sumps for a period of eight years.[16] Nonetheless, the uncontroverted evidence in this record establishes that approximately 550 gallons of hazardous waste was allowed to accumulate in the sumps for a period of about 64 days,[17] and was not removed from the Portway facility until March 20, 2001, more than 180 days after it first entered the sumps.[18]

Although the precise facts alleged by the Department were not proven, the preponderance of evidence in this record nonetheless establishes that Respondent violated 40 CFR 262.34(d).

Storage of hazardous waste in an improper tank

According to 40 CFR 265, Subpart J (b)(2), small quantity hazardous waste generators must ensure that "[h]azardous wastes or treatment reagents must not be placed in a tank if they could cause the tank or its inner liner to rupture, leak, corrode, or otherwise fail before the end of its intended life." In addition, 40 CFR 265.195 requires daily inspections of tanks, pursuant to Subpart J.

The Department contends that Respondent violated this provision by allowing hazardous waste to accumulate in the concrete sumps beneath the electroplating room floor. The Department's witness, Mr. Ingalls, testified that the hazardous waste in the sumps was acidic, with toxicity characteristics for chromium, and could compromise the integrity of the concrete,

---

[14] ORS 466.075(2) provides as follows: "The generator of a hazardous waste shall be allowed to store a hazardous waste produced by that generator on the premises of that generator for a term not to exceed that set by rule without obtaining a hazardous waste storage site permit. This shall not relieve any generator from complying with any other rule or standard regarding storage of hazardous waste."

[15] "100 kilograms to 1000 kilograms" is equivalent to "220 pounds to 2200 pounds".

[16] Mr. Ingalls testified that an employee of the Portway facility, Mr. Ishmael Pineado told him that the sumps had last been cleaned out eight years before the August 14, 2001 inspection.

[17] The minimum amount of time that the waste was stored in the sumps was from one week before June 18, 2001, until August 14, 2001, or a period of 64 days.

[18] At a minimum, the hazardous waste was stored at the Portway facility for 275 days, from June 18, 2001 until March 20, 2002.

allowing the hazardous waste to escape the sumps through cracks or imperfections and enter the land or water. Respondent offered testimony that the concrete sumps were designed in 1978 and that the concrete was coated to prevent leakage or absorption of material. Respondent conceded, however, that the sumps were not inspected daily.

There was no evidence offered about the "intended life" span of the concrete in the sumps. Nonetheless, Respondent failed to properly inspect the 25-year-old sumps. Moreover, it is clear from this record that the sumps were not designed to store the amount of hazardous waste that Respondent allowed to accumulate in the sumps. Respondent allowed hazardous waste to accumulate in the sumps for a period of approximately 64 days. Federal regulations prohibit storing hazardous waste in a tank if the waste *could* cause leakage or failure of the tank; proof of actual leakage or failure is not required. In this case, the preponderance of the evidence establishes that the acidic hazardous waste *could* cause the concrete sumps to leak, corrode or fail.

Failure to maintain and operate Portway facility so as to minimize possibility of unplanned release of or exposure to hazardous waste

Under 40 CFR 265.31, "Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment."

In this case, the record establishes that Respondent allowed acidic, toxicity characteristic hazardous waste to accumulate in the concrete sumps beneath the electroplating room floor. According to the Department's laboratory, the liquid in the sumps contained high levels of chromium. There was no inspection regimen, and approximately 550 gallons of the hazardous waste was allowed to remain in the sumps for about 64 days. The floorboards in the electroplating room were sodden and swollen. Respondent knew, on June 18, 2001, that approximately 550 gallons of water had been pumped into the electroplating room, yet Respondent did not take any steps to inspect the 25 year old sumps, or remove the hazardous waste from the sumps, until after Mr. Ingalls' inspection on August 14, 2001. Indeed, Mr. Wiltz was surprised to find the green liquid in the sumps. According to Mr. Ingalls, it was possible that the acidic nature of the hazardous waste could compromise the integrity of the concrete in the sumps.

Under these circumstances, it is apparent that Respondent did not maintain and operate its Portway facility to minimize release of hazardous waste into the environment, or to minimize exposure of its workers to hazardous waste.

Biannual storm water monitoring and filing of annual monitoring reports

In 1997, the Department issued Respondent a National Pollutant Discharge Elimination System Storm Water Discharge Permit. The permit was valid until June 20, 2002, and was in place during the inspection on August 14, 2001. This was not Respondent's first permit. By the terms of the permit, Respondent was required to conduct biannual sampling of its storm water

discharge, and to file annual monitoring reports with the Department about this sampling. Mr. Ingalls checked the Department's databases and determined that since 1993 Respondent had not filed any monitoring reports. Mr. Wiltz confirmed that Respondent had not conducted biannual sampling as required by Respondent's permit.

Respondent offered evidence that biannual sampling was not possible because the storm drain outfall pipe was below the surface of the Columbia River. In addition, Mr. Wiltz testified that someone at the Department told him, sometime between 1993 and 2001, that Respondent did not need to sample or submit reports because of the location of the outfall pipe. Mr. Wiltz was unable to recall whom he spoke with, or when this conversation occurred. Respondent also offered testimony that there had not been any significant rainfall prior to the inspection on August 14, 2001, so there was no storm water available for sampling.

The Department offered evidence that on August 14, 2001, the outfall pipe was well above the level of the river. Mr. Ingalls described the pipe as "high and dry." In addition, Mr. Ingalls checked with the National Weather Service and learned that the Hood River area had received 0.31 inches of rain on July 21, 2001 and 0.47 inches of rain on July 31, 2001.

Under these circumstances, I am persuaded by the Department's evidence. Respondent's evidence on this issue was incomplete, contradictory and conclusory. *See Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979)(J. Richardson concurring). In addition, I reject Mr. Jensen's argument that Respondent should not be penalized for failing to comply with their permit requirements because in their 25 years at the Portway location, the Department never raised Respondent's failure to sample and file reports before. This is belied by evidence that he knew that Respondent's permit required the biannual sampling and annual filing of monitoring reports. The terms of the permit are clear. Respondent is responsible for complying with the permit, and is subject to penalties for its non-compliance.

Assessment of Civil Penalty

The Director of the Department is authorized to assess civil penalties for any violations of the Department's rules or statutes. OAR 340-012-0042. The amount of civil penalties assessed is determined through use of matrices and a formula contained in OAR 340-012-0045. See OAR 340-012-0042.

In this case, the Department determined that Respondent was liable for $34,801 in civil penalties based on Respondent's numerous violations. (Ex. P-2.) These penalties include the violations Respondent admitted, as well as those violations proven at hearing. The civil penalties were determined by calculating the base penalty (BP) and considering other factors, such as prior significant actions (P), past history (H), the number of occurrences (O), the cause of the violation (R), Respondent's cooperation (C), and the economic benefit that Respondent gained by noncompliance with the Department's rules and statutes. The formula for determining civil penalties in this case is expressed as follows: "BP + [(0.1 x BP) x (P + H + O + R + C)] + EP." The calculations for each individual penalty are appended to Exhibit P-2, and are incorporated by reference as if fully set forth herein.

Based on this record, the civil penalty assessment of $34,801 is accurate and warranted.

PROPOSED ORDER

I propose that the Department issue the following order:
Respondent is subject to a civil penalty in the amount of $34,801.

Andrea H. Sloan
Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: June 16, 2003

REVIEW

If you are not satisfied with this decision, you have a right to petition the Environmental Quality Commission for review. To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date of service of this Order, as provided in Oregon Administrative Rule (OAR) 340-011-0132(1) and (2). Service is defined in OAR 340-011-0097, as the date the Order is mailed to you, not the date you receive it. The Petition for Review must be filed with:

Environmental Quality Commission
c/o DEQ – Assistant to the Director
811 SW 6th Avenue
Portland OR 97204

Within 30 days of filing the Petition, you must also file exceptions and a brief as provided in OAR 340-011-0132(3).

CERTIFICATE OF SERVICE

I certify that on June 16, 2003, I served the attached Proposed Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

PHIL JENSEN
LUHR JENSEN & SONS INC
PO BOX 297
HOOD RIVER OR 97031

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 3254

JEFF BACHMAN
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

Lucy Garcia

Lucy Garcia, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

Attachment B

AMENDED EXHIBIT A1

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

VIOLATION A1: Illegal storage of hazardous waste in violation of Oregon Revised Statute 466.095.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0068(1)(d).

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-12-0090(3)(c)(C) because the violation involved less than 250 gallons of hazardous waste.

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, minor 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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant actions and receives a value of –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 2, pursuant to OAR 340-012-0045(1)(c)(C)(ii), as the violation existed for more than one day.

"R" is the cause of the violation and receives a value of 2, pursuant to OAR 340-12-0045(1)(c)(D)(ii) as the cause of the violation was Luhr Jensen's negligent conduct.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of -2, pursuant to OAR 340-012-0045(1)(c)(E)(1), as Respondent was cooperative and corrected the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $1,000 + [(0.1 x $1,000) x (4 + (-)2 + 2 + 2 + (-)2)] + $0
= $1,000 + [($100 x 4)] + $0
= $1,000 + $400 + $0
= $1,400

State of Oregon
Department of Environmental Quality Memorandum

Date: November 13, 2003

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item A, Action Item: Appeal of Proposed Order in the Matter of the Luhr Jensen & Sons, Inc., LQ/HW-ER-01-275, December 4, 2004 EQC Meeting

Appeal to EQC

On July 10, 2003, Luhr Jensen & Sons, Inc. (Luhr Jensen), filed a petition for Commission review of an Administrative Law Judge's Proposed Order (Attachment G), which assessed the company a $34,801 civil penalty for hazardous waste management and water quality permit violations.

Background

The Proposed Order contains factual and legal issues identified during the hearing process, as well as proposed Evidentiary Rulings, Findings of Fact, Conclusions of Law, and an Opinion elaborating on the proposed conclusions. The following is a brief summary.

On April 17, 2002, DEQ assessed Luhr Jensen a $66,354 civil penalty for 11 violations (A1 through A11) of Oregon law regulating the management of hazardous waste and for three water quality violations (B1 through B3). The alleged violations are set forth specifically in the attached Notice of Assessment of Civil Penalty (Attachment J, P2).

On March 4, 2003, the Department amended the Notice to reduce the total civil penalty assessed from $66,354 to $34,801, based on information received from Luhr Jensen. A contested case hearing was held on March 18, 2003. On June 16, 2003, the Commission's Administrative Law Judge issued a Proposed Order finding that Luhr Jensen had committed the violations alleged in the Notice and assessing the civil penalties as calculated by the Department.

Evidentiary rulings. The key evidentiary rulings made by the Administrative Law Judge in her Proposed Order are summarized as follows:

Luhr Jensen admitted to violations A5-A11 and B1 in its Answer to the Notice or at hearing (Attachment J, P4). Luhr Jensen attempted to withdraw these admissions in its May 6, 2003 Answer to the Department's Hearing Memorandum (Attachment H). The Administrative Law Judge found that Luhr Jensen could not withdraw its admissions in its Hearing Memorandum, which was filed after the evidentiary record in the hearing was closed. The Administrative Law Judge

[1] The 2003 Legislature changed the designation of *Hearing Officer* to *Administrative Law Judge*, and the officer in this case refers to herself as an "Administrative Law Judge." Thus, this staff report uses the term Administrative Law Judge for consistency.

further found that Luhr Jensen failed to avail itself of the opportunity to withdraw any of its admissions during the course of the hearing when the Administrative Law Judge clarified which violations were and which were not at issue.

Findings of fact. The Administrative Law Judge's findings are summarized as follows:

Luhr Jensen operates two facilities in Hood River where it manufactures fishing tackle and accessories. Luhr Jensen's Portway facility in Hood River is a small quantity generator of hazardous waste with the registration number ORD 990751414. On August 14, 2001, DEQ Hazardous Waste Specialist Jeff Ingalls conducted a compliance inspection of the Portway facility. Mr. Ingalls observed four 55-gallon drums with hazardous waste labels affixed in the facility's acid storage room. The labels indicated that the waste was spent tin plating solution generated on July 6, 2001, at Luhr Jensen's Oak Grove facility in Hood River. Mr. Ingalls field tested the pH of the solution in the drums and found it to be between 0.5 and 1. A residue with a pH of 2 or less is a "corrosivity characteristic" hazardous waste. Luhr Jensen's Portway facility is not a permitted hazardous waste treatment, storage or disposal facility.

After inspecting the acid storage room, Mr. Ingalls inspected the facility's electroplating room. The walking surface of the room consisted of slatted wooden boards, which covered a sump that was divided into separate sections. The sump was designed and constructed in 1978 to contain drippage from items being moved from one bath to another during the electroplating process. Mr. Ingalls removed one of the floorboards and observed two to three inches of green-colored liquid in the sump.

On August 30, 2001, Mr. Ingalls collected samples of spent tin plating solution from three of the four drums in the Portway acid storage room and one sample each of the green liquid from two different sections of the sump beneath the plating room. Laboratory analysis determined the tin plating solution to be a corrosivity characteristic hazardous waste. The samples from plating room sump were determined to be hazardous waste for chromium toxicity. The chromium waste was also acidic and could compromise the integrity of the sump, allowing the waste to enter the environment. On March 20, 2002, Luhr Jensen shipped the hazardous waste that had been pumped from the sump, consisting of eleven 55-gallon drums, to a permitted treatment, storage or disposal facility.

The Department issued Luhr Jensen a stormwater discharge permit for the Portway facility in 1997. The permit required Luhr Jensen to perform biannual sampling of its stormwater discharge and to report the results of that monitoring annually. Luhr Jensen did not conduct sampling of its stormwater discharge nor did it file annual monitoring reports. Luhr Jensen was not prevented from collecting stormwater samples because of the location of the end of its stormwater discharge pipe.

Conclusions of Law. The Administrative Law Judge addressed only those violations which she determined had not been admitted to by Luhr Jensen, Violations A1 through A4, B2 and B3 of the Notice. She found that Luhr Jensen violated state law by:

1. Storing the hazardous tin plating waste generated at its Oak Grove facility at its Portway facility before August 14, 2001 (Violation A1);
2. Storing the chrome plating hazardous waste in the sump at Portway for more than 180 days, between August 14, 2001 and March 20, 2002 (Violation A2);
3. Storing the chrome plating hazardous waste in a tank that did not meet state requirements (Violation A3);
4. Failing to maintain and operate its facility in a manner that minimized the possibility of unplanned release of the chrome plating hazardous waste to the environment on and before August 14, 2001 (Violation A4);
5. Failing to perform twice annual stormwater monitoring in 1994 through 2001 (Violation B2); and
6. Failing to submit annual storm water reports in 1994 through 2001 (Violation B3).

The Administrative Law Judge also concluded that the civil penalty assessment proposed by the Department was warranted for all the violations alleged in the Notice.

Petition for Commission Review. Luhr Jensen appealed the Administrative Law Judge's Proposed Order to the Commission on July 10, 2003. On August 14, 2003, Luhr Jensen filed its Exceptions and Brief in the form of a letter to the members of the Environmental Quality Commission and a three-ring binder of documents (August 14 binder). The Department has objected to the admission of the August 14 binder in its entirety arguing that the documents in it are either copies of documents already admitted into the record, documents that were offered but not admitted into the record at hearing, or are new documents, which the Commission may not consider unless they are first remanded to the Administrative Law Judge for her consideration. On September 12, the Commission's legal

counsel informed Luhr Jensen that Oregon statutes and rules prohibit the Commission from considering new evidence that was not placed on the administrative record by the Administrative Law Judge (Attachment B).

In its appeal to the Commission (Attachment C), Luhr Jensen took the following exceptions to the Proposed Order:

1. The Administrative Law Judge's assessment of civil penalties for Violations A1, A5, A6 and A7 of the Notice relating to the tin plating waste generated at the Oak Grove facility.
2. The Administrative Law Judge's assessment of civil penalties for Violations A2, A3 and A4 relating to the chrome plating waste in the sump beneath the plating room floor at Portway.
3. The Administrative Law Judge's assessment of civil penalties for Violations B2 and B3 relating to the alleged failure to conduct required stormwater monitoring and reporting.

Exception 1

In its Brief, Luhr Jensen admits that it failed to perform a hazardous waste determination on the tin plating waste generated at Oak Grove and that a penalty for that violation (A9) is appropriate. The company argues, however, that penalties for violations that occurred subsequent to the failure to perform a determination (storing the waste at Portway, A1; transporting the waste from Oak Grove to Portway, A5; failing to manifest the waste prior to transport, A6; and failure to provide a land disposal restriction notification, A7), are an "unreasonable layering" of fines. Luhr Jenson argues that the fines are unreasonable because they were inadvertently caused by the company's initial failure to perform the waste determination, and thus the company is being fined four times for the same mistake.

In its Response Brief (Attachment A), the Department argues that the Commission should not consider Luhr Jensen's appeal regarding Violations A5, A6 and A7 because the Administrative Law Judge ruled that Luhr Jensen admitted those violations and Luhr Jensen has not asked the Commission to reverse that ruling, nor offered any reason why it should. If the Commission does chose to consider Violations A5, A6 and A7, the Department argues that the penalties are not "unreasonably layered." The Department argues that these violations represent separate, independent requirements intended to address different risks, and penalties for each violation are both legal and appropriate.

Exception 2

Luhr Jensen claims that the sump under the plating room was not a "hazardous waste storage tank." Rather it is "an underflow containment sump, designed to capture any inadvertent spills and allow them to be reclaimed if a spill occurred." All penalties related to the sump and the alleged violations (A2, A3 and A4) for which they were assessed should therefore be dismissed.

In its response, the Department argues that regardless of the intended purpose of the sump, it is a hazardous waste storage tank if hazardous waste is in fact stored in it. The Department further argues that because the sump was used to store hazardous waste, it must meet all requirements applicable to hazardous waste storage tanks.

Exception 3

In its appeal, Luhr Jensen argues that it should not be assessed penalties for its failure to conduct stormwater monitoring and report the results because the Department never raised the issue with the company during prior inspections.

In its response, the Department argues that the penalties are appropriate and that there is no credible evidence that Luhr Jensen was told by the Department that it did not need to comply with the monitoring and reporting requirements of its permit.

EQC Authority

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

Alternatives

The Commission's alternatives include the following:

1. It can accept the Administrative Law Judge's proposed order and if it does so, it need not supply additional findings or conclusions.
2. If the Commission determines that that the Administrative Law Judge made a mistake in her determination that Luhr Jensen admitted liability for violation A5 to A111 and B1, and that these admissions could not be withdrawn after the evidentiary record was closed, it may remand the case to the Administrative Law Judge for consideration of the new evidence. If it does so, the Commission must explain in writing the basis for its decision to reject the Administrative Law Judge's conclusion.
3. If the Commission determines that the Administrative Law Judge erred in her legal conclusions challenged in Exceptions 2 and 3, it may modify the

Proposed Order accordingly. The Commission must explain in writing the basis for its determination.

In reviewing the Proposed Order, the Commission may substitute its judgment for that of the Hearing Officer except as noted below.[1] The Order was issued under 1999 statutes and rules governing the Hearing Officer Panel Pilot Project.[2] Under these statutes, DEQ's contested case hearings must be conducted by a Administrative Law Judge appointed to the panel, and the EQC's authority to review and reverse the Administrative Law Judge'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 Administrative Law Judge's Proposed Order in any substantial manner without identifying and explaining the modifications. [4]

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

(3) The Commission may not consider any new or additional evidence, but may only remand the matter to the Administrative Law Judge 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 Administrative Law Judge unless it is necessary to prevent a manifest injustice. [8]

(2) The Commission will not remand a matter to the Administrative Law Judge to

---

[1] OAR 340-011-0132.
[2] Or Laws 1999 Chapter 849.
[3] *Id.* at § 5(2); § 9(6).
[4] *Id.* at § 12(2).
[5] *Id.* at § 12(3). A historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist either before or at the time of the hearing.
[6] *Id.* at § 8; OAR 137-003-0655(4).
[7] OAR 137-003-0655(5); 137-003-0660.
[8] OAR 340-011-132(3)(a).

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 Response Brief to Luhr Jensen's Appeal Brief, dated December September 15, 2003.
B. Letter from Larry Knudsen, Oregon Assistant Attorney General, to Luhr Jensen, dated September 12, 2003.
C. Luhr Jensen Appeal Brief, dated August 14, 2003.
D. Letter from Mikell O'Mealy, dated August 8, 2003.
E. Letter from Mikell O'Mealy, dated July 24, 2003.
F. Petition for Commission Review, received July 10, 2003.
G. Administrative Law Judge's Proposed Order for Assessment of Civil Penalty, dated September June 16, 2003.
H. Luhr Jensen's Answer to Department's Hearing Memorandum, dated May 6, 2003.
I. Department's Hearing Memorandum, dated April 30, 2003.
J. Exhibits from Hearing of March 18 and April 17, 2003.
   P1. Cover letter to Notice of Assessment of Civil Penalty No. LQ/HW-ER-01-275, dated April 17, 2002.
   P2. Notice of Assessment of Civil Penalty No. LQ/HW-ER-01-275, dated April 17, 2002.
   P3. Amendments to Notice of Assessment of Civil Penalty No. LQ/HW-ER-01-275, dated March 4, 2003.
   P4. Respondent's Answer and Request for Hearing, dated May 8, 2002.
   P5. Notice of Contested Case Rights and Procedures
   A1. Industrial Storm Water Discharge Permit, No. 1200-Z, File No. 51810, issued by DEQ to Luhr Jensen & Sons, Inc., October 27, 1997
   A2. Chain of custody for samples collected by DEQ at Luhr Jensen & Sons on August 30, 2001, and results of sample analyses performed by DEQ laboratory.
   A3. Photographs offered in support of Violation A11 of the Notice of Assessment of Civil Penalty (Notice).
   A4. Photographs offered in support of Violations A1, A5 and A6 of the Notice.
   A5. Photographs offered in support of Violations A2, A3 and A4 of the Notice.
   A6. Invoice to Luhr Jensen & Sons for hazardous waste disposal services by

[9] *Id.* at (4).

Wastewatch, LLC, dated March 22, 2002, and Hazardous Waste Manifest No. 03079 for waste generated by Luhr Jensen & Sons and dated March 20, 2002.

A7. Economic benefit analysis performed by DEQ in support of the civil penalty calculation for Violation A2 of the Notice.

A8. Public Health Statement for Chromium, prepared by the U.S. Agency for Toxic Substances and Disease Registry, dated September 2000.

A9. Photograph offered in support of Violation 10 of the Notice.

A10. Cover letter and Mutual Agreement and Order, In the Matter of Luhr Jensen & Sons, Case No. HW-ER-97-095, dated October 21, 1998; and Cover letter and Notice of Assessment of Civil Penalty, In the Matter of Luhr Jensen & Sons, Inc., Case No. HW-ER-97-095, dated July 17, 1997.

A11. Photographs offered in support of Violations B2 and B3

A12. Letter from Mark Wiltz, Luhr Jensen, to Jeff Ingalls, DEQ, dated March 12, 1997.

A13. Letter from Mark Wiltz, Luhr Jensen to Jeff Ingalls, DEQ, dated January 25, 2002.

R1. Luhr Jensen's Answers to All Allegations.

R2. Closing Comments

R3. Luhr Jensen & Sons, Inc. - DEQ Penalty Evaluation

R4. Timeline

R5. Engineering Drawing of Sump

R9. Photograph of Stormwater Outfall

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: LUHR JENSEN & SONS, INC., PETITIONER	RESPONDENT'S BRIEF NO. WQ/I-ER-01-275 HOOD RIVER COUNTY

Respondent, Department of Environmental Quality (the Department), submits this Brief to the Environmental Quality Commission (Commission) for its consideration in the appeal of the Hearing Officer's Proposed Order in Notice of Assessment of Civil Penalty No. WQ/I-ER-01-275, filed by Luhr Jensen & Sons, Inc. (Luhr Jensen), Petitioner.

INTRODUCTION

Luhr Jensen & Sons, Inc. (Luhr Jensen) is a privately held Oregon corporation that manufactures fishing lures and other products in Hood River, Oregon. Luhr Jensen operates three facilities, the Oak Grove facility, the Portway facility, and the Jen-Tech facility, in Hood River. The fishing lure manufacturing process generates regulated hazardous wastes from electroplating and painting of lures and other products.

On August 14, 2001, DEQ conducted an inspection of Luhr Jensen's Portway facility to determine the company's compliance with state hazardous waste and other environmental law. A follow-up inspection was conducted on August 30, 2001. As a result of the investigation, DEQ issued Luhr Jensen a Notice of Assessment of Civil Penalty (the Notice) on April 17, 2002. The Notice alleged that Luhr Jensen had committed 11 violations of hazardous waste regulations (A1 through A11) and three violations of water quality regulations (B1 through B3). The Notice assessed total civil penalties of $66,534 for the 14 alleged violations.

Luhr Jensen appealed the Notice and requested a contested case hearing. On March 4, 2003, DEQ amended the Notice reducing the civil penalties for violations A1 through A5 and A8 through A10. The amendments reduced Luhr Jensen's penalty from $66,354 to $34,801. DEQ also amended Section III, Paragraph A2 of the Notice. A contested case hearing was held on March 18

and April 17, 2003. On June 16, 2003, the Hearing Officer issued a Proposed Order assessing Luhr Jensen a total civil penalty of $34,801 as calculated in the amended Notice. On July 10, 2003, Luhr Jensen petitioned the Commission to review the Hearing Officer's Proposed Order.

OBJECTIONS

On August 14, 2003, Luhr Jensen filed its Exceptions and Brief. The Exceptions and Brief are in the form of a letter to the members of the Environmental Quality Commission and a three-ring binder of documents (August 14 binder). The Department objects to the admission of the August 14 binder in its entirety as the documents in it are either copies of documents already admitted into the record, documents that were offered but not admitted into the record at hearing, or are new documents.

Documents 1, 2, 3 and the timeline portion of Document 4 of the August 14 binder were admitted at hearing as Exhibits R-3, R-1, R-2 and the timeline portion of R-5, respectively. The non-timeline portion of Document 4, and Documents 5, 6 and 7 of the August 14 binder were offered by Luhr Jensen, but not admitted by the Hearing Officer. Luhr Jensen makes no exception to the Hearing Officer's rulings denying admission of these documents and offers no reason why the Commission should reverse those rulings. The August 14 binder also contained several documents located behind divider number 8. These are new documents not offered at hearing. The Commission cannot consider this new or additional evidence unless the hearing is reopened and remanded to the hearing officer. Oregon Administrative Rule (OAR) 340-011-0132(4). The August 14 binder is inadmissible in its entirety and should not be considered by the Commission.

Throughout the letter portion of Luhr Jensen's Exceptions and Brief, the company relies on facts that are not in the hearing record. Many of these alleged facts are irrelevant (i.e., the conversation with a newspaper reporter referred to on page 5 of the letter), but even if they were not, they should not be considered by the Commission. A request to present additional evidence must be made by motion to the Commission and be accompanied by a statement of the reason why the person failed to present the evidence at the hearing. Luhr Jensen has not filed a motion with the Commission requesting the admittance of additional evidence into the hearing record, thus the

Commission cannot rely on this evidence. The Department urges the Commission to rely solely on the findings of fact made by the Hearing Officer in making its decision.

DISCUSSION

The Hearing Officer upheld the Department's Amended Notice in its entirety and the Department request that the Commission adopt the Hearing Officer's Proposed Order as its Final Order. The letter portion of Luhr Jensen's Exceptions and Brief takes no specific exception to any finding of fact or conclusion of law. Section 1 of the letter does take some general exceptions to the Proposed Order.

1. "Layering" of Penalties Related to Oak Grove Tin Plating Waste

In her evidentiary rulings, the Hearing Officer found that Luhr Jensen had admitted to Violations A1, A5, A6 and A7, which arose from Luhr Jensen's management of hazardous tin plating waste it generated at its Oak Grove facility and then transported and stored at its Portway facility. Luhr Jensen has no made no specific exception to this ruling nor offered any reason for the Commission to reverse it. The sole basis for Luhr Jensen's request to dismiss the penalties for violations A5, A6, and A7 is that they are "unreasonable". Respondent's Exceptions and Brief at 2. Given that Luhr Jensen has not asked, or given any reason, for the Commission to reverse the Hearing Officer's ruling, the Commission should uphold the ruling.

At several points in its Exceptions and Brief, Luhr Jensen stresses that it was not represented at Hearing, nor were the Exceptions and Brief drafted, by legal counsel, apparently in an appeal to the Commission to overlook any shortcomings in pleading and arguing its case. Luhr Jensen's answer to the Notice was prepared by counsel and it is likely that the company received legal advice at that time. For whatever reason, Luhr Jensen chose to proceed with the contested case hearing and this petition for review without benefit of counsel. The Commission cannot and should not reward that choice by disregarding the rules and procedures governing the form of pleadings, admissibility of evidence, etc. These rules and procedures have been developed over time to ensure fairness to all parties and have passed muster before the courts of Oregon. Furthermore, to do so would unfairly penalize those respondents who do comply with those rules

and procedures, either by hiring counsel or by taking the time and effort to educate themselves on the proper process.

If Luhr Jensen properly raised an exception to the Notice based on its belief that the penalties for Violations A1, A5, A6 and A7 were unreasonably "layered", that argument is without merit. Transporting waste without a transporter identification number, shipping it without a manifest, and shipping it without a land disposal restriction notice, are separate, serious violations not predicated on whether a generator has performed a hazardous waste determination. Each of these regulations is an important link in the chain of requirements intended to ensure that hazardous waste is safely managed and disposed. Luhr Jensen's argument is akin to a drunk driver who kills someone arguing that he should only be prosecuted for driving under the influence because it was never his intention to harm anyone when he got behind the wheel.

2. Plating Room Sump

Luhr Jensen's argument against the penalties related to the presence of hazardous waste in a sump below the plating room of it Portway facility is equally without merit. That Luhr Jensen intended the sump to capture drippage and spillage from plating operations and not as a hazardous waste storage tank does not prevent the sump from being a hazardous waste storage tank if hazardous waste is in fact stored there. The drippage and spillage found in the tank was a hazardous waste. See the Proposed Order's Finding of Fact 14.

3. Stormwater Discharge Permit Violations

At hearing, Luhr Jensen admitted that it did not comply with the requirements of its National Pollutant Discharge Elimination System 1200-Z permit by failing to conduct monitoring and submitting required reports. The company, however, raised what is essentially an estoppel defense at hearing and in its Exceptions and Brief. Luhr Jensen claimed that it could not collect the required samples because the stormwater outfall was below the surface of the Columbia River. A DEQ water quality staff member was made aware of this situation during inspections, according to Luhr Jensen, and told the company that they did not need to collect samples.

Luhr Jensen's evidence consisted of the testimony of the company's environmental manager, Mark Wiltz. According to the Proposed Order, "Mr. Wiltz testified that someone at the Department told him, sometime between 1993 and 2001, that [Luhr Jensen] did not need to sample or submit reports because of the location of the outfall pipe. Mr. Wiltz was unable to recall whom he spoke with, or when this conversation occurred." See Proposed Order, Page 12. The Hearing Officer found this testimony unpersuasive. She also made a finding that the location of the pipe outfall did not prevent Luhr Jensen from conducting sampling. Significant rainfall events do occur after the river level has dropped sufficiently to expose the outfall. The Hearing Officer found that significant rainfall events occurred approximately three weeks and two weeks prior to the Department observing that the pipe outfall was above water level. Alternatively, the company could have cut a sampling port into the pipe before it reached the river. See Findings of Fact 20, 21 and 22.

To dismiss the stormwater permit violations, the Comission would need to reverse or modify the Hearing Officer's Findings of Fact. While the Commission may reverse or modify a Hearing Officer's Finding of Fact, it can do so only if it finds that the finding is not supported by a preponderance of the evidence in the hearing record. OAR 137-003-0665(4). Findings of fact are often best determined by the Hearing Officer, especially when there is conflicting evidence in the record.

4. Luhr Jensen's Exceptions and Brief Section 2

Section 2 of the letter portion of Luhr Jensen's Exceptions and Brief addresses what the company believes to be the Department's "overzealous" use of its enforcement discretion. The Department regrets that Luhr Jensen feels that it has been unfairly treated, but thinks that the record demonstrates that the penalties assessed were appropriate given the seriousness of the violations and Luhr Jensen's past enforcement history. Luhr Jensen was previously penalized for Class I[1] hazardous waste violations in 1989 and 1997. During the August 2001 inspection, from which the

[1] OAR Chapter 340, Division 12 classifies environmental violations for enforcement purposes as Class I, II or III, with Class I being the most serious and Class III the least serious.

present case arises, the Department documented nine Class I violations and four Class II violations of hazardous waste and water quality law.

The Department regrets that the company also perceives the process for resolving contested cases as unfairly stacked in favor of the Department. Because Luhr Jensen did not take any specific legal exception to the process, the Department can only respond that the contested case hearing process has been developed by the legislature and this Commission with the intention of assuring that respondents are afforded their constitutional right to due process.

The Department, however, goes beyond the minimum requirements of due process and provides respondents with additional opportunities to be heard before a civil penalty assessment is issued and again before a civil penalty assessment goes to a hearing. When an inspection documents a violation, the Department first issues a written Notice of Noncompliance (NON). The NON summarizes the DEQ's factual findings and sets forth the violations stemming from those findings. After the NON has been issued, the DEQ is receptive to any comments, questions, or new information the recipient may wish to submit.

After a Notice of Assessment of Civil Penalty is issued and appealed, the respondent may request an "informal discussion" before the case proceeds to hearing. At this discussion, the Respondent meets with DEQ field and enforcement staff and may bring forward any mitigating information he or she believes the DEQ may not have had or did not adequately consider when it prepared the civil penalty assessment. The Respondent may also ask any questions he or she may have about the factual findings the DEQ made, and how the DEQ interpreted the law, applied the law to the facts, and arrived at the decision to assess the civil penalty that it did. Most cases are resolved as result of these informal discussions. In Luhr Jensen's case the informal discussion resulted in a reduction of the civil penalty from the $66,354 assessed in the Notice, to the $34,801 assessed in the Amended Notice and upheld by the Hearing Officer.

Section 2 of Luhr Jensen's Exceptions and Brief also makes reference to the fact that Mr. Wiltz suffered from a brain tumor during the time period when the violations were documented. While the Department sympathizes with Mr. Wiltz, his condition did not alleviate Luhr Jensen of

its responsibility to meet its environmental compliance obligations, anymore than the illness of its payroll manager would be an excuse for not paying the company's employees.

CONCLUSION

Based on Luhr Jensen's failure to raise any sufficient legal or policy reason to alter the Hearing Officer's Proposed Order, the Department requests that the Commission adopt the Proposed Order as its Final Order.

9/15/03
Date

Jeff Bachman
Environmental Law Specialist

CERTIFICATE OF SERVICE

I hereby certify that I served the Hearing Memorandum within on the 15th day of September, 2003 by PERSONAL SERVICE upon

The Oregon Environmental Quality Commission
c/o Mikell O'Meally, Assistant to the Commission
811 SW Sixth Avenue
Portland, OR 97204

Personal Service

and upon

Luhr Jensen & Sons, Inc.
c/o Phil Jensen, President
P.O. Box 297
Hood River, OR 97031

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 September 15, 2003

Deborah Nesbit

HARDY MYERS
Attorney General

Attachment B

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

September 12, 2003

Phil Jensen
Luhr-Jensen and Sons
P.O. Box 297
Hood River, OR 97031

Re: Petition for EQC Review in Case No. LQ/HW-ER-01-275

Dear Mr. Jensen:

I am legal counsel for the Oregon Environmental Quality Commission (EQC). On July 10, 2003, you filed a petition for Commission review of Administrative Law Judge Sloan's decision and order assessing a $34,801 civil penalty against your company for certain hazardous waste management and water quality permit violations. On August 14, 2003, you sent the Commission a letter and an accompanying binder of information relating to the case. On behalf of the Commission, I am writing to let you know that Oregon statutes and rules prohibit the Commission from considering evidence that was not placed in the administrative record by the Administrative Law Judge.

In legal terms, this administrative proceeding is what is known as a contested case hearing. ORS 183.310(2) and ORS 183.413 to 183.470. In 1999, the Oregon legislature adopted a number of statutes that restrict how most agencies, including the DEQ, may conduct contested case hearings. Oregon Laws, 1999, Chapter 849; 2003 Enrolled Bill HB 2526. These restrictions include a requirement that the evidentiary hearing in a contested case be conducted by an administrative law judge from the state's Office of Administrative Hearings rather than the Environmental Quality Commission. *Id.* at section 9. Agencies may still provide an opportunity for review of the administrative law judge's order, however, and the Commission by rule has elected to provide that opportunity. OAR 340-011-0132. But the Commission's review is limited to the evidentiary record (e.g. testimony and exhibits) allowed into the official record by the administrative law judge. *Id.* Sections 8 and 12; OAR 137-003-0600, 137-003-0655(5).

While the Commission cannot itself consider new evidence, it can in some situations send the matter back to the administrative law judge to consider new evidence. This procedure is known as a remand. A remand is not available, however, to consider issues that were not raised before the Hearing Officer except when necessary to prevent "manifest injustice," and even then a timely motion must have been filed to remand the matter for additional evidence. (The motion also must be "accompanied by a statement specifying the reason for the failure to present the evidence to the hearing officer." OAR 340-011-0132(3) and (4).

As noted above, the binder included with your August 14, 2003 letter includes a number of documents that do not appear to have been placed in the record before Administrative Law Judge Sloan. Accordingly, I will be advising the Commission that it does not have legal authority to consider the new evidence. (The Commission will have, however, those documents that were placed into the record by the administrative law judge.) In keeping with the statutes and rules discussed above and the Commission's past practice, it is my expectation that the Commission will conclude that it cannot consider the new evidence or any arguments based on the new evidence.

On a related matter, I note that some of the concerns discussed in your August 14, 2003 letter appear to focus on DEQ's general enforcement policies and programs rather than the specific violations at issue in this contested case. The Commission reserves time during every regular meeting to hear from members of the public on any topic relating to the responsibilities of the Department that are not otherwise included on the agenda. To the extent, if any, that you have concerns about the DEQ enforcement program that are distinct from the issues involved in your petition for Commission review of the contested case hearing, these issues could be raised during this public forum section of the Commission meeting.

Sincerely,

Larry Knudsen
Assistant Attorney General
Natural Resources Section

LJK:lal/GENG7752.DOC

cc: Mark Reeve
Mikell O'Mealy
Anne Price

LUHR·JENSEN™ & SONS, INC.

400 Portway Ave., P.O. Box 297, Hood River, OR 97031 • (541) 386-3811 • Fax (541) 386-4917 • www.luhrjensen.com

August 14, 2003

Oregon Department of Environmental Quality
811 SW 6th Ave.
Portland, OR 97204-1390

Attn: Mikell O'Mealy, Ass't to the Commission

RE: Case No. LQ/HW-ER-01-275

Dear Commission Members:

Thanks for the opportunity to further explain Luhr Jensen's position in this case. There are two parts to this presentation that I wish to address. The first is …the charges and fines levied against my company, and the second part is in regard to the current conduct and *impact* of the conduct of the ODEQ. I sincerely believe that it is important and incumbent upon the Commissioners to read this material thoroughly… and to carefully consider the seriousness and social consequences of this matter.

The enclosed presentation booklet fully explains each event or issue, and thoroughly examines the circumstances and the requested alternative "finding". This booklet is virtually the same presentation that was prepared and offered at the most recent ODEQ hearing, which was referred to as a "tribunal". I am unsure whether or not the information was considered by the officer in charge of the tribunal *(Andrea Sloan / @ 503-644-5190 / Dept. of Transportation)* as Jeff Bachman *(representing attorney on behalf of the DEQ)* objected to this manner of presentation. The appeal was conducted in a strict courtroom manner, and as Luhr Jensen was not represented by legal or professional council, the process heavily favored the ODEQ and outcome of the tribunal was predictable.

Commissioners: …please let me explain my personal position and my company's position regarding this case. We are very supportive of the goals of the DEQ and respect the work that the Department does and the results that they are focused on. We do not want to be, or appear to be, overly critical of the several DEQ employees that we have dealt with in this case, as we understand that they are "simply doing their job"… as it has been assigned to them. In addition, of course, it is these same employees that we are desirous of having a good working relationship with in the future, and we do not want to prejudice this future relationship. We do, however, take substantial issue with the manner in which "the Department" directs these employees, as it is our opinion that there

has been a cultural drift toward unreasonable enforcement and penalty assessment procedures.

Luhr Jensen has engaged in a great deal of dialogue with these DEQ employees. I believe that we have talked with or exchanged letters with most everyone in the Portland office of the enforcement division, including a recent letter from Stephanie Hallock. Each encounter, in spite of a rather awkward or contentious atmosphere, was professional and courteous, but very predictably, resulted in the same outcome. It has been my observation that the system lacks objective checks and balances. There is no incentive for the ODEQ to significantly modify its position based on the facts presented by Luhr Jensen. Furthermore, to do so, would be an admission that the initial citations and penalties were unreasonable. The result is a system that encourages preservation of the ODEQ position and discourages input by the affected party to achieve a reasonable outcome. It seems to work well for the department to invite the accused to appeal through an established system that is simply an invitation to participate in a cycle of litigation that the accused cannot financially or emotionally afford. In most cases, and for most people, it is simply easier to write a check and get back to the business of keeping their company afloat.

The point that I wish to make with the commission or to the responsible politicians that have the ability to effect change in the department, is simply this; the Oregon Department of Environmental Quality, Enforcement Division has allowed itself to drift into a state of unfairness and abusiveness in the manner of conduct regarding the discharge of their duties. I will present the following Luhr Jensen case to make the point. Section 1 will be a brief (hopefully) outline of Luhr Jensen's response to the DEQ charges. Section 2 addresses Phil Jensen's experiences and concerns regarding the conduct of the DEQ Enforcement Department and the suggestions for "reform" that should be encouraged.

SECTION 1

As outlined in Section 1 of the presentation booklet, entitled *Luhr Jensen & Sons, DEQ penalty Evaluation...* the first line (A9) stated that a fine of $1,600 for Failure to *Perform Haz Waste Determination (OG Plating)*...The facts of the case supported this fine (A9), although there were circumstances surrounding this event that could provide some valid and worthy discussion as outlined in Section 2, page 1 of the presentation booklet. Luhr Jensen would say that A9 is a fair call, and would feel obligated and certainly willing to pay the fine, but, again as outlined in the same section of the presentation booklet, Luhr Jensen strongly objects to the unreasonable layering on of four subsequent fines that represent a total of $11,600. This is simply unreasonable for an action that was inadvertent, did not cause any harm to the environment and did not affect any financial gain to Luhr Jensen. In fact, the material in question, if the Ph were within the limits, is not a regulated product. Mr. Wiltz, our environmental manager at the time, was simply doing what he thought was the best possible way to dispose of this material by taking it to the Portway facility where it could be properly Ph adjusted and discharged into the local POTW. A legal alternative would have been to simply add a few pounds of

soda or potash and dispose of it at the facility where it originated or ...deliver it to the local POTW (as was originally intended). That action would have eliminated this entire event. The error was the omission of the Ph testing of the material at the Oak Grove facility.

The second event, as outlined in the second portion (green letters) of Section 1 of the booklet (items A2, A3 and A4), relates to the plating sump and the manner in which it performs its functions in our electroplating installation. The inspecting representative simply makes a wrongful characterization of what this production tool is. It is not a storage tank...it is an underfloor containment sump, designed to capture any inadvertent spills and allow them to be reclaimed if a spill occurred. The design and construction of this installation goes back to 1978 and it has performed well and as expected for over 25 years. This exact design is being used in new construction at the present time. Again, it is Luhr Jensen's position that the inspecting ODEQ representative did not fully understand the design or the function of this sump. A fine of $13,900 is simply unwarranted and total absolution of this fine is requested.

Subsequent fines on the Section 2 schedule (A8, A10, A11 and B1), while arguably excessive in our opinion, were as the inspector saw them, and Luhr Jensen will not contest them.

However, we must contest the fines named in the seventh "event" (B2 and B3). Section 2, page 9 outlines the charges, circumstances and the request for rescinding the fines. As explained in the several prior inspections of that stormwater installation, there has never been any concern expressed by visiting inspectors or representatives of the DEQ, nor has Luhr Jensen had any directive regarding the issue. If, as we now understand and acknowledge our obligations regarding this issue, there had been this level of concern, the company would have known the procedures and would have complied with them. This is simply a case of ignorance on our part, supported by lack of communication by the department. The $3,200 fine is excessive for what should be termed a "first offense" and should be rescinded.

SECTION 2

Please let me now return to the primary issue that I believe that the Commission needs to address.

Most simply stated, I believe that the DEQ Department of Enforcement suffers from a high degree of over zealousness. While I am quite sure that many of the allegations and fines that are generated by the department are deserved, ...many are not, and in many cases, the fines are dramatically excessive and prove to be an unwarranted and severe hardship on people and small businesses in our state. Many examples of the Department's efforts, in and around our state could be cited, as the alleged offenses and fines ...and the dollars that they generate are dutifully posted in a section of the DEQ web-site that is accessible to the public. No one would disagree that the laws of our state and the nation need to be observed and the objectives of the EPA and state environmental

agencies are to be respected, but... the public's rights and the importance of the health of our Oregon business community also need to be respected. Is it not a fact that ...the ODEQ creates the rules/laws (confirmed by legislative action), enforces the laws, and judges the appellant if he does not agree with their allegations? Going back to the now famous statement... *"The DEQ has never lost a case"* ... how could it. The appellant simply does not have a chance! A "system" has been put in place that is intimidating, expensive and so emotionally taxing on the appellant that ODEQ's position is virtually bulletproof.

A file of the ODEQ News Releases regarding "DEQ Penalties" that have been levied since May of 2000 is available for your review and may be found on the internet. The web site that details these penalties is found by reaching the ODEQ home page at www.deq.state.or.us, then at the bottom of the page, clicking on "More New Releases"...Then enter the word "Penalties" into the search box that comes up. You will find a list and an avenue to see the details of all the penalties that have been assessed since 5/2000. The brief outlines of the offenses that are alleged reads like a midnight horror story. In the several interviews that I have conducted with the accused, the "other side of the story" sounds very different than what is presented in the ODEQ reports.

Following are the total fines and presumably the money received for the years indicated ;

2000, May through December...	$1,131,634.00
2001, February through December...	2,314,207.00
2002, January through December...	3,173,206.24
2003, January through June...	1,123,348.00

The least that could be said about these figures... is that they represent quite a profit center for the ODEQ, and that it lends substantive "incentive" to be aggressive in this regard. It is acknowledged that the money received from these assessed penalties goes into a state general fund not administered by the ODEQ, but the very tight connection to the state allocated funding that the department receives also has to be acknowledged. To drive this point just a little bit harder... budget cuts cost peoples jobs!

Another factor that entered into this imbroglio was the fact that our superintendent in charge of these environmental concerns (Mark Wiltz) was suffering from a brain tumor during the time frame of most of the activities that were addressed in the allegations. He, apparently, lost much of his cognitive abilities and has had great difficulties in remembering the details of events that occurred during this time. Mark was very distressed about his condition and resisted talking about it in the prior hearings. Nevertheless, his condition and the extended time off from work had great impact on his abilities to perform his assigned duties during that period. Mark recently quit his job here, ostensibly because of the stress of this recent incident. I am saddened over this, as Mark is a wonderful person and a very good friend. Please see the newspaper article located in Section \8 of the booklet, showing Mark and his son. Article is entitled "Relay For Life".

Additionally, I wish to bring another practice of the ODEQ to your consideration. The release of information regarding the allegations to local newspapers, sometimes even before the accused has been informed, is beyond comprehension. It is demeaning and totally insensitive, if not libelous. This practice feeds the hunger of local newspapers, with writers or editors that may have varying prejudices or degrees of competence, to make banner headlines that simply (as explained to me by the writer of the article in the Hood River News about the Luhr Jensen company) *"...helps to sell newspapers"* (please see Section 6 of the enclosed booklet, entitled LUHR JENSEN SLAPPED WITH $66,354 FINE). This "strategy" by the ODEQ was explained to me by way of a copy of a letter from Stephanie Hallock to State Senator Rick Metsker as she explained... *"the DEQ does issue press releases when penalties are assessed because we believe that publicizing the financial consequences of violations can help deter others from violating environmental and public health protection laws"*. This strategy and practice is odious and does not fit well with American ideal of innocent until proven guilty. Further, it falls far short of the lowest level of graciousness in which a public service agency should conduct itself and certainly is not in keeping with the stated goals of *"...work cooperatively with all Oregonians for a healthy sustainable environment"* (Stephanie Hallock). I fail to understand how administering such severe public humiliation and substantial financial punishment to Oregonians who, in most cases, are cooperating and attempting to comply with the complicated rules and regulations of the ODEQ, can be considered as *"working cooperatively"*.

As you can easily understand, Luhr Jensen's business depends on a healthy and sustainable resource. Our company prides itself on working diligently to protect the environment and the resource upon which we depend. Company personnel, including past and present management of the company, have served on or contributed to just about every environmental or resource conservation council that is currently in existence. Our management teams have supplied active members and great support, including presidents for the Isaac Walton league, Northwest Association of Steelheaders, Northwest Sportfishing Industry Association, the American Sportfishing Association, Pacific Rivers, Columbia Riverkeepers and many other councils that are concerned with our environment and the resources that supports our livelihood. The allegations and subsequent publicity that was generated by the actions of the ODEQ ...cut to the quick! We cannot express how deeply this publicity hurt us personally and hurt our business financially. In our estimation, great damage was done to our company and personal reputations, ...to the potential viability or success of our company, ...and to the value of our company by these yet to be proven (or disproven) allegations.

Additionally, I can tell you with great certainty, that the impact of the publicity and financial extent of the requested penalties have made a deep impression on the owner of this business, who happens to be 67 years old. As a lifetime Hood River community member and the owner of a company that has employed hundreds of people for many years (current employment at 250 people) it strains logic and comprehension to consider how this disagreement (and that's all it is) and the actions of the ODEQ has had such a negative impact on the survival of a company that has contributed so much to the local

and statewide economy, for such a long time (Luhr Jensen, Sr. founded this company in 1932 and it has been family owned since that time). The State of Oregon and our responsible and excellent governor, are spending millions of dollars to bolster our economy through assistance to existing businesses or to entice new business to our state. It makes no sense that an agency of the state, working under the directorship of the governor, can conduct itself in such a manner as to exact defamation and financial punishment on the businesses and individuals of this state.

In closing, we ask two things…

(1) … that the proposed fine for the alleged violations be reduced to the figure of $6,100 as suggested in Section 3 of the enclosed booklet. Luhr Jensen does acknowledge that our recent encounter with the DEQ has brought new light into our lives. Mr. Wiltz is no longer with our company (God bless him) and our new environmental management team is very anxious to work cooperatively with the ODEQ to perfect the highest standard of compliance that is possible.

(2) …that the ODEQ and its governing body seriously consider the strategies that are currently in place that are acting to unfairly and unjustly vilify and punish Oregon companies and citizens for allegations that, in many cases, are not justified. A very serious commission review of these strategies and the fairness and impact of them on our state's fragile economy is definitely in order.

Very Sincerely,

Phil Jensen
Owner and President of Luhr Jensen and Sons, Inc.

LUHR JENSEN . . .

A Legendary Company with Legendary People

One of the messages that I would like you to know is how I feel about the people here at Luhr Jensen. I am proud of each and every one of them. It would be really neat if you could meet those folks and gain a better understanding of their value to you...and how dedicated they are to serving you. "The People" of Luhr Jensen are all the stuff legends are made of (and some of them, including me, are old enough to be "Legends"). I wish we all could wear "dress uniforms" like they do in the service where the "hash marks" on our sleeves indicate how long we have been in service. Pictured here are some of our "veterans". They are all "family" and I wish I could mention them all.

What we want you to know is that Luhr Jensen is a very real company, founded some 70 years ago by a very real person . . . a person who loved fishing and the environment (see the "window" at right on Luhr Jensen, Sr.). We love to fish and we are dedicated to providing you with the finest fishing products that we can make.

Through the body of this catalog, we will take you on a mini tour of our factory here on the banks of the Columbia River in Oregon. You'll see some of our people and some of our processes. Trust me, these products are touched by a lot of caring hands. The comment we hear most by touring parties is, "I just don't know how you can sell these products so cheaply." . . . and sometimes we don't know either.

You can see more of our people, our factory and our legendary products on the net at www.luhrjensen.com. See you there!

Phil Jensen, President

Warehouse

David, Beth, Eileen

Joyce

Engineering & Maintenance

Paint & Finish

Brandie

Print Shop

Debbie

"The Grand Old Fisherman" 1887-1972

Luhr Jensen, Sr. "the Grand Old Fisherman" started his fishing tackle business in the depths of the depression when a failing market and tight money forced him from his family fruit ranch in 1932. He turned his inventive genius and efforts toward his lifelong favorite pastime — fishing, and found a ready and profitable market for the salmon and steelhead lures he was fashioning mostly by hand, in his home workshop. With some borrowed capital and dedication that comes only from true love for your work, Luhr Jensen, Sr. established himself firmly as a top-grade manufacturer of salmon, steelhead and trout lures. Many of his earliest successes now are household names in the fishing tackle industry and to anglers worldwide, such as the "Ford Fender®" trolL and "Krocodile®" spoon.

What had begun as one man's way of easing the hard times of the depression became the foundation for what is today a mainstay of the fishing tackle industry. Luhr Jensen, Sr. studied fishing, treated it as a science and then used what he'd learned to painstakingly hand-fashion the highest quality, most effective lures possible.

Over the years, that tradition has continued through the dedicated efforts of Luhr's three sons Phil, Luhr, Jr. and Dave Jensen. Now, more than 300 people work at Luhr Jensen's facilities to produce fishing lures and accessories that had their standard of quality set almost 70 years ago. Today, the company that Luhr Jensen, Sr. started in 1932 represents a family tradition that "the Grand Old Fisherman" would be proud of.

Buzz

Roger

Dave

Kathy

Dave

Gayle

Harriet

Pat

Lisa

Judy

Maxine

Roger

Carol

Dena

Geneva

Customer Service
Amy Christie
Robyn Brenda

Chris

Sunshine

Randi

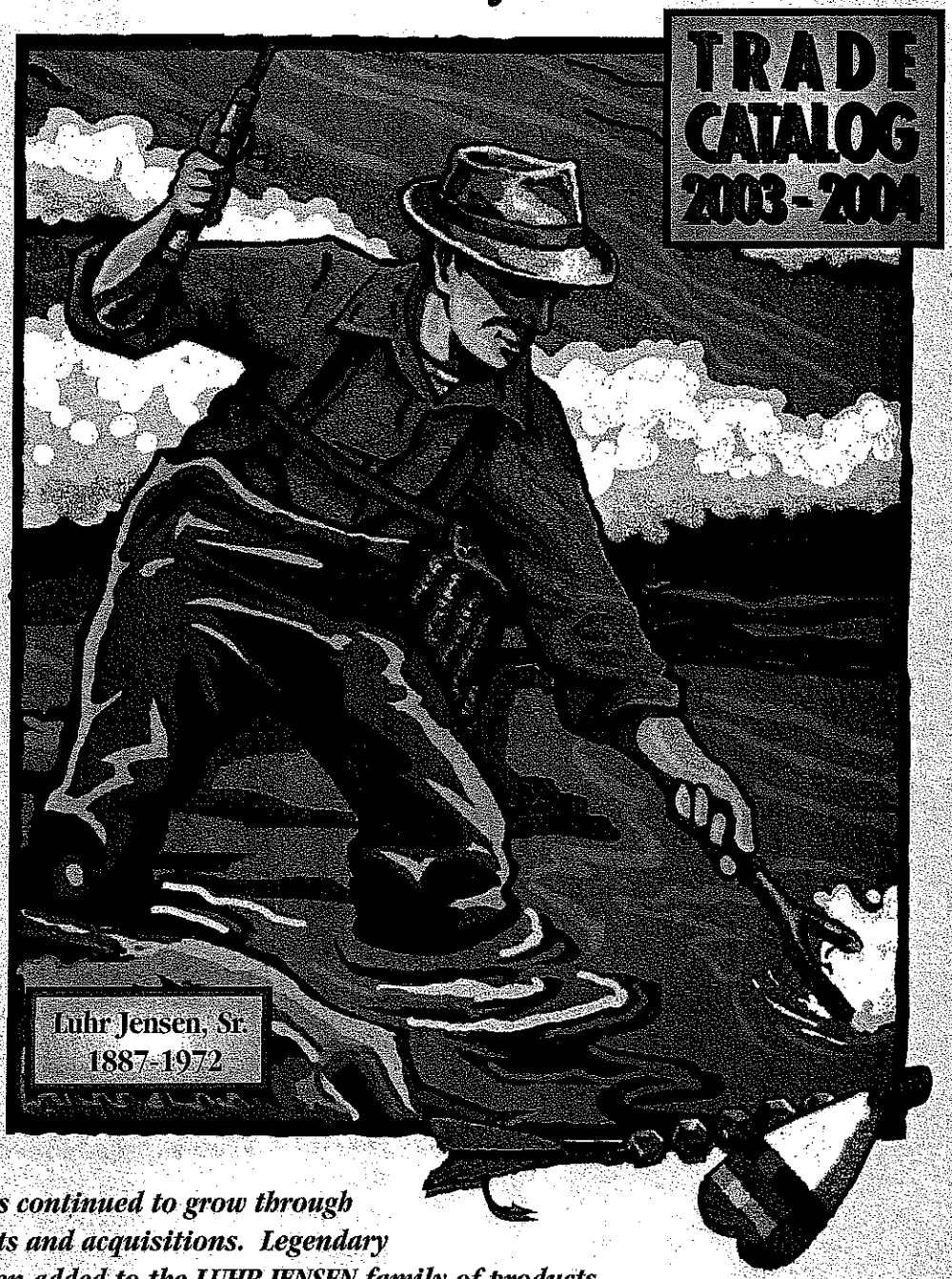
LUHR·JENSEN™ SINCE 1932
. . . Where Legends Live

LUHR·JENSEN™

SINCE 1932

. . . Where Legends Live

- *Ewing Products*
- *Alaskan Tackle Co.*
- *Abe'n Al Tackle*
- *Eddie Pope Co.*
- *Maxwell Mnfg.*
- *Outers Laboratories*
- *Glen L. Evans*
- *South Bend Tackle*
- *Les Davis*
- *Mill Run*
- *Florida Fishing Tackle*
- *Barracuda Brand*
- *Tony Acetta*
- *Egar Tackle Co.*
- *Kwikfish*
- *Ozark Mountain*



Since 1932 LUHR JENSEN has continued to grow through innovation, quality products and acquisitions. Legendary names have continually been added to the LUHR JENSEN family of products, bringing time-honored and proven fishing lures and accessories to the fishing public. Add technical skills and a real "down home" business mentality and you've got LUHR JENSEN. . . an original family owned and fishin' crazy group that will continue to bring you the best Legendary fishing lures for many generations to come.

Phil Jensen, ***President***

Note;

The following "opening remarks" were written for the "tribunal hearing" in March of '03. They were left in this booklet for "added information" if desired.

Opening Remarks…

March 16, 2003

Good Morning…

In attendance here today… with Luhr Jensen, is our financial Officer… Beth Hogan… Our Environmental Officer, Mark Wiltz, the head of our engineering department, Dave Lind, and the owner of the Portland firm VLMK Consulting Engineers, Fred Van Domelen. Fred's firm designed our plating operation, …including the containment sump, in 1977.

My name is Phil Jensen. I am the owner and CEO of Luhr Jensen & Sons, Incorporated, Hood River, Oregon.

At first glance at the original notice to appear before the Hearings Officer Panel the word "Tribunal" was used several times. Being a whole lot naïve about these affairs, I was a bit apprehensive about this rather new word. Then, I looked it up in the dictionary and found that it meant… quite simply… "a court of justice"… and I thought… Yeah, that's what we're here for… and I'm really comfortable with that.

And before we move deep into the issues… let me first say that Luhr Jensen is very supportive of the goals of the DEQ. We deeply respect the work that this agency does for the state of Oregon… This is not easy work… and with the proposed state budget cuts, I suppose that it's not going to get any easier.

We hope and trust… that our conversations regarding these issues will always be cordial and of a cooperative nature… and that anything that comes from this "tribunal" will not prejudice Luhr Jensen's future relationship with the department.

Let's move forward… I am very new at this… Please guide me, …gently!

It is my (our) opinion that the information offered today is relevant to the proceedings, in that… The continued characterization of Luhr Jensen as a "repeat offender" is a very arguable term… and this characterization has a substantial bearing on the number of fines and how these fines are calculated and assessed.

Further, it is our contention that Luhr Jensen has been unfairly characterized and portrayed, to the public, through the media, in a manner that has injured our company's reputation, sales potential and ultimately the value of our company.

Let me give you some examples;

In Jeff Ingalls statements to the Hood River News (please see the exhibit, mark as you see fit...), Jeff is quoted as saying; *"...every time we have gone there we have found a problem and we obviously need a bigger presence"*. Inspector Ingalls has been to our factory (made inspections) twice since he has been with the department. The DEQ has been to our factory for inspections four times in the past 20 years. Over this time, there have been many changes in the company personnel, locations, operations and especially, operational standards of the DEQ. The "infractions" that have been found at Luhr Jensen are characterized under a very large umbrella as "being similar". In fact, most of the events and circumstances were ...distinctly different. It may be "tidy" to lump them together for the sake of simplicity, or for other motives, but the action that effected the allegations and the fines were not the same. I believe that it would be fair to say that on any given day (or inspection) it would be very difficult for any company to be found completely fault free in the eyes of a determined inspector. The rules and regulations of this agency are many and they are complicated.

In the same article (front page, Hood River News), it is suggested that Luhr Jensen would be entering into a "Voluntary Compliance Agreement) triggered by this recent inspection. This "VCP" is ongoing. We have investigated concerns of the Department with respect to both our plating sumps integrity and allegations of buried drums at another facility. These tests were conducted at substantial expense to Luhr Jensen. In conclusion of these tests it was determined that "no ground water contamination was found, nor were any buries drums found of detected".

In addition to the substantial cost of these testing procedures, Luhr Jensen paid $4,737.00 to the DEQ for administration of the "Voluntary Cleanup Agreement". Again, please note that it was determined by outside professional companies ...that there was nothing to clean up. Total cost (to Luhr Jensen) for the exercise was $14,361.00.

In a recent letter from Stephanie Hallock, the Portland office director of the DEQ, to State Senator Rick Metsker, Stephanie refers to the penalty history of Luhr Jensen, stating *"The increasing amount of penalties assessed by DEQ is a result of the company's continued violations of hazardous waste law over the years"*.

Now, (as they say...) we may not be "rocket scientists"...but it appears evident to Luhr Jensen... that the DEQ views Luhr Jensen with a very suspicious eye, if not an attitude of distrust and, ...that, indeed, the department is somewhat prejudiced regarding Luhr Jensen.

My answer, again... in a perfect world, nothing would ever be ..."awry"... and quite probably that is how a dedicated group of professional people would like to imagine or desire the world to be (perfect!) (I would, also!). But, please know that in our manufacturing world, employing over 200 people, many of which are entry level and of different cultural backgrounds, doing multiple tasks to generate product and a profit in a crushingly competitive market place... "perfect" is not always in the cards.

It is important to understand… that the prior visits (total of three since the early '80's) from the DEQ all brought certain allegations and the resultant fines. They were, again, for violations of "Rules and Regulations"… **Never was there any harm intended …nor any harm done. … There was no economic benefit to Luhr Jensen, and there was no harm done to the planet.**

Luhr Jensen did not contest these earlier fines, as it was simply an economical decision. It would have cost more in time, energy and money to contest them than to simply pay them and have them go away. Little did we realize how we were setting ourselves up for much larger fines on subsequent visits? "As quoted by Stephanie Hallock in the letter to Senator Metsker; *"…in a first enforcement case, even if a generator has 10 violations, the DEQ usually only issues a penalty for one of the violations. If there is a second case, penalties are assessed for more than one violation, and so on".* I believe that the formula for fines, as prescribed by Oregon State law, uses a multiplier factor that provides for an increased level of the fine, for subsequent infractions of the same nature. I am not aware that the law suggests the department should assess an increasing number of fines for what is perceived to be repeat infractions of the same nature. I would like to know if this is so, please.

This is the reason, very frankly, that we feel so strongly about defending ourselves in this case, and entering into the records, our position on the allegations and a very thorough explanation of the true circumstances surrounding the allegations. Luhr Jensen certainly hopes that it is never in this position again, but… it is a frightening thought, compelling us to be very thorough in the examination of all the facts in this case.

Now… another consideration, please.

Regarding the Departments stated position of issuing news releases on violations of environmental and health law, Stephanie Hallock, in support of this strategy, is quoted in her letter to Senator Rick Metsker…*"because we believe that publicizing the financial consequences of violations can help deter others from violating environmental and public health protection laws".*

This "strategy" may indeed serve as desired, but it also has other ramifications and effects. Again, please note the headlines in the attached copy of the Hood River News…

This "strategy" and the attendant allegations... resulted in a very "homely" (not pretty) characterization in the local newspaper that was injurious to Phil Jensen's personal reputation and the company's reputation... Further this news release appeared in other and even more influential newspapers, and resulted in many calls or other inquiries to Luhr Jensen regarding the department's allegations. Without a doubt, Luhr Jensen's reputation, and the potential success and value of the company were compromised by this press release. How can this damage to reputation and value be repaired? It can't be. Please read this newspaper article and see if your perceptions about the conduct and attitude of the company are not substantially colored by the way that Luhr Jensen was characterized in the article.

It is my opinion that the DEQ is very wrong ...to offer these damaging news releases before the case has been resolved. It is my opinion that the "injury" done by these premature news releases may someday subject the agency to severe legal repercussions.

..... we are now prepared to go forward with a brief discussion on each of the allegations...

The original Notice of Assessment of Civil Penalty dated April 17. 2002, lists the allegations in somewhat "random" order. Luhr Jensen has, for convenience, bundled these under what is referred to as "Event #1, the Oak Grove situation", "Event #2, the Portway sump situation", and then deals with them individually and in order from that point on.

Each "event" lists the corresponding allegation number in the header.

Luhr Jensen & Sons Inc ~ DEQ Penalty Evaluation

		Original DEQ Penalty	DEQ offer Penalty	Comments
A9	Failure to Perform Haz Waste Determination (OG tin Plating)	$ 1,600.00	$ 1,600.00	n/c
A1	Illegal Storage of Haz Waste (OG tin Plating)	$ 7,200.00	$ 1,800.00	Moderate to mild - Cooperative +
A5	Transporting Haz Waste (OG tin Plating)	$ 4,200.00	$ 1,400.00	Moderate to mild
A6	Failure to Prepare Haz Waste Manifest (OG tin Plating)	$ 4,200.00	$ 4,200.00	n/c
A7	Failure to Provide LDR notification (OG tin Plating)	$ 4,200.00	$ 4,200.00	n/c
A2	Storage of Haz Waste in Excess of 180 days (plating sump)	$ 17,654.00	$ 4,301.00	Major to moderate - adj economic benefit
A3	Storing Haz Waste in non-Conforming tank (plating sump)	$ 9,600.00	$ 4,800.00	Major to moderate
A4	Failing to prevent possible release of Haz Waste (plating sump)	$ 9,600.00	$ 4,800.00	Major to moderate
A8	Failure to comply w/Haz Waste reporting requirements (waste acetone)	$ 1,800.00	$ 1,600.00	Cooperative +
A10	Failure to Store Haz Waste in Container (plating filters)	$ 700.00	$ 600.00	Cooperative +
A11	Failure to keep Haz Waste container closed	$ 800.00	$ 700.00	Cooperative +
B1	Placing Waste where likely to enter waters (storm water)	$ 1,600.00	$ 1,600.00	n/c
B2	Failure to perform monitoring (storm water)	$ 1,600.00	$ 1,600.00	n/c
B3	Failure to submit annual reports (storm water)	$ 1,600.00	$ 1,600.00	n/c
	Totals	$ 66,354.00	$ 34,801.00	

1. The first "event" (Tin plating solution . Oak Grove) pertains to the DEQ Penalty assessment items #9, #5, #6, #7 and #1.

   - This basic or "lynchpin" offense was *"failure to perform a hazardous waste determination on the plating solution generated at Oak Grove"*.
   - Luhr Jensen understands and will agree to the assessment of this fine.

Circumstances;

- Luhr Jensen does, however, want it to be "in the record" that this *"failure to perform a hazardous waste determination"*.... Might or should be more accurately described as a *"failure to perform a correct determination"*. While this may seem to be "splitting hairs"... I believe it to be true that convention recognizes ..."PRIOR PROCESS"... The procedure used to maintain a functional plating solution at the Oak Grove facility requires an occasional "de-canting" of the tin-plating solution when new material is needed to "freshen" the solution. . From time to time, a portion of the existing plating solution is taken from the tank... tested for pH ...and transported to the 400 Portway facility for proper and legal disposal in the local POTW. It should be noted that "tin" is a non-regulated substance. An alternative and legal method of disposal would be to simply drain to the on-site septic system. Mark chose to transport the material to the Portway location for further testing and ultimately, to dispose of through the local POTW or permitted TSD.

Pleading;

- Again, Luhr Jensen will agree with allegation #9 and will accept the suggested fine for the offense. It was a mistake by our company personnel to not make an on-site test of this solution for pH.
- Luhr Jensen does, however, strongly argue with the subsequent layered on fines for that offense. Without knowledge that the material was considered hazardous, the company personnel could not know that the subsequent actions would be necessary. It is unreasonable and unnecessarily punitive to exact a multiple layer of fines with a proposed total fine of $21,400 based upon one action (fine @ $1,600) that triggered the entire chain of subsequent events and multiple fines. Mark's strategy decision to dispose of the material at the Portway location was based upon his best intentions to dispose of the material in the very

best manner possible. While it is regrettable that he didn't make the pH test at the time… all prior testing done had never indicated that there could possibly be a problem. …in truth, there was no harm intended, and no harm done. No economic benefit to Luhr Jensen, and no damage to the planet.

- Luhr Jensen asks that the following charges and fines be rescinded.
    - *#5; Transporting hazardous waste (tin plating solution) from the Oak Grove to the Portway facility without first notifying the Department and obtaining a hazardous waste transporter identification number.*
    - *#6; Transporting hazardous waste (tin plating waste from Oak Grove) without preparing a hazardous waste manifest.*
    - *#7; Failing to provide a land disposal restriction notification for an off-site shipment of hazardous waste (Oak Grove tin plating waste).*
    - *#1; Illegally storing at the Portway facility hazardous wasted generated at Oak Grove.*

2. The second "event" (Plating room and sump facility at 400 Portway location). Penalty assessment items #2, #3 and #4.

- All charges in this section are based on the contention of the inspecting officer, that the sump located under the plating room floor was, in fact, a long term storage facility. (Tank or otherwise).

Circumstances;

- In fact, the sump is not what the inspecting officer perceives it to be. The officer has characterized this facility inaccurately.

- This plating room and its associated containment sump was professionally designed and installed some 25 years ago. The intent of this design is to catch and contain any inadvertent spills that may result from leakage from the system that is located directly above it. This containment sump has no drains and its "integrity" has been recently proven by a thorough cleaning and inspection. This action was immediately followed by a professional inspection of the ground water below the 400 Portway building and the surrounding grounds. The inspecting company conducted a series of drilling explorations under the building and on adjacent property and discovered.... nothing. ...thus ...further proving that the containment sump had performed exactly as its design intended.

- Note; A floor plan of the plating room sump and original design specifications will be offered to the court including testimony by the original design engineer. It should also be noted that this basic functioning design is still being installed and used by plating companies...today.

Pleading;

- Luhr Jensen requests that all events and fines that pertain to this inaccurate understanding of the design and function of the plating operations and containment sump at its 400 Portway location, as listed below, be rescinded.

  - *#4; Storing hazardous waste in a manner (open sump under the Portway plating room) that failed to minimize a threat of release of hazardous waste or hazardous wasted constituents to the environment or a threat to public health.*

  - *#3; Storing hazardous waste in a tank (Portway plating room sump) that did not meet state and federal hazardous waste tank standards.*

- *#2 Storing hazardous waste in a sump under the Portway facility's plating room for greater than 180 days.*

NOTE; At this point... There is some confusion regarding this allegation... (#2) the DEQ changed the verbiage a bit ...to a charge that is a bit more straight-forward... reading " *...storing hazardous waste in excess of 180 days. Specifically, respondent caused or allowed approximately 550 gallons of chrome plating sludge, ... to be stored in a sump under its plating room at its 400 Portway facility".*

In fact, the material in question was removed from the sump and placed into barrels following the DEQ visit and discovery by Jeff Ingalls. These barrels were shipped from Luhr Jensen on March 22, 2002. Our records indicate that the "material" (incoming water mixed with accumulated dried plating residue) was created by an inadvertent water discharge connection from a cooling system, as early as June 18, 2001. ...this time line stretch's over 8 months...

NOTE: At this point, it is very important to our best understanding. ...That an explanation of Mark's disability be fully explained. Marks various cognitive ability's were severely compromised by a growing and cancerous brain tumor. The time line of the "impact" of this on his abilities may have stretched through the entire year of 2001, up until his diagnosis and operation in February 2002. The diagnosis came about after Mark's vision became increasingly and dramatically impaired. The operation was performed three days after the diagnosis. The operation was successful. The tumor removed. And his future looks much better at this time.

3. The third "event" pertains to penalty assessment # 8

   - The charge as follows; *#8: Failing to comply with hazardous waste generator reporting requirements by under-reporting the types of waste stream and quantities of hazardous wastes generated at the Portway facility in 1998, 1999, and 2000.*

Circumstances:

We... (All of us at Luhr Jensen) are dramatically confused regarding this allegation. There are very complicated procedural rules regarding this operation (Recycling of acetone used in our painting operations). Luhr Jensen operates a recycling still that allows us to re-use acetone, many times. From time to time, the physical volume of material being used sometimes impairs the ability of this recycling operation. How this material and the wastes from the recycling operation are measured and characterized is strictly a subjective decision. It is Luhr Jensen's opinion that it is an "un-winnable" argument from either side. However, in this circumstance, Luhr Jensen accepts the decision of the DEQ and will pay the fine. Further, we will modify our procedures to more correctly mirror the procedures or advice of the DEQ.

We would try to explain this situation and the required procedures at t his time, but we are still somewhat unsure. Perhaps for our benefit and the benefit of all in attendance, the DEQ could assist with a brief explanation of them at this time.

NOTE: There are several "other" ways to "dispose" of this volatile material. Evaporation is the quickest and the easiest, but it is damaging to the air quality and it is somewhat expensive. It has been Luhr Jensen's goal to minimize both by installing and operating the Acetone Still... to recycle this substance. This "high road" of action, has resulted in confusion and this resulting allegation / fine. ...it sort of falls into the category or "no good deed will go unpunished".

4. The fourth "event" pertains to penalty assessment #10

- The charge as follows: *#10 Failure to store hazardous waste (plating filter on the floor of the Portway electroplating room) in a container, in a tank, on a drip pad, or in a containment building.*

Circumstances;

- This filter is about 3" is diameter and about 12" long. The picture shown in section 9 of the DEQ presentation binder shows three of these filters. Only one is in question.
- A production line employee removed the filter and allowed it to drain, overnight, back into the tank from which it had been taken. The following morning, after it was dry, it was placed on the floor of the plating room while doing his regular production activities. It was his explanation that he was simply waiting for a break in the production line activities…to properly handle the filter. Inspector Ingles happened to be at that location when this occurred and he observed it.

Pleading:

- Luhr Jensen agrees with whatever fine is appropriate for this offense. Our employee has been properly admonished.

5. The fifth "event" pertains to penalty assessment #11:

- The charge is as follows: *#11: Failing to keep multiple containers of hazardous waste in the flammable storage area and the caustic storage area of the Portway facility closed except when necessary to add or remove waste.*

Circumstances;

- The activity at the location in question is, in part, in the painting department. The operators all work on a piece rate basis, and they earn a considerable wage because they are …fast. They, and Luhr Jensen, are guilty of poor housekeeping habits. We will train them better and exact a bit more discipline.
- It should be noted that Luhr Jensen has created a new position to better serve these necessary rules and regulations. The newly created position has the following responsibilities;

    - Primary Hazardous Material Management Responsibilities… includes duties that insure that environmental compliance regulations are adhered to consistently. The duties are primarily confined to the Paint Room, the Flammable Storage Room, the Caustic and Acid Storage Rooms, the Acetone Still Room, and the Waste Storage area. Employee will be responsible for clearly labeling all containers with content information and ensuring that all containers have lids securely fastened unless they are currently being filled or emptied. Responsible for weekly inspection of containers for ruptures and/or leakage. Responsible for handling the Acetone Distilling Operation, which includes recovery of recycled acetone, and proper disposal of the stills residue (refer to Acetone Management Plan for more details). HazMat Technician will ensure that all hazardous material storage areas are maintained at the highest level of cleanliness. Will work closely with the Environmental Engineer to meet all hazardous material regulations and report any unsafe or non-compliant personnel and/or departments.

    - It should also be noted that Luhr Jensen has conducted a series of training events for all members of our staff that are concerned with the handling of hazardous materials. There has also been Environmental Management and Training Manual developed that is available for all concerned employees.

Pleading:

- Luhr Jensen agrees with and will accept whatever fine is appropriate for this offense.

6. The sixth "event" pertains to penalty assessment #B1

- The charge is as follows: *#B1: Placing wastes where they are likely to enter waters of the states by any means by allowing industrial waste water from the polishing room and sediments containing oil and grease, copper, lead, chromium and nickel to be discharged into a storm drain at the Portway facility.*

Circumstances:

- This is a very marginal call. The facility that was observed contains vibratory polishing machinery, which uses a rock-like tumbling media and detergents that clean and polish certain parts used in our production. It is true that these machines, during loading and unloading can splash a small amount of this water-based solution on the floor. This solution can hold a small amount of oil and larger amounts of detergent (just like the exhaust water from your dishwasher). This operation does not use chromium, nickel, lead or copper, as the assessment incorrectly states. This operation and the solution used in that operation were not tested. What was tested was the solution found in the adjacent storm drain, located outside of the building, but in a location where escaping fluids would be likely to drain to. Further it is true that a containment berm at the doorsill was compromised at the time of inspection. It was, in fact, under repair at the time. This doorsill has been repaired and, additionally, a containment gutter has been provided to insure another level of protection.
- What was properly tested… was the material that had accumulated in the bottom of the storm drain. This "action" indicated to Luhr Jensen that a program of regular cleaning of the storm drains should be established. Luhr Jensen has done so.
- What was not tested at that time… was the effluent to the river at the "exit" of the storm drain system. The "level" of materials that may be tested in the bottom of a catch basin are not necessarily the level of materials that flow through the drain system on an ongoing basis. Also note that the testing occurred in a month where rain and system flow was minimal.
- It should also be noted that it was not possible to test the water at the outflow in the river at that time, as the outflow point is below the surface level of the water in the Columbia River. Since that time, and at the DEQ request, Luhr Jensen has commissioned excavation work on the rock embankment to reveal the outflow pipe …and the pipe has been "pierced" to allow for a "grab sample" of the storm-drain water from time to time.

Pleading:

Luhr Jensen agrees with and will accept whatever fine is appropriate for this offense.

7. The seventh "event" pertains to penalty assessment #B2 and #B3.

- The charges are as follows; *#B2: Failing to conduct ~~twice~~ annual monitoring of stormwater discharges as required under the Portway facility's stormwater discharge permit.* And *#B3: Failing to submit an annual stormwater monitoring report as required under the Portway facility's stormwater discharge permit.*
- *Note; The stormwater permit exhibited in the DEQ brief is for Oak Grove...???*

Circumstances:

- Luhr Jensen objects to this penalty. Luhr Jensen has operated at this facility for 25 years. Never in the history of this facility has this issue been brought up. There has never been a warning, or any assistance offered to determine how to do this procedure. In all of this time (it has seemed to us) if this were truly a concern of the department, we would think that a more specific directive by the DEQ Report Monitoring Division would have been in order, ...and certainly would have been heeded if had we heard from them.
- As mentioned in item #6, above, there was simply no way to sample this outflow from the 400 Portway system, as the outflow point is below the surface of the water in the Columbia river... this is similar to the stormwater system at other Luhr Jensen locations, where there is absolutely no opportunity for access to the outflow points.
- We are certainly willing to do this rather simple procedure, and, in fact, have added this function to our Factory Environmental Compliance Standard. It is unreasonable to exact a $3,200 fine for what may be more aptly described as a "first warning".
- Since that time, and at the DEQ request, Luhr Jensen did the excavation work on the rock embankment to reveal the outflow pipe and the pipe has been "pierced" to allow for a "grab sample" of the storm-drain water from time to time. Luhr Jensen, also, added this stormwater monitoring function to our Factory Environmental Compliance Standard and is now able to fully comply with the monitoring and reporting as required in the permit.

Pleading:

Luhr Jensen requests that the penalty for items #B2 and #B3 be rescinded.

Closing Comments

August 13, 2003

In summary and in closing ... It is Luhr Jensen's goal to be in full compliance with any or all applicable laws and regulations of the State and the agency. We will work with the department to perfect all procedures. Again, we ask for absolution from the harm that has been done to our reputation and to the confidence and morale of our employees. The reduction of the civil penalties to the level asked for will constitute a great consideration and (hopefully) will assist us to restore our reputation in the community in which we live and the market place where we sell our product.

To put exact numbers to this fine structure...

• Please fine us for not testing for pH at Oak Grove...	(A9)	$1,600
• Absolution for "layering fines"	(A1, A5, A6, and A7)	...
• Complete absolution of this allegation	(A2, A3, and A4)	...
• O.K. with fine as appropriate	(A8)	$1,600
• O.K. with fine as appropriate	(A10)	$ 600
• O.K with fine as appropriate.	(A11)	$ 700
• O.K. with fine as appropriate	(B1)	$1,600
• Complete absolution of these allegations	(B2, B3)	...

P.S. We would like to draw to your attention that since the inception of this action, Luhr Jensen has spent $92,311 total to either (1) Improve process's ($54,790), or (2) Fund punitive oriented projects such as lawyers, consultants and the voluntary cleanup agreement ($37,521).

P.P.S. An additional comment... Luhr Jensen has learned a lot about Environmental Law and the expectations of the ODEQ in the past two years. We appreciate the intentions of the ODEQ and the education (painful and expensive) that we have experienced, as it will enable us to be the stewards of our environment and precious resources in a more responsible way.

Luhr Jensen & Sons, Inc.				
	Summary of time and monetary commitments to increased awareness and compliance with environmental regulations			
		TOTAL	PROCESS	PUNITIVE
DATE	**WHAT**	**DOLLARS**	**IMPROVEMENT**	**DOLLARS**
05/30/01	Silver minnow machine set-up and testing began.			
	Some water gets into sump.			
06/18/01	Silver minnow production began, water diverted to POTW.			
08/14/01	DEQ Inspection.			
08/30/01	2nd DEQ Inspection.			
10/15/01	Received notice of noncompliance.			
10/25/01	Mark's first response to notice of noncompliance.			
11/01/01	Portway storm drain access hole and cover installed.			
11/20/01	Storm water drains cleaned and inspected.			
01/25/02	Mark's second response to notice of noncompliance.			
01/31/02	Liquids removed from plating sump area, barreled, labeled and readied for shipment.			
02/01/02	Contracted with Jerry Hodson of Miller Nash LLP for legal representation.			
02/01/02	Luhr Jensen signs Voluntary Cleanup Agreement 59497000 with DEQ.	$2,500		$2,500
02/18/02	Contracted with John Day of Kleinfelder for assistance with understanding DEQ regulations, reporting requirements and VCP.			
02/27/02	Mark Wiltz begins 30 day Family Medical leave due to serious medical condition.			
03/12/02	Letter from Bob Schwarz regarding requirements of VCP 59497000.			
03/20/02	Rehydrated solution from sump shipped.	$2,805	$2,805	
04/17/02	Received Notice of Assessment of Civil Penalty of $66,354.			
05/08/02	Hodson Responds to Notice of Assessment of Civil Penalty and requests hearing based on information received from LJ.			
05/13/02	Metal reclamation device added to silver plating tank.	$2,476	$2,476	
05/18/02	"Luhr Jensen slapped with $66,354 fine" on front page of Hood River News.			
05/30/02	Entered into agreement with Hood River Soil & Water Conservation department to request grant assistance for Oak Grove clean-up.			
05/31/02	OMEP consultation.	$2,753		$2,753
06/01/02	Created part-time HazMat Management Technician position.	$10,400	$10,400	
06/04/02	Met with Bob Schwarz and Terry Hosaka, DEQ regarding VCP.			
06/12/02	Informal DEQ hearing.			
06/17/02	Added one full time employee to maintenance department to assist with workplace cleanup, environmental and safety housekeeping, scheduled maintenance and process improvement.	$16,900	$16,900	
06/17/02	HazWop training for Mark Wiltz and Doug Dexter.	$900	$900	
06/20/02	LJ signs agreement with White & Associates, Inc. for audit of environmental documents, assistance in procedure writing and employee training; in conjunction with Columbia Gorge Community College.			
06/24/02	Storm water Sampling results sent to Jeff Engalls.			
06/30/02	Geopotential Drum detection at Oak Grove. !!NO DRUMS FOUND!!	$1,730		$1,730
06/30/02	Miller Nash	$2,023		$2,023

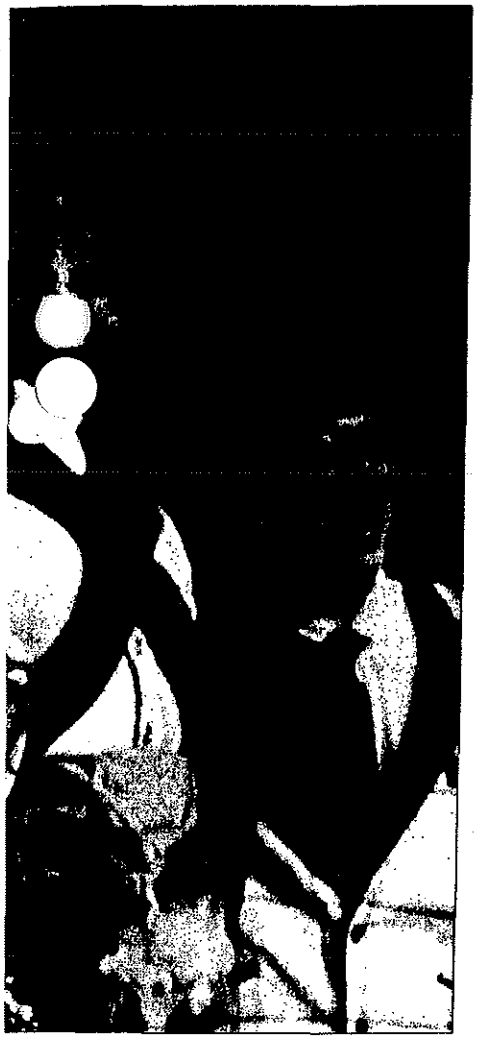
DATE	WHAT	TOTAL DOLLARS	PROCESS IMPROVEMENT	PUNITIVE DOLLARS
06/30/02	Kleinfelder	$4,875		$4,875
07/01/02	Mark Wiltz's duties reassigned to be 100% focused on environmental compliance.			
07/01/02	Requested assistance from Senator Rick Metsger.			
07/15/02	Initial meeting with all Supervisors and Joe White regarding Environmental Management and Training Program.			
07/18/02	Updated Storm water Pollution Control Plan submitted.			
07/18/02	New acetone recycling procedures implemented.	$200	$200	
07/30/02	Progress billing VCP 59497000	$142		$142
07/31/02	Received copy of letter to Senator Metsger regarding meeting with DEQ director, Stephanie Hallock.			
07/31/02	Miller Nash	$8,021		$8,021
08/27/02	Progress billing VCP 59497000	$24		$24
08/31/02	OMEP consultation.	$4,875		$4,875
08/31/02	White & Associates	$415	$415	
09/03/02	Received Mutual Agreement and Order reducing fine to $34,700.			
09/12/02	Storm water drains cleaned out and new filtering system installed.	$540	$540	
09/23/02	Water supply lines in plating area rerouted from under floor to overhead.	$750	$750	
09/26/02	Progress billing VCP 59497000	$234		$234
10/10/02	Phil writes letter to Stephanie Hallock explaining issues and Luhr Jensen's position.			
10/30/02	Progress billing VCP 59497000	$858		$858
10/31/02	Plating Sump area cleaned out - West Coast Marine.	$7,654	$7,654	
11/18/02	HazWop training for Ed Farrell and Ismeal Pineado.	$900	$900	
11/26/02	Progress billing VCP 59497000	$55		$55
11/30/02	Miller Nash	$624		$624
01/29/03	Progress billing VCP 59497000	$60		$60
01/29/03	New plating rinse water and pH control system.	$1,395	$1,395	
02/18/03	Prehearing Conference			
02/19/03	Elimination of Black nickel plating.			
02/25/03	Progress billing VCP 59497000	$864		$864
02/28/03	HazMat material handling seminar for employees.	$1,350	$1,350	
03/01/03	Burck and Associates, groundwater testing sump area.	$7,884		$7,884
03/09/03	New Gold plating system, tanks and chemicals.	$8,105	$8,105	
03/18/03	Hearing scheduled, case #104229			
	TOTAL	**$92,311**	**$54,790**	**$37,521**

Luhr Jensen & Sons, Inc.
Summary of Proactive Environmental Compliance

	Dollars to Date
° Miller Nash LLP legal representation.	$10,668
° Voluntary Cleanup Agreement 59497000	$4,737
° OMEP/Kleinfelder Environmental Consultation.	$12,503
° Geopotential Drum Detection at Oak Grove.	$1,730
° Burck and Associates groundwater testing Portway.	$7,884
Subtotal punitive charges	**$37,522**
° Mark Wiltz's duties reassigned to environmental compliance.	
° Full time maintenance position added.	$16,900
° Created part-time HazMat Technician position.	$10,400
° New acetone recycling and reporting procedures implemented.	$200
° Industrial wastewater collection site and system upgraded.	
° Automatic pH regulating system installed.	$1,395
° Metal reclamation device added to silver plating tank.	$2,476
° Company is working with White and Associates regarding Environmental Management and Training program.	$415
° Company is working with Hood River Soil & Water Conservation for upgrading and improving Oak Grove/Indian Creek grounds and operations.	
° Portway Plating sump area cleaned and inspected.	$7,654
° Implemented new procedure for maintenance and cleaning storm water drains.	$540
° Water supply lines in Portway plating room have been rerouted overhead.	$750
° Black nickel plating operation eliminated.	
° Installed new Gold plating system, tanks and chemicals.	$8,105
° Continue to examine possible elimination of Copper Plating.	
° Currently have four certified HazWopper trained employees.	$1,800
Grand Total all charges to date	**$88,157**

River News

)N ■ SATURDAY, MAY 18, 2002



Photos by Jim Semlor

RV competition.

house

crowd over

Luhr Jensen slapped with $66,354 fine

DEQ contends HR employer is a repeat hazardous waste offender

By RAELYNN GILL
News staff writer

A Hood River company that prides itself on being environmentally friendly has been fined $66,354 for violations of Oregon's hazardous waste and water quality rules.

In addition, Luhr Jensen & Sons, Inc., was issued a $1,000 fine from the City of Hood River this week for releasing a high pH effluent into the wastewater treatment plant. That penalty follows a $10,000 levy against the company in the past two months for dumping heavy metals into the system.

yet full and it was expensive to give them special transport to a disposal facility.

However, DEQ inspector Jeff Ingalls said the law requires that hazardous waste containers be removed from the premises every 180 days and many companies smaller than Luhr Jensen routinely meet public health and safety standards. In addition, he said the DEQ regularly provides technical assistance to producers of toxic materials — an offer Luhr Jensen has not accepted.

He said the recent violations are of special concern since the Hood

Photos by Jim Semlor

song to culminate the the Mr. HRV competition.

ıts a full house

/ charm wins the crowd over

BRIAN ADAMS gets swarmed by his fellow competitors after winning the 2002 Mr. HRV competition held Thursday evening in the Bowe Theater at Hood River Valley High School. Adams used good old-fashioned country charm to win over the hearts of both the judges and the crowd.

tick light show, nair air, Gabe Rowact and Eric Nelson's ng dedicated to retirer Bob Level.

ı get that kind of en- Hood River?" asked

topped off the laugh-filled contest — which along with beach and evening wear and talent, showcased wit with a pair of impromptu questions — with a team dance.

Proceeds from the event will help pay for the Class of 2002 Graduation Ceremo-

Luhr Jensen slapped with $66,354 fine

DEQ contends HR employer is a repeat hazardous waste offender

By RAELYNN GILL
News staff writer

A Hood River company that prides itself on being environmentally friendly has been fined $66,354 for violations of Oregon's hazardous waste and water quality rules.

In addition, Luhr Jensen & Sons, Inc., was issued a $1,000 fine from the City of Hood River this week for releasing a high pH effluent into the wastewater treatment plant. That penalty follows a $10,000 levy against the company in the past two months for dumping heavy metals into the system.

Phil Jensen, owner of the fishing lure manufacturing plant, is denying the allegations of wrongdoing made by both the city and state Department of Environmental Quality (DEQ).

"We do have the resources and we do have the resolve to prove our innocence — we're not guilty of anything," said Jensen, who has already paid the city fine but plans to appeal both the local and state charges.

He asserts that DEQ inspectors are "street local bureaucrats" who are charged with holding small businesses to regulatory standards that are more appropriate for their larger counterparts. For example, he said DEQ accused him of faulty recordkeeping because he had not hauled away barrels of hazardous waste yet full and it was expensive to give them special transport to a disposal facility.

However, DEQ inspector Jeff Ingalls said the law requires that hazardous waste containers be removed from the premises every 180 days and many companies smaller than Luhr Jensen routinely meet public health and safety standards. In addition, he said the DEQ regularly provides technical assistance to producers of toxic materials — an offer Luhr Jensen has not accepted.

'We do have the resources and we do have the resolve to prove our innocence — we are not guilty of anything.'

PHIL JENSEN

He said the recent violations are of special concern since the Hood River operation already paid $11,400 ($3,800 through a mitigation program) in 1997 for violations of almost the same exact nature, which the company vowed to correct at that time.

"Every time we have gone there we have found a problem and we obviously need a bigger presence," said Ingalls. "If you're that environmentally inclusive why not be proactive instead of reactive?"

At issue is whether Luhr Jensen properly contained, transported and kept records on heavy metals used in its electro-plating and tin-plating operations. In addition, questions have been raised about copper and lead being released into the Columbia River through the stormwater drainage system, which Ingalls

JENSEN

Continued from Page A1

past eight years, and whether chrome sludge from a cement containment tank has leached into the earth it covers.

Bob Schwartz, project manager for DEQ's cleanup programs, intends to answer those questions next month by working cooperatively with Luhr Jensen to drill core samples through the containment tank and by sampling sediment below stormwater piping at the edge of the river.

In addition he will be overseeing a geophysical operation at the Oak Grove plant which manufactures Big Chief and Little Chief electric meat smokers. That scientific methodology will answer an allegation filed by a former employee in the late 1980s that the company was burying metal drums filled with hazardous waste.

"There are times when we get reports like this that are well founded and times when they are not but we need to know," said Schwartz.

On Monday, DEQ publicly declared that Luhr Jensen was being given the high dollar fine because of 14 violations that were found during an unannounced inspection last August. Five of these charges stem from tin plating waste that was hauled illegally from the Oak Grove plant and stored at the waterfront facility.

Jensen said the four 50-gallon barrels were untested and would have been acceptable for transfer if they had been treated first with baking soda.

However, Jensen's assertion that the same mistake has only been made twice in 10 years drew sharp comment from Ingalls.

"This was an unannounced inspection and it is a huge coincidence that I just happened to be there in both cases and I'm sorry if that's the way it happened but it still doesn't change the violation," he said.

Of special concern to Ingalls was the five-inch layer of "chrome sludge" in the bottom of a basement sump that a worker admitted had not been cleaned out for more than eight years. He said DEQ standards have determined that metals become hazardous waste when their presence exceeds more than five parts per million — and lab results showed samplings from the sump at 1,580 parts per million.

However, Jensen said the six-foot-deep containment structure was engineered 25 years ago without a drain to capture any materials from the plating operation above it which might accidentally be discharged. In fact, he said the only reason the 20-by-30-foot tank even had material in it on the day of the inspection was that it has been mistakenly used to catch water coolant which speeds the manufacturing cycle of newly soldered parts.

> *'. . At no time have any of the 'identified' materials ever been put into a public waterway.'*
>
> **PHIL JENSEN**

Jensen also said that tank had been viewed as the required "drip pad" for a plating filter that had been laid directly on the duckboard floor above it while awaiting disposal, the source of another violation.

Jensen believes many of the violations stemmed from Ingalls lack of understanding about the operation of his plant, a charge that Ingalls categorically denies.

"I have been doing this for 16 years and I have never lost one case. I inspect a lot of facilities and I don't always know all the ins and outs of the operation but I do know hazardous waste when I see it and I know that chrome sludge in the bottom of a sump doesn't belong there," Ingalls said.

Jensen is also refuting the city's methodology for sampling wastewater. He contends that sludge is being scooped up along with water at the junction where his outflow enters the treatment plant.

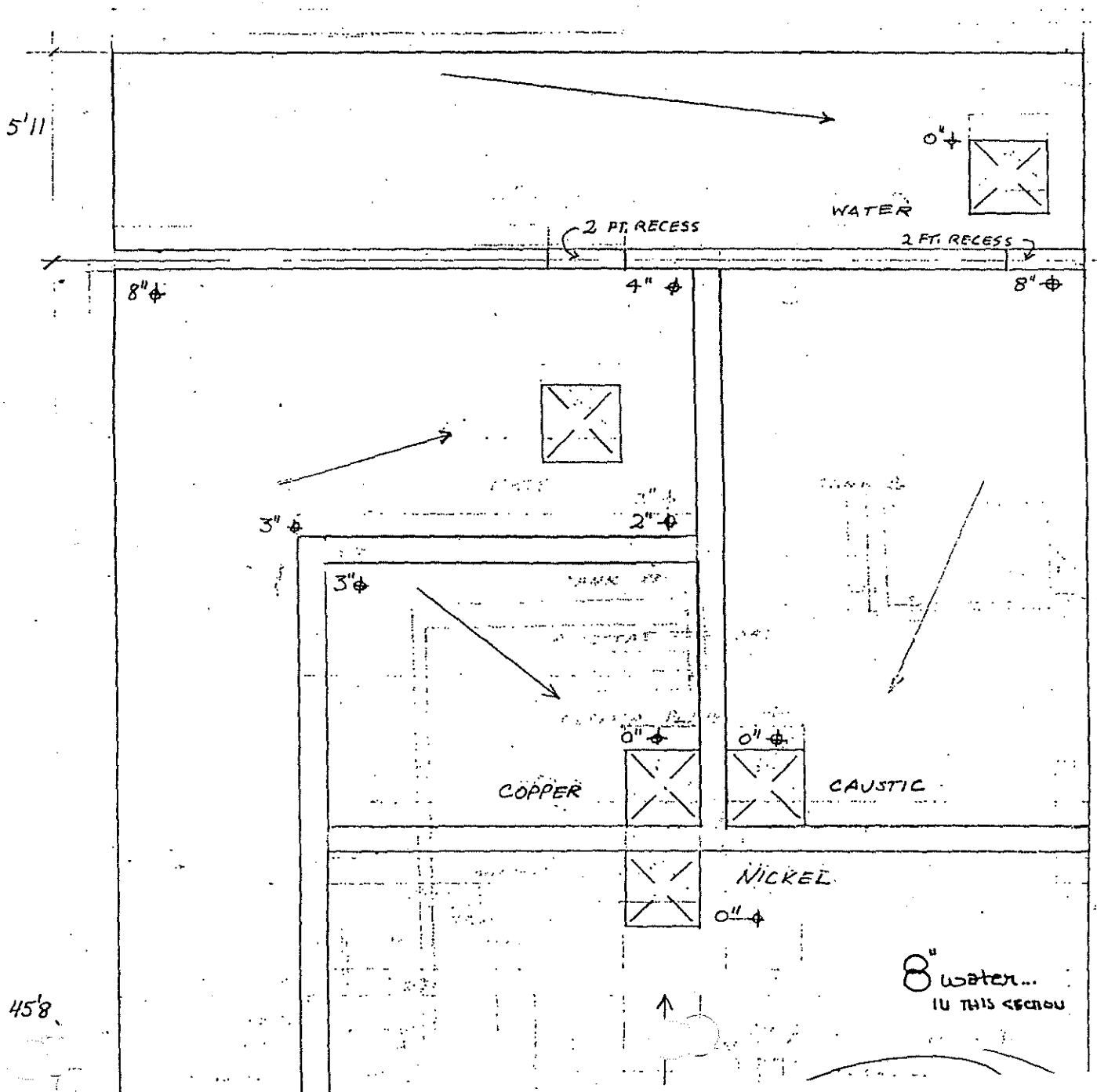
Doug Nichols, project manager for the city facility, adamantly denies that assertion. He said all routine samples are taken from just below the surface of the water and not near the bottom where solids gather.

"It is important for the public to know that, in spite of the implied and seemingly negative allegations that Luhr Jensen has been involved with, at no time have any of the 'identified' materials ever been put into a public waterway," said Jensen. "These materials are directed to the waste water treatment plant, where they are treated in exactly the same manner as the wastewater that comes from the homes, offices, laboratories, etc., of every other person that is connected with our city wastewater treatment plant."

Phil's ... do not lose!

N

Bob Schwartz: 298-7255 x30



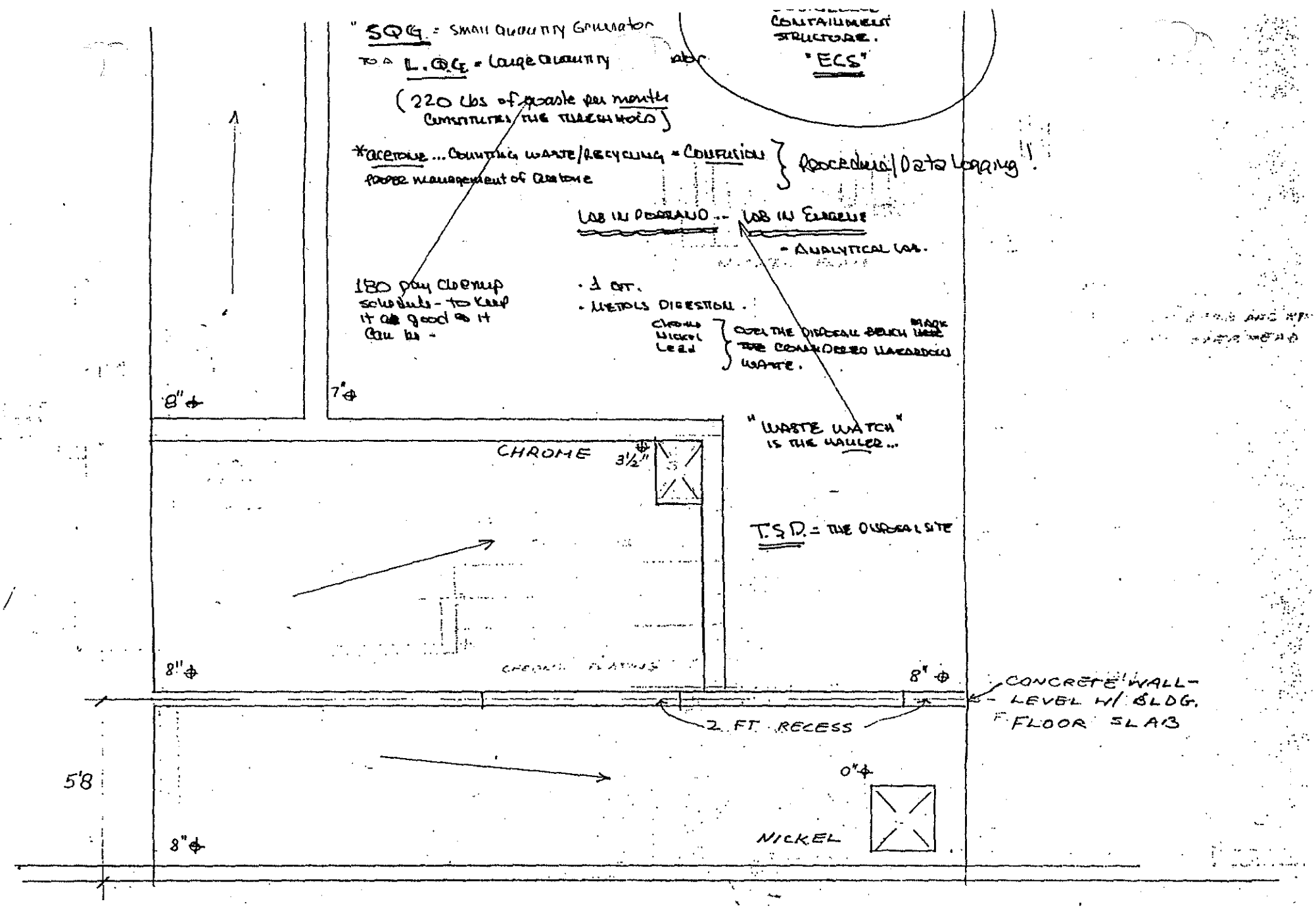
PIT FLOOR SLAB - 4" CONC.

0" ⌖ ELEVATION OF PIT FLOOR SLAB = 5'0" BELOW MAIN BUILDING FLOOR LINE

DIKES - 8" CONC. ON PIT FLOOR SLAB - HEIGHT 16" OVER 0" ⌖ ELEVATIO

SUMPS - 24" DEEP BELOW 0" ⌖ ELEVATION

ALL CONC. SURFACES (PIT SLAB - SUMPS)



PLATING ROOM

PITS AND SUMPS

1/4" = 1 FT

DRAWING NO. 2

DATE: 1/7/78

VLMK CONSULTING ENGINEERS
333 SW Kelly Avenue • Portland • Oregon 97201-4393

P 503.222.4453
F 503.248.9263
E vlmk@vlmk.com
W www.vlmk.com

March 17, 2003

DRAFT

Phil Jensen
Luhr-Jensen
P. O. Box 297
Hood River, OR 97031

Re: Luhr-Jensen & Sons - 400 Portway Manufacturing Facility

Gentlemen:

We understand the State of Oregon DEQ has some concerns over the way the plating room in the Luhr Jensen facility is designed. The plating room at Luhr Jensen was designed the same as all other similar operations designed by VLMK Consulting Engineers. The plating activity is located on a pressure treated wood platform over a containment pit. The pit is water stopped and sloped to a sump but has no outlet. The purpose is to contain and capture any inadvertent spill such as from a ruptured tank. The pit at your facility was further sectionalized with curbs so that high value plating solutions would not become contaminated. Any spill could be recovered and then treated and/or disposed of as appropriate. My visit to the site on February 24th confirmed that the existing facility is operating just as the design and our conversations I recall from 1977 intended it to do.

In the original design of the Luhr Jensen facility, there was a treatment area outside the building. Some process water was treated and discharged. We know of other facilities that accomplish that exact goal by simply diluting some discharges to get them within the required limits. We understand that pretreatment capability is no longer used.

I could not help but notice a major difference between the plating room at Luhr Jensen and other plating facilities. One of the Luhr Jensen requirements was to provide good ventilation so that the moisture and odors accompanying a plating facility didn't drift through the other manufacturing areas. The exhaust system is doing an excellent job. The room feels dry and has no odor. Not being an environmental or air quality specialist, I do not know if the plating fumes are harmful but in the Luhr Jensen facility, they simply do not exist. Removal of the steam and vapors coming off the top of the tanks is much more effective than the more common approach of providing air changes to the entire room.

All plating rooms are scary looking. The plating and other chemical deposit on the racks and tanks is an inherent part of the operation. These same chemical deposits and others occur in the containment structure below. If it has been a long time since a major spill. I could imagine the containment floor would become pretty dirty from drippings.

This system is working properly if the dripping and other inadvertent water accumulation is contained. That is the purpose for the containment pit. It doesn't make sense to me that the accumulation of contaminants in a containment pit is a problem. It prevents site contamination just as intended. The operation could not function continuously if that condition wasn't allowed.

I hope these comments are helpful. If you have any questions, please call.

Sincerely,

A. H. Van Domelen, P.E., S.E., Principal
VLMK Consulting Engineers

AHV:jjs

Relay for Life a 'big success'

By KIRBY NEUMANN-REA
News staff writer

In the high 90s.

That describes the weather and the tally from the Columbia Gorge Relay For Life, held Saturday and Sunday at Hood River Valley High School.

The water slide was the newest feature Saturday at Relay For Life, and root beer floats sold out as a record 44 teams found ways to cool off as they went round the track to raise money to fight cancer.

The event had raised more than $96,000 through Monday, according to Relay chairwoman Marilynn Shaw.

"We think we'll break $100,000, probably $102,000," before all donations are brought in, Shaw said.

The receipts are down slightly from $106,000 in 2002, but Shaw termed the Relay "a big success, because of the way people really came through to make things happen."

"It was teamwork: more people getting involved and stepping forward to meet a need," Shaw said.

'. . . People really came through to make things happen. It was teamwork.'

MARILYNN SHAW

One new event — the water slide — and one traditional one — luminaria — were evidence of new interest and energy in the event, she said. The Relay committee had indentified the water slide as a need this year, and West Side Fire Department stepped up to provide the slick hillside attraction that had dozens of kids and adults getting a thrill and a cool-down. Originally scheduled for one Saturday afternoon, it was expanded to the evening because it was so popular, Shaw said.

Luminaria sales went smoother this year because more people got involved in selling them, according to Shaw. Luminaria are paper bags fitted with candles, which are purchased in memory of cancer victims. A total of 750 luminaria were sold, and, all 558 names were read aloud in the annual 11 p.m. ceremony. The luminaria price was changed from $5 to a donation, and three people paid $50 each, Shaw said.

In another Relay For Life tradition, 16 people had their hair cut so their locks could be donated for use as wigs for cancer survivors.

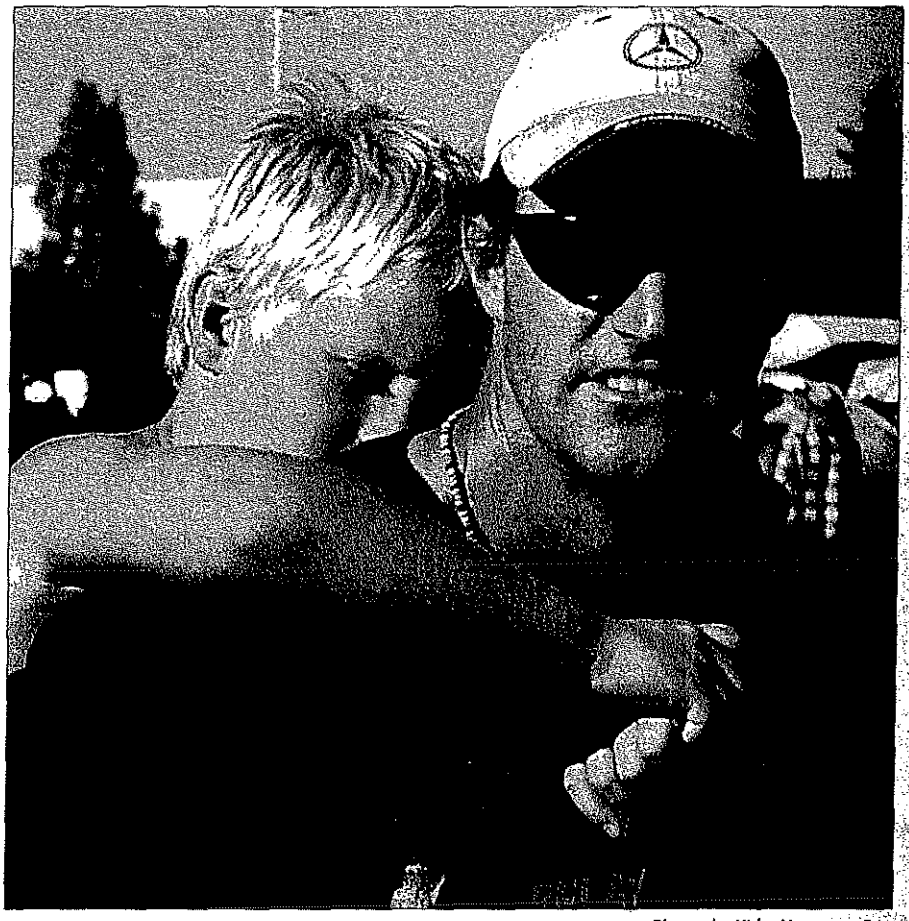
A total of 99 cancer survivors donned the traditional purple t-shirts and walked around the track for the annual 6 p.m. Survivor Lap, but purple shirts were seen at all hours as team members took turns on the track. Shaw said the event benefitted greatly from the stadium improvements done this year under the name Project 2003.

"The restrooms were so appreciated by all participants," Shaw said. The new Project 2003 courtyard and barbecue provided an excellent venue for the Hood River Fire Department barbecue, stretching, and even dancing, according to Shaw.

Project 2003 coordinators Gary Fisher, Brian Hoffman and Bernie Wells dedicated the project at 7:30 p.m. Saturday.

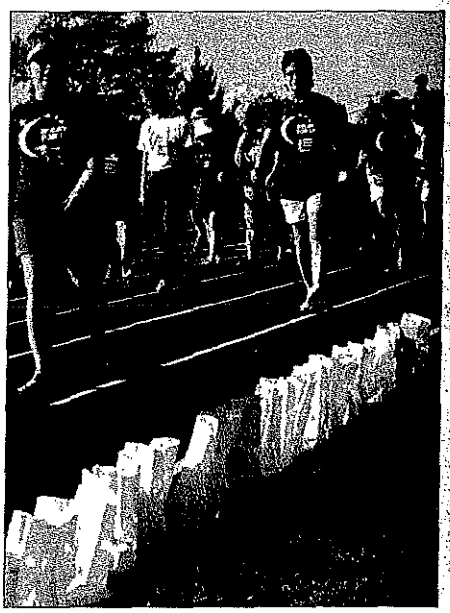
Shaw said another measure of the smooth coordination of the Relay was that clean-up was done by 10 a.m. Sunday — a Relay record.

"I'm ready for next year," said Shaw, who announced that Charlie Vanden Heuvel and Jan Gimlin have joined the Relay committee. Shaw will return as chairwoman, assisted by committeee members Mooreen Morris, Carolyn Van Orman, Betty Osborne, Dick Snyder, Ronda Snyder, Anna Hidle, and Janie Spurgeon.



Photos by Kirby Neumann-Rea

AFTER A full day at the Relay for Life, Alec Wiltz, 8, was ready for a ride. His dad, Mark Wiltz, carried Alec during the Survivor Walk; Mark had a tumor removed from his brain less than two years ago.



WALKERS fill the Hood River Valley High School track, lined with luminaria, to be lit in Saturday night's ceremony commemorating people who have died of cancer.

RICK METSGER
State Senator
DISTRICT 14
CLACKAMAS AND
MULTNOMAH COUNTIES

OREGON STATE SENATE
SALEM, OREGON
97310

August 27, 2002

Phil Jensen
Luhr Jensen Fishing Lures
PO Box 297
Hood River, OR 97031

Dear Phil:

I recently had a meeting with Stephanie Hallock, the director of the Department of Environmental Quality (DEQ). We discussed at length some of my concerns about the handling of their enforcement. I wanted to share with you the response I received from Director Hallock.

Please let me know if there is any additional assistance I can provide.

Sincerely,

Rick Metsger
State Senator

Enclosure

Office: State Capitol, Salem, OR 97310 – Phone: (503) 986-1714 – E-Mail: metsger.sen@state.or.us
District: PO Box 287, Welches, OR 97067 – Phone: (503) 622-0127

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, 2002

The Honorable Rick Metsger
P.O. Box 287
Welches, OR 97067

Dear Senator Metsger:

Thank you very much for meeting with me and DEQ's legislative liaison, Lauri Aunan, on July 12. This letter follows up on two items we discussed at our meeting.

Luhr Jensen Enforcement

You had several questions about DEQ's enforcement against Luhr Jensen as a result of the company's violations of hazardous waste law. Because enforcement is a legal responsibility of DEQ, and due process requires a fair hearing and equal treatment for violations of the law, DEQ must be careful about third-party involvement during an enforcement action. Although I know it is not your intent, there can sometimes be a perception of preferential treatment or inequity if DEQ were to let third parties influence handling of an enforcement action.

It is not appropriate for me to comment on specific details of our enforcement action and settlement discussions; however, I can provide you with facts about Luhr Jensen's enforcement history with DEQ, and the facts that led to the current enforcement case.

First, you asked whether DEQ has a policy or criteria for news releases on violations of environmental and health laws. DEQ does issue press releases when penalties are assessed because we believe that publicizing the financial consequences of violations can help deter others from violating environmental and public health protection laws.

You asked several questions about the history and the facts behind the number of penalties assessed, and the types of violations that occurred.

As I'm sure you know, Luhr Jensen manufactures fishing lures and other products at two facilities in Hood River, the "Oak Grove" facility and the "Portway" facility. A significant portion of the manufacturing process involves metal plating, which uses chromium, nickel, tin, silver, and gold. These operations generate hazardous wastes, including:

- Waste solvents and waste lacquer thinners that are highly flammable and/or toxic (ability to cause cancer or otherwise damage human health); and
- Plating wastes that toxic, corrosive and/or explosive if they come into contact with water or other substances.

Federal law requires hazardous waste to be safely managed "from cradle to grave" and creates strict reporting and recordkeeping requirements to document safe management at every step. As I suggested at our meeting, under federal law failure to comply with any of the steps is a separate

violation. As a result, even though the steps may involve one "transaction" (e.g., storing, transporting and then disposing of one barrel of hazardous waste), they are multiple violations which may be assessed penalties. DEQ administers the federal law in Oregon, under delegation from the Environmental Protection Agency. If DEQ did not carry out this program in Oregon, it would be carried out by EPA.

DEQ enforcement policy provides for increasing levels of enforcement if a hazardous waste generator continues to violate the law. This is accomplished by increasing the number of violations for which penalties are assessed in successive enforcement actions. For example, in a first enforcement case, even if a generator has 10 violations, DEQ usually only issues a penalty for one of the violations. If there is a second case, penalties are assessed for more than one violation, and so on.

DEQ has conducted four hazardous waste inspections at Luhr Jensen, in 1984, 1989, 1997 and 2001. Each time, DEQ documented several violations of hazardous waste laws and informed Luhr Jensen of what was required to come into compliance.

In 1984, DEQ did not issue penalties for Luhr Jensen's violations. In 1989, Luhr Jensen had three violations and DEQ issued a penalty of $1,200 for one violation, the most serious violation. In 1997, Luhr Jensen had 10 violations and DEQ issued penalties of $17,400 for the five most serious violations. In 2001, Luhr Jensen had 14 violations and DEQ issued penalties of $66,354 for all 14 violations. Luhr Jensen's enforcement history with DEQ should have made the company well aware of how to safely and legally handle its hazardous waste. The increasing number of penalties and, thus, the increasing amount of penalties assessed by DEQ is a result of the company's continued violations of hazardous waste law over the years.

Summary of the 2001 Violations

DEQ's inspection found that Luhr Jensen committed numerous violations of hazardous waste laws in its handling of waste tin plating solution. As described above, plating wastes are toxic, corrosive and/or explosive under certain conditions. DEQ assessed penalties for five violations associated with the tin plating solution (described below). Each of the violations could have resulted in harm to human health or the environment.

1) Failure to determine whether the waste was a hazardous waste. This is the first step required by law, in order for a company to know whether the waste requires special management.
2) Transporting the waste from Oak Grove to Portway without an Environmental Protection Agency identification number. The identification number is used to track and identify the person that has custody of the waste as it is moved from "cradle to grave," so we will know it was safely disposed and not, instead, dumped somewhere it could harm people or the environment.
3) Shipping the waste without preparing a hazardous waste manifest, which identifies the type and amount of waste so that each person in the chain of custody knows what type of waste they are handling and understands how to handle and dispose of it safely.
4) Failure to prepare a "land disposal restriction" (LDR) notice for the manifest. Some wastes may not be disposed of in a landfill until they are treated in order to reduce their

toxicity and the risk that they will migrate into the soil or groundwater after disposal. The LDR notice ensures the disposal facility is aware that the waste must be treated before safe disposal.

5) Illegal storage of hazardous waste at the Portway facility. Under federal law and Oregon statute, facilities that take hazardous waste for storage must first obtain a permit that includes appropriate safeguards to ensure the waste will be stored in a manner that protects public health.

DEQ's inspection also found that waste from plating operations dripped on the floor, then dripped through the floor boards into a sump beneath the building. DEQ sampled and analyzed the waste, and in some of the samples found chromium at levels 300 times higher than the hazardous waste threshold. Chromium has been found to cause lung cancer and also adversely affects the liver and kidneys. Luhr Jensen employees told DEQ that waste had been allowed to accumulate in the sump for approximately eight years. DEQ was concerned that plating room employees were being exposed to chromium as a result of the improper storage in the sump. After DEQ's inspection, Luhr Jensen cleaned out the sump and properly disposed of the waste. Luhr Jensen is currently working with DEQ to determine whether the plating wastes leaked from the sump into soil or groundwater.

DEQ also assessed penalties for three violations associated with the plating waste sump:

1) Illegal storage of hazardous waste (storing for longer than 180 days is prohibited by law with certain very limited exceptions).
2) Failure to minimize the risk of exposing people to hazardous waste.
3) Storage of hazardous waste in a tank that did not meet state and federal requirements for hazardous waste tanks, which are more protective against leaks.

Of the remaining six violations, three were related to water quality, including Luhr Jensen's failure to properly monitor its stormwater discharges and report the results of that monitoring to the Department. Federal and state law places the burden for monitoring pollutant discharges on the source rather than on the Department. For this reason, the Department is entirely reliant on complete and accurate reporting by sources for the information necessary to develop programs and policies that will protect Oregon's environmental quality.

The final three violations were hazardous waste violations. Two involved failure to properly containerize hazardous waste to minimize the risk of human or environmental exposure. Lastly, Luhr Jensen under reported the types and quantities of hazardous wastes the company generated in 1999, 2000, and 2001.

If you have questions or need additional information about this case, please contact Anne Price, Compliance and Enforcement Administrator, at (503) 229-6585.

Portland Harbor Cleanup

We also talked about the Portland Harbor Superfund cleanup, and you indicated that you may be involved with some proposed legislation on this issue. Here is a summary of the current status of the Portland Harbor cleanup.

Cleanup of Portland Harbor involves two major categories of work: (1) cleanup of contaminated land on the banks of the river, from which contaminated runoff has entered the river; and (2) cleanup of the contaminated sediments on the river bottom. DEQ is the lead agency for cleaning up sites located on the banks of the river (sometimes called "upland" sites). EPA is the lead agency responsible for cleanup of contaminated sediments in the river (sometimes called "in-water" work).

As of July 2002, DEQ is working on cleanup of almost 50 upland sites in Portland Harbor. The work ranges from investigation of the contamination before beginning cleanup, to actual cleanup activities. DEQ is working with EPA to make sure the upland cleanups are coordinated with EPA's in-water work.

In September 2001, EPA signed an agreement with members of the Lower Willamette Group, a coalition of Portland Harbor businesses and public agencies who voluntarily stepped forward to pay for investigation of Portland Harbor contaminated sediments. This investigation will involve sampling to determine the extent of contamination, and will identify options for addressing the contamination. The investigation will also identify responsibility for the contamination. The Lower Willamette Group has developed a draft work plan for this investigation. EPA and DEQ are reviewing the work plan to ensure that state laws and local issues are adequately considered. The in-water investigation work may begin as soon as this fall.

If you have questions or need additional information, please contact Dick Pedersen, Land Quality Administrator, at (503) 229-5332. The EPA contact for the Portland Harbor Superfund site is Sylvia Kawabata, at (206)-553-1078.

As we discussed, these are very challenging times for public service in Oregon. I look forward to working with you to improve the state's service to Oregonians.

