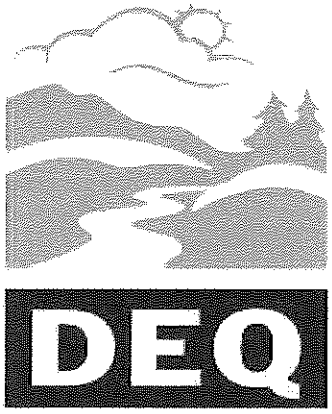
EQCMeeting1of2DOC20041209

Part 1 of 2

OREGON
ENVIRONMENTAL QUALITY
COMMISSION MEETING
MATERIALS 12/09/2004



State of Oregon
Department of Environmental Quality

Note on EQC notebook:

- Item A was withdrawn from agenda. Last minute; Ferguson requested an extension
- The number tabs merely indicate the beginning of the next Item in the folder - the numbers do not signify anything themselves.

Environmental Quality Commission Meeting
December 9-10, 2004
DEQ Headquarters, Room 3A

Thursday, December 9, regular meeting begins at 1:00 p.m.

10:00 – 1:00	Executive Session: Finish Director's Performance Appraisal, including a working lunch
1:00 – 2:05	A. Contested Case: Ferguson, Anne Price and Jenine Camilleri
2:05 – 2:10	B. Contested Case: United Gem & Carpets, Inc. (dismissal)
2:10 – 2:15	C. Contested Case: Palmer's & Sons Construction., Inc. (dismissal)
2:15 – 3:15	D. Rule Adoption: Compliance and Enforcement Rules – Phase I, Anne Price and Jane Hickman
3:15 – 3:30	Break
3:30 – 5:00	E. Action Item: Independent Spent Fuel Storage Installation Tax Credit Certification, Paul Slyman and Maggie Vandehey

Friday, December 10, regular meeting begins at 9:00 a.m.

8:00 – 9:00	Exec Session: Discuss litigation involving the Department and EQC
9:00 – 9:05	F. Adoption of Minutes
9:05 – 9:20	G. Director's Report
9:20 – 9:40	H. Action Item: Pollution Control Facility Tax Credit Requests, Paul Slyman and Maggie Vandehey
9:40 – 10:10	I. Rule Adoption: Clean Air Act State Implementation Plan for Particulate Matter (PM10) in the Medford Ashland Air Quality Maintenance Area, Andy Ginsburg and David Collier
10:10 – 10:25	Break
10:25 – 10:55	J. Rule Adoption: Portland Area Carbon Monoxide Plan and the Oxygenated Fuel Requirement, Andy Ginsburg and possible Oregon Department of Energy speaker
10:55 – 11:40	K. Rule Adoption: Onsite Wastewater Treatment System Rules, Holly Schroeder and Mark Cullington
11:40 – noon	Public Forum
Noon – 1:00	Working lunch
1:00 – 1:30	L. Informational Item: Update on Status of UMCDF, Dennis Murphey
1:30 – 1:40	M. Action Item: Annual Approval of Director's Financial Transactions, Helen Lottridge • State that Director's performance appraisal has been completed – possible need to move that the EQC is not going to take the extra step of issuing a public summary of the appraisal and press release; process is done.
1:40 – 1:55	N. Action Item: Proposed Settlement of *Northwest Environmental Defense Center et al. v. Oregon EQC et al.*, Larry Knudsen, Holly Schroeder and Debbie Gorham (ODA)
1:55 – 2:00	O. Commissioners' Reports

Environmental Quality Commission Meeting
December 9-10, 2004[1]

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

Beginning at 10:00 a.m. on December 9, prior to the regular Environmental Quality Commission meeting, the Commission will hold an executive session to review and evaluate the employment-related performance of the Director pursuant to standards, criteria and policy directives previously adopted by the Commission[2]. The executive session will be held in the Room 3B of the DEQ Headquarters Building, and will include a working lunch.

Thursday, December 9 – regular meeting begins at 1:00 p.m.

A. Contested Case No. WQ/SW-WR-02-015 regarding William H. Ferguson
The Commission will consider a contested case in which William H. Ferguson appealed a proposed order and $5,400 civil penalty for causing pollution to waters of the state. The Commission will hear statements on behalf of Mr. Ferguson and the DEQ at this meeting.

B. Action Item: Request for Dismissal of Contested Case No. AQ/AB-NWR-03-196 regarding United Gem & Carpets, Inc.
The Commission will consider a request from the DEQ to dismiss a petition for review and uphold a proposed order on an enforcement action taken against United Gem & Carpets, Inc., because the petitioner did not file exceptions to the order as required by rule (OAR 340-011-0132(3)).

C. Action Item: Request for Dismissal of Contested Case No. AQ/AB-ER-03-128 regarding Palmers & Sons Construction Inc.
The Commission will consider a request from the DEQ to dismiss a petition for review and uphold a proposed order on an enforcement action taken against Palmers & Sons Construction, Inc., because the petitioner did not file exceptions to the order as required by rule (OAR 340-011-0132(3)).

D. *Rule Adoption: Enforcement Procedure and Civil Penalties, OAR Chapter 340, Divisions 12, 150 and 200
Anne Price, DEQ Office of Compliance and Enforcement Administrator, will propose changes to the DEQ's rules governing the enforcement of Oregon's environmental regulations and statutes, including civil penalty assessments and orders. In 2001, the Department began a comprehensive review and update of the enforcement rules to ensure that the DEQ's enforcement program continues to be equitable, consistent, and

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[1] This agenda and the staff reports for this meeting can be viewed and printed from DEQ's web site at http://www.deq.state.or.us/about/eqc/eqc.htm.
[2] This executive session will be held pursuant to ORS 192.660(1)(i)

understandable to Oregonians. The Commission will consider adoption of the proposed rules at this meeting.

E. Action Item: Consideration of a Pollution Control Facility Tax Credit Request for the Independent Spent Fuel Storage Installation
Paul Slyman, DEQ Deputy Director, and Maggie Vandehey, DEQ Pollution Control Facilities Tax Credit Manager, will present the Department's recommendation on a Pollution Control Facilities Tax Credit application for the Independent Spent Fuel Storage Installation (ISFSI). The Commission granted preliminary certification of the ISFSI as a pollution control facility in September 2000, and will consider final certification of the facility at this meeting.

Friday, December 10 – regular meeting begins at 9:00 a.m.

At 8:00 a.m., prior to the regular meeting, the Commission will hold an executive session to consult with counsel concerning legal rights and duties regarding current and potential litigation against the DEQ[3]. Only representatives of the media may attend, and media representatives may not report on any deliberations during the session.

F. Adoption of Minutes
The Commission will review, amend if necessary, and approve draft minutes of the October 21-22, 2004, Environmental Quality Commission meeting.

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

H. Action Item: Consideration of Pollution Control Facility Tax Credit Requests
In 1967, the Oregon Legislature established the Pollution Control Facility Tax Credit Program to help businesses meet environmental requirements. The legislature later expanded the program to encourage investment in technologies and processes that prevent, control or reduce significant amounts of pollution. Paul Slyman, DEQ Deputy Director, and Maggie Vandehey, DEQ Tax Credit Program Manager, will present the Department's recommendations on Pollution Control Facilities Tax Credit applications for facilities that control air pollution and water pollution, and for facilities that recover material from solid waste.

I. *Rule Adoption: Medford-Ashland PM_{10} Attainment and Maintenance Plan as a revision to the State of Oregon Clean Air Act Implementation Plan, including supporting rule revisions in Divisions 200, 204, 224, 225 and 240
Andy Ginsburg, DEQ Air Quality Division Administrator, will recommend that the Commission adopt an air quality attainment and maintenance plan for particulate matter measuring 10 micrometers or smaller (PM_{10}) for the Medford-Ashland area, including

[3] This executive session will be held pursuant to ORS 192.660(1)(h).

supporting rules. The DEQ has been working with residents of Oregon's Rogue Valley for years to reduce PM_{10} pollution to meet federal air quality standards, and the communities of Jackson County, Ashland, Phoenix, Talent, Medford, Jacksonville, Central Point, White City and Eagle Point have all been involved. The area now meets federal standards and the proposed plan acknowledges the efforts of these communities. The Commission will consider adoption of the proposed plan and supporting rules at this meeting.

J. *Rule Adoption: Portland Area Carbon Monoxide Plan Maintenance Plan as a revision to the State of Oregon Clean Air Act Implementation Plan, including supporting rule revisions in OAR 340-200-0040, 340-204-0090 and 340-242-0440

Andy Ginsburg, DEQ Air Quality Division Administrator, will recommend Commission adoption of the Portland Area Carbon Monoxide Maintenance Plan and supporting rules. The proposed plan would repeal the oxygenated fuel requirement, amend motor vehicle emission budgets, modify transportation control measures, and incorporate expected future changes to DEQ's Vehicle Inspection Program. The Commission will consider adoption of the proposed plan and supporting rules at this meeting.

K. *Rule Adoption: Onsite Wastewater Treatment System Rules

Holly Schroeder, DEQ Water Quality Division Administrator, will recommend Commission adoption of revised rules for Oregon's Onsite Wastewater Treatment System program. Onsite systems serve approximately one third of Oregon's population in mostly un-sewered, rural areas. In 2002, the Department surveyed onsite system installers and pumpers and identified several opportunities for improving customer service, simplifying permitting requirements, and modernizing the onsite program. The Commission will consider adopting rules to streamline and update the program at this meeting.

L. Informational Item: Update on the Status of the Umatilla Chemical Agent Disposal Facility

Dennis Murphey, DEQ Chemical Demilitarization Program Administrator, will give an update on the status of recent activities at the Umatilla Chemical Agent Disposal Facility (UMCDF). In August, the Commission gave approval to start chemical weapon destruction at the facility, and DEQ's Chemical Demilitarization Program continues close oversight of work at the facility.

M. 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 Commission 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, Paul Slyman, DEQ Deputy Director, will present a summary of DEQ Director Stephanie Hallock's 2004 financial transactions, as required by state accounting and DEQ policy.

N. Action Item: Proposed Settlement of *Northwest Environmental Defense Center et al. v. Oregon EQC et al.*

The Commission will consider a proposed settlement agreement for *Northwest Environmental Defense Center et al. v. Oregon EQC et al.* pertaining to Confined Animal Feeding Operation (CAFO) program rules and implementation. In October 2003, a number of groups filed a petition for judicial review of rules adopted by the Commission and the Oregon Department of Agriculture (ODA) in August 2003 for the CAFO wastewater permit program. Holly Schroeder, DEQ Water Quality Division Administrator, and Debbie Gorham, ODA Program Administrator, will present the proposed settlement and recommend Commission approval.

O. Commissioners' Reports

Adjourn

Environmental Quality Commission meeting dates for 2005 include:
February 3-4, April 21-22, June 23-24, August 18-19, October 20-21, December 8-9

Agenda Notes

***Rule Adoptions**: Hearings have been held on Rule Adoption items and public comment periods have closed. In accordance with ORS 183.335(14), no comments may be presented by any party to either the Commission or Department on these items at any time during this meeting.

Staff Reports: Staff reports for each item on this agenda can be viewed and printed from DEQ's web site at http://www.deq.state.or.us/about/eqc/eqc.htm. To request a particular staff report be sent to you in the mail, contact Day Marshall 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 Ms. Marshall 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 9 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 a member of the Oregon Watershed Enhancement Board.

Lynn Hampton, Vice Chair
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.

Deirdre Malarkey, Commissioner
Deirdre Malarkey graduated from Reed College and received her M.A. and Ph.D. 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 reappointed in 2003. Commissioner Malarkey lives in Eugene.

Ken Williamson, Commissioner
Ken Williamson is head of the Department of Civil, Construction and Environmental Engineering at Oregon State University and serves as Co-Director of the Center for Water and Environmental Sustainability. He received his B.S. and M.S. at Oregon State University and his Ph.D. at Stanford University. Commissioner Williamson was appointed to the EQC in February 2004 and he lives in Corvallis.

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

Please Sign In

Environmental Quality Commission Meeting
Room 3A 12/10/2004 9:00 am - 2:00 pm

Name	Organization
JOHN CHARLES	CASCADE POLICY INST
Rick Paul	Tenwest Fibers
Jim Anderson	ODEQ
Gaylene Hurley	Rogue Valley Citizens for Clean Air
John Becker	ODEQ
Steven M. Cranchen	ODEQ
David Collier	ODEQ
Andy Ginsburg	ODEQ
Jeff Smith	ODEQ
Steve Lively	Harney County
Candy Lively	Harney County
Mike Blosser	
Tom Koehler	
Fred Holmes	USBA
Brian Doherty	U
Paul Romain	PAO
Audrey O'Brien	ODEQ - NWR
Charles Cook	Cascade Grain
Sam Carte	Oreco Systems
Kate Richard	Nordia
Leg Garrett	OPB news
Tom Alk	BNA
David Allaway	DEQ
Michael Campbell	Stoel Rives
Michele Luna	UMCD
Susan Hanna	NEIS(

State of Oregon

Department of Environmental Quality Memorandum

Date: November 18, 2004

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item B, Action Item: Request for Dismissal of Contested Case No. AQ/AB-NWR-03-196 regarding United Gem & Carpets, Inc.
December 9, 2004 EQC Meeting

Appeal to EQC

On July 8, 2004, Ann B. Witte, representing United Gem & Carpets, Inc. (UGR), filed a petition for Commission review of a Proposed Order (Attachment E) that assessed UGR a $1,200 civil penalty for conducting an asbestos abatement project without being licensed by the Department of Environmental Quality (DEQ, Department) as an asbestos abatement contractor. The order also found UGR liable for openly accumulating asbestos-containing waste material.

On July 9, 2004, on behalf of the Commission, Mikell O'Mealy sent Ms. Witte a letter via certified mail (Attachment C) explaining the requirements for filing exceptions to the Proposed Order by August 7, 2004, as required by OAR 340-011-0132. The postal service certified that the letter was received on July 12, 2004.

When no exceptions were filed by the August 7 deadline, the Department filed a request on August 10, 2004, (Attachment B) that the Commission dismiss the petition for review and uphold the Proposed Order. Ms. Witte subsequently filed exceptions to the order on September 8, 2004 (Attachment A).

A representative of the Department will be present at the December 9, 2004 Commission meeting to answer any questions you may have about this request.

EQC Authority

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

Alternatives

The Commission may:

1. As requested by the Department, dismiss the petition for review and uphold the Proposed Order.
2. Schedule the case for a future Commission meeting and request copies of the hearing record to review.

Attachments

A. Respondent's Exceptions to the Proposed Order and Brief, dated September 8, 2004
B. Department's request for dismissal, dated August 10, 2004
C. Letter from Mikell O'Mealy to Ms. Witte, dated July 9, 2004
D. Petition for Review of the Proposed Order, dated July 8, 2004
E. Proposed and Final Order, dated June 10, 2004

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

In the Matter of:	)	RESPONDENT'S EXCEPTIONS
	)	TO PROPOSED ORDER & BRIEF
UNITED GEM & CARPETS, INC.,	)	OAH No. 115034
Respondent.	)	Agency No. AQ/AB-NWR-03-196

Respondent United Gem & Carpets, Inc., hereby objects to the Proposed and Final Order dated June 10, 2004 as follows:

Respondent United Gem & Carpets, Inc. is an entity separate and distinct from its officers and owners, and separate and distinct from GLO Construction Company. The fact that Mr. Ghaffari gave investigators a business card from UGR, (Tr. 44, ll. 1-6), perhaps in response to Dey's request for his address, (Tr. 44, l. 21) and apparently along with other business cards (Tr. 25, l. 24 - Tr. 26, l. 3) is not sufficient evidence to support a conclusion that Rahim Ghaffari was acting as an agent of UGR when he entered into partnership with GLO Construction Company as the general contractor on this demolition project. Tr. 26, l. 2; Tr. 45, ll. 2-20; Tr. 46, ll. 17-19; Tr. 48, ll. 21-23; Tr. 63, ll. 6 - 21; Ex. A-7.

Respondent UGR therefore objects to Conclusions of Law (1), (2) and (3).

Dated: September 7, 2004

Ann B. Witte, OSB #77077
Attorney for Respondent

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 10, 2004

Environmental Quality Commission
c/o Mikell O'Mealy
Office of the Director
Oregon Department of Environmental Quality
811 S.W. 6th Avenue
Portland, Oregon 97204

Re: United Gem & Carpets, Inc.
Notice of Violation and Assessment of Civil Penalty
No. AQ/AB-NWR-03-196
Multnomah County

Members of the Environmental Quality Commission:

The Department respectfully requests that, pursuant to OAR 340-011-0575(5)(f), the Commission dismiss Petitioner United Gem & Carpets, Inc.'s Petition for Commission Review received by the Department on July 8, 2004. In addition, the Department requests that the Commission uphold the Proposed Order in the above-referenced matter, which was issued on June 10, 2004. The Petition was filed timely, but Petitioner has not filed a brief with written exceptions as required by OAR 340-011-0575(5)(a). The Department cannot prepare an answering brief because Petitioner's exceptions are unknown. Enclosed for your reference is a copy of the Proposed Order and the Petition for Review.

If you have any questions about this action, please contact me at (503) 229-5692.

Sincerely,

Bryan Smith
Environmental Law Specialist

Enclosures

cc: United Gem & Carpets, Inc.
Air Quality Division, Northwest Region, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: UNITED GEM & CARPETS, INC., Petitioner.	)	NO. AQ/AB-NWR-03-196 MOTION TO DISMISS

On July 8, 2004, Petitioner United Gem & Carpets, Inc., petitioned the Environmental Quality Commission to review the Proposed Order. Pursuant to Oregon Administrative Rules (OAR) 340-011-0575(5)(a), Petitioner had thirty days from that date to file its written exceptions and brief. Petitioner has not timely filed its written exceptions and brief. The Office of Compliance and Enforcement of the Department of Environmental Quality (DEQ) moves the Environmental Quality Commission to dismiss Petitioner's petition, pursuant to OAR 340-011-0575(5)(f).

8/19/04
Date

Bryan Smith
Bryan Smith, Environmental Law Specialist
Office of Compliance and Enforcement, DEQ

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

In the Matter of:	)	PETITION FOR REVIEW
	)	
UNITED GEM & CARPETS, INC.,	)	OAH No. 115034
Respondent.	)	Agency No. AQ/AB-NWR-03-196

Respondent United Gem & Carpets, Inc., hereby requests commission review of the Proposed and Final Order dated June 10, 2004.

Dated: Jul 7, 2004

Ann B. Witte, OSB #77077
Attorney for Respondent

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

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
UNITED GEM & CARPETS, INC.,	)
Respondent	)
	) OAH Case No. 115034
	) Agency Case Number AQ/AB-NWR-03-196

HISTORY OF THE CASE

On February 19, 2004, the Department of Environmental Quality (Department) issued a Notice of Assessment of Civil Penalty (Notice) to Respondent United Gem & Carpets, Inc. (UGR). The Notice alleged that Respondent violated ORS 468A.710(1)[1] and OAR 340-248-0110(3)[2] and 340-248-0205(1).[3]

On March 17, 2004, Respondent requested a hearing.[4] The Department referred the matter to the Office of Administrative Hearings (OAH) on April 21, 2004. A hearing was held on May 20, 2004, at 10:00 a.m., in Portland, Oregon. Andrea H. Sloan, from the Office of Administrative Hearings, presided as the Administrative Law Judge (ALJ). Rahim Ghaffari, president and owner of UGR, appeared in person without counsel as the registered agent of Respondent. Mr. Ghaffari testified at the hearing. Environmental Law Specialist Bryan Smith represented the Department. Witnesses for the Department were David Wall and Sharon Dey. The record closed on May 20, 2004, at the end of the hearing.

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[1] ORS 468A.710 provides, in relevant part, that "no contractor shall work on an asbestos abatement project unless the contractor holds a license issued by the Department of Environmental Quality under ORS 468A.720."

[2] OAR 340-248-0110(3) provides that "An owner or operator of a facility may not allow any persons other than those employees of the facility owner or operator who are appropriately certified or a licensed asbestos abatement contractor to perform an asbestos abatement project in or on that facility."

[3] OAR 340-248-0205(1) provides that "No person may openly accumulate friable asbestos material or asbestos-containing waste material."

[4] The request for hearing was received one day beyond the 20 day period provided by the Department. The Department determined that the delay was beyond Respondent's reasonable control, and accepted the late hearing request.

This hearing decision has been copied to: field person & his/her mngr; Staff Folder; EQC; DA; Business Office; Hearing Decision Notebook; West Publishing; & LexusNexus. Let me know if anyone else needs a copy. Deb

ISSUES

(1) Whether Respondent conducted an asbestos abatement project without being licensed by the Department as an asbestos abatement contractor.

(2) Whether Respondent openly accumulated asbestos-containing waste material.

(3) Whether the civil penalty assessment is appropriate.

EVIDENTIARY RULINGS

Department Exhibits A1 through A15 were admitted. Respondent objected to the reliability and relevance of Exhibits A1 through A5, A7, A8 and A10 and I overruled Respondent's objections on the record. Respondent's Exhibit R4 was admitted into the record. The Department objected to Exhibits R1 through R3, arguing relevance. Mr. Ghaffari conceded that the exhibits were irrelevant, so they were not admitted.

FINDINGS OF FACT

(1) Rahim Ghaffari is the president and owner of UGR. (Ex. A5 and testimony of Mr. Ghaffari.)

(2) Joseph Blumberg was the owner of a building located at 2540 NE Martin Luther King, Jr. Boulevard (MLK Blvd.) in Portland, Oregon. (Testimony of Mr. Ghaffari, Ms. Dey and Mr. Wall.) The building was constructed in the early 1900s. (Testimony of Ms. Dey.)

(3) In October 2003, GLO Construction Company (GLO) entered into a contract with Mr. Blumberg for an interior partial demolition of the building. (Ex. A7 and A9, and testimony of Ms. Dey.) At that time, Mr. Ghaffari partnered with GLO to complete this job. He had partnered with GLO 20 to 30 times before, and worked under GLO's Construction Contractor's Board license. (Testimony of Mr. Ghaffari.) The contract committed GLO to "haul all debris" from the building. (Ex. A7 and testimony of Mr. Ghaffari.)

(4) Before the demolition job started, Mr. Blumberg met with Mr. Ghaffari at the building. Mr. Blumberg told Mr. Ghaffari that the building contained asbestos, and pointed out piping in the boiler room that he said was wrapped in asbestos-containing material (ACM).[5] (Testimony of Ms. Dey and Mr. Ghaffari.)

(5) Mr. Ghaffari hired Jeff Smith, a man who had been referred to him by another contractor, to supervise the demolition project for Respondent. Mr. Smith was responsible for hiring a work crew and for completing the demolition. Mr. Ghaffari told Mr. Smith that the building's owner said that there was ACM in the boiler room. (Testimony of Mr. Ghaffari.) Mr. Smith hired several homeless or unemployed people to do the demolition work. Mr. Ghaffari

[5] "Asbestos-containing material" is defined at OAR 340-248-0010(8) to include "any material, including particulate material, that contains more than one-percent of asbestos as determined using the method specified in 40 CFR Part 763 Appendix E, Subpart E, Section 1, Polarized Light Microscopy."

provided Mr. Smith with the cash to pay the demolition workers. (Testimony of Ms. Dey and Mr. Ghaffari.)

(6) On or before October 2, 2003, some of the workers used power saws to cut insulated water pipes in the basement boiler room inside the building. (Ex. A5 and testimony of Ms. Dey.) Personnel from D & F Plumbing were also inside the building removing piping. (Testimony of Mr. Ghaffari.) In the process of removing the pipes, insulating material was damaged and some of the material fell to the ground. The pipes were insulated with air-cell and "Mag" material.[6] (Testimony of Mr. Wall.)

(7) After the pipes were cut down, they were stacked in piles along with other demolition debris. Respondent's workers carried the material, including the piping and ACM insulation, out the front door and onto the sidewalk on MLK Blvd.[7] The workers carried piping and insulation material along the sidewalk on NE Russell to the back of the building, where the workers entered a parking lot and deposited the material inside of a large truck. The workers carried other construction debris to a dumpster located on NE Russell. None of the material carried from the building was packaged or labeled. Many of the workers knew that the pipe insulation contained ACM. (Exs. A4, A5 and A13; testimony of Mr. Wall and Ms. Dey.)

(8) On October 2, 2003, an employee of D & F Plumbing called Oregon Occupational Safety and Health Division (Or-OSHA), to complain that asbestos was being disturbed during the demolition project inside of the building. Sharon Dey, an industrial hygienist and compliance officer with Or-OSHA, inspected the building that same day. She met with Mr. Smith, who identified himself as the project foreman. Mr. Smith acknowledged knowing that the building contained ACM, but said that they were not disturbing the material. Ms. Dey inspected the boiler room in the basement of the building. She observed cut pipes and suspicious looking material on the floor. Considering the age of the building and the appearance of the material, Ms. Dey suspected that the insulation on the pipes and the material on the floor was ACM.[8] She also looked inside of the truck parked behind the building. Ms. Dey observed piping and insulation material inside the trailer of the truck. (Ex. A4 and testimony of Ms. Dey.) She took three digital photographs of the suspected ACM. (Ex. A4.) Ms. Dey collected several samples, including insulation material from a pipe in the boiler room and two samples of pipe insulation material from the trailer of the truck. She submitted these samples to the Or-OSHA laboratory for analysis. Ms. Dey also spoke with Mr. Ghaffari. He told her that there was ACM in the

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[6] Air-cell material is similar in appearance to corrugated cardboard. It includes asbestos fibers and was commonly used to wrap straight sections of water pipes to provide insulation. A cheese-cloth sleeve was then fitted over the air-cell. "Mag" material is an ACM that is similar in texture to dry sheet rock mud. This material is applied at elbow joints and at "t" intersections of piping. Typically, "Mag" was applied between sections of air-cell insulation. (Testimony of Mr. Wall.)

[7] Mr. Ghaffari conceded that his workers may have "accidentally" carried piping and insulation material out of the building, along with other debris. (Testimony of Mr. Ghaffari.)

[8] Ms. Dey has worked as an industrial hygienist and compliance officer for 13 years. She has conducted many inspections of boiler rooms and crawl spaces, and knows from experience that pipe insulation in older buildings contains ACM. (Testimony of Ms. Dey.)

building, but that his workers were not disturbing it. Before leaving the work site, Ms. Dey "red-tagged" the truck.[9] (Testimony of Ms. Dey.)

(9) The Or-OSHA test results confirmed the presence of ACM. The laboratory determined that the pipe insulation from the boiler room contained 40 to 50 percent chrysotile asbestos, and that one of the samples from the truck contained 30 to 40 percent chrysotile asbestos. (Ex. A1.)

(10) On October 6, 2003, Ms. Dey returned to the building and took additional samples, including pipe wrapping material[10] that she observed near the building's front door. The laboratory determined that this material contained ten percent chrysotile asbestos. (Ex. A2 and testimony of Ms. Dey.) Ms. Dey also interviewed several workers at the building. The workers reported that they carried the pipes and insulation material out of the building to the truck. Three of the workers told Ms. Dey that they had cut the pipes with power tools. (Ex. A5 and testimony of Ms. Dey.) Ms. Dey estimated that there was about six to seven linear feet of ACM material inside of the truck, and another six linear feet of ACM on the floor of the boiler room. (Testimony of Ms. Dey.)

(11) Based on Ms. Dey's investigation, Or-OSHA levied several fines against Respondent for to its failure to protect workers from exposure to ACM and for other unsafe working conditions in the building. (Ex. A6 and testimony of Ms. Dey.)

(12) The ACM brought out of the boiler room was friable[11] because it had been cut, damaged or disturbed, thereby exposing the public and the workers to possible inhalation of the asbestos fibers. (Testimony of Ms. Dey.)

(13) On October 6, 2003, David Wall, asbestos control analyst and natural resource specialist for the Department, inspected the building after receiving a complaint from Or-OSHA about public exposure to asbestos at the work site. Mr. Smith introduced himself as the job foreman. While inspecting the basement, Mr. Wall saw several ACM-insulated water pipes. He also observed pieces of pipe insulation on the floor. Mr. Wall took two samples of the insulating material, which he submitted to the Department's laboratory for analysis. He also inspected the truck, and noticed that it was no longer "red-tagged."[12] He took three digital photographs and observed pipe insulation material inside the truck. He did not take samples because he could not easily reach the material without further disturbing it or exposing himself to risk. (Ex. A13 and testimony of Mr. Wall.)

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[9] "Red-tagging" is used by Or-OSHA to signify that work at the red-tagged facility must stop immediately because of an imminent danger. Here, the truck was red-tagged to indicate that it could not be opened until the danger, the presence of friable ACM, was safely corrected. (Testimony of Ms. Dey.)

[10] "Pipe insulation material" is synonymous with "pipe wrapping material." (Testimony of Ms. Dey.)

[11] ORS 468A.700(8) defines "friable asbestos material" as "any asbestos-containing material that hand pressure can crumble, pulverize or reduce to powder when dry." The Department's definition of "friable asbestos material" mirrors the statutory definition. OAR 340-248-0070(25).

[12] The red tag, which had been attached to the truck's rear door locking mechanism, was eventually discovered in the front seat of the truck cab. Because the material in the truck had not been abated, the tag was improperly removed. (Testimony of Mr. Wall.)

(14) The Department's laboratory determined that one of the samples contained 50 percent chrysotile asbestos, and the other sample contained 10 percent chrysotile and crocidolite asbestos. (Ex. A12 and testimony of Mr. Wall.)

(15) Mr. Wall also believed that the ACM in the insulating material was friable because of its damaged condition. He was concerned about public exposure to the friable asbestos because the material was carried through a building, out the front door onto the sidewalk of a busy street, then along another street, and piled into a truck. None of the ACM was packaged, wetted, or labeled. He was also concerned because there was a large apartment building next door to where the truck was parked. (Testimony of Mr. Wall.)

(16) Mr. Wall confirmed that neither Respondent nor Mr. Ghaffari was licensed by the Department as asbestos abatement contractors.[13] On October 22, 2003, Mr. Wall sent Respondent and Mr. Ghaffari a Notice of Noncompliance (NON), documenting Respondent's violations of Oregon environmental law.

CONCLUSIONS OF LAW

(1) Respondent conducted an asbestos abatement project without being licensed by the Department as an asbestos abatement contractor.

(2) Respondent openly accumulated asbestos-containing waste material.

(3) The amount of civil penalties assessed by the Department was appropriate.

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 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).

Here, Respondent argued that it could not have performed an asbestos abatement project because Mr. Ghaffari and Respondent have *never been* licensed asbestos abatement contractors. This argument is without merit. The fact that Mr. Ghaffari and Respondent have never been licensed to do asbestos abatement projects is the alleged *violation*, not a defense. The Department argues that Respondent performed an asbestos abatement project by removing pipes and pipe insulation material from the building. The Department further argues that Respondent

[13] The Department maintains a database of all licensed abatement contractors and all certified abatement workers. (Testimony of Mr. Wall.)

knew that the pipe insulation contained ACM. The Department also argues that the friable ACM was openly accumulated when Respondent carried the piping material, unpackaged, unlabeled and unsealed, from the building, along the sidewalk and into the parking lot before depositing the material inside of the truck. The material in the truck was not properly sealed, labeled, wetted or packaged. Respondent counters that the workers may have "accidentally" carried out the ACM, but that it was unintentional. Again, this argument is without merit.

Asbestos abatement project

The legislature has given the Environmental Quality Commission authority to "adopt such rules and standards as it considers necessary and proper in performing the functions vested by law in the commission." ORS 468A.020(1). In addition, ORS 468A.707 requires the Environmental Quality Commission to promulgate rules to "(a) Establish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training." Within this authority, the Environment Quality Commission developed rules relating to environmental quality issues, including rules relating to asbestos abatement and the definition of applicable statutory terms.

The Department defines an "asbestos abatement project" as follows:

> [A]ny demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling, disturbance, or disposal of any asbestos containing material with the potential of releasing asbestos fibers from asbestos containing material[14] into the air.

OAR 340-248-0010(6).

In this case, workers hired by Mr. Smith, Respondent's foreman on the building project, told the Department that they cut insulated pipes with power tools inside of the boiler room. This was corroborated by Ms. Dey's observations of cut pipes and pipe insulation material on the ground inside the boiler room, and inside of the truck. Mr. Ghaffari acknowledged that the building's owner told him that there was ACM in the boiler room. And, he admitted that neither he nor Respondent was licensed by the Department to do asbestos abatement work. This was confirmed by Mr. Wall, who testified that he checked the Department's computer records and determined that Respondent and Mr. Ghaffari were not licensed for this type of work. Moreover, both of the Department's witnesses testified that the public and the environment were exposed to harm by the potential release of asbestos. This record establishes that Respondent conducted an unlicensed asbestos abatement project at the building.

Open accumulation of asbestos

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[14] "Asbestos-containing material" is defined at OAR 340-248-0010(8) to include "any material, including particulate material, that contains more than one-percent of asbestos as determined using the method specified in 40 CFR Part 763 Appendix E, Subpart E, Section 1, Polarized Light Microscopy."

OAR 340-248-0205(1) provides that "No person may openly accumulate friable asbestos material or asbestos-containing waste material." Within its statutory authority, the Department has defined "open accumulation" of ACM as "any accumulation, including interim storage, of friable asbestos-containing material or asbestos-containing waste material other than material securely enclosed and stored as required by this chapter." OAR 340-248-0010(32). There is no statutory definition of this term. ORS 468A.700(8) defines "friable asbestos material" as "any asbestos-containing material that hand pressure can crumble, pulverize or reduce to powder when dry." The Department's definition of "friable asbestos material" mirrors the statutory definition. OAR 340-248-0070(25).

The evidence adduced at hearing establishes that the pipe insulation material sampled by Ms. Dey and Mr. Wall contained between ten and fifty percent chrysotile asbestos. Both witnesses testified that the ACM was friable because it had been cut, damaged and disturbed. The damaged condition of the ACM rendered the asbestos friable because asbestos fibers could easily be released into the environment. Both witnesses also testified that the ACM they observed in the boiler room and in the truck was not properly labeled, packaged or sealed. Mr. Wall further testified that the ACM he observed was not wet.

OAR 340-248-0280 sets out the requirements for proper disposal of friable asbestos. In pertinent part, the rule provides that the owner or operator of a facility must meet the following requirements:

> 2) All asbestos-containing waste materials must be adequately wetted to ensure that they remain wet until delivered to an authorized landfill, and:
> * * *
> (b) Packaged in leak-tight containers such as two plastic bags each with a minimum thickness of 6 mil., or fiber or metal drum. Containers must be labeled as follows:
> (A) The name of the asbestos waste generator and the location where the waste was generated; and
> (B)(i) A warning label that states:
>
> **DANGER**
>
> **Contains Asbestos Fibers**
>
> **Avoid Creating Dust**
>
> **Cancer and Lung Disease Hazard**
>
> **Avoid Breathing Airborne**
>
> **Asbestos Fibers**
>
> (3) If the asbestos-containing materials are not removed from a facility before demolition as described in OAR 340-248-0270(5), adequately wet the asbestos-containing waste material at all times after demolition and keep it wet during handling and loading for transport to a disposal site. Such asbestos-containing waste materials must be transported in lined and covered containers for bulk disposal.

(4) The interim storage of asbestos-containing waste material must protect the waste from dispersal into the environment and provide physical security from tampering by unauthorized persons. The interim storage of asbestos-containing waste material is the sole responsibility of the contractor, owner or operator performing the asbestos abatement project.

(Emphasis in original).

In this case, Respondent, as the general contractor on the project, was responsible for complying with Oregon environmental laws. Both Mr. Wall and Ms. Dey testified that none of the ACM they observed was packaged, labeled or secured. Mr. Wall also testified that none of the ACM he observed was wet. By carrying the dry, unsecured and unlabeled ACM through the building to the truck, Respondent openly accumulated friable ACM.

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 a matrix and formula contained in OAR 340-012-0045. *See* OAR 340-012-0042.

In this case, the Department determined that Respondent was liable for $1,200 in civil penalties based on Respondent's unlicensed abatement. The Department did not seek civil penalties for the open accumulation of asbestos. This penalty was 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 Department determined that the base penalty for Respondent's violation was $1,000. This was based on a determination that the violation was a minor magnitude, Class 1 violation. OAR 340-012-0050(1)(s) provides that "Conduct[ing of] an asbestos abatement project by a person not licensed as an asbestos abatement contractor," is a Class 1 violation. The Department further determined that Respondent committed a minor magnitude violation because "[l]ess than 40 lineal feet or 80 square feet or less than 17 cubic feet of asbestos-containing material" was disturbed. OAR 340-012-0090(1)(d)(C). The Department also determined that the P, H, C and O factors would all be assigned values of 0, given Respondent's lack of prior actions and history, then length of time the violation existed, and Respondent's cooperativeness. The Department assigned a value of 2 to the R factor, based on its determination that Respondent's actions were negligent. The record supports this determination because Mr. Ghaffari knew that the pipe insulation material contained ACM prior to starting the job. As the contractor, Respondent was responsible for complying with environmental laws, and for ensuring that a licensed asbestos abatement contractor removed the ACM from the work site. The failure to do so was negligent. Finally, the Department had insufficient evidence to determine that Respondent realized an economic benefit.