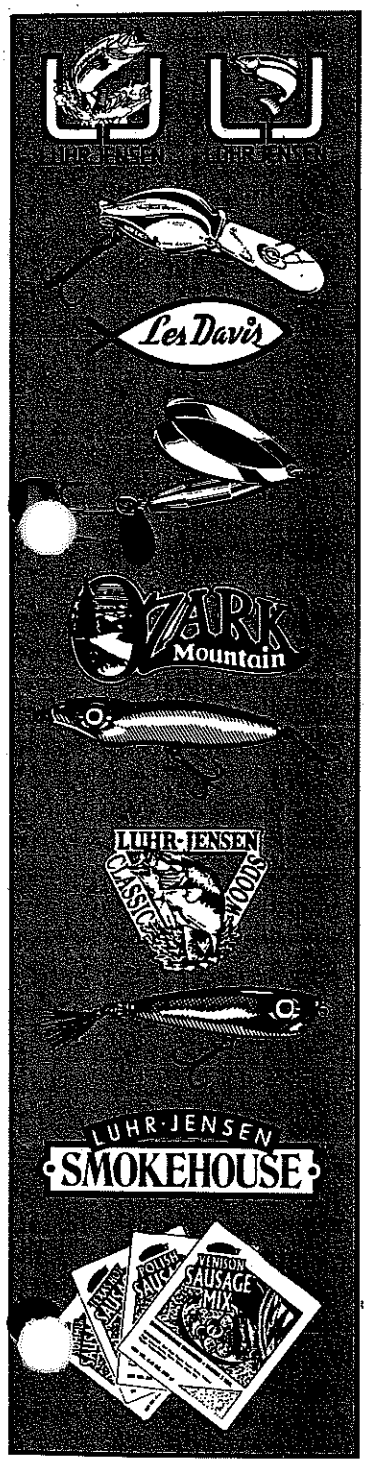
Sincerely,

Stephanie Hallock

Stephanie Hallock
Director

LUHR JENSEN & SONS, INC.
COMPANY HISTORY
"Quality Fishing Tackle & Accessories Since 1932"

"The fishing tackle business is a natural for success they say . . . when times are bad, people have the time to go fishing so they buy fishing tackle. When times are good, people buy fishing tackle because they want to go fishing." *Luhr Jensen, Sr.*



HUMBLE BEGINNINGS

Luhr Jensen and Sons, a company known world-wide for its quality fishing lures and accessories, had its start in an unused chicken coop on a depression-ridden fruit ranch in the upper Hood River Valley of Oregon. But its real beginnings go a little farther back than that — to the inventive mind of an enterprising man who had, for much of his life, found both peace and excitement at the handle of a fishing rod, and who used that enthusiasm to found a thriving business.

Luhr Jensen, Sr. was born on March 30, 1888, in Ironwood, Michigan, the son of German-born Julius Jensen and his wife Anna-Zinta Von Diltz Jensen.

(CONTINUED ON PAGE 2)

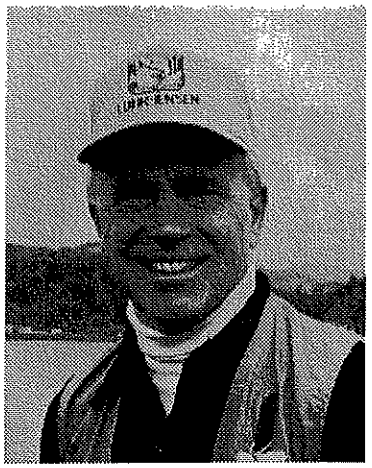
PHIL JENSEN HEADS COMPANY

Phil Jensen is president of family-owned Luhr Jensen & Sons, Inc., and has been involved with the business for more than 35 years.

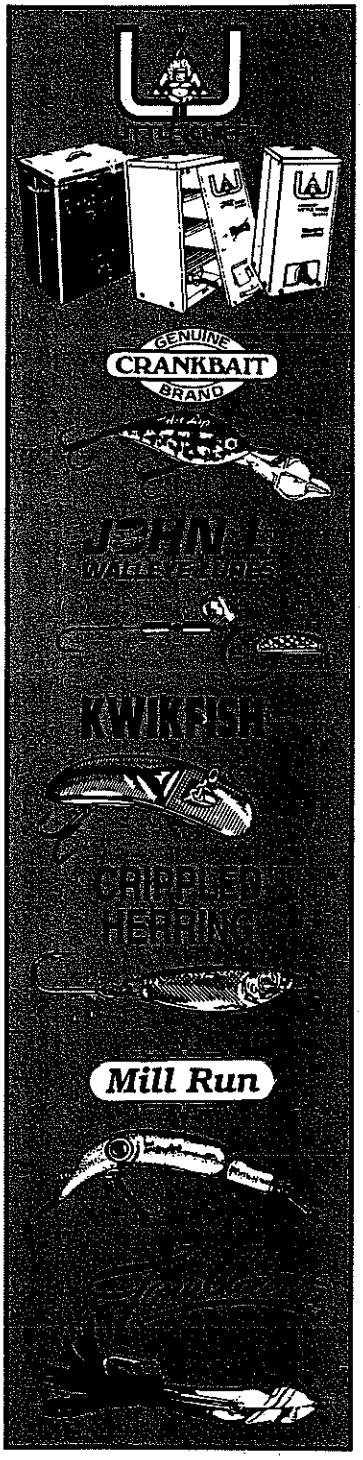
The third son of company founder Luhr Jensen, Sr., Phil is a graduate of The University of Oregon with a degree in Economics and Business Administration.

He has taken a very active role in industry matters as well and is a board member of the American Sportfishing Association (ASA), chair of the ASA Environmental Quality Committee, member of the ASA Governmental Affairs Committee, a founding member and on the board of the Oregon Wildlife Heritage Foundation. He is a board member (national) of Trout Unlimited, chair of the Northwest Sportfishing Industry Association, an associate member of the Pacific Rivers Council and a supporting member of both the Northwest Steelheaders Association and the Izaak Walton League.

Phil resides a few blocks away from the Hood River plant. His hobbies include fishing and collecting old fishing lures.



PHIL JENSEN, PRESIDENT



"HISTORY" - FROM PAGE 1

He spent his youth in Denver, Colorado — most of it with his mother and his sister Doris, who later, under the pen-name of Shannon Garst, became an internationally-known author of at least 45 books on western history, biography and fiction for young readers. His father, involved in mining operations in Colorado, was often away from home, and later was killed in a mining accident when Luhr was still in his early teens.

While enrolled at Manual Training High School in Denver, Luhr worked as a newsboy and a "printers devil" for the *Denver Post* newspaper. He was a champion long-distance runner, experimented with electricity and the then-new electronics and ultimately graduated from high school, even though his strong will had occasionally clashed with school authorities.

WESTWARD HO

In 1909, Luhr came to the Hood River Valley. He had seen an advertisement printed by the government, encouraging rural settlement of that promising agricultural area . . . and he had been hooked. Only 21 years old, the young Jensen was anxious to move west to seek his fortune in the agricultural or lumbering industry of the area, and to find a new home for himself and, eventually, for his mother, sister and stepfather, Wesley Shannon.

Luhr worked in the woods and in various mills for several years, then finally persuaded his mother and stepfather to join him, and to purchase some land south of Hood River in Dee. They eagerly claimed 10 acres of stumps on Dee Flat and, while both men worked full shifts during the day at the Oregon Lumber Mill (in operation until it burned to the ground in 1997), they spent all their extra time clearing the land using shovels, dynamite and horses. Once cleared, they planted it with apple and pear trees, with strawberries set between the rows as an interim crop.

These were happy, albeit hard-working times. Family albums depict the scenes and the happiness they shared. They often spoke of the very special train trips into Hood River for shopping and visiting and perhaps to take a boat ride on the Columbia, or to spend a Saturday night at the outside bandstand near the center of town.

For several years Luhr courted his wife-to-be, Clarice Remington Davenport, the daughter of a pioneer lumberman and mill manager for whom he worked. They were married in 1914 after he had purchased an additional 10-acre "stump farm" which adjoined the acreage that had been previously cleared. Luhr and Clarice settled down to what they thought would be country living at its best, on what his letterhead called "The Stonegate Fruit Farm." But even the namesake stone gate failed to materialize.

Though there were fun hobbies such as short wave radio, amateur photography, collecting Indian relics, and a few successful farm years, most of the times were very hard. He worked long hours in the local lumber mill and attempted to raise chickens at home. This latter effort was responsible for the construction of two 20- x 100-foot buildings which were never occupied by poultry because of an epidemic that totally wiped out the chicken population in the valley at that time. However, the buildings were ultimately put to good use. The newer one was remodeled to replace the family home which had been destroyed by fire in 1929. The other housed the equipment for the embryo fishing tackle business which he started in 1932.

The buildings were ultimately put to good use . . .

THE DEPRESSION

Luhr was 41 when the Great Depression hit. For two years the sales co-op in Hood River that ordinarily marketed the fruit the family so laboriously grew, picked and sent to them, could not realize the sales that so many farmers were depending on. Times were tough . . . jobs were few and far between. It was time for a re-grouping.

Quitting his job at the mill, Luhr bought a Sears & Roebuck suit and "*went to selling radios*" — the big floor models that families used to sit around while listening to President Roosevelt talk about the good times to come in his "fireside chats".

Luhr also had a lot more time for one of his favorite pastimes . . . fishing! He had always been an ardent angler, whether sitting peacefully in a rowboat on Lost Lake, casting from the banks of the Desc[illegible]s River, or standing next t[illegible]e Indians at Celilo Falls. He also was always searching for a better means of luring fish. He visited the Boyle Fishing Tackle Company in Portland one day, ostensibly to buy spinner parts — wire, clevises, beads, spinner blades — in order to assemble them in his own fashion. But the owner, perhaps sensing competition, refused to sell him the unassembled materials. So, he returned home that day with a second-hand, manually-operated printing press — hoping to stamp out his own blades.

One of the acquaintances Luhr had made while traveling the countryside selling radios was Emil Gruebner, a retired German toolmaker. Emil made the necessary dies for him out of old truck parts, and Luhr polished and assembled spinners in his typically meticulous [illegible]y. They both were skilled a[illegible]e-spected fishermen and soon the reputation of these two fishing pals and their beautiful spinners spread. Friends and associates began demanding them, and so a business was born in his little backyard chicken coop factory.

Luhr was selling spinners to Franz Hardware (still in business at the same Hood River location), a local retailer, when a wholesale representative from Oregon Marine Supply Company in Portland noticed them and wanted to market the lures in that city. Luhr quickly struck a bargain with the company's principals . . . if they would loan him enough money to st[illegible]s manufacturing business properly, he would pay them back in product over the next several years.

Emil made the necessary dies for him out of old truck parts . . .

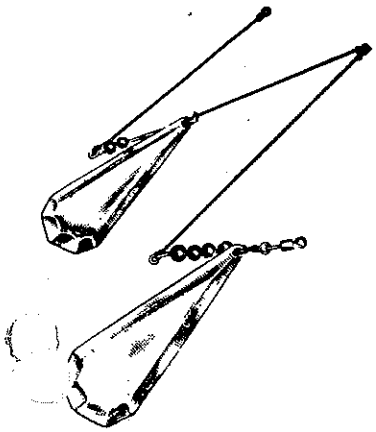
AS A YOUNG MAN GROWING UP IN OREGON, LUHR JENSEN FOUND SPORT IN MAKING HIS OWN TACKLE. HIS LIVELY WOBBLERS AND SPINNERS LANDED MANY STEELHEAD & SALMON. FRIENDS, IMPRESSED WITH HIS SUCCESS ALONG THE RIVER BANK, URGED HIM TO CONTINUE, OFFERING SUGGESTIONS FOR SHAPE AND COLOR VARIATIONS. THUS BEGAN OUR TRADITION OF ACTIVE LURES OF UNRIVALED QUALITY.

THE LEGEND LIVES

THE BUSINESS GROWS

In 1934, the couple sold their [illegible] Flat ranch and moved into Hood River where they purchased a home. With the money he had borrowed from the Portland wholesaler, Luhr constructed a small frame building behind the home and his little spinner business, born in the Depression and started in a chicken coop, had become a genuine enterprise, with sales in two states and a giant debt to service. With a handful of employees cutting, assembling and polishing, and with his teenage son and daughter working after school, the business grew. They worked hard — the company prospered and they were able to pay off the debts that had been incurred.

Luhr continued to create new lures, such as the still-famous Ford Fender®, named after the Model A from which he obtained the headlight reflector and built the blades. He had a straightforward and honest business sense and a fresh and unconventional manner that appealed to many. To cut red tape, he would pen the answer to an inquiry at the bottom of the inquirer's letter and send it back by return mail. His favorite call of "Fish On!!!" would ring through the offices and stores of his wholesale customers announcing his arrival.



FORD FENDER®

Avowedly modest in his ambitions for nothing more than "a good product and a good living", he never-the-less saw the business expand, with sales almost doubling each year.

WORLD WAR II

When World War II started in 1941, their eldest son, Luhr, Jr. joined the Navy. Luhr, Sr. continued to work with what materials were available until 1943, and then had to shut down the operation until 1945, due to various war-caused material shortages. It was during that period that he turned his energies to clearing a few acres of land he had purchased. Underbrush, blackberries, thistles and some giant boulders were removed and, before too long, a spanking new family home appeared.

With the end of the war and the return of Luhr, Jr., the business again boomed. In 1947, they built a new frame building on the cleared acreage and soon spinners were once again rolling off the modest little assembly line, with more employees and more widespread distribution. Luhr Jr.'s recent experiences and youthful enthusiasm spawned a new and different breed of lures . . . small wobblers and spinners called spinning lures. These were cast by a new-fangled type of French reel, referred to as a spinning reel.

LUHR, SR. RETIRES

The reputation and success grew and the tiny firm, now strengthened by the involvement of another family member, the second son, Dave Jensen, was marketing their products in many new areas around the United States. As the two youthful brothers took hold of the business in the early '50s, Luhr, Sr. was very busy "letting go". Though officially retired and well into his sixties, he remained actively involved in the business — even though he didn't want to be! Some will never forget the day, when, typical of Luhr's sometimes gruff manner, he came into the spartan little office and emphatically announced that he was moving away from the beloved Hood River Valley where he had spent over 40 years of his life . . . to the Oregon Coast — so that he "wouldn't have to watch his sons run his business into the ground". It is sometimes very difficult to let loose of something that has been so near and dear for so long.

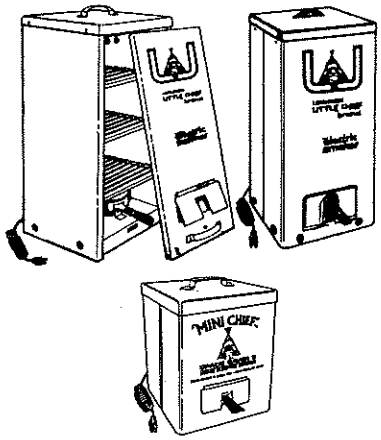
The early '60s continued to show sales growth and expansion for the company. The third son, Phil, joined the organization in 1961 after graduation from the University of Oregon, and quickly focused his energy on developing a nation-wide sales team. With a growing product line and a sudden thirst for expansion, the company moved strongly into new markets and, adding products from several other companies that were acquired during the period, watched sales grow from a 1960-base of about $250,000 to well over $1 million by 1970.

Luhr, Sr. spent a very active and happy 20 years at the Oregon Coast, first moving to Yachats, later to North Bend with a vacation home on Siltcoos Lake. Always restless in retirement, he fished, gathered an impressive collection of agates and semi-precious stones, raised tropical fish and collected stamps. Several heart attacks later, he moved to Wooodburn, later to Salemtowne, then returned to Hood River where the serious illness of his wife of 50 years, Clarice, ultimately resulted in her death in 1971. However, long before his own death in 1973, Luhr, Sr. had the satisfaction of seeing the business he had created become a large and thriving company of international scope.

DIVERSIFICATION

The Little Chief™ Electric Smokehouse was purchased from a California company in the mid-'60s. Sales in the early years were few, yet the response was so positive from enthusiastic buyers that the ultimate success of that product was never in doubt. The Little Chief™, 1991 newly-developed Big Chief™ and 1997 introduced Mini-Chief Space Saver III models, along with the five flavors of Chips 'n Chunks™ wood flavorfuel, Home Sausage Kit, Smokehouse Brand™ Sausage Seasoning Mixes, Brine Mixes and Shaker Bottle Seasonings have added significantly to the sales and success of the 1990s Luhr Jensen Company.

As the years passed, an aggressive program of acquisition eventually brought the company's family of products to 11 different brands *(see acquisition sidebar for dates and companies).*



HOME ELECTRIC SMOKEHOUSES

LAKE MICHIGAN MIRACLE

In 1967, a wonderful phenomenon occurred that was to make Luhr Jensen a household name in the population centers of Chicago and Detroit and the

(CONTINUED ON PAGE 4)

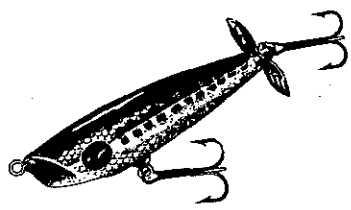
THE DALTON SPECIAL® - A TRUE CLASSIC

Dalton Special® - the name is synonymous with wood plugs and topwater bass fishing. For nearly 70 years the Dalton Special® has maintained a reputable position in the topwater wood plug industry and has earned undeniable status as a legend of topwater fishing success.

The Dalton Special® was first designed and whittled by Edward Browne in the fall of 1928. Not long after, Paul Mannon, the owner of Angler Bait Co. (A.B.C.) of Orlando, Florida was given the production right and he named it the "Angler Plug". He continued to make small numbers of the lure until 1933 when he entered into a partnership with "Dazzy" Vance of the old Brooklyn Dodgers baseball fame (1922-1936) to form the Dazzy Vance Bait Co. The plug was then called the "Angle Frog Bait" and production continued under the Vance name through 1934 when Mannon was killed in an auto accident. His widow took the remaining plugs in his estate to the Mitchell Tackle Shop in Orlando and sold them.

Enter P.P. Dalton. He bought all of the blanks and finished plugs Mitchell had for 20 cents each and, for the next several months, painted and sold "Dalton Specials®" during his travels.

When Dalton was at Lake Okeechobee in 1935, he purchased some large black bass from a commercial netter out on the lake. Upon his return to shore, he had his picture taken with the bass and one of his plugs. The photo made the local paper and plug sales soared, so much so in fact that he could no longer make and paint enough to meet demand. So, that same year he patented the plug and entered into a production arrangement with the Shakespeare Company that continued until just after World War II.



DALTON SPECIAL®

At that point, Dalto[illegible]d Shakespeare parted ways and the production rights went to the Florida Fishing Tackle Co. (Barracuda Brand Products). They marketed the plug until 1975 when it was sold to Marine Metal Products Co. of Clearwater, Florida, a manufacturer of aeration systems. In late 1987, their fishing tackle division was sold to Luhr Jensen, and the "Special" moved 2,700 miles west to Oregon.

Under the Luhr Jensen label, the Dalton® once again returned to its original sugar pine configuration. Demand for the plug blossomed during the late '80s in light of a lot of publicity in several popular fishing publications concerning wood plugs.

"HISTORY" - FROM PAGE 3

surrounding mid-west states.

In order to combat a growing and difficult problem with a small baitfish known as the alewife, the Michigan Department of Natural Resources embarked on a coho salmon planting project in several tributaries of Lake Michigan. Eggs were taken from a hatchery at Bonneville Dam, some 25 miles west of Luhr Jensen's Hood River headquarters, and flown to Michigan. There the department hatched them and released the fry into rivers that flowed into the lake. The success of that program is now legend.

First the coho salmon, then chinook prospered and provided what has been termed by many as the greatest fishery on the North American continent. With a growing awareness of this magnificent resource, and the various states scrambling to provide facilities for boat launching and other fishing access, the industry has grown by leaps and bounds. Many companies manufacturing products such as boats, electronic fish-finders and temperature-sensing devices, fishing tools such as downriggers and all of the attendant accessories have found a new and challenging market for their products.

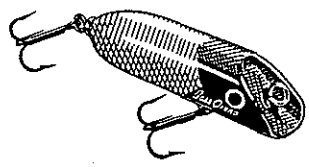
Luhr Jensen met that challenge with aggressive promotion and sales action, and by 1970 was established as the dominant lure manufacturer to that fishery. The famous J-Plug® and later the Dipsy Diver® adjustable, directional trolling sinker accounted for sales close to $1 million annually in that area.

(CONTINUED ON PAGE 6)

GLEN L. EVANS COMPANY

In 1922, Glen and Ruth Evans turned what had been a hobby into a small business in the Idaho town of Caldwell. With the passage of time, the company was successful and grew; so much so in fact, that it created the need for six different building expansions over the years. Their company slogan was *"Fine Fishing Tackle — for Particular Fishermen and Fish"* and the 1957 catalog advertised that "*... each lure is honestly made and priced; is attractively and distinctly packaged, and has a host of friends.*"

Some years later the company was sold to the Gladding Corporation. Gladding had previously purchased the lure division of the old South Bend Company. This brought the Bass-Oreno®, Spin-Oreno®, Midge-Oreno®, Spin-I-Diddee®, Nip-I-Diddee® and Super Duper® under the Evans name and manufacture. The latter was billed as the world's most versatile lure because of its ability to be used for trolling, casting, fly [illegible]g and river, bay or ocean [illegible].



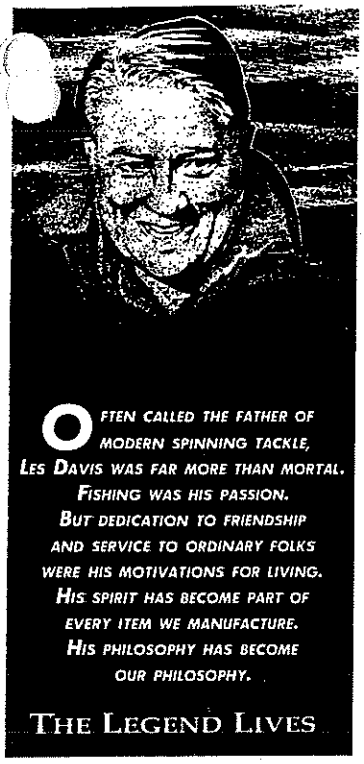
BASS-ORENO®

Luhr Jensen entered the scene in 1982 with the acquisition of the Evans arm of the Gladding Corp., along with the Oreno® line as well as the Sea-Bee™. Incidently, the South Bend Company's original patent on the Bass-Oreno® is dated February 15, 1916, making it one of the real old-timers!

The lure that gained the most notoriety during the Evans' years was the Shyster® spinner.

Other famous Evans lures include the Bear Valley™, Colorado and Indiana spinners; Herb's Dilly™, Midge Wobbler™, Hus-Lure™, Loco® Spoon, School-O-Minnows® troll, Doc Shelton™, Cherry Bobber® and the Sammy Special®. Most of these continue to enjoy great popularity with anglers around the world. In fact a resurgence of interest [illegible]itional wood topwater plugs has once again, created a great demand for the Bass-Oreno® and Nip-I-Diddee® in particular.

THE LES DAVIS® COMPANY



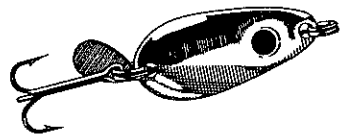
The Les Davis® Fishing Tackle Company was born in 1926 in the back room of a small house in Tacoma, Washington and for more than seven decades, the Les Davis® name has stood for innovation and quality.

It was his boyhood love for salmon fishing that sparked Les' interest in the idea that someone should be making better salmon tackle than that being offered for sale in those days. His first tools were a pair of tin snips, a creative mind and a lot of desire. He combined these to bring

HERRING DODGER®

about the introduction of his original Herring Dodger® — an instant success that to this day continues to be a strong attractor for salmon, lake trout and other gamefish.

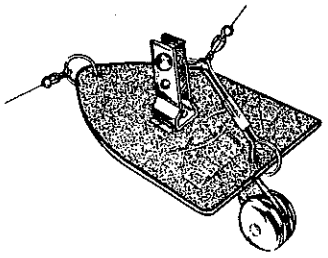
From that modest beginning, this company of two (Les and wife Ruth) grew and grew until, in the mid-'70s, and four plants later, it had become the largest



HOT ROD® WOBBLER

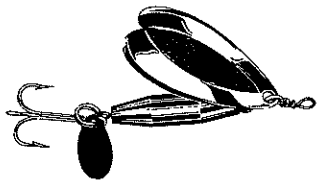
manufacturer of salmon tackle in the world.

It was the respect for his knowledge that caused Les to be one of a select group called upon by the Michigan State Fish and Game Department in 1967 to provide advice and assistance in the highly successful introduction of coho salmon to the Great Lakes area.



DEEP SIX® DIVER

Such products as the Cowbell®, Bolo®, Willow Leaf, Odd-Ball® and Jack-O-Diamonds® Flex-I-Trolls®; Canadian Wonder®, Point Defiance®, Hot Rod® and Bang-Tail® spoons and spinners; Cutplug®, Herring Dodger®, and the Deep Six® Diving Sinker have meant many a successful trout, salmon or steelhead fishing trip for thousands of anglers.



BOLO® SPINNER

With the purchase of the company in 1983 by Luhr Jensen and Sons, the absolute best materials, workmanship and painstaking field testing ensure that these and other Les Davis® lures and accessories continue to maintain their tradition of excellence.

TONY ACCETTA AND SON

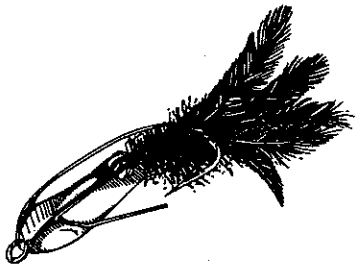
Founded in the late '30s in Cleveland, Ohio, the Tony Accetta® and Son Company remained in that mid-west city until 1956 when a move was made to the warmer shores of Riviera Beach, Florida. Ray Accetta, Tony's son, ran the business from 1958 to 1970 at which time it was acquired by George S. Agnew, Inc. Some 18 years later, Luhr Jensen and Sons purchased the company from Agnew and moved the entire manufacturing process to Hood River, where an ongoing family tradition of high-quality workmanship, coupled with the best materials continues.

That same year, Luhr Jensen acquired the lure manufacturing portion of Marine Metal Products of Clearwater, Florida. This included the old Florida Fishing Tackle Company Barracuda® brands, the Reflecto® trolling spoon and the Dalton® topwater plug series made up of the Dalton Special®, Dalton Twist® and the Dalton Fish Stick™.

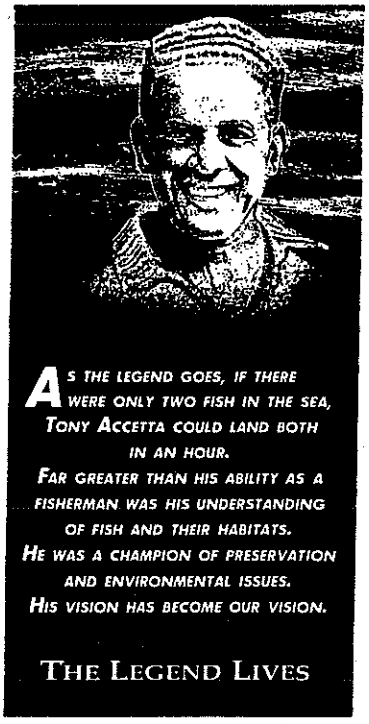
The Dalton Special® is one of the oldest topwater wooden lures made, and is reputed to have won more bass tournaments of record than any other topwater plug. These lures joined the Genuine Crankbait® Brand division of Luhr Jensen and were later moved under the Classic Woods™ category with the rest of their wooden baits.

The Reflecto® spoon was moved under the marque of the Tony Accetta® line of bluewater fishery lures. The entire Accetta® line now includes the legendary Pet®, Cast Champ (Original Mr. Champ®), Original Reflecto® Spoon, Tony's Spoon™, Hobo® and features the popular 24K gold plate finish on many products.

PET® SPOON



HOBO™



LUHR JENSEN & SONS LURE HISTORY

FACTORY-DEVELOPED LURES & ACCESSORIES

1932 -1997 LUHR JENSEN & SONS, INC (Hood River OR) •Actionizer™ •Alaskan Eagle™ •Alpena Diamond™ •Alpena Diamond Dodger™ •Alpena Diamond Squid •Amazon Ripper •Baby Flasher •Baby Gang™ •Beer Can™ •Big Chief™ Electric Smokehouse •Big Hammer •Bikini •Birdy Drifter® •Birdy® Fly •Birdy® Wobbler •Bob Tail™ •Bonneville Prawn Rig™ •Brush Baby® •Chips 'n Chunks™ •Clearwater Flash™ •Coast Special •Crawler Hauler™ •Crystal Krocodile® •Crystal Minnow™ •Curvet •Cherry Drifter •Cherry Cluster •Chico Special •Crater Lake Troll •Deep Secret™ •Deep Stinger™ •Diamond King™ •Diamond Lake Troll •Dipsy Diver® Spoon •Dipsy Diver® Mini •Dodger Fly •Dolphin Diver •Doo-Dadd •Double Deschutes •Eagle Squids™ •Egg Brite™ •Egg Drifter •Egg Wobbler •88 •Fat Max •Fish Lake Special •Flasher •Flash Fly •Fluted Beauty Laker Taker •Ford Fender® •"Gigantic" Aluminum Troll •Gooey-Bob™ •Goon Spoon •Grays Harbor Special •Hart •Helldiver •High Lakes Troll •Hoochie Actionizer™ •Javelin™ •JensenEgg™ •JensenEgg Cluster™ •Jensen Dodger™ •Jensen Minnow™ •Jeweled Bead Kokanee Troll™ •Jeweled Bead Walleye Spinner™ •J-Plug® •Jointed J-Plug® •"Jumbo" Aluminum Troll •Kelly's Comet •Kilroy •Klamath Spinner •Klawdad® •Knobby Dodger •Knobby Spinner •Knobby Wobbler •Koho King •Kokanee King™ •Krocodile® •Krocodile® Flutter Jig •Krocodile® Stubby •Kwikfish® Stretchy Thread •Lead Cinch •L. G. Johnson™ •Lil Jaspar •Limpet •Little Chief™/Mini Chief Electric Smokehouse •Little Fender •Little Lake •Little Pat •Live Wire •Long John •Lotta Fish •Lucky Luhr •Luhr Pac •Luhr's Hart •Luhr's Lucky Knight •Luhr's Wobbler •Main Train •Maisie Wobbler™ •Manistee •McMahon™ •Metric™ •Mickey Gump •Midget •Mister J™ •Mountee •Mounti •Mr Biggs™ Walleye Spinner •Mr. Biggs™ Walleye Troll •Needlefish® •Nordic® •Norseman •Nootka Flasher™ •One Bell •P.J. Pop •P.J. Shiner •Pearly •Pecker Head •Pirate® •Power Dive® Minnow •Prism-Glo •Prism-Lite® •Pro Lure™ •P.T. •Radar •Red Baron •Redside Special •Ripple Tail™ •Rock Walker™ •Rubber Sink™ •Sacramento Special •Salgaffo Spinner •Salmon Caddy •Salmon Seeker™ •Satellite •Serpentine •Shadow Mountain Troll •Silver Eagle Flasher™ •Silver King •Double Silver King •Skagit Special™ •Skat •Skimpy Linda •Slow-Sam™ •Smith River •Smokehouse Brand™ •Sneak™ •Speed Trap™ •SquareDeal •Steelhead Caddy •Steely Bob •Super Flasher •Superior •Super Shad •Teaser •Tee Spoon® •Tee Spoon® Prawn Rig •Tiger Tail® •Tom Mack® •Twin Fin •Twinkle Squid™ •Two Bell •Walkin' Diddee™ •Wee Wooly •Willy Wobbler •Wing Bobber

1963 - EWING CO. (CA) •Electric, top load smoker •Double Fly Box •Rotary Pockit Pak •Egg Lug™ •65s Fly Box

1965 - ALASKAN TACKLE CO. (Vancouver B.C.) •Alaskan Plug

1966 - A-LURE, INC. (Johnny Arff, Portland, OR) •Keel-Fish

1967 - TRADEWINDS COMPANY - (Tacoma, WA) •Zimmy Plug •Spinnin' Minny

1968 - RENO PLASTICS/RECKS TACKLE CO. - (Reno, NV) •Cinch-Bug *(re-named Fireplug).*

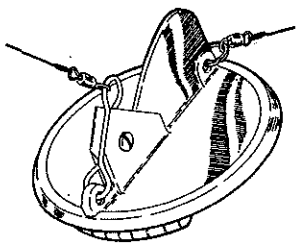
1969 - ABE & AL TACKLE CO. - (Port Angeles, WA) •Abe & Al® Flasher *(formerly Honest Abe®)* •Ediz Hook Spoon

(CONTINUED ON PAGE 7)

GROWING PAINS

In the early '70s, the company was scrambling to provide manufacturing space for its growing sales. Several downtown Hood River buildings were purchased and adapted to the various manufacturing, inventory and shipping functions. During that period, the company was utilizing more than ten different locations in the area to meet the demands from its continually expanding sales.

It was during that same period that Luhr Jensen, Jr. was actively building the company's reputation and sales in the Canadian marketplace. He enjoyed that challenge as well as the abundant good fishing to be found in western Canada. So much so, in fact that it was decided the company should open



DIPSY DIVER®

a manufacturing facility in Vancouver, B.C. He worked very hard in the years following and up to his retirement in 1984. He firmly established the company there — to the extent that sales now run in excess of $2 million.

A NEW HOME

Meanwhile, Phil and Dave Jensen tended the home fires in Hood River. The company had outgrown the many buildings and rather haphazard growth patterns of the past. So, a new and more efficient 60,000 square foot structure to house the entire tackle operation under one roof was built in the late '70s. In 1989, a nearby building was purchased which now houses the company's plastic injection molding and vacu-metalizing operations. Both stand on the banks of the mighty Columbia River, a stone's throw from where Luhr, Sr. once fished for salmon . . . with his very special spinners . . . made on a hand printing press . . . from dies fashioned from old truck parts . . . assembled in a chicken coop. His company now employs more than 220 people and enjoys sales in excess of $13 million annually.

The Luhr Jensen family of quality, American-made fishing lures and accessories now includes: "Luhr Jensen™", "Luhr Jensen Classic Woods™", "Little Chief™ and Big Chief™ Home Electric Smokehouses", "Les Davis®", "Tony Accetta®", "Genuine Crankbait Brand®", "Crippled Herring®", "Kwikfish®", "John L.® Walleye", "Mill Run™", "Ozark Mountain®", "Brothers Bait" "Mepps Tackle" and "B-2 Squid".

Luhr Jensen, Sr. would indeed be very proud.

LUHR·JENSEN™
"Where Legends Live."

RAMSEY DIRECTS RESEARCH & PROMOTIONS

An avid angler for more than 3[illegible]ars, Buzz Ramsey has been with Luhr Jensen over 20 of them, and is a key member of the sales and marketing team.

His responsibilities include the development, testing and setting specifications for new fishing lure products as well as the promotion of new and existing products.

Using a national team of promotional volunteers, Buzz gains "grass roots" input for what is needed in the fishing industry and then helps "spec" and guide Luhr Jensen's product line.

He is involved with consumer and trade shows, outdoor writer conventions, promotion, advertising, sales meetings in addition to being sales manager for Luhr Jensen's Oregon, Washington and Alaska sales staff, jobbers and retailers.

[illegible]uzz has taught fishing at a l[illegible]nd college and is nationally recognized for his knowledge of cold-water sport fisheries. He has fished throughout the U.S., Canada and even parts of the former Soviet Union.

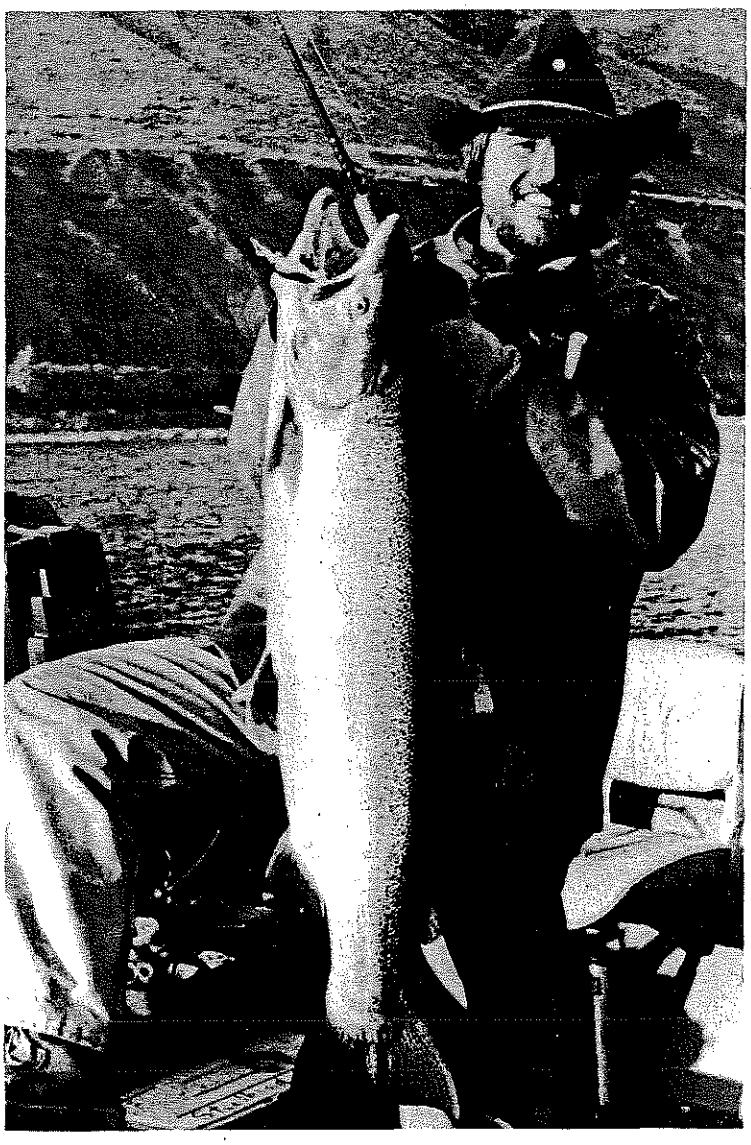
Buzz conducts fishing tackle and technique seminars at major sport shows across the country, is featured in fishing films and writes free-lance articles for various publications.

Buzz has a one-time world record steelhead to his credit, a 30-lb, 5-oz. brute taken from British Columbia, Canada's Thompson River in 1984. It was recognized by the I.G.F.A. as a line-class record and was caught on a Model 25 Hot Shot® lure of his own design!

His hobbies include antique reel collecting, writing, cooking, rafting, photography, hunting and reloading.

Buzz has been inducted into the National Fresh Water Fishing Hall of Fame as a "Legendary Angler", is a member of the Northwest Steelheaders Association, Outdoor Writers of America (OWAA), Northwest Outdoor Writers (NOWA), American Sportfishing Association (ASA), Michigan Steelheaders Association, Salmon Unlimited, Trout Unlimited and is a Northwest Sportfishing Industry Association director.

A dedicated-to-the-bone fisherman, Buzz lives with his wife Maggie and two sons Blake and Wade near Lyle in Washington state, just a lure's throw from the Klickitat River, a premier, free-flowing steelhead and salmon river. What else would you expect!



BUZZ RAMSEY WITH RECORD-SETTING STEELHEAD

"LURE HISTORY" - CONTINUED FROM PAGE 6

LUHR JENSEN& SONS LURES - Continued

1969 - HERRING MAGIC CO. - (Seattle, WA) • Herring Magic™

1969 - COLLINS & COLLINS CO. (Anacortes, WA) •Pink Lady® *(Diving Sinker).*

1974 - EDDIE POPE & CO., INC. - (Valencia, CA) •Bait Box •Basshound™ •Slip Sinker •Blazer™ •Dave Davis® Lake Trolls •Dave Davis® Trolling Rudder •Eddie Pope's™ •Fish Back •Hogback™ •Hot Shot® •Hot Shot® Wobbler •Jeep •Leader Tote •Schoolie *(re-named 6-Pack Schoolie®)* •Sharpie •Tahoe Spoon •Troll-Ease™ •Under Wonder

1975 - MAXWELL MFG. CO. (Vancouver, WA) *(Selected lures only)* •Okie Drifter® •Shrimp Louie

CHETCO-DIVER CO. (Grants Pass, OR) •Chetco Diver *(re-named Jet Planer™, then Jet Diver™)*

1979 - OUTERS LABORATORIES •Electric Smoker, knock-down version •Front load Smoker.

LURES & ACCESSORIES OBTAINED THROUGH ACQUISITION

1980 - J.C. HARGRAVE CO. (Beaverton, OR) •Snagless Sinker *(re-named Bouncing Betty®)*

1981 - WEBCO TACKLE CO. (Russ Weber) (Menomonee Falls, WI) •Dipsy Diver® *(Multi-directional diving sinker)*

1982 - GLEN L. EVANS CO. (Caldwell, ID) •Allwater Spinner •Bear Valley •Big Bug Eye •Big-Jerk Jig •Big Zep Jig •Bonita Jig •Bottom Walker •Cherry Bobber® •Cherry Buoyant •Colorado •Cyclops •Doc Shelton™ •Dredger Jig •Flectolite Spoon™ •Gad-About™ •Gleco Wobbler •Gob-O-Roe Drifter •Gob-O-Roe Spinner •Hectic Spinner •Herb's Dilly™ •Hus-Lure™ *(originally Hustler)* •Indiana •Lead-Belly •Little Doggie Jig •Little Sammy •Loco® Spoon •Midge Wobbler™ •Nips Spinner •Pacific Jig •Pay-Off Wobbler •Perche Spinner •Racketeer

(CONTINUED ON PAGE 8)

"LURE HISTORY" - CONTINUED FROM PAGE 7

(re-named Rattlesnake™) •Robot Spinner •Safari™ •Sammy Special® •Sashay Minnow •School-O-Minnows •School-O-Minnows Spoon •Sea-Bee •Sea Duper •Sea Lecta •Shad Dart Jig Fly •Shadrac •Shag Spoon •Shyster® •Shyster®-Bob •Shyster®-Swing •Skin Head •Skip-It Jig •Sunbeam Wobbler •Super Duper® •S-O-B Wobbler •Stanick Spinner •Spin-I-Diddee •Spin Oreno® •Super Dogie Jig •Squirm-Spin •Squirm-Jig •Squirm-Worm •Stainless Steel Trolling Planer •Tall Tale Bucktail •Tall Tale w/Minnow •Tall Tale Shrimp w/ legs •Tall Tale Shrimp •Thunderbird Spinner •Tornado Spinner •Toro-Jig Spoon •Under-Taker Wobbler •Vis-O-Minno Spoon

1982 - SOUTH BEND TACKLE CO. *(Selected items previously acquired by **Glen L. Evans Company**)* •Babe Oreno® •Bass Oreno® •Midge Oreno® •Nip-I-Diddee® •Sea-Bee •Sea Duper® •Super Duper® •Spin-I-Diddee® •Spin Oreno® •Stainless Steel Trolling Planer •The "Oreno®" Trademark

1982 - JASON HUBBARD CO. (CA) •Hydro-Kyte *(re-named Hot Shot® Side Planer)*

1983 - LES DAVIS® TACKLE CO. (Tacoma, WA) •Attracto Jig® •Attracto Spoon® •Bang-Tail® •Bass Bolo® •Bolo® Spinner •Bolo® Minnow •Cowbell® •CW •Dart Spoon •Diamond Ray Herring Dodger® •Golf-Tee Cowbell® •Golf Tee Bolo® •Super Bolo® •Canadian Wonder® •Cowbell® •Cutplug® •Deep Six® •Fluted Shelton •Herring Aid® *(formerly Strip Rig®)* •Herring Dodger® •Hotrod® •Weedless Hotrod® •Jack-O-Diamonds® •Kelp Kutter® •Kickteaser •Killer Diller •North Star Fly •Odd-Ball® •Oregon Special Troll •Point Defiance® •Ripple Spoon® •Scalelite® Squid •Scalelite Wobbler •Silverdart •Sleek •Slim Jim •Stripteaser •Sun Flash Troll •Swiftsure Plug •Ulua Plug •Western Rivers Special •Willow Leaf •Witch Doctor® Spoon •Witch Doctor® Plug

1987 - YO HO HO LURE CO., INC. (Greg Yoder) (CA) •Yo Ho Ho™ Jig •Yo Ho® Diamond Jig •Calamar™ *(re-named Calamari™ Rig* •Wahoo •Lura •Al-Lura Light

1987 - ANGLER'S PRIDE (Garfield Heights, OH) *(Genuine Crank-bait Brand®)* •Bullcat™ •Chowpuppy •Clearwater Spinnerbait •Control Depth •Fingerling Hi-Catch™ •Great Catch •Great Lake •Hi Contrast •Hot Lips Express® •Super Dawg™ •Swivel Thumper •Triple Deep®

1987 - MILL RUN CO. - (Cleveland, OH) - *(Previously acquired by **Angler's Pride**)* •Beno™ •Baby Beno™ •Mill Run Strin[illegible]

1987 - MARINE METALS PRODUCTS - FISHING LURE DIVISION - (Clearwater, FL) *(All lures were previously acquired from **Florida Fishing Tackle Company**)* •Baby Dude •Baby "J" Jig •Bali Dancer •Barracuda® Spoon •Barracuda® Reflecto Spoon •Big Eye Dude •Blooper •Chrome Squid •Convict •Dalton Twist® •Dalton Special® •Dalton Fishstick® •Dude •Dude Fly •Eel Jig •Florida Shad •Florida Shiner •Baby Florida Shiner •Golden Falcon •Jerk •Jig-A-Bu •Kingcuda •May Wes •Baby May Wes •Pee Wee •Pencil Squid •Reynolds Spoon •Ruby Dude •Shark Face •Silver Spirit •Spark A Lure •Spark A Midget •Spark A Wiggle •Spin-O-Dude •Squid Dude •Tiny Dude •Topper •Baby Topper •Torpecuda

1988 - SAM GRIFFIN CO. - (Lake Okeechobee, FL) •Bass Agitator™ •Bass Baffler •Chobee Chug •Sammy Shad™ •Jerk 'n Sam™ •Lil' Chris •Magnum Jerk n' Sam™ •Nippin' Sam •Ol' Line Sides •Pop 'n Sam •Sam's Chub™ •Sam's Woody •Sugarwood Spoon •Wobble Pop™ •Wood Trap *(Previously acquired by Griffin in 1980 from **Ol' Ben's Baits**, Ben Bacon of Shreveport, LA)* •Bass Snatcher •Bass Sticker •Basstaker •Big Ben •Big Ripple® •Big Stud •Cry Baby •Divin' Ben •Floatin' H & H •Hobo® •Hustler •K-9 •Lil' Ben •Millionaire •Ol' Ben's Snooker •Slo-Sinker H & H •Swisher •Tiny Tor-Mag •Tor-Mag •Super Tor-Mag

*(Griffin also purchased lathes and other equipment from the **Morgan Wood Works** of Tulsa, OK to start his company)*

1989 - KWIKFISH® LTD. (Windsor, Ontario, Canada) •Kwikfish® •Jointed Kwikfish® •King Kranky •Kranky Baby •Kranky [illegible]

1989 - TONY ACCETTA® CO. (Riviera Beach, FL) •Bally Bubb[illegible] •Bug Spoon •Belly Strip™ •Flat Top Belly Strip™ •Flat Top Jelly Belly® •Jelly Jet •Keel Head Trolling Feather •Pet® Spoon •Hobo® •Rag Mop •Tony-Hoo •Tony's Spoon™ •Original Reflecto® Spoon •Wacky

1989 - WEBER CO. (Stevens Pt., WI) *(Acquired with **Tony Accetta Co.** purchase)* •Mr. Champ®

1989 - LAPE'S FISH LURES - (Lima, OH) •Down & Dirty Glow™ •John L.® Glow Magnum •John L.® Walleye

1989 - CRIPPLED HERRING® (Pete Rosko) - (OH) •Crippled Herring®

1991 - OZARK MOUNTAIN® - (Carthage, MO) •Big Game Chugger™ •Big Game Ripper™ •Big Game Jointed Woodmaster™ •Big Game Woodchopper™ •Charlie Campbell Woodwalker •Chug Eye™ •Kingfisher •Ozark Dog •Panatela™ •Peacock Bass Lure™ • Pop Eye™ •Ripper •Woodchopper™ •Wood Walker™ •Big Game Wood Frog™ •Big Game Woodmaster™ •Big Game Jointed Woodmaster™

1992 - BIG FOOT® TACKLE CO. - (Mark J. Henry, Salem, OR) •Clamshell® Spinner

1992 - ED MOORE LURES - (Welaka, FL) *(Single lure purchase)* •Sugar Shad®

1993 - BROTHER'S BAIT - (Louisville, KY) •Limberneck® •Buzzer'd™

1994 - MEHLER TACKLE - (Ponderay, ID) •Trolling Speed Indicator (re-named Luhr-Speed™ Trolling Speed Indicator) •Mac's Squid Plug.

1997 - REEF FISHER PRODUCTS - (Seal Rock, OR) •B-2 C[illegible] Squid™ •B-2 Cruiser Squid™ •B-2 Bomber Squid™ • B-2 [illegible] Head Squid™

ALPHABETICAL INDEX OF PRODUCTS

A complete copy of this catalog was provided to our EQC

Please see back cover for contents by category.

Understanding Stock Numbers

When ordering, please **be sure to use our complete 11-digit stock number.** The first four numbers designate the product. The following three numbers designate the size. The final four numbers designate the finish. Example: **Stock #6534-012-0570** breaks down as **6534-** (Product: Brush Baby), **012-** (Size: 1/2), **0570** (Finish: Crawdad/"Crystal").

Finish Availability: Targeted ◉ items indicate our best sellers and generally are immediately available from warehouse stock. Dotted ● items are regional favorites and may not be available from warehouse stock. These items may take longer to deliver. Items that are not targeted or dotted are available on special order - 72 ea. minimum per size and finish.

LUHR·JENSEN & SONS, INC.
P.O. BOX 297 • 400 PORTWAY
HOOD RIVER, OREGON 97031

Dear Mikell...

Please be sure to include this envelope with the letter addressed to commision members, with the booklet that is provided. There are five sets. Thank you...

Oregon
Theodore R. Kulongoski, Governor

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

August 8, 2003

Phil Jensen
Luhr Jensen
P.O. Box 297
Hood River, OR 97031

RE: Case No. LQ/HW-ER-01-275

Dear Mr. Jensen:

This letter confirms our phone conversation today. The Environmental Quality Commission accepts your request for extension of one week to file Exceptions and Briefs in the above referenced case. Your Exceptions and Briefs must now be filed with the Commission by August 16, 2003. If you have any questions, please contact 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 DEQ

Attachment E

Oregon

Theodore R. Kulongoski, Governor

July 24, 2003

Via Certified Mail

Luhr Jensen
400 Portland Ave.
Hood River, OR 97031

RE: Case No. LQ/HW-ER-01-275

Dear Mr. Jensen:

On July 10, 2003, the Environmental Quality Commission received your timely request for Commission review of the Proposed Order for the above referenced case.

The Proposed Order 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, or August 9, 2003. 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, a representative of the Department of Environmental Quality may file an answer brief within thirty days. I have enclosed a copy of the applicable administrative rules for your information.

To file exceptions and briefs, please mail the 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, Oregon Department of Environmental Quality, 811 SW 6th Ave., 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 DEQ

7002 2410 0002 2228 0932

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE
Postage $
Certified Fee
Return Reciept Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Requi
Total Postage & F
Postmark Here
Sent To
Street, Apt. No.; or PO Box No.
City, State, ZIP+4
Luhr Jensen
400 Portland Avenue
Hood River, OR 97031
PS Form 3800, June 2002
See Reverse for Instructions

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

Attachment F

Environmental Quality Commission
C/o DEQ – Assistant to the Director
811 SW 6th Ave.
Portland, OR 97024

Re: Petition for Review
Luhr Jensen & Sons
Agency Case Number: LQ/HW-ER-01-275

Luhr Jensen & Sons formally requests that the above case decision be reviewed by the Environmental Quality Commission.

Within 30 days of this letter Luhr Jensen & Sons will file with the Department our exceptions to the Proposed Order subjecting Luhr Jensen & Sons to a civil penalty in the amount of $34,801.

Sincerely,

Phil Jensen
President
Luhr Jensen & Sons

cc: Jeff Bachman
OCO

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
ENVIRONMENTAL QUALITY COMMISSION

IN THE MATTER OF:	)**PROPOSED ORDER**
	)
LUHR JENSEN & SONS, INC.,	)
Respondent,	)
	)Office of Administrative Hearings
	)Case Number 104220
	)Agency Case Number LQ/HW-ER-01-275
	)Hood River County

HISTORY OF THE CASE

On April 17, 2002, the Department of Environmental Quality (Department) issued a Notice of Assessment of Civil Penalty (Notice) to Respondent Luhr Jensen & Sons, Inc. The Notice alleged that Respondent violated ORS 466.095, 40 CFR 262.3(d), 40 CFR 262.34(a)(1)(ii), 40 CFR 265.31, 40 CFR 263.11, 40 CFR 262.20(a), 40 CFR 268.7(a), OAR 340-102-0041, OAR 340-102-0011, 40 CFR 262.34(a)(1)(i), 40 CFR 265.173(a), ORS 468B.025(1)(a), and ORS 468B.025(2).

On May 8, 2002, Respondent requested a hearing. The matter was referred to the Office of Administrative Hearings (OAH) on November 7, 2002.

A hearing was held on March 18, 2003, at the Department offices in Portland, Oregon. Andrea H. Sloan, from the Office of Administrative Hearings, presided as the Administrative Law Judge (ALJ). Respondent was represented by Phil Jensen, President and CEO of Luhr Jensen & Sons, Inc. Mr. Jensen was the authorized representative of Luhr Jensen & Sons, Inc. (OAR 340-011-0106). Respondent appeared in person without counsel. Environmental Law Specialist Jeff Bachman represented the Department. Jeff Ingalls, DEQ Natural Resource Specialist, testified on behalf of the Department. Testifying on behalf of Respondent were: Mark Wiltz, Environmental Manager; Fred VanDomelon, Engineering Consultant with VLMK Engineering; Ed Farrell, Maintenance Team Supervisor; and Phil Jensen.

The record was left open for additional testimony and for both the Department and Respondent to submit written comments. On April 17, 2003, Mr. Ingalls offered additional testimony for the Department. The evidentiary record closed on April 17, 2003.

ISSUES

(1) Whether on or before August 14, 2001, Respondent illegally stored hazardous wastes[1] at its Portway facility.

(2) Whether on or before August 14, 2001 through March 20, 2002, Respondent stored hazardous wastes at its Portway facility in excess of 180 days.

(3) Whether on or before August 14, 2001, Respondent stored hazardous wastes in a tank that did not meet the requirements of Subpart J of 40 CFR Part 265.

(4) Whether on or before August 14, 2001, Respondent failed to maintain and operate its Portway facility in a manner that minimized the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the air, soil or water, or that could threaten human health and the environment.

(5) Whether on or about July 1, 1994 and each successive July 1st through 2001, Respondent violated Schedule B, Condition 3 of its National Pollutant Discharge Elimination System General Permit 1200-Z, by failing to perform twice annual storm water monitoring during the previous monitoring year.

(6) Whether on or about July 15, 1994, and each successive July 15th through 2001, Respondent violated Schedule B, Condition 3 of its National Pollutant Discharge Elimination System General Permit 1200-Z, by failing to submit annual storm water monitoring reports.

(7) Whether the civil penalty assessment proposed by the Department is warranted.

---

[1] ORS 466.005(7) provides as follows:

> Hazardous waste does include all of the following which are not declassified by the commission under ORS 466.015 (3):
> (a) Discarded, useless or unwanted materials or residues resulting from any substance or combination of substances intended for the purpose of defoliating plants or for the preventing, destroying, repelling or mitigating of insects, fungi, weeds, rodents or predatory animals, including but not limited to defoliants, desiccants, fungicides, herbicides, insecticides, nematocides and rodenticides.
> (b) Residues resulting from any process of industry, manufacturing, trade or business or government or from the development or recovery of any natural resources, if such residues are classified as hazardous by order of the commission, after notice and public hearing. For purposes of classification, the commission must find that the residue, because of its quantity, concentration, or physical, chemical or infectious characteristics may:
> (A) Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
> (B) Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
> (c) Discarded, useless or unwanted containers and receptacles used in the transportation, storage, use or application of the substances described in paragraphs (a) and (b) of this subsection."

ISSUES

(1) Whether on or before August 14, 2001, Respondent illegally stored hazardous wastes[1] at its Portway facility.

(2) Whether on or before August 14, 2001 through March 20, 2002, Respondent stored hazardous wastes at its Portway facility in excess of 180 days.

(3) Whether on or before August 14, 2001, Respondent stored hazardous wastes in a tank that did not meet the requirements of Subpart J of 40 CFR Part 265.

(4) Whether on or before August 14, 2001, Respondent failed to maintain and operate its Portway facility in a manner that minimized the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the air, soil or water, or that could threaten human health and the environment.

(5) Whether on or about July 1, 1994 and each successive July 1st through 2001, Respondent violated Schedule B, Condition 3 of its National Pollutant Discharge Elimination System General Permit 1200-Z, by failing to perform twice annual storm water monitoring during the previous monitoring year.

(6) Whether on or about July 15, 1994, and each successive July 15th through 2001, Respondent violated Schedule B, Condition 3 of its National Pollutant Discharge Elimination System General Permit 1200-Z, by failing to submit annual storm water monitoring reports.

(7) Whether the civil penalty assessment proposed by the Department is warranted.

---

[1] ORS 466.005(7) provides as follows:

> Hazardous waste does include all of the following which are not declassified by the commission under ORS 466.015 (3):
> (a) Discarded, useless or unwanted materials or residues resulting from any substance or combination of substances intended for the purpose of defoliating plants or for the preventing, destroying, repelling or mitigating of insects, fungi, weeds, rodents or predatory animals, including but not limited to defoliants, desiccants, fungicides, herbicides, insecticides, nematocides and rodenticides.
> (b) Residues resulting from any process of industry, manufacturing, trade or business or government or from the development or recovery of any natural resources, if such residues are classified as hazardous by order of the commission, after notice and public hearing. For purposes of classification, the commission must find that the residue, because of its quantity, concentration, or physical, chemical or infectious characteristics may:
> (A) Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
> (B) Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
> (c) Discarded, useless or unwanted containers and receptacles used in the transportation, storage, use or application of the substances described in paragraphs (a) and (b) of this subsection."

EVIDENTIARY RULINGS

Exhibits

OAH Exhibits P1 through P5, Department Exhibits A1 through A13, and Respondent Exhibits R1 through R3, R7, R9 and the timeline portion of R4 were admitted into the record without objection. The cassette tape recording of the prehearing conference was incorporated by reference into this hearing record.

An attorney licensed by the Oregon State Bar prepared Respondent's Answer.[2] In the Answer, Respondent admitted part of violations A5, A6 and A7,[3] and all of violations A10, A11, B2 and B3.[4] At hearing, Respondent appeared without counsel, and specifically withdrew its admission to violations B2 and B3. Respondent did not, however, withdraw its partial admissions to violations A5, A6 and A7. In addition, Respondent admitted violations A8 through A11, and B1.

At one point during the March 18, 2003 hearing I asked for clarification of the outstanding issues. I advised that my notes reflected that the only issues remaining were alleged violations A1 through A4, B2 and B3. Mr. Bachman concurred. Mr. Jensen did not object or comment. Further, during the hearing Mr. Bachman noted that because Respondent had admitted the violations relating to the illegal transport of hazardous waste, the Department was not prepared to offer any evidence in support of these violations.[5] Again, Respondent did not object or comment.

In its written summation, the Department reiterated its understanding that Respondent had admitted all violations except A1 through A4, B2 and B3. In Respondent's written summation, Mr. Jensen argued that Respondent had not admitted violations A1 through A7, B2 or B3.

There is, obviously, some confusion about which violations Respondent believes it has admitted and which violations remain contested. A large part of the confusion stems from Respondent's written material, which is, at times, contradictory. For example, the written Answer, prepared by counsel, conflicts with portions of Exhibit R1. In Exhibit R1, a document offering Respondent's explanations, Respondent wrote: "Luhr Jensen understands and will agree to the assessment of this fine." The term, "this fine" relates to penalty assessments for items "#9, #5, #6, #7 and #1," which were classified by Mr. Jensen as part of the "first 'event'." These penalty assessment items correspond to violations A9, A5, A6, A7 and A1. Despite this apparent admission to these violations, Respondent asked elsewhere in the document that the charges and fines for #5, #6, #7 and #1 be rescinded.

---

[2] Jerry Hodson of Miller Nash LLP prepared respondent's Answer. Mr. Hodson identified himself in the Answer as Respondent's attorney. (Ex. P4.)

[3] For example, Respondent admitted that it did not obtain a transporter identification number (violation A5), that it did not prepare a hazardous waste manifest (violation A6) and that it did not provide a land disposal restriction notification for the shipment of hazardous waste (violation A7).

[4] The designations relating to violations are taken from the Notice. For example, violation A1 refers to the first numbered paragraph within the "A" subheading. The violations starting with the letter "A" refer to hazardous waste management, storage and treatment violations. The violations starting with the letter "B" refer to water quality violations.

[5] Violations A5, A6 and A7 relate to the transportation of hazardous waste materials.

Given Respondent's initial admissions in the Answer, and the ambiguous admissions/denials in Exhibit R1, it is understandable that both the Department and I would be confused about Respondent's position on these violations. Nonetheless, Respondent did not object or offer any comment during the hearing when both the Department and I clarified the remaining unresolved issues. Relying on Respondent's admissions in the Answer, the Department did not present any evidence in support of several of the violations. Respondent did not withdraw its partial admissions to A5 through A7, although Respondent did amend other prior admissions and denials.

Respondent cannot now, after the evidentiary record has closed, withdraw its prior admissions. In reliance on Respondent's admissions to the violations, the Department did not present evidence on the issues at either the March 18, 2003 or April 17, 2003 hearings. By not objecting to either my recitation of the outstanding issues, or the Department's objection to Respondent presenting evidence on previously admitted violations, Respondent has waived its right to amend the Answer.

Amendments

At hearing, the Department moved to amend the language of violation A2 as follows:

> On or about August 14, 2001 through March 20, 2002, Respondent violated Code of Federal Regulations (CFR) 262.34(d), adopted pursuant to OAR 340-100-0002, by storing hazardous waste in excess of 180 days. Specifically, Respondent caused or allowed approximately 550 gallons of chrome plating sludge, a toxicity characteristic hazardous waste for chromium (D0007) and a listed hazardous waste (F006), to be stored in a sump under its plating room at its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(e).

Respondent did not object to the amendment and the language of violation A2 was amended as proposed. In addition, the Department amended its penalty assessment calculation for violations A1 through A5 and A8 through A10. There was no objection to the amended penalty assessment calculations and the amendment was accepted.

FINDINGS OF FACT

(1) Respondent is in the business of manufacturing various products used in fishing, including tackle and accessories. Respondent operates at least two manufacturing facilities in Hood River, Oregon: Portway and Oak Grove. (Ex. P2; testimony of Ingalls.)

(2) Respondent operates an electroplating room at the Portway facility. The Portway facility is a registered small quantity generator of hazardous waste. The Portway facility's registration number is ORD 99751414. A small quantity generator is a facility that produces between 220 and 2200 pounds of hazardous waste each month. As a small quantity generator, Respondent was required to ship hazardous wastes offsite to a permitted treatment, storage and disposal (TSD) facility. (Ex. P2; testimony of Ingalls.)

Given Respondent's initial admissions in the Answer, and the ambiguous admissions/denials in Exhibit R1, it is understandable that both the Department and I would be confused about Respondent's position on these violations. Nonetheless, Respondent did not object or offer any comment during the hearing when both the Department and I clarified the remaining unresolved issues. Relying on Respondent's admissions in the Answer, the Department did not present any evidence in support of several of the violations. Respondent did not withdraw its partial admissions to A5 through A7, although Respondent did amend other prior admissions and denials.

Respondent cannot now, after the evidentiary record has closed, withdraw its prior admissions. In reliance on Respondent's admissions to the violations, the Department did not present evidence on the issues at either the March 18, 2003 or April 17, 2003 hearings. By not objecting to either my recitation of the outstanding issues, or the Department's objection to Respondent presenting evidence on previously admitted violations, Respondent has waived its right to amend the Answer.

Amendments

At hearing, the Department moved to amend the language of violation A2 as follows:

> On or about August 14, 2001 through March 20, 2002, Respondent violated Code of Federal Regulations (CFR) 262.34(d), adopted pursuant to OAR 340-100-0002, by storing hazardous waste in excess of 180 days. Specifically, Respondent caused or allowed approximately 550 gallons of chrome plating sludge, a toxicity characteristic hazardous waste for chromium (D0007) and a listed hazardous waste (F006), to be stored in a sump under its plating room at its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(e).

Respondent did not object to the amendment and the language of violation A2 was amended as proposed. In addition, the Department amended its penalty assessment calculation for violations A1 through A5 and A8 through A10. There was no objection to the amended penalty assessment calculations and the amendment was accepted.

FINDINGS OF FACT

(1) Respondent is in the business of manufacturing various products used in fishing, including tackle and accessories. Respondent operates at least two manufacturing facilities in Hood River, Oregon: Portway and Oak Grove. (Ex. P2; testimony of Ingalls.)

(2) Respondent operates an electroplating room at the Portway facility. The Portway facility is a registered small quantity generator of hazardous waste. The Portway facility's registration number is ORD 99751414. A small quantity generator is a facility that produces between 220 and 2200 pounds of hazardous waste each month. As a small quantity generator, Respondent was required to ship hazardous wastes offsite to a permitted treatment, storage and disposal (TSD) facility. (Ex. P2; testimony of Ingalls.)

(3) On August 14, 2001, Mr. Ingalls conducted an unannounced compliance inspection of the Portway facility. The inspection was done within Mr. Ingalls' duties as a Natural Resource Specialist with the Department's Hazardous Waste Compliance Program. The federal Environmental Protection Agency requires these compliance inspections. The purpose of the inspection was to identify waste streams within the facility and see how the company is managing the wastes generated by its manufacturing process. (Testimony of Ingalls.)

(4) Mr. Ingalls had previously inspected the Portway facility in 1997. At that time, he identified some areas of concern. As a result of the 1997 inspection, Respondent entered into a Mutual Agreement and Order with the Department, and agreed to pay civil penalties and take corrective action. (Ex. A10; testimony of Ingalls.)

(5) During the August 14, 2001 inspection of the Portway facility, Mr. Ingalls met with Mr. Wiltz, Respondent's Environmental Manager. After an initial interview, Mr. Wiltz took Mr. Ingalls to the acid storage room. Mr. Ingalls observed four 55-gallon blue drums with hazardous waste labels on them. The labels indicated that the wastes were accumulated in these drums starting on July 6, 2001, and that the drums contained tin plating solution. The plating solution was generated at Respondent's Oak Grove facility. Mr. Ingalls asked Mr. Wiltz why the drums were at the Portway facility, and Mr. Wiltz explained that he was storing them because the drums were easier to deal with at Portway than at Oak Grove. The drums were transported from Oak Grove to Portway by truck. Mr. Wiltz did not think that the tin plating solution was a hazardous waste, but he did not check the pH of the plating solution. Mr. Ingalls used pH strips to field test the contents of the drums. According to the test strips, the pH of the solution was between 0.5 and 1. A pH less than or equal to 2 is a corrosivity characteristic hazardous waste.[6] (Testimony of Ingalls.)

(6) At the time of the August 14, 2001 inspection, the Department had not issued a hazardous waste TSD permit to Respondent. Mr. Ingalls checked the Department's database of all TSD permitees, and confirmed that Respondent did not have a TSD permit to store hazardous waste. (Testimony of Ingalls.)

(7) After inspecting the acid storage room, Mr. Ingalls inspected the electroplating room. This room contained nickel plating baths, two cyanide plating baths, and chrome plating baths. In addition, the room contains rinsing baths. The walking surface of this room was covered with slatted wooden boards. The boards covered concrete sumps, or compartmentalized containment tanks built above the actual concrete floor. The sumps were approximately 24 inches tall and were built above a concrete slab. The sumps were designed to catch drag out and drippage from the electroplating baths as items were moved from bath to bath within the room. (Ex. A5, 1-4; R7; testimony of Ingalls and VanDomelon.)

---

[6] There are four general characteristics of hazardous wastes: 1) ignitability, which means that the material has a flash point of less than 140 degrees Fahrenheit (40 CFR 261.21); 2) corrosivity, which means that the material has a pH less than or equal to 2 or greater than or equal to 12.5 (40 CFR 261.22); 3) reactivity, which means that the waste could react violently, without detonation, upon exposure to air or water (40 CFR 261.23); and 4) toxicity, which is determined by using the Toxicity Characteristics Leaching Procedure (40 CFR 261.24).

(8) On August 14, 2001, Mr. Ingalls saw that the floorboards in several areas in the electroplating room were sodden and saturated with moisture. Mr. Ingalls tried unsuccessfully to pull up boards to look in the sump, but most of the boards were too swollen to be removed. Mr. Ingalls did find a board that he could pick up and he saw what looked to be two to three inches of green colored liquid in the sump below the board. Mr. Ingalls knew that there was not supposed to be any liquid in these sumps. Mr. Wiltz was surprised to find the green liquid in the sumps. (Ex. A5, 1-4; testimony of Ingalls.)

(9) Respondent released water into the electroplating room in June 2001, while Respondent was installing new welding equipment in an adjoining room of the Portway facility. Mr. Farrell, Respondent's maintenance manager, saw the wooden slats on the electroplating room floor and erroneously concluded that there was a drain beneath the flooring. Over the course of about one week, Mr. Farrell pumped between 500 and 600 gallons of clean water onto the electroplating room floor, believing that the water would be drained away. Instead, the water collected in the sumps in the electroplating room. Mr. Farrell stopped pumping water into the electroplating room on approximately June 18, 2001, when he discovered that there was no drain in the floor. (Testimony of Farrell, Ingalls and Wiltz.)

(10) On August 30, 2001, Mr. Ingalls returned to Portway to conduct an additional inspection. He collected samples from three of the 55-gallon drums in the acid storage room, and from two sumps in the electroplating room. One of these samples was taken near the chrome plating bath, and the other was taken near the nickel plating bath. An additional sample was taken from the storm drain in the breezeway area of the Portway facility. The samples were submitted to the Department's laboratory for analysis. (Ex. A2; testimony of Ingalls.)

(11) Every day that the electroplating room is operating, plating bath solution drips from the equipment down the side of the baths and onto the floorboards. Most of these drips evaporate during the day, leaving crystals or salts behind. (Testimony of Wiltz.)

(12) Respondent did not have a procedure for cleaning up these salts. Respondent did not have a procedure for inspecting the baths and sumps, and the sumps were not inspected every day for the presence of hazardous waste, other liquids or imperfections. (Testimony of Wiltz and Ingalls.)

(13) No one knows for certain why the liquid in the sumps was green. Mr. Wiltz theorized that the green liquid was the product of rehydrated salts, created when Mr. Farrell pumped the 500 to 600 gallons of water into the electroplating room. Mr. Farrell did not know why the liquid was green, but assumed that the water he pumped into the room mixed with the dried green material that was on the floor. On one or two prior occasions, plating solution spilled into the sumps. (Testimony of Wiltz and Farrell.)

(14) On November 9, 2001, the Department's laboratory completed an analytical records report of the samples taken from the Portway facility. The report was sent to Mr. Ingalls. The laboratory concluded that the pH of the contents of the 55-gallon drums was less than 1. The laboratory also concluded that the green liquid in the sump near the chrome plating bath

(8) On August 14, 2001, Mr. Ingalls saw that the floorboards in several areas in the electroplating room were sodden and saturated with moisture. Mr. Ingalls tried unsuccessfully to pull up boards to look in the sump, but most of the boards were too swollen to be removed. Mr. Ingalls did find a board that he could pick up and he saw what looked to be two to three inches of green colored liquid in the sump below the board. Mr. Ingalls knew that there was not supposed to be any liquid in these sumps. Mr. Wiltz was surprised to find the green liquid in the sumps. (Ex. A5, 1-4; testimony of Ingalls.)

(9) Respondent released water into the electroplating room in June 2001, while Respondent was installing new welding equipment in an adjoining room of the Portway facility. Mr. Farrell, Respondent's maintenance manager, saw the wooden slats on the electroplating room floor and erroneously concluded that there was a drain beneath the flooring. Over the course of about one week, Mr. Farrell pumped between 500 and 600 gallons of clean water onto the electroplating room floor, believing that the water would be drained away. Instead, the water collected in the sumps in the electroplating room. Mr. Farrell stopped pumping water into the electroplating room on approximately June 18, 2001, when he discovered that there was no drain in the floor. (Testimony of Farrell, Ingalls and Wiltz.)

(10) On August 30, 2001, Mr. Ingalls returned to Portway to conduct an additional inspection. He collected samples from three of the 55-gallon drums in the acid storage room, and from two sumps in the electroplating room. One of these samples was taken near the chrome plating bath, and the other was taken near the nickel plating bath. An additional sample was taken from the storm drain in the breezeway area of the Portway facility. The samples were submitted to the Department's laboratory for analysis. (Ex. A2; testimony of Ingalls.)

(11) Every day that the electroplating room is operating, plating bath solution drips from the equipment down the side of the baths and onto the floorboards. Most of these drips evaporate during the day, leaving crystals or salts behind. (Testimony of Wiltz.)

(12) Respondent did not have a procedure for cleaning up these salts. Respondent did not have a procedure for inspecting the baths and sumps, and the sumps were not inspected every day for the presence of hazardous waste, other liquids or imperfections. (Testimony of Wiltz and Ingalls.)

(13) No one knows for certain why the liquid in the sumps was green. Mr. Wiltz theorized that the green liquid was the product of rehydrated salts, created when Mr. Farrell pumped the 500 to 600 gallons of water into the electroplating room. Mr. Farrell did not know why the liquid was green, but assumed that the water he pumped into the room mixed with the dried green material that was on the floor. On one or two prior occasions, plating solution spilled into the sumps. (Testimony of Wiltz and Farrell.)

(14) On November 9, 2001, the Department's laboratory completed an analytical records report of the samples taken from the Portway facility. The report was sent to Mr. Ingalls. The laboratory concluded that the pH of the contents of the 55-gallon drums was less than 1. The laboratory also concluded that the green liquid in the sump near the chrome plating bath

contained, among other things, 1,580 milligrams per liter (mg/L)[7] of chromium. The sample of green liquid taken from the sump near the nickel-plating bath contained, *inter alia*, 743 mg/L of chromium. Waste that contains 5 mg/L or more of chromium is considered to be a hazardous waste with toxicity characteristics. (Ex. A2; testimony of Ingalls.)

(15) On March 20, 2002, Respondent contracted with WasteWatch, LLC to ship 11 55-gallon drums from the Portway facility. These drums contained the hazardous waste that had been pumped out of the sumps in the electroplating room. The drums were shipped to Pollution Control Industries of Tennessee for disposal. (Ex. A6.)

(16) The hazardous waste inside the concrete sumps was acidic. If left in the tank, the acidic liquid could compromise the integrity of the concrete, allowing the liquid to escape from imperfections or cracks in the sumps and enter the environment. The Portway facility is located approximately 100 yards from the banks of the Columbia River. (Testimony of Ingalls.)

(17) VLMK Engineering designed the concrete sumps in 1978. The concrete was coated to prevent leakage or absorption of material. The sumps were not designed to comply with the Resource Conservation and Recovery Act (RCRA). (Testimony of VanDomelon.)

(18) In 1997, the Department issued to Respondent a National Pollutant Discharge Elimination System Storm Water Discharge Permit. The permit expired on June 30, 2002. The permit required Respondent to perform biannual sampling of its storm water discharge. The sampling dates were not specified, but were to be 60 days apart. In addition, the permit required Respondent to submit annual monitoring reports, by July 15th of each year, reporting the results of the samplings conducted in the previous year. (Ex. A1.)

(19) According to the Department's databases, from 1993 until the time of the August 14, 2001 inspection, Respondent did not file annual storm water discharge monitoring reports with the Department. Petitioner also failed to perform twice annual sampling of its storm water discharge. Four storm drain outfall pipes at the Portway facility drain directly into the Columbia River. (Testimony of Ingalls and Wiltz.)

(20) Mr. Ingalls inspected one of the storm drain outfall pipes and found it to be "high and dry," with the end of the pipe above the level of the river. [8] Mr. Ingalls later checked with the

---

[7] "mg/L" is equivalent to "parts per million." (Testimony of Ingalls.)

[8] At the time of the August 14, 2001 inspection, Mr. Wiltz told Mr. Ingalls that Respondent had been unable to sample its storm water discharge because the storm drain outfall pipe extended below the level of the Columbia River. Mr. Wiltz also explained that because there had not been any storm events recently, there had been nothing to sample. Mr. Wiltz testified that he spoke with a DEQ employee, sometime in the past, and explained that Respondent's storm water discharge could not be sampled because the drainpipe was below the level of the river. According to Mr. Wiltz, this employee told Mr. Wiltz that he was not sure what to do, and that Respondent did not have to submit sampling reports. Mr. Wiltz did not know the name of this person, although he was thought that the person was male. Mr. Wiltz believed that he had this conversation sometime between 1993 and 2001. Because he did not detect any urgency from the Department about sampling, Mr. Wiltz concluded that sampling reports were not necessary. (Testimony of Wiltz.)

National Weather Service and determined that the Hood River area had received 0.31 inches of rain on July 21, 2001 and 0.47 inches of rain on July 30, 2001.[9] (Ex. A11; testimony of Ingalls.)

(21) On August 14, 2001, Mr. Ingalls suggested to Mr. Wiltz that he pierce the storm drain outfall pipe farther back from the end, creating a sampling port. This port would allow sampling in the event that the river ever covered the end of the pipe. During the fall of 2001, Respondent pierced the pipe and installed a rectangular plate to cover the sampling port. The contents of the pipe are now accessible, regardless of the level of water in the river. (Ex. R9; testimony of Ingalls and Jensen.)

(22) Respondent knew that its Storm Water Discharge Permit required annual reports and biannual sampling. (Testimony of Ingalls and Jensen.)

CONCLUSIONS OF LAW

(1) Respondent illegally stored hazardous wastes at its Portway facility on or before August 14, 2001.

(2) Respondent stored hazardous waste at its Portway facility for more than 180 days, between August 14, 2001 and March 20, 2002.

(3) Respondent stored hazardous waste in a tank that did not meet the requirements of Subpart J of 40 CFR 265.

(4) On or before August 14, 2001, Respondent failed to maintain and operate its Portway facility in a manner that minimized the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the soil or water, or that could threaten human health and the environment.

(5) Between July 1, 1994 and on each successive July 1st through 2001, Respondent failed to perform twice-annual storm water monitoring.

(6) Between July 15, 1994 and each successive July 15th through 2001, Respondent failed to submit annual storm water monitoring reports.

(7) The civil penalty assessment proposed by the Department is warranted for all violations alleged in the Notice.

OPINION

"The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position." ORS 183.450(2). Here, the Department has the burden of proving its allegations by a preponderance of the evidence. *See, Harris v. SAIF*, 292

[9] Mr. Jensen also testified that in the 25 years his company had been at the Portway location, the Department had never before mentioned Respondent's failure to monitor and file reports. According to Mr. Jensen, the level of water in the river can vary by as much as eight feet, depending on rainfall.

National Weather Service and determined that the Hood River area had received 0.31 inches of rain on July 21, 2001 and 0.47 inches of rain on July 30, 2001.[9] (Ex. A11; testimony of Ingalls.)

(21) On August 14, 2001, Mr. Ingalls suggested to Mr. Wiltz that he pierce the storm drain outfall pipe farther back from the end, creating a sampling port. This port would allow sampling in the event that the river ever covered the end of the pipe. During the fall of 2001, Respondent pierced the pipe and installed a rectangular plate to cover the sampling port. The contents of the pipe are now accessible, regardless of the level of water in the river. (Ex. R9; testimony of Ingalls and Jensen.)

(22) Respondent knew that its Storm Water Discharge Permit required annual reports and biannual sampling. (Testimony of Ingalls and Jensen.)

CONCLUSIONS OF LAW

(1) Respondent illegally stored hazardous wastes at its Portway facility on or before August 14, 2001.

(2) Respondent stored hazardous waste at its Portway facility for more than 180 days, between August 14, 2001 and March 20, 2002.

(3) Respondent stored hazardous waste in a tank that did not meet the requirements of Subpart J of 40 CFR 265.

(4) On or before August 14, 2001, Respondent failed to maintain and operate its Portway facility in a manner that minimized the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the soil or water, or that could threaten human health and the environment.

(5) Between July 1, 1994 and on each successive July 1st through 2001, Respondent failed to perform twice-annual storm water monitoring.

(6) Between July 15, 1994 and each successive July 15th through 2001, Respondent failed to submit annual storm water monitoring reports.

(7) The civil penalty assessment proposed by the Department is warranted for all violations alleged in the Notice.

OPINION

"The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position." ORS 183.450(2). Here, the Department has the burden of proving its allegations by a preponderance of the evidence. *See, Harris v. SAIF*, 292

[9] Mr. Jensen also testified that in the 25 years his company had been at the Portway location, the Department had never before mentioned Respondent's failure to monitor and file reports. According to Mr. Jensen, the level of water in the river can vary by as much as eight feet, depending on rainfall.

Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I find that the Department has met its burden with respect to all violations alleged. [10]

Illegal storage of hazardous wastes

Respondent denied that it knowingly stored hazardous waste at its Portway facility. In support, Respondent argued that Mr. Wiltz did not know that the tin plating solution in the four 55-gallon drums he brought to Portway from Oak Grove was considered a hazardous material. This record reflects that Respondent did not conduct a pH test on the contents of the drums prior to August 14, 2001.

Mr. Ingalls determined that Respondent had illegally transported four 55-gallon drums containing tin plating solution from Respondent's Oak Grove facility to Portway. Mr. Ingalls' initial pH testing of the solution inside the drums was confirmed on November 9, 2001 by the Department's laboratory. The solution inside the four 55-gallon drums had a pH of less than 1.

Under 40 CFR 261.22, any solid waste,[11] with a pH of less than or equal to 2, is a hazardous waste with corrosivity characteristics.[12] Thus, the solution in the drums found at the Portway facility was a hazardous waste. As such, only a permitted hazardous waste treatment, storage or disposal (TSD) site could lawfully store the tin plating solution found in the drums at the Portway facility. ORS 466.095(1)(a).[13] The fact that Respondent transported the hazardous

---

[10] Respondent admitted violations A5 through A11 and B1. I will not analyze violations that Respondent admitted prior to or at the time of hearing. These violations will be included in the penalty assessment calculation without further discussion.

[11] According to 40 CFR 261.2, hazardous waste liquids are considered to be solid wastes.

[12] 40 CFR 262.22 provides as follows:

> (a) A solid waste exhibits the characteristic of corrosivity if a representative sample of the waste has either of the following properties:
> (1) It is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using Method 9040 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter.
> (2) It is a liquid and corrodes steel (SAE 1020) at a rate greater than 6.35 mm (0.250 inch) per year at a test temperature of 55degreesC (130degreesF) as determined by the test method specified in NACE (National Association of Corrosion Engineers) Standard TM-01-69 as standardized in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter.
> (b) A solid waste that exhibits the characteristic of corrosivity has the EPA Hazardous Waste Number of D002.

[13] According to ORS 466.095(1), "[N]o person shall: (a) Store a hazardous waste anywhere in this state except at a permitted hazardous waste treatment, storage or disposal site."

waste from Oak Grove, where it was generated, to Portway, makes the exception of 466.075(2) inapplicable.[14] The Department has met its burden on this issue.

Storage of hazardous waste in excess of 180 days

According to 40 CFR 262.34(d), "A generator who generates greater than 100 kilograms but less than 1000 kilograms[15] of hazardous waste in a calendar month may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status, * * *." This provision applies to small quantity generators such as Respondent.

In the Notice, the Department alleges that Respondent allowed approximately 1600 gallons of hazardous waste to accumulate in its sumps for a period of eight years. The facts adduced at hearing do not support these factual allegations. For example, approximately 550 gallons of liquid was pumped out of the sumps following the August 14, 2001 inspection. Further, the evidence in this record does not establish that the hazardous waste remained in the sumps for a period of eight years.[16] Nonetheless, the uncontroverted evidence in this record establishes that approximately 550 gallons of hazardous waste was allowed to accumulate in the sumps for a period of about 64 days,[17] and was not removed from the Portway facility until March 20, 2001, more than 180 days after it first entered the sumps.[18]

Although the precise facts alleged by the Department were not proven, the preponderance of evidence in this record nonetheless establishes that Respondent violated 40 CFR 262.34(d).

Storage of hazardous waste in an improper tank

According to 40 CFR 265, Subpart J (b)(2), small quantity hazardous waste generators must ensure that "[h]azardous wastes or treatment reagents must not be placed in a tank if they could cause the tank or its inner liner to rupture, leak, corrode, or otherwise fail before the end of its intended life." In addition, 40 CFR 265.195 requires daily inspections of tanks, pursuant to Subpart J.

The Department contends that Respondent violated this provision by allowing hazardous waste to accumulate in the concrete sumps beneath the electroplating room floor. The Department's witness, Mr. Ingalls, testified that the hazardous waste in the sumps was acidic, with toxicity characteristics for chromium, and could compromise the integrity of the concrete,

---

[14] ORS 466.075(2) provides as follows: "The generator of a hazardous waste shall be allowed to store a hazardous waste produced by that generator on the premises of that generator for a term not to exceed that set by rule without obtaining a hazardous waste storage site permit. This shall not relieve any generator from complying with any other rule or standard regarding storage of hazardous waste."

[15] "100 kilograms to 1000 kilograms" is equivalent to "220 pounds to 2200 pounds".

[16] Mr. Ingalls testified that an employee of the Portway facility, Mr. Ishmael Pineado told him that the sumps had last been cleaned out eight years before the August 14, 2001 inspection.

[17] The minimum amount of time that the waste was stored in the sumps was from one week before June 18, 2001, until August 14, 2001, or a period of 64 days.

[18] At a minimum, the hazardous waste was stored at the Portway facility for 275 days, from June 18, 2001 until March 20, 2002.

waste from Oak Grove, where it was generated, to Portway, makes the exception of 466.075(2) inapplicable.[14] The Department has met its burden on this issue.

Storage of hazardous waste in excess of 180 days

According to 40 CFR 262.34(d), "A generator who generates greater than 100 kilograms but less than 1000 kilograms[15] of hazardous waste in a calendar month may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status, * * *." This provision applies to small quantity generators such as Respondent.

In the Notice, the Department alleges that Respondent allowed approximately 1600 gallons of hazardous waste to accumulate in its sumps for a period of eight years. The facts adduced at hearing do not support these factual allegations. For example, approximately 550 gallons of liquid was pumped out of the sumps following the August 14, 2001 inspection. Further, the evidence in this record does not establish that the hazardous waste remained in the sumps for a period of eight years.[16] Nonetheless, the uncontroverted evidence in this record establishes that approximately 550 gallons of hazardous waste was allowed to accumulate in the sumps for a period of about 64 days,[17] and was not removed from the Portway facility until March 20, 2001, more than 180 days after it first entered the sumps.[18]

Although the precise facts alleged by the Department were not proven, the preponderance of evidence in this record nonetheless establishes that Respondent violated 40 CFR 262.34(d).

Storage of hazardous waste in an improper tank

According to 40 CFR 265, Subpart J (b)(2), small quantity hazardous waste generators must ensure that "[h]azardous wastes or treatment reagents must not be placed in a tank if they could cause the tank or its inner liner to rupture, leak, corrode, or otherwise fail before the end of its intended life." In addition, 40 CFR 265.195 requires daily inspections of tanks, pursuant to Subpart J.

The Department contends that Respondent violated this provision by allowing hazardous waste to accumulate in the concrete sumps beneath the electroplating room floor. The Department's witness, Mr. Ingalls, testified that the hazardous waste in the sumps was acidic, with toxicity characteristics for chromium, and could compromise the integrity of the concrete,

---

[14] ORS 466.075(2) provides as follows: "The generator of a hazardous waste shall be allowed to store a hazardous waste produced by that generator on the premises of that generator for a term not to exceed that set by rule without obtaining a hazardous waste storage site permit. This shall not relieve any generator from complying with any other rule or standard regarding storage of hazardous waste."

[15] "100 kilograms to 1000 kilograms" is equivalent to "220 pounds to 2200 pounds".

[16] Mr. Ingalls testified that an employee of the Portway facility, Mr. Ishmael Pineado told him that the sumps had last been cleaned out eight years before the August 14, 2001 inspection.

[17] The minimum amount of time that the waste was stored in the sumps was from one week before June 18, 2001, until August 14, 2001, or a period of 64 days.

[18] At a minimum, the hazardous waste was stored at the Portway facility for 275 days, from June 18, 2001 until March 20, 2002.

allowing the hazardous waste to escape the sumps through cracks or imperfections and enter the land or water. Respondent offered testimony that the concrete sumps were designed in 1978 and that the concrete was coated to prevent leakage or absorption of material. Respondent conceded, however, that the sumps were not inspected daily.

There was no evidence offered about the "intended life" span of the concrete in the sumps. Nonetheless, Respondent failed to properly inspect the 25-year-old sumps. Moreover, it is clear from this record that the sumps were not designed to store the amount of hazardous waste that Respondent allowed to accumulate in the sumps. Respondent allowed hazardous waste to accumulate in the sumps for a period of approximately 64 days. Federal regulations prohibit storing hazardous waste in a tank if the waste *could* cause leakage or failure of the tank; proof of actual leakage or failure is not required. In this case, the preponderance of the evidence establishes that the acidic hazardous waste *could* cause the concrete sumps to leak, corrode or fail.

Failure to maintain and operate Portway facility so as to minimize possibility of unplanned release of or exposure to hazardous waste

Under 40 CFR 265.31, "Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment."

In this case, the record establishes that Respondent allowed acidic, toxicity characteristic hazardous waste to accumulate in the concrete sumps beneath the electroplating room floor. According to the Department's laboratory, the liquid in the sumps contained high levels of chromium. There was no inspection regimen, and approximately 550 gallons of the hazardous waste was allowed to remain in the sumps for about 64 days. The floorboards in the electroplating room were sodden and swollen. Respondent knew, on June 18, 2001, that approximately 550 gallons of water had been pumped into the electroplating room, yet Respondent did not take any steps to inspect the 25 year old sumps, or remove the hazardous waste from the sumps, until after Mr. Ingalls' inspection on August 14, 2001. Indeed, Mr. Wiltz was surprised to find the green liquid in the sumps. According to Mr. Ingalls, it was possible that the acidic nature of the hazardous waste could compromise the integrity of the concrete in the sumps.

Under these circumstances, it is apparent that Respondent did not maintain and operate its Portway facility to minimize release of hazardous waste into the environment, or to minimize exposure of its workers to hazardous waste.

Biannual storm water monitoring and filing of annual monitoring reports

In 1997, the Department issued Respondent a National Pollutant Discharge Elimination System Storm Water Discharge Permit. The permit was valid until June 20, 2002, and was in place during the inspection on August 14, 2001. This was not Respondent's first permit. By the terms of the permit, Respondent was required to conduct biannual sampling of its storm water

discharge, and to file annual monitoring reports with the Department about this sampling. Mr. Ingalls checked the Department's databases and determined that since 1993 Respondent had not filed any monitoring reports. Mr. Wiltz confirmed that Respondent had not conducted biannual sampling as required by Respondent's permit.

Respondent offered evidence that biannual sampling was not possible because the storm drain outfall pipe was below the surface of the Columbia River. In addition, Mr. Wiltz testified that someone at the Department told him, sometime between 1993 and 2001, that Respondent did not need to sample or submit reports because of the location of the outfall pipe. Mr. Wiltz was unable to recall whom he spoke with, or when this conversation occurred. Respondent also offered testimony that there had not been any significant rainfall prior to the inspection on August 14, 2001, so there was no storm water available for sampling.

The Department offered evidence that on August 14, 2001, the outfall pipe was well above the level of the river. Mr. Ingalls described the pipe as "high and dry." In addition, Mr. Ingalls checked with the National Weather Service and learned that the Hood River area had received 0.31 inches of rain on July 21, 2001 and 0.47 inches of rain on July 31, 2001.

Under these circumstances, I am persuaded by the Department's evidence. Respondent's evidence on this issue was incomplete, contradictory and conclusory. *See Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979)(J. Richardson concurring). In addition, I reject Mr. Jensen's argument that Respondent should not be penalized for failing to comply with their permit requirements because in their 25 years at the Portway location, the Department never raised Respondent's failure to sample and file reports before. This is belied by evidence that he knew that Respondent's permit required the biannual sampling and annual filing of monitoring reports. The terms of the permit are clear. Respondent is responsible for complying with the permit, and is subject to penalties for its non-compliance.

Assessment of Civil Penalty

The Director of the Department is authorized to assess civil penalties for any violations of the Department's rules or statutes. OAR 340-012-0042. The amount of civil penalties assessed is determined through use of matrices and a formula contained in OAR 340-012-0045. See OAR 340-012-0042.

In this case, the Department determined that Respondent was liable for $34,801 in civil penalties based on Respondent's numerous violations. (Ex. P-2.) These penalties include the violations Respondent admitted, as well as those violations proven at hearing. The civil penalties were determined by calculating the base penalty (BP) and considering other factors, such as prior significant actions (P), past history (H), the number of occurrences (O), the cause of the violation (R), Respondent's cooperation (C), and the economic benefit that Respondent gained by noncompliance with the Department's rules and statutes. The formula for determining civil penalties in this case is expressed as follows: "BP + [(0.1 x BP) x (P + H + O + R + C)] + EP." The calculations for each individual penalty are appended to Exhibit P-2, and are incorporated by reference as if fully set forth herein.

discharge, and to file annual monitoring reports with the Department about this sampling. Mr. Ingalls checked the Department's databases and determined that since 1993 Respondent had not filed any monitoring reports. Mr. Wiltz confirmed that Respondent had not conducted biannual sampling as required by Respondent's permit.

Respondent offered evidence that biannual sampling was not possible because the storm drain outfall pipe was below the surface of the Columbia River. In addition, Mr. Wiltz testified that someone at the Department told him, sometime between 1993 and 2001, that Respondent did not need to sample or submit reports because of the location of the outfall pipe. Mr. Wiltz was unable to recall whom he spoke with, or when this conversation occurred. Respondent also offered testimony that there had not been any significant rainfall prior to the inspection on August 14, 2001, so there was no storm water available for sampling.

The Department offered evidence that on August 14, 2001, the outfall pipe was well above the level of the river. Mr. Ingalls described the pipe as "high and dry." In addition, Mr. Ingalls checked with the National Weather Service and learned that the Hood River area had received 0.31 inches of rain on July 21, 2001 and 0.47 inches of rain on July 31, 2001.

Under these circumstances, I am persuaded by the Department's evidence. Respondent's evidence on this issue was incomplete, contradictory and conclusory. *See Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979)(J. Richardson concurring). In addition, I reject Mr. Jensen's argument that Respondent should not be penalized for failing to comply with their permit requirements because in their 25 years at the Portway location, the Department never raised Respondent's failure to sample and file reports before. This is belied by evidence that he knew that Respondent's permit required the biannual sampling and annual filing of monitoring reports. The terms of the permit are clear. Respondent is responsible for complying with the permit, and is subject to penalties for its non-compliance.

Assessment of Civil Penalty

The Director of the Department is authorized to assess civil penalties for any violations of the Department's rules or statutes. OAR 340-012-0042. The amount of civil penalties assessed is determined through use of matrices and a formula contained in OAR 340-012-0045. See OAR 340-012-0042.

In this case, the Department determined that Respondent was liable for $34,801 in civil penalties based on Respondent's numerous violations. (Ex. P-2.) These penalties include the violations Respondent admitted, as well as those violations proven at hearing. The civil penalties were determined by calculating the base penalty (BP) and considering other factors, such as prior significant actions (P), past history (H), the number of occurrences (O), the cause of the violation (R), Respondent's cooperation (C), and the economic benefit that Respondent gained by noncompliance with the Department's rules and statutes. The formula for determining civil penalties in this case is expressed as follows: "BP + [(0.1 x BP) x (P + H + O + R + C)] + EP." The calculations for each individual penalty are appended to Exhibit P-2, and are incorporated by reference as if fully set forth herein.

Based on this record, the civil penalty assessment of $34,801 is accurate and warranted.

PROPOSED ORDER

I propose that the Department issue the following order:
Respondent is subject to a civil penalty in the amount of $34,801.

Andrea H. Sloan
Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: June 16, 2003

REVIEW

If you are not satisfied with this decision, you have a right to petition the Environmental Quality Commission for review. To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date of service of this Order, as provided in Oregon Administrative Rule (OAR) 340-011-0132(1) and (2). Service is defined in OAR 340-011-0097, as the date the Order is mailed to you, not the date you receive it. The Petition for Review must be filed with:

Environmental Quality Commission
c/o DEQ – Assistant to the Director
811 SW 6th Avenue
Portland OR 97204

Within 30 days of filing the Petition, you must also file exceptions and a brief as provided in OAR 340-011-0132(3).

CERTIFICATE OF SERVICE

I certify that on June 16, 2003, I served the attached Proposed Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

PHIL JENSEN
LUHR JENSEN & SONS INC
PO BOX 297
HOOD RIVER OR 97031

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 3254

JEFF BACHMAN
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

Lucy Garcia

Lucy Garcia, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

HR·JENSEN™ & SONS, INC.

400 Portway Ave., P.O. Box 297, Hood River, OR 97031 • (541) 386-3811 • Fax (541) 386-4917 • www.luhrjensen.com

May 6, 2003

Andrea Sloan
Administrative Law Judge
Hearing Officer Panel
1905 Lana Ave., NE
Salem, OR 97314

Subject: In answer to the April 30 Hearing Memorandum submitted by DEQ legal representative Jeff Bachman, regarding case No. LQ/HW-ER-275

Dear Judge Sloan;

My main concern was with the statement made by Mr. Bachman that Luhr Jensen had admitted to certain violations (A5 through A11 and B1) at a previous hearing (contested case hearing held on March 18 ...and April 17), and that only the remaining issues were "on the table" for consideration. You will recall that... at our tribunal hearing held at the downtown offices of the DEQ on March 18, 2003, we discussed the issue, briefly, and it was acknowledged that all 14 issues were open and would be challenged in the presentation booklet that was circulated. The booklet explained Luhr Jensen's understanding of each allegation, gave further explanation of the circumstances and presented our "pleading". Several of the allegations were agreed with and the resulting fines were accepted. For your convenience, a listing of these, with notations of acceptance or denial, is attached. This information is supported by the original booklet that you and Mr. Bachman (and others) have in your hands.

It is worthy of note that the department required 6 months to prepare the list of allegations, and that Luhr Jensen was given 20 days to respond, in which time we had to locate and meet with an attorney and were guided by his recommendations. Upon further and deeper consideration, our position became clearer to us, and the request for an appeals hearing was submitted.

Please refer to the presentation booklet for an "in-depth" understanding of the circumstances of the specific situations that triggered the allegations. I hope that we all understand that Luhr Jensen has no great argument with the field inspector, nor the

mechanics at home office that interpret what the field inspector reported. They are simply doing the job that they are trained and qualified for. Luhr Jensen does, however, have a substantial argument with the methodology and direction of the DEQ Department of Enforcement and the zeal and the extent with which the field inspector and others concerned executed their charge. We presume, that this is the reason that the accused entity is given the opportunity for a denial of the allegations, and to take advantage of the several hearings or tribunals that are available to the person or company that is being charged …to best explain their view of the accompanying circumstances.

The previously submitted presentation booklet outlines all of this, and suggests which of the allegations that the company will admit to. For the purposes of this tribunal, I believe that this is all that is required.

Thanks for your considerations during this tribunal. We are looking forward to a fair and just resolution of this matter, just as the DEQ is, …also.

Very best regards,

Phil Jensen

Cc; Jeff Bachman
Dave Lind
Beth Hogan
Mark Wiltz

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: LUHR JENSEN & SONS Respondent.	HEARING MEMORANDUM No. LQ/HW-ER-01-275 HOOD RIVER COUNTY

This Hearing Memorandum is offered in support of Notice of Assessment of Civil Penalty (Notice) No. LQ/HW-ER-01-275, issued April 17, 2002, as amended on March 4, 2003, to Luhr Jensen & Sons, Inc., by the Department of Environmental Quality (the Department or DEQ).

INTRODUCTION

Luhr Jensen & Sons, Inc. (Luhr Jensen) is a privately held Oregon corporation that manufactures fishing lures and other products in Hood River, Oregon. Luhr Jensen operates three facilities, the Oak Grove facility, the Portway facility, and the Jen-Tech facility, in Hood River. The fishing lure manufacturing process generates regulated hazardous wastes from electroplating and painting of the lures.

On August 14, 2001, DEQ conducted an inspection of Luhr Jensen's Portway facility to determine the company's compliance with state hazardous waste and other environmental law. A follow-up inspection was conducted on August 30, 2001. As a result of the investigation, DEQ issued Luhr Jensen a Notice of Assessment of Civil Penalty (the Notice) on April 17, 2002. The Notice alleged that Luhr Jensen had committed 11 violations of hazardous waste regulations (A1 through A11) and three violations of water quality regulations (B1 through B3). The Notice assessed total civil penalties of $66,534 for the 14 alleged violations.

Luhr Jensen appealed the Notice and requested a contested case hearing. On March 4, 2003, DEQ amended the Notice reducing the civil penalties for violations A1 through A5 and A8 through A10. DEQ also amended Section III, Paragraph A2 of the Notice. A contested case hearing was held on March 18 and April 17, 2003.

///

DISCUSSION

In its Answer to the Notice, and at hearing, Luhr Jensen admitted to violations A5 though A11 and B1. Therefore, the Hearing Officer must only determine Luhr Jensen's liability for violations A1 through A4, B2 and B3, and whether the civil penalties assessed for all the violations were correctly calculated.

Violation A1 – Illegal Storage of Hazardous Waste

Oregon Revised Statute (ORS) 466.095(1) states that "Except as provided in ORS 466.075(2), no person shall: (a) store hazardous waste anywhere in the state, except at a permitted hazardous waste treatment, storage or disposal site." Jeff Ingalls, a DEQ Hazardous Waste Specialist, testified at hearing that during his August 14, 2002 inspection of Luhr Jensen's Portway facility he observed four 55-gallon drums labeled "tin plating solution" in the facility's acid storage room. See DEQ Exhibits 4-1 through 4-5.

At that time, Mr. Ingalls asked Mark Wiltz, Luhr Jensen's environmental manager, who was accompanying him on the inspection, what were the origin and nature of the contents of the drums. Mr. Wiltz told Mr. Ingalls that the drums contained waste tin plating solution generated when Luhr Jensen changed out the old solution for its tin plating bath at its Oak Grove facility for new solution on July 6, 2001. According to Mr. Ingalls, Mr. Wiltz said that he thought the pH of the waste was 4 or 5, and that the material had been brought from the Oak Grove to Portway for storage until Luhr Jensen decided how best to manage the waste.

Mr. Ingalls testified that he field tested the solution and found that it had a pH of 0.5. Pursuant to 40 Code of Federal Regulations (CFR) 261.22(a)(1)[1] any solid waste[2] that has a pH equal to or less than 2 is a characteristic hazardous waste for corrosivity. During his follow-up inspection on August 30, 2001, Mr. Ingalls collected samples from three of the drums containing

///

[1] The Environmental Quality Commission has adopted 40 CFR Parts 260 to 266, 268, 270, and 273 pursuant to Oregon Administrative Rule (OAR) 340-100-0002 and OAR 340-102-0034.

[2] Under the hazardous waste regulations, liquid wastes are "solid" wastes. See 40 CFR 261.2.

waste tin plating solution. The DEQ laboratory analyzed the samples, using the method specified in 40 CFR 261.22(a)(1), and determined the pH for all three samples to be less than 1. See Exhibit 2.

Mr. Ingalls testified that Luhr Jensen has not been issued a hazardous waste treatment, storage or disposal (TSD) facility permit, nor did Luhr Jensen offer any evidence that Portway is a permitted TSD facility. The exception in ORS 466.075(2)[3] to the general prohibition against unpermitted storage of hazardous waste does not apply because the waste tin plating solution was not being stored on site at the facility where it was generated. See 40 CFR 262.34(a). Luhr Jensen violated ORS 466.095(1)(a) by storing hazardous waste generated at its Oak Grove facility at its Portway facility without possessing a TSD permit.

Violation A2 – Storing Hazardous Waste in Excess of 180 days

40 CFR 262.34(d) allows small quantity generators of hazardous waste to store hazardous waste on site for up to 180 days without obtaining a TSD permit. Mr. Ingalls' uncontroverted testimony at hearing is that Luhr Jensen reported itself to be a small quantity generator for all of 2001. DEQ also submitted at hearing Luhr Jensen's generator report for 2001 in which it identified itself as a small quantity generator.

Mr. Ingalls testified that during his August 14, 2001 inspection, he discovered that Luhr Jensen had allowed plating wastes to accumulate in a concrete sump located under slatted floor boards in the Portway facility's plating room. See Exhibit 5-1 through 5-4. During his August 30, 2001 follow-up inspection, Mr. Ingalls collected two samples, Samples 002 and 003, from the sump. DEQ's laboratory analyzed the samples, using the methodology prescribed in 40 CFR 261.24(a), and determined that Samples 002 and 003 contained chromium at concentrations of 1,580 milligrams per liter (mg/L) and 743 mg/L, respectively. Pursuant to 40 CFR 261.24, a solid waste containing chromium at a concentration equal to or greater than 5 mg/L is a toxicity characteristic hazardous waste.

[3] ORS 466.075(2) states that "The generator of a hazardous waste shall be allowed to store a hazardous waste produced by that generator on the premises of that generator for a term not to exceed that set by rule without obtaining a hazardous waste storage site permit." The rule referenced in the statute is 40 CFR 262.34.

The testimony at hearing provided no clear evidence as to how long the plating waste had been in the sump prior to Mr. Ingalls' August 14, 2001 inspection. What is clear, however, is that the waste was not removed from the Portway facility and properly disposed of until March 20, 2002, a period of 218 days. See Exhibit 6. Luhr Jensen accumulated hazardous waste on site for greater than 180 days without obtaining a TSD permit, in violation of 40 CFR 262.34.[4]

Violation 3 – Storing Hazardous Waste in a Tank that Does Not Meet Federal and State Hazardous Waste Tank Standards

40 CFR 262.34(a)(1) requires that tanks used to store hazardous waste meet the requirements of 40 CFR 265, Subpart J. 40 CFR 265.195 requires owners and operators to inspect hazardous waste storage tanks at least once on each operating day. At hearing, Mr. Wiltz testified that the Portway plating room sump where hazardous waste was allowed to accumulate was not inspected on a daily or any other periodic basis. Luhr Jensen violated 40 CFR 262.34(1)(a).

Violation 4 – Failing to Maintain or Operate Facilities in a Manner the Minimizes the Risk of Release or Exposure

Pursuant to 40 CFR 262.34(d)(4) requires small quantity generators of hazardous waste to comply with the requirements of 40 CFR 265, Subpart C, including 40 CFR 265.31. That regulation requires that facilities be "maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment."

At hearing, Mr. Ingalls testified that he field tested the pH of the waste in the sump and found it to be acidic, ranging from 4 near the chrome plating bath to 6 near the nickel plating bath. Mr. Ingalls further testified that the given the acidic nature of the waste that accumulated in the sump and the long period of use, nearly 25 years, there was a risk that the concrete in the sump may

[4] 40 CFR 262.34(d) also states that a generator who has "interim status" is also excepted from the requirement to send waste to a permitted TSD within 180 days. Interim status is the term used for facilities which were allowed to treat store of dispose of hazardous waste while their application for a TSD permit is pending. See 40 CFR 270, Subpart G. DEQ neglected to introduce evidence at hearing that Luhr Jensen does not have interim status. Interim status, however, is an exception to the general prohibition against small quantity generators storing waste on site for more than 180 days. As an exception, DEQ submits that interim status is an affirmative defense for which Luhr Jensen bears the burden of proof.

have become corroded and allowed hazardous waste constituents to escape into the underlying soil and ground water. After being made aware of this risk, Luhr Jensen agreed to conduct an assessment to determine whether the sump had in fact leaked. In using the sump to store an acidic waste that was hazardous for chromium toxicity of hazardous waste constituents over a period of nearly 25 years, Luhr Jensen failed to operate and maintain its facilities in a manner the minimized the risk of release in violation of 40 CFR 265.31.

Violations B2 and B3 – Failure to Comply with Storm Water Discharge Permit Requirements by Conducting Required Monitoring and Submit Required Reports

At hearing, Luhr Jensen admitted that it failed to comply with the requirements of its National Pollutant Discharge Elimination System 1200-Z permit by conducting required monitoring and submitting required reports. The company did, however, raise what is essentially an estoppel defense. Mr. Wiltz testified that he told a DEQ staff person that Luhr Jensen was unable to collect samples because the end of its storm water outfall pipe was below the surface of the Columbia River, and that the DEQ staff member acquiesced to Luhr Jensen's not conducting the storm water monitoring.

As an initial matter, Luhr Jensen is barred from raising this defense at hearing because it failed to raise it in its Answer to the Notice. OAR 340-011-0107(2) provides in relevant part as follows: "In the answer, the party shall admit or deny all factual matters and shall affirmatively allege any and all affirmative claims or defenses the party may have and the reasoning in support thereof. Except for good cause shown: * * * (b) Failure to raise a claim or defense shall be presumed to be a waiver of such claims or defenses." Luhr Jensen has not offered any evidence of good cause why it could not have raised this defense in its answer. While Luhr Jensen was not represented at hearing, its Answer was prepared and submitted by legal counsel, who did in fact raise several equitable defenses.

If the Hearing Officer does find that the estoppel defense was properly raised, Luhr Jensen has not met its burden of proof by submitting credible evidence to establish that a DEQ staff person ever said it was acceptable for Luhr Jensen to not comply with its monitoring and

reporting obligations. Luhr Jensen's evidence was Mr. Wiltz's vague testimony that he had such a conversation with a DEQ staff person sometime in the last five or six years. He could not identify the staff person or be any more precise on when the alleged conversation took place. It begs credibility that a person charged with environmental compliance at a manufacturing facility the size of Luhr Jensen would not better document an alleged statement relieving the company of specific legal obligations, noncompliance with which are subject to civil and criminal penalties.

Furthermore, DEQ introduced evidence that contradicts the fundamental premise of Luhr Jensen's defense, that it was unable to collect storm water samples. Exhibit 11 shows Luhr Jensen's storm water outfall pipe above water on August 14, 2001. Mr. Ingalls testified that he learned from the National Weather Service that Hood River experienced storm events of .31 inches and .47 inches of rain on July 21 and 30, 2001, respectively. In addition, after Mr. Ingalls' inspection, Luhr Jensen solved its perceived sampling problem by simply cutting a sampling port into its outfall pipe, alleviating the need to collect samples at the end of the pipe.

Affirmative Defenses

In its Answer, Luhr Jensen raised four affirmative defenses. The company, despite bearing the burden of proof, has not, however, submitted any legal argument or evidence why those defenses are relevant, let alone why it should be entitled to any of the defenses. The Hearing Officer should not consider these defenses in arriving at her decision concerning the violations still at issue in this case.

CIVIL PENALTY CALCULATIONS

OAR 340-012-0045 sets forth the procedures for determining civil penalties. The first step in the process is to determine the class and the magnitude of the violation to arrive at a base penalty. Then mitigating and aggravating factors are determined and applied to the base penalty. The last step is to determine and add the economic benefit, if any, derived from the violation. The Department assessed Luhr Jensen 14 civil penalties. Discussed below are the determinations at issue in this case.

///

"P" Factor, All Violations

The P factor is the Respondent's prior significant actions[5], or, in other words, its history of complying with Oregon environmental law. Department Exhibit 10 is Luhr Jensen's relevant prior significant action, a Notice of Assessment of Civil Penalty issued July 17, 1997, and a Mutual Agreement and Order issued October 21, 1998 that revised the Notice. The Department's determination of the P factor for all violations is set forth in the Notice of Assessment of Civil Penalty, Exhibits A1 through A11 and B1 through B3.

"R" Factor, All Violations

The R factor "is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act of the Respondent." See OAR 340-012-0045(1)(c)(D). In Violations A2 through A11 and B1 through B3, the Department determined that the violations were caused by Respondent's negligent conduct. For purposes of determining civil penalties, "negligent" "means failure to take reasonable care to avoid a foreseeable risk of committing an act or omission constituting a violation." See OAR 340-012-0030(11).

Luhr Jensen is a regulated generator of hazardous waste with a history of noncompliance with the hazardous waste regulations. Having been previously penalized by DEQ for hazardous waste violations, the risk that Luhr Jensen could commit violations in the future was certainly foreseeable for the company. Furthermore, there were no facts or circumstances surrounding violations A2 through A11 that would have rendered them unforeseeable. The wastes were at all times under the care and control of Luhr Jensen, and the violations did not involve acts or omissions by third parties. The actions necessary to avoid committing these violations were well within Luhr Jensen's capability. Reasonable care by Luhr Jensen would have precented the violations from occurring. Violations A1 through A11 were the result of Luhr Jensen's negligent conduct.

[5] 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." See OAR 340-012-0030(14).

Concerning Violations B2 through B3, DEQ has issued Luhr Jensen a storm water discharge permit. The conditions of the permit, including the requirements to conducting monitoring and submit reports are express and unequivocal. Luhr Jensen knew or should have known of these requirements. For Violation B1, by virtue of its storm water permit, Luhr Jensen knew or should have know of the possibility that wastes from its operations could be discharged to the Columbia River. Violations B1 through B3 are the result of Luhr Jensen's negligent conduct.

For Violation A1, the illegal storage of the tin plating waste at Portway, DEQ found that violation was a result of Luhr Jensen's intentional conduct. OAR 340-012-0030(9) defines "intentional as "conduct by a person with a conscious objective to cause the result of the conduct." Intentional does not mean that the Respondent knew it was violating the law, only that it consciously engaged in the conduct that led to the violation. Mr. Ingalls' uncontroverted testimony is that was Luhr Jensen's purpose to store, at Portway, the waste tin plating solution generated at Oak Grove. Whether Luhr Jensen knew the waste to be hazardous, or stored the waste knowing such conduct to be illegal, is irrelevant as to whether its conduct was intentional.

Magnitude, Violations A1 through A6.

The magnitudes for hazardous waste violations are set forth in OAR 340-012-0090(3)(c). Violations A2 through A4 were related to the chromium toxicity characteristic waste stored in the sump beneath the Portway facility's plating room. DEQ Exhibit 6 includes a hazardous waste manifest for the waste removed from the sump and indicates that 550 gallons of chrome plating sludge had been stored there. Pursuant to OAR 340-012-0090(3)(c)(B), hazardous waste management violations involving 250 gallons or more of waste, but less than 1,000 gallons, are of moderate magnitude.

Violations A1 and A5 involved the four 55-gallon drums of corrosive hazardous waste characteristic tin plating waste generated at Luhr Jensen's Oak Grove facility that was transported to the Portway facility and stored there. Pursuant to OAR 340-012-0090(3)(c)(C)

hazardous waste management violations involving less than 250 gallons of hazardous waste are of minor magnitude.

Violation A6 involved Luhr Jensen's failure to manifest the shipment of tin plating waste from Oak Grove to Portway. DEQ does not consider manifesting to be a management requirement, but rather a treatment, storage or disposal requirement. A manifest is required when waste is moved from its site of generation to a treatment, storage and disposal facility. In essence, by manifesting waste, the generator is indicating its intention to transfer care and control of the waste to another person, even if that other person is another facility of the same company that possesses a TSD permit.

There is no selected magnitude for failing to prepare a hazardous waste manifest in OAR 340-012-0090(3)(c). Pursuant to OAR 340-012-0045(1)(a)(B), in the absence of a selected magnitude, the magnitude is moderate unless the Department can make findings sufficient to support a magnitude of major or minor. For major magnitude, the Department must find that the violation "had a significant adverse impact on the environment, or posed a significant threat to public health. Because no actual environmental damage or human exposure resulted from the failure to manifest the waste, the Department could not make a finding of major magnitude.

For minor magnitude, the Department must find 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." The failure to manifest the tin plating waste created a risk that the waste could have been mishandled by a subsequent transporter or TSD facility resulting in environmental or human exposure. Because the violation had the potential for adverse impact on the environment, the Department could not make a finding of minor.

<u>"O" Factor, Violations A1 through A4, A8, A9, A11, B1 through B3</u>

The O factor "is whether the violation was repeated or continuous". See OAR 340-012-0045(1)(c)(C). The Department found that Violations A1 through A4, A8, A9, and B1 through B3, were repeated or continuous. According to Mr. Ingalls testimony, Luhr Jensen began storing the waste tin plating solution involved in Violation A1 shortly after it was generated on July 6,

2001. Luhr Jensen illegally stored the waste at Portway continuously from mid-July 2001 to mid-August 2001. The violation occurred for more than one day.

Violations A2 through A4 involved the plating wastes allowed to accumulate in the sump below the Portway facility plating room. Waste had been allowed to accumulate in the sump for an undetermined period prior to its discovery by Mr. Ingalls on August 14, 2001. Mr. Wiltz testified that it was Luhr Jensen's normal practice to allow plating wastes to accumulate in the sump and that the sump was cleaned out infrequently. Violations A2 through A4 continued for more than one day.

Violation A8 involved Luhr Jensen's failure to file complete hazardous waste reports for the years 1998, 1999, and 2000. Luhr Jensen continued to be in violation from the date each report came due until the reports were submitted in late 2001. Violation A8 continued for more than one day.

Violation A9 involved Luhr Jensen's failure to perform a hazardous waste determination on the tin plating waste generated at its Oak Grove facility on July 6, 2001. No waste determination was performed until Mr. Ingalls field tested the waste on August 14, 2001. The violation occurred from July 6, 2001 until August 14, 2001.

Violation A11 involved Luhr Jensen's failure to keep hazardous waste containers closed except when necessary to add or remove waste. Violation A11 involved four open containers located in three different areas of the facility. Violation A11 was repeated.

Violation B1 involved Luhr Jensen allowing wastes to accumulate in storm drain at its Portway facility. Mr. Ingalls observed that the waste had been accumulating in the drain for some time prior to his August 14 and August 31, 2001 inspections. Violation B1 occurred for more than one day. Violations B2 and B3 concerned Luhr Jensen's failure to conduct required monitoring and reporting since 1994, which were therefore violations continuing for more than one day.

///

///

"C" Factor, Violations A3 through A9 and B1 through B3

The C factor "is Respondent's cooperativeness and efforts to correct the violation." See OAR 340-012-0045(1)(c)(E). To receive the credit for cooperativeness, a Respondent must demonstrate that it " was cooperative and took reasonable efforts to correct the violation, took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the violation would not be repeated." For Violations A3 through A9 and B1 through B3, Respondent failed to introduce evidence at hearing sufficient to prove that it met the requirements for receiving the cooperativeness credit for those violations.

CONCLUSION

For the reasons cited herein, the Hearing Officer should issue a Proposed Order assessing Luhr Jensen & Sons, Inc., a civil penalty of $34,801 as calculated in the exhibits attached to the Notice of Assessment of Civil Penalty.

DATED this 30th day of April 2003.

Respectfully submitted,

Jeff Bachman,
Environmental Law Specialist
Office of Compliance and Enforcement
Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that I served the Hearing Memorandum within on the 30th day of April, 2003 upon

Andrea L. Sloan
Administrative Law Judge
Hearing Officer Panel
1905 Lana Avenue, NE
Salem, OR 97314
Fax: (503) 945-5034

Phil Jensen, President
Luhr Jensen & Sons, Inc.
P.O. Box 297
Hood River, OR 97031
Fax: (541) 386-3811

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 April 30, 2003

Debb Nesbit, Admin Ass't, OCE, DEQ

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 17, 2002

CERTIFIED MAIL No. 7001 1140 0002 3546 5683

Luhr Jensen & Sons, Inc.
c/o Elizabeth K. Hogan, Registered Agent
400 Portway Ave.
Hood River, OR 97031

Re: Notice of Assessment of Civil Penalty
No. LQ/HW-ER-01-275
Hood River County

On August 14, 2001, DEQ Hazardous Waste Specialist Jeff Ingalls conducted an inspection of the Luhr Jensen & Sons, Inc. facility at 400 Portway in Hood River, Oregon. On August 30, 2001, Mr. Ingalls conducted a follow-up inspection during which he sampled four drums containing tin plating solution from the company's Oak Grove facility and stored at Portway, sludge from a sump under the facility's plating room, and water and sediment in a facility storm drain.

As a result of Mr. Ingalls' inspections, the Department has documented the following violations of Oregon law:

adm (1) Illegally storing at the Portway facility hazardous waste generated at Oak Grove.

(2) Storing hazardous waste in the sump under the Portway facility's plating room for greater than 180 days.

(3) Storing hazardous waste in a tank (the Portway plating room sump) that did not meet state and federal hazardous waste tank standards.

(4) Storing hazardous waste in a manner (an open sump under the Portway plating room) that failed to minimize a threat of release of hazardous waste or hazardous waste constituents to the environment or a threat to public health.

(5) Transporting hazardous waste (tin plating waste) from the Oak Grove to the Portway facility without first notifying the Department and obtaining a hazardous waste transporter identification number.

(6) Transporting hazardous waste (tin plating waste from Oak Grove) without preparing a hazardous waste manifest.

(7) Failing to provide a land disposal restriction notification for an off-site shipment of hazardous waste (Oak Grove tin plating waste).

adm (8) Failing to comply with hazardous waste generator reporting requirements by under-reporting the types of waste streams and quantities of hazardous wastes generated at the Portway facility in 1998, 1999, and 2000.

adm (9) Failing to perform a hazardous waste determination on the tin plating solution generated at Oak Grove.

A

EXHIBIT 1

DEQ-1

(10) Failing to store hazardous waste (cyanide plating filters on the floor of the Portway electroplating room) in a container, in a tank, on a drip pad, or in a containment building.

(11) Failing to keep multiple containers of hazardous waste in the flammable storage area and the caustic storage area of the Portway facility closed except when necessary to add or remove waste.

(12) Placing wastes where they are likely to enter waters of the states by any means by allowing industrial wastewater from the polishing room and sediments containing oil and grease, copper, lead, chromium and nickel to be discharged into a storm drain at the Portway facility.

(13) Failing to conduct twice annual monitoring of stormwater discharges as required under the Portway facility's stormwater discharge permit.

(14) Failing to submit an annual stormwater monitoring report as required under the Portway facility's stormwater discharge permit.

Violations 1 through 9 are Class I violations. Violations 10 through 14 are Class II violations.

Improper management of hazardous wastes threatens public health and the environment. To protect public health and the environment, the legislature has enacted statutes and the Department has adopted rules establishing strict requirements governing the accumulation, storage, handling, treatment, and disposal of hazardous wastes. Luhr Jensen & Sons' failure to comply with hazardous waste rules increases the risk that the public or the environment could be harmed by mismanagement of hazardous waste.

The Portway facility was previously inspected in 1989 and 1997. Both prior inspections documented serious violations of hazardous waste management laws and resulted in formal enforcement action by the Department consisting of civil penalty assessments. Luhr Jensen & Sons' continued violations compel the Department to deem the Portway facility a significant non-complier with the hazardous waste management laws and regulations.

In the enclosed Notice, Luhr Jensen & Sons is assessed a total civil penalty of $66,354 for the violations cited above. The amount of the penalty was determined using 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 Exhibits A1 – A11 and B1 – B3.

Appeal procedures are outlined in Section VI of the Notice. If Luhr Jensen & Sons fails to either pay or appeal the penalty within twenty (20) days, a Default Order will be entered against the company.

If you wish to discuss this matter, or if Luhr Jensen & Sons believes there are mitigating factors which the Department might not have considered in assessing the civil penalty, the company may request an informal discussion by attaching a request to the appeal. Luhr Jensen & Sons' request to discuss this matter with the Department will not waive the company's right to a contested case hearing.

I look forward to Luhr Jensen & Sons' cooperation in complying with Oregon's environmental laws in the future. Continued non-compliance will make Luhr Jensen & Sons subject to escalating levels of enforcement.

Copies of referenced rules are enclosed. If Luhr Jensen & Sons has 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:\winword\letters\1luhrltr.doc
Enclosures
cc: Jeff Ingalls, Eastern Region, Bend Office, DEQ
Land Quality Division, HQ, DEQ
Water Quality Division, HQ, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Deschutes County District Attorney

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: LUHR JENSEN & SONS, INC., an Oregon corporation, Respondent.	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. LQ/HW-ER-01-275 HOOD RIVER COUNTY

I. AUTHORITY

This Notice of Assessment of Civil Penalty (Notice) is issued to Respondent, Luhr Jensen & Sons, Inc., by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.126 through 468.140, ORS 466.990, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. FINDINGS

1. Luhr Jensen & Sons operates manufacturing facilities, the Oak Grove facility and the Portway facility, in Hood River, Oregon.

2. On August 14 and 30, 2001, Department staff conducted a hazardous waste compliance inspection at Portway facility.

3. The Portway facility is a registered small quantity generator of hazardous waste, registration number ORD 990751414.

4. During the years 1998, 1999, and 2000, the Portway facility generated the following hazardous wastes on a monthly basis, approximately 1,700 pounds of waste acetone (EPA Hazardous Waste Numbers F003 and D001), 80 pounds of acetone still bottoms (F003, D001), 200 pounds of waste lacquer thinner (D001, F003 and F005), and an unknown quantity of electroplating waste (F006 – F009).

5. For the years 1998, 1999, and 2000, the Portway facility did not report generating the waste acetone, the waste lacquer thinner, or the electroplating waste described in Paragraph 4, above.

(A)

EXHIBIT 2

6. The Oak Grove facility is not a registered generator of hazardous waste.

7. For the month of July 2001, the Oak Grove facility was a small quantity generator of hazardous waste as the facility generated approximately 200 gallons of tin plating waste, a corrosivity characteristic hazardous waste (EPA Hazardous Waste Number D002), weighing greater than 1,600 pounds.

8. The Portway facility is authorized to discharge stormwater to the Columbia River subject to the limitations and conditions of National Pollutant Discharge Elimination System General Permit 1200-Z, Facility ID No. 107234/A.

III. VIOLATIONS

A. Hazardous Waste Management, Storage and Transport

1. On and before August 14, 2001, Respondent violated ORS 466.095 by illegally storing hazardous waste. Specifically, Respondent stored four 55-gallon drums of spent tin plating solution generated at its Oak Grove facility in Hood River, Oregon, at its Portway facility in Hood River, Oregon. The tin plating solution was a corrosivity characteristic hazardous waste (D002). Respondent's Portway facility is not a permitted to receive hazardous waste for storage. Illegally storing hazardous waste is a Class I violation pursuant to OAR 340-012-0068(1)(d).

2. On and ~~before~~ before thru March 20, 2002 August 14, 2001, Respondent violated 40 Code of Federal Regulations (CFR) 262.34(d), adopted pursuant to OAR 340-100-0002, by storing hazardous waste in excess of 180 days. Specifically, Respondent caused or allowed approximately 1,600 gallons of chrome plating sludges, a toxicity characteristic hazardous waste for chromium (D007) and a listed hazardous waste (F006), to accumulate in a sump under its plating room at its Portway facility for a period of approximately eight years. This is a Class I violation pursuant to OAR 340-012-0068(1)(e).

Amended 3/4/03

3. On and before August 14, 2001, Respondent violated 40 CFR 262.34(a)(1)(ii), adopted pursuant OAR 340-100-0002, by storing hazardous waste in a tank that did not meet the requirements of Subpart J of 40 CFR Part 265. Specifically, the sump described in paragraph A2,

which was being used as a primary collection and storage tank for hazardous waste, did not meet the Subpart J requirements. This is a Class I violation pursuant to OAR 340-012-0068(1)(u).

4. On and before August 14, 2001, Respondent violated 40 CFR 265.31, by failing to maintain and operate its facility in a manner that minimizes the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the air soil or water or that could threaten human health and the environment. Specifically, Respondent failed to minimize the threat to human health and the environment by storing toxicity characteristic and listed hazardous waste in the open sump below its plating room at the Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(cc).

5. Some time between July 6, and August 14, 2001, Respondent violated 40 CFR 263.11(a), adopted pursuant to OAR 340-100-0002, by transporting hazardous waste without first obtaining a US Environmental Protection Agency hazardous waste transporter identification number. Specifically, Respondent failed to obtain a transporter identification number prior to transporting the hazardous waste described in Paragraph A1 from its Oak Grove facility to its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(nn).

6. Some time between July 6, and August 14, 2001, Respondent violated 40 CFR 262.20(a), adopted pursuant to OAR 340-100-0002, by failing to prepare a hazardous waste manifest prior to transporting hazardous waste. Specifically, Respondent failed to prepare a hazardous waste manifest prior to transporting the hazardous waste described in Paragraph A1 from its Oak Grove facility to its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(f).

7. Some time between July 6, and August 14, 2001, Respondent violated 40 CFR 268.7(a), adopted pursuant to OAR 340-100-0002, by failing to provide a land disposal restriction (LDR) notification on an off-site shipment of hazardous waste. Specifically, Respondent failed to provide LDR notification when it shipped the hazardous waste described in Paragraph A1 from its Oak Grove facility to its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(s).

8. On and before August 14, 2001, Respondent violated OAR 340-102-0041 by failing to comply with hazardous waste generator reporting requirements. Specifically, Respondent under reported the number and type of different hazardous waste streams it generated and the volumes of hazardous wastes generated in the years 1998, 1999, and 2000. This is a Class I violation pursuant to OAR 340-012-0068(1)(jj).

9. On and before August 14, 2001, Respondent violated OAR 340-102-0011, by failing to perform a hazardous waste determination. Specifically, Respondent failed to perform a hazardous waste determination on the waste described in Paragraph A1. This is a Class I violation pursuant to OAR 340-012-0068(1)(b).

10. On and before August 14, 2001, Respondent violated 40 CFR 262.34(a)(1)(i) by failing to store hazardous waste in a container. Specifically, Respondent stored listed hazardous waste (F008 and F009) cyanide plating filters placed on the floor of the electroplating room instead of in a container, in a tank, on a drip pad, or in a containment building. This is a Class II violation pursuant to OAR 340-012-0068(2)(m).

11. On or about August 14, 2001, Respondent violated 40 CFR 265.173(a), adopted pursuant to OAR 340-100-0002, by failing to keep hazardous waste containers closed except when necessary to add or remove wastes. Specifically, Respondent failed to keep closed two 55-gallon containers of ignitability characteristic hazardous waste (D001) in its flammable storage area; a satellite container of listed hazardous cyanide plating waste (F008 and F009) in its caustic storage room; and a satellite container of listed hazardous cyanide plating waste (F008 and F009) in its electroplating room. These are Class II violations pursuant to OAR 340-012-0068(2)(d).

B. Water Quality

1. On and before August 14, 2001, Respondent violated ORS 468B.025(1)(a) by placing wastes where they are likely to enter waters of the state by any means. Specifically, Respondent caused or allowed sediments containing nickel and chromium, as well as oil and grease, copper, and lead in concentrations greater than the benchmarks established in the facility's

stormwater discharge permit, to enter a storm drain at its Portway facility. This is a Class II violation pursuant to OAR 340-012-0055(c).

2. On or about July 1, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001, Respondent violated ORS 468B.025(2) by violating a condition of its National Pollutant Discharge Elimination System General Permit 1200-Z. Specifically, Respondent violated Schedule B, Condition 1(a) of its permit by failing to perform twice annual stormwater monitoring during the prior monitoring year. These are Class II violations pursuant to OAR 340-012-0055(2)(g).

3. On or about July 15, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001, Respondent violated ORS 468B.025(2) by violating a condition of its National Pollutant Discharge Elimination System General Permit 1200-Z. Specifically, Respondent violated Schedule B, Condition 3 of its permit by failing to submit its annual stormwater monitoring report. These are Class II violations pursuant to OAR 340-012-0055(2)(a).

IV. COMPLIANCE ORDER

1. Within thirty (30) days of receipt of this Notice and Order, prepare amended annual hazardous waste reports for 1998, 1999, and 2000 that correct the number and types of wastes streams and quantities of hazardous wastes generated at Respondent's Portway facility and return those forms to the Department.

2. Within ten (10) days of receipt of an invoice from the Department, pay any hazardous waste generator fees that the Department invoices based on the amended annual reports for the Portway facility and submitted pursuant to Paragraph 1 of this section, above.

3. Within thirty (30) days of receipt of this Notice and Order notify the Department of the Oak Grove facility's generator status for July 2001, and obtain an EPA identification number.

4. Within 10 days of receiving an EPA identification number prepare an annual hazardous waste report for 2001 and return those forms to the Department.

5. Within ten (10) days of receipt of an invoice from the Department, pay any hazardous waste generator fees that the Department invoices based on the report for the Oak Grove facility and submitted pursuant to Paragraph 2 of this section, above.

V. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the violations cited in Section III, above, as follows:

Violation	Penalty Amount
A1	$7,200
A2	$17,654
A3	$9,600
A4	$9,600
A5	$4,200
A6	$4,200
A7	$4,200
A8	$1,800
A9	$1,600
A10	$700
A11	$800
B1	$1,600
B2	$1,600
B3	$1,600

Respondent's total civil penalty is $66,354. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-012-0045, are attached and incorporated as Exhibits A1 – A11 and B1 – B3.

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 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 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.

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.

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.

///

///

VIII. 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 $66,354 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**.

4-17-02
Date

Stephanie Hallock
Stephanie Hallock, Director

Oregon
Theodore R. Kulongoski, Governor

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

March 4, 2003

Andrea Sloan, Administrative Law Judge
Hearing Officer Panel
1905 Lana Avenue, NE
Salem, OR 97314
Certified Mail 7002 2410 0002 2229 7381

Phil Jensen, President
Luhr Jensen and Sons, Inc.
P.O Box 297
Hood River, OR 97031
Certified Mail 7002 2410 0002 2229 7398

Re: Luhr Jensen & Sons, Inc.
Hearing Panel Case No. 104220
DEQ Case No. LQ/HW-ER-01-275

Dear ALJ Sloan and Mr. Jensen:

As discussed during the pre-hearing conference please find enclosed amended civil penalty calculation exhibits for Violations A1 through A-5 and A8 through A10. These amendments reduce the total amount sought at hearing from $66,354 to $34,801. These reductions are based on new evidence collected after issuance of the Notice of Civil Penalty Assessment.

Please also be advised that the Department amends Section III, Paragraph A2 of the Notice of Assessment of Civil Penalty to read as follows:

Aug 14, 2001 "On or ~~about February 10, 2002~~ b/4 through March 20, 2002, Respondent violated 40 Code of Federal Regulations (CFR) 262.34(d), adopted pursuant to OAR 340-100-0002, by storing hazardous waste in excess of 180 days. Specifically, Respondent caused or allowed approximately 550 gallons of chrome plating sludge, a toxicity characteristic hazardous waste for chromium (D007) and a listed hazardous waste (F006), to be stored in a sump under its plating room at its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(e)."

As agreed during the pre-hearing the Department will submit proposed exhibits on March 11, 2003. If you have any questions or wish to discuss this matter, please contact me at (503)-229-5950.

Sincerely,

Jeff Bachman
Environmental Law Specialist
Office of Compliance and Enforcement

EXHIBIT 3 DEQ-1

AMENDED EXHIBIT A1

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

VIOLATION A1: Illegal storage of hazardous waste in violation of Oregon Revised Statute 466.095.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0068(1)(d).

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-12-0090(3)(c)(C) because the violation involved less than 250 gallons of hazardous waste.

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, minor 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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant actions and receives a value of –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 2, pursuant to OAR 340-012-0045(1)(c)(C)(ii), as the violation existed for more than one day.

"R" is the cause of the violation and receives a value of 6, pursuant to OAR 340-12-0045(1)(c)(D)(iii) as the cause of the violation was Luhr Jensen's intentional conduct. Luhr Jensen, with the conscious objective to cause the result of its conduct, stored at its Portway facility hazardous waste generated at its Oak Grove facility.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of -2, pursuant to OAR 340-012-0045(1)(c)(E)(1), as Respondent was cooperative and corrected the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $1,000 + [(0.1 x $1,000) x (4 + (-)2 + 2 + 6 + (-)2)] + $0
= $1,000 + [($100 x 8)]+ $0
= $1,000 + $800 + $0
= $1,800

AMENDED EXHIBIT A2

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

VIOLATION A2: Small-quantity generator storage of hazardous waste in excess of 180 days in violation of 40 Code of Federal Regulations 262.34(d), adopted pursuant to OAR 340-100-0002.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0068(1)(e).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0090(3)(c)(B) because the violation involved more than 250 but less than 1,000 gallons of hazardous waste.

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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"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 –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 2 pursuant to OAR 340-012-0045(1)(c)(C)(ii) as the violation existed for more than one day.

"R" is the cause of the violation and receives a value of 2, pursuant to OAR 340-012-0045(1)(c)(D)(ii) as the cause of the violation was Respondent's negligent conduct. Respondent was penalized for the same violation in 1997 and therefore knew or should of known that it could not store hazardous waste in excess of 180 days. Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of -2, pursuant to OAR 340-012-0045(1)(c)(E)(i), as Respondent was cooperative and corrected the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of $101 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 timely dispose of hazardous waste, Respondent delayed the $2,805 cost of proper disposal of the waste and therefore received an economic benefit of $101.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (4 + (-)2 + 2 + 2 + -2)] + $101
= $3,000 + [($300 x 4)] + $101
= $3,000 + $1,200 + $101
= $4,301

AMENDED EXHIBIT A3

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

VIOLATION A3: Storing hazardous waste in a tank that does not meet the requirements of Subpart J of 40 Code of Federal Regulations 265 in violation of 40 CFR 262.34(a)(1)(ii), adopted pursuant to OAR 340-100-0002.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0068(1)(u).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0090(3)(c)(B) because the violation involved more than 250 but less than 1,000 gallons of waste.

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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"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 –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 2 pursuant to OAR 340-012-0045(1)(c)(C)(ii) as the violation existed for more than one day.

"R" is the cause of the violation and receives a value of 2, pursuant to OAR 340-012-0045(1)(c)(D)(ii) as the cause of the violation was Respondent's negligent conduct. Respondent has twice previously been penalized, in 1989 and in 1997, for hazardous waste management violations. As a regulated entity, particularly one that has been previously penalized, Respondent has a duty to determine its compliance obligations and fulfill those obligations. In failing to do so, Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0, pursuant to OAR 340-012-0045(1)(c)(E)(ii). While Respondent was cooperative, it could not correct the violation once it had occurred, could not make reasonable efforts to minimize the effects of the violation and did not take extraordinary measures to prevent a recurrence of the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0, as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (4 + (-)2 + 2 + 2 + 0)] + $0
= $3,000 + [($300 x 6)] + $0
= $3,000 + $1,800 + $0
= $4,800

AMENDED EXHIBIT A4

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

VIOLATION A4: Failing to maintain and operate a facility in a manner minimizing the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water that could threaten human health or the environment in violation of 40 Code of Federal Regulations 265.31, adopted pursuant to OAR 340-100-0002.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0068(1)(cc).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0090(3)(c)(B) because the violation involved more than 250 gallons, but less than 1,000 of hazardous waste.

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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"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 –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 2 pursuant to OAR 340-012-0045(1)(c)(C)(ii) as the violation existed for more than one day.

"R" is the cause of the violation and receives a value of 2, pursuant to OAR 340-012-0045(1)(c)(D)(ii) as the cause of the violation was Respondent's negligent conduct. Respondent was penalized for the same violation in 1997 and therefore knew or should of known of its duty to manage hazardous waste in a manner that minimized the threat of release. Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as there is insufficient information on which to base a finding.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0, as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (4 + (-)2 + 2 + 2 + 0)] + $0
= $3,000 + [($300 x 6)] + $0
= $3,000 + $1,800 + $0
= $4,800

AMENDED EXHIBIT A5

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

VIOLATION A5: Transporting hazardous waste without first obtaining a US Environmental Protection Agency identification number in violation of 40 Code of Federal Regulations 263.11(a), adopted pursuant to OAR 340-100-0002.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0068(1)(nn).

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0090(3)(c)(C) because the violation involved less than 250 gallons of waste.

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, minor 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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"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 –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 pursuant to OAR 340-012-0045(1)(c)(C)(i) as the violation was a single occurrence.

"R" is the cause of the violation and receives a value of 2, pursuant to OAR 340-012-0045(1)(c)(D)(ii) as the cause of the violation was Respondent's negligent conduct. Respondent has twice previously been penalized, in 1989 and in 1997, for hazardous waste management violations. As a regulated entity, particularly one that has been previously penalized, Respondent has a duty to determine its compliance obligations and fulfill those obligations. In failing to do so, Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

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

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0, as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $1,000 + [(0.1 x $1,000) x (4 + (-)2 + 0 + 2 + 0)] + $0
= $1,000 + [($100 x 4)] + $0
= $1,000 + $400 + $0
= $1,400

AMENDED EXHIBIT A8

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

VIOLATION A8: Failure to comply with hazardous waste generator reporting requirements in violation of OAR 340-102-0041.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0068(1)(jj) because Respondent under reported the waste streams and volumes of wastes it generated in 1998, 1999, and 2000.

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0045(1)(a)(B)(ii) because the violation had no potential for or actual adverse impact on the environment and posed no threat to public health.

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, minor 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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"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 –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 2 pursuant to OAR 340-012-0045(1)(c)(C)(ii) as the violation occurred on more than one occasion.

"R" is the cause of the violation and receives a value of 2, pursuant to OAR 340-012-0045(1)(c)(D)(ii) as the cause of the violation was Respondent's negligent conduct. Respondent has twice previously been penalized, in 1989 and in 1997, for hazardous waste management violations. As a regulated entity, particularly one that has been previously penalized, Respondent has a duty to determine its compliance obligations and fulfill those obligations. In failing to do so, Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0, as Respondent has taken some steps towards compliance but has not corrected the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0, as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $1,000 + [(0.1 x $1,000) x (4 + (-)2 + 2 + 2 + 0)] + $0
= $1,000 + [($100 x 6)] + $0
= $1,000 + $600 + $0
= $1,600

AMENDED EXHIBIT A10

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

VIOLATION A10: Failure to store hazardous waste in a container in violation of 40 Code of Federal Regulations 262.34(a)(1)(i), adopted pursuant to OAR 340-100-0002.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0068(2)(m).

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0090(3)(c)(C) because the violation involved less than 250 gallons of hazardous waste

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, minor 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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"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 –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 pursuant to OAR 340-012-0045(1)(c)(C)(ii) as the violation occurred on one occasion.

"R" is the cause of the violation and receives a value of 2, pursuant to OAR 340-012-0045(1)(c)(D)(ii) as the cause of the violation was Respondent's negligent conduct. Respondent has twice previously been penalized, in 1989 and in 1997, for hazardous waste management violations. As a regulated entity, particularly one that has been previously penalized, Respondent has a duty to determine its compliance obligations and fulfill those obligations. In failing to do so, Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of -2 pursuant to OAR 340-012-0045(1)(c)(E)(i) as Respondent was cooperative and corrected the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0, as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $500 + [(0.1 x $500) x (4 + (-)2 + 0 + 2 + (-)2)] + $0
= $500 + [($50 x 2)] + $0
= $500 + $100 + $0
= $600

AMENDED EXHIBIT A11

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

VIOLATION A11: Failure to keep hazardous waste containers closed except when necessary to add or remove waste in violation of 40 Code of Federal Regulation 265.173(a), adopted pursuant to OAR 340-100-0002.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0068(2)(d).

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0090(3)(c)(C) because the violation involved less than 250 gallons of hazardous waste.

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, minor 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. Respondent has one prior significant action, HW-ER-97-095, which consists of five Class I or Class I equivalent violations, and results in an initial value of 6, pursuant to OAR 340-012-0045(1)(c)(A)(vii). The initial value is reduced by 2 pursuant to OAR 340-012-0045(1)(c)(A)(xii)(I) as the date of issuance of all the prior significant actions is more than three years old, resulting in a final value of 4.

"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 –2 pursuant to OAR 340-012-0045(1)(c)(B)(i) as Respondent took 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 2 pursuant to OAR 340-012-0045(1)(c)(C)(ii) as the violation was repeated.

"R" is the cause of the violation and receives a value of 2, pursuant to OAR 340-012-0045(1)(c)(D)(ii) as the cause of the violation was Respondent's negligent conduct. Respondent was cited for this same violation in 1997 Notice of Assessment of Civil Penalty and therefore knew or should of known that it was required to keep containers closed except when adding or removing waste. Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of -2, pursuant to OAR 340-012-0045(1)(c)(E)(i) as Respondent was cooperative and corrected the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0, as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $500 + [(0.1 x $500) x (4 + (-)2 + 2 + 2 + (-)2)] + $0
= $500 + [($50 x 4)] + $0
= $500 + $200 + $0
= $700

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: LUHR JENSEN & SONS, INC., an Oregon corporation, Respondent,	No. LQ/HW-ER-01-275 HOOD RIVER COUNTY ANSWER **(REQUEST FOR HEARING)**

For its answer to the Department of Environmental Quality's ("DEQ") Notice of Assessment of Civil Penalty, No. LQ/HW-ER-01-275, respondent Luhr Jensen & Sons, Inc. ("Luhr Jensen") admits, denies, and alleges as follows:

FINDINGS

Findings Paragraph 1: Luhr Jensen & Sons operates manufacturing facilities, the Oak Grove facility and the Portway facility, in Hood River, Oregon.

Response: Luhr Jensen admits this allegation.

Findings Paragraph 2: On August 14 and 30, 2001, Department staff conducted a hazardous waste compliance inspection at Portway facility.

Response: Luhr Jensen admits this allegation.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

EXHIBIT 4

Findings Paragraph 3: *The Portway facility is a registered small quantity generator of hazardous waste, registration number ORD 990751414.*

Response: Luhr Jensen admits this allegation.

Findings Paragraph 4: *During the years 1998, 1999, and 2000, the Portway facility generated the following hazardous wastes on a monthly basis, approximately 1,700 pounds of waste acetone (EPA Hazardous Waste Numbers F003 and D001), 80 pounds of acetone still bottoms (F003, D001), 200 pounds of waste lacquer thinner (D001, F003 and F005), and an unknown quantity of electroplating waste (F006-F009).*

Response: Luhr Jensen admits that it generates the hazardous wastes identified by DEQ, but denies the remaining allegations in Paragraph 4.

Findings Paragraph 5: *For the years 1998, 1999, and 2000, the Portway facility did not report generating the waste acetone, the waste lacquer thinner, or the electroplating waste described in Paragraph 4, above.*

Response: Luhr Jensen denies this allegation.

Findings Paragraph 6: *The Oak Grove facility is not a registered generator of hazardous waste.*

Response: Luhr Jensen admits this allegation.

Findings Paragraph 7: *For the month of July 2001, the Oak Grove facility was a small quantity generator of hazardous waste as the facility generated approximately 200 gallons of tin plating waste, a corrosivity characteristic hazardous waste (EPA Hazardous Waste Number D002), weighing greater than 1,600 pounds.*

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

Response: Luhr Jensen admits this allegation.

Findings Paragraph 8: The Portway facility is authorized to discharge stormwater to the Columbia River subject to the limitations and conditions of National Pollutant Discharge Elimination System General Permit 1200-Z, Facility ID No. 107234/A.

Response: Luhr Jensen admits this allegation.

VIOLATIONS

A. Hazardous Waste Management, Storage, and Transport

Violations Paragraph 1: On and before August 14, 2001, Respondent violated ORS 466.095 by illegally storing hazardous waste. Specifically, Respondent stored four 55-gallon drums of spent tin plating solution generated at its Oak Grove facility in Hood River, Oregon, at its Portway facility in Hood River, Oregon. The tin plating solution was a corrosivity characteristic hazardous waste (D002). Respondent's Portway facility is not permitted to receive hazardous waste for storage. Illegally storing hazardous waste is a Class I violation pursuant to OAR 340-012-0068(1)(d).

Response: Luhr Jensen denies this allegation.

Violations Paragraph 2: On and before August 14, 2001, Respondent violated 40 Code of Federal Regulations (CFR) 262.34(d), adopted pursuant to OAR 340-100-0002, by storing hazardous waste in excess of 180 days. Specifically, Respondent caused or allowed approximately 1,600 gallons of chrome plating sludges, a toxicity characteristic hazardous waste for chromium (D007) and a listed hazardous waste (F006), to accumulate in a sump under its plating room at its Portway facility for a period of approximately eight years. This is a Class I violation pursuant to OAR 340-012-0068(1)(e).

Response: Luhr Jensen denies this allegation. The material that was observed in the sump of the electroplating room was caused by the cooling water of a soldering machine

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

being drained and accumulating in the plating sump area. The plating room was built 25 years ago with a sump area designed to contain liquids in the event of a plating tank rupture or spill. Over the years, this sump area has accumulated dust, dirt, and an amount of plating process waste, that when hydrated or mixed with water and sampled, exhibited the properties of a hazardous waste. The soldering machine that released water into the plating sump area was installed and placed into production on June 18, 2001. The inspection took place on August 30, 2001. Accordingly, the sump had not accumulated this liquid for greater than 180 days, and certainly not for a period of 8 years.

Violations Paragraph 3: On and before August 14, 2001, Respondent violated 40 CFR 262.34(a)(1)(ii), adopted pursuant OAR 340-100-0002, by storing hazardous waste in a tank that did not meet the requirements of Subpart J of 40 CFR Part 265. Specifically, the sump described in paragraph A2, which was being used as a primary collection and storage tank for hazardous waste, did not meet the Subpart J requirements. This is a Class I violation pursuant to OAR 340-012-0068(1)(u).

Response: Luhr Jensen denies this allegation. The sump described by DEQ is not a storage tank or vessel, but rather a collection sump designed to limit and prevent spills from entering the environment. The sump performed as designed, by collecting and holding the spilled materials, in this case, water. Unfortunately, the water became mixed and contaminated with material associated with the plating process, thus, exhibiting hazardous waste characteristics. Luhr Jensen was not "storing" this material, nor is this sump a storage tank; thus, it does not fall under hazardous waste tank standards or requirements.

Violations Paragraph 4: On and before August 14, 2001, Respondent violated 40 CFR 265.31, by failing to maintain and operate its facility in a manner that minimizes the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the air soil or water or that could threaten human health and the environment. Specifically, Respondent failed to minimize the threat to human health and the environment by storing toxicity characteristic and listed hazardous waste in the open sump below its plating room at the Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(cc).

Response: Luhr Jensen denies this allegation. The sump did contain hazardous constituents at the time of the inspection, but the contents did not constitute a threat to public health or to the environment. The sump contained very dilute concentrations of electroplating metals that are used daily in concentrated form in the plating room as plating bath chemicals. At the concentration and temperature of the materials in the sump area, this did not present a threat to the health of humans. Similarly, the environment was not threatened with this situation, as the materials were held in a spill sump specifically designed to contain this type of material with the specific objective of preventing its release into the environment. The sump was engineered as such a containment sump when the facility was constructed.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

Violations Paragraph 5: Some time between July 6, and August 14, 2001, Respondent violated 40 CFR 263.11(a), adopted pursuant to OAR 340-100-0002, by transporting hazardous waste without first obtaining a US Environmental Protection Agency hazardous waste transporter identification number. Specifically, Respondent failed to obtain a transporter identification number prior to transporting the hazardous waste described in Paragraph A1 from its Oak Grove facility to its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(nn).

Response: Luhr Jensen admits that it did not obtain a transporter identification number, but denies the remaining allegations in Paragraph A5.

Violations Paragraph 6: Some time between July 6, and August 14, 2001, Respondent violated 40 CFR 262.20(a), adopted pursuant to OAR 340-100-0002, by failing to prepare a hazardous waste manifest prior to transporting hazardous waste. Specifically, Respondent failed to prepare a hazardous waste manifest prior to transporting the hazardous waste described in Paragraph A1 from its Oak Grove facility to its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(f).

Response: Luhr Jensen admits that it did not prepare a hazardous waste manifest, but denies the remaining allegations in Paragraph A6.

Violations Paragraph 7: Some time between July 6, and August 14, 2001, Respondent violated 40 CFR 268.7(a), adopted pursuant to OAR 340-100-0002, by failing to provide a land disposal restriction (LDR) notification on an off-site shipment of hazardous waste. Specifically, Respondent failed to provide LDR notification when it shipped the hazardous waste described in Paragraph A1 from its Oak Grove facility to its Portway facility. This is a Class I violation pursuant to OAR 340-012-0068(1)(s).

Response: Luhr Jensen admits that it did not provide a land disposal restriction notification for the shipment described in Paragraph A1, but denies the remaining allegations in Paragraph A7.

Violations Paragraph 8: On and before August 14, 2001, Respondent violated OAR 340-102-0041 by failing to comply with hazardous waste generator reporting requirements. Specifically, Respondent under reported the number and type of different hazardous waste streams it generated and the volumes of hazardous wastes generated in the years 1998, 1999, and 2000. This is a Class I violation pursuant to OAR 340-012-0068(1)(jj).

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

Response: Luhr Jensen denies this allegation. All wastes generated have been reported on Luhr Jensen's annual hazardous waste reporting forms, with the exception of used acetone, which is reclaimed and reused onsite. The amounts and types of waste reported corresponds with Luhr Jensen's hazardous waste shipments. Luhr Jensen does generate hazardous waste from its electroplating process, paint and thinner wastes from its paint processes, as well as still bottoms wastes from its acetone still process. Luhr Jensen has shipped all of these wastes for disposal at a regulated TSD.

Violations Paragraph 9: On and before August 14, 2001, Respondent violated OAR 340-102-0011, by failing to perform a hazardous waste determination. Specifically, Respondent failed to perform a hazardous waste determination on the waste described in Paragraph A1. This is a Class I violation pursuant to OAR 340-012-0068(1)(b).

Response: Luhr Jensen denies this allegation.

Violations Paragraph 10: On and before August 14, 2001, Respondent violated 40 CFR 262.34(a)(1)(i) by failing to store hazardous waste in a container. Specifically, Respondent stored listed hazardous waste (F008 and F009) cyanide plating filters placed on the floor of the electroplating room instead of in a container, in a tank, on a drip pad, or in a containment building. This is a Class II violation pursuant to OAR 340-012-0068(2)(m).

Response: Luhr Jensen admits this allegation, but clarifies that by the time DEQ's inspector left the facility, Luhr Jensen had placed the cyanide plating filters in appropriate containers.

Violations Paragraph 11: On or about August 14, 2001, Respondent violated 40 CFR 265.173(a), adopted pursuant to OAR 340-100-0002, by failing to keep hazardous waste containers closed except when necessary to add or remove wastes. Specifically, Respondent failed to keep closed two 55-gallon containers of ignitability characteristic hazardous waste (D001) in its flammable storage area; a satellite container of listed hazardous cyanide plating waste (F008 and F009) in its caustic storage room; and a satellite container of listed hazardous cyanide plating waste (F008 and F009) in its electroplating room. These are Class II violations pursuant to OAR 340-012-0068(2)(d).

Response: Luhr Jensen admits this allegation, but clarifies that by the time DEQ's inspector left the facility, Luhr Jensen had closed the subject containers.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

B. Water Quality

Violations Paragraph 1: On and before August 14, 2001, Respondent violated ORS 468B.025(1)(a) by placing wastes where they are likely to enter waters of the state by any means. Specifically, Respondent caused or allowed sediments containing nickel and chromium, as well as oil and grease, copper, and lead in concentrations greater than the benchmarks established in the facility's stormwater discharge permit, to enter a storm drain at its Portway facility. This is a Class II violation pursuant to OAR 340-012-0055(c).

Response: Luhr Jensen denies this allegation.

Violations Paragraph 2: On or about July 1, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001, Respondent violated ORS 468B.025(2) by violating a condition of its National Pollutant Discharge Elimination System General Permit 1200-Z. Specifically, Respondent violated Schedule B, Condition 1(a) of its permit by failing to perform twice annual stormwater monitoring during the prior monitoring year. These are Class II violations pursuant to OAR 340-012-0055(2)(g).

Response: Luhr Jensen admits this allegation.

Violations Paragraph 3: On or about July 15, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001, Respondent violated ORS 468B.025(2) by violating a condition of its National Pollutant Discharge Elimination System General Permit 1200-Z. Specifically, Respondent violated Schedule B, Condition 3 of its permit by failing to submit its annual stormwater monitoring report. These are Class II violations pursuant to OAR 340-012-0055(2)(a).

Response: Luhr Jensen admits this allegation, but clarifies that it submitted its annual stormwater monitoring report in the fall of 2001.

FIRST AFFIRMATIVE DEFENSE

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

The Notice of Assessment of Civil Penalty ("Notice") fails to state a claim for relief.

SECOND AFFIRMATIVE DEFENSE

DEQ's assessment of penalties is barred by the pertinent statute of limitations.

THIRD AFFIRMATIVE DEFENSE

DEQ has not provided fair warning of its current interpretation of its regulations. For example, Luhr Jensen's collection sump has been a part of the original design of the plating room for 25 years and DEQ has never suggested that it needed to meet its tank requirements.

FOURTH AFFIRMATIVE DEFENSE

Luhr Jensen does not believe that it has committed violations with respect to the allegations which are denied above. Nonetheless, in the event that a violation is established, and with respect to the violations admitted above, the amount of the penalty proposed by DEQ far exceeds the amount that would be appropriate for such a violation in light of (a) the affirmative defenses set forth above, (b) Luhr Jensen's good faith effort to comply with the law, (c) the minimal or negligible potential for harm, (d) the minimal extent of any deviation from the alleged regulatory requirement, (e) Luhr Jensen's cooperative attitude, (f) the absence of any economic benefit derived from the alleged violation, and (g) the absence of any history of similar prior violations.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

WHEREFORE, having fully answered DEQ's Notice, Luhr Jensen prays for judgment dismissing the Notice with prejudice, or such further relief as is deemed just and equitable.

REQUEST FOR CONTESTED CASE HEARING

Luhr Jensen respectfully requests a contested case hearing regarding the matters alleged in the Notice.

DATED this 8 day of May, 2002.

MILLER NASH LLP

Jerry B. Hodson
Oregon State Bar No. 87256

Attorneys for Respondent
Luhr Jensen & Sons, Inc.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: LUHR JENSEN & SONS, INC., an Oregon corporation, Respondent,	No. LQ/HW-ER-01-275 HOOD RIVER COUNTY REQUEST FOR INFORMAL DISCUSSION

Respondent requests an informal discussion with the Department of Environmental Quality ("DEQ") regarding mitigating factors that respondent believes DEQ did not consider in assessing the subject civil penalties.

DATED this 8 day of May, 2002.

MILLER NASH LLP

Jerry B. Hodson

Jerry B. Hodson
Oregon State Bar No. 87256

Attorneys for Respondent
Luhr Jensen & Sons, Inc.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

I hereby certify that I served the foregoing answer on:

Ms. Deborah Nesbit
Department of Environmental Quality
811 S.W. Sixth Avenue
Portland, Oregon 97204

by the following indicated method or methods:

☐ by **faxing** full, true, and correct copies thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office, on the date set forth below.

☐ by **mailing** full, true, and correct copies thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.

☐ by sending full, true and correct copies thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, on the date set forth below.

☒ by causing full, true and correct copies thereof to be **hand-delivered** to the attorney at the attorney's last-known office address listed above on the date set forth below.

DATED this 8th day of May, 2002.

Jerry B. Hodson

Of Attorney for Respondent

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (503) 224-5858
3500 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE, PORTLAND, OREGON 97204-3699

Oregon
Theodore R. Kulongoski, M.D., Governor

HEARING OFFICER PANEL
1905 Lana Avenue NE
Salem OR 97314
Telephone: (503) 945-7960
FAX: (503) 945-5304
TTY: (503) 945-5001

NOTICE OF HEARING

Date Mailed: February 21, 2003

PHIL JENSEN
LUHR JENSEN & SONS INC
PO BOX 297
HOOD RIVER OR 97031

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

CERTIFIED MAIL RECEIPT #7002 2410 0001 7406 0446

RE: *In the Matter of Luhr Jensen & Sons, Inc*
For the Oregon Department of Environmental Quality
Hearing Officer Panel Case No. 104220
Agency Case No. LQ/HW-ER-01-275

Issue: Did Luhr Jensen & Sons commit the violations alleged in the notice and if so, were the civil penalties assessed correctly calculated?

A hearing has been set in the above-entitled matter before the Hearing Officer Panel.

Hearing Date: **March 18, 2003** **Hearing Time:** **9:00 a.m.**

Location: **Department of Environmental Quality**
Conference Room 11
811 SW 6th Ave
Portland OR 97204

Check in with the 7th Floor Receptionist

The Hearing Officer Panel is an impartial tribunal, and is independent of the agency for whom the hearing is held. Your case has been assigned to Administrative Law Judge Andrea Sloan, an employee of the Hearing Officer Panel.

A written request for a reset of the hearing must be submitted at least 7 days prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired or need a language interpreter at the hearing, immediately notify the Hearing Officer Panel at (503) 945-5547 or TDD at (503) 945-5001. The Hearing Officer Panel can arrange for an

P 5 EXHIBIT (A)

interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

Please notify the Hearing Officer Panel at (503) 945-5547 immediately if you change your address or telephone number at any time prior to a final decision in this matter.

interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

Please notify the Hearing Officer Panel at (503) 945-5547 immediately if you change your address or telephone number at any time prior to a final decision in this matter.

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

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.*

GENERAL PERMIT
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
STORM WATER DISCHARGE PERMIT

Department of Environmental Quality
811 Southwest Sixth Avenue, Portland, OR 97204
Telephone: (503) 229-5279
Issued pursuant to ORS 468B.050 and The Federal Clean Water Act

ISSUED TO:
File No. 107234 GEN12Z
Luhr Jensen, & Sons, Inc.
P.O. Box 297
Hood River, OR 97031

Site Loc. 400 Portway Ave., Hood River, Oregon

Issued 10-27-97
Hood River County
ORR20-1412
Hydro-Code No.
10=-COLU 167.8 D

SOURCES COVERED BY THIS PERMIT

Facilities identified in 40 Code of Federal Regulation (CFR) §122.26(b)(14)(i -ix, xi) with storm water discharges. Construction activities, asphalt mix batch plants, concrete batch plants and Standard Industrial Classification code 14, *Mining and Quarrying of Nonmetallic Minerals, Except Fuels* are excluded from this permit. These activities are regulated under separate permits.

See Table 1: Sources Covered, pages 2-3, for more information on the CFR regulated industries covered by this permit.

Michael T. Llewelyn, Administrator
Water Quality Division

JULY 22, 1997
Date

PERMITTED ACTIVITIES

Until this permit expires or is modified or revoked, the permittee is authorized to construct, install, modify, or operate storm water treatment and/or control facilities, and to discharge storm water to public waters in conformance with all the requirements, limitations, and conditions set forth in the attached schedules as follows:

Unless authorized by another NPDES permit, all other direct and indirect discharges to public waters are prohibited.

TABLE 1: Sources Covered

Previous Permit Type	Sources Covered
1200-D	Facilities with the following primary Standard Industrial Classification codes: 21 Tobacco Products 22 Textile Mill Products 23 Apparel and Other Finished Products Made From Fabrics and Similar Material 27 Printing, Publishing and Allied Industries 4221 Farm Product Warehousing and Storage 4222 Refrigerated Warehousing and Storage 4225 General Warehousing and Storage Facilities with SIC codes 22, 23, 27, 4221, 4222, and 4225 are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.
1200-F	Facilities with primary Standard Industrial Classification code 20 Food and Kindred Products. Facilities with this SIC code are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.
1200-G	Landfills, land application sites and open dumps.
1200-H	Facilities with the following primary Standard Industrial Classification codes: 28 Chemicals and Allied Products (excluding 2874 Phosphate Fertilizer Manufacturing) 29 Petroleum Refining and Related Industries 30 Rubber and Miscellaneous Plastics Products 31 Leather and Leather Products 32 Stone, Clay, Glass, and Concrete Products 33 Primary Metal Industries and Steam Electric Power Generation including coal handling sites. Facilities with SIC codes 283, 285, 30, 31 (except 311), and 323 are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.
1200-L	Facilities with the following primary Standard Industrial Classification codes: 34 Fabricated Metal Products, Except Machinery and Transportation Equipment 35 Industrial and Commercial Machinery and Computer Equipment 36 Electronic and Other Electrical Equipment and Components, Except Computer Equipment 37 Transportation Equipment 38 Measuring, Analyzing, and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks 39 Miscellaneous Manufacturing Industries Facilities with SIC codes 34 (except 3441), 35, 36, 37 (except 373), 38, and 39 are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.

TABLE 1: Sources Covered

Previous Permit Type	Sources Covered
1200-D	Facilities with the following primary Standard Industrial Classification codes: 21 Tobacco Products 22 Textile Mill Products 23 Apparel and Other Finished Products Made From Fabrics and Similar Material 27 Printing, Publishing and Allied Industries 4221 Farm Product Warehousing and Storage 4222 Refrigerated Warehousing and Storage 4225 General Warehousing and Storage Facilities with SIC codes 22, 23, 27, 4221, 4222, and 4225 are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.
1200-F	Facilities with primary Standard Industrial Classification code 20 Food and Kindred Products. Facilities with this SIC code are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.
1200-G	Landfills, land application sites and open dumps.
1200-H	Facilities with the following primary Standard Industrial Classification codes: 28 Chemicals and Allied Products (excluding 2874 Phosphate Fertilizer Manufacturing) 29 Petroleum Refining and Related Industries 30 Rubber and Miscellaneous Plastics Products 31 Leather and Leather Products 32 Stone, Clay, Glass, and Concrete Products 33 Primary Metal Industries and Steam Electric Power Generation including coal handling sites. Facilities with SIC codes 283, 285, 30, 31 (except 311), and 323 are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.
1200-L	Facilities with the following primary Standard Industrial Classification codes: 34 Fabricated Metal Products, Except Machinery and Transportation Equipment 35 Industrial and Commercial Machinery and Computer Equipment 36 Electronic and Other Electrical Equipment and Components, Except Computer Equipment 37 Transportation Equipment 38 Measuring, Analyzing, and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks 39 Miscellaneous Manufacturing Industries Facilities with SIC codes 34 (except 3441), 35, 36, 37 (except 373), 38, and 39 are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.

TABLE 1: Sources Covered (cont.)

Previous Permit Type	Sources Covered
1200-M	Facilities with the following primary Standard Industrial Classification codes: 10 Metal Mining 12 Coal Mining 13 Oil and Gas Extraction
1200-P	Facilities with primary Standard Industrial Classification code 26 Paper and Allied Products. Facilities with SIC codes 265 and 267 are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.
1200-R	Hazardous Waste Treatment, Storage and Disposal Facilities, and facilities with primary Standard Industrial Classification codes 5015 Motor Vehicle Parts, Used, and 5093 Scrap and Waste Materials.
1200-S	Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage, recycling, and reclamation of municipal or domestic sewage (including land dedicated to the disposal of sewage sludge that are located within the confines of the facility) with the design flow capacity of 1.0 mgd or more, or required to have a pretreatment program under 40 CFR § 403.
1200-T	Facilities with the following primary Standard Industrial Classification codes that have vehicle maintenance shops (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, or airport deicing operations: 40 Railroad Transportation 41 Local and Suburban Transit and Interurban Highway Passenger Transportation 42 Motor Freight Transportation and Warehousing (excluding 4221 Farm Product Warehousing and Storage, 4222 Refrigerated Warehousing and Storage, and 4225 General Warehousing and Storage) 43 United States Postal Service 44 Water Transportation 45 Transportation by Air 5171 Petroleum Bulk Stations and Terminals
1200-W	Facilities with the following primary Standard Industrial Classification codes: 24 Lumber and Wood Products, Except Furniture (excluding 2491 Wood Preserving and 2411 Logging) 25 Furniture and Fixtures Facilities with SIC codes 2434 and 25 are only required to apply for permit if storm water is exposed to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery.

SCHEDULE A
STORM WATER POLLUTION CONTROL PLAN

1. **Preparation and Implementation of the Storm Water Pollution Control Plan (SWPCP)**
   a) The SWPCP shall be prepared by a person knowledgeable in storm water management and familiar with the facility.
   b) The SWPCP shall be signed in accordance with 40 CFR §122.22. Updates and revisions to the SWPCP shall also be signed in this manner. The SWPCP shall be signed as follows:
      i) For a Corporation - By a principal executive officer of at least the level of vice president;
      ii) For a Partnership or Sole Proprietorship - By a general partner or the proprietor, respectively; or
      iii) For a Municipality, State, Federal, or other Public Facility - By either a principal executive officer or ranking elected official.
   c) The SWPCP shall be prepared and implemented according to the time frames set forth in Schedule C.
   d) The SWPCP shall be kept current and updated as necessary to reflect any changes in facility operation.
   e) The SWPCP and updates to the SWPCP shall be submitted to the Department in accordance with Schedule B.3.
   f) A copy of the SWPCP shall be kept at the facility and made available upon request to government agencies responsible for storm water management in the permittee's area.

2. **Storm Water Pollution Control Plan Requirements**
   a) **Site Description** The SWPCP shall contain the following information:
      i) A description of the industrial activities conducted at the site. Include a description of the significant materials (see Schedule D.3, Definitions) that are stored, used, treated and/or disposed of in a manner that allows exposure to storm water. Also describe the methods of storage, usage, treatment and/or disposal.
      ii) A general location map showing the location of the site in relation to surrounding properties, transportation routes, surface waters and other relevant features.
      iii) A site map including the following:
         (1) drainage patterns
         (2) drainage and discharge structures
         (3) outline of the drainage area for each storm water outfall
         (4) paved areas and buildings within each drainage area
         (5) areas used for outdoor manufacturing, treatment, storage, and/or disposal of significant materials
         (6) existing structural control measures for reducing pollutants in storm water runoff
         (7) material loading and access areas
         (8) hazardous waste treatment, storage and disposal facilities
         (9) location of wells including waste injection wells, seepage pits, drywells, etc..
         (10) location of springs, wetlands and other surface water bodies.
      iv) Estimates of the amount of impervious surface area (including paved areas and building roofs) relative to the total area drained by each storm water outfall.
      v) For each area of the site where a reasonable potential exists for contributing pollutants to storm water runoff, identify the potential pollutants that could be present in storm water discharges.
      vi) The name(s) of the receiving water(s) for storm water drainage. If drainage is to a municipal storm sewer system, the name(s) of the ultimate receiving waters and the name of the municipality.

SCHEDULE A
STORM WATER POLLUTION CONTROL PLAN

1. **Preparation and Implementation of the Storm Water Pollution Control Plan (SWPCP)**
   a) The SWPCP shall be prepared by a person knowledgeable in storm water management and familiar with the facility.
   b) The SWPCP shall be signed in accordance with 40 CFR §122.22. Updates and revisions to the SWPCP shall also be signed in this manner. The SWPCP shall be signed as follows:
      i) For a Corporation - By a principal executive officer of at least the level of vice president;
      ii) For a Partnership or Sole Proprietorship - By a general partner or the proprietor, respectively; or
      iii) For a Municipality, State, Federal, or other Public Facility - By either a principal executive officer or ranking elected official.
   c) The SWPCP shall be prepared and implemented according to the time frames set forth in Schedule C.
   d) The SWPCP shall be kept current and updated as necessary to reflect any changes in facility operation.
   e) The SWPCP and updates to the SWPCP shall be submitted to the Department in accordance with Schedule B.3.
   f) A copy of the SWPCP shall be kept at the facility and made available upon request to government agencies responsible for storm water management in the permittee's area.

2. **Storm Water Pollution Control Plan Requirements**
   a) **Site Description** The SWPCP shall contain the following information:
      i) A description of the industrial activities conducted at the site. Include a description of the significant materials (see Schedule D.3, Definitions) that are stored, used, treated and/or disposed of in a manner that allows exposure to storm water. Also describe the methods of storage, usage, treatment and/or disposal.
      ii) A general location map showing the location of the site in relation to surrounding properties, transportation routes, surface waters and other relevant features.
      iii) A site map including the following:
         (1) drainage patterns
         (2) drainage and discharge structures
         (3) outline of the drainage area for each storm water outfall
         (4) paved areas and buildings within each drainage area
         (5) areas used for outdoor manufacturing, treatment, storage, and/or disposal of significant materials
         (6) existing structural control measures for reducing pollutants in storm water runoff
         (7) material loading and access areas
         (8) hazardous waste treatment, storage and disposal facilities
         (9) location of wells including waste injection wells, seepage pits, drywells, etc..
         (10) location of springs, wetlands and other surface water bodies.
      iv) Estimates of the amount of impervious surface area (including paved areas and building roofs) relative to the total area drained by each storm water outfall.
      v) For each area of the site where a reasonable potential exists for contributing pollutants to storm water runoff, identify the potential pollutants that could be present in storm water discharges.
      vi) The name(s) of the receiving water(s) for storm water drainage. If drainage is to a municipal storm sewer system, the name(s) of the ultimate receiving waters and the name of the municipality.

vii) Identification of the discharge outfall(s) and the point(s) where storm water monitoring will occur as required by Schedule B. If multiple discharge outfalls exist but will not all be monitored (as allowed in Schedule B.1.c), a description supporting this approach shall also be included.

b) **Site Controls** The permittee shall maintain existing controls and/or develop new controls appropriate for the site. The purpose of these controls is to eliminate or minimize the exposure of pollutants to storm water. In developing a control strategy, the SWPCP shall have the following minimum components. A description of each component shall be included in the SWPCP.

i) *Storm Water Best Management Practices* If technically and economically feasible, the following best management practices shall be employed at the site. A schedule for implementation of these practices shall be included in the SWPCP if the practice has not already been accomplished. This schedule must be consistent with the requirements for developing and implementing the SWPCP in Schedule C of the permit.

(1) Containment - All hazardous materials (see Schedule D.3, Definitions) shall be stored within berms or other secondary containment devices to prevent leaks and spills from contaminating storm water. If the use of berms or secondary containment devices is not possible, then hazardous materials shall be stored in areas that do not drain to the storm sewer system.

(2) Oil and Grease - Oil/Water separators, booms, skimmers or other methods shall be employed to eliminate or minimize oil and grease contamination of storm water discharges.

(3) Waste Chemicals and Material Disposal - Wastes shall be recycled or properly disposed of in a manner to eliminate or minimize exposure of pollutants to storm water. All waste contained in bins or dumpsters where there is a potential for drainage of storm water through the waste shall be covered to prevent exposure of storm water to these pollutants. Acceptable covers include, but are not limited to, storage of bins or dumpsters under roofed areas and use of lids or temporary covers such as tarps.

(4) Erosion and Sediment Control - Erosion control methods such as vegetating exposed areas, graveling or paving shall be employed to minimize erosion of soil at the site. Sediment control methods such as detention facilities, sediment control fences, vegetated filter strips, bioswales, or grassy swales shall be employed to minimize sediment loads in storm water discharges. For activities that involve land disturbance, the permittee shall contact the local municipality to determine if there are other applicable requirements.

(5) Debris Control - Screens, booms, settling ponds, or other methods shall be employed to eliminate or minimize debris in storm water discharges.

(6) Storm Water Diversion - Storm water shall be diverted away from fueling, manufacturing, treatment, storage, and disposal areas to prevent exposure of uncontaminated storm water to potential pollutants.

(7) Covering Activities - Fueling, manufacturing, treatment, storage, and disposal areas shall be covered to prevent exposure of storm water to potential pollutants. Acceptable covers include, but are not limited to, permanent structures such as roofs or buildings and temporary covers such as tarps.

(8) Housekeeping - Areas that may contribute pollutants to storm water shall be kept clean. Sweeping, prompt clean up of spills and leaks, and proper maintenance of vehicles shall be employed to eliminate or minimize exposure of storm water to pollutants.

ii) *Spill Prevention and Response Procedures* Methods to prevent spills along with clean-up and notification procedures shall be included in the SWPCP. These methods and procedures shall be made available to appropriate personnel. The required clean up material shall be on-site or readily available. Spills prevention plans required by other regulations may be substituted for this provision providing that storm water management concerns are adequately addressed.

iii) *Preventative Maintenance* A preventative maintenance program shall be implemented to ensure the effective operation of all storm water best management practices. At a minimum the program shall include:

(1) Monthly inspections of areas where potential spills of significant materials or industrial activities could impact storm water runoff.

(2) Monthly inspections of storm water control measures, structures, catch basins, and treatment facilities.

(3) Cleaning, maintenance and/or repair of all materials handling and storage areas and all storm water control measures, structures, catch basins, and treatment facilities as needed upon discovery.

iv) *Employee Education* An employee orientation and education program shall be developed and maintained to inform personnel of the components and goals of the SWPCP. The program shall also address spill response procedures and the necessity of good housekeeping practices. A schedule for employee education shall be included in the SWPCP.

c) **Record Keeping and Internal Reporting Procedures** The following information shall be recorded and maintained at the facility and provided to the Department and other government agencies upon request. This information does not need to be submitted as part of the SWPCP.

i) Inspection, maintenance, repair and education activities as required by the SWPCP.

ii) Spills or leaks of significant materials that impacted or had the potential to impact storm water or surface waters. Include the corrective actions to clean up the spill or leak as well as measures to prevent future problems of the same nature.

ADDITIONAL REQUIREMENTS

3. **Oregon Administrative Rule (OAR) 340-44-50, Waste Disposal Wells for Surface Drainage** OAR 340-44-50 requires that waste disposal wells for storm drainage only be used in those areas where there is an adequate confinement barrier or filtration medium between the well and an underground source of drinking water; and where construction of surface discharging storm sewers is not practical. In addition, this rule requires the following:

a) New storm drainage disposal wells shall be as shallow as possible but shall not exceed a depth of 100 feet.

b) Disposal wells shall be located at least 500 feet from domestic water wells.

c) Using a disposal well for agricultural drainage is prohibited.

d) Using a disposal well for surface drainage in areas where toxic chemicals or petroleum products are stored or handled is prohibited unless there is containment around the product area which will prevent spills and leaks from entering the well.

e) Any owner or operator of the disposal well shall have available a means of temporarily plugging or blocking the well in the event of an accident of spill.

f) Any area that is drained by a disposal well shall be kept clean of petroleum products and other organic or chemical wastes as much as practicable to minimize the degree of contamination of the storm water drainage.

ii) *Spill Prevention and Response Procedures* Methods to prevent spills along with clean-up and notification procedures shall be included in the SWPCP. These methods and procedures shall be made available to appropriate personnel. The required clean up material shall be on-site or readily available. Spills prevention plans required by other regulations may be substituted for this provision providing that storm water management concerns are adequately addressed.

iii) *Preventative Maintenance* A preventative maintenance program shall be implemented to ensure the effective operation of all storm water best management practices. At a minimum the program shall include:

(1) Monthly inspections of areas where potential spills of significant materials or industrial activities could impact storm water runoff.

(2) Monthly inspections of storm water control measures, structures, catch basins, and treatment facilities.

(3) Cleaning, maintenance and/or repair of all materials handling and storage areas and all storm water control measures, structures, catch basins, and treatment facilities as needed upon discovery.

iv) *Employee Education* An employee orientation and education program shall be developed and maintained to inform personnel of the components and goals of the SWPCP. The program shall also address spill response procedures and the necessity of good housekeeping practices. A schedule for employee education shall be included in the SWPCP.

c) **Record Keeping and Internal Reporting Procedures** The following information shall be recorded and maintained at the facility and provided to the Department and other government agencies upon request. This information does not need to be submitted as part of the SWPCP.

i) Inspection, maintenance, repair and education activities as required by the SWPCP.

ii) Spills or leaks of significant materials that impacted or had the potential to impact storm water or surface waters. Include the corrective actions to clean up the spill or leak as well as measures to prevent future problems of the same nature.

ADDITIONAL REQUIREMENTS

3. **Oregon Administrative Rule (OAR) 340-44-50, Waste Disposal Wells for Surface Drainage** OAR 340-44-50 requires that waste disposal wells for storm drainage only be used in those areas where there is an adequate confinement barrier or filtration medium between the well and an underground source of drinking water; and where construction of surface discharging storm sewers is not practical. In addition, this rule requires the following:

a) New storm drainage disposal wells shall be as shallow as possible but shall not exceed a depth of 100 feet.

b) Disposal wells shall be located at least 500 feet from domestic water wells.

c) Using a disposal well for agricultural drainage is prohibited.

d) Using a disposal well for surface drainage in areas where toxic chemicals or petroleum products are stored or handled is prohibited unless there is containment around the product area which will prevent spills and leaks from entering the well.

e) Any owner or operator of the disposal well shall have available a means of temporarily plugging or blocking the well in the event of an accident of spill.

f) Any area that is drained by a disposal well shall be kept clean of petroleum products and other organic or chemical wastes as much as practicable to minimize the degree of contamination of the storm water drainage.

4. **Oregon Administrative Rule 340-41-26(3)(a)(D), Surface Water Temperature Management Plan** Individual storm water discharges are not expected to cause a measurable increase in stream temperature. Compliance with this permit meets the requirement of OAR 340-41-26(3)(a)(D) to develop and implement a surface water temperature management plan. If it is determined that storm discharges in a particular basin are impacting a Total Maximum Daily Load for temperature, then permittees in this basin will be required to implement additional management practices to reduce the temperature of the discharges. These practices include, but are not limited to, increased vegetation to provide for shading, underground conveyance systems or detention vaults, and filter treatment systems to reduce detention times.

5. **Storm Water Only** This permit only regulates the discharge of storm water. It does not authorize the discharge or on-site disposal of process wastewater, wash water, boiler blowdown, cooling water, air conditioning condensate, deicing residues, or any other non-storm discharges associated with the facility.

   Any other wastewater discharge or disposal must be permitted in a separate permit. A separate Department permit may not be required if the wastewater is reused or recycled without discharge or disposal, or discharged to the sanitary sewer with approval from the local sanitary authority.

6. **Specific River Basin Requirements** The permittee shall comply with any Oregon Administrative Rule requirements for storm water management specific to the applicable river basin.

7. **Water Quality Standards** The ultimate goal for permittees is to comply with water quality standards in OAR 340-41. In instances where a storm water discharge adversely impacts water quality, the Department may require the facility to implement additional management practices, apply for an individual permit, or take other appropriate action.

CODE OF FEDERAL REGULATION STORM WATER DISCHARGE LIMITATIONS

8. The permittee with the following activities shall be in compliance with the applicable limitations at the time of permit assignment:

CFR Industry Category	Parameter	Limitation	
Cement manufacturing facilities for runoff from material storage piles (40 CFR §411)	pH Total Suspended Solids (TSS)	6.0 - 9.0 SU 50 mg/l	
Steam powered electric power generation facilities with coal handling and storage facilities (40 CFR §423)	TSS	50 mg/l, Daily Maximum	
Manufacturing of asphalt paving and roofing emulsions (40 CFR §443)	Oil & Grease	20 mg/l, Daily Maximum	15 mg/l, 30 Day Average
	pH	6.0 - 9.0 SU	

STORM WATER DISCHARGE BENCHMARKS

9. **Benchmarks** Benchmarks are guideline concentrations not limitations. They are designed to assist the permittee in determining if the implementation of their SWPCP is reducing pollutant concentrations to below levels of concern. For facilities that are subject to federal limitations, benchmarks apply to only those pollutants that are not limited by the federal regulations. The following benchmarks apply to each point source discharge of storm water associated with industrial activity:

Parameter	Benchmark
Total Copper	0.1 mg/l
Total Lead	0.4 mg/l
Total Zinc	0.6 mg/l
pH	5.5 - 9 S.U.
Total Suspended Solids	130 mg/l
Oil & Grease	10 mg/l
** E. coli	406 counts/100 ml
Floating Solids (associated with industrial activities)	No Visible Discharge
Oil & Grease Sheen	No Visible Sheen

** The benchmark for E. coli applies only to landfills, if septage and sewage biosolids are disposed at the site, and sewage treatment plants.

10. **Review of SWPCP** If benchmarks are not achieved, the permittee shall review their SWPCP within 60 days of receiving sampling results. The purpose of this review is to determine if the SWPCP is being followed and to identify any additional technically and economically feasible site controls that need to be implemented to further improve the quality of storm water discharges. These site controls include best management practices, spill prevention and response procedures, preventative maintenance, and employee education procedures as described in Schedule A.2.b.

    a) **SWPCP Revision** Any newly identified site controls shall be implemented in a timely manner and incorporated into the SWPCP as an update. A new SWPCP is not required. If no additional site controls are identified, the permittee shall state as such in an update to the SWPCP.

    b) **SWPCP Revision Submittal** Results of this review shall be submitted to the Department in accordance with Schedule B.3 and made available upon request to government agencies responsible for storm water management in the permittee's area.

    c) **Background or Natural Conditions** If the permittee demonstrates that background or natural conditions not associated with industrial activities at the site cause an exceedance of a benchmark, then no further modifications to the SWPCP are required for that parameter. Upon successful demonstration of natural or background conditions through monitoring of the same storm event used to evaluate benchmarks the permittee would be eligible for the monitoring reduction as outlined in Schedule B.2.

STORM WATER DISCHARGE BENCHMARKS

9. **Benchmarks**. Benchmarks are guideline concentrations not limitations. They are designed to assist the permittee in determining if the implementation of their SWPCP is reducing pollutant concentrations to below levels of concern. For facilities that are subject to federal limitations, benchmarks apply to only those pollutants that are not limited by the federal regulations. The following benchmarks apply to each point source discharge of storm water associated with industrial activity:

Parameter	Benchmark
Total Copper	0.1 mg/l
Total Lead	0.4 mg/l
Total Zinc	0.6 mg/l
pH	5.5 - 9 S.U.
Total Suspended Solids	130 mg/l
Oil & Grease	10 mg/l
** E. coli	406 counts/100 ml
Floating Solids (associated with industrial activities)	No Visible Discharge
Oil & Grease Sheen	No Visible Sheen

** The benchmark for E. coli applies only to landfills, if septage and sewage biosolids are disposed at the site, and sewage treatment plants.

10. **Review of SWPCP** If benchmarks are not achieved, the permittee shall review their SWPCP within 60 days of receiving sampling results. The purpose of this review is to determine if the SWPCP is being followed and to identify any additional technically and economically feasible site controls that need to be implemented to further improve the quality of storm water discharges. These site controls include best management practices, spill prevention and response procedures, preventative maintenance, and employee education procedures as described in Schedule A.2.b.

a) **SWPCP Revision** Any newly identified site controls shall be implemented in a timely manner and incorporated into the SWPCP as an update. A new SWPCP is not required. If no additional site controls are identified, the permittee shall state as such in an update to the SWPCP.

b) **SWPCP Revision Submittal** Results of this review shall be submitted to the Department in accordance with Schedule B.3 and made available upon request to government agencies responsible for storm water management in the permittee's area.

c) **Background or Natural Conditions** If the permittee demonstrates that background or natural conditions not associated with industrial activities at the site cause an exceedance of a benchmark, then no further modifications to the SWPCP are required for that parameter. Upon successful demonstration of natural or background conditions through monitoring of the same storm event used to evaluate benchmarks the permittee would be eligible for the monitoring reduction as outlined in Schedule B.2.

SCHEDULE B
MONITORING AND REPORTING REQUIREMENTS

1. **Minimum Monitoring Requirements**

a) All permittees shall monitor storm water associated with industrial activity for the following:

GRAB SAMPLES OF STORM WATER	
Parameter	Frequency
Total Copper	Twice per Year
Total Lead	Twice per Year
Total Zinc	Twice per Year
pH	Twice per Year
Total Suspended Solids	Twice per Year
Oil & Grease	Twice per Year
**E. coli	Twice per Year

**The monitoring for E.coli applies only to landfills, if septage and sewage biosolids are disposed at the site, and sewage treatment plants.

VISUAL MONITORING OF STORM WATER	
Parameter	Frequency
Floating Solids (associated with industrial activities)	Once a Month (when discharging)
Oil & Grease Sheen	Once a Month (when discharging)

b) **Grab Samples** Grab samples that are representative of the discharge shall be taken at least 60 days apart. It is preferred, but not required, that one sample be collected in the fall and one in the spring. Compositing of samples from different drainage areas is not allowed.

c) **Multiple Point Source Discharges** The permittee may reduce the number of storm water monitoring points provided the outfalls have substantially identical effluents. Substantially identical effluents are discharges from drainage areas serving similar activities where the discharges are expected to be similar in composition. Outfalls serving areas with no exposure of storm water to industrial activities are not required to be monitored.

d) **Monitoring Location** All samples shall be taken at monitoring points specified in the SWPCP before the storm water joins or is diluted by any other wastestream, body of water or substance.

e) **No Exposure** If there is no exposure of storm water to material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery at the site, monitoring is not required. The permittee shall submit an annual statement certifying as such in lieu of monitoring (refer to Schedule B.3.b). If exposure cannot be prevented, the permittee shall comply with Schedule B.

2. **Monitoring Reduction**
   a) **Visual Observations** There is no reduction allowed of the required visual observations.

   b) **Grab Samples** The permittee is not required to conduct sampling if the benchmarks specified in Schedule A.9 are met, or if the exceedance is due to natural or background conditions for at least four consecutive storm water monitoring events over 24 continuous months. Note that there is no reduction in monitoring allowed for facilities subject to limitations under CFR (Schedule A.8).
      i) Results from sampling events cannot be averaged to meet the benchmarks.
      ii) Monitoring waivers may be allowed for individual parameters.
      iii) Parameters in exceedance or not previously sampled shall be monitored as required in Schedule B.1 until the monitoring waiver condition above is met.
      iv) Monitoring data from the previous permit period may be used to meet the waiver requirement. This data shall be evaluated against the benchmarks specified in this permit.
      v) Monitoring data from the same storm event shall be used to demonstrate that background or natural conditions not associated with industrial activities at the site are contributing to the exceedance of a benchmark.
      vi) The permittee shall submit written notification to the Department when exercising the monitoring waiver condition (refer to Schedule B.3.c).

   c) **Reinstatement of Monitoring Requirements**
      i) The permittee shall conduct monitoring as specified in Schedule B.1 if changes to site conditions are expected to impact storm water discharge characteristics.
      ii) The Department may reinstate monitoring requirements as specified in Schedule B.1 if prior monitoring efforts were improper or results were incorrect.
      iii) Monitoring may also be reinstated if future sampling efforts indicate benchmarks are being exceeded.

3. **Reporting Requirements** The permittee shall submit the following to the appropriate DEQ regional office:
   a) **Monitoring Data** The permittee shall submit by July 15 of each year grab sampling and visual monitoring data for the previous monitoring period (July 1- June 30). If there was insufficient rainfall to collect samples, the permittee shall notify the Department by July 15 of each year.

   b) **No Exposure Certification** The permittee shall submit an annual certification by July 15 of each year if monitoring is not required due to no exposure of storm water to industrial activities. The certification shall state that site conditions have been evaluated and the facility meets the requirements of Schedule B.1.e.

   c) **Monitoring Reduction Notification** The permittee shall submit written notification when exercising the monitoring reduction condition in Schedule B.2.b.

   d) **SWPCP Update/Completion** The permittee shall prepare or update the SWPCP in accordance with Schedule C of the permit. The permittee shall submit an updated or completed SWPCP within 14 days after completion.

   e) **SWPCP Revision** The permittee shall submit any revisions to the SWPCP required by Schedule A.10 within 14 days after the SWPCP is revised. If the Department does not review and comment on the revised SWPCP within 30 days, the permittee shall implement the revisions as proposed.

2. **Monitoring Reduction**
   a) **Visual Observations** There is no reduction allowed of the required visual observations.

   b) **Grab Samples** The permittee is not required to conduct sampling if the benchmarks specified in Schedule A.9 are met, or if the exceedance is due to natural or background conditions for at least four consecutive storm water monitoring events over 24 continuous months. Note that there is no reduction in monitoring allowed for facilities subject to limitations under CFR (Schedule A.8).
      i) Results from sampling events cannot be averaged to meet the benchmarks.
      ii) Monitoring waivers may be allowed for individual parameters.
      iii) Parameters in exceedance or not previously sampled shall be monitored as required in Schedule B.1 until the monitoring waiver condition above is met.
      iv) Monitoring data from the previous permit period may be used to meet the waiver requirement. This data shall be evaluated against the benchmarks specified in this permit.
      v) Monitoring data from the same storm event shall be used to demonstrate that background or natural conditions not associated with industrial activities at the site are contributing to the exceedance of a benchmark.
      vi) The permittee shall submit written notification to the Department when exercising the monitoring waiver condition (refer to Schedule B.3.c).

   c) **Reinstatement of Monitoring Requirements**
      i) The permittee shall conduct monitoring as specified in Schedule B.1 if changes to site conditions are expected to impact storm water discharge characteristics.
      ii) The Department may reinstate monitoring requirements as specified in Schedule B.1 if prior monitoring efforts were improper or results were incorrect.
      iii) Monitoring may also be reinstated if future sampling efforts indicate benchmarks are being exceeded.

3. **Reporting Requirements** The permittee shall submit the following to the appropriate DEQ regional office:
   a) **Monitoring Data** The permittee shall submit by July 15 of each year grab sampling and visual monitoring data for the previous monitoring period (July 1- June 30). If there was insufficient rainfall to collect samples, the permittee shall notify the Department by July 15 of each year.

   b) **No Exposure Certification** The permittee shall submit an annual certification by July 15 of each year if monitoring is not required due to no exposure of storm water to industrial activities. The certification shall state that site conditions have been evaluated and the facility meets the requirements of Schedule B.1.e.

   c) **Monitoring Reduction Notification** The permittee shall submit written notification when exercising the monitoring reduction condition in Schedule B.2.b.

   d) **SWPCP Update/Completion** The permittee shall prepare or update the SWPCP in accordance with Schedule C of the permit. The permittee shall submit an updated or completed SWPCP within 14 days after completion.

   e) **SWPCP Revision** The permittee shall submit any revisions to the SWPCP required by Schedule A.10 within 14 days after the SWPCP is revised. If the Department does not review and comment on the revised SWPCP within 30 days, the permittee shall implement the revisions as proposed.

SCHEDULE C
COMPLIANCE CONDITIONS AND SCHEDULES

1. **Existing Permittee** (for a facility with an NPDES storm water discharge permit assigned prior to September 30, 1996):

   a) Not later than 90 days after receiving this permit, the existing permittee shall revise and begin implementation of their SWPCP to meet any new permit requirements.

   b) Except for site controls that require capital improvements (see Schedule D.3, Definitions), the SWPCP shall be implemented within 90 days after revision of SWPCP. Site control activities that require capital improvements shall be completed in accordance with the schedule set forth in the SWPCP.

2. **New Permittee with Existing Facility** (for a facility operating prior to September 30, 1996, without an NPDES storm water discharge permit):

   a) Not later than 90 days after receiving this permit, the new permittee shall prepare and begin implementation of their SWPCP.

   b) Except for site controls that require capital improvements (see Schedule D.3, Definitions), the SWPCP shall be implemented within 90 days after completion of SWPCP. Site control activities that require capital improvements shall be completed in accordance with the schedule set forth in the SWPCP.

3. **New Facility** (for a facility beginning operation after September 30, 1996):

   a) Prior to starting operations, a new facility shall prepare and begin implementation of their SWPCP.

   b) Except for site controls that require capital improvements (see Schedule D.3, Definitions), the SWPCP shall be implemented within 90 days after beginning operation. Site control activities that require capital improvements shall be completed in accordance with the schedule set forth in the SWPCP.

4. **New Permittee Discharging to Clackamas River, McKenzie River above Hayden Bridge (River Mile 15) or North Santiam River.** Not later than 180 days after receiving this permit, new permittees discharging to Clackamas River, McKenzie River above Hayden Bridge (river mile 15) or North Santiam River shall submit to the Department a monitoring and water quality evaluation program. This program shall be effective in evaluating the in-stream impacts of the discharge as required by OAR 340-41-470. Within 30 days after Department approval, the permittee shall implement the monitoring and water quality evaluation program. New permittees are defined to include potential or existing dischargers that did not have a permit, and existing dischargers that have a permit but request an increased load limitation.

SCHEDULE D
SPECIAL CONDITIONS

1. **Releases in Excess of Reportable Quantities.** This permit does not relieve the permittee of the reporting requirements of 40 CFR §117 Determination of Reportable Quantities for Hazardous Substances and 40 CFR §302 Designation, Reportable Quantities, and Notification.

2. **Availability of SWPCP and Monitoring Data.** The Storm Water Pollution Control Plan and/or storm water monitoring data shall be made available to government agencies responsible for storm water management in the permittee's area.

3. **Definitions**

   a) *Capital Improvements* means the following improvements that require capital expenditures:
      i) Treatment best management practices including but not limited to settling basins, oil/water separation equipment, catch basins, grassy swales, and detention/retention basins.
      ii) Manufacturing modifications that incur capital expenditures, including process changes for reduction of pollutants or wastes at the source.
      iii) Concrete pads, dikes and conveyance or pumping systems utilized for collection and transfer of storm water to treatment systems.
      iv) Roofs and appropriate covers for manufacturing areas.

   b) *Hazardous Materials* as defined in 40 CFR §302 Designation, Reportable Quantities, and Notification.

   c) *Material Handling Activities* include the storage, loading and unloading, transportation or conveyance of raw material, intermediate product, finished product, by-product or waste product.

   d) *Point Source* means a discharge from any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, or conduit.

   e) *Significant Materials* includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical that a facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ash, slag, and sludge that have the potential to be released with storm water discharges.

SCHEDULE D
SPECIAL CONDITIONS

1. **Releases in Excess of Reportable Quantities.** This permit does not relieve the permittee of the reporting requirements of 40 CFR §117 Determination of Reportable Quantities for Hazardous Substances and 40 CFR §302 Designation, Reportable Quantities, and Notification.

2. **Availability of SWPCP and Monitoring Data.** The Storm Water Pollution Control Plan and/or storm water monitoring data shall be made available to government agencies responsible for storm water management in the permittee's area.

3. Definitions

   a) *Capital Improvements* means the following improvements that require capital expenditures:
      i) Treatment best management practices including but not limited to settling basins, oil/water separation equipment, catch basins, grassy swales, and detention/retention basins.
      ii) Manufacturing modifications that incur capital expenditures, including process changes for reduction of pollutants or wastes at the source.
      iii) Concrete pads, dikes and conveyance or pumping systems utilized for collection and transfer of storm water to treatment systems.
      iv) Roofs and appropriate covers for manufacturing areas.

   b) *Hazardous Materials* as defined in 40 CFR §302 Designation, Reportable Quantities, and Notification.

   c) *Material Handling Activities* include the storage, loading and unloading, transportation or conveyance of raw material, intermediate product, finished product, by-product or waste product.

   d) *Point Source* means a discharge from any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, or conduit.

   e) *Significant Materials* includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical that a facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ash, slag, and sludge that have the potential to be released with storm water discharges.

SCHEDULE F
NPDES GENERAL CONDITIONS

SECTION A. STANDARD CONDITIONS

1. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of Oregon Revised Statutes (ORS) 468B.025 and is grounds for enforcement action; for permit termination, suspension, or modification; or for denial of a permit renewal application.

2. Penalties for Water Pollution and Permit Condition Violations

Oregon Law (ORS 468.140) allows the Director to impose civil penalties up to $10,000 per day for violation of a term, condition, or requirement of a permit.

Under ORS 468.943, unlawful water pollution, if committed by a person with criminal negligence, is punishable by a fine of up to $25,000 or by imprisonment for not more than one year, or by both. Each day on which a violation occurs or continues is a separately punishable offense.

Under ORS 468.946, a person who knowingly discharges, places or causes to be placed any waste into the waters of the state or in a location where the waste is likely to escape into the waters of the state, is subject to a Class B felony punishable by a fine not to exceed $200,000 and up to 10 years in prison.

3. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment. In addition, upon request of the Department, the permittee shall correct any adverse impact on the environment or human health resulting from noncompliance with this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and have the permit renewed. The application shall be submitted at least 180 days before the expiration date of this permit.

The Director may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date.

5. Permit Actions

This permit may be modified, suspended, revoked and reissued, or terminated for cause including, but not limited to, the following:

a. Violation of any term, condition, or requirement of this permit, a rule, or a statute;
b. Obtaining this permit by misrepresentation or failure to disclose fully all material facts; or
c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

The filing of a request by the permittee for a permit modification or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

6. Toxic Pollutants

The permittee shall comply with any applicable effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

7. Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privilege.

8. Permit References

Except for effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants and standards for sewage sludge use or disposal established under Section 405(d) of the Clean Water Act, all rules and statutes referred to in this permit are those in effect on the date this permit is issued.

SECTION B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

1. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls, and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

2. Duty to Halt or Reduce Activity

For industrial or commercial facilities, upon reduction, loss, or failure of the treatment facility, the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power of the treatment facility fails or is reduced or lost. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

3. Bypass of Treatment Facilities

a. Definitions
   (1) "Bypass" means intentional diversion of waste streams from any portion of the treatment facility. The term "bypass" does not include nonuse of singular or multiple units or processes of a treatment works when the nonuse is insignificant to the quality and/or quantity of the effluent produced by the treatment works. The term "bypass" does not apply if the diversion does not cause effluent limitations to be exceeded, provided the diversion is to allow essential maintenance to assure efficient operation.
   (2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities or treatment processes which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Prohibition of bypass.
   (1) Bypass is prohibited unless:
      (a) Bypass was necessary to prevent loss of life, personal injury, or severe property damage;
      (b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance; and
      (c) The permittee submitted notices and requests as required under General Condition B.3.c.
   (2) The Director may approve an anticipated bypass, after considering its adverse effects and any alternatives to bypassing, when the Director determines that it will meet the three conditions listed above in General Condition B.3.b.(1).

c. Notice and request for bypass.
   (1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior written notice, if possible at least ten days before the date of the bypass.
   (2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in General Condition D.5.

4. Upset

a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operation error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

b. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of General Condition B.4.c are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
   (1) An upset occurred and that the permittee can identify the causes(s) of the upset;
   (2) The permitted facility was at the time being properly operated;
   (3) The permittee submitted notice of the upset as required in General Condition D.5, hereof (24-hour notice); and
   (4) The permittee complied with any remedial measures required under General Condition A.3 hereof.

d. Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

5. Treatment of Single Operational Event

Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls, and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

2. Duty to Halt or Reduce Activity

For industrial or commercial facilities, upon reduction, loss, or failure of the treatment facility, the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power of the treatment facility fails or is reduced or lost. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

3. Bypass of Treatment Facilities

a. Definitions
   (1) "Bypass" means intentional diversion of waste streams from any portion of the treatment facility. The term "bypass" does not include nonuse of singular or multiple units or processes of a treatment works when the nonuse is insignificant to the quality and/or quantity of the effluent produced by the treatment works. The term "bypass" does not apply if the diversion does not cause effluent limitations to be exceeded, provided the diversion is to allow essential maintenance to assure efficient operation.
   (2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities or treatment processes which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Prohibition of bypass.
   (1) Bypass is prohibited unless:
      (a) Bypass was necessary to prevent loss of life, personal injury, or severe property damage;
      (b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance; and
      (c) The permittee submitted notices and requests as required under General Condition B.3.c.
   (2) The Director may approve an anticipated bypass, after considering its adverse effects and any alternatives to bypassing, when the Director determines that it will meet the three conditions listed above in General Condition B.3.b.(1).

c. Notice and request for bypass.
   (1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior written notice, if possible at least ten days before the date of the bypass.
   (2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in General Condition D.5.

4. Upset

a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operation error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

b. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of General Condition B.4.c are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
   (1) An upset occurred and that the permittee can identify the causes(s) of the upset;
   (2) The permitted facility was at the time being properly operated;
   (3) The permittee submitted notice of the upset as required in General Condition D.5, hereof (24-hour notice); and
   (4) The permittee complied with any remedial measures required under General Condition A.3 hereof.

d. Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

5. Treatment of Single Operational Event

For purposes of this permit, A Single Operational Event which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation. A single operational event is an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. A single operational event does not include Clean Water Act violations involving discharge without a NPDES permit or noncompliance to the extent caused by improperly designed or inadequate treatment facilities. Each day of a single operational event is a violation.

6. Overflows from Wastewater Conveyance Systems and Associated Pump Stations

a. Definitions
   (1) "Overflow" means the diversion and discharge of waste streams from any portion of the wastewater conveyance system including pump stations, through a designed overflow device or structure, other than discharges to the wastewater treatment facility.
   (2) "Severe property damage" means substantial physical damage to property, damage to the conveyance system or pump station which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of an overflow.
   (3) "Uncontrolled overflow" means the diversion of waste streams other than through a designed overflow device or structure, for example to overflowing manholes or overflowing into residences, commercial establishments, or industries that may be connected to a conveyance system.

b. Prohibition of overflows. Overflows are prohibited unless:
   (1) Overflows were unavoidable to prevent an uncontrolled overflow, loss of life, personal injury, or severe property damage;
   (2) There were no feasible alternatives to the overflows, such as the use of auxiliary pumping or conveyance systems, or maximization of conveyance system storage; and
   (3) The overflows are the result of an upset as defined in General Condition B.4. and meeting all requirements of this condition.

c. Uncontrolled overflows are prohibited where wastewater is likely to escape or be carried into the waters of the State by any means.

d. Reporting required. Unless otherwise specified in writing by the Department, all overflows and uncontrolled overflows must be reported orally to the Department within 24 hours from the time the permittee becomes aware of the overflow. Reporting procedures are described in more detail in General Condition D.5.

7. Public Notification of Effluent Violation or Overflow

If effluent limitations specified in this permit are exceeded or an overflow occurs, upon request by the Department, the permittee shall take such steps as are necessary to alert the public about the extent and nature of the discharge. Such steps may include, but are not limited to, posting of the river at access points and other places, news releases, and paid announcements on radio and television.

8. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in such a manner as to prevent any pollutant from such materials from entering public waters, causing nuisance conditions, or creating a public health hazard.

SECTION C. MONITORING AND RECORDS

1. Representative Sampling

Sampling and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge. All samples shall be taken at the monitoring points specified in this permit and shall be taken, unless otherwise specified, before the effluent joins or is diluted by any other waste stream, body of water, or substance. Monitoring points shall not be changed without notification to and the approval of the Director.

2. Flow Measurements

Appropriate flow measurement devices and methods consistent with accepted scientific practices shall be selected and used to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated and maintained to insure that the accuracy of the measurements is consistent with the accepted capability of that type of device. Devices selected shall be capable of measuring flows with a maximum deviation of less than $\pm$ 10 percent from true discharge rates throughout the range of expected discharge volumes.

3. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

4. Penalties of Tampering

The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than two years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person, punishment is a fine not more than $20,000 per day of violation, or by imprisonment of not more than four years or both.

5. Reporting of Monitoring Results

Monitoring results shall be summarized each month on a Discharge Monitoring Report form approved by the Department. The reports shall be submitted monthly and are to be mailed, delivered or otherwise transmitted by the 15th day of the following month unless specifically approved otherwise in Schedule B of this permit.

6. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency shall also be indicated. For a pollutant parameter that may be sampled more than once per day (e.g., Total Chlorine Residual), only the average daily value shall be recorded unless otherwise specified in this permit.

7. Averaging of Measurements

Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean, except for bacteria which shall be averaged as specified in this permit.

8. Retention of Records

Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records of all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

9. Records Contents

Records of monitoring information shall include:
a. The date, exact place, time and methods of sampling or measurements;
b. The individual(s) who performed the sampling or measurements;
c. The date(s) analyses were performed;
d. The individual(s) who performed the analyses;
e. The analytical techniques or methods used; and
f. The results of such analyses.

10. Inspection and Entry

The permittee shall allow the Director, or an authorized representative upon the presentation of credentials to:

a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit, and
d. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by state law, any substances or parameters at any location.

SECTION D. REPORTING REQUIREMENTS

1. Planned Changes

The permittee shall comply with Oregon Administrative Rules (OAR) 340, Division 52, "Review of Plans and Specifications". Except where exempted under OAR 340-52, no construction, installation, or modification involving disposal systems, treatment works, sewerage systems, or common sewers shall be commenced until the plans and specifications are submitted to and approved by the Department. The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted facility.

2. Anticipated Noncompliance

The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

3. Transfers

The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than two years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person, punishment is a fine not more than $20,000 per day of violation, or by imprisonment of not more than four years or both.

5. Reporting of Monitoring Results

Monitoring results shall be summarized each month on a Discharge Monitoring Report form approved by the Department. The reports shall be submitted monthly and are to be mailed, delivered or otherwise transmitted by the 15th day of the following month unless specifically approved otherwise in Schedule B of this permit.

6. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency shall also be indicated. For a pollutant parameter that may be sampled more than once per day (e.g., Total Chlorine Residual), only the average daily value shall be recorded unless otherwise specified in this permit.

7. Averaging of Measurements

Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean, except for bacteria which shall be averaged as specified in this permit.

8. Retention of Records

Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records of all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

9. Records Contents

Records of monitoring information shall include:
a. The date, exact place, time and methods of sampling or measurements;
b. The individual(s) who performed the sampling or measurements;
c. The date(s) analyses were performed;
d. The individual(s) who performed the analyses;
e. The analytical techniques or methods used; and
f. The results of such analyses.

10. Inspection and Entry

The permittee shall allow the Director, or an authorized representative upon the presentation of credentials to:

a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit, and
d. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by state law, any substances or parameters at any location.

SECTION D. REPORTING REQUIREMENTS

1. Planned Changes

The permittee shall comply with Oregon Administrative Rules (OAR) 340, Division 52, "Review of Plans and Specifications". Except where exempted under OAR 340-52, no construction, installation, or modification involving disposal systems, treatment works, sewerage systems, or common sewers shall be commenced until the plans and specifications are submitted to and approved by the Department. The permittee shall give notice to the Department as soon as possible of any planned physical alternations or additions to the permitted facility.

2. Anticipated Noncompliance

The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

3. Transfers

This permit may be transferred to a new permittee provided the transferee acquires a property interest in the permitted activity and agrees in writing to fully comply with all the terms and conditions of the permit and the rules of the Commission. No permit shall be transferred to a third party without prior written approval from the Director. The permittee shall notify the Department when a transfer of property interest takes place.

4. Compliance Schedule

Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date. Any reports of noncompliance shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirements.

5. Twenty-Four Hour Reporting

The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally (by telephone) within 24 hours, unless otherwise specified in this permit, from the time the permittee becomes aware of the circumstances. During normal business hours, the Department's Regional office shall be called. Outside of normal business hours, the Department shall be contacted at 1-800-452-0311 (Oregon Emergency Response System).

A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. If the permittee is establishing an affirmative defense of upset or bypass to any offense under ORS 468.922 to 468.946, and in which case if the original reporting notice was oral, delivered written notice must be made to the Department or other agency with regulatory jurisdiction within 4 (four) calendar days. The written submission shall contain:

a. A description of the noncompliance and its cause;
b. The period of noncompliance, including exact dates and times;
c. The estimated time noncompliance is expected to continue if it has not been corrected;
d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance; and
e. Public notification steps taken, pursuant to General Condition B.7.

The following shall be included as information which must be reported within 24 hours under this paragraph:

a. Any unanticipated bypass which exceeds any effluent limitation in this permit.
b. Any upset which exceeds any effluent limitation in this permit.
c. Violation of maximum daily discharge limitation for any of the pollutants listed by the Director in this permit.

The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

6. Other Noncompliance

The permittee shall report all instances of noncompliance not reported under General Condition D.4 or D.5, at the time monitoring reports are submitted. The reports shall contain:

a. A description of the noncompliance and its cause;
b. The period of noncompliance, including exact dates and times;
c. The estimated time noncompliance is expected to continue if it has not been corrected; and
d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

7. Duty to Provide Information

The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit.

Other Information: When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to the Department, it shall promptly submit such facts or information.

8. Signatory Requirements

All applications, reports or information submitted to the Department shall be signed and certified in accordance with 40 CFR 122.22.

9. Falsification of Reports

Under ORS 468.953, any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, is subject to a Class C felony punishable by a fine not to exceed $100,000 per violation and up to 5 years in prison.

Changes to Indirect Dischargers - [Applicable to Publicly Owned Treatment Works (POTW) only]

The permittee must provide adequate notice to the Department of the following:

a. Any new introduction of pollutants into the POTW from an indirect discharger which would be subject to section 301 or 306 of the Clean Water Act if it were directly discharging those pollutants and;

b. Any substantial change in the volume or character of pollutants being introduced into the POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

c. For the purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

11. Changes to Discharges of Toxic Pollutant - [Applicable to existing manufacturing, commercial, mining, and silvicultural dischargers only]

The permittee must notify the Department as soon as they know or have reason to believe of the following:

a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:
   (1) One hundred micrograms per liter (100 µg/l);
   (2) Two hundred micrograms per liter (200 µg/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;
   (3) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
   (4) The level established by the Department in accordance with 40 CFR 122.44(f).

b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
   (1) Five hundred micrograms per liter (500 µg/l);
   (2) One milligram per liter (1 mg/l) for antimony;
   (3) Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
   (4) The level established by the Department in accordance with 40 CFR 122.44(f).

SECTION E. DEFINITIONS

1. BOD means five-day biochemical oxygen demand.
2. TSS means total suspended solids.
3. mg/l means milligrams per liter.
4. kg means kilograms.
5. m^3/d means cubic meters per day.
6. MGD means million gallons per day.
7. Composite sample means a sample formed by collecting and mixing discrete samples taken periodically and based on time or flow.
8. FC means fecal coliform bacteria.
9. Technology based permit effluent limitations means technology-based treatment requirements as defined in 40 CFR 125.3, and concentration and mass load effluent limitations that are based on minimum design criteria specified in OAR 340-41.
10. CBOD means five day carbonaceous biochemical oxygen demand.
11. Grab sample means an individual discrete sample collected over a period of time not to exceed 15 minutes.
12. Quarter means January through March, April through June, July through September, or October through December.
13. Month means calendar month.
14. Week means a calendar week of Sunday through Saturday.
15. Total residual chlorine means combined chlorine forms plus free residual chlorine.
16. The term "bacteria" includes but is not limited to fecal coliform bacteria, total coliform bacteria, and E. coli bacteria.
17. POTW means a publicly owned treatment works.

b. Any substantial change in the volume or character of pollutants being introduced into the POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

c. For the purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

11. Changes to Discharges of Toxic Pollutant - [Applicable to existing manufacturing, commercial, mining, and silvicultural dischargers only]

The permittee must notify the Department as soon as they know or have reason to believe of the following:

a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:
   (1) One hundred micrograms per liter (100 µg/l);
   (2) Two hundred micrograms per liter (200 µg/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;
   (3) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
   (4) The level established by the Department in accordance with 40 CFR 122.44(f).

b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
   (1) Five hundred micrograms per liter (500 µg/l);
   (2) One milligram per liter (1 mg/l) for antimony;
   (3) Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
   (4) The level established by the Department in accordance with 40 CFR 122.44(f).

SECTION E. DEFINITIONS

1. BOD means five-day biochemical oxygen demand.
2. TSS means total suspended solids.
3. mg/l means milligrams per liter.
4. kg means kilograms.
5. m^3/d means cubic meters per day.
6. MGD means million gallons per day.
7. Composite sample means a sample formed by collecting and mixing discrete samples taken periodically and based on time or flow.
8. FC means fecal coliform bacteria.
9. Technology based permit effluent limitations means technology-based treatment requirements as defined in 40 CFR 125.3, and concentration and mass load effluent limitations that are based on minimum design criteria specified in OAR 340-41.
10. CBOD means five day carbonaceous biochemical oxygen demand.
11. Grab sample means an individual discrete sample collected over a period of time not to exceed 15 minutes.
12. Quarter means January through March, April through June, July through September, or October through December.
13. Month means calendar month.
14. Week means a calendar week of Sunday through Saturday.
15. Total residual chlorine means combined chlorine forms plus free residual chlorine.
16. The term "bacteria" includes but is not limited to fecal coliform bacteria, total coliform bacteria, and E. coli bacteria.
17. POTW means a publicly owned treatment works.

ENFORCEMENT

Page 1 of 2

DEPARTMENT OF ENVIRONMENTAL QUALITY
Request for Analysis

Case No. _____

Location/Site: Luhr Jensen - Portway Date Sampled: 8-30-01 Date Received in Lab: _____

Collected by: Jeff Ingalls Fund Code: Hazardous Waste Generator Date Reported: 8-30-01

Purpose: Storm Water Permit requirements / hazardous waste determination Report Data to: Jeff Ingalls - Bend

Comments: Note sample 3 - if you get high total metals please run TCLP. 388-6146 x238

Item #	Sampling Point Description (include time)	Sample container according to test(s) requested: Nutrients / Basic	DO / BOD	Metals / Organic	Misc. / Misc.	Test(s) Required
1	X004932 - Taken from storm drain in breezeway - 9:08 AM				X004932 oil & grease	Run oil & grease
2	P572 - Taken from storm drain in breezeway 9:10AM				P572 Suspended solids	Run suspended solids
3	TM679 Taken from storm drain in breezeway 9:12AM			TM679		Total Metals / If elevated run TCLP Metals
4	DM 890 Taken from storm drain in breezeway 9:18 AM			DM 890		Total Metals
pH = 4 5+	TM 806 - Sample from sump in electroplating next to chrome bath 8:50 AM			TM 806		TCLP Metals - Chromium # Cr^6
pH = 4 6+	TM 807: Sample from sump in electroplating next to nickel bath 9:00AM			TM 807		TCLP Metals - Chromium [redacted] Cr^6

Laboratory Comments: _____

Contac[t] [S]ample Tracker for proper sampling containers and [p]reservation procedure. (503) 229-5983

EXHIBIT 2

Attachment JA21

EXHIBIT 2

Continuation Sheet

DEPARTMENT OF ENVIRONMENTAL QUALITY
Request for Analysis

Case No. _____

Location/Site: Luhr Jensen Parkway Date Sampled: 8-30-01 Date Received in Lab: _____

Collected by: Jeff Ingalls Fund Code: Haz Waste Generator Date Reported: 8-30-01

Purpose: Haz Waste determination Report Data to: Jeff Ingalls - Bend 388-6146

Comments: pH is very acidic !!! Sample is a tin electroplating bath!

Item #	Sampling Point Description (include time)	Sample container according to test(s) requested: Nutrients / Basic	DO / BOD	Metals / Organic	Misc. / Misc.	Test(s) Required
1	Sample of Tin Bath Drum #1 Acid room 9:35AM DM761				DM761 pH	Run pH only
2	Sample of Tin Bath Drum #2 Acid Room 9:40AM DM729				DM729 pH	Run pH only
3	Sample of Tin Bath Drum #3 Acid Room 9:44AM DM613				DM613 pH	Run pH only
4						
5						
6						

Laboratory Comments: _____

Contac[t] [S]ample Tracker for proper sampling containers and [p]reservation procedure. (503) 229-5983

CASE NAME: 995012 LUHR JENSON -PORTWAY
SUBMITTER: Ingalls, Jeff COLLECTOR: Ingalls, Jeff
FUND CODE: 48511 Hazardous & Solid Waste Generators

ITEM #	RESULT	UNITS	TEST
001	Storm drain in breezeway		
	08/30/01 @ 09:08		
	11.4	mg/L	Copper
	5.58	mg/L	Nickel
			Toxic Pollutant Metals #1
	0.015	mg/L	Arsenic
	0.413	mg/L	Barium
	0.0453	mg/L	Cadmium
	1.38	mg/L	Chromium
	1.98	mg/L	Lead
	<0.020	mg/L	Selenium
	0.187	mg/L	Silver
	40	mg/L	Total Suspended Solids
	22	mg/L	Oil and Grease
002	Sump in electroplating next to chrome bath		
	08/30/01 @ 08:50		
			Toxic Pollutant Metals #1
	<1.0	mg/L	Arsenic, Toxicity Characteristic Leaching Procedur
	0.33	mg/L	Barium, Toxicity Characteristic Leaching Procedure
	<0.050	mg/L	Cadmium, Toxicity Characteristic Leaching Procedur
	1580	mg/L	Chromium, Toxicity Characteristic Leaching Procedure
	0.7	mg/L	Lead, Toxicity Characteristic Leaching Procedure
	<2.0	mg/L	Selenium, Toxicity Characteristic Leaching Procedu
	0.22	mg/L	Silver, Toxicity Characteristic Leaching Procedure
003	Sump in electroplating next to nickel bath		
	08/30/01 @ 09:00		
			Toxic Pollutant Metals #1
	<1.0	mg/L	Arsenic, Toxicity Characteristic Leaching Procedur
	0.27	mg/L	Barium, Toxicity Characteristic Leaching Procedure
	0.661	mg/L	Cadmium, Toxicity Characteristic Leaching Procedure
	743	mg/L	Chromium, Toxicity Characteristic Leaching Procedure
	<1.0	mg/L	Lead, Toxicity Characteristic Leaching Procedure
	<2.0	mg/L	Selenium, Toxicity Characteristic Leaching Procedu
	0.15	mg/L	Silver, Toxicity Characteristic Leaching Procedure
004	Tin bath drum 1		
	08/30/01 @ 09:35		
	<1	SU	pH
005	Tin bath drum 2		
	08/30/01 @ 09:40		
	<1	SU	pH

CASE NAME: 995012 LUHR JENSON -PORTWAY
SUBMITTER: Ingalls, Jeff COLLECTOR: Ingalls, Jeff
FUND CODE: 48511 Hazardous & Solid Waste Generators

ITEM #	RESULT	UNITS	TEST
006	Tin bath drum 3		
	08/30/01 @ 09:44		
	<1	SU	pH
007	SOLIDS FROM STORM DRAIN IN BREEZEWAY		
	08/30/01 @ 09:08		
			Toxic Pollutant Metals #1
	0.042	mg/L	Arsenic, Toxicity Characteristic, Leaching, Fluid #1
	0.424	mg/L	Barium, Toxicity Characteristic, Leaching, Fluid #1
	0.00665	mg/L	Cadmium, Toxicity Characteristic, Leaching, Fluid #1
	0.139	mg/L	Chromium, Toxicity Characteristic, Leaching, Fluid #1
	0.073	mg/L	Lead, Toxicity Characteristic, Leaching, Fluid #1
	<0.020	mg/L	Selenium, Toxicity Characteristic, Leaching, Fluid
	<0.0010	mg/L	Silver, Toxicity Characteristic, Leaching, Fluid #

CASE NAME: 995012 LUHR JENSON -PORTWAY
SUBMITTER: Ingalls, Jeff COLLECTOR: Ingalls, Jeff
FUND CODE: 48511 Hazardous & Solid Waste Generators

ITEM #	RESULT	UNITS	TEST
006	Tin bath drum 3		
	08/30/01 @ 09:44		
	11	SU	pH
007	SOLIDS FROM STORM DRAIN IN BREEZEWAY		
	08/30/01 @ 09:08		
			Toxic Pollutant Metals #1
	0.042	mg/L	Arsenic, Toxicity Characteristic, Leaching, Fluid #1
	0.424	mg/L	Barium, Toxicity Characteristic, Leaching, Fluid #1
	0.00665	mg/L	Cadmium, Toxicity Characteristic, Leaching, Fluid #1
	0.139	mg/L	Chromium, Toxicity Characteristic, Leaching, Fluid #1
	0.073	mg/L	Lead, Toxicity Characteristic, Leaching, Fluid #1
	<0.020	mg/L	Selenium, Toxicity Characteristic, Leaching, Fluid
	<0.0010	mg/L	Silver, Toxicity Characteristic, Leaching, Fluid #

EXHIBIT 3-1

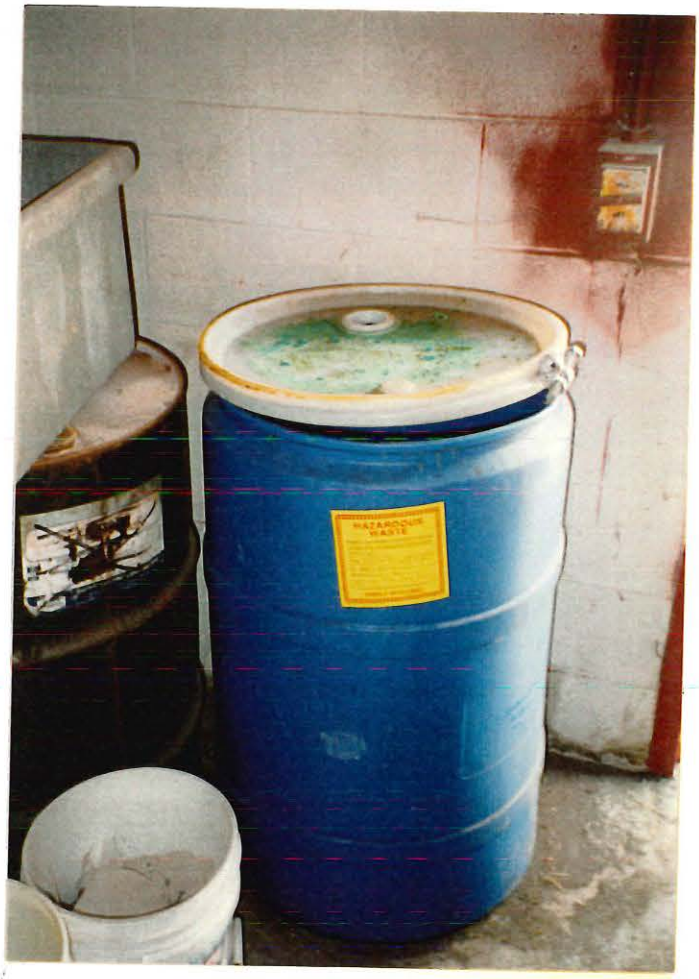


EXHIBIT 3-2

EXHIBIT 4-1

EXHIBIT 4-2

EXHIBIT 4-3

EXHIBIT 4-4


KEEP FROM
FREEZING
HAZARDOUS
WASTE
07-06-01
Tin Plating Sol'n
HANDLE WITH CARE!
Enthone·OMI

EXHIBIT 4-5

EXHIBIT S-1

EXHIBIT 5-2

EXHIBIT 5-3

EXHIBIT 5-4

Attachment J-A6

WasteWatch, LLC
Environmental Services

INVOICE

Invoice number	0302-119
Invoice date	3/22/02
WW Job #	02-03079
Terms	Net 30
Date shipped	3/20/02
P O Number	

SOLD TO

Company name	Luhr Jensen & Sons
Name	Mark Wiltz
Address (line 1)	400 Portway
Address (line 2)	
City, State	Hood River, OR 97031
Phone	(541) 386-3811
Fax	

NOTES

Manifest No: 03079

QTY	DESCRIPTION	EACH	TOTAL
11	Disposal: Waste Ni/Cr Plating Solution, 55-gal	$255.00	$2,805.00
	Sump.		
		PLEASE PAY THIS AMOUNT	**$2,805.00**
		TERMS: Net 30 days	

Please make checks payable to:
WASTEWATCH, LLC
592 SE 42nd Circle
Troutdale, OR 97060

Please Pay -

EXHIBIT 6 Mark Wiltz

3-26-02

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

Form Approved. OMB No. 2050-0039.

UNIFORM HAZARDOUS WASTE MANIFEST	1. Generator's US EPA ID No.	Manifest Document No.	2. Page 1 of 1	Information in the shaded areas is not required by Federal law.
	ORD990751414	03079		

GENERATOR

3. Generator's Name and Mailing Address
Luhr Jensen and Sons, Inc.
400 Portway
Hood River, OR 97031
4. Generator's Phone (541) 386-3811

A. State Manifest Document Number

B. State Generator's ID

5. Transporter 1 Company Name: WasteMatch, L.L.C.
6. US EPA ID Number: ORO000006221
C. State Transporter's ID
D. Transporter's Phone (503) 463-8603

7. Transporter 2 Company Name: SLT Express, Inc.
8. US EPA ID Number: UTD981552425
E. State Transporter's ID
F. Transporter's Phone (801) 265-2529

9. Designated Facility Name and Site Address
Pollution Control Industries of Tennessee LLC
5485 Tay-Fox Drive
Millington, TN 38053
10. US EPA ID Number: TND000772186
G. State Facility's ID
H. Facility's Phone (901) 353-5291

	11. US DOT Description (Including Proper Shipping Name, Hazard Class and ID Number)	HM	12. Containers No.	12. Containers Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
a.	RQ, Hazardous waste, liquid, n.o.s., (chrome, lead), 9, NA3082, PGIII	X	011	DF	0550	G	D007, D008
b.							
c.							
d.							

J. Additional Descriptions for Materials Listed Above
a) 239512
CN 13246

K. Handling Codes for Wastes Listed Above
SC1

15. Special Handling Instructions and Additional Information
a) ERG#: 171 Emergency Phone No: 503-504-1733

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations.

If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name	Signature	Month	Day	Year
David Burns	David Burns	03	20	12

TRANSPORTER

17. Transporter 1 Acknowledgement of Receipt of Materials

Printed/Typed Name	Signature	Month	Day	Year
Tim Ferrick	Tim Ferrick	03	21	12

18. Transporter 2 Acknowledgement of Receipt of Materials

Printed/Typed Name	Signature	Month	Day	Year

FACILITY

19. Discrepancy Indication Space
Alan Sawyer signed for wrong line

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in Item 19.

Printed/Typed Name	Signature	Month	Day	Year
Alan Sawyer	Alan Sawyer	03	21	12

State of Oregon
Department of Environmental Quality **Memorandum**

Date: March 3, 2003
To: File
From: Les Carlough, Senior Policy Advisor, Office of Compliance and Enforcement
Subject: Ben calculation for Luhr Jensen, Inc.

General Purpose and Authority

The economic benefit portion of the civil penalty formula is simply the monetary benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance.

Oregon Revised Statute 468.130(2)(c,h) directs the Environmental Quality Commission to consider economic conditions of the entity in assessing a penalty as well as other factors that Commission makes relevant by rule. Accordingly, the Commission specified in Oregon Administrative Rule (OAR) 340-012-0045(1)(c)(F) that the penalty will contain an "approximated dollar sum of the economic benefit." That rule also specifies that, "[i]n determining the economic benefit component of a civil penalty, the Department may use the U.S. Environmental Protection Agency's BEN computer model . . ." and must use it on request of a respondent.

Theory of Economic Benefit

Compliance with environmental regulations may require an entity to expend financial resources. These expenditures support the public goal of better environmental quality, but often do not yield direct financial return to the entity. "Economic benefit" represents the financial gain that a violating entity accrues by delaying and/or avoiding such expenditures. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, the entity avoids the costs associated with obtaining additional funds for environmental compliance (opportunity cost). Economic benefit is the amount by which an entity is financially better off from not having complied with environmental requirements in a timely manner.

Economic benefit is "no fault" in nature. An entity need not have deliberately chosen to delay compliance (for financial or any other reasons), or in fact even have been aware of its noncompliance, for it to have accrued the economic benefit of noncompliance.

An appropriate economic benefit calculation represents the amount of money that would make the entity indifferent between compliance and noncompliance. If DEQ does not recover, through a civil penalty, at least this economic benefit, then the entity will retain a gain.

Because of the precedent of this retained gain, other regulated companies may see an economic advantage in similar noncompliance, and the penalty will fail to deter potential violators. Economic benefit is designed to be neither punitive nor tort damage, but instead is the minimum amount by which the entity must be penalized so as to return it to the position it would have been in had it complied on time.

Basis of the Costs Considered

Luhr Jensen should have properly disposed of 550 gallons of D007, D009 hazardous waste by August 14, 2001. By delaying $2,805 in costs of disposal until March 20, 2002, Luhr Jensen benefited by **$101**.

Applicability of Standard Rates Presumed by Rule

The BEN model relies on income tax rates, inflation rates, and discount rates. The model allows the operator to input particular rates, but in the absence of operator input, the BEN model uses standard values based on the entity's corporate status, whether it acted for profit, and the state where the violations occurred. It calculates inflation rates from the Plant Cost Index published by the magazine *Chemical Engineering* and from the Consumer Price Index. EPA updates the standard values annually.

Pursuant to OAR 340-012-0045(1)(c)(F)(iii), the "model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect the Respondent's actual circumstance."

Description of the Attached Run

BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures. Such expenditures can include: (1) capital investments (*e.g.*, larger pollution control or monitoring equipment, costs of design and installation), (2) one-time nondepreciable expenditures (*e.g.*, permit fees, clean-up costs, setting up a reporting system, acquiring land needed for a capital improvement), (3) annually recurring costs (*e.g.*, routine operating and maintenance costs, utilities). Each of these expenditures can be either delayed or avoided. BEN's baseline assumption is that capital investments and one-time nondepreciable expenditures are merely delayed over the period of noncompliance, whereas annual costs are avoided entirely over this period.

The calculation incorporates the economic concept of the "time value of money." Stated simply, a dollar today is worth more than a dollar tomorrow, because you can invest today's

Because of the precedent of this retained gain, other regulated companies may see an economic advantage in similar noncompliance, and the penalty will fail to deter potential violators. Economic benefit is designed to be neither punitive nor tort damage, but instead is the minimum amount by which the entity must be penalized so as to return it to the position it would have been in had it complied on time.

Basis of the Costs Considered

Luhr Jensen should have properly disposed of 550 gallons of D007, D009 hazardous waste by August 14, 2001. By delaying $2,805 in costs of disposal until March 20, 2002, Luhr Jensen benefited by **$101**.

Applicability of Standard Rates Presumed by Rule

The BEN model relies on income tax rates, inflation rates, and discount rates. The model allows the operator to input particular rates, but in the absence of operator input, the BEN model uses standard values based on the entity's corporate status, whether it acted for profit, and the state where the violations occurred. It calculates inflation rates from the Plant Cost Index published by the magazine *Chemical Engineering* and from the Consumer Price Index. EPA updates the standard values annually.

Pursuant to OAR 340-012-0045(1)(c)(F)(iii), the "model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect the Respondent's actual circumstance."

Description of the Attached Run

BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures. Such expenditures can include: (1) capital investments (*e.g.*, larger pollution control or monitoring equipment, costs of design and installation), (2) one-time nondepreciable expenditures (*e.g.*, permit fees, clean-up costs, setting up a reporting system, acquiring land needed for a capital improvement), (3) annually recurring costs (*e.g.*, routine operating and maintenance costs, utilities). Each of these expenditures can be either delayed or avoided. BEN's baseline assumption is that capital investments and one-time nondepreciable expenditures are merely delayed over the period of noncompliance, whereas annual costs are avoided entirely over this period.

The calculation incorporates the economic concept of the "time value of money." Stated simply, a dollar today is worth more than a dollar tomorrow, because you can invest today's

dollar to start earning a return immediately. Thus, the further in the future the dollar is, the less it is worth in "present-value" terms. Similarly, the greater the time value of money (*i.e.*, the greater the "discount" or "compound" rate used to derive the present value), the lower the present value of future costs. To calculate an entity's economic benefit, BEN uses standard financial cash flow and net-present-value analysis techniques based on modern and generally accepted financial principles, which were subjected to extensive national notice-and-comment processes.[1]

Inputs to the model include costs specific to the situation of the entity as well as the presumed standard indexes and rates described in the section above. These values are listed in the lower three-quarters of the table. Using these values, BEN makes a series of calculations listed at the top of the table as follows:

A) On-Time Capital & One-Time Costs. What compliance would have cost had the entity complied on-time, adjusted for inflation and tax deductibility. The number is a present value as of the date of initial noncompliance. BEN derives this value by discounting the annual cash flows at an average of the cost of capital throughout this time period.
B) Delay Capital & One Time Costs. What late compliance did cost, adjusted for inflation and tax deductibility. The number is a present value as of the date of initial noncompliance. BEN derives this value by discounting the annual cash flows at an average of the cost of capital throughout this time period. This value will be zero if the costs were avoided.
C) Avoided Annually Recurring Costs. This sum is a present value as of the date of initial noncompliance. BEN derives this value by discounting the annual cash flows at an average of the cost of capital throughout this time period.
D) Initial Economic Benefit (A - B+C). The delayed-case present value is subtracted from the on-time-case present value plus the sum of the avoided costs to determine the initial economic benefit as of the noncompliance date.
E) Final Economic Benefit at Penalty Payment Date. BEN compounds the initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance.

---

[1] *See* Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Request for comment, 61 Fed. Reg. 53025-53030 (Oct. 9, 1996); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Extension of time for request for comment, 61 Fed. Reg. 65391 (Dec. 12, 1996); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Advance notice of proposed action, response to comment, and request for additional comment, 64 Fed. Reg. 32947-32972 (June 18, 1999); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Advance notice of proposed action, response to comment, and request for additional comment, 64 Fed. Reg. 39135-39136 (July 21, 1999).

Calculated Economic Benefit Likely an Underestimate

The economic benefit calculated above may underestimate the total economic benefit that the respondent received to date because it does not address uncertain indirect financial benefits, including:

- *Advantage-of-risk* – the value of (1) the risk of never getting caught and (2) keeping future options open by delaying a decision to institute a process or purchase capital.
- *Competitive advantage* – (1) beginning production earlier than would be possible if in compliance; (2) attracting clients by avoiding compliance costs, having a higher profit margin and therefore being able to offer goods or services at a lower cost than competitors; (3) keeping those clients attracted by lower prices because of brand loyalty or high switching costs; or (4) using the time or money saved to increase production.
- *Illegal profits* – selling illegal products or services.

However, I consider these other economic benefits to be "de minimis" in light of the difficulties in calculation. Pursuant to OAR 340-012-0045(1)(c)(F)(ii), the Department need not calculate an economic benefit if that benefit is de minimis.

Calculated Economic Benefit Likely an Underestimate

The economic benefit calculated above may underestimate the total economic benefit that the respondent received to date because it does not address uncertain indirect financial benefits, including:

- *Advantage-of-risk* – the value of (1) the risk of never getting caught and (2) keeping future options open by delaying a decision to institute a process or purchase capital.
- *Competitive advantage* – (1) beginning production earlier than would be possible if in compliance; (2) attracting clients by avoiding compliance costs, having a higher profit margin and therefore being able to offer goods or services at a lower cost than competitors; (3) keeping those clients attracted by lower prices because of brand loyalty or high switching costs; or (4) using the time or money saved to increase production.
- *Illegal profits* – selling illegal products or services.

However, I consider these other economic benefits to be "de minimis" in light of the difficulties in calculation. Pursuant to OAR 340-012-0045(1)(c)(F)(ii), the Department need not calculate an economic benefit if that benefit is de minimis.

Run Name =	one
Present Values as of Noncompliance Date (NCD),	14-Aug-2001
A) On-Time Capital & One-Time Costs	$1,686
B) Delay Capital & One-Time Costs	$1,601
C) Avoided Annually Recurring Costs	$0
D) Initial Economic Benefit (A-B+C)	$86
E) Final Econ. Ben. at Penalty Payment Date,	
18-Mar-2003	**$101**
C-Corporation w/ OR tax rates	
Discount/Compound Rate	10.9%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	20-Mar-2002
Capital Investment:	
Cost Estimate	$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
# of Replacement Cycles; Useful Life	N/A; N/A
Projected Rate for Future Inflation	N/A
One-Time, Nondepreciable Expenditure:	
Cost Estimate	$2,805
Cost Estimate Date	22-Mar-2002
Cost Index for Inflation	PCI
Tax Deductible?	Y
Annually Recurring Costs:	
Cost Estimate	$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	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	

CARLOUGH Les

From: BACHMAN Jeff
Sent: Monday, March 03, 2003 3:21 PM
To: CARLOUGH Les
Subject: Luhr Jensen EB

Hey les, I need this quick in prep for some hearing documents i need to get out. Cost delayed. Should have disposed of 550 gallons of D007 and D009 waste by August 14, 2001. Disposed of it on March 20, 2002. Delayed cost of $2,805. Cost established as of 3/22/02. Danke.

Attachment J-A8

Public Health Statement for

Chromium

CAS# 7440-47-3

September 2000

This Public Health Statement is the summary chapter from the Toxicological Profile for Chromium. It is one in a series of Public Health Statements about hazardous substances and their health effects. A shorter version, the ToxFAQs™, is also available. This information is important because this substance may harm you. The effects of exposure to any hazardous substance depend on the dose, the duration, how you are exposed, personal traits and habits, and whether other chemicals are present. For more information, you may call the ATSDR Information Center at 1-888-422-8737.

This public health statement tells you about chromium and the effects of exposure.

The Environmental Protection Agency (EPA) identifies the most serious hazardous waste sites in the nation. These sites make up the National Priorities List (NPL) and are the sites targeted for long-term federal cleanup activities. Total Chromium has been found in at least 1,036 of the 1,591 current or former NPL sites. Chromium(VI) has been found in at least 120 of the 1,591 current or former NPL sites. However, the total number of NPL sites evaluated for this substance is not known. As more sites are evaluated, the sites at which chromium is found may increase. This information is important because exposure to this substance may harm you and because these sites may be sources of exposure.

When a substance is released from a large area, such as an industrial plant, or from a container, such as a drum or bottle, it enters the environment. This release does not always lead to exposure. You are exposed to a substance only when you come in contact with it. You may be exposed by breathing, eating, or drinking the substance, or by skin contact.

EXHIBIT 8

If you are exposed to chromium, many factors determine whether you'll be harmed. These factors include the dose (how much), the duration (how long), and how you come in contact with it/them. You must also consider the other chemicals you're exposed to and your age, sex, diet, family traits, lifestyle, and state of health.

1.1 What is chromium?

Chromium is a naturally occurring element found in rocks, animals, plants, soil, and in volcanic dust and gases. Chromium is present in the environment in several different forms. The most common forms are chromium(0), trivalent (or chromium(III)), and hexavalent (or chromium (VI)). Chromium(III) occurs naturally in the environment and is an essential nutrient required by the human body to promote the action of insulin in body tissues so that sugar, protein, and fat can be used by the body. Chromium(VI) and chromium(0) are generally produced by industrial processes. No known taste or odor is associated with chromium compounds. The metal chromium, which is the chromium(0) form, is a steel-gray solid with a high melting point. It is used mainly for making steel and other alloys. The naturally occurring mineral chromite in the chromium(III) form is used as brick lining for high-temperature industrial furnaces, for making metals and alloys (mixtures of metals), and chemical compounds. Chromium compounds, mostly in chromium (III) or chromium(VI) forms, produced by the chemical industry are used for chrome plating, the manufacture of dyes and pigments, leather tanning, and wood preserving. Smaller amounts are used in drilling muds, rust and corrosion inhibitors, textiles, and toner for copying machines. For more information on the physical and chemical properties and on the production and use of chromium, see Chapters 3 and 4 of the toxicological profile.

1.2 What happens to chromium when it enters the environment?

Chromium enters the air, water, and soil mostly in the chromium(III) and chromium(VI) forms as a result of natural processes and human activities. Emissions from burning coal and oil, and steel production can increase chromium(III) levels in air. Stainless steel welding, chemical manufacturing, and use of compounds containing chromium(VI) can increase chromium(VI) levels in air. Waste streams from electroplating can discharge chromium(VI). Leather tanning and textile industries as well as those that make dyes and pigments can discharge both chromium (III) and chromium(VI) into waterways. The levels of both chromium (III) and chromium(VI) in soil increase mainly from disposal of commercial products containing chromium, chromium waste from industry, and coal ash from electric utilities.

In air, chromium compounds are present mostly as fine dust particles. This dust eventually settles over land and water. Rain and snow help remove chromium from air. Chromium compounds will usually remain in the air for fewer than 10 days. Although most of the chromium in water binds to dirt and other materials and settles to the bottom, a small

If you are exposed to chromium, many factors determine whether you'll be harmed. These factors include the dose (how much), the duration (how long), and how you come in contact with it/them. You must also consider the other chemicals you're exposed to and your age, sex, diet, family traits, lifestyle, and state of health.

1.1 What is chromium?

Chromium is a naturally occurring element found in rocks, animals, plants, soil, and in volcanic dust and gases. Chromium is present in the environment in several different forms. The most common forms are chromium(0), trivalent (or chromium(III)), and hexavalent (or chromium (VI)). Chromium(III) occurs naturally in the environment and is an essential nutrient required by the human body to promote the action of insulin in body tissues so that sugar, protein, and fat can be used by the body. Chromium(VI) and chromium(0) are generally produced by industrial processes. No known taste or odor is associated with chromium compounds. The metal chromium, which is the chromium(0) form, is a steel-gray solid with a high melting point. It is used mainly for making steel and other alloys. The naturally occurring mineral chromite in the chromium(III) form is used as brick lining for high-temperature industrial furnaces, for making metals and alloys (mixtures of metals), and chemical compounds. Chromium compounds, mostly in chromium (III) or chromium(VI) forms, produced by the chemical industry are used for chrome plating, the manufacture of dyes and pigments, leather tanning, and wood preserving. Smaller amounts are used in drilling muds, rust and corrosion inhibitors, textiles, and toner for copying machines. For more information on the physical and chemical properties and on the production and use of chromium, see Chapters 3 and 4 of the toxicological profile.

1.2 What happens to chromium when it enters the environment?

Chromium enters the air, water, and soil mostly in the chromium(III) and chromium(VI) forms as a result of natural processes and human activities. Emissions from burning coal and oil, and steel production can increase chromium(III) levels in air. Stainless steel welding, chemical manufacturing, and use of compounds containing chromium(VI) can increase chromium(VI) levels in air. Waste streams from electroplating can discharge chromium(VI). Leather tanning and textile industries as well as those that make dyes and pigments can discharge both chromium (III) and chromium(VI) into waterways. The levels of both chromium (III) and chromium(VI) in soil increase mainly from disposal of commercial products containing chromium, chromium waste from industry, and coal ash from electric utilities.

In air, chromium compounds are present mostly as fine dust particles. This dust eventually settles over land and water. Rain and snow help remove chromium from air. Chromium compounds will usually remain in the air for fewer than 10 days. Although most of the chromium in water binds to dirt and other materials and settles to the bottom, a small

amount may dissolve in the water. Fish do not accumulate much chromium in their bodies from water. Most of the chromium in soil does not dissolve easily in water and can attach strongly to the soil. A very small amount of the chromium in soil, however, will dissolve in water and can move deeper in the soil to underground water. The movement of chromium in soil depends on the type and condition of the soil and other environmental factors. For more information about the fate and movement of chromium compounds in the environment, see Chapters 4 and 5 of the toxicological profile.

1.3 How might I be exposed to chromium?

You can be exposed to chromium by breathing air, drinking water, or eating food containing chromium or through skin contact with chromium or chromium compounds. The level of chromium in air and water is generally low. The concentration of total chromium in air (both chromium(III) and chromium(VI)) generally ranges between 0.01 and 0.03 microgram (µg) (1 µg equals 1/1,000,000 of a gram) per cubic meter of air (µg/m^3). Chromium concentrations in drinking water (mostly as chromium(III)) are generally very low, less than 2 parts of chromium in a billion parts of water (2 ppb). Contaminated well water may contain chromium(VI). For the general population, eating foods that contain chromium is the most likely route of chromium(III) exposure. Chromium(III) occurs naturally in many fresh vegetables, fruits, meat, yeast, and grain. Various methods of processing, storage, and preparation can alter the chromium content of food. Acidic foods in contact with stainless steel cans or cooking utensils might contain higher levels of chromium because of leaching from stainless steel. Refining processes used to make white bread or sugar can decrease chromium levels. Chromium(III) is an essential nutrient for humans. On the average, adults in the United States take in an estimated 60 µg of chromium daily from food. You may also be exposed to chromium from using consumer products such as household utensils, wood preservatives, cement, cleaning products, textiles, and tanned leather.

People who work in industries that process or use chromium or chromium compounds can be exposed to higher-than-normal levels of chromium. An estimated 305,000 workers in the United States are potentially exposed to chromium and chromium-containing compounds in the workplace.