Based on this record, the civil penalty assessment of $1,200 is warranted.[15]

PROPOSED ORDER

I propose that the Board issue the following order:

Respondent is subject to a civil penalty in the amount of $1,200.

Andrea H. Sloan
Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: June 10, 2004

APPEAL RIGHTS

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

Environmental Quality Commission
c/o Stephanie Hallock, Director, DEQ
811 SW Sixth Avenue
Portland, OR 97204

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

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

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[15] The penalty was calculated as follows:

Penalty = $1,000 + [(0.1 x $1,000) x (0 + 0 + 0 + 2 + 0)] + $0
= $1,000 + ($100 x 2) + $0
= $1,000 + $200
= $1,200

CERTIFICATE OF SERVICE

I certify that on June 10, 2004, I served the attached Proposed and Final Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

RAHIM GHAFFARI
UNITED GEM & CARPETS INC
1416 SE STARK
PORTLAND OR 97214

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7002 2410 0001 7411 1537

BRYAN SMITH
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

DEBORAH NESBIT
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

Ann Redding

Ann Redding, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

Oregon
Theodore R. Kulongoski, Governor

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

July 9, 2004

Via Certified Mail

Ann B. Whitte
Attorney at Law for
United Gem & Carpets, Inc.
812 SW Washington #910
Portland, OR 97205

RE: AQ/AB-NWR-03-196

Dear Ms. Whitte:

On July 8, 2004, the Environmental Quality Commission (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 340-011-0575) state that you must file exceptions and brief within thirty days from the filing of your request for Commission review, or August 7, 2004. Your exceptions must specify the findings and conclusions in the Proposed Order that you object to, and also include proposed alternative findings of fact, conclusions of law, and an alternative order with specific references to the parts of the record upon which you rely. The brief must include the arguments supporting these alternative findings of fact, conclusions of law and order. Failure to take an exception to a finding or conclusion in the brief waives your ability to later raise that exception. Once your exceptions have been received, a representative of the Department of Environmental Quality may file an answering brief within thirty days. The Commission may extend any of the time limits contained in OAR 340-011-0575(5) if an extension request is made in writing and is filed with the Commission before the expiration of the time limit. 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 a copy to Bryan Smith, Oregon Department of Environmental Quality, 811 SW 6th Avenue, Portland, Oregon 97204. If you fail to timely file the exceptions or brief, the Commission may dismiss your petition for review. At the time of dismissal, the Commission will also enter a final order upholding the proposed order.

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: Bryan Smith, Oregon Department of Environmental Quality

SENDER: COMPLETE THIS SECTION

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

1. Article Addressed to:

Ann B. White
Attorney at Law for United Gem & Carpets, Inc.
812 SW Washington #910
Portland, OR 97205

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☒ Addressee

B. Received by (Printed Name) M. SALDON C. Date of Delivery 6/12/04

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

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

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7002 2410 0002 2228 1182

PS Form 3811, August 2001 Domestic Return Receipt 102595-01-M-2

7002 2410 0002 2228 1182

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Postmark Here

To
Ann B. White
Attorney at Law for United Gem & Carpets, Inc.
812 SW Washington #910
Portland, OR 97205

PS Form 3800, June 2002 See Reverse for Instructions

Oregon Administrative Rules 340-011-0575

Review of Proposed Orders in Contested Cases

(1) For purposes of this rule, filing means receipt in the office of the director or other office of the department.

(2) Following the close of the record for a contested case hearing, the administrative law judge will issue a proposed order. The administrative law judge will serve the proposed order on each participant.

(3) Commencement of Review by the Commission: The proposed order will become final unless a participant or a member of the commission files, with the commission, a Petition for Commission Review within 30 days of service of the proposed order. The timely filing of a Petition is a jurisdictional requirement and cannot be waived. Any participant may file a petition whether or not another participant has filed a petition.

(4) 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 proposed order. Each petition and subsequent brief must be captioned to indicate the participant filing the document and the type of document (for example: Respondents Exceptions and Brief; Department's Answer to Respondent's Exceptions and Brief).

(5) Procedures on Review:

(a) Exceptions and Brief: Within 30 days from the filing of a petition, the participant(s) filing the petition must file written exceptions and brief. 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 participant relies. The brief must include the arguments supporting these alternative findings of fact, conclusions of law and order. Failure to take an exception to a finding or conclusion in the brief, waives the participant's ability to later raise that exception.

(b) Answering Brief: Each participant, except for the participant(s) filing that exceptions and brief, will have 30 days from the date of filing of the exceptions and brief under subsection (5)(a), in which to file an answering brief.

(c) Reply Brief: If an answering brief is filed, the participant(s) who filed a petition will have 20 days from the date of filing of the answering brief under subsection (5)(b), in which to file a reply brief.

(d) Briefing on Commission Invoked Review: When one or more members of the commission wish to review the proposed order, and no participant has timely filed a Petition, the chair of the commission will promptly notify the participants of the issue that the commission desires the participants to brief. The participants must limit their briefs to those issues. The chair of the commission will also establish the schedule for filing of briefs. When the commission wishes to review the proposed 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 commission or director may extend any of the time limits contained in section (5) of this rule. Each extension request must be in writing and filed with the commission before the expiration of the time limit. Any request for an extension may be granted or denied in whole or in part.

(f) Dismissal: The commission may dismiss any petition, upon motion of any participant or on its own motion, if the participant(s) seeking review fails to timely file the exceptions or brief required under subsection (5)(a) of this rule. A motion to dismiss made by a participant must be filed within 45 days after the filing of the Petition. At the time of dismissal, the commission will also enter a final order upholding the proposed order.

(g) Oral Argument: Following the expiration of the time allowed the participants to present exceptions and briefs, the matter will be scheduled for oral argument before the commission.

(6) Additional Evidence: A request to present additional evidence must be submitted by motion and must be accompanied by a statement showing good cause for the failure to present the evidence to the administrative law judge. The motion must accompany the brief filed under subsection (5)(a) or (b) of this rule. If the commission grants the motion or decides on its own motion that additional evidence is necessary, the matter will be remanded to an administrative law judge for further proceedings.

(7) Scope of Review: The commission may substitute its judgment for that of the administrative law judge in making any particular finding of fact, conclusion of law, or order except as limited by OAR 137-003-0655 and 137-003-0665.

(8) Service of documents on other participants: All documents required to be filed with the commission under this rule must also be served upon each participant in the contested case hearing. Service can be completed by personal service, certified mail or regular mail.

Stat. Auth.: ORS 183.341 & 468.020
Stats. Implemented: ORS 183.460, 183,464 & ORS 183.470
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; Renumbered from 340-011-0132 by DEQ 18-2003, f. & cert. ef. 12-12-03

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

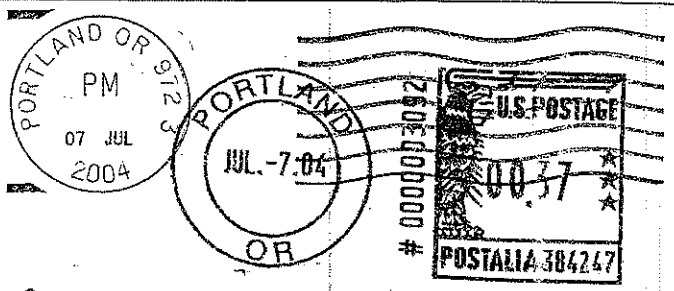
In the Matter of:	)	PETITION FOR REVIEW
	)	
UNITED GEM & CARPETS, INC.,	)	OAH No. 115034
Respondent.	)	Agency No. AQ/AB-NWR-03-196

Respondent United Gem & Carpets, Inc., hereby requests commission review of the Proposed and Final Order dated June 10, 2004.

Dated: Jul 7, 2004

Ann B. Witte, OSB #77077
Attorney for Respondent

Ann Berryhill Witte
Attorney at Law
812 S.W. Washington #910
Portland OR 97205



Environmental Quality Commission
℅ Stephanie Hallock, Dir. DEQ
811 SW Sixth Ave
Portland, OR 97204

97204+1334

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

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
UNITED GEM & CARPETS, INC.,	)
Respondent	)
	) OAH Case No. 115034
	) Agency Case Number AQ/AB-NWR-03-196

HISTORY OF THE CASE

On February 19, 2004, the Department of Environmental Quality (Department) issued a Notice of Assessment of Civil Penalty (Notice) to Respondent United Gem & Carpets, Inc. (UGR). The Notice alleged that Respondent violated ORS 468A.710(1)[1] and OAR 340-248-0110(3)[2] and 340-248-0205(1).[3]

On March 17, 2004, Respondent requested a hearing.[4] The Department referred the matter to the Office of Administrative Hearings (OAH) on April 21, 2004. A hearing was held on May 20, 2004, at 10:00 a.m., in Portland, Oregon. Andrea H. Sloan, from the Office of Administrative Hearings, presided as the Administrative Law Judge (ALJ). Rahim Ghaffari, president and owner of UGR, appeared in person without counsel as the registered agent of Respondent. Mr. Ghaffari testified at the hearing. Environmental Law Specialist Bryan Smith represented the Department. Witnesses for the Department were David Wall and Sharon Dey. The record closed on May 20, 2004, at the end of the hearing.

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[1] ORS 468A.710 provides, in relevant part, that "no contractor shall work on an asbestos abatement project unless the contractor holds a license issued by the Department of Environmental Quality under ORS 468A.720."

[2] OAR 340-248-0110(3) provides that "An owner or operator of a facility may not allow any persons other than those employees of the facility owner or operator who are appropriately certified or a licensed asbestos abatement contractor to perform an asbestos abatement project in or on that facility."

[3] OAR 340-248-0205(1) provides that "No person may openly accumulate friable asbestos material or asbestos-containing waste material."

[4] The request for hearing was received one day beyond the 20 day period provided by the Department. The Department determined that the delay was beyond Respondent's reasonable control, and accepted the late hearing request.

ISSUES

(1) Whether Respondent conducted an asbestos abatement project without being licensed by the Department as an asbestos abatement contractor.

(2) Whether Respondent openly accumulated asbestos-containing waste material.

(3) Whether the civil penalty assessment is appropriate.

EVIDENTIARY RULINGS

Department Exhibits A1 through A15 were admitted. Respondent objected to the reliability and relevance of Exhibits A1 through A5, A7, A8 and A10 and I overruled Respondent's objections on the record. Respondent's Exhibit R4 was admitted into the record. The Department objected to Exhibits R1 through R3, arguing relevance. Mr. Ghaffari conceded that the exhibits were irrelevant, so they were not admitted.

FINDINGS OF FACT

(1) Rahim Ghaffari is the president and owner of UGR. (Ex. A5 and testimony of Mr. Ghaffari.)

(2) Joseph Blumberg was the owner of a building located at 2540 NE Martin Luther King, Jr. Boulevard (MLK Blvd.) in Portland, Oregon. (Testimony of Mr. Ghaffari, Ms. Dey and Mr. Wall.) The building was constructed in the early 1900s. (Testimony of Ms. Dey.)

(3) In October 2003, GLO Construction Company (GLO) entered into a contract with Mr. Blumberg for an interior partial demolition of the building. (Ex. A7 and A9, and testimony of Ms. Dey.) At that time, Mr. Ghaffari partnered with GLO to complete this job. He had partnered with GLO 20 to 30 times before, and worked under GLO's Construction Contractor's Board license. (Testimony of Mr. Ghaffari.) The contract committed GLO to "haul all debris" from the building. (Ex. A7 and testimony of Mr. Ghaffari.)

(4) Before the demolition job started, Mr. Blumberg met with Mr. Ghaffari at the building. Mr. Blumberg told Mr. Ghaffari that the building contained asbestos, and pointed out piping in the boiler room that he said was wrapped in asbestos-containing material (ACM).[5] (Testimony of Ms. Dey and Mr. Ghaffari.)

(5) Mr. Ghaffari hired Jeff Smith, a man who had been referred to him by another contractor, to supervise the demolition project for Respondent. Mr. Smith was responsible for hiring a work crew and for completing the demolition. Mr. Ghaffari told Mr. Smith that the building's owner said that there was ACM in the boiler room. (Testimony of Mr. Ghaffari.) Mr. Smith hired several homeless or unemployed people to do the demolition work. Mr. Ghaffari

[5] "Asbestos-containing material" is defined at OAR 340-248-0010(8) to include "any material, including particulate material, that contains more than one-percent of asbestos as determined using the method specified in 40 CFR Part 763 Appendix E, Subpart E, Section 1, Polarized Light Microscopy."

provided Mr. Smith with the cash to pay the demolition workers. (Testimony of Ms. Dey and Mr. Ghaffari.)

(6) On or before October 2, 2003, some of the workers used power saws to cut insulated water pipes in the basement boiler room inside the building. (Ex. A5 and testimony of Ms. Dey.) Personnel from D & F Plumbing were also inside the building removing piping. (Testimony of Mr. Ghaffari.) In the process of removing the pipes, insulating material was damaged and some of the material fell to the ground. The pipes were insulated with air-cell and "Mag" material.[6] (Testimony of Mr. Wall.)

(7) After the pipes were cut down, they were stacked in piles along with other demolition debris. Respondent's workers carried the material, including the piping and ACM insulation, out the front door and onto the sidewalk on MLK Blvd.[7] The workers carried piping and insulation material along the sidewalk on NE Russell to the back of the building, where the workers entered a parking lot and deposited the material inside of a large truck. The workers carried other construction debris to a dumpster located on NE Russell. None of the material carried from the building was packaged or labeled. Many of the workers knew that the pipe insulation contained ACM. (Exs. A4, A5 and A13; testimony of Mr. Wall and Ms. Dey.)

(8) On October 2, 2003, an employee of D & F Plumbing called Oregon Occupational Safety and Health Division (Or-OSHA), to complain that asbestos was being disturbed during the demolition project inside of the building. Sharon Dey, an industrial hygienist and compliance officer with Or-OSHA, inspected the building that same day. She met with Mr. Smith, who identified himself as the project foreman. Mr. Smith acknowledged knowing that the building contained ACM, but said that they were not disturbing the material. Ms. Dey inspected the boiler room in the basement of the building. She observed cut pipes and suspicious looking material on the floor. Considering the age of the building and the appearance of the material, Ms. Dey suspected that the insulation on the pipes and the material on the floor was ACM.[8] She also looked inside of the truck parked behind the building. Ms. Dey observed piping and insulation material inside the trailer of the truck. (Ex. A4 and testimony of Ms. Dey.) She took three digital photographs of the suspected ACM. (Ex. A4.) Ms. Dey collected several samples, including insulation material from a pipe in the boiler room and two samples of pipe insulation material from the trailer of the truck. She submitted these samples to the Or-OSHA laboratory for analysis. Ms. Dey also spoke with Mr. Ghaffari. He told her that there was ACM in the

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[6] Air-cell material is similar in appearance to corrugated cardboard. It includes asbestos fibers and was commonly used to wrap straight sections of water pipes to provide insulation. A cheese-cloth sleeve was then fitted over the air-cell. "Mag" material is an ACM that is similar in texture to dry sheet rock mud. This material is applied at elbow joints and at "t" intersections of piping. Typically, "Mag" was applied between sections of air-cell insulation. (Testimony of Mr. Wall.)

[7] Mr. Ghaffari conceded that his workers may have "accidentally" carried piping and insulation material out of the building, along with other debris. (Testimony of Mr. Ghaffari.)

[8] Ms. Dey has worked as an industrial hygienist and compliance officer for 13 years. She has conducted many inspections of boiler rooms and crawl spaces, and knows from experience that pipe insulation in older buildings contains ACM. (Testimony of Ms. Dey.)

building, but that his workers were not disturbing it. Before leaving the work site, Ms. Dey "red-tagged" the truck.[9] (Testimony of Ms. Dey.)

(9) The Or-OSHA test results confirmed the presence of ACM. The laboratory determined that the pipe insulation from the boiler room contained 40 to 50 percent chrysotile asbestos, and that one of the samples from the truck contained 30 to 40 percent chrysotile asbestos. (Ex. A1.)

(10) On October 6, 2003, Ms. Dey returned to the building and took additional samples, including pipe wrapping material[10] that she observed near the building's front door. The laboratory determined that this material contained ten percent chrysotile asbestos. (Ex. A2 and testimony of Ms. Dey.) Ms. Dey also interviewed several workers at the building. The workers reported that they carried the pipes and insulation material out of the building to the truck. Three of the workers told Ms. Dey that they had cut the pipes with power tools. (Ex. A5 and testimony of Ms. Dey.) Ms. Dey estimated that there was about six to seven linear feet of ACM material inside of the truck, and another six linear feet of ACM on the floor of the boiler room. (Testimony of Ms. Dey.)

(11) Based on Ms. Dey's investigation, Or-OSHA levied several fines against Respondent for to its failure to protect workers from exposure to ACM and for other unsafe working conditions in the building. (Ex. A6 and testimony of Ms. Dey.)

(12) The ACM brought out of the boiler room was friable[11] because it had been cut, damaged or disturbed, thereby exposing the public and the workers to possible inhalation of the asbestos fibers. (Testimony of Ms. Dey.)

(13) On October 6, 2003, David Wall, asbestos control analyst and natural resource specialist for the Department, inspected the building after receiving a complaint from Or-OSHA about public exposure to asbestos at the work site. Mr. Smith introduced himself as the job foreman. While inspecting the basement, Mr. Wall saw several ACM-insulated water pipes. He also observed pieces of pipe insulation on the floor. Mr. Wall took two samples of the insulating material, which he submitted to the Department's laboratory for analysis. He also inspected the truck, and noticed that it was no longer "red-tagged."[12] He took three digital photographs and observed pipe insulation material inside the truck. He did not take samples because he could not easily reach the material without further disturbing it or exposing himself to risk. (Ex. A13 and testimony of Mr. Wall.)

---

[9] "Red-tagging" is used by Or-OSHA to signify that work at the red-tagged facility must stop immediately because of an imminent danger. Here, the truck was red-tagged to indicate that it could not be opened until the danger, the presence of friable ACM, was safely corrected. (Testimony of Ms. Dey.)

[10] "Pipe insulation material" is synonymous with "pipe wrapping material." (Testimony of Ms. Dey.)

[11] ORS 468A.700(8) defines "friable asbestos material" as "any asbestos-containing material that hand pressure can crumble, pulverize or reduce to powder when dry." The Department's definition of "friable asbestos material" mirrors the statutory definition. OAR 340-248-0070(25).

[12] The red tag, which had been attached to the truck's rear door locking mechanism, was eventually discovered in the front seat of the truck cab. Because the material in the truck had not been abated, the tag was improperly removed. (Testimony of Mr. Wall.)

(14) The Department's laboratory determined that one of the samples contained 50 percent chrysotile asbestos, and the other sample contained 10 percent chrysotile and crocidolite asbestos. (Ex. A12 and testimony of Mr. Wall.)

(15) Mr. Wall also believed that the ACM in the insulating material was friable because of its damaged condition. He was concerned about public exposure to the friable asbestos because the material was carried through a building, out the front door onto the sidewalk of a busy street, then along another street, and piled into a truck. None of the ACM was packaged, wetted, or labeled. He was also concerned because there was a large apartment building next door to where the truck was parked. (Testimony of Mr. Wall.)

(16) Mr. Wall confirmed that neither Respondent nor Mr. Ghaffari was licensed by the Department as asbestos abatement contractors.[13] On October 22, 2003, Mr. Wall sent Respondent and Mr. Ghaffari a Notice of Noncompliance (NON), documenting Respondent's violations of Oregon environmental law.

CONCLUSIONS OF LAW

(1) Respondent conducted an asbestos abatement project without being licensed by the Department as an asbestos abatement contractor.

(2) Respondent openly accumulated asbestos-containing waste material.

(3) The amount of civil penalties assessed by the Department was appropriate.

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 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).

Here, Respondent argued that it could not have performed an asbestos abatement project because Mr. Ghaffari and Respondent have *never been* licensed asbestos abatement contractors. This argument is without merit. The fact that Mr. Ghaffari and Respondent have never been licensed to do asbestos abatement projects is the alleged *violation*, not a defense. The Department argues that Respondent performed an asbestos abatement project by removing pipes and pipe insulation material from the building. The Department further argues that Respondent

[13] The Department maintains a database of all licensed abatement contractors and all certified abatement workers. (Testimony of Mr. Wall.)

knew that the pipe insulation contained ACM. The Department also argues that the friable ACM was openly accumulated when Respondent carried the piping material, unpackaged, unlabeled and unsealed, from the building, along the sidewalk and into the parking lot before depositing the material inside of the truck. The material in the truck was not properly sealed, labeled, wetted or packaged. Respondent counters that the workers may have "accidentally" carried out the ACM, but that it was unintentional. Again, this argument is without merit.

Asbestos abatement project

The legislature has given the Environmental Quality Commission authority to "adopt such rules and standards as it considers necessary and proper in performing the functions vested by law in the commission." ORS 468A.020(1). In addition, ORS 468A.707 requires the Environmental Quality Commission to promulgate rules to "(a) Establish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training." Within this authority, the Environment Quality Commission developed rules relating to environmental quality issues, including rules relating to asbestos abatement and the definition of applicable statutory terms.

The Department defines an "asbestos abatement project" as follows:

> [A]ny demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling, disturbance, or disposal of any asbestos containing material with the potential of releasing asbestos fibers from asbestos containing material[14] into the air.

OAR 340-248-0010(6).

In this case, workers hired by Mr. Smith, Respondent's foreman on the building project, told the Department that they cut insulated pipes with power tools inside of the boiler room. This was corroborated by Ms. Dey's observations of cut pipes and pipe insulation material on the ground inside the boiler room, and inside of the truck. Mr. Ghaffari acknowledged that the building's owner told him that there was ACM in the boiler room. And, he admitted that neither he nor Respondent was licensed by the Department to do asbestos abatement work. This was confirmed by Mr. Wall, who testified that he checked the Department's computer records and determined that Respondent and Mr. Ghaffari were not licensed for this type of work. Moreover, both of the Department's witnesses testified that the public and the environment were exposed to harm by the potential release of asbestos. This record establishes that Respondent conducted an unlicensed asbestos abatement project at the building.

Open accumulation of asbestos

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[14] "Asbestos-containing material" is defined at OAR 340-248-0010(8) to include "any material, including particulate material, that contains more than one-percent of asbestos as determined using the method specified in 40 CFR Part 763 Appendix E, Subpart E, Section 1, Polarized Light Microscopy."

OAR 340-248-0205(1) provides that "No person may openly accumulate friable asbestos material or asbestos-containing waste material." Within its statutory authority, the Department has defined "open accumulation" of ACM as "any accumulation, including interim storage, of friable asbestos-containing material or asbestos-containing waste material other than material securely enclosed and stored as required by this chapter." OAR 340-248-0010(32). There is no statutory definition of this term. ORS 468A.700(8) defines "friable asbestos material" as "any asbestos-containing material that hand pressure can crumble, pulverize or reduce to powder when dry." The Department's definition of "friable asbestos material" mirrors the statutory definition. OAR 340-248-0070(25).

The evidence adduced at hearing establishes that the pipe insulation material sampled by Ms. Dey and Mr. Wall contained between ten and fifty percent chrysotile asbestos. Both witnesses testified that the ACM was friable because it had been cut, damaged and disturbed. The damaged condition of the ACM rendered the asbestos friable because asbestos fibers could easily be released into the environment. Both witnesses also testified that the ACM they observed in the boiler room and in the truck was not properly labeled, packaged or sealed. Mr. Wall further testified that the ACM he observed was not wet.

OAR 340-248-0280 sets out the requirements for proper disposal of friable asbestos. In pertinent part, the rule provides that the owner or operator of a facility must meet the following requirements:

> 2) All asbestos-containing waste materials must be adequately wetted to ensure that they remain wet until delivered to an authorized landfill, and:
> * * *
> (b) Packaged in leak-tight containers such as two plastic bags each with a minimum thickness of 6 mil., or fiber or metal drum. Containers must be labeled as follows:
> (A) The name of the asbestos waste generator and the location where the waste was generated; and
> (B)(i) A warning label that states:
>
> **DANGER**
>
> **Contains Asbestos Fibers**
>
> **Avoid Creating Dust**
>
> **Cancer and Lung Disease Hazard**
>
> **Avoid Breathing Airborne**
>
> **Asbestos Fibers**
>
> (3) If the asbestos-containing materials are not removed from a facility before demolition as described in OAR 340-248-0270(5), adequately wet the asbestos-containing waste material at all times after demolition and keep it wet during handling and loading for transport to a disposal site. Such asbestos-containing waste materials must be transported in lined and covered containers for bulk disposal.

(4) The interim storage of asbestos-containing waste material must protect the waste from dispersal into the environment and provide physical security from tampering by unauthorized persons. The interim storage of asbestos-containing waste material is the sole responsibility of the contractor, owner or operator performing the asbestos abatement project.

(Emphasis in original).

In this case, Respondent, as the general contractor on the project, was responsible for complying with Oregon environmental laws. Both Mr. Wall and Ms. Dey testified that none of the ACM they observed was packaged, labeled or secured. Mr. Wall also testified that none of the ACM he observed was wet. By carrying the dry, unsecured and unlabeled ACM through the building to the truck, Respondent openly accumulated friable ACM.

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 a matrix and formula contained in OAR 340-012-0045. *See* OAR 340-012-0042.

In this case, the Department determined that Respondent was liable for $1,200 in civil penalties based on Respondent's unlicensed abatement. The Department did not seek civil penalties for the open accumulation of asbestos. This penalty was 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 Department determined that the base penalty for Respondent's violation was $1,000. This was based on a determination that the violation was a minor magnitude, Class 1 violation. OAR 340-012-0050(1)(s) provides that "Conduct[ing of] an asbestos abatement project by a person not licensed as an asbestos abatement contractor," is a Class 1 violation. The Department further determined that Respondent committed a minor magnitude violation because "[l]ess than 40 lineal feet or 80 square feet or less than 17 cubic feet of asbestos-containing material" was disturbed. OAR 340-012-0090(1)(d)(C). The Department also determined that the P, H, C and O factors would all be assigned values of 0, given Respondent's lack of prior actions and history, then length of time the violation existed, and Respondent's cooperativeness. The Department assigned a value of 2 to the R factor, based on its determination that Respondent's actions were negligent. The record supports this determination because Mr. Ghaffari knew that the pipe insulation material contained ACM prior to starting the job. As the contractor, Respondent was responsible for complying with environmental laws, and for ensuring that a licensed asbestos abatement contractor removed the ACM from the work site. The failure to do so was negligent. Finally, the Department had insufficient evidence to determine that Respondent realized an economic benefit.

Based on this record, the civil penalty assessment of $1,200 is warranted.[15]

PROPOSED ORDER

I propose that the Board issue the following order:

Respondent is subject to a civil penalty in the amount of $1,200.

Andrea H. Sloan
Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: June 10, 2004

APPEAL RIGHTS

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

Environmental Quality Commission
c/o Stephanie Hallock, Director, DEQ
811 SW Sixth Avenue
Portland, OR 97204

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

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

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[15] The penalty was calculated as follows:

Penalty = $1,000 + [(0.1 x $1,000) x (0 + 0 + 0 + 2 + 0)] + $0
= $1,000 + ($100 x 2) + $0
= $1,000 + $200
= $1,200

CERTIFICATE OF SERVICE

I certify that on June 10, 2004, I served the attached Proposed and Final Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

RAHIM GHAFFARI
UNITED GEM & CARPETS INC
1416 SE STARK
PORTLAND OR 97214

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7002 2410 0001 7411 1537

BRYAN SMITH
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

DEBORAH NESBIT
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

Ann Redding

Ann Redding, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

Oregon
Theodore R. Kulongoski, Governor

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

Note: both the original of the CCH decision and the EQC decision were sent to the Respondent in error.

December 16, 2004

Via Certified Mail

Denis Palmer
32218 Stanfield Meadows Rd.
Stanfield, OR 97875

RE: AQ/AB-ER-03-128

Dear Mr. Palmer:

On December 17, 2004, the Environmental Quality Commission issued the attached Final Order in Case Number AQ/AB-ER-03-128, which found that you are liable for a civil penalty of $9,600, to be paid to the State of Oregon. As noted at the bottom of the order, you have 60 days to appeal the decision to the Oregon Court of Appeals. Regardless of whether you decide to appeal, the penalty is due and payable 10 days after the date of the order, or December 27, 2004, pursuant to Oregon Revised Statute (ORS) 183.090. *Even if you decide to appeal the order, you are required to pay the penalty.*

Please immediately send a check or money order in the amount of $9,600, 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 December 27, 2004, we will file the Final Order with the appropriate counties, thereby placing a lien on any property you own 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
Bryan Smith, OCE, OD, DEQ

Oregon
Theodore R. Kulongoski, Governor

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

Mikell O'Mealy
Assistant to the Commission

cc: Business Office, DEQ
Bryan Smith, OCE, OD, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of	)	Final Contested Case Order
Palmers & Sons Construction, Inc.	)	No. AQ/AB-ER-03-128

This matter came before the Oregon Environmental Quality Commission at its regular meeting on December 9, 2004.

On May 28, 2004, Administrative Law Judge Andrea H. Sloan issued a proposed order upholding the Department of Environmental Quality's assessment of a $9,600 civil penalty against Palmers & Sons Construction, Inc. The Company submitted a request for Commission Review on June 25, 2004, but it failed to provide exceptions and a brief as required by OAR 340-011-0575.

On August 10, 2004, the Department filed a motion to dismiss the petition for review based on the Company's failure to file exceptions and a brief. The Company did not respond or appear before the Commission on the motion to dismiss.

The Department's motion to dismiss the petition for review is **granted** and the proposed order of the Administrative Law Judge is **upheld** and **adopted** as the final order in this matter.

Dated this 17th day of Dec, 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.

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

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
PALMERS & SONS CONSTRUCTION INC.,	) OAH Case No. 113025
Respondent,	) Agency Case Number AQ/AB-ER-03-128
	) Umatilla County

HISTORY OF THE CASE

On September 9, 2003, the Department of Environmental Quality (Department) issued a Notice of Assessment of Civil Penalty (Notice) to Respondent Palmers & Sons Construction, Inc. The Notice alleged that Respondent violated ORS 468A.715(1),[1] OAR 340-248-0110(2)[2] and 340-248-0205(1).[3]

On September 25, 2003, Respondent requested a hearing, which was held on March 4, 2004, in Pendleton, Oregon. Andrea H. Sloan, from the Office of Administrative Hearings, presided as the Administrative Law Judge (ALJ). Denis L. Palmer appeared in person as the registered agent for Respondent, and testified at the hearing. Environmental Law Specialist Bryan Smith represented the Department. Witnesses for the Department were Tom Hack and Patty Jacobs. The record closed on April 15, 2004 following submission of closing briefs.

ISSUES

(1) Whether Respondent allowed unlicensed contractors to perform an asbestos abatement project on a facility it operated.

(2) Whether Respondent allowed the open accumulation of asbestos-containing material.

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[1] ORS 468A.715 provides as follows:

> (1) Except as provided in subsection (2) of this section, an owner or operator of a facility containing asbestos shall require only licensed contractors to perform asbestos abatement projects.
> (2) A facility owner or operator whose own employees maintain, repair, renovate or demolish the facility may allow the employees to work on asbestos abatement projects only if the employees comply with the training and certification requirements established under ORS 468A.730.

[2] OAR 340-248-0110(2) provides that "An owner or operator of a facility may not allow any persons other than those employees of the facility owner or operator who are appropriately certified or a licensed asbestos abatement contractor to perform an asbestos abatement project in or on that facility."

[3] OAR 340-248-0205(1) provides that "No person may openly accumulate friable asbestos material or asbestos-containing waste material."

(3) If so, whether the civil penalty assessment calculated by the Department is appropriate.

EVIDENTIARY RULINGS

Department Exhibits A1 through A11 and Respondent's Exhibits R1 through R9 were admitted into the record.

CREDIBILITY DETERMINATION

There is a significant discrepancy between the testimony of the Department's two witnesses, and that of Mr. Palmer. Because these discrepancies concern material facts, I must resolve these differences in order to make findings of fact, which must be based on reliable evidence. "Irrelevant, immaterial or unduly repetitious evidence shall be excluded * * *." ORS 183.450(1).

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002), *citing Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979) *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part). If an ALJ declines to find in accordance with evidence because it comes from a source that the ALJ finds mistaken or untruthful, then an express finding of such fact should be made. *See Dennis v. Employment Division*, 302 Or 160 (1986).

In this case, Mr. Palmers testimony was, in many instances, inconsistent, improbable and incredible. He changed his mind several times about what he loaded into the truck, and when it was loaded. For example, he insisted that, at the time of Ms. Jacobs' inspection, the screen material was largely intact on top of a black tarp and underneath a framework of timber that was very close to the truck. I find it unlikely that Ms. Jacobs, a trained professional, would not see a timber framework that was roughly 100 by 60 feet in size, within a few yards of the truck she was inspecting. At other times, he testified that by the time Ms. Jacobs' arrived, he and his wife had loaded all but a few broken screen panels into the truck. In his summation, Mr. Palmer acknowledged that his memory may have been somewhat faulty when he argued that "[o]nes [sic] memory may not recall all the details but pictures cannot lie * * *." Despite his assertion that the pictures accurately reflected the scene at the time of Ms. Jacobs' inspection, the relevant pictures, R3-T and U, are dated, "May 5," yet Mr. Palmer insists that these photographs were actually taken on May 3, the date of the inspection. At one point he testified that these photographs were taken *after* Ms. Jacobs left the worksite, and he also testified that these photographs were taken *before* Ms. Jacobs arrived. I am not persuaded, therefore, that Mr. Palmers photographs cure the discrepancies in his testimony. Indeed, the photographs highlight the many inconsistencies in Mr. Palmers testimony. I also consider that Mr. Palmer, as the owner and president of Palmers & Sons Construction, has a substantial financial stake in the outcome of this hearing. There is no evidence to establish, or reason to suspect that the Department or its witnesses had a similar stake.

Based on the totality of the evidence, and my evaluation of the witnesses' testimony, I conclude that Mr. Palmers testimony is not reliable. When there is a discrepancy between Mr. Palmers testimony and that of the other witnesses, I will base my findings of fact on the other witnesses' testimony.

FINDINGS OF FACT

(1) William McClannahan is the owner of property located on Theater Lane, off of Highway 395, in Hermiston, Umatilla County, Oregon. The property is commonly referred to as the Hermiston Drive-In Theater. (Ex. A3 and testimony of Hack.)

(2) The drive-in consisted of a large screen (approximately 60 feet high by 100 feet wide, including a ten foot "skirt" at the bottom of the screen), a concession building, and a projection building. Throughout the years, a few screen panels were replaced with panels that did not contain asbestos, although the majority of the screen was made up of the original panels. In recent years, the theater screen was not maintained and experienced weathering and deterioration. As a result, some of the screen's panels broke off and fell to the ground. (Testimony of Palmer, Hack and Jacobs.)

(3) Denis L. Palmer, owner of Palmers & Sons Construction (Respondent), Inc, a local company, had previously done work for Mr. McClannahan. On or about May 1, 2003, Mr. McClannahan entered into a contract with Respondent for demolition and removal of the screen. Mr. Palmer wrote the contract that both he and Mr. McClannahan signed. Mr. McClannahan contracted to pay Respondent $5,000, and agreed that "any and all usable materials removed become the property of Palmers and Son's Inc." (Ex. A4-3; testimony of Palmer.)

(4) On May 7, 2003, Patty Jacobs, an environmental engineer with the Department,[4] received a call from Frank Messina, with the Department's air quality program office in Bend. Mr. Messina reported receiving an anonymous complaint about an asbestos project in Hermiston. Mr. Messina asked Ms. Jacobs to investigate the complaint because she was much closer to Hermiston than he was. (Testimony of Jacobs.)

(5) During the early afternoon of May 7, 2003, Ms. Jacobs arrived at the drive-in property with a digital camera. She noticed a large truck and about three or four people near the truck, which was located in one of the back corners of the property. She approached and contacted Mr. Palmer, who identified himself as the foreman on the project. Mr. Palmer explained that he was demolishing and removing the movie screen, which he said was about 60 feet by 100 feet in size. Ms. Jacobs observed a large black plastic tarp on the ground near the truck. She saw piles of broken lumber on the tarp and pry bars nearby. Ms. Jacobs did not see any configurations of lumber that looked like intact supports for the screen. Ms. Jacobs also saw a large amount of broken gray and white material, which she understood to be pieces of the theater screen, in the

[4] Ms. Jacobs joined the Department's Pendleton office on April 22, 2003. Her previous experience was as an engineer responsible for overseeing removal of asbestos from the Hyperion Waste Water Treatment Plant in Los Angeles, California. (Testimony of Jacobs.)

bed of the truck. The pieces of screen were of varying size,[5] but Ms. Jacobs did not see a stack of unbroken screen panels. She estimated that there was approximately 120 square feet of broken screen material in the bed of the truck. Mr. Palmer told Ms. Jacobs that this was the "last load," and that they were almost done with the project. Mr. Palmer also told Ms. Jacobs that the screen material had been tested by a laboratory in Vancouver, Washington, and was found to contain nonfriable asbestos-containing material (ACM). Because Mr. Palmer indicated that this was the "last load," Ms. Jacobs surmised that other "loads" had already been taken to the dump. (Testimony of Jacobs.)