Occupational sources of chromium exposure (with chemical forms of interest shown in brackets) may occur in the following industries:

- Stainless steel welding (chromium(VI))
- Chromate production (chromium(VI))
- Chrome plating (chromium(VI))
- Ferrochrome industry (chromium(III) and chromium(VI))
- Chrome pigments (chromium(III) and chromium(VI))
- Leather tanning (mostly chromium(III))

Examples of other occupations that may involve chromium exposure include these:

- Painters (chromium(III) and chromium(VI))
- Workers involved in the maintenance and servicing of copying machines, and the disposal of some toner powders from copying machines (chromium(VI))
- Battery makers (chromium(VI))
- Candle makers (chromium(III) and chromium(VI))
- Dye makers (chromium(III))
- Printers (chromium(III) and chromium(VI))
- Rubber makers (chromium(III) and chromium(VI))
- Cement workers (chromium(III) and chromium(VI))

A list of other industries that may be sources of occupational exposure is given in Section 5.5 of the toxicological profile.

You may be exposed to higher-than-normal levels of chromium if you live near the following:

- Landfill sites with chromium-containing wastes
- Industrial facilities that manufacture or use chromium and chromium-containing compounds
- Cement-producing plants, because cement contains chromium
- Industrial cooling towers that previously used chromium as a rust inhibitor
- Waterways that receive industrial discharges from electroplating, leather tanning, and textile industries
- Busy roadways, because emissions from automobile brake lining and catalytic converters contain chromium

In addition, you may be exposed to higher levels of chromium if you use tobacco products, since tobacco contains chromium. For additional information about chromium exposure, see Chapter 5.

1.4 How can chromium enter and leave my body?

Chromium can enter your body when you breathe air, eat food, or drink water containing chromium. In general, chromium(VI) is absorbed by the body more easily than chromium(III), but once inside the body, chromium(VI) is changed to chromium(III). When you breathe air containing chromium, chromium particles can be deposited in the lungs. Particles that are deposited in the upper part of the lungs are likely to be coughed up and swallowed. Particles deposited deep in the lungs are likely to remain long enough for some of the chromium to pass through the lining of the lungs and enter your bloodstream. Once in the bloodstream, chromium is distributed to all parts of the body. Chromium will then pass through the kidneys and be eliminated in the urine in a few days. Everyone normally eats or drinks a small amount of chromium daily. Most of the chromium that you swallow leaves your body within a

Examples of other occupations that may involve chromium exposure include these:

- Painters (chromium(III) and chromium(VI))
- Workers involved in the maintenance and servicing of copying machines, and the disposal of some toner powders from copying machines (chromium(VI))
- Battery makers (chromium(VI))
- Candle makers (chromium(III) and chromium(VI))
- Dye makers (chromium(III))
- Printers (chromium(III) and chromium(VI))
- Rubber makers (chromium(III) and chromium(VI))
- Cement workers (chromium(III) and chromium(VI))

A list of other industries that may be sources of occupational exposure is given in Section 5.5 of the toxicological profile.

You may be exposed to higher-than-normal levels of chromium if you live near the following:

- Landfill sites with chromium-containing wastes
- Industrial facilities that manufacture or use chromium and chromium-containing compounds
- Cement-producing plants, because cement contains chromium
- Industrial cooling towers that previously used chromium as a rust inhibitor
- Waterways that receive industrial discharges from electroplating, leather tanning, and textile industries
- Busy roadways, because emissions from automobile brake lining and catalytic converters contain chromium

In addition, you may be exposed to higher levels of chromium if you use tobacco products, since tobacco contains chromium. For additional information about chromium exposure, see Chapter 5.

1.4 How can chromium enter and leave my body?

Chromium can enter your body when you breathe air, eat food, or drink water containing chromium. In general, chromium(VI) is absorbed by the body more easily than chromium(III), but once inside the body, chromium(VI) is changed to chromium(III). When you breathe air containing chromium, chromium particles can be deposited in the lungs. Particles that are deposited in the upper part of the lungs are likely to be coughed up and swallowed. Particles deposited deep in the lungs are likely to remain long enough for some of the chromium to pass through the lining of the lungs and enter your bloodstream. Once in the bloodstream, chromium is distributed to all parts of the body. Chromium will then pass through the kidneys and be eliminated in the urine in a few days. Everyone normally eats or drinks a small amount of chromium daily. Most of the chromium that you swallow leaves your body within a

few days through the feces and never enters your blood. A small amount (about 0.4–2.1%) will pass through the lining of the intestines and enter the bloodstream. Chromium(III) present in food can attach to other compounds that make it easier for chromium to enter your bloodstream from your stomach and intestines. This form of chromium is used by your body to carry out essential body functions. If your skin comes into contact with chromium, very little will enter your body unless your skin is damaged. For more information, please read Chapter 2 of the toxicological profile.

1.5 How can chromium affect my health?

To protect the public from the harmful effects of toxic chemicals and to find ways to treat people who have been harmed, scientists use many tests.

One way to see if a chemical will hurt people is to learn how the chemical is absorbed, used, and released by the body; for some chemicals, animal testing may be necessary. Animal testing may also be used to identify health effects such as cancer or birth defects. Without laboratory animals, scientists would lose a basic method to get information needed to make wise decisions to protect public health. Scientists have the responsibility to treat research animals with care and compassion. Laws today protect the welfare of research animals, and scientists must comply with strict animal care guidelines.

Chromium(III) is an essential nutrient that helps the body use sugar, protein, and fat. An intake of 50–200 µg of chromium(III) per day is recommended for adults. On the average, adults in the United States take in an estimated 60–80 µg of chromium per day in food. Therefore, many people's diets may not provide enough chromium(III). Without chromium(III) in the diet, the body loses its ability to use sugars, proteins, and fat properly, which may result in weight loss or decreased growth, improper function of the nervous system, and a diabetic-like condition. Therefore, chromium(III) compounds have been used as dietary supplements and are beneficial if taken in recommended dosages.

The health effects resulting from exposure to chromium(III) and chromium(VI) are fairly well described in the literature. In general, chromium(VI) is more toxic than chromium(III). Breathing in high levels (greater than 2 $\mu g/m^3$) chromium(VI), such as in a compound known as chromic acid or chromium(VI) trioxide, can cause irritation to the nose, such as runny nose, sneezing, itching, nosebleeds, ulcers, and holes in the nasal septum. These effects have primarily occurred in factory workers who make or use chromium(VI) for several months to many years. Long-term exposure to chromium has been associated with lung cancer in workers exposed to levels in air that were 100 to 1,000 times higher than those found in the natural environment. Lung cancer may occur long after exposure to chromium has ended.

Chromium(VI) is believed to be primarily responsible for the increased lung cancer rates observed in workers who were exposed to high levels of chromium in workroom air. Breathing in small amounts of chromium (VI) for short or long periods does not cause a problem in most people. However, high levels of chromium in the workplace have caused asthma attacks in people who are allergic to chromium. Breathing in chromium (III) does not cause irritation to the nose or mouth in most people. In the same way, small amounts of chromium(VI) that you swallow will not hurt you; however, accidental or intentional swallowing of larger amounts has caused stomach upsets and ulcers, convulsions, kidney and liver damage, and even death. The levels of chromium(VI) that caused these effects were far greater than those that you might be exposed to in food or water. Although chromium(III) in small amounts is a nutrient needed by the body, swallowing large amounts of chromium(III) may cause health problems. Workers handling liquids or solids that have chromium(VI) in them have developed skin ulcers. Some people have been found to be extremely sensitive to chromium(VI) or chromium(III). Allergic reactions consisting of severe redness and swelling of the skin have been noted. Exposure to chromium(III) is less likely than exposure to chromium(VI) to cause skin rashes in chromium-sensitive people. The metal, chromium(0), is less common and does not occur naturally. We do not know much about how it affects your health, but chromium(0) is not currently believed to cause a serious health risk. We have no reliable information that any form of chromium has harmful effects on reproduction or causes birth defects in humans, though it does not seem likely that the amount of chromium that most people are exposed to will result in reproductive or developmental effects.

In animals that breathed high levels of chromium, harmful effects on the respiratory system and a lower ability to fight disease were noted. However, we do not know if chromium can lower a person's ability to fight disease. Some of the female mice that were given chromium(VI) by mouth had fewer offspring and had offspring with birth defects. Some male mice that were given chromium(VI) or chromium(III) by mouth had decreased numbers of sperm in the testes. The birth defects or the decrease in sperm occurred in mice at levels about several thousand times higher than the normal daily intake by humans. Some chromium (VI) compounds produced lung cancer in animals that breathed in the particles or had the particles placed directly in their lungs. In animals that were injected with some chromium(VI) compounds, tumors formed at the site of injection.

Because some chromium(VI) compounds have been associated with lung cancer in workers and caused cancer in animals, the Department of Health and Human Services has determined that certain chromium(VI) compounds (calcium chromate, chromium trioxide, lead chromate, strontium chromate, and zinc chromate) are known human carcinogens. The International Agency for Research on Cancer (IARC) has determined that chromium(VI) is carcinogenic to humans, based on sufficient evidence in humans for the carcinogenicity of chromium(VI) compounds as found in chromate production, chromate pigment

Chromium(VI) is believed to be primarily responsible for the increased lung cancer rates observed in workers who were exposed to high levels of chromium in workroom air. Breathing in small amounts of chromium (VI) for short or long periods does not cause a problem in most people. However, high levels of chromium in the workplace have caused asthma attacks in people who are allergic to chromium. Breathing in chromium (III) does not cause irritation to the nose or mouth in most people. In the same way, small amounts of chromium(VI) that you swallow will not hurt you; however, accidental or intentional swallowing of larger amounts has caused stomach upsets and ulcers, convulsions, kidney and liver damage, and even death. The levels of chromium(VI) that caused these effects were far greater than those that you might be exposed to in food or water. Although chromium(III) in small amounts is a nutrient needed by the body, swallowing large amounts of chromium(III) may cause health problems. Workers handling liquids or solids that have chromium(VI) in them have developed skin ulcers. Some people have been found to be extremely sensitive to chromium(VI) or chromium(III). Allergic reactions consisting of severe redness and swelling of the skin have been noted. Exposure to chromium(III) is less likely than exposure to chromium(VI) to cause skin rashes in chromium-sensitive people. The metal, chromium(0), is less common and does not occur naturally. We do not know much about how it affects your health, but chromium(0) is not currently believed to cause a serious health risk. We have no reliable information that any form of chromium has harmful effects on reproduction or causes birth defects in humans, though it does not seem likely that the amount of chromium that most people are exposed to will result in reproductive or developmental effects.

In animals that breathed high levels of chromium, harmful effects on the respiratory system and a lower ability to fight disease were noted. However, we do not know if chromium can lower a person's ability to fight disease. Some of the female mice that were given chromium(VI) by mouth had fewer offspring and had offspring with birth defects. Some male mice that were given chromium(VI) or chromium(III) by mouth had decreased numbers of sperm in the testes. The birth defects or the decrease in sperm occurred in mice at levels about several thousand times higher than the normal daily intake by humans. Some chromium (VI) compounds produced lung cancer in animals that breathed in the particles or had the particles placed directly in their lungs. In animals that were injected with some chromium(VI) compounds, tumors formed at the site of injection.

Because some chromium(VI) compounds have been associated with lung cancer in workers and caused cancer in animals, the Department of Health and Human Services has determined that certain chromium(VI) compounds (calcium chromate, chromium trioxide, lead chromate, strontium chromate, and zinc chromate) are known human carcinogens. The International Agency for Research on Cancer (IARC) has determined that chromium(VI) is carcinogenic to humans, based on sufficient evidence in humans for the carcinogenicity of chromium(VI) compounds as found in chromate production, chromate pigment

production, and chromium plating industries. IARC's determination is also based on sufficient evidence in experimental animals for the carcinogenicity of calcium chromate, zinc chromate, strontium chromate, and lead chromate; and limited evidence in experimental animals for the carcinogenicity of chromium trioxide (chromic acid) and sodium dichromate. IARC has also determined that chromium(0) and chromium(III) compounds are not classifiable as to their carcinogenicity to humans. The EPA has determined that chromium(VI) in air is a human carcinogen. The EPA has also determined that there is insufficient information to determine whether chromium(VI) in water or food and chromium(III) are human carcinogens.

For more information on the health effects of chromium, please see Chapter 2 of the toxicological profile.

1.6 How can chromium affect children?

This section discusses potential health effects from exposures during the period from conception to maturity at 18 years of age in humans.

Children who live near wastes sites where chromium is found are likely to be exposed to higher environmental levels of chromium through breathing, touching soil, and eating contaminated soil. Children at age five years or younger have higher levels of chromium in their urine than do adults and children living outside of contaminated areas. Very few studies have looked at how chromium can affect the health of children. Children need small amounts of chromium(III) for normal growth and development. It is likely that the health effects seen in children exposed to high amounts of chromium will be similar to the effects seen in adults. We do not know whether children differ from adults in their susceptibility to chromium.

We do not know if exposure to chromium will result in birth defects or other developmental effects in people. Birth defects have been observed in animals exposed to chromium(VI). Death, skeletal deformities, and impaired development of the reproductive system have been observed in the newborn babies of animals that swallowed chromium(VI). Additional animal studies are needed to determine whether exposure to chromium(III) will result in birth defects.

One animal study showed that more chromium(III) will enter the body of a newborn than an adult. We do not know if this is also true for chromium(VI). We have no information to suggest that there are any differences between children and adults in terms of where chromium can be found in the body, and how fast chromium will leave the body. Studies with mice have shown that chromium crosses the placenta and concentrates in fetal tissue. Therefore, pregnant women who were exposed to chromium in the workplace or by living near chromium waste sites may transfer chromium from their blood into the baby where it may build up at levels greater than in the mother. There is some evidence in humans that chromium can be transferred from mother to

infant through breast milk.

1.7 How can families reduce their risk of exposure to chromium?

If your doctor finds that you have been exposed to significant amounts of chromium, ask whether your children might also be exposed. Your doctor might need to ask your state health department to investigate.

Children living near chromium waste sites are likely to be exposed to higher environmental levels of chromium through breathing, touching soil, and eating contaminated soil. Some children eat a lot of dirt. You should discourage your children from eating dirt. Make sure they wash their hands frequently and before eating. Discourage your children from putting their hands in their mouths or hand-to-mouth activity. Although chromium(III) is an essential nutrient that helps the body use sugar, protein, and fat, you should avoid excessive use of dietary supplements containing chromium such as chromium picolinate. You should only use the recommended amount if you choose to use these products and store these products out of children's reach in order to avoid accidental poisonings.

1.8 Is there a medical test to determine whether I have been exposed to chromium?

Chromium can be measured in the hair, urine, serum, red blood cells, and whole blood. However, since chromium(III) is an essential nutrient, low levels of chromium are normally found in body tissues and urine. Tests for chromium exposure are most useful for people exposed to high levels. These tests cannot determine the exact levels of chromium you may have been exposed to or predict whether or not health effects will occur. High chromium levels in the urine and red blood cells indicate exposure to chromium(VI) or chromium(III) compounds. Since the body changes chromium(VI) to chromium(III), the form of chromium that you were exposed to cannot be determined from levels in the urine. Much more chromium(VI) can enter red blood cells than chromium(III), but chromium(VI) can be changed to chromium(III) within these cells. Therefore, chromium levels in the red blood cells indicate exposure to chromium(VI). Because red blood cells last about 120 days before they are replaced by newly made red blood cells, the presence of chromium in red blood cells can show whether a person was exposed to chromium 120 days prior to testing but not if exposure occurred longer than 120 days before testing. Skin patch tests may indicate whether a person is allergic to some chromium salts. For more information, please see Chapters 2 and 6 of the toxicological profile.

1.9 What recommendations has the federal government made to protect human health?

The federal government develops regulations and recommendations to protect public health. Regulations can be enforced by law. Federal

infant through breast milk.

1.7 How can families reduce their risk of exposure to chromium?

If your doctor finds that you have been exposed to significant amounts of chromium, ask whether your children might also be exposed. Your doctor might need to ask your state health department to investigate.

Children living near chromium waste sites are likely to be exposed to higher environmental levels of chromium through breathing, touching soil, and eating contaminated soil. Some children eat a lot of dirt. You should discourage your children from eating dirt. Make sure they wash their hands frequently and before eating. Discourage your children from putting their hands in their mouths or hand-to-mouth activity. Although chromium(III) is an essential nutrient that helps the body use sugar, protein, and fat, you should avoid excessive use of dietary supplements containing chromium such as chromium picolinate. You should only use the recommended amount if you choose to use these products and store these products out of children's reach in order to avoid accidental poisonings.

1.8 Is there a medical test to determine whether I have been exposed to chromium?

Chromium can be measured in the hair, urine, serum, red blood cells, and whole blood. However, since chromium(III) is an essential nutrient, low levels of chromium are normally found in body tissues and urine. Tests for chromium exposure are most useful for people exposed to high levels. These tests cannot determine the exact levels of chromium you may have been exposed to or predict whether or not health effects will occur. High chromium levels in the urine and red blood cells indicate exposure to chromium(VI) or chromium(III) compounds. Since the body changes chromium(VI) to chromium(III), the form of chromium that you were exposed to cannot be determined from levels in the urine. Much more chromium(VI) can enter red blood cells than chromium(III), but chromium(VI) can be changed to chromium(III) within these cells. Therefore, chromium levels in the red blood cells indicate exposure to chromium(VI). Because red blood cells last about 120 days before they are replaced by newly made red blood cells, the presence of chromium in red blood cells can show whether a person was exposed to chromium 120 days prior to testing but not if exposure occurred longer than 120 days before testing. Skin patch tests may indicate whether a person is allergic to some chromium salts. For more information, please see Chapters 2 and 6 of the toxicological profile.

1.9 What recommendations has the federal government made to protect human health?

The federal government develops regulations and recommendations to protect public health. Regulations can be enforced by law. Federal

agencies that develop regulations for toxic substances include the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Food and Drug Administration (FDA). Recommendations provide valuable guidelines to protect public health but cannot be enforced by law. Federal organizations that develop recommendations for toxic substances include the Agency for Toxic Substances and Disease Registry (ATSDR) and the National Institute for Occupational Safety and Health (NIOSH).

Regulations and recommendations can be expressed in not-to-exceed levels in air, water, soil, or food that are usually based on levels that affect animals; then they are adjusted to help protect people. Sometimes these not-to-exceed levels differ among federal organizations because of different exposure times (an 8-hour workday or a 24-hour day), the use of different animal studies, or other factors.

Recommendations and regulations are also periodically updated as more information becomes available. For the most current information, check with the federal agency or organization that provides it. Some regulations and recommendations for chromium include the following:

EPA has set the maximum level of chromium(III) and chromium(VI) allowed in drinking water at 100 µg chromium/L. According to EPA, the following levels of chromium(III) and chromium(VI) in drinking water are not expected to cause effects that are harmful to health: 1,400 µg chromium/L for 10 days of exposure for children, 240 µg chromium/L for longer term exposure for children, 840 µg chromium/L for longer term exposure for adults, and 120 µg chromium/L for lifetime exposure of adults.

OSHA regulates chromium levels in the workplace air. The occupational exposure limits for an 8-hour workday, 40-hour workweek are 500 µg chromium/m^3 for water-soluble chromic (chromium(III)) or chromous [chromium(II)] salts and 1,000 µg chromium/m^3 for metallic chromium (chromium(0)), and insoluble salts. The level of chromium trioxide (chromic acid) and other chromium(VI) compounds in the workplace air should not be higher than 52 µg chromium(VI)/m^3 for any period of time.

For chromium(0), chromium(II), and chromium(III), NIOSH recommends an exposure limit of 500 µg chromium/m^3 for a 10-hour workday, 40-hour workweek. NIOSH considers all chromium(VI) compounds (including chromic acid) to be potential occupational carcinogens and recommends an exposure limit of 1 µg chromium (VI)/m^3 for a 10-hour workday, 40-hour workweek.

For more information, please see Chapter 7 of the toxicological profile.

1.10 Where can I get more information?

If you have any more questions or concerns, please contact your community or state health or environmental quality department or

Agency for Toxic Substances and Disease Registry
Division of Toxicology
1600 Clifton Road NE, Mailstop E-29
Atlanta, GA 30333

* Information line and technical assistance

Phone: 888-422-8737
FAX: (404)498-0057

ATSDR can also tell you the location of occupational and environmental health clinics. These clinics specialize in recognizing, evaluating, and treating illnesses resulting from exposure to hazardous substances.

* To order toxicological profiles, contact

National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161
Phone: 800-553-6847 or 703-605-6000

References

Agency for Toxic Substances and Disease Registry (ATSDR). 2000. Toxicological profile for chromium (Update). Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

If you have any more questions or concerns, please contact your community or state health or environmental quality department or

Agency for Toxic Substances and Disease Registry
Division of Toxicology
1600 Clifton Road NE, Mailstop E-29
Atlanta, GA 30333

* Information line and technical assistance

Phone: 888-422-8737
FAX: (404)498-0057

ATSDR can also tell you the location of occupational and environmental health clinics. These clinics specialize in recognizing, evaluating, and treating illnesses resulting from exposure to hazardous substances.

* To order toxicological profiles, contact

National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161
Phone: 800-553-6847 or 703-605-6000

References

Agency for Toxic Substances and Disease Registry (ATSDR). 2000. Toxicological profile for chromium (Update). Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

ATSDR Information Center / ATSDRIC@cdc.gov / 1-888-422-8737

This page last updated on May 22, 2002

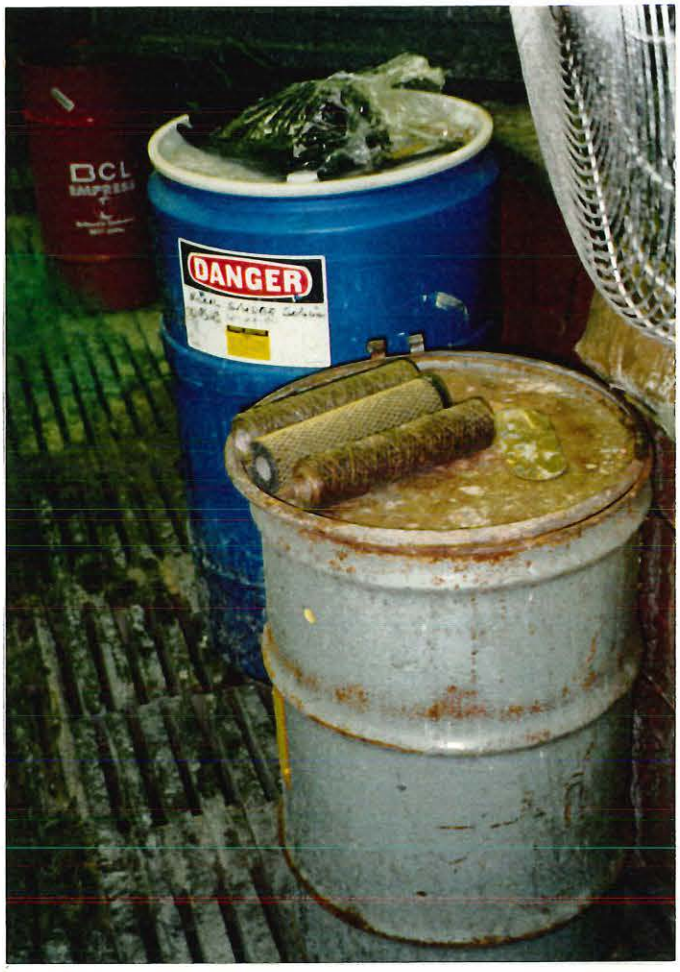


EXHIBIT 9

Oregon

DEPARTMENT
ENVIRONMENT
QUALITY

ENFORCEMENT SECT.

October 21, 1998

I HEREBY CERTIFY THAT THE FORGOING IS A COMPLETE AND EXACT COPY OF THE ORIGINAL THEREOF.
Deborah Nesbit

Luhr Jensen & Sons, Inc.
Attn. Mark Wiltz
P.O. Box 297
Hood River, OR 97031

Re: Mutual Agreement and Order
In the Matter of:
Luhr Jensen & Sons, Inc.
Case No. HW-ER-07-095
Hood River County

Dear Mr. Wiltz:

The Mutual Agreement and Order mitigating the $17,400 civil penalty in the above case to $11,400 has been approved by the Department's Enforcement Administrator on behalf of the Environmental Quality Commission. A copy of the signed order is enclosed. The MAO provides for the further mitigation of the civil penalty to $3,800, upon the successful completion of Luhr Jensen & Sons supplemental environmental project. Once Luhr Jensen & Sons satisfactorily completes the conditions of the MAO, the case will be closed.

Thank you for your cooperation.

Sincerely,

Les Carlough, Manager
Enforcement Section

LAC:jrb
e:\winword\letters\luhr6ltr.doc
Enclosure
cc: Rules Coordinator, DEQ
Eastern Region, Bend Office, DEQ, Attn. Jeff Ingalls
Waste Management and Cleanup Division, HQ, DEQ
Business Office, DEQ

EXHIBIT 10

2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5528
TTY (503) 229-5471
DEQ-1

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: LUHR JENSEN & SONS, INC.	MUTUAL AGREEMENT AND ORDER, SUPPLEMENTAL ENVIRONMENTAL PROJECT No. HW-ER-97-095 HOOD RIVER COUNTY

WHEREAS:

1. On July 17, 1997, the Department of Environmental Quality (Department) issued Notice of Assessment of Civil Penalty No. HW-ER-97-095 to Luhr Jensen & Sons, Inc. The Notice assessed a $17,400 civil penalty against Luhr Jensen & Sons for violations alleged in the Notice.

2. By letter dated August 6, 1997, Luhr Jensen & Sons filed a request for hearing and an Answer to the Notice.

3. On February 24, 1998, Luhr Jensen & Sons submitted a Supplemental Environmental Project (SEP) proposal to the Department. Luhr Jensen & Sons submitted additional proposal information on June 24, 1998.

4. The parties agree to compromise and settle this contested case on the following terms.

NOW THEREFORE, it is stipulated and agreed that:

5. Luhr Jensen & Sons hereby waives any and all rights and objections it may have to the form, content, manner of service and timeliness of the Notice; to a contested case hearing and judicial review of the Notice; and to service of a copy of this Mutual Agreement and Order (MAO), which shall be effective when signed by the Director on behalf of the Environmental Quality Commission (Commission).

6. Based on information submitted by Luhr Jensen & Sons the Department agrees to amend the Notice in the following manner: (1) Treat Violation No. 2 as a second occurrence of Violation No. 1, not as a separate violation, thereby reducing the total civil penalty by $4,200, (2) In the civil penalty calculation for Violation No. 3, change the value for the C or "cooperativeness" factor from 0 to –2, thereby reducing the total civil penalty by $600, and (3) dismiss Violation No. 5,

reducing the civil penalty a further $1,200. The Amended Findings and Determination of Civil Penalty for Violation No. 3 is attached as Exhibit 3. These amendments reduce the total civil penalty from $17,400 to $11,400.

7. In accordance with Paragraph 10 of the Department's Internal Management Directive for SEPs, the Department agrees to further mitigate two-thirds of the $11,400 civil penalty, thereby reducing it to $3,800, on the condition that Luhr Jensen and Sons satisfactorily completes the approved SEP proposal by January 1, 2001. The $3,800 civil penalty shall be paid when Luhr Jensen & Sons signs and returns this MAO to the Department.

8. The Department's approval of the SEP proposal and the penalty mitigation contingent upon the SEP's successful completion is subject to the following conditions:

a. No more than 40 hours of the 125 work hours to be performed by Luhr Jensen's environmental manager on behalf of the Green Smart program may consist of work hours completed prior to the execution of this agreement.

b. The Green Smart Program Coordinator shall verify the number of work hours performed by Luhr Jensen's environmental manager in writing.

c. The Program Coordinator shall verify the value of in kind donations by Luhr Jensen & Sons to the Green Smart Program in writing.

9. The SEP proposal is incorporated into this Mutual Agreement and Order as Exhibit A.

10. Pursuant to OAR 340-12-030(14), the violations alleged in the Notice will be treated as a prior significant action in the event a future violation occurs.

11. Luhr Jensen & Sons agrees not to use the value of the SEP as a tax deduction or as part of a tax credit application. Luhr Jensen & Sons further agrees that if and when it publicizes the SEP or the results of the SEP, it will state in a prominent manner that the project has or is being undertaken as part of a settlement of a Department enforcement action.

10. The Commission shall enter a final order:

a. Finding that the Department and Commission have satisfied all the requirements of law and that mitigation of the civil penalty is consistent with public health and safety, and is in the public interest.

b. Requiring Luhr Jensen & Sons to satisfactorily complete the SEP by January 1, 2001. Should Luhr Jensen & Sons fail to complete the SEP by the specified date, the mitigated portion of the penalty, $7,600, shall become due and owing on February 1, 2001

c. Imposing upon Luhr Jensen & Sons a civil penalty of $3,~~600~~ 800

d. Requiring Luhr Jensen & Sons to comply with all the terms and conditions of this MAO.

LUHR JENSEN & SONS, INC.

Aug 26, 98 — M. Mark Vilt
Date

DEPARTMENT OF ENVIRONMENTAL QUALITY

10/21/98 — for Neil Mullane
Date — Langdon Marsh, Director

FINAL ORDER

IT IS ORDERED:

ENVIRONMENTAL QUALITY COMMISSION

10/21/98 — for Neil Mullane
Date — Langdon Marsh, Director
Pursuant to OAR 340-11-136(1) and
OAR 340-12-047

encl 1, 2

Oregon

I HEREBY CERTIFY THAT THE FORGOING IS A COMPLETE AND EXACT COPY OF THE ORIGINAL THEREOF.
Deborah Nesbit

DEPARTMENT OF ENVIRONMENTAL QUALITY

ENFORCEMENT SECTION

July 17, 1997

CERTIFIED MAIL P 335 735 715

Luhr Jensen & Sons, Inc.
c/o Elizabeth R. Hogan, Registered Agent
400 Portway
Hood River, OR 97031

Re: Notice of Violation, Compliance Order
and Assessment of Civil Penalty
No. HW-ER-97-095
Hood River County

On March 25 and 26, 1997, the Department inspected the Luhr Jensen & Sons, Inc. (Luhr Jensen), facility at 400 Portway, Hood River, Oregon. The inspection results determined that Luhr Jensen is a small quantity generator of hazardous waste and that it had committed the following violations of the hazardous waste rules that pertain to small quantity generators.

(1) Operating as a hazardous waste storage facility without a permit,
(2) Storing hazardous waste in excess of 180 days,
(3) Failing to mark hazardous waste containers with accumulation dates and the words "hazardous waste",
(4) Failing to minimize the possibility of release of hazardous waste,
(5) Failing to make a hazardous waste determination,
(6) Failing to keep containers of hazardous waste closed except when necessary to add or remove waste,
(7) Failing to maintain adequate aisle space in a hazardous waste storage area,
(8) Failing to post required emergency information near the telephone closest to a hazardous waste storage area,
(9) Failing to keep a telephone or a two-way radio readily available at the scene of hazardous waste operations, and
(10) Failing to properly complete a hazardous waste manifest.

Violations 1-5 are Class I violations and Violations 6-10 are Class II violations. The Department assessed Luhr Jensen a civil penalty for several of the same violations in 1989. The 1989 violations were failure to mark waste containers with accumulation dates, failure to mark containers with the words "hazardous wastes", and failure to keep storage containers closed.

Improper management of hazardous wastes threatens public health and the environment. To protect public health and the environment, the legislature has enacted statutes and the Department has adopted rules establishing strict

2020 SW Fourth Avenue
Suite 400
Portland, OR 97201-4987
(503) 229-5528
TTY (503) 229-5471

requirements governing the generation, accumulation, storage, handling, treatment, and disposal of hazardous wastes. Luhr Jensen's failure to comply with hazardous waste rules increases the risk that the public or the environment could be harmed by mismanagement of hazardous waste.

Because Luhr Jensen violated Oregon environmental law, I have enclosed a Notice of Violation, Compliance Order, and Assessment of Civil Penalty (Notice and Order). The Department is in receipt of a May 12, 1997 letter from Mark Wiltz, the environmental manager at the Portway facility, in which Mr. Wiltz asserts that all the violations documented on March 25 and 26 have been corrected. The Department appreciates this response, but requires documentary proof. The Compliance Order requires Luhr Jensen to provide such proof within 30 days of receipt of the Notice and Order.

Furthermore, Luhr Jensen is liable for a civil penalty assessment because it violated Oregon environmental law. In the Notice and Order, I have assessed civil penalties totaling $17,400 for the five Class I violations cited above. In determining the amount of the penalty, I used the procedures set forth in Oregon Administrative Rule (OAR) 340-12-045. The Department's findings and civil penalty determination are attached to the Notice as Exhibit Nos. 1-5.

Appeal procedures are outlined in Section VI of the Notice. If Luhr Jensen fails to either pay or appeal the penalty within twenty (20) days, a Default Order will be entered against it.

If Luhr Jensen wishes to discuss this matter, or if it believes there are mitigating factors the Department might not have considered in assessing the civil penalty, Luhr Jensen may request an informal discussion by attaching a request to its appeal. Luhr Jensen's request to discuss this matter with the Department will not waive its right to a contested case hearing.

I look forward to Luhr Jensen's cooperation in complying with Oregon environmental law in the future. However, if any additional violations occur, Luhr Jensen may be assessed additional civil penalties.

Copies of referenced rules are enclosed. Also enclosed is a copy of the Department's internal management directive regarding civil penalty mitigation for Supplemental Environmental Projects (SEPs). If Luhr Jensen has any questions about this action, please contact Jeff Bachman with the Department's Enforcement Section in Portland at (503) 229-5950 or toll-free at 1-800-452-4011, enforcement extension 5950.

Sincerely,

Langdon Marsh

Langdon Marsh
Director

e:\winword\letters\luhrltr.doc

Enclosures

cc: Eastern Region, Bend Office, DEQ
Waste Management and Cleanup Division, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Hood River County District Attorney

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: LUHR JENSEN & SONS, INC., an Oregon corporation, Respondent.	NOTICE OF VIOLATION, COMPLIANCE ORDER, AND ASSESSMENT OF CIVIL PENALTY NO. HW-NWR-97-095 HOOD RIVER COUNTY

I. AUTHORITY

This Notice of Violation, Compliance Order, and Assessment of Civil Penalty (Notice and Order) is issued by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.126 through 468.140, 466.190, 466.880, ORS Chapter 183, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. FINDINGS

1. Respondent, Luhr Jensen & Sons, Inc., owns and operates a facility located at 400 Portway, Hood River, Oregon.

2. Respondent manufactures fishing lures and equipment at the Portway facility and is a small quantity generator of hazardous waste assigned identification number ORD 99075 1414.

3. A representative of the Department conducted a compliance inspection at Respondent's facility on March 25 and 26, 1997.

III. VIOLATIONS

Based upon the above noted inspection, Respondent has violated the following provisions of Oregon's hazardous waste laws and regulations applicable to the facility as set forth in ORS Chapter 466 and OAR Chapter 340, Divisions 100 to 110 and 120, including regulations incorporated in OAR 340-100-002, adopted pursuant to ORS Chapter 466:

1. Respondent violated ORS 466.095(1)(b) by operating as a hazardous waste storage facility without a hazardous waste storage facility permit. Specifically, Respondent's

Portway facility accepted and stored hazardous waste from Respondent's Oak Grove facility prior to its disposal. This is a Class I violation pursuant to OAR 340-12-068(1)(c).

2. Respondent violated 40 Code of Federal Regulations (CFR) 262.34(f), adopted pursuant to OAR 340-100-002, by storing hazardous wastes in excess of 180 days. Specifically, Respondent stored four drums of F001 and D001 hazardous waste acetone still bottoms, one drum of D001 hazardous waste inks, and one drum of D007 hazardous waste plating bath sludge in its hazardous waste storage area, and two drums of unidentified hazardous wastes across from the acetone distillation area, for more than 180 days. This is a Class I violation pursuant to OAR 340-12-068(1)(d).

3. Respondent violated 40 CFR 262.34(a)(2), adopted pursuant to OAR 340-100-002 by failing to mark hazardous waste containers with accumulation dates. Specifically, Respondent failed to mark with accumulation dates four containers of F003, D001 hazardous waste acetone still bottoms and one container of D007 plating bath sludge stored in its hazardous waste storage area; three containers of unidentified hazardous waste stored across from the distillation area; four containers of still bottoms and one container of spent acetone stored in the distillation room; and three containers of spent plating bath sludge stored in the plating room. This is a Class I violation pursuant to OAR 340-12-068(1)(x).

4. Respondent violated 40 CFR 265.31, adopted pursuant to OAR 340-100-002, by failing to minimize the possibility of fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment. Specifically, Respondent allowed spent electroplating bath stored in the hazardous waste storage area to corrode through a metal drum and leak, punctured a drum in the hazardous waste storage area, later determined to contain used oil, with a fork lift blade, and allowed stripping agents stored in the acid storage area to corrode through a metal drum. This is a Class I violation pursuant to OAR 340-12-068(1)(u).

5. Respondent violated OAR 340-102-011 by failing to make a hazardous waste determination. Specifically, Respondent failed to determine the contents of a drum stored in the hazardous waste storage area. This is a Class I violation pursuant to OAR 340-12-068(1)(b).

6. Respondent violated 40 CFR 265.173(a), adopted pursuant to OAR 340-100-002, by failing to keep hazardous waste containers closed during storage. Specifically, Respondent allowed to remain open four containers of still bottoms stored in the distillation area and three containers of plating bath sludges stored in the plating room. This is a Class II violation pursuant to OAR 340-12-068(2).

7. Respondent violated 40 CFR 265.35, adopted pursuant to OAR 340-100-002, by failing to maintain adequate aisle space in container storage areas to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment. Specifically, there was insufficient aisle space in the hazardous waste storage area. This is a Class II violation pursuant to OAR 340-12-068(2).

8. Respondent violated 40 CFR 262.34(d)(5)(ii), adopted pursuant to OAR 340-100-102, by failing to post near the telephone closest to the hazardous storage area and the distillation area the name and telephone number of Respondent's emergency coordinator, the location of fire extinguishers and spill containment equipment, and fire department telephone number. This is a Class II violation pursuant to OAR 340-12-068(2).

9. Respondent violated 40 CFR 265.32(b), adopted pursuant to OAR 340-100-102, by failing to provide a device, such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or State or local emergency response teams. Specifically, Respondent failed to provide a telephone or hand-held two-way radio readily available at the hazardous waste storage area and adjacent acetone distillation area. This is a Class II violation pursuant to OAR 340-12-068(2).

10. Respondent violated 40 CFR 262.20(a), adopted pursuant to OAR 340-100-102, by failing to properly complete a manifest for an off-site shipment of hazardous waste.

Specifically, Respondent recorded an incorrect address and identification number on manifest no. 00516, dated March 10, 1997. This is a Class II violation pursuant to OAR 340-12-068(2).

IV. COMPLIANCE ORDER

Based upon the foregoing FINDINGS and VIOLATIONS, Respondent is hereby ORDERED TO:

1. Immediately initiate actions necessary to correct all of the above cited violations and come into full compliance with Oregon's hazardous waste laws.

2. Within 30 days of receipt of this Notice and Order, submit to the Department documentary and all other appropriate proof necessary to demonstrate correction of the above cited violations.

V. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for Violation Nos. 1-5 cited in Section III as follows:

Violation	Penalty Amount
1	$4,200
2	$4,200
3	$4,200
4	$3,600
5	$1,200

Respondent's total civil penalty is $17,400.

VI. OPPORTUNITY FOR CONTESTED CASE HEARING

This Notice and Order shall become final unless, within 20 days of issuance of this Notice and Order, Respondent requests a hearing before the Environmental Quality Commission (Commission) pursuant to ORS 466.190. **The request 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 allegations 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 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.

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 $17,400 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**.

7.17.97
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 NO. 1: Operating as a hazardous waste storage facility without a permit in violation of Oregon Revised Statute 466.095(1)(b).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-12-068(1)(c).

MAGNITUDE: The magnitude of the violation is moderate. OAR 340-12-045(1)(a) provides that in the absence of a selected magnitude, the magnitude shall be moderate.

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 340-12-042(1).

"P" is Respondent's prior significant action(s) and receives a value of 0. Respondent has one prior significant action, HW-CR-89-89, which consisted of two Class I equivalent violations, resulting in a value of 3, pursuant to OAR 340-12-045(1)(c)(A)(iv). That value is reduced by 4, pursuant to OAR 340-12-045(1)(c)(A)(xii)(II) because the date of issuance of the prior significant action is more than five years old. The final value is 0 pursuant to OAR 340-12-045(1)(c)(A)(xii)(III) because no value for the "P" factor may be less than 0.

"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 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 as the violation occurred on more than one day.

"R" is the cause of the violation and receives a value of 2 as Respondent was negligent in that it failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

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

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} = BP &+ [(0.1 \times BP) \times (P + H + O + R + C)] + EB \\ &= \$3,000 + [(0.1 \times \$3,000) \times (0 + 0 + 2 + 2 + 0)] + \$0 \\ &= \$3,000 + [(\$300 \times 4)] + \$0 \\ &= \$3,000 + \$1,200 + \$0 \\ &= \$4,200 \end{aligned}$$

EXHIBIT 2

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO. 2 — Exceeding the 180-day storage limit for accumulated hazardous wastes in violation of 40 Code of Federal Regulations 262.34(f), adopted pursuant to OAR 340-100-002.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-12-068(1)(d).

MAGNITUDE: The magnitude of the violation is moderate. OAR 340-12-045(1)(a) provides that in the absence of a selected magnitude, the magnitude shall be moderate.

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 340-12-042(1).

"P" is Respondent's prior significant action(s) and receives a value of 0. Respondent has one prior significant action, HW-CR-89-89, which consisted of two Class I equivalent violations, resulting in a value of 3, pursuant to OAR 340-12-045(1)(c)(A)(iv). That value is reduced by 4, pursuant to OAR 340-12-045(1)(c)(A)(xii)(II) because the date of issuance of the prior significant action is more than five years old. The final value is 0 pursuant to OAR 340-12-045(1)(c)(A)(xii)(III) because no value for the "P" factor may be less than 0.

"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 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 as the violation occurred for more than one day.

"R" is the cause of the violation and receives a value of 2 as Respondent was negligent in that it failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

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

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as Respondent's economic benefit was de minimis.

PENALTY CALCULATION:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (0 + 0 + 2 + 2 + 0)] + 0
= $3,000 + [($300 x 4)] + $0
= $3,000 + $1,200 + $0
= $4,200

EXHIBIT 3

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO. 3: Failure to mark hazardous waste containers with accumulation dates in violation of 40 Code of Federal Regulations 262.34(a)(2), adopted pursuant to OAR 340-100-002.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-12-068(1)(x).

MAGNITUDE: The magnitude of the violation is moderate. OAR 340-12-045(1)(a) provides that in the absence of a selected magnitude, the magnitude shall be moderate.

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 340-12-042(1).

"P" is Respondent's prior significant action(s) and receives a value of 0. Respondent has one prior significant action, HW-CR-89-89, which consisted of two Class I equivalent violations, resulting in a value of 3, pursuant to OAR 340-12-045(1)(c)(A)(iv). That value is reduced by 4, pursuant to OAR 340-12-045(1)(c)(A)(xii)(II) because the date of issuance of the prior significant action is more than five years old. The final value is 0 pursuant to OAR 340-12-045(1)(c)(A)(xii)(III) because no value for the "P" factor may be less than 0.

"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 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 as the violation occurred for more than one day.

"R" is the cause of the violation and receives a value of 2 as Respondent was negligent in that it failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as there is insufficient information on which to base a finding.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as there is insufficient information on which to base a finding.

PENALTY CALCULATION:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (0 + 0 + 2 + 2 + 0)] + 0
= $3,000 + [($300) x 4)] + $0
= $3,000 + $1,200 + $0
= $4,200

EXHIBIT 4

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO. 4: Failure to minimize the possibility of fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment in violation of 40 Code of Federal Regulations 265.31, adopted pursuant to OAR 340-100-002.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-12-068(1)(u).

MAGNITUDE: The magnitude of the violation is moderate. OAR 340-12-045(1)(a) provides that in the absence of a selected magnitude, the magnitude shall be moderate.

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 340-12-042(1).

"P" is Respondent's prior significant action(s) and receives a value of 0. Respondent has one prior significant action, HW-CR-89-89, which consisted of two Class I equivalent violations, resulting in a value of 3, pursuant to OAR 340-12-045(1)(c)(A)(iv). That value is reduced by 4, pursuant to OAR 340-12-045(1)(c)(A)(xii)(II) because the date of issuance of the prior significant action is more than five years old. The final value is 0 pursuant to OAR 340-12-045(1)(c)(A)(xii)(III) because no value for the "P" factor may be less than 0.

"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 there is insufficient information on which to base a finding.

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0 as the violation was documented on a single occasion.

"R" is the cause of the violation and receives a value of 2 as Respondent was negligent in that it failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

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

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as the economic benefit was de minimis.

PENALTY CALCULATION:

Penalty = BP + [(0.1 x BP) x (P + H + O + R + C)] + EB
= $3,000 + [(0.1 x $3,000) x (0 + 0 + 0 + 2 + 0)] + 0
= $3,000 + [($300 x 2)] + $0
= $3,000 + $600 + $0
= $3,600

EXHIBIT 5

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-12-045

VIOLATION NO. 6 — Failure to make a hazardous waste determination in violation of OAR 340-102-011.

CLASSIFICATION: — This is a Class I violation pursuant to OAR 340-12-068(1)(b).

MAGNITUDE: — The magnitude of the violation is minor pursuant to OAR 340-12-090(3)(a)(C) because the violation involved only one waste stream.

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, minor magnitude violation in the matrix listed in OAR 340-12-042(1).

"P" is Respondent's prior significant action(s) and receives a value of 0. Respondent has one prior significant action, HW-CR-89-89, which consisted of two Class I equivalent violations, resulting in a value of 3, pursuant to OAR 340-12-045(1)(c)(A)(iv). That value is reduced by 4, pursuant to OAR 340-12-045(1)(c)(A)(xii)(II) because the date of issuance of the prior significant action is more than five years old. The final value is 0 pursuant to OAR 340-12-045(1)(c)(A)(xii)(III) because no value for the "P" factor may be less than 0.

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

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 0 as the violation was documented on a single occasion.

"R" is the cause of the violation and receives a value of 2 as Respondent was negligent in that it failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 as there is insufficient information on which to base a finding.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as the economic benefit was de minimis.

PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} = BP &+ [(0.1 \times BP) \times (P + H + O + R + C)] + EB \\ &= \$1,000 + [(0.1 \times \$1,000) \times (0 + 0 + 0 + 2 + 0)] + \$0 \\ &= \$1,000 + [(\$100 \times 2)] + \$0 \\ &= \$1,000 + \$200 + \$0 \\ &= \$1,200 \end{aligned}$$

EXHIBIT 11

A EXHIBIT 11

Attachment J-A12

Jeff Ingalls
Environmental Specialist
Hazardous Waste Program
Department of Environmental Quality
2146 N.E. Fourth, Suite 104
Bend, Oregon 97701

May 12, 1997

In response to your letter dated April 17, 1997 concerning noncompliance and hazardous waste violations, the following addresses each violation;

Violation 1 - Luhr Jensen will continue to receive C.E.G. shipments of "Dirty Acetone" from the Jen-Tech facility into the Portway facility for subsequent recycling. This recycled acetone will then be used at both the Portway and Jen-Tech facilities. We will not, however, receive any hazardous waste from any site for accumulation or disposal. All hazardous waste generated from sites other than the Portway facility will be manifested and shipped from that site of generation.

Violation 2 - Luhr Jensen will not store hazardous waste over the 180 day limit, and will comply with the requirements for accumulation of hazardous waste as stated in 40 CFR 262.34. A weekly log is currently being maintained to document and support drum storage inspections. In this log, general housekeeping information and storage data will be noted to support timely hazardous waste shipments insure correct hazardous waste handling, labeling and container inspections. Acetone recycling operation has been updated with better housekeeping methods, container accumulation labeling and weekly inspections.

Violation 3 - Contents of the Blue 55 gallon has been determined to be a used oil product, and has been combined with the existing used oil for disposal. At the time of the inspection, the contents were assumed to be an oil of some kind, but we were hesitant to mix this with the existing waste oils for fear of possible contamination by carburetor cleaner or similar solvent.

The waste oil from the Jen Tech facility has been concentrated into drums and properly labeled. Luhr Jensen will ship these drums for disposal sometime between May 12 - May 23, 1997. We currently have an active profile for this waste stream.

Violation 4 - All drums containing hazardous waste have been labeled with the words "Hazardous Waste", have been supplied with an accumulation start date. The container in the Acetone still room which receives the acetone still bottoms, has been correctly labeled and properly dated. All containers containing hazardous waste (5 gallon containers) have been emptied into accumulation drums that are properly labeled and dated. An increased awareness is being propagated throughout the company concerning waste oil management and drum labeling. A drum labeling system has been put into practice to effect empty drums and drums that are used for waste collection.

Violation 5 - All drums will be maintained closed unless actively involved in filling or emptying activities. We have trained and informed affected employees of this requirement. Our weekly inspection, as well as daily observation will insure that this requirement is maintained.

Violation 6 - A drum management and training requirement has been put in place to insure proper drum handling, spill prevention and spill notification. A Spill Control and Prevention Plan is being used to re-train employees in the account of a spill. The work practices and methods have been changed in the acetone distillation room. Namely; a single drum for acetone still bottoms is all that will be allowed inside the acetone still room for the collection of still bottom waste. This drum will be labeled with the works "Hazardous Waste", the proper shipping designation, and dated as to the date when the drum was 1) placed into service, and 2) full. This drum will remain covered unless waste is actively being managed in this drum.

Wastes with a corrosive or oxidizing potential towards steel, will be managed in plastic drums. This includes, but is not limited to nickel plating waste and chromic acid plating waste. A weekly drum inspection will also detect situations where storage drums are compromised by oxidation or corrosion.

Violation - 7 A drum storage inspection system has been put into place to adequately manage containers, their labeling and condition. The inspection system will log Drum accumulation dates, drum condition, housekeeping and labeling. Proper spacing of drums will also be maintained for proper inspection and access to all drums. The inspection will be conducted at least once a week.

Violation - 8 A copy of Luhr Jensen's Contingency Plan, and Spill Control and Countermeasure Plan is now posted and maintained next to the telephone in the Maintenance room, which is the closest telephone to the Hazardous Waste storage area. I might add that this requirement was fulfilled during the inspection before the Inspector finished his inspection of our facility.

Violation - 9 This condition will be prevented from happening in the future through proper employee training, and through the administration of Luhr Jensen's drum management and inspection procedure conducted by Mark Wiltz.

Violation - 10 A work order has been placed with our internal maintenance department to install a telephone in the Acetone Still Room for the purpose of summoning emergency assistance. This phone will allow for internal access, as well as access to the fire, police and emergency response teams. This phone will be installed and connected by May 23, 1997.

Violation - 11 Eltex Chemical has been contacted to correct the E.P.A. I.D. number and facility address on manifest 00516, dated March 10, 1997. I am currently awaiting the corrected manifest from Eltex.

Some of the above violations were on materials or containers of materials that are considered product or potential product for manufacturing. As a source reduction method, we are disposing of materials that have a low probability of being used in the near to near-distant future. We are also managing our waste with a much closer eye on accumulation and storage dates. I've developed a working relationship with a TSD who drives through the area frequently, and is very helpful with manifesting, disposal options, and general waste management advice.

We have also re-directed our focus with our acetone still operation. We are only going to distill dirty acetone, with no efforts expended on trying to concentrate our still-bottoms. Although this is a source reduction process, it can sometimes interfere with recycling and waste treatment objectives.

Our primary source reduction efforts will be reducing the amount of materials and chemicals we have inventoried and on site, with an eye on processes that can be simplified or combined. Recently we have removed a 1,1,2-Trichloroethyene degreaser from production, and gone to an aqueous-based cleaner.

If there is any additional information that I can supply, or have omitted, please contact me.

Sincerely,

Mark Wiltz
Env. Mgr.

LUHR-JENSEN™ "Where Legends Live."

N. MARK WILTZ
Environmental Manager/
Plating Supervisor

Phone (541) 386-3811
FAX (541) 386-4917
e-mail luhr@gorge.net
http:www.luhr-jensen.com

P.O. Box 297, 400 Portway, Hood River, OR 97031

Attachment J-A13

Oregon Department of Environmental Quality
2146 NE 4th St., Suite 104
Bend, OR 97701

January 25, 2002

Attn: Jeff Ingalls
Re: notice of non-compliance (HW-ERB-2001-7710) - response #2

Jeff, I thought that I would communicate some additional information that I have become aware of that pertains to the above non-compliance action taken against Luhr Jensen & Sons.

The sump area beneath the electroplating facility contained liquids during your visit that resulted in you writing violations;
Violation #1 – (ORS 466.095(1)(b) As mentioned before, the plating room is built above a sump or catch basin. This sump is intended to trap spills, drag out and generally contain any materials for subsequent collection disposal, and is intended to prevent any release into the environment. During the inspection of this facility on August 14, 2001, the sump contained a measurable quantity of liquids.

I had eventually found out from our maintenance department that they had recently installed an automated assembly machine, and had routed the cooling water into the plating sump area for a few weeks. This explains the quantity of liquids in the sump. On the notice of violation it was stated that this F006 hazardous waste has been stored in the sump area for at least 20 years. This is not accurate, as the leak that allowed water into the sump area happened in July of 2001. This spill containment sump functioned exactly as is was designed.

Our future efforts with respect to this sump area is to reduce plating and rinse water spills into this sump in an effort to maintain a clean and dry sump area. This will more accurately allow us to closely monitor fluid ingress to the sump area.

We have also added drip pans and fluid catch basins to prevent any liquids from the plating process to fall and enter into the sump area.

Another clarification of the notice of non compliance has to do with the soldering waste containing lead. We have been using a lead-free solder (Violation 4) in this manufacturing operation.

I hope that the above facts are useful in mitigating some of our violations.

Sincerely,

N. Mark Wiltz

N. Mark Wiltz
Env. Mgr.

Opening Remarks…

March 16, 2003

Good Morning…

In attendance here today… with Luhr Jensen, is our financial Officer… Beth Hogan… Our Environmental Officer, Mark Wiltz, the head of our engineering department, Dave Lind, and the owner of the Portland firm VLMK Consulting Engineers, Fred Van Domelen. Fred's firm designed our plating operation, …including the containment sump, in 1977.

My name is Phil Jensen. I am the owner and CEO of Luhr Jensen & Sons, Incorporated, Hood River, Oregon.

At first glance at the original notice to appear before the Hearings Officer Panel the word "Tribunal" was used several times. Being a whole lot naïve about these affairs, I was a bit apprehensive about this rather new word. Then, I looked it up in the dictionary and found that it meant… quite simply… "a court of justice"… and I thought… Yeah, that's what we're here for… and I'm really comfortable with that.

And before we move deep into the issues… let me first say that Luhr Jensen is very supportive of the goals of the DEQ. We deeply respect the work that this agency does for the state of Oregon… This is not easy work… and with the proposed state budget cuts, I suppose that it's not going to get any easier.

We hope and trust… that our conversations regarding these issues will always be cordial and of a cooperative nature… and that anything that comes from this "tribunal" will not prejudice Luhr Jensen's future relationship with the department.

Let's move forward… I am very new at this… Please guide me, …gently!

It is my (our) opinion that the information offered today is relevant to the proceedings, in that… The continued characterization of Luhr Jensen as a "repeat offender" is a very arguable term… and this characterization has a substantial bearing on the number of fines and how these fines are calculated and assessed.

Further, it is our contention that Luhr Jensen has been unfairly characterized and portrayed, to the public, through the media, in a manner that has injured our company's reputation, sales potential and ultimately the value of our company.

Let me give you some examples;

In Jeff Ingalls statements to the Hood River News (please see the exhibit, mark as you see fit…), Jeff is quoted as saying; *"...every time we have gone there we have found a problem and we obviously need a bigger presence"*. Inspector Ingalls has been to our factory (made inspections) twice since he has been with the department. The DEQ has been to our factory for inspections four times in the past 20 years. Over this time, there have been many changes in the company personnel, locations, operations and especially, operational standards of the DEQ. The "infractions" that have been found at Luhr Jensen are characterized under a very large umbrella as "being similar". In fact, most of the events and circumstances were …distinctly different. It may be "tidy" to lump them together for the sake of simplicity, or for other motives, but the action that effected the allegations and the fines were not the same. I believe that it would be fair to say that on any given day (or inspection) it would be very difficult for any company to be found completely fault free in the eyes of a determined inspector. The rules and regulations of this agency are many and they are complicated.

In the same article (front page, Hood River News), it is suggested that Luhr Jensen would be entering into a "Voluntary Compliance Agreement) triggered by this recent inspection. This "VCP" is ongoing. We have investigated concerns of the Department with respect to both our plating sumps integrity and allegations of buried drums at another facility. These tests were conducted at substantial expense to Luhr Jensen. In conclusion of these tests it was determined that "no ground water contamination was found, nor were any buries drums found of detected".

In addition to the substantial cost of these testing procedures, Luhr Jensen paid $4,737.00 to the DEQ for administration of the "Voluntary Cleanup Agreement". Again, please note that it was determined by outside professional companies …that there was nothing to clean up. Total cost (to Luhr Jensen) for the exercise was $14,361.00.

In a recent letter from Stephanie Hallock, the Portland office director of the DEQ, to State Senator Rick Metsker, Stephanie refers to the penalty history of Luhr Jensen, stating *"The increasing amount of penalties assessed by DEQ is a result of the company's continued violations of hazardous waste law over the years"*.

Now, (as they say…) we may not be "rocket scientists"…but it appears evident to Luhr Jensen… that the DEQ views Luhr Jensen with a very suspicious eye, if not an attitude of distrust and, …that, indeed, the department is somewhat prejudiced regarding Luhr Jensen.

My answer, again… in a perfect world, nothing would ever be …"awry"… and quite probably that is how a dedicated group of professional people would like to imagine or desire the world to be (perfect!) (I would, also!). But, please know that in our manufacturing world, employing over 200 people, many of which are entry level and of different cultural backgrounds, doing multiple tasks to generate product and a profit in a crushingly competitive market place… "perfect" is not always in the cards.

It is important to understand… that the prior visits (total of three since the early '80's) from the DEQ all brought certain allegations and the resultant fines. They were, again, for violations of "Rules and Regulations"… **Never was there any harm intended …nor any harm done. … There was no economic benefit to Luhr Jensen, and there was no harm done to the planet.**

Luhr Jensen did not contest these earlier fines, as it was simply an economical decision. It would have cost more in time, energy and money to contest them than to simply pay them and have them go away. Little did we realize how we were setting ourselves up for much larger fines on subsequent visits? "As quoted by Stephanie Hallock in the letter to Senator Metsker; *"...in a first enforcement case, even if a generator has 10 violations, the DEQ usually only issues a penalty for one of the violations. If there is a second case, penalties are assessed for more than one violation, and so on".* I believe that the formula for fines, as prescribed by Oregon State law, uses a multiplier factor that provides for an increased level of the fine, for subsequent infractions of the same nature. I am not aware that the law suggests the department should assess an increasing number of fines for what is perceived to be repeat infractions of the same nature. I would like to know if this is so, please.

This is the reason, very frankly, that we feel so strongly about defending ourselves in this case, and entering into the records, our position on the allegations and a very thorough explanation of the true circumstances surrounding the allegations. Luhr Jensen certainly hopes that it is never in this position again, but… it is a frightening thought, compelling us to be very thorough in the examination of all the facts in this case.

Now… another consideration, please.

Regarding the Departments stated position of issuing news releases on violations of environmental and health law, Stephanie Hallock, in support of this strategy, is quoted in her letter to Senator Rick Metsker…*"because we believe that publicizing the financial consequences of violations can help deter others from violating environmental and public health protection laws".*

This "strategy" may indeed serve as desired, but it also has other ramifications and effects. Again, please note the headlines in the attached copy of the Hood River News…

This "strategy" and the attendant allegations… resulted in a very "homely" (not pretty) characterization in the local newspaper that was injurious to Phil Jensen's personal reputation and the company's reputation… Further this news release appeared in other and even more influential newspapers, and resulted in many calls or other inquiries to Luhr Jensen regarding the department's allegations. Without a doubt, Luhr Jensen's reputation, and the potential success and value of the company were compromised by this press release. How can this damage to reputation and value be repaired? It can't be. Please read this newspaper article and see if your perceptions about the conduct and attitude of the company are not substantially colored by the way that Luhr Jensen was characterized in the article.

It is my opinion that the DEQ is very wrong …to offer these damaging news releases before the case has been resolved. It is my opinion that the "injury" done by these premature news releases may someday subject the agency to severe legal repercussions.

…… we are now prepared to go forward with a brief discussion on each of the allegations…

The original Notice of Assessment of Civil Penalty dated April 17. 2002, lists the allegations in somewhat "random" order. Luhr Jensen has, for convenience, bundled these under what is referred to as "Event #1, the Oak Grove situation", "Event #2, the Portway sump situation", and then deals with them individually and in order from that point on.

Each "event" lists the corresponding allegation number in the header.

1. The first "event" (Tin plating solution . Oak Grove) pertains to the DEQ Penalty assessment items #9, #5, #6, #7 and #1.

   - This basic or "lynchpin" offense was *"failure to perform a hazardous waste determination on the plating solution generated at Oak Grove"*.
   - Luhr Jensen understands and will agree to the assessment of this fine.

   Circumstances;

   - Luhr Jensen does, however, want it to be "in the record" that this *"failure to perform a hazardous waste determination"*.... Might or should be more accurately described as a *"failure to perform a correct determination"*. While this may seem to be "splitting hairs"... I believe it to be true that convention recognizes ..."PRIOR PROCESS"... The procedure used to maintain a functional plating solution at the Oak Grove facility requires an occasional "de-canting" of the tin-plating solution when new material is needed to "freshen" the solution. . From time to time, a portion of the existing plating solution is taken from the tank... tested for pH ...and transported to the 400 Portway facility for proper and legal disposal in the local POTW. It should be noted that "tin" is a non-regulated substance. An alternative and legal method of disposal would be to simply drain to the on-site septic system. Mark chose to transport the material to the Portway location for further testing and ultimately, to dispose of through the local POTW or permitted TSD.

   Pleading;

   - Again, Luhr Jensen will agree with allegation #9 and will accept the suggested fine for the offense. It was a mistake by our company personnel to not make an on-site test of this solution for pH.
   - Luhr Jensen does, however, strongly argue with the subsequent layered on fines for that offense. Without knowledge that the material was considered hazardous, the company personnel could not know that the subsequent actions would be necessary. It is unreasonable and unnecessarily punitive to exact a multiple layer of fines with a proposed total fine of $21,400 based upon one action (fine @ $1,600) that triggered the entire chain of subsequent events and multiple fines. Mark's strategy decision to dispose of the material at the Portway location was based upon his best intentions to dispose of the material in the very

best manner possible. While it is regrettable that he didn't make the pH test at the time… all prior testing done had never indicated that there could possibly be a problem. …in truth, there was no harm intended, and no harm done. No economic benefit to Luhr Jensen, and no damage to the planet.

- Luhr Jensen asks that the following charges and fines be rescinded.
    - *#5; Transporting hazardous waste (tin plating solution) from the Oak Grove to the Portway facility without first notifying the Department and obtaining a hazardous waste transporter identification number.*
    - *#6; Transporting hazardous waste (tin plating waste from Oak Grove) without preparing a hazardous waste manifest.*
    - *#7;Failing to provide a land disposal restriction notification for an off-site shipment of hazardous waste (Oak Grove tin plating waste).*
    - *#1; Illegally storing at the Portway facility hazardous wasted generated at Oak Grove.*

2. The second "event" (Plating room and sump facility at 400 Portway location). Penalty assessment items #2, #3 and #4.

   - All charges in this section are based on the contention of the inspecting officer, that the sump located under the plating room floor was, in fact, a long term storage facility. (Tank or otherwise).

   Circumstances;

   - In fact, the sump is not what the inspecting officer perceives it to be. The officer has characterized this facility inaccurately.

   - This plating room and its associated containment sump was professionally designed and installed some 25 years ago. The intent of this design is to catch and contain any inadvertent spills that may result from leakage from the system that is located directly above it. This containment sump has no drains and its "integrity" has been recently proven by a thorough cleaning and inspection. This action was immediately followed by a professional inspection of the ground water below the 400 Portway building and the surrounding grounds. The inspecting company conducted a series of drilling explorations under the building and on adjacent property and discovered…. nothing. …thus …further proving that the containment sump had performed exactly as its design intended.

   - Note; A floor plan of the plating room sump and original design specifications will be offered to the court including testimony by the original design engineer. It should also be noted that this basic functioning design is still being installed and used by plating companies…today.

Pleading;

- Luhr Jensen requests that all events and fines that pertain to this inaccurate understanding of the design and function of the plating operations and containment sump at its 400 Portway location, as listed below, be rescinded.

  - *#4; Storing hazardous waste in a manner (open sump under the Portway plating room) that failed to minimize a threat of release of hazardous waste or hazardous wasted constituents to the environment or a threat to public health.*

  - *#3; Storing hazardous waste in a tank (Portway plating room sump) that did not meet state and federal hazardous waste tank standards.*

- *#2 Storing hazardous waste in a sump under the Portway facility's plating room for greater than 180 days.*

NOTE; At this point… There is some confusion regarding this allegation… (#2) the DEQ changed the verbiage a bit …to a charge that is a bit more straight-forward… reading *" ...storing hazardous waste in excess of 180 days. Specifically, respondent caused or allowed approximately 550 gallons of chrome plating sludge, ... to be stored in a sump under its plating room at its 400 Portway facility".*

In fact, the material in question was removed from the sump and placed into barrels following the DEQ visit and discovery by Jeff Ingalls. These barrels were shipped from Luhr Jensen on March 22, 2002. Our records indicate that the "material" (incoming water mixed with accumulated dried plating residue) was created by an inadvertent water discharge connection from a cooling system, as early as June 18, 2001. …this time line stretch's over 8 months…

NOTE: At this point, it is very important to our best understanding. …That an explanation of Mark's disability be fully explained. Marks various cognitive ability's were severely compromised by a growing and cancerous brain tumor. The time line of the "impact" of this on his abilities may have stretched through the entire year of 2001, up until his diagnosis and operation in February 2002. The diagnosis came about after Mark's vision became increasingly and dramatically impaired. The operation was performed three days after the diagnosis. The operation was successful. The tumor removed. And his future looks much better at this time.

3. The third "event" pertains to penalty assessment # 8

   - The charge as follows; *#8: Failing to comply with hazardous waste generator reporting requirements by under-reporting the types of waste stream and quantities of hazardous wastes generated at the Portway facility in 1998, 1999, and 2000.*

Circumstances:

We… (All of us at Luhr Jensen) are dramatically confused regarding this allegation. There are very complicated procedural rules regarding this operation (Recycling of acetone used in our painting operations). Luhr Jensen operates a recycling still that allows us to re-use acetone, many times. From time to time, the physical volume of material being used sometimes impairs the ability of this recycling operation. How this material and the wastes from the recycling operation are measured and characterized is strictly a subjective decision. It is Luhr Jensen's opinion that it is an "un-winnable" argument from either side. However, in this circumstance, Luhr Jensen accepts the decision of the DEQ and will pay the fine. Further, we will modify our procedures to more correctly mirror the procedures or advice of the DEQ.

We would try to explain this situation and the required procedures at t his time, but we are still somewhat unsure. Perhaps for our benefit and the benefit of all in attendance, the DEQ could assist with a brief explanation of them at this time.

NOTE: There are several "other" ways to "dispose" of this volatile material. Evaporation is the quickest and the easiest, but it is damaging to the air quality and it is somewhat expensive. It has been Luhr Jensen's goal to minimize both by installing and operating the Acetone Still… to recycle this substance. This "high road" of action, has resulted in confusion and this resulting allegation / fine. …it sort of falls into the category or "no good deed will go unpunished".

4. The fourth "event" pertains to penalty assessment #10

- The charge as follows: *#10 Failure to store hazardous waste (plating filter on the floor of the Portway electroplating room) in a container, in a tank, on a drip pad, or in a containment building.*

Circumstances;

- This filter is about 3" is diameter and about 12" long. The picture shown in section 9 of the DEQ presentation binder shows three of these filters. Only one is in question.
- A production line employee removed the filter and allowed it to drain, overnight, back into the tank from which it had been taken. The following morning, after it was dry, it was placed on the floor of the plating room while doing his regular production activities. It was his explanation that he was simply waiting for a break in the production line activities…to properly handle the filter. Inspector Ingles happened to be at that location when this occurred and he observed it.

Pleading:

- Luhr Jensen agrees with whatever fine is appropriate for this offense. Our employee has been properly admonished.

5. The fifth "event" pertains to penalty assessment #11:

- The charge is as follows: *#11: Failing to keep multiple containers of hazardous waste in the flammable storage area and the caustic storage area of the Portway facility closed except when necessary to add or remove waste.*

Circumstances;

- The activity at the location in question is, in part, in the painting department. The operators all work on a piece rate basis, and they earn a considerable wage because they are …fast. They, and Luhr Jensen, are guilty of poor housekeeping habits. We will train them better and exact a bit more discipline.
- It should be noted that Luhr Jensen has created a new position to better serve these necessary rules and regulations. The newly created position has the following responsibilities;

    - Primary Hazardous Material Management Responsibilities… includes duties that insure that environmental compliance regulations are adhered to consistently. The duties are primarily confined to the Paint Room, the Flammable Storage Room, the Caustic and Acid Storage Rooms, the Acetone Still Room, and the Waste Storage area. Employee will be responsible for clearly labeling all containers with content information and ensuring that all containers have lids securely fastened unless they are currently being filled or emptied. Responsible for weekly inspection of containers for ruptures and/or leakage. Responsible for handling the Acetone Distilling Operation, which includes recovery of recycled acetone, and proper disposal of the stills residue (refer to Acetone Management Plan for more details). HazMat Technician will ensure that all hazardous material storage areas are maintained at the highest level of cleanliness. Will work closely with the Environmental Engineer to meet all hazardous material regulations and report any unsafe or non-compliant personnel and/or departments.

    - It should also be noted that Luhr Jensen has conducted a series of training events for all members of our staff that are concerned with the handling of hazardous materials. There has also been Environmental Management and Training Manual developed that is available for all concerned employees.

Pleading:

- Luhr Jensen agrees with and will accept whatever fine is appropriate for this offense.

6. The sixth "event" pertains to penalty assessment #B1

- The charge is as follows: *#B1: Placing wastes where they are likely to enter waters of the states by any means by allowing industrial waste water from the polishing room and sediments containing oil and grease, copper, lead, chromium and nickel to be discharged into a storm drain at the Portway facility.*

Circumstances:

- This is a very marginal call. The facility that was observed contains vibratory polishing machinery, which uses a rock-like tumbling media and detergents that clean and polish certain parts used in our production. It is true that these machines, during loading and unloading can splash a small amount of this water-based solution on the floor. This solution can hold a small amount of oil and larger amounts of detergent (just like the exhaust water from your dishwasher). This operation does not use chromium, nickel, lead or copper, as the assessment incorrectly states. This operation and the solution used in that operation were not tested. What was tested was the solution found in the adjacent storm drain, located outside of the building, but in a location where escaping fluids would be likely to drain to. Further it is true that a containment berm at the doorsill was compromised at the time of inspection. It was, in fact, under repair at the time. This doorsill has been repaired and, additionally, a containment gutter has been provided to insure another level of protection.
- What was properly tested… was the material that had accumulated in the bottom of the storm drain. This "action" indicated to Luhr Jensen that a program of regular cleaning of the storm drains should be established. Luhr Jensen has done so.
- What was not tested at that time… was the effluent to the river at the "exit" of the storm drain system. The "level" of materials that may be tested in the bottom of a catch basin are not necessarily the level of materials that flow through the drain system on an ongoing basis. Also note that the testing occurred in a month where rain and system flow was minimal.
- It should also be noted that it was not possible to test the water at the outflow in the river at that time, as the outflow point is below the surface level of the water in the Columbia River. Since that time, and at the DEQ request, Luhr Jensen has commissioned excavation work on the rock embankment to reveal the outflow pipe …and the pipe has been "pierced" to allow for a "grab sample" of the storm-drain water from time to time.

Pleading:

Luhr Jensen agrees with and will accept whatever fine is appropriate for this offense.

7. The seventh "event" pertains to penalty assessment #B2 and #B3.

- The charges are as follows; *#B2: Failing to conduct twice annual monitoring of stormwater discharges as required under the Portway facility's stormwater discharge permit.* And *#B3: Filing to submit an annual stormwater monitoring report as require under the Portway facility's stormwater discharge permit.*
- *Note; The stormwater permit exhibited in the DEQ brief is for Oak Grove...???*

Circumstances:

- Luhr Jensen objects to this penalty. Luhr Jensen has operated at this facility for 25 years. Never in the history of this facility has this issue been brought up. There has never been a warning, or any assistance offered to determine how to do this procedure. In all of this time (it has seemed to us) if this were truly a concern of the department, we would think that a more specific directive by the DEQ Report Monitoring Division would have been in order, ...and certainly would have been heeded if had we heard from them.
- As mentioned in item #6, above, there was simply no way to sample this outflow from the 400 Portway system, as the outflow point is below the surface of the water in the Columbia river... this is similar to the stormwater system at other Luhr Jensen locations, where there is absolutely no opportunity for access to the outflow points.
- We are certainly willing to do this rather simple procedure, and, in fact, have added this function to our Factory Environmental Compliance Standard. It is unreasonable to exact a $3,200 fine for what may be more aptly described as a "first warning".
- Since that time, and at the DEQ request, Luhr Jensen did the excavation work on the rock embankment to reveal the outflow pipe and the pipe has been "pierced" to allow for a "grab sample" of the storm-drain water from time to time. Luhr Jensen, also, added this stormwater monitoring function to our Factory Environmental Compliance Standard and is now able to fully comply with the monitoring and reporting as required in the permit.

Pleading:

Luhr Jensen requests that the penalty for items #B2 and #B3 be rescinded.

Closing Comments

March 16, 2003

In summary and in closing … It is Luhr Jensen's goal (absolute) to be in full compliance with any or all applicable laws and regulations of the State and the agency. We will work with the department to perfect all procedures. Again, we pray for absolution from the harm that has been done to our reputation and to the confidence and morale of our employees. The reduction of the civil penalties to the level asked for will constitute a great consideration and (hopefully) will assist us to restore our reputation in the community in which we live and the market place where we sell our product.

To put exact numbers to this fine structure…

• Please fine us for not testing for pH at Oak Grove…	(A9)	$1,600
• Absolution for "layering fines"	(A1, A5, A6, and A7)	…
• Complete absolution of this allegation	(A2, A3, and A4)	…
• O.K. with fine as appropriate	(A8)	$1,600
• O.K. with fine as appropriate	(A10)	$ 600
• O.K with fine as appropriate.	(A11)	$ 700
• O.K. with fine as appropriate	(B1)	$1,600
• Complete absolution of these allegations	(B2, B3)	…

P.S. We would like to draw to your attention that since the inception of this action, Luhr Jensen has spent $92,311 total to either (1) Improve process's ($54,790), or (2) Fund punitive oriented projects such as lawyers, consultants and the voluntary cleanup agreement ($37,521

P.P.S. An additional comment… Luhr Jensen has learned a lot about Environmental Law and expectations in the past year and one-half. We are grateful for the (painful and expensive) education as it will enable us to be the stewards of our environment and precious resources in a much more responsible way.

Luhr Jensen & Sons Inc ~ DEQ Penalty Evaluation

		Original DEQ Penalty	DEQ offer Penalty	Comments
A9	Failure to Perform Haz Waste Determination (OG tin Plating)	$ 1,600.00	**$ 1,600.00**	n/c
A1	Illegal Storage of Haz Waste (OG tin Plating)	$ 7,200.00	$ 1,800.00	Moderate to mild - Cooperative +
A5	Transporting Haz Waste (OG tin Plating)	$ 4,200.00	$ 1,400.00	Moderate to mild
A6	Failure to Prepare Haz Waste Manifest (OG tin Plating)	$ 4,200.00	**$ 4,200.00**	n/c
A7	Failure to Provide LDR notification (OG tin Plating)	$ 4,200.00	**$ 4,200.00**	n/c
A2	Storage of Haz Waste in Excess of 180 days (plating sump)	$ 17,654.00	$ 4,301.00	Major to moderate - adj economic benefit
A3	Storing Haz Waste in non-Conforming tank (plating sump)	$ 9,600.00	$ 4,800.00	Major to moderate
A4	Failing to prevent possible release of Haz Waste (plating sump)	$ 9,600.00	$ 4,800.00	Major to moderate
A8	Failure to comply w/Haz Waste reporting requirements (waste acetone)	$ 1,800.00	$ 1,600.00	Cooperative +
A10	Failure to Store Haz Waste in Container (plating filters)	$ 700.00	$ 600.00	Cooperative +
A11	Failure to keep Haz Waste container closed	$ 800.00	$ 700.00	Cooperative +
B1	Placing Waste where likely to enter waters (storm water)	$ 1,600.00	**$ 1,600.00**	n/c
B2	Failure to perform monitoring (storm water)	$ 1,600.00	**$ 1,600.00**	n/c
B3	Failure to submit annual reports (storm water)	$ 1,600.00	**$ 1,600.00**	n/c
	Totals	$ 66,354.00	$ 34,801.00	

Attachment J-R3

	Luhr Jensen & Sons, Inc.
	Summary of time and monetary commitments to increased awareness and compliance with environmental regulations
DATE	**WHAT**
05/30/01	Silver minnow machine set-up and testing began.
	Some water gets into sump.
06/18/01	Silver minnow production began, water diverted to POTW.
08/14/01	DEQ Inspection.
08/30/01	2nd DEQ Inspection.
10/15/01	Received notice of noncompliance.
10/25/01	Mark's first response to notice of noncompliance.
01/25/02	Mark's second response to notice of noncompliance.
01/31/02	Liquids removed from plating sump area, barreled, labeled and readied for shipment.
02/01/02	Contracted with Jerry Hodson of Miller Nash LLP for legal representation.
02/01/02	Luhr Jensen signs Voluntary Cleanup Agreement 59497000 with DEQ.
02/18/02	Contracted with John Day of Kleinfelder for assistance with understanding DEQ regulations, reporting requirements and VCP.
03/12/02	Letter from Bob Schwarz regarding requirements of VCP 59497000.
03/20/02	Rehydrated solution from sump shipped.
04/17/02	Received Notice of Assessment of Civil Penalty of $66,354.
05/08/02	Hodson Responds to Notice of Assessment of Civil Penalty and requests hearing based on information received from LJ.
05/13/02	Metal reclamation device added to silver plating tank.
05/18/02	"Luhr Jensen slapped with $66,354 fine" on front page of Hood River News.
05/30/02	Entered into agreement with Hood River Soil & Water Conservation department to request grant assistance for Oak Grove clean-up.
05/31/02	OMEP consultation.
06/01/02	Created part-time HazMat Management Technician position.
06/04/02	Met with Bob Schwarz and Terry Hosaka, DEQ regarding VCP.
06/12/02	Informal DEQ hearing.
06/17/02	Added one full time employee to maintenance department to assist with workplace cleanup, environmental and safety housekeeping, scheduled maintenance and process improvement.
06/17/02	HazWop training for Mark Wiltz and Doug Dexter.
06/20/02	LJ signs agreement with White & Associates, Inc. for audit of environmental documents, assistance in procedure writing and employee training; in conjunction with Columbia Gorge Community College.
06/24/02	Storm water Sampling results sent to Jeff Engalls.
06/30/02	Geopotential Drum detection at Oak Grove.
06/30/02	Miller Nash
06/30/02	Kleinfelder
07/01/02	Mark Wiltz's duties reassigned to be 100% focused on environmental compliance.
07/01/02	Requested assistance from Senator Rick Metsger.

(A) timeline only

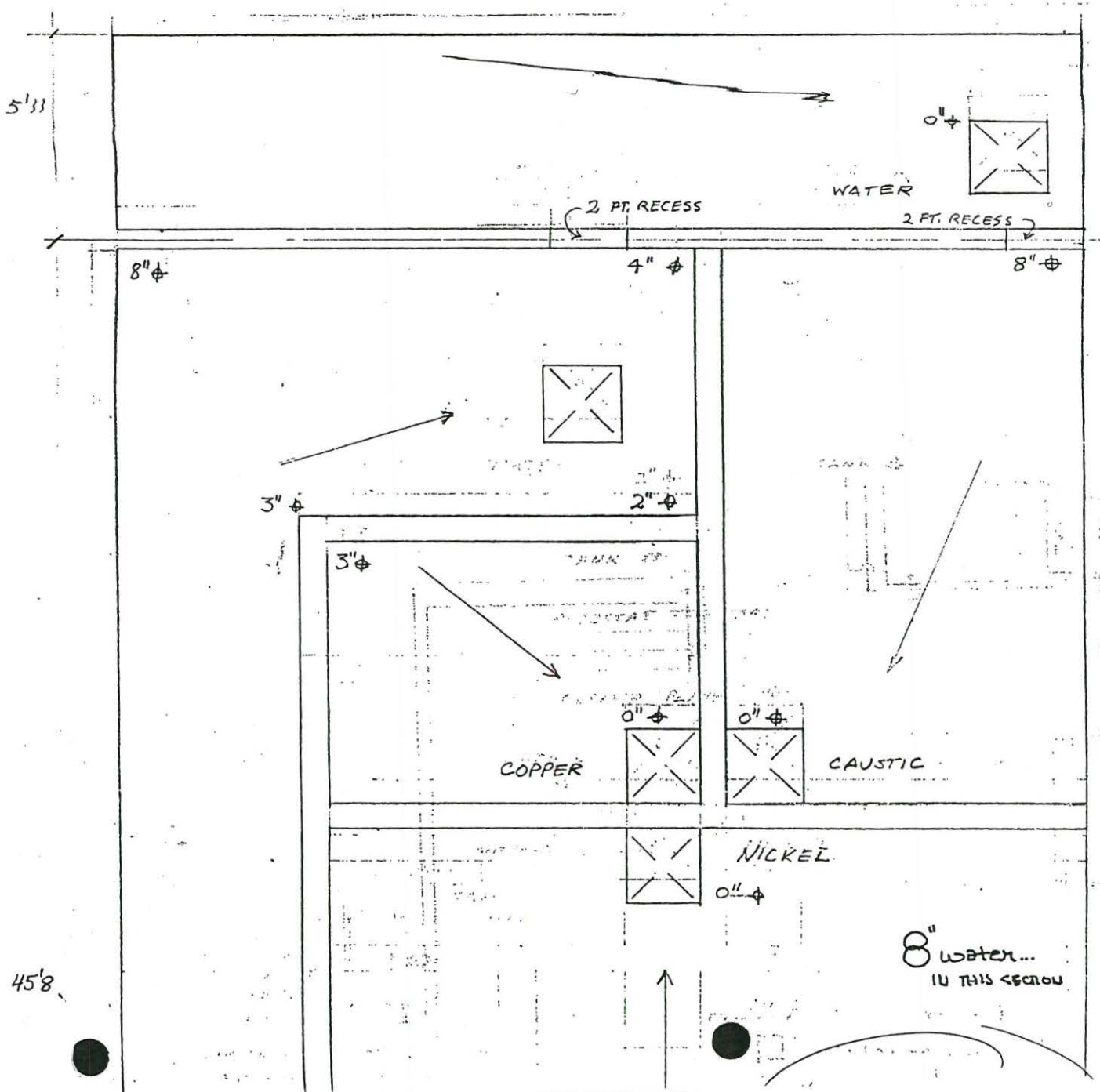
Attachment J-R4

DATE	WHAT
07/15/02	Initial meeting with all Supervisors and Joe White regarding Environmental Management and Training Program.
07/18/02	Updated Storm water Pollution Control Plan submitted.
07/18/02	New acetone recycling procedures implemented.
07/30/02	Progress billing VCP 59497000
07/31/02	Received copy of letter to Senator Metsger regarding meeting with DEQ director, Stephanie Hallock.
07/31/02	Miller Nash
08/27/02	Progress billing VCP 59497000
08/31/02	OMEP consultation.
08/31/02	White & Associates
09/03/02	Received Mutual Agreement and Order reducing fine to $34,700.
09/12/02	Storm water drains cleaned out and new filtering system installed.
09/23/02	Water supply lines in plating area rerouted from under floor to overhead.
09/26/02	Progress billing VCP 59497000
10/10/02	Phil writes letter to Stephanie Hallock explaining issues and Luhr Jensen's position.
10/30/02	Progress billing VCP 59497000
10/31/02	Plating Sump area cleaned out - West Coast Marine.
11/18/02	HazWop training for Ed Farrell and Ismeal Pineado.
11/26/02	Progress billing VCP 59497000
11/30/02	Miller Nash
01/29/03	Progress billing VCP 59497000
01/29/03	New plating rinse water and pH control system.
02/18/03	Prehearing Conference
02/19/03	Elimination of Black nickel plating.
02/25/03	Progress billing VCP 59497000
02/28/03	HazMat material handling seminar for employees.
03/01/03	Burck and Associates, groundwater testing in plating sump area.
03/09/03	New Gold plating system, tanks and chemicals.
03/18/03	Hearing scheduled, case #104229
	TOTAL

Phil's ... do not lose!

N

Bob Schwartz: 298-7255 x30



CONCRETE WALL - LEVEL W/ BLDG. FLOOR SLAB.

COPY

PIT FLOOR SLAB - 4" CONC.

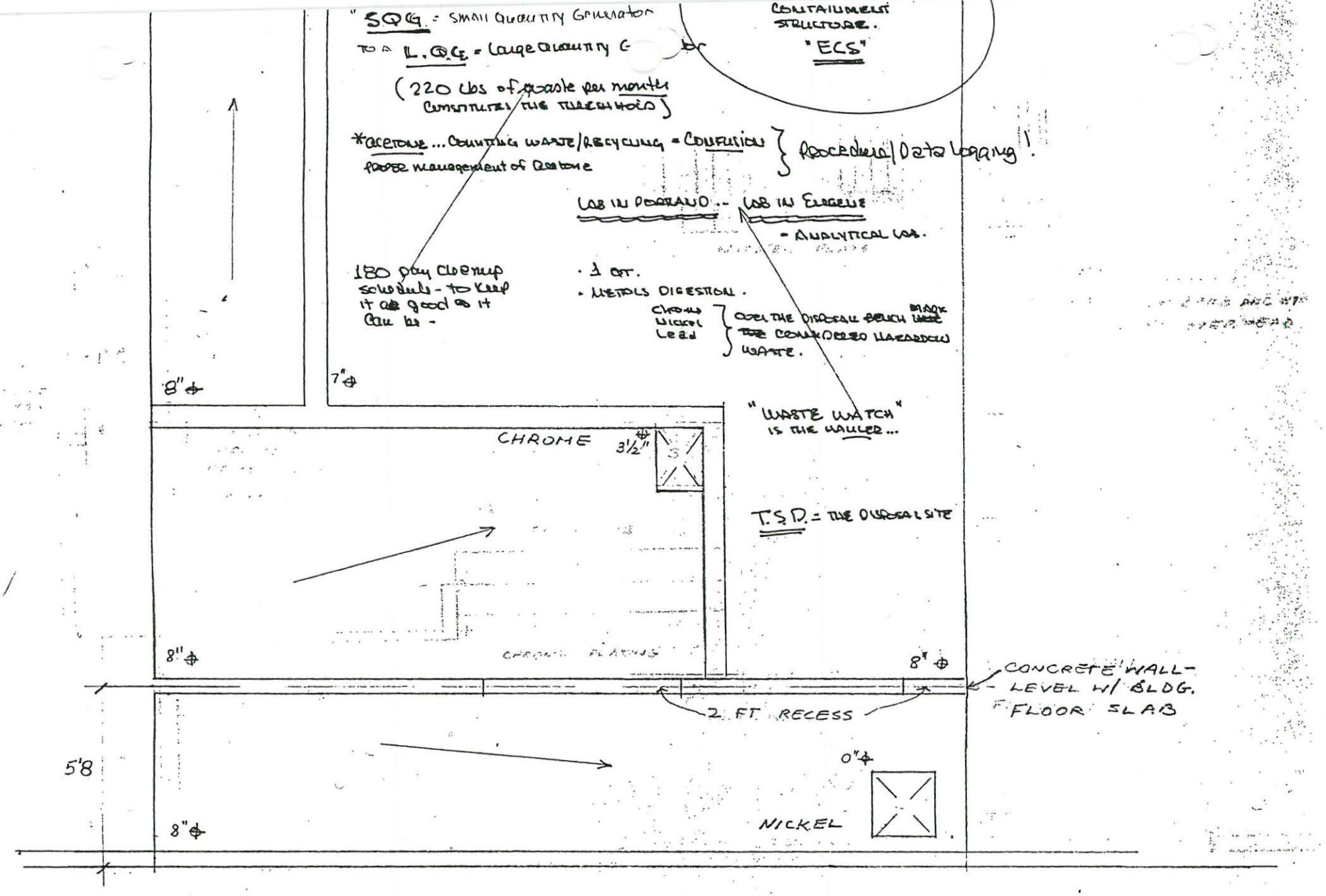
0" ⌖ ELEVATION OF PIT FLOOR SLAB = 5'0" BELOW MAIN BUILDING FLOOR LINE

DIKES - 8" CONC. ON PIT FLOOR SLAB - HEIGHT 16" OVER 0" ⌖ ELEVATION

SUMPS - 24" DEEP BELOW 0" ⌖ ELEVATION

ALL CONC. SURFACES (PIT SLAB - DIKES - SUMPS) COATED W/ CORROSION RESISTANT SEALER

Attachment J-R5



PLATING ROOM

PITS AND SUMPS

1/4" = 1 FT

DRAWING NO. 2

REV. 2/7/78

Phil's ... do not lose!

N

Bob Schwartz: 298-7255 x30

5'11

0"ϕ

WATER

2 FT. RECESS

2 FT. RECESS

CONCRETE WALL - LEVEL W/ BLDG. FLOOR SLAB.

8"ϕ

4"ϕ

8"ϕ

3"ϕ

2"ϕ

3"ϕ

0"ϕ

0"ϕ

COPPER

CAUSTIC

NICKEL

0"ϕ

8" water... IN THIS SECTION

45'8

PIT FLOOR SLAB - 4" CONC.

0"ϕ ELEVATION OF PIT FLOOR SLAB = 5'0" BELOW MAIN BUILDING FLOOR LINE

DIKES - 8" CONC. ON PIT FLOOR SLAB - HEIGHT 16" OVER 0"ϕ ELEVATION

SUMPS - 24" DEEP BELOW 0"ϕ ELEVATION

ALL CONC. SURFACES (PIT SLAB - DIKE SUMPS) COATED W/ CORROSION RESISTANT SEALER

"SQG" = SMALL QUANTITY GENERATOR TO A L.Q.G. = LARGE QUANTITY GEN

(220 lbs of waste per month CONSTITUTES THE THRESHHOLD)

CONTAINMENT STRUCTURE. "ECS"

*ACETONE ... COUNTING WASTE/RECYCLING = CONFUSION } PROCEDURE/Data Logging!

PROPER management of Acetone

LAB IN PORTLAND -- LAB IN ELIGELIE - ANALYTICAL LAB.

180 day CLEANUP SCHEDULE - TO KEEP IT AS GOOD AS IT CAN BE -

- 1 QT.
- METALS DIGESTION.

CHROME, NICKEL, LEAD } COST THE DISPOSAL BRUCH MORE BECAUSE CONSIDERED HAZARDOUS WASTE.

8"ϕ

7"ϕ

"WASTE WATCH" IS THE HAULER...

CHROME

3½"ϕ

T.S.D. = THE DISPOSAL SITE

8"ϕ

CHROME PLATING

8"ϕ

CONCRETE WALL - LEVEL W/ BLDG. FLOOR SLAB

2 FT. RECESS

5'8

0"ϕ

NICKEL

8"ϕ

PLATING ROOM

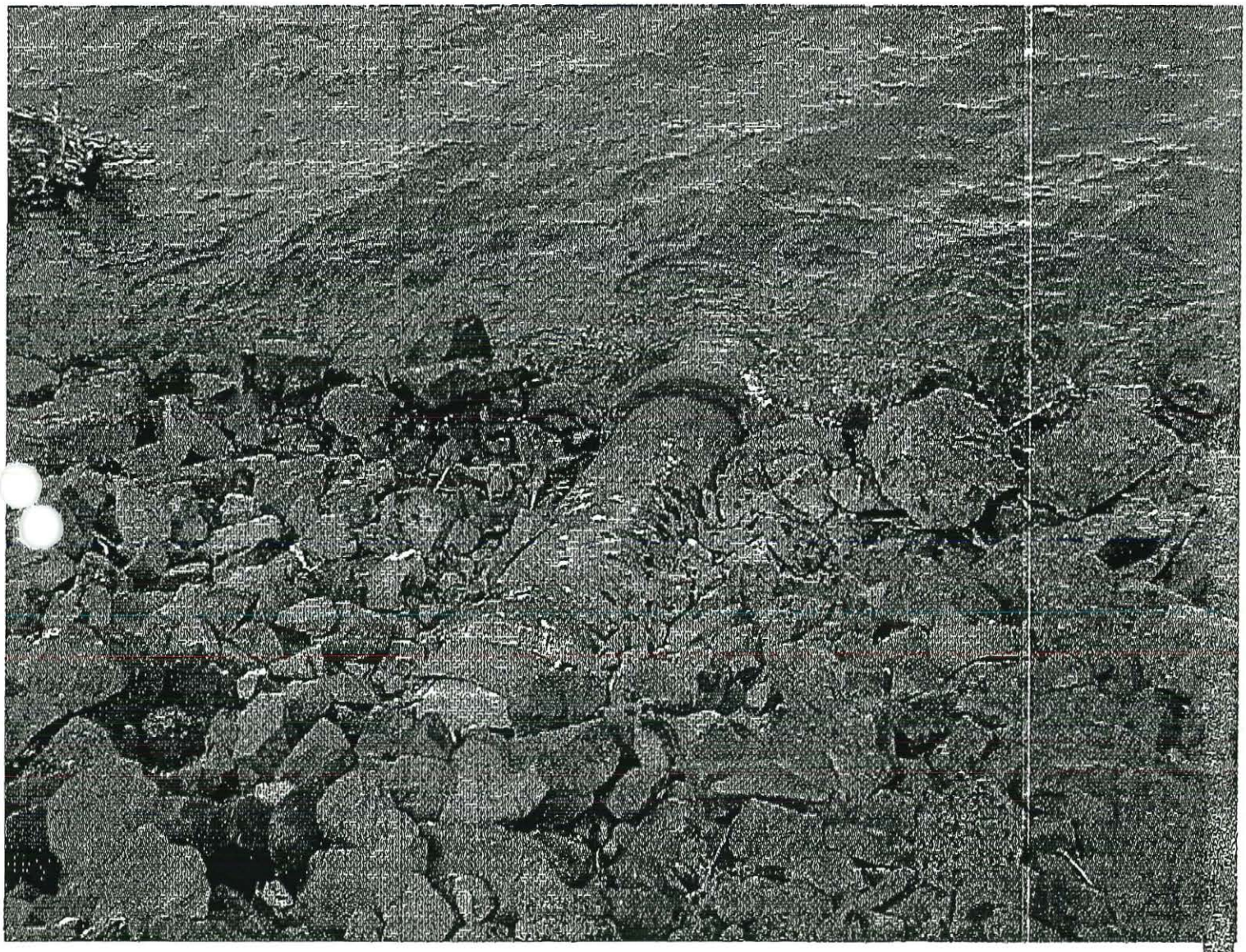
PITS AND SUMPS

1/4" = 1 FT

DRAWING NO. 2

REV 2/7/78

Attachment J-R9



R-9 EXHIBIT

EXHIBIT 3-1

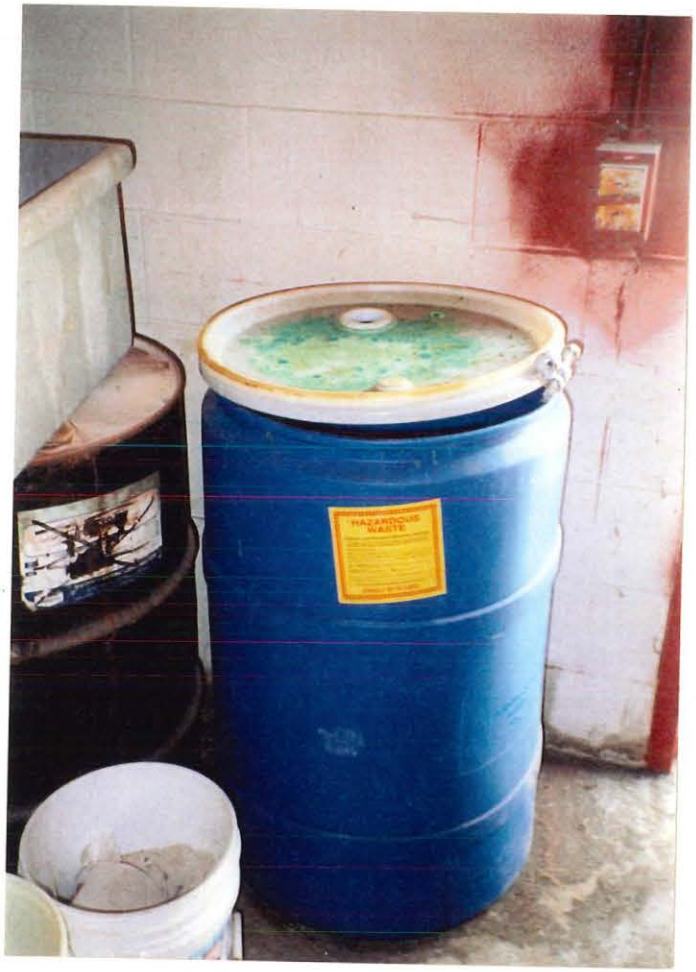


EXHIBIT 3-2

EXHIBIT 4-1

EXHIBIT 4-2

EXHIBIT 4-3

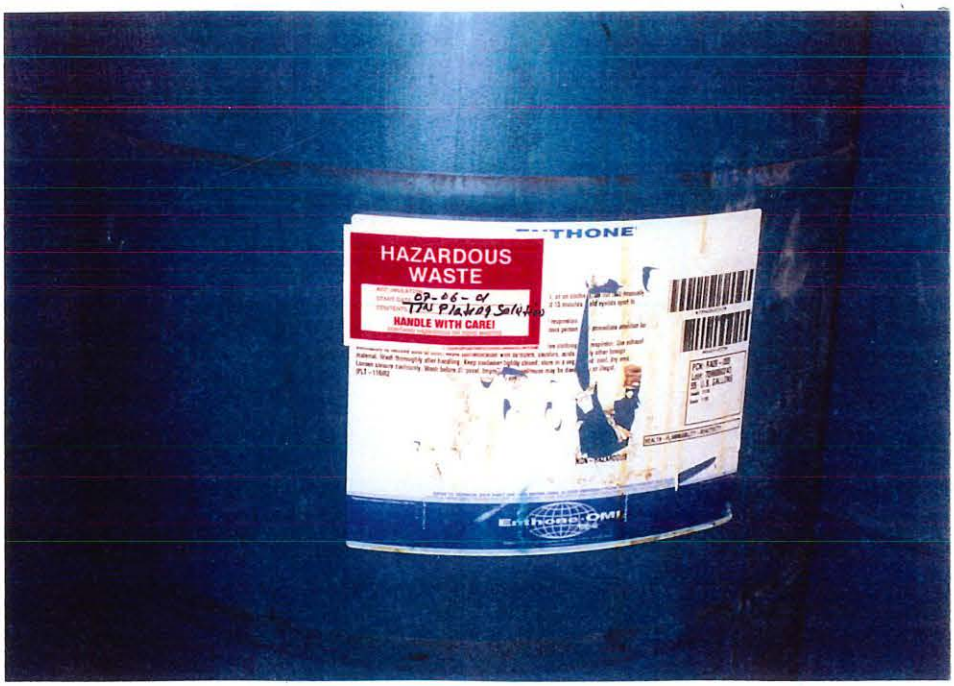


EXHIBIT 4-4


KEEP FROM FREEZING
HAZARDOUS WASTE
HANDLE WITH CARE!
Enthone-OMI

EXHIBIT 4-5

EXHIBIT 5-1

EXHIBIT 5-2

EXHIBIT 5-3

EXHIBIT 5-4

EXHIBIT 3-1

EXHIBIT 3-2

EXHIBIT 4-1

EXHIBIT 4-2

EXHIBIT 4-3

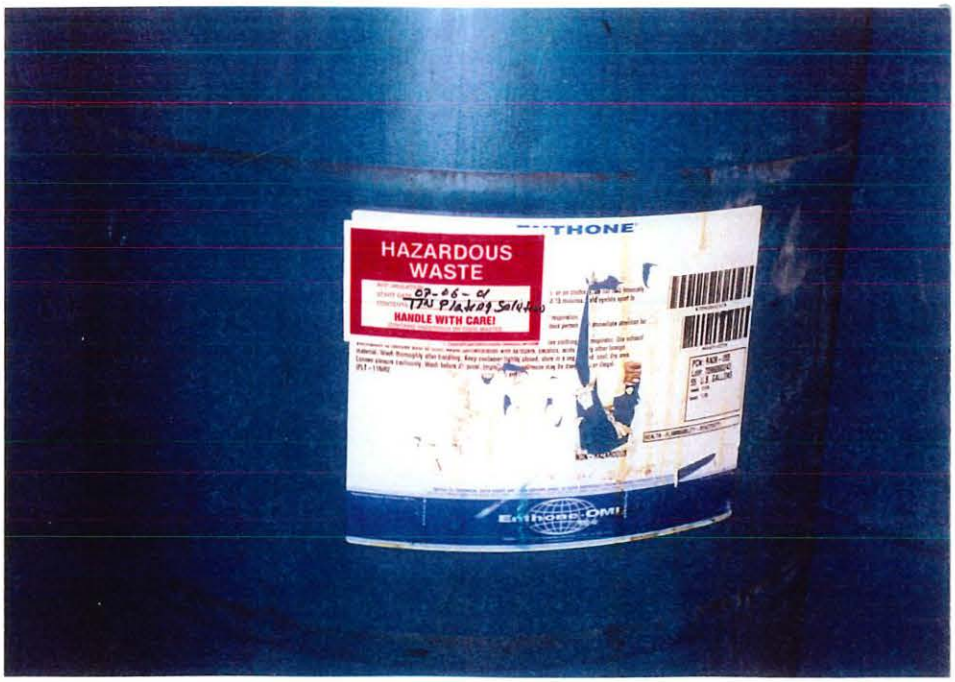


EXHIBIT 4-4

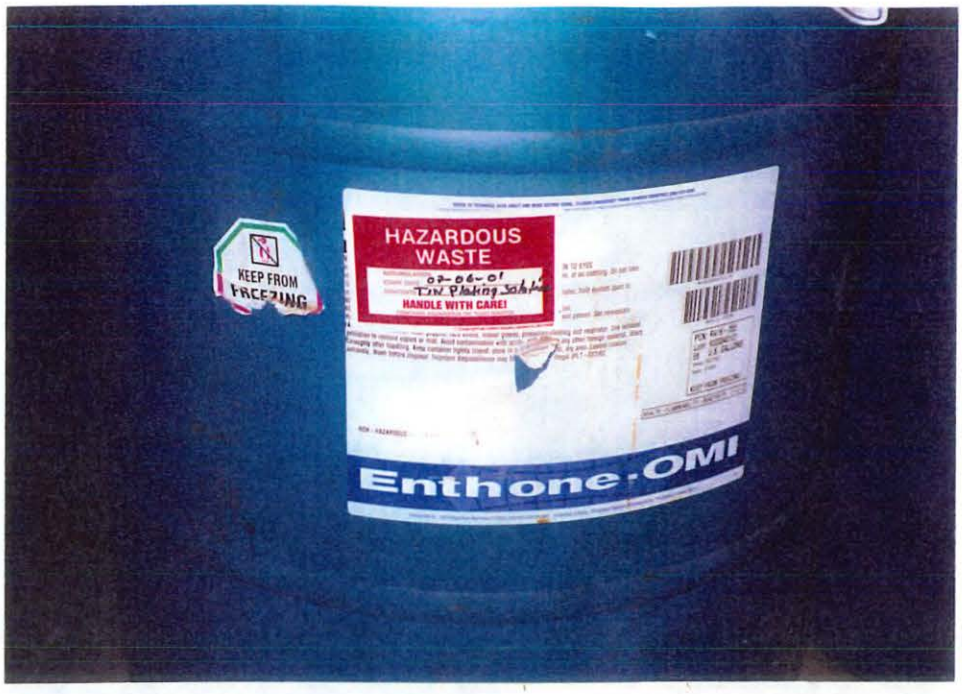

KEEP FROM
FREEZING
HAZARDOUS
WASTE
02-06-01
Tin Plating Sol'n
HANDLE WITH CARE!
Enthone-OMI

EXHIBIT 4-5

EXHIBIT 5-1

EXHIBIT 5-2

EXHIBIT 5-3

EXHIBIT 5-4

EXHIBIT 3-1

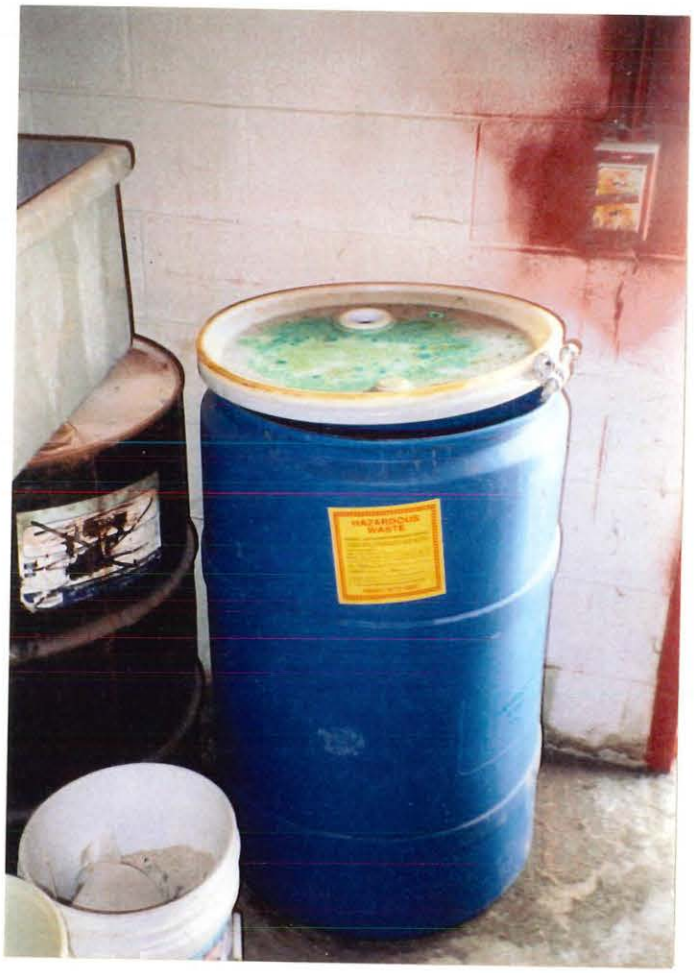


EXHIBIT 3-2

EXHIBIT 4-1

EXHIBIT 4-2

EXHIBIT 4-3

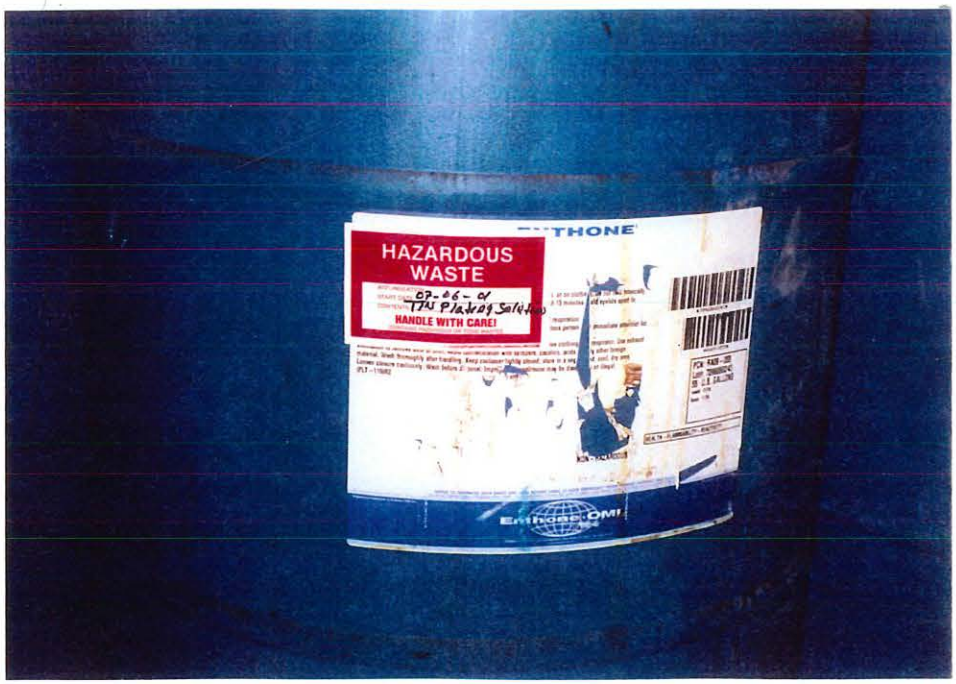


EXHIBIT 4-4

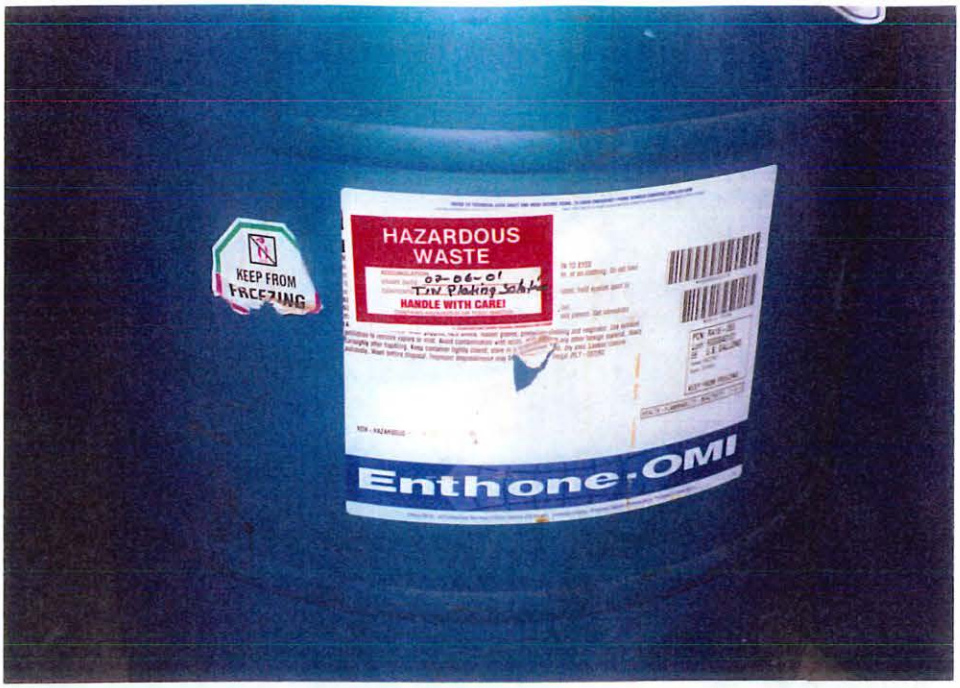

KEEP FROM FREEZING
HAZARDOUS WASTE
02-06-01
Tin Plating Sludge
HANDLE WITH CARE!
Enthone·OMI

EXHIBIT 4-5

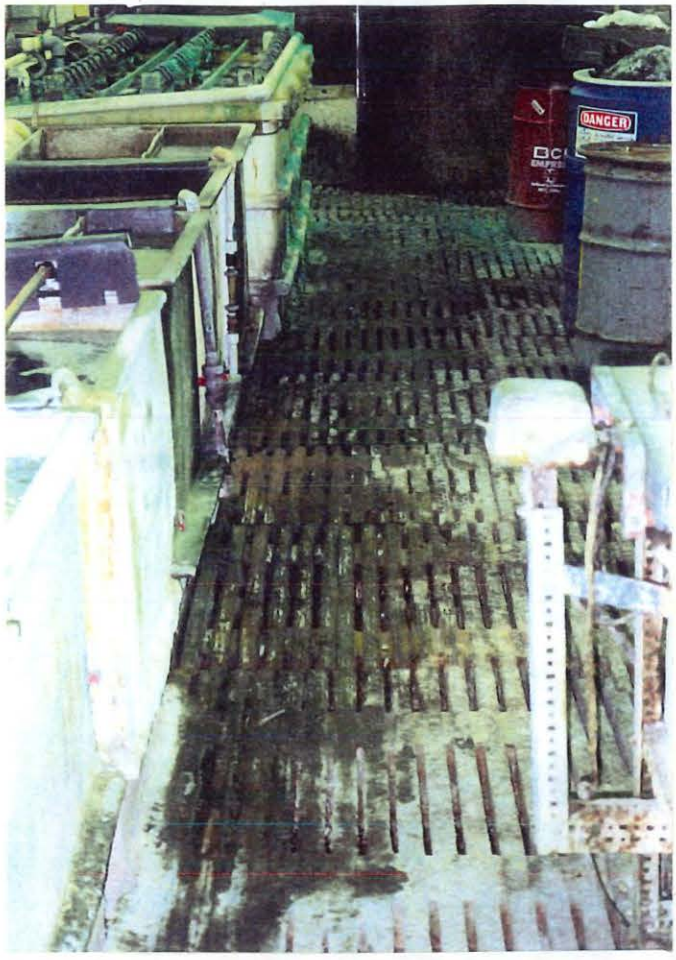


EXHIBIT 5-1

EXHIBIT 5-2

EXHIBIT 5-3

EXHIBIT 5-4

EXHIBIT 5-4

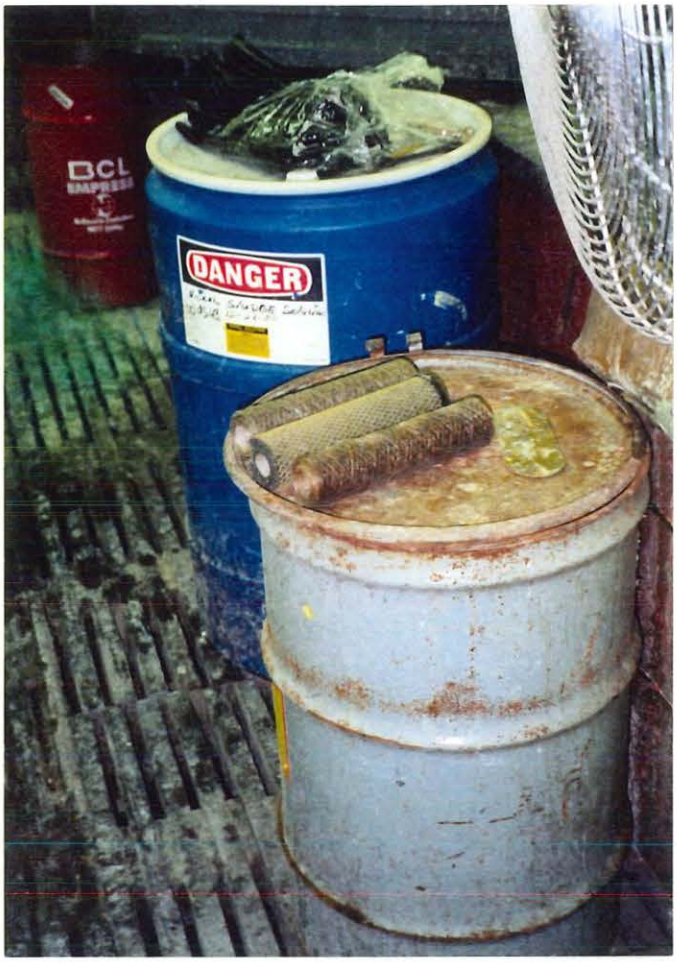


EXHIBIT 9

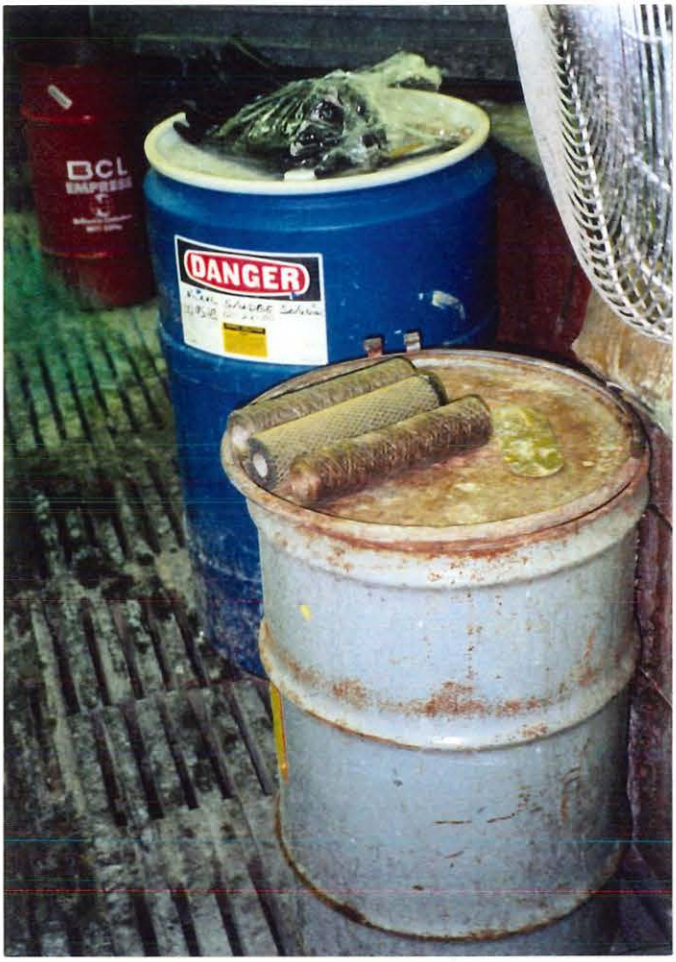


EXHIBIT 9

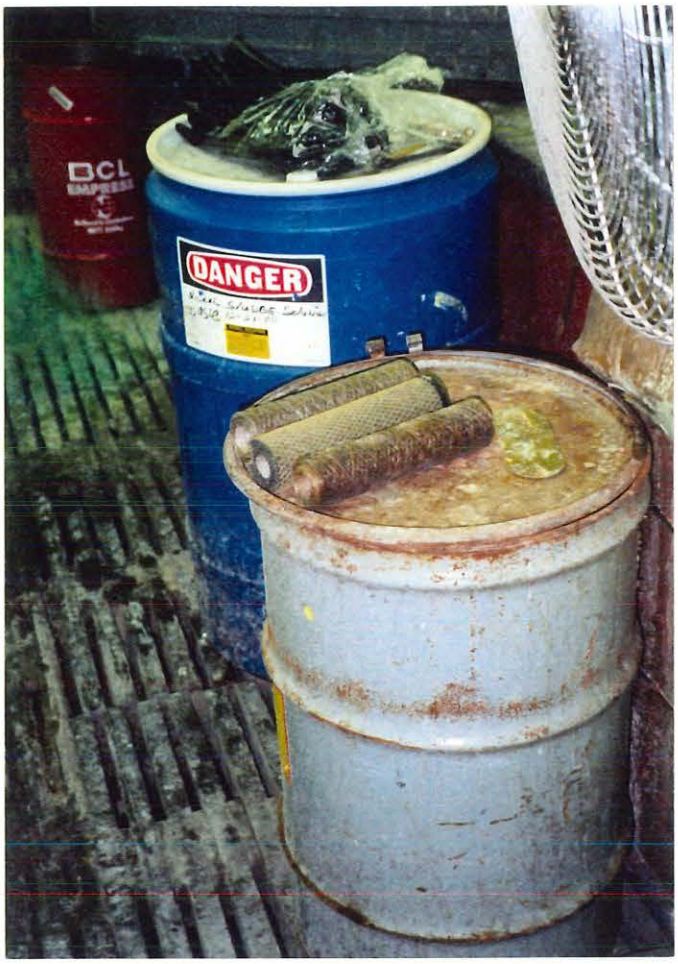


EXHIBIT 9

EXHIBIT 11

A EXHIBIT 11

EXHIBIT 11

A EXHIBIT 11

EXHIBIT 11

A EXHIBIT 11

12/4/03 – Submitted at meeting for case records, Agenda Item A

DEC 1 RECD

LUHR JENSEN™ & SONS, INC.

400 Portway Ave., P.O. Box 297, Hood River, OR 97031 • (541) 386-3811 • Fax (541) 386-4917 • www.luhrjensen.com

Mark P. Reeve
610 SW Alder St., Suite 910
Portland, OR 97205

November 26, 2003

Dear Mark;

My name is Phil Jensen. I am the owner Luhr Jensen & Sons, Inc., a fishing tackle manufacturing company in Hood River, Oregon. Our company was founded by my father, Luhr Jensen, Sr. in 1932. We have operated in Hood River since that time and currently employ more than 200 people, contributing more than $4,000,000 per year to the local economy in wages and salaries. I personally have worked directly with the company since graduating from the University of Oregon in 1960. The purpose of my letter is to speak with you, indirectly, regarding an appeal hearing that our company has with the EQC, which will be conducted on Thursday, December 4, in Portland (next week). I am very apprehensive about this meeting…

I greatly admire the work that the Department of Environmental Quality does and I am very supportive of their goals. I also love "my" state and I am grateful that I have had the opportunity to live and work here for that past 40 years (plus), raising my family and being a responsible and contributing member of my local community and the greater community of my industry, both regional and on a national basis. All of this has a "however" attached to it, and this is the reason behind my apprehensions about the upcoming hearing.

The issues that I have elected to take (very seriously) with the ODEQ are two-fold. The first is about the "ticket" and the resulting fines that Luhr Jensen received on a field inspection done in the summer of 2001. I have, during the course of these several hearings, prepared an extensive portfolio regarding all of the circumstances of the alleged violations and of the rationale regarding Luhr Jensen's objections to the manner of treatment that we were accorded. Luhr Jensen's efforts to affect a higher level of compliance with the Rules and Regulations, and the associated costs, were also documented. To my knowledge, the review committee or the administrative law judge that was assigned to the case acknowledged none of this information. Our company was not represented by legal counsel, simply because of cost considerations. We attempted to "tell the story" ourselves. Perhaps this was not a wise decision.

The second issue is with the department itself… and the manner in which is executes its charge. Frankly speaking, I am stunned by the fact that this department has the "opportunity" to (1) make the rules, (2) police the rules, and (3) adjudicate the rules with very little or no meaningful oversight. The department also seems to feel that it has the right to consider the alleged offending party guilty, until proven innocent (another fact that is, well, unconstitutional). Additionally, the department uses a strategy, that the director supports, of "press releases" that employ the tool of public humiliation to further *"deter others from violating environmental and public health protection laws"* (Stephanie Hallock). Please see the attached newspaper clipping from my hometown newspaper. This article was the first that I had heard of the nature and extent of the fine.

The point that I deliver is that, in my opinion, our ODEQ, Department of Enforcement, has allowed itself to drift into a state of unfairness and abusiveness in the manner of conduct regarding the discharge of its duties. The omni-power that they apparently have has enabled them to do, …simply as they wish, regarding the interpretation of the many (and constantly changing) rules and regulations of the department. Disagreements and the resulting appeals by the alleged offending parties are most often met with an initial offer to cut the fine (as much as 50% or more) if the accused party will "plead guilty" or alternatively, participate in a cycle of litigation that the accused cannot financially or emotionally afford. In most cases and for most people, it is simply easier to write a check and get back to the business of keeping their business afloat.

I am in hopes that the commission will have an understanding and sympathetic ear for my concerns. I, personally, have walked the walk through the informal hearings, the tribunal, and now am at the final point of speaking with you folks at the EQC level. I am firm in my convictions regarding the mistaken perceptions of the inspecting officer and the excessive layering of fines. In addition it is my opinion that the conduct of the Department of Enforcement reflects the inevitable consequence of too much power and very little opportunities for the checks and balances that a public agency of this size and importance should have. It is my opinion that this is the charge of the commission… and this is why I will come to you on December 4.