(6) Ms. Jacobs was concerned that the pieces of screen in the truck were actually friable ACM because they were irregularly broken.[6] The pieces of screen material in the truck were not broken along seams. Mr. Palmer gave Ms. Jacobs permission to take a sample of the screen material from the back of the truck. Ms. Jacobs reached into the truck and broke off a corner piece of the screen material by hand. She saw fibrous particles on the piece she broke off, and on some of the other pieces in the truck. Before she left, Ms. Jacobs took several digital photographs. The screen material in the truck was not bagged or labeled as ACM. Ms. Jacobs could see that the truck was lined with a tarp, but the ACM in the truck was exposed to the environment. (Ex. A2-1-5 and testimony of Jacobs.)

(7) Ms. Jacobs did not order Mr. Palmer to stop work on the theater site because it was clear to her that most of the screen had already been removed before she arrived. And, Mr. Palmers statement that the truck contained the "last load" confirmed her belief that the job was mostly complete. Ms. Jacobs did not see any screen material other than what was in the truck. Ms. Jacobs was new to the job and did not know whether she had authority to shut down the work site. The material in the truck was not wet, and Ms. Jacobs did not see a source for water near the truck. Ms. Jacobs advised Mr. Palmer to securely wrap and label the material. She further encouraged Mr. Palmer to wet the material. Ms. Jacobs knew that requiring Mr. Palmer to remove the pieces of screen from the truck could increase the risk of exposure to friable ACM to the people nearby and to the environment. (Ex. A2-5 and testimony of Jacobs.)

(8) Ms. Jacobs returned to her office with the sample. She contacted Mr. Messina, told him what she had seen and sent him the sample. Mr. Messina then sent the sample to the Department's laboratory for analysis. The laboratory determined that the sample taken from the drive-in contained 10 percent chrysotile asbestos. (Exs. A1, A2-6 and testimony of Jacobs and Hack.)

(9) The ACM in the truck had the potential for public exposure to asbestos or for the release of asbestos into the environment. (Testimony of Jacobs.)

(10) Tom Hack, a natural resource specialist for the Department, spoke with Ms. Jacobs shortly after May 12, 2003. Ms. Jacobs showed Mr. Hack the photographs she had taken at the

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[5] The pieces seen by Ms. Jacobs ranged from two inches by two inches, to three feet by four feet. (Testimony of Jacobs.)

[6] Ms. Jacobs does not have specific training or experience in identifying asbestos, but she suspected, because the pieces in the truck were irregularly broken and dusty and based on what Mr. Palmer had told her, that the ACM was friable. (Testimony of Jacobs.)

drive-in and explained what she had seen during her May 7, 2003 inspection. Mr. Hack reviewed the laboratory analysis report. Based on the photographs and on his training and experience, Mr. Hack believed that the ACM in the truck was friable because the pieces of material were badly broken. If the material had been intact, it would not have been friable; the demolition of the screen rendered the ACM friable. Mr. Hack learned that Denis Palmer was in charge of the demolition project, that Maurice McDaniel was the job foreman, and that Atkinson Reforestation, a temporary labor service, provided workers for the job. Mr. Palmer asked Mr. Atkinson to send workers with pry bars to the job site. Mr. Atkinson provided Mr. Hack with the names of six workers from his company that had worked for Mr. Palmer and Mr. McDaniel on the drive-in demolition job. Mr. Hack confirmed, by checking Department databases,[7] that neither Mr. Palmer nor Mr. McDaniel were licensed asbestos abatement contractors, and that none of the six workers provided by Atkinson Reforestation were certified asbestos abatement workers. Mr. McClannahan sent Mr. Hack a copy of the contract with Respondent for demolition of the drive-in screen. Atkinson Reforestation billed Respondent for the laborer's time between May 2 and May 7, 2003. (Exs. A3, A6 and testimony of Hack.)

(11) On June 11, 2003, Mr. Hack inspected the drive-in property. The site was cleaned "fairly well," but he saw approximately 60 square feet of broken screen material on the ground in the southeast corner of the property. The material Mr. Hack saw was comparable to the material Ms. Jacobs saw in the truck during her inspection on May 7, 2003. Mr. Hack concluded that the material on the ground looked friable. He took digital photographs and collected two samples of the material. The material was irregularly broken and left powdery residue inside of the sample bags. Mr. Hack submitted the samples to the Department's laboratory, which determined that the samples each contained 10 percent chrysotile asbestos. Mr. Hack believed that the ACM he saw on the ground had the potential to expose the public to asbestos, or to release asbestos into the environment. (Exs. A7 and A8 and testimony of Hack.)

(12) Following his June 11, 2003 inspection, Mr. Hack sent Respondent a Notice of Noncompliance (NON) on June 18, 2003, advising Respondent that it was in violation of Oregon Environmental law by hiring unlicensed abatement contractors for an asbestos abatement project. Respondent was told to hire licensed abatement contractors to properly abate the remaining ACM no later than June 30, 2003. (Ex. A8 and testimony of Hack.)

(13) Respondent did not have the remaining ACM properly abated because the Department never received notification from a licensed asbestos abatement contractor that Respondent had hired the contractor to abate the ACM.[8] (Testimony of Hack.)

(14) On July 1 and July 3, 2003, Becky Hillwig, an inspector with the Oregon Occupational Safety and Health Administration (OSHA), inspected the drive-in property.

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[7] The Department maintains a database of all licensed abatement contractors and all certified abatement workers. A certified worker is required to complete 40 hours of asbestos abatement training. A licensed contractor must also complete 80 hours of supervisory training. (Testimony of Hack.)

[8] OAR 340-248-0260 provides, in relevant part, as follows: "written notification of any asbestos abatement project must be provided to the Department on a form prepared by and available from the Department, accompanied by the appropriate fee. The notification must be submitted by the facility owner or operator or by the contractor * * *."

Mr. Hack contacted OSHA because workers had been exposed to ACM during the screen demolition job. Ms. Hillwig also found broken screen material on the ground. Ms. Hillwig took three samples of the material, which was tested by the Oregon Department of Consumer and Business Services Occupational Health Laboratory on July 24, 2003. The laboratory determined that each of the samples contained between 10 and 20 percent chrysotile asbestos. (Ex. A10 and testimony of Hack.)

(15) On August 22, 2003, Mr. Hack returned to the drive-in property and determined that the ACM he had seen earlier was still on the ground in the southeast corner of the drive-in property. (Testimony of Hack.)

(16) On August 27, 2003, Mr. Hack sent a second NON, advising Respondent that it was in violation of Oregon Environmental law by continuing the open accumulation of ACM by not immediately hiring a licensed asbestos abatement contractor to remove the material. Respondent never contacted the Department following this second NON. (Ex. A11 and testimony of Hack.)

(17) In most cases, cement asbestos products are nonfriable "unless mishandled, damaged, or in badly weathered condition." If the asbestos material is crushed, broken, dropped, thrown, or stepped on, it becomes friable. (Exs. R4 and R5.)

CONCLUSIONS OF LAW

(1) Respondent hired unlicensed asbestos abatement contractors to perform an asbestos abatement project on the drive-in property.

(2) Respondent allowed the open accumulation of asbestos-containing materials.

(3) The Department's civil penalty assessment is appropriate.

OPINION

Mr. Palmer argued that the Department's action is based on fabrication, that it misconstrued the facts, and violated the public trust. He further argues that the ACM was not friable because he and his workers did not break the screen sheets, so there was no abatement issue. The Department counters that the actions of Mr. Palmer and his crew rendered the asbestos friable, and that this was an asbestos abatement project, requiring a licensed asbestos abatement contractor.

"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 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). In this case, the Department has the burden. After reviewing the record, I conclude that the Department has met its burden.

Asbestos abatement project

The legislature has given the Environmental Quality Commission authority to "adopt such rules and standards as it considers necessary and proper in performing the functions vested by law in the commission." ORS 468A.020(1). In addition, ORS 468A.707 requires the Environmental Quality Commission to promulgate rules to "(a) Establish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training." Within this authority, the Environment Quality Commission developed rules relating to environmental quality issues, including rules relating to asbestos abatement and the definition of applicable statutory terms.

The Department defines an "asbestos abatement project" as follows:

> [A]ny demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling, disturbance, or disposal of any asbestos containing material with the potential of releasing asbestos fibers from asbestos containing material[9] into the air.

OAR 340-248-0010(6).

The record in this case establishes that Respondent was hired by Mr. McClannahan to demolish and remove the drive-in theater screen on Mr. McClannahan's property. At the time of the project, Mr. Palmer knew that the screen material contained asbestos, although he believed that it was nonfriable. Department testing established that the samples taken by Ms. Jacobs and Mr. Hack were, in fact, ACM. Respondent was not a licensed asbestos abatement contractor, and none of the workers it hired through Atkinson Reforestation were licensed asbestos abatement workers. Generally, licensed abatement contractors and workers must conduct all asbestos abatement projects. The Department has carved out exceptions to this requirement at OAR 340-248-0250(2),[10] but based on the facts adduced at hearing, the demolition of the drive-in screen does not qualify as an exception under this rule. The demolition of the screen was, therefore, an asbestos abatement project.

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[9] "Asbestos-containing material" is defined at OAR 340-248-0010(8) to include "any material, including particulate material, that contains more than one-percent of asbestos as determined using the method specified in 40 CFR Part 763 Appendix E, Subpart E, Section 1, Polarized Light Microscopy."

[10] OAR 340-248-0250(2) exempts the following projects from the general requirements OAR 340 division 248: asbestos abatement conducted within a single private residence; abatement conducted outside of a single property if the residence is not a rental property, a commercial business, or intended to be demolished; residential buildings with less than four dwelling units (constructed after 1987); projects removing "mastics and roofing products that are fully encapsulated with a petroleum-based binder and are not hard, dry, or brittle;" projects involving removal of less than three square feet or three linear feet of ACM; and projects to remove ACM that are sealed "from the atmosphere by a rigid casing;"

For this particular violation, I do not have to decide whether the ACM samples were friable because friability is not required within the definition of an asbestos abatement project.

Open accumulation of ACM

I do, however, need to decide whether the material sampled by the Department is friable in order to determine whether Respondent openly accumulated ACM. There is no statutory definition of "open accumulation." Within its statutory authority, the Department has defined "open accumulation" of ACM as "any accumulation, including interim storage, of friable asbestos-containing material or asbestos-containing waste material other than material securely enclosed and stored as required by this chapter." OAR 340-248-0010(32).

The Department alleges that the ACM found in the truck during Ms. Jacobs' inspection on May 3, 2003, and on the property during Mr. Hack's June 11, 2003 and August 22, 2003 inspections was openly accumulated, in violation of environmental rules. Mr. Palmer argues that the ACM found by Mr. Hack was not located on Mr. McClannahan's property, but this is not supported by the preponderance of reliable evidence in the record. Mr. Palmer further argues that he did properly package the ACM in the truck, and that he and his crew did not cause the ACM to be friable.

I must first determine whether the samples taken from the truck and from Mr. McClannahan's property were friable ACM. Both Ms. Jacobs and Mr. Hack testified that the samples they took were friable. Ms. Jacobs testified that with one hand, she easily broke off the sample she took from a larger piece of material. Mr. Hack testified that he believed that the material in the truck was friable based on his review of Ms. Jacobs' photographs, and on his discussion with her. He also relied on his experience with ACM. Mr. Hack determined that the material he saw on the ground looked friable. He further testified that this material was similar in appearance to the material Ms. Jacobs saw in the truck. The pieces on the ground, and in the truck, were irregularly broken. Mr. Hack's samples left a powdery residue inside of the sample bags.

ORS 468A.700(8) defines "friable asbestos material" as "any asbestos-containing material that hand pressure can crumble, pulverize or reduce to powder when dry." The Department's definition of "friable asbestos material" mirrors the statutory definition. OAR 340-248-0070(25).

The samples taken by the Department meet the definition of "friable asbestos material" because the samples were breakable by hand, and they contained 10 percent chrysotile asbestos. Respondent argued that, according to Department guidelines (Exhibit R4), the material was not friable because he and his crew removed the screen material in full, unbroken sheets. He misconstrues the Department's guidelines, however. According to Exhibit R4, "How to Remove NonFriable Cement Asbestos Products," cement-based ACM *can be* nonfriable, so long as it is handled correctly. If the ACM is "mishandled, damaged, or in badly weathered condition," if can be rendered friable. (Ex. R4.) Further, Respondent's argument is belied by the evidence, which demonstrates that the back of the truck was nearly full of badly broken pieces of screen. Moreover, Ms. Jacobs did not see *any* full, unbroken sheets during her inspection. The Department has established, therefore, that the samples they collected contained "friable asbestos material." And, because the ACM in the truck and on the ground was not "securely enclosed and stored," it was

openly accumulated in violation of environmental law. OAR 340-248-0205(1) ("No person may openly accumulate friable asbestos material or asbestos-containing waste material.")

Assessment of Civil Penalty

Finally, Mr. Palmer argues that the Department, not Respondent, should be penalized.

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 a matrix and formula contained in OAR 340-012-0045.

In this case, the Department determined that Respondent is liable for $9,600 in civil penalties based on Respondent's open accumulation of ACM. The Department did not seek a penalty for allowing unlicensed contractors to perform an asbestos abatement project. The penalty was 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."

Because the violation had the potential for public exposure to asbestos, or to the release of asbestos into the environment, the Department determined that the based penalty (BP) should be $6,000.[11] The Department's determination of this factor was correct.

The Department also determined that the P and H factors should be assigned values of 0. The Department further determined that the O factor should be assigned a value of 2 because the open accumulation violation existed for more than one day. This is supported by the evidence in the record. The Department concluded that the R factor should be assigned a value of 2 because Respondent was negligent in committing this violation. I agree. Respondent knew that the screen panels contained asbestos, yet he allowed the badly broken screen tiles to be piled in the back of a truck rather than properly and securely packaging the ACM. And, Respondent left ACM material at the work site, which was discovered during Mr. Hack's inspections on June 11, 2003 and August 22, 2003. The Department further determined that the C factor should be assigned a value of 2 because Respondent was uncooperative and did not take reasonable steps to correct or minimize the effects of the violation. This is evidenced by Respondent's failure to respond to the two NONs, and its failure to hire an asbestos abatement contractor within the time set by the Department. Finally, the Department had insufficient information to determine that Respondent realized an economic benefit, [12] so the EB factor was assigned a value of 0.

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[11] According to OAR 340-012-0050(1)(q), "Storage or accumulation of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which causes a potential for public exposure to asbestos or release of asbestos into the environment" is a Class 1 violation. This violation was determined to be major (rather than minor or moderate) because the amount of asbestos openly accumulated was more than 160 square feet. OAR 340-012-0090(1)(d)(A). This Class 1 major magnitude violation is assigned a base penalty of $6,000. OAR 340-012-0042(1)(a).

[12] An economic benefit is "the monetary benefit that an entity gained by not complying with the law." ORS 468.130(2)(h) authorizes the Department to consider "any relevant rule of the commission" in

Based on this record, the civil penalty assessment of $9,600[13] is warranted.

PROPOSED ORDER

I propose that the Board issue the following order:

Respondent is subject to a civil penalty in the amount of $9,600.

Randolph Fraser / for
Andrea H. Sloan, Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: May 28, 2004

APPEAL RIGHTS

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

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

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

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calculating the economic benefit. The Department is required to include in its penalty assessments an "approximated dollar sum of the economic benefit." OAR 340-012-0045(1)(c)(F). The Department "may use the U.S. Environmental Protection Agency's BEN computer model" to calculate the economic benefit component of a penalty assessment. OAR 340-012-0045(1)(c)(F)(iii).

[13] Penalty = BP + [0.1 x BP) x (P + H + O + R + C)] + EB
= $6,000 + [(0.1 x $6,000) x (0 + 0 + 2 + 2 + 2)] + $0
= $6,000 + ($600 x 6) = $0
= $6,000 + $3,600 + $0
= $9,600

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

CERTIFICATE OF SERVICE

I certify that on May 28, 2004, I served the attached Proposed and Final Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

PALMER & SONS CONSTRUCTION INC
32218 STANFIELD MEADOWS RD
STANFIELD OR 97875

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7002 2410 0001 7411 0998

BRYAN SMITH
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

DEBORAH NESBIT
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

Ann Redding

Ann Redding, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

State of Oregon
Department of Environmental Quality Memorandum

Date: November 18, 2004

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item C, Action Item: Request for Dismissal of Contested Case No. AQ/AB-ER-03-128 regarding Palmers & Sons Construction Inc.
December 9, 2004 EQC Meeting

Appeal to EQC

On June 25, 2004, Denis Palmer, representing Palmers & Sons Construction Inc. (Palmers), filed a petition for Commission review of a Proposed Order (Attachment D) that assessed Palmers a $9,600 civil penalty for allowing the open accumulation of asbestos-containing materials. The order also found Palmers liable for failing to hire an asbestos abatement contractor licensed by the Department of Environmental Quality (DEQ, Department) to perform an asbestos abatement project.

On July 7, 2004, on behalf of the Commission, Mikell O'Mealy sent Mr. Palmer a letter via certified mail (Attachment B) explaining the requirements for filing exceptions to the Proposed Order by July 26, 2004, as required by OAR 340-011-0132. The postal service certified that the letter was received.

When no exceptions were filed by the July 26 deadline, the Department filed a request on August 10, 2004, (Attachment A) that the Commission dismiss the petition for review and uphold the Proposed Order.

A representative of the Department will be present at the December 9, 2004 Commission meeting to answer any questions you may have about this request.

EQC Authority

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

Alternatives

The Commission may:

1. As requested by the Department, dismiss the petition for review and uphold the Proposed Order.
2. Schedule the case for a future Commission meeting and request copies of the hearing record to review.

Attachments

A. Department's request for dismissal, dated August 10, 2004
B. Letter from Mikell O'Mealy to Mr. Palmer, dated July 7, 2004
C. Petition for Review of the Proposed Order, dated June 25, 2004
D. Proposed and Final Order, dated May 28, 2004

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

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 10, 2004

Environmental Quality Commission
c/o Mikell O'Mealy
Office of the Director
Oregon Department of Environmental Quality
811 S.W. 6th Avenue
Portland, Oregon 97204

Re: Palmer's & Sons Construction, Inc.
Notice of Violation and Assessment of Civil Penalty
No. AQ/AB-ER-03-128
Umatilla County

Members of the Environmental Quality Commission:

The Department respectfully requests that, pursuant to OAR 340-011-0575(5)(f), the Commission dismiss Petitioner Palmer's & Sons Construction, Inc.'s Petition for Commission Review received by the Department on June 25, 2004. In addition, the Department requests that the Commission uphold the Proposed Order in the above-referenced matter, which was issued on May 28, 2004. The Petition was filed timely, but Petitioner has not filed a brief with written exceptions as required by OAR 340-011-0575(5)(a). The Department cannot prepare an answering brief because Petitioner's exceptions are unknown. Enclosed for your reference is a copy of the Proposed Order and the Petition for Review.

If you have any questions about this action, please contact me at (503) 229-5692.

Sincerely,

Bryan Smith

Bryan Smith
Environmental Law Specialist

Enclosures

cc: Palmer's & Sons Construction, Inc.
Air Quality Division, Eastern Region, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: PALMER'S & SONS CONSTRUCTION, INC., Petitioner.	NO. AQ/AB-ER-03-128 MOTION TO DISMISS

On June 25, 2004, Petitioner Palmer's & Sons Construction, Inc., petitioned the Environmental Quality Commission to review the Proposed Order. Pursuant to Oregon Administrative Rules (OAR) 340-011-0575(5)(a), Petitioner had thirty days from that date to file its written exceptions and brief. Petitioner has not timely filed its written exceptions and brief. The Office of Compliance and Enforcement of the Department of Environmental Quality (DEQ) moves the Environmental Quality Commission to dismiss Petitioner's petition, pursuant to Oregon Administrative Rules 340-011-0575(5)(f).

8/10/04
Date

Bryan Smith, Environmental Law Specialist
Office of Compliance and Enforcement, DEQ

MILLENNIUM HOME BUILDER

Palmers & Son's Construction, Inc.

CCB # 151885

Dear Sirs,

I am requesting a review in the matter concerning Palmers & Sons Construction as no one from my company was allowed to witnesse the inspection done, and all testimonies were ignored. I have all the information as well as witnesses who will verifing that this information is correct, and also my personal testimony.

Denis Palmer

RECEIVED

JUN 25 2004

Oregon DEQ
Office of the Director

32218 Stanfield Meadows Rd. • Stanfield, OR • 97875 • (541) 449-3556 • fax (541) 449-3515

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

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
PALMERS & SONS CONSTRUCTION INC.,	) OAH Case No. 113025
Respondent,	) Agency Case Number AQ/AB-ER-03-128
	) Umatilla County

HISTORY OF THE CASE

On September 9, 2003, the Department of Environmental Quality (Department) issued a Notice of Assessment of Civil Penalty (Notice) to Respondent Palmers & Sons Construction, Inc. The Notice alleged that Respondent violated ORS 468A.715(1),[1] OAR 340-248-0110(2)[2] and 340-248-0205(1).[3]

On September 25, 2003, Respondent requested a hearing, which was held on March 4, 2004, in Pendleton, Oregon. Andrea H. Sloan, from the Office of Administrative Hearings, presided as the Administrative Law Judge (ALJ). Denis L. Palmer appeared in person as the registered agent for Respondent, and testified at the hearing. Environmental Law Specialist Bryan Smith represented the Department. Witnesses for the Department were Tom Hack and Patty Jacobs. The record closed on April 15, 2004 following submission of closing briefs.

ISSUES

(1) Whether Respondent allowed unlicensed contractors to perform an asbestos abatement project on a facility it operated.

(2) Whether Respondent allowed the open accumulation of asbestos-containing material.

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[1] ORS 468A.715 provides as follows:

> (1) Except as provided in subsection (2) of this section, an owner or operator of a facility containing asbestos shall require only licensed contractors to perform asbestos abatement projects.
>
> (2) A facility owner or operator whose own employees maintain, repair, renovate or demolish the facility may allow the employees to work on asbestos abatement projects only if the employees comply with the training and certification requirements established under ORS 468A.730.

[2] OAR 340-248-0110(2) provides that "An owner or operator of a facility may not allow any persons other than those employees of the facility owner or operator who are appropriately certified or a licensed asbestos abatement contractor to perform an asbestos abatement project in or on that facility."

[3] OAR 340-248-0205(1) provides that "No person may openly accumulate friable asbestos material or asbestos-containing waste material."

(3) If so, whether the civil penalty assessment calculated by the Department is appropriate.

EVIDENTIARY RULINGS

Department Exhibits A1 through A11 and Respondent's Exhibits R1 through R9 were admitted into the record.

CREDIBILITY DETERMINATION

There is a significant discrepancy between the testimony of the Department's two witnesses, and that of Mr. Palmer. Because these discrepancies concern material facts, I must resolve these differences in order to make findings of fact, which must be based on reliable evidence. "Irrelevant, immaterial or unduly repetitious evidence shall be excluded * * *." ORS 183.450(1).

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002), *citing Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979) *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part). If an ALJ declines to find in accordance with evidence because it comes from a source that the ALJ finds mistaken or untruthful, then an express finding of such fact should be made. *See Dennis v. Employment Division*, 302 Or 160 (1986).

In this case, Mr. Palmers testimony was, in many instances, inconsistent, improbable and incredible. He changed his mind several times about what he loaded into the truck, and when it was loaded. For example, he insisted that, at the time of Ms. Jacobs' inspection, the screen material was largely intact on top of a black tarp and underneath a framework of timber that was very close to the truck. I find it unlikely that Ms. Jacobs, a trained professional, would not see a timber framework that was roughly 100 by 60 feet in size, within a few yards of the truck she was inspecting. At other times, he testified that by the time Ms. Jacobs' arrived, he and his wife had loaded all but a few broken screen panels into the truck. In his summation, Mr. Palmer acknowledged that his memory may have been somewhat faulty when he argued that "[o]nes [sic] memory may not recall all the details but pictures cannot lie * * *." Despite his assertion that the pictures accurately reflected the scene at the time of Ms. Jacobs' inspection, the relevant pictures, R3-T and U, are dated, "May 5," yet Mr. Palmer insists that these photographs were actually taken on May 3, the date of the inspection. At one point he testified that these photographs were taken *after* Ms. Jacobs left the worksite, and he also testified that these photographs were taken *before* Ms. Jacobs arrived. I am not persuaded, therefore, that Mr. Palmers photographs cure the discrepancies in his testimony. Indeed, the photographs highlight the many inconsistencies in Mr. Palmers testimony. I also consider that Mr. Palmer, as the owner and president of Palmers & Sons Construction, has a substantial financial stake in the outcome of this hearing. There is no evidence to establish, or reason to suspect that the Department or its witnesses had a similar stake.

Based on the totality of the evidence, and my evaluation of the witnesses' testimony, I conclude that Mr. Palmers testimony is not reliable. When there is a discrepancy between Mr. Palmers testimony and that of the other witnesses, I will base my findings of fact on the other witnesses' testimony.

FINDINGS OF FACT

(1) William McClannahan is the owner of property located on Theater Lane, off of Highway 395, in Hermiston, Umatilla County, Oregon. The property is commonly referred to as the Hermiston Drive-In Theater. (Ex. A3 and testimony of Hack.)

(2) The drive-in consisted of a large screen (approximately 60 feet high by 100 feet wide, including a ten foot "skirt" at the bottom of the screen), a concession building, and a projection building. Throughout the years, a few screen panels were replaced with panels that did not contain asbestos, although the majority of the screen was made up of the original panels. In recent years, the theater screen was not maintained and experienced weathering and deterioration. As a result, some of the screen's panels broke off and fell to the ground. (Testimony of Palmer, Hack and Jacobs.)

(3) Denis L. Palmer, owner of Palmers & Sons Construction (Respondent), Inc, a local company, had previously done work for Mr. McClannahan. On or about May 1, 2003, Mr. McClannahan entered into a contract with Respondent for demolition and removal of the screen. Mr. Palmer wrote the contract that both he and Mr. McClannahan signed. Mr. McClannahan contracted to pay Respondent $5,000, and agreed that "any and all usable materials removed become the property of Palmers and Son's Inc." (Ex. A4-3; testimony of Palmer.)

(4) On May 7, 2003, Patty Jacobs, an environmental engineer with the Department,[4] received a call from Frank Messina, with the Department's air quality program office in Bend. Mr. Messina reported receiving an anonymous complaint about an asbestos project in Hermiston. Mr. Messina asked Ms. Jacobs to investigate the complaint because she was much closer to Hermiston than he was. (Testimony of Jacobs.)

(5) During the early afternoon of May 7, 2003, Ms. Jacobs arrived at the drive-in property with a digital camera. She noticed a large truck and about three or four people near the truck, which was located in one of the back corners of the property. She approached and contacted Mr. Palmer, who identified himself as the foreman on the project. Mr. Palmer explained that he was demolishing and removing the movie screen, which he said was about 60 feet by 100 feet in size. Ms. Jacobs observed a large black plastic tarp on the ground near the truck. She saw piles of broken lumber on the tarp and pry bars nearby. Ms. Jacobs did not see any configurations of lumber that looked like intact supports for the screen. Ms. Jacobs also saw a large amount of broken gray and white material, which she understood to be pieces of the theater screen, in the

[4] Ms. Jacobs joined the Department's Pendleton office on April 22, 2003. Her previous experience was as an engineer responsible for overseeing removal of asbestos from the Hyperion Waste Water Treatment Plant in Los Angeles, California. (Testimony of Jacobs.)

bed of the truck. The pieces of screen were of varying size,[5] but Ms. Jacobs did not see a stack of unbroken screen panels. She estimated that there was approximately 120 square feet of broken screen material in the bed of the truck. Mr. Palmer told Ms. Jacobs that this was the "last load," and that they were almost done with the project. Mr. Palmer also told Ms. Jacobs that the screen material had been tested by a laboratory in Vancouver, Washington, and was found to contain nonfriable asbestos-containing material (ACM). Because Mr. Palmer indicated that this was the "last load," Ms. Jacobs surmised that other "loads" had already been taken to the dump. (Testimony of Jacobs.)

(6) Ms. Jacobs was concerned that the pieces of screen in the truck were actually friable ACM because they were irregularly broken.[6] The pieces of screen material in the truck were not broken along seams. Mr. Palmer gave Ms. Jacobs permission to take a sample of the screen material from the back of the truck. Ms. Jacobs reached into the truck and broke off a corner piece of the screen material by hand. She saw fibrous particles on the piece she broke off, and on some of the other pieces in the truck. Before she left, Ms. Jacobs took several digital photographs. The screen material in the truck was not bagged or labeled as ACM. Ms. Jacobs could see that the truck was lined with a tarp, but the ACM in the truck was exposed to the environment. (Ex. A2-1-5 and testimony of Jacobs.)

(7) Ms. Jacobs did not order Mr. Palmer to stop work on the theater site because it was clear to her that most of the screen had already been removed before she arrived. And, Mr. Palmers statement that the truck contained the "last load" confirmed her belief that the job was mostly complete. Ms. Jacobs did not see any screen material other than what was in the truck. Ms. Jacobs was new to the job and did not know whether she had authority to shut down the work site. The material in the truck was not wet, and Ms. Jacobs did not see a source for water near the truck. Ms. Jacobs advised Mr. Palmer to securely wrap and label the material. She further encouraged Mr. Palmer to wet the material. Ms. Jacobs knew that requiring Mr. Palmer to remove the pieces of screen from the truck could increase the risk of exposure to friable ACM to the people nearby and to the environment. (Ex. A2-5 and testimony of Jacobs.)

(8) Ms. Jacobs returned to her office with the sample. She contacted Mr. Messina, told him what she had seen and sent him the sample. Mr. Messina then sent the sample to the Department's laboratory for analysis. The laboratory determined that the sample taken from the drive-in contained 10 percent chrysotile asbestos. (Exs. A1, A2-6 and testimony of Jacobs and Hack.)

(9) The ACM in the truck had the potential for public exposure to asbestos or for the release of asbestos into the environment. (Testimony of Jacobs.)

(10) Tom Hack, a natural resource specialist for the Department, spoke with Ms. Jacobs shortly after May 12, 2003. Ms. Jacobs showed Mr. Hack the photographs she had taken at the

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[5] The pieces seen by Ms. Jacobs ranged from two inches by two inches, to three feet by four feet. (Testimony of Jacobs.)

[6] Ms. Jacobs does not have specific training or experience in identifying asbestos, but she suspected, because the pieces in the truck were irregularly broken and dusty and based on what Mr. Palmer had told her, that the ACM was friable. (Testimony of Jacobs.)

drive-in and explained what she had seen during her May 7, 2003 inspection. Mr. Hack reviewed the laboratory analysis report. Based on the photographs and on his training and experience, Mr. Hack believed that the ACM in the truck was friable because the pieces of material were badly broken. If the material had been intact, it would not have been friable; the demolition of the screen rendered the ACM friable. Mr. Hack learned that Denis Palmer was in charge of the demolition project, that Maurice McDaniel was the job foreman, and that Atkinson Reforestation, a temporary labor service, provided workers for the job. Mr. Palmer asked Mr. Atkinson to send workers with pry bars to the job site. Mr. Atkinson provided Mr. Hack with the names of six workers from his company that had worked for Mr. Palmer and Mr. McDaniel on the drive-in demolition job. Mr. Hack confirmed, by checking Department databases,[7] that neither Mr. Palmer nor Mr. McDaniel were licensed asbestos abatement contractors, and that none of the six workers provided by Atkinson Reforestation were certified asbestos abatement workers. Mr. McClannahan sent Mr. Hack a copy of the contract with Respondent for demolition of the drive-in screen. Atkinson Reforestation billed Respondent for the laborer's time between May 2 and May 7, 2003. (Exs. A3, A6 and testimony of Hack.)

(11) On June 11, 2003, Mr. Hack inspected the drive-in property. The site was cleaned "fairly well," but he saw approximately 60 square feet of broken screen material on the ground in the southeast corner of the property. The material Mr. Hack saw was comparable to the material Ms. Jacobs saw in the truck during her inspection on May 7, 2003. Mr. Hack concluded that the material on the ground looked friable. He took digital photographs and collected two samples of the material. The material was irregularly broken and left powdery residue inside of the sample bags. Mr. Hack submitted the samples to the Department's laboratory, which determined that the samples each contained 10 percent chrysotile asbestos. Mr. Hack believed that the ACM he saw on the ground had the potential to expose the public to asbestos, or to release asbestos into the environment. (Exs. A7 and A8 and testimony of Hack.)

(12) Following his June 11, 2003 inspection, Mr. Hack sent Respondent a Notice of Noncompliance (NON) on June 18, 2003, advising Respondent that it was in violation of Oregon Environmental law by hiring unlicensed abatement contractors for an asbestos abatement project. Respondent was told to hire licensed abatement contractors to properly abate the remaining ACM no later than June 30, 2003. (Ex. A8 and testimony of Hack.)

(13) Respondent did not have the remaining ACM properly abated because the Department never received notification from a licensed asbestos abatement contractor that Respondent had hired the contractor to abate the ACM.[8] (Testimony of Hack.)

(14) On July 1 and July 3, 2003, Becky Hillwig, an inspector with the Oregon Occupational Safety and Health Administration (OSHA), inspected the drive-in property.

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[7] The Department maintains a database of all licensed abatement contractors and all certified abatement workers. A certified worker is required to complete 40 hours of asbestos abatement training. A licensed contractor must also complete 80 hours of supervisory training. (Testimony of Hack.)

[8] OAR 340-248-0260 provides, in relevant part, as follows: "written notification of any asbestos abatement project must be provided to the Department on a form prepared by and available from the Department, accompanied by the appropriate fee. The notification must be submitted by the facility owner or operator or by the contractor * * *."

Mr. Hack contacted OSHA because workers had been exposed to ACM during the screen demolition job. Ms. Hillwig also found broken screen material on the ground. Ms. Hillwig took three samples of the material, which was tested by the Oregon Department of Consumer and Business Services Occupational Health Laboratory on July 24, 2003. The laboratory determined that each of the samples contained between 10 and 20 percent chrysotile asbestos. (Ex. A10 and testimony of Hack.)

(15) On August 22, 2003, Mr. Hack returned to the drive-in property and determined that the ACM he had seen earlier was still on the ground in the southeast corner of the drive-in property. (Testimony of Hack.)

(16) On August 27, 2003, Mr. Hack sent a second NON, advising Respondent that it was in violation of Oregon Environmental law by continuing the open accumulation of ACM by not immediately hiring a licensed asbestos abatement contractor to remove the material. Respondent never contacted the Department following this second NON. (Ex. A11 and testimony of Hack.)

(17) In most cases, cement asbestos products are nonfriable "unless mishandled, damaged, or in badly weathered condition." If the asbestos material is crushed, broken, dropped, thrown, or stepped on, it becomes friable. (Exs. R4 and R5.)

CONCLUSIONS OF LAW

(1) Respondent hired unlicensed asbestos abatement contractors to perform an asbestos abatement project on the drive-in property.

(2) Respondent allowed the open accumulation of asbestos-containing materials.

(3) The Department's civil penalty assessment is appropriate.

OPINION

Mr. Palmer argued that the Department's action is based on fabrication, that it misconstrued the facts, and violated the public trust. He further argues that the ACM was not friable because he and his workers did not break the screen sheets, so there was no abatement issue. The Department counters that the actions of Mr. Palmer and his crew rendered the asbestos friable, and that this was an asbestos abatement project, requiring a licensed asbestos abatement contractor.

"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 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). In this case, the Department has the burden. After reviewing the record, I conclude that the Department has met its burden.

Asbestos abatement project

The legislature has given the Environmental Quality Commission authority to "adopt such rules and standards as it considers necessary and proper in performing the functions vested by law in the commission." ORS 468A.020(1). In addition, ORS 468A.707 requires the Environmental Quality Commission to promulgate rules to "(a) Establish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training." Within this authority, the Environment Quality Commission developed rules relating to environmental quality issues, including rules relating to asbestos abatement and the definition of applicable statutory terms.

The Department defines an "asbestos abatement project" as follows:

> [A]ny demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling, disturbance, or disposal of any asbestos containing material with the potential of releasing asbestos fibers from asbestos containing material[9] into the air.

OAR 340-248-0010(6).