I am not a lawyer. I am a businessman. I rather expect that the dutiful representatives of the Department of Enforcement will not be sympathetic (or accepting) of my "down-home" approach to telling my side of the story, as was the case in the tribunal. I am, never the less, ready to proceed in the only manner in which I am able. According to the agenda forwarded by the Assistant to the Commission, I will have a total of 12 minutes to tell "my side of the story". I will try.

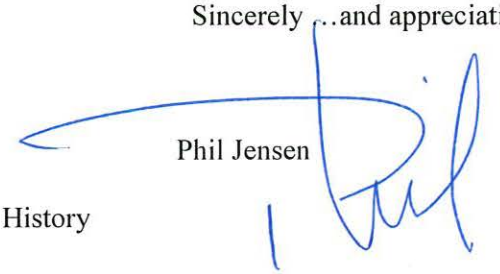
Two more relevant pieces of information…

- My company depends on a healthy environment and the resource that it supports.
- At no time/occasion did Luhr Jensen …ever… spill one drop of hazardous material into the environment.

Thank you… I really tried to keep this letter short. If you are interested or wish to read more, I have included an earlier letter that was directed to you, but was short-stopped by "the system"… The 5-pound illustrated and unexpurgated notebook that was also earlier submitted to the department… has been omitted.

Thank you again. If you are ever in Hood River, I would be pleased to have a cup of coffee with you and to show you how we make fishing lures.

Sincerely …and appreciative of your work,



Phil Jensen

Enc. Catalog and History

Oregon
Theodore R. Kulongoski, Governor

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

January 5, 2004

Richard Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

On December 4, 2003, the Environmental Quality Commission issued the attached Final EQC Order in Case No. AQ/A-WR-98-186. The Final Order found that American Exchange Services, Inc., is liable for a civil penalty of $7,200, to be paid to the State of Oregon. While you have 60 days to seek judicial review of the decision, the penalty is due and payable 10 days after the date of the Final Order, pursuant to Oregon Revised Statute (ORS) 183.090.

Please immediately send a check or money order in the amount of $7,200, made payable to "State Treasurer, State of Oregon," to the Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.

If we do not receive payment in full by January 15, 2004, we will file the Final Order with the appropriate counties, thereby placing a lien on any property American Exchange Services, Inc., owns within Oregon. We will also refer the Final Order to the Department of Revenue and/or a private collection agency for collection, pursuant to ORS 293.231. Statutory interest on judgments is nine percent per annum.

If you have any questions, please call Deborah Nesbit at DEQ's Office of Compliance and Enforcement in Portland, (503) 229-5340.

Sincerely,

Mikell O'Mealy

Mikell O'Mealy
Assistant to the Commission

cc: Business Office, DEQ
Shelley McIntyre, Department of Justice
Jeff Bachman, OCE, OD, DEQ
Deborah Nesbit, OCE, OD, DEQ
Steve Croucher, Medford Office, Western Region, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of	)	
	)	Final Contested
American Exchange Services, Inc.,	)	Case Hearing Order
an Oregon corporation,	)	
	)	
Petitioner	)	No. AQ/A-WR-98-186

On December 4, 2003, the Environmental Quality Commission considered the appeal of American Exchange Services, Inc. to the Proposed Order issued by Hearing Officer Lawrence S. Smith on April 24, 2003 and incorporated herein as Attachment A. (Commissioner Deirdre Malarkey did not participate.) 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 Attorney Richard A. Stark on behalf of the Petitioner and Jeff Bachman, Environmental Law Specialist and Shelley McIntyre, Assistant Attorney General on behalf of the Department.

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

Dated this 5th day of January, 2004.

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
GENH8152.DOC

Attachment A

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

In the Matter of	) **PROPOSED ORDER**
	) **ASSESSING CIVIL**
AMERICAN EXCHANGE SERVICES, INC.,	) **PENALTY**
an Oregon Corporation,	) **No. AQ/A-WR-98-186**
Respondent	) **Jackson County**
	) **HOP Case No. 104055**

The Department of Environmental Quality (DEQ) issued a Notice of Assessment of Civil Penalty on February 1, 1999, alleging that American Exchange Services, Inc. (Respondent) violated OAR 340-032-5600 through 340-032-5650 by openly accumulating asbestos and by using a contractor unlicensed to do asbestos removal and was liable for a civil penalty. Respondent timely appealed the Notice. The matter was referred to the Hearing Officer Panel.

Pre-hearing telephone conferences were conducted by Hearing Officer Lawrence S. Smith of the Hearing Officer Panel on December 4, 2002 and February 20, 2003. Respondent was represented by its attorney, Scott Kaplan. Shelley McIntyre, Assistant Attorney General, represented DEQ. The parties stipulated certain documents would be the entire evidentiary record of the hearing. In a letter of March 3, 2003, DEQ listed the stipulated documents. Review of this record was completed on April 1, 2003. The record was then closed.

ISSUES

1. Who is responsible for the open accumulation of friable asbestos-containing material or asbestos-containing waste material and the failure to package, store and dispose of this material properly?

2. Whether Respondent used an unlicensed contractor to perform asbestos abatement at the site in question?

3. How much friable asbestos-containing material or asbestos-containing waste material was openly accumulated?

4. If Respondent committed the first violation, what is the appropriate penalty under OAR 340-012-0050 and OAR 340-012-0045?[1]

5. Can Respondent assert affirmative defenses not raised in its Answer?

6. Is Respondent exempt from liability as a section 1031 exchange company?

[1] In its Notice of Violation, DEQ did not assess a civil penalty for the second alleged violation.

7. Can the negligence of Respondent's agent be imputed to Respondent when the negligence is at least in part based on the agent's prior knowledge?

EVIDENTIARY RULING

DEQ's letter of March 3, 2003 and the stipulated documents referred to in the letter are admitted as the record of the hearing, as stipulated by the parties. They are described in the letter and are marked as Exhibits 1 through 16. They constitute the entire evidentiary record in this case. Exhibit 16 contains undisputed facts 1 through 30, which are incorporated in the Findings of Fact below.

FINDINGS OF FACT

(1) American Exchange Services, Inc. (Respondent) is an Oregon corporation that acts as a facilitator for tax-deferred exchange transactions under the Internal Revenue Code, 26 U.S.C. sec. 1031. (Ex. 16.)

(2) As part of these tax deferred exchanges, Respondent temporarily holds legal title to real property on behalf of its customers so they can take advantage of tax deferrals. (Ex. 16.)

(3) On April 2, 1998, Respondent acquired title to real property and its improvements located at 4044 Crater Lake Ave., Medford, Jackson County, Oregon (Property) on behalf of its customer, William H. Ferguson (Ferguson). (Ex. 16.) Respondent transferred title to the Property to Ferguson on August 23, 1999 and charged Ferguson $800 for its services. (Ex. 9, Written Testimony of Cindy Poling.)

(4) Respondent and Ferguson entered into a Real Property Exchange Agreement (Agreement) dated March 9, 1998 in which Respondent was "entitled to exercise and perform all rights and obligations as owner of the [Property], including without limitations, * * * obligations to maintain and operate the [Property]" and to pay all expenses of the Property. (Ex. 4.)

(5) The Agreement named Ferguson as Respondent's agent "to manage, operate, maintain, and repair" the Property. (Ex. 4.)

(6) On May 29, 1998, Steve Croucher, a DEQ air quality specialist, observed a building on the Property being demolished by hand by workers hired by Barbara and Lawrence Dial. He suspected that some of materials in the building contained asbestos and that asbestos was being openly accumulated. He told the Dials to stop the removal. (Exs. 11 & 16.)

(7) At that time, Respondent held legal title to the Property. The reverse directory for the address of the Property listed Ferguson's name and address. (Ex. 16.)

(8) After Croucher informed Ferguson regarding his concerns of open accumulation of asbestos at the Property, Ferguson immediately retained BRW, environmental consultants, to do an asbestos survey of the partially demolished building on the Property. (Ex. 16.)

(9) BRW's survey and analysis of the Property revealed asbestos in various materials in the following locations: taping compound in the northeast bathroom of the building; yellow floor vinyl in the kitchen; brown floor vinyl in the northwest room near the sliding door (which was removed); texture on the kitchen soffit, southeast corner room closet wall, and exposed beam room ceiling; and black/gray sealant on roofing vents. (Ex. 11-B & Ex. 16.)

(10) In regards to another property, DEQ issued a Notice of Violation and Assessment of Civil Penalty to Ferguson in December 1996 for failing to follow several of the requirements for asbestos abatement. Ferguson requested a hearing. At the hearing, he argued that he was unaware of any asbestos-containing materials in the building when he started the renovation and that once he knew there were such materials, he complied with all statutes and rules regarding the removal of such materials. The final order from that hearing notes that "Respondent is an experienced property owner and manager who has been involved in the acquisition, renovation and maintenance of commercial properties. He has been involved in situations involving potential asbestos-containing materials * * *." (Ex. 11-C.)

(11) As part of its regular procedures in handling applications for building permits, the office of Jackson County Planning and Development Services requires agency comment on applications it receives. In response to an application by Ferguson to remove an existing structure and rebuild a larger building on the Property, Tom Schauer, a Jackson County planner, distributed a form for agency comments to Keith R. Tong of DEQ. Tong submitted agency comments on a form dated April 17, 1998 in anticipation of a "Pre-application Conference" scheduled for that day. Tong specifically warned that asbestos might be present in existing structures. He recommended that an asbestos survey be done and that an asbestos consultant design a control or removal plan. He also wrote that the proposal might need an asbestos notification. (Ex. 11-D; Ex. 12.)

(12) The purpose of the Pre-application Conference is for the staff to confer with the applicant about any possible concerns. The report prepared for Ferguson's application specifically directs him to "See agency comments," referring to Tong's comments from DEQ. (Ex. 11-D.)

(13) On about May 1, 1998, Ferguson entered into an agreement with Barbara and Lawrence Dial on behalf of Respondent. The Dials had approached Ferguson, offering to remove the building and salvage from the Property. In the agreement, Ferguson sold certain buildings and personal property on the Property for salvage to the Dials for $1,000, with the understanding that Ferguson would return the $1,000 to the Dials when the Property was clean. (Ex. 8-1,2.)

(14) The agreement between Ferguson and the Dials is a one-page, handwritten document, signed at the top by Ferguson as "agent for the seller" and by the Dials and dated "5-1-98." Attached to it is an undated, handwritten "Bill of Sale" with a signature at the bottom of "William Ferguson agent for owner ASE [sic]." (Ex. 8, 1-2.)

(15) The Dials did not pay $1,000 to Ferguson before the demolition of the Property's building began. (Ex. 16.)

(16) The demolition or salvage operation on the Property's building was an asbestos abatement project. (Ex. 16.)

(17) Asbestos was found in the Property's building as stated in Finding of Fact #9 above. (Ex. 16.)

(18) The samples from the asbestos sites in the Property's building showed friable asbestos in several types of materials throughout the building, including drywall, taping compound, roofing, wall texture, floor vinyl, ceiling texture, and duct tape. (Ex. 16.)

(19) These asbestos-containing materials were accumulated or stored in an open area and were not packed, stored, or otherwise securely enclosed as required by *former* OAR 340-032-5650 in effect at that time. (Ex. 16.)

(20) The Dials were not licensed to perform asbestos abatement. (Ex. 16.)

(21) None of the workers used by the Dials at the Property was licensed to perform asbestos abatement. (Ex. 16.)

(22) Ferguson was not licensed to perform asbestos abatement. (Ex. 16.)

(23) From 1,600 to over 4,999 square feet of friable asbestos-containing material or asbestos-containing waste material were openly accumulated during demolition or salvage operation by the Dials (Ex. 11) and removed by an asbestos removal company hired by Ferguson. (Ex. 11-E.)

(24) DEQ issued a Notice of Assessment of Civil Penalty to Respondent on February 1, 1999. (Ex. 1.)

(25) On February 12, 1999, Respondent filed an Answer, asserting that Respondent was not the owner of the asbestos-containing materials. (Ex. 2.)

(26) On November 2, 1999, Respondent filed a Motion to Dismiss on the grounds that Respondent was not the owner of the asbestos-containing materials because the Dials had purchased the materials under an agreement with Ferguson while Ferguson was acting as attorney in fact to manage the property for Respondent. (Ex. 3.)

(27) On July 14, 2000, Respondent filed a Memorandum in Support of the Motion to Dismiss, relying entirely on the ground that the alleged sale of the buildings on the Property to the Dials meant that Respondent did not own the asbestos-containing materials at the time of the open accumulation of asbestos. (Ex. 5.)

(28) On July 31, 2000, DEQ filed its Memorandum in Opposition to Respondent's Motion to Dismiss, focusing on Respondent's defense. (Ex. 6.)

(29) At a prehearing conference on December 4, 2001, Respondent for the first time raised the issue of whether it should be held liable as a Section 1031 fiduciary trustee. (Ex. 16.)

(30) On March 18, 2002, Respondent filed Respondent's Prehearing Brief on Ownership and Liability Issues that contained its legal argument concerning Section 1031 fiduciaries. Respondent has never moved to amend its Answer in order to raise this defense or a claim that Ferguson was not its agent. (Ex. 16.)

(31) Ferguson eventually hired a company to remove the asbestos on the Property. DEQ required him to encapsulate the asbestos-containing materials, which greatly increased the cost of removal. He paid $26,804 for removal of these materials. (Ex. 7, Ferguson affidavit.)

CONCLUSIONS OF LAW

1. Respondent openly accumulated friable asbestos-containing material or asbestos-containing waste material and failed to package, store and dispose of this material properly.

2. Respondent used an unlicensed contractor to perform asbestos abatement at the Property.

3. At least 160 square feet of friable asbestos-containing material or asbestos-containing waste material were openly accumulated.

4. The appropriate civil penalty for the violation of openly accumulating friable asbestos-containing material or asbestos-containing waste material is $7,200.[2]

5. Respondent cannot assert affirmative defenses or legal arguments that were not raised in its Answer.

6. Respondent is not exempt from liability as a Section 1031 exchange company.

7. Ferguson's negligence can be imputed to Respondent even though the negligence is at least in part based on Ferguson's prior knowledge.

OPINION

1. Openly accumulating asbestos-containing material

The legislature has found that exposure to asbestos poses a public health hazard that should be minimized to protect the public. ORS 468A.705.[3] The Environmental Quality Commission was given the authority to issue rules to control exposure to asbestos.

---

[2] In its Notice of Violation, DEQ did not assess a civil penalty for the violation of using an unlicensed contractor.

[3] See Appendix for text of law.

C.1

ORS 468A.745.[4] *Former* OAR 340-32-5600 was in effect at the time of the alleged violation and states: "Open accumulation of friable asbestos-containing material or asbestos-containing waste material is prohibited."

Respondent did not deny that friable asbestos-containing material or asbestos-containing waste material was accumulated on its Property, but claimed it was not the owner of these materials and should not be held liable for the violation. The main issue is whether the agreement between Respondent's agent, Ferguson, and the Dials transferred ownership of the materials to the Dials in regards to the alleged violation and thereby absolved Respondent of its responsibility for the violation as owner of the Property.

Based on interpretations of the Clean Air Act regarding asbestos release, *former* OAR 340-32-5600 should be strictly construed. In *United States v. Geppert Bros., Inc.*, 638 F. Supp. 996 (E.D. Pa. 1986), the court ruled that it would defeat the purposes of the Act if a property owner could avoid liability by giving someone else the salvage rights to the contaminated structures. DEQ has imposed strict liability on Respondent as the owner of the Property at the time of the open accumulation of asbestos. DEQ's interpretation of the rule is given considerable deference. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132 (1994), which is quoted as authority in *Oregon Occupational Safety & Health Div. v. D & H Logging, Inc.*, 159 Or App 458, 462-63 (1999):

> As noted, this court is authorized to overrule an agency's interpretation of a rule if an agency has 'erroneously interpreted a provision of law.' ORS 183.484(8)(a). In this case, the 'provision of law' is the rule itself. Where, as here, the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously.' It follows that, in circumstances like those presented here, this court cannot overrule, under ORS 183.482(8)(a), an agency's interpretation of its own rule.

DEQ's interpretation of *former* OAR 340-32-5600 will be upheld unless Respondent shows DEQ's interpretation is "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law." *Id.* Respondent has not shown such an inconsistency. DEQ's interpretation that Respondent should be strictly liable for the violation as the owner of the Property is a reasonable interpretation of the rule in this case because the property owner ultimately controls what happens on the owner's property. Respondent argues at some length that, even though it held the legal title to the Property, it did not exercise its rights to the Property. The agreement between Respondent and Ferguson stated that Respondent was "entitled to exercise and perform all rights and obligations as owner of the [Property], including without limitations, * * * obligations to maintain and operate the [Property]." In Ferguson's Direct Testimony Affidavit (Ex. 7), Ferguson sought prior approval from Respondent to enter the Agreement with the Dials. Ferguson considered Respondent as owner of the Property, despite Respondent's later contention that it did not exercise its rights to the Property. Respondent had

[4] See Appendix for text of law.

complete control over the property. It had final authority to control any removal of asbestos from the Property. The fact that it may not have exercised this authority is not relevant.

Moreover, Ferguson's alleged sale of the building and salvage to the Dials was in reality a contract to remove salvage and clean the Property. The alleged sale was for $1,000, with the Dials receiving the salvageable materials for their efforts. The agreement stated that the $1,000 received from the Dials would be returned to them after the site was cleaned. The Dials did not pay Ferguson the $1,000 before the building was demolished. They stopped salvaging the Property when DEQ advised them of the presence of asbestos-containing materials. The Dials in fact were salvagers hired by Ferguson to remove the buildings on Respondent's Property in preparation for when Ferguson became owner of the property. The Dials and Ferguson were only interested in the Dials' owning the buildings as salvage, not property. Respondent cannot call them property owners in order to avoid liability.

Respondent claimed that neither it nor its agent, Ferguson, knew asbestos was on the Property. This claim is not relevant because, pursuant to DEQ's reasonable interpretation, the property owner is strictly liable. Alleged knowledge is relevant in regards to the determination of the penalty and is considered in sections 4 and 7 below.

2. Removal by a contractor not licensed by DEQ

"Each contractor engaged in an asbestos abatement project must be licensed by [DEQ} under OAR 340-248-0120." *Former* OAR 340-33-030(3).

No one with a license to abate asbestos worked on the Property until Ferguson hired an asbestos removal company later, after friable asbestos-containing material or asbestos-containing waste material had accumulated and was detected by DEQ. Respondent did not contest this allegation that the accumulation was done by unlicensed personnel. Respondent's defense was that it was not the owner of the Property and should not be considered liable for not using a licensed contractor. As explained above, Respondent is strictly liable for this violation as owner of the Property and is liable for having unlicensed personnel accumulate the asbestos-containing materials.

3. Amount of friable asbestos-containing material openly accumulated

DEQ provided evidence that from 1,600 to over 4,999 square feet of friable asbestos-containing material or asbestos-containing waste material were openly accumulated during demolition or the salvage operation by the Dials (Ex. 11) and removed by an asbestos removal company hired by Ferguson. Respondent did not specifically contest the argument regarding the amount of friable asbestos-containing material that was accumulated on the Property, although some of the statements from its witnesses said that some of the material was already accumulated before Respondent received title to the property. OAR 340-012-0090(1)(d)(A) (see below) states that a violation is considered major if more than 160 square feet of friable asbestos-containing material was openly accumulated. Based on the record and the amount of materials later removed, at least this amount was openly accumulated.

C.1

4. Penalty

DEQ sought a civil penalty for only the first violation of open accumulation of friable asbestos-containing material or asbestos-containing waste material. The appropriate civil penalty for this violation is $7,200.

DEQ has the authority to assess a civil penalty for this violation. ORS 468.140(1)(c).[5] Respondent violated a rule promulgated pursuant ORS Chapter 468A when it openly accumulated friable asbestos-containing material or asbestos-containing waste material. The penalty is determined by calculating the base penalty and considering other factors, such as prior significant actions, history, number of occurrences, Respondent's responsibility for the violation, its cooperation, and the economic benefit it gained from noncompliance (BP + [(.1 x BP) x (P + H + O + R + C)] + EB). OAR 340-012-0045.[6]

Respondent's violation is a Class I violation because it was a "[v]iolation of a work practice requirement for asbestos abatement projects which causes a potential for public exposure to asbestos or release of asbestos into the environment." OAR 340-012-0050(1)(p).[7] The magnitude of the violation is major because more than 160 square feet of friable asbestos-containing material or asbestos-containing waste material was openly accumulated. OAR 340-012-0090(1)(d)(A).[8] The base penalty for a Class One, major violation is $6,000. OAR 340-012-0042(1)(b)(I).[9]

---

[5] ORS 468.140 says in relevant part:

> Civil penalties for specified violations. (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.

[6] See the Appendix for the full text of the rule.

[7] OAR 340-012-0050 states in relevant part:

> Air Quality Classification of Violations
>
> Violations pertaining to air quality shall be classified as follows:
>
> (1) Class One:
>
> * * * * *
>
> (p) Violation of a work practice requirement for asbestos abatement projects which causes a potential for public exposure to asbestos or release of asbestos into the environment;

[8] OAR 340-012-0090 states in relevant part:

DEQ alleged no prior significant actions (factor P) and no past history (factor H). DEQ assigned a value of two (2) to the occurrence factor (O) because the violation was repeated or continuous for more than one day. This value is appropriate because the violation was continuous for more than one day.

DEQ assigned a value of two (2) to the cause factor (R) because Respondent was negligent in failing to take reasonable steps to comply with the law. OAR 340-012-0030(11) says a person is negligent when not taking reasonable care to avoid a violation. Respondent was not directly involved in the open accumulation, but was held strictly liable as the owner of the

---

Selected Magnitude Categories

(1) Magnitudes for select violations pertaining to Air Quality may be determined as follows:

* * * * *

(d) Asbestos violations:

(A) Major - More than 260 lineal feet or more than 160 square feet or more than 35 cubic feet of
asbestos-containing material;

[9] OAR 340-012-0042 states in relevant part:

Civil Penalty Schedule Matrices

In addition to any liability, duty, or other penalty provided by law, the Director may assess a civil penalty for any violation pertaining to the Commission's or Department's statutes, rules, permits or orders by service of a written notice of assessment of civil penalty upon the Respondent. Except for civil penalties assessed under OAR 340-012-0048 and 340-012-0049, the 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:

(i) Major -- $6000;

* * * * *

(b) No civil penalty issued by the Director pursuant to this matrix shall be less than $50 dollars or more than $10,000 dollars for each day of each violation. This matrix shall apply to the following:

(A) Any violation related to air quality statutes, rules, permits or orders, except for the selected open burning violations listed in section (3) below;

Property. Respondent gave Ferguson, its agent, broad delegation to do what he wanted with the Property. For the reasons stated below in section 7, the negligence of Respondent's agent is imputed to Respondent. A value of two (2) is appropriate for this factor.

DEQ alleged that the cooperation factor (C) should be zero (0) because Respondent's violation could not be corrected after it occurred. OAR 340-012-0045(1)(c)(E) says:

> "C" is the Respondent's cooperativeness and efforts to correct the violation. The values for "C" and the finding which supports each are as follows:
>
> (i) -2 if Respondent was cooperative and took reasonable efforts to correct a violation, took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the violation would not be repeated;
>
> (ii) 0 if there is insufficient information to make a finding, or if the violation or the effects of the violation could not be corrected;

Upon being confronted with the violation, Respondent's agent immediately hired a licensed contractor to determine the amount of asbestos on the Property and eventually paid a contractor over $26,000 to correct the violation. Through its agent, Respondent took reasonable efforts to correct the violation and affirmative efforts to minimize the effects. For these efforts, the value of the C factor is set at minus two (-2).

DEQ did not allege that Respondent received an economic benefit from the violation because of the large amount its agent paid to correct the violation, so the penalty is not increased for this factor.

The total civil penalty is the base penalty of $6,000, plus $1,200 (total factors of two multiplied by one-tenth of the base penalty, or $600), or $7,200. If unpaid, the penalty will accrue interest pursuant to ORS 82.010 and may be filed in court.

5. Raising issues beyond the Answer

After receiving a Notice of Violation and Civil Penalty from DEQ, the recipient may request a hearing by filing an Answer within the time limit. In this Answer, the recipient must admit or deny all factual matters and affirmatively allege any affirmative claim or defense. "Failure to raise a claim or defense will be presumed to be a waiver of such claim or defense." OAR 340-011-0107(2)(b).

Respondent filed its Answer on February 12, 1999, alleging that it was not the owner of the asbestos-containing materials referred to in the Notice. Respondent filed a Motion to Dismiss on November 2, 1999, again claiming it was not the owner. On December 4, 2001, Respondent first raised the issue of whether it should be exempt from liability as a Section 1031 fiduciary trustee. Respondent also argued for the first time that it should not held liable for the acts of Ferguson, its agent. There is no evidence that Respondent moved to amend its Answer to include these arguments. Without such amendment of its Answer, these arguments are waived and will not be considered.

6. Liability as a Section 1031 exchange company

Even if the above arguments by Respondent were not waived, Respondent has not established these arguments. It provided no authority to support its assertion that it is exempt in asbestos cases from liability as a Section 1031 exchange company, but mainly argued that it was bad policy. DEQ has reasonably concluded that property owners should be strictly liable. The agency has the sole authority to make policy decisions.

Respondent argues at length that Ferguson acted beyond his authority as its agent. Its delegation of authority to Ferguson in their contract was very broad and included the authority to contract with the Dials to remove the salvage from the Property. This case does not turn on whether Ferguson acted within his authority. Respondent's liability was strict, based on its ownership of the property and its rights to "exercise and perform all rights and obligations as owner." Moreover, Respondent has argued at other times that Ferguson was its agent. Finally the authority cited by Respondent can be distinguished from the facts in this case as explained in DEQ's Hearing Memorandum (Ex, 16).

7. Imputation of Ferguson's negligence

Ferguson did not take reasonable care to avoid the violation, especially considering that he had been fined before for an asbestos violation, that the Dials told him that they feared asbestos on the site, and that he was advised by Jackson County to see information from DEQ that said he should test for asbestos on the site. Respondent alleges that Ferguson's knowledge based on the prior violation against him should not be held against Respondent because that violation was before Respondent and Ferguson entered an agreement. Even without that prior violation, Ferguson should have been aware of the possibility of asbestos on site because Ferguson was advised by Jackson County to review DEQ's warning of possible asbestos contamination on the Property and the Dials expressed that concern to him. This knowledge of Respondent's agent is imputed to Respondent.

PROPOSED ORDER

I propose that Respondent American Exchange Services, Inc. violated *former* OAR 340-032-5600(4) and *former* OAR 340-032-5600(4) on or before May 29, 1998 and be liable for a civil penalty of $7,200 and that Respondent also violated former OAR 340-033-0030(3) on or before May 29, 1998.

Dated this 24th day of April, 2003

Lawrence S. Smith
Hearing Officer
Hearing Officer Panel for the
Environmental Quality Commission

Dated and Issued on: May 9, 2003

REVIEW

If you are not satisfied with this decision, you have a right to petition the Environmental Quality Commission for review. To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date of service of this Order, as provided in Oregon Administrative Rule (OAR) 340-011-0132(1) and (2). Service is defined in OAR 340-011-0097, as the date the Order is mailed to you, not the date you receive it. The Petition for Review must be filed with:

Environmental Quality Commission
c/o DEQ – Assistant to the Director
811 SW 6th Avenue
Portland OR 97204

Within 30 days of filing the Petition, you must also file exceptions and a brief as provided in OAR 340-011-0132(3).

APPENDIX

ORS 468A.705 Legislative findings. The Legislative Assembly finds and declares that:

(1) Asbestos-containing material in a friable condition, or when physically or chemically altered, can release asbestos fibers into the air. Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are a danger to the public health.

(2) There is no known minimal level of exposure to asbestos fibers that guarantees the full protection of the public health.

(3) Asbestos-containing material found in or on facilities or used for other purposes within the state is a potential health hazard.

(4) The increasing number of asbestos abatement projects increases the exposure of contractors, workers and the public to the hazards of asbestos.

(5) If improperly performed, an asbestos abatement project creates unnecessary health and safety hazards that are detrimental to citizens and to the state in terms of health, family life, preservation of human resources, wage loss, insurance, medical expenses and disability compensation payments.

(6) It is in the public interest to reduce exposure to asbestos caused by improperly performed asbestos abatement projects through the upgrading of contractor and worker knowledge, skill and competence. [Formerly 468.877]

ORS 468A.745 Rules; variances; training; standards; procedures. The Environmental Quality Commission shall adopt rules to carry out its duties under ORS 279.025, 468A.135 and 468A.700 to 468A.760.

OAR 340-012-0045 states in relevant part: "Civil Penalty Determination Procedure.
(1) When determining the amount of civil penalty to be assessed for any violation, * * *, the Director shall apply the following procedures:
(a) Determine the class and the magnitude of each violation:
(A) The class of a violation is determined by consulting OAR 340-012-0050 to 340-012-0073;
(B) The magnitude of the violation is determined by first consulting the selected magnitude categories in OAR 340-012-0090. * * *
(b) Choose the appropriate base penalty (BP) established by the matrices of OAR 340-012-0042 after determining the class and magnitude of each violation;
(c) Starting with the base penalty, determine the amount of penalty through application of the formula: BP + [(.1 x BP) x (P + H + O + R + C)] + EB, where:
(A) "P" is whether the Respondent has any prior significant actions relating to statutes, rules, orders and permits pertaining to environmental quality or pollution control. A violation is deemed to have become a Prior Significant Action on the date of the issuance of the first Formal Enforcement Action in which it is cited. For the purposes of this determination, violations that were the subject of any prior significant actions that were issued before the effective date of the Division 12 rules as adopted by the Commission in March 1989, shall be classified in accordance with the classifications set forth in the March 1989 rules to ensure equitable consideration of all prior significant actions. The values for "P" and the finding which supports each are as follows:
(i) 0 if no prior significant actions or there is insufficient information on which to base a finding;
(ii) 1 if the prior significant action is one Class Two or two Class Threes;
(iii) 2 if the prior significant action(s) is one Class One or equivalent;
(iv) 3 if the prior significant actions are two Class One or equivalents;
(v) 4 if the prior significant actions are three Class Ones or equivalents;
(vi) 5 if the prior significant actions are four Class Ones or equivalents;
(vii) 6 if the prior significant actions are five Class Ones or equivalents;

(viii) 7 if the prior significant actions are six Class Ones or equivalents;
(ix) 8 if the prior significant actions are seven Class Ones or equivalents;
(x) 9 if the prior violations significant actions are eight Class Ones or equivalents;
(xi) 10 if the prior significant actions are nine Class Ones or equivalents, or if any of the prior significant actions were issued for any violation of ORS 468.996;
(xii) In determining the appropriate value for prior significant actions as listed above, the Department shall reduce the appropriate factor by:
(I) A value of 2 if the date of issuance of all the prior significant actions are greater than three years old; or
(II) A value of 4 if the date of issuance of all the prior significant actions are greater than five years old.
(III) In making the above reductions, no finding shall be less than zero.
(xiii) Any prior significant action which is greater than ten years old shall not be included in the above determination;
(xiv) A permittee, who would have received a Notice of Permit Violation, but instead received a civil penalty or Department Order because of the application of OAR 340-012-0040(2)(d), (e), (f), or (g) shall not have the violation(s) cited in the former action counted as a prior significant action, if the permittee fully complied with the provisions of any compliance order contained in the former action.
(B) "H" is Respondent's history in correcting prior significant actions or taking reasonable efforts to minimize the effects of the violation. In no case shall the combination of the "P" factor and the "H" factor be a value less than zero. In such cases where the sum of the "P" and "H" values is a negative numeral the finding and determination for the combination of these two factors shall be zero. The values for "H" and the finding which supports each are as follows:
(i) -2 if Respondent took all feasible steps to correct the majority of all prior significant actions;
(ii) 0 if there is no prior history or if there is insufficient information on which to base a finding.
(C) "O" is whether the violation was repeated or continuous. The values for "O" and the finding which supports each are as follows:
(i) 0 if the violation existed for one day or less and did not recur on the same day, or if there is insufficient information on which to base a finding;
(ii) 2 if the violation existed for more than one day or if the violation recurred on the same day.
(D) "R" is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act of the Respondent. The values for "R" and the finding which supports each are as follows:
(i) 0 if an unavoidable accident, or if there is insufficient information to make a finding;
(ii) 2 if negligent;
(iii) 6 if intentional; or
(iv) 10 if flagrant.
(E) "C" is the Respondent's cooperativeness and efforts to correct the violation. The values for "C" and the finding which supports each are as follows:
(i) -2 if Respondent was cooperative and took reasonable efforts to correct a violation, took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the violation would not be repeated;
(ii) 0 if there is insufficient information to make a finding, or if the violation or the effects of the violation could not be corrected;
(iii) 2 if Respondent was uncooperative and did not take reasonable efforts to correct the violation or minimize the effects of the violation.
(F) "EB" is the approximated dollar sum of the economic benefit that the Respondent gained through noncompliance. The Department or Commission may assess "EB" whether or not it applies the civil penalty formula above to determine the gravity and magnitude-based portion of the civil penalty, provided that the sum penalty does not exceed the maximum allowed for the violation by rule or statute. "EB" is to be determined as follows:
(i) Add to the formula the approximate dollar sum of the economic benefit gained through noncompliance, as calculated by determining both avoided costs and the benefits obtained through any delayed costs, where applicable;
(ii) The Department need not calculate nor address the economic benefit component of the civil penalty when the benefit obtained is de minimis;
(iii) In determining the economic benefit component of a civil penalty, the Department may use the U.S. Environmental Protection Agency's BEN computer model, as adjusted annually to reflect changes in marginal tax rates, inflation rate and discount rate. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the economic benefit

gained by Respondent's noncompliance. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect that Respondent's actual circumstance. Upon request of the Respondent, the Department will use the model in determining the economic benefit component of a civil penalty;

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

CERTIFICATE OF SERVICE

I certify that on May 9, 2003, I served the attached Proposed Order by mailing in a sealed envelope, by certified mail or with first class postage prepaid, as noted below, a copy thereof addressed as follows:

AMERICAN EXCHANGE SERVICES INC
C/O ROD WENDT REGISTERED AGENT
PO BOX 1329
KLAMATH FALLS OR 97601-0268

BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 2530

SCOTT J KAPLAN
ATTORNEY AT LAW
900 SW FIFTH AVE STE 2600
PORTLAND OR 97204

BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 2547

JEFF BACHMAN
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

Ann Redding
Administrative Specialist

State of Oregon
Department of Environmental Quality Memorandum

Date: November 13, 2003

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item B: Contested Case No. AQ/A-WR-98-186 regarding American Exchange Services, Inc., December 4, 2003 EQC Meeting

Appeal to EQC

On June 6, 2003, American Exchange Services, Inc. (AES) filed a Petition for Commission review of a Hearing Officer's[1] Proposed Order (Attachment F), which assessed a $7,200 civil penalty for open accumulation of friable asbestos-containing material or asbestos-containing waste material, and for failing to properly package, store, and dispose of this material.

Background

The Proposed Order contains factual and legal issues identified during the hearing process, as well as proposed Findings of Fact, Conclusions of Law, and an Opinion elaborating on the proposed conclusions. The following is a brief summary.

On May 29, 1998, DEQ's air quality specialist Steve Croucher observed a building on property in Jackson County being demolished by hand. He suspected that some of the materials in the building contained asbestos and that the asbestos was being improperly contained and otherwise disturbed. Croucher learned that the workers had been hired by Barbara and Lawrence Dial. He told the workers to stop work and, using a reverse directory for the property's address, contacted William H. Ferguson.

Ferguson entered into a Real Property Exchange Agreement on March 9, 1998, with AES, which is an Oregon corporation that acts as a facilitator for tax-deferred exchange transactions under the Internal Revenue Code, 26 U.S.C. § 1031 (Section 1031). As part of these tax-deferred exchanges, AES temporarily holds legal title to real property on behalf of its customers so they can take advantage of tax deferrals. At the time of the violation, AES held title to the property while Ferguson managed it.

Croucher told Ferguson of his concerns about asbestos at the property, and Ferguson retained BRW, environmental consultants, to do an asbestos survey of the partially demolished building on the property. BRW's survey and analysis

[1] Although the 2003 Legislature changed the designation of *Hearing Officer* to *Administrative Law Judge*, the officer in this case refers to himself in the Proposed Order as a "Hearing Officer." Thus, this staff report uses the term Hearing Officer for consistency with the Order.

revealed asbestos in various materials in several locations. These materials were accumulated or stored in an open area and were not packed, stored, or otherwise securely enclosed as required by DEQ's asbestos rules. Neither the Dials, any of the workers, nor Ferguson was licensed to perform asbestos abatement.

In December 1996, DEQ had issued Ferguson a Notice of Violation and Assessment of Civil Penalty for failing to follow several of the requirements for asbestos abatement. That matter went to hearing before the Commission, and the Commission found that Ferguson had violated several provisions of the asbestos rules and assessed a civil penalty for one violation.

On February 1, 1999, DEQ issued a Notice of Assessment of Civil Penalty to AES for $8,400 (Attachment H1). AES's Answer asserted that the corporation was not the owner of the asbestos-containing materials. DEQ and AES submitted legal briefs on the issue of whether AES was the owner of the asbestos-containing materials when Ferguson allegedly "sold" the buildings on the property to the Dials for salvage. At that time, the Commission's contested case hearing rules did not allow for immediate Commission review to resolve this legal issue.

At a prehearing conference on December 4, 2001, AES asserted for the first time that as a Section 1031 fiduciary trustee, it should not be held liable for the violations allegedly caused by its "customer" Ferguson, and that Ferguson's alleged negligence could not be imputed to AES. AES and DEQ subsequently briefed these and other legal issues.

DEQ and AES agreed that the Hearing Officer could consider this matter based on written legal arguments supported by written direct testimony and affidavits. On May 9, 2003, the Hearing Officer issued a Proposed Order concluding that AES is liable for a civil penalty of $7,200. The reduced civil penalty was based on the Hearing Officer's conclusion that AES's agent (Ferguson) took reasonable efforts to correct the violation and affirmative efforts to minimize the effects. For these efforts, the hearing officer set the value of the C factor of the civil penalty formula at minus two (-2).

In its appeal to the Commission (Attachment B), AES took the following exceptions to the Proposed Order:

1. AES was not the owner of the asbestos-containing materials and, therefore, is not liable at all,
2. if AES was the owner, DEQ may not impute Ferguson's negligence to AES, and
3. the amount of the asbestos-containing material at issue was less than 80 square feet and should be considered a minor magnitude.

In the its response brief (Attachment A), the Department requested the Commission uphold the Proposed Order and noted two apparent clerical errors in the proposed order:

1. The Hearing Officer appears to have made a clerical error on page 4, Finding of Fact (23). The Department believes the reference should be to Ex. 11-F and 11-G and asked the Commission to make this correction.
2. There appears to be a clerical error in the last paragraph on page 11 where it repeats "*former* OAR 340-032-5600(4)" consecutively in the same sentence.

EQC Authority

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

Alternatives

The Commission may:

1. As requested by AES, reverse the Hearing Officer's decision based on AES's Exceptions and Brief;
2. As requested by the Department, uphold the Hearing Officer's Proposed Order that AES violated the open accumulation rules and is liable for the $7,200 civil penalty;
3. Uphold the Hearing Officer's decision but adopt different reasoning; or
4. Remand the case to the Hearing Officer for further proceedings.

In reviewing the Proposed Order, the Commission may substitute its judgment for that of the Hearing Officer except as noted below.[2] The Order was issued under 1999 statutes and rules governing the Hearing Officer Panel Pilot Project.[3] Under these 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. [4]

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. [5]

(2) The Commission may not modify a recommended finding of historical fact unless it finds that the recommended finding is not supported by a preponderance of the evidence. [6] Accordingly, the Commission may not

---

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

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. [7]

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.[8]

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. [9]

(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.[10]

Attachments

A. Department's Response Brief to Respondent's Exceptions and Brief, dated August 27, 2003.
B. AES's Exceptions and Brief, dated July 28, 2003.
C. Letter from Andrea Crozier, dated July 7, 2003.
D. Letter from Mikell O'Mealy, dated June 10, 2003.
E. Petition for Commission Review, dated June 6, 2003.
F. Hearing Officer's Proposed Order Assessing Civil Penalty, dated May 9, 2003.
G. Letter from Assistant Attorney General Shelley K. McIntyre to Hearing Officer Lawrence Smith, dated March 3, 2003.
H. Exhibits
    1. DEQ's Notice of Assessment of Civil Penalty, dated February 1, 1999
    2. AES's Answer, dated February 12 1999.
    3. AES's Motion to Dismiss, dated November 2, 1999 with attached Affidavit (referred to as Exhibit A).
    4. Affidavit of Cindi Poling, dated November 24, 1999 with attachments (referred to as Exhibits A and B).
    5. Memorandum in Support of Respondent's Motion to Dismiss, dated July 14, 2000.
    6. Department's Memorandum in Opposition to Respondent's Motion to Dismiss, dated July 31, 2000 with accompanying Affidavit of Steven Croucher and State's Exhibits A through E.

---

[7] *Id.* at § 8; OAR 137-003-0655(4).
[8] OAR 137-003-0655(5); 137-003-0660.
[9] OAR 340-011-132(3)(a).
[10] *Id.* at (4).

7. Respondent's Direct Testimony Affidavit of William Ferguson, William Coryell, Daniel Ferguson, Joel Ferguson, and John Hamlin, dated March 18, 2002.
8. Ferguson's Exhibit List, dated March 18, 2002 and Exhibits marked 1 through 8.
9. Respondent's Prehearing Brief on Ownership and Liability Issues, dated March 18, 2002.
10. Written Testimony of Cindi Poling, dated March 18, 2002 with exhibits 1 and 2.
11. Steven Croucher Written Direct Examination dated March 18, 2002 (State's Exhibits referred to are those submitted with the Department's Memorandum in Opposition to Respondent's Motion to Dismiss, above) with cover letter from Assistant Attorney General Shelley K. McIntyre, dated April 4, 2002.
12. Keith Tong Written Direct Testimony, dated March 18, 2002.
13. Respondent's Objections to Testimony and Documents, dated March 21, 2002.
14. William Ferguson's Narrative Statement, undated but submitted with a cover letter, dated March 25, 2002.
15. Letter from attorney Scott Kaplan to Ms. Gretchen Miller, dated April 5, 2002.
16. DEQ's Hearing Memorandum and cover letter from Assistant Attorney General Shelley K. McIntyre, dated June 12, 2002.

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

RECEIVED
AUG 27 2003
Oregon DEQ
Office of the Director

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of American Exchange Services, Inc., An Oregon Corporation, Respondent.	Case No. AQ/A-WR-98-186 Jackson County DEQ'S RESPONSE TO RESPONDENT'S EXCEPTIONS AND BRIEF

INTRODUCTION

This matter concerns a civil penalty assessment for violations of the Department's asbestos rules. On May 9, 2003, Lawrence S. Smith, a hearing officer for the Hearing Officer Panel, issued his Proposed Order Assessing Civil Penalty in which he concluded that Respondent is liable for a civil penalty of $7,200[1]. Respondent American Exchange Services, Inc. (AES) timely filed a Petition for Commission Review and, after requesting and receiving an extension of time, timely filed Exceptions to the hearing officer's Findings of Fact and Conclusions of Law.

Respondent's Exceptions and Brief basically repeat arguments presented in Respondent's Prehearing Brief on Ownership and Liability Issues. (Ex. 9, attached to Respondent's Exceptions and Brief). The Department previously responded to the arguments set forth in that document (Ex. 16[2]) and will not repeat them here.

In short, AES argues that it was not the owner of the asbestos-containing materials and, therefore, is not liable at all. Even if it was the owner, AES argues that the base civil penalty may not be enhanced by William H. Ferguson's negligence. Finally, AES asserts that the

[1] The Department's Notice of Assessment of Civil Penalty assessed $8,400. The hearing officer proposed reducing this by $1,200 by changing the cooperation factor (C) in the penalty calculation formula from a value of zero (0) to a value of minus two (-2) on the grounds that Respondent took reasonable efforts to correct the violation and affirmative efforts to minimize the effects of the violation. *See* OAR 340-012-0045(1)(c)(E). The Department did not challenge the hearing officer's conclusion.

[2] Note that pages 5 and 7 contain typographic errors in numbering under the section on Matters for Resolution by the Hearing Officer. Numbers 29-32 should be 1-4.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

amount of asbestos-containing material at issue was less than 80 square feet and should be considered a minor magnitude.

Respondent is wrong on the law, and it has not shown that the hearing officer's findings of historical facts are not supported by a preponderance of the evidence in the record. Most of Respondent's proposed facts either are irrelevant or are unsupported by the evidence contained in the record. Therefore, the Department opposes Respondent's Exceptions and asks the Commission to adopt the hearing officer's Proposed Order, including his Findings of Fact and Conclusions of Law.

COMMISSION'S AUTHORITY FOR MODIFYING THE HEARING OFFICER'S FINDINGS OF FACT

Under the provisions governing contested cases conducted by a hearing officer assigned from the Hearing Officer Panel, if the agency modifies the form of order issued by the hearing officer in any substantial manner, the agency must explain why it made the modification. 1999 Or. Laws, c. 849 §12(2). In addition, an agency may not modify a "finding of historical fact" made by the assigned hearing officer unless the agency determines that the finding of historic fact made by the hearing officer is not supported by a preponderance of the evidence in the record.[3] 1999 Or. Laws, c. 849 §12(3).

RESPONDENT'S EXCEPTIONS TO THE HEARING OFFICER'S FINDINGS OF FACT

1. Respondent objects to Findings of Fact numbers 3, 4, 5, and 7 and proposes alternative Findings of Fact. These findings are based on undisputed facts and are supported by a preponderance of the evidence in the record as cited in the Proposed Order. Respondent makes no claim otherwise. Therefore, there is no basis for modifying the findings.

[3] A "finding of historical fact" is a determination by the hearing officer that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing. 1999 Or. Laws, c. 849 §12(3).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

The proposed changes are designed to set up Respondent's argument that AES should not be held liable for the asbestos violations because it held the property "in trust" for its customer, William H. Ferguson. As explained in the Department's hearing memorandum, the law imposes strict liability on the property owner. Whether AES held the property as a fiduciary or knew what Ferguson was doing is irrelevant to its liability. AES held legal title to the real property for over sixteen months, including the time when the asbestos violations occurred. Furthermore, it authorized Ferguson to manage, operate, maintain, and repair the property, *i.e.,* it exercised management control over the property. Therefore, AES is liable for the asbestos violations.

2. *Respondent objects to Findings of Fact numbers 7 through 23 on the grounds that they are irrelevant because they apply to the activities of William H. Ferguson, AES's "customer."* Again, these findings are based on a preponderance of the evidence in the record, and Respondent makes no contrary claim. Instead, Respondent refers to Exhibit 9, AES's Prehearing Brief on Ownership and Liability Issues, in support of its exceptions. As stated above, the Department responded at length to AES's defense on this issue in its Hearing Memorandum (Ex. 16) and will not elaborate further here. In short, there is no basis for eliminating these Findings of Fact.

AES argues that it is "bad policy" to hold facilitators of Section 1031 tax deferred exchange transactions liable for asbestos violations because it could "significantly damage the real-estate industry in Oregon." (Ex. 9, p. 1.). AES makes this policy argument because its legal argument totally lacks merit. AES asserts that it should not be liable because imposing such liability on Section 1031 facilitators would substantially increase the costs for real estate transactions. Interestingly, however, AES also points out that it has an Indemnity and Release Agreement with Mr. Ferguson requiring him to indemnify, defend, and hold harmless AES from and against all liabilities arising from or related to various environmental laws. *See* Ex. 9, p. 5; Ex. 4, subex. 2, p. 1. Therefore, Mr. Ferguson will be liable to AES for the civil penalty and the expenses incurred by AES during the contested case proceeding.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

AES is strictly liable for the violation because it held legal title to the property when the violations occurred. Ferguson's activities, prior violations of the asbestos rules, and knowledge of the probability of asbestos at this site are relevant to the issue of whether his negligence may be imputed to Respondent. The hearing officer's Findings of Fact support a conclusion that Ferguson was negligent. Ferguson knew or should have known about the possibility of asbestos on the site, and this knowledge may be imputed to Respondent.

3. Respondent proposes additional Findings of Fact in case the Commission agrees that Ferguson's activities are relevant to this proceeding. In its Hearing Memorandum (Ex. 16), the Department set forth a list of 30 statements of undisputed facts that the hearing officer incorporated by reference into the Proposed Order. (*See* Proposed Order, p. 2 under Evidentiary Ruling). In addition, the hearing officer made his own Findings of Fact based on the evidentiary record.[4] The Commission may not change any of these findings unless it determines that they are not supported by a preponderance of the evidence. Respondent has not claimed that any of these Findings of Fact are not supported by a preponderance of the evidence.

On the other hand, AES's proposed new Findings of Fact are not supported by the evidence, and in some cases they are completely irrelevant. We discuss them in turn here. Proposed No. 5 is irrelevant. Mr. Ferguson's interest in acquiring the property has nothing to do with the case. Proposed No. 6 also is irrelevant. The relevant elements concerning Respondent's legal status are covered by numbers (1) and (2) in the hearing officer's Proposed Order. However, even though these statements are irrelevant, they are undisputed, and the Department does not strenuously object to their being included if the Commission so desires.

[4] Note that the Department objected to the admissibility of William Ferguson's Narrative Statement that AES asked be attached as Exhibit "A" to Mr. Ferguson's previously filed Affidavit, identified as Exhibit 14. The Department objected to the admissibility of this document on the grounds that the "narrative" is not sworn testimony and was not even signed by anyone. It does not appear that the hearing officer relied on this document for any of his Findings of Fact, nor does AES in its Exceptions and Brief.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Proposed No. 7 appears to be a rewriting of numbers (13) and (14) in the hearing officer's Proposed Order. Respondent does not argue that numbers (13) and (14) are not supported by a preponderance of the evidence, and the Department objects to their being rewritten.

Proposed No. 8 is supported by evidence in the record, and if the Commission chooses to add it, we suggest the following edited version for easier reading and to more accurately reflect the evidence:

> "Before the Dials began salvage operations, they told Ferguson that they wanted any "suspicious" material tested for asbestos. They collected approximately twelve samples of flooring, roofing, and other materials, which Ferguson arranged to have tested by BWR, an asbestos analysis company in Medford. Of the twelve samples selected by the Dials, BWR tested three, and none of those contained asbestos. Neither the Dials nor Ferguson chose to consult with the Department or have a professional asbestos survey performed." (Ex. 7; Ex. 8, subex. 3).

We would like to point out that after the Department became involved and Ferguson hired BWR to do a proper asbestos survey, BWR took and tested over 30 samples from interior and exterior areas of the building and associated debris piles. *See* Ex. 8, subex. 4.

Given Ferguson's experience in property management and development, his past asbestos violations, the information provided by the Department and the Jackson County Planning and Development Services, and the Dials' concerns, Ferguson knew or should have known that asbestos likely was present in much of the materials that he wanted the Dials to remove. It would have been reasonable to all materials that may reasonably suspected to contain asbestos, which would include all of the building products in which asbestos has been used historically, such as floor tile, popcorn ceiling, joint compound, etc. Part of the negligence element is that Ferguson took it upon himself or deferred to

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

the Dials to decide what should and should not be sampled when he should have hired an asbestos expert to do a survey.

Proposed No. 9 essentially is addressed by numbers (6) and (7) in the hearing officer's Proposed Order, and there is no reason for substitute language.

Although it is not entirely clear, proposed Nos. 10 and 11 appear to challenge the magnitude portion of the civil penalty, *i.e.,* that more than 160 square feet of friable asbestos-containing material or asbestos-containing waste material was openly accumulated. First, these statements are irrelevant because the issue is not how much material the Dials may have disturbed but how much material was in violation of the rule prohibiting open accumulation of friable asbestos-containing materials. Second, Respondent has failed to show that the hearing officer's findings are not supported by a preponderance of the evidence.

The hearing officer's Finding of Fact (23) appears to be the only statement supporting a major magnitude. The hearing officer cites to Ex. 11 in general and Ex. 11-E in particular. We believe the latter is a typographic error and should read Ex. 11-F, which is the Department's Notice for Removal issued to Western States Environmental Services indicating that some 3,000 square feet of asbestos-containing material would be removed or encapsulated.[5] Exhibit 11 in general includes several written statements by Steven Croucher, the Department's Air Quality Specialist that first noticed and inspected the demolition project, and supporting documents.

Croucher's Written Direct Testimony (Continued) (part of Ex. 11) explains how he estimated the amount of asbestos-containing material. Attached to that document are several photos (Ex. 11-G; also submitted by AES as Ex. 8, subex. 5 and 6). Croucher explained that photos 1, 2, and 3 show approximately 158 square feet of disturbed asbestos-containing material. Photos 4 and 5 show a substantial amount of asbestos-

[5] Ex. 11-E is a letter from Francisco J. Hernandez, Jackson County Planner 1, and accompanying documents and is not related to the magnitude of the violation.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

containing floor covering that was removed and discarded outside the building. The asbestos floor covering that was discarded outside was commingled with other building materials. Based on the size of the room, Croucher estimated that approximately 300 square feet of asbestos floor covering had been removed and discarded outside the building. Therefore, Croucher concluded that at a minimum, some 460 square feet of asbestos-containing material was impacted and documented with photos. This is nearly three times the threshold level of 160 square feet for a major magnitude violation.

Croucher also testified that BWR's asbestos survey identified over 4,300 square feet of asbestos-containing materials. "Based on the overall condition of the building, which was approximately 50% demolished, I calculate that over 2000 square feet of asbestos containing material was improperly removed and left onsite creating open accumulation of asbestos containing material with the potential for airborne fiber releases." Ex. 11, Croucher Written Direct Examination (Continued). This is similar to the Notice submitted by Western States Environmental for the clean-up of 3,000 square feet. (Ex. 11-F).

Finally, the Work Order prepared by Western States Environmental Services, Inc. shows that it charged for the removal of 235 yards of asbestos-containing waste material. Ex. 8, subex. 7. The above evidence in the record supports a finding of major magnitude.

Proposed No. 12 is irrelevant even if it is true. Although Ferguson stated in his affidavit that he never saw the notations made by DEQ, there is no dispute that DEQ submitted the comments and that they were a matter of record with the Jackson County Planning and Development Services. *See* nos. (11) and (12) of the hearing officer's Proposed Order. There is no evidence to rebut Mr. Keith Tong's testimony contained in Ex. 12 and, thus, no reason to change numbers (11) and (12) in the hearing officer's Proposed Order. Ferguson was on notice that asbestos might be present in the existing

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

structures and that an asbestos survey should be done. His failure or refusal to check these records is no reason for him to avoid liability for negligence.

RESPONDENT'S EXCEPTIONS TO

THE HEARING OFFICER'S PROPOSED CONCLUSIONS OF LAW

1. *The Department thoroughly addressed proposed nos. 1, 4, and 6 in its Memorandum in Opposition and Hearing Memorandum.* AES owned the premises involved and is strictly liable for the violations. Nothing in the federal Clean Air Act or state law provides an exemption from liability for a Section 1031 exchange company.

2. *The Commission should reject proposed nos. 2 and 7 for the reasons set forth in the hearing officer's Proposed Order. See* Findings of Fact (4) and (5) and Opinion at 6. The Real Property Exchange Agreement clearly designated Ferguson as AES's agent "to manage, operate, maintain, and repair" the property while AES retained the right "to exercise and perform all rights and obligations as owner of the [property], including without limitations, * * * obligations to maintain and operate" the property. Ferguson testified that before entering into the Agreement with the Dials, he asked AES if he could sell the buildings and dispose of the personal property located on the site. AES authorized him to go ahead. Ex. 7, Ferguson Affidavit, p. 2.

3. *Respondent's proposed nos. 3 and 8 concern the amount of asbestos-containing material openly accumulated, which relates to the magnitude of the violation when calculating the amount of the civil penalty.* The Department determined that the violation was a major magnitude because more than 160 square feet of friable asbestos-containing material or asbestos-containing waste material was openly accumulated. As discussed above under Respondent's proposed changes to the Findings of Fact, AES asserts that the amount of material openly accumulated by Ferguson or the Dials was less than 40 lineal feet or eighty square feet, which would make it a minor magnitude. The evidence does not support these proposed changes.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

4. Proposed no. 5 concerns raising an affirmative defense not raised in the Answer.

The Department objected to Respondent's Section 1031 defense and legal argument because it was not raised in the Answer. In its July 14, 2000 Memorandum in Support of its Motion to Dismiss, Respondent relied solely on its argument that the Dials "owned" the buildings, including the asbestos-containing materials, and therefore was not liable. Naturally, the Department's Response focused on that issue, *i.e.,* that the purported sale of the buildings was a sham and was, in fact, a contract for services. To my embarrassment, I did not realize at the time that the Commission had adopted OAR 340-011-0124, which prohibits motions for rulings on legal issues. But for that rule, the Commission could have decided this matter based on the Motion to Dismiss, and the Section 1031 issue would never have arisen.

Respondent did not raise the Section 1031 affirmative defense until nearly two years later (March 18, 2002) when the matter was about to be set for hearing. Ex. 9. The hearing officer agreed that the Section 1031 affirmative defense went beyond the bare allegation contained in AES's Answer and that Respondent had waived its arguments. The Commission should do the same, recognizing, of course, that even if Respondent did not waive this argument, its defense fails on the merits.

CONCLUSION

Respondent is liable as the owner of the real property. The purported "sale" of the buildings was a sham. Ferguson knew or should have known the structures had asbestos-containing material, and his negligence may be imputed to Respondent. Respondent openly accumulated more than 160 square feet of asbestos-containing material or asbestos-containing waste material. AES did not raise the Section 1031 affirmative defense in its Answer and, therefore, waived that argument. Even if AES did not waive the defense, it lacks merit.

The Commission should reject Respondent's proposed Findings of Fact and Conclusions of Law and adopt the hearing officer's Proposed Order in its entirety. Alternatively, the Commission could include new proposed numbers 5 and 6 and number 8 as rewritten above, as

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

well as clarify the hearing officer's Finding of Fact (23) concerning the magnitude of the violation. None of these changes would affect the outcome.

DATED this 27 day of August 2003.

Respectfully submitted,

Shelley K. McIntyre, #84401
Assistant Attorney General

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

CERTIFICATE OF SERVICE BY MAIL & HAND DELIVERY

I certify that on August 27, 2003, I served the foregoing DEQ'S RESPONSE TO RESPONDENT'S EXCEPTIONS AND BRIEF upon the party hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Richard Stark
201 West Main Street, Suite 1B
Medford, OR 97501

I certify that on August 27, 2003, I served the foregoing DEQ'S RESPONSE TO RESPONDENT'S EXCEPTIONS AND BRIEF upon the parties hereto by hand delivering a true, exact and full copy thereof to:

Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

Original

Jeff Bachman
811 SW 6th Avenue
Portland, OR 97204

copy

Shelley K. McIntyre #84401
Assistant Attorney General

DEPARTMENT OF JUSTICE
1515 SW 5th Avenue
Portland, OR 97201
PHONE: 229-5725

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

July 28, 2003

VIA FACSIMILE AND REGULAR U.S. MAIL

Ms. Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

Re: In the Matter of American Exchange Services, Inc., an Oregon corporation, No. AQ/A-WR-98-186
Our File No.: RP 2831

Dear Ms. O'Mealy:

Enclosed please find the following document for the above-captioned case:

PETITIONER AMERICAN EXCHANGE SERVICES, INC.'S, EXCEPTIONS AND BRIEF

Also enclosed is an additional copy of the filing for conforming and returning in the enclosed postage-paid, self-addressed envelope.

Very truly yours,

STARK and HAMMACK, P.C.

Richard A. Stark

RAS:df
Enclosures
cc: Ms. Shelley K. McIntyre
Mr. Jeff Bachman

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	No. AQ/A-WR-98-186 PETITIONER AMERICAN EXCHANGE SERVICES, INC.'S, EXCEPTIONS AND BRIEF

COMES NOW the Respondent, American Exchange Services, Inc.,hereinafter referred to as "AES", and presents the following exceptions and brief in support of its appeal to the Environmental Quality Commission of the proposed Order assessing civil penalty issued May 9, 2003, by Lawrence S. Smith, Hearing Officer.

THE Petitioner presents the following exceptions to the findings of fact contained in the proposed Order.

EXCEPTIONS TO FINDINGS OF FACT

1.

Exception is taken to Findings of Fact numbers 3, 4, 5, and 7. Those Findings should be replaced with the following Findings of Fact:

1. On April 2, 1998, Respondent became the party in the deed records of Jackson County holding title to the real property located at 4044 Crater Lake Avenue, Medford, Jackson County, Oregon, on behalf of its customer, William H. Ferguson, hereinafter referred to as "Ferguson". (Exhibit 16)

STARK & HAMMACK, P.C.
TORNEYS AT LAW
MAIN ST., SUITE 1B
RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

2. Respondent transferred title to the property to Ferguson on August 23, 1999, and charged $800 for its services. (Exhibit 10)

3. Respondent and Ferguson entered into a real property exchange agreement dated March 9, 1999, in which Respondent was entitled to exercise and perform all rights and obligations as an owner of the property including without limitations...obligations to maintain and operate the property and to pay all expenses of the property (Exhibit 4). The actual facts show that the Respondent did not exercise or perform any rights and obligations as the owner of the property, did not pay any expenses and specifically did not have any involvement whatsoever in the alleged asbestos abatement activity at 4044 Crater Lake Avenue, Medford, Jackson County, Oregon. (Exhibit 10, 7, Ferguson Testimony)

4. The Respondent acted as a fiduciary only in the transaction for a fee of $800 and all activities taking place on the property were taking place for the benefit of, and at the direction and control of, William H. Ferguson. The economic realities of the situation determine the existence and scope of agency authority and in this particular case there was no agency relationship between the Respondent and William H. Ferguson. Respondent had no connection at all with the activity on the site located at 4044 Crater Lake Avenue, Medford, Jackson County, Oregon. (Exhibits 9, 10, and Exhibit 7, Ferguson Testimony)

2.

Exception is taken to Findings of Fact numbers 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23.

Petitioner contends that these Findings are irrelevant in that the Respondent cannot be held liable for the activities of William H. Ferguson. See Exhibit 9.

STARK & HAMMACK, P.C.
TORNEYS AT LAW
MAIN ST., SUITE 1B
RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

DISCUSSION

The DEQ relies on Environmental Quality Commission Case No. WPMSPWR00009 *In Re* Ronald C. LaFranchi dba Ron's Oil Company for the proposition that Petitioner, AES, is responsible because Ferguson is an agent of AES. The case sited is a *respondeat superior* case and differs from the instant case. See Norris v. Sackett, 63 ORAP 262,655 P2nd 1262, 1983, the Court pointed out the distinction between principal and agent and master and servant quoting from Kowaleski v. Kowaleski, 235 OR 454,385 P2nd 611, 1963, at 457:

> "...it is only when the relation of principal and agent when the relation of principal and agent there is added the right to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor (...emphasis supplied)."

The Court went on to state:

> "applying the foregoing to the present case Plaintiff cannot establish Housings liability merely by showing that Sackett was one of Housing directors. That proves agency only there must also exist a right to control...
>
> "...the evidence shows only that Sackett was given a task finding group homes, there is no suggestion in this record that Housing had any right to control the way in which the task was accomplished. The trial court did not error in taking the issue from the jury."

In the instant case, the alleged principal, AES, had no control over the details of the work. Ferguson was the one who sold the three buildings, fifty (50) canopies, and other material to the Dials. AES had no control over that matter and did not, in fact, have any connection at all to the alleged conduct by the Dials which the DEQ is complaining of.

See also the arguments set forth in Exhibit 9 on the agency issue which support the Petitioner's contention, a copy of which is attached hereto.

STARK & HAMMACK, P.C.
TTORNEYS AT LAW
. MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2684 FAX

If the Commission holds that the activities of William H. Ferguson are relevant in this proceeding, then the following additional Findings of Fact should be adopted:

5. Prior to April 2, 1998, William H. Ferguson was interested in acquiring the property located at 4044 Crater Lake Avenue from Truck Tops Plus which was in bankruptcy. (Exhibit 7, Ferguson Testimony)

6. Ferguson entered into what was known as a "reverse Starker" with back-in exchange with American Exchange Services, Inc. A deed for the property was delivered from the bankruptcy trustee to American Exchange Services, Inc., on April 2, 1998. (Exhibit 10)

7. Mr. Ferguson was approached by the Dials who represented themselves as experienced in house-moving and salvage operations and the disposal of personal property. This included their offer to remove the three buildings and over fifty (50) canopies and other personal property located on the premises. The Dials and Mr. Ferguson entered into a sale dated May 1, 1998, where the Dials purchased all three buildings and the various items of personal property located on the premises. A bill of sale was entered into for the three buildings and the movable items. Two hundred fifty dollars ($250.00) was paid at the time and the balance was paid later. (Exhibit 7, Ferguson Testimony, Exhibit 8)

8. Prior to the Dials commencing salvage operations approximately twelve samples of flooring and roofing materials were tested by BWR, an asbestos analysis company. This testing was done at the Dials request. A report was issued finding no asbestos. Thereafter the Dials commenced their moving/salvage operation. (Exhibit 8, Ferguson Exhibits, subexhibit 3, and Exhibit 7, Ferguson Testimony)

9. On May 29, 1998, the Dials contacted Mr. Ferguson by telephone and told

STARK & HAMMACK, P.C.
TTORNEYS AT LAW
MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

him that the DEQ had placed a stop order on the property. Mr. Ferguson contacted the DEQ and agreed to have BWR conduct another asbestos analysis. BWR completed the second asbestos analysis. (Exhibit 7, Ferguson Testimony, Exhibit 8)

10. The prior owner (Truck Tops Plus, Bankruptcy Trustee) of the property prior to April 2, 1998, had allowed the property to fall into disrepair including some of the asbestos-containing material on the premises. The asbestos survey done by BWR (Exhibit 8, subexhibit 4) found some asbestos in the following locations:

a. taping compound in the northeast bathroom and kitchen wall;

b. yellow floor vinyl in kitchen;

c. brown floor vinyl in northwest room near sliding door (removed);

d. texture in kitchen soffit, southeast corner room closet wall and exposed beam room ceiling; and

e. black/gray sealant on roofing vents.

The footnotes to the BWR report on page 4c indicate that the report marks as a footnote "3" any property that was previously removed. The only item listed in the report with a footnote "3" noting that it was previously removed, is sample number 98-126A.20 "brown vinyl floor", located in the northwest room near slide door. This brown vinyl floor was found under a cabinet that was not over ten square feet of material disturbed by the Dials.

11. That the only material disturbed by the Dials was the following:

Sample 98-126A.20 "brown vinyl floor" located at the northwest room near a slide door and that amount removed by the Dials is estimated to be less than ten square feet of material. It is believed that this material was removed by the Dials from beneath a cabinet and consequently was not some of the vinyl

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

tested in the first test done by BWR. The Dials activity on the premises did not disturb or expose or damage any of the other materials in BWR's second report. The condition of the building on April 2, 1998, was in the same condition as when work was stopped except for the sample number 98-126A.20 mentioned in this paragraph. (Exhibit 7, all testimony, Exhibit 8)

12. That Ferguson was not aware, nor did he see, any notations made by DEQ, and never saw anything from DEQ prior the sale of the building to the Dials. This is in reference to Tong's testimony (Exhibit 12).

EXCEPTIONS TO CONCLUSIONS OF LAW

PETITIONER accepts to Conclusions of Law numbers 1 through 7.

AND requests that the following Conclusions of Law be adopted by the Environmental Quality Commission:

1. For purposes of the alleged violations of OAR 3400325600 through 3400325650 American Exchange Services, Inc., is not an owner of the premises involved.
2. For purposes of determining whether or not a violation occurred at 4044 Crater Lake Avenue, Medford, Jackson County, Oregon, as alleged in the Notice of Assessment of Civil Penalty, William H. Ferguson is not an agent of Respondent, American Exchange Services, Inc.
3. The amount of friable asbestos-containing material or asbestos-containing waste material openly accumulated by Ferguson or the Dials was less than eighty square feet.
4. The Respondent, American Exchange Services, Inc., should not be held liable in these proceedings because it served only in a fiduciary capacity and did not exercise any control or have any connection at all with the activities that occurred on the premises.

STARK & HAMMACK, P.C.
TORNEYS AT LAW
MAIN ST., SUITE 1B
RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

5. The Defendant's Answer denying that the Respondent, American Exchange Services, Inc., was the owner of the property is sufficient for the Respondent to argue the contentions as to its liability contained in Exhibit 9 and if technically the answer should have been amplified there is no prejudice to the DEQ and the arguments will be allowed because they were fully briefed and argued.

6. Respondent is exempt from liability as a Section 1031 exchange company.

7. Ferguson's alleged negligence and prior knowledge cannot be imputed to the Respondent.

8. If there is a civil penalty to be assessed, the penalty should be calculated on the basis of a minor violation of less than forty lineal feet or eighty square feet (OAR 3400120901(d)(c)) and the amount of the penalty should be no more than $1,200.00.

DISCUSSION

The above Conclusions of Laws are based on the Findings of Fact presented by the Petitioner and also on the briefing contained in Exhibits 5 and 9.

CONCLUSION

The above proceedings should be dismissed.

DATED this 28th day of July, 2003.

Respectfully submitted,

STARK AND HAMMACK, P.C.

By: _____
Richard A. Stark, OSB #69164
Of Attorneys for American
Exchange Services, Inc.

STARK & HAMMACK, P.C.
TTORNEYS AT LAW
MAIN ST., SUITE 1B
)RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of: American Exchange Services, Inc., an Oregon corporation, Respondent.	)))))))	RESPONDENT'S PREHEARING BRIEF ON OWNERSHIP AND LIABILITY ISSUES No. AQ/A-WR-98-186 Jackson County

I. INTRODUCTION

In this case, DEQ seeks to hold respondent American Exchange Services, Inc. ("AES"), a section 1031 exchange provider—for relevant purposes an escrow company—liable for the activities of a customer at property held in escrow by AES. The evidence will be undisputed that AES had no knowledge of and exercised no control over the customer's activities and that the activities were undertaken solely to benefit the customer, not AES. *AES's sole contact with the property at issue is to hold bare title as a fiduciary pending completion of the exchange transaction.*

DEQ does not really question any of this but has stubbornly persisted with this prosecution, claiming that while it may be "bad policy" to prosecute escrow companies acting as fiduciaries, DEQ staff is not in a position to change policy. However, this prosecution is not only a bad idea because it is bad policy and could significantly damage the real-estate industry in Oregon. By this brief, AES will show that the prosecution is a bad idea because it is contrary to the law and the facts. To dismiss this prosecution, the Hearing Officer need not make a policy decision but need only apply well-established law to the undisputed facts.

First, under the environmental laws, something more than a hypothetical ability to control the activities that caused the pollution is necessary for liability. The exercise of

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

actual control is required. No one will contend that AES exercised such control. Moreover, Oregon's legislature has expressly enacted laws to protect fiduciaries by clarifying the meaning of "owner" and "operator." This authority should be applied to hold that AES, as is necessary for the concept of an escrow to be feasible, is immune from liability so long as it merely acts as a fiduciary.

Finally, perhaps recognizing that the environmental laws offer little support, DEQ relies on common-law agency authority. However, under this authority, an alleged principal is not subject to liability for actions by the alleged agent outside the scope of the agent's authority, contrary to the principal's express written instructions or undertaken solely to benefit the agent. This is particularly true where the liability is for the purposes of punishment as are civil penalties sought here. In the highly analogous area of punitive damages, the Oregon Supreme Court has held that vicarious liability only applies if the alleged principal condones the transaction and the transaction was for the principal's benefit. The facts here are entirely to the contrary.

Thus, although this prosecution makes no sense on a policy level, the Hearing Officer need not make a policy decision. Applying the law to the undisputed facts, the case must be dismissed because AES was not at any relevant time the owner or operator of the property, nor is it vicariously liable for the actions of its customer.

II. FACTS

AES is an Oregon corporation engaged in the business of acting as a facilitator for tax-deferred exchange transactions under the Internal Revenue Code, 26 USC § 1031. AES is an affiliate of AmeriTitle Insurance, an escrow and title insurance company. As an adjunct to the escrow services performed by AmeriTitle, AES handles IRS

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

section 1031 exchanges. In a section 1031 exchange, AES holds legal title on behalf of its customers so that they can try to take advantage of certain tax laws by controlling the timing of their disposition and acquisition of real property. (Written Testimony of Cindi Poling (hereafter, "Poling") ¶¶ 2-3.)

AES holds itself out to the public as offering its services to any real property owner subject to the payment of its fees. It does no background check or investigation of its customers before being retained. The cost of such investigation would be prohibitive. The practices of other section 1031 exchange and escrow companies with regard to not investigating their customers is consistent throughout the industry. (*Id.* ¶¶ 9, 10.)

On March 9, 1998, AES's customer, William Ferguson, and AES entered into a Real Property Exchange Agreement ("Reverse Starker with Back-End Exchange") (the "Agreement") (attached as Exhibit 1) and an Indemnity and Release Agreement (the "Indemnity") (attached as Exhibit 2) to facilitate a delayed section 1031 exchange in which Mr. Ferguson would acquire from the bankruptcy trustee, Michael Grassmueck, property at 4044 Crater Lake Avenue, Medford, Oregon (the "Property"). On April 2, 1998, Mr. Ferguson paid $278,282.34 into the escrow and received a deed of trust in return. AES then took title to the property. (*Id.* ¶ 4.)

AES held title in escrow until August 16, 1999, until Mr. Ferguson was able to find a "buyer" for the property he was exchanging. On August 23, 1999, title was formally put into Mr. Ferguson's name. (*Id.* ¶ 5.)

Mr. Ferguson has never been an officer, director, employee or owner of AES. Under the IRS regulations, such a relationship would have precluded AES from acting as an intermediary for Mr. Ferguson. The sole relationship between Mr. Ferguson and AES,

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

as required by law, was that Mr. Ferguson was a customer pursuant to the terms of the Agreement. (*Id.* ¶ 6.)

Here no act or omission of AES caused the alleged asbestos violation. AES held title as a fiduciary, but Mr. Ferguson controlled day-to-day activities at the property, as is made clear by the Agreement. The Agreement indicates that AES only took title to facilitate the potential tax benefit to Mr. Ferguson, the exchangor, of the 1031 exchange. (*See, e.g.*, Recital B.) The property was therefore placed in an escrow, the "Acquisition Escrow." (Section 2.1.) Mr. Ferguson deposited into the escrow a sum sufficient to pay all costs and expenses in connection with the property. (Section 21.2.) Mr. Ferguson was authorized to collect all rents and proceeds from the property and pay therefrom all expenses and, as AES's "attorney-in-fact," to "manage, operate, maintain and repair" the property. (Sections 2.2.2.1, 2.2.2.3.) Mr. Ferguson was contractually required to complete the exchange as quickly as possible: "The Relinquished Property shall be disposed of to a third party and the Exchange Transaction shall be completed as soon as practicable." (Section 2.2.1.) Mr. Ferguson was required to use his best efforts to obtain a buyer for a brief period of time and the real party in interest retains control of the property. (*Id.*)

Although the Agreement purports to give AES the right "to exercise and perform all rights and obligations as owner of the [Property]," AES exercised no such rights. The Property was at all relevant times exclusively controlled by Mr. Ferguson or his contractors. AES engaged in no activities on or at the Property. No AES representative was physically present at the Property. Mr. Ferguson did not seek or obtain any approval

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

from AES for his activities at the Property, and AES did not direct any such activities. This was consistent with the standard industry practice. (*Id.* ¶¶ 7, 8.)

If section 1031 exchange and escrow companies are required to investigate their customers and be held responsible for their customers' activities, it would substantially increase the costs for real estate transactions. Indeed, I believe it might destroy the 1031 exchange business. It would be difficult to justify staying in the business given the magnitude of potential liabilities. *Here the penalty sought by DEQ is more than 10 times the fee AES received for its services.* (*Id.* ¶ 11.)

Furthermore, AES requires customers to obey the environmental laws in their activities. The Indemnity requires Mr. Ferguson to indemnify AES and obey all laws related to:

> "1.5 The existence on the Replacement Property of any hazardous or toxic substance, material or waste that is or becomes regulated by any federal, state or local government authority, including, without limitation, any material or substance designed as a hazardous substance, waste or material pursuant to the Clean Air Act (42 USC §7401 *et seq.*), the Federal Water Pollution Act (the 'Clean Water Act') (33 USC §1251 *et seq.*), the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendment (42 USC §6901 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended by the Superfund Amendments and Reauthorization Act) (42 USC §9601 *et seq.*), the Hazardous Materials Transportation Act (42 USC §1801 *et seq.*), the Toxic Substances Control Act (15 USC §2701 *et seq.*), or Article 90 of the Uniform Fire Code, as amended from time to time, or the breach of any covenant, representation, warranty or other term or provision of that certain Environmental Compliance Certificate executed by the parties of even date herewith." (*Id.* at 13.)

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

AES did not direct or request that Mr. Ferguson engage in demolition activities at the Property. AES experienced no benefit from such activities, nor could it conceivably do so. Any such activities were engaged in to benefit Mr. Ferguson, not AES. AES's sole interest is its fee (in this case, $800) for handling property in escrow, which is entirely unrelated to any activities on properties in escrow. (*Id.* ¶ 14.)

Although Mr. Ferguson must indemnify AES for any fine imposed, this indemnity will not alleviate the competitive harm to AES from a finding that it violated the environmental laws. Nor will Mr. Ferguson's indemnity alleviate the harm to the indemnity resulting from holding escrow companies liable for their customers' activities. (*Id.* ¶ 15.)

III. ARGUMENT

A. AES Is Not Vicariously Liable for Mr. Ferguson's Acts or Omissions Under the Clean Air Act

As DEQ has argued in this proceeding,

> "although DEQ seeks to enforce state law, it is helpful to look to federal law for background, interpretation and policy. Section 112 of the federal Clean Air Act authorizes the Environmental Protection Agency (EPA) to establish health-based national emission standards for categories of hazardous air pollutants (NESHAP) to protect the public from these pollutants. 42 U.S.C. § 7412." (Department's Memorandum in Opposition to Respondent's Motion To Dismiss at 3.)

It is these federal law standards that DEQ is seeking to enforce, albeit against the wrong party. Consequently, the authority interpreting the scope of liability under that federal environmental laws is persuasive. *See Newell v. Weston*, 150 Or App 562, 571-72, 946 P2d 691 (1997) (where state environmental law is based on federal law, state law should be interpreted consistently with federal standards); *accord Badger v. Paulson Investment*

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Co., Inc., 311 Or 14, 21, 803 P2d 1178 (1991) (Oregon courts will look to federal law for guidance in interpreting a state statute based upon a federal statute). Under the federal authority, because AES did not actually exercise control over the polluting activities, it has no liability.

1. The Supreme Court's *Bestfoods* Standard

In *United States v. Bestfoods*, 524 US 51, 118 S Ct 1876, 141 L Ed 2d 43 (1998), although in the specific context of liability of a parent corporation for the actions of its subsidiary, stressed that the test for liability under the environmental laws is not merely an alleged right to control the actions of another but whether any such right was *actually exercised.* The Court stressed the general rule that to give rise to liability,

> "an operator must manage, direct or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations * * *." *Id.* at 1887.

The Court described three scenarios that could establish sufficient control by a parent over a facility to give rise to operator liability, scenarios that are highly analogous to the alleged principle-agent relationship here. First, "* * * a parent can be held directly liable when the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of joint venture." *Id.* at 1889. Second, a person serving as officer or director of both the parent and the subsidiary "* * * might depart so far from the norms of parental influence exercised through dual office-holding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility." *Id.* Finally, "* * * an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility." *Id.*; *see also Schiavone v. Pearce*, 77 F Supp 2d 284 (D

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Conn 1999) (party only liable if "managed, directed, or conducted operations specifically related to the pollution * * * or had anything to do with the leakage or disposal of creosote, or decision about compliance with environmental regulations").

Here, applying *Bestfoods*:

- There was no joint venture between AES and Mr. Ferguson. AES merely held the property in escrow. Mr. Ferguson's activities on the property were for his own purposes, not AES's and provided no benefit to AES.
- There is no evidence that AES directed or authorized Mr. Ferguson's activities.
- Mr. Ferguson's "hat" was his own. He was not an officer, director or employee of AES. Indeed, this sort of relationship would have precluded AES from acting as an intermediary.

Under *Bestfoods*, the utter failure to prove that AES "managed, directed or conducted operations" at the property necessitates a dismissal of the charges.

2. Clean Air Act Authority

As noted above, the DEQ asbestos regulations at issue were enacted against the background of the federal Clean Air Act ("CAA"). Therefore, in addition to *Bestfoods*, it will be necessary to examine CAA authority. As under *Bestfoods*, under the CAA, a party is generally only subject to liability if he or she had "significant or substantial or real control and supervision over a project." *United States v. Walsh*, 783 F Supp 546, 548 (WD Wash 1991), *aff'd United States v. Walsh*, 8 F3d 659, 662 (9th Cir 1993). The reason for this rule is that only a person in actual control of the project has "the ability to correct work" and so "ha[s] the necessary control to be an operator under the statute."

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Walsh, 783 F Supp at 550. Thus a person "cannot be held personally responsible" where he has a "lack of hands-on supervision and control of that project." *Id.*

United States v. Dell'Aquilla ,150 F3d 329 (3d Cir 1998), in which such control was found, is instructive. One of the factors that the court found relevant was that one of the defendants met the contractors conducting the work and played a role in the hiring of these contractors. Additionally, he signed the demolition contracts and was regularly on site witnessing the demolition of the asbestos-filled buildings. *See id.* The other defendant was found liable as an operator because it was involved in hiring attorneys, engineers and architects for the project, it signed a check used to pay contractors, and it signed a letter that modified the contract with the demolition contractor and subcontractors. *See id.* at 334.

Here AES had no connection to any demolition activities. It hired no one, supervised no one, paid no one. Under CAA authority, the charges should be dismissed.

B. Protection of Fiduciaries Under the Environmental Laws

1. Oregon Law

DEQ alleges that AES was the "owner" of the property while the property was in escrow. It is true that bare title was formally in AES's name at the relevant time. However, under the environmental laws, that is not the end of the inquiry, because the term "owner" is not defined in the asbestos or relevant air-quality regulations. However, in the hazardous waste area, for the purposes of the state and federal Superfund statutes, "owner" has been defined to exclude a party that holds title as a fiduciary to facilitate a transaction and does not actively manage the property. Given the ambiguity of the term

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

"owner" under the air-quality laws and regulations, this authority should apply here. Mr. Ferguson, not AES, was the owner of the property as that term is properly construed.

There has been substantial legislative and regulatory activity and public comment on the need to protect fiduciaries from liability under the state Superfund statute, ORS 465.200, *et seq.* As a result, ORS 465.200(19) now excludes from the definition of "owner" a person who "without participating in the management of a facility, holds indicia of ownership primarily to protect a security interest in a facility." *Accord* ORS 465.425. These exceptions come from the legislature's finding that it was necessary to clarify the law to exempt security interest holders from liability under certain circumstances (ORS 465.430)—that is, when they hold title only to protect their or another person's interests and do not actively manage the property. These same principles apply when a 1031 exchange company such as AES holds title merely as a facilitator.

Moreover, the Oregon Legislature recognized not only that security interest holders need protection from unwarranted environmental liability, but also that fiduciaries are entitled to protection. First, the legislature indicated that the lender-liability laws may not be construed "to impose liability on a security interest holder *or fiduciary* or to expand the liability of a security interest holder *or fiduciary* beyond that which might otherwise exist." ORS 465.455 (emphasis added). ORS 465.255(3)(c) exempts from liability fiduciaries pursuant to regulations to be enacted by the Environmental Quality Commission (the "EQC").

The EQC did so in a manner that is directly applicable here. It defined a security interest holder for the purposes of exemption from liability as follows:

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-12
Telephone (503) 224-3380

> "'Holder' for the purposes of ORS 465.200, *et seq.* and this rule means a person who maintains indicia of ownership (as defined below) primarily to protect a security interest (as defined below). A holder includes the initial holder (such as a loan originator), any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market), a guarantor of an obligation, a surety, or any other person who holds ownership indicia primarily to protect a security interest holder or a receiver *or other person who acts on behalf or for the benefit of a holder.*" OAR 340-122-0120(1)(a).

See also OAR 340-122-0140 (excepting ORS chapter 709 trust companies from liability). AES did precisely as the highlighted language indicates: it acted for the benefit of Mr. Ferguson to protect his interests in the property. The EQC has *already made the policy decision* to except fiduciaries like AES from liability.

2. Protection of Fiduciaries Under Federal Environmental Laws

The same need to protect fiduciaries and similar persons who hold title for the benefit of another and who do not manage the property has also led to exemptions under the federal Superfund statute, CERCLA. The Asset Conservation Act of 1996, 110 Stat 3009-462, amended the federal Superfund law to create a "safe harbor" for fiduciaries who merely require that another person comply with the environmental laws. 42 USC § 9607(n)(4); *see also Norfolk Southern Ry. Co. v. Shulimson Bros. Co., Inc.*, 1 F Supp 2d 553, 557 (WD NC 1998) (the CERCLA safe-harbor exception "provides there is no private right of action against the fiduciary"). Again, because the federal authority is persuasive, it further supports a finding that the environmental laws exempt AES from liability.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-12(
Telephone (503) 224-3380

C. Oregon Agency Law Authority

Notwithstanding all of the environmental law authority, DEQ would hold AES vicariously liable for Mr. Ferguson's actions, over which AES had no supervision, and which were done solely to further Mr. Ferguson's interests. (*See, e.g.*, Poling ¶¶ 7, 12, 13-14.) Despite the fact that it would seem contrary to common sense, therefore, for AES to be liable for Mr. Ferguson's activities, DEQ relies solely on agency language in the 1031 exchange contracts for its prosecution of the wrong party. However, the party asserting vicarious liability has the burden of proving the existence and scope of the alleged agency. *Dias v. Favel-Utey Realty Co.*, 126 Or 227, 232, 269 P 207 (1928). DEQ will not be able to meet its burden of holding AES responsible for the acts or omissions of Mr. Ferguson at issue here.

a. Mr. Ferguson Was Not AES's Agent

While the contract documents make use of the term "agent," the economic realities of the transaction, not the labels the parties use, determine the existence and scope of alleged agency authority. Thus, existence of an agency relationship, where there is any doubt, is an issue of fact. *Buckel v. Nunn*, 131 Or App 121, 127, 883 P2d 878 (1994). Here the facts will show no such relationship. The testimony of Cindy Poling establishes that, consistent with the industry custom, AES exercised no control over any activities on the property and had no knowledge of these activities. (Poling ¶¶ 7, 12.) The industry custom and realities establish that Mr. Ferguson was not AES's agent.

b. Mr. Ferguson's Activities Were Outside Any Alleged Agency

Even if Mr. Ferguson was AES's agent for some purpose, DEQ must establish that with regard to the demolition project, Mr. Ferguson was acting on behalf of AES

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-126
Telephone (503) 224-3380

within the scope of authority granted by AES. *See Akerson v. D.C. Bates & Sons*, 180 Or 224, 174 P2d 953 (1946) (principal only liable for acts or omissions within scope of agent's authority). The key aspect of the agency relationship is a purpose to benefit the principal "in furtherance of the master's business." *Stroud v. Denny's Restaurant, Inc.*, 271 Or 430, 437, 532 P2d 790 (1975). Because of the need for an intent to benefit the principal, it is a "fundamental legal principle" that "an agent cannot bind his principal in a matter in which his own interest conflicts with the duty he owes to his principal." *Fine v. Harney County Nat'l Bank*, 181 Or 411, 446-48, 182 P2d 379 (1947) (bank not liable for cashier's personal transactions); *accord Hagen v. Shore*, 140 Or App 393, 400-01, 915 P2d 435 (1996) (principal not liable for agent's self-dealing *ultra vires* actions).

Here the contract documents specifically insisted Mr. Ferguson to comply with all environmental laws and regulations in his activities on the property by requiring him to assume all liability for

> "[t]he existence on the Replacement Property of any hazardous or toxic substance, material or waste that is or becomes regulated by any federal, state or local government authority, including, without limitation, any material or substance designed as a hazardous substance, waste or material pursuant to the Clean Air Act (42 USC §7401 *et seq.*), the Federal Water Pollution Act (the 'Clean Water Act') (33 USC §1251 *et seq.*), the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendment (42 USC §6901 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended by the Superfund Amendments and Reauthorization Act) (42 USC §9601 *et seq.*), the Hazardous Materials Transportation Act (42 USC §1801 *et seq.*), the Toxic Substances Control Act (15 USC §2701 *et seq.*), or Article 90 of the Uniform Fire Code, as amended from time to time, or the breach of any covenant, representation, warranty or other term or provision of that

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

certain Environmental Compliance Certificate executed by the parties of even date herewith." (*Id.* at 13.)

In violating these contractual restrictions, Mr. Ferguson was acting solely to benefit himself. (Poling ¶ 14.) AES had no interest in construction, demolition or any other activities on property it held in escrow for a brief time period. (*Id.*) Its interest was solely to hold bare title as a fiduciary in exchange for a fee of $800. (*Id.*) Mr. Ferguson's actions were not within the scope of any authority granted by AES, were directly contrary to AES's written instructions and were solely to benefit Mr. Ferguson, not AES. Consequently, DEQ cannot meet its burden of proving vicarious liability.[1]

c. In the Punitive Damages Context, Actual Knowledge and the Exercise of Control Is Required for Liability

DEQ is seeking to punish AES, not to recover economic loss. Thus this prosecution is highly analogous to an attempt to impose punitive damages, and the punitive damages authority should be persuasive.

In this analysis, a comparison between *Badger v. Paulson Investment Co.*, 311 Or 14, 803 P2d 1178 (1991), and *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or App 371, 879 P2d 1288 (1994), is instructive. In *Badger*, which like this case did not arise in the employment context but in the (alleged) principal and agent context, the court had no difficulty holding that an investment company was vicariously liable for actual damages arising from violations of the securities laws by its independent sales agents. 311 Or at 27. However, with regard to *punitive damages*, the state supreme court noted:

"There is no evidence that Paulson [principal] was aware of, approved of, ratified, or countenanced Kennedy's

[1] For this same reason, AES objects to DEQ's proposed findings of fact related to Mr. Ferguson's development activities. Because these activities were for Mr. Ferguson's own account, they are completely irrelevant to AES's liability or knowledge.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

> or Lambo's [agents'] misconduct. The relevant sales were not recorded in Paulson's books. Paulson received no money from and paid no commissions on the sales. The sales were outside the scope of Kennedy's and Lambo's actual or implied authority and were purely personal dealings."

In comparison, in the employment context, the court in *Bunaitis* held that the employer would be liable for punitive damages based upon the actions of employees if the actions were within the scope of employment and done to further the employer's interests. 129 Or App at 392. Thus *Badier* and *Bunaitis* teach that it is important to distinguish the alleged agent-principal relationship from an employment relationship. In the former circumstance, to *punish* the alleged principal as DEQ seeks to do here, DEQ must prove that the principal approved of and benefited from the alleged conduct. The facts here are entirely to the contrary. DEQ may not impose punitive sanctions on AES for Mr. Ferguson's activities. It serves no purpose and is contrary to law to impose punishment on an innocent bystander.

d. AES Cannot Be Charged with Notice of Facts Mr. Ferguson Obtained before Becoming an AES Customer

Even if the actions or knowledge of a customer could somehow be imputed to AES—and they cannot—preexisting knowledge obtained outside the scope of the alleged agency cannot be imputed. An alleged principal is not deemed to know everything the alleged agent has ever learned, only those facts obtained within the scope of the agency. *Tri-Met v. Odighizuwa*, 112 Or App 159, 828 P2d 468 (1992); *Akerson*, 180 Or at 222-28. In its penalty calculation, to obtain a penalty of *over 10 times AES's fee for the transaction*, DEQ must hold AES liable for alleged knowledge Mr. Ferguson obtained in 1996, two years before he became an AES customer. Even if the law allowed DEQ to

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

punish an innocent bystander—and it does not—the law does not allow an increase in the punishment for knowledge obtained by an unrelated third party two years before the incident in question.

IV. CONCLUSION

AES was not an "owner" as that term is properly construed, nor is it vicariously liable for Mr. Ferguson's acts or omissions.

This is an issue that has importance outside these proceedings. Failure to dismiss the charges here could have serious ramifications for the real estate industry. It would put in jeopardy the ability to consummate a delayed section 1031 exchange or, indeed, to put property under the control of either a buyer or a seller into escrow for any period of time. (Poling ¶ 11.) Because it is not cost-effective for an escrow company to assure compliance with environmental laws, the escrow company must depend upon the parties to the transaction to do so. These parties are the real parties in interest, and it is they the law should require to comply with the environmental laws. Other persons, not AES, owned, operated and were responsible for the property at issue here.

As a matter of law on the undisputed facts, DEQ is stubbornly insisting on prosecuting the wrong party. The charges against AES should be dismissed.

DATED: March 18, 2002.

STOEL RIVES LLP

Scott J. Kaplan, OSB No. 91335
Attorneys for Respondent American Exchange Services, Inc.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Respondent's Prehearing Brief on Ownership and Liability Issues** on the following named person(s) on the date indicated below by

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below.

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

Attorneys for William Ferguson

Shelley McIntyre
Oregon Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201-5451

Attorneys for Oregon Department of Environmental Quality

DATED: March 18, 2002

Scott J. Kaplan, OSB No. 91335
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the28th day of July, 2003, I served the foregoing:

PETITIONER AMERICAN EXCHANGE SERVICES, INC.'S, EXCEPTIONS AND BRIEF

on the following:

Ms. Shelley K. McIntyre
Assistant Attorney General
Department of Justice
General Counsel Division
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201
fax: (503) 229-5120

Mr. Jeff Bachman
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390
fax: (503) 229-6945

by facsimile and by mailing an original thereof contained in sealed envelopes with postage fully prepaid thereon, addressed to the above individuals at the addresses indicated, and deposited in the United States Mail at Medford, Oregon.

DATED this 28th day of July, 2003.

STARK AND HAMMACK, P.C.

By: _____
Richard A. Stark, OSB #69162
Of Attorneys for Respondent

STARK & HAMMACK, P.C.
TORNEYS AT LAW
MAIN ST., SUITE 1B
RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	No. AQ/A-WR-98-186 PETITIONER AMERICAN EXCHANGE SERVICES, INC.'S, EXCEPTIONS AND BRIEF

COMES NOW the Respondent, American Exchange Services, Inc.,hereinafter referred to as "AES", and presents the following exceptions and brief in support of its appeal to the Environmental Quality Commission of the proposed Order assessing civil penalty issued May 9, 2003, by Lawrence S. Smith, Hearing Officer.

THE Petitioner presents the following exceptions to the findings of fact contained in the proposed Order.

EXCEPTIONS TO FINDINGS OF FACT

1.

Exception is taken to Findings of Fact numbers 3, 4, 5, and 7. Those Findings should be replaced with the following Findings of Fact:

1. On April 2, 1998, Respondent became the party in the deed records of Jackson County holding title to the real property located at 4044 Crater Lake Avenue, Medford, Jackson County, Oregon, on behalf of its customer, William H. Ferguson, hereinafter referred to as "Ferguson". (Exhibit 16)

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
20[illegible] MAIN ST., SUITE 1B
[illegible]D, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

2. Respondent transferred title to the property to Ferguson on August 23, 1999, and charged $800 for its services. (Exhibit 10)

3. Respondent and Ferguson entered into a real property exchange agreement dated March 9, 1999, in which Respondent was entitled to exercise and perform all rights and obligations as an owner of the property including without limitations...obligations to maintain and operate the property and to pay all expenses of the property (Exhibit 4). The actual facts show that the Respondent did not exercise or perform any rights and obligations as the owner of the property, did not pay any expenses and specifically did not have any involvement whatsoever in the alleged asbestos abatement activity at 4044 Crater Lake Avenue, Medford, Jackson County, Oregon. (Exhibit 10, 7, Ferguson Testimony)

4. The Respondent acted as a fiduciary only in the transaction for a fee of $800 and all activities taking place on the property were taking place for the benefit of, and at the direction and control of, William H. Ferguson. The economic realities of the situation determine the existence and scope of agency authority and in this particular case there was no agency relationship between the Respondent and William H. Ferguson. Respondent had no connection at all with the activity on the site located at 4044 Crater Lake Avenue, Medford, Jackson County, Oregon. (Exhibits 9, 10, and Exhibit 7, Ferguson Testimony)

2.

Exception is taken to Findings of Fact numbers 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23.

Petitioner contends that these Findings are irrelevant in that the Respondent cannot be held liable for the activities of William H. Ferguson. See Exhibit 9.

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
20[illegible] MAIN ST., SUITE 1B
[illegible]D, OREGON 97501
[illegible]41) 773-2213
(541) 779-2133
(541) 773-2084 FAX

DISCUSSION

The DEQ relies on Environmental Quality Commission Case No. WPMSPWR00009 *In Re* Ronald C. LaFranchi dba Ron's Oil Company for the proposition that Petitioner, AES, is responsible because Ferguson is an agent of AES. The case sited is a *respondeat superior* case and differs from the instant case. See Norris v. Sackett, 63 ORAP 262,655 P2nd 1262, 1983, the Court pointed out the distinction between principal and agent and master and servant quoting from Kowaleski v. Kowaleski, 235 OR 454,385 P2nd 611, 1963, at 457:

> "...it is only when the relation of principal and agent when the relation of principal and agent there is added the right to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor (...emphasis supplied)."

The Court went on to state:

> "applying the foregoing to the present case Plaintiff cannot establish Housings liability merely by showing that Sackett was one of Housing directors. That proves agency only there must also exist a right to control...
>
> "...the evidence shows only that Sackett was given a task finding group homes, there is no suggestion in this record that Housing had any right to control the way in which the task was accomplished. The trial court did not error in taking the issue from the jury."

In the instant case, the alleged principal, AES, had no control over the details of the work. Ferguson was the one who sold the three buildings, fifty (50) canopies, and other material to the Dials. AES had no control over that matter and did not, in fact, have any connection at all to the alleged conduct by the Dials which the DEQ is complaining of.

See also the arguments set forth in Exhibit 9 on the agency issue which support the Petitioner's contention, a copy of which is attached hereto.

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
[illegible] MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-1133
(541) 773-2084 FAX

If the Commission holds that the activities of William H. Ferguson are relevant in this proceeding, then the following additional Findings of Fact should be adopted:

5. Prior to April 2, 1998, William H. Ferguson was interested in acquiring the property located at 4044 Crater Lake Avenue from Truck Tops Plus which was in bankruptcy. (Exhibit 7, Ferguson Testimony)

6. Ferguson entered into what was known as a "reverse Starker" with back-in exchange with American Exchange Services, Inc. A deed for the property was delivered from the bankruptcy trustee to American Exchange Services, Inc., on April 2, 1998. (Exhibit 10)

7. Mr. Ferguson was approached by the Dials who represented themselves as experienced in house-moving and salvage operations and the disposal of personal property. This included their offer to remove the three buildings and over fifty (50) canopies and other personal property located on the premises. The Dials and Mr. Ferguson entered into a sale dated May 1, 1998, where the Dials purchased all three buildings and the various items of personal property located on the premises. A bill of sale was entered into for the three buildings and the movable items. Two hundred fifty dollars ($250.00) was paid at the time and the balance was paid later. (Exhibit 7, Ferguson Testimony, Exhibit 8)

8. Prior to the Dials commencing salvage operations approximately twelve samples of flooring and roofing materials were tested by BWR, an asbestos analysis company. This testing was done at the Dials request. A report was issued finding no asbestos. Thereafter the Dials commenced their moving/salvage operation. (Exhibit 8, Ferguson Exhibits, subexhibit 3, and Exhibit 7, Ferguson Testimony)

9. On May 29, 1998, the Dials contacted Mr. Ferguson by telephone and told

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
[illegible] MAIN ST., SUITE 1B
[illegible]RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

him that the DEQ had placed a stop order on the property. Mr. Ferguson contacted the DEQ and agreed to have BWR conduct another asbestos analysis. BWR completed the second asbestos analysis. (Exhibit 7, Ferguson Testimony, Exhibit 8)

10. The prior owner (Truck Tops Plus, Bankruptcy Trustee) of the property prior to April 2, 1998, had allowed the property to fall into disrepair including some of the asbestos-containing material on the premises. The asbestos survey done by BWR (Exhibit 8, subexhibit 4) found some asbestos in the following locations:

a. taping compound in the northeast bathroom and kitchen wall;

b. yellow floor vinyl in kitchen;

c. brown floor vinyl in northwest room near sliding door (removed);

d. texture in kitchen soffit, southeast corner room closet wall and exposed beam room ceiling; and

e. black/gray sealant on roofing vents.

The footnotes to the BWR report on page 4c indicate that the report marks as a footnote "3" any property that was previously removed. The only item listed in the report with a footnote "3" noting that it was previously removed, is sample number 98-126A.20 "brown vinyl floor", located in the northwest room near slide door. This brown vinyl floor was found under a cabinet that was not over ten square feet of material disturbed by the Dials.

11. That the only material disturbed by the Dials was the following:

Sample 98-126A.20 "brown vinyl floor" located at the northwest room near a slide door and that amount removed by the Dials is estimated to be less than ten square feet of material. It is believed that this material was removed by the Dials from beneath a cabinet and consequently was not some of the vinyl

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

tested in the first test done by BWR. The Dials activity on the premises did not disturb or expose or damage any of the other materials in BWR's second report. The condition of the building on April 2, 1998, was in the same condition as when work was stopped except for the sample number 98-126A.20 mentioned in this paragraph. (Exhibit 7, all testimony, Exhibit 8)

12. That Ferguson was not aware, nor did he see, any notations made by DEQ, and never saw anything from DEQ prior the sale of the building to the Dials. This is in reference to Tong's testimony (Exhibit 12).

EXCEPTIONS TO CONCLUSIONS OF LAW

PETITIONER accepts to Conclusions of Law numbers 1 through 7.

AND requests that the following Conclusions of Law be adopted by the Environmental Quality Commission:

1. For purposes of the alleged violations of OAR 3400325600 through 3400325650 American Exchange Services, Inc., is not an owner of the premises involved.

2. For purposes of determining whether or not a violation occurred at 4044 Crater Lake Avenue, Medford, Jackson County, Oregon, as alleged in the Notice of Assessment of Civil Penalty, William H. Ferguson is not an agent of Respondent, American Exchange Services, Inc.

3. The amount of friable asbestos-containing material or asbestos-containing waste material openly accumulated by Ferguson or the Dials was less than eighty square feet.

4. The Respondent, American Exchange Services, Inc., should not be held liable in these proceedings because it served only in a fiduciary capacity and did not exercise any control or have any connection at all with the activities that occurred on the premises.

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
[illegible] MAIN ST., SUITE 1B
[illegible]ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

5. The Defendant's Answer denying that the Respondent, American Exchange Services, Inc., was the owner of the property is sufficient for the Respondent to argue the contentions as to its liability contained in Exhibit 9 and if technically the answer should have been amplified there is no prejudice to the DEQ and the arguments will be allowed because they were fully briefed and argued.

6. Respondent is exempt from liability as a Section 1031 exchange company.

7. Ferguson's alleged negligence and prior knowledge cannot be imputed to the Respondent.

8. If there is a civil penalty to be assessed, the penalty should be calculated on the basis of a minor violation of less than forty lineal feet or eighty square feet (OAR 3400120901(d)(c)) and the amount of the penalty should be no more than $1,200.00.

DISCUSSION

The above Conclusions of Laws are based on the Findings of Fact presented by the Petitioner and also on the briefing contained in Exhibits 5 and 9.

CONCLUSION

The above proceedings should be dismissed.

DATED this 28th day of July, 2003.

Respectfully submitted,

STARK AND HAMMACK, P.C.

By: _____
Richard A. Stark, OSB #69164
Of Attorneys for American
Exchange Services, Inc.

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-2333
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of: American Exchange Services, Inc., an Oregon corporation,	)	RESPONDENT'S PREHEARING BRIEF ON OWNERSHIP AND LIABILITY ISSUES
Respondent.	)	No. AQ/A-WR-98-186 Jackson County

I. INTRODUCTION

In this case, DEQ seeks to hold respondent American Exchange Services, Inc. ("AES"), a section 1031 exchange provider—for relevant purposes an escrow company—liable for the activities of a customer at property held in escrow by AES. The evidence will be undisputed that AES had no knowledge of and exercised no control over the customer's activities and that the activities were undertaken solely to benefit the customer, not AES. *AES's sole contact with the property at issue is to hold bare title as a fiduciary pending completion of the exchange transaction.*

DEQ does not really question any of this but has stubbornly persisted with this prosecution, claiming that while it may be "bad policy" to prosecute escrow companies acting as fiduciaries, DEQ staff is not in a position to change policy. However, this prosecution is not only a bad idea because it is bad policy and could significantly damage the real-estate industry in Oregon. By this brief, AES will show that the prosecution is a bad idea because it is contrary to the law and the facts. To dismiss this prosecution, the Hearing Officer need not make a policy decision but need only apply well-established law to the undisputed facts.

First, under the environmental laws, something more than a hypothetical ability to control the activities that caused the pollution is necessary for liability. The exercise of

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

actual control is required. No one will contend that AES exercised such control. Moreover, Oregon's legislature has expressly enacted laws to protect fiduciaries by clarifying the meaning of "owner" and "operator." This authority should be applied to hold that AES, as is necessary for the concept of an escrow to be feasible, is immune from liability so long as it merely acts as a fiduciary.

Finally, perhaps recognizing that the environmental laws offer little support, DEQ relies on common-law agency authority. However, under this authority, an alleged principal is not subject to liability for actions by the alleged agent outside the scope of the agent's authority, contrary to the principal's express written instructions or undertaken solely to benefit the agent. This is particularly true where the liability is for the purposes of punishment as are civil penalties sought here. In the highly analogous area of punitive damages, the Oregon Supreme Court has held that vicarious liability only applies if the alleged principal condones the transaction and the transaction was for the principal's benefit. The facts here are entirely to the contrary.

Thus, although this prosecution makes no sense on a policy level, the Hearing Officer need not make a policy decision. Applying the law to the undisputed facts, the case must be dismissed because AES was not at any relevant time the owner or operator of the property, nor is it vicariously liable for the actions of its customer.

II. FACTS

AES is an Oregon corporation engaged in the business of acting as a facilitator for tax-deferred exchange transactions under the Internal Revenue Code, 26 USC § 1031. AES is an affiliate of AmeriTitle Insurance, an escrow and title insurance company. As an adjunct to the escrow services performed by AmeriTitle, AES handles IRS

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

section 1031 exchanges. In a section 1031 exchange, AES holds legal title on behalf of its customers so that they can try to take advantage of certain tax laws by controlling the timing of their disposition and acquisition of real property. (Written Testimony of Cindi Poling (hereafter, "Poling") ¶¶ 2-3.)

AES holds itself out to the public as offering its services to any real property owner subject to the payment of its fees. It does no background check or investigation of its customers before being retained. The cost of such investigation would be prohibitive. The practices of other section 1031 exchange and escrow companies with regard to not investigating their customers is consistent throughout the industry. (*Id.* ¶¶ 9, 10.)

On March 9, 1998, AES's customer, William Ferguson, and AES entered into a Real Property Exchange Agreement ("Reverse Starker with Back-End Exchange") (the "Agreement") (attached as Exhibit 1) and an Indemnity and Release Agreement (the "Indemnity") (attached as Exhibit 2) to facilitate a delayed section 1031 exchange in which Mr. Ferguson would acquire from the bankruptcy trustee, Michael Grassmueck, property at 4044 Crater Lake Avenue, Medford, Oregon (the "Property"). On April 2, 1998, Mr. Ferguson paid $278,282.34 into the escrow and received a deed of trust in return. AES then took title to the property. (*Id.* ¶ 4.)

AES held title in escrow until August 16, 1999, until Mr. Ferguson was able to find a "buyer" for the property he was exchanging. On August 23, 1999, title was formally put into Mr. Ferguson's name. (*Id.* ¶ 5.)

Mr. Ferguson has never been an officer, director, employee or owner of AES. Under the IRS regulations, such a relationship would have precluded AES from acting as an intermediary for Mr. Ferguson. The sole relationship between Mr. Ferguson and AES,

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

as required by law, was that Mr. Ferguson was a customer pursuant to the terms of the Agreement. (*Id.* ¶ 6.)

Here no act or omission of AES caused the alleged asbestos violation. AES held title as a fiduciary, but Mr. Ferguson controlled day-to-day activities at the property, as is made clear by the Agreement. The Agreement indicates that AES only took title to facilitate the potential tax benefit to Mr. Ferguson, the exchangor, of the 1031 exchange. (*See, e.g.*, Recital B.) The property was therefore placed in an escrow, the "Acquisition Escrow." (Section 2.1.) Mr. Ferguson deposited into the escrow a sum sufficient to pay all costs and expenses in connection with the property. (Section 21.2.) Mr. Ferguson was authorized to collect all rents and proceeds from the property and pay therefrom all expenses and, as AES's "attorney-in-fact," to "manage, operate, maintain and repair" the property. (Sections 2.2.2.1, 2.2.2.3.) Mr. Ferguson was contractually required to complete the exchange as quickly as possible: "The Relinquished Property shall be disposed of to a third party and the Exchange Transaction shall be completed as soon as practicable." (Section 2.2.1.) Mr. Ferguson was required to use his best efforts to obtain a buyer for a brief period of time and the real party in interest retains control of the property. (*Id.*)

Although the Agreement purports to give AES the right "to exercise and perform all rights and obligations as owner of the [Property]," AES exercised no such rights. The Property was at all relevant times exclusively controlled by Mr. Ferguson or his contractors. AES engaged in no activities on or at the Property. No AES representative was physically present at the Property. Mr. Ferguson did not seek or obtain any approval

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

from AES for his activities at the Property, and AES did not direct any such activities. This was consistent with the standard industry practice. (*Id.* ¶¶ 7, 8.)

If section 1031 exchange and escrow companies are required to investigate their customers and be held responsible for their customers' activities, it would substantially increase the costs for real estate transactions. Indeed, I believe it might destroy the 1031 exchange business. It would be difficult to justify staying in the business given the magnitude of potential liabilities. *Here the penalty sought by DEQ is more than 10 times the fee AES received for its services.* (*Id.* ¶ 11.)

Furthermore, AES requires customers to obey the environmental laws in their activities. The Indemnity requires Mr. Ferguson to indemnify AES and obey all laws related to:

> "1.5 The existence on the Replacement Property of any hazardous or toxic substance, material or waste that is or becomes regulated by any federal, state or local government authority, including, without limitation, any material or substance designed as a hazardous substance, waste or material pursuant to the Clean Air Act (42 USC §7401 *et seq.*), the Federal Water Pollution Act (the 'Clean Water Act') (33 USC §1251 *et seq.*), the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendment (42 USC §6901 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended by the Superfund Amendments and Reauthorization Act) (42 USC §9601 *et seq.*), the Hazardous Materials Transportation Act (42 USC §1801 *et seq.*), the Toxic Substances Control Act (15 USC §2701 *et seq.*), or Article 90 of the Uniform Fire Code, as amended from time to time, or the breach of any covenant, representation, warranty or other term or provision of that certain Environmental Compliance Certificate executed by the parties of even date herewith." (*Id.* at 13.)

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-126
Telephone (503) 224-3380

AES did not direct or request that Mr. Ferguson engage in demolition activities at the Property. AES experienced no benefit from such activities, nor could it conceivably do so. Any such activities were engaged in to benefit Mr. Ferguson, not AES. AES's sole interest is its fee (in this case, $800) for handling property in escrow, which is entirely unrelated to any activities on properties in escrow. (*Id.* ¶ 14.)

Although Mr. Ferguson must indemnify AES for any fine imposed, this indemnity will not alleviate the competitive harm to AES from a finding that it violated the environmental laws. Nor will Mr. Ferguson's indemnity alleviate the harm to the indemnity resulting from holding escrow companies liable for their customers' activities. (*Id.* ¶ 15.)

III. ARGUMENT

A. AES Is Not Vicariously Liable for Mr. Ferguson's Acts or Omissions Under the Clean Air Act

As DEQ has argued in this proceeding,

> "although DEQ seeks to enforce state law, it is helpful to look to federal law for background, interpretation and policy. Section 112 of the federal Clean Air Act authorizes the Environmental Protection Agency (EPA) to establish health-based national emission standards for categories of hazardous air pollutants (NESHAP) to protect the public from these pollutants. 42 U.S.C. § 7412." (Department's Memorandum in Opposition to Respondent's Motion To Dismiss at 3.)

It is these federal law standards that DEQ is seeking to enforce, albeit against the wrong party. Consequently, the authority interpreting the scope of liability under that federal environmental laws is persuasive. *See Newell v. Weston*, 150 Or App 562, 571-72, 946 P2d 691 (1997) (where state environmental law is based on federal law, state law should be interpreted consistently with federal standards); *accord Badger v. Paulson Investment*

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Co., Inc., 311 Or 14, 21, 803 P2d 1178 (1991) (Oregon courts will look to federal law for guidance in interpreting a state statute based upon a federal statute). Under the federal authority, because AES did not actually exercise control over the polluting activities, it has no liability.

1. The Supreme Court's *Bestfoods* Standard

In *United States v. Bestfoods*, 524 US 51, 118 S Ct 1876, 141 L Ed 2d 43 (1998), although in the specific context of liability of a parent corporation for the actions of its subsidiary, stressed that the test for liability under the environmental laws is not merely an alleged right to control the actions of another but whether any such right was *actually exercised.* The Court stressed the general rule that to give rise to liability,

> "an operator must manage, direct or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations * * *." *Id.* at 1887.

The Court described three scenarios that could establish sufficient control by a parent over a facility to give rise to operator liability, scenarios that are highly analogous to the alleged principle-agent relationship here. First, "* * * a parent can be held directly liable when the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of joint venture." *Id.* at 1889. Second, a person serving as officer or director of both the parent and the subsidiary "* * * might depart so far from the norms of parental influence exercised through dual office-holding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility." *Id.* Finally, "* * * an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility." *Id.*; *see also Schiavone v. Pearce*, 77 F Supp 2d 284 (D

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Conn 1999) (party only liable if "managed, directed, or conducted operations specifically related to the pollution * * * or had anything to do with the leakage or disposal of creosote, or decision about compliance with environmental regulations").

Here, applying *Bestfoods*:

- There was no joint venture between AES and Mr. Ferguson. AES merely held the property in escrow. Mr. Ferguson's activities on the property were for his own purposes, not AES's and provided no benefit to AES.
- There is no evidence that AES directed or authorized Mr. Ferguson's activities.
- Mr. Ferguson's "hat" was his own. He was not an officer, director or employee of AES. Indeed, this sort of relationship would have precluded AES from acting as an intermediary.

Under *Bestfoods*, the utter failure to prove that AES "managed, directed or conducted operations" at the property necessitates a dismissal of the charges.

2. Clean Air Act Authority

As noted above, the DEQ asbestos regulations at issue were enacted against the background of the federal Clean Air Act ("CAA"). Therefore, in addition to *Bestfoods*, it will be necessary to examine CAA authority. As under *Bestfoods*, under the CAA, a party is generally only subject to liability if he or she had "significant or substantial or real control and supervision over a project." *United States v. Walsh*, 783 F Supp 546, 548 (WD Wash 1991), *aff'd United States v. Walsh*, 8 F3d 659, 662 (9th Cir 1993). The reason for this rule is that only a person in actual control of the project has "the ability to correct work" and so "ha[s] the necessary control to be an operator under the statute."

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Walsh, 783 F Supp at 550. Thus a person "cannot be held personally responsible" where he has a "lack of hands-on supervision and control of that project." *Id.*

United States v. Dell'Aquilla ,150 F3d 329 (3d Cir 1998), in which such control was found, is instructive. One of the factors that the court found relevant was that one of the defendants met the contractors conducting the work and played a role in the hiring of these contractors. Additionally, he signed the demolition contracts and was regularly on site witnessing the demolition of the asbestos-filled buildings. *See id.* The other defendant was found liable as an operator because it was involved in hiring attorneys, engineers and architects for the project, it signed a check used to pay contractors, and it signed a letter that modified the contract with the demolition contractor and subcontractors. *See id.* at 334.

Here AES had no connection to any demolition activities. It hired no one, supervised no one, paid no one. Under CAA authority, the charges should be dismissed.

B. Protection of Fiduciaries Under the Environmental Laws

1. Oregon Law

DEQ alleges that AES was the "owner" of the property while the property was in escrow. It is true that bare title was formally in AES's name at the relevant time. However, under the environmental laws, that is not the end of the inquiry, because the term "owner" is not defined in the asbestos or relevant air-quality regulations. However, in the hazardous waste area, for the purposes of the state and federal Superfund statutes, "owner" has been defined to exclude a party that holds title as a fiduciary to facilitate a transaction and does not actively manage the property. Given the ambiguity of the term

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

"owner" under the air-quality laws and regulations, this authority should apply here. Mr. Ferguson, not AES, was the owner of the property as that term is properly construed.

There has been substantial legislative and regulatory activity and public comment on the need to protect fiduciaries from liability under the state Superfund statute, ORS 465.200, *et seq.* As a result, ORS 465.200(19) now excludes from the definition of "owner" a person who "without participating in the management of a facility, holds indicia of ownership primarily to protect a security interest in a facility." *Accord* ORS 465.425. These exceptions come from the legislature's finding that it was necessary to clarify the law to exempt security interest holders from liability under certain circumstances (ORS 465.430)—that is, when they hold title only to protect their or another person's interests and do not actively manage the property. These same principles apply when a 1031 exchange company such as AES holds title merely as a facilitator.

Moreover, the Oregon Legislature recognized not only that security interest holders need protection from unwarranted environmental liability, but also that fiduciaries are entitled to protection. First, the legislature indicated that the lender-liability laws may not be construed "to impose liability on a security interest holder *or fiduciary* or to expand the liability of a security interest holder *or fiduciary* beyond that which might otherwise exist." ORS 465.455 (emphasis added). ORS 465.255(3)(c) exempts from liability fiduciaries pursuant to regulations to be enacted by the Environmental Quality Commission (the "EQC").

The EQC did so in a manner that is directly applicable here. It defined a security interest holder for the purposes of exemption from liability as follows:

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-12
Telephone (503) 224-3380

> "'Holder' for the purposes of ORS 465.200, *et seq.* and this rule means a person who maintains indicia of ownership (as defined below) primarily to protect a security interest (as defined below). A holder includes the initial holder (such as a loan originator), any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market), a guarantor of an obligation, a surety, or any other person who holds ownership indicia primarily to protect a security interest holder or a receiver *or other person who acts on behalf or for the benefit of a holder.*" OAR 340-122-0120(1)(a).

See also OAR 340-122-0140 (excepting ORS chapter 709 trust companies from liability). AES did precisely as the highlighted language indicates: it acted for the benefit of Mr. Ferguson to protect his interests in the property. The EQC has *already made the policy decision* to except fiduciaries like AES from liability.

2. Protection of Fiduciaries Under Federal Environmental Laws

The same need to protect fiduciaries and similar persons who hold title for the benefit of another and who do not manage the property has also led to exemptions under the federal Superfund statute, CERCLA. The Asset Conservation Act of 1996, 110 Stat 3009-462, amended the federal Superfund law to create a "safe harbor" for fiduciaries who merely require that another person comply with the environmental laws. 42 USC § 9607(n)(4); *see also Norfolk Southern Ry. Co. v. Shulimson Bros. Co., Inc.*, 1 F Supp 2d 553, 557 (WD NC 1998) (the CERCLA safe-harbor exception "provides there is no private right of action against the fiduciary"). Again, because the federal authority is persuasive, it further supports a finding that the environmental laws exempt AES from liability.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-12(
Telephone (503) 224-3380

C. Oregon Agency Law Authority

Notwithstanding all of the environmental law authority, DEQ would hold AES vicariously liable for Mr. Ferguson's actions, over which AES had no supervision, and which were done solely to further Mr. Ferguson's interests. (*See, e.g.*, Poling ¶¶ 7, 12, 13-14.) Despite the fact that it would seem contrary to common sense, therefore, for AES to be liable for Mr. Ferguson's activities, DEQ relies solely on agency language in the 1031 exchange contracts for its prosecution of the wrong party. However, the party asserting vicarious liability has the burden of proving the existence and scope of the alleged agency. *Dias v. Favel-Utey Realty Co.*, 126 Or 227, 232, 269 P 207 (1928). DEQ will not be able to meet its burden of holding AES responsible for the acts or omissions of Mr. Ferguson at issue here.

a. Mr. Ferguson Was Not AES's Agent

While the contract documents make use of the term "agent," the economic realities of the transaction, not the labels the parties use, determine the existence and scope of alleged agency authority. Thus, existence of an agency relationship, where there is any doubt, is an issue of fact. *Buckel v. Nunn*, 131 Or App 121, 127, 883 P2d 878 (1994). Here the facts will show no such relationship. The testimony of Cindy Poling establishes that, consistent with the industry custom, AES exercised no control over any activities on the property and had no knowledge of these activities. (Poling ¶¶ 7, 12.) The industry custom and realities establish that Mr. Ferguson was not AES's agent.

b. Mr. Ferguson's Activities Were Outside Any Alleged Agency

Even if Mr. Ferguson was AES's agent for some purpose, DEQ must establish that with regard to the demolition project, Mr. Ferguson was acting on behalf of AES

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

within the scope of authority granted by AES. *See Akerson v. D.C. Bates & Sons*, 180 Or 224, 174 P2d 953 (1946) (principal only liable for acts or omissions within scope of agent's authority). The key aspect of the agency relationship is a purpose to benefit the principal "in furtherance of the master's business." *Stroud v. Denny's Restaurant, Inc.*, 271 Or 430, 437, 532 P2d 790 (1975). Because of the need for an intent to benefit the principal, it is a "fundamental legal principle" that "an agent cannot bind his principal in a matter in which his own interest conflicts with the duty he owes to his principal." *Fine v. Harney County Nat'l Bank*, 181 Or 411, 446-48, 182 P2d 379 (1947) (bank not liable for cashier's personal transactions); *accord Hagen v. Shore*, 140 Or App 393, 400-01, 915 P2d 435 (1996) (principal not liable for agent's self-dealing *ultra vires* actions).

Here the contract documents specifically insisted Mr. Ferguson to comply with all environmental laws and regulations in his activities on the property by requiring him to assume all liability for

> "[t]he existence on the Replacement Property of any hazardous or toxic substance, material or waste that is or becomes regulated by any federal, state or local government authority, including, without limitation, any material or substance designed as a hazardous substance, waste or material pursuant to the Clean Air Act (42 USC §7401 *et seq.*), the Federal Water Pollution Act (the 'Clean Water Act') (33 USC §1251 *et seq.*), the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendment (42 USC §6901 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended by the Superfund Amendments and Reauthorization Act) (42 USC §9601 *et seq.*), the Hazardous Materials Transportation Act (42 USC §1801 *et seq.*), the Toxic Substances Control Act (15 USC §2701 *et seq.*), or Article 90 of the Uniform Fire Code, as amended from time to time, or the breach of any covenant, representation, warranty or other term or provision of that

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-126
Telephone (503) 224-3380

certain Environmental Compliance Certificate executed by the parties of even date herewith." (*Id.* at 13.)

In violating these contractual restrictions, Mr. Ferguson was acting solely to benefit himself. (Poling ¶ 14.) AES had no interest in construction, demolition or any other activities on property it held in escrow for a brief time period. (*Id.*) Its interest was solely to hold bare title as a fiduciary in exchange for a fee of $800. (*Id.*) Mr. Ferguson's actions were not within the scope of any authority granted by AES, were directly contrary to AES's written instructions and were solely to benefit Mr. Ferguson, not AES. Consequently, DEQ cannot meet its burden of proving vicarious liability.[1]

c. In the Punitive Damages Context, Actual Knowledge and the Exercise of Control Is Required for Liability

DEQ is seeking to punish AES, not to recover economic loss. Thus this prosecution is highly analogous to an attempt to impose punitive damages, and the punitive damages authority should be persuasive.