The record in this case establishes that Respondent was hired by Mr. McClannahan to demolish and remove the drive-in theater screen on Mr. McClannahan's property. At the time of the project, Mr. Palmer knew that the screen material contained asbestos, although he believed that it was nonfriable. Department testing established that the samples taken by Ms. Jacobs and Mr. Hack were, in fact, ACM. Respondent was not a licensed asbestos abatement contractor, and none of the workers it hired through Atkinson Reforestation were licensed asbestos abatement workers. Generally, licensed abatement contractors and workers must conduct all asbestos abatement projects. The Department has carved out exceptions to this requirement at OAR 340-248-0250(2),[10] but based on the facts adduced at hearing, the demolition of the drive-in screen does not qualify as an exception under this rule. The demolition of the screen was, therefore, an asbestos abatement project.

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[9] "Asbestos-containing material" is defined at OAR 340-248-0010(8) to include "any material, including particulate material, that contains more than one-percent of asbestos as determined using the method specified in 40 CFR Part 763 Appendix E, Subpart E, Section 1, Polarized Light Microscopy."

[10] OAR 340-248-0250(2) exempts the following projects from the general requirements OAR 340 division 248: asbestos abatement conducted within a single private residence; abatement conducted outside of a single property if the residence is not a rental property, a commercial business, or intended to be demolished; residential buildings with less than four dwelling units (constructed after 1987); projects removing "mastics and roofing products that are fully encapsulated with a petroleum-based binder and are not hard, dry, or brittle;" projects involving removal of less than three square feet or three linear feet of ACM; and projects to remove ACM that are sealed "from the atmosphere by a rigid casing;"

For this particular violation, I do not have to decide whether the ACM samples were friable because friability is not required within the definition of an asbestos abatement project.

Open accumulation of ACM

I do, however, need to decide whether the material sampled by the Department is friable in order to determine whether Respondent openly accumulated ACM. There is no statutory definition of "open accumulation." Within its statutory authority, the Department has defined "open accumulation" of ACM as "any accumulation, including interim storage, of friable asbestos-containing material or asbestos-containing waste material other than material securely enclosed and stored as required by this chapter." OAR 340-248-0010(32).

The Department alleges that the ACM found in the truck during Ms. Jacobs' inspection on May 3, 2003, and on the property during Mr. Hack's June 11, 2003 and August 22, 2003 inspections was openly accumulated, in violation of environmental rules. Mr. Palmer argues that the ACM found by Mr. Hack was not located on Mr. McClannahan's property, but this is not supported by the preponderance of reliable evidence in the record. Mr. Palmer further argues that he did properly package the ACM in the truck, and that he and his crew did not cause the ACM to be friable.

I must first determine whether the samples taken from the truck and from Mr. McClannahan's property were friable ACM. Both Ms. Jacobs and Mr. Hack testified that the samples they took were friable. Ms. Jacobs testified that with one hand, she easily broke off the sample she took from a larger piece of material. Mr. Hack testified that he believed that the material in the truck was friable based on his review of Ms. Jacobs' photographs, and on his discussion with her. He also relied on his experience with ACM. Mr. Hack determined that the material he saw on the ground looked friable. He further testified that this material was similar in appearance to the material Ms. Jacobs saw in the truck. The pieces on the ground, and in the truck, were irregularly broken. Mr. Hack's samples left a powdery residue inside of the sample bags.

ORS 468A.700(8) defines "friable asbestos material" as "any asbestos-containing material that hand pressure can crumble, pulverize or reduce to powder when dry." The Department's definition of "friable asbestos material" mirrors the statutory definition. OAR 340-248-0070(25).

The samples taken by the Department meet the definition of "friable asbestos material" because the samples were breakable by hand, and they contained 10 percent chrysotile asbestos. Respondent argued that, according to Department guidelines (Exhibit R4), the material was not friable because he and his crew removed the screen material in full, unbroken sheets. He misconstrues the Department's guidelines, however. According to Exhibit R4, "How to Remove NonFriable Cement Asbestos Products," cement-based ACM *can be* nonfriable, so long as it is handled correctly. If the ACM is "mishandled, damaged, or in badly weathered condition," if can be rendered friable. (Ex. R4.) Further, Respondent's argument is belied by the evidence, which demonstrates that the back of the truck was nearly full of badly broken pieces of screen. Moreover, Ms. Jacobs did not see *any* full, unbroken sheets during her inspection. The Department has established, therefore, that the samples they collected contained "friable asbestos material." And, because the ACM in the truck and on the ground was not "securely enclosed and stored," it was

openly accumulated in violation of environmental law. OAR 340-248-0205(1) ("No person may openly accumulate friable asbestos material or asbestos-containing waste material.")

Assessment of Civil Penalty

Finally, Mr. Palmer argues that the Department, not Respondent, should be penalized.

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 a matrix and formula contained in OAR 340-012-0045.

In this case, the Department determined that Respondent is liable for $9,600 in civil penalties based on Respondent's open accumulation of ACM. The Department did not seek a penalty for allowing unlicensed contractors to perform an asbestos abatement project. The penalty was 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."

Because the violation had the potential for public exposure to asbestos, or to the release of asbestos into the environment, the Department determined that the based penalty (BP) should be $6,000.[11] The Department's determination of this factor was correct.

The Department also determined that the P and H factors should be assigned values of 0. The Department further determined that the O factor should be assigned a value of 2 because the open accumulation violation existed for more than one day. This is supported by the evidence in the record. The Department concluded that the R factor should be assigned a value of 2 because Respondent was negligent in committing this violation. I agree. Respondent knew that the screen panels contained asbestos, yet he allowed the badly broken screen tiles to be piled in the back of a truck rather than properly and securely packaging the ACM. And, Respondent left ACM material at the work site, which was discovered during Mr. Hack's inspections on June 11, 2003 and August 22, 2003. The Department further determined that the C factor should be assigned a value of 2 because Respondent was uncooperative and did not take reasonable steps to correct or minimize the effects of the violation. This is evidenced by Respondent's failure to respond to the two NONs, and its failure to hire an asbestos abatement contractor within the time set by the Department. Finally, the Department had insufficient information to determine that Respondent realized an economic benefit, [12] so the EB factor was assigned a value of 0.

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[11] According to OAR 340-012-0050(1)(q), "Storage or accumulation of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which causes a potential for public exposure to asbestos or release of asbestos into the environment" is a Class 1 violation. This violation was determined to be major (rather than minor or moderate) because the amount of asbestos openly accumulated was more than 160 square feet. OAR 340-012-0090(1)(d)(A). This Class 1 major magnitude violation is assigned a base penalty of $6,000. OAR 340-012-0042(1)(a).

[12] An economic benefit is "the monetary benefit that an entity gained by not complying with the law." ORS 468.130(2)(h) authorizes the Department to consider "any relevant rule of the commission" in

Based on this record, the civil penalty assessment of $9,600[13] is warranted.

PROPOSED ORDER

I propose that the Board issue the following order:

Respondent is subject to a civil penalty in the amount of $9,600.

Randolph Fraser / for
Andrea H. Sloan, Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: May 28, 2004

APPEAL RIGHTS

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

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

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

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calculating the economic benefit. The Department is required to include in its penalty assessments an "approximated dollar sum of the economic benefit." OAR 340-012-0045(1)(c)(F). The Department "may use the U.S. Environmental Protection Agency's BEN computer model" to calculate the economic benefit component of a penalty assessment. OAR 340-012-0045(1)(c)(F)(iii).

[13] Penalty = BP + [0.1 x BP) x (P + H + O + R + C)] + EB
= $6,000 + [(0.1 x $6,000) x (0 + 0 + 2 + 2 + 2)] + $0
= $6,000 + ($600 x 6) = $0
= $6,000 + $3,600 + $0
= $9,600

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

CERTIFICATE OF SERVICE

I certify that on May 28, 2004, I served the attached Proposed and Final Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

PALMER & SONS CONSTRUCTION INC
32218 STANFIELD MEADOWS RD
STANFIELD OR 97875

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7002 2410 0001 7411 0998

BRYAN SMITH
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

DEBORAH NESBIT
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL

Ann Redding

Ann Redding, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

Oregon
Theodore R. Kulongoski, Governor

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

July 7, 2004

Via Certified Mail

Denis Palmer
32218 Stanfield Meadows Rd.
Stanfield, OR 97875

RE: AQ/AB-ER-03-128

Dear Mr. Palmer:

On June 25, 2004, 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 26, 2004. 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 Bryan Smith, 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: Bryan Smith, Oregon Department of Environmental Quality

SENDER: COMPLETE THIS SECTION

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

1. Article Addressed to:

Denis Palmer
32218 Stanfield Meadows Road
Stanfield, OR 97875

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) [Denis Palmer] C. Date of Delivery

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

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

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7002 2410 0002 2228 1175

PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540

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Sent To Denis Palmer
Street, Apt. or PO Box N 32218 Stanfield Meadows Road
City, State, Z Stanfield, OR 97875

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.

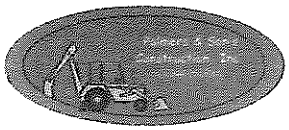
(c) Reply Brief: Each participant will have 20 days from the date of filing of a Respondent's brief, in which to file with the Commission and serve upon each participant a reply brief and proof of service.

(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



MILLENNIUM HOME BUILDER

Palmers & Son's Construction, Inc.

CCB # 151885

Dear Sirs,

I am requesting a review in the matter concerning Palmers & Sons Construction as no one from my company was allowed to witnesse the inspection done, and all testimonies were ignored. I have all the information as well as witnesses who will verifing that this information is correct, and also my personal testimony.

Denis Palmer

32218 Stanfield Meadows Rd. • Stanfield, OR • 97875 • (541) 449-3556 • fax (541) 449-3515

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

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
PALMERS & SONS CONSTRUCTION INC.,	) OAH Case No. 113025
Respondent,	) Agency Case Number AQ/AB-ER-03-128
	) Umatilla County

HISTORY OF THE CASE

On September 9, 2003, the Department of Environmental Quality (Department) issued a Notice of Assessment of Civil Penalty (Notice) to Respondent Palmers & Sons Construction, Inc. The Notice alleged that Respondent violated ORS 468A.715(1),[1] OAR 340-248-0110(2)[2] and 340-248-0205(1).[3]

On September 25, 2003, Respondent requested a hearing, which was held on March 4, 2004, in Pendleton, Oregon. Andrea H. Sloan, from the Office of Administrative Hearings, presided as the Administrative Law Judge (ALJ). Denis L. Palmer appeared in person as the registered agent for Respondent, and testified at the hearing. Environmental Law Specialist Bryan Smith represented the Department. Witnesses for the Department were Tom Hack and Patty Jacobs. The record closed on April 15, 2004 following submission of closing briefs.

ISSUES

(1) Whether Respondent allowed unlicensed contractors to perform an asbestos abatement project on a facility it operated.

(2) Whether Respondent allowed the open accumulation of asbestos-containing material.

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[1] ORS 468A.715 provides as follows:

> (1) Except as provided in subsection (2) of this section, an owner or operator of a facility containing asbestos shall require only licensed contractors to perform asbestos abatement projects.
>
> (2) A facility owner or operator whose own employees maintain, repair, renovate or demolish the facility may allow the employees to work on asbestos abatement projects only if the employees comply with the training and certification requirements established under ORS 468A.730.

[2] OAR 340-248-0110(2) provides that "An owner or operator of a facility may not allow any persons other than those employees of the facility owner or operator who are appropriately certified or a licensed asbestos abatement contractor to perform an asbestos abatement project in or on that facility."

[3] OAR 340-248-0205(1) provides that "No person may openly accumulate friable asbestos material or asbestos-containing waste material."

(3) If so, whether the civil penalty assessment calculated by the Department is appropriate.

EVIDENTIARY RULINGS

Department Exhibits A1 through A11 and Respondent's Exhibits R1 through R9 were admitted into the record.

CREDIBILITY DETERMINATION

There is a significant discrepancy between the testimony of the Department's two witnesses, and that of Mr. Palmer. Because these discrepancies concern material facts, I must resolve these differences in order to make findings of fact, which must be based on reliable evidence. "Irrelevant, immaterial or unduly repetitious evidence shall be excluded * * *." ORS 183.450(1).

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002), *citing Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979) *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part). If an ALJ declines to find in accordance with evidence because it comes from a source that the ALJ finds mistaken or untruthful, then an express finding of such fact should be made. *See Dennis v. Employment Division*, 302 Or 160 (1986).

In this case, Mr. Palmers testimony was, in many instances, inconsistent, improbable and incredible. He changed his mind several times about what he loaded into the truck, and when it was loaded. For example, he insisted that, at the time of Ms. Jacobs' inspection, the screen material was largely intact on top of a black tarp and underneath a framework of timber that was very close to the truck. I find it unlikely that Ms. Jacobs, a trained professional, would not see a timber framework that was roughly 100 by 60 feet in size, within a few yards of the truck she was inspecting. At other times, he testified that by the time Ms. Jacobs' arrived, he and his wife had loaded all but a few broken screen panels into the truck. In his summation, Mr. Palmer acknowledged that his memory may have been somewhat faulty when he argued that "[o]nes [sic] memory may not recall all the details but pictures cannot lie * * *." Despite his assertion that the pictures accurately reflected the scene at the time of Ms. Jacobs' inspection, the relevant pictures, R3-T and U, are dated, "May 5," yet Mr. Palmer insists that these photographs were actually taken on May 3, the date of the inspection. At one point he testified that these photographs were taken *after* Ms. Jacobs left the worksite, and he also testified that these photographs were taken *before* Ms. Jacobs arrived. I am not persuaded, therefore, that Mr. Palmers photographs cure the discrepancies in his testimony. Indeed, the photographs highlight the many inconsistencies in Mr. Palmers testimony. I also consider that Mr. Palmer, as the owner and president of Palmers & Sons Construction, has a substantial financial stake in the outcome of this hearing. There is no evidence to establish, or reason to suspect that the Department or its witnesses had a similar stake.

Based on the totality of the evidence, and my evaluation of the witnesses' testimony, I conclude that Mr. Palmers testimony is not reliable. When there is a discrepancy between Mr. Palmers testimony and that of the other witnesses, I will base my findings of fact on the other witnesses' testimony.

FINDINGS OF FACT

(1) William McClannahan is the owner of property located on Theater Lane, off of Highway 395, in Hermiston, Umatilla County, Oregon. The property is commonly referred to as the Hermiston Drive-In Theater. (Ex. A3 and testimony of Hack.)

(2) The drive-in consisted of a large screen (approximately 60 feet high by 100 feet wide, including a ten foot "skirt" at the bottom of the screen), a concession building, and a projection building. Throughout the years, a few screen panels were replaced with panels that did not contain asbestos, although the majority of the screen was made up of the original panels. In recent years, the theater screen was not maintained and experienced weathering and deterioration. As a result, some of the screen's panels broke off and fell to the ground. (Testimony of Palmer, Hack and Jacobs.)

(3) Denis L. Palmer, owner of Palmers & Sons Construction (Respondent), Inc, a local company, had previously done work for Mr. McClannahan. On or about May 1, 2003, Mr. McClannahan entered into a contract with Respondent for demolition and removal of the screen. Mr. Palmer wrote the contract that both he and Mr. McClannahan signed. Mr. McClannahan contracted to pay Respondent $5,000, and agreed that "any and all usable materials removed become the property of Palmers and Son's Inc." (Ex. A4-3; testimony of Palmer.)

(4) On May 7, 2003, Patty Jacobs, an environmental engineer with the Department,[4] received a call from Frank Messina, with the Department's air quality program office in Bend. Mr. Messina reported receiving an anonymous complaint about an asbestos project in Hermiston. Mr. Messina asked Ms. Jacobs to investigate the complaint because she was much closer to Hermiston than he was. (Testimony of Jacobs.)

(5) During the early afternoon of May 7, 2003, Ms. Jacobs arrived at the drive-in property with a digital camera. She noticed a large truck and about three or four people near the truck, which was located in one of the back corners of the property. She approached and contacted Mr. Palmer, who identified himself as the foreman on the project. Mr. Palmer explained that he was demolishing and removing the movie screen, which he said was about 60 feet by 100 feet in size. Ms. Jacobs observed a large black plastic tarp on the ground near the truck. She saw piles of broken lumber on the tarp and pry bars nearby. Ms. Jacobs did not see any configurations of lumber that looked like intact supports for the screen. Ms. Jacobs also saw a large amount of broken gray and white material, which she understood to be pieces of the theater screen, in the

[4] Ms. Jacobs joined the Department's Pendleton office on April 22, 2003. Her previous experience was as an engineer responsible for overseeing removal of asbestos from the Hyperion Waste Water Treatment Plant in Los Angeles, California. (Testimony of Jacobs.)

bed of the truck. The pieces of screen were of varying size,[5] but Ms. Jacobs did not see a stack of unbroken screen panels. She estimated that there was approximately 120 square feet of broken screen material in the bed of the truck. Mr. Palmer told Ms. Jacobs that this was the "last load," and that they were almost done with the project. Mr. Palmer also told Ms. Jacobs that the screen material had been tested by a laboratory in Vancouver, Washington, and was found to contain nonfriable asbestos-containing material (ACM). Because Mr. Palmer indicated that this was the "last load," Ms. Jacobs surmised that other "loads" had already been taken to the dump. (Testimony of Jacobs.)

(6) Ms. Jacobs was concerned that the pieces of screen in the truck were actually friable ACM because they were irregularly broken.[6] The pieces of screen material in the truck were not broken along seams. Mr. Palmer gave Ms. Jacobs permission to take a sample of the screen material from the back of the truck. Ms. Jacobs reached into the truck and broke off a corner piece of the screen material by hand. She saw fibrous particles on the piece she broke off, and on some of the other pieces in the truck. Before she left, Ms. Jacobs took several digital photographs. The screen material in the truck was not bagged or labeled as ACM. Ms. Jacobs could see that the truck was lined with a tarp, but the ACM in the truck was exposed to the environment. (Ex. A2-1-5 and testimony of Jacobs.)

(7) Ms. Jacobs did not order Mr. Palmer to stop work on the theater site because it was clear to her that most of the screen had already been removed before she arrived. And, Mr. Palmers statement that the truck contained the "last load" confirmed her belief that the job was mostly complete. Ms. Jacobs did not see any screen material other than what was in the truck. Ms. Jacobs was new to the job and did not know whether she had authority to shut down the work site. The material in the truck was not wet, and Ms. Jacobs did not see a source for water near the truck. Ms. Jacobs advised Mr. Palmer to securely wrap and label the material. She further encouraged Mr. Palmer to wet the material. Ms. Jacobs knew that requiring Mr. Palmer to remove the pieces of screen from the truck could increase the risk of exposure to friable ACM to the people nearby and to the environment. (Ex. A2-5 and testimony of Jacobs.)

(8) Ms. Jacobs returned to her office with the sample. She contacted Mr. Messina, told him what she had seen and sent him the sample. Mr. Messina then sent the sample to the Department's laboratory for analysis. The laboratory determined that the sample taken from the drive-in contained 10 percent chrysotile asbestos. (Exs. A1, A2-6 and testimony of Jacobs and Hack.)

(9) The ACM in the truck had the potential for public exposure to asbestos or for the release of asbestos into the environment. (Testimony of Jacobs.)

(10) Tom Hack, a natural resource specialist for the Department, spoke with Ms. Jacobs shortly after May 12, 2003. Ms. Jacobs showed Mr. Hack the photographs she had taken at the

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[5] The pieces seen by Ms. Jacobs ranged from two inches by two inches, to three feet by four feet. (Testimony of Jacobs.)

[6] Ms. Jacobs does not have specific training or experience in identifying asbestos, but she suspected, because the pieces in the truck were irregularly broken and dusty and based on what Mr. Palmer had told her, that the ACM was friable. (Testimony of Jacobs.)

drive-in and explained what she had seen during her May 7, 2003 inspection. Mr. Hack reviewed the laboratory analysis report. Based on the photographs and on his training and experience, Mr. Hack believed that the ACM in the truck was friable because the pieces of material were badly broken. If the material had been intact, it would not have been friable; the demolition of the screen rendered the ACM friable. Mr. Hack learned that Denis Palmer was in charge of the demolition project, that Maurice McDaniel was the job foreman, and that Atkinson Reforestation, a temporary labor service, provided workers for the job. Mr. Palmer asked Mr. Atkinson to send workers with pry bars to the job site. Mr. Atkinson provided Mr. Hack with the names of six workers from his company that had worked for Mr. Palmer and Mr. McDaniel on the drive-in demolition job. Mr. Hack confirmed, by checking Department databases,[7] that neither Mr. Palmer nor Mr. McDaniel were licensed asbestos abatement contractors, and that none of the six workers provided by Atkinson Reforestation were certified asbestos abatement workers. Mr. McClannahan sent Mr. Hack a copy of the contract with Respondent for demolition of the drive-in screen. Atkinson Reforestation billed Respondent for the laborer's time between May 2 and May 7, 2003. (Exs. A3, A6 and testimony of Hack.)

(11) On June 11, 2003, Mr. Hack inspected the drive-in property. The site was cleaned "fairly well," but he saw approximately 60 square feet of broken screen material on the ground in the southeast corner of the property. The material Mr. Hack saw was comparable to the material Ms. Jacobs saw in the truck during her inspection on May 7, 2003. Mr. Hack concluded that the material on the ground looked friable. He took digital photographs and collected two samples of the material. The material was irregularly broken and left powdery residue inside of the sample bags. Mr. Hack submitted the samples to the Department's laboratory, which determined that the samples each contained 10 percent chrysotile asbestos. Mr. Hack believed that the ACM he saw on the ground had the potential to expose the public to asbestos, or to release asbestos into the environment. (Exs. A7 and A8 and testimony of Hack.)

(12) Following his June 11, 2003 inspection, Mr. Hack sent Respondent a Notice of Noncompliance (NON) on June 18, 2003, advising Respondent that it was in violation of Oregon Environmental law by hiring unlicensed abatement contractors for an asbestos abatement project. Respondent was told to hire licensed abatement contractors to properly abate the remaining ACM no later than June 30, 2003. (Ex. A8 and testimony of Hack.)

(13) Respondent did not have the remaining ACM properly abated because the Department never received notification from a licensed asbestos abatement contractor that Respondent had hired the contractor to abate the ACM.[8] (Testimony of Hack.)

(14) On July 1 and July 3, 2003, Becky Hillwig, an inspector with the Oregon Occupational Safety and Health Administration (OSHA), inspected the drive-in property.

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[7] The Department maintains a database of all licensed abatement contractors and all certified abatement workers. A certified worker is required to complete 40 hours of asbestos abatement training. A licensed contractor must also complete 80 hours of supervisory training. (Testimony of Hack.)

[8] OAR 340-248-0260 provides, in relevant part, as follows: "written notification of any asbestos abatement project must be provided to the Department on a form prepared by and available from the Department, accompanied by the appropriate fee. The notification must be submitted by the facility owner or operator or by the contractor * * *."

Mr. Hack contacted OSHA because workers had been exposed to ACM during the screen demolition job. Ms. Hillwig also found broken screen material on the ground. Ms. Hillwig took three samples of the material, which was tested by the Oregon Department of Consumer and Business Services Occupational Health Laboratory on July 24, 2003. The laboratory determined that each of the samples contained between 10 and 20 percent chrysotile asbestos. (Ex. A10 and testimony of Hack.)

(15) On August 22, 2003, Mr. Hack returned to the drive-in property and determined that the ACM he had seen earlier was still on the ground in the southeast corner of the drive-in property. (Testimony of Hack.)

(16) On August 27, 2003, Mr. Hack sent a second NON, advising Respondent that it was in violation of Oregon Environmental law by continuing the open accumulation of ACM by not immediately hiring a licensed asbestos abatement contractor to remove the material. Respondent never contacted the Department following this second NON. (Ex. A11 and testimony of Hack.)

(17) In most cases, cement asbestos products are nonfriable "unless mishandled, damaged, or in badly weathered condition." If the asbestos material is crushed, broken, dropped, thrown, or stepped on, it becomes friable. (Exs. R4 and R5.)

CONCLUSIONS OF LAW

(1) Respondent hired unlicensed asbestos abatement contractors to perform an asbestos abatement project on the drive-in property.

(2) Respondent allowed the open accumulation of asbestos-containing materials.

(3) The Department's civil penalty assessment is appropriate.

OPINION

Mr. Palmer argued that the Department's action is based on fabrication, that it misconstrued the facts, and violated the public trust. He further argues that the ACM was not friable because he and his workers did not break the screen sheets, so there was no abatement issue. The Department counters that the actions of Mr. Palmer and his crew rendered the asbestos friable, and that this was an asbestos abatement project, requiring a licensed asbestos abatement contractor.

"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 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). In this case, the Department has the burden. After reviewing the record, I conclude that the Department has met its burden.

Asbestos abatement project

The legislature has given the Environmental Quality Commission authority to "adopt such rules and standards as it considers necessary and proper in performing the functions vested by law in the commission." ORS 468A.020(1). In addition, ORS 468A.707 requires the Environmental Quality Commission to promulgate rules to "(a) Establish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training." Within this authority, the Environment Quality Commission developed rules relating to environmental quality issues, including rules relating to asbestos abatement and the definition of applicable statutory terms.

The Department defines an "asbestos abatement project" as follows:

> [A]ny demolition, renovation, repair, construction or maintenance activity of any public or private facility that involves the repair, enclosure, encapsulation, removal, salvage, handling, disturbance, or disposal of any asbestos containing material with the potential of releasing asbestos fibers from asbestos containing material[9] into the air.

OAR 340-248-0010(6).

The record in this case establishes that Respondent was hired by Mr. McClannahan to demolish and remove the drive-in theater screen on Mr. McClannahan's property. At the time of the project, Mr. Palmer knew that the screen material contained asbestos, although he believed that it was nonfriable. Department testing established that the samples taken by Ms. Jacobs and Mr. Hack were, in fact, ACM. Respondent was not a licensed asbestos abatement contractor, and none of the workers it hired through Atkinson Reforestation were licensed asbestos abatement workers. Generally, licensed abatement contractors and workers must conduct all asbestos abatement projects. The Department has carved out exceptions to this requirement at OAR 340-248-0250(2),[10] but based on the facts adduced at hearing, the demolition of the drive-in screen does not qualify as an exception under this rule. The demolition of the screen was, therefore, an asbestos abatement project.

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[9] "Asbestos-containing material" is defined at OAR 340-248-0010(8) to include "any material, including particulate material, that contains more than one-percent of asbestos as determined using the method specified in 40 CFR Part 763 Appendix E, Subpart E, Section 1, Polarized Light Microscopy."

[10] OAR 340-248-0250(2) exempts the following projects from the general requirements OAR 340 division 248: asbestos abatement conducted within a single private residence; abatement conducted outside of a single property if the residence is not a rental property, a commercial business, or intended to be demolished; residential buildings with less than four dwelling units (constructed after 1987); projects removing "mastics and roofing products that are fully encapsulated with a petroleum-based binder and are not hard, dry, or brittle;" projects involving removal of less than three square feet or three linear feet of ACM; and projects to remove ACM that are sealed "from the atmosphere by a rigid casing;"

For this particular violation, I do not have to decide whether the ACM samples were friable because friability is not required within the definition of an asbestos abatement project.

Open accumulation of ACM

I do, however, need to decide whether the material sampled by the Department is friable in order to determine whether Respondent openly accumulated ACM. There is no statutory definition of "open accumulation." Within its statutory authority, the Department has defined "open accumulation" of ACM as "any accumulation, including interim storage, of friable asbestos-containing material or asbestos-containing waste material other than material securely enclosed and stored as required by this chapter." OAR 340-248-0010(32).

The Department alleges that the ACM found in the truck during Ms. Jacobs' inspection on May 3, 2003, and on the property during Mr. Hack's June 11, 2003 and August 22, 2003 inspections was openly accumulated, in violation of environmental rules. Mr. Palmer argues that the ACM found by Mr. Hack was not located on Mr. McClannahan's property, but this is not supported by the preponderance of reliable evidence in the record. Mr. Palmer further argues that he did properly package the ACM in the truck, and that he and his crew did not cause the ACM to be friable.

I must first determine whether the samples taken from the truck and from Mr. McClannahan's property were friable ACM. Both Ms. Jacobs and Mr. Hack testified that the samples they took were friable. Ms. Jacobs testified that with one hand, she easily broke off the sample she took from a larger piece of material. Mr. Hack testified that he believed that the material in the truck was friable based on his review of Ms. Jacobs' photographs, and on his discussion with her. He also relied on his experience with ACM. Mr. Hack determined that the material he saw on the ground looked friable. He further testified that this material was similar in appearance to the material Ms. Jacobs saw in the truck. The pieces on the ground, and in the truck, were irregularly broken. Mr. Hack's samples left a powdery residue inside of the sample bags.

ORS 468A.700(8) defines "friable asbestos material" as "any asbestos-containing material that hand pressure can crumble, pulverize or reduce to powder when dry." The Department's definition of "friable asbestos material" mirrors the statutory definition. OAR 340-248-0070(25).

The samples taken by the Department meet the definition of "friable asbestos material" because the samples were breakable by hand, and they contained 10 percent chrysotile asbestos. Respondent argued that, according to Department guidelines (Exhibit R4), the material was not friable because he and his crew removed the screen material in full, unbroken sheets. He misconstrues the Department's guidelines, however. According to Exhibit R4, "How to Remove NonFriable Cement Asbestos Products," cement-based ACM *can be* nonfriable, so long as it is handled correctly. If the ACM is "mishandled, damaged, or in badly weathered condition," if can be rendered friable. (Ex. R4.) Further, Respondent's argument is belied by the evidence, which demonstrates that the back of the truck was nearly full of badly broken pieces of screen. Moreover, Ms. Jacobs did not see *any* full, unbroken sheets during her inspection. The Department has established, therefore, that the samples they collected contained "friable asbestos material." And, because the ACM in the truck and on the ground was not "securely enclosed and stored," it was

openly accumulated in violation of environmental law. OAR 340-248-0205(1) ("No person may openly accumulate friable asbestos material or asbestos-containing waste material.")

Assessment of Civil Penalty

Finally, Mr. Palmer argues that the Department, not Respondent, should be penalized.

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 a matrix and formula contained in OAR 340-012-0045.

In this case, the Department determined that Respondent is liable for $9,600 in civil penalties based on Respondent's open accumulation of ACM. The Department did not seek a penalty for allowing unlicensed contractors to perform an asbestos abatement project. The penalty was 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."

Because the violation had the potential for public exposure to asbestos, or to the release of asbestos into the environment, the Department determined that the based penalty (BP) should be $6,000.[11] The Department's determination of this factor was correct.

The Department also determined that the P and H factors should be assigned values of 0. The Department further determined that the O factor should be assigned a value of 2 because the open accumulation violation existed for more than one day. This is supported by the evidence in the record. The Department concluded that the R factor should be assigned a value of 2 because Respondent was negligent in committing this violation. I agree. Respondent knew that the screen panels contained asbestos, yet he allowed the badly broken screen tiles to be piled in the back of a truck rather than properly and securely packaging the ACM. And, Respondent left ACM material at the work site, which was discovered during Mr. Hack's inspections on June 11, 2003 and August 22, 2003. The Department further determined that the C factor should be assigned a value of 2 because Respondent was uncooperative and did not take reasonable steps to correct or minimize the effects of the violation. This is evidenced by Respondent's failure to respond to the two NONs, and its failure to hire an asbestos abatement contractor within the time set by the Department. Finally, the Department had insufficient information to determine that Respondent realized an economic benefit, [12] so the EB factor was assigned a value of 0.

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[11] According to OAR 340-012-0050(1)(q), "Storage or accumulation of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which causes a potential for public exposure to asbestos or release of asbestos into the environment" is a Class 1 violation. This violation was determined to be major (rather than minor or moderate) because the amount of asbestos openly accumulated was more than 160 square feet. OAR 340-012-0090(1)(d)(A). This Class 1 major magnitude violation is assigned a base penalty of $6,000. OAR 340-012-0042(1)(a).

[12] An economic benefit is "the monetary benefit that an entity gained by not complying with the law." ORS 468.130(2)(h) authorizes the Department to consider "any relevant rule of the commission" in

Based on this record, the civil penalty assessment of $9,600[13] is warranted.

PROPOSED ORDER

I propose that the Board issue the following order:

Respondent is subject to a civil penalty in the amount of $9,600.

Randolph Fraser / for
Andrea H. Sloan, Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: May 28, 2004

APPEAL RIGHTS

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

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

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

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calculating the economic benefit. The Department is required to include in its penalty assessments an "approximated dollar sum of the economic benefit." OAR 340-012-0045(1)(c)(F). The Department "may use the U.S. Environmental Protection Agency's BEN computer model" to calculate the economic benefit component of a penalty assessment. OAR 340-012-0045(1)(c)(F)(iii).

[13] Penalty = BP + [0.1 x BP) x (P + H + O + R + C)] + EB
= $6,000 + [(0.1 x $6,000) x (0 + 0 + 2 + 2 + 2)] + $0
= $6,000 + ($600 x 6) = $0
= $6,000 + $3,600 + $0
= $9,600

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

CERTIFICATE OF SERVICE

I certify that on May 28, 2004, I served the attached Proposed and Final Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

PALMER & SONS CONSTRUCTION INC
32218 STANFIELD MEADOWS RD
STANFIELD OR 97875

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7002 2410 0001 7411 0998

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State of Oregon
Department of Environmental Quality Memorandum

Date: November 18, 2004

To: Environmental Quality Commission

From: Stephanie Hallock, Director S. Hallock

Subject: Agenda Item D, Rule Adoption: Enforcement Procedure and Civil Penalties, OAR Chapter 340, Divisions 12, 150 and 200, December 9, 2004, EQC Meeting

Department Recommendation

The Department of Environmental Quality (DEQ, Department) recommends that the Environmental Quality Commission (EQC, Commission) amend OAR Chapter 340, Divisions 12, 150 and 200 by adopting the proposed rules as presented in Attachments A-2, A-3, and A-4, respectively.

Background and Need for Rulemaking

OAR Chapter 340, Division 12 explains the agency's enforcement policies and processes and provides for calculation of civil penalties for environmental violations referred for formal enforcement. Whether a violation is referred for formal enforcement is determined by the Department's inspection priorities, the history of the violator and other factors set forth in the Department's policy document, "Enforcement Guidance for Field Staff." The guidance manual assists staff in determining when a violation should result in issuance of a Warning Letter or a Pre-Enforcement Notice, rather than formal enforcement. The Department is currently revising the guidance manual so that it will be ready to implement when these proposed rules become effective.

Division 12 was first adopted in 1989 to implement the requirement contained in ORS 468.130(1) that the Commission adopt by rule, schedules establishing the amount of civil penalties that may be assessed for environmental violations. Those "schedules" are set forth in Division 12 in the form of the civil penalty formula. The statute describes the factors that the Commission must consider in imposing a penalty pursuant to the schedules. Those factors are included in Division 12 as aggravating and mitigating factors and are assigned values depending on the facts of each case.

Before 1989, the amount of civil penalty was determined on a case-by-case basis. Since 1989, Division 12 has provided a detailed civil penalty calculation process intended to ensure that violators are treated consistently and objectively. In 2001, the Department began a comprehensive review and update of Division 12 to ensure that we continue to provide an equitable, consistent, and understandable enforcement program.

As a result of that review, the Department proposed initial amendments to Division 12 in January 2004. During the public comment period, the Department

received comments that the proposed rules were too complex and the proposed changes were too sweeping. In response, the Department has divided the rulemaking into two phases. The rulemaking package presented in this staff report represents Phase I, which primarily includes the following proposed changes:

Summary of Proposed Rule Changes

- Clarifying the differences between informal and formal enforcement processes.
- Separately listing some sub-program violations to make the rules easier to use.
- Modifying the penalty matrices, including increasing the values of the $10,000 penalty matrix (which is now the $8,000 penalty matrix), adding a new intermediate $6,000 penalty matrix , increasing the values for the $2,500 penalty matrix, decreasing the values for the $1,000 penalty matrix and eliminating the $500 penalty matrix. The matrices have also been modified so that, in most cases, small businesses and other smaller permitted sources fall into a lower penalty matrix.
- Replacing the notice of noncompliance process with two types of notification (e.g., Warning Letters and Pre-Enforcement Notices).
- Amending a rule from DEQ's Undergrou nd Storage Tanks (UST) program (OAR 340-150-0250) regarding the expedited enforcement process to provide for assessment of a field penalty of $50 for all Class II violations. (Some Class II violations are currently subject to a field penalty of $75.) The proposed amendment would also allow some Class I UST violations to be handled via the expedited enforcement process.
- Additional rule changes are proposed to streamline the rules and to reorganize them to more closely track the penalty calculation process.

Effect of Rule

Some penalties will be lower as a result of base penalty changes; others (especially for the larger, potentially more knowledgeable violators) will be higher. Smaller or potentially less knowledgeable violators are assigned to lower penalty matrices. These amendments, if adopted, will be submitted to the U.S. Environmental Protection Agency (EPA) as a revision to the State Implementation Plan, which is a requirement of the Clean Air Act (see Attachment A-4).