In this analysis, a comparison between *Badger v. Paulson Investment Co.*, 311 Or 14, 803 P2d 1178 (1991), and *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or App 371, 879 P2d 1288 (1994), is instructive. In *Badger*, which like this case did not arise in the employment context but in the (alleged) principal and agent context, the court had no difficulty holding that an investment company was vicariously liable for actual damages arising from violations of the securities laws by its independent sales agents. 311 Or at 27. However, with regard to *punitive damages*, the state supreme court noted:

"There is no evidence that Paulson [principal] was aware of, approved of, ratified, or countenanced Kennedy's

[1] For this same reason, AES objects to DEQ's proposed findings of fact related to Mr. Ferguson's development activities. Because these activities were for Mr. Ferguson's own account, they are completely irrelevant to AES's liability or knowledge.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

> or Lambo's [agents'] misconduct. The relevant sales were not recorded in Paulson's books. Paulson received no money from and paid no commissions on the sales. The sales were outside the scope of Kennedy's and Lambo's actual or implied authority and were purely personal dealings."

In comparison, in the employment context, the court in *Bunaitis* held that the employer would be liable for punitive damages based upon the actions of employees if the actions were within the scope of employment and done to further the employer's interests. 129 Or App at 392. Thus *Badier* and *Bunaitis* teach that it is important to distinguish the alleged agent-principal relationship from an employment relationship. In the former circumstance, to *punish* the alleged principal as DEQ seeks to do here, DEQ must prove that the principal approved of and benefited from the alleged conduct. The facts here are entirely to the contrary. DEQ may not impose punitive sanctions on AES for Mr. Ferguson's activities. It serves no purpose and is contrary to law to impose punishment on an innocent bystander.

d. AES Cannot Be Charged with Notice of Facts Mr. Ferguson Obtained before Becoming an AES Customer

Even if the actions or knowledge of a customer could somehow be imputed to AES—and they cannot—preexisting knowledge obtained outside the scope of the alleged agency cannot be imputed. An alleged principal is not deemed to know everything the alleged agent has ever learned, only those facts obtained within the scope of the agency. *Tri-Met v. Odighizuwa*, 112 Or App 159, 828 P2d 468 (1992); *Akerson*, 180 Or at 222-28. In its penalty calculation, to obtain a penalty of *over 10 times AES's fee for the transaction*, DEQ must hold AES liable for alleged knowledge Mr. Ferguson obtained in 1996, two years before he became an AES customer. Even if the law allowed DEQ to

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

punish an innocent bystander—and it does not—the law does not allow an increase in the punishment for knowledge obtained by an unrelated third party two years before the incident in question.

IV. CONCLUSION

AES was not an "owner" as that term is properly construed, nor is it vicariously liable for Mr. Ferguson's acts or omissions.

This is an issue that has importance outside these proceedings. Failure to dismiss the charges here could have serious ramifications for the real estate industry. It would put in jeopardy the ability to consummate a delayed section 1031 exchange or, indeed, to put property under the control of either a buyer or a seller into escrow for any period of time. (Poling ¶ 11.) Because it is not cost-effective for an escrow company to assure compliance with environmental laws, the escrow company must depend upon the parties to the transaction to do so. These parties are the real parties in interest, and it is they the law should require to comply with the environmental laws. Other persons, not AES, owned, operated and were responsible for the property at issue here.

As a matter of law on the undisputed facts, DEQ is stubbornly insisting on prosecuting the wrong party. The charges against AES should be dismissed.

DATED: March 18, 2002.

STOEL RIVES LLP

Scott J. Kaplan, OSB No. 91335
Attorneys for Respondent American Exchange Services, Inc.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Respondent's Prehearing Brief on Ownership and Liability Issues** on the following named person(s) on the date indicated below by

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below.

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

Attorneys for William Ferguson

Shelley McIntyre
Oregon Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201-5451

Attorneys for Oregon Department of Environmental Quality

DATED: March 18, 2002

Scott J. Kaplan, OSB No. 91335
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the28th day of July, 2003, I served the foregoing:

PETITIONER AMERICAN EXCHANGE SERVICES, INC.'S, EXCEPTIONS AND BRIEF

on the following:

Ms. Shelley K. McIntyre
Assistant Attorney General
Department of Justice
General Counsel Division
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201
fax: (503) 229-5120

Mr. Jeff Bachman
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390
fax: (503) 229-6945

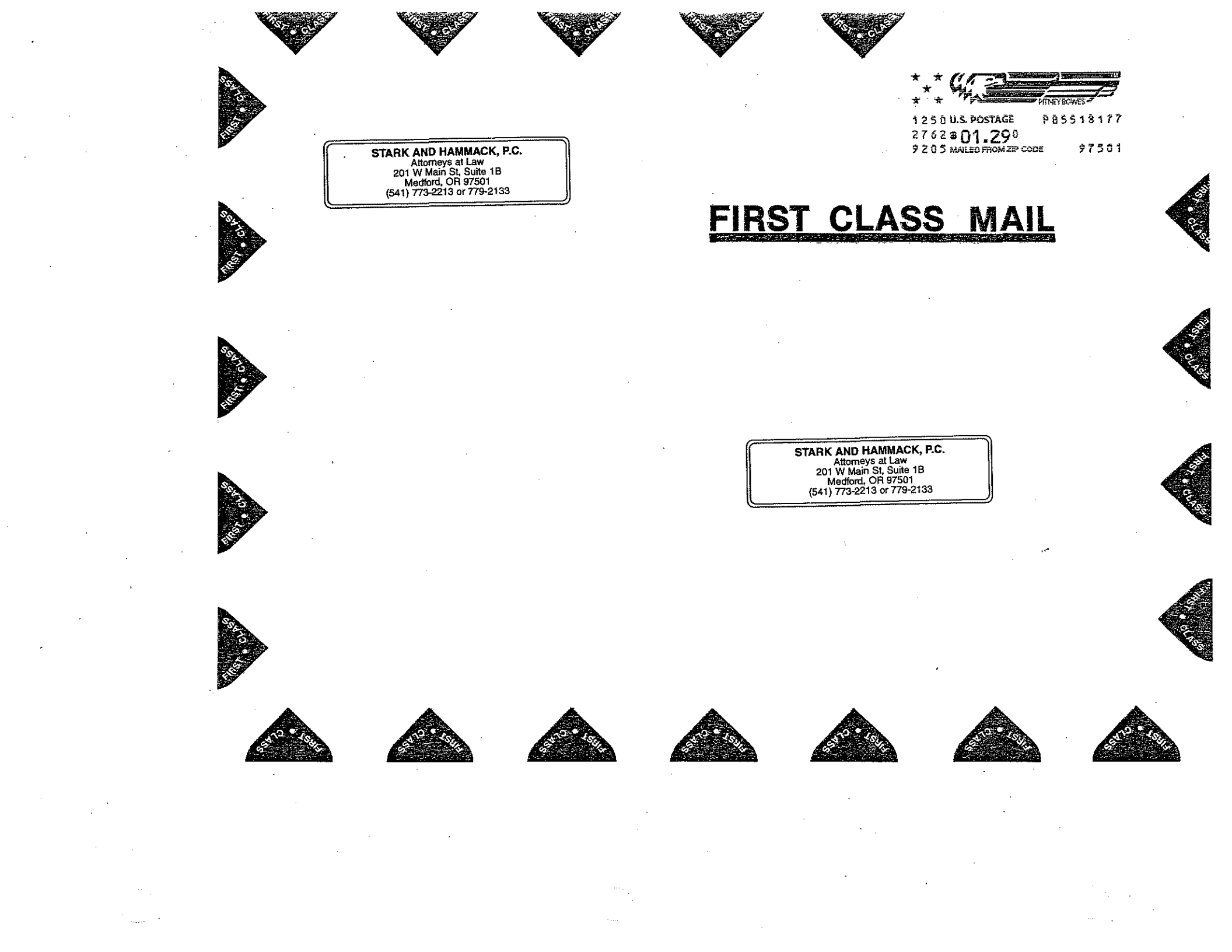
by facsimile and by mailing an original thereof contained in sealed envelopes with postage fully prepaid thereon, addressed to the above individuals at the addresses indicated, and deposited in the United States Mail at Medford, Oregon.

DATED this 28th day of July, 2003.

STARK AND HAMMACK, P.C.

By: _____
Richard A. Stark, OSB #69162
Of Attorneys for Respondent

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX



PITNEY BOWES

1250 U.S. POSTAGE P85518177
2762 $01.29⁰
9205 MAILED FROM ZIP CODE 97501

STARK AND HAMMACK, P.C.
Attorneys at Law
201 W Main St, Suite 1B
Medford, OR 97501
(541) 773-2213 or 779-2133

FIRST CLASS MAIL

STARK AND HAMMACK, P.C.
Attorneys at Law
201 W Main St, Suite 1B
Medford, OR 97501
(541) 773-2213 or 779-2133

Oregon
Theodore R. Kulongoski, Governor

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

Richard Stark
Stark and Hammack, P.C.
Attorneys at Law
201 West Main Street, Suite 1B
Medford, Oregon 97501

RE: In the Matter of the American Exchange Services, Inc., an Oregon Corporation
AQ/A-WER-98-186

Dear Mr. Stark:

I spoke with both Shelley McIntyre of the Oregon Department of Justice and Jeff Bachman of the Oregon Department of Environmental Quality and we accept your Request for Extension of Time of three weeks to file your Exceptions and Brief for the above referenced proceeding.

Sincerely,

Andrea Crozier
for Mikell O'Mealy

cc: Shelley McIntyre, Oregon Department of Justice
Jeff Bachman, Oregon Department of Environmental Quality

Also sent via fax on 7/7/03.
~AC

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

FAX TRANSMITTAL

Date: June 26, 2003

To: Mikell O'Mealy

Destination FAX Number#: **(503) 229-6762** Number of Pages (including cover): 2

From: **Richard A. Stark**

Your Reference: AQ/A-WR-98-186
In the Matter of American Exchange Services, Inc., an Oregon corporation

SPECIAL INSTRUCTIONS:

OUR REFERENCE: **RP 2831**

[X] An original is being mailed.
[ ] An original is being delivered.
[ ] An original is available on request.
[ ] Facsimile transmittal only.

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

June 25, 2003

VIA FACSIMILE (503) 229-6762 and REGULAR U.S. MAIL

Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

RE: In the Matter of the American Exchange Services, Inc., an Oregon corporation
No. AQ/A-WR-98-186
Our File No.: RP 2831

Dear Ms. O'Mealy:

This will confirm my telephone conversation with your office on Wednesday, June 25, 2003. Please accept this letter as a Request for an Extension of Time of three weeks within which to file my Exceptions and Brief in the above-captioned proceeding.

I will be able to complete the Brief within the three week period and the requested extension is due to the July 4 holiday weekend when I will be out of the office, and Shelley McIntyre of the Oregon Department of Justice and I are attempting to locate an exhibit list which will be needed for the filing of my Exceptions and Brief.

Thank you for your attention to this matter.

Respectfully yours,

STARK and HAMMACK, P.C.

Richard A. Stark

RAS:df
cc: client
Shelley McIntyre, Oregon Department of Justice
Jeff Bachman, Oregon Department of Environmental Quality

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

June 25, 2003

VIA FACSIMILE (503) 229-6762 and REGULAR U.S. MAIL

Mikell O'Mealy
Assistant to the Commission
Environmental Quality Commission
811 SW 6th Avenue
Portland, OR 97204

RE: In the Matter of the American Exchange Services, Inc., an Oregon corporation
No. AQ/A-WR-98-186
Our File No.: RP 2831

Dear Ms. O'Mealy:

This will confirm my telephone conversation with your office on Wednesday, June 25, 2003. Please accept this letter as a Request for an Extension of Time of three weeks within which to file my Exceptions and Brief in the above-captioned proceeding.

I will be able to complete the Brief within the three week period and the requested extension is due to the July 4 holiday weekend when I will be out of the office, and Shelley McIntyre of the Oregon Department of Justice and I are attempting to locate an exhibit list which will be needed for the filing of my Exceptions and Brief.

Thank you for your attention to this matter.

Respectfully yours,

STARK and HAMMACK, P.C.

Richard A. Stark

RAS:df
cc: client
Shelley McIntyre, Oregon Department of Justice
Jeff Bachman, Oregon Department of Environmental Quality

Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

June 10, 2003

Via Certified Mail

Richard Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

RE: AQ/A-WR-98-186

Dear Mr. Stark:

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

Postage	$
Certified Fee	
Return Reciept Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

7002 2410 0002 2228 0918

Sent To: Richard Stark
Street, Apt. No., or PO Box No.: Stark & Hammack, P.C.
City, State, ZIP+4: 201 West Main Street, Suite 1B
Medford, OR 97501

PS Form 3800, June 2002 — See Reverse for Instructions

On June 6, 2003, the Environmental Quality Commission received your timely request for Commission review of the Proposed Order for the above referenced case.

The Proposed Order 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, or July 6, 2003. 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, a representative of the Department of Environmental Quality may file an answer brief within thirty days. I have enclosed a copy of the applicable administrative rules for your information.

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, Oregon Department of Environmental Quality, 811 SW 6th Ave., 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 Department of Environmental Quality
Shelley McIntyre, Oregon Department of Justice

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

Attachment E

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

June 5, 2003

VIA FEDERAL EXPRESS

Environmental Quality Commission
c/o Department of Environmental Quality
Assistant to the Director
811 SW 6th Avenue
Portland, OR 97204

RE: Proposed Order Assessing Civil Penalty
American Exchange Services, Inc., an Oregon corporation
No. AQ/A-WR-98-186, Jackson County, HOP Case No. 104055
Issued May 9, 2003 by Lawrence S. Smith, Hearing Officer
Our File No.: RP 2831

Dear Commission:

Please accept this letter as a ***Petition for Commission Review*** in connection with the above-referred to Hearing Officer Order.

It is the intent of the Respondent, American Exchange Services, Inc., to have the Commission review the Hearing Officer's Order.

Very truly yours,

STARK AND HAMMACK, P.C.

Richard A. Stark
Co-Counsel for Respondent
American Exchange Services, Inc.

RAS/df
cc: client

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of: AMERICAN EXCHANGE SERVICES, INC., an Oregon Corporation, Respondent.	No. AQ/A-WR-98-186 Jackson County HOP Case No. 104055 **AFFIDAVIT OF MAILING**

STATE OF OREGON)
)ss.
County of Jackson)

I, Richard A. Stark, being first duly sworn, depose and say that: I am co-counsel for the Respondent of the above-captioned case; I have mailed a true copy of the letter submitted to the Environmental Quality Commission dated June 5, 2003, as a ***Petition for Commission Review***.

The information was mailed to each of the following named persons on the 5th day of June, 2003:

American Exchange Services, Inc.
c/o Rod Wendt, Registered Agent
P.O. Box 1329
Klamath Falls, OR 97601-0268

Mr. Scott J. Kaplan
Attorney at Law
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

Mr. Jeff Bachman
Oregon Department of Environmental Quality
Office of Compliance and Enforcement
811 SW Sixth Avenue
Portland, OR 97204

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

Ms. Shelley K. McIntyre
Assistant Attorney General
Department of Justice
General Counsel Division
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201-5406

Each such information was contained in a separate sealed envelope with postage thereon fully prepaid, addressed to each of the persons at the address as it appears herein.

Richard A. Stark
Of Attorneys for Respondent

STATE OF OREGON)
)ss.
County of Jackson)

This instrument was acknowledged before me this 5th day of June, 2003, by Richard A. Stark.

OFFICIAL SEAL
ANETTE YOUNG
NOTARY PUBLIC-OREGON
COMMISSION NO. 351364
MY COMMISSION EXPIRES OCT. 28, 2005

Notary Public for Oregon
My Commission Expires: 10-28-05

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
D, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

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

In the Matter of	) **PROPOSED ORDER**
	) **ASSESSING CIVIL**
AMERICAN EXCHANGE SERVICES, INC.,	) **PENALTY**
an Oregon Corporation,	) **No. AQ/A-WR-98-186**
Respondent	) **Jackson County**
	) **HOP Case No. 104055**

The Department of Environmental Quality (DEQ) issued a Notice of Assessment of Civil Penalty on February 1, 1999, alleging that American Exchange Services, Inc. (Respondent) violated OAR 340-032-5600 through 340-032-5650 by openly accumulating asbestos and by using a contractor unlicensed to do asbestos removal and was liable for a civil penalty. Respondent timely appealed the Notice. The matter was referred to the Hearing Officer Panel.

Pre-hearing telephone conferences were conducted by Hearing Officer Lawrence S. Smith of the Hearing Officer Panel on December 4, 2002 and February 20, 2003. Respondent was represented by its attorney, Scott Kaplan. Shelley McIntyre, Assistant Attorney General, represented DEQ. The parties stipulated certain documents would be the entire evidentiary record of the hearing. In a letter of March 3, 2003, DEQ listed the stipulated documents. Review of this record was completed on April 1, 2003. The record was then closed.

ISSUES

1. Who is responsible for the open accumulation of friable asbestos-containing material or asbestos-containing waste material and the failure to package, store and dispose of this material properly?

2. Whether Respondent used an unlicensed contractor to perform asbestos abatement at the site in question?

3. How much friable asbestos-containing material or asbestos-containing waste material was openly accumulated?

4. If Respondent committed the first violation, what is the appropriate penalty under OAR 340-012-0050 and OAR 340-012-0045?[1]

5. Can Respondent assert affirmative defenses not raised in its Answer?

6. Is Respondent exempt from liability as a section 1031 exchange company?

[1] In its Notice of Violation, DEQ did not assess a civil penalty for the second alleged violation.

7. Can the negligence of Respondent's agent be imputed to Respondent when the negligence is at least in part based on the agent's prior knowledge?

EVIDENTIARY RULING

DEQ's letter of March 3, 2003 and the stipulated documents referred to in the letter are admitted as the record of the hearing, as stipulated by the parties. They are described in the letter and are marked as Exhibits 1 through 16. They constitute the entire evidentiary record in this case. Exhibit 16 contains undisputed facts 1 through 30, which are incorporated in the Findings of Fact below.

FINDINGS OF FACT

(1) American Exchange Services, Inc. (Respondent) is an Oregon corporation that acts as a facilitator for tax-deferred exchange transactions under the Internal Revenue Code, 26 U.S.C. sec. 1031. (Ex. 16.)

(2) As part of these tax deferred exchanges, Respondent temporarily holds legal title to real property on behalf of its customers so they can take advantage of tax deferrals. (Ex. 16.)

(3) On April 2, 1998, Respondent acquired title to real property and its improvements located at 4044 Crater Lake Ave., Medford, Jackson County, Oregon (Property) on behalf of its customer, William H. Ferguson (Ferguson). (Ex. 16.) Respondent transferred title to the Property to Ferguson on August 23, 1999 and charged Ferguson $800 for its services. (Ex. 9, Written Testimony of Cindy Poling.)

(4) Respondent and Ferguson entered into a Real Property Exchange Agreement (Agreement) dated March 9, 1998 in which Respondent was "entitled to exercise and perform all rights and obligations as owner of the [Property], including without limitations, * * * obligations to maintain and operate the [Property]" and to pay all expenses of the Property. (Ex. 4.)

(5) The Agreement named Ferguson as Respondent's agent "to manage, operate, maintain, and repair" the Property. (Ex. 4.)

(6) On May 29, 1998, Steve Croucher, a DEQ air quality specialist, observed a building on the Property being demolished by hand by workers hired by Barbara and Lawrence Dial. He suspected that some of materials in the building contained asbestos and that asbestos was being openly accumulated. He told the Dials to stop the removal. (Exs. 11 & 16.)

(7) At that time, Respondent held legal title to the Property. The reverse directory for the address of the Property listed Ferguson's name and address. (Ex. 16.)

(8) After Croucher informed Ferguson regarding his concerns of open accumulation of asbestos at the Property, Ferguson immediately retained BRW, environmental consultants, to do an asbestos survey of the partially demolished building on the Property. (Ex. 16.)

(9) BRW's survey and analysis of the Property revealed asbestos in various materials in the following locations: taping compound in the northeast bathroom of the building; yellow floor vinyl in the kitchen; brown floor vinyl in the northwest room near the sliding door (which was removed); texture on the kitchen soffit, southeast corner room closet wall, and exposed beam room ceiling; and black/gray sealant on roofing vents. (Ex. 11-B & Ex. 16.)

(10) In regards to another property, DEQ issued a Notice of Violation and Assessment of Civil Penalty to Ferguson in December 1996 for failing to follow several of the requirements for asbestos abatement. Ferguson requested a hearing. At the hearing, he argued that he was unaware of any asbestos-containing materials in the building when he started the renovation and that once he knew there were such materials, he complied with all statutes and rules regarding the removal of such materials. The final order from that hearing notes that "Respondent is an experienced property owner and manager who has been involved in the acquisition, renovation and maintenance of commercial properties. He has been involved in situations involving potential asbestos-containing materials * * *." (Ex. 11-C.)

(11) As part of its regular procedures in handling applications for building permits, the office of Jackson County Planning and Development Services requires agency comment on applications it receives. In response to an application by Ferguson to remove an existing structure and rebuild a larger building on the Property, Tom Schauer, a Jackson County planner, distributed a form for agency comments to Keith R. Tong of DEQ. Tong submitted agency comments on a form dated April 17, 1998 in anticipation of a "Pre-application Conference" scheduled for that day. Tong specifically warned that asbestos might be present in existing structures. He recommended that an asbestos survey be done and that an asbestos consultant design a control or removal plan. He also wrote that the proposal might need an asbestos notification. (Ex. 11-D; Ex. 12.)

(12) The purpose of the Pre-application Conference is for the staff to confer with the applicant about any possible concerns. The report prepared for Ferguson's application specifically directs him to "See agency comments," referring to Tong's comments from DEQ. (Ex. 11-D.)

(13) On about May 1, 1998, Ferguson entered into an agreement with Barbara and Lawrence Dial on behalf of Respondent. The Dials had approached Ferguson, offering to remove the building and salvage from the Property. In the agreement, Ferguson sold certain buildings and personal property on the Property for salvage to the Dials for $1,000, with the understanding that Ferguson would return the $1,000 to the Dials when the Property was clean. (Ex. 8-1,2.)

(14) The agreement between Ferguson and the Dials is a one-page, handwritten document, signed at the top by Ferguson as "agent for the seller" and by the Dials and dated "5-1-98." Attached to it is an undated, handwritten "Bill of Sale" with a signature at the bottom of "William Ferguson agent for owner ASE [sic]." (Ex. 8, 1-2.)

(15) The Dials did not pay $1,000 to Ferguson before the demolition of the Property's building began. (Ex. 16.)

C.1

(16) The demolition or salvage operation on the Property's building was an asbestos abatement project. (Ex. 16.)

(17) Asbestos was found in the Property's building as stated in Finding of Fact #9 above. (Ex. 16.)

(18) The samples from the asbestos sites in the Property's building showed friable asbestos in several types of materials throughout the building, including drywall, taping compound, roofing, wall texture, floor vinyl, ceiling texture, and duct tape. (Ex. 16.)

(19) These asbestos-containing materials were accumulated or stored in an open area and were not packed, stored, or otherwise securely enclosed as required by *former* OAR 340-032-5650 in effect at that time. (Ex. 16.)

(20) The Dials were not licensed to perform asbestos abatement. (Ex. 16.)

(21) None of the workers used by the Dials at the Property was licensed to perform asbestos abatement. (Ex. 16.)

(22) Ferguson was not licensed to perform asbestos abatement. (Ex. 16.)

(23) From 1,600 to over 4,999 square feet of friable asbestos-containing material or asbestos-containing waste material were openly accumulated during demolition or salvage operation by the Dials (Ex. 11) and removed by an asbestos removal company hired by Ferguson. (Ex. 11-E.)

(24) DEQ issued a Notice of Assessment of Civil Penalty to Respondent on February 1, 1999. (Ex. 1.)

(25) On February 12, 1999, Respondent filed an Answer, asserting that Respondent was not the owner of the asbestos-containing materials. (Ex. 2.)

(26) On November 2, 1999, Respondent filed a Motion to Dismiss on the grounds that Respondent was not the owner of the asbestos-containing materials because the Dials had purchased the materials under an agreement with Ferguson while Ferguson was acting as attorney in fact to manage the property for Respondent. (Ex. 3.)

(27) On July 14, 2000, Respondent filed a Memorandum in Support of the Motion to Dismiss, relying entirely on the ground that the alleged sale of the buildings on the Property to the Dials meant that Respondent did not own the asbestos-containing materials at the time of the open accumulation of asbestos. (Ex. 5.)

(28) On July 31, 2000, DEQ filed its Memorandum in Opposition to Respondent's Motion to Dismiss, focusing on Respondent's defense. (Ex. 6.)

(29) At a prehearing conference on December 4, 2001, Respondent for the first time raised the issue of whether it should be held liable as a Section 1031 fiduciary trustee. (Ex. 16.)

(30) On March 18, 2002, Respondent filed Respondent's Prehearing Brief on Ownership and Liability Issues that contained its legal argument concerning Section 1031 fiduciaries. Respondent has never moved to amend its Answer in order to raise this defense or a claim that Ferguson was not its agent. (Ex. 16.)

(31) Ferguson eventually hired a company to remove the asbestos on the Property. DEQ required him to encapsulate the asbestos-containing materials, which greatly increased the cost of removal. He paid $26,804 for removal of these materials. (Ex. 7, Ferguson affidavit.)

CONCLUSIONS OF LAW

1. Respondent openly accumulated friable asbestos-containing material or asbestos-containing waste material and failed to package, store and dispose of this material properly.

2. Respondent used an unlicensed contractor to perform asbestos abatement at the Property.

3. At least 160 square feet of friable asbestos-containing material or asbestos-containing waste material were openly accumulated.

4. The appropriate civil penalty for the violation of openly accumulating friable asbestos-containing material or asbestos-containing waste material is $7,200.[2]

5. Respondent cannot assert affirmative defenses or legal arguments that were not raised in its Answer.

6. Respondent is not exempt from liability as a Section 1031 exchange company.

7. Ferguson's negligence can be imputed to Respondent even though the negligence is at least in part based on Ferguson's prior knowledge.

OPINION

1. Openly accumulating asbestos-containing material

The legislature has found that exposure to asbestos poses a public health hazard that should be minimized to protect the public. ORS 468A.705.[3] The Environmental Quality Commission was given the authority to issue rules to control exposure to asbestos.

---

[2] In its Notice of Violation, DEQ did not assess a civil penalty for the violation of using an unlicensed contractor.

[3] See Appendix for text of law.

ORS 468A.745.[4] *Former* OAR 340-32-5600 was in effect at the time of the alleged violation and states: "Open accumulation of friable asbestos-containing material or asbestos-containing waste material is prohibited."

Respondent did not deny that friable asbestos-containing material or asbestos-containing waste material was accumulated on its Property, but claimed it was not the owner of these materials and should not be held liable for the violation. The main issue is whether the agreement between Respondent's agent, Ferguson, and the Dials transferred ownership of the materials to the Dials in regards to the alleged violation and thereby absolved Respondent of its responsibility for the violation as owner of the Property.

Based on interpretations of the Clean Air Act regarding asbestos release, *former* OAR 340-32-5600 should be strictly construed. In *United States v. Geppert Bros., Inc.*, 638 F. Supp. 996 (E.D. Pa. 1986), the court ruled that it would defeat the purposes of the Act if a property owner could avoid liability by giving someone else the salvage rights to the contaminated structures. DEQ has imposed strict liability on Respondent as the owner of the Property at the time of the open accumulation of asbestos. DEQ's interpretation of the rule is given considerable deference. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132 (1994), which is quoted as authority in *Oregon Occupational Safety & Health Div. v. D & H Logging, Inc.*, 159 Or App 458, 462-63 (1999):

> As noted, this court is authorized to overrule an agency's interpretation of a rule if an agency has 'erroneously interpreted a provision of law.' ORS 183.484(8)(a). In this case, the 'provision of law' is the rule itself. Where, as here, the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously.' It follows that, in circumstances like those presented here, this court cannot overrule, under ORS 183.482(8)(a), an agency's interpretation of its own rule.

DEQ's interpretation of *former* OAR 340-32-5600 will be upheld unless Respondent shows DEQ's interpretation is "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law." *Id.* Respondent has not shown such an inconsistency. DEQ's interpretation that Respondent should be strictly liable for the violation as the owner of the Property is a reasonable interpretation of the rule in this case because the property owner ultimately controls what happens on the owner's property. Respondent argues at some length that, even though it held the legal title to the Property, it did not exercise its rights to the Property. The agreement between Respondent and Ferguson stated that Respondent was "entitled to exercise and perform all rights and obligations as owner of the [Property], including without limitations, * * * obligations to maintain and operate the [Property]." In Ferguson's Direct Testimony Affidavit (Ex. 7), Ferguson sought prior approval from Respondent to enter the Agreement with the Dials. Ferguson considered Respondent as owner of the Property, despite Respondent's later contention that it did not exercise its rights to the Property. Respondent had

[4] See Appendix for text of law.

complete control over the property. It had final authority to control any removal of asbestos from the Property. The fact that it may not have exercised this authority is not relevant.

Moreover, Ferguson's alleged sale of the building and salvage to the Dials was in reality a contract to remove salvage and clean the Property. The alleged sale was for $1,000, with the Dials receiving the salvageable materials for their efforts. The agreement stated that the $1,000 received from the Dials would be returned to them after the site was cleaned. The Dials did not pay Ferguson the $1,000 before the building was demolished. They stopped salvaging the Property when DEQ advised them of the presence of asbestos-containing materials. The Dials in fact were salvagers hired by Ferguson to remove the buildings on Respondent's Property in preparation for when Ferguson became owner of the property. The Dials and Ferguson were only interested in the Dials' owning the buildings as salvage, not property. Respondent cannot call them property owners in order to avoid liability.

Respondent claimed that neither it nor its agent, Ferguson, knew asbestos was on the Property. This claim is not relevant because, pursuant to DEQ's reasonable interpretation, the property owner is strictly liable. Alleged knowledge is relevant in regards to the determination of the penalty and is considered in sections 4 and 7 below.

2. Removal by a contractor not licensed by DEQ

"Each contractor engaged in an asbestos abatement project must be licensed by [DEQ} under OAR 340-248-0120." *Former* OAR 340-33-030(3).

No one with a license to abate asbestos worked on the Property until Ferguson hired an asbestos removal company later, after friable asbestos-containing material or asbestos-containing waste material had accumulated and was detected by DEQ. Respondent did not contest this allegation that the accumulation was done by unlicensed personnel. Respondent's defense was that it was not the owner of the Property and should not be considered liable for not using a licensed contractor. As explained above, Respondent is strictly liable for this violation as owner of the Property and is liable for having unlicensed personnel accumulate the asbestos-containing materials.

3. Amount of friable asbestos-containing material openly accumulated

DEQ provided evidence that from 1,600 to over 4,999 square feet of friable asbestos-containing material or asbestos-containing waste material were openly accumulated during demolition or the salvage operation by the Dials (Ex. 11) and removed by an asbestos removal company hired by Ferguson. Respondent did not specifically contest the argument regarding the amount of friable asbestos-containing material that was accumulated on the Property, although some of the statements from its witnesses said that some of the material was already accumulated before Respondent received title to the property. OAR 340-012-0090(1)(d)(A) (see below) states that a violation is considered major if more than 160 square feet of friable asbestos-containing material was openly accumulated. Based on the record and the amount of materials later removed, at least this amount was openly accumulated.

4. Penalty

DEQ sought a civil penalty for only the first violation of open accumulation of friable asbestos-containing material or asbestos-containing waste material. The appropriate civil penalty for this violation is $7,200.

DEQ has the authority to assess a civil penalty for this violation. ORS 468.140(1)(c).[5] Respondent violated a rule promulgated pursuant ORS Chapter 468A when it openly accumulated friable asbestos-containing material or asbestos-containing waste material. The penalty is determined by calculating the base penalty and considering other factors, such as prior significant actions, history, number of occurrences, Respondent's responsibility for the violation, its cooperation, and the economic benefit it gained from noncompliance (BP + [(.1 x BP) x (P + H + O + R + C)] + EB). OAR 340-012-0045.[6]

Respondent's violation is a Class I violation because it was a "[v]iolation of a work practice requirement for asbestos abatement projects which causes a potential for public exposure to asbestos or release of asbestos into the environment." OAR 340-012-0050(1)(p).[7] The magnitude of the violation is major because more than 160 square feet of friable asbestos-containing material or asbestos-containing waste material was openly accumulated. OAR 340-012-0090(1)(d)(A).[8] The base penalty for a Class One, major violation is $6,000. OAR 340-012-0042(1)(b)(I).[9]

---

[5] ORS 468.140 says in relevant part:

> Civil penalties for specified violations. (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.

[6] See the Appendix for the full text of the rule.

[7] OAR 340-012-0050 states in relevant part:

> Air Quality Classification of Violations
>
> Violations pertaining to air quality shall be classified as follows:
>
> (1) Class One:
>
> * * * * *
>
> (p) Violation of a work practice requirement for asbestos abatement projects which causes a potential for public exposure to asbestos or release of asbestos into the environment;

[8] OAR 340-012-0090 states in relevant part:

DEQ alleged no prior significant actions (factor P) and no past history (factor H). DEQ assigned a value of two (2) to the occurrence factor (O) because the violation was repeated or continuous for more than one day. This value is appropriate because the violation was continuous for more than one day.

DEQ assigned a value of two (2) to the cause factor (R) because Respondent was negligent in failing to take reasonable steps to comply with the law. OAR 340-012-0030(11) says a person is negligent when not taking reasonable care to avoid a violation. Respondent was not directly involved in the open accumulation, but was held strictly liable as the owner of the

---

Selected Magnitude Categories

(1) Magnitudes for select violations pertaining to Air Quality may be determined as follows:

* * * * *

(d) Asbestos violations:

(A) Major - More than 260 lineal feet or more than 160 square feet or more than 35 cubic feet of
asbestos-containing material;

[9] OAR 340-012-0042 states in relevant part:

Civil Penalty Schedule Matrices

In addition to any liability, duty, or other penalty provided by law, the Director may assess a civil penalty for any violation pertaining to the Commission's or Department's statutes, rules, permits or orders by service of a written notice of assessment of civil penalty upon the Respondent. Except for civil penalties assessed under OAR 340-012-0048 and 340-012-0049, the 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:

(i) Major -- $6000;

* * * * *

(b) No civil penalty issued by the Director pursuant to this matrix shall be less than $50 dollars or more than $10,000 dollars for each day of each violation. This matrix shall apply to the following:

(A) Any violation related to air quality statutes, rules, permits or orders, except for the selected open burning violations listed in section (3) below;

Property. Respondent gave Ferguson, its agent, broad delegation to do what he wanted with the Property. For the reasons stated below in section 7, the negligence of Respondent's agent is imputed to Respondent. A value of two (2) is appropriate for this factor.

DEQ alleged that the cooperation factor (C) should be zero (0) because Respondent's violation could not be corrected after it occurred. OAR 340-012-0045(1)(c)(E) says:

> "C" is the Respondent's cooperativeness and efforts to correct the violation. The values for "C" and the finding which supports each are as follows:
>
> (i) -2 if Respondent was cooperative and took reasonable efforts to correct a violation, took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the violation would not be repeated;
>
> (ii) 0 if there is insufficient information to make a finding, or if the violation or the effects of the violation could not be corrected;

Upon being confronted with the violation, Respondent's agent immediately hired a licensed contractor to determine the amount of asbestos on the Property and eventually paid a contractor over $26,000 to correct the violation. Through its agent, Respondent took reasonable efforts to correct the violation and affirmative efforts to minimize the effects. For these efforts, the value of the C factor is set at minus two (-2).

DEQ did not allege that Respondent received an economic benefit from the violation because of the large amount its agent paid to correct the violation, so the penalty is not increased for this factor.

The total civil penalty is the base penalty of $6,000, plus $1,200 (total factors of two multiplied by one-tenth of the base penalty, or $600), or $7,200. If unpaid, the penalty will accrue interest pursuant to ORS 82.010 and may be filed in court.

5. Raising issues beyond the Answer

After receiving a Notice of Violation and Civil Penalty from DEQ, the recipient may request a hearing by filing an Answer within the time limit. In this Answer, the recipient must admit or deny all factual matters and affirmatively allege any affirmative claim or defense. "Failure to raise a claim or defense will be presumed to be a waiver of such claim or defense." OAR 340-011-0107(2)(b).

Respondent filed its Answer on February 12, 1999, alleging that it was not the owner of the asbestos-containing materials referred to in the Notice. Respondent filed a Motion to Dismiss on November 2, 1999, again claiming it was not the owner. On December 4, 2001, Respondent first raised the issue of whether it should be exempt from liability as a Section 1031 fiduciary trustee. Respondent also argued for the first time that it should not held liable for the acts of Ferguson, its agent. There is no evidence that Respondent moved to amend its Answer to include these arguments. Without such amendment of its Answer, these arguments are waived and will not be considered.

6. Liability as a Section 1031 exchange company

Even if the above arguments by Respondent were not waived, Respondent has not established these arguments. It provided no authority to support its assertion that it is exempt in asbestos cases from liability as a Section 1031 exchange company, but mainly argued that it was bad policy. DEQ has reasonably concluded that property owners should be strictly liable. The agency has the sole authority to make policy decisions.

Respondent argues at length that Ferguson acted beyond his authority as its agent. Its delegation of authority to Ferguson in their contract was very broad and included the authority to contract with the Dials to remove the salvage from the Property. This case does not turn on whether Ferguson acted within his authority. Respondent's liability was strict, based on its ownership of the property and its rights to "exercise and perform all rights and obligations as owner." Moreover, Respondent has argued at other times that Ferguson was its agent. Finally the authority cited by Respondent can be distinguished from the facts in this case as explained in DEQ's Hearing Memorandum (Ex. 16).

7. Imputation of Ferguson's negligence

Ferguson did not take reasonable care to avoid the violation, especially considering that he had been fined before for an asbestos violation, that the Dials told him that they feared asbestos on the site, and that he was advised by Jackson County to see information from DEQ that said he should test for asbestos on the site. Respondent alleges that Ferguson's knowledge based on the prior violation against him should not be held against Respondent because that violation was before Respondent and Ferguson entered an agreement. Even without that prior violation, Ferguson should have been aware of the possibility of asbestos on site because Ferguson was advised by Jackson County to review DEQ's warning of possible asbestos contamination on the Property and the Dials expressed that concern to him. This knowledge of Respondent's agent is imputed to Respondent.

PROPOSED ORDER

I propose that Respondent American Exchange Services, Inc. violated *former* OAR 340-032-5600(4) and *former* OAR 340-032-5600(4) on or before May 29, 1998 and be liable for a civil penalty of $7,200 and that Respondent also violated former OAR 340-033-0030(3) on or before May 29, 1998.

Dated this 24th day of April, 2003

Lawrence S. Smith
Hearing Officer
Hearing Officer Panel for the
Environmental Quality Commission

Dated and Issued on: May 9, 2003

REVIEW

If you are not satisfied with this decision, you have a right to petition the Environmental Quality Commission for review. To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date of service of this Order, as provided in Oregon Administrative Rule (OAR) 340-011-0132(1) and (2). Service is defined in OAR 340-011-0097, as the date the Order is mailed to you, not the date you receive it. The Petition for Review must be filed with:

Environmental Quality Commission
c/o DEQ – Assistant to the Director
811 SW 6th Avenue
Portland OR 97204

Within 30 days of filing the Petition, you must also file exceptions and a brief as provided in OAR 340-011-0132(3).

APPENDIX

ORS 468A.705 Legislative findings. The Legislative Assembly finds and declares that:

(1) Asbestos-containing material in a friable condition, or when physically or chemically altered, can release asbestos fibers into the air. Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are a danger to the public health.

(2) There is no known minimal level of exposure to asbestos fibers that guarantees the full protection of the public health.

(3) Asbestos-containing material found in or on facilities or used for other purposes within the state is a potential health hazard.

(4) The increasing number of asbestos abatement projects increases the exposure of contractors, workers and the public to the hazards of asbestos.

(5) If improperly performed, an asbestos abatement project creates unnecessary health and safety hazards that are detrimental to citizens and to the state in terms of health, family life, preservation of human resources, wage loss, insurance, medical expenses and disability compensation payments.

(6) It is in the public interest to reduce exposure to asbestos caused by improperly performed asbestos abatement projects through the upgrading of contractor and worker knowledge, skill and competence. [Formerly 468.877]

ORS 468A.745 Rules; variances; training; standards; procedures. The Environmental Quality Commission shall adopt rules to carry out its duties under ORS 279.025, 468A.135 and 468A.700 to 468A.760.

OAR 340-012-0045 states in relevant part: "Civil Penalty Determination Procedure.
(1) When determining the amount of civil penalty to be assessed for any violation, * * *, the Director shall apply the following procedures:
(a) Determine the class and the magnitude of each violation:
(A) The class of a violation is determined by consulting OAR 340-012-0050 to 340-012-0073;
(B) The magnitude of the violation is determined by first consulting the selected magnitude categories in OAR 340-012-0090. * * *
(b) Choose the appropriate base penalty (BP) established by the matrices of OAR 340-012-0042 after determining the class and magnitude of each violation;
(c) Starting with the base penalty, determine the amount of penalty through application of the formula: BP + [(.1 x BP) x (P + H + O + R + C)] + EB, where:
(A) "P" is whether the Respondent has any prior significant actions relating to statutes, rules, orders and permits pertaining to environmental quality or pollution control. A violation is deemed to have become a Prior Significant Action on the date of the issuance of the first Formal Enforcement Action in which it is cited. For the purposes of this determination, violations that were the subject of any prior significant actions that were issued before the effective date of the Division 12 rules as adopted by the Commission in March 1989, shall be classified in accordance with the classifications set forth in the March 1989 rules to ensure equitable consideration of all prior significant actions. The values for "P" and the finding which supports each are as follows:
(i) 0 if no prior significant actions or there is insufficient information on which to base a finding;
(ii) 1 if the prior significant action is one Class Two or two Class Threes;
(iii) 2 if the prior significant action(s) is one Class One or equivalent;
(iv) 3 if the prior significant actions are two Class One or equivalents;
(v) 4 if the prior significant actions are three Class Ones or equivalents;
(vi) 5 if the prior significant actions are four Class Ones or equivalents;
(vii) 6 if the prior significant actions are five Class Ones or equivalents;

(viii) 7 if the prior significant actions are six Class Ones or equivalents;
(ix) 8 if the prior significant actions are seven Class Ones or equivalents;
(x) 9 if the prior violations significant actions are eight Class Ones or equivalents;
(xi) 10 if the prior significant actions are nine Class Ones or equivalents, or if any of the prior significant actions were issued for any violation of ORS 468.996;
(xii) In determining the appropriate value for prior significant actions as listed above, the Department shall reduce the appropriate factor by:
(I) A value of 2 if the date of issuance of all the prior significant actions are greater than three years old; or
(II) A value of 4 if the date of issuance of all the prior significant actions are greater than five years old.
(III) In making the above reductions, no finding shall be less than zero.
(xiii) Any prior significant action which is greater than ten years old shall not be included in the above determination;
(xiv) A permittee, who would have received a Notice of Permit Violation, but instead received a civil penalty or Department Order because of the application of OAR 340-012-0040(2)(d), (e), (f), or (g) shall not have the violation(s) cited in the former action counted as a prior significant action, if the permittee fully complied with the provisions of any compliance order contained in the former action.
(B) "H" is Respondent's history in correcting prior significant actions or taking reasonable efforts to minimize the effects of the violation. In no case shall the combination of the "P" factor and the "H" factor be a value less than zero. In such cases where the sum of the "P" and "H" values is a negative numeral the finding and determination for the combination of these two factors shall be zero. The values for "H" and the finding which supports each are as follows:
(i) -2 if Respondent took all feasible steps to correct the majority of all prior significant actions;
(ii) 0 if there is no prior history or if there is insufficient information on which to base a finding.
(C) "O" is whether the violation was repeated or continuous. The values for "O" and the finding which supports each are as follows:
(i) 0 if the violation existed for one day or less and did not recur on the same day, or if there is insufficient information on which to base a finding;
(ii) 2 if the violation existed for more than one day or if the violation recurred on the same day.
(D) "R" is whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act of the Respondent. The values for "R" and the finding which supports each are as follows:
(i) 0 if an unavoidable accident, or if there is insufficient information to make a finding;
(ii) 2 if negligent;
(iii) 6 if intentional; or
(iv) 10 if flagrant.
(E) "C" is the Respondent's cooperativeness and efforts to correct the violation. The values for "C" and the finding which supports each are as follows:
(i) -2 if Respondent was cooperative and took reasonable efforts to correct a violation, took reasonable affirmative efforts to minimize the effects of the violation, or took extraordinary efforts to ensure the violation would not be repeated;
(ii) 0 if there is insufficient information to make a finding, or if the violation or the effects of the violation could not be corrected;
(iii) 2 if Respondent was uncooperative and did not take reasonable efforts to correct the violation or minimize the effects of the violation.
(F) "EB" is the approximated dollar sum of the economic benefit that the Respondent gained through noncompliance. The Department or Commission may assess "EB" whether or not it applies the civil penalty formula above to determine the gravity and magnitude-based portion of the civil penalty, provided that the sum penalty does not exceed the maximum allowed for the violation by rule or statute. "EB" is to be determined as follows:
(i) Add to the formula the approximate dollar sum of the economic benefit gained through noncompliance, as calculated by determining both avoided costs and the benefits obtained through any delayed costs, where applicable;
(ii) The Department need not calculate nor address the economic benefit component of the civil penalty when the benefit obtained is de minimis;
(iii) In determining the economic benefit component of a civil penalty, the Department may use the U.S. Environmental Protection Agency's BEN computer model, as adjusted annually to reflect changes in marginal tax rates, inflation rate and discount rate. With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the economic benefit

gained by Respondent's noncompliance. Upon request of the Respondent, the Department will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect that Respondent's actual circumstance. Upon request of the Respondent, the Department will use the model in determining the economic benefit component of a civil penalty;

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

CERTIFICATE OF SERVICE

I certify that on May 9, 2003, I served the attached Proposed Order by mailing in a sealed envelope, by certified mail or with first class postage prepaid, as noted below, a copy thereof addressed as follows:

AMERICAN EXCHANGE SERVICES INC
C/O ROD WENDT REGISTERED AGENT
PO BOX 1329
KLAMATH FALLS OR 97601-0268

BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 2530

SCOTT J KAPLAN
ATTORNEY AT LAW
900 SW FIFTH AVE STE 2600
PORTLAND OR 97204

BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 2547

JEFF BACHMAN
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

Ann Redding
Administrative Specialist

Attachment G

HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 3, 2003

Mr. Lawrence Smith
Hearing Officer Panel
1905 Lana Avenue NE
Salem, Oregon 97314

Re: *In the Matter of American Exchange Services, Inc.*
Hearing Officer Panel Case No. 104055

Dear Mr. Smith:

As we discussed during our prehearing conference call on February 20, 2003, DEQ and AES agreed to submit this matter for a ruling based on written testimony and written legal argument. The following is a chronological list of documents submitted in this case that DEQ and AES believe should be the basis of your proposed order, including evidentiary rulings. Mr. Kaplan has reviewed this list and concurs.

(Ex. 1). DEQ's Notice of Assessment of Civil Penalty dated February 1, 1999
Ex. 2. AES's Answer dated February 12 1999
3. AES's Motion to Dismiss dated November 2, 1999 with attached Affidavit (referred to as Exhibit A)
4. Affidavit of Cindi Poling dated November 22, 1999 with attachments (referred to as Exhibits A and B)
5. Memorandum in Support of Respondent's Motion to Dismiss dated July 14, 2000
6. Department's Memorandum in Opposition to Respondent's Motion to Dismiss dated July 31, 2000 with accompanying Affidavit of Steven Croucher and State's Exhibits A through E
7. Respondent's Direct Testimony Affidavit of William Ferguson, William Coryell, Daniel Ferguson, Joel Ferguson, and John Hamlin dated March 18, 2002
8. Ferguson's Exhibit List dated March 18, 2002 and Exhibits marked 1 through 8
9. Respondent's Prehearing Brief on Ownership and Liability Issues dated March 18, 2002
10. Written Testimony of Cindi Poling dated March 18, 2002 with exhibits 1 and 2
11. Steven Croucher Written Direct Examination dated March 18, 2002 (State's Exhibits referred to are those submitted with the Department's Memorandum in Opposition to Respondent's Motion to Dismiss, above) with cover letter from Assistant Attorney General Shelley K. McIntyre dated April 4, 2002
12. Keith Tong Written Direct Testimony dated March 18, 2002
13. Respondent's Objections to Testimony and Documents dated March 21, 2002

14. William Ferguson's Narrative Statement, undated but submitted with a cover letter dated March 25, 2002
15. Letter from attorney Scott Kaplan to Ms. Gretchen Miller dated April 5, 2002
16. DEQ's Hearing Memorandum and cover letter from Assistant Attorney General Shelley K. McIntyre, dated June 12, 2002

We appreciate that this is a lot of information for you master. We therefore suggest that the best places to begin your review are with the Notice of Assessment of Civil Penalty, Respondent's March 18, 2002 Prehearing Brief on Ownership and Liability, and the Department's June 12, 2002 Hearing Memorandum, which responds to the March 18 brief. These best frame the issues as they currently stand and identify the issues most likely to be dispositive. I note in reviewing these documents that the Department's Hearing Memorandum has some numbering on pages 6 and 7 under Matters for Resolution by the Hearing Officer that are out of place. My formatting must have gotten messed up. I think 29 through 32 should be 1 through 4.

I trust you will let us know if you need any additional information. Thank you.

Respectfully,

Shelley K. McIntyre
Assistant Attorney General

c: Scott Kaplan, Attorney for Respondent
Jeff Bachman, DEQ

GENE6934

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	)	NOTICE OF ASSESSMENT OF CIVIL PENALTY No. AQ/A-WR-98-186 JACKSON COUNTY

I. AUTHORITY

This Notice of Assessment of Civil Penalty (Notice) is issued to Respondent, American Exchange Services, Inc., 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. VIOLATIONS

1. On and before May 29, 1998, Respondent violated OAR 340-32-5600(4) by openly accumulating friable asbestos-containing material or asbestos-containing waste material. Specifically, Respondent failed to comply with the provisions of OAR 340-32-5650 concerning packaging, storing, and disposal of asbestos-containing waste material owned by Respondent and located at 4044 Crater Lake Ave., Medford, Jackson County, Oregon. This is a Class I violation pursuant to OAR 340-12-050(1)(p).

2. On and before May 29, 1998, Respondent violated OAR 340-33-030(3) by using an unlicensed contractor to perform asbestos abatement. Specifically, Respondent or Respondent's agent hired people not licensed to perform asbestos abatement to demolish a structure it owned at 4044 Crater Lake Ave., Medford, Jackson County, Oregon. This a Class II violation pursuant to OAR 340-12-050(2)(i).

III. ASSESSMENT OF CIVIL PENALTIES

The Department imposes a civil penalty of $8,400 for Violation No. 1 in Section II, above. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-12-045, are attached and incorporated as Exhibit 1.

Ex. 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's Rules Coordinator within twenty (20) days from the date of service of this Notice, and must be accompanied by a written "Answer" to the charges contained in this Notice.**

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: **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.

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 $8,400 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**.

2-1-99
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: Open accumulation of friable asbestos-containing material or asbestos-containing ~~containing~~ waste material in violation of OAR 340-32-5600(4).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-12-050(1)(p).

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-12-090(1)(D)(a) because more than 160 square feet of friable asbestos-containing material or asbestos-containing waste material was openly accumulated.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:
$BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

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

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

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

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 as the violation occurred for more than one day.

"R" is the cause of the violation and receives a value of 2 as Respondent was negligent in that it failed to exercise reasonable care to prevent the foreseeable risk of committing the violation. Respondent's agent was aware of regulation of asbestos-containing materials as he was previously assessed a civil penalty for violating these regulations. Respondent should have exercised reasonable care by conducting a survey of the structure prior to demolition to determine whether asbestos-containing materials were present.

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

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of 0 as Respondent did not gain an economic benefit because the cost of abatement after demolition of the structure exceeded the cost of pre-demolition abatement.

PENALTY CALCULATION:

$$\begin{aligned}\text{Penalty} = BP &+ [(0.1 \times BP) \times (P + H + O + R + C)] + EB \\ &= \$6{,}000 + [(0.1 \times \$6{,}000) \times (0 + 0 + 2 + 2 + 0)] + \$0 \\ &= \$6{,}000 + [(\$600 \times 4)] + \$0 \\ &= \$6{,}000 + \$2{,}400 + \$0 \\ &= \$8{,}400\end{aligned}$$

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	) No. AQ/A-WR-98-186) ANSWER

A true copy

For answer to the Notice of Assessment of Civil Penalty Respondent alleges as follows:

1.

Denies each and every fact and matter alleged in the Notice of Assessment of Civil Penalty and the whole thereof.

2.

That Respondent was not the owner of the asbestos-containing waste material mentioned in the Notice of Assessment of Civil Penalty.

3.

That the proposed penalty was improperly computed.

WHEREFORE, having fully answered the Notice of Assessment of Civil Penalty Respondent requests that it be dismissed.

DATED this 12th day of February, 1999.

STARK AND HAMMACK, P.C.

By: _____
Richard A. Stark, OSB #69164
Of Attorneys for Respondent

Ex. 2

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

Attachment H-3

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

November 2, 1999

Department of Environmental Quality
Hearings Division
811 SW 6th Avenue
Portland, OR 97204

Re: In the Matter of the American Exchange Services, Inc., an Oregon corporation,
No. AQ/A-WR-98-186
Our File No. RP 2831

Dear Hearings Division:

In connection with the above captioned proceeding, please find a Motion to Dismiss for filing. Attached to the Motion is the Affidavit of William Ferguson and I have another Affidavit coming from American Exchange Services, Inc. and I will file that Affidavit within the next week. I have sent a copy of this letter and a true copy of the Motion and Affidavit to Shelley K. McIntyre.

Very truly yours,

STARK AND HAMMACK, P.C.

Richard A. Stark

RAS/lmd
Enclosure
cc: Client
Ms. Shelley K. McIntyre

Ex. 3

a true copy

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	No. AQ/A-WR-98-186 MOTION TO DISMISS

COMES NOW the above Respondent, American Exchange Services, Inc. and moves the Commission for an Order dismissing the Notice of Assessment filed herein on the ground and for the reason that Respondent was not the owner of the asbestos containing waste material mentioned in the Notice of Assessment of Civil Penalty. This Motion is based on the Affidavit which is attached hereto marked Exhibit "A" and by this reference incorporated herein.

DATED this 2nd day of November, 1999.

STARK AND HAMMACK, P.C.

By: _____
Richard A. Stark, OSB #69164
Of Attorneys for Respondent

STARK HAMMACK, P.C.
ATTORNEYS AT LAW
201 W. MAIN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	No. AQ/A-WR-98-186 AFFIDAVIT

STATE OF OREGON)
)ss.
County of Jackson)

I, William Ferguson, being first duly sworn, depose and say as follows:

That at all material times mentioned in the Notice of Assessment filed in the above captioned case, the asbestos containing material was owned by Lawrence Dial and Barbara Dial pursuant to agreement and bill of sale, copies of which are attached hereto marked Exhibit "1" and by this reference incorporated herein.

Respondent, American Exchange Services, Inc. held bare naked title to the property in a 1031 exchange at the time mentioned in the Notice of Assessment and had no other incidence of ownership. That pursuant to the Real Estate Exchange Agreement between American Exchange Services, Inc. and myself, I was appointed as attorney in fact to manage the property for the exchange company until the 1031 exchange was completed. During the exchange period I was authorized to manage, operate, maintain and repair the replacement property. That pursuant to my authority I sold the various buildings and personal property located on the subject premises to Lawrence Dial and Barbara Dial as set forth on Exhibit "1".

ST BAMMACK, P.C.
NEYS AT LAW
201 W. MAIN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

That the Dials had approached me as I was at the 4044 Crater Lake Avenue location about the purchase of various items located on the real estate.

Those items included approximately 50 camper tops in various stages of repair, a camper, a mobile home belonging to Dallas Macy, a chain link fence, building material, camper top construction materials, two metal buildings, one former office of truck tops plus with ceiling and walls partially demolished by weather, building materials, well pumps, refrigeration units, heating and cooling units and miscellaneous yard sale type materials.

That the Dials advised they were experienced used materials dealers and were interested in all the salvage they could take from the site. After a thorough examination and some negotiation, and based on authority in the exchange documents, the Dials purchased all the above items, except the mobile home that was moved by Dallas Macy and a Ford pick-up that was, I believe, removed by Truck Tops Plus.

During the removal by the Dials of their property, they advised the undersigned that someone had cut a hole in the cyclone fence which they had locked, and vandalized the building and removed some items without their permission.

After the Dials discovered that the sheet rock tape on the last building they were removing had asbestos they abandoned the property.

The balance of what property they abandoned was removed by Batzer Construction Company using all environmental safeguards.

Further deponent saith not.

William Ferguson

& HAMMACK, P.C.
ORNEYS AT LAW
201 W. MAIN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

STATE OF OREGON)
)ss.
County of Jackson)

This instrument was acknowledged before me on the 4 day of November, 1999 by William Ferguson.

OFFICIAL SEAL
CORDA ANN JOHNSON
NOTARY PUBLIC-OREGON
COMMISSION NO. 318537
MY COMMISSION EXPIRES DEC. 01, 2002

Corda Ann Johnson
Notary Public for Oregon
My Commission Expires: 12/01/02

ST HAMMACK, P.C.
NEYS AT LAW
201 ...MAIN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

So Agreed
William H. Rayner
agent for seller

Barbara Rae
Laurene E. Dial
824 1065

5-1-98 94-2929 → BUYERS

RECIEVED OF LAURENE DIAL & BARBARA DIAL OF 237 THUNDER CLOUD CIRCLE EAGLE PT. OREGON THE SUM OF $250.00 CASH AS DOWN PAYMENT ON THOSE BUILDINGS LOCATED AT THE CORNER OF COKER BUTTE ROAD & CRATER LAKE HWY KNOWN AS TRUCK TOPS. PLUS. THE BALANCE OF $750.00 IS TO BE PAID AS FOLLOWS $250.00 DUE MAY 4TH & THE BALANCE OF $500.00 DUE MAY 11TH 1998.

PURCHASE OF SAID BUILDING & COMPER & ALL OTHER MOVEABLE MATERIAL ON THE PREMESS'S EXCEPT. TRAILER HOME WELL PUMP & TANK & GOOSE NECK TRAILER. DIALS MAY CHARGE STORAGE ON SAID GOOSE NECK TRAILER IF IT IS NOT REMOVED FORTHWITH BY WHOEVER HAS LEGAL TITLE. HAS TO HAVE BEEN REMOVED BEFORE CLOSING OF PURCHASE BY SELLER

UPON A CLEAN & WORKMAN LIKE REMOVAL BUYER SHALL BE REFUNDED THE FULL PURCHASE PRICE. CONCRETE NEED NOT BE REMOVED & A BILL OF SALE TO BE DELIVERED UPON FULL PAYMENT OF THE $1,000 PURCHASE PRICE.

Removal of Building & CLEAN UP TO BE ACCOMPLISHED WITHIN 5 WEEKS FROM THE DATE HEREOF

EXHIBIT 1-1

NORTHWEST
wholesale incorporated®

1567 N. Wenatchee Ave.
Wenatchee, WA 98801

P.O. Box 1649
Wenatchee, WA 98807-1649

Office: (509) 662-2141 • Fax (509) 663-4540
Warehouse: (509) 662-3563 • Fax (509) 662-3564
1-800-874-6607

Bill of Sale

Seller hereby sells unto Barbara + Lawrence Dail of 237 Thunder Cloud circle the Existing Building located at the corner of Coles Butte Road + Chatter Creek Hyst known as Travel Top plus to move on Salvage & including all moveable items except as owned by the Bankruptcy Trustee or the prior Owners Tenancy To Be Removed By 7-1-98

[illegible] Owner

1-2

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

November 24, 1999

Department of Environmental Quality
Hearings Division
811 SW 6th Avenue
Portland, OR 97204

Re: In the Matter of the American Exchange Services, Inc., an Oregon corporation,
No. AQ/A-WR-98-186
Our File No. RP 2831

Dear Hearings Division:

In connection with the Motion to Dismiss filed by the Respondent enclosed for filing please find the Affidavit of Cindi Poling.

Very truly yours,

STARK AND HAMMACK, P.C.

Richard A. Stark

RAS/lmd
Enclosure
cc: Client
Ms. Shelley K. McIntyre

Ex. 4

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	No. AQ/A-WR-98-186 AFFIDAVIT

STATE OF OREGON)
)ss.
County of Jackson)

I, Cindi Poling, being first duly sworn upon my oath depose and say as follows:

I am the assistant secretary and exchange manager of American Exchanges, Inc., a subsidiary of Jeld-Wen Corporation. That I was in charge of the exchange transaction for property located at 4044 Crater Lake Avenue, Medford, Oregon.

That at all times relevant American Exchange Services was the vested title holder in accordance with the terms of the Exchange Agreement in trust to the property commonly described as 4044 Crater Lake Avenue, Medford, Oregon by virtue of a deed from Michael Grassmueck, Trustee in bankruptcy for the bankruptcy estate of Truck Tops Plus and the Towries, a copy of said deed and exchange agreement is attached hereto as Exhibits "A" and "B" respectively.

American Exchange Services has since completed the exchange with the exchangor and has no longer any title whatsoever in the subject property.

American Exchange Services, pursuant to the terms of the exchange agreement, on Page 4, Paragraph 2.2.2.3 appointed "...Exchangor (Mr. Ferguson) as its attorney in fact until the end of the exchange period, to manage, operate, maintain and repair the

STA AMMACK, P.C.
A EYS AT LAW
201 IN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

replacement property." Parenthesis supplied.

Further deponent saith not.

Cindi Poling
Cindi Poling

STATE OF OREGON)
)ss.
County of Jackson)

This instrument was acknowledged before me on the 22 day of November, 1999 by Cindi Poling.

Kimberly L Ayres
Notary Public for Oregon
My Commission Expires:_____

OFFICIAL SEAL
KIMBERLY L. AYRES
NOTARY PUBLIC-OREGON
COMMISSION NO. 062780
MY COMMISSION EXPIRES MARCH 16, 2001

ST. HAMMACK, P.C.
ATTORNEYS AT LAW
201 W. MAIN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

AMERITITLE
98-12918

Fax:541-608-9522

AFTER RECORDING RETURN TO:
AmeriTitle 724543-DR

TRUSTEE'S DEED

15-15 2C

KNOW ALL MEN BY THESE PRESENTS that the Bankruptcy Estate of Julie Towry No. 695-64263-fra7, now pending in the United States Bankruptcy Court for the District of Oregon, by and through its duly appointed and acting Trustee, MICHAEL A. GRASSMUECK, INC., herein called "GRANTOR", acting in its capacity as Trustee and not individually, by virtue of the power and authority given a bankruptcy trustee under the laws of the United States of America, for the consideration hereinafter stated, does hereby grant, bargain, sell, convey and release to American Exchange Services, Inc, herein called "GRANTEES", and unto Grantees successors and assigns, all of the interest, if any, vested in the Debtor(s) in the subject property described herein, at the time of the filing of the above referenced bankruptcy case, and which passed to the Bankruptcy Estate by operation of law and became subject to administration of the Trustee, together with all after acquired title of the Bankruptcy Estate, if any, all tenements, hereditaments, appurtenance thereunto belonging, or in any way appertaining, situated in the County of Jackson, State of Oregon, described as follows, to-wit:

(SEE EXHIBIT "A" ATTACHED HERETO AND BY REFERENCE INCORPORATED HEREIN)

SUBJECT TO AND EXCEPTING:

All liens, encumbrances, easements, or any other interest of record, of any type or nature.

The Trustee's power and authority to dispose of such property of the Bankruptcy Estate originates in 11 U. S. C. Section 363, and this transfer is made following notice to "interested persons" and an opportunity for hearing pursuant to such law.

The Consideration for this transfer is $275,000.00

Grantor makes this conveyance without any warranties express or implied. This conveyance and release is intended to transfer all of the Bankruptcy Estate's interest, if any, in the subject property described herein, to the Grantees, in its existing conditions, "AS IS", without any warranties express or implied. Grantees' recording of this Deed indicates Grantees' acceptance of this conveyance and release upon that basis.

Grantor covenants that this Deed is to be absolute in effect as pertains to the Bankruptcy Estate and conveys whatever right, title and interest the Bankruptcy Estate may have in the described property. This conveyance and release is not intended to operate as a mortgage, trust deed or security of any kind.

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.

EXHIBIT A-1

98-12918

EXHIBIT "A"

PARCELS NO. 1, 2 AND 3 OF MINOR LAND PARTITION RECORDED AS PARTITION PLAT NO. P-128-1992, OF THE RECORDS OF JACKSON COUNTY, OREGON, INDEX VOLUME 3, PAGE 128, COUNTY SURVEY NO. 13269.

Jackson County, Oregon
Recorded
OFFICIAL RECORDS

APR 02 1998
2:30 PM

COUNTY CLERK

REAL PROPERTY EXCHANGE AGREEMENT
("Reverse Starker" With Back-end Exchange)

BETWEEN: American Exchange Services, Inc., an Oregon corporation ("AES")

AND: WILLIAM H. FERGUSON ("Exchangor").

DATED: March 9, 1998

RECITALS:

A. Exchangor desires to exchange certain real property presently owned by Exchangor that is located at Sunriver Estates, Lot 6, Oregon and is more particularly described in Exhibit A attached hereto (the "Relinquished Property") for certain real property that is located at 4044 CRATER LAKE AVE., MEDFORD, OR and is more particularly described in Exhibit B attached hereto (the "Replacement Property"), all pursuant to this Real Property Exchange Agreement (the "Exchange Agreement") and Section 1031 of the Internal Revenue Code the ("Exchange Transaction").

B. Exchangor desires to structure the Exchange Transaction as a delayed exchange by which AES will acquire the Replacement Property, exchange the Replacement Property for the Relinquished Property with Exchangor, and dispose of the Relinquished Property, all as more particularly set forth in this Exchange Agreement. Exchangor is aware that there are no current federal or state tax laws, regulations or other similar authority that expressly provide that this Exchange Transaction structure will qualify for tax-deferral treatment under Section 1031 of the Internal Revenue Code.

C. To effectuate the Exchange Transaction, Exchangor has entered into TRUSTEES EARNEST MONEY RECEIPT (the "Purchase Agreement") with MICHAEL A. GRASSMUECK, INC., BANKRUPTCY TRUSTEE ("Seller") concerning the Replacement Property, and Seller has agreed to cooperate with Exchangor in effectuating the Exchange Transaction.

D. AES desires and is willing to participate in the Exchange Transaction on the terms and conditions hereinafter set forth.

AGREEMENT:

1. EXCHANGE OF PROPERTY

AES shall acquire the Replacement Property and transfer and convey the Replacement Property to Exchangor pursuant to the Purchase Agreement and Sections 2 and 3 of this Exchange Agreement, in consideration and exchange for, among other things, the acquisition of the Relinquished Property from Exchangor and the transfer and conveyance of the Relinquished Property pursuant to Section 3 of this Exchange Agreement. Each of the transfers, conveyances and acquisitions contemplated by this Exchange Agreement is part of an integrated, interdependent, mutual and reciprocal plan, which are intended to effectuate an exchange of like-kind properties within the meaning of Section 1031 of the Internal Revenue Code by Exchangor. Each of the transfers, conveyances and acquisitions contemplated by this Exchange Agreement is a condition precedent or a condition subsequent, as the case may be, to each of the other transfers, conveyances and acquisitions contemplated by this Exchange Agreement.

2. PHASE I -- ACQUISITION OF REPLACEMENT PROPERTY; RIGHTS AND OBLIGATIONS DURING EXCHANGE PERIOD

2.1. *Acquisition of Replacement Property:* An escrow (the "Acquisition Escrow") for the transfer and conveyance of the Replacement Property from Seller to AES is or shall be opened with AMERITITLE - DONNA RICK (the "Escrow Company"). The Acquisition Escrow shall close on or before the date specified in, or determined in accordance with, the Purchase Agreement, as such date may be extended by the agreement of Exchangor and Seller (the "Phase I Closing Date"). On or before the Phase I Closing Date:

2.1.1. AES shall be assigned and shall assume the Purchase Agreement, with Seller's consent (and with Seller's release of AES pursuant to separate Release Agreement).

2.1.2. Exchangor shall make one or more loans to AES (in the aggregate, the "Exchange Loan") of cash in an amount sufficient for AES to perform the obligations AES assumed under the Purchase Agreement and to pay the costs and expenses incurred by AES under Section 2.2.2 of this Exchange Agreement to the extent the net proceeds of operations of the Replacement Property (as defined in Section 2.2.2.1) are not sufficient to pay those costs and expenses. The Exchange Loan shall be evidenced by AES' Promissory Note, in the form attached hereto, and the Promissory Note shall be secured by a Trust Deed, also in the form attached hereto (the "Exchange Note and Trust Deed") encumbering the Replacement Property. The Exchange Loan shall be due and payable in full at the end of the Exchange Period (as defined in Section 2.2.1). Notwithstanding the foregoing provisions, or any other provision of the Exchange Note and Trust Deed: (a) AES hereby covenants to use the net proceeds of operations of the Replacement Property (as defined in Section 2.2.2.1) to make partial prepayments of the Exchange Loan, (b) the balance of the Exchange Loan (including, without limitation, the Exchange Note and Trust Deed) outstanding at the end of the Exchange Period shall be paid and satisfied solely out of the net proceeds of the sale of the Relinquished Property, and (c) the Exchange Loan (including, without limitation, the Exchange Note and Trust Deed) is nonrecourse as to AES. Exchangor waives any right Exchangor may have to waive the security for the Exchange Loan and to enforce the Exchange Loan obligation directly, and Exchangor shall look solely to the net proceeds of the sale of the Relinquished Property as the source of repayment of, and to the Replacement Property as the sole security for the performance of the terms of, the Exchange Loan (including, without limitation, the Exchange Note and Trust Deed).

2.1.3. AES shall deposit into the Acquisition Escrow a copy of this Exchange Agreement, and each of the parties shall execute, acknowledge, obtain and deposit in the Acquisition Escrow such other documents as are reasonably required by this Exchange Agreement, the Purchase Agreement, the Escrow Company or otherwise to effectuate the Exchange Transaction. Such other documents include, but are not limited to, the documents listed on Exhibit C attached hereto.

2.1.4. If the Purchase Agreement includes a provision for seller financing, the terms shall also provide that: (a) the seller financing shall be by note and trust deed, (b) the note and trust deed shall be assigned to and assumed by Exchangor at the Phase II Closing Date (as defined in Section 3, below), and (c) the Seller shall

consent to the assignment and assumption from AES to and by Exchangor, with a full release of AES, in a form and in substance acceptable to AES, at the Phase II Closing Date. If the terms of acquisition of the Replacement Property include a provision for non-seller financing, in no event shall those terms require AES to enter into, assume or otherwise be obligated on any loan secured by the Replacement Property. In addition, AES shall have no obligations to Exchangor or the lender respecting, and shall have no liability to Exchangor or the lender for, any loss or diminution in value with respect to such financing and any security therefor. Without limiting the generality of the foregoing, AES shall have no obligation to Exchangor to protect the value or enforceability of, or to enforce, and shall not be obligated to cure any default of, any obligation encumbering the Replacement Property unless: (i) the Exchange Loan provided funds therefor as an expense of the Replacement Property payable by AES pursuant to Section 2.2.2, or (ii) Exchangor so instructs AES in writing and provides AES with funds sufficient to cure the default of the obligation and to pay AES' costs and expenses in connection therewith, including, without limitation, AES' attorney fees.

2.2 *Exchange Period*: The period from the Phase I Closing Date to the disposition of the Relinquished Property to a third party is referred in this Exchange Agreement as the "Exchange Period."

2.2.1 Relinquished Property: The Relinquished Property shall be disposed of to a third party and the Exchange Transaction shall be completed as soon as practicable, but in no event shall the Exchange Period end later than the earlier to occur of: (a) the date that is six (6) months from the Phase I Closing Date, or (b) December 31 of the calendar year in which the Phase I Closing Date occurs. During the Exchange Period, Exchangor shall keep the Relinquished Property listed for sale with a licensed real estate broker and shall use Exchangor's best efforts to obtain a third party purchaser of the Relinquished Property ("Purchaser") as soon as is practicable. The terms of the agreement with the Purchaser shall include a requirement that the Purchaser's purchase of the Relinquished Property shall occur no later than the end of the Exchange Period.

2.2.2 Replacement Property: During the Exchange Period, AES shall have and be entitled to exercise and perform all rights and obligations as owner of the Replacement Property, including, without limitation, rights to collect any rents and other proceeds of the Replacement Property and obligations to maintain and operate the Replacement Property and to pay all taxes, insurance premiums, maintenance and repair expenses, and other expenses of the Replacement Property. Effective at the Phase I Closing Date, to provide for the management of the Replacement Property, AES and Exchangor hereby enter into a management agreement on the following terms and conditions (the "Management Agreement"):

2.2.2.1 Exchangor, on behalf of AES, shall collect any rents and other proceeds of the Replacement Property and pay therefrom all taxes, premiums for fire, casualty, liability and other insurance deemed necessary or appropriate by AES, maintenance and repair expenses, and any other expenses of the Replacement Property (including, without limitation, a reasonable management fee for performing these management services on AES' behalf). The net amount remaining ("net proceeds of operations of the Replacement Property") shall be paid over to AES.

2.2.2.2. Exchangor shall keep accurate and sufficiently detailed records of all items of income and expense in connection with the Replacement Property and, not less often than monthly during the Exchange Period, shall prepare and deliver to AES an itemized income and expense statement.

2.2.2.3 To enable Exchangor to carry out its obligations under this Management Agreement, AES hereby appoints Exchangor as its attorney-in-fact, until the end of the Exchange Period, to manage, operate, maintain and repair the Replacement Property.

3. PHASE II: EXCHANGE OF REPLACEMENT AND RELINQUISHED PROPERTIES, TRANSFER OF RELINQUISHED PROPERTY AND COMPLETION OF EXCHANGE

Phase II of the Exchange Transaction consists of the exchange of the Replacement Property and the Relinquished Property between AES and Exchangor, the transfer and conveyance of the Relinquished Property to the Purchaser and the completion of the Exchange.

3.1. *Exchange of Replacement and Relinquished Properties:* An escrow (the "Phase II Exchange Escrow") for the transfer and conveyance of the Replacement Property from AES to Exchangor, in exchange for the transfer and conveyance of the Relinquished Property from Exchangor to AES, shall also be opened with the Escrow Company. The Phase II Exchange Escrow shall close on the same date as the closing of Phase II (the "Phase II Closing Date"), concurrently with the close of the escrow by which AES transfers and conveys the Relinquished Property to the Purchaser. The transfer and conveyance of title to the Relinquished Property shall, at AES' direction (which is hereby given), occur (a) by deed from Exchangor directly to Purchaser, and (b) shall occur simultaneously with the transfer and conveyance of title to the Relinquished Property from Exchangor to AES.

3.2. *Completion of Exchange:*

3.2.1 The net cash proceeds payable to AES upon the sale of the Relinquished Property shall be used to pay the Exchange Loan. If the net cash proceeds are less than the balance of the Exchange Loan outstanding at the time of the sale of the Relinquished Property, the amount of the Exchange Loan shall be reduced by the amount of the difference so that the net cash proceeds are sufficient to pay the Exchange Loan in full. If the net cash proceeds are greater than the balance of the Exchange Loan outstanding at the time of the sale of the Relinquished Property, the amount of the excess shall be paid over to Exchangor pursuant to Section 4.

3.2.2 If the terms of sale of the Relinquished Property include a provision for seller financing, the seller financing shall be by note and trust deed in favor of AES or its assignee. AES may assign to Exchangor AES' rights in and to the note and trust deed (which assignment Exchangor shall accept) in partial satisfaction, dollar for dollar, of AES' obligation to Exchangor under the Exchange Loan. The assignment shall occur concurrently with the Phase II closing and the note and trust deed shall name Exchangor as payee and beneficiary, respectively.

3.2.3 AES and Exchangor shall enter into supplemental exchange escrow instructions for this Phase II of the Exchange Transaction, which shall provide for the

satisfaction of the Exchange Loan and the terms and purposes of the Exchange Agreement.

3.2.4 Notwithstanding any other provision of this Exchange Agreement to the contrary, if the sale of the Relinquished Property and the Phase II Closing Date have not occurred on or before the last day of the Exchange Period, then: (a) AES may transfer and convey the Replacement Property to Exchangor subject to the Exchange Trust Deed, (b) Exchangor shall pay all costs and expenses of the transfer and conveyance of the Replacement Property to Exchangor, (c) Exchangor shall cancel the Exchange Note, and (d) this Exchange Agreement shall thereupon terminate and AES shall have no further obligation to Exchangor under this Exchange Agreement, the Exchange Note and Trust Deed, the Relinquished Property, the Replacement Property or otherwise in connection with the Exchange Transaction.

4. EXCHANGE VALUE BALANCING; PAYMENT OF EXCHANGE SET-UP FEE

4.1. AES shall pay over to Exchangor the net proceeds received by AES upon the transfer and conveyance of the Relinquished Property to Purchaser at the Phase II Closing Date, after deduction of all closing costs and other costs of sale, after deduction of the amount of the net proceeds used by AES to pay the Exchange Loan, and any other outstanding costs or expenses that Exchangor is obligated to pay under this Exchange Agreement. If the net proceeds received by AES upon the transfer and conveyance of the Relinquished Property to Purchaser at the Phase II Closing Date, after deduction of all closing costs and other costs of sale and any other outstanding costs or expenses that Exchangor is obligated to pay under this Exchange Agreement ("net proceeds of sale"), are less than the amount of the then outstanding balance of the Exchange Loan, the Exchange Loan balance shall automatically be reduced to equal the amount of the net proceeds of sale. Notwithstanding any other provision of this Exchange Agreement, the Exchange Note and Trust Deed, or any other agreement, in no event shall AES be obligated to repay the Exchange Loan to the extent that the Exchange Loan balance outstanding at the Phase II Closing Date exceeds the net proceeds of sale, as defined in the preceding sentence.

4.2 Exchangor shall pay to AES an exchange set-up fee of Eight Hundred Dollars ($ 800.00). The fee shall be due and payable upon execution of this Exchange Agreement. In addition, Exchangor shall pay or reimburse AES for reasonable attorneys' fees incurred by AES in reviewing documents and legal and factual issues in connection with this Exchange Agreement, the transactions contemplated thereby, the Relinquished Property and the Replacement Property. The fees shall be payable to AES regardless of whether there is a Phase II Closing Date, an acquisition, disposition or exchange of Replacement Property or Relinquished Property, or whether this Exchange Agreement is terminated pursuant to Section 3.2.4.

5. INCIDENTAL PROPERTY

Property that is incidental to either the Relinquished Property or the Replacement Property may be transferred with, and not treated as separate from, the Relinquished Property or the Replacement Property, as the case may be, if: (a) in standard commercial transactions, the property is typically transferred together with the larger item of property, and (b) the aggregate fair market value of all of the incidental property does not exceed fifteen percent (15%) of the aggregate fair market value of the larger item of property.

6. NOTICES

Any notice or demand required or permitted to be given under this Exchange Agreement shall be deemed to have been given only when it is in writing, has been hand delivered or deposited in the United States mail, with postage prepaid, to be forwarded by certified or registered mail, and is addressed to the party at the address set forth below (and with a copy to the person and address, if any, specified below), or at such other address (and with a copy to such other person and address) as a party may for itself designate from time to time by giving written notice to the other party:

TO AES:	TO EXCHANGOR:
AMERICAN EXCHANGE SERVICES, INC.	WILLIAM H. FERGUSON
Attn: CINDI POLING	Attn:
100 E. MAIN SUITE A	5200 PIONEER RD.
MEDFORD, OR 97501	MEDFORD, OR 97501
WITH A COPY TO:	WITH A COPY TO:

7. FURTHER ASSURANCES

The parties shall execute such other documents and take such other actions as are reasonably necessary or appropriate, or as reasonably requested by the other party, to effectuate the exchange transaction contemplated by this Exchange Agreement. The costs incurred by AES in connection with the preparation or review of such further documents, including AES' attorneys' fees reasonably incurred, shall be paid for by Exchangor prior to the Phase I Closing Date or Phase II Closing Date, whichever next follows the date such costs are incurred by AES.

8. TIME OF THE ESSENCE

Time is of the essence of this Exchange Agreement.

9. ATTORNEYS' FEES

If either party shall commence any action or other proceeding to enforce or interpret this Exchange Agreement, the prevailing party shall be entitled to collect, and the other party shall pay, in addition to costs and disbursements allowed by law, the prevailing party's reasonable attorneys' fees in the action or proceeding, including proceedings on appeal, as may be fixed by the court. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise enforcing each order, judgment or decree entered in the action or proceeding.

10. BINDING EFFECT

This Exchange Agreement shall be binding on and shall inure to the benefit of the parties hereto and their respective successors, heirs and assigns.

11. ENTIRE AGREEMENT; AMENDMENTS

This Exchange Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes any prior or contemporaneous oral agreement and any prior written agreement regarding the subject matter hereof. Any prior or contemporaneous oral agreement and any prior written agreement regarding the subject matter hereof shall be of no further force or effect. No modification, alteration, amendment, change or addition to this Exchange Agreement shall be binding or effective unless reduced to writing and signed by the party to be bound.

12. PARTIAL INVALIDITY

If any term, covenant or condition of this Exchange Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Exchange Agreement, or the application of such term, covenant or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term, covenant or condition of this Exchange Agreement shall be valid and be enforced to the fullest extent permitted by law.

13. JOINT AND SEVERAL LIABILITY

If any party to this Exchange Agreement now consists or hereafter shall consist of more than one person, firm or corporation, all such persons, firms or corporations shall be jointly and severally liable for the obligations of that party hereunder.

14. CAPTIONS

The captions appearing at headings of sections in this Exchange Agreement are provided for convenience of reference only and shall not be used to construe or interpret the meaning of this Exchange Agreement.

15. GOVERNING LAW

This Exchange Agreement shall be governed by and interpreted in accordance with the internal laws of the State of Oregon.

16. SURVIVAL

The obligations of the parties hereunder shall survive the Phase I Closing Date and Phase II Closing Date.

17. COUNTERPARTS

This Exchange Agreement may be executed in multiple counterparts.

IN WITNESS WHEREOF, AES and Exchangor have executed this Real Property Exchange Agreement as of the date first written above.

AMERICAN EXCHANGE SERVICES, INC.

By Cindi Poling
Its CINDI POLING, ASSISTANT SECRETARY
AES

WILLIAM H. FERGUSON
By _____
Its _____
EXCHANGOR

EXHIBIT "A"

DESCRIPTION SHEET

DESCRIPTION OF RELINQUISHED PROPERTY:

The land referred to in this report/policy is situated in the State of Oregon, County of Jackson, and is described as follows:

Lot 6 of SUNCREST ESTATES, a recorded subdivision located in Jackson County, Oregon, TOGETHER WITH Beginning at a 5/8 inch rebar with plastic cap found set for the North-Northwest corner of Lot 8 of SUNCREST ESTATES, a recorded subdivision located in Jackson County, Oregon; thence along the Westerly boundary of said Lot 8, South 0° 01' 42" East, 174.72 feet; thence North 89° 00' 35" East, 600.78 feet to intersect the Northerly boundary of said Lot 8; thence along the Northerly boundary of said Lot 8, North 76° 32' 19" West, 700.00 feet to the point of beginning. EXCEPTING THEREFROM Beginning at a 1/2 inch iron pipe found set for the South-Southwest corner of Lot 8 of SUNCREST ESTATES, a recorded subdivision located in Jackson County, Oregon; thence along the Westerly boundary of said Lot 8, North 0° 01' 42" West, 494.936 feet to a found 5/8 inch rebar with plastic cap; thence along the Southerly boundary of the "flagpole" portion of said Lot 8, South 80° 46' West, 80.555 feet; thence continue along said boundary, North 81° 56' West, 96.541 feet to a 5/8 inch rebar with plastic cap located at the Southwesterly corner of said "flagpole" portion of Lot 8; thence North 9° 39' 58" East, 12.505 feet to a 5/8 inch rebar with plastic cap located on the Westerly end boundary of said "flagpole"; thence along the centerline of Suncrest Way (private road), North 80° 20' 02" West, 61.402 feet to a 5/8 inch rebar with plastic cap angle point; thence continue along said private road centerline, North 77° 35' 11" West, 19.30 feet; thence leaving said private road, South 25° 48' 35" East, 580.224 feet to the point of beginning.

EXHIBIT B-8

EXHIBIT B

Legal Description of Replacement Property

[to be supplied]

Parcels No. 1, 2 and 3 of Minor Land Partition recorded as Partition Plat No. P-128-1992, of the Records Of Jackson County, Oregon, Index volume 3, Page 128, County Survey No. 13269.

EXHIBIT C
Exchange Document List

PHASE I:

1. Real Property Exchange Agreement.

2. Assignment and Assumption (For Phase I Transfer of Replacement Property -- "Reverse Starker" With Back-end Exchange): This should be accompanied by copies of the Acquisition Agreement, preliminary title report and other pertinent documents in connection with the transfer and conveyance of the Replacement Property (such as a well water test report or waiver of due-on-sale clause in underlying financing.)

3. Indemnity and Release Agreement (Exchangor): From Exchangor in favor of AES.

4. Release Agreement (Seller): From Seller in favor of AES.

5. Environmental Compliance Certificate (For Phase I Transfer of Replacement Property -- "Reverse Starker" With Back-end Exchange): From Seller in favor or AES.

6. Acknowledgment of Independent Relationship.

7. Deed to transfer and convey the Replacement Property from Seller to AES [with such statements and disclosures as are required by law, such as authorized use or fire protection district disclosure for rural property].

8. If necessary, Novation and Release Agreement and Memorandum of Assumption and Novation.

PHASE II:

9. Assignment and Assumption (For Phase II Transfer of Relinquished Property -- "Reverse Starker" With Back-end Exchange): This should be accompanied by copies of the Sale Agreement, preliminary title report and other pertinent documents in connection with the disposition of the Relinquished Property (such as a well water test report or waiver of due-on-sale clauses in underlying financing.) [Standard form of Assignment and Assumption calls for direct deeding of Relinquished Property from Exchangor directly to Purchaser.]

10. Indemnity and Release Agreement (Exchangor--Phase II): From Exchangor in favor of AES.

11. Release Agreement (Purchaser--Phase II): From the third-party purchaser of the Relinquished Property in favor of AES.

12. Deeds:

    12.1. Deed to transfer Replacement Property from AES to Exchangor.

    12.2. Deed to transfer Relinquished Property from Exchangor directly to Purchaser or to AES (and, if to AES, Deed to transfer Relinquished Property from AES to Purchaser and Environmental Compliance Certificate) [Deeds must contain such statements and disclosures as are required by law, such as authorized use or fire protection district disclosure for rural property].

EXHIBIT "B"

PROMISSORY NOTE

MEDFORD, OR

$ 278,282.34 DATE April 2nd 1998

THE UNDERSIGNED CORPORATION PROMISES TO PAY TO THE ORDER OF

**********WILLIAM H. FERGUSON**********

AT PLACE DESIGNATED BY BENEFICIARY Two hundred Seventy Eight thousand two hundred Eighty two & 34/100 DOLLARS

PAYABLE ACCORDING TO THE TERMS AND PROVISIONS OF THE REAL PROPERTY EXCHANGE AGREEMENT. IF NOTE IS NOT SO PAID THE WHOLE SUM TO BECOME IMMEDIATELY DUE AND COLLECTIBLE AT THE OPTION OF THE HOLDER OF THIS NOTE. IF THIS NOTE IS PLACED IN THE HANDS OF AN ATTORNEY FOR COLLECTION, THE UNDERSIGNED PROMISES AND AGREES TO PAY THE REASONABLE COLLECTION COSTS OF THE HOLDER HEREOF; AND IF SUIT OR ACTION IS FILED HEREON, ALSO PROMISE TO PAY THE HOLDER'S REASONABLE ATTORNEY'S FEE TO BE FIXED BY THE TRIAL COURT AND IF ANY APPEAL IS TAKEN FROM ANY DECISION OF THE TRIAL COURT, SUCH FURTHER SUM AS MAY BE FIXED BY THE APPELLATE COURT, AS THE HOLDER'S REASONABLE ATTORNEY'S FEES IN THE APPELLATE COURT.

THIS NOTE IS SUBJECT TO THE PROVISIONS OF THE REAL PROPERTY EXCHANGE AGREEMENT DATED March 5, 1998 BETWEEN THE PARTIES HEREIN INCLUDING LIMITATIONS, THE NON-RECOURSE PROVISION AND OTHER PROVISIONS REGARDING REPAYMENT OF THE NOTE SET FORTH IN THE REAL PROPERTY EXCHANGE AGREEMENT.

THIS NOTE IS SECURED BY A TRUST DEED OF EVEN DATE.

AMERICAN EXCHANGE SERVICES, INC.

BY Cindi Poling
CINDI POLING, ASSISTANT SECRETARY

EXHIBIT B-11

Form No. 881 – TRUST DEED (Assignment) (Grantor) EXHIBIT "D" AFTER RECORDING, RETURN TO

NS

98-18523

AmeriTitle 24543-DR

15

TRUST DEED

AMERICAN EXCHANGE SERVICES, INC.
100 E. MAIN SUITE A
MEDFORD, OR 97501
Grantor's Name and Address

WILLIAM H. FERGUSON
5200 PIONEER RD.
MEDFORD, OR 97501
Beneficiary's Name and Address

After recording, return to (Name, Address, Zip):
AMERITITLE

SPACE RESERVED FOR RECORDER'S USE

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/reel/volume No. ..... on page ..... and/or as fee/file/instrument/microfilm/reception No. ....., Record of ..... of said County.
Witness my hand and seal of County affixed.

NAME TITLE
By ....., Deputy.

THIS TRUST DEED, made this 2nd day of April, 1998, between
AMERICAN EXCHANGE SERVICES, INC., AN OREGON CORPORATION, as Grantor,
AMERITITLE, as Trustee, and
WILLIAM H. FERGUSON, as Beneficiary,

WITNESSETH:

Grantor irrevocably grants, bargains, sells and conveys to trustee in trust, with power of sale, the property in JACKSON County, Oregon, described as:

Parcel's No. 1, 2 and 3 of Minor Land Partition recorded as Partition Plat No. P-128-1992 of the Records of Jackson County, Oregon, Index Volume 3, Page 128, County Survey No. 13269.

This Trust Deed and the Note is secures are subject to the provisions of the Real Property Exchange Agreement dated 3-99 between the parties herein including limitations, the non-recourse provision and other provisions regardin repayment of the note set forth in the Real Property Exchange Agreement.

together with all and singular the tenements, hereditaments and appurtenances and all other rights thereunto belonging or in anywise now or hereafter appertaining, and the rents, issues and profits thereof and all fixtures now or hereafter attached to or used in connection with the property.

FOR THE PURPOSE OF SECURING PERFORMANCE of each agreement of grantor herein contained and payment of the sum of Two Hundred Seventy-Eight Thousand two hundred Eighty-Two & 34/100 Dollars, with interest thereon according to the term of a promissory note of even date herewith, payable to beneficiary or order and made by grantor, the final payment of principal and interest hereof, if not sooner paid, to be due and payable pursuant to the terms of Real property exchange agreement.

The date of maturity of the debt secured by this instrument is the date, stated above, on which the final installment of the note becomes due and payable. Should the grantor either agree to, attempt to, or actually sell, convey, or assign all (or any part) of the property or all (or any part) of grantor's interest in it without first obtaining the written consent or approval of the beneficiary, then, at the beneficiary's option**, all obligations secured by this instrument, irrespective of the maturity dates expressed therein, or herein, shall become immediately due and payable. The execution by grantor of an earnest money agreement** does not constitute a sale, conveyance or assignment.

To protect the security of this trust deed, grantor agrees:

1. To protect, preserve and maintain the property in good condition and repair; not to remove or demolish any building or improvement thereon; not to commit or permit any waste of the property.

2. To complete or restore promptly and in good and habitable condition any building or improvement which may be constructed, damaged or destroyed thereon, and pay when due all costs incurred therefor.

3. To comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the property; if the beneficiary so requests, to join in executing such financing statements pursuant to the Uniform Commercial Code as the beneficiary may require and to pay for filing same in the proper public office or offices, as well as the cost of all lien searches made by filing officers or searching agencies as may be deemed desirable by the beneficiary.

4. To provide and continuously maintain insurance on the buildings now or hereafter erected on the property against loss or damage by fire and such other hazards as the beneficiary may from time to time require, in an amount not less than $ ....., written in companies acceptable to the beneficiary, with loss payable to the latter; all policies of insurance shall be delivered to the beneficiary as soon as insured; if the grantor shall fail for any reason to procure any such insurance and to deliver the policies to the beneficiary at least fifteen days prior to the expiration of any policy of insurance now or hereafter placed on the buildings, the beneficiary may procure the same at grantor's expense. The amount collected under any fire or other insurance policy may be applied by beneficiary upon any indebtedness secured hereby and in such order as beneficiary may determine, or at option of beneficiary the entire amount so collected, or any part thereof, may be released to grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

5. To keep the property free from construction liens and to pay all taxes, assessments and other charges that may be levied or assessed upon or against the property before any part of such taxes, assessments and other charges become past due or delinquent and promptly deliver receipts therefor to beneficiary; should the grantor fail to make payment of any taxes, assessments, insurance premiums, liens or other charges payable by grantor, either by direct payment or by providing beneficiary with funds with which to make such payment, beneficiary may, at its option, make payment thereof, and the amount so paid, with interest at the rate set forth in the note secured hereby, together with the obligations described in paragraphs 6 and 7 of this trust deed, shall be added to and become a part of the debt secured by this trust deed, without waiver of any rights arising from breach of any of the covenants hereof and for such payments, with interest as aforesaid, the property hereinbefore described, as well as the grantor, shall be bound to the same extent that they are bound for the payment of the obligation herein described, and all such payments shall be immediately due and payable without notice, and the nonpayment thereof shall, at the option of the beneficiary, render all sums secured by this trust deed immediately due and payable and constitute a breach of this trust deed.

6. To pay all costs, fees and expenses of this trust including the cost of title search as well as the other costs and expenses of the trustee incurred in connection with or in enforcing this obligation and trustee's and attorney's fees actually incurred.

7. To appear in and defend any action or proceeding purporting to affect the security rights or powers of beneficiary or trustee; and in any suit, action or proceeding in which the beneficiary or trustee may appear, including any suit for the foreclosure of this deed or any suit or action related to this instrument, including but not limited to its validity and/or enforceability, to pay all costs and expenses, including evidence of title and the beneficiary's or trustee's attorney fees; the amount of attorney fees mentioned in this paragraph 7 in all cases shall be fixed by the trial court and in the event of an appeal from any judgment or decree of the trial court, grantor further agrees to pay such sum as the appellate court shall adjudge reasonable as the beneficiary's or trustee's attorney fees on such appeal.

It is mutually agreed that:

8. In the event that any portion or all of the property shall be taken under the right of eminent domain or condemnation, beneficiary shall have the right, if it so elects, to require that all or any portion of the monies payable as compensation for such taking,

NOTE: The Trust Deed Act provides that the trustee hereunder must be either an attorney, who is an active member of the Oregon State Bar, a bank, trust company or savings and loan association authorized to do business under the laws of Oregon or the United States, a title insurance company authorized to insure title to real property of this state, its subsidiaries, affiliates, agents or branches, the United States or any agency thereof, or an escrow agent licensed under ORS 696.505 to 696.585.

*WARNING: 12 USC 1701j-3 regulates and may prohibit exercise of this option.

**The publisher suggests that such an agreement address the issue of obtaining beneficiary's consent in complete detail.

EXHIBIT B-12

98-12918

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 OR 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.

IN WITNESS WHEREOF, Grantor has executed this Deed this 18th day of March, 1998.

MICHAEL A. GRASSMUECK, INC., TRUSTEE

BY: _____
Michael A. Grassmueck, President

STATE OF OREGON, County of MULTNOMAH } ss.

FORM No. 23—ACKNOWLEDGMENT. Stevens-Ness Law Publishing Co., INC. Portland, OR 97204 © 1992

BE IT REMEMBERED, That on the 18th day of March, 1998, before me, the undersigned, a Notary Public in and for the State of Oregon, personally appeared the within named Michael A. Grassmueck, as President of Michael A. Grassmueck, Inc., Trustee on behalf of the Bankruptcy estate of Julie and David Ivory known to me to be the identical individual described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily.

OFFICIAL SEAL
PAM LEITKO
NOTARY PUBLIC-OREGON
COMMISSION NO 308509
MY COMMISSION EXPIRES JAN 19, 2002

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year last above written.

_____
Notary Public for Oregon
My commission expires 1-19-2002

Tax Statements to:
5200 Pioneer Rd
Medford, OR 97501

2

EXHIBIT B-13

Attachment H-5

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

July 14, 2000

VIA FACSIMILE (541) 686-7565 AND REGULAR MAIL

Ms. Gretchen Miller
Hearings Officer
875 Union Street N.E.
Salem, OR 97311

Re: In the Matter of the American Exchange Services, Inc., an Oregon corporation,
No. AQ/A-WR-98-186
Our File No. RP 2831

Dear Ms. Miller:

Enclosed please find the Respondent's Memorandum in Support of the Motion to Dismiss. I have faxed a copy of this Memorandum to you and to Shelly McIntyre today and I will also mail the original to you and a copy to Ms. McIntyre by regular mail.

Respectfully yours,

Very truly yours,

STARK AND HAMMACK, P.C.

Richard A. Stark

RAS/kd
Enclosure
cc: Ms. Shelley K. McIntyre

Ex. 5

Richard A. Stark, OSB# 69164
Stark & Hammack, P.C.
Attorneys at Law
201 West Main, Suite 1B
Medford, OR 97501
(541) 773-2213
Fax (541) 773-2084
Of Attorneys for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon Corporation, Respondent.	No. AQ/A-WR-98-186 MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

INTRODUCTION

On February 1, 1999, Director Marsh issued a Notice of Assessment of Civil Penalty in this case, assessing respondent a penalty in the sum of $8,400 for allegedly violating OAR 340-32-5600(4). Though not separately assessed, the Director further alleged respondent violated OAR 340-33-030(3). In relevant part, the Notice of Assessment provides:

> "1. On and before May 29, 1998, Respondent violated OAR 340-32-5600(4) by openly accumulating friable asbestos-containing material or asbestos-containing waste material. Specifically, Respondent failed to comply with the provisions of OAR 340-32-5650 concerning packaging, storing, and disposal of asbestos-containing waste material owned by Respondent and located at 4044 Crate Lake Ave., Medford, Jackson County, Oregon. This is a Class I violation pursuant to OAR 340-12-050(1)(p).
>
> "2. On and before May 29, 1998, Respondent violated OAR 340-33-030(3) by using an unlicensed contractor to perform asbestos abatement. Specifically, Respondent or

Respondent's agent hired people not licensed to perform asbestos abatement to demolish a structure it owned at 4044 Crater Lake Ave., Medford, Jackson County, Oregon. This is a Class II violation pursuant to OAR 340-12-050(2)(i)." (Emphases added).

Respondent has moved to dismiss this proceeding and offers this memorandum in support of the motion to dismiss. This memorandum is supported by the affidavit of William H. Ferguson, attached as Exhibit A to Respondent's motion to dismiss and by this reference incorporated herein, and the points and authorities cited.

BACKGROUND FACTS

In March, 1998, William H. Ferguson ("Ferguson" or "Exchangor"), entered into an Exchange Agreement with Respondent American Exchange Services, Inc. ("AES"), an Oregon corporation, to effectuate a tax-deferred exchange of real property in Jackson County, Oregon. The agreement provided AES would acquire legal title to the "replacement property"—land and improvements located at 4044 Crater Lake Highway, Medford, Oregon—and eventually exchange that property for other property owned by Ferguson, called the "relinquished property", pursuant to §1031 of the Internal Revenue Code.

An integral part of the Exchange Agreement was a Management Agreement pursuant to which AES designated Ferguson its agent to manage the replacement property until the exchange. Ferguson's duties included, *inter alia*, management, operation, maintenance and repair of the property. Based on his authority under the Management Agreement, Ferguson proceeded to repair and maintain the property which had formerly housed several businesses, most recently *Truck Tops Plus*, a manufacturer and seller of pick-up camper shells and tops. *Truck Tops Plus* had gone bankrupt and the property was acquired out the bankruptcy estate.

Ferguson discovered the property was in a sad state. Not only was it strewn with numerous camper tops in various stages of repair, there were construction materials, metal buildings, a former stick-built office with ceiling and walls partially destroyed by weather and vandalism,

STARK & HAMMACK
Attorneys At Law
201 West Main, Suite 1B • Medford, OR 97501
(541) 773-2213 • Fax (541) 773-2084

and pumps, heating and cooling units, fencing and miscellaneous "yard sale-type" items scattered about the property.

While Ferguson was planning how to manage the property he was approached by Lawrence and Barbara Dial who represented themselves as experienced salvagers. Ferguson and the Dials entered into an agreement dated May 1, 1998, pursuant to which Ferguson, in his capacity as property manager, sold most items on the property to the Dials. Specifically included in the list of property sold were "...those buildings located at the corner of Coker Butte Road & Crater Lake Ave. known as Truck Tops Plus." (Emphasis added). A copy of the agreement is attached as Exhibit 1 to the affidavit of Ferguson—Exhibit A to Respondent's motion to dismiss—and by this reference incorporated herein. The Dials were given five weeks to remove what they had purchased. The consideration consisted to $1,000 paid by Dials which, "...upon a clean & workman like removal ...", was to be refunded.

In the process of removing and salvaging buildings on the property, the Dials apparently encountered, severed and disturbed asbestos-containing materials. They then promptly abandoned the property, leaving to Ferguson the task of completing clean-up including dealing with the asbestos. Prior to the acts of the Dials, neither Respondent nor Ferguson knew the property located at 4044 Crater Lake Ave., included asbestos-containing materials. Once the existence of asbestos-containing materials was confirmed, Ferguson, as Respondent's agent, accomplished their removal by promptly contracting with an asbestos-removal firm which observed all environmental safeguards.

ISSUES

1. Was the asbestos-containing material located at 4044 Crater Lake Ave., Medford, Jackson County, Oregon, "owned" by Respondent within the meaning of OAR Chapter 340, Division 32?

STARK & HAMMACK
Attorneys At Law
201 West Main, Suite 1B • Medford, OR 97501
(541) 773-2213 • Fax (541) 773-2084

2. Did Respondent or Respondent's agent hire people not licensed to perform asbestos abatement to demolish the structure it "owned" at 4044 Crater Lake Avenue?

ARGUMENT

1. The asbestos-containing material was not "owned" by Respondent as alleged.

Respondent is unable to find any definition of "owner" or "owned" in OAR Chapter 340, Division 32, although other words and phrases are defined for purposes of the division, including the section allegedly violated by Respondent. *See,* OAR 340-32-5590, defining terms used in OAR 340-032-5600 through 340-032-5650. The word, in its ordinary sense, implies the right to possession of a thing. On and after May 31, 1998, the right to possession of the structures on the property, including the asbestos-containing materials, belonged to the Dials.

Ownership of the structures and their components, attached to the real property and capable of severance without harm to the property, was specifically transferred by the agreement of May 1, 1998. ORS 72.1070 provides, in part:

> "(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within ORS 72.1010 to 72.7250 if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.
>
> "(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) of this section or of timber to be cut is a contract for the sale of goods within ORS 72.1010 to 72.7250 whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance." (Emphases added).

Here, since the structure and its materials were to be removed by the buyers rather than the seller, they were not things "described in subsection (1)." Rather, they fell under subsection (2) of the statute. Because, even though they may have formed part of the realty at the time of contracting they could be identified before severance, the contract of May 1, 1998

STARK & HAMMACK
Attorneys At Law
201 West Main, Suite 1B • Medford, OR 97501
(541) 773-2213 • Fax (541) 773-2084

was a present sale of goods within ORS 72.1010 to 72.7250. Accordingly, the structures, and any asbestos-containing materials, were not owned by Respondent as alleged, but by the Dials.

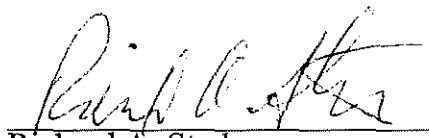
1. <u>Respondent or Respondent's agent did not hire people not licensed to perform asbestos abatement to demolish the structure it "owned" as alleged</u>.

As with respect to OAR 340, Division 32, Division 33 contains no definition of "owned". OAR 340-033-0020 contains definitions used in the division, but does not include "own" or "owned". For the reasons previously discussed, neither Respondent nor Respondent's agent "owned" the structure as alleged. On and after May 1, 1998, and during the time alleged by the Department, the structure was owned by the Dials. Respondent is not liable for assessment of the proposed penalty and this proceeding should be dismissed.

DATED this 14th day of July, 2000.

Respectfully submitted,

Stark & Hammack



Richard A. Stark
OSB #69164
Of Attorneys for Respondent

STARK & HAMMACK
Attorneys At Law
201 West Main, Suite 1B • Medford, OR 97501
(541) 773-2213 • Fax (541) 773-2084

CERTIFICATE OF MAILING AND FACSIMILE

I hereby certify that on the 14TH day of July, 2000, I served the foregoing:

RESPONDENT'S MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS

Ms. Gretchen Miller
Hearings Officer
875 Union Street N.E.
Salem, OR 97311

by facsimile and by mailing an original thereof contained in sealed envelopes with postage fully prepaid thereon, addressed to the above individual at the address indicated, and deposited in the United States Mail at Medford.

DATED this 14th day of July, 2000.

STARK AND HAMMACK, P.C.

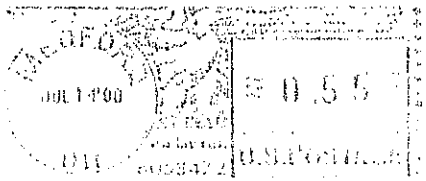
By: _____

Richard A. Stark, OSB #69162

Of Attorneys for Respondent

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

STARK AND HAMMACK PC
ATTORNEYS AT LAW
201 W MAIN ST STE 1B
MEDFORD OR 97501



MS GRETCHEN MILLER
HEARINGS OFFICER
875 UNION STREET NE
SALEM OR 97311

RECEIVED
JUL 17 2000
EMPLOYMENT HEARINGS

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of American Exchange Services, Inc., an Oregon Corporation, Respondent	No. AQ/A-WR-98-186 DEPARTMENT'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

INTRODUCTION

The Department of Environmental Quality (Department or DEQ) has issued a Notice of Assessment of Civil Penalty against American Exchange Services, Inc. (AES). The Department alleges that AES violated the agency's rules concerning the handling of asbestos-containing waste materials during a demolition project on real property and of buildings owned by AES.

The Department cited AES with two violations and assessed a penalty of $8,400 for one of the violations. AES filed an Answer containing a general denial and specifically denied that it was "the owner of the asbestos-containing waste material" referred to in the Notice.

The rules cited in the Department's Notice read as follows:[1]

> OAR 340-32-5600(4): "Open accumulation of friable asbestos-containing material or asbestos-containing waste material is prohibited."
>
> OAR 340-33-030(3): "Each contractor engaged in an asbestos abatement project must be licensed by the Department under [*current*]OAR 340-248-0120."

Although the Notice refers to asbestos-containing waste material "owned by" Respondent, note that nothing in the rule expressly requires ownership of that material as a prerequisite for liability.

///

///

Ex. 6

[1] The rules cited in the Notice were renumbered to OAR 340-248-0210(4) and 340-248-0110(3), respectively.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Even if ownership of the material is the issue, Mr. Ferguson's purported "sale" of the buildings containing the material was a sham. He wanted the building removed from the property, but he wanted to shield himself and AES from any liability if asbestos was disturbed during the demolition.

The transaction was simply a contract for services under which the salvage rights were consideration for demolishing the buildings. Despite AES's attempt to characterize the transaction as a "sale," the contract was simply an arrangement for disposal of asbestos-containing material. Therefore, AES is liable for violations of the asbestos rules.

FACTUAL BACKGROUND

On May 29, 1998, DEQ Air Quality Specialist Steven Croucher observed a building demolition project underway on property owned by AES.[2] *See* Affidavit of Steve Croucher and the attached document prepared by him and marked as State's Exhibit A. Mr. Croucher suspected that the building materials contained asbestos, and he realized that the demolition was being conducted in violation of state rules intended to prevent people from being exposed to asbestos fibers.

Mr. Croucher eventually contacted Mr. Ferguson and learned that he purportedly had "sold" the building to Barbara Dial for salvage. Neither she nor her husband, Lawrence, was licensed to perform asbestos abatement projects, nor were any of the workers they hired to do the demolition work.

After informing Mr. Ferguson of his concerns about asbestos, Mr. Ferguson retained BRW, environmental consultants, to do an asbestos survey. The survey and analysis revealed asbestos in various materials throughout the building. State's Exhibit B. Mr. Ferguson eventually hired an asbestos abatement contractor who eventually cleaned up the site.

///

[2] From its Motion to Dismiss and supporting documents, there is no dispute that AES held title to the real property underlying the demolition activities.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

DISCUSSION

1. The regulatory scheme for asbestos-containing materials compels a strict interpretation of the requirements and a skeptical view towards efforts to avoid compliance.

Asbestos is regulated by both federal and state laws. Although DEQ seeks to enforce state law, it is helpful to look to federal law for background, interpretation and policy. Section 112 of the federal Clean Air Act authorizes the Environmental Protection Agency (EPA) to establish health-based national emission standards for categories of hazardous air pollutants (NESHAP) to protect the public from these pollutants. 42 U.S.C. § 7412.

Asbestos is a listed hazardous air pollutant. *Id.* As provided by the federal Act, EPA's NESHAP for asbestos emissions does not set a numerical threshold for emissions. Instead, it requires persons involved in asbestos-related activities, such as demolition and renovation operations, to notify EPA and to follow certain procedures relating to the stripping and removal of asbestos materials, and to adopt specific work practices to prevent the release of asbestos fibers into the air. 40 CFR Part 61, Subpart M.

In 1987, the Oregon legislature enacted ORS 468A.700 to 468A.760, authorizing the EQC to adopt rules to "[e]stablish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training." ORS 468A.707(1). ORS 468A.705 declares that: (1) Asbestos fibers are respiratory hazards proven to cause lung cancer, mesothelioma and asbestosis and as such, are *a danger to public health...* (3) Asbestos-containing material found in or on facilities or used for other purposes within the state is *a potential health hazard...* (5) If *improperly performed, an asbestos abatement project creates unnecessary health and safety hazards that are detrimental to citizens and to the state in terms of health, family life, preservation of human resources*, wage loss, insurance, medical expenses and disability compensations payments. (6) It *is in the public interest to reduce*

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

exposure to asbestos caused by improperly performed asbestos abatement projects... (Emphasis added).

The licensing and certification rules adopted pursuant to this statute *formerly* were contained in OAR 340 Division 33. The work practices requirements and other provisions of the federal asbestos NESHAP, although not always identical, *formerly* were contained in OAR 340-32-5590 through 5650. Thus, *former* Division 33 provided the training, licensing, and certification standards for implementing *former* OAR 340-32-5590 through 5650. All of these rules currently are located in OAR 340 Division 248.

The legislative history of the 1977 amendments to the federal Clean Air Act makes clear that Congress intended that the Act and the asbestos NESHAPs provide strict liability for civil violations of their provisions. Congress explained its rationale for establishing a strict liability scheme in the legislative history accompanying the 1977 Amendments to the Clean Air Act.

> [W]here protection of the public health is the root purpose of a regulatory scheme (such as the Clean Air Act), persons who own or operate pollution sources in violation of such health regulations must be held strictly accountable. This rule of law was believed to be the only way to assure due care in the operation of any such source. Any other rule would make it in the owner or operator's interest not to have actual knowledge of the manner of operation of the source. Moreover, in the Committee's view, the public health is injured just as much by a violation due to negligence or inaction as it is by a violation due to intent to circumvent the law. Thus, the Committee believes that the remedial and deterrent purposes of the civil penalty would be better served by not limiting its application to 'knowing' violations. * * * ***[T]he Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will assure that violations will not occur.***

H.R. REP. NO. 94-1175, 94TH CONG., 2D SESS. at 52, 53-54 (1976), *quoted in U.S. v. J & D Enterprises of Duluth*, 955 F. Supp. 1153, 1158 (D. Minn. 1997) (emphasis added). *See also U.S. v. Sealtite Corp.*, 739 F. Supp. 464 (31 ERC 1730, 1732) (E.D. Ark. 1990), *Beerman v. Alloyd Asbestos Abatement*, 635 N.E. 2d 1218 (Ohio App. 2 Dist. 1995) and cases cited therein. Likewise, Oregon law contains a strict liability standard.

///

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Federal courts have strictly construed EPA's requirements with respect to affirmative defenses asserting lack of ownership of the buildings being demolished. In *United States v. Geppert Bros., Inc.*, 638 F. Supp. 996 (E.D. Pa. 1986), defendant Amstar Corp. owned real property containing buildings that it wanted demolished. Amstar entered into a contract with defendant Geppert Bros. for the latter to do the demolition work. EPA brought a civil action against both Amstar and Geppert for violating the regulations controlling the release of asbestos. Amstar asserted several affirmative defenses, including that it did not "own" the buildings being demolished because of its demolition contract with Geppert.

The court rejected these defenses, explaining that doing so "furthers the purposes of the Clean Air Act by insuring that owners of property act responsibly in disposing of their buildings. The regulations prevent the owner of a building from avoiding liability for hazardous substances present in a building by merely contracting with another party do demolish the building." 638 F. Supp. at 1000.

The court pointed out that "the purpose of the asbestos regulations in question is to insure that buildings containing asbestos are demolished in such a way as to minimize the release of asbestos dust into the air. * * * It would defeat the purposes of the regulations to allow Amstar to avoid its obligations under the regulations merely because it gave Geppert rights to the salvageable material from the buildings." *Id.*

Although *Geppert* is a federal court case, the same argument applies in the instant case. Mr. Ferguson, on behalf of the property owner, attempted to avoid liability for himself and AES by purportedly "selling" the buildings. Although in *Geppert* Amstar did not actually sell the buildings but only contracted for their demolition, Mr. Ferguson's scheme was to effect the same result. This too would defeat the purposes of Oregon's regulations.

///

///

///

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

2. Mr. Ferguson knew, or should have known, that the building he wanted demolished had asbestos-containing materials.

AES's Memorandum in Support of its Motion to Dismiss states on page 3 that prior to the acts of the Dials, neither AES nor Mr. Ferguson knew that the property included asbestos-containing materials. Once such materials were confirmed, Ferguson "accomplished their removal by promptly contracting with an asbestos-removal firm which observed all environmental safeguards." This suggests an innocence that simply does not ring true for at least two reasons.

First, Mr. Ferguson is not ignorant about the Department's asbestos rules. In December 1996, DEQ issued a Notice of Violation and Assessment of Civil Penalty against him for failing to follow several of the requirements for asbestos abatement projects. Mr. Ferguson requested and was given a contested case hearing on that Notice. Mr. Ferguson argued then, as he does now, that he was not aware there were asbestos-containing materials in the building when he started the renovation, and that once he knew there was asbestos-containing material, he complied with all statutes and rules regarding the removal of such materials. *See* State's Exhibit C at 3. The final order from that proceeding notes that "[r]espondent is an experienced property owner and manager who has been involved in the acquisition, renovation and maintenance of commercial properties. He has been involved in situations involving potential asbestos-containing materials * * *."

Second, the Jackson County Planning and Development Services office, as part of its routine procedures, requires agency comment on certain proposals it receives. In response to an application by Mr. Ferguson to remove an existing structure and rebuild a larger building, Tom Schauer, Planner II, distributed a form for agency comments to Keith R. Tong on behalf of DEQ. Mr. Tong submitted comments on a form dated April 17, 1998. *See* State's Exhibit D. This was in anticipation of a "Pre-application Conference" scheduled for that same day. Mr. Tong specifically warned that asbestos may be present in the existing structures, and he

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

recommended that an asbestos survey be done and an asbestos consultant design control or removal. He also said that they the proposal may need an asbestos notification.[3]

According to Jackson County Planning department staff, Mr. Schauer no longer works there. Although staff cannot swear that Mr. Schauer gave Mr. Ferguson a copy of DEQ's comments or otherwise informed him of DEQ's concerns, the purpose of the Pre-application Conference is for the staff to confer with the applicant about any concerns that may arise. The report prepared for Mr. Ferguson's application specifically directs the reader to "See agency comments." *See* State's Exhibit E, letter from Mr. Hernandez and attached Pre-application Conference summary.

Although DEQ's rules do not require an owner to conduct an asbestos survey before beginning a demolition or renovation project, the owner or operator acts at his own peril if he fails to do so because he is strictly liable for violations of the asbestos rules. *See* State's Exhibit C at 7-8. Thus, we do not argue that Mr. Ferguson violated the rules by failing to conduct an asbestos survey, but that his assertion that he did not know the facility had asbestos-containing material is incredible.

3. The purported sale of the buildings was a sham and was, in fact, a contract for services.

As stated above, the asbestos rules impose strict liability on violators. Therefore, whether Mr. Ferguson knew about the asbestos is irrelevant insofar as his liability is concerned. However, the issue is important for other reasons.

It is clear that Mr. Ferguson either knew from experience or had reason to know about the asbestos-containing materials. He simply chose not to find out for sure. Instead, he concocted a scheme whereby he hoped either to escape the expense of complying with the asbestos abatement requirements, or to escape liability for violating those requirements. Note that

---

[3] *Former* OAR 340-032-5630 (*current* 340-248-0260) requires that any person who conducts an asbestos abatement project must provide written notice to the Department and pay a fee.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Mr. Ferguson entered into his arrangement with the Dials less than two weeks after the Pre-application Conference discussed above. He must have known then about the possible asbestos-containing material.

We note that Mr. Ferguson is a member of the Oregon State Bar. OSB #61025(E). It is very likely that he is familiar with the case law discussed above and believed he could go one step beyond the facts in *Geppert* and actually sell the buildings. Although we can find no case law on point under the Clean Air Act, cases under other environmental have addressed this very issue.

The cases arise primarily in the context of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C.A. §§ 9601 to 9675.[4] However, the rationale underlying the CERCLA analysis - that the legislative intent to protect public health and safety not be frustrated by a narrow statutory interpretation that allows a party to "contract away" its responsibility[5] - applies equally to Oregon law.[6]

Indeed, in the seminal case of *CP Holdings v. Goldberg-Zoino & Associates*, 769 F. Supp. 432 (D.N.H. 1991), the federal district court found that the vendor of an asbestos-containing building was liable under the analogous New Hampshire state law by the same reasoning that rendered the vendor liable as a "disposer" under CERCLA.[7] In addition, the federal court in Wyoming, considering the question in the RCRA[8] context, noted that: "We rely

---

[4] However, two cases arise in the RCRA context. *ACME Printing Ink Co. v. Menard, Inc.*, 881 F. Supp. 1237 (E.D.Wis. 1995); and *U.S. v. Valentine*, 885 F. Supp. 1506 (D. Wyo. 1995). Further, the case most factually on point applies the CERCLA analysis in construing the relevant *state* law *CP Holdings v. Goldberg-Zoino & Associates*, 769 F. Supp. 432 (D.N.H. 1991).

[5] *See, e.g., CP Holdings v. Goldberg-Zoino & Associates*, 769 F. Supp. 432 at 435-436 (D.N.H. 1991); and *State of N.Y. v. General Elec. Co.*, 592 F. Supp. 291 at 297 (N.D.N.Y. 1984).

[6] *See, e.g.*, ORS 468A.705(1)-(6), "Findings."

[7] *CP Holdings v. Goldberg-Zoino & Associates*, 769 F. Supp. 432 at 440 (D.N.H. 1991).

[8] Resource Conservation and Recovery Act (RCRA), Solid Waste Disposal Act, as amended, 42 U.S.C.A. § 6901 *et seq.*

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

on authority discussing CERCLA in this context as it provides a useful analogue."[9] These cases demonstrate that AES is subject to CERCLA liability in addition to Oregon asbestos abatement law liability.

A. When a "Sale" is a "Disposal" - the General Parameters

First, it is clear that a transaction is not a "sale" simply because it is so characterized by one or all of the parties. The federal court in *State of N.Y. v. General Elec. Co.*, 592 F. Supp. 291, 297 (1984), observed that:

> (T)he legislative history of CERCLA makes clear that "persons cannot escape liability by 'contracting away' their responsibility or by alleging that the incident was caused by the act or omission of a third party." S.Rep. No. 96-848, 96th cong., 2d Sess. 31 (1980)... *(I)t is equally clear that a waste generator's liability ... is not to be so facilely circumvented by its characterization of its arrangements as "sales."*[10]

The true nature of the transaction will be determined instead by a case-specific consideration of facts that indicate the so-called seller's purpose. The federal court in *U.S. v. Petersen Sand and Gravel, Inc.*, 806 F. Supp. 1346, 1354 (N.D. Ill. 1992), provided a thoughtful overview of the analytical framework:

> A party's characterization of its hazardous substance transaction as a sale does not automatically preclude a finding that the party is a responsible person under [CERCLA] Section 9607(a). Selling hazardous substances as part of a complete, useful product does not generally make a party a responsible person... Neither does selling a useful ingredient in a manufacturing process... *However, a party is a responsible person when a transaction - even though characterized as a "sale" - is a sham for a disposal...* A party can likewise be a responsible person when a party engages a third-party to refine a product and the refining process produces hazardous runoff... (T)here is no bright line between a sale and a disposal under CERCLA. *A party's responsibility ... must by necessity turn on a fact-specific inquiry into the nature of the transaction...*There is some dispute as to whether subjective intent or knowledge is a relevant part of this inquiry... *Objective*

---

[9] *U.S. v. Valentine*, 885 F. Supp. 1506, 1514, f.3 (D. Wyo. 1995).

[10] *State of N.Y. v. General Elec. Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (emphasis added). In *N.Y. v. G.E.*, the defendant sold drums of oil containing hazardous waste to a dragway to be used as the dragway owner saw fit. Thus, this was a "sale" of a hazardous substance itself, and not a "sale" of a "facility" containing hazardous waste.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

> *indications of the purpose of the transaction are, however, certainly relevant - there is no other evidence of whether an act is an arrangement for disposal.*[11]

We quote this passage at length because it outlines the parameters of the "test" that has evolved from the position that a "sale" of a *facility* containing hazardous waste could be a "disposal" of such waste.[12] That rule was first announced in *Sanford Street Local Dev. v. Textron, Inc.*, 768 F. Supp. 1218 (W.D.Mich. 1991).

B. "Sale" of a Usable Facility May Be "Disposal" - *Sanford Street v. Textron*

In *Sanford Street*, defendant Textron sold a foundry, which had an appraised value of $200,000, to Delta Properties for $25,000. Included in the sale were transformers containing PCB's, a hazardous substance under CERCLA. Delta ultimately decided not to refurbish the foundry and, after the Michigan Department of Natural Resources determined that the transformers were not leaking, sold the building to Great Lakes Development Corporation for $1,000. Great Lakes subsequently sold the building to plaintiff Sanford for $30,000.

After the sale, Sanford discovered that the transformers were leaking and incurred clean-up costs. Sanford then sought reimbursement from Textron, arguing that Textron had "arranged for" the "disposal" of the transformers when it sold the building to Delta. Textron moved for summary judgement on the theory that the transformers were not "waste" because they were "usable products."

Rather than rely simply upon the fact that the transformers were "usable" and were not leaking at the time of the original "sale," the court held that:

> (T)his court must look beyond Textron's characterization of its decision to sell (the plant) to determine whether the transaction involves an arrangement for disposing of a hazardous substance.[13]

---

[11] *U.S. v. Petersen Sand and Gravel, Inc.*, 806 F. Supp. 1346, 1354 (N.D. Ill. 1992) (citations omitted) (emphasis added).