Commission Authority

The Commission has authority to take this action under ORS 468.130(1) and ORS 468.020(1), as well as ORS 459.376(1); ORS 459.995; 465.900; ORS 466.210; ORS 466.990; ORS 466.992; ORS 466.994; ORS 468.020(1); ORS 468.035(1)(j);

ORS 468.045(1)(c); 465.900; ORS 466.210; ORS 466.990; ORS 466.992; ORS 466.994; ORS 783.992.

Stakeholder Involvement

The Department established an external Advisory Group in January 2003, after an internal rulemaking team narrowed the scope of issues and developed an initial draft of proposed amendments. The Advisory Group was comprised of thirteen regular members and two auxiliary members. (Attachment B provides the Advisory Group Membership List.) The regular members represented large and small businesses, small cities, public water management agencies, the Associated Oregon Industries and environmental groups. The auxiliary members represented Lane Regional Air Pollution Agency and the EPA. The Advisory Group met eight times, from February 2003 to September 2004. The Advisory Group's role was to review proposed amendments and provide guidance on how the enforcement process and civil penalties can be equitable while achieving compliance and deterrence.

An internal DEQ rulemaking team drafted proposed amendments to the rules and provided them to the Advisory Group for review. The Advisory Group provided comments at meetings with the Department. Based on these external and internal discussions, a final rule package was proposed for public review this summer.

Public Comment

A public comment period on the proposed Phase I rule package was held from August 2, 2004 to September 10, 2004 (extended from the initial September 1, 2004 deadline upon request), and included public hearings in Salem and Portland. The Department held informational briefings in conjunction with both of the public hearings. Ten people attended the public hearing/informational briefing in Portland and one person attended in Salem. None of the attendees testified at the hearings. (Attachment C provides the Presiding Officer's Report.) Ten stakeholders submitted written comments during the public comment period. The Department responded to these comments by either incorporating suggested changes or explaining why they were not incorporated. (Attachment D provides the Summary of Public Comments and Responses.)

Key Issues

The key issues raised from the public comments:
1) Should the Department make issuance of Warning Letters and Pre-Enforcement Notices mandatory or discretionary?

Recommendation: The Department proposes to return to language similar in intent to that under the current rules. The Department will not send a

warning letter or pre-enforcement notice unless such a notice will further the Department's objective of achieving compliance and deterrence. An example where such a notice would not contribute toward compliance or deterrence is when the violation is caused by a catastrophic weather event or there is an unavoidable accident. The Department will set forth to the extent possible in the enforcement guidance manual those rare circumstances in which the Department will not issue an informal notice when there is evidence that a violation has occurred.

2) Should the Department provide in rule that the agency must issue and resolve formal enforcement actions within a certain amount of time?

Recommendation: The Department proposes to provide in section OAR 340-012-0026 that it will endeavor to issue a formal enforcement action within six months from the time the investigation of a referred violation is complete. The Department proposes to delete proposed OAR 340-012-0160(5), which clarified that the Director has the discretion not to proceed with a formal enforcement action if the department has created excessive delay in issuing the formal enforcement action. The Department agrees with the commentor that such a provision, which does not change the current scope of the Director's discretion, may encoura ge appeals on the issues of whether the delay was " excessive" and who caused the delay.

3) Should the rules provide that the Department must formally notify the recipient of a Warning Letter or Pre-Enforcement Notice if and when the cited violations have been resolved?

Recommendation: Clear written guidance will be provided to staff that a respondent should be notified in writing when a violation has been corrected or resolved. Templates will be developed for this purpose and will be included as part of the centralized compliance database being developed concurrently with implementation of these proposed rules. Use of these templates will be triggered automatically when records indicate a violation has been corrected or resolved. In addition, the Department has added a sentence to the Warning Letter and Pre-Enforcement Notice sections (0038(1) and (2)) indicating that a Warning Letter or Pre-Enforcement Notice will be amended or withdrawn if information is provided that shows the conduct did not occur.

4) Should the rule provide that the "P" factor (an aggravatin g factor reflecting

"prior si gnificant actions") will be calculated so that only those prior violations by the same facility and/or in the same environmental media are counted?

Recommendation: The Department will continue to aggravate the base penalty using the prior significant actions (i.e., meaning violations cited in prior formal enforcement actions) from all facilities owned or operated by the same corporation or entity within the state of Oregon. However, the specific violations that will be used for any potential penalty increase will include only those within the same media (i.e., land, air, water) as the violation(s) currently being penalized. This is less stringent than the current approach which counts prior significant actions in all media toward the aggravating factor of "P ."

5) Should the statewide Class I violation of "Su bmitting false, inaccurate or incomplete information to the Department" be narrowed to include only intentional submission of false information?

Recommendation: The Department has modified the rule by including the language that would have been in guidance only. The new violation language reads: "Submitting false, inaccurate or incomplete information to the Department where the submittal masked another separate violation, caused environmental harm, or caused the Department to misinterpret any substantive fact."

Next Steps

The proposed effective dates for the proposed rule changes are as follows:

1) Onsite Wastewater Treatment System violation classifications (OAR 340-012-0060) – March 1, 2005, to match the effective date of the proposed Onsite rules the Commission is considering at the December 10, 2004 meeting (agenda item K);
2) All remaining rule sections – June 1, 2005.

This will allow time for training of inspectors and technical assistance staff statewide, and for the development of a statewide compliance database.

Implementation of these rules will be informed by a Department enforcement guidance document clarifying Department policies pertaining to referrals for formal enforcement, self-reporting and disclosure, confidentiality of documents, economic benefit, supplemental environmental projects, ability to pay, mutual agreements and orders, notices of permit violations and multiple day penalties. The Department will be developing templates for Warning Letters and Pre-enforcement Notices and will conduct statewide training of staff on the rule

changes and how to implement them (including the guidance policies and the new database). We estimate that six full time staff (6 FTE) will be invested in developing and conducting the training. Training will be conducted prior to the rules becoming effective on June 1, 2005. (See draft Implementation Plan provided in Attachment H.) A sample of the draft guidance governing program-specific enforcement referrals is provided in Attachment I for informational purposes (no action by the EQC is requested on this item).

In addition, the Department is developing a new statewide compliance database that will serve as a central repository for all compliance and enforcement data. If the rules are adopted, the Department will provide updated rule information to those who submitted comments. We will also issue a press release and draft an article for distribution to interested publications announcing and describing the rule adoption.

Attachments

A. Proposed Rule Revisions
   1. Outline of Rule Changes
   2. Proposed Division 12 Rule Revisions {redlined version}
   3. Proposed Division 150 Rule Revisions {redlined version}
   4. Proposed Division 200 Rule Revision {only legislative history will change}

B. Summary of Public Comments and Agency Responses
C. Advisory Committee Membership Roster
D. Presiding Officer's Report on Public Hearings
E. Relationship to Federal Requirements Questions
F. Statement of Need and Fiscal and Economic Impact
G. Land Use Evaluation Statement
H. Draft Implementation Plan
I. Sample Program Draft Enforcement Guidance for Field Staff (Asbestos Program)

Available Upon Request

1. Legal Notice of Hearing
2. Cover Memorandum from Public Notice
3. Written Comments Received

Approved:

Section: _____

Division: 

Report Prepared By:
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OUTLINE OF CHANGES PROPOSED IN RULE REVISIONS REGARDING ENFORCEMENT PROCEDURE AND CIVIL PENALTIES

340-012-0026 Policy
Amended

- Added explanations of the different components of the civil penalty equation (classification; magnitude; base penalty matrices; aggravating and mitigating factors; economic benefit).
- Added a statement indicating that the department shall endeavor to issue a formal enforcement action within six months from completion of the investigation of the violation.

340-012-0027 Rule Effective Date
New
Added effective date section to clarify which pieces of the rule will be effective on which dates.

340-012-0030 Definitions
Amended

- Clarifies the meaning of "formal enforcement action" and changes name of "Notice of Noncompliance" to "Warning Letters" and "Pre-Enforcement Notices," to avoid confusion by people who receive Warning Letters and Pre-Enforcement Notices and mistakenly assume they are party to a formal enforcement action.
- Clarifies definition and applicability of "prior significant action" to reflect longstanding agency practice that when a Respondent settles a formal enforcement action by paying a civil penalty, or pays a civil penalty without settlement, for one or more violations cited in a Notice, the remaining violations for which a civil penalty was not assessed or paid will be considered as an aggravating factor in any future formal enforcement actions.
- Changes the definition of "formal enforcement action" to include all proceedings for which a person is entitled to a contested case hearing.
- Adds a definition for "willful" which currently is used in the rules, but is not defined.
- Adds a definition for "residential owner-occupant," a category of violators that will be subject to a lower penalty matrix for some program violations.

340-012-0038 Warning Letters, Pre-Enforcement Notices and Notices of Permit Violations
Amended and renumbered from 340-012-0040

- Divides the former Notice of Noncompliance into two types of informal enforcement notices.
    - Specifies the purpose of each notice and the instances where each will be issued (Warning Letter to be issued when the violation is not anticipated to

be referred for formal enforcement; the Pre-Enforcement Notice is to be issued when violation is being referred for formal enforcement).
    - States definition and purpose of "Warning Letter" and "Pre-Enforcement Notice." Makes clear that Warning Letters, Pre-Enforcement Notices and Notices of Permit Violation are informal enforcement actions that are not subject to appeal and makes clear that alleged violator may present clarifying information regarding alleged violations.
    - States that if the department determines that the conduct identified in the Warning Letter or Pre-Enforcement Notice did not occur, the department will withdraw or amend the Warning Letter or Pre-Enforcement Notice, as appropriate, within 30 days.
- Clarifies the instances where a Notice of Permit Violation will be issued, to include only violations of non-federal requirements in programs that are federally delegable. Reflects amendment to ORS 468.126(1)(c) allowing public hearing in certain instances when a Notice of Permit Violation is issued.

340-012-0041 Formal Enforcement Actions
Amended

- Adds description of what a formal enforcement action entails (an order requiring a respondent to take certain actions within a specified time, civil penalty assessment and/or revocation of a permit).
- Adds Penalty Demand Notice to section.

340-012-0045 Civil Penalty Determination Procedure
Amended (same number and subject matter, but content changed and much of original content moved to -0130, -0145, -0150, -0162)

- Provides a brief description of the civil penalty calculation equation and moves details of each component to rule sections correlating to where in process each component is calculated.

340-012-0050 Air Quality Classification of Violations
Renumbered to -0054

340-012-0052 Noise Control Classification of Violations
Deleted

- Eliminates these violations because they are no longer enforced by the Department.

340-012-0053 Violations that Apply to all Programs
Added

- Creates new section that lists violations common to all programs, so violations do not need to be repeated for each program.

340-012-0060 On-Site Disposal Classification of Violations
Amended

- Adds provisions to reflect new program requirements.

340-012-0067 Underground Storage Tank (UST) Classification of Violations
Amended

- Violations of requirements related to UST cleanup (-0074) and heating oil tanks (-0079) have been moved to separate sections.

340-012-0068 Hazardous Waste Management and Disposal Classification of Violations
Amended

- Moves provisions related to dry cleaning moved to new rule section (-0097).
- Amended and renumbered 340-012-0068(1)(ii) "Violation of any TSD facility permit, provided that the violation is equivalent to any Class I violation set forth in these rules" to 340-012-0068(1)(hh) "Violation of any TSD facility permit condition related to the handling, management, treatment, storage or disposal of hazardous waste unless otherwise classified."

340-012-0074 Underground Storage Tank Cleanup Classification of Violations
Added new section

- These violations, which relate to releases from tanks, are separated out from the general UST violations (-0067) to make clear which violation classifications are applicable in a given case.

340-012-0079 Heating Oil Tank Classification of Violations
Added new section

- These violations, pertaining to heating oil tanks, are separated out from the general UST violations (-0067) to make clear which violation classifications are applicable in a given case.

340-012-0097 Dry Cleaning Classification of Violations
Added new section

- These violations are separated out from the hazardous waste violation classifications (-0068) to make clear which violation classifications are applicable in a given case.

340-012-0130 Determination of Violation Magnitude
Added new section that incorporates most of the language from former –0045(1)(a).

- Makes clear that if information is not reasonably available to determine the application of a selected magnitude, the Department will then make a general magnitude determination based on the information available.
- Adds a rebuttable presumption that allows the party to provide evidence to show a different magnitude should be applied in their case.

340-012-0140 Determination of Base Penalty
Renumbered from 340-012-0140

- Adds a new mid-range ($6,000) penalty matrix; provides additional differentiation of violations to be assigned to different matrices.
- Increases values in the $10,000 matrix (now called the $8,000 matrix).
- Provides a set penalty for Class III violations in each matrix.
- This matrix approach addresses equity while achieving specific deterrence based on who the violator is. Smaller or potentially less sophisticated violators are assigned to lower penalty matrices. Some penalties will be lower as a result of these base penalty determinations; others (for the larger, potentially more sophisticated violators) will be higher.

340-012-0145 Determination of Aggravating or Mitigating Factors
Amended

- Provides that if respondent's prior enforcement history results in aggravation of civil penalty, respondent's history of correcting prior violations cannot completely negate that aggravation unless the Respondent took extraordinary efforts to correct or minimize the impacts of the prior violations.
- Provide that only prior significant actions involving violation of the same media will be counted for the P factor.
- Provides for a greater range of options for respondent to get credit for addressing past violations.
- Increases penalty in relation to number of days of violation.
- Proposes clarifying language to the mental state factor.
- Provides that respondent can receive a broader range of credit for efforts to correct the current violation.
- Provides for a greater range of options under the occurrence factor (number of days or number of occurrences of the violation).

340-012-0150 Determination of Economic Benefit
Renumbered from 340-012-0045 and amended

- Provides that economic benefit will be calculated using the U.S. EPA's BEN model; use of the model is no longer discretionary.
- Makes clear that to determine the economic benefit the Department considers the benefit gained and the costs avoided or delayed as a result of noncompliance.

340-012-0155 Additional or Alternate Civil Penalties
Renumbered from 340-012-0049 and amended

- Adds civil penalty amounts to be assessed for failure to pay UST fee and for field penalties assessed in the pilot expedited enforcement program for Tanks.
- Adds alternate civil penalty amounts for ballast water violations as required in statute.
- Adds a civil penalty amount of at least $5,000 for air emission sources operating under the Western Backstop SO2 Trading Program that violate the allowance limitation.

340-012-0160 Department Discretion Regarding Penalty Assessment
Renumbered from 340-012-0045(3) and amended

- Allows Department to increase the penalty matrix by a level if doing so will achieve specific deterrence.
- Gives the Department discretion to increase any penalty assessed pursuant to Division 12 to $10,000 per violation per day of violation based upon the facts and circumstances of the individual case.

The Oregon Administrative Rules contain OARs filed through April 15, 2004

[In this redlined version, information in brackets (e.g., [ ]) provides background regarding where the proposed text has been moved from in the current Div. 12 rules. This information will be removed prior to filing with the Secretary of State.]

DEPARTMENT OF ENVIRONMENTAL QUALITY

DIVISION 12

ENFORCEMENT PROCEDURE AND CIVIL PENALTIES

340-012-0026

Policy

(1) The goals of enforcement ~~is~~are to:

(a~~b~~) Protect the public health and the environment;

(ab) Obtain and maintain compliance with applicable environmental statutes and the ~~D~~department's ~~statutes,~~ rules, permits and orders;

(c) Deter future violators and violations; and

(d) Ensure an appropriate and consistent statewide enforcement program.

(2) The d~~D~~epartment shall endeavor by conference, conciliation and persuasion to solicit compliance.

(3) The ~~D~~department endeavors to~~shall~~ address all ~~documented~~alleged violations in order of priority, based on the actual or potential impact to human health or the environment, using increasing ~~seriousness at the most appropriate~~ levels of enforcement as necessary to achieve the goals set forth in section (1) of this rule.

(4) The department subjects ~~V~~violators who do not comply with an initial enforcement action ~~shall be subject~~ to increasing levels of enforcement until they come into compliance. ~~is achieved.~~

(5) The department assesses civil penalties based on the class of violation, the magnitude of violation, the application of the penalty matrices and aggravating and mitigating factors, and the economic benefit realized by the respondent:

(a) Classification of Violation. Each violation is classified as Class I, Class II or Class III. Class I violations have the greatest likelihood of actual or potential impact to human health or the environment or are of the greatest significance to the regulatory structure of the given environmental program. Class II violations are less likely than Class I violations to have actual or potential impact to human health or the environment. Class III violations have the least likelihood of actual or potential impact to human health and the environment. (See OAR 340-012-0053 to 340-012-0097.)

(b) Magnitude of Violation. For Class I and Class II violations, the department uses a selected magnitude or determines the magnitude based on the impact to human health and the environment resulting from that particular violation. A magnitude is not determined for Class III violations. (See OAR 340-012-0130 and 340-012-0135.)

(c) Base Penalty Matrices. The department uses the base penalty matrices to determine an appropriate penalty based on the classification and magnitude of the violation. (See OAR 340-012-0140.)

(d) Aggravating and Mitigating Factors. The department uses the aggravating and mitigating factors to adjust the base penalty to reflect the particular circumstances surrounding the violation. These factors include the duration of the violation, the respondent's past compliance history, the mental state of the respondent, and the respondent's cooperativeness in achieving compliance or remedying the situation. (See OAR 340-012-0145.)

(e) Economic Benefit. The department adds the economic benefit gained by the respondent to the civil penalty to achieve deterrence and create equity between the respondent and those regulated persons who have borne the expense of maintaining compliance. (See OAR 340-012-0150.)

(6) The department endeavors to issue a formal enforcement action within six months from completion of the investigation of the violation.

Stat. Auth.: ORS 459.995, ORS 466, ORS 467, ORS 468.020, ORS 468.130, ORS 468.996, ORS 468A & ORS 468B
Stats. Implemented: ORS 183.745~~090~~, ORS 454.635, ORS 454.645, ORS 459.376, ORS 459.995, ORS 465.900, ORS 466.210, ORS 466.~~88~~990 - ORS 466.~~89~~945, ORS 468.090 - ORS 468.140, ORS 468A.990, ORS 468.992, ORS 468B.025, ORS 468B.220 & ORS 468B.450
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

340-012-0027

Rule Effective Date

(1) The following effective dates apply to these rules:

(a) OAR 340-012-0060 will become effective March 1, 2005.

(b) All remaining changes will become effective on June 1, 2005.

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 183.355, ORS 454, ORS 459, ORS 465, ORS 466, ORS 468, ORS 468A, & ORS 468B.

340-012-0028

Scope of Applicability

Amendments to OAR 340-012-0028 to 340-012-0170~~090~~ shall only apply to formal enforcement actions issued by the Department on or after the effective date of such amendments and not to any contested cases pending or formal enforcement actions issued prior to the effective date of such amendments. ~~Any contested cases pending or formal enforcement actions issued prior to the effective date of any amendments shall be subject to OAR 340-012-0028 to 340-012-0090 as prior to amendment. The list of violations classified in these rules is intended to be used only for the purposes of setting penalties for violations of law and for other rules set forth in OAR Chapter 340.~~

Stat. Auth.: ORS 454, ORS 459.995, ORS 466, ORS 467, ORS 468.020 & ORS 468.996
Stats. Implemented: ORS 183.745~~090~~, ORS 454.635, ORS 454.645, ORS 459.376, ORS 459.995, ORS 465.900, ORS 466.210, ORS 466.99~~88~~0 - ORS 466.~~89~~945, ORS 468.090 - ORS 468.140, ORS 468A.990, ORS 468.992, ORS 468B.025, ORS 468B.220 & ORS 468B.450
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; Renumbered from 340-012-0080

340-012-0030

Definitions

All terms used in this division have the meaning given to the term in the appropriate substantive statute or rule or, in the absence of such definition, their common and ordinary meaning ~~U~~unless otherwise required by context or defined below:~~, as used in this Division:~~

(1~~6~~) "~~Documented~~Alleged Violation" means any violation cited in a Notice of Noncompliance, Warning Letter or Pre-Enforcement Notice ~~which~~ that the ~~D~~department or other government agency records after observation, investigation or data collection, or for which the department receives independent evidence sufficient to issue a Notice of Noncompliance, Warning Letter or Pre-Enforcement Notice.

(2~~1~~) "Class ~~One~~I Equivalent," ~~or "Equivalent,"~~, which is used ~~only for the purposes of~~ to determine~~ing~~ the value of the "P" factor in the civil penalty formula, means two Class ~~Two~~ II violations, one Class ~~Two~~ II and two Class ~~Three~~ III violations, or three Class ~~Three~~ III violations.

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

(43) "Compliance" means meeting the requirements of the applicable statutes, ~~Commission's and Department's statutes,~~and commission or department rules, permits or orders.

(5) "Conduct" means an act or omission.

(64) "Director" means the ~~D~~director of the ~~D~~department or the ~~D~~director's authorized deputies or officers.

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

(87) "Flagrant" or "flagrantly" means ~~any documented violation where~~ the ~~R~~respondent had actual knowledge ~~of the law~~ that the conduct was unlawful and ~~had~~ consciously set out to commit the violation.

(98) "Formal Enforcement Action" means a proceeding initiated by the department that entitles a person to a contested case hearing or that settles such entitlement, including, but not limited to, ~~an action signed by the Director or a Regional Administrator or authorized representatives or deputies which is issued to a Respondent for a documented violation. Formal enforcement actions may require the Respondent to take action within a specified time frame, and/or state the consequences for the violation or continued noncompliance. "Formal enforcement action" includes~~ Notices of ~~Permit~~ Violation, Notices of Civil Penalty ~~Assessments~~, Penalty Demand Notices, department orders, commission orders, Mutual Agreement and Orders, and other consent ~~O~~orders. ~~that may be appealed through the contested case process; but does not include Notices of Noncompliance issued pursuant to OAR 340-012-004 1(1).~~

(109) "Intentional" means ~~conduct by a person~~ the respondent acted with a conscious objective to cause the result of the conduct.

(110) "Magnitude of the Violation" means the extent and effects of a ~~violator's~~ respondent's deviation from statutory requirements, rules, standards, permits or orders. ~~the Commission's and Department's statutes, rules, standards, permits or orders. In determining magnitude the Department shall consider all available applicable information, including such factors as: Concentration, volume, percentage, duration, toxicity, and the extent of the effects of the violation. Deviations shall be categorized as major, moderate or minor as set forth in OAR 340-012-0045(1)(a)(B).~~

(121) "Negligence" or "Negligent" means the respondent failedure to take reasonable care to avoid a foreseeable risk of ~~committing an act or omission~~ conduct constituting or resulting in a violation.

~~(12) "Order" means:~~

~~(a) Any action satisfying the definition given in ORS Chapter 183; or~~

~~(b) Any other action so designated in ORS Chapters 454, 459, 465, 466, 467, 468, 468A, or 468B.~~

(13~~e~~) "Penalty Demand Notice" means a written notice issued to a respondent by ~~a representative of~~ the ~~D~~department ~~to a party~~ demanding payment of a stipulated penalty pursuant to the terms of an agreement entered into between the respondent ~~the party~~ and the ~~D~~department.

(14) "Pre-Enforcement Notice" means a written notice of an alleged violation that the department is considering for formal enforcement.

(15~~3~~) "Person" includes, but is not limited to, individuals, corporations, associations, firms, partnerships, trusts, joint stock companies, public and municipal corporations, political subdivisions, states and their agencies, and the ~~F~~federal ~~G~~government and its agencies.

(16~~4~~) "Prior Significant Action" means any violation ~~established either~~ cited in a formal enforcement action, with or without admission of a violation, that becomes final by payment of a civil penalty, ~~or~~ by a final order of the ~~C~~commission or the ~~D~~department, or by judgment of a court.

(17~~5~~) "Reckless" or "Recklessly" means the respondent~~conduct by a person who is aware of and~~ consciously disregarded~~s~~ a substantial and unjustifiable risk that the result ~~will~~ would occur or that the circumstance existed~~s~~. The risk must be of such a nature and degree that disregarding that risk ~~thereof~~ constituted~~s~~ a gross deviation from the standard of care a reasonable person would observe in that situation.

~~(16) "Residential Open Burning" means the open burning of any domestic wastes generated by a single family dwelling and conducted by an occupant of the dwelling on the dwelling premises. This does not include the open burning of materials prohibited by OAR 340-023-004 2(2).~~

(18) "Residential Owner-Occupant" means the person who owns or otherwise possesses a single family dwelling unit, and who occupies that dwelling at the time of the alleged violation. The violation must involve or relate to the normal uses of a dwelling unit.

(19~~7~~) "Respondent" means the person to whom a formal enforcement action is issued.

~~(18) "Risk of Harm" means the individual or cumulative possibility of harm to public health or the environment caused by a violation or violations. Risk of harm shall be categorized as major, moderate or minor.~~

(20~~19~~) "Systematic" means any ~~documented~~ violation ~~which~~ that occurred or occurs on a regular basis.

(21~~0~~) "Violation" means a transgression of any statute, rule, order, license, permit, or any part thereof and includes both acts and omissions. ~~Violations shall be categorized as Class One (or I),~~

~~Class Two (or II) or Class Three (or III), with Class One designating the most serious class of violation.~~

(22) "Warning Letter" means a written notice of an alleged violation for which formal enforcement is not anticipated.

(23) "Willful" means the respondent had a conscious objective to cause the result of the conduct and the respondent knew or had reason to know that the result was not lawful.

Stat. Auth.: ORS 468.020 & ORS 468.130
Stats. Implemented: ORS 459.376, ORS 459.995, ORS 465.900, ORS 468.090 – ORS 468.140, ORS 466.88990 – ORS 466.89945, ORS 468.996 – ORS 468.997, ORS 468A.990 – ORS 468A.992 & ORS 468B.220
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98

~~**340-012-0035**~~

~~**Consolidation of Proceedings**~~

~~Notwithstanding that each and every violation is a separate and distinct offense, and in cases of continuing violations, that each day's continuance is a separate and distinct violation, proceedings for the assessment of multiple civil penalties for multiple violations may be consolidated into a single proceeding.~~

~~Stat. Auth.: ORS 468.020~~
~~Stats. Implemented: ORS 468.997~~
~~Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 21-1992, f. & cert. ef. 8-11-92~~

340-012-00384~~0~~

Warning Letters, Pre-Enforcement Notices and Notices of Permit Violation ~~Notice of Permit Violations and Exceptions~~

(1) A Warning Letter is a written notice of an alleged violation for which formal enforcement is not anticipated. Warning Letters may contain an opportunity to correct noncompliance as a means of avoiding formal enforcement. A Warning Letter generally will identify the alleged violations found, what needs to be done to comply, and the consequences of further noncompliance. Warning Letters will be issued under the direction of a Manager or authorized representative. A person receiving a Warning Letter may provide information to the department to clarify the facts surrounding the alleged violation(s). If the department determines that the conduct identified in the Warning Letter did not occur, the department will withdraw or amend

the Warning Letter, as appropriate, within 30 days. A Warning Letter is not a formal enforcement action and does not afford any person a right to a contested case hearing.

(2) A Pre-Enforcement Notice is a written notice of an alleged violation that the department is considering for formal enforcement. A Pre-Enforcement Notice generally will identify the alleged violations found, what needs to be done to comply, the consequences of further noncompliance, and the formal enforcement process that may occur. Pre-Enforcement Notices will be issued under the direction of a Manager or authorized representative. A person receiving a Pre-Enforcement Notice may provide information to the department to clarify the facts surrounding the alleged violations. If the department determines that the conduct identified in the Pre-Enforcement Notice did not occur, the department will withdraw or amend the Pre-Enforcement Notice, as appropriate, within 30 days. Failure to send a Pre-Enforcement Notice does not preclude the department from issuing a formal enforcement action. A Pre-Enforcement Notice is not a formal enforcement action and does not afford any person a right to a contested case hearing.

(3) Notice of Permit Violation (NPV):

~~(1) Prior to assessment of a civil penalty for a violation of the terms or conditions of a National Pollutant Discharge Elimination System Permit, Water Pollution Control Facilities Permit, or Solid Waste Disposal Permit, the Department shall provide a Notice of Permit Violation to the permittee.~~

(a) Except as provided in subsection (3)(e) below, an NPV will be issued for the first occurrence of an alleged Class I violation of an air, water or solid waste permit issued by the department, and for repeated or continuing alleged Class II or Class III violations of an air, water, or solid waste permit issued by the department when a Notice of Noncompliance or Warning Letter has failed to achieve compliance or satisfactory progress toward compliance. [Concepts previously included in -0041(2)(c)]

(b) ~~The~~ An NPV~~otice of Permit Violation shall be~~ is in writing, specifies~~ying~~ the violation and states~~ing~~ that a civil penalty will be imposed for the permit violation unless the permittee submits one of the following to the ~~D~~department within five working days of receipt of the NPV~~otice of Permit Violation~~:

(A~~a~~) A written response from the permittee ~~acceptable to the Department~~ certifying that the permittee~~d facility~~ is complying with all terms and conditions of the permit from which the violation is cited. The response must~~ecertification shall~~ include a sufficient description of the information on which the permittee's ~~is~~ certification~~ying compliance~~ relies to enable the ~~D~~department to determine that compliance has been achieved. ~~(d)~~ The certification ~~allowed in subsection (1)(a) of this rule shall~~ must be signed by a Responsible Official based on information and belief after making reasonable inquiry. For purposes of this rule "Responsible Official" ~~of the permitted facility~~ means one of the following:

(iA) For a corporation:, a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or the manager of one orf more manufacturing, production, or operating facilities if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.;

(iiB) For a partnership or sole proprietorship:, a general partner or the proprietor, respectively.;

(iiiC) For a municipality, Sstate, Ffederal, or other public agency:, either a principal executive officer or appropriate elected official.

(Bb) A written proposal, acceptable to the Ddepartment, describing how the permittee willto bring the facility into compliance with the permit. At a minimum, Aan acceptable proposal ~~under this rule shall~~ must include ~~at least~~ the following:

(Ai) A detailed plan and time schedule for achieving compliance in the shortest practicable time;

(Bii) A description of the interim steps that will be taken to reduce the impact of the permit violation until the permitteed facility is in compliance with the permit; and

(Ciii) A statement that the permittee has reviewed all other conditions and limitations of the permit and no other violations of the permit were discovered; or.

(C) For a water quality permit violation, a written request to the department that the department follow procedures described in ORS 468B.032. Notwithstanding the requirement for a response to the department within five working days, the permittee may file a request under this paragraph within 20 days from the date of service of the NPV.

(c) If n the event that any a compliance schedule to be approved by the Ddepartment under paragraph (3)(b)(B) pursuant to subsection (1)(b) of this rule provides for a compliance period of greater more than six months, the compliance schedule must Department shall be incorporated the compliance schedule into a finaln Oorder that described in OAR 340-012-004-1(4)(b)(C) which shall provides for stipulated penalties in the event of any failure to comply with the approved schedule.noncompliance therewith. The stipulated penalties shall not apply to circumstances beyond the reasonable control of the permittee. The stipulated penalties mayshall be set at amounts consistent equivalent to the base penalty amount appropriate for the underlying violation as set forth in with those established under OAR 340-012-0140048;

(d) If the NPV is issued by a regional authority, the regional authority may require that the permittee submit information in addition to that described in subsection (3)(b). [Moved from -0040(1)e)]

(e) For the purposes of this section, when a regional authority issues an NPV, different acceptability criteria may apply for subsections (a) and (b) of this section.

(~~c~~2) The department may ~~No advance notice prior to~~ assessment ~~of~~ a ~~civil~~ penalty without first issuing an NPV ~~shall be required under section (1) of this rule and the Department may issue a Notice of Civil Penalty Assessment~~ if:

(~~a~~A) The violation is intentional;

(~~b~~B) The water or air violation would not normally occur for five consecutive days; ~~or~~

(~~c~~C) The permittee has received a Notice of Permit Violation~~,~~ or a ~~other~~ formal enforcement action with respect to any violation of the permit within the 36 months immediately preceding the ~~documented~~alleged violation;

(D) The permittee is subject to the Oregon Title V operating permit program and violates any rule or standard adopted under ORS chapter 468A or any permit or order issued under ORS chapter 468A; or

(~~g~~E) The requirement to provide ~~such notice~~an NPV would disqualify a state program from federal approval or delegation. The permits and permit conditions to which this NPV exception applies include:

(i) Air Contaminant Discharge Permit conditions that implement the State Implementation Plan under the federal Clean Air Act;

(ii) Water Pollution Control Facility permit conditions that implement the Underground Injection Control program under the federal Safe Drinking Water Act;

(iii) National Pollutant Discharge Elimination System Permit conditions; and

(iv) Municipal Landfill Solid Waste Disposal Permit conditions that implement Subtitle D of the federal Solid Waste Disposal Act.~~;~~

~~(d) The permittee is subject to the federal operating permit program under ORS 468A.300 to 468A.320 (Title V of the Clean Air Act of 1990) and violates any rule or standard adopted or permit or order issued under ORS Chapter 468A and applicable to the permittee;~~

~~(e) The permittee is a solid waste permit holder subject to federal solid waste management requirements contained in **40 CFR, Part 258** as of the effective date of these rules ("Subtitle D"), and violates any rule or standard adopted or permit or order issued under ORS Chapter 459 and applicable to the permittee;~~

~~(f) The permittee has an air contaminant discharge permit and violates any State Implementation Plan requirement contained in the permit;~~

(~~f~~h) For purposes of ~~this~~ section (3), a "permit" includes permit renewals and modifications. ~~and~~ ~~n~~No such renewal or modification ~~will~~shall result in the requirement that the ~~D~~department

provide the permittee with an additional advance ~~warning~~ notice before formal enforcement if the permittee has received a Notice of Permit Violation, or other formal enforcement action, with respect to the permit, within the 36 months immediately preceding the alleged violation.

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 459.376, ORS 468.090 - ORS 468.140, ORS 468A.990 & ORS 468B.025
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 25-1979, f. & ef. 7-5-79; DEQ 22-1984, f. & ef. 11-8-84; DEQ 16-1985, f. & ef. 12-3-85; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98

340-012-0041

Formal Enforcement Actions

~~(1) Notice of Noncompliance (NON):~~ [replaced by -0038]

~~(a) Informs a person of a violation, and the consequences of the violation or continued non-compliance. The notice may state the actions required to resolve the violation and may specify a time by which compliance is to be achieved and that the need for formal enforcement action will be evaluated;~~

~~(b) Shall be issued under the direction of a Manager or authorized representative;~~

~~(c) Shall be issued for all classes of documented violations, unless the violation is a continuing violation for which the person has received a prior NON and the continuing violation is documented pursuant to a Department-approved investigation plan or Order, and the person is in compliance with the Department-approved investigation plan or Order.~~

~~(2) Notice of Permit Violation (NPV):~~

~~(a) Is issued pursuant to OAR 340-012-0040;~~

~~(b) Shall be issued by a Regional Administrator or authorized representative;~~

~~(c) Shall be issued for the first occurrence of a documented Class One violation which is not excepted under OAR 340-012-0040(2), or the repeated or continuing occurrence of documented Class Two or Three violations where a NON has failed to achieve compliance or satisfactory progress toward compliance. A permittee shall not receive more than three NONs for Class Two violations of the same permit within a 36 month period without being issued an NPV.~~

(1) Formal enforcement actions may require that the respondent take action within a specified timeframe or may assess civil penalties. The department may issue a Notice of Permit Violation or formal enforcement action whether or not it has previously issued a Notice of Noncompliance,

Warning Letter or Pre-Enforcement Notice related to the issue or violation. Unless specifically prohibited by statute or rule, the department may issue a formal enforcement action without first issuing a Notice of Permit Violation.

(23) Notice of Civil Penalty Assessment (CPA):

(a) may be issued for the occurrence of any class of violation that is not limited by the NPV requirement of OAR 340-012-0038(3). Is issued pursuant to ORS 468.130, and OAR 340-012-0042 and 340-012-0045;

(b) Shall be issued by the Director;

(c) May be issued for the occurrence of any Class of documented violation that is not limited by the NPV requirement of OAR 340-012-004 0(2).

(34) Order:

(a) Is issued pursuant to ORS Chapters 183, 454, 459, 465, 466, 467, 468, 468A, or 468B;

(b) M may be in the form of a Ccommission or Ddepartment Oorder, or including any written order that has been consented to in writing by the parties adversely affected thereby thereto including but not limited to, a Mutual Agreement and Order (MAO).:

(A) Commission Orders shall be issued by the Commission, or the Director on behalf of the Commission;

(B) Department Orders shall be issued by the Director;

(C) All other Orders:

(i) May be negotiated;

(ii) Shall be signed by the Director and the authorized representative of each other party.

(c) May be issued for any Class of violation.

(4) Penalty Demand Notice (PDN) may be issued according to the terms of any written final order that has been consented to in writing by the parties thereto, including, but not limited to, a Mutual Agreement and Order (MAO).

(5) The enforcement actions described in sections (12) through (4) of this rule in no way limit the Ddepartment or Ccommission from seeking any other legal or equitable remedies, including revocation of any department-issued license or permit, or other remedies as provided by ORS Chapters 183, 454, 459, 465, 466, 467, 468, 468A, and 468B.

Stat. Auth.: ORS 454.625, ORS 459.376, ORS 465.400 - ORS 465.410, ORS 466.625, ORS 467.030, ORS 468.020, ORS 468A.025, ORS 468A.045, & ORS 468B.035
Stats. Implemented: ORS 454.635, ORS 454.645, ORS 459.376, ORS 459.995, ORS 465.900, ORS 466.210, ORS 466.88990 - ORS 466.89945, ORS 468.090 - ORS 468.140, ORS 468A.990, ORS 468.992, ORS 468B.025, ORS 468B.220 & ORS 468B.450
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98

340-012-0045

Civil Penalty Determination Procedure

(1) Except as provided in OAR 340-012-0038(3), ~~I~~in addition to any other liability, duty, or other penalty provided by law, the department may assess ~~When determining the amount of a~~ civil penalty ~~to be assessed~~ for any violation~~,~~. Except for civil penalties assessed under OAR 340-012-0155(2), the department determines the amount of the civil penalty ~~other than violations of ORS 468.996, which are is~~determined ~~according to the procedure set forth below in OAR 340-012-0049(8), the Director shall apply~~ using the following procedures:

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

(a~~A~~) The classification of each~~a~~ violation is determined by consulting OAR 340-012-0053~~0~~ to 340-012-0097~~83~~;

(b~~B~~) The magnitude of the violation is determined as follows:

(A) ~~by first consulting t~~The selected magnitude categories in OAR 340-012-0135~~090~~ are used.

(B) If ~~In the absence of~~ a selected magnitude is not specified in OAR 340-012-0135, or if information is not reasonably available to determine which selected magnitude applies, OAR 340-012-0130~~,~~ is used to determine the magnitude of the violation.

(c) [original text from -0045(1)(b)] ~~Choose t~~The appropriate base penalty (BP) for each violation is ~~established by the matrices of OAR 340-012-0042 after~~ determined~~ing~~ by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140~~;~~.

(d) The base penalty is adjusted by the application of aggravating or mitigating factors (P = prior significant actions, H = history in correcting prior significant actions, O = repeated or ongoing violation, M = mental state of the violator and C = efforts to correct) as set forth in OAR 340-012-0145.

(e) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.

(2) [original text from -0045(1)(c)] The results of the determinations made in section (1) are ~~Starting with the base penalty, determine the amount of penalty through~~ applied~~eation of~~in the

following formula to calculate the penalty: BP + [(0.1 x BP) x (P + H + O + RM + C)] + EB.~~;~~ ~~where:~~

(3) [original text from -0045(2)] In addition to the factors listed in section (1) of this rule, the ~~D~~director may consider any other relevant rule of the ~~C~~commission in assessing a civil penalty and ~~shall~~ will state the effect that rule~~the consideration~~ had on the penalty amount. ~~On review, the Commission shall consider the factors contained in section (1) of this rule and any other relevant rule of the Commission.~~

Stat. Auth.: ORS 468.020 & ORS 468.130
Stats. Implemented: ORS 459.376, ORS 459.995, ORS 465.900, ORS 465.992, ORS 466.990 – ORS 466.994, ORS 468.090 – ORS 468.140 & ORS 468B.450

~~**340-012-0046**~~

~~**Written Notice of Assessment of Civil Penalty; When Penalty Payable**~~

~~(1) A civil penalty shall be due and payable ten days after the order assessing the civil penalty becomes final and the civil penalty is thereby imposed by operation of law or on appeal. A person against whom a civil penalty is assessed shall be served with a notice in the form and manner provided in ORS 183.415 and OAR Chapter 340, Division 11.~~

~~(2) The written notice of assessment of civil penalty shall comply with ORS 468.135(1) and 183.090, relating to notice and contested case hearing applications, and shall state the amount of the penalty or penalties assessed.~~

~~(3) The rules prescribing procedure in contested case proceedings contained in OAR Chapter 340, Division 11 shall apply thereafter.~~

~~Stat. Auth.: ORS 459.995, ORS 468.020 & ORS 468.996~~
~~Stats. Implemented: ORS 183.090~~
~~Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1988, f. & cert. ef. 9-14-88; Renumbered from 340-012-0070; DEQ 21-1992, f. & cert. ef. 8-11-92~~

340-012-0053

Violations that Apply to all Programs

(1) Class I:

(a) Violation of a requirement or condition of a commission or department order, consent order, agreement or consent judgment (formerly called judicial consent decree).

(b) Submitting false, inaccurate or incomplete information to the department where the submittal masked another separate violation, caused environmental harm, or caused the department to misinterpret any substantive fact.

(c) Failure to provide access to premises or records as required by statute, permit, order, consent order, agreement or consent judgment (formerly called judicial consent decree).

(d) Any otherwise unclassified violation that causes a significant adverse impact on the human health or the environment, or poses a significant threat to human health or the environment.

(2) Class II:

(a) Any otherwise unclassified violation.

(3) Class III:

(a) Any otherwise unclassified violation that had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors.

Stat. Auth.: ORS 468.020 & ORS 468.130
Stats. Implemented: ORS 459.376, ORS 459.995, ORS 465.900, ORS 465.992, ORS 466.990 – ORS 466.994, ORS 468.090 – ORS 468.140 & ORS 468B.450

340-012-00540

Air Quality Classification of Violations

~~Violations pertaining to air quality shall be classified as follows:~~

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Commission or Department Order, or variance;~~

(a~~b~~) Constructing or operating a source required to have a permit other than a Basic Air Contaminant Discharge Permit (ACDP) without first obtaining the appropriate permit;

(b~~e~~) Modifying a source with an A~~a~~ir P~~p~~permit without first notifying and receiving approval from the D~~d~~epartment;

(c~~d~~) Failure to install control equipment or meet performance standards as required by New Source Performance Standards under OAR 340 division 238 or National Emission Standards for Hazardous Air Pollutant Standards under OAR 340 division 244;

(de) Violation of a compliance schedule in a permit;

(ef) Exceeding a hazardous air pollutant emission limitation;

(fg) Exceeding an opacity or criteria pollutant emission limitation in a permit, rule or order by a factor of greater than or equal to two times the limitation;

(gh) Exceeding the yearly emission limitations of a permit, rule or order;

(hi) Failure to perform testing, or monitoring, required by a permit, rule or order that results in failure to show compliance with an emission limitation or a performance standard;

(ij) Systematic failure to keep records required by a permit, rule or order;

(jk) Failure to submit semi-annual Compliance Certification or Oregon Title V Annual Operating Report;

(kl) Failure to file a timely application for an Oregon Title V Operating Permit pursuant to OAR 340 division 218;

(lm) Submitting a report, semi-annual Compliance Certification or Oregon Title V Annual Operating Report, or any part thereof, that does not accurately reflect the monitoring, record keeping or other documentation held or performed by the permittee;

(mn) Causing emissions that are a hazard to public safety;

(no) Failure to comply with Emergency Action Plans or allowing excessive emissions during emergency episodes;

(op) 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;

(pq) Storage or accumulation of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which causes a potential for public exposure to asbestos or release of asbestos into the environment;

(qr) Visible emissions of asbestos during an asbestos abatement project or during collection, processing, packaging, transportation, or disposal of asbestos-containing waste material;

(rs) Conduct of an asbestos abatement project by a person not licensed as an asbestos abatement contractor;

(st) Violation of a disposal requirement for asbestos-containing waste material which causes a potential for public exposure to asbestos or release of asbestos into the environment;

(tu) Failing to hire a licensed contractor to conduct an asbestos abatement project which results in the potential for public exposure to asbestos or release of asbestos into the environment;

(uv) Advertising to sell, offering to sell or selling a non-certified woodstove;

(vw) Open burning of materials which are prohibited from being open burned anywhere in the Sstate by OAR 340-264-0060(3);

(wx) Failure to install vapor recovery piping in accordance with standards set forth in OAR chapter 340, division 150;

(xy) Installing vapor recovery piping without first obtaining a service provider license in accordance with requirements set forth in OAR chapter 340, division 160; or

(yz) Submitting falsified actual or calculated emission fee data.;

~~(aa) Failure to provide access to premises or records when required by law, rule, permit or order;~~

~~(bb) Any violation related to air quality which causes a major harm or poses a major risk of harm to public health or the environment.~~

(2) Class IITwo:

(a) Unless otherwise classified, exceeding an emission limitation, other than an annual emission limitation, or exceeding an opacity limitation by more than five percent opacity in permits, rules or order;

(b) Violating standards in permits or rules for fugitive emissions, particulate deposition, or odors;

(c) Failure to submit a complete ACDP~~Air Contaminant Discharge Permit~~ application 60 days prior to permit expiration or prior to modifying a source;

(d) Failure to maintain on site records when required by a permit to be maintained on site;

(e) Exceedances of operating limitations that limit the potential to emit that do not result in emissions above the Oregon Title V Operating Permit permitting thresholds pursuant to OAR 340 division 218;

(f) Failure to perform testing or monitoring required by a permit, rule or order unless otherwise classified.

(g) Illegal open burning of agricultural, commercial, construction, demolition, and/or industrial waste except for open burning in violation of OAR 340-264-0060(3);

(h) Failing to comply with notification and reporting requirements in a permit;

(i) Failure to comply with asbestos abatement licensing, certification, or accreditation requirements;

(j) Failure to provide notification of an asbestos abatement project;

(k) Violation of a work practice requirement for asbestos abatement projects that does not cause a potential for public exposure to asbestos and does not release asbestos into the environment;

(l) Violation of a disposal requirement for asbestos-containing waste material that does not cause a potential for public exposure to asbestos and does not release asbestos into the environment;

(m) Failure to perform a final air clearance test or submit an asbestos abatement project air clearance report for an asbestos abatement project.

(n) Failure to display permanent labels on a certified woodstove;

(o) Alteration of a permanent label for a certified woodstove;

(p) Failure to use ~~D~~department-approved vapor control equipment when transferring fuel;

(q) Operating a vapor recovery system without first obtaining a piping test performed by a licensed service provider as required by OAR chapter 340, division 160;

(r) Failure to obtain ~~D~~department approval prior to installing a Stage II vapor recovery system not already registered with the ~~D~~department as specified in ~~D~~department rules;

(s) Installing, servicing, repairing, disposing of or otherwise treating automobile air conditioners without recovering and recycling chlorofluorocarbons using approved recovery and recycling equipment;

(t) Selling, or offering to sell, or giving as a sales inducement any aerosol spray product which contains as a propellant any compound prohibited under ORS 468A.655;

(u) Selling any chlorofluorocarbon or halon containing product prohibited under ORS 468A.635;

(v) Failure to pay an emission fee;

(w) Submitting inaccurate emission fee data;

(x) Violation of OAR 340-242-0620 by a person who has performed motor vehicle refinishing on 10 or more on-road motor vehicles in the previous 12 months;

(y) Constructing or operating a source required to have a Basic ACDP; or

(z) Any violation of the Employee Commute Option rules contained in OAR 340-242-0010 to 0290.;

~~(aa) Any violation related to air quality which is not otherwise classified in these rules.~~

(3) Class III~~Three~~:

(a) Failure to perform testing, or monitoring required by a permit, rule or order where missing data can be reconstructed to show compliance with standards, emission limitations or underlying requirements;

(b) Illegal residential open burning;

(c) Improper notification of an asbestos abatement project;

(d) Failure to submit a completed renewal application for an asbestos abatement license in a timely manner;

(e) Failure to display a temporary label on a certified woodstove;

(f) Exceeding opacity limitation in permits or rules by five percent opacity or less.

(g) Violation of OAR 340-242-0620 by a person who has performed motor vehicle refinishing on fewer than 10 on-road motor vehicles in the previous 12 months.

[Publications: The publication(s) referenced in this rule is available from the agency.]

~~Stat. Auth.: ORS 468.020, ORS 468A.025 & ORS 468A.045~~
Stats. Implemented: ORS 468.020 & ORS 468A.025
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 5-1980, f. & ef. 1-28-80; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 31-1990, f. & cert. ef. 8-15-90; DEQ 2-1992, f. & cert. ef. 1-30-92; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 20-1993(Temp), f. & cert. ef. 11-4-93; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 13-1994, f. & cert. ef. 5-19-94; DEQ 21-1994, f. & cert. ef. 10-14-94; DEQ 22-1996, f. & cert. ef. 10-22-96; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

~~**340-012-0052**~~

~~**Noise Control Classification of Violations**~~

~~Violations pertaining to noise control shall be classified as follows:~~

~~(1) Class One:~~

~~(a) Violation of a requirement or condition of a Commission or Department order or variance;~~

~~(b) Violations that exceed noise standards by ten decibels or more;~~

~~(c) Exceeding the ambient degradation rule by five decibels or more; or~~

~~(d) Failure to submit a compliance schedule required by OAR 340-035-0035(2);~~

~~(e) Operating a motor sports vehicle without a properly installed or well-maintained muffler or exceeding the noise standards set forth in OAR 340-035-0040(2);~~

~~(f) Operating a new permanent motor sports facility without submitting and receiving approval of projected noise impact boundaries;~~

~~(g) Failure to provide access to premises or records when required by law, rule, or order;~~

~~(h) Violation of motor racing curfews set forth in OAR 340-035-0040(6);~~

~~(i) Any violation related to noise control which causes a major harm or poses a major risk of harm to public health or the environment.~~

~~(2) Class Two:~~

~~(a) Violations that exceed noise standards by three decibels or more;~~

~~(b) Advertising or offering to sell or selling an uncertified racing vehicle without displaying the required notice or obtaining a notarized affidavit of sale;~~

~~(c) Any violation related to noise control which is not otherwise classified in these rules.~~

~~(3) Violations that exceed noise standards by one or two decibels are Class III violations.~~

~~Stat. Auth.: ORS 467.030 & ORS 468.020~~
~~Stats. Implemented: ORS 467.050 & ORS 467.990~~
~~Hist.: DEQ 101, f. & ef. 10-1-75; DEQ 22-1984, f. & ef. 11-8-84; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98~~

340-012-0055

Water Quality Classification of Violations

~~Violations pertaining to water quality shall be classified as follows:~~

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Commission or Department Order;~~

(~~a~~b) Causing pollution of waters of the ~~S~~state.~~;~~

(b~~c~~) Reducing the water quality of waters of the ~~S~~state below water quality standards.~~;~~

(c~~d~~) Any discharge of waste that enters waters of the state, either without a waste discharge permit or from a discharge point not authorized by a waste discharge permit.~~;~~

(d~~e~~) Failure to comply with statute, rule, or permit requirements regarding notification of a spill or upset condition which results in a non-permitted discharge to public waters.~~;~~

(e~~f~~) Violation of a permit compliance schedule.~~;~~

(f~~g~~) Any violation of any pretreatment standard or requirement by a user of a municipal treatment works which ~~either~~ impairs or damages the treatment works, or causes a major harm or poses a major risk of harm to public health or the environment.~~;~~

(g~~h~~) Operation of a disposal system without first obtaining a Water Pollution Control Facility Permit (WPCF).~~;~~

~~(i) Failure to provide access to premises or records when required by law, rule, permit or order;~~

(h~~j~~) Failure of any ship carrying oil to have financial assurance as required in ORS 468B.300 - 468B.335 or rules adopted there under.~~;~~

~~(k) Any violation related to water quality which causes a major harm or poses a major risk of harm to public health or the environment.~~

(i~~l~~) Unauthorized changes, modifications, or alterations to a facility operating under a WPCF or National Pollutant Discharge Elimination System (NPDES) permit.~~,~~

~~(m) Intentionally submitting false information;~~

(j~~n~~) Operating or supervising a wastewater treatment system without proper certification.

(2) Class II~~Two~~:

(a) Failure to submit a report or plan as required by rule, permit, or license, except for a report required by permit compliance schedule.~~;~~

(b) Any violation of OAR Chapter 340, Division 49 regulations pertaining to certification of wastewater system operator personnel unless otherwise classified.~~;~~

(c) Placing wastes such that the wastes are likely to enter public waters by any means.~~;~~

(d) Failure by any ship carrying oil to keep documentation of financial assurance on board or on file with the ~~D~~department as required by ORS 468B.300 - 468B.335 or rules adopted there under.~~;~~

(e) Failing to connect all plumbing fixtures to, or failing to discharge wastewater or sewage into, a ~~D~~department-approved system unless otherwise classified in OAR 340-012-0055 or 340-012-0060.~~;~~

(f) Any violation of a management, monitoring, or operational plan established pursuant to a waste discharge permit~~,~~ that is not otherwise classified in these rules.

~~(g) Any violation related to water quality which is not otherwise classified in these rules.~~

(3) Class III ~~Three~~:

(a) Failure to submit a discharge monitoring report on time.~~;~~

(b) Failure to submit a complete discharge monitoring report.~~;~~

(c) Exceeding a waste discharge permit biochemical oxygen demand (BOD), carbonaceous biochemical oxygen demand (CBOD), or total suspended solids (TSS) limitation by a concentration of 20 percent or less, or exceeding a mass loading limitation by ten percent or less.~~;~~

(d) Violation of a removal efficiency requirement by a factor of less than or equal to 0.2 times the number value of the difference between 100 and the applicable removal efficiency requirement (e.g., if the requirement is 65 percent removal, 0.2 (100-65) = 0.2(35) = 7 percent; then 7 percent would be the maximum percentage that would qualify under this rule for a permit with a 65 percent removal efficiency requirement).~~;~~

(e) Violation of a pH requirement by less than 0.5 pH.

Stat. Auth.: ORS 468.020 & ORS 468B.015
Stats. Implemented: ORS 468.090 - ORS 468.140, ORS 468B.025, ORS 468B.220 & ORS 468B.305
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 17-1986, f. & ef. 9-18-86; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98

340-012-0060

On-Ssite Sewage Disposal Classification of Violations

~~Violations pertaining to On-Site Sewage Disposal shall be classified as follows:~~

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Commission or Department order;~~

(a~~b~~) Performing ~~, advertising or representing one's self as being in the business of performing~~ sewage disposal services without ~~first obtaining and maintaining~~ a current ~~sewage disposal service~~ license required by ORS 454.695; ~~from the Department;~~

(b~~e~~) Installing or causing to be installed an on-site sewage disposal system or any part thereof, or repairing any part thereof, without first obtaining a permit.~~;~~

(c~~d~~) Disposing of septic tank, holding tank, chemical toilet, privy or other treatment facility contents in a manner or location not authorized by the ~~D~~department.~~;~~

(d~~e~~) Owning, ~~O~~operating or using an on-site sewage disposal system that is ~~failing by~~ discharging sewage or effluent onto the ground or into waters of the state.~~;~~

~~(f) Failure to provide access to premises or records when required by law, rule, permit or order;~~

~~(g) Any violations related to on-site sewage disposal which cause major harm or pose a major risk of harm to public health, welfare, safety or the environment.~~

(2) Class II~~Two~~:

(a) ~~Installing or causing to be installed an on-site sewage disposal system, or any part thereof, or the repairing of any part thereof, which f~~Failures to meet the requirements for satisfactory completion within 30 days after written notification or posting of a Correction Notice at the site.~~;~~

(b) Operating or using a nonwater-carried waste disposal facility without first obtaining a letter of authorization or permit~~from the Agent~~.~~;~~

(c) Operating or using an ~~newly constructed, altered or repaired~~ on-site sewage disposal system~~,~~ or part thereof~~,~~ without first obtaining a Certificate of Satisfactory Completion.~~;~~

~~(d) Providing any sewage disposal service in violation of any statute, rule, license, or permit, provided that the violation is not otherwise classified in these rules;~~

(d) Advertising or representing oneself as being in the business of performing sewage disposal services without a current license as required by ORS 454.695.

(e) Placing into service, reconnecting to or changing the use of an onsite sewage disposal system and ~~Failing to obtain an authorization notice from the Agent prior to affecting change to a dwelling or commercial facility that results in the potential~~ increasinge ~~in~~ the projected ~~peak~~ daily sewage flow into the system without first obtaining an authorization notice, construction

permit, alteration permit, or repair permit~~from the dwelling or commercial facility in excess of the sewage disposal system's peak design flow.~~;

~~(f) Installing or causing to be installed a nonwater-carried waste disposal facility without first obtaining written approval from the Agent;~~

(gf) Failing to connect all plumbing fixtures to, or failing to discharge wastewater or sewage into, a ~~D~~department~~-~~approved ~~on-site~~ system, unless failure results in sewage on the ground or the discharge of sewage to waters of the state.~~;~~

(g) Licensed sewage disposal business allowing an uncertified installer to supervise or be responsible for the construction or installation of a system, or part thereof.

(h) Failure of a service provider for alternative treatment technologies to submit an annual maintenance report.

(i) Failure of a service provider for alternative treatment technologies to report that a required operation and maintenance contract has been terminated.

~~(h) Any violation related to on-site sewage disposal which is not otherwise classified in these rules.~~

(3) Class III:

(a) Failure by an owner of an alternative treatment technology, recirculating gravel filter, commercial sand filter or other alternative system to obtain an operation and maintenance contract from a certified service provider.

(b) In situations ~~Violations~~ where the sewage disposal system design flow is not exceeded~~,~~, placing an existing system into service~~,~~ or changing the dwelling or type of commercial facility, without first obtaining an authorization notice. ~~are Class Three violations.~~

Stat. Auth.: ORS 454.050, ORS 454.625 & ORS 468.020
Stats. Implemented: ORS 454.635, ORS 454.645 & ORS 468.090 - ORS 468.140
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 4-1981, f. & ef. 2-6-81; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98

340-012-0065

Solid Waste Management Classification of Violations

~~Violations pertaining to the management, recovery and disposal of solid waste shall be classified as follows:~~

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Commission or Department Order;~~

(a~~b~~) Establishing, expanding, maintaining or operating a disposal site without first obtaining a registration or permit;

(b~~e~~) Accepting solid waste for disposal in a permitted solid waste unit or facility that has been expanded in area or capacity without first submitting plans to the ~~D~~department and obtaining ~~D~~department approval;

(c~~d~~) Disposing of or authorizing the disposal of a solid waste at a location not permitted by the ~~D~~department to receive that solid waste;

(d~~e~~) Violation of the freeboard limit which results in the actual overflow of a sewage sludge or leachate lagoon;

(e~~f~~) Violation of the landfill methane gas concentration standards;

(f~~g~~) Violation of any federal or state drinking water standard in an aquifer beyond the solid waste boundary of the landfill, or an alternative boundary specified by the ~~D~~department;

(g~~h~~) Violation of a permit-specific groundwater concentration limit, as defined in OAR 340-040-0030(3) at the permit-specific groundwater concentration compliance point, as defined in OAR 340-040-0030(2)(e);

(h~~i~~) Failure to perform the groundwater monitoring action requirements specified in OAR 340-040-0030(5), when a significant increase (for pH, increase or decrease) in the value of a groundwater monitoring parameter is detected;

(i~~j~~) Impairment of the beneficial use(s) of an aquifer beyond the solid waste boundary or an alternative boundary specified by the ~~D~~department;

(j~~k~~) Deviation from the ~~D~~department approved facility plans which results in an safety hazard, public health hazard or damage to the environment;

(k~~l~~) Failure to properly construct and maintain groundwater, surface water, gas or leachate collection, treatment, disposal and monitoring facilities in accordance with the facility permit, the facility environmental monitoring plan, or ~~D~~department rules;

(l~~m~~) Failure to collect, analyze and report ground-water, surface water or leachate quality data in accordance with the facility permit, the facility environmental monitoring plan, or ~~D~~department rules;

(m~~n~~) Violation of a compliance schedule contained in a solid waste disposal or closure permit;

~~(o) Failure to provide access to premises or records when required by law, rule, permit or order;~~

(np) Knowingly disposing, or accepting for disposal, materials prohibited from disposal at a solid waste disposal site by statute, rule, permit or order;

(oq) Accepting, handling, treating or disposing of clean-up materials contaminated by hazardous substances by a landfill in violation of the facility permit and plans as approved by the Ddepartment or the provisions of OAR 340-093-0170(3);

(pr) Accepting for disposal infectious waste not treated in accordance with laws and Ddepartment rules;

(qs) Accepting for treatment, storage or disposal wastes defined as hazardous under ORS 466.005, et seq., or wastes from another state which are hazardous under the laws of that state without specific approval from the Ddepartment;

(rt) Mixing for disposal or disposing of principal recyclable material that has been properly prepared and source separated for recycling;

(su) Receiving special waste in violation of or without a Ddepartment approved Special Waste Management Plan;

(tv) Failure to follow a Ddepartment approved Construction Quality Assurance (CQA) plan when constructing a waste cell;

(uw) Failure to comply with a Ddepartment approved Remedial Investigation Workplan developed in accordance with OAR 340-040-0040;

(vx) Failure to establish and maintain financial assurance as required by statute, rule, permit or order;

(wy) Open burning in violation of OAR 340-264-0060(3); or

(xz) Failure to abide by the terms of a permit automatically terminated due to a failure to submit a timely application for renewal as set forth in OAR 340-093-0115(1)(c).;

~~(aa) Any violation related to the management, recovery and disposal of solid waste which causes major harm or poses a major risk of harm to public health or the environment.~~

(2) Class IITwo:

(a) Violation of a condition or term of a Letter of Authorization;

(b) Failure of a permitted landfill, solid waste incinerator or a municipal solid waste compost facility operator or a metropolitan service district to report amount of solid waste disposed in accordance with the laws and rules of the ~~D~~department;

(c) Failure to accurately report weight and type of material recovered or processed from the solid waste stream in accordance with the laws and rules of the ~~D~~department;

(d) Failure of a disposal site to obtain certification for recycling programs in accordance with the laws and rules of the ~~D~~department prior to accepting solid waste for disposal;

(e) Acceptance of solid waste by a permitted disposal site from a person that does not have an approved solid waste reduction program in accordance with the laws and rules of the ~~D~~department;

(f) Failure to comply with any solid waste permit requirement pertaining to permanent household hazardous waste collection facility operations;

(g) Failure to comply with landfill cover requirements, including but not limited to daily, intermediate, and final covers, and limitation of working face size;

~~(h) Unless otherwise classified failure to comply with any plan approved by the Department;~~

(h~~i~~) Failure to submit a permit renewal application 180 days prior to the expiration date of the existing permit; or

(i~~j~~) Failure to establish and maintain a facility operating record for a municipal solid waste landfill.~~;~~

~~(k) Any violation related to solid waste, solid waste reduction, or any violation of a solid waste permit not otherwise classified in these rules.~~

(3) Class III ~~Three~~:

(a) Failure to post required signs;

(b) Failure to control litter;

(c) Unless otherwise classified failure to notify the d~~D~~epartment of any name or address change of the owner or operator of the facility within ten days of the change.

Stat. Auth.: ORS. 459.045 & ORS 468.020
Stats. Implemented: ORS 459.205, ORS 459.376, ORS 459.995 & ORS 468.090 - ORS 468.140
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 1-1982, f. & ef. 1-28-82; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94;

DEQ 26-1994, f. & cert. ef. 11-2-94; DEQ 9-1996, f. & cert. ef. 7-10-96; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-012-0066

Solid Waste Tire Management Classification of Violations

~~Violations pertaining to the storage, transportation and management of waste tires or tire-derived products shall be classified as follows:~~

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Commission or Department Order;~~

(a~~b~~) Establishing, expanding, or operating a waste tire storage site without first obtaining a permit;

(b~~e~~) Systematic failure to maintain written records of waste tire generation and disposal as required;

(c~~d~~) Disposing of waste tires or tire-derived products at an unauthorized site;

(d~~e~~) Violation of the compliance schedule or fire safety requirements of a waste tire storage site permit;

(e~~f~~) Hauling waste tires or advertising or representing one's self as being in the business of a waste tire carrier without first obtaining a waste tire carrier permit as required by laws and rules of the d~~D~~epartment;

(f~~g~~) Hiring or otherwise using an unpermitted waste tire carrier to transport waste tires; or

(g~~h~~) Failure to establish and maintain financial assurance as required by statute, rule, permit or order.~~;~~

~~(i) Failure to provide access to premises or records when required by law, rule, permit or order;~~

~~(j) Any violation related to the storage, transportation or management of waste tires or tire-derived products which causes major harm or poses a major risk of harm to public health or the environment.~~

(2) Class II~~Two~~:

~~(a) Violation of a waste tire storage site or waste tire carrier permit other than a specified Class One or Class Three violation;~~

(ab) Failure to submit a permit renewal application prior to the expiration date of the existing permit within the time required by statute, rule, or permit;

(be) Hauling waste tires in a vehicle not identified in a waste tire carrier permit or failing to display required decals as described in a permitee's waste tire carrier permit; or

(cd) Violation of a condition or term of a Letter Authorization.;

~~(e) Any violation related to the storage, transportation or management of waste tires or tire-derived products which is not otherwise classified in these rules.~~

(3) Class IIIThree:

(a) Failure to submit required annual reports in a timely manner;

(b) Failure to keep required records on use of vehicles;

(c) Failure to post required signs;

(d) Failure to submit a permit renewal application in a timely manner;

(e) Failure to submit permit fees in a timely manner;

(f) Failure to maintain written records of waste tire disposal and generation.

Stat. Auth.: ORS 459.785 & ORS 468.020
Stats. Implemented: ORS 459.705 - ORS 459.790, ORS 459.992 & ORS 468.090 - ORS 468.140
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98

~~**340-012-0067**~~

~~**Underground Storage Tank and Heating Oil Tank Classification of Violations**~~

~~Violations pertaining to underground storage tank (UST) systems and heating oil tanks are classified as follows:~~

~~(1) Class One:~~

~~(a) Violating a requirement or condition of a commission or department order;~~

~~(b) Failure to report a release or suspected release from an UST system or a heating oil tank;~~

~~(c) Failure to perform an investigation or confirmation of a suspected release;~~

~~(d) Failure to establish or maintain the required financial responsibility mechanism;~~

~~(e) Failure to initiate and complete the investigation or cleanup of a release from an UST system or a heating oil tank;~~

~~(f) Failure to submit reports from the investigation or cleanup of a release from an UST system or heating oil tank;~~

~~(g) Failure to provide or allow access to premises or records;~~

~~(h) Failure to apply for and be issued the appropriate general permit registration certificate before decommissioning, installing or operating an UST, not otherwise classified;~~

~~(i) Failure to install spill and overfill protection equipment that will prevent a release or to be able to demonstrate to the department that the equipment is properly functioning;~~

~~(j) Failure to install, operate or maintain a method or combination of methods for release detection for an UST system such that the method can detect a release from any portion of the UST system;~~

~~(k) Failure to install or use equipment that is properly designed and constructed to protect any portion of the UST or piping from corrosion;~~

~~(l) Failure to operate and maintain corrosion protection such that it continuously provides protection to the UST system;~~

~~(m) Failure to permanently decommission an UST system;~~

~~(n) Failure to obtain approval from the department before installing or operating vapor or groundwater monitoring wells as part of a release detection method;~~

~~(o) Installing, repairing, replacing or modifying an UST system in violation of any rule adopted by the department, not otherwise classified;~~

~~(p) Systematic failure to conduct testing, monitoring or to keep records;~~

~~(q) Failure to initiate and complete free product removal in accordance with OAR 340-122-0235;~~

~~(r) Providing installation, modification, repair, replacement, decommissioning or testing services on an UST system or providing soil matrix cleanup services at an UST facility without an UST service or soil matrix cleanup service provider license;~~

~~(s) Using fraud or deceit to obtain an UST service provider, soil matrix cleanup service provider, heating oil tank service provider or supervisor license or demonstrating negligence or incompetence in performing UST or other tank services;~~

~~(t) Failure to assess the excavation zone of a decommissioned or abandoned UST when directed to do so by the department; and~~

~~(u) Any other violations related to UST systems or heating oil tanks that cause or pose significant harm to public health or the environment.~~

~~(2) Class Two:~~

~~(a) Failure to conduct release detection monitoring and testing activities for USTs or piping, not otherwise classified;~~

~~(b) Failure to conduct corrosion protection monitoring and testing activities for USTs or piping, not otherwise classified;~~

~~(c) Failure to conform to performance standards and requirements and third party evaluation and approval for UST system release detection methods or equipment or corrosion protection equipment, not otherwise classified;~~

~~(d) Continuing to use a method or methods of release detection after period allowed by rule has expired;~~

~~(e) Failure to use or maintain spill or overfill prevention equipment, not otherwise classified;~~

~~(f) Failure to meet all requirements for a financial responsibility mechanism, not otherwise classified;~~

~~(g) Failure to have a trained UST system operator for an UST facility after March 1, 2004;~~

~~(h) Failure to apply for a modified general permit registration certificate;~~

~~(i) Failure to have an operation certificate for all compartments or chambers of a multichambered or multicompartment UST when at least one compartment or chamber has an operation certificate;~~

~~(j) Installing, repairing, replacing or modifying an UST or UST equipment or conducting a soil matrix cleanup without providing the required notifications;~~

~~(k) Failure to decommission an UST in compliance with the statutes and rules adopted by the department, including, but not limited to, performance standards, procedures, notification, general permit registration and site assessment requirements;~~

~~(l) Providing installation, modification, decommissioning or testing services on an UST system or providing soil matrix cleanup services at an UST facility that does not have the appropriate general permit registration certificate;~~

~~(m) Failure by a distributor to obtain the identification number for each UST and operation certificate number before depositing a regulated substance into an UST;~~

~~(n) Failure by a distributor to maintain a record of all USTs into which it deposited a regulated substance;~~

~~(o) Allowing the installation, modification, decommissioning or testing of an UST system or soil matrix cleanup at an UST facility by any person not licensed by the department;~~

~~(p) Failure to provide information as required by OAR 340-150-0135(6) or as requested by the department;~~

~~(q) Failure to submit checklists or reports for UST installation, modification or suspected release confirmation activities;~~

~~(r) Failure to comply with integrity assessment inspection schedules or requirements for internally lined USTs;~~

~~(s) Allowing the performance of heating oil tank services or supervision at a heating oil tank by any person not licensed by the department;~~

~~(t) Providing heating oil tank services at a heating oil tank without a heating oil tank service provider or supervisor license;~~

~~(u) Failure to submit a corrective action plan (CAP) in accordance with the schedule or format established by the department pursuant to OAR 340-122-0250;~~

~~(v) Failure by an owner or permittee to pass the appropriate national examination before performing installation, decommissioning or testing services on an UST system;~~

~~(w) Supervising the installation, modification, repair, replacement, decommissioning, testing or soil matrix cleanup of an UST system without a supervisor license;~~

~~(x) Failure by an owner or permittee to provide the identification number for each UST or operation certificate number to persons depositing a regulated substance into an UST; and~~

~~(y) Any other violation related to UST systems or heating oil tanks not otherwise classified.~~

~~(3) Class Three:~~

~~(a) Failure by a person who sells an UST to notify the new owner or permittee of the department's general permit registration requirements;~~

~~(b) Failure to maintain release detection records for USTs or piping if the failure does not constitute a significant operational compliance violation;~~

~~(c) Failure to maintain required manufacturer's information or third party evaluation documents for approved methods or equipment;~~

~~(d) Failure to maintain training records for an UST system operator; and~~

~~(e) Failure to keep records of UST system repair, modification or replacement work.~~

340-012-0067

Underground Storage Tank (UST) Classification of Violations

(1) Class I:

(a) Failure to investigate or confirm a suspected release;

(b) Failure to establish or maintain the required financial responsibility mechanism;

(c) Failure to obtain the appropriate general permit registration certificate before installing or operating an UST;

(d) Failure to install spill and overfill protection equipment that will prevent a release, or failure to demonstrate to the department that the equipment is properly functioning;

(e) Failure to install, operate or maintain a method or combination of methods for release detection such that the method can detect a release from any portion of the UST system;

(f) Failure to protect from corrosion any part of an UST system that routinely contains a regulated substance;

(g) Failure to permanently decommission an UST system;

(h) Failure to obtain approval from the department before installing or operating vapor or groundwater monitoring wells as part of a release detection method;

(i) Installing, repairing, replacing or modifying an UST system in violation of any rule adopted by the department;

(j) Systematic failure to conduct testing or monitoring, or to keep records;

(k) Providing or offering tank services without the appropriate UST service provider license;

(l) Supervising tank services without the appropriate supervisor license;

(m) Using fraud or deceit to obtain a UST services provider or supervisor license;

(n) Demonstrating negligence or incompetence in performing tank services; or

(o) Failure to assess the excavation zone of a decommissioned or abandoned UST when directed to do so by the department.

(2) Class II:

(a) Continuing to use a method or methods of release detection after period allowed by rule has expired;

(b) Failure to have a trained UST system operator for an UST facility after March 1, 2004;

(c) Failure to apply for a modified general permit registration certificate;

(d) Failure to have an operation certificate for each compartment of a multi-chambered or multi-compartment UST when at least one compartment or chamber has an operation certificate.