[12] The building obviously was a "facility." ORS 468A.700(7) defines the term "facility" as "all or any part of any public or private building, structure, installation, equipment, vehicle or vessel, including but not limited to ships."

[13] *Sanford Street Local Dev. v. Textron, Inc.*, 768 F. Supp. 1218, 1222 (W.D. Mich. 1991) (citation omitted).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

To this end, the court considered a number of factors, summarizing its findings as follows:

> Given the lack of a resale market ... and high cost associated with dispos(al) ..., Textron had reason to consider more expeditious and economical ways to rid itself of (the transformers). Moreover, Textron's negotiations with Delta suggest that it viewed the sale ... as a way to dispose of the transformers... *Delta ... assured Textron that it would take responsibility for the transformers if they were not used... The price of the building was heavily discounted to reflect that fact...* This evidence could lead a reasonable fact finder to conclude that Textron arranged for the disposal of the transformers by selling (the plant) to Delta.[14]

The court therefore denied Textron's motion for summary judgement.

The court in *Sanford Street* looked to the subjective intent of Textron - the seller's purpose - as evidenced by objective indications of that purpose, to determine the true nature of the transaction. Central to the court's decision was the fact that the buyer agreed to "take responsibility" for the hazardous substance-containing facility, and that the sale price reflected that promise.[15]

In the instant case, the "contract" clearly indicates that the Dials should take responsibility for removal of the asbestos-containing building, and the sale price not only "reflects" that promise, but is explicitly tied directly to the promise, being reduced to *zero* if the promise is carried out. Whatever the appraised value of the building,[16] it was almost certainly greater than zero.

Two other points are worth noting, here, regarding AES. First, the fact that the building may have been "usable" and asbestos may have been fully contained at the time of the transaction is not dispositive. The transformers were operational and the state agency had determined them not to be leaking PCB's when the sale took place in *Sanford Street*.

---

[14] *Id.* at 1222-1223 (citation omitted) (emphasis added).

[15] It is perhaps ironic that the existence of Delta's promise to "take responsibility" is what cast responsibility back upon Textron.

[16] We do not know the appraised value of the building.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Second, the court in *Sanford Street* reached back through two prior owners (Great Lakes and Delta) to find that Textron may have "disposed" of the material if it was Textron's *intent* or purpose to "rid itself" of the facility. Thus, AES cannot claim that it cannot have "disposed" of the asbestos because it did not own the building at the time of demolition. It was Mr. Ferguson's "purpose" in selling the building to rid himself and AES of the asbestos problem.[17] Therefore, the transaction was a "disposal." Mr. Ferguson's purpose is even clearer than was Textron's. The "sale agreement" explicitly provides that: "Removal of building (and) clean up to be accomplished within _5_ weeks from the date hereof."

C. The *CP Holdings* Line of Cases - Sale of Asbestos-Containing Buildings

i. *Stevens Creek* - A Prelude to Asbestos Abatement Liability

The case of *CP Holdings v. Goldberg-Zoino & Associates*, 769 F. Supp. 432 (D.N.H. 1991) is perhaps most closely on point and most instructive to the issues raised in the instant case. *CP Holdings* also appears to be the seminal case regarding "arranger" liability for sellers of asbestos-containing buildings. However, the discussion of asbestos abatement under CERCLA must begin, especially here in the 9th Circuit, with the case of *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355 (9th Cir. 1990).

In *Stevens Creek*, the purchaser of a commercial building sued the seller of the building to recover the costs of removing asbestos from the building. First Valley Corporation had constructed the building in 1963, using asbestos insulation. Barclays Bank subsequently

---

[17] As discussed below, the courts appear to comprehend four levels of "intent," the distinctions between which may not be obvious at first glance, and which the courts themselves may confuse at times. First, the seller may have the purpose of arranging for the buyer to dispose of the facility. Second, the seller may have knowledge that the buyer intends to dispose of the facility. Third, the seller may simply have the purpose of ridding itself of the facility, with no knowledge of the buyer's intention to dispose of the facility. Fourth, the seller may have the purpose of ridding itself of the disposal problem and no knowledge of the buyer's intentions, and the buyer may intend to use the product and not "dispose" of it. The lowest (fourth) level of intent is arguably the applicable standard, although there may be some disagreement or confusion in the case law. That is, the court will look to the case-specific facts to determine whether it was the seller's intent to rid itself of the "problem," regardless of the seller's knowledge of the buyer's plans, and perhaps regardless of the buyer's plans (although that will be a factor). Of course, the seller will be liable for "disposal" if either of the two higher levels is shown. In any event, liability may certainly be established under the first or second levels, and AES comes within one of these levels of intent.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

acquired First Valley's interests, including the building, in 1969. Barclays then sold the building to Stevens Creek in 1984. Stevens Creek remodeled the building, incurring costs for asbestos abatement, and sought reimbursement from Barclays. Barclays contended that First Valley had not "disposed" of the asbestos.[18]

The court held that the "placement [of asbestos] as part of the structure of a building"[19] does not constitute "disposal" of a hazardous substance, reasoning that "disposal" referred "only to an affirmative act of discarding a substance as waste, and not to the productive use of the substance."[20]

The *Stevens Creek* ruling may have been intended to preclude the attachment of liability to asbestos manufactures or installers who acted before the hazardous nature of asbestos was known.[21] In any event, the case merely holds that the party responsible for *installing* the asbestos (i.e., one who "puts that product to its constructive use"[22]) is not a "disposer" of the ACM. Thus, this case does not speak to the potential liability of a *seller* of an asbestos-containing facility, and the "productive / constructive use" language does not apply to a seller of a "useful product" that contains asbestos. As the court held in *Sanford Street v. Textron*, the seller of a hazardous material-containing facility may still be liable as a "disposer" even though the facility is a "usable product."

///

---

[18] The issue focused upon whether First Valley's original use of asbestos in construction was a "disposal," and not upon whether the sale by Barclays was a "disposal."

[19] *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355, 1361 (9th Cir. 1990).

[20] *Id.* at 1362.

[21] *See, e.g., CP Holdings v. Goldberg-Zoino & Associates*, 769 F. Supp. 432, 437-438 (D.N.H. 1991), where the court explained: "In *First Methodist Church (v. U.S. Gypsum*, 882 F.2d 862 (4th Cir. 1989)), the court spelled out its fear that to hold liable 'all persons who manufactured, transported and installed asbestos products into buildings would be to shift literally billions of dollars of removal cost liability.' ... (S)uch a transferal of costs would indeed be improvident." (Citation omitted).

[22] *3550 Stevens Creek*, 915 at 1362.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Stevens Creek is not, therefore, relevant to AES's liability in this case. We mention the case here because it is factually similar to the present case, and AES may be tempted to seize upon the "constructive use" language to argue that the "sale" was not a "disposal" because the building was a "useful product." Such reliance would be misplaced.

ii. *CP Holdings* - Sale of Asbestos-Containing Building with Knowledge of Buyer's Intent to Demolish is "Disposal."

As noted above, *CP Holdings* is the case that most clearly establishes AES's liability for "disposal" of ACM through its sale of the building to the Dials in an agreement that contemplated demolition of the building. In *CP Holdings*, the plaintiffs contracted to purchase the New Hampshire Highway Hotel from the sellers, the contract being executed on November 17, 1987. Sometime before plaintiffs took title, the defendant engineering firm conducted an environmental site assessment. Title was then conveyed on September 19, 1998.

As planned, plaintiffs began demolishing the building on November 15, 1998, but demolition was "enjoined by the State of New Hampshire following an on-site inspection disclosing asbestos and asbestos-containing materials."[23] Plaintiff then sued the sellers and the engineering firm, Goldberg-Zoino, seeking reimbursement for clean-up costs. Defendants moved to dismiss for failure to state a claim, arguing that the sale was not a "disposal" under the *3550 Stevens Creek* analysis.[24]

The court denied defendants' motion, finding that: "...this case can be distinguished in several significant ways from *Stevens Creek*."[25] Among these distinctions, the court noted that:

> The release or threatened release of asbestos into the environment was the result of the building's demolition - *an action fully contemplated by both parties within the Agreement*.[26]

---

[23] *CP Holdings*, 769 F. Supp. at 434.

[24] *Id.* at 436-437.

[25] *Id.* at 437.

[26] *Id.* (emphasis added).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

The court further distinguished *Stevens Creek* based upon the obvious difference between an attempt to hold the "installer" liable, as was rejected by the *Stevens Creek* court, and the allegation of "seller" liability. The *CP Holdings* court held:

> Defendant ... argues that it did not "dispose" of a hazardous substance, since CERCLA requires a more active role in "disposal" than the sale of ... a building containing asbestos products. Defendant again relies on *Stevens Creek*, which held that "the construction of a building using these materials [cannot] fit into 'the discharge, deposit, injection ... or placing into or on any land or water' specified in the definition." ... (T)his court recognizes a significant distinction between holding the manufacturer of asbestos products liable and holding a previous landowner who brought such products onto the property liable for CERCLA clean-up costs... In the present case, *it was not the placement of the asbestos products into the building that qualified as a "disposal," but rather the sale of the building with the knowledge that the building itself was to be disposed of.*[27]

We quote this passage at length because it addresses the identical defense asserted by AES. In *CP Holdings*, the fact that the sale agreement "fully contemplated" the building's demolition, such that the seller had "knowledge that the building ... was to be disposed of," was sufficient to find the seller of the building liable as a "disposer" of the asbestos-containing material within the building.

In the instant case, the "contract" stipulates that "Removal of building and clean up to be accomplished within _5_ weeks," and the "Bill of Sale" contemplates "salvage" of the building. This, together with the "refund" provision upon complete demolition and removal, clearly demonstrates that Mr. Ferguson sold the building knowing that the building was to be disposed of.

In addition, the *CP Holdings* court applied the same analysis to find liability under the state statute, holding:

> Liability under the New Hampshire statute is set out in RSA 147-B:10, which states ... that a person may be held liable if he "(b) owned or operated a facility at the time hazardous waste or hazardous materials were disposed there." ... As

---

[27] *Id.* at 437-438 (emphasis added).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

> with the CERCLA claim, this court must reject any definition which would effectively frustrate the Legislature's apparent intent.[28]

Regarding effectuation of the legislative goals underlying CERCLA, the court explained:

> CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore *obligated* to construe its provisions liberally to avoid frustration of the beneficial legislative purposes.[29]

Like CERCLA and the New Hampshire statute at issue in *CP Holdings*, ORS 468A.700 *et seq.* is designed to protect "public health" and the "public interest." The same "liberal construction" should therefore be applied to find AES liable as a "disposer" in order to "avoid frustration of the beneficial legislative purposes."

iii. Cases Following *CP Holdings* - "Sale" as "Disposal" Determined by Purpose of Seller, Regardless of Knowledge of Buyer's Intent to Demolish, and Regardless of Buyer's Intent

Cases following *CP Holdings*, some in the asbestos context and some not, continue to look beyond the characterization of the transaction as a "sale" in order to determine the true nature of the deal.[30] In so doing, the courts will find a "disposal" if it was the purpose of the *seller* to rid itself of the "disposal problem." Such "purpose" is discerned from a fact-specific inquiry into objective indications of the seller's subjective intent. Thus, the analysis has evolved

---

[28] *Id.* at 440.

[29] *Id.* at 436, *quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (emphasis added).

[30] The Fourth Circuit recently articulated a non-exclusive list of factors to be considered in determining the true nature of the deal, stating that: "In determining whether a transaction was for the discard of hazardous substances or for the sale of valuable materials, courts focus on several factors: *the intent of the parties to the contract as to whether the materials were to be reused entirely or reclaimed and then reused*, the value of the materials sold, the usefulness of the materials in the condition in which they were sold, and the state of the product at the time of transferal (was the hazardous material contained or leaking / loose)... However, 'there is *no bright line* between a sale and a disposal ... A Party's responsibility ... must by necessity *turn on a fact-specific inquiry* into the nature of the transaction.'" *Pneumo Abex v. High Point Thomasville &Denton*, 142 F.3d 769, 775 (4th Cir. 1998) (emphasis added) (citations omitted), *holding* that transactions between railroads and a foundry were not for the disposal of bearings that occurred in the remolding process, but rather involved a valuable product for which the foundry paid a competitive price.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

in a subtle way beyond the *CP Holdings* framework. That is, *CP Holdings* looked to the seller's knowledge of the *buyer*'s intent to demolish the facility. But subsequent cases hold sellers liable based upon the *seller's* motivation, even if the seller did not know that the buyer intended to scrap the usable product being sold, and even where the buyer did not actually intend to dispose of the facility.

a.) U.S. v. Summit Equipment & Supplies, Inc.

First, in *U.S. v. Summit Equipment & Supplies, Inc.*, 805 F. Supp. 1422 (N.D.Ohio 1992), the court held that the sale of used, surplus equipment at a blind auction was a "disposal" despite the fact that the sellers did not know that the buyers intended to "scrap" the equipment. There, the defendants argued that "the sale of valuable, useable equipment can never be an arrangement for disposal as a matter of law."[31] Like the court in *Sanford Street v. Textron*, the court rejected this argument. The court then stated: "The crucial inquiry, therefore, is the reasons for the transaction."[32]

The court explained the rule as follows:

> If a company sells equipment that contains hazardous substances ... "for a purpose other than its disposal," it will not be liable for the costs that result from the purchaser's subsequent decision to dispose of the product... On the other hand, if a company sells equipment that contains hazardous substances in order to dispose of the product, he will be liable ... *even if the equipment is valuable and usable at the time of the sale*. Common sense dictates that if a company no longer needs a product and cannot find other companies to use it either, its only recourse is to dispose of the product and *at least recover its scrap value*.[33]

The court continued:

> In ascertaining the purpose of a particular transaction, the "courts have not hesitated to look beyond defendants' characterizations" and examine the other

---

[31] *U.S. v. Summit Equipment & Supplies, Inc.*, 805 F. Supp. 1422, 1431 (N.D. Ohio 1992).

[32] *Id.*

[33] *Id.* at 1432 (emphasis added).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

> objective factors surrounding the sale in question... *It is clear that if the defendants had known that (the buyers) intended to scrap their equipment ... they would be liable under CERCLA... Consequently, they cannot avoid this liability simply by keeping blinders on during the transaction.*[34]

Because the defendants sold the equipment to "scrap dealers" for "scrap value," the court determined that the sale had been a "disposal," granting the government's motion for summary judgement.

The significance of this holding is that it adds a wrinkle to the *CP Holdings* rule. That is, under *Summit Equipment*, the seller need not even be aware of the buyer's intention to dispose of the facility. Indeed, *Summit Equipment* has been cited for the proposition that:

> (S)ellers of used, surplus equipment ... were liable as generators of hazardous substances, *even if they did not know that the purchaser intended to scrap the equipment rather than using it.*[35]

In the instant case, Ferguson "knew" that the Dials intended to scrap the building (that was, in fact, the essence of the deal). Under *Summit Equipment*, however, AES cannot escape liability even if they did not know the Dials' intentions; that is, even if Ferguson had "kept blinders on." The determining factor for the *Summit Equipment* court in determining the *seller's* reasons for the transaction ("the crucial inquiry") was the "scrap value" sale price. As discussed *supra* regarding *Sanford Street v. Textron*, the "contract" with the Dials appears to contemplate a "scrap value" sale price.

b.) U.S. v. Valentine

Summit Equipment was followed by *U.S. v. Valentine*, 885 F. Supp. 1506 (D.Wyo. 1995), which involved RCRA liability arising from the sale of waste-oil. Following the same analysis,[36] the court found:

---

[34] *Id.* (emphasis added).

[35] *U.S. v. Valentine*, 885 F. Supp. 1506, 1514 (D. Wyo. 1995) (emphasis added). This language is identical to Headnote 9 of *Summit Equipment*, 805 F. Supp. at 1423.

[36] The court observed: "Central to the [defendant's] thesis ... is the notion that the materials it sold ... are not discarded ... simply because they ... continue to be useful products... This argument is not persuasive and has been

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

> In this case, it is clear that JWS *intended to rid itself of a disposal problem* when it sold pit skimmings to PRCP, who apparently *intended to use the pit skimmings* in a further reclamation process. JWS recovered the cost of skimming the oil from its own disposal pits when it sold the wastes to PRCP... This is a case where *common sense* dictates that the company's best recourse was to dispose of the pit skimmings that had no further value to JWS and *attempt to recover at least the cost of skimming*.[37]

Thus, *U.S. v. Valentine* explicitly recognizes that not only may the seller be liable where it is unaware of the buyer's intent to "scrap" the product, *but also where the buyer in fact uses the product*. The determination turns upon the seller's intent to "rid itself of a disposal problem." In the instant case, "common sense" dictates that Mr. Ferguson "sold" the building to "rid [him]self" and AES of the asbestos disposal problem, and attempted to recover at least the cost of demolition.

c.) Plaskon Electronic Materials v. Allied-Signal

Next, a federal District Court in Ohio, applying the *CP Holdings* analysis to an asbestos-containing building sale situation, found that *no* disposal had occurred. In so doing, the court correctly applies *CP Holdings*, but either retreats from *Summit Equipment, et al.*, or fails to comprehend the distinction. In *Plaskon Electronic Materials v. Allied-Signal*, 904 F. Supp. 644 (N.D. Ohio 1995), the court held that:

> (Plaintiff), in seeking to recover for the asbestos removal costs, relies on *CP Holdings*... However, (*CP Holdings*) ... is factually distinguishable from the instant case. *There is no allegation here that the buildings at issue ... were sold for anything other than continued operation of the Site.*[38]

Thus, the court implies that the seller *would* have been liable if the buildings had been sold for anything other than continued operation (i.e., demolition, salvage, etc.). Unlike *Summit*

---

rejected by other courts that have considered the same argument." *U.S. v. Valentine*, 885 F. Supp. 1506, 1513 (D. Wyo. 1995) (citations omitted).

[37] *U.S. v. Valentine*, 885 F. Supp. 1506, 1514 (D. Wyo. 1995) (emphasis added).

[38] *Plaskon Electronic Materials v. Allied-Signal*, 904 F. Supp. 644, 664 (N.D. Ohio 1995) (emphasis added).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Equipment and *U.S. v. Valentine*, however, *Plaskon Electronic* seems to look to the *buyer's* intent, rather than that of the *seller*, to determine whether the sale was a "disposal." That is, under *Summit* and *Valentine*, it makes no difference whether the *buyer* intends to operate or demolish the building, or whether the seller has any such knowledge. However, the *Plaskon Electronic* ruling is consistent with *CP Holdings*, and the court may simply have failed to understand the subtle elaboration of the later cases.

d.) G.J. Leasing Co., Inc. v. Union Elec. Co.

The 7th Circuit also considered the CERCLA liability of a vendor of an asbestos-containing building in *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379 (7th Cir. 1995). In that case, the federal District court first denied the defendant's motion for summary judgement, finding that a genuine issue of material fact existed regarding "...whether this site was sold simply as a real estate transaction or for the purpose of demolition."[39] However, the same court ultimately found, after a full trial, that: "Here ... there is no evidence that the sale of the power plant property was a 'sham.'"[40] In so doing, the court explained the test and it's reasoning:

> Where the *seller* is not primarily motivated to "dispose" of hazardous substances, courts have declined to impose liability... (T)he stated reason for the sale, the purchase price and the condition of the property are relevant in determining a *seller's motive*... Here ... (t)he purchase price was established through competitive bidding. The entire property had value including the equipment which was capable of reuse... (T)he purchase price was fair and ... specifically contemplated the cost of asbestos removal. *(The buyer) testified that he never intended to demolish or tear down the power plant building...*[41]

Thus, the test applied by the federal district court clearly looks to the *seller's* intent, with the buyer's intent being only one of several factors.

---

[39] *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 825 F. Supp. 1363, 1376 (S.D. Ill. 1993).

[40] *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 854 F. Supp. 539, 560 (S.D. Ill. 1994).

[41] *Id.* (citations omitted) (emphasis added).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Although the court in *G.J. Leasing* found that the seller did not intend to "dispose" of the building, applying the same test to the instant case produces a different result. Here, the stated reason for the sale, or at least a condition of the sale (and certainly a condition of the "refund"), is the "removal" of the building. The "purchase price" is *precisely* the "salvage or scrap value" of the building, being the work of "salvaging" the building. Finally, the "buyers" (the Dials) had little or no incentive to enter into the deal if they did not intend to demolish the building, and they had every motivation (the "refund") to demolish the building. The *G.J. Leasing* factors, when applied to the instant case, lead to a conclusion that the sale of the building was indeed a "sham" for the purpose of demolition, and was not "simply a real estate transaction."

The 7th Circuit affirmed the District Court's decision, noting that:

> We may assume that had a primary purpose and likely effect of the sale ... been to bring about the removal of asbestos in circumstances that would make the release of fibers into the environment outside the plant inevitable or at least highly likely, Union Electric could be found, through that sale, to have disposed of ... a hazardous substance.[42]

While this articulation of the test seems to raise the bar somewhat, it recognizes that the focal point of the inquiry is the motivation of the seller.[43] Further, as authority for this proposition, the court cites the 9th Circuit case of *Cadillac Fairview/California, Inc. v. U.S.*, 41 F.3d 562 (9th Cir. 1994).

///

///

---

[42] *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379, 385 (7th Cir. 1995).

[43] The 7th Circuit went on to say that the evidence showed that the asbestos release had been due to the "ham handed" methods used by the *buyer's* employees. The court thus observed: "It seems to us very odd ... to attribute the negligent, unforeseeable conduct of the buyer's agents to the seller. It amounts to saying that if X sells a box to Y with strict instructions not to open it, and Y does open it with resulting damage . . . , X shall be deemed to have opened it." *G.J. Leasing*, 54 F.3d at 385. AES may argue, on a similar basis, that it cannot be held liable for the incompetence of the Dials, particularly in light of the "clean and workmanlike removal" language contained in the "contract." This argument fails, however, because unlike the *G.J. Leasing* scenario, Mr. Ferguson contracted *directly* with the Dials for "removal" of the building, the fact that the Dials would remove the building was certainly "foreseeable," and the Dials' lack of certification was similarly "foreseeable."

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

e.) Cadillac *Fairview/California, Inc. v. U.S.*

In *Cadillac Fairview*, the owner of property formerly owned by the United States sued the government, a styrene producer (Dow), and rubber companies (Goodyear, et al.) for reimbursement of the CERCLA clean-up costs of removing styrene (a hazardous substance used in rubber production) from the land. Dow, which had deposited the styrene on the land, had purchased materials used to produce styrene (i.e., contaminated styrene) from the rubber companies, and the rubber companies paid Dow for "finished," or clean, styrene. Dow sought contribution from the rubber companies for the clean-up costs.

The rubber companies sought "to avoid arranger liability ... by relying upon cases holding that a sale of a hazardous substance in the form of a useful product is not an arrangement for disposal..."[44] The Ninth Circuit rejected this argument, pointing out that:

> As these authorities recognize, however, a transaction is not beyond the reach of [CERCLA] simply because it is cast in the form of a sale. The question remains whether in light of all the circumstances the transaction involved an arrangement for disposal or treatment of a hazardous substance.[45]

Considering these circumstances, the court concluded:

> Although Dow paid the rubber companies seven cents for each pound of contaminated styrene they sent to Dow, it charged them nine cents for each pound of uncontaminated styrene it returned. A trier of fact could find the *substance of the transactions* to have been that the rubber companies paid Dow two cents per pound to remove the contaminants from the used styrene and return the fresh styrene to them - that they simply arranged and paid for treatment of the contaminated styrene by Dow.[46]

This analysis applies directly to the "transactions" between Mr. Ferguson and the Dials, and it is extremely helpful in deciphering the true "substance of the transactions" from the "contract,"

---

[44] *Cadillac Fairview/California, Inc. v. U.S.*, 41 F.3d 562, 566 (9th Cir. 1994) (citations omitted).

[45] *Id.* (citation omitted).

[46] *Id.* (emphasis added).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

"Bill of Sale," refund condition, et cetera.[47] That is, (lifting the language directly from the case and plugging in the names of the parties), although the Dials may have paid Mr. Ferguson $1,000 for the building, the Dials essentially "charged" AES $1,000 plus the "salvaged material" for the disposal of the building. The substance of the transactions were that Mr. Ferguson paid the Dials the "salvaged material" to dispose of the asbestos-containing building and return the "clean" property to AES - that Mr. Ferguson simply arranged and paid for disposal of the asbestos-containing building by the Dials.

D. Legislative History of the Oregon Asbestos Abatement Law, ORS 468A.700 *et seq.*

The legislative history of Oregon's Asbestos Abatement Law, ORS 468A.700 to 468A.760, offers little guidance for determining when a "sale" of an asbestos-containing building is a "disposal" of the material. Indeed, the legislature does not appear to have directly considered the question. Nevertheless, the goals of the statute, as set out in ORS 468A.705, are clearly aimed at protecting the public health, safety, and welfare.

Therefore, as the court in *CP Holdings* observed regarding the analogous New Hampshire state law, the Oregon statute should be liberally construed to effectuate without frustration the legislative intent. Beyond this general proposition, some insight may be offered by the evolution of the definition of "contractor," as set forth at ORS 468A.700(6).

The Asbestos Abatement Law was introduced in 1987 as House Bill 2367. As introduced, H.B. 2367 defined "Contractor" as follows:

> (6) "Contractor" means a person that undertakes an asbestos abatement project for another person.[48]

///

---

[47] The 9th Circuit's "substance of the transactions" analysis is also extremely useful in cutting though the tortured "contract theory" problems addressed *infra* in topic no. 4.

[48] 1987 H.B. 2367, § 2.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

However, the minutes from the April 1, 1987 House Committee on Environment and Energy work session on H.B. 2367 contain the following exchange:

> REP. BARILLA asked if compensation meant monetary compensation. REP. PETERSON said it was assumed it was monetary. REP. BARILLA said he would prefer statutory reference.[49]

The House Committee on Environment and Energy subsequently referred H.B. 2367 to the Ways and Means Committee with recommendation to pass with amendments.[50] Among the proposed amendments was the following definition of "contractor":

> (6) "Contractor" means a person that undertakes for compensation an asbestos abatement project for another person. *As used in this subsection, "compensation" means wages, salaries, commissions and any other form of remuneration paid to a person for personal service.*[51]

This is the definition currently found at ORS 468A.700(6).

Although the legislative history does not appear to clarify the reason for the expansion of the definition of "compensation" within the "contractor" definition, the apparent intent was to enlarge the definition of "contractor" to include *anyone* who performs asbestos abatement at the behest of another. The "salvage" rights contemplated by the contract with the Dials come within the definition of "any ... form of remuneration paid to a person for personal service." Thus, ORS 468A.714 applies to the Dials as "contractors" and to AES as "an owner or operator of a facility." That statute mandates that:

> ...an owner or operator of a facility containing asbestos shall require only licensed contractors to perform asbestos abatement projects.[52]

---

[49] *Work Session on H.B. 2367 Before the House Committee on Environment and Energy*, (April 1, 1987), Minutes from Tape 80, Side A, Counter No. 033 (Statements of Rep. Nancy Peterson and Rep. Rocky Barilla).

[50] House Committee Report, Committee on Environment and Energy, April 10, 1987.

[51] House Committee on Environment and Energy, Proposed Amendments to House Bill 2367, Section 2, April 9, 1987 (emphasis added).

[52] ORS 468A.715(1).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

The legislative intent of the statute to protect the public health, safety and welfare should not be so "facilely circumvented" by AES's characterization of what was, in truth, the Dials' "compensation for an asbestos abatement project for another person" as a "sale" of the building's "salvage material." This is particularly true in light of the legislative amendment of the term "contractor" to include those whose "remuneration" includes not only money, but also "any other form of remuneration." Indeed, the Dials may be precisely the types of "contractors" that the legislature sought to include with the broader net cast by the amended definition.

The "salvage rights" are "compensation," so the Dials are "contractors" and AES is an "owner or operator of a facility." The Dials were not licensed. Therefore, AES violated ORS 468A.715(1) and the rules implementing that statute.[53]

4. The "contract" for the sale of the buildings contains technical flaws.

The so-called contract is a one-page, handwritten and barely legible document, signed at the top by William Ferguson, Barbara Dial, and Lawrence Dial. A handwritten "Bill of Sale" also exists, signed at the bottom by "William Ferguson agent for owner ASE (sic)," which does not appear to be dated. The "Bill of Sale" is written on a piece of paper with the letterhead: "Northwest Wholesale, Incorporated." It is unclear what connection, if any, "Northwest Wholesale" has to AES.

The two documents contain a number of technical deficiencies, including misspellings of the names of the parties at various points. For example, the "Bill of Sale," being on "Northwest Wholesale, Inc." letterhead and signed "for owner ASE" contains no reference to the "seller," "AES." Also, the "Bill of Sale" contains no sale price. Further, the "Bill of Sale" indicates that AES is the "owner" at the point of delivery, and the "contract" states that: "A Bill of Sale *to be delivered upon full payment* of the $1,000 purchase price." (Emphasis added).

[53] This memo does not attempt to identify all possible violations of the statutes and rules because the Department did not pursue all violations.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

Although it is unclear whether the full "purchase price" was ever paid, it appears that the $1,000 was not tendered before demolition of the building began. Therefore, the "Bill of Sale" contains an admission that AES "owned" the building when the demolition was carried out. It also is unclear whether the Dials had any means of paying $1,000 in 11 days.

It also is worth noting that the "consideration" contemplated by the "contract" is specious. That is, the "consideration" paid for the building is the $1,000 (or the promise to pay and the $250 down payment). However, the consideration is entirely refunded upon "removal" of the building. There seem to be a number of ways of looking at this.

First, the $1,000 may be viewed as adequate consideration for the building, and that is the end of that contract. In that case, AES's offer to "pay" (or "refund") $1,000 is "consideration" for a separate "contract" to remove the building. Thus, under this theory, while AES would not be the "owner" of the building, AES (as owner of the land) would still be "employing" an unlicensed contractor for asbestos abatement. However, it seems unlikely that there are two separate contracts within the single document. *See, e.g., Cadillac Fairview/California, Inc. v. U.S.*, 41 F.3d 562, 566 (9th Cir. 1994) (discerning the "substance of the transactions"), discussed *infra*.

Second, the $1,000 "consideration" may be seen as "conditional." But payment in that case would be conditioned upon the Dials' *not* removing the building, which is contrary to the express terms of the "contract," *i.e.*, that removal "(is) to be accomplished..." This interpretation appears to be contrary to the plain intention of the parties.

Third, and the most reasonable, what was "sold" was not the "building" for $1,000, but rather the "salvage rights" (or "salvaged material"). The "consideration" was the Dial's agreement to demolish the building, and the $1,000 was simply "collateral." In this case, the contract clearly contemplates "demolition" or "salvage," and AES has arranged for "disposal" of asbestos-containing material under the applicable case law, despite their attempt to characterize the transaction as a "sale."

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

CONCLUSION

The sale of a building containing asbestos is a "disposal" of the ACM if it is the seller's purpose to rid itself of the disposal problem. The parties' characterization of the transaction as a "sale" is not determinative. Rather, the court will look beyond such characterization to determine the true "substance of the transaction."

While no "bright line" exists between a "sale" transaction and a "disposal," the seller's intent may be determined by a fact-specific inquiry into the objective indications of that intent. Chief among these appear to be whether the building was sold for its "appraised value" or its "scrap value," whether the buyer intended to demolish the building, whether the seller knew of this intent (although the buyer's motivation and/or seller's knowledge thereof are not necessary to a "disposal" finding), and simple "common sense." While this framework derives primarily from the CERCLA context, the analysis should apply equally to the Oregon statute, as the courts are "obligated" to liberally construe the law in order not to frustrate the legislative intent to protect the public health, safety, and welfare.

Applying this analysis to the AES case, the sale was a "disposal," and AES is in violation of ORS chapter 468A as an "owner or operator of a facility containing asbestos," despite AES's characterization of the transaction as a "sale." The "contract" and "Bill of Sale" clearly contemplated the demolition of the building by the Dials, and the building was explicitly sold for its value as "salvage."

As the Ninth Circuit demonstrated in *Cadillac Fairview/California, Inc. v. U.S.*, the court will not dissect a transaction agreement into distinct compartments. Rather the "substance of the transaction" will be considered as a whole. In the AES case, AES paid the Dials the "salvage" rights to the building in return for the Dials' services in demolishing the building.[54]

---

[54] For further commentary and analyses, *see* Christopher J. Grant, *Sale or Disposal: The Extension of CERCLA Liability to Vendors of Hazardous Materials*, 23 Loyola Univ. L.J. 355 (1992); Catherine M. Madore and Janie Breggin, *Environmental Liability Associated With Real Estate Transfers*, 22 Colorado Lawyer 67 (Jan., 1993); William B. Johnson, *Arranger Liability of Sellers Pursuant to §107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS §9607(a)(3)*, 125 ALR Fed 315, § 21 (Sale of

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

For these reasons, the hearing officer should deny AES's Motion to Dismiss, find AES violated the rules cited in the Notice of Assessment of Civil Penalty, and uphold the Department's assessed civil penalty.

DATED this 31 day of July 2000.

Respectfully submitted,

HARDY MYERS
Attorney General

Shelley K. McIntyre, #84401
Assistant Attorney General
Of Attorneys for
Department of Environmental Quality

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

In the Matter of American Exchange Services, Inc., an Oregon Corporation, Respondent	Case No. AQ/A-WR-98-186 Affidavit of Steven Croucher

I, Steven Croucher, do swear as follows:

I am employed by the Oregon Department of Environmental Quality as an Air Quality Specialist. It was in this capacity that I inspected a building demolition project at 4044 Crater Lake Avenue, Medford, Oregon on or about May 29, 1998.

As part of my job duties, I prepared a document summarizing my inspection and conversations I had with Mr. Ferguson and other people involved in the demolition project. Attached is a copy of that document. It is a true an accurate reporting of my actions and the conversations I had during that time.

Steven M Croucher

Steven Croucher

STATE OF OREGON

Jackson County

This instrument was acknowledged before me on July 27, 2000.

OFFICIAL SEAL
MARI-LYNN BELSKY
NOTARY PUBLIC-OREGON
COMMISSION NO. 332221
MY COMMISSION EXPIRES MAR. 28, 2004

Mari-Lynn Belsky

Notary Public for Oregon

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(503) 229-5725

AMERICAN EXCHANGE INC.
Bill Ferguson
4044 Crater Lake Ave.
Medford Oregon.

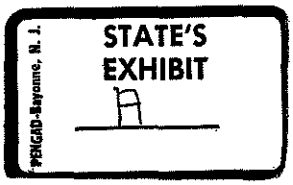
On the morning of May 29,1998 I observed a building demolition project at 4044 Crater lake Avenue, Medford, Oregon. The building was being disassembled by hand and some of the materials I observed were suspect for asbestos. I returned to the site at approximately 10:30 AM and spoke with the workers at the site. The workers confirmed the project, however they spoke poor English so I left a business card and asked them to have the owner call me. At 3:00PM, having not been contacted by the owner, I returned to the site and took samples of some of the suspect materials.

I never received a phone call so when I returned to the office from sampling I contacted the County Assessors office and got the name American Exchange Incorporated as the owner. Using a reverse directory I found Bill Ferguson shown at the same address as American exchange incorporated. I contacted Mr. Ferguson at 4:38 PM on May 29, and he told me that he owned the land that he but had sold the building. Mr. Ferguson said that Barbara Dial had purchased the building from him for salvage and that I needed to contact her about the site. I asked Mr. Ferguson if an asbestos survey had been performed he said that his worker had taken samples of materials to BWR Associates Incorporated for asbestos testing and the results were negative. On June 1, 1998, I contacted BWR and confirmed that samples had been taken in for analysis. The samples analyzed were negative for asbestos however, only three samples were analyzed which is well below the number required.

On June 1, at 1:00 PM, I met with Bill Ferguson, Barbara Dial, and Dave Fawcett from BWR Associates at the building site, to review the asbestos concerns. At the site, it appeared that Mr. Ferguson was accepting responsibility for the asbestos and he hired Dave Fawcett to perform a complete asbestos survey that included the collection of an additional 36 samples. I requested that the results be released to me as soon as they were available and everyone agreed. The next day when I contacted Mr. Fawcett for a copy of the results he said that Mr. Ferguson had changed his mind. The new plan was for Mr. Ferguson and Mr. Fawcett to meet at the site on Wednesday, June 3, to review the results of the asbestos testing performed by Mr. Fawcett, then DEQ would be given a copy of the asbestos test results.

Barbara Dial called me late in the afternoon on June 2, and told me that she had just spoken with Mr. Ferguson. According to Ms. Dial, Mr. Ferguson had called and told her that she was responsible for the asbestos cleanup. He then listed a number of new materials that BWR sampled, that were positive for asbestos. She went on to tell me that during her original conversations with Mr. Ferguson he told her that the site had been checked and that there was no asbestos.

Mr. Ferguson called me on June 3, and asked for meeting that would include Mr. Fawcett. I agreed and the three of us met at BWR Associates at 8:30AM the next day. At that meeting Mr. Ferguson once again accepted responsibility for the asbestos and a



plan for site cleanup was agreed upon. Mr. Ferguson was to hire an asbestos abatement contractor to clean the site. It was also agreed that the site would be secured, as the start of the final cleanup was going to be delayed two weeks because of Mr. Ferguson's schedule. The site is fenced and could offer reasonable security.

Over the next two months, a number of problems and questions arose, each seemed to delay the cleanup process. I am not sure that any single delay could be questioned, however, the number of delays at this type of site indicates to me a lack of serious concern for the hazards of asbestos by Mr. Ferguson.

At this point, August 11, 1998, the asbestos is being cleaned up by Western States Environmental who was contracted by Mr. Ferguson. I anticipate the job will be completed within the week which will bring the site into compliance.

Note: In the photo log there is picture ~~of a~~ heating unit with a material labeled asbestoseal. The labeling was in plain view and I question how that was over looked while the building was represented as containing no asbestos. Also, enclosed in the packet are forms for a Pre-application Conference. On the second page are some hand written notes from Keith Tong that specifically address asbestos at that site. The dates indicate that Mr. Ferguson had advance information regarding DEQ requirements as Keith listed the possible need for an asbestos survey, asbestos consultant design control, and an asbestos notification.

environmental consultants

ASBESTOS SURVEY
OF
Truck Tops Plus Demolition Site
4044 Crater Lake Avenue

INTRODUCTION

BWR Associates, Inc. (BWR) was retained by Bill Ferguson to perform an asbestos survey of the Truck Tops Plus building. The purpose of the survey was to provide Stiles Construction with the type and quantity of asbestos containing materials located in the area of building demolition.

ASBESTOS SURVEY

The partially demolished building was surveyed by David W. Fawcett of BWR, on June 1, 1998. Samples of potential asbestos containing materials were collected from interior and exterior areas of the building and associated debris piles. No attempt was made to sift through the piles. See the Site Sample Record Sheets for locations of all samples collected, and approximate amounts of materials. A sample tag was placed at each collection location.

ASBESTOS ANALYSIS

All samples collected were analyzed for asbestos using Polarized Light Microscopy techniques. Asbestos analysis results are found in Bulk Sample Analysis for Asbestos.

ASBESTOS MATERIALS

Asbestos was found in materials at the following locations:

1. Taping compound in the northeast bathroom and kitchen wall
2. Yellow floor vinyl in the kitchen
3. Brown floor vinyl in the NW room near sliding door (removed)
4. Texture on the kitchen soffit, SE corner room closet wall, and exposed beam room ceiling
5. Black/gray sealant on roofing vents

David W. Fawcett
Asbestos Division Manager

PENGAD-Bayonne, N. J.
STATE'S EXHIBIT
B

MEDFORD, OREGON 97501-1242 • (541) 779-2646

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF THE NOTICE OF VIOLATION AND ASSESSMENT OF CIVIL PENALTY FOR FAILURE TO FOLLOW REQUIRED WORK PRACTICES FOR ASBESTOS ABATEMENT WILLIAM H. FERGUSON, Respondent.	FINDINGS OF FACT AND CONCLUSIONS OF LAW, OPINION AND ORDER Case No. AQFB-WR-96-351

Background

Mr. William H. Ferguson has appealed from a December 5, 1996 Notice of Violation and Assessment of Civil Penalty issued pursuant to Oregon Revised Statutes (ORS) Chapter 468, ORS Chapter 183, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12. The Department of Environmental Quality (Department) alleged that Respondent violated: OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste material; violated OAR 340-32-5600(4) by open accumulation of asbestos-containing waste material; violated OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material; violated OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project; violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement; and violated OAR 340-33-030(4) by supervising an asbestos abatement project without being certified.

A civil penalty of $5,400 was assessed pursuant to OAR 340-12-045.

Mr. William H. Ferguson requested a hearing on December 20, 1996. A hearing was conducted in Medford, Oregon on September 10, 1997. The Respondent appeared with witnesses Joel Ferguson, A. K. Morris, April Sevack, Gary Breeden, and William Corelle. Mr. Jeff Bachman represented the Department with witness Keith Tong.

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

On December 11, 1997, the Hearings Officer issued Findings of Fact, Conclusions of Law and an Order. The Hearings Officer found that the Commission has jurisdiction and that Respondent had violated each of the cited rules except for OAR 340-032-5620(1) (failure to notify the Department of an asbestos abatement project). The Hearings Officer further found that the Respondent was liable for a civil penalty of $1,000 rather than $5,400. This was based upon his determination that the base penalty and the occurrence, responsibility and cooperative factors should be decreased.

The Department filed a timely notice of appeal. It subsequently filed five exceptions to the Hearings Officer's conclusion and opinion. These were filed late. The Respondent submitted a brief that also was filed late.

The Commission set August 10, 1998 as the date to hear oral arguments. At that time, the Commission entered a preliminary ruling denying the Respondent's motion to dismiss based upon the late filing of the Department's exceptions and brief. With this decision, that preliminary ruling is made final. After the Commission made its preliminary ruling, the Chair of the Commission granted both the Department and the Respondent extensions and the Commission accepted the exceptions and briefs.

The Respondent was not present at the August 10, meeting. The Respondent sent a representative in his place. This representative, however, was not a licensed attorney and therefore could not represent the Respondent in the proceedings. The representative withdrew his request to represent the Respondent and the Commission set the matter over until September 17, 1998. The Commission resumed its hearing on September 17. At that time, the Commission heard oral arguments. Mr. Jeffrey Bachman represented the Department and the Respondent represented himself.

Respondent's Contentions

Respondent Mr. William H. Ferguson contends that he had taken reasonable steps to assure the property was free from contaminants when he purchased the property, that he

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

was not aware there were asbestos-containing materials in the building when he started the renovation, and that when he became aware that there might be a problem he took reasonable measures to protect the public and others from exposure, and that once he determined the materials were asbestos-containing he complied with all statutes and rules regarding the removal of such materials.

FINDINGS OF FACT

1. On October 2, 1996, Mr. Keith Tong (Mr. Tong), Department Asbestos Control Analyst, was driving by a building renovation project being conducted at 421 W. Sixth Street-37 North Ivy Street, Medford, Oregon, when he observed what appeared to be asbestos-containing material on the site.

2. Mr. Tong stopped at the site, inspected the materials he had observed, and contacted Joel Ferguson who was in charge of the renovation project, and advised him that the duct wrap appeared to be asbestos-containing material, and that proper steps should be taken to accomplish the asbestos removal, and not to disturb the materials.

3. Mr. Tong was on his way to a meeting and advised Joel Ferguson that he would return after the meeting and conduct a more detailed inspection, and left the premises.

4. After Mr. Tong left, Mr. Joel Ferguson called his father, Respondent herein, and reported his contact with Mr. Tong.

5. Respondent contacted the disposal company that was authorized to dispose of asbestos-containing materials and was advised that the materials needed to be double bagged and the bags secured for disposal.

6. Respondent went to the renovation project and obtained a sample of the material and took it in for testing.

///

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

7. Respondent advised Mr. Joel Ferguson to bag the material so that there would be no further disbursement of the materials if it was asbestos-containing and not to remove further ducting.

8. Mr. Joel Ferguson placed the ducting in double black plastic bagging and placed it in a utility trailer on the premises and also sent other workers home until it could be determined whether the duct wrap did contain asbestos.

9. When Mr. Tong returned after the meeting he found that the ducting and wrap containing what appeared to be asbestos-containing material had been removed from where he first observed it and placed in black plastic garbage bags and placed in a utility trailer on the premises.

10. Mr. Tong did observe pieces of the material on the ground where the ducting had been located.

11. After the second meeting with Mr. Tong, Respondent and Mr. Joel Ferguson did encapsulate the building and taped off the premises from public passage.

12. The materials did test positive for asbestos and Respondent contracted for the services of an abatement engineer and then with an abatement contractor for the actual removal of the material.

13. Respondent paid approximately $5,160 for the services of the engineer and actual removal of the material.

14. Mr. Joel Ferguson is not a certified asbestos removal worker.

15. Respondent is not certified as an asbestos abatement project supervisor.

16. When Respondent purchased the property, the environmental investigation and study of the building did not reveal any active or current contamination problems although did indicate that there could be asbestos on the premises.

///

///

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

17. Respondent had removed a false ceiling and was removing a length of old heating duct so that new heating ducts could be installed, when the asbestos-containing material was discovered by Mr. Tong.

18. The ducting situation had been reviewed by the heating and air-conditioning contractor and the contractor who worked with Respondent on a number of renovation or construction projects and neither observed any conditions or materials that caused them concern that asbestos was a factor in the renovation project.

19. The type of wrap used on the length of duct work that had been removed was manufactured in asbestos-containing and non asbestos containing products, and the wrap

///

had no distinguishing marks or colors to accurately determine whether it contained asbestos or not.

20. Respondent had been involved in the renovation of another building where a similar type of wrap was suspected of containing asbestos, but after testing, it was determined that it in fact did not.

21. Respondent did not believe that the duct wrap was asbestos containing, but wanted to take some precautions in case it was and had directed Joel Ferguson to bag the wrapped ducting and to put it in the trailer.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction.

2. Mr. William H. Ferguson violated OAR 340-32-5620(1), OAR 340-32-5600(4), OAR 340-32-5650, OAR 340-33-030(2) and OAR 340-33-030(4).

3. Mr. William H. Ferguson is subject to a civil penalty of $1,400.

///

///

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

OPINION

1. The Commission has jurisdiction.

The Environmental Quality Commission is directed by ORS Chapters 468 and 468A to adopt rules and policies to establish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training and to establish work practice standards regarding the abatement of asbestos hazards and the handling and disposal of waste materials containing asbestos. The Commission did that, and these proceedings are under those rules. The Commission has jurisdiction to proceed with the notice of violation herein and the assessment of civil penalty.

2. Respondent violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste.

OAR 340-32-5620(1) provides that any person conducting an asbestos abatement project shall comply with notification and asbestos abatement work practices and procedures of OAR 340-32-5630 and OAR 340-32-5640 (1) through (11).

OAR 340-032-5590(3) defines an "Asbestos abatement project" as any demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling or disposal of any asbestos-containing material with the potential of releasing asbestos fibers from asbestos-containing material into the air.

OAR 340-32-5640(1) provides that if asbestos containing materials were not discovered prior to demolition, upon discovery of the materials, the owner should stop demolition work immediately, notify the Department of the occurrence, keep the exposed material adequately wet until a licensed abatement contractor begins removal, and have a licensed asbestos abatement contractor remove and dispose of the materials.

///

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

Respondent is an experienced property owner and manager who has been involved in the acquisition, renovation and maintenance of commercial properties. He has been involved in situations involving potential asbestos-containing materials, and took reasonable steps to assure that the building in question was free from any hazardous materials or contaminants that would cause costs for removal or containment. He was not aware of the nature of the duct work above the false ceiling, and when the false ceiling was removed, took additional steps to assure that he was not dealing with any materials that would require special handling or removal processes. He was conducting the demolition portion of the renovation project accordingly.

Respondent became aware of concerns when Mr. Tong informed Respondent's son that the insulation wrap on some of the duct work that had been removed might contain asbestos. Upon becoming aware of Mr. Tong's concerns, he immediately took a sample to a testing laboratory to be tested and did advise his son to place the removed ducting in plastic bags and put them in a trailer that was on the site. He also advised his son to stop all removal operations.

The Hearings Officer concluded that prior to Mr. Tong's notification, Respondent was not involved in an "Asbestos abatement project," notwithstanding the definition of the rule and the strict liability interpretation of its provisions. He reasoned that prior to Mr. Tong's notification of potential asbestos-containing material, Respondent had taken all reasonable and necessary steps to proceed with his demolition and remodeling project, and this liability did not attach prior to notification.

The Department took exception to this determination. It argued that the ruling is contrary to the strict liability standard applicable to this violation.

A majority of the Commission concludes that the Hearings Officer erred in the determinations and that in keeping with the strict liability standard established by ORS

///

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

468.140(1)(f) and the Commission's prior decisions, liability attached when the Respondent began asbestos abatement.

Respondent immediately stopped the demolition. The Department, although not formally notified of the project as provided by the rule, was aware of the project through Mr. Tong's involvement. Respondent, after stopping the demolition, however, continued to handle the suspected asbestos-containing material in violation of the rule.

While Respondent's actions may have been a good faith effort to protect the public, the statutes and rules involving the removal and disposal of asbestos-containing materials impose a strict liability on the property owner, and non-compliance, even based on good faith effort does not excuse violation of the rules.

Respondent's testing of the sample was reasonable. Mr. Tong's observations were hurried and in passing, and there was no definitive means by which to visually determine whether that particular type of insulation wrap contained asbestos or not. Further, Respondent had been recently involved in a situation where a similar-appearing wrap of suspected asbestos-containing material turned out not to contain asbestos. Notwithstanding the reasonableness of the testing and the delay in notification or contact with an asbestos removal engineer or contractor, the strict liability of the rule required that nothing transpire with the material other than wetting down the material and keeping it in that condition until removal.

The Respondent did not do that and thus violated the rule.

The Respondent, in proceeding with the bagging and removal of the duct work with the wrap from where it was stacked to the trailer also violated the following provisions of the rules.

Respondent violated OAR 340-32-5600(4) by openly accumulating asbestos-containing waste material.

///

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

OAR 340-32-5600(4) provides that open accumulation of friable asbestos-containing waste material is prohibited. Once the notice was given Respondent was responsible to conform to the rule. The insulating wrap materials were not bagged and sealed in accordance with the rule and therefore created an open accumulation of those materials.

Respondent violated OAR 340-32-5650 by failing to properly package and store asbestos-containing waste material.

OAR 340-32-5650 provides for standards for the packaging, storage, transport and disposal of asbestos-containing waste material and requires that all asbestos-containing waste material shall be adequately wetted to ensure that they remain wet until disposed of and packaged in leak-tight containers such as two plastic bags each with a minimum thickness of 6 mil and labeled as provided in the rule.

Respondent did call the disposal company and then triple bagged the materials as was suggested, however the materials were not wetted and Respondent did not use the 6 mil bags required by the rule. Respondent did not properly package and store the asbestos-containing materials.

Respondent did not violate OAR 340-32-5620(1) by failing to notify the Department of an asbestos abatement project.

OAR 340-32-5620(1) requires that any person who conducts an asbestos abatement project shall comply with OAR 340-032-5630 which requires that any person conducting such project shall provide notification within a specific time prior to the abatement project being started.

In this case, Respondent was not aware that there was any asbestos-containing materials in the building or that would be affected by the demolition or renovation, and then, other than the bagging and moving of the materials was not actively involved in the actual abatement project that was conducted through the abatement engineer and abatement contractor. At the time of the bagging and removal to the trailer it had not been determined

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

that the materials were in fact asbestos-containing. It is not appropriate to assess violation under this provision of the rule.

Respondent violated OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement.

OAR 340-33-030(2) provides than an owner of a facility shall not allow any person who is not certified to removal asbestos-containing waste material to perform asbestos abatement projects.

Mr. Joel Ferguson was not a certified asbestos abatement worker.

Respondent violated OAR 340-33-030(4) by supervising an abatement project without being certified.

OAR 340-33-030(4) provides that each person acting as a supervisor for any asbestos abatement project must be certified.

Respondent was not a certified asbestos abatement project supervisor.

3. Respondent is subject to a civil penalty of $1,400.

Violation 1. Failing to employ required work practices for handling and removal of asbestos containing waste.

Penalty = BP +[(.1 x BP) (P + H + O + R + C)] + BE.

"BP" is the base penalty which is $1000 for a Class I, minor magnitude violation. "P" is Respondent's prior violations. "H" is the past history of the Respondent in taking all feasible steps or procedures necessary to correct any prior violations. "O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation. "R" is the cause of the violation. "C" is the Respondent's cooperativeness. "EB" is the approximated dollar sum of the economic benefit that Respondent gained through noncompliance.

The Department applied a base penalty of $3,000 finding that this was a class I, moderate magnitude violation as provided in OAR 340-012-0042(1). This was predicated

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

on the provision in OAR 340-012-0090(1)(d)(D) which allows the magnitude to be increase one level if the asbestos containing material was compromised of more the 5% asbestos.

The Hearings Officer reduced the base penalty to $1,000 because he believed it was inappropriate to increase the base penalty. His decision was based on conclusion that the violation was not intentional.

A majority of the Commission finds that the Respondent's actions were intentional as that term is used in OAR 340-012-0045. Nevertheless, when the Respondent's conduct is viewed as whole, a majority of the Commission agrees that it will not exercise its discretion to increase the magnitude of the violation. Accordingly, the base penalty is $1,000.

The Department assigned a value of 0 to "P" and "H," because Respondent had no prior violations or past history regarding violations.

The Department assigned "O" a value of 2 because the violation occurred for more than one day. The Hearings Officer found that the occurrence that results in the violation and penalty occurred during a period in one day where materials were moved and stored. "O" is assigned a value of 0 for this penalty calculation. The Department filed an exception to this ruling.

The Commission was unable to reach an agreement on this issue. Therefore, the decision of the Hearings Officer will stand on this factor. The Commission agrees, however, that the Hearings Officer's reasoning on this point should not be viewed as precedent in future cases.

The Department assigned a value of 6 for "R" because it determined that the violation was intentional. The Hearings Officer reduced the factor to 2 because he concluded that the Respondent's actions were at most negligent. The Department excepted. It noted that intent is defined in OAR 340-012-0030(9) and that the definition requires only "a conscious objective to cause the result of the conduct." Accordingly, only general intent to remove the asbestos-containing material is required, not specific intent to violate the

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

asbestos regulations. A majority of the Commission agrees with the Department and accordingly the R factor is 6.

The Department assigned "C" a value of 0 because Respondent continued abatement proceedings after being advised that the materials might contain asbestos. The rule provides for a value of -2 if a Respondent was cooperative and took reasonable efforts to correct the violation or minimize the effects of the violation. The Hearings Officer noted that the Respondent was skeptical and he had taken steps to assure that the building did not contain contaminates. He had been involved with suspected asbestos-containing materials before which had been tested and found not to contain asbestos. Notwithstanding those facts, he did stop demolition immediately, took what he felt were reasonable steps to minimize the effects of the violation, and then hired an engineer and contractor to perform the removal and disposal tasks. Based on these findings, the Hearings Officer assigned a value of -2 to the "C" factor.

The Commission was unable to reach an agreement on this issue. Therefore, the decision of the Hearings Officer will stand on this factor. The Commission agrees, however, that the Hearings Officer's reasoning on this point should not be viewed as precedent in future cases.

"EB" is assigned a value of $0 because Respondent did not gain any economic benefit by his actions after determining that the materials were asbestos-containing.

The civil penalty as calculated under the rule for violation 1 is $1,400.

The requirements for establishing a penalty have been met. The values assigned and the calculations are set forth above. Respondent is liable for a civil penalty of $1,400.

///

///

///

///

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

ORDER

The Commission, through its Hearings Officer, finds that the Commission has subject matter and personal jurisdiction in this proceeding: that William H. Ferguson violated OAR 340-32-5620(1) by failing to employ required work practices for handling and removal of asbestos-containing waste material; OAR 340-32-5600(4) by open accumulation of asbestos-containing waste material; OAR 340-32-5650 by failing to properly dispose of asbestos-containing waste material; OAR 340-33-030(2) by allowing uncertified persons to perform asbestos abatement; and OAR 340-33-030(4) by supervising an asbestos abatement project without being certified; and that Respondent is liable for a $1,400 civil penalty.

DATED this 30 day of Oct, 1998.

Environmental Quality Commission

Carol Q. Whipple

Carol Whipple
Chair

Notice of 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.

LK:kt/LJK0862.PLE

DEPARTMENT OF JUSTICE
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (503) 229-5725

Certificate of Mailing

I certify that I mailed the attached FINDINGS OF FACT AND CONCLUSIONS OF LAW, OPINION AND ORDER to each of the following persons on 11/3, 1998:

William H. Ferguson
5200 Pioneer Road
Medford OR 97501
(Via Certified Mail #P335742336)

Jeff Bachman
Department of Environmental Quality
2020 S.W. 4th Avenue, Suite 400
Portland OR 97201

Carol Whipple, Chair
Environmental Quality Commission
21755 Highway 138 West
Elkton OR 97436

Melinda S. Eden
Environmental Quality Commission
P.O. Box 79
Milton-Freewater OR 97862

Linda McMahan
Environmental Quality Commission
Berry Botanic Garden
11505 S.W. Summerville Avenue
Portland OR 97219

Mark Reeve
Environmental Quality Commission
610 S.W. Alder, Suite 803
Portland OR 97205

Tony Van Vliet
Environmental Quality Commission
1530 N.W. 13th
Corvallis OR 97330

Susan M. Greco
Department of Environmental Quality

DISTRIBUTION LIST FOR PRE-APPLICATION CONFERENCE:

Jackson County Planning and Development Services
10 South Oakdale Avenue, Room 100, Medford, Oregon 97501
Phone: 541-776-7554 ✦ Fax: 541-776-7384

From: Tom Schauer, Planner II
Subject: Pre-application Conference 98-176-PA
Date: April 13, 1998
To: Pre-application Distribution List

General Services

- ☑ County Building & On-Site Stormwater: Dale Bohannan, Jackson County Building
- ☑ County Access & Off-Site Stormwater: Eric Niemeyer, Jackson County Roads and Parks
- ☑ State Access & Off-Site Stormwater: Debbie Timms, ODOT
- ☑ Fire: Lou Gugliotta, Jackson County Fire District #3

On-Site Public or Private Services

- ☑ On-Site Water/Wastewater: Kathy Knox, Jackson County Environmental Quality
- ☑ On-Site Water/Other: Gary Stevens, Health Department
- ☐ On-Site Water (for some uses): Terry Hill, Oregon Dept. of Agriculture
- ☑ On-Site Wastewater/Other: Jonathan Gasik, DEQ

Regional Public Services

- ☐ Regional Water Supply: Larry Rains, Medford Water Commission
- ☐ Regional Wastewater Transmission: Chuck Root, BCVSA
- ☐ Regional Wastewater Treatment: Gail Hammond, City of Medford, Region Water Reclamation Facility

Overlays and Site Features

- ☑ AQMA Air-Quality: Keith Tong, DEQ
- ☑ Airport Zone/Overlay (Local): Bern Case, Rogue Valley International Airport
- ☐ Airport Zone/Overlay (State): Tom Highland, Oregon Aeronautics Division
- ☐ Floodplain/Floodway: Kate Jackson, Jackson County Planning
- ☐ Wetlands: Mary Pakenham-Walsh, Division of State Lands
- ☐ Class I or II Stream: David Haight, Oregon Dept. of Fish and Wildlife
- ☐ Bear Creek Greenway: Karen Smith, Jackson County Roads and Parks

UGB

- ☑ UGB Planning: Bianca Petrou, City of Medford Planning
- ☑ UGB Engineering: Michael Gamble, City of Medford Engineering
- ☑ UGB Fire: John Pierce, Medford Fire District (Rural Fire District #2)

Utilities

- ☑ Power: Bruce Snook, Pacific Power & Light Co.
- ☑ Telecommunications: Engineering Dept., US West Communications
- ☑ Natural Gas: David McFadden, WP Natural Gas

Other

- ☐
- ☐
- ☐

PENGAD-Bayonne, N. J.
STATE'S EXHIBIT
D

Post-it® Fax Note 7671	Date 4/14/98	# of pages ▶ 4
To Keith Tong	From TOM Schauer	
Co./Dept. DEQ	Co. Planning	
Phone #	Phone #	
Fax # 776-6262	Fax #	

H:\WP\APPS\PA\98-176PA\98-176PA.DIS April 13, 1998

AGENCY COMMENT FOR PRE-APPLICATION CONFERENCE:

Jackson County Planning and Development Services
10 South Oakdale Avenue, Room 100, Medford, Oregon 97501
Phone: 541-776-7554 ✦ Fax: 541-776-7384

From: Tom Schauer, Planner II
Subject: Preapplication Conference 98-176-PA
Date: April 13, 1998
To: See Attached Distribution List

A preapplication conference has been scheduled with the Jackson County Planning Department to discuss the proposal described below. Please return this form with your comments to this office by **4:00 p.m., Thursday, April 16, 1998** so that your concerns or any proposed conditions can be expressed to the applicant. Please contact **Tom Schauer** of this office if you have any questions.

File:	98-176-PA
Meeting Date and Time:	Friday, April 17, 1998, 9:00 a.m.
Meeting Location:	Conference Room, Room 100, 10 S. Oakdale, Medford
Owner/Applicant/Agent:	William Ferguson
Legal Description:	~~37-1W-05-1300, 1301, 1302~~
Address:	4044 Crater Lake Avenue
Zoning:	LI (Light Industrial); also within AC (Airport Concern) Overlay; Medford Urban Growth Boundary; Medford-Ashland Air Quality Maintenance Area
Proposal:	Remove existing structures (approximately 10,000 square feet retail) and rebuild approximately 30,000 square feet, for manufacturing, warehouse, and retail use

( ) _____ will be attending the pre-application conference.
( ) We have no comment.
( ) We recommend approval with no special conditions.
( ) This property is not within our jurisdiction.
(✓) Please address the following concerns of this agency:
Indirect Source permit rules may apply + require paving. Control trackout during demol/construction
Asbestos may be present in existing structure - recommend that asbestos survey be done and asbestos consultant design control or removal - may need asbestos notification
( ) This office encourages denial of this proposal because: _____

Agency: DEQ
Signature of Agency Rep.: Keith L Tang Date: 17 Apr 98

Attachments: ~~Area Map~~, Zoning Map, Applicant's Site Plan Map

JACKSON COUNTY
Oregon

Roads, Parks, and Planning Services
Francisco Hernandez
Planner I

10 South Oakdale Avenue, Room 100
Medford, OR 97501-2902
Phone: (541)774-6903
Fax: (541)774-6791
hernanfm@jacksoncounty.org

July 28, 2000

Shelley K. McIntyre
Assistant Attorney General
Oregon Department of Justice
1515 SW 5th Avenue, Suite 410
Portland, OR 97201

Re: 1998-176-PA, Ferguson Pre-Application Conference Summary

Dear Ms. McIntyre

As we discussed on the phone, enclosed is a copy from our file of a summary written by Tom Schauer, Planner II, for the application filed by William Ferguson concerning his proposal to remove an existing structure on the property and rebuild a 30,190 square foot building for lease space and other allowable uses in the Light Industrial zone. Mr. Schauer is with the City of Grants Pass, and no longer works for this agency. Therefore, I cannot absolutely confirm that he gave Mr. Ferguson a copy of either the comments submitted by Mr. Keith Tong dated April 17, 1998 or the report. However I can say that at that time a pre- application conference acted as time for the planner and applicant to discuss the proposal, and any questions and concerns that may arise.

Sincerely,

Francisco M. Hernandez
Planner I

PENGAD-Bayonne, N. J.
STATE'S EXHIBIT
E

original Comments.

File: 98-176-PA
Parcel(s): 37-1W-05-1300, 1301, 1302
Owner/Applicant/Agent: William Ferguson

Zoning/Overlays: LI, AC, Medford UGB, AQMA
Site Features: No floodway/floodplain, wetlands, or streams identified.

Applicable Chapters:
Chapter 238. Light Industrial District
Chapter 252. AC Overlay
Section 280.040. Vision Clearance
Section 280.050. Height, Setback, and Lot Coverage
Section 280.080. Sign Requirements
Section 280.070. Off-Street Parking
Chapter 282. Site Plan Review

Other Regulations:
OAR 340-20. Air Pollution Control. N/A. Proposal is for less than 250 parking spaces. No Indirect Source Permit is required from DEQ.

ORS 447 and UBC 1104. Accessible Parking Facilities. These requirements override the requirements of the LDO, and are required. The site plan appears to show 102 parking spaces, which would require 5 ADA spaces, with the first being van accessible.

Summary of Major Issues:
Applicant should contact City of Medford and consider annexation before proceeding further through County review. It appears that lack of municipal water for fire protection purposes would result in a denial of the application if annexation is not pursued. The following items need to be considered if development can proceed through County review without annexation.

Issues:
1. Lot Legality. The parcels were created through approval of a minor partition and an amendment to the partition 90-3-MP.

2. Use. The proposal is to remove existing structures and rebuild a structure of approximately 30,000 square feet on tax lots 1300 and 1301, reserving the area of tax lot 1302 for future development. The proposed use is manufacturing, warehouse, and retail. The site plan identifies 31,600 sq ft of building area, which includes 8 lease areas, with front areas to be retail, office, or manufacturing, and rear areas to be warehouse. The light industrial zone is limited to uses permitted in Chapter 238, which significantly limits retail uses. While not specifically listed, the Planning Department has recognized that a business office in conjunction with a use permitted on the parcel is also permitted as accessory to the primary use. Sales of items manufactured on the premises has also been recognized as an allowable accessory use to a primary permitted use. General retail or office use not in conjunction with a permitted use is not permitted in this district.

3. Building footprint. The proposed development is located on three tax lots. Site planning issues could be simplified by consolidating tax lots. Without consolidation, from a zoning standpoint, it would be necessary to ensure that each tax lot would meet site plan requirements (landscaping, parking, setbacks, etc.), in the event that they were sold separately at a future date. From a building code standpoint, buildings cannot cross property lines, and issues of setbacks and fire separation and construction are complicated by property lines.

- Applicant indicated consolidation will be done

4. Parking and Circulation. The applicant needs to provide a breakdown of areas devoted to various uses identified in LDO 280.070(3), and provide a calculation showing the number of spaces required based on the areas various uses. It appears that 102 parking spaces are currently shown on the site plan. Parking areas must be paved. Bicycle parking racks may be required, depending on uses. The circulation plan appears to meet LDO requirements. A scale drawing would be necessary to confirm this. The Fire District has provided additional comments regarding requirements for circulation.

5. The applicant may obtain approval for a sign if an elevation drawing and site plan are provided.

6. Applicant will need to submit a site plan to scale, a drainage plan, and a landscape plan prepared by an ASLA registered professional. Drainage plan will be reviewed by Building Division, Roads & Parks and ODOT, and Medford Engineering. Generally, 15% of the site must be landscaped. However, if the applicant can demonstrate that the criteria can be met for a reduction, it is possible that less than 15% of the site can be landscaped. At a minimum, the landscape buffer shown on the site plan might be considered adequate for landscaping purposes if a reduction is approved. The ordinance provides that landscaping in the right-of-way cannot be counted as part of the required percentage. The area proposed as future development area should not be included as part of the percentage calculation. It may be worthwhile to provide a tentative plan showing how future development of tax lot 1302 could be incorporated into the circulation and landscaping plan. The ordinance requires all setback areas to be landscaped, except that parking circulation areas (not spaces) may be within a required setback if the landscaping generally screens vehicles from view. It is recommended that landscaping be provided at the ends of parking rows to provide for distributed landscaping and to provide for protection of parked vehicles at ends of rows.

7. Medford Fire has indicated that municipal water is not available at the site. Medford Fire is indicating that annexation would be required to obtain water for fire fighting purposes.

8. Due to the AC Overlay, the applicant will need to demonstrate that structures are less than 35' in height and will not penetrate imaginary airport surfaces. Otherwise an AC application will be required. The applicant will need to demonstrate that no building, structure, or tree will penetrate any of the airport surfaces, otherwise, additional review requirements apply. The airport has indicated that it will be necessary to enter into an avigational easement.
- Also - glare producing materials.
9. See agency comments.

Before submitting application - applicant needs to address fire district comments - re: hydrant/annexation.
+ issue of Medford circulation plan.

- site plan may require significant modifications due to proposed realignment of Coker Butte + Crater Lake Ave
- ODOT wants 1 access closed

need to call NW natural gas before demolishing existing structures.

CERTIFICATE OF SERVICE BY MAIL

I certify that on July 31, 2000, I served the foregoing **Department's Memorandum in Opposition to Respondent's Motion to Dismiss** upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Richard A. Stark
Stark & Hammack PC
201 W Main Ste 1B
Medford, OR 97501

Attorney for Respondent

Jeff Bachman
Department of Environmental Quality
Northwest Region Office
2020 SW 4th Avenue, #400
Portland, OR 97201-4987

Shelley K. McIntyre
Assistant Attorney General

DEPARTMENT OF JUSTICE
1515 SW 5th Avenue
Portland, OR 97201
PHONE: 229-5725

STATE OF OREGON
DEPARTMENT OF JUSTICE
1515 SW FIFTH AVENUE, SUITE 410
PORTLAND, OREGON 97201-5451

ADDRESS SERVICE REQUESTED

PORTLAND OR JUL 31 '00 U.S. POSTAGE PITNEY BOWES 024015 $2.31

Gretchen Miller
Hearing Officer Panel
Employment Dept.
875 Union Street NE
Salem, OR 97311

AUG 2000 RECEIVED EMP. DIV. EUGENE HEARINGS

RECEIVED
AUG 01 2000
EMPLOYMENT HEARINGS

Ex. 6

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

March 18, 2002

Ms. Gretchen L. Miller
Hearings Officer
Department of Environmental Quality
875 Union Street, NE
Salem, OR 97311

Re: In the Matter of the American Exchange Services, Inc., an Oregon corporation,
No. AQ/A-WR-98-186
Our File No. RP 2831
Reference No: G60222

Dear Hearings Officer Miller:

Enclosed please find the Direct Testimony Affidavit of William Ferguson, William Coryell, Daniel Ferguson, Joel Ferguson and John Hamlin.

Also enclosed is the Ferguson Exhibit List and Exhibits marked one (1) through eight (8).

I have sent copies of this Direct Testimony and the Exhibit List and Exhibits to Shelley McIntyre and Scott Kaplan.

Respectfully yours,

STARK AND HAMMACK, P.C.

Richard A. Stark

Ex. 7

RAS/kd
Enclosures
cc: Ms. Shelley K. McIntyre
Mr. Scott Kaplan

RECEIVED
MAR 20 2002
EMPLOYMENT HEARINGS

RECEIVED
MAR 20 2002
Employment Hearings

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	**No. AQ/A-WR-98-186** **AFFIDAVIT OF WILLIAM FERGUSON**

STATE OF OREGON)
)ss.
County of Jackson)

I, William Ferguson, being first duly sworn depose and say as follows:

1. Prior to April 2, 1998, I was interested in exchanging property I owned for the property formerly known by Truck Tops Plus, at 4044 Crater Lake Avenue, Medford, Oregon. That I inspected the property with others prior to April 2, 1998, and the property was in very bad shape and strewn about the property were approximately fifty (50) camper tops and other items of personal property, a camper, a Ford Pick-Up owned by Truck Tops Plus and Dallas Marcy, a mobile home belonging to Dallas Marcy, a 40' trailer, building materials stacked on the ground, camper top construction materials, two (2) metal buildings, one (1) former office of Truck Tops Plus, with ceiling and walls partially demolished by weather, building materials, well pumps, refrigeration units, heating and cooling units and miscellaneous yard sale type materials all surrounded by a locked chain link fence.

2. I was in the process of selling other property of mine located on John's Peak

STARK & HAMMACK, P.C.
RNEYS AT LAW
AIN ST., SUITE 1B
D, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

Road and was interested in doing an exchange that is known as a "reverse starker with back end exchange". That American Exchange Services, Inc., agreed to be the exchange company to accomplish this exchange for me. In simple terms, I would supply the money to purchase the property I was interested in at 4044 Crater Lake Avenue, Medford, Oregon, to American Exchange Services, Inc., and American Exchange Services, Inc., would buy that property using my money and be the legal title holder. Then, when my other property sold, I would exchange that property for the Crater Lake Avenue property and I would have the benefit of a IRS Code 1031 Tax Free Exchange in this process.

3. My contact at Amerititle and at American Exchange Services, Inc., was Donna Ricks who was the Exchange Officer and who had helped me in some transactions prior to this time, while working for other title companies.

4. I entered into the exchange documents with American Exchange Services, Inc., on March 9, 1998 and those documents will be in evidence.

5. Truck Tops Plus was in bankruptcy and on April 2, 1998, a Deed was delivered from the Bankruptcy Trustee to American Exchange Services, Inc., for the property at 4044 Crater Lake Avenue, Medford, Oregon.

6. I contacted Donna Ricks at Amerititle and American Exchange Services, Inc., and asked her if I could sell the buildings and dispose of the personal property located on the Crater Lake Avenue site, under the agreements that I had signed involving the "reverse starker with back end exchange". Donna Ricks said I "could treat it as my own".

7. Prior to May 6, 1998, I was on the site when I was approached by Lawrence Dial and Barbara Dial, who represented to me that they were very experienced with house moving and salvage operations and the disposal of

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

personal property including campers and other items of personal property that were on the property and they were interested in purchasing some or all of such property and reselling it to the public and various entities.

8. The Dials and myself entered into an Agreement dated May 1, 1998, for the purchase by the Dials of the buildings on the premises and campers and all other movable material on the premises that was not owned by Truck Tops Plus and Marcy (Exhibit "1").

9. I gave to the Dials a Bill of Sale for the buildings and the movable items except as owned by the Bankruptcy Trustee or the prior owner, requiring that the items sold be removed by July 1, 1998. (Exhibit "2")

10. The Dials represented to me, that they were familiar with and had experience with the moving and salvage of buildings and that they would like to have any material suspicious of Asbestos tested before they entered into the Agreement set forth in Paragraphs eight (8) and nine (9) above. The Dials, in my presence, collected approximately twelve (12) samples of the flooring and roofing and other materials and I arranged to have those samples tested by BWR, an Asbestos analysis company, in Medford, Oregon, BWR discarded most of those samples as obviously not containing any Asbestos. Three (3) questionable samples were tested by BWR and a report was completed showing that the samples tested did not contain Asbestos. (Exhibit "3")

11. That the Dials proceeded to remove and sell canopies, camper shells and other items of personal property from the premises and out buildings.

12. On or about Friday, May 29, 1998, I learned from the Dials by telephone, that someone from DEQ had placed a Stop Work Order on the property. This person also informed some of the persons who had purchased property from the Dials that they could not remove the property that they had purchased

K & HAMMACK, P.C.
ORNEYS AT LAW
MAIN ST., SUITE 1B
FORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

from the premises. Thereafter, I called the DEQ office and told the representative that I talked to, that BWR had analyzed samples of the materials on the site. I asked Mr. Croucher if he had samples and he said no. I stated to the DEQ representative that if additional items were questionable, I would like to have BWR come to the site and do the necessary sampling. He agreed. The individual that I spoke to at the DEQ offices was Steven M. Croucher. We set up a meeting at the site on Monday, June 1, 1998, with Steven Croucher from DEQ David Fawcett from BWR Associates and the building owner, the Dials and myself. At no time did Mr. Croucher advise me that he had already come on the property with or without permission and had taken samples. When I asked Mr. Croucher if the DEQ wanted to take samples, he replied that it was too expensive and took too long for the DEQ to take the necessary samples and if we were in a hurry to complete the salvage operation, we would have to hire our own consultants to do the sampling and testing. I accompanied Mr. Croucher and Mr. Fawcett from BWR. Mr. Croucher pointed out to Mr. Fawcett, the items and materials that he wanted tested. I hired Mr. Fawcett of BWR, to do the sampling and testing and I agreed to pay for the sampling and testing. BWR Associates completed an Asbestos Survey. (Exhibit "4") DEQ, at no time, advised me that they had been on the property through the locked gate to take samples. Shortly after June 1, 1998, we discovered a hole cut in the chain link fence near the locked gate that would have been big enough for a person only and was not big enough to remove any materials. This hole had not been in existence prior thereto.

13. The yellow floor vinyl found in the kitchen, which contained Asbestos, was not removed. This vinyl was located under a cabinet that was removed by the

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

Dials and the floor was undisturbed. The yellow vinyl floor was sample 98-126A-16. The taping compound found in the kitchen wall, 98-126A.17, was exposed as indicated in the report but only a very small amount of the taping compound was exposed less than three (3) square feet.

14. That the samples taken and found to have various amounts of Asbestos, were taken from the building as it existed when it was transferred by the Bankruptcy Trustee on April 2, 1998, except for the following: Sample 98-126A.16 "yellow vinyl floor", found under a cabinet after the cabinet was removed. It is my estimation that the area of this sample does not exceed a 2x8' area or 16 square feet.

15. Sample 98-126A.20 (brown vinyl floor) located at the Northwest room near a slide door, is a very small amount and I would estimate less than ten (10) square feet of material was removed. I believe this was removed from under a cabinet.

16. Test #98-126A.34, see Exhibit "5", photograph 1, is a ceiling which was not demolished by the Dials or anyone after April 2, 1998. The condition of that ceiling, as depicted in the photograph, I believe, is as it was when the building was transferred from the Bankruptcy Trustee on April 2, 1998.

17. I would agree with the estimate on Exhibit "5", photograph 2, that the hole depicted shows approximately 6 square feet, but this hole pre-existed the Dials salvage operation.

18. I would agree that the material removed in the hall way, as depicted on photograph 3 of Exhibit "5", contains approximately 32 square feet and this situation pre-existed the Dials salvage operation.

19. That prior to Mr. Croucher stopping the work on May 29, 1998, there had been no wrecking or removal of any load supporting structural member of the

ST RK & HAMMACK, P.C.
ORNEYS AT LAW
MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

building. Neither the Dials' work, nor anyone else's work, had affected in any way, load supporting structural members of this building.

20. I sent a letter dated September 3, 1998 (Exhibit "8") to the DEQ setting forth my involvement in the situation.

21. After consulting with Mr. Croucher and Mr. Fawcett, I instructed Mr. Fawcett to obtain some bids to remove the Asbestos material from the building on the premises, in my absence. I had planned a vacation of approximately three (3) weeks with my graduating daughter and the rest of my family, on which I left in early June, 1998. Upon my return, Mr. Fawcett put me in touch with Western States Environmental Services, Inc., to contract the removal of the Asbestos material from the building on the premises. I was then informed by agents of Western States Environmental Services, that Mr. Croucher would not allow the Asbestos to be removed, but required that the entire building be encapsulated. The clean up was further delayed. After negotiations by Western States and Mr. Croucher, the DEQ agreed to a procedure whereby the building was demolished and all of the material was then placed in lined containers for disposal at the landfill. I paid Western States Environmental Services, Inc., the sum of $26,804.75 (Exhibit "7") to do that work. That sum was approximately $20,000.00 more than Western States Environmental Services, Inc., would have charged to remove the Asbestos only. In addition, I paid BWR Associates for its testing and advice and helping to locate a contractor in connection with the property located Crater Lake Avenue.

22. In regards to the land use procedures involving the property, I was not aware, nor did I see, any of the notations made by the DEQ. I never saw anything from DEQ prior to the sale of the building to the Dials.

ST[illegible]K & HAMMACK, P.C.
[illegible]RNEYS AT LAW
[illegible]AIN ST., SUITE 1B
[illegible]RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

23. Attached hereto as Exhibit "A" is my Narrative involving my connection with the property at 4044 Crater Lake Avenue, Medford, Oregon.

Further deponent saith not.

William Ferguson

STATE OF OREGON)
)ss.
County of Jackson)

This instrument was acknowledged before me on the 18 day of March, 2002 by William Ferguson.

OFFICIAL SEAL
RICHARD A. STARK
NOTARY PUBLIC-OREGON
COMMISSION NO. 327989
MY COMMISSION EXPIRES NOV 27, 2003

Notary Public for Oregon
My Commission Expires: 11-27-03

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
2 MAIN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	**No. AQ/A-WR-98-186** **AFFIDAVIT OF JOEL FERGUSON**

STATE OF OREGON)
)ss.
County of Jackson)

I, Joel Ferguson, being first duly sworn, depose and say as follows:

1. I am the son of William Ferguson who eventually exchanged for the property located at 4044 Crater Lake Avenue, Medford, Oregon.

2. Prior to April 2, 1998, I inspected the premises at my father's request, to see if the building could be renovated and used.

3. When I inspected the building prior to April 2, 1998, it was in very bad shape illustrating damage to the walls, ceiling, roof and flooring due to weather, apparent vandalism and property removal by the prior owner.

4. I have reviewed Exhibit "5", Photographs 1,2 and 3 and I state that the condition of the premises prior to April 2, 1998 is a depicted in those photographs.

Further deponent sayeth not.

RK & HAMMACK, P.C.
TORNEYS AT LAW
. MAIN ST., SUITE 1B
FORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

Joel Ferguson

STATE OF OREGON)
)ss.
County of Jackson)

This instrument was acknowledged before me this 18 day of March, 2002 by Joel Ferguson.

Anette Young
Notary Public for Oregon
My Commission Expires: 10/28/2005

OFFICIAL SEAL
ANETTE YOUNG
NOTARY PUBLIC-OREGON
COMMISSION NO. 351364
MY COMMISSION EXPIRES OCT. 28, 2005

ST[illegible]RK & HAMMACK, P.C.
[illegible]ORNEYS AT LAW
[illegible] MAIN ST., SUITE 1B
[illegible]ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	**No. AQ/A-WR-98-186** **AFFIDAVIT OF WILLIAM CORYELL**

STATE OF OREGON)
)ss.
County of Jackson)

I, William Coryell, being first duly sworn, depose and say as follows:

1. I am an independent maintenance contractor doing business as Coryell Maintenance and I was contacted by Mr. Ferguson to inspect the facilities at 4044 Crater Lake Avenue, Medford, Oregon, to see if I thought the building could be salvaged and used as opposed to being removed.

2. I inspected the building prior to April 2, 1998.

3. I have reviewed Exhibit "5" and I can state that the condition of the building as depicted in Photograph 1, 2 and 3 of Exhibit "5", essentially shows what the building looked like prior to April 2, 1998.

4. The building was in very bad shape and there were several areas where walls, ceilings and floors were damaged because of lack of roofing attention, apparent vandalism and water seepage.

Further deponent sayeth not.

ST[illegible]RK & HAMMACK, P.C.
[illegible]ORNEYS AT LAW
[illegible]MAIN ST., SUITE 1B
[illegible]ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

William Coryell

STATE OF OREGON)
)ss.
County of Jackson)

This instrument was acknowledged before me this 18th day of March, 2002 by William Coryell.

Notary Public for Oregon
My Commission Expires: 6-22-04

OFFICIAL SEAL
KAREN L. DAVIE
NOTARY PUBLIC-OREGON
COMMISSION NO. 335855
MY COMMISSION EXPIRES JUNE 22, 2004

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
MEDFORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	**No. AQ/A-WR-98-186** **AFFIDAVIT OF DANIEL FERGUSON**

STATE OF OREGON)
)ss.
County of Jackson)

I, Daniel Ferguson, being first duly sworn, depose and say as follows:

1. I am the son of William Ferguson who eventually exchanged for the property located at 4044 Crater Lake Avenue, Medford, Oregon.
2. Prior to April 2, 1998, I inspected the premises at my father's request, to see if the building could be renovated and used.
3. When I inspected the building prior to April 2, 1998, it was in very bad shape illustrating damage to the walls, ceiling, roof and flooring due to weather, apparent vandalism and property removal by the prior owner.
4. I have reviewed Exhibit "5", Photographs 1,2 and 3 and I state that the condition of the premises prior to April 2, 1998 is a depicted in those photographs.

Further deponent sayeth not.

ST[illegible]K & HAMMACK, P.C.
[illegible]ORNEYS AT LAW
[illegible]AIN ST., SUITE 1B
[illegible]RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

Daniel Ferguson

STATE OF OREGON)
)ss.
County of Jackson)

This instrument was acknowledged before me this 8th day of March, 2002 by Daniel Ferguson.

Notary Public for Oregon
My Commission Expires: 6-22-04

OFFICIAL SEAL
KAREN L. DAVIE
NOTARY PUBLIC-OREGON
COMMISSION NO. 335855
MY COMMISSION EXPIRES JUNE 22, 2004

STARK & HAMMACK, P.C.
RNEYS AT LAW
AIN ST., SUITE 1B
D, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	**No. AQ/A-WR-98-186** **AFFIDAVIT OF JOHN HAMLIN**

STATE OF OREGON)
)ss.
County of Jackson)

I, John Hamlin, being first duly sworn, depose and say as follows:

1. I am a Commercial Realtor in Medford and am working for Coldwell Banker Pro West Real Estate.

2. I am familiar with the property at 4044 Crater Lake Avenue, Medford, Oregon.

3. Prior to April 2, 1998 I looked at the premises for William Ferguson and the building on the premises was in a bad state of repairs. Ceilings had fallen down, walls had fallen and there was a good deal of water damage and other damage to the ceiling, roof, flooring and walls.

4. I have looked at Exhibit "5", but I cannot remember specifically the damaged areas. However, there were many damaged areas and the building was in very bad shape.

Further deponent sayeth not.

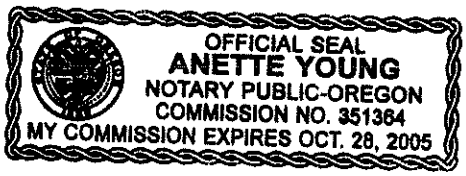
ST[illegible]K & HAMMACK, P.C.
[illegible]ORNEYS AT LAW
[illegible]MAIN ST., SUITE 1B
[illegible]RD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

John Hamlin

STATE OF OREGON)
)ss.
County of Jackson)

This instrument was acknowledged before me this 18 day of March, 2002 by John Hamlin.

Notary Public for Oregon
My Commission Expires: Oct 28, 2005



STARK & HAMMACK, P.C.
ORNEYS AT LAW
MAIN ST., SUITE 1B
ORD, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: AMERICAN EXCHANGE SERVICES, INC., an Oregon corporation, Respondent.	**No. AQ/A-WR-98-186** **FERGUSON'S EXHIBIT LIST**

Exhibit 1: Agreement between Ferguson and the Dials for purchase of the buildings and other personal property.

Exhibit 2: Bill of Sale from Ferguson to the Dials for the existing building and the personal property.

Exhibit 3: BWR Analysis of samples dated May 6, 1998.

Exhibit 4: BWR Asbestos Survey dated June 1, 1998.

Exhibit 5: Three (3) photographs marked 1,2,3 of the site.

Exhibit 6: Three (3) pictures marked 4,5,6 of the site.

Exhibit 7: Work Order from Western States Environmental Services showing amount of work $26,804.75.

Exhibit 8: A letter from William Ferguson to DEQ dated September 3, 1998.

DATED this 18 day of March, 2002.

STARK AND HAMMACK, P.C.

By: _____ Ex. 8
Richard A. Stark, OSB #69164
Of Attorneys for William Ferguson

STARK & HAMMACK, P.C.
ATTORNEYS AT LAW
MAIN ST., SUITE 1B
MED, OREGON 97501
(541) 773-2213
(541) 779-2133
(541) 773-2084 FAX

So Agreed — ~~Barbara Dial~~ Lawrence E. Dial 824-1065

5-1-98 agent for seller William H. Bagwell 944-2929 → Buyers

RECIEVED OF LAWRENE DIAL & BARBARA DIAL OF 237 THUNDER CLOUD CIRCLE EAGLE PT. OREGON THE SUM OF $250.00 CASH AS DOWN PAYMENT ON THOSE BUILDINGS LOCATED AT THE CORNER OF COKER BUTTE ROAD & CRATER LAKE HWY KNOWN AS TRUCK TOPS. PLUS. THE BALANCE OF $750.00 IS TO BE PAID AS FOLLOWS $250.00 DUE MAY 4TH & THE BALANCE OF $500.00 DUE MAY 11TH 1998.

PURCHASE OF SAID BUILDING & COMPER & ALL OTHER MOVEABLE MATERIAL ON THE PREMISES EXCEPT. TRAILER HOME WELL PUMP & TANK & GOOSE NECK TRAILER. DIALS MAY CHARGE STORAGE ON SAID GOOSE NECK TRAILER IF IT IS NOT REMOVED FORTHWITH BY WHOEVER HAS LEGAL TITLE. WAS TO HAVE BEEN REMOVED BEFORE CLOSING OF PURCHASE BY SELLER

UPON A CLEAN & WORKMAN LIKE REMOVAL BUYER SHALL BE REFUNDED THE FULL PURCHASE PRICE. CONCRETE NEED NOT BE REMOVED & A BILL OF SALE TO BE RECIEVED UPON FULL PAYMENT OF THE $1,000 PURCHASE PRICE.

EXHIBIT 1

Removal of Buildings & clean up to be accomplished within 30 days from the date hereof

EXHIBIT 1-1

NORTHWEST
wholesale incorporated®

1567 N. Wenatchee Ave.
Wenatchee, WA 98801

P.O. Box 1649
Wenatchee, WA 98807-1649

Office: (509) 662-2141 • Fax (509) 663-4540
Warehouse: (509) 662-3563 • Fax (509) 662-3564
1-800-874-6607

Bill of Sale

Seller hereby sells unto Barbara + Lawrence Dail of 237 Thunder Cloud circle the Existing Building located at the corner of Cole Butte Road + Chelan Ave Hyd known as Truck Stop plus to move or salvage + including all moveable items except as owned by the Bankruptcy Trustee or the prior owners Tenancy To Be Removed By 7-1-98

Seller Owner

EXHIBIT 2

environmental consultants

Bill Ferguson
5200 Pioneer Road
Medford, OR 97501

DATE: 05-06-98
PHONE #: 772-9545

REGARDING: RESULTS OF ANALYSIS ON BULK SAMPLES RECEIVED 05-04-98

Dear Bill:

Listed below are the test results for the above referenced samples you brought into our office.

BULK SAMPLE ANALYSIS FOR ASBESTOS

Source: Flooring & Roofing
Location: Truck Tops
Site Address: N/A
Sampled By: N/A

Container: None
Date Collected: N/A
Date Analyzed: 05-06-98
No. of Samples: 3

SAMPLE ID #	SAMPLE APPEARANCE	ASBESTOS CONTENT	FIBROUS MATERIAL	NON FIBROUS MATERIAL
98A131 (Vinyl Floor)	Brown Vinyl, Gray Backing	None Detected	25% Plant 25% Synthetic	50% Synthetic
98A132 (Roofing)	Red Pebble, Brown Solid	None Detected	30% Plant	40% Mineral Aggregate 30% Organic Binder
98A133 (Floor Tile)	Tan Solid	None Detected		90% Synthetic, 10% Mineral Aggregate

If you have any questions regarding this report, please feel free to contact me at 779-2646.

Sincerely,

David W. Fawcett
Asbestos Analyst

EXHIBIT 3

ASBESTOS SURVEY
OF
Truck Tops Plus Demolition Site
4044 Crater Lake Avenue

INTRODUCTION

BWR Associates, Inc. (BWR) was retained by Bill Ferguson to perform an asbestos survey of the Truck Tops Plus building. The purpose of the survey was to provide Stiles Construction with the type and quantity of asbestos containing materials located in the area of building demolition.

ASBESTOS SURVEY

The partially demolished building was surveyed by David W. Fawcett of BWR, on June 1, 1998. Samples of potential asbestos containing materials were collected from interior and exterior areas of the building and associated debris piles. No attempt was made to sift through the piles. See the Site Sample Record Sheets for locations of all samples collected, and approximate amounts of materials. A sample tag was placed at each collection location.

ASBESTOS ANALYSIS

All samples collected were analyzed for asbestos using Polarized Light Microscopy techniques. Asbestos analysis results are found in Bulk Sample Analysis for Asbestos.

ASBESTOS MATERIALS

Asbestos was found in materials at the following locations:

1. Taping compound in the northeast bathroom and kitchen wall
2. Yellow floor vinyl in the kitchen
3. Brown floor vinyl in the NW room near sliding door (removed)
4. Texture on the kitchen soffit, SE corner room closet wall, and exposed beam room ceiling
5. Black/gray sealant on roofing vents

D W Fawcett

David W. Fawcett
Asbestos Division Manager

EXHIBIT 4-A

920 MASON WAY • MEDFORD, OREGON 97501-1343 • (541) 779-2646

SITE SAMPLE RECORD SHEET

SOURCE: Truck Tops Plus
LOCATION: 4044 Crater Lake Ave. Medford, Oregon
DATE: 06-01-98
INSPECTOR: David W. Fawcett

SAMPLE #	TYPE	LOCATION	FRIABLE	AREA ft^2
98-126A.1	Drywall	Concrete Floor, Metal Peak Roof Area	Yes	?
98-126A.2	Taping Compound	Concrete Floor, Metal Peak Roof Area	Yes	?
98-126A.3	Tar Paper	Concrete Floor, Metal Peak Roof Area		?
98-126A.4	Red/Green/White Small Pebble Roofing	Concrete Floor, Metal Peak Roof Area	No	?
98-126A.5[a]	Red/Green/White Large Pebble Roofing	Concrete Floor, Metal Peak Roof Area	No	?
98-126A.6	White Pebble Tab Roofing	Outside on Concrete Slab, North East Side	No	?
98-126A.7	White Roll Roofing	Plywood with Round Hole	No	?
98-126A.8	Tar Paper Roofing	Plywood with Round Hole	No	?
98-126A.9	Old Red Roofing	Plywood with Round Hole	Yes	?
98-126A.10	Texture	Plywood Boards Central Area	Yes	?
98-126A.11	Taping Compound	Tape Near Stacked Plywood	Yes	?
98-126A.12[b]	Brown Vinyl	Small Fireplace Room	Yes	100
98-126A.13	Taping Compound	Northeast Bathroom	Yes	300
98-126A.14	Tan Floor Tile	Northeast Bathroom	No	100
98-126A.15[c]	Tan/Pink Floor Tile	Northeast Hallway	No	400
98-126A.16	Yellow Vinyl Floor	Kitchen	Yes	4
98-126A.17	Taping Compound	Kitchen Wall	Yes[1]	500

EXHIBIT 4-B

920 MASON WAY • MEDFORD, OREGON 97501-1343 • (541) 779-2646

SITE SAMPLE RECORD SHEET

SOURCE: Truck Tops Plus
LOCATION: 4044 Crater Lake Ave. Medford, Oregon
DATE: 06-01-98
INSPECTOR: David W. Fawcett

SAMPLE #	TYPE	LOCATION	FRIABLE	AREA
98-126A.18	Wall Texture	Kitchen Soffit	Yes[2]	?
98-126A.19	Taping Compound	NW Room Near Slide Door	Yes	1000
98-126A.20	Brown Vinyl Floor	NW Room Near Slide Door	Yes[3]	?
98-126A.21	Taping Compound	Phone Room	Yes	10
98-126A.22	Taping Compound	SW Glass Window Room Ceiling	Yes	1000
98-126A.23	Drywall	SW Flower Wallpaper Room	Yes	1000
98-126A.24	Pink Vinyl Floor	South Bathroom	Yes	40
98-126A.25	Gray Vinyl Floor	South Bathroom Toilet	Yes	15
98-126A.26	Plaster	South Bathroom Wall	No	100
98-126A.27	Orange Peel Texture	SE Corner Room, Closet	No	40
98-126A.28	Ceiling Texture	Exposed Beam Room	Yes	500
98-126A.29	Black/Gray Sealant	Roof Vent on Ground East of Large Cedar Tree	No	?
98-126A.30	Black Roofing	NW Corner on Gravel	No	?
98-126A.31	White Duct Tape	Round Duct Outside South of Building	Yes	200

[1]Exposed. [2]Damaged. [3] Previously Removed. [a] Previously analyzed as sample 98A132. Previously analyzed as sample 98A131. [c]Previously analyzed as sample 98A133.

Note: Amounts provided in ft^2 are visual estimates based on material still attached to walls and ceilings. Previously removed material was not quantified. HVAC vibration cloth stamped "asbestos seal".

EXHIBIT 4-C

920 MASON WAY • MEDFORD, OREGON 97501-1343 • (541) 779-2646

BWR assoc., inc.
environmental consultants

BULK SAMPLE ANALYSIS FOR ASBESTOS

Bill Ferguson
5200 Pioneer Road
Medford, OR 97501

DATE: 06-03-98
PROJECT #: 98-126A

Source: Various
Location: Truck Tops Plus
Sampled By: David W. Fawcett
Container: Plastic Bags

Date Collected: 06-01-98
Date Analyzed: 06-02-98
No. of Samples: 28

SAMPLE #	SAMPLE APPEARANCE	ASBESTOS CONTENT	FIBROUS MATERIAL	NON FIBROUS MATERIAL
98-126A.1	White Solid, Tan Paper	None Detected	10% Plant	70% CaC03 20% Mineral Aggregate
98-126A.2	White Pieces	None Detected		70% CaC03 30% Mineral Aggregate
98-126A.3	Brown Fibrous Solid	None Detected	60% Plant	40% Organic Binder
98-126A.4	Red/White/Green Pebble, Br Solid	None Detected	40% Plant	40% Organic Binder
98-126A.6	White Pebble, Brown Fibrous	None Detected	15% Glass	60% Mineral Aggregate 25% Organic Binder
98-126A.7	White Pebble, Brown Fibrous	None Detected	10% Glass	50% Mineral Aggregate 40% Organic Binder
98-126A.8	Brown Fibrous	None Detected	70% Plant 15% Synthetic	15% Organic Binder
98-126A.9	Red Pebble, Brown Fibrous	None Detected	30% Plant	40% Organic Binder 30% Mineral Aggregate
98-126A.10	Gray Surface, White Solid	None Detected		80% CaC03 20% Mineral Aggregate
98-126A.11	White Pieces	None Detected		60% CaC03 40% Mineral Aggregate

D.W. Fawcett

David W. Fawcett
Asbestos Analyst

EXHIBIT 4-D

920 MASON WAY • MEDFORD, OREGON 97501-1343 • (541) 779-2646

environmental consultants

BULK SAMPLE ANALYSIS FOR ASBESTOS

Bill Ferguson
5200 Pioneer Road
Medford, OR 97501

DATE: 06-03-98
PROJECT #: 98-126A

Source: Various
Location: Truck Tops Plus
Sampled By: David W. Fawcett
Container: Plastic Bags

Date Collected: 06-01-98
Date Analyzed: 06-02-98
No. of Samples: 28

SAMPLE #	SAMPLE APPEARANCE	ASBESTOS CONTENT	FIBROUS MATERIAL	NON FIBROUS MATERIAL
98-126A.13	White/Tan Pieces	<10% Chrysotile		60% CaC03 30% Mineral Aggregate
98-126A.14	Tan Solid	None Detected		60% Synthetic 40% Mineral Aggregate
98-126A.16	Yellow Vinyl, Gray Backing	40% Chrysotile	10% Plant	30% Synthetic 20% Binder
98-126A.17	White/Tan Pieces	10% Chrysotile		50% Mineral Aggregate 40% CaC03
98-126A.18	White Solid	<10% Chrysotile		60% CaC03 30% Mineral Aggregate
98-126A.19	White Solid	<10% Chrysotile		50% CaC03 40% Mineral Aggregate
98-126A.20	Brown Vinyl, Gray Backing	20% Chrysotile	20% Plant	50% Synthetic 10% Binder
98-126A.21	White Pieces	None Detected		50% Mineral Aggregte 50% Binder
98-126A.22	White Solid	None Detected	5% Plant	60% Mineral Aggregate 35% Binder
98-126A.23	White Solid, Tan Paper	None Detected	10% Plant	60% CaC03 30% Mineral Aggregate

D.W. Fawcett

David W. Fawcett
Asbestos Analyst

EXHIBIT 4-E

920 MASON WAY • MEDFORD, OREGON 97501-1343 • (541) 779-2646

BWR assoc inc
environmental consultants

BULK SAMPLE ANALYSIS FOR ASBESTOS

Bill Ferguson
5200 Pioneer Road
Medford, OR 97501

DATE: 06-03-98
PROJECT #: 98-126A

Source: Various
Location: Truck Tops Plus
Sampled By: David W. Fawcett
Container: Plastic Bags

Date Collected: 06-01-98
Date Analyzed: 06-02-98
No. of Samples: 28

SAMPLE #	SAMPLE APPEARANCE	ASBESTOS CONTENT	FIBROUS MATERIAL	NON FIBROUS MATERIAL
98-126A.24	Pink/Gray Vinyl Gray Backing	None Detected	20% Plant 20% Synthetic	50% Synthetic 10% Bider
98-126A.25	White Vinyl, Gray Backing	None Detected		80% Synthetic 20% Binder
98-126A.26	White Solid Cementitious	None Detected	5% Plant	90% Mineral Aggregate 5% Binder
98-126A.27	White/Tan Pieces	15% Chrysotile		60% Mineral Aggregate 35% Binder
98-126A.28	White Solid	10% Chrysotile		50% Mineral Aggregate 40% Binder
98-126A.29	Gray/Black Solid	10% Chrysotile		50% Organic Binder 35% Mineral Aggregate
98-126A.30	Black Fibrous Solid	None Detected	15% Synthetic 15% Plant	60% Organic Binder 10% Mineral Aggregate
98-126A.31	White Fibrous	None Detected	90% Synthetic	10% Binder

David W. Fawcett
Asbestos Analyst

EXHIBIT 4-F

920 MASON WAY • MEDFORD, OREGON 97501-1343 • (541) 779-2646

Photo # 1 is BWR test #98-126A.34. This asbestos ceiling material was removed and discarded outside the building prior to my inspection. Approx. 120 sqft

Photo # 2 is BWR test #98-126A.36. This shows a hole through asbestos containing tape compound and texture. Approx. 6 sqft

Photo # 3 is BWR test #98-126A.35. This is the hallway looking east showing asbestos material removed from the wall discarded on the floor Approx. 32 sqft

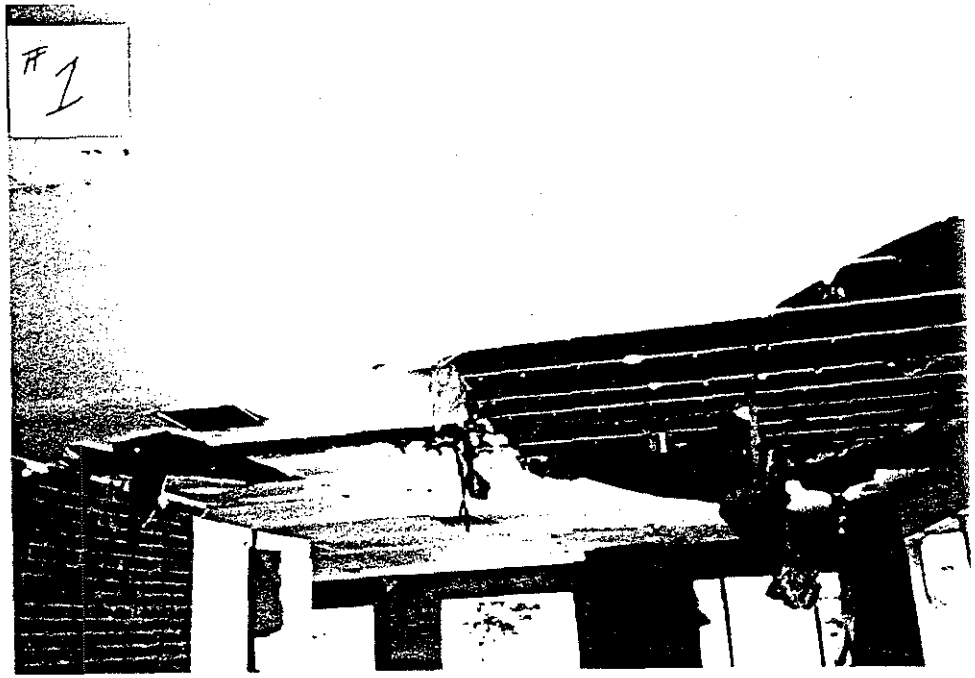


EXHIBIT 5

Photo # 4 is BWR test #98-126A.20 and DEQ test # Z5045. This flooring material was removed and discarded outside the building prior to my inspection. It was distributed throughout a pile of other materials. See photo # 5.

Photo # 5. This shows the general conditions at the site. Also looking inside the building one can see the area were the flooring in photo #5 was removed.

Photo # 6. This shows the front of the building from Crater Lake Ave. facing East. Note the condition of the building and numerous piles of debris.

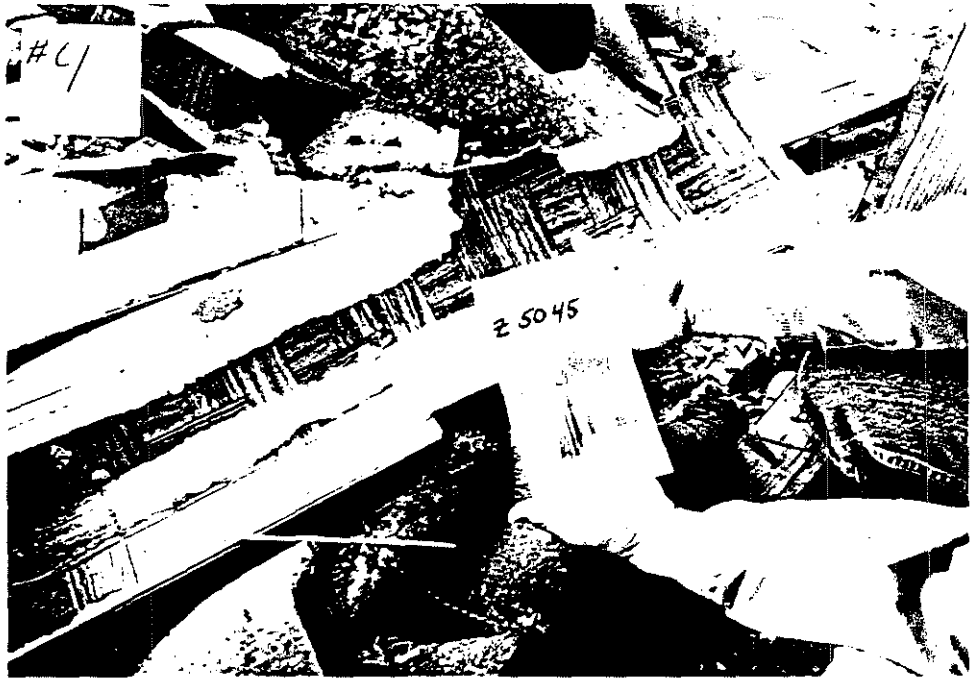
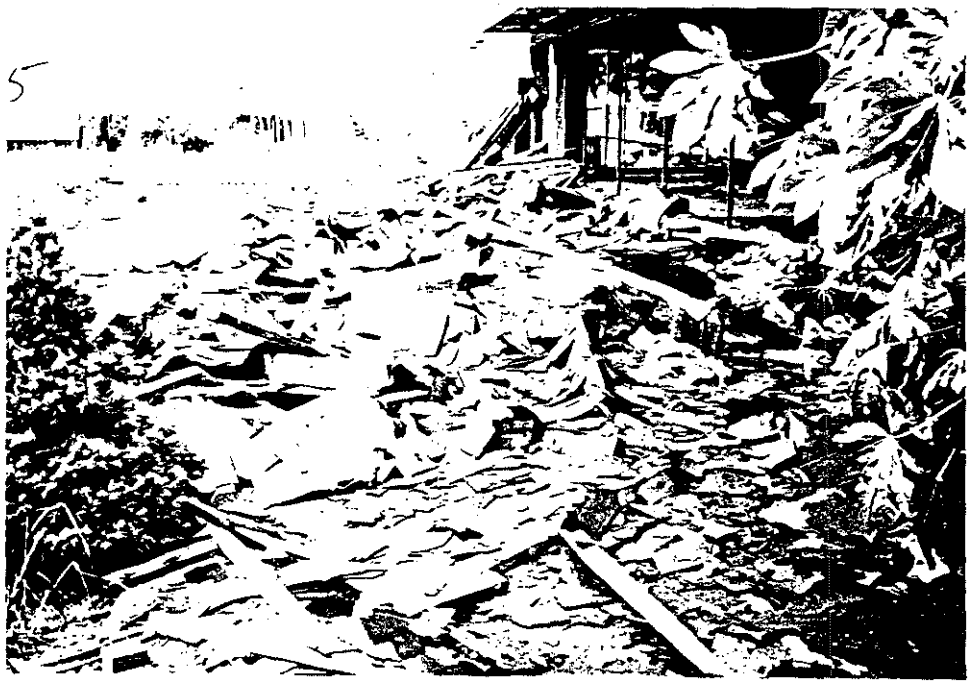
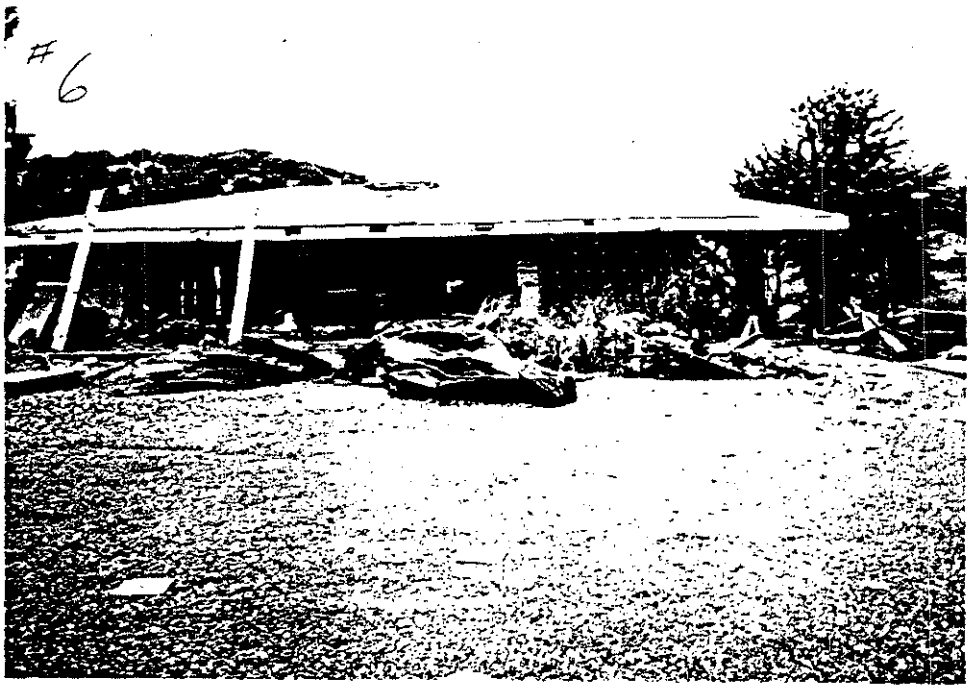


EXHIBIT 6





Western States Environmental Services, Inc.

PO Box 4460 Medford, OR 97501
(541) 770-2482 FAX (541) 773-5923

WORK ORDER

NO. 80698

TO:

F & L Ltd
Attn.: Bill Ferguson
5200 Pioneer Road

Medford, OR 97504

PHONE	DATE OF ORDER
	08/05/98
ORDER TAKEN BY	CUSTOMER'S ORDER NUMBER
Gene Rahenkamp	
[X] T & M	[ ] CONTRACT

JOB NAME NUMBER
Truck Top / Asbestos clean-up & Demo 6157.98

JOB LOCATION
4044 Crater Lake Hwy Medford, OR

JOB PHONE	STARTING DATE
	08/05/98

QTY.	MATERIAL	PRICE	AMOUNT
25	Tyvex	$5.00	125.00
12	1/2 Mask Filters	$3.00	36.00
	Box Towels	$30.00	0.00
	Roll Duct Tape	$3.75	0.00
24	Roll Barricade Tape	$15.00	360.00
	Disposal Bags 36 X 60	$1.00	0.00
10	Disposal Bags 33 X 50	$1.00	10.00
	Disposal Bags 30 X 40	$1.00	0.00
1	Rol 6 mil Poly 20 X 100 Clear	$40.00	40.00
	Roll 4 mil Poly 8 X 100 Clear	$20.00	0.00
	Roll 10 mil Poly 20 X 100 Clear	$90.00	1,080.00
	Glove Bags Horizontal 44 X 60	$4.25	0.00
	Glove Bags Vertical	$6.25	0.00
	Glove Bags One Hand 22 X 30	$3.45	0.00
24	Cans Spray Adhesive	$8.00	192.00
	Gal Lock-Down	$7.50	0.00
	Gal Lag-kote	$17.00	0.00
	Lag Kloth in feet	$3.22	0.00
	Gal Mastic Remover	$19.40	0.00
2	Gloves	$2.00	4.00
	N/A Filters	$3.00	0.00
4	Roll 6 mil Poly Reinforced	$95.00	380.00
1	Roll Asbestos Sticker	$50.00	50.00
2	Roll of Rope	$45.00	90.00
			0.00
	TOTAL MATERIALS		2,367.00

DESCRIPTION OF WORK

Remove all sabestos debris from site

Demo and remove demo debris form site

EQUIPMENT		Unites	AMOUNT
CQS Track Hoe	$365.00	1	$365.00
Water Truck Per Hour	$55.00	35	$1,897.50
Simi End Dumps Per Hour	$65.00	53	$3,428.75
Track Hole	$450.00	4	$1,800.00
Transporst Track Hole	$200.00	1	$200.00
TOTAL EQUIPMENT			$7,691.25

OTHER CHARGES			AMOUNT
Dumping in yards Demo	$7.00	230	$1,610 00
Dumping in yards Asbestos	$15.15	235	$3,560.25
DEQ FEE	$650.00	1	$650.00
Air Testing Personals	$25.00	3	$75.00
Scrap Salvege Schnitzer Steel	($39.95)	1	($39.95)
TOTAL OTHER			$5,855.30

LABOR	HOURS	RATE	AMOUNT
Asbestos Suppervisor	62	$35.00	$2,170.00
Asbestos Worker	155	$25.00	$3,875.00
Office Worker	12	$20.00	$240.00
			$0.00
			$0.00
TOTAL LABOR			$6,285.00

TOTAL LABOR	$6,285.00
TOTAL MATERIALS	$2,367.00
TOTAL OTHER	$5,855.30
TOTAL EQUIPMENT	$7,691.25
SUB TOTAL	$22,198.55
HAZARDOUS INSURANCE 5%	1,276.42
OVERHEAD & PROFIT 15%	3,329.78
TOTAL	26,804.75

DATE COMPLETED:

WORK ORDERED BY

SIGNATURES

I hereby acknowledge the satisfactory completion of the above described work

EXHIBIT 7

September 3, 1998

Department of Environmental Quality
201 West Main, Suite 2-D
Medford, OR 97501

RE: Notice of noncompliance
WRM-98-060
Air Quality, Jackson County

Attn.: Steven M. Croucher

Dear Mr. Croucher:

I am in receipt of your letter dated August 18, 1998 reciting a May 29, 1998 contact.

You reference, "as the owner of the property, you later confirmed that you were performing site renovations that did include removal of asbestos containing material." This statement is incorrect and untrue. I advised you that the person doing the work, that you contacted, was the owner of the building.

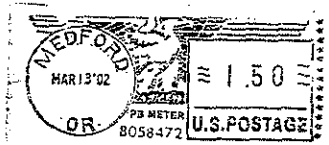
All work at the site, done under either my direction or control, was in compliance with all DEQ requirements.

If you have any questions, please call me at 944-2929.

Sincerely,

William Ferguson
5200 Pioneer Road
Medford, OR 97501

EXHIBIT 8



FIRST CLASS MAIL

STARK AND HAMMACK, P.C.
Attorneys at Law
201 W. Main Street, Suite 1B
Medford, Oregon 97501

Ms. Gretchen L. Miller
Hearings Officer
Department of Enviromental Quality
875 Union Street, NE
Salem, OR 97311

Attachment H-9

STOEL RIVES LLP
ATTORNEYS AT LAW

900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

March 18, 2002

SCOTT J. KAPLAN
Direct (503) 294-9186
sjkaplan@stoel.com

Ms. Gretchen Miller
Central Hearings Panel
2510 Oakmont Way
PO Box 1027
Eugene OR 97440

Re: ***In the Matter of American Exchange Services, Inc.,***
No. AQ/A-WR-98-186 Jackson County

Dear Ms. Miller:

Enclosed for your consideration are Respondent's Prehearing Brief on Ownership and Liability Issues and the Testimony of Cindi Poling.

Thank you for your attention to this matter.

Very truly yours,

Scott J. Kaplan

SJK:dmv
Enclosures
cc (w/enc.): Mr. Richard A. Stark
Ms. Shelley McIntyre

RECEIVED
MAR 20 2002
EMPLOYMENT HEARINGS

Ex. 9

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of: American Exchange Services, Inc., an Oregon corporation,	)	RESPONDENT'S PREHEARING BRIEF ON OWNERSHIP AND LIABILITY ISSUES
Respondent.	)	No. AQ/A-WR-98-186 Jackson County

I. INTRODUCTION

In this case, DEQ seeks to hold respondent American Exchange Services, Inc. ("AES"), a section 1031 exchange provider—for relevant purposes an escrow company—liable for the activities of a customer at property held in escrow by AES. The evidence will be undisputed that AES had no knowledge of and exercised no control over the customer's activities and that the activities were undertaken solely to benefit the customer, not AES. *AES's sole contact with the property at issue is to hold bare title as a fiduciary pending completion of the exchange transaction.*

DEQ does not really question any of this but has stubbornly persisted with this prosecution, claiming that while it may be "bad policy" to prosecute escrow companies acting as fiduciaries, DEQ staff is not in a position to change policy. However, this prosecution is not only a bad idea because it is bad policy and could significantly damage the real-estate industry in Oregon. By this brief, AES will show that the prosecution is a bad idea because it is contrary to the law and the facts. To dismiss this prosecution, the Hearing Officer need not make a policy decision but need only apply well-established law to the undisputed facts.

First, under the environmental laws, something more than a hypothetical ability to control the activities that caused the pollution is necessary for liability. The exercise of

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

actual control is required. No one will contend that AES exercised such control. Moreover, Oregon's legislature has expressly enacted laws to protect fiduciaries by clarifying the meaning of "owner" and "operator." This authority should be applied to hold that AES, as is necessary for the concept of an escrow to be feasible, is immune from liability so long as it merely acts as a fiduciary.

Finally, perhaps recognizing that the environmental laws offer little support, DEQ relies on common-law agency authority. However, under this authority, an alleged principal is not subject to liability for actions by the alleged agent outside the scope of the agent's authority, contrary to the principal's express written instructions or undertaken solely to benefit the agent. This is particularly true where the liability is for the purposes of punishment as are civil penalties sought here. In the highly analogous area of punitive damages, the Oregon Supreme Court has held that vicarious liability only applies if the alleged principal condones the transaction and the transaction was for the principal's benefit. The facts here are entirely to the contrary.

Thus, although this prosecution makes no sense on a policy level, the Hearing Officer need not make a policy decision. Applying the law to the undisputed facts, the case must be dismissed because AES was not at any relevant time the owner or operator of the property, nor is it vicariously liable for the actions of its customer.

II. FACTS

AES is an Oregon corporation engaged in the business of acting as a facilitator for tax-deferred exchange transactions under the Internal Revenue Code, 26 USC § 1031. AES is an affiliate of AmeriTitle Insurance, an escrow and title insurance company. As an adjunct to the escrow services performed by AmeriTitle, AES handles IRS

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

section 1031 exchanges. In a section 1031 exchange, AES holds legal title on behalf of its customers so that they can try to take advantage of certain tax laws by controlling the timing of their disposition and acquisition of real property. (Written Testimony of Cindi Poling (hereafter, "Poling") ¶¶ 2-3.)

AES holds itself out to the public as offering its services to any real property owner subject to the payment of its fees. It does no background check or investigation of its customers before being retained. The cost of such investigation would be prohibitive. The practices of other section 1031 exchange and escrow companies with regard to not investigating their customers is consistent throughout the industry. (*Id.* ¶¶ 9, 10.)

On March 9, 1998, AES's customer, William Ferguson, and AES entered into a Real Property Exchange Agreement ("Reverse Starker with Back-End Exchange") (the "Agreement") (attached as Exhibit 1) and an Indemnity and Release Agreement (the "Indemnity") (attached as Exhibit 2) to facilitate a delayed section 1031 exchange in which Mr. Ferguson would acquire from the bankruptcy trustee, Michael Grassmueck, property at 4044 Crater Lake Avenue, Medford, Oregon (the "Property"). On April 2, 1998, Mr. Ferguson paid $278,282.34 into the escrow and received a deed of trust in return. AES then took title to the property. (*Id.* ¶ 4.)

AES held title in escrow until August 16, 1999, until Mr. Ferguson was able to find a "buyer" for the property he was exchanging. On August 23, 1999, title was formally put into Mr. Ferguson's name. (*Id.* ¶ 5.)

Mr. Ferguson has never been an officer, director, employee or owner of AES. Under the IRS regulations, such a relationship would have precluded AES from acting as an intermediary for Mr. Ferguson. The sole relationship between Mr. Ferguson and AES,

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

as required by law, was that Mr. Ferguson was a customer pursuant to the terms of the Agreement. (*Id.* ¶ 6.)

Here no act or omission of AES caused the alleged asbestos violation. AES held title as a fiduciary, but Mr. Ferguson controlled day-to-day activities at the property, as is made clear by the Agreement. The Agreement indicates that AES only took title to facilitate the potential tax benefit to Mr. Ferguson, the exchangor, of the 1031 exchange. (*See, e.g.*, Recital B.) The property was therefore placed in an escrow, the "Acquisition Escrow." (Section 2.1.) Mr. Ferguson deposited into the escrow a sum sufficient to pay all costs and expenses in connection with the property. (Section 21.2.) Mr. Ferguson was authorized to collect all rents and proceeds from the property and pay therefrom all expenses and, as AES's "attorney-in-fact," to "manage, operate, maintain and repair" the property. (Sections 2.2.2.1, 2.2.2.3.) Mr. Ferguson was contractually required to complete the exchange as quickly as possible: "The Relinquished Property shall be disposed of to a third party and the Exchange Transaction shall be completed as soon as practicable." (Section 2.2.1.) Mr. Ferguson was required to use his best efforts to obtain a buyer for a brief period of time and the real party in interest retains control of the property. (*Id.*)

Although the Agreement purports to give AES the right "to exercise and perform all rights and obligations as owner of the [Property]," AES exercised no such rights. The Property was at all relevant times exclusively controlled by Mr. Ferguson or his contractors. AES engaged in no activities on or at the Property. No AES representative was physically present at the Property. Mr. Ferguson did not seek or obtain any approval

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

from AES for his activities at the Property, and AES did not direct any such activities. This was consistent with the standard industry practice. (*Id.* ¶¶ 7, 8.)

If section 1031 exchange and escrow companies are required to investigate their customers and be held responsible for their customers' activities, it would substantially increase the costs for real estate transactions. Indeed, I believe it might destroy the 1031 exchange business. It would be difficult to justify staying in the business given the magnitude of potential liabilities. *Here the penalty sought by DEQ is more than 10 times the fee AES received for its services.* (*Id.* ¶ 11.)

Furthermore, AES requires customers to obey the environmental laws in their activities. The Indemnity requires Mr. Ferguson to indemnify AES and obey all laws related to:

> "1.5 The existence on the Replacement Property of any hazardous or toxic substance, material or waste that is or becomes regulated by any federal, state or local government authority, including, without limitation, any material or substance designed as a hazardous substance, waste or material pursuant to the Clean Air Act (42 USC §7401 *et seq.*), the Federal Water Pollution Act (the 'Clean Water Act') (33 USC §1251 *et seq.*), the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendment (42 USC §6901 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended by the Superfund Amendments and Reauthorization Act) (42 USC §9601 *et seq.*), the Hazardous Materials Transportation Act (42 USC §1801 *et seq.*), the Toxic Substances Control Act (15 USC §2701 *et seq.*), or Article 90 of the Uniform Fire Code, as amended from time to time, or the breach of any covenant, representation, warranty or other term or provision of that certain Environmental Compliance Certificate executed by the parties of even date herewith." (*Id.* at 13.)

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

AES did not direct or request that Mr. Ferguson engage in demolition activities at the Property. AES experienced no benefit from such activities, nor could it conceivably do so. Any such activities were engaged in to benefit Mr. Ferguson, not AES. AES's sole interest is its fee (in this case, $800) for handling property in escrow, which is entirely unrelated to any activities on properties in escrow. (*Id.* ¶ 14.)

Although Mr. Ferguson must indemnify AES for any fine imposed, this indemnity will not alleviate the competitive harm to AES from a finding that it violated the environmental laws. Nor will Mr. Ferguson's indemnity alleviate the harm to the indemnity resulting from holding escrow companies liable for their customers' activities. (*Id.* ¶ 15.)

III. ARGUMENT

A. AES Is Not Vicariously Liable for Mr. Ferguson's Acts or Omissions Under the Clean Air Act

As DEQ has argued in this proceeding,

> "although DEQ seeks to enforce state law, it is helpful to look to federal law for background, interpretation and policy. Section 112 of the federal Clean Air Act authorizes the Environmental Protection Agency (EPA) to establish health-based national emission standards for categories of hazardous air pollutants (NESHAP) to protect the public from these pollutants. 42 U.S.C. § 7412." (Department's Memorandum in Opposition to Respondent's Motion To Dismiss at 3.)

It is these federal law standards that DEQ is seeking to enforce, albeit against the wrong party. Consequently, the authority interpreting the scope of liability under that federal environmental laws is persuasive. *See Newell v. Weston*, 150 Or App 562, 571-72, 946 P2d 691 (1997) (where state environmental law is based on federal law, state law should be interpreted consistently with federal standards); *accord Badger v. Paulson Investment*

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Co., Inc., 311 Or 14, 21, 803 P2d 1178 (1991) (Oregon courts will look to federal law for guidance in interpreting a state statute based upon a federal statute). Under the federal authority, because AES did not actually exercise control over the polluting activities, it has no liability.

1. The Supreme Court's *Bestfoods* Standard

In *United States v. Bestfoods*, 524 US 51, 118 S Ct 1876, 141 L Ed 2d 43 (1998), although in the specific context of liability of a parent corporation for the actions of its subsidiary, stressed that the test for liability under the environmental laws is not merely an alleged right to control the actions of another but whether any such right was *actually exercised*. The Court stressed the general rule that to give rise to liability,

> "an operator must manage, direct or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations * * *." *Id.* at 1887.

The Court described three scenarios that could establish sufficient control by a parent over a facility to give rise to operator liability, scenarios that are highly analogous to the alleged principle-agent relationship here. First, "* * * a parent can be held directly liable when the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of joint venture." *Id.* at 1889. Second, a person serving as officer or director of both the parent and the subsidiary "* * * might depart so far from the norms of parental influence exercised through dual office-holding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility." *Id.* Finally, "* * * an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility." *Id.*; *see also Schiavone v. Pearce*, 77 F Supp 2d 284 (D

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Conn 1999) (party only liable if "managed, directed, or conducted operations specifically related to the pollution * * * or had anything to do with the leakage or disposal of creosote, or decision about compliance with environmental regulations").

Here, applying *Bestfoods*:

- There was no joint venture between AES and Mr. Ferguson. AES merely held the property in escrow. Mr. Ferguson's activities on the property were for his own purposes, not AES's and provided no benefit to AES.
- There is no evidence that AES directed or authorized Mr. Ferguson's activities.
- Mr. Ferguson's "hat" was his own. He was not an officer, director or employee of AES. Indeed, this sort of relationship would have precluded AES from acting as an intermediary.

Under *Bestfoods*, the utter failure to prove that AES "managed, directed or conducted operations" at the property necessitates a dismissal of the charges.

2. Clean Air Act Authority

As noted above, the DEQ asbestos regulations at issue were enacted against the background of the federal Clean Air Act ("CAA"). Therefore, in addition to *Bestfoods*, it will be necessary to examine CAA authority. As under *Bestfoods*, under the CAA, a party is generally only subject to liability if he or she had "significant or substantial or real control and supervision over a project." *United States v. Walsh*, 783 F Supp 546, 548 (WD Wash 1991), *aff'd United States v. Walsh*, 8 F3d 659, 662 (9th Cir 1993). The reason for this rule is that only a person in actual control of the project has "the ability to correct work" and so "ha[s] the necessary control to be an operator under the statute."

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Walsh, 783 F Supp at 550. Thus a person "cannot be held personally responsible" where he has a "lack of hands-on supervision and control of that project." *Id.*

United States v. Dell'Aquilla ,150 F3d 329 (3d Cir 1998), in which such control was found, is instructive. One of the factors that the court found relevant was that one of the defendants met the contractors conducting the work and played a role in the hiring of these contractors. Additionally, he signed the demolition contracts and was regularly on site witnessing the demolition of the asbestos-filled buildings. *See id.* The other defendant was found liable as an operator because it was involved in hiring attorneys, engineers and architects for the project, it signed a check used to pay contractors, and it signed a letter that modified the contract with the demolition contractor and subcontractors. *See id.* at 334.

Here AES had no connection to any demolition activities. It hired no one, supervised no one, paid no one. Under CAA authority, the charges should be dismissed.

B. Protection of Fiduciaries Under the Environmental Laws

1. Oregon Law

DEQ alleges that AES was the "owner" of the property while the property was in escrow. It is true that bare title was formally in AES's name at the relevant time. However, under the environmental laws, that is not the end of the inquiry, because the term "owner" is not defined in the asbestos or relevant air-quality regulations. However, in the hazardous waste area, for the purposes of the state and federal Superfund statutes, "owner" has been defined to exclude a party that holds title as a fiduciary to facilitate a transaction and does not actively manage the property. Given the ambiguity of the term

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

"owner" under the air-quality laws and regulations, this authority should apply here. Mr. Ferguson, not AES, was the owner of the property as that term is properly construed.

There has been substantial legislative and regulatory activity and public comment on the need to protect fiduciaries from liability under the state Superfund statute, ORS 465.200, *et seq.* As a result, ORS 465.200(19) now excludes from the definition of "owner" a person who "without participating in the management of a facility, holds indicia of ownership primarily to protect a security interest in a facility." *Accord* ORS 465.425. These exceptions come from the legislature's finding that it was necessary to clarify the law to exempt security interest holders from liability under certain circumstances (ORS 465.430)—that is, when they hold title only to protect their or another person's interests and do not actively manage the property. These same principles apply when a 1031 exchange company such as AES holds title merely as a facilitator.

Moreover, the Oregon Legislature recognized not only that security interest holders need protection from unwarranted environmental liability, but also that fiduciaries are entitled to protection. First, the legislature indicated that the lender-liability laws may not be construed "to impose liability on a security interest holder *or fiduciary* or to expand the liability of a security interest holder *or fiduciary* beyond that which might otherwise exist." ORS 465.455 (emphasis added). ORS 465.255(3)(c) exempts from liability fiduciaries pursuant to regulations to be enacted by the Environmental Quality Commission (the "EQC").

The EQC did so in a manner that is directly applicable here. It defined a security interest holder for the purposes of exemption from liability as follows:

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

> "'Holder' for the purposes of ORS 465.200, *et seq.* and this rule means a person who maintains indicia of ownership (as defined below) primarily to protect a security interest (as defined below). A holder includes the initial holder (such as a loan originator), any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market), a guarantor of an obligation, a surety, or any other person who holds ownership indicia primarily to protect a security interest holder or a receiver *or other person who acts on behalf or for the benefit of a holder.*" OAR 340-122-0120(1)(a).

See also OAR 340-122-0140 (excepting ORS chapter 709 trust companies from liability). AES did precisely as the highlighted language indicates: it acted for the benefit of Mr. Ferguson to protect his interests in the property. The EQC has *already made the policy decision* to except fiduciaries like AES from liability.

2. Protection of Fiduciaries Under Federal Environmental Laws

The same need to protect fiduciaries and similar persons who hold title for the benefit of another and who do not manage the property has also led to exemptions under the federal Superfund statute, CERCLA. The Asset Conservation Act of 1996, 110 Stat 3009-462, amended the federal Superfund law to create a "safe harbor" for fiduciaries who merely require that another person comply with the environmental laws. 42 USC § 9607(n)(4); *see also Norfolk Southern Ry. Co. v. Shulimson Bros. Co., Inc.*, 1 F Supp 2d 553, 557 (WD NC 1998) (the CERCLA safe-harbor exception "provides there is no private right of action against the fiduciary"). Again, because the federal authority is persuasive, it further supports a finding that the environmental laws exempt AES from liability.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

C. Oregon Agency Law Authority

Notwithstanding all of the environmental law authority, DEQ would hold AES vicariously liable for Mr. Ferguson's actions, over which AES had no supervision, and which were done solely to further Mr. Ferguson's interests. (*See, e.g.,* Poling ¶¶ 7, 12, 13-14.) Despite the fact that it would seem contrary to common sense, therefore, for AES to be liable for Mr. Ferguson's activities, DEQ relies solely on agency language in the 1031 exchange contracts for its prosecution of the wrong party. However, the party asserting vicarious liability has the burden of proving the existence and scope of the alleged agency. *Dias v. Favel-Utey Realty Co.*, 126 Or 227, 232, 269 P 207 (1928). DEQ will not be able to meet its burden of holding AES responsible for the acts or omissions of Mr. Ferguson at issue here.

a. Mr. Ferguson Was Not AES's Agent

While the contract documents make use of the term "agent," the economic realities of the transaction, not the labels the parties use, determine the existence and scope of alleged agency authority. Thus, existence of an agency relationship, where there is any doubt, is an issue of fact. *Buckel v. Nunn*, 131 Or App 121, 127, 883 P2d 878 (1994). Here the facts will show no such relationship. The testimony of Cindy Poling establishes that, consistent with the industry custom, AES exercised no control over any activities on the property and had no knowledge of these activities. (Poling ¶¶ 7, 12.) The industry custom and realities establish that Mr. Ferguson was not AES's agent.

b. Mr. Ferguson's Activities Were Outside Any Alleged Agency

Even if Mr. Ferguson was AES's agent for some purpose, DEQ must establish that with regard to the demolition project, Mr. Ferguson was acting on behalf of AES

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

within the scope of authority granted by AES. *See Akerson v. D.C. Bates & Sons*, 180 Or 224, 174 P2d 953 (1946) (principal only liable for acts or omissions within scope of agent's authority). The key aspect of the agency relationship is a purpose to benefit the principal "in furtherance of the master's business." *Stroud v. Denny's Restaurant, Inc.*, 271 Or 430, 437, 532 P2d 790 (1975). Because of the need for an intent to benefit the principal, it is a "fundamental legal principle" that "an agent cannot bind his principal in a matter in which his own interest conflicts with the duty he owes to his principal." *Fine v. Harney County Nat'l Bank*, 181 Or 411, 446-48, 182 P2d 379 (1947) (bank not liable for cashier's personal transactions); *accord Hagen v. Shore*, 140 Or App 393, 400-01, 915 P2d 435 (1996) (principal not liable for agent's self-dealing *ultra vires* actions).

Here the contract documents specifically insisted Mr. Ferguson to comply with all environmental laws and regulations in his activities on the property by requiring him to assume all liability for

> "[t]he existence on the Replacement Property of any hazardous or toxic substance, material or waste that is or becomes regulated by any federal, state or local government authority, including, without limitation, any material or substance designed as a hazardous substance, waste or material pursuant to the Clean Air Act (42 USC §7401 *et seq.*), the Federal Water Pollution Act (the 'Clean Water Act') (33 USC §1251 *et seq.*), the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendment (42 USC §6901 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended by the Superfund Amendments and Reauthorization Act) (42 USC §9601 *et seq.*), the Hazardous Materials Transportation Act (42 USC §1801 *et seq.*), the Toxic Substances Control Act (15 USC §2701 *et seq.*), or Article 90 of the Uniform Fire Code, as amended from time to time, or the breach of any covenant, representation, warranty or other term or provision of that

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

certain Environmental Compliance Certificate executed by the parties of even date herewith." (*Id.* at 13.)

In violating these contractual restrictions, Mr. Ferguson was acting solely to benefit himself. (Poling ¶ 14.) AES had no interest in construction, demolition or any other activities on property it held in escrow for a brief time period. (*Id.*) Its interest was solely to hold bare title as a fiduciary in exchange for a fee of $800. (*Id.*) Mr. Ferguson's actions were not within the scope of any authority granted by AES, were directly contrary to AES's written instructions and were solely to benefit Mr. Ferguson, not AES. Consequently, DEQ cannot meet its burden of proving vicarious liability.[1]

c. In the Punitive Damages Context, Actual Knowledge and the Exercise of Control Is Required for Liability

DEQ is seeking to punish AES, not to recover economic loss. Thus this prosecution is highly analogous to an attempt to impose punitive damages, and the punitive damages authority should be persuasive.

In this analysis, a comparison between *Badger v. Paulson Investment Co.*, 311 Or 14, 803 P2d 1178 (1991), and *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or App 371, 879 P2d 1288 (1994), is instructive. In *Badger*, which like this case did not arise in the employment context but in the (alleged) principal and agent context, the court had no difficulty holding that an investment company was vicariously liable for actual damages arising from violations of the securities laws by its independent sales agents. 311 Or at 27. However, with regard to *punitive damages*, the state supreme court noted:

"There is no evidence that Paulson [principal] was aware of, approved of, ratified, or countenanced Kennedy's

[1] For this same reason, AES objects to DEQ's proposed findings of fact related to Mr. Ferguson's development activities. Because these activities were for Mr. Ferguson's own account, they are completely irrelevant to AES's liability or knowledge.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

> or Lambo's [agents'] misconduct. The relevant sales were not recorded in Paulson's books. Paulson received no money from and paid no commissions on the sales. The sales were outside the scope of Kennedy's and Lambo's actual or implied authority and were purely personal dealings."

In comparison, in the employment context, the court in *Bunaitis* held that the employer would be liable for punitive damages based upon the actions of employees if the actions were within the scope of employment and done to further the employer's interests. 129 Or App at 392. Thus *Badier* and *Bunaitis* teach that it is important to distinguish the alleged agent-principal relationship from an employment relationship. In the former circumstance, to *punish* the alleged principal as DEQ seeks to do here, DEQ must prove that the principal approved of and benefited from the alleged conduct. The facts here are entirely to the contrary. DEQ may not impose punitive sanctions on AES for Mr. Ferguson's activities. It serves no purpose and is contrary to law to impose punishment on an innocent bystander.

d. AES Cannot Be Charged with Notice of Facts Mr. Ferguson Obtained before Becoming an AES Customer

Even if the actions or knowledge of a customer could somehow be imputed to AES—and they cannot—preexisting knowledge obtained outside the scope of the alleged agency cannot be imputed. An alleged principal is not deemed to know everything the alleged agent has ever learned, only those facts obtained within the scope of the agency. *Tri-Met v. Odighizuwa*, 112 Or App 159, 828 P2d 468 (1992); *Akerson*, 180 Or at 222-28. In its penalty calculation, to obtain a penalty of *over 10 times AES's fee for the transaction*, DEQ must hold AES liable for alleged knowledge Mr. Ferguson obtained in 1996, two years before he became an AES customer. Even if the law allowed DEQ to

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

punish an innocent bystander—and it does not—the law does not allow an increase in the punishment for knowledge obtained by an unrelated third party two years before the incident in question.

IV. CONCLUSION

AES was not an "owner" as that term is properly construed, nor is it vicariously liable for Mr. Ferguson's acts or omissions.

This is an issue that has importance outside these proceedings. Failure to dismiss the charges here could have serious ramifications for the real estate industry. It would put in jeopardy the ability to consummate a delayed section 1031 exchange or, indeed, to put property under the control of either a buyer or a seller into escrow for any period of time. (Poling ¶ 11.) Because it is not cost-effective for an escrow company to assure compliance with environmental laws, the escrow company must depend upon the parties to the transaction to do so. These parties are the real parties in interest, and it is they the law should require to comply with the environmental laws. Other persons, not AES, owned, operated and were responsible for the property at issue here.

As a matter of law on the undisputed facts, DEQ is stubbornly insisting on prosecuting the wrong party. The charges against AES should be dismissed.

DATED: March 18, 2002.

STOEL RIVES LLP

Scott J. Kaplan, OSB No. 91335
Attorneys for Respondent American Exchange Services, Inc.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Respondent's Prehearing Brief on Ownership and Liability Issues** on the following named person(s) on the date indicated below by

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below.

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

Attorneys for William Ferguson

Shelley McIntyre
Oregon Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201-5451

Attorneys for Oregon Department of Environmental Quality

DATED: March 18, 2002

Scott J. Kaplan, OSB No. 91335
Of Attorneys for Respondent

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of: American Exchange Services, Inc., an Oregon corporation,	)	WRITTEN TESTIMONY OF CINDI POLING
Respondent.	)	

STATE OF OREGON)
) ss.
County of Jackson)

1. I am the Exchange Supervisor for respondent American Exchange Services, Inc. ("AES"). I have handled section 1031 exchanges since 1991, when the Internal Revenue Service issued regulations that led to the creation of the 1031 exchange industry. As such, and based on my work on the transaction at issue, I have personal knowledge of the matters stated herein.

2. AES is an Oregon corporation engaged in the business of acting as a facilitator for tax-deferred exchange transactions under the Internal Revenue Code, 26 USC § 1031.

3. AES is an affiliate of AmeriTitle Insurance, an escrow and title insurance company. As an adjunct to the escrow services performed by AmeriTitle, AES handles IRS section 1031 exchanges. In a section 1031 exchange, AES holds legal title on behalf of its customers so that they can try to take advantage of certain tax laws by controlling the timing of their disposition and acquisition of real property.

4. On March 9, 1998, Mr. Ferguson and AES entered into a Real Property Exchange Agreement ("Reverse Starker with Back-End Exchange") (the "Agreement") (attached as Exhibit 1) and an Indemnity and Release Agreement (the "Indemnity") (attached as Exhibit 2) to facilitate a delayed section 1031 exchange in which

Ex. 10

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Mr. Ferguson would acquire from the bankruptcy trustee, Michael Grassmueck, property at 4044 Crater Lake Avenue, Medford, Oregon (the "Property"). On April 2, 1998, Mr. Ferguson paid $278,282.34 into the escrow and received a deed of trust in return. AES then took title to the property.

5. AES held title in escrow until August 16, 1999, until Mr. Ferguson was able to find a "buyer" for the property he was exchanging. On August 23, 1999, title was formally put into Mr. Ferguson's name.

6. Mr. Ferguson has never been an officer, director, employee or owner of AES. Indeed, under my understanding of the IRS regulations, such a relationship would preclude AES from acting as an intermediary for Mr. Ferguson. The sole relationship between Mr. Ferguson and AES is that Mr. Ferguson is a customer pursuant to the terms of the Agreement, as I believe is required by law.

7. Although the Agreement purports to give AES the right "to exercise and perform all rights and obligations as owner of the [Property]," AES exercised no such rights. The Property was at all relevant times exclusively controlled by Mr. Ferguson or his contractors. AES engaged in no activities on or at the Property. No AES representative was physically present at the Property. Mr. Ferguson did not seek or obtain any approval from AES for his activities at the Property, and AES did not direct any such activities.

8. During the time period AES held the Property in escrow, it was the industry standard practice that while a property is in escrow, the section 1031 exchange company did not exercise any actual control over escrow properties or engage in any activities at escrow properties.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

9. AES holds itself out to the public as offering its services to any real property owner subject to the payment of its fees. It does no background check or investigation of its customers before being retained. The cost of such investigation would be prohibitive.

10. The practices of other section 1031 exchange and escrow companies with regard to not investigating their customers is consistent throughout the industry.

11. If section 1031 exchange and escrow companies are required to investigate their customers and be held responsible for their customers' activities, it would substantially increase the costs for real estate transactions. Indeed, I believe it might destroy the 1031 exchange business. It would be difficult to justify staying in the business given the magnitude of potential liabilities. *Here the penalty sought by DEQ is more than 10 times the fee AES received for its services.*

12. [NOT USED.]

13. AES requires customers to obey the environmental laws in their activities. The Indemnity requires Mr. Ferguson to indemnify AES and obey all laws related to:

> "1.5 The existence on the Replacement Property of any hazardous or toxic substance, material or waste that is or becomes regulated by any federal, state or local government authority, including, without limitation, any material or substance designed as a hazardous substance, waste or material pursuant to the Clean Air Act (42 USC §7401 *et seq.*), the Federal Water Pollution Act (the 'Clean Water Act') (33 USC §1251 *et seq.*), the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendment (42 USC §6901 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended by the Superfund Amendments and Reauthorization Act) (42 USC §9601 *et seq.*), the

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

Hazardous Materials Transportation Act (42 USC §1801 *et seq.*), the Toxic Substances Control Act (15 USC §2701 *et seq.*), or Article 90 of the Uniform Fire Code, as amended from time to time, or the breach of any covenant, representation, warranty or other term or provision of that certain Environmental Compliance Certificate executed by the parties of even date herewith."

14. AES did not direct or request that Mr. Ferguson engage in demolition activities at the Property. AES experienced no benefit from such activities, nor could it conceivably do so. Any such activities were engaged in to benefit Mr. Ferguson, not AES. AES's sole interest is its fee (in this case, $800) for handling property in escrow, which is entirely unrelated to any activities on properties in escrow.

15. Although Mr. Ferguson must indemnify AES for any fine imposed, this indemnity will not alleviate the competitive harm to AES from a finding that it violated the environmental laws. Nor will Mr. Ferguson's indemnity alleviate the harm to the indemnity resulting from holding escrow companies liable for their customers' activities.

Cindi Poling

Cindi Poling

SUBSCRIBED AND SWORN to before me this 13 day of March, 2002.

OFFICIAL SEAL
SARAH D. GUTCHES
NOTARY PUBLIC-OREGON
COMMISSION NO. 338417
MY COMMISSION EXPIRES SEPT. 13, 2004

Sarah D. Gutches

Notary Public for Oregon

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

REAL PROPERTY EXCHANGE AGREEMENT
("Reverse Starker" With Back-end Exchange)

BETWEEN: American Exchange Services, Inc., an Oregon corporation ("AES")

AND: WILLIAM H. FERGUSON ("Exchangor").

DATED: March 9, 1998

RECITALS:

A. Exchangor desires to exchange certain real property presently owned by Exchangor that is located at Sunriver Estates, Lot 6, Oregon and is more particularly described in Exhibit A attached hereto (the "Relinquished Property") for certain real property that is located at 4044 CRATER LAKE AVE., MEDFORD, OR and is more particularly described in Exhibit B attached hereto (the "Replacement Property"), all pursuant to this Real Property Exchange Agreement (the "Exchange Agreement") and Section 1031 of the Internal Revenue Code the ("Exchange Transaction").

B. Exchangor desires to structure the Exchange Transaction as a delayed exchange by which AES will acquire the Replacement Property, exchange the Replacement Property for the Relinquished Property with Exchangor; and dispose of the Relinquished Property, all as more particularly set forth in this Exchange Agreement. Exchangor is aware that there are no current federal or state tax laws, regulations or other similar authority that expressly provide that this Exchange Transaction structure will qualify for tax-deferral treatment under Section 1031 of the Internal Revenue Code.

C. To effectuate the Exchange Transaction, Exchangor has entered into TRUSTEES EARNEST MONEY RECEIPT (the "Purchase Agreement") with MICHAEL A. GRASSMUECK, INC., BANKRUPTCY TRUSTEE ("Seller") concerning the Replacement Property, and Seller has agreed to cooperate with Exchangor in effectuating the Exchange Transaction.

D. AES desires and is willing to participate in the Exchange Transaction on the terms and conditions hereinafter set forth.

AGREEMENT:

1. EXCHANGE OF PROPERTY

AES shall acquire the Replacement Property and transfer and convey the Replacement Property to Exchangor pursuant to the Purchase Agreement and Sections 2 and 3 of this Exchange Agreement, in consideration and exchange for, among other things, the acquisition of the Relinquished Property from Exchangor and the transfer and conveyance of the Relinquished Property pursuant to Section 3 of this Exchange Agreement. Each of the transfers, conveyances and acquisitions contemplated by this Exchange Agreement is part of an integrated, interdependent, mutual and reciprocal plan, which are intended to effectuate an exchange of like-kind properties within the meaning of Section 1031 of the Internal Revenue Code by Exchangor. Each of the transfers, conveyances and acquisitions contemplated by this Exchange Agreement is a condition precedent or a condition subsequent, as the case may be, to each of the other transfers, conveyances and acquisitions contemplated by this Exchange Agreement.

2. PHASE I – ACQUISITION OF REPLACEMENT PROPERTY; RIGHTS AND OBLIGATIONS DURING EXCHANGE PERIOD

2.1. *Acquisition of Replacement Property*: An escrow (the "Acquisition Escrow") for the transfer and conveyance of the Replacement Property from Seller to AES is or shall be opened with AMERITITLE - DONNA RICK (the "Escrow Company"). The Acquisition Escrow shall close on or before the date specified in, or determined in accordance with, the Purchase Agreement, as such date may be extended by the agreement of Exchangor and Seller (the "Phase I Closing Date"). On or before the Phase I Closing Date:

2.1.1. AES shall be assigned and shall assume the Purchase Agreement, with Seller's consent (and with Seller's release of AES pursuant to separate Release Agreement).

2.1.2. Exchangor shall make one or more loans to AES (in the aggregate, the "Exchange Loan") of cash in an amount sufficient for AES to perform the obligations AES assumed under the Purchase Agreement and to pay the costs and expenses incurred by AES under Section 2.2.2 of this Exchange Agreement to the extent the net proceeds of operations of the Replacement Property (as defined in Section 2.2.2.1) are not sufficient to pay those costs and expenses. The Exchange Loan shall be evidenced by AES' Promissory Note, in the form attached hereto, and the Promissory Note shall be secured by a Trust Deed, also in the form attached hereto (the "Exchange Note and Trust Deed") encumbering the Replacement Property. The Exchange Loan shall be due and payable in full at the end of the Exchange Period (as defined in Section 2.2.1). Notwithstanding the foregoing provisions, or any other provision of the Exchange Note and Trust Deed: (a) AES hereby covenants to use the net proceeds of operations of the Replacement Property (as defined in Section 2.2.2.1) to make partial prepayments of the Exchange Loan, (b) the balance of the Exchange Loan (including, without limitation, the Exchange Note and Trust Deed) outstanding at the end of the Exchange Period shall be paid and satisfied solely out of the net proceeds of the sale of the Relinquished Property, and (c) the Exchange Loan (including, without limitation, the Exchange Note and Trust Deed) is nonrecourse as to AES. Exchangor waives any right Exchangor may have to waive the security for the Exchange Loan and to enforce the Exchange Loan obligation directly, and Exchangor shall look solely to the net proceeds of the sale of the Relinquished Property as the source of repayment of, and to the Replacement Property as the sole security for the performance of the terms of, the Exchange Loan (including, without limitation, the Exchange Note and Trust Deed).

2.1.3. AES shall deposit into the Acquisition Escrow a copy of this Exchange Agreement, and each of the parties shall execute, acknowledge, obtain and deposit in the Acquisition Escrow such other documents as are reasonably required by this Exchange Agreement, the Purchase Agreement, the Escrow Company or otherwise to effectuate the Exchange Transaction. Such other documents include, but are not limited to, the documents listed on Exhibit C attached hereto.

2.1.4. If the Purchase Agreement includes a provision for seller financing, the terms shall also provide that: (a) the seller financing shall be by note and trust deed, (b) the note and trust deed shall be assigned to and assumed by Exchangor at the Phase II Closing Date (as defined in Section 3, below), and (c) the Seller shall

consent to the assignment and assumption from AES to and by Exchangor, with a full release of AES, in a form and in substance acceptable to AES, at the Phase II Closing Date. If the terms of acquisition of the Replacement Property include a provision for non-seller financing, in no event shall those terms require AES to enter into, assume or otherwise be obligated on any loan secured by the Replacement Property. In addition, AES shall have no obligations to Exchangor or the lender respecting, and shall have no liability to Exchangor or the lender for, any loss or diminution in value with respect to such financing and any security therefor. Without limiting the generality of the foregoing, AES shall have no obligation to Exchangor to protect the value or enforceability of, or to enforce, and shall not be obligated to cure any default of, any obligation encumbering the Replacement Property unless: (i) the Exchange Loan provided funds therefor as an expense of the Replacement Property payable by AES pursuant to Section 2.2.2, or (ii) Exchangor so instructs AES in writing and provides AES with funds sufficient to cure the default of the obligation and to pay AES' costs and expenses in connection therewith, including, without limitation, AES' attorney fees.

2.2 *Exchange Period*: The period from the Phase I Closing Date to the disposition of the Relinquished Property to a third party is referred in this Exchange Agreement as the "Exchange Period."

2.2.1 Relinquished Property: The Relinquished Property shall be disposed of to a third party and the Exchange Transaction shall be completed as soon as practicable, but in no event shall the Exchange Period end later than the earlier to occur of: (a) the date that is six (6) months from the Phase I Closing Date, or (b) December 31 of the calendar year in which the Phase I Closing Date occurs. During the Exchange Period, Exchangor shall keep the Relinquished Property listed for sale with a licensed real estate broker and shall use Exchangor's best efforts to obtain a third party purchaser of the Relinquished Property ("Purchaser") as soon as is practicable. The terms of the agreement with the Purchaser shall include a requirement that the Purchaser's purchase of the Relinquished Property shall occur no later than the end of the Exchange Period.

2.2.2 Replacement Property: During the Exchange Period, AES shall have and be entitled to exercise and perform all rights and obligations as owner of the Replacement Property, including, without limitation, rights to collect any rents and other proceeds of the Replacement Property and obligations to maintain and operate the Replacement Property and to pay all taxes, insurance premiums, maintenance and repair expenses, and other expenses of the Replacement Property. Effective at the Phase I Closing Date, to provide for the management of the Replacement Property, AES and Exchangor hereby enter into a management agreement on the following terms and conditions (the "Management Agreement"):

2.2.2.1 Exchangor, on behalf of AES, shall collect any rents and other proceeds of the Replacement Property and pay therefrom all taxes, premiums for fire, casualty, liability and other insurance deemed necessary or appropriate by AES, maintenance and repair expenses, and any other expenses of the Replacement Property (including, without limitation, a reasonable management fee for performing these management services on AES' behalf). The net amount remaining ("net proceeds of operations of the Replacement Property") shall be paid over to AES.

2.2.2.2. Exchangor shall keep accurate and sufficiently detailed records of all items of income and expense in connection with the Replacement Property and, not less often than monthly during the Exchange Period, shall prepare and deliver to AES an itemized income and expense statement.

2.2.2.3 To enable Exchangor to carry out its obligations under this Management Agreement, AES hereby appoints Exchangor as its attorney-in-fact, until the end of the Exchange Period, to manage, operate, maintain and repair the Replacement Property.

3. PHASE II: EXCHANGE OF REPLACEMENT AND RELINQUISHED PROPERTIES, TRANSFER OF RELINQUISHED PROPERTY AND COMPLETION OF EXCHANGE

Phase II of the Exchange Transaction consists of the exchange of the Replacement Property and the Relinquished Property between AES and Exchangor, the transfer and conveyance of the Relinquished Property to the Purchaser and the completion of the Exchange.

3.1. *Exchange of Replacement and Relinquished Properties*: An escrow (the "Phase II Exchange Escrow") for the transfer and conveyance of the Replacement Property from AES to Exchangor, in exchange for the transfer and conveyance of the Relinquished Property from Exchangor to AES, shall also be opened with the Escrow Company. The Phase II Exchange Escrow shall close on the same date as the closing of Phase II (the "Phase II Closing Date"), concurrently with the close of the escrow by which AES transfers and conveys the Relinquished Property to the Purchaser. The transfer and conveyance of title to the Relinquished Property shall, at AES' direction (which is hereby given), occur (a) by deed from Exchangor directly to Purchaser, and (b) shall occur simultaneously with the transfer and conveyance of title to the Relinquished Property from Exchangor to AES.

3.2. *Completion of Exchange:*

3.2.1 The net cash proceeds payable to AES upon the sale of the Relinquished Property shall be used to pay the Exchange Loan. If the net cash proceeds are less than the balance of the Exchange Loan outstanding at the time of the sale of the Relinquished Property, the amount of the Exchange Loan shall be reduced by the amount of the difference so that the net cash proceeds are sufficient to pay the Exchange Loan in full. If the net cash proceeds are greater than the balance of the Exchange Loan outstanding at the time of the sale of the Relinquished Property, the amount of the excess shall be paid over to Exchangor pursuant to Section 4.

3.2.2 If the terms of sale of the Relinquished Property include a provision for seller financing, the seller financing shall be by note and trust deed in favor of AES or its assignee. AES may assign to Exchangor AES' rights in and to the note and trust deed (which assignment Exchangor shall accept) in partial satisfaction, dollar for dollar, of AES' obligation to Exchangor under the Exchange Loan. The assignment shall occur concurrently with the Phase II closing and the note and trust deed shall name Exchangor as payee and beneficiary, respectively.

3.2.3 AES and Exchangor shall enter into supplemental exchange escrow instructions for this Phase II of the Exchange Transaction, which shall provide for the

satisfaction of the Exchange Loan and the terms and purposes of the Exchange Agreement.

3.2.4 Notwithstanding any other provision of this Exchange Agreement to the contrary, if the sale of the Relinquished Property and the Phase II Closing Date have not occurred on or before the last day of the Exchange Period, then: (a) AES may transfer and convey the Replacement Property to Exchangor subject to the Exchange Trust Deed, (b) Exchangor shall pay all costs and expenses of the transfer and conveyance of the Replacement Property to Exchangor, (c) Exchangor shall cancel the Exchange Note, and (d) this Exchange Agreement shall thereupon terminate and AES shall have no further obligation to Exchangor under this Exchange Agreement, the Exchange Note and Trust Deed, the Relinquished Property, the Replacement Property or otherwise in connection with the Exchange Transaction.

4. EXCHANGE VALUE BALANCING; PAYMENT OF EXCHANGE SET-UP FEE

4.1. AES shall pay over to Exchangor the net proceeds received by AES upon the transfer and conveyance of the Relinquished Property to Purchaser at the Phase II Closing Date, after deduction of all closing costs and other costs of sale, after deduction of the amount of the net proceeds used by AES to pay the Exchange Loan, and any other outstanding costs or expenses that Exchangor is obligated to pay under this Exchange Agreement. If the net proceeds received by AES upon the transfer and conveyance of the Relinquished Property to Purchaser at the Phase II Closing Date, after deduction of all closing costs and other costs of sale and any other outstanding costs or expenses that Exchangor is obligated to pay under this Exchange Agreement ("net proceeds of sale"), are less than the amount of the then outstanding balance of the Exchange Loan, the Exchange Loan balance shall automatically be reduced to equal the amount of the net proceeds of sale. Notwithstanding any other provision of this Exchange Agreement, the Exchange Note and Trust Deed, or any other agreement, in no event shall AES be obligated to repay the Exchange Loan to the extent that the Exchange Loan balance outstanding at the Phase II Closing Date exceeds the net proceeds of sale, as defined in the preceding sentence.

4.2 Exchangor shall pay to AES an exchange set-up fee of Eight Hundred Dollars ($ 800.00). The fee shall be due and payable upon execution of this Exchange Agreement. In addition, Exchangor shall pay or reimburse AES for reasonable attorneys' fees incurred by AES in reviewing documents and legal and factual issues in connection with this Exchange Agreement, the transactions contemplated thereby, the Relinquished Property and the Replacement Property. The fees shall be payable to AES regardless of whether there is a Phase II Closing Date, an acquisition, disposition or exchange of Replacement Property or Relinquished Property, or whether this Exchange Agreement is terminated pursuant to Section 3.2.4.

5. INCIDENTAL PROPERTY

Property that is incidental to either the Relinquished Property or the Replacement Property may be transferred with, and not treated as separate from, the Relinquished Property or the Replacement Property, as the case may be, if: (a) in standard commercial transactions, the property is typically transferred together with the larger item of property, and (b) the aggregate fair market value of all of the incidental property does not exceed fifteen percent (15%) of the aggregate fair market value of the larger item of property.

6. NOTICES

Any notice or demand required or permitted to be given under this Exchange Agreement shall be deemed to have been given only when it is in writing, has been hand delivered or deposited in the United States mail, with postage prepaid, to be forwarded by certified or registered mail, and is addressed to the party at the address set forth below (and with a copy to the person and address, if any, specified below), or at such other address (and with a copy to such other person and address) as a party may for itself designate from time to time by giving written notice to the other party:

TO AES:	TO EXCHANGOR:
AMERICAN EXCHANGE SERVICES, INC.	WILLIAM B. FERGUSON
Attn: CINDI POLING	Attn:
100 E. MAIN SUITE A	5200 PIONEER RD.
MEDFORD, OR 97501	MEDFORD, OR 97501
WITH A COPY TO:	WITH A COPY TO:

7. FURTHER ASSURANCES

The parties shall execute such other documents and take such other actions as are reasonably necessary or appropriate, or as reasonably requested by the other party, to effectuate the exchange transaction contemplated by this Exchange Agreement. The costs incurred by AES in connection with the preparation or review of such further documents, including AES' attorneys' fees reasonably incurred, shall be paid for by Exchangor prior to the Phase I Closing Date or Phase II Closing Date, whichever next follows the date such costs are incurred by AES.

8. TIME OF THE ESSENCE

Time is of the essence of this Exchange Agreement.

9. ATTORNEYS' FEES

If either party shall commence any action or other proceeding to enforce or interpret this Exchange Agreement, the prevailing party shall be entitled to collect, and the other party shall pay, in addition to costs and disbursements allowed by law, the prevailing party's reasonable attorneys' fees in the action or proceeding, including proceedings on appeal, as may be fixed by the court. Such sum shall include an amount estimated by the court as the reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise enforcing each order, judgment or decree entered in the action or proceeding.

10. BINDING EFFECT

This Exchange Agreement shall be binding on and shall inure to the benefit of the parties hereto and their respective successors, heirs and assigns.

11. ENTIRE AGREEMENT; AMENDMENTS

This Exchange Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes any prior or contemporaneous oral agreement and any prior written agreement regarding the subject matter hereof. Any prior or contemporaneous oral agreement and any prior written agreement regarding the subject matter hereof shall be of no further force or effect. No modification, alteration, amendment, change or addition to this Exchange Agreement shall be binding or effective unless reduced to writing and signed by the party to be bound.

12. PARTIAL INVALIDITY

If any term, covenant or condition of this Exchange Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Exchange Agreement, or the application of such term, covenant or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term, covenant or condition of this Exchange Agreement shall be valid and be enforced to the fullest extent permitted by law.

13. JOINT AND SEVERAL LIABILITY

If any party to this Exchange Agreement now consists or hereafter shall consist of more than one person, firm or corporation, all such persons, firms or corporations shall be jointly and severally liable for the obligations of that party hereunder.

14. CAPTIONS

The captions appearing at headings of sections in this Exchange Agreement are provided for convenience of reference only and shall not be used to construe or interpret the meaning of this Exchange Agreement.

15. GOVERNING LAW

This Exchange Agreement shall be governed by and interpreted in accordance with the internal laws of the State of Oregon.

16. SURVIVAL

The obligations of the parties hereunder shall survive the Phase I Closing Date and Phase II Closing Date.

17. COUNTERPARTS

This Exchange Agreement may be executed in multiple counterparts.

IN WITNESS WHEREOF, AES and Exchangor have executed this Real Property Exchange Agreement as of the date first written above.

AMERICAN EXCHANGE SERVICES, INC.

By Cindi Poling
Its CINDI POLING, ASSISTANT SECRETARY
AES

WILLIAM H. FERGUSON
By _____
Its _____
EXCHANGOR

EXHIBIT "A"

DESCRIPTION SHEET

DESCRIPTION OF RELINQUISHED PROPERTY:

The land referred to in this report/policy is situated in the State of Oregon, County of Jackson, and is described as follows:

Lot 6 of SUNCREST ESTATES, a recorded subdivision located in Jackson County, Oregon, TOGETHER WITH Beginning at a 5/8 inch rebar with plastic cap found set for the North-Northwest corner of Lot 8 of SUNCREST ESTATES, a recorded subdivision located in Jackson County, Oregon; thence along the Westerly boundary of said Lot 8, South 0° 01' 42" East, 174.72 feet; thence North 89° 00' 35" East, 600.78 feet to intersect the Northerly boundary of said Lot 8; thence along the Northerly boundary of said Lot 8, North 76° 32' 19" West, 700.00 feet to the point of beginning. EXCEPTING THEREFROM Beginning at a 1/2 inch iron pipe found set for the South-Southwest corner of Lot 8 of SUNCREST ESTATES, a recorded subdivision located in Jackson County, Oregon; thence along the Westerly boundary of said Lot 8, North 0° 01' 42" West, 494.936 feet to a found 5/8 inch rebar with plastic cap; thence along the Southerly boundary of the "flagpole" portion of said Lot 8, South 80° 46' West, 80.555 feet; thence continue along said boundary, North 81° 56' West, 96.541 feet to a 5/8 inch rebar with plastic cap located at the Southwesterly corner of said "flagpole" portion of Lot 8; thence North 9° 39' 58" East, 12.505 feet to a 5/8 inch rebar with plastic cap located on the Westerly end boundary of said "flagpole"; thence along the centerline of Suncrest Way (private road), North 80° 20' 02" West, 61.402 feet to a 5/8 inch rebar with plastic cap angle point; thence continue along said private road centerline, North 77° 35' 11" West, 19.30 feet; thence leaving said private road, South 25° 48' 35" East, 580.224 feet to the point of beginning.

EXHIBIT B

Legal Description of Replacement Property

[~~Attached~~]

Parcels No. 1, 2 and 3 of Minor Land Partition recorded as Partition Plat No. P-128-1992, of the Records Of Jackson County, Oregon, Index volume 3, Page 128, County Survey No. 13269.

INDEMNITY AND RELEASE AGREEMENT

(For Exchangor At Phase I Transfer of Replacement Property-- "Reverse Starker" With Back-end Exchange)

BETWEEN: American Exchange Services, Inc., an Oregon corporation ("AES");

AND: WILLIAM H. FERGUSON ("Exchangor");

DATED: March 9, 1998.

RECITALS:

A. AES and Exchangor have entered into a Real Property Exchange Agreement, dated March 9, 1998 (the "Exchange Agreement").

B. Pursuant to the Exchange Agreement, AES will acquire certain property owned by Exchangor (the "Relinquished Property") in exchange for the transfer to Exchangor of certain other property to be acquired by AES (the "Replacement Property"). Replacement Property is being acquired by AES pursuant to an Assignment and Assumption between AES, Exchangor and MICHAEL A. GRASSMUECK, INC. BANKRUPTCY TRUSTEE ("Seller"), executed on or about the date hereof, concerning that certain TRUSTEES EARNEST MONEY RECEIPT Agreement (the "Acquisition Agreement").

C. Exchangor agrees to release AES from liability and to indemnify and defend AES as hereinafter set forth.

AGREEMENTS:

1. Release and Indemnity

Exchangor hereby releases AES from, and Exchangor shall indemnify, defend and hold harmless AES from and against, any and all losses, costs, expenses, liabilities, claims, demands and damages, whether foreseen or unforeseen, whether now known or unknown, whether liquidated or unliquidated, at any time whatsoever arising from, based upon, incident to, in connection with or otherwise related to the following matters (the "Matters"):

1.1. The qualification of the transaction contemplated by the Exchange Agreement for treatment as a tax deferred exchange under Section 1031 of the Internal Revenue Code, and any questions regarding, or challenge to or denial of, such qualification by the Internal Revenue Service, and any other matters concerning the federal or state tax consequences or ramifications of the transaction;

1.2. The condition of title to the Replacement Property;

1.3. The value, nature, or use of the Replacement Property;

1.4. The possession, occupation or ownership of the Replacement Property;

1.5. The existence on the Replacement Property of any hazardous or toxic substance, material or waste that is or becomes regulated by any federal, state or local government authority, including, without limitation, any material or substance designated as a hazardous substance, waste or material pursuant to the Clean Air Act (42 USC §7401 *et seq.*), the Federal Water Pollution Control Act (the "Clean Water Act") (33 USC §1251 *et seq.*), the

Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments (42 USC §6901 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended by the Superfund Amendments and Reauthorization Act) (42 USC §9601 *et seq.*), the Hazardous Materials Transportation Act (49 USC §1801 *et seq.*), the Toxic Substances Control Act (15 USC §2601 *et seq.*), or Article 90 of the Uniform Fire Code, as amended from time to time, or the breach of any covenant, representation, warranty or other term or provision of that certain Environmental Compliance Certificate executed by the parties of even date herewith;

1.6. The breach of any covenants, representations or warranties made or assumed by Exchangor or AES in connection with the Replacement Property or the Acquisition Agreement, including, without limitation, the failure to perform any covenants, representations or warranties prior to or that survive the closing of the transaction contemplated by the Acquisition Agreement (including, but not limited to, any promise to make payments to Seller at or after the closing); and

1.7. Any other matters pertaining to the Seller, the Replacement Property, or otherwise in connection with the transactions contemplated by the Acquisition Agreement.

2. Defense of Actions

If any claim is made or threatened to be made against AES, or any action or other proceeding is brought or threatened to be brought against AES, that arises out of or is based on, incident to, in connection with or otherwise related to any of the Matters, then Exchangor shall provide for the investigation and defense of the actual or threatened claim, action or other proceeding. Exchangor shall not hire any person to investigate or defend the actual or threatened claim, action or other proceeding without AES' approval of the hiring of such person, which approval shall not be unreasonably withheld. AES shall cooperate with Exchangor in connection with the obligation of Exchangor to investigate and defend pursuant to this Section 3, including, without limitation, giving Exchangor notice of any actual or threatened claim, action or other proceeding within a reasonable period after AES receives notice of same.

3. Limitation of Exchangor's Obligations

Notwithstanding the provisions of Sections 1 and 2 of this Indemnity and Release Agreement to the contrary, Exchangor shall not be obligated to indemnify, defend or hold harmless AES, and AES shall not be released, from any losses, costs, expenses, liabilities, claims, demands and damages that arise solely by reason of AES' intentional or willful misconduct or gross negligence.

4. Tax Matters

AES and Exchangor each acknowledge that AES has not made any representation or warranty as to the tax consequences or other tax ramifications of the transaction contemplated by the Exchange Agreement. Exchangor has expressed Exchangor's desire and intention that the transaction contemplated by the Exchange Agreement qualify for treatment as a tax deferred exchange under Section 1031 of the Internal Revenue Code and AES and Seller have agreed to participate in the transaction solely for independent business reasons. Exchangor has consulted with or obtained the advice of Exchangor's own attorney or accountant, or such other independent third parties as Exchangor may deem advisable, regarding the tax treatment of the transaction contemplated by the Exchange Agreement insofar as Exchangor is concerned.

5. Binding Effect

This Indemnity and Release Agreement shall be binding on and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

6. Attorneys' Fees in Certain Actions

If any party commences any action or proceeding to enforce or interpret this Indemnity and Release Agreement, the prevailing party shall be entitled to collect, and the non-prevailing party or parties shall pay, in addition to costs and disbursements allowed by law, the prevailing party's reasonable attorneys' fees in the action or proceeding, including proceedings on appeal, as may be fixed by the court. Such sum shall include an amount estimated by the court as reasonable costs and fees to be incurred by the prevailing party in collecting any monetary judgment or award or otherwise enforcing each order, judgment or decree entered in the action or proceeding.

7. Severability

If any provision of this Indemnity and Release Agreement shall be held unenforceable or invalid, such unenforceability or invalidity shall not affect the enforceability or validity of any other provision of this Indemnity and Release Agreement.

8. Joint and Several Liability

If any party to this Indemnity and Release Agreement now consists or hereafter shall consist of more than one person, firm or corporation, all such persons, firms or corporations shall be jointly and severally liable for the obligations of that party hereunder.

9. Captions

The captions appearing at headings of sections in this Indemnity and Release Agreement are provided for convenience of reference only and shall not be used to construe or interpret the meaning of this Indemnity and Release Agreement.

10. Entire Agreement

This Indemnity and Release Agreement is the entire agreement between the parties regarding the subject matter hereof and supersedes any prior agreements of the parties relating to the subject matter hereof. Without limiting the foregoing, this Indemnity and Release Agreement is made notwithstanding, and shall survive, the execution by the parties of the Exchange Agreement and that certain Assignment and Assumption, of even date herewith. However, this Indemnity and Release Agreement is made in addition to, and not by way of limitation of, that certain Environmental Compliance Certificate between the parties of even date herewith.

11. Amendments

No modification, alteration, amendment, change or addition to this Indemnity and Release Agreement shall be binding upon either party unless reduced to writing and signed by the party to be bound.

12. Notices

Any notice or demand required or permitted to be given under this Indemnity and Release Agreement shall be deemed to have been given only when it is in writing, has been hand

delivered or deposited in the United States mail, with postage prepaid, to be forwarded by certified or registered mail, and is addressed to the party at the address set forth below (and with a copy to the person and address, if any, specified below), or at such other address (and with a copy to such other person and address) as a party may for itself designate from time to time by giving written notice to the other party:

To AES:

American Exchange Services, Inc.
ATTN: CINDI POLING
100 E. MAIN SUITE A
MEDFORD, OR 97501

With a copy to:

To Exchangor:

WILLIAM H. FERGUSON
ATTN:
5200 PIONEER RD.
MEDFORD, OR 97501

With a copy to:

13. Execution

This Indemnity and Release Agreement may be executed in multiple counterparts, each of which shall constitute an original.

IN WITNESS WHEREOF, Exchangor and AES have entered into this Indemnity and Release Agreement as of the date first written above.

AMERICAN EXCHANGE SERVICES, INC.

By Cindi Poling
Its CINDI POLING, ASSISTANT SECRETARY

AES

WILLIAM H. FERGUSON
By
Its

EXCHANGOR

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Testimony of Cindi Poling** on the following named person(s) on the date indicated below by

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below.

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

Attorneys for William Ferguson

Shelley McIntyre
Oregon Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201-5451

Attorneys for Oregon Department of Environmental Quality

DATED: March 18, 2002

Scott J. Kaplan, OSB No. 91335
Of Attorneys for Respondent

HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

April 4, 2002

Ms. Gretchen L. Miller
Hearings Officer
875 Union Street, NE
Salem, Oregon 97311

Re. In the Matter of American Exchange Services, Inc.

Dear Ms. Miller:

Enclosed is additional written testimony from Steve Croucher for the Department of Environmental Quality plus exhibits. In addition, DEQ has asked me to inform you and the attorneys in this case that the agency does want the opportunity to cross-examine Mr. Ferguson in person and to present live, in-person rebuttal testimony.

Along with its written direct testimony, AES included a Prehearing Brief on Ownership and Liability Issues that is better characterized as written closing argument because it argues the legal issues. DEQ will respond to that brief in its written closing argument after the evidentiary record is complete.

That said, however, we object to AES's characterization of DEQ's enforcement proceeding and any inference that DEQ believes that holding AES liable for its agent's actions is "bad policy." By putting those words in quotes, AES suggests that DEQ has so stated. This is incorrect.

During conversations with Mr. Kaplan, he argued to me as he does in his brief that seeking to hold an escrow company is bad public policy. I said that I do not know whether it is or not. But in any case, given that the law allows it, such policy decisions are for the Environmental Quality Commission, not DEQ.

Finally, AES has formally objected to certain testimony and documents submitted by DEQ as being irrelevant to AES. That objection is misplaced. AES argues (1) that it is not responsible for what its agent, William Ferguson, did, and (2) that Ferguson's prior knowledge cannot be imputed to AES. However, those are affirmative defenses and provide no basis for disallowing evidence into the record. AES is the named respondent. DEQ submitted the evidence in support of the "enhanced" civil penalty (negligence) to show that Ferguson knew or

Ex. 11

should have known about the presence of asbestos-containing materials. Thus, the testimony and documentary evidence is relevant to that part of the Notice and is admissible.

Sincerely,

Shelley K. McIntyre
Assistant Attorney General
Natural Resources Section

SKM:lan/GENB5369.DOC

Enclosures

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of:	)	STEVEN CROUCHER
American Exchange Services, Inc., an	)	WRITTEN DIRECT EXAMINATION
Oregon corporation,	)	(CONTINUED)
	)	No. AQ/A-WR-98-186
Respondent.		Jackson County

I, Steven Croucher, do swear as follows:

1. As part of my investigation of the American Exchange Services (AES) site I took photographs of the demolished building showing disturbance and open accumulation of friable asbestos containing materials throughout the site. I mounted several of the photographs on 8-1/2 by 11 paper and typed descriptions of them, referring back to the samples collected by BWR Associates, Inc. (BWR) on behalf of AES. The attached 2-page exhibit is a copy of those photos and my comments.

2. Asbestos is a naturally occurring mineral that was added to a number of common building materials used in construction through the 1980s. Because of the health risks associated with the inhalation of asbestos fibers, special handling practices must be employed to eliminate the possibly of asbestos fibers becoming airborne.

3. The photographs document a building demolition site were no such asbestos control measures were employed creating the potential for exposure to airborne asbestos fibers to anyone allowed access to the site.

4. Photographs 1, 2, and 3 show approximately 158 square feet of disturbed asbestos containing material.

5. A substantial amount of asbestos containing floor covering as shown in Photographs 4 and 5 was removed and discarded outside the building. The asbestos floor covering that was discarded outside was commingled with other building materials. A portion of the room where the asbestos floor covering was removed can be seen in Photograph 5.

6. Based on the overall size of the room, I would roughly estimate the amount of asbestos floor covering that was removed and discarded outside the building to be approximately 300 square feet. David Fawcett, representing BWR, noted that all the floor covering had been removed from this room.

7. The asbestos survey conducted by BWR identified over 4300 square feet of asbestos containing materials. Based on the overall condition of the building, which was approximately 50% demolished, I calculate that over 2000 square feet of asbestos containing material was improperly removed and left onsite creating open

accumulation of asbestos containing material with the potential for airborne fiber releases.

8. The Department of Environmental Quality Notice for Removal or Encapsulation of Asbestos form, ASN-1.1, attached as an exhibit, used for friable asbestos removal notifications, submitted by Western States Environmental, was for the clean up of 3000 square feet of friable asbestos. This notification, submitted by an expert in the asbestos industry, indicates an assessment of the site similar to my assessment regarding the amount of area impacted by friable asbestos.

9. Therefore, at a minimum, some 460 square feet of asbestos-containing material was impacted and documented with photographs. Additionally, the photographs detail the condition of the structure and confirm the improper handling practices of the remaining friable asbestos at the site.

Steven M Croucher

Steven Croucher

STATE OF OREGON

Jackson County

Signed and sworn to before me on April 2, 2002.

Mari-Lynn Belsky

Notary Public for Oregon

My Commission expires on March 28, 2004

OFFICIAL SEAL
MARI-LYNN BELSKY
NOTARY PUBLIC-OREGON
COMMISSION NO. 332221
MY COMMISSION EXPIRES MAR. 28, 2004

CERTIFICATE OF SERVICE BY MAIL

I certify that on April 4, 2002, I served the foregoing STEVEN CROUCHER WRITTEN DIRECT EXAMINATION upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Scott J. Kaplan
Stoel Rives
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

Jeff Bachman
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

Shelley McIntyre
Assistant Attorney General

DEPARTMENT OF JUSTICE
1515 SW 5th Avenue
Portland, OR 97201
PHONE: 229-5725

CERTIFICATE OF SERVICE

I certify that on March 18, 2002, I served the attached Steven Croucher Written Direct Testimony by mailing the original in a sealed envelope, first class postage prepaid to the hearing officer and copies to the parties as follows:

Gretchen L. Miller
Hearing Officer
Central Hearings Panel
2510 Oakmont Way
P.O. Box 1027
Eugene, Oregon 97440

Scott J. Kaplan
Steol Rives LLP
900 SW 5th Ave., Stuite 2600
Portland, Oregon 97204

Richard A. Stark
Stark & Hammock PC
201 W. Main, Suite 1B
Medford, Oregon 97501

Shelley K. McIntyre
Department of Justice
1515 SW 5th Ave.
Portland, Oregon 97201

DATED this 18th day of March 2002.

Steven Croucher
Department of Environmental Quality

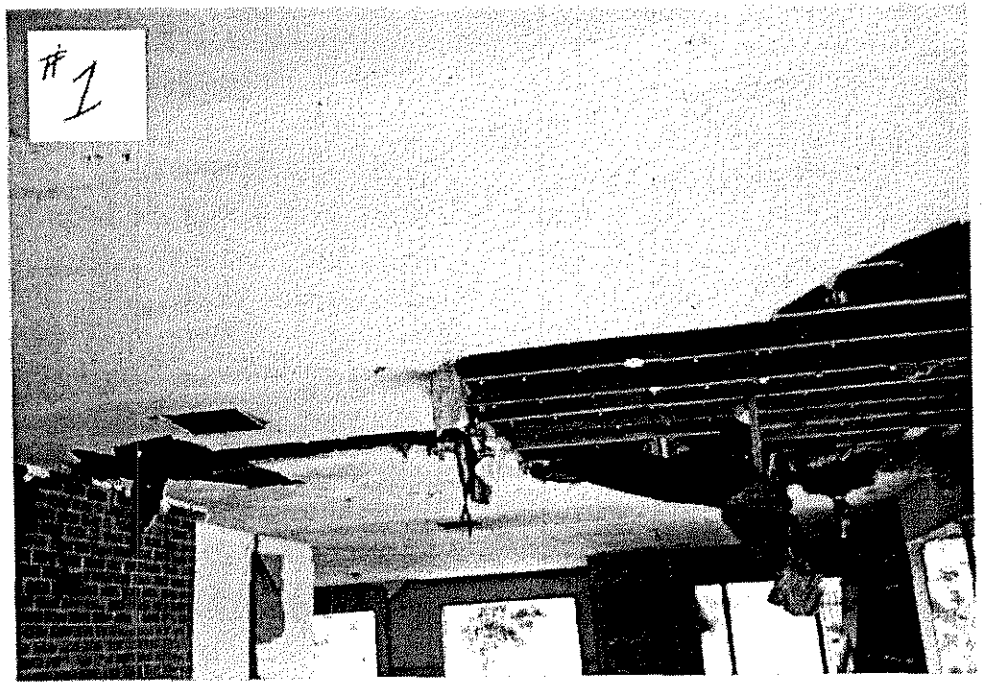
Ex. 11

EXHIBIT _____

Photo # 1 is BWR test #98-126A.34. This asbestos ceiling material was removed and discarded outside the building prior to my inspection. Approx. 120 sqft

Photo # 2 is BWR test #98-126A.36. This shows a hole through asbestos containing tape compound and texture. Approx. 6 sqft

Photo # 3 is BWR test #98-126A.35. This is the hallway looking east showing asbestos material removed from the wall discarded on the floor Approx. 32 sqft



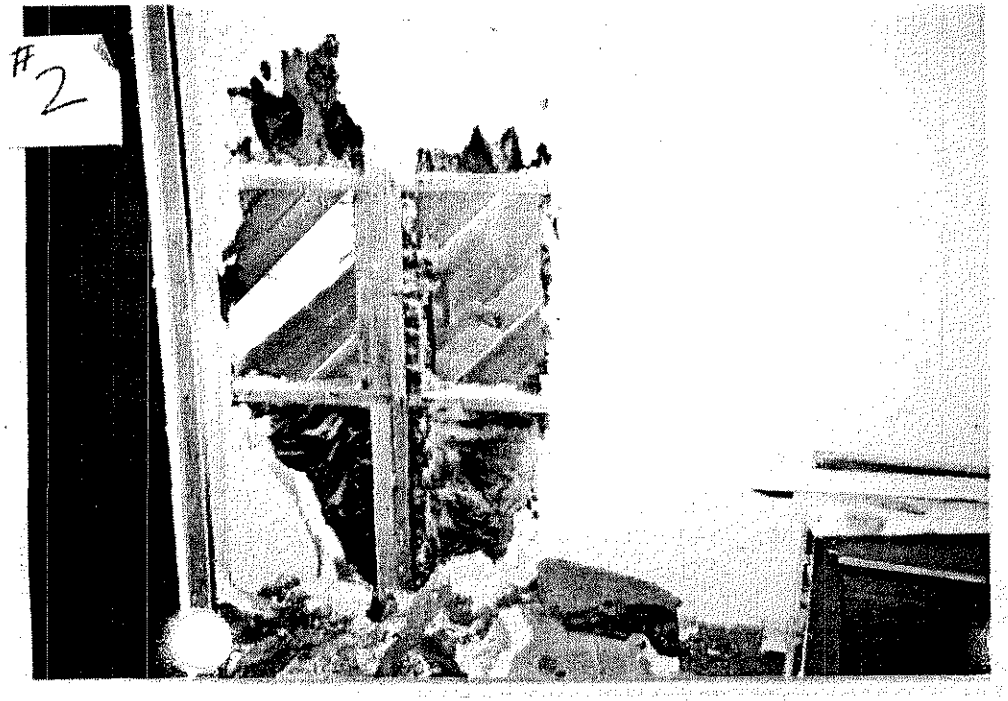
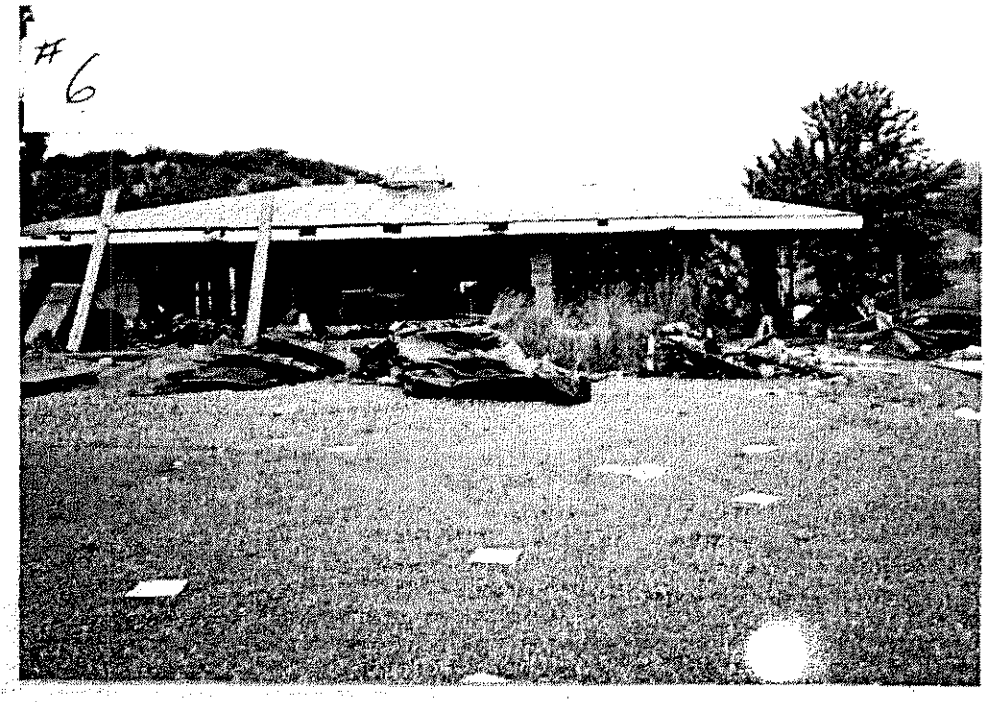


EXHIBIT 6

Photo # 4 is BWR test #98-126A.20 and DEQ test # Z5045. This flooring material was removed and discarded outside the building prior to my inspection. It was distributed throughout a pile of other materials. See photo # 5.

Photo # 5. This shows the general conditions at the site. Also looking inside the building one can see the area were the flooring in photo #5 was removed.

Photo # 6. This shows the front of the building from Crater Lake Ave. facing East. Note the condition of the building and numerous piles of debris.



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of:	)	STEVEN CROUCHER
American Exchange Services, Inc., an Oregon corporation,	)	WRITTEN DIRECT EXAMINATION
	)	No. AQ/A-WR-98-186
Respondent.		Jackson County

I, Steven Croucher, do swear as follows:

1. I am employed by the Oregon Department of Environmental Quality as an Air Quality Specialist. It was in this capacity that I inspected a building demolition project at 4044 Crater Lake Avenue, Medford, Oregon on or about May 29, 1998.
2. As part of my job duties, I prepared a document summarizing my inspection and the conversations I had with Mr. Ferguson and other people involved in the demolition project. That document is incorporated herein by this reference. (State's Exhibit A) It is a true and accurate reporting of my actions and the conversations I had during that time.
3. On May 29, 1998, I observed a building demolition project underway on property located at 4044 Crater Lake Avenue in Medford, Oregon. I suspected that the building materials contained asbestos, and I realized that the demolition was being conducted in violation of the Department's administrative rules that are intended to prevent people from being exposed to asbestos fibers.
4. I contacted the County Assessor's office in order to find the property owner and was given American Exchange, Inc. as the owner. I eventually contacted Mr. Ferguson, who said that he had "sold" the building to Barbara Dial for salvage. Neither she nor her husband, Lawrence, was licensed to perform asbestos abatement projects, nor were any of the workers that they hired to do the demolition work, nor was Mr. Ferguson.
5. After informing Mr. Ferguson of my concerns about asbestos, Mr. Ferguson retained BWR, environmental consultants, to do an asbestos survey. The survey and analysis revealed asbestos in various materials at the following locations:
   - Taping compound in the northeast bathroom and kitchen wall

- Yellow floor vinyl in the kitchen
- Brown floor vinyl in the NW room near a removed sliding door
- Texture on the kitchen soffit, SE corner room closet wall, and exposed beam room ceiling
- Black/gray sealant on roofing vents

(State's Exhibit B, BWR Asbestos Survey).

6. The site samples showed friable asbestos in several types of materials throughout the building, including drywall, taping compound, roofing, wall texture, floor vinyl, ceiling texture, and duct tape. (State's Exhibit B, Site Sample Record Sheets). In addition, some of the materials that BWR reported as not friable in the lab actually were friable on the site because of the way they were handled. Mr. Ferguson eventually hired an asbestos abatement contractor who eventually cleaned up the site.
7. At the time of this violation, DEQ's rules did not require an owner to conduct an asbestos survey before beginning a demolition or renovation project. However, an owner or operator acted at his own peril if he failed to do so because he is strictly liable for violations of the asbestos rules. *See* State's Exhibit C at 7-8.
8. Even before this incident, Mr. Ferguson was aware of the Department's asbestos rules. In December 1996, DEQ issued a Notice of Violation and Assessment of Civil Penalty against him for failing to follow several of the requirements for asbestos abatement projects. Mr. Ferguson requested and was given a contested case hearing on that Notice.
9. Mr. Ferguson argued then, as he does now, that he was unaware there were asbestos-containing materials in the building when he started the renovation, and that once he knew there was asbestos-containing material, he complied with all statutes and rules regarding the removal of such materials. *See* State's Exhibit C at pp 2-3. The final order from that proceeding notes that, "[r]espondent is an

experienced property owner and manager who has been involved in the acquisition, renovation and maintenance of commercial properties. He has been involved in situations involving potential asbestos-containing materials * * *." *Id.* at 7.

10. Mr. Ferguson entered into his arrangement with the Dials on May 1, 1998, less than two weeks after the Pre-Application Conference. (AES's Exhibit 1-1)

11. During the relevant time period, AES held title to the real property and its improvements located at 4044 Crater Lake Ave, Medford, Jackson County, Oregon. (Affidavit of Cindi Poling and Exhibit A-1, Trustee's Deed).

12. Ferguson and AES entered into an Agreement dated March 9, 1998 providing that AES was entitled to exercise and perform all rights and obligations as owner of the property, including without limitation, the obligations to maintain and operate the property and pay all expenses of the property. (AES Exhibit B-3, ¶2.2.2) The Agreement also named Mr. Ferguson as AES's "attorney-in-fact" to manage, operate, maintain, and repair the property at issue on behalf of AES. (Cindi Poling Affidavit, AES Exhibit B-4, ¶2.2.2.3)

Steven Croucher

STATE OF OREGON

Jackson County

Signed and sworn to before me on March 18, 2002.

OFFICIAL SEAL
MARI-LYNN BELSKY
NOTARY PUBLIC-OREGON
COMMISSION NO. 332221
MY COMMISSION EXPIRES MAR. 28, 2004

Notary Public for Oregon

My Commission expires on

Oregon
DEPARTMENT OF
ENVIRONMENTAL
QUALITY
Western Region
201 W. Main, Suite 2-D
Medford, OR 97501

GRETCHEN L MILLER
HEARING OFFICER
CENTRAL HEARINGS PANEL
2510 OAKMONT WAY
P O BOX 1027
EUGENE OREGON 97440

RECEIVED
MAR 1 [illegible] 2002
EMPLOYMENT HEARINGS

DEQ/SWR-105

97440%1027

STATE OF OREGON
DEPARTMENT OF JUSTICE
1515 SW FIFTH AVENUE, SUITE 410
PORTLAND, OREGON 97201-5451

ADDRESS SERVICE REQUESTED

Ms. Gretchen L. Miller
Hearings Officer
875 Union Street, NE
Salem, Oregon 97311

CERTIFICATE OF SERVICE

I certify that on March 18, 2002, I served the attached Keith Tong Written Direct Testimony by mailing it in a sealed envelope, first class postage prepaid to the hearing officer and the parties as follows:

Gretchen L. Miller
Central Hearings Panel
2510 Oakmont Way
P.O. Box 1027
Eugene, Oregon 97440

(Sent original to this person)

Scott J. Kaplan
Steol Rives LLP
900 SW 5th Ave., Stuite 2600
Portland, Oregon 97204

(Sent copies to these persons)

Richard A. Stark
Stark & Hammock PC
201 W. Main, Suite 1B
Medford, Oregon 97501

Shelley K. McIntyre
Department of Justice
1515 SW 5th Ave.
Portland, Oregon 97201

DATED this 18th day of March 2002.

Keith Tong

Keith Tong
Department of Environmental Quality

Ex. 12

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of: American Exchange Services, Inc., an Oregon corporation, Respondent.	)))))	KEITH TONG WRITTEN DIRECT TESTIMONY No. AQ/A-WR-98-186 Jackson County

I, Keith Tong, do swear as follows:

1. I have been employed by the Oregon Department of Environmental Quality since 1990. I started as an asbestos inspector, and at the time of the alleged violations, I was a backup inspector for Steve Croucher. I currently am employed as an airshed planner and source test coordinator. It was in the capacity of airshed planning and source test coordinator that I reviewed and commented on a request for agency comment for a pre-application conference for a building demolition project at 4044 Crater Lake Avenue, Medford, Oregon, as described below.
2. As part of its routine procedures, the Jackson County Planning and Development Services office requests agency comment on certain proposals it receives. In response to an application by Mr. Ferguson to remove an existing structure and rebuild a larger building, Tom Schauer, Planner II, distributed a form for agency comments to me and others. (State's Exhibit D, Distribution List for Pre-Application Conference.)
3. I made comments on a form dated April 17, 1998 and hand delivered it to the County Planning office on April 17, 1998, before the 9:00 a.m. Pre-Application Conference. (State's Exhibit D, Agency Comment for Pre-Application Conference.) The form indicates a "preapplication conference" was scheduled for that same day. I specifically warned on the form that "[a]sbestos may be present in the existing structures," recommended that an asbestos survey be done

and an asbestos consultant design control or removal, and stated that the proposal may need an asbestos notification.[1]

4. Although I attended the meeting, I cannot remember anything specific from that meeting. The Jackson County staff cannot absolutely confirm that Mr. Schauer gave Mr. Ferguson a copy of DEQ's comments or otherwise informed him of DEQ's concerns, but the purpose of the pre-application conference is for the staff to confer with the applicant about any questions and concerns that may arise. The Pre-Application Conference Summary prepared for Mr. Ferguson's application, attached to Mr. Hernandez letter dated July 28, 2000, specifically directs the reader to "See agency comments." (State's Exhibit E, the Pre-Application Conference Summary at 2, Issue no. 9).

Keith Tong

STATE OF OREGON

Jackson County

Signed and sworn to before me on March 18, 2002.

Mari-Lynn Belsky

Notary Public for Oregon

My Commission expires on March 28, 2004

OFFICIAL SEAL
MARI-LYNN BELSKY
NOTARY PUBLIC-OREGON
COMMISSION NO. 332221
MY COMMISSION EXPIRES MAR. 28, 2004

[1] *Former* OAR 340-032-5630 (*current* 340-248-0260) requires that any person who conducts an asbestos abatement project must provide written notice to the Department and pay a fee.

Oregon
DEPARTMENT OF
ENVIRONMENTAL
QUALITY
Western Region
201 W. Main, Suite 2-D
Medford, OR 97501

MEDFORD
MAR18'02
OR

U.S. POSTAGE
00.34
H METER 503936

GRETCHEN L MILLER
CENTRAL HEARINGS PANEL
2510 OAKMONT WAY
P O BOX 1027
EUGENE OREGON 97440

RECEIVED
MAR 1 8 2002
EMPLOYMENT HEARINGS

97440%1027

STOEL RIVES LLP
ATTORNEYS AT LAW

900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

March 21, 2002

SCOTT J. KAPLAN
Direct (503) 294-9186
sjkaplan@stoel.com

Ms. Gretchen Miller
Central Hearings Panel
2510 Oakmont Way
PO Box 1027
Eugene OR 97440

Re: ***In the Matter of American Exchange Services, Inc.,***
No. AQ/A-WR-98-186 Jackson County

Dear Ms. Miller:

Enclosed for your consideration is Respondent's Objections to Testimony and Documents.

Thank you for your attention to this matter.

Very truly yours,

Scott J. Kaplan

Ex. 13

SJK:dmv
Enclosures
cc (w/enc.): Mr. Richard A. Stark
Ms. Shelley McIntyre
Ms. Linda K. Stelle

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of: American Exchange Services, Inc., an Oregon corporation, Respondent.	)	RESPONDENT'S OBJECTIONS TO TESTIMONY AND DOCUMENTS No. AQ/A-WR-98-186 Jackson County

Respondent American Exchange Services, Inc. ("AES") objects to the following testimony and exhibits offered by the State:

1. Mr. Ferguson's Development Efforts

For the reasons stated in its prehearing brief, AES objects to testimony and documents related to Mr. Ferguson's development efforts as irrelevant to AES. Because the efforts were not directed or approved by AES and were undertaken solely to benefit Mr. Ferguson, his actions or knowledge may not be imputed to AES. This objection encompasses:

- Keith Tong Written Direct Testimony ¶¶ 2-4.
- State's proposed Exhibits D, E.

2. Mr. Ferguson's Prior Civil Penalty Proceedings

AES objects to testimony and documents related to Mr. Ferguson's 1996 Notice of Violation and Assessment of Civil Penalty. These events occurred one and one-half years before his becoming an AES customer and were thus necessarily outside the scope of any alleged authority from AES. For the reasons stated further in AES's prehearing brief, the evidence is therefore irrelevant to AES. This objection encompasses:

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

- Steven Croucher Written Direct Testimony ¶¶ 8-9.
- State's proposed Exhibit C.

DATED: March 21, 2002.

STOEL RIVES LLP

Scott J. Kaplan, OSB No. 91335
Attorneys for Respondent American
Exchange Services, Inc.

STOEL RIVES LLP
ATTORNEYS
900 SW FIFTH AVENUE, SUITE 2600 PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Respondent's Objections to Testimony and Documents** on the following named person(s) on the date indicated below by

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below.

Richard A. Stark
Stark and Hammack, P.C.
201 West Main Street, Suite 1B
Medford, OR 97501

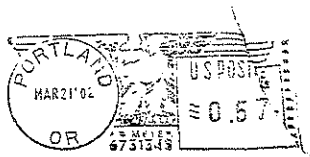
Attorneys for William Ferguson

Shelley McIntyre
Oregon Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201-5451

Attorneys for Oregon Department of Environmental Quality

DATED: March 21, 2002

Scott J. Kaplan, OSB No. 91335
Of Attorneys for Respondent



FIRST CLASS MAIL

STOEL RIVES LLP
ATTORNEYS AT LAW

900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204

SJK

16725-10

GRETCHEN L MILLER
CENTRAL HEARINGS PANEL
2510 OAKMONT WAY
PO BOX 1027
EUGENE OR 97440

STARK AND HAMMACK, P.C.
ATTORNEYS AT LAW
201 WEST MAIN STREET, SUITE 1B
MEDFORD, OREGON 97501

RICHARD A. STARK
LARRY C. HAMMACK
ERIC R. STARK

(541) 773-2213
(541) 779-2133
FAX (541) 773-2084
ras@starkhammack.com

March 25, 2002

Ms. Gretchen L. Miller
Hearings Officer
Department of Environmental Quality
875 Union Street, NE
Salem, OR 97311

Re: In the Matter of the American Exchange Services, Inc., an Oregon corporation,
No. AQ/A-WR-98-186
Our File No. RP 2831
Reference No: G60222

Dear Hearings Officer Miller:

Enclosed please find William Ferguson's Narrative Statement. This Statement should be attached as Exhibit "A" to William Ferguson's Affidavit.

I have forwarded copies to Shelley McIntyre and Scott Kaplan as well.

Very truly yours,

STARK and HAMMACK, P.C.

Richard A. Stark

Ex. 14

RAS/kd
Enclosure
cc: Ms. Shelley K. McIntyre
Mr. Scott Kaplan

WILLIAM FERGUSON'S NARRATIVE STATEMENT

EXHIBIT "A"

In early 1998, I started a real estate exchange through the selling broker at Coldwell Banker Pro West for property located at 4044 Crater Lake Ave. in Medford, Oregon. The property was about 3 acres and was surrounded by a locked, 8 foot high, 3 wired tapped, chain linked fence.

The property was owned by the Trustee in Bankruptcy of the Towerys that had operated a business known as Tuck Tops Plus that manufactured and sold pick-up canopies to the public.

The Bankruptcy Trustee advised that the property had been vacant for some time and included many items abandoned in the bankruptcy including about 50 pick-up canopies in various states of repair, canopy glass, canopy building materials general building materials, many other movable items and three buildings and shops, a sign post and the surrounding security fence.

The Trustee advised that due to this being a Bankruptcy sale, that no warranties of any kind could be given. The property was to be in its present dilapidated condition and strictly is without even warranties of title to anything and would be sold as is where is.

The selling realtor advised that test holes for underground tanks should be done as the

property had previously been an orchard, a restaurant, a real estate office, a spa sales office and a manufacturing and retail office that had been vacant for at least two (2) years. He also advised that we should have someone look at it to see if any of the building could be brought up to code and refurbished or moved. It was determined that it was not reasonable to refurbish or move the building.

The Back Hoe testing was done and produced negative results and no tanks were found later during the excavating on site for new buildings.

While at the site trying to figure out what to do with the canopies, building material, buildings and misc. items, I was approached by several individuals about purchasing the buildings and materials on the premises. One was the Dial family who wanted to purchase all that was on the property including all three (3) buildings to be moved or salvaged.

A hand written contract and Bill of Sale was executed and I was paid the $1,000.00 purchase price which I said I would pay back to them if they took everything and left the area clean. Upon payment, they received a Bill of Sale. Thereafter, the Dials proceeded to sell and/or remove all the canopies a camper, most of two (2) metal buildings, canopy glass, metal tubing and miscellaneous canopy construction materials.

They also sold and/or removed all glass, sliding glass, some doors, the well pump and storage tank, heating and air conditioning units, kitchen cabinets and had sold the fire place and other building materials. They even tried to sell the large high-rise sign, not connected with the building, (a $5,000.00 item to replace) for $500.00 and the chain link fence (about

$8,000.00 to replace) which were not included in the sales agreement or the Bill of Sale.

Prior to the agreement to sell to the Dials, they advised me that they were very experienced in building moving and salvaging and had done so for a living for several years in Nevada. The speed at which they sold and/or removed items from the property supported this statement.

Because of their prior experience, they asked if the property had come with a substance guarantee and I advised them that it was from a Bankruptcy Trustee and they would have to buy it on the same basis as did I. At that point, they advised, based on their experience, that they did not want to get involved in any tank or Asbestos removal as it was very expensive and would cut into their profit margin.

I estimated the 50 canopies, the building and other materials should be worth at least $15,000.00. They said even so it would cost them to move or salvage the buildings. At that point, I advised them that I did not want them to move any dirt or concrete and that the property had been tested with a back hoe before I entered into my exchange agreement but that no Asbestos survey had yet been undertaken. The advised me that they had dealt with Asbestos projects in the past and wanted me to pay for samples before they agreed to buy the movable property. The Dials walked through the buildings and picked-out about 12 samples of various roofing, the visible kitchen floor tile and some insulation type material. At their request, I took the materials selected to BRW for testing. BRW discarded approximately nine (9) samples as being a waste of money to test and tested what they thought could

possibly have Asbestos contained therein. Of the samples tested, BRW advised no Asbestos. This report was given to the Dials and the purchase was consummated and they sold or moved all canopies quickly.

On or about May 29, 1998, I received a call from the Dials saying a person to whom they had sold the fire place from the main building and had told them that a DEQ person had come through the gate on the site and told them they had to stop any work or salvage as there was Asbestos in the building. They were advised that the whole property was off limits to any buyer to retrieve purchased property. That the fire place purchaser advised the Dials that he had told Mr. Croucher that he had purchased the fire place and other material from the Dials and that Mr. Croucher would not let that buyer remove the purchased items and that he wanted his money back from the Dials.

The Dials asked that I call Mr. Croucher to find out what this was about and I called him as soon as I completed my conversation with the Dials. Mr. Croucher said he had stopped any building removal or salvaging as there was Asbestos present. I said BWR had tested several samples and he said that it did not matter and that he would be back to work on Monday but he had put a stop order on the property and we could meet with him on Monday.

On Monday I set up an appointment with Mr. Croucher, the Dials and a representative of BWR at the building site. At that time, Mr. Croucher advised that the DEQ not had taken samples and if the building removal and salvage was to continue, we had to

pay for sampling and testing of items he would ask BWR to take and test. We agreed. The next day I got a call from BWR and was advised DEQ wanted the testing results before being released to me. I set up a meeting with BWR to look at the test results on site so they would make some sense to me and told BWR as soon as we had done this we could give my test results to DEQ. He said that was fair and we met at the site and he gave all test results to Mr. Croucher.

I contacted the Dials and they advised me that Mr. Croucher had told them the DEQ had prior samples. I asked them if the DEQ had ever asked for permission to go on the property and they advised no such permission had been given. They further advised that they kept the gate locked at all times except when they or someone they had sold items to were on this property. At that time the Dials and I looked at the gates to see if there were signs of forced entry and found someone had cut a man hole in the chain link fence with a bolt cutter and made a flap, just to the west of the gate, so a person could enter. The hole was not big enough to pass building materials through. The Dials advised that nothing seemed to be missing.

After the meeting on June 1st, I advised Mr. Croucher that BWR would make arrangements to hire an abatement contractor as I was leaving the country and the Dials declined to have anymore to do with the property as they had not bargained to do any Asbestos clean up. I advised the Dials that they needed to complete the last removal as soon as BWR made arrangements to have the Asbestos removed.

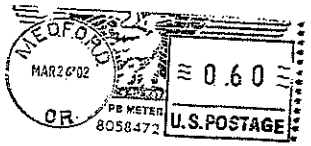
Upon returning in the later part of June, I was advised by BWR that Mr. Croucher was requesting the whole building to be encapsulated and that the best bid they had was from Western States Environmental a division of Batzer Construction.

I then contacted Gene Reinkemp, the Manager of Western States and we negotiated a time and material contract for the clean up. He advised me that as the building was far from the road, surrounded by a chain link fence and that encapsulating the building made no sense as there was only minimum asbestos and mostly in the taping compound that was on 4'x8' joints in the walls and they could go in with protective gear to take it out. Later, I was advised that Mr. Croucher must be mad at something as the best they could get Mr. Croucher to agree to was to treat the whole building as having asbestos and place it all in encapsulated containers and transport the material to an environmental dump site. This would result in the whole building including the foundation being removed by heavy equipment. I agreed to pay for the same on a time and materials contract. As there would be no building left, the Dials had nothing left to do and walked away from what material that was left. They had received about $15,000.00 worth of material. They agreed that I could keep the $1,000.00 purchase price for my clean up of their purchase.

I was advised by the Dials that they had received a notice that they would be fined by DEQ as being building owners doing asbestos abatement project. We discussed this and they were going to see an attorney. Most of the area they had worked on (the roof, cabinets and out building) did not have asbestos and they did not do the other damage which had pre-

existed their purchase.

That was the last I heard about the Dials until I was recently advised that all claims by the DEQ against them were dropped. I am the Landlord for the local DEQ office and we have had some disagreement with the DEQ over small matters in the past, but to my knowledge did not give Mr. Croucher any reason to personally be mad at me or my family.

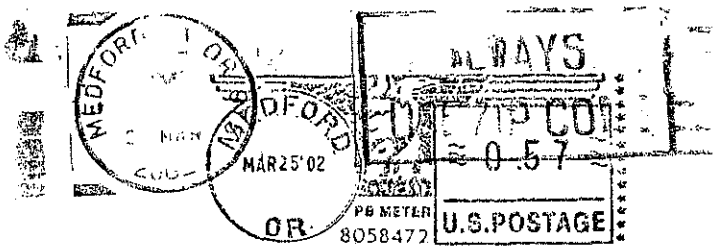


FIRST CLASS MAIL

STARK AND HAMMACK, P.C.
Attorneys at Law
201 W. Main Street, Suite 1B
Medford, Oregon 97501

Ms. Gretchen Miller
Hearings Officer
Department of Environmental Quality
875 Union Street, NE
Salem, OR 97311

STARK AND HAMMACK, P.C.
201 W. MAIN, SUITE 1B
MEDFORD, OR 97501



Ms. Gretchen L. Miller
Hearings Officer
Department of Environmental Quality
875 Union Street, NE
Salem, OR 97311

STOEL RIVES LLP
ATTORNEYS AT LAW

900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

April 5, 2002

SCOTT J. KAPLAN
Direct (503) 294-9186
sjkaplan@stoel.com

Ms. Gretchen Miller
Central Hearings Panel
2510 Oakmont Way
PO Box 1027
Eugene, OR 97440

Re: *In the Matter of American Exchange Services, Inc.*, No. AQ/A-WR-98-186 Jackson County

Dear Ms. Miller:

This is in response to Ms. McIntyre's letter of April 4, 2002.

First, AES did not state DEQ agreed that this enforcement action is "bad policy." Unfortunately, DEQ has stubbornly refused to consider the ramifications of its actions on the real-estate industry. However, for the purpose of this hearing, the issues are only the facts and the law, not policy.

It is the State's burden to prove vicarious liability and imputed knowledge, not an affirmative defense on AES's part to refute these elements of the State's case. *See Dias v. Favel-Utey Realty Co.*, 126 Or 227, 232, 269 P 207 (1928) (party asserting vicarious liability has the burden of proof). AES showed that the State cannot meet its burden of proving AES is vicariously liable for the actions of a customer solely for the customer's benefit. On the issue of imputed knowledge, Mr. Ferguson's knowledge before becoming an AES customer may not be imputed to AES. Only knowledge obtained within the scope of the alleged agency may be imputed. *E.g.*, *Tri-Met v. Odighizuwa*, 112 Or App 159, 828 P2d 468 (1992). Consequently Mr. Ferguson's knowledge is not relevant to the "enhanced" civil penalty sought against AES. The evidence is not alleged to be relevant on any other issue. Thus it is inadmissible against AES. OEC 402.

EX. 15

We hope this clarifies AES's position.

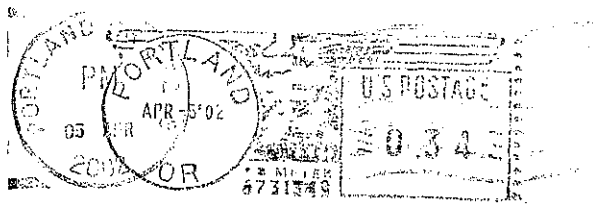
Very truly yours,

Scott J. Kaplan

SJK:dmv
cc: Mr. Richard A. Stark
Ms. Shelley McIntyre
Ms. Linda K. Stelle

STOEL RIVES LLP
ATTORNEYS AT LAW
900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204

(SJK)



MS GRETCHEN MILLER
CENTRAL HEARINGS PANEL
2510 OAKMONT WAY
PO BOX 1027
EUGENE OR 97440

97440+1027

HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

June 12, 2002

Gretchen Miller
Hearing Officer
P.O. Box 1027
Eugene, Oregon 97440

Re: *In the Matter of American Exchange Services, Inc.*
DEQ Civil Penalty Assessment

Dear Ms. Miller:

Quite some time ago, the Department of Environmental Quality and American Exchange Services, Inc. (AES) filed written direct testimony and submitted documentary evidence. AES also filed a Prehearing Brief on Ownership and Liability Issues on March 18, 2002. This was in addition to AES's previously filed Motion to Dismiss with Supporting Affidavits (November 2, 1999) and a Memorandum in Support (July 14, 2000). Enclosed is the Department's Hearing Memorandum, which supplements its Memorandum in Opposition (July 13, 2000).

In addition to written direct testimony by way of an Affidavit of William Ferguson and others, AES also filed William Ferguson's Narrative Statement and asked that it be attached as Exhibit "A" to Mr. Ferguson's Affidavit. We object to the admissibility of this document. Mr. Stark submitted Mr. Ferguson's sworn affidavit as his Direct Testimony on March 18, 2002. Although arguably he could have supplemented that affidavit, he apparently chose not to. The "narrative" is not sworn testimony. It is not even signed by anyone.

Finally, DEQ wishes to provide live rebuttal testimony as part of the contested case hearing. Therefore, we need to discuss a date for this part of the proceeding. Because Jeff Bachman will be conducting the rebuttal testimony as DEQ's lay representative, it would be best to coordinate dates directly with him. His phone number is 503-229-5950. Of course, any additional legal argument must come from our office.

Ex. 16

Sincerely,

Shelley K. McIntyre
Assistant Attorney General
Natural Resources Section

c: Scott Kaplan
Richard Stark
Jeff Bachman

GENC2009.DOC

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of:	)	DEQ's HEARING MEMORANDUM
American Exchange Services, Inc., an	)	
Oregon corporation,	)	No. AQ/A-WR-98-186
	)	Jackson County

Respondent.

This Memorandum describes the issues presented in this case, a summary of the undisputed facts presented by DEQ's testimony and exhibits, and legal argument. The Notice of Hearing states that the issue is whether DEQ's Notice of Assessment of Civil Penalty should be affirmed, modified, or vacated. However, there are a number of sub-issues, as presented below.

In addition, this Memorandum is a reply to Respondent's Prehearing Brief on Ownership and Liability Issues submitted on March 18, 2002. Despite Mr. Kaplan's statement to the contrary in his April 5, 2002 letter to the hearing officer, AES not only is strictly liable for the asbestos violations but is liable for Mr. Ferguson's negligence, which resulted in the "enhanced" civil penalty.

DEQ includes and incorporates by reference its Memorandum in Opposition to Respondent's Motion to Dismiss submitted on July 31, 2000.

ISSUES PRESENTED BY DEQ'S NOTICE

1. Whether William H. Ferguson violated *former* OAR 340-032-5600(4) by openly accumulating friable asbestos-containing or asbestos-containing waste material by failing to comply with the provisions contained in OAR 340-032-5650 concerning packaging, storing, and disposal of asbestos-containing material.

2. Whether American Exchange Services, Inc. (AES) was the owner or operator of a source or an activity covered under *former* OAR 340-032-5600 through 340-032-5650 or any other source of friable asbestos-containing waste material.

3. Whether Ferguson used an unlicensed contractor to perform asbestos abatement, *i.e.,* to demolish a structure it owned at the subject site.

4. Whether more than 160 square feet of friable asbestos-containing material or asbestos-containing waste material was openly accumulated.

5. Whether AES or Ferguson was negligent.

ISSUES PRESENTED BY AES'S ANSWER

1. Whether AES was the owner of the asbestos-containing waste material referred to in DEQ's Notice.

2. Whether DEQ properly computed the proposed penalty.

ISSUES PRESENTED BY AES AFTER FILING ITS ANWER (RELATED TO ITS STATUS AS A SECTION 1031 EXCHANGE SERVICE)

1. If AES was the owner of the asbestos-containing material referred to in the Notice, whether it is exempt from liability as a section 1031 exchange company.

2. Whether Ferguson's negligence can be imputed to AES when the basis for the negligence is at least in part based on prior knowledge.

UNDISPUTED FACTS

1. AES is an Oregon corporation designed and established to act as a facilitator for tax-deferred exchange transactions under the Internal Revenue Code, 26 U.S.C. section 1031.

2. In what is referred to as a "section 1031 exchange," AES holds legal title to real property on behalf of its customers to enable them to take advantage of certain tax laws.

3. During the relevant time period, AES held title to the real property and its improvements located at 4044 Crater Lake Ave., Medford, Jackson County, Oregon. [Poling Affidavit, Nov. 22, 1999]

4. Ferguson and AES entered into a Real Property Exchange Agreement dated March 9, 1998 providing that AES was "entitled to exercise and perform all rights and obligations as owner of the [property], including without limitation, * * * obligations to maintain and operate the [property]" and to pay all expenses of the property. [Exchange Agreement, p. 3, ¶ 2.2.2]

5. The Agreement also named Mr. Ferguson as AES's agent "to manage, operate, maintain, and repair" the property at issue on behalf of AES. [*Id.* at p. 4, ¶2.2.2.3]

6. On or about May 29, 1998, Steve Croucher, one of the Department's Air Quality Specialists, observed a building demolition project at the subject property. He suspected some of the materials being disassembled by hand contained asbestos.

7. After determining from the Jackson County that AES held title to the real property, Mr. Croucher contacted the party listed in the reverse directory for the address, William Ferguson.

8. After Croucher informed Ferguson of his concerns about asbestos, Ferguson retained BRW, environmental consultants, to do an asbestos survey of the partially demolished building.

9. The survey and analysis revealed asbestos in various materials throughout the building. [State's Ex. B, p. 1].

10. In December 1996, DEQ issued a Notice of Violation and Assessment of Civil Penalty against Ferguson for failing to follow several of the requirements for asbestos abatement projects. Ferguson requested and was given a contested case hearing on that Notice. He argued then that he was unaware there were asbestos-containing materials in the building when he started the renovation, and that once he knew there was asbestos-containing material, he complied with all statutes and rules regarding the removal of such materials. The final order from that proceeding notes that "[r]espondent is an experienced property owner and manager who has been involved in the acquisition, renovation and maintenance of

commercial properties. He has been involved in situations involving potential asbestos-containing materials * * *." [State's Ex. C]

11. As part of its routine procedures, the Jackson County Planning and Development Services office requires agency comment on certain proposals it receives. In response to an application by Mr. Ferguson to remove an existing structure and rebuild a larger building, Tom Schauer, Planner II, distributed a form for agency comments to Keith R. Tong on behalf of DEQ. Mr. Tong submitted comments on a form dated April 17, 1998. This was in anticipation of a "Pre-application Conference" scheduled for that same day. Mr. Tong specifically warned that asbestos might be present in the existing structures, and he recommended that an asbestos survey be done and an asbestos consultant design control or removal. He also said that they the proposal may need an asbestos notification. [Keith Tong Written Direct Exam and State's Ex. D]

12. The purpose of the Pre-application Conference is for the staff to confer with the applicant about any concerns that may arise. The report prepared for Mr. Ferguson's application specifically directs the reader to "See agency comments." [*Id.*]

13. On or about May 1, 1998, Ferguson entered into an agreement with Barbara Dial and Lawrence Dial under which Ferguson purportedly sold to the Dials certain buildings and personal property located on the property.

14. The agreement is memorialized in a one-page, handwritten document, signed at the top by William Ferguson as "agent for the seller," Barbara Dial, and Lawrence Dial and dated "5-1-98." An accompanying undated, handwritten "Bill of Sale" is signed at the bottom by "William Ferguson agent for owner ASE (sic)." The "Bill of Sale" is written on a piece of paper with the letterhead "Northwest Wholesale, Incorporated" and a Wenatchee, Washington address.

15. The Dials did not tender the $1,000 before demolition of the building began.

16. The demolition or salvage operation constituted an asbestos abatement project.

17. Asbestos was found in materials at the following locations:

- Taping compound in the northeast bathroom and kitchen wall
- Yellow floor vinyl in the kitchen
- Brown floor vinyl in the NW room near a removed sliding door
- Texture on the kitchen soffit, SE corner room closet wall, and exposed beam room ceiling
- Black/gray sealant on roofing vents [BWR Asbestos Survey, June 1998]

18. The site samples showed friable asbestos in several types of materials throughout the building and in the truck tops, including drywall, taping compound, roofing, wall texture, floor vinyl, ceiling texture, and duct tape.

19. The asbestos-containing material accumulated or was stored in an open area and was not packed, stored, or otherwise securely enclosed as required by *former* OAR 340-032-5650, which was in effect at the time.

20. Neither Lawrence Dial nor Barbara Dial was licensed to perform asbestos abatement.

21. None of the persons used by the Dials to perform the work on site was licensed to perform asbestos abatement.

22. Ferguson was not licensed to perform asbestos abatement.

23. Several hundred, and perhaps as much as 3,000, square feet of asbestos-containing waste material were disturbed during the demolition or so-called salvage operation. [Croucher Written Direct Testimony, State's Ex. F]

24. DEQ issued its Notice of Assessment of civil Penalty on February 1, 1999.

25. On February 12, 1999, AES filed its Answer asserting that Respondent was not the owner of the asbestos-containing material.

26. On November 2, 1999, AES filed a Motion to Dismiss on the grounds that Respondent was not the owner of the asbestos containing materials because Lawrence and Barbara Dial had purchased the materials from Ferguson while Ferguson was acting as attorney in fact to manage the property for AES.

27. On July 14, 2000, AES filed a Memorandum in Support of the Motion to Dismiss relying entirely on the purported sale of the buildings to the Dials.

28. On July 31, 2000, DEQ filed its Memorandum in Opposition to Respondent's Motion to Dismiss, focusing on AES's defense.

29. At the prehearing conference on December 4, 2001, AES for the first time raised the issue of whether it is or should be held liable as a Section 1031 fiduciary trustee

30. On March 18, 2002, AES filed Respondent's Prehearing Brief on Ownership and Liability Issues containing its legal argument concerning Section 1031 fiduciaries. AES has never moved to amend its Answer raising this new defense.

MATTERS FOR RESOLUTION BY THE HEARING OFFICER

29. Whether Ferguson's agreement with the Dials was a "sale" of the building or merely a contract for services, *i.e.,* disposal or salvage rights, exempting AES from liability.

- Whether the alleged "sale" of asbestos-containing buildings with the seller's intent that the building be demolished is "disposal."

- Whether the alleged sale of asbestos-containing buildings with the seller's intent that the building be demolished renders the seller not liable for violations of the asbestos abatement work practices and procedures.

30. Whether, after it filed its Answer, AES can raise its Section 1031 and other defenses.

31. If it can raise such defenses, then whether AES is exempt, as a fiduciary or otherwise, from liability for Ferguson's violations of the asbestos rules, even though it held title to the real property.

32. Whether Ferguson's knowledge can be imputed to AES on the negligence issue.

LEGAL ARGUMENT

1. AES is barred from raising new defenses at this late date. The only permissible defense is whether the purported "sale" of the building transferred liability from AES and Ferguson solely to the Dials.

OAR 340-011-0107(2) requires as follows:

> In the answer, the person must admit or deny all factual matters and affirmatively allege any and all affirmative claims or defenses *and the reasoning in support thereof.* Except for good cause shown:
> (a) Factual matters not controverted will be presumed admitted;
> (b) *Failure to raise a claim or defense will be presumed to be waiver of such claim or defense*; (Emphasis added).

In its Answer, AES stated only that it was not the owner of the asbestos-containing materials mentioned in the Notice. At DEQ's prompting for an elaboration of that defense, AES filed a bare-bones Motion to Dismiss with supporting Affidavit and exhibits on November 2, 1999. The motion states only that "Respondent was not the owner of the asbestos containing waste material mentioned in the Notice of Assessment of Civil Penalty" and that it is based on the attached Affidavit.

In the attached Affidavit, Ferguson asserts that "the asbestos-containing material was owned by Lawrence Dial and Barbara Dial pursuant to agreement and bill of sale."[1] (AES's Affidavit at 1.) AES provided no legal explanation of this meaning or validity of this transaction, relying entirely on its documents.

[1] As it turned out, OAR 340-011-0124 prohibited the hearing officer from issuing a ruling on this Motion.

On November 24, 1999, AES submitted an Affidavit of Cindi Poling with exhibits. Ms. Poling admitted that "at all times relevant American Exchange Services was the vested title holder in accordance with the terms of the Exchange Agreement in trust to the property" at issue in this case. She also admitted that AES appointed Ferguson "as its attorney in fact until the end of the exchange period, to manage, operate, maintain and repair the replacement property." AES provided no explanation of the possible legal significance of this information.

Eight months later, in a Memorandum in Support date July 14, 2000, AES put forth its sole legal argument in support of its affirmative defense. That memorandum focused entirely on Ferguson's purported sale of the certain materials on the property to the Dials, including the partially demolished building, and Ferguson's denial that he knew the property included asbestos-containing materials. AES stated that "[a]n integral part of the Exchange Agreement was a Management Agreement pursuant to which *AES designated Ferguson its agent* to manage the replacement property until the exchange." (Memorandum in Support at p. 2, emphasis added).

The substance of the argument in this Memorandum was that AES was not the owner of the asbestos containing material because Ferguson, "in his capacity of property manager" for AES, sold most of the items on the property to the Dials. (Memorandum in Support at p. 3). AES then asserts that after the presence of asbestos was confirmed, "*Ferguson, as Respondent's agent,* accomplished their removal by promptly contracting with an asbestos-abatement removal firm which observed all environmental safeguards." (Memorandum in Support at p. 3, emphasis added.)

AES's sole argument in its Memorandum in Support was that Ferguson purportedly "sold" the asbestos-containing material to the Dials. In its conclusion, AES stated:

> For the reasons previously discussed, neither Respondent *nor Respondent's agent* "owned" the structure as alleged. On and after May 1, 1998, and during the time alleged by the Department, the structure was owned by the Dials. Respondent is not liable for assessment of the proposed penalty and this proceeding should be dismissed. (Memorandum in Support at p. 5, emphasis added.)

AES never contended that it should be exempt from liability because of its alleged fiduciary status or any other defense related to being a Section 1031 company.

On July 31, 2000, DEQ submitted a Memorandum in Opposition responding at length to the "ownership" argument that AES raised in its Memorandum in Support. We incorporate that Memorandum here by reference. After that, DEQ and AES again discussed whether the case could be settled. Also, sometime after that I realized that OAR 340-011-0124 prohibits motions for rulings on legal issues, so we were unable to resolve the sole defense raised by AES without going to an evidentiary hearing first.

It was not until December the pre-hearing conference call held on December 4, 2001 that AES for the first time raised the issue of whether it is or should be held liable as a section 1031 fiduciary trustee. I said then that AES should move for leave to amend its Answer. My notes indicate that Mr. Stark was going to do this by December 20.[2] However, AES has never filed such a motion. Instead, it is trying to insert this new defense as part of the evidentiary hearing by submitting its Prehearing Brief on Ownership and Liability Issues. This is impermissible under OAR 340-011-0107(2), and we move that the arguments and exhibits in support be struck from the record.

2. AES cannot escape liability by pointing the finger at its agent. AES is strictly liable as the owner.

DEQ's Memorandum in Opposition to Respondent's Motion to Dismiss shows that AES's "sale of the buildings" defense lacks merit. AES now argues for the first time that it cannot be held liable for the acts of its agent, and that it should be exempt from liability for violations of the asbestos rules because it held title to the property as a fiduciary. Not only are these new arguments, but they defy federal and state law, as well as public policy.

- ***AES cannot escape liability even under the Bestfoods standard***

AES relies first on the U.S. Supreme Court's opinion in *United States v. Bestfoods*, 524 US 51, 118 S Ct 1876 (1998). However, that case concerned a parent corporation's liability for the acts of its subsidiary under the federal Comprehensive

[2] I assume this pre-hearing conference call was recorded and that the hearing officer or ultimate decision-maker can verify this statement.

Environmental Response, Compensation, and Liability Act (CERCLA). It has no bearing on this case for several reasons.

First, even though analogy to CERCLA cases might be appropriate for certain arguments, *Bestfoods* is not on point. It concerned whether so-called operator liability under CERCLA might apply to a parent corporation so as to hold the parent company directly liable as an operator of a facility owned by its subsidiary. That is, the Court had to decide "whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable *as an operator* of a polluting facility owned or operated by the subsidiary." 524 US at 52, emphasis added.[3] Here, "operator liability" is not at issue. AES actually held title to the property, *i.e.,* it was the owner, and Ferguson acted as its agent.

Second, the Supreme Court noted that "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." 524 US at 61. AES has provided no authority for such "deeply ingrained principal" concerning a Section 1031 company and its agent. The "bedrock principle" of the *Bestfoods* case is the common-law "respect for corporate distinctions when the subsidiary is a polluter." *Id.* Here, there is no corporate distinction between AES and its agent, Ferguson.

In *Bestfoods,* the United States government never even claimed that a corporate parent is liable as an owner or operator under CERCLA simply because its subsidiary is subject to liability for owning or operating a polluting facility. *Id.* The issue was whether the parent corporation could be held *directly* liable for its own actions in operating a facility owned by its subsidiary. It is in answering that question that the elements AES relies on in its brief come into play.

But those elements are irrelevant here because AES actually owned the property. DEQ did not allege operator liability. The Notice alleges that "Respondent failed to comply with [the relevant requirements for] asbestos-containing waster material owned by Respondent * * * " and "Respondent or Respondent's agent hired people not licensed

[3] The answer is no, unless the corporate veil may be pierced, although a corporate parent that actively participated in and exercised control over the operations of the facility itself may be held directly liable in its own right as an operator of the facility. 524 US at 52.

to perform asbestos abatement to demolish a structure it owned * * * ." Notice of Assessment of Civil Penalty, p. 1, para. II.1. and 2.

- ***AES is liable under the Federal Clean Air Act***

AES argues next that it is not liable under the federal Clean Air Act, relying on two federal cases. However, such reliance is misplaced. In fact, those cases support DEQ's arguments.

In *United States v. Walsh*, 783 F Supp 546 (WD Wash 1991), *aff'd United States v. Walsh* 8 F3d 659, 662 (9th Cir 1993), *cert denied* 114 SCt 1830 (1994), the federal government sought a civil penalty against the former employee of an asbestos abatement firm for violating asbestos removal regulations. EPA's regulations impose certain obligations on the owner or operator of a renovation or demolition operation over a certain size. 40 CFR § 61.145. The regulations define "owner or operator" as "any person who owns, leases, operates, controls or supervises a stationary source."[4] 40 CFR § 61.02. As with the *Bestfoods* case under CERCLA, the issue here was whether the defendant should be held liable as an *operator*, not whether he was an owner.

The district court acknowledged that nobody contended that Walsh was an owner. 783 F Supp at 548. The court also acknowledge in several ways that it was "concerned" about the case because EPA sought substantial penalties while he had essentially no assets, the asbestos abatement company was a small operation, and one of EPA's key witness was not credible. 783 F Supp at 548. Nonetheless, the court found that Walsh was an operator and was liable under the Clean Air Act for violations, although the court substantially reduced the amount of the civil penalty based on a number of factors that do not apply to Oregon state law. 783 F Supp at 550-52.

The cited opinion in *U.S. v. Dell'Aquilla,* 150 F3d 329 (3d Cir 1998) is equally irrelevant to AES's argument because it also concerns whether two of the named defendants (Harry Grant and Sandalwood Corporation) were "operators" subject to liability for violations of the asbestos regulations. The district court held that they were "operators," found them in violation of the regulations, and imposed the statutory

[4] AES has not asserted that the building or the site is not a "stationary source" as that term is used in these regulations. "*Stationary source* means any building, structure, facility, or installation which emits or may emit any air pollutant which has been designated as hazardous by the Administrator." 40 C.F.R. § 61.02. Asbestos has been designated as hazardous. 40 C.F.R. § 61.01.

maximum penalty of $25,000 per day for each violation for a total fine of $2,975,000. 150 F3d at 330. Grant and Sandalwood argued that they were not liable under the regulations because they were neither owners nor operators, and the court of appeals affirmed in part and remanded. On the other hand, as the owner of the property, Dell'Aquilla paid $400,000 in fines to EPA. 150 F3d at 331, 332.

As stated in *Dell'Aquilla*, the federal Act imposes strict liability upon owners and operators who violate the Act. As the court explained, "although Grant and Sandalwood argue that Dell'Aquilla and/or his agents led them to believe that any asbestos on the property had properly been removed and all necessary permits had been obtained, those assertions are not relevant to our analysis, and we need not respond." 150 F3d at 332. In the same way, Ferguson's argument that he had some of the materials tested and he believed there was no asbestos is irrelevant.

Furthermore, the court noted that "our determination of whether one is an operator or owner under the CAA must be conducted in a manner consistent wit the broad reach of the statute. Owner or operator is defined broadly for purposes of asbestos regulations." 150 F3d at333 (citations and internal quotes omitted).

- ***AES is not exempt from liability under the environmental laws***

In addition to the above federal cases, AES argues that it should not be burdened with owner liability because CERCLA and Oregon law have protected fiduciaries under the hazardous waste cleanup laws. This argument lacks merit for several reasons.

AES argues that because the asbestos rules in effect at the time of the violations did not define the term "owner," we must turn to the federal and state hazardous waste laws for an understanding of the term. But while analogy to CERCLA is helpful at times, it is unnecessary here.

Although the asbestos rules in effect at the time (*former* OAR 340-032-5600 through 340-032-5650) did not define the term "owner," EPA's rules did. As stated in the Discussion section of DEQ's Memorandum in Opposition to Respondent's Motion to Dismiss, we often look to the federal Clean Air Act when interpreting Oregon's air quality laws. The federal Act imposes strict liability on owners and operators who violate the Act. *U.S. v. Dell'Aquilla, supra,* 159 F3d at 332. Both the Act and EPA's regulations define an "owner or operator" as "*any person* who owns, leases, operates,

controls, or supervises a stationary source." 42 U.S.C. § 7412(a)(9), 40 C.F.R. § 61.02. Nothing in that definition eliminates fiduciaries or any other entity from liability for violations of the Act or EPA's regulations.

The federal Act defines the term "person" for general purposes to include "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42. U.S.C. § 7602(e). Again, nothing suggests that Congress intended to eliminate fiduciaries from liability under the federal Clean Air Act.

As for Oregon law, ORS 468.005, which contains definitions for use in ORS Chapter 468A, states that the term person "*includes* individuals, corporations, associations, firms, partnerships, joint stock companies, public and municipal corporations, political subdivisions, the state and any agencies thereof, and the federal government and any agencies thereof." (emphasis added). *Former* Division 32, which concerned hazardous air pollutants and included the asbestos rules, defined the term "person" to mean "the United States Government and agencies thereof, any state, individual, public or private corporation, political subdivision, governmental agency, municipality, industry, co-partnership, association, firm, trust, estate, or any other legal entity whatsoever." *Former* OAR 340-032-120(31). The current rule defines "person" to mean "individuals, estates, trusts, corporations, associations, firms, partnerships, joint stock companies, municipal corporations, political sub-divisions, the state and any agencies thereof, and the federal government and any agencies thereof." OAR 340-249-0010(35).

As with the federal Clean Air Act, Oregon law shows no inclination, either now or historically, to remove trustees and other fiduciaries from the broad applicability of the asbestos rules. The fact that both Congress and the Oregon legislature expressly amended the cleanup laws to exempt fiduciaries supports the argument that AES is *not* exempt under the asbestos rules, which were adopted pursuant to the air quality statues. Congress has not amended the federal Clean Air Act, nor has the Oregon legislature amended ORS chapter 468A, to exempt fiduciaries from either federal or state air quality requirements. Perhaps they have not thought about it. Perhaps they thought about it and intentionally declined to do so.

AES is correct about the debate over protecting fiduciaries from liability *under the federal and state Superfund statutes.* However, Respondent points to no equivalent debate concerning the air quality statutes. Perhaps there should be one, and perhaps Congress and the Oregon legislature would amend the air quality statutes if asked to do so. But carving out exceptions for fiduciaries is not DEQ's job, and it certainly is not the hearing officer's job.

Assuming without agreeing that the term "owner" is ambiguous or in need of further explanation, DEQ is entitled considerable deference in its interpretation. Oregon courts have consistently stated that reviewing courts must defer to plausible interpretations by administrative agencies of their own rules. As the court of appeals stated recently,

> "In determining the meaning of an administrative rule, we must strive to discern the agency's intent when it adopted the rule. We must follow the ordinary rules of construction that apply to the interpretation of statutes, that is to say, they examine the language of the rule, giving effect to the intent of the enacting body. * * * [fn.1] When an administrative agency interprets its own administrative rule, our review is more deferential. Under *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or. 132, 142, 881 P.2d 119 (1994), when an agency interprets its own rule, we will defer to that interpretation if it is 'plausible,' that is, if it 'cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law.'"

County of Morrow v. Department Of Fish And Wildlife, 178 Or App 329 (2001).

There is nothing inconsistent with the rule's context or with any other source of law in defining the term "owner" as used in the asbestos rules to include fiduciaries. First, the plain, natural, and ordinary meaning of the term is "one that owns: one that has the legal or rightful title whether the possessor or not." *Webster's Third New Int'l Dictionary*, 1612 (unabridged ed. 1993). AES had legal title. Second, DEQ's interpretation is consistent with the federal Clean Air Act. Third, and perhaps most important, DEQ's interpretation is consistent with the legislature's that asbestos fibers are a danger to the public health. ORS 468A.705.

- ***Ferguson's negligence may be imputed to AES***

AES's arguments on agency law authority are misplaced. First, as discussed above, AES is strictly liable as the "owner or operator" for the violations. AES started arguing recently that it ought not to be held liable for someone who was merely a "customer," disputing that Ferguson was AES's agent. This argument goes solely to the issue of Ferguson's negligence and has no bearing on ownership liability.

When calculating a civil penalty, DEQ first determines the class of a violation by consulting OAR 340-012-0050 to 340-012-0073 and the magnitude by consulting the selected magnitude categories contained in OAR 340-012-0090.[5] OAR 340-012-0045. Here, AES is charged with allowing open accumulation of friable asbestos-containing material or asbestos-containing waste materials in violation of the asbestos work practice requirements contained in *former* OAR 340-32-5600(4). Violation of a work practice requirement for asbestos abatement projects that causes a potential for public exposure to asbestos or release of asbestos into the environment is a Class I violation. OAR 340-012-0050(1)(p). This is a major magnitude violation under OAR 340-012-0090(1)(d)(A) because it involved "[m]ore than 260 lineal feet or more than 160 square feet or more than 35 cubic feet of asbestos-containing material." Therefore, DEQ assessed a base civil penalty of $6,000 for a Class I, major magnitude violation.

Starting with this base penalty, DEQ then determines the amount of the penalty by applying the formula contained in OAR 340-012-0045. Here, DEQ assigned a value of 2 for the "O" factor because the violation occurred for more than one day. OAR 340-012-0045(1)(c)(C)(ii). DEQ also assigned a value of 2 for the "R" factor because of Ferguson's negligence. DEQ explained that Respondent's agent, *i.e.*, Ferguson, was aware of the regulations concerning asbestos-containing materials because he previously was assessed a civil penalty for violating these rules. DEQ stated that "Respondent should have exercised reasonable care by conducting a survey of the structure prior to demolition to determine whether asbestos-containing materials were present." *See* Notice of Assessment, Exhibit 1. These two factors increased the base penalty by $2,400 ($1,200 each) to a total of $8,400.

a. Ferguson was AES's agent

[5] DEQ assessed the civil penalty under *former* OAR 340 Division 12, which contained different numbers. We refer here to the current rules, which are the same substantively as the earlier edition.

AES now argues for the first time that Ferguson was not AES's agent. This flatly contradicts the documentary evidence and AES's previous admission. The most obvious evidence is the Real Property Exchange Agreement entered into between AES and Ferguson. First, it states on its face that

> "AES shall have and be entitled to exercise and perform all rights and obligations as owner of the Replacement Property, including, without limitation, rights to collect any rents and other proceeds of the Replacement Property and obligations to maintain and operate the Replacement Property and to pay all taxes, insurance premiums, maintenance and repair expenses, and other expenses of the Replacement Property." Exchange Agreement at p. 3, ¶ 2.2.2.

Then, in order to provide for management of the property, it includes a "Management Agreement" whereby AES "appoints Exchangor [Ferguson] as its attorney-in-fact, until the end of the Exchange Period, to manage, operate, maintain and repair the Replacement Property." *Id.* at p. 4, ¶ 2.2.2.3. It also provides for "a reasonable management fee for performing these management services on AES' behalf." *Id.* at p. 3, ¶ 2.2.2.1.

The language could not be any clearer. AES owned and controlled the property but appointed Ferguson as its agent to perform management purposes on AES's behalf. Cindi Poling's testimony that AES actually exercised no control over any activities on the property is irrelevant. AES obviously had authority to do so; it simply chose not to.

In addition to the documentary evidence, AES previously admitted that Ferguson was its agent. In AES's Memorandum in Support of its Motion to Dismiss, AES states at page 2 that

> "[a]n integral part of the Exchange Agreement was a Management Agreement pursuant to which AES designated Ferguson its agent to manage the replacement property until the exchange. Ferguson's duties included, *inter alia,* management, operation, maintenance and repair of the property. Based on his authority under the Management Agreement, Ferguson proceeded to repair and maintain the property * * * ."

On page 3, AES stated that Ferguson, "in his capacity as property manager," purportedly sold most items on the property to the dials. Further down on that same page, AES stated that "Ferguson, as Respondent's agent, accomplished" the removal of the asbestos-containing materials by promptly contracting with an asbestos-removal firm.

Thus, both the documentary evidence and AES's own admissions show that Ferguson acted on behalf of and for AES as the property owner. Just because AES entered into an Indemnity and Release Agreement requiring Ferguson to assume all liability for compliance with the environmental laws does not mean that AES is not liable. AES cannot contract away its liability under the environmental laws; it can only require that Ferguson indemnify AES for its costs.

AES's reliance on *Buckel v. Nunn,* 131 Or App 21 (1994), is misplaced. The case involved employment law, not general agency-principal law. The general rule in Oregon is that one who hires an independent contractor is not vicariously liable for the torts of that independent contractor. The issue there was whether the security firm hired by a grocery store owner and manager to investigate employee theft was subject to the store owner and manager's control. That is, were they employees, for whose tortious conduct the defendants can be held vicariously liable on the basis of respondeat superior, or were they were independent contractors? 131 Or App 125. Here, there is no doubt that Ferguson was *subject to* AES's control; AES just chose not to exercise that control.

b. Ferguson's activities were within the scope of the agency agreement

AES argues next that Ferguson was not acting on AES's behalf and within the scope of the authority granted by AES. Again, the documentary evidence belies this argument. As stated above, the "Management Agreement" expressly authorized Ferguson to "manage, operate, maintain and repair" the property. In this capacity, he arranged for the Dials to perform an asbestos abatement.

Although the activities ended up being done improperly and illegally, conducting an asbestos abatement project properly certainly was within the scope of the agency agreement. The mere fact that AES was wise enough to enter into an Indemnity and Release Agreement does not mean that any activities that require Ferguson to indemnify AES were outside of the agency.

The cases cited by AES are not particularly helpful on this point. For example, in *Akerson v. D.C. Bates & Sons,* 180 Or 224 (1946), the plaintiff went into the defendant's commercial garage at the invitation of an employee. It was the employee's job to take care of stored cars and to sell gasoline, not to show his friends around or invite

them to use the escalator as a plaything. Here, it was part of Ferguson's "job" to manage, operate, maintain, and repair the property. That would include cleaning it up. Cleaning it up would include removing the asbestos-containing materials. Ferguson was doing his "job;" he just did it without complying with the asbestos rules.

Finally, AES misstates this case when it argues that DEQ seeks to "punish" AES for the acts of its agent. As stated several times now, the law imposes strict liability on the owner. Ignorance of Ferguson's activities is no defense.

c. Ferguson's negligence may be imputed to AES

AES implies that DEQ's entire case depends on imputed liability. But the only issue concerning vicarious liability is whether the base penalty should be increased because of Ferguson's negligence. In fact, AES could be found directly negligent for failing to exercise reasonable care, given the condition of the site. However, DEQ specifically points to Ferguson's knowledge, which was obtained both before entering into the Agreement with AES and after.

Even if AES is correct that knowledge Ferguson obtained from his previous enforcement proceedings may not be imputed to AES, the knowledge he obtained during the county review process may. The Real Property Exchange Agreement is dated March 9, 1998. At that point, if not before, Ferguson became AES's agent.

As part of its routine procedures, the Jackson County Planning and Development Services office requires agency comment on certain proposals it receives. In response to Ferguson's application to remove an existing structure and rebuild a larger building, Tom Schauer, Planner II, distributed a form for agency comments to Keith R. Tong on behalf of DEQ. Mr. Tong submitted comments on a form dated April 17, 1998. This was in anticipation of a "Pre-application Conference" scheduled for that same day, which was several weeks after the date of the Agreement.

Mr. Tong specifically warned that asbestos may be present in the existing structures, and he recommended that an asbestos survey be done and an asbestos consultant design control or removal. He also said that they the proposal may need an asbestos notification. [Keith Tong Written Direct Exam and State's Ex. D.] The purpose

of the Pre-application Conference is for the staff to confer with the applicant about any concerns that may arise. The report prepared for Ferguson's application specifically directs the reader to "See agency comments." *Id.* Therefore, there is no doubt that Ferguson knew about the potential for asbestos. Furthermore, the cleanup of the site was within Ferguson's authority as AES's agent.

"It is well established that knowledge of an agent is binding upon his principal if it concerns the business conducted through the agent, although the agent does not, in fact, inform his principal thereof." *Hogan v. Aluminum Lock Shingle Corp. of America,* 214 Or 218, 229 (when an offer has not been accepted by the principal, a communication of revocation to the agent is communication to the principal). Thus, it is no defense that AES simply did not know exactly what Ferguson was doing on a day-to-day basis.

CONCLUSION

AES's original defense, that it was not the owner of the asbestos-containing materials because Ferguson sold them to the Dials, fails for the reasons contained in DEQ's Memorandum in Response to the Motion to Dismiss. That should be the end of the matter.

But now AES has raised new policy issues as a defense in this case because its original defense fails. These new defenses must be struck as being in violation of the Commission's rules concerning filing an Answer in a contested case proceeding.

Even if these new defenses are allowed, they also fail. There is no dispute that AES held title to the property at issue. There is no basis in law for exempting fiduciaries from liability under the asbestos rules. DEQ "stubbornly insists" on assessing a civil penalty against AES because AES is strictly liable under the law. If the legislature chooses to exempt fiduciaries from liability for violations of the air quality laws, that is their choice. But until they do so, AES is not exempt.

Finally, Ferguson knew or should have known about the asbestos-containing materials. He is an experienced land developer. He had previous violations. And most important, he was provided with information alerting him to the potential problems at the

site. There is no excuse for his actions. He simply did not want to incur the costs of hiring an asbestos abatement contractor, and he thought he could get away with the letting a salvage operator do his dirty work for him. Whether AES "knew" what Ferguson was doing or not is irrelevant. He was their agent, and he acted with their full authority.

The undisputed facts and the law support DEQ's proposed civil penalty, and it should be upheld.

DATED: June 12, 2002

Respectfully submitted,

Shelley K. McIntyre
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on June 12, 2002, I served DEQ's Hearing Memorandum by mailing the original in a sealed envelope with first class postage prepaid to the hearing officer and copies to the parties as follows:

Gretchen L. Miller
Hearing Officer
Central Hearings Panel
2510 Oakmont Way
P.O. Box 1027
Eugene, Oregon 97440

Scott J. Kaplan
Stoel Rives LLP
900 SW 5th Ave., Stuite 2600
Portland, Oregon 97204

Richard A. Stark
Stark & Hammock PC
201 W. Main, Suite 1B
Medford, Oregon 97501

Jeff Bachman
Department of Environmental Quality
811 SW 6th Avenue
Portland, Oregon 97204

DATED June 12, 2002.

Shelley K. McIntyre
Assistant Attorney General