(e) Installing, repairing, replacing or modifying an UST or UST equipment without providing the required notifications;

(f) Failure to decommission an UST in compliance with the statutes and rules adopted by the department, including, but not limited to, performance standards, procedures, notification, general permit registration and site assessment requirements;

(g) Providing tank services at an UST facility that does not have the appropriate general permit registration certificate;

(h) Failure by a distributor to obtain the identification number and operation certificate number before depositing a regulated substance into an UST;

(i) Failure by a distributor to maintain a record of all USTs into which it deposited a regulated substance;

(j) Allowing tank services to be performed by a person not licensed by the department;

(k) Failure to submit checklists or reports for UST installation, modification or suspected release confirmation activities;

(l) Failure to complete an integrity assessment before adding corrosion protection;

(m) Failure by an owner or permittee to pass the appropriate national examination before performing tank services; or

(n) Failure to provide the identification number or operation certificate number to persons depositing a regulated substance into an UST.

(3) Class III:

(a) Failure by a person who sells an UST to notify the new owner or permittee of the department's general permit registration requirements.

Stat. Auth.: ORS 466.720, ORS 466.746, ORS 466.882, ORS 466.994 & ORS 468.020
Stats. Implemented: ORS 466.706 - ORS 466.835, ~~&~~ ORS 466.994 & ORS 468.090 – ORS 468.140
Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2003, f. & cert. ef. 2-14-03

340-012-0068

Hazardous Waste Management and Disposal Classification of Violations

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

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Department or Commission order;~~

(a~~b~~) Failure to make a complete and accurate hazardous waste determination of a residue as required by OAR 340-102-0011;

(b~~e~~) Failure to have a waste analysis plan as required by **40 CFR 265.13**;

(c~~d~~) Operation of a hazardous waste treatment, storage or disposal facility (TSD) without first obtaining a permit or without having interim status pursuant to OAR 340-105-0010(2)(a);

(d~~e~~) Accumulation of hazardous waste on site for longer than twice the applicable generator allowable on-site accumulation period;

(e~~f~~) Transporting or offering for transport hazardous waste for off-site shipment without first preparing a manifest;

(f~~g~~) Accepting for transport hazardous waste which is not accompanied by a manifest;

(gh) Systematic failure of a hazardous waste generator to comply with the manifest system requirements;

(hi) Failure to submit a manifest discrepancy report or exception report;

(ij) Failure to prevent the unknown entry or prevent the possibility of the unauthorized entry of person or livestock into the waste management area of a TSD facility;

(jk) Failure to manage ignitable, reactive, or incompatible hazardous wastes as required under **40 CFR Part 264** and **265.17(b)(1), (2), (3), (4)** and **(5)**;

(kl) Illegal disposal of hazardous waste;

(lm) Disposal of hazardous waste in violation of the land disposal restrictions;

(mn) Failure to contain waste pesticide or date containers of waste pesticide as required by OAR 340-109-0010(2);

(no) Treating or diluting universal wastes in violation of **40 CFR 273.11, 273.31** or OAR 340-113-0030(5);

(op) Use of empty non-rigid or decontaminated rigid pesticide containers for storage of food, fiber or water intended for human or animal consumption;

(pq) Mixing, solidifying, or otherwise diluting hazardous waste to circumvent land disposal restrictions;

(qr) Incorrectly certifying a hazardous waste for disposal/treatment in violation of the land disposal restrictions;

(rs) Failure to submit a Land Disposal notification, demonstration or certification with a shipment of hazardous waste;

(st) Shipping universal waste to a site other than an off-site collection site, destination facility or foreign destination in violation of 40 CFR 273.18 or 273.38;

(tu) Failure to comply with the hazardous waste tank integrity assessments and certification requirements;

(uv) Failure of an owner/operator of a TSD facility to have a closure and/or post closure plan and/or cost estimates;

(vw) Failure of an owner/operator of a TSD facility to retain an independent registered professional engineer to oversee closure activities and certify conformity with an approved closure plan;

(wx) Failure of an owner/operator of a TSD facility to establish or maintain financial assurance for closure and/or post closure care;

(xy) Systematic failure of an owner/operator of a TSD facility or a generator of hazardous waste to conduct inspections;

(yz) Failure of an owner/operator of a TSD facility or generator to promptly correct any hazardous condition discovered during an inspection;

(zaa) Failing to prepare a Contingency Plan;

(aabb) Failure to follow an emergency procedure contained in a Contingency Plan or other emergency response plan when failure could result in serious harm;

(bbee) Storage of hazardous waste in a container which is leaking or presenting a threat of release;

(ccdd) Storing more than 100 containers of hazardous waste without complying with the secondary containment requirements at **40 CFR 264.175**;

(ddee) Systematic failure to follow hazardous waste container labeling requirements or lack of knowledge of container contents;

(eeff) Failure to label a hazardous waste container where such failure could cause an inappropriate response to a spill or leak and substantial harm to public health or the environment;

(ffgg) Failure to date a hazardous waste container with a required accumulation date or failure to document length of time hazardous waste was accumulated;

(gghh) Failure to comply with the export requirements for hazardous wastes;

(hhii) Violation of ~~any~~ TSD facility permit condition related to the handling, management, treatment, storage or disposal of hazardous waste unless otherwise classified.~~, provided that the violation is equivalent to any Class I violation set forth in these rules;~~

(iijj) Systematic failure to comply with hazardous waste generator annual reporting requirements, Treatment, Storage, Disposal and Recycling facility annual reporting requirements and annual registration information;

(jjkk) Failure to properly install groundwater monitoring wells such that detection of hazardous waste or hazardous constituents that migrate from the waste management area cannot be immediately be detected;

(kkll) Failure to install any groundwater monitoring wells;

(llmm) Failure to develop and follow a groundwater sampling and analysis plan using proper techniques and procedures;

(mmnn) Generating and treating, storing, disposing of, transporting, and/or offering for transportation, hazardous waste without first obtaining an EPA Identification Number; or

(nnoo) Systematic failure of a large-quantity hazardous waste generator or TSD facility to properly control volatile organic hazardous waste emissions.;

~~(pp) Failure to provide access to premises or records when required by law, rule, permit or order;~~

~~(qq) Any violation related to the generation, management and disposal of hazardous waste which causes major harm or poses a major risk of harm to public health or the environment;~~

~~(rr) In addition to the above, the following Class One violations apply to entities regulated under OAR 340-124:~~ [Violations pertaining to dry cleaning facilities have been moved to -0097]

~~(A) Placing hazardous waste generated at a dry cleaning facility at any location other than an appropriately labeled hazardous waste storage container.~~

~~(B) Discharging dry cleaning wastewater to a sanitary sewer, storm sewer, septic system, boiler or into the waters of the state.~~

~~(C) Failure to have a secondary containment system under and around the dry cleaning machine as required by OAR 340-124-0040(3)(a) and under and around stored solvent as required by OAR 340-124-0040(3)(c).~~

~~(D) Failure by persons generating hazardous waste at a dry cleaning facility in amounts of 220 pounds a month or less or who never store onsite more than 2,200 pounds of hazardous waste to dispose of hazardous waste within one year of the date the waste was placed in the hazardous waste container.~~

~~(E) Failure by persons generating hazardous waste at a dry cleaning facility in amounts of 220 pounds a month or less or who never store onsite more than 2,200 pounds of hazardous waste to label a hazardous waste storage container with the date the waste was first placed in the container.~~

~~(F) Failure to store hazardous waste in closed containers.~~

~~(G) Failure to treat hazardous waste dry cleaning wastewater in equipment meeting the criteria in OAR 340-124-0040(2)(c) or (2)(d).~~

~~(H) Failure of a dry cleaning business owner or dry cleaning operator to submit an annual report to the Department.~~

~~(I) Failure of a dry store operator to submit an annual report to the Department.~~

~~(J) Failure to report a release of more than one pound of dry cleaning solvent in a 24 hour period released outside of a containment system.~~

~~(K) Failure to repair the cause of a release of dry cleaning solvent within a containment system.~~

(2) Class II~~two~~:

(a) Failure to keep a copy of the documentation used to determine whether a residue is a hazardous waste;

(b) Failure to label a tank or container of hazardous wastes with the words "Hazardous Waste," "Pesticide Waste," "Universal Waste" or with other words as required that identify the contents;

(c) Failure to comply with hazardous waste generator annual reporting requirements, Treatment, Storage, Disposal and Recycling facility annual reporting requirements and annual registration information, unless otherwise classified;

(d) Failing to keep a container of hazardous waste closed except when necessary to add or remove waste;

(e) Failing to inspect areas where containers of hazardous waste are stored, at least weekly;

(f) Failure of a hazardous waste generator to maintain aisle space adequate to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination;

(g) Accumulating hazardous waste on-site, without fully complying with the Personnel Training requirements;

(h) Failure to manage universal waste in a manner that prevents releases into the environment; or

(i) Failure to comply with the empty pesticide container management requirements unless otherwise classified;

~~(j) Any violation pertaining to the generation, management and disposal of hazardous waste which is not otherwise classified in these rules is a Class Two violation.~~

~~(k) In addition to the above, the following Class Two violations apply to entities as regulated under OAR 340-124.~~ [Violations pertaining to dry cleaning facilities have been moved to -0097]

~~(A) Failure to remove dry cleaning solvent remaining in the dry cleaning machine and solvent containing residue in accordance with OAR 340-124-0040(1)(h) and 340-124-0055.~~

~~(B) Failure to disconnect utilities from a dry cleaning machine at a dry store in accord with OAR 340-124-0055.~~

~~(C) Failure to comply with the containment requirements in OAR 340-124-0040(3)(b), (3)(d), (3)(e), (3)(f) and (3)(g).~~

~~(D) Failure to prominently post the Oregon Emergency Response System telephone number so the number is immediately available to all employees of the dry cleaning facility.~~

~~(E) Failure of a person delivering perchloroethylene solvent to a dry cleaning facility to use closed direct coupled delivery according to OAR 340-124-0040(6) when delivering perchloroethylene dry cleaning solvent.~~

~~(F) Failure of a dry cleaning operator at a dry cleaning facility to have closed direct coupled delivery for perchloroethylene according to OAR 340-124-0040(6).~~

~~(G) Failure to label hazardous waste storage container with the words "hazardous waste".~~

~~(H) Failure to immediately cleanup a release of dry cleaning solvent within a containment system.~~

~~(I) Any violation pertaining to the generation, management and disposal of hazardous waste from a dry cleaning facility which is not otherwise classified in these rules is a Class Two violation.~~

(3) Class III~~three~~:

(a) Accumulation of hazardous waste on site by a large-quantity generator for less than ten days over the allowable on-site accumulation period;

(b) Accumulation of hazardous waste on site by a small-quantity generator for less than twenty days over the allowable on-site accumulation period;

(c) Failure of a large-quantity generator of hazardous waste to retain signed copies of manifests for at least three years when less than 5% of the reviewed manifests are missing and the facility is able to obtain copies during the inspection;

(d) Failure of a small-quantity generator of hazardous waste to retain signed copies of manifests for at least three years when only 3 of the reviewed manifests are missing and the facility is able to obtain copies and submit them to the ~~D~~department within 10 days of the inspection;

(e) Failure to label only one container or tank which is less than 60 gallons in volume and in which hazardous waste was accumulated on site, with the required words "Hazardous Waste," "Pesticide Waste," "Universal Waste" or with other words as required that identify the contents;

(f) Failure of a large-quantity generator to retain copies of land disposal restriction notifications, demonstrations, or certifications when less than 5% of the reviewed land disposal restriction notices are missing and the facility is able to obtain copies during the inspection;

(g) Failure of a small-quantity generator to retain copies of land disposal restriction notifications, demonstrations, or certifications when 3 or fewer of the reviewed land disposal restriction notices are missing and the facility is able to obtain copies and submit them to the ~~D~~department within 10 days of the inspection;

(h) Failure to keep a container of hazardous waste located in a "satellite accumulation area" closed except when necessary to add or remove waste, when only one container is open; or

(i) Failure to properly label a container of pesticide-containing material for use or reuse as required by OAR 340-109-0010(1).

~~(j) In addition to the above, the following Class Three violations apply to entities as regulated under OAR 340-124:~~ [Violations pertaining to dry cleaning facilities have been moved to -0097]

~~(A) Failure to notify the Department of change or closure at a dry cleaning business or dry store according to 340-124-0050.~~

[Publications: Publications referenced in this rule are available from the agency.]

Stat. Auth.: ORS 459.995, ORS 466.070-ORS 466.080, 466.625 & ORS 468.020
Stats. Implemented: ORS 466.635-466.680, 466.~~88~~990-466.994~~2~~ & 468.090-468.140
Hist.: DEQ 1-1982, f. & ef. 1-28-82; DEQ 22-1984, f. & ef. 11-8-84; DEQ 9-1986, f. & ef. 5-1-86; DEQ 17-1986, f. & ef. 9-18-86; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 13-2002, f. & cert. ef. 10-9-02

340-012-0071

Polychlorinated Biphenyl (PCB) Classification of Violations

~~Violations pertaining to the management and disposal of polychlorinated biphenyls (PCB) shall be classified as follows:~~

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Commission or Department Order;~~

(a~~b~~) Treating or disposing of PCBs anywhere other than at a permitted PCB disposal facility; or

(be) Establishing, constructing or operating a PCB disposal facility without first obtaining a permit.;

~~(d) Failure to provide access to premises or records when required to by law, rule, permit or order;~~

~~(e) Any violation related to the management and disposal of PCBs which causes a major harm or poses a major risk of harm to public health or the environment.~~

(2) Class IITwo:

(a) Violating a condition of a PCB disposal facility permit.;

~~(b) Any violation related to the management and disposal of PCBs which is not otherwise classified in these rules.~~

Stat. Auth.: ORS 459.995, ORS 466.625, ORS 467.030, ORS 468.020 & ORS 468.996
Stats. Implemented: ORS 466.255, ORS 466.265 - ORS 466.270, ORS 466.530 & ORS 466.88990 - ORS 466.9942
Hist.: DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-012-0072

Used Oil Management Classification of Violations

~~Violations pertaining to the management of used oil shall be classified as follows:~~

(1) Class IOne:

~~(a) Violation of a requirement or condition of a Department or Commission Order;~~

(ab) Using used oil as a dust suppressant or pesticide, or otherwise spreading used oil directly in the environment;

(be) Collecting, processing, storing, disposing of, and/or transporting, used oil without first obtaining an EPA Identification number;

(cd) Burning used oil with less than 5,000 Btu/pound for the purpose of "energy recovery" in violation of OAR 340-111-0110(3)(b);

(de) Offering for sale used oil as specification used oil-fuel when the used oil does not meet used oil-fuel specifications;

(ef) Offering to sell off-specification used oil fuel to facility not meeting the definition of an industrial boiler or furnace, or failing to obtain proper certification under 40 CFR 179.75;

(fg) Burning off-specification used oil in a device not specifically exempted under 40 CFR 279.60(a) that does not meet the definition of an industrial boiler or furnace

(gh) Storing or managing used oil in a surface impoundment;

(hi) Storing used oil in containers which are leaking or present a threat of release;

(ij) Failure by a used oil transporter or processor to determine whether the halogen content of used oil exceeds that permissible for used oil;

(jk) Failure to develop and follow a written waste analysis plan when required by law; or

(kl) Failure by a used-oil processor or transporter to manage used-oil residues as required under 40 CFR 279(10)(e).;

~~(m) Any violation related to the management of used oil which causes major harm or poses a major risk of harm to public health or the environment;~~

~~(n) Failure to provide access to premises or records when required to do so by law, rule, permit or order.~~

(2) Class IITwo:

(a) Failure to close or cover used oil tanks or containers as required by OAR 340-111-0032(2);

(b) Failing to submit annual used oil handling reports;

(c) Failure by a used-oil transfer facility, processors, or off-specification used-oil burners to store used oil within secondary containment;

(d) Failure to label each container or tank in which used oil was accumulated on site with the words "used oil";

(e) Failure of a used-oil processor to keep a written operating record at the facility in violation of 40 CFR 279.57;

(f) Failure by a used-oil processor to prepare and maintain a preparedness and prevention plan; or

(g) Failure by a used-oil processor to close out used-oil tanks or containers when required by 40 CFR 279.54(h);.

~~(h) Any violation related to the management of used oil which is not otherwise classified in these rules is a Class two violation.~~

(3) Class III~~three~~:

(a) Failure to label one container or tank in which used oil was accumulated on site, when there are five or more present, with the required words "used oil."

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 459.995, ORS 468.020, ORS 468.869, ORS 468.870 & ORS 468.996
Stats. Implemented: ORS 459A.580 - ORS 459A.585, ORS 459A.590 & ORS 468.090 - ORS 468.140
Hist.: DEQ 33-1990, f. & cert. ef. 8-15-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98

340-012-0073

Environmental Cleanup Classification of Violations

~~Violations of ORS 465.200 through 465.420 and related rules or orders pertaining to environmental cleanup shall be classified as follows:~~

(1) Class I~~One~~:

(a) All environmental cleanup-related Class I violations are addressed under OAR 340-012-0053(1).

~~(a) Violation of a requirement or condition of a Commission or Department order;~~

~~(b) Failure to provide access to premises or records when required to do so by law, rule, permit or order;~~

~~(c) Any violation related to environmental investigation or cleanup which causes a major harm or poses a major risk of harm to public health or the environment.~~

(2) Class II~~Two~~:

(a) Failure to provide information under ORS 465.250.~~;~~

~~(b) Any violation related to environmental investigation or cleanup which is not otherwise classified in these rules.~~

Stat. Auth.: ORS 465.280, ORS 465.400 - ORS 465.410, ORS 465.435 & ORS 468.020
Stats. Implemented: ORS 465.210 & ORS 468.090 - ORS 468.140
Hist.: DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98

340-012-0074

Underground Storage Tank (UST) Cleanup Classification of Violations

(1) Class I:

(a) Failure to report a confirmed release from an UST;

(b) Failure to initiate or complete the investigation or cleanup, or to perform required monitoring, of a release from an UST;

(c) Failure to conduct free product removal;

(d) Failure to properly manage petroleum contaminated soil;

(e) Failure to mitigate fire, explosion or vapor hazards;

(f) Using fraud or deceit to obtain a soil matrix cleanup service provider or supervisor license;

(g) Demonstrating negligence or incompetence in performing soil matrix cleanup services;

(h) Providing soil matrix cleanup services without obtaining the appropriate service provider license; or

(i) Supervising soil matrix cleanup services without obtaining the appropriate supervisor license.

(2) Class II:

(a) Failure to report a suspected release from an UST;

(b) Failure to submit reports or other documentation from the investigation or cleanup of a release from an UST; or

(c) Failure to submit a corrective action plan or submitting an incomplete corrective action plan.

Stat. Auth.: ORS 466.746, ORS 466.994 & ORS 468.020
Stats. Implemented: ORS 466.706 - ORS 466.835 & ORS 466.994

340-012-0079

Heating Oil Tank (HOT) Classification of Violations

(1) Class I:

(a) Failure to report a release from an HOT when the failure is discovered by the department;

(b) Failure to initiate and complete the investigation or cleanup of a release from an HOT;

(c) Failure to submit reports from the investigation or cleanup of a release from an HOT;

(d) Failure to initiate and complete free product removal;

(e) Failure by a service provider to certify that heating oil tank services were conducted in compliance with all applicable regulations;

(f) Failure of a responsible party or service provider to conduct corrective action after the department rejects a certified report;

(g) Using fraud or deceit to obtain an HOT services provider or supervisor license;

(h) Demonstrating negligence or incompetence in performing HOT services;

(i) Providing HOT services without first obtaining the appropriate service provider license; or

(j) Supervising HOT services without first obtaining the appropriate supervisor's license.

(2) Class II:

(a) Failure to submit a corrective action plan (CAP);

(b) Failing to properly decommission an HOT;

(c) Failure of an HOT service provider to hold and continuously maintain errors and omissions or professional liability insurance;

(d) Failure to have a supervisor present when performing HOT services;

(e) Failure to report a release from an HOT within 72 hours when the failure is reported to the department by the responsible person or the service provider;

(f) Offering to provide heating oil tank services without first obtaining the appropriate service provider license.

Stat. Auth.: ORS 466.746, ORS 466.858 - ORS 466.994 & ORS 468.020
Stats. Implemented: ORS 466.706, ORS 466.858 - ORS 466.882, ORS 466.994 & ORS 468.090 - ORS 468.140

340-012-0081

Oil and Hazardous Material Spill and Release Classification of Violations

~~Violations pertaining to spills or releases of oil or hazardous materials will be classified as follows:~~

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Commission or Department Order;~~

~~(b) Failure to provide access to premises or records when required by law, rule, permit or order;~~

(a~~e~~) Failure by any person having ownership or control over oil or hazardous materials to immediately clean up spills or releases or threatened spills or releases;

(b~~d~~) Failure to immediately notify the Oregon Emergency Response System (OERS) of the type, quantity and location of a spill of oil or hazardous material, and corrective and cleanup actions taken and proposed to be taken if the amount of oil or hazardous material released exceeds the reportable quantity, or will exceed the reportable quantity within 24 hours;

(c~~e~~) Failure to immediately stop any spill that has entered or may enter waters of the state;

(d~~f~~) Any spill or release of oil or hazardous materials which enters waters of the state;

(e~~g~~) Failure to identify the existence, source, nature and extent of a hazardous materials spill or release, or threatened spill or release;

(f~~h~~) Failure to activate alarms, warn people in the immediate area, contain the oil or hazardous material or notify appropriate local emergency personnel;

(g~~i~~) Failure to immediately implement a required plan;

(h~~j~~) Failure to immediately correct the cause of the spill or release;

(ik) Use of chemicals to disperse, coagulate or otherwise treat a spill or release of oil or hazardous material spills without prior Ddepartment approval;

(jl) Failure to obtain Ddepartment approval before conducting any major aspect of the spill response contrary to a Ddepartment approved plan for the site or spiller;

(km) Intentional dilution of wastes during a spill response;

~~(n) Knowingly submitting false information to the Department;~~

(lo) Failure to take immediate preventative, repair, corrective or containment action in the event of a threatened spill or release;

(mp) Improper characterization of drug lab waste during disposal or recycling; or

(nq) Disposal of spilled oils and oil contaminated materials resulting from control, treatment and cleanup in a manner not approved by the Ddepartment.

(2) Class IITwo:

(a) Failure to submit a complete and detailed written report to the Ddepartment of a spill of oil or hazardous material for which the person is responsible describing all aspects of the spill and steps taken to prevent a recurrence if required by the Ddepartment to make a report;

(b) Failure to use the required sampling procedures and analytical testing protocols for oil and hazardous materials spills or releases;

~~(c) Failure of a responsible party to coordinate with the Ddepartment during the emergency~~ response to a spill after being notified of the Ddepartment's jurisdiction; or

(d) Failure to immediately report spills or releases within containment areas when reportable quantities are exceeded and exemptions are not met under OAR 340-142-0040.; ~~or~~

~~(e) Any violation related to the spill or release of oil or hazardous materials which is not otherwise classified in these rules is a Class Two violation.~~

(3) Class IIIThree:

(a) Failure to provide maintenance and inspections records of the storage and transfer facilities to the Ddepartment upon request; or

(b) Failure of vessel owners or operators to make maintenance and inspection records, and oil transfer procedures available to the Ddepartment upon request.

Stat. Auth.: ORS 466.625 & ORS 468.020
Stats. Implemented: ORS 466.635 - ORS 466.680, ORS 466.992, & ORS 468.090 - ORS 468.140
Hist.: DEQ 1-2003, f. & cert. ef. 1-31-03; DEQ 7-2003, f. & cert. ef. 4-21-03

340-012-0082

Contingency Planning Classification of Violations

~~Violations pertaining to contingency planning shall be classified as follows:~~

(1) Class I~~One~~:

~~(a) Violation of a requirement or condition of a Commission or Department Order;~~

(a~~b~~) Failure to immediately implement the required oil spill prevention and emergency response contingency plan;

(b~~e~~) Failure to immediately implement the site's applicable contingency plan;

(c~~d~~) Operation of an onshore or offshore facility without an approved or conditionally approved oil spill prevention and emergency response contingency plan;

(d~~e~~) Entry into the waters of the state by a covered vessel without an approved or conditionally approved oil spill prevention and emergency response contingency plan or purchased coverage under an umbrella oil spill prevention and emergency response contingency plan;

(e~~f~~) Entry into the waters of the state by any covered vessel after the D~~d~~epartment has denied such entry;

(f~~g~~) Failure to maintain equipment, personnel and training at levels described in an approved or conditionally approved oil spill prevention and emergency response contingency plan;

~~(h) Knowingly submitting false information to the Department;~~

(g~~i~~) Failure to establish and maintain financial assurance as required by statute, rule or order; or

(h~~j~~) Failure by the owner or operator of an oil terminal facility, or covered vessel, to take all appropriate measures to prevent spills or overfilling during transfer of petroleum or hazardous material products.

(2) Class II~~Two~~:

(a) Failure to pay the annual fee for all offshore and onshore facilities required to develop oil spill prevention and emergency response plans;

(b) Failure to pay the per trip fee for all regulated vessels or barges within thirty (30) days of conclusion of each trip;

(c) Failure by any onshore or offshore facility or covered vessel to submit an oil spill prevention and emergency response contingency plan to the ~~D~~department at least 90 calendar days before beginning operations in Oregon;

(d) Failure, in the event of a spill, to have prepared and have available on-site a simplified field document summarizing key notification and action elements of a required vessel or facility contingency plan;

(e) Failure by a plan holder to submit and implement required changes to a required vessel or facility contingency plan that has received conditional approval status from the ~~D~~department within thirty (30) calendar days of conditional approval;

(f) Failure of a covered vessel or facility contingency plan holder to submit the required vessel or facility contingency plan for re-approval at least ninety (90) days before the expiration date of the required vessel or facility contingency plan; or

(g) Failure to obtain ~~D~~department approval of the management or disposal of spilled oil or hazardous materials, or materials contaminated with oil or hazardous material, that are generated during spill response.; ~~or~~

~~(h) Any violation related to required contingency plans that is not otherwise classified in these rules is a Class Two violation.~~

(3) Class III~~Three~~:

(a) Failure to provide maintenance and inspections records of the storage and transfer facilities to the ~~D~~department upon request;

(b) Failure of a vessel owner or operator to make maintenance and inspection records and oil transfer procedures available to the ~~D~~department upon request;

(c) Failure to have at least one copy of the required vessel or facility contingency plan in a central location accessible at any time by the incident commander or spill response manager;

(d) Failure to have the covered vessel field document available to all appropriate personnel in a conspicuous and accessible location;

(e) Failure to notify the ~~D~~department within 24 hours of any significant changes that could affect implementation of a required vessel or facility contingency plan; or

(f) Failure to distribute amended page(s) of the plan changes to the ~~D~~department within thirty (30) calendar days of the amendment.

Stat. Auth.: ORS 468B.350
Stats. Implemented: ORS 468B.345
Hist.: DEQ 1-2003, f. & cert. ef. 1-31-03

340-012-0083

Ballast Water Management Classification of Violations

~~Violations pertaining to ballast water management shall be classified as follows.~~

(1) Class I~~One~~:

~~(a) Violation of a Commission or Department Order;~~

~~(b) Failure to provide access to premises or records when required by law, rule, permit or order;~~

(a~~e~~) Unauthorized discharging of ballast water.~~; or~~

~~(d) Knowingly submitting false information.~~

(2) Class II~~Two~~:

(a) Failure to report ballast water management information to the ~~D~~department at least 24 hours before entering the waters of this ~~S~~state; or

(b) Failure to file an amended ballast water management report after a change in the vessel's ballast water management plan.~~; or~~

~~(c) Any violation of these rules related to ballast water management, or ballast water reports and reporting, that is not otherwise classified in these rules is a Class Two violation.~~

Stat. Auth.: ORS 783.600 to ORS 783.992
Stats. Implemented: ORS 783.620
Hist.: DEQ 1-2003, f. & cert. ef. 1-31-03

340-012-0097
Dry Cleaning Classification of Violations

(1) Class I:

(a) Placing or storing hazardous waste generated at a dry cleaning facility at any location other than in an appropriately labeled hazardous waste storage container;

(b) Discharging dry cleaning wastewater to a sanitary sewer, storm sewer, septic system, boiler or into waters of the state;

(c) Failure to have a secondary containment system under and around a dry cleaning machine or stored solvent;

(d) Failure of a person generating hazardous waste at a dry cleaning facility to dispose of hazardous waste within the required time frame from when the waste was placed in a hazardous waste container;

(e) Failure of a person generating hazardous waste at a dry cleaning facility to label a hazardous waste storage container with the date the waste was first placed in the container;

(f) Failure of a dry cleaning owner or operator to store hazardous waste in closed containers;

(g) Failure of a dry cleaning owner or operator to treat hazardous waste dry cleaning wastewater in the required equipment;

(h) Failure of a dry cleaning owner or operator to submit an annual report to the department;

(i) Failure to report a release outside of a containment system of more than one pound of dry cleaning solvent released in a 24-hour period; or

(j) Failure to repair the cause of a release of dry cleaning solvent within a containment system.

(2) Class II:

(a) Failure of a dry cleaning owner or operator to remove dry cleaning solvent or solvent-containing residue from a dry cleaning machine, dry cleaning store or dry store as required;

(b) Failure to disconnect utilities from a dry cleaning machine at a dry cleaning store as required;

(c) Failure of a dry cleaning operator to comply with containment requirements;

(d) Failure of a dry cleaning operator to prominently post the Oregon Emergency Response System telephone number so the number is immediately available to all employees of the dry cleaning facility;

(e) Failure of a person delivering perchloroethylene to a dry cleaning facility to use closed, direct-coupled delivery;

(f) Failure of a dry cleaning operator to have closed, direct-coupled delivery for perchloroethylene;

(g) Failure of a dry cleaner owner or operator to label a hazardous waste storage container with the words "hazardous waste;" or

(h) Failure to immediately clean up a release of dry cleaning solvent within a containment system.

(3) Class III:

(a) Failure to notify the department of change or closure at a dry cleaning business or dry store.

Stat. Auth.: ORS 466.070 - ORS 466.080, ORS 466.625 & ORS 468.020
Stats. Implemented: ORS 466.635 – ORS 466.680, ORS 466.990, ORS 466.994 & ORS 468.090 - 468.140

340-012-0130 [original text from -0045(1)(a)]

Determination of Violation Magnitude

(1) For each civil penalty assessed, the magnitude ~~shall~~ will be moderate unless:

(a) A selected magnitude is specified in 340-012-0135 and information is reasonably available to the department to determine the application of that selected magnitude; or

(b) The department determines, using information reasonably available to it, that the magnitude should be major under section (2) or minor under section (3).

(c) If the department determines, using information reasonably available to the department, that a general or selected magnitude applies, the Department's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude.

(2~~i~~) The magnitude of the violation will be major ~~I~~if the ~~D~~department finds that the violation had a significant adverse impact on human health or the environment~~, or posed a significant threat to public health.~~ , ~~a determination of major magnitude shall be made.~~ In making this finding~~a determination of major magnitude~~, the ~~D~~department ~~shall~~ will consider all reasonably available ~~applicable~~ information, including, but not limited to: ~~such factors as: T~~the degree of deviation from applicable statutes or ~~the C~~commission~~'s~~ and ~~D~~department~~'s statutes,~~ rules, standards, permits or orders~~,~~; the extent of actual effects of the violation; the concentration, volume, ~~percentage, duration,~~or toxicity of the materials involved; and the duration ~~, and the extent~~ of the ~~effects of the~~ violation. In making this finding, the ~~D~~department may consider any single factor to be conclusive. ~~for the purpose of making a major magnitude determination;~~

(3~~ii~~) The magnitude of the violation will be minor ~~I~~if the ~~D~~department finds that the violation had no more than a de minimis ~~potential for or actual~~ adverse impact on human health or the environment, and ~~nor~~ posed no more than a de minimis ~~any~~ threat to ~~public~~ human health~~,~~ or other environmental receptors. ~~, a determination of minor magnitude shall be made.~~ In making

this finding~~a determination of minor magnitude~~, the ~~D~~department ~~shall~~ will consider all reasonably available ~~applicable~~ information including, but not limited to: ~~such factors as: T~~ the degree of deviation from applicable statutes or ~~the C~~commission's and ~~D~~department's ~~statutes,~~ rules, standards, permits or orders~~;~~; the extent of actual or threatened effects of the violation; the concentration, volume, ~~percentage, duration,~~or toxicity of the materials involved;~~,~~ and the duration ~~extent~~ of the ~~effects of the~~ violation. In making this finding, the ~~D~~department may consider any single factor to be conclusive. ~~for the purpose of making a minor magnitude determination.~~

Stat. Auth.: ORS 468.020 & ORS 468.130
Stats. Implemented: ORS 459.376, ORS 459.995, ORS 465.900, ORS 465.992, ORS 466.990 – ORS 466.994, ORS 468.090 – ORS 468.140 & ORS 468B.450

340-012-0135~~090~~

Selected Magnitude Categories

(1) Magnitudes for select violations pertaining to ~~A~~air ~~Q~~quality may be determined as follows:

(a) Opacity limitation violations:

(A) Major - Opacity measurements or readings of more than 40 percent opacity over the applicable limitation;

(B) Moderate - Opacity measurements or readings between greater than 10 percent and 40 percent or less opacity over the applicable limitation;

(C) Minor - Opacity measurements or readings of ten percent or less opacity over the applicable limitation.

(b) Steaming rates, performance standards, and fuel usage limitations:

(A) Major - Greater than 1.3 times any applicable limitation;

(B) Moderate - From 1.1 up to and including 1.3 times any applicable limitation;

(C) Minor - Less than 1.1 times any applicable limitation.

(c) Air contaminant emission limitation violations for selected air pollutants:

~~(A)~~ Magnitude determinations under this subsection shall be made based upon significant emission rate amounts listed in OAR 340-200-0020 (Tables 2 and 3).~~the following table: [Table not included. See ED. NOTE.]~~

(A~~B~~) Major:

(i) Exceeding the annual ~~amount~~ limit as established by permit, rule or order by more than the above amount;

(ii) Exceeding the monthly ~~amount~~ limit as established by permit, rule or order by more than ten percent of the above amount;

(iii) Exceeding the daily ~~amount~~ limit as established by permit, rule or order by more than 0.5 percent of the above amount;

(iv) Exceeding the hourly ~~amount~~ limit as established by permit, rule or order by more than 0.1 percent of the above amount.

(B~~C~~) Moderate:

(i) Exceeding the annual ~~amount~~ limit as established by permit, rule or order by an amount from 50 up to and including 100 percent of the above amount;

(ii) Exceeding the monthly ~~amount~~ limit as established by permit, rule or order by an amount from five up to and including ten percent of the above amount;

(iii) Exceeding the daily ~~amount~~ limit as established by permit, rule or order by an amount from 0.25 up to and including 0.50 percent of the above amount;

(iv) Exceeding the hourly ~~amount~~ limit as established by permit, rule or order by an amount from 0.05 up to and including 0.10 percent of the above amount.

(C~~D~~) Minor:

(i) Exceeding the annual ~~amount~~ limit as established by permit, rule or order by an amount less than 50 percent of the above amount;

(ii) Exceeding the monthly ~~amount~~ limit as established by permit, rule or order by an amount less than five percent of the above amount;

(iii) Exceeding the daily ~~amount~~ limit as established by permit, rule or order by an amount less than 0.25 percent of the above amount;

(iv) Exceeding the hourly ~~amount~~ limit as established by permit, rule or order by an amount less than 0.05 percent of the above amount.

(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;

(B) Moderate - From 40 lineal feet up to and including 260 lineal feet or from 80 square feet up to and including 160 square feet or from 17 cubic feet up to and including 35 cubic feet of asbestos-containing material;

(C) Minor - Less than 40 lineal feet or 80 square feet or less than 17 cubic feet of asbestos-containing material;

(D) The magnitude of the asbestos violation may be increased by one level if the material was comprised of more than five percent asbestos.

(e) Open burning violations:

(A) Major - Initiating or allowing the initiation of open burning of material constituting more than five cubic yards in volume;

(B) Moderate - Initiating or allowing the initiation of open burning of material constituting from one up to and including five cubic yards in volume, or if the ~~D~~department lacks sufficient information on which to base a determination;

(C) Minor - Initiating or allowing the initiation of open burning of material constituting less than one cubic yard in volume;

(D) For the purposes of determining the magnitude of a violation only, five tires shall be deemed the equivalent in volume to one cubic yard.

(2) Magnitudes for select violations pertaining to Water Quality may be determined as follows:

(a) Violating wastewater discharge limitations:

(A) Major:

(i) Discharging more than 30% outside any applicable range for flow rate, concentration limitation, or mass limitation, except for toxics, pH, and bacteria; or

(ii) Discharging more than 10% over any applicable concentration limitation or mass load limitations for toxics; or

(iii) Discharging wastewater having a pH of more than 1.5 above or below any applicable pH range; or

(iv) Discharging more than 1,000 bacteria per 100 milliliters (bact./100 mls) over the effluent limitation; or

(v) Discharging wastes having more than 10% below any applicable removal rate.

(B) Moderate:

(i) Discharging from 10% to 30% outside any applicable range for flow rate, concentration limitation, or mass limitation, except for toxics, pH, and bacteria; or

(ii) Discharging from 5% to 10% over any applicable concentration limitation or mass load limitations for toxics; or

(iii) Discharging wastewater having a pH from 0.5 to 1.5 above or below any applicable pH range; or

(iv) Discharging from 500 to 1,000 bact./100 mls over the effluent limitation; or

(v) Discharging wastewater having from 5% to 10% below any applicable removal rate.

(C) Minor:

(i) Discharging less than 10% outside any applicable range for flow rate, concentration limitation or mass limitation, except for toxics, pH, and bacteria; or

(ii) Discharging less than 5% over any applicable concentration limitation or mass load limitations for toxics; or

(iii) Discharging wastewater having a pH of less than 0.5 above or below any applicable pH range; or

(iv) Discharging less than 500 bact./100 mls over the effluent limitation; or

(v) Discharging wastewater having less than 5% below any applicable removal rate.

(b) Causing violation of numeric water-quality standards:

(A) Major:

(i) Reducing or increasing any criteria by 25% or more of the standard except for toxics, pH, and turbidity;

(ii) Increasing toxics by any amount over the acute standard or by 100% or more of the chronic standard;

(iii) Reducing or increasing pH by 1.0 pH unit or more from the standard;

(iv) Increasing turbidity by 50 nephelometric turbidity units (NTU) or more of the standard.

(B) Moderate:

(i) Reducing or increasing any criteria by more than 10% but less than 25% of the standard, except for toxics, pH, and turbidity;

(ii) Increasing toxics by more than 10% but less than 100% of the chronic standard;

(iii) Reducing or increasing pH by more than 0.5 pH unit but less than 1.0 pH unit from the standard;

(iv) Increasing turbidity by more than 20 but less than 50 NTU over the standard.

(C) Minor:

(i) Reducing or increasing any criteria by 10% or less of the standard, except for toxics, pH, and turbidity;

(ii) Increasing toxics by 10% or less of the chronic standard;

(iii) Reducing or increasing pH by 0.5 pH unit or less from the standard;

(iv) Increasing a turbidity standard by 20 NTU or less over the standard.

(D) The magnitude of the violation may be increased one level if the reduction or increase:

(i) Occurred in a stream which is water-quality limited for that ~~criterium~~criterion; or

(ii) For oxygen or turbidity in a stream where salmonids are rearing or spawning; or

(iii) For bacteria in shell-fish growing waters or during period June 1 through September 30.

(3) Magnitudes for select violations pertaining to Hazardous Waste may be determined as follows:

(a) Failure to make a hazardous waste determination:

(A) Major - Failure to make the determination on five or more waste streams;

(B) Moderate - Failure to make the determination on three or four waste streams;

(C) Minor - Failure to make the determination on one or two waste streams;

(D) The magnitude of the violation may be increased by one level, if more than 1,000 gallons of hazardous waste is involved in the violation;

(E) The magnitude of the violation may be decreased by one level, if less than 250 gallons of hazardous waste is involved in the violation.

(b) Hazardous Waste disposal violations:

(A) Major - Disposal of more than 150 gallons of hazardous waste, or the disposal of more than three gallons of acutely hazardous waste, or the disposal of any amount of hazardous waste or acutely hazardous waste that has a substantial impact on the local environment into which it was placed;

(B) Moderate - Disposal of 50 to 150 gallons of hazardous waste, or the disposal of one to three gallons of acutely hazardous waste;

(C) Minor - Disposal of less than 50 gallons of hazardous waste, or the disposal of less than one gallon of acutely hazardous waste when the violation had no potential for or had no more than de minimis actual adverse impact on the environment, nor posed any threat to public health, or other environmental receptors.

(c) Hazardous waste management violations:

(A) Major - Failure to comply with hazardous waste management requirements when more than 1,000 gallons of hazardous waste, or more than 20 gallons of acutely hazardous waste, are involved in the violation;

(B) Moderate - Failure to comply with hazardous waste management requirements when 250 to 1,000 gallons of hazardous waste, or when 5 to 20 gallons of acutely hazardous waste, are involved in the violation;

(C) Minor - Failure to comply with hazardous waste management requirements when less than 250 gallons of hazardous waste, or 10 gallons of acutely hazardous waste are involved in the violation.

(4) Magnitudes for select violations pertaining to Solid Waste may be determined as follows:

(a) Operating a solid waste disposal facility without a permit:

(A) Major - If the volume of material disposed of exceeds 400 cubic yards;

(B) Moderate - If the volume of material disposed of is between 40 and 400 cubic yards;

(C) Minor - If the volume of materials disposed of is less than 40 cubic yards;

(D) The magnitude of the violation may be raised by one magnitude if the material disposed of was either in the floodplain of waters of the state or within 100 feet of waters of the state.

(b) Failing to accurately report the amount of solid waste received.

(A) Major - If the amount of solid waste is underreported by more than 15% of the amount received;

(B) Moderate - If the amount of solid waste is underreported by from 5% to 15% of the amount received;

(C) Minor - If the amount of solid waste is underreported by less than 5% of the amount received.

(5) Magnitudes for select violations pertaining to spills of oil or hazardous materials may be adjusted when a violation listed in subsection (a) or (b) has been determined. Further, any overdue notification violation under subsection (b) is raised in significance as indicated in subsection (c) if the amount of the material involved equals or exceeds the reportable quantity (RQ) set by OAR chapter 340, -division 142:

(a) Failure to clean up spills involving the following quantities spilled to land and not threatening waters of the ~~S~~state:

(A) Major - Greater than 10 times the RQ.

(B) Moderate - From the RQ to 10 times the RQ.

(C) Minor - Less than the RQ.

(b) Overdue notification violations.

(A) Major - Notifying more than one week after the spill or release.

(B) Moderate - Notifying from 48 hours to one week after the spill or release.

(C) Minor - Notifying between 24 and 48 hours after the spill or release.

(c) Overdue notification violations are raised in relation to RQ:

(A) A spill or release of greater than 10 times the RQ increases minor or moderate magnitude violations in section (5)(b) to major magnitude violations.

(B) A spill or release equal to twice the RQ, or to 10 times the RQ, increases a minor magnitude violation in section (5)(b) to a moderate magnitude violation.

[ED. NOTE: Tables & Publications referenced are available from the agency.]

Stat. Auth.: ORS 468.065 & ORS 468A.045
Stats. Implemented: ORS 468.090 - ORS 468.140 & ORS 468A.060
Hist.: DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 1-2003, f. & cert. ef. 1-31-03

340-012-0140~~42~~

Determination of Base ~~Civil~~ Penalty ~~Schedule Matrices~~

(1) Except for Class III violations and for penalties assessed under OAR 340-012-0155, the base penalty (BP) is determined by applying the type, class and magnitude of the violation to the matrices set forth in this section. For Class III violations, no magnitude determination is required.~~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:~~

(2~~1~~)(~~a~~) $8~~10~~,000 Penalty Matrix:

(ab) ~~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. The~~is $8,000 penalty matrix ~~shall~~ appliesy to the following:

(A) Any violation of an ~~related to~~ air quality statutes, rules, permits or related orders committed by a person that has or should have a Title V permit or an Air Contaminant Discharge Permit (ACDP) issued pursuant to New Source Review (NSR) regulations or Prevention of Significant Deterioration (PSD) regulations, or section 112(g) of the federal Clean Air Act.

(B), ~~except for the selected o~~ Open burning violations as follows:~~listed in section (3) below;~~

(i) Any violation of an open burning statute, rule, permit or related order committed by a permitted industrial facility.

(ii) Any violation of OAR 340-264-0060(3) in which 25 or more cubic yards of prohibited materials are burned, except when committed by a residential owner-occupant.

(iii) Any violation of OAR 340-264-0080 through -0180 in which ten or more cubic yards of commercial, construction, demolition, or industrial wastes are burned.

(iv) Any violation involving open burning of more than 15 tires except when committed by a residential owner-occupant.

(C) Any violation of 468B.025(1)(a) or (1)(b), or of ORS 468B.050(1)(a) by a person without an National Pollutant Discharge Elimination System (NPDES) permit.

(D~~B~~) Any violation ~~related to ORS 164.785 and~~of a water quality statutes, rules, permits or related order~~s, violations~~ by:

(i) a~~A~~ person that has an NPDES permit, or that has~~ving~~ or ~~needing~~ should have a Water Pollution Control Facility (WPCF) P~~p~~permit, for a municipal or private utility sewage treatment facility with a permitted flow of five million or more gallons per day.~~, violations of ORS Chapter 454 and on-site sewage disposal rules by a person performing sewage disposal services;~~

(ii) A person that has a major industrial source NPDES permit.

(iii) A person that has a population of 100,000 or more, as determined by the most recent national census, and either has or should have a WPCF Municipal Stormwater Underground Injection Control (UIC) System Permit, or has an NPDES Municipal Separated Storm Sewer Systems (MS4) Stormwater Discharge Permit.

(iv) A person that has or should have a WPCF permit for a major vegetable or fruit processing facility, for a major mining operation involving over 500,000 cubic yards per year, or for any mining operation using chemical leaching or froth flotation.

(v) A person that installs or operates a prohibited Class I, II, III, IV or V UIC system, except for a cesspool.

(E~~C~~) Any violation ~~related to~~ of an underground storage tanks statute~~s~~, rules, permits or related order~~s~~, committed by the owner, operator or permittee of 10 or more UST facilities or a person who is licensed or should be licensed by the department to perform tank services.~~except for failure to pay a fee due and owing under ORS 466.785 and 466.795;~~

(F) Any violation of a heating oil tank statute, rule, permit, license or related order committed by a person who is licensed or should be licensed by the department to perform heating oil tank services.

(G) Any violation of ORS 468B.485, or related rules or orders regarding financial assurance for ships transporting hazardous materials or oil.

(H) Any violation of a used oil statute, rule, permit or related order committed by a person who is a used oil transporter, transfer facility, processor or re-refiner, off-specification used oil burner or used oil marketer.

(I~~D~~) Any violation ~~related to~~ of a hazardous waste ~~management~~ statutes, rules, permits or related order~~s, except for violations of ORS 466.992 related to damage to wildlife;~~ by:

(i) A person that is a large quantity generator or hazardous waste transporter.

(ii) A person that has or should have a treatment, storage or disposal facility permit.

(JE) Any violation ~~related to~~ of an oil and hazardous material spill and release statutes, rules, or related orders~~, except for negligent or intentional oil spills;~~.

(KF) Any violation ~~related to~~ of a polychlorinated biphenyls (PCBs) management and disposal statutes, rule, permit or related order~~;~~.

(LG) Any violation of ORS Chapter 465, UST or environmental cleanup statute, rules, ~~or~~related orders or related agreement.~~;~~

~~(H) Any violation of ORS Chapter 467 or any violation related to noise control rules or orders;~~

(MI) Unless specifically listed under another penalty matrix, ~~A~~any violation of ORS Chapter 459 or any violation ~~related to~~ of a solid waste statutes, rules, permits, or related orders committed by:~~;~~

(i) A person that has or should have a solid waste disposal permit.

(ii) A person with a population of 25,000 or more, as determined by the most recent national census.

~~(J) Any violation of ORS Chapter 459A, except as provided in section (4) of this rule and except any violation by a city, county or metropolitan service district of failing to provide the opportunity to recycle as required by law; and~~

~~(2) In addition to any other penalty provided by law, any person causing an oil spill through an intentional or negligent act shall incur a civil penalty of not less than $100 dollars or more than $20,000 dollars. The amount of the penalty shall be determined by doubling the values contained in the matrix in section (1) of this rule in conjunction with the formula contained in OAR 340-012-0045.~~ [language moved to -0155(1)(b)]

[original language from -0042(1)(a)(A)]

(b) The base penalty values for the $8,000 penalty matrix are as follows:

(A) Class I:

(i) Major -- $~~6~~8000;

(ii) Moderate -- $~~3~~4000;

(iii) Minor -- $~~1~~2000.

(B) Class II:

(i) Major -- $~~2~~4000;

(ii) Moderate -- $~~1~~2000;

(iii) Minor -- $~~5~~1000.

(C) Class III: $750

~~(i) Major -- $500;~~

~~(ii) Moderate -- $250;~~

~~(iii) Minor -- $100.~~

(3) $6,000 Penalty Matrix

(a) The $6,000 penalty matrix applies to the following:

(A) Any violation of an air quality statute, rule, permit or related order committed by a person that has or should have an ACDP permit, except for NSR, PSD and Basic ACDP permits.

(B) Any violation of an asbestos statute, rule, permit or related order except those violations listed in section (5) of this rule.

(C) Any violation of a vehicle inspection program statute, rule, permit or related order committed by an auto repair facility.

(D) Any violation of a water quality statute, rule, permit or related order committed by:

(i) A person that has an NPDES Permit, or that has or should have a WPCF Permit, for a municipal or private utility sewage treatment facility with a permitted flow of two million or more, but less than five million, gallons per day.

(ii) A person that has a minor industrial source NPDES Permit, or has or should have a WPCF Permit, for an industrial source.

(iii) A person that has or should have applied for coverage under an NPDES or a WPCF General Permit, except an NPDES Stormwater Discharge 1200-C General Permit for a construction site of one acre or more, but less than five acres in size.

(iv) A person that has a population of less than 100,000 but more than 10,000, as determined by the most recent national census, and has or should have a WPCF Municipal Stormwater UIC System Permit or has an NPDES MS4 Stormwater Discharge Permit.

(v) A person that has or should have a WPCF permit for a mining operation involving from 100,000 up to 500,000 cubic yards other than those operations using chemical leachate or froth flotation.

(vi) A person that owns, and that has or should have registered, a UIC system that disposes of wastewater other than storm water or sewage.

(E) Any violation of an UST statute, rule, permit or related order committed by a person who is the owner, operator or permittee of five to nine UST facilities.

(F) Unless specifically listed under another penalty matrix, any violation of ORS Chapter 459 or other solid waste statute, rule, permit, or related order committed by:

(i) A person that has or should have a waste tire permit or

(ii) A person with a population of more than 5,000 but less than or equal to 25,000, as determined by the most recent national census.

(G) Any violation of a hazardous waste management statute, rule, permit or related order committed by a person that is a small quantity generator.

(b) The base penalty values for the $6,000 penalty matrix are as follows:

(A) Class I:

(i) Major - $6,000.

(ii) Moderate - $3,000.

(iii) Minor - $1,500.

(B) Class II:

(i) Major - $3,000.

(ii) Moderate - $1,500.

(iii) Minor - $750.

(C) Class III: $500.

(43)~~(a)~~ $2,500 Penalty Matrix:

(ab) ~~No civil penalty issued by the Director pursuant to this matrix shall be less than $50. The total civil penalty may exceed $2,500 for each day of each violation, but shall not exceed $10,000 for each day of each violation.~~ The~~is~~ $2,500 penalty matrix ~~shall~~ applies~~y~~ to the following:

(A) Any violation of any statute, rule, permit, license, or order committed by a person not listed under another penalty matrix.

(B) Any violation of an air quality statute, rule, permit or related order committed by a person not listed under another penalty matrix.

(C) Any violation of an open burning statute, rule, permit or related order committed by the residential owner-occupant, involving more than 25 cubic yards of any material listed in OAR 340-264-0060(3) or more than 15 tires, and not listed under another penalty matrix.

(D) Any violation of a vehicle inspection program statute, rule, permit or related order committed by a natural person, except for those violations listed in section (5) of this rule.

(E) Any violation of a water quality statute, rule, permit, license or related order not listed under another penalty matrix and committed by:

(i) A person that has an NPDES permit, or has or should have a WPCF permit, for a municipal or private utility wastewater treatment facility with a permitted flow of less than two million gallons per day.

(ii) A person that has or should have applied for coverage under a NPDES Stormwater Discharge 1200-C General Permit for a construction site that is more than one, but less than five acres.

(iii) A person that has a population of 10,000 or less, as determined by the most recent national census, and either has an NPDES MS4 Stormwater Discharge Permit or has or should have a WPCF Municipal Stormwater UIC System Permit.

(iv) A person who is licensed to perform onsite sewage disposal services or who has performed sewage disposal services.

(v) A person, except for a residential owner-occupant, that owns and either has or should have registered a UIC system that disposes of stormwater or sewage.

(vi) A person that has or should have a WPCF individual stormwater UIC system permit.

(F) Any violation of an onsite sewage disposal statute, rule, permit or related order, except for a violation committed by the residential owner-occupant.

(G) Any violation of an UST statute, rule, permit or related order if the person is the owner, operator or permittee of two to four UST facilities.

(H) Any violation, except a violation related to a spill or release, of a used oil statute, rule, permit or related order committed by a person that is a used oil generator.

(I) Unless listed under another penalty matrix, any violation of a hazardous waste management statute, rule, permit or related order committed by a person that is a conditionally exempt generator if the violation does not impact the person's generator status.

(J) Any violation of ORS Chapter 459 or other solid waste statute, rule, permit, or related order committed by a person with a population less than 5,000, as determined by the most recent national census.

(K) Any violation of the labeling requirements of ORS 459A.675 through 459A.685.

(L) Any violation of rigid pesticide container disposal requirements by a conditionally exempt generator of hazardous waste.

~~(A) Any violation related to on-site sewage statutes, rules, permits, or orders, other than violations by a person performing sewage disposal services or by a person having or needing a Water Pollution Control Facility permit;~~

~~(B) Any violation of the Department's Division 23 open burning rules, excluding all industrial open burning violations, and violations of OAR 340-023-0042(2) where the volume of the prohibited materials burned is greater than or equal to twenty-five cubic yards. In cases of the open burning of tires, this matrix shall apply only if the number of tires burned is less than fifteen. The matrix set forth in section (1) of this rule shall be applied to the open burning violations excluded from this section.~~

(b) The base penalty values for the $2,500 penalty matrix are as follows:

[original text from -0042((3)(a)(A)](A) Class I:

(i) Major -- $2500;

(ii) Moderate -- $1250~~000~~;

(iii) Minor -- $625~~500~~.

(B) Class II:

(i) Major -- $1250~~750~~;

(ii) Moderate -- $625~~500~~;

(iii) Minor -- $300~~200~~.

(C) Class III: $200

~~(i) Major – $250;~~

~~(ii) Moderate – $100;~~

~~(iii) Minor – $50.~~

(54)~~(a)~~ $1,000 Penalty Matrix:

(a~~b~~) ~~No civil penalty issued by the Director pursuant to this matrix shall be less than $50 or more than $1,000 for each day of each violation.~~

~~(c)~~ The~~is~~ $1,000 penalty matrix ~~shall~~ applies~~y~~ to the following:

(A) Any violation of an open burning statute, rule, permit or related order committed by a residential owner-occupant at the residence, not listed under another penalty matrix.

(B) Any violation of visible emissions standards by operation of a vehicle.

(C) Any violation of an asbestos statute, rule, permit or related order committed by a residential owner-occupant.

(D) Any violation of an onsite sewage disposal statute, rule, permit or related order of OAR chapter 340, division 44 committed by a residential owner-occupant.

(E) Any violation of an UST statute, rule, permit or related order committed by a person who is the owner, operator or permittee of one UST facility.

(F) Any violation of an HOT statute, rule, permit or related order not listed under another penalty matrix.

(G) Any violation of a dry cleaning facility statute, rule, permit or related order.

(H) ~~a~~Any violation of a statute,~~laws,~~ rules, permit or orders relating to rigid plastic containers,~~;~~ except for violation of the labeling requirements under OAR 459A.675 through 459A.685. ~~and for rigid pesticide containers under OAR 340-109-0020 which shall be subject to the matrix set forth in section (1) of this rule.~~

(I) Any violation of a statute, rule or order relating to the opportunity to recycle.

(J) Any violation of a statute, rule, permit or order relating to woodstoves, except a violation related to the sale of new or used woodstoves.

(K) Any violation of an UIC system statute, rule, permit or related order by a residential owner-occupant, when the UIC disposes of stormwater or sewage.

(b) The base penalty values for the $1,000 penalty matrix are as follows:

[Original text from -0042(4)(a)(A)](A) Class I:

(i) Major -- $1000;

(ii) Moderate -- $500~~750~~;

(iii) Minor -- $250~~500~~.

(B) Class II:

(i) Major -- $500~~750~~;

(ii) Moderate -- $250~~500~~;

(iii) Minor -- $125~~250~~.

(C) Class III: $100

~~(i) Major -- $250;~~

~~(ii) Moderate -- $150;~~

~~(iii) Minor -- $50.~~

~~(5)(a) $500 Matrix:~~

~~(A) Class I:~~

~~(i) Major -- $400;~~

~~(ii) Moderate -- $300;~~

~~(iii) Minor -- $200.~~

~~(B) Class II:~~

~~(i) Major -- $300;~~

~~(ii) Moderate -- $200;~~

~~(iii) Minor -- $100.~~

~~(C) Class III:~~

~~(i) Major -- $200;~~

~~(ii) Moderate -- $100;~~

~~(iii) Minor -- $50.~~

~~(b) No civil penalty issued by the Director pursuant to this matrix shall be less than $50 dollars or more than $500 dollars for each day of each violation. This matrix shall apply to the following types of violations:~~

~~(A) Any violation of laws, rules, orders or permits relating to woodstoves, except violations relating to the sale of new woodstoves;~~

~~(B) Any violation by a city, county or metropolitan service district of failing to provide the opportunity to recycle as required by law; and~~

~~(C) Any violation of ORS 468B.480 and 468B.485 and rules adopted thereunder relating to the financial assurance requirements for ships transporting hazardous materials and oil.~~

Stat. Auth.: ORS 468.020 & ORS 468.090 - ORS 468.140
Stats. Implemented: ORS 459.995, ORS 459A.655, ORS 459A.660, ORS 459A.685 & ORS 468.035
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 33-1990, f. & cert. ef. 8-15-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 9-1996, f. & cert. ef. 7-10-96; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01

340-012-0145 [original text from -0045]

Determination of Aggravating or Mitigating Factors

(1) Each of the aggravating or mitigating factors is determined, as described below, and then applied to the civil penalty formula in OAR 340-012-0045(2).

(~~A~~2) "P" is whether the ~~R~~respondent has any prior significant actions (PSAs). ~~relating to statutes, rules, orders and permits pertaining to environmental quality or pollution control.~~ A violation ~~is deemed to have~~ becomes a PS~~Arior Significant Action~~ on the date ~~of the issuance of the first~~ the first ~~F~~formal ~~E~~enforcement ~~A~~action in which it is cited is issued. ~~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.~~

(a) Except as otherwise provided in this section, ~~T~~the values for "P" and the finding ~~which~~ that supports each are as follows:

(~~i~~A) 0 if no ~~prior significant actions~~ PSAs or there is insufficient information on which to base a finding under this section~~;~~.

(~~ii~~B) 1 if the PSA~~prior significant action is~~ included one Class II~~Two~~ violation~~-~~ or two Class III ~~Threes~~ violations.~~;~~

(~~iii~~C) 2 if the PSA~~prior significant action~~(s) included~~is~~ one Class I violation ~~One~~ or Class I equivalent.~~;~~

(~~iv~~D) For each additional Class I violation or Class I equivalent, the value of "P" is increased by 1.~~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~~b) The value of "P" will not exceed 10.~~ if the prior significant actions are nine Class Ones or equivalents, or~~

(dc) i~~I~~f any of the PSA~~sprior significant actions~~ were issued ~~for any violation of~~ under ORS 468.996, the value of "P" will be 10.~~;~~

(d~~xii~~) In determining the ~~appropriate~~ value of "P," ~~for prior significant actions as listed above,~~ the ~~D~~department ~~shall~~ will:

(A) ~~r~~Reduce the ~~appropriate factor~~ value of "P" by:

(~~I~~Ai) ~~A value of~~ 2 if all the formal enforcement actions in which PSAs were cited were ~~date of~~ issued~~ance of all the prior significant actions are greater~~ more than three years ~~old~~ before the date the current violation occurred.~~; or~~

(~~II~~Bii) ~~A value of~~ 4 if all the formal enforcement actions in which PSAs were cited were ~~date of~~ issued~~ance of all the prior significant actions are greater~~ more than five years ~~old~~before the date the current violation occurred.

(B) Include the PSAs:

(i) At all facilities owned or operated by the same violator within the state of Oregon; and

(ii) That involved the same media (air, water or land) as the violations that are the subject of the current formal enforcement action.

(~~II~~e) In applying subsection (2)(d)(A), the value of "P" may not be reduced below~~making the above reductions, no finding shall be less than~~ zero.

(f~~xiii~~) PSAs~~Any prior significant action which is greater~~ that are more than ten years old ~~shall~~ are not ~~be~~ included in ~~the above~~ determin~~ing~~ation the value of "P."~~;~~

~~(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.~~

(3~~B~~) "H" is the ~~R~~respondent's history ~~in~~of correcting ~~prior significant actions~~PSAs. ~~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.~~

(a) The values for "H" and the finding that~~which~~ supports each are as follows:

(A~~i~~) -2 if the Respondent corrected all violations cited as PSAs.~~took all feasible steps to correct the majority of all prior significant actions;~~

(B) -1 if the violations were uncorrectable and the respondent took reasonable efforts to minimize the effects of the violations cited as PSAs; or

(C~~ii~~) 0 if there is no prior history or if there is insufficient information on which to base a finding under paragraphs (3)(a)(A) or (B).

(b) The sum of values for "P" and "H" may not be less than 1 unless the respondent took extraordinary efforts to correct or minimize the effects of all PSAs. In no case ~~shall~~ may the ~~combination~~ sum of the values of "P" ~~factor~~ and ~~the~~ "H" ~~factor~~ be ~~a value~~ less than zero. [Original text moved from -0045(1)(c)(B).]

(C4) "O" is whether the violation was repeated or ongoingcontinuous.

(a) The values for "O" and the finding that which supports each are as follows:

(Ai) 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 under paragraphs (4)(a)(B) through (4)(a)(D).;

(Bii) 2 if the violation recurred on the same day, or existed for or occurred on more than one day up to and including six days, which need not be consecutive days.or if the violation recurred on the same day.

(C) 3 if the violation existed for or occurred from seven to 28 days, which need not be consecutive days.

(D) 4 if the violation existed for or occurred on more than 28 days, which need not be consecutive days.

(b) The department may, at its discretion, assess separate penalties for each day that a violation occurs. If the department does so, the O factor for each affected violation will be set at 0.

(5D) "MR" is the mental state whether the violation resulted from an unavoidable accident, or a negligent, intentional or flagrant act of the Rrespondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply.

(a) The values for "MR" and the finding which that supports each are as follows:

(Ai) 0 if an unavoidable accident, or if there is insufficient information on which to make base a finding under paragraphs (5)(a)(B) through (5)(a)(D).;

(Bii) 2 if the respondent's conduct was negligent or the respondent had constructive knowledge (reasonably should have known) that the conduct would be a violation. Holding a permit that prohibits or requires conduct is presumed to constitute at least constructive knowledge and may be actual knowledge depending on the specific facts of the case.;

(Ciii) 6 if the respondent's conduct was reckless, or the respondent had actual knowledge that its conduct would be a violation and respondent's conduct was intentional. A respondent that previously received a notice of noncompliance, warning letter, pre-enforcement notice or any formal enforcement action for the same violation is presumed to have actual knowledge. Holding a permit that prohibits or requires conduct may be actual knowledge depending on the specific facts of the case.; or

(Div) 10 if respondent acted flagrantly.

(6E) "C" is the Rrespondent's cooperativeness and efforts to correct the violation.

(a) The values for "C" and the finding ~~which~~ that supports each are as follows:

(A~~i~~) -3 if the respondent made extraordinary efforts to correct the violation, or took extraordinary efforts to minimize the effects of the violation.

(B) -2 if the R~~r~~espondent ~~was cooperative and took~~ made reasonable efforts to correct ~~a~~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.~~;~~

(C) -1 if the respondent eventually made efforts to correct the violation, or took affirmative efforts to minimize the effects of the violation.

(D~~ii~~) 0 if there is insufficient information to make a finding under paragraphs (6)(a)(A) through (6)(a)(C), or (6)(a)(E), or if the violation or the effects of the violation could not be corrected or minimized.~~;~~

(E~~iii~~) 2 if the R~~r~~espondent ~~was uncooperative and~~ did not address ~~take reasonable efforts to correct~~ the violation as described in paragraphs (6)(a)(A) through (6)(a)(C) and the facts do not support a finding under paragraph (6)(a)(D).~~or minimize the effects of the violation.~~

Stat. Auth.: ORS 468.020 & ORS 468.130
Stats. Implemented: ORS 459.376, ORS 459.995, ORS 465.900, ORS 465.992, ORS 466.990 – ORS 466.994, ORS 468.090 – ORS 468.140, & ORS 468B.450

340-012-0150 [original text from -0045 (1)(c)(F)]

Determination of Economic Benefit

(1~~F~~) The Economic Benefit "(EB)" is the approximated dollar value ~~sum~~ of the ~~economic~~ benefit gained and the costs avoided or delayed (without duplication) as a result of ~~that~~ the R~~r~~espondent's noncompliance. ~~gained through noncompliance.~~ [Original text moved from –0045(1)(c)(F)(iii)] ~~In determining t~~The EB ~~economic benefit~~ may be determined ~~component of a civil penalty, the Department may~~ usinge 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 R~~r~~espondent, the D~~d~~epartment 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~~ are presumed to apply to all R~~r~~espondents unless a specific R~~r~~espondent can demonstrate that the standard value does not reflect that R~~r~~espondent's actual circumstance. Upon request of the Respondent, the

~~D~~department will use the model in determining the economic benefit component of a civil penalty~~;~~.

(2) The department may make, for use in the applicable model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent. Economic benefit will be calculated without duplicating or double-counting the advantages realized by respondent as a result of its noncompliance.

(3)[the following original text from -0045(1)(c)(F)(ii)] The ~~D~~department need not calculate EB~~nor address the economic benefit component of the civil penalty~~ if the department makes a reasonable determination that ~~when~~ the EB ~~benefit obtained~~ is de minimis or if there is insufficient information reasonably available to the department on which to make an estimate under section (2) of this rule.~~;~~

(4)[the following original text from (F)] The ~~D~~department ~~or Commission~~ may assess EB~~"EB"~~ whether or not it assesses any other portion of ~~applies~~ the civil penalty using the formula in OAR 340-012-0045.

(5) [the following original text from (F)] The department's calculation of EB may not result in a ~~above to determine the gravity and magnitude based portion of the~~ civil penalty for a violation to~~, provided that the sum penalty does not~~ exceeding the maximum civil penalty allowed ~~for the violation~~ by rule or statute. [the following original text from -0045(1)(c)(F)(iv)] However, ~~W~~when a violation has occurred or been repeated for ~~extended over~~ more than one day, ~~however, for determining the maximum penalty allowed,~~ the ~~Director~~ department may treat the violation as extending over at least as many days as necessary to recover the economic benefit of the violation~~of noncompliance~~. When the purpose of treating a violation as extending over more than one day is to recover the economic benefit, the ~~D~~department has the discretion not to impose the base penalty~~gravity and magnitude based~~ portion of the civil penalty~~. for more than one day.~~ Nothing in this section precludes the department from assessing a penalty of up to the maximum allowed for the violation by 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;~~

~~(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.~~

Stat. Auth.: ORS 468.020 & ORS 468.090 - ORS 468.140
Stats. Implemented: ORS 459.376, ORS 459.995, ORS 465.900, ORS 465.992, ORS 466.210, ORS 466.990, ORS 466.994, ORS 467.050, ORS 467.990, ORS 468.090 – ORS 468.140, ORS & 468.996

340-012-0155049

Additional or Alternate Civil Penalties

(1) In addition to any other penalty provided by law, tThe following violations and violators may beare subject to the additional civil penalties as specified below:

(a) [original text from -0049(7)] In addition to any other penalty prescribed by these rules, Aany person who intentionally or recklessly violates any provisions of ORS 164.785, 459.205 - 459.426, 459.705 - 459.790, ORS Cchapters 465, 466, 467, 468, or 468A or 468B or any rule or standard or order of the commission adopted or issued pursuant to ORS 459.205 - 459.426, 459.705 - 459.790, ORS Cchapters 465, 466, 467, 468, 468A, or 468B, which that results in or creates the imminent likelihood for an extreme hazard to the public health or which that causes extensive damage to the environment, mayshall incur a civil penalty of up to $100,000. When determining the civil penalty sum to be assessed under this subsection, the Ddirector shawill apply the following procedures:

(Aa) Select one of the following base penalties after determining evaluating the cause of the violation:

(iA) $50,000 if the violation was caused recklesslyintentionally;

(iiB) $75,000 if the violation was caused intentionallyrecklessly;

(iiiC) $100,000 if the violation was caused flagrantly.

(Bb) Then determine the civil penalty through application of the following formula: BP + [(.1 x BP) (P + H + O + C)] + EB., in accordance with OAR340-012-004 5(1)(c).

(b) [original text from -0042(2)] In addition to any other penalty provided prescribed by these ruleslaw, any person causing an oil spill through an who intentionally or negligently causes or permits the discharge of oil to waters of the state act shall will incur a civil penalty of not less than $100 dollars or more than to exceed $20,000 dollars for each violation. The amount of the penalty shall be is determined by doubling the penalty derived from application of the $8,000 penalty values contained in the matrix in 340-012-0140(2) and the civil penalty section (1) of this rule in conjunction with the formula contained in OAR 340-012-0045.

(c) (1)In addition to any other penalty prescribed by these rules, Aany person who willfully or negligently causes or permits the discharge of an oil to state waters spill shall will incur, in addition to any other penalty derived from application of the $8,000 penalty matrix in 340-012-0140(2) and the civil penalty formula contained in OAR 340-012-0045, a civil penalty commensurate with the amount of damage incurred. The amount of the penalty shall will be determined by the Ddirector with the advice of the Ddirector of the Oregon Department of Fish

and Wildlife. In determining the amount of the penalty, the ~~D~~director may consider the gravity of the violation, the previous record of the violator in complying with the provisions of ORS 468B.450 to 468B.460, and such other considerations the ~~D~~director deems appropriate.

(d) [the following original text from -0049(6)] In addition to any other penalty prescribed by these rules, ~~A~~any person who has care, custody or control of a hazardous waste or a substance ~~which~~ that would be a hazardous waste except for the fact that it is not discarded, useless or unwanted ~~shall~~ will incur a civil penalty according to the schedule set forth in this subsection for the destruction, due to contamination of food or water supply by such waste or substance, of any of the following wildlife ~~referred to in this section~~ that are property of the state:

(A~~a~~) Each game mammal other than mountain sheep, mountain goat, elk or silver gray squirrel, $400.~~;~~

(B~~b~~) Each mountain sheep or mountain goat, $3,500.~~;~~

(C~~e~~) Each elk, $750.~~;~~

(D~~d~~) Each silver gray squirrel, $10.~~;~~

(E~~e~~) Each game bird other than wild turkey, $10.~~;~~

(F~~f~~) Each wild turkey, $50.~~;~~

(G~~g~~) Each game fish other than salmon or steelhead trout, $5.~~;~~

(H~~h~~) Each salmon or steelhead trout, $125.~~;~~

(I~~i~~) Each fur-bearing mammal other than bobcat or fisher, $50.~~;~~

(J~~j~~) Each bobcat or fisher, $350.~~;~~

(K~~k~~) Each specimen of any wildlife species whose survival is specified by the wildlife laws or the laws of the United States as threatened or endangered, $500.~~;~~

(L~~l~~) Each specimen of any wildlife species otherwise protected by the wildlife laws or the laws of the United States, but not otherwise referred to in this section, $25.

(2) The following violations are subject to the civil penalties specified below, in lieu of civil penalties calculated pursuant to OAR 340-012-0045:

~~(2) Any person planting contrary to the restriction of subsection (1) of ORS 468.465 pertaining to the open field burning of cereal grain acreage shall be assessed by the Department a civil penalty of $25 for each acre planted contrary to the restrictions.~~

(a3) Until December 31, 2005, Wwhenever an underground storage tank fee is due and owing under ORS 466.785 or 466.795, the Ddirector may issue a civil penalty of up to not less than $25 nor more than $100 for each day the fee is due and owing.

(b) Until December 31, 2005, the department will assess a field penalty as specified under OAR 340-150-0250 for Class I, Class II or Class III violations under OAR 340-012-0067 unless the department determines that an owner, operator or permittee is not eligible for the field penalty. In such cases of ineligibility, the penalty will be calculated according to the procedures in OAR chapter 340, division 12.

(c) Any owner or operator of a vessel discharging ballast water in violation of ORS 783.635 may incur a civil penalty not to exceed $5,000 for each violation. In determining the amount of the penalty, the director will consider whether the violation was intentional, negligent or without any fault and will consider the quality and nature of risks created by the violation, the previous record of the violator in complying with the provisions of ORS 468B.450 to 468B.460, and such other considerations the director deems appropriate.

(d) Any owner or operator of a vessel violating the ballast water reporting requirements in ORS 783.640 will incur a civil penalty not to exceed $500 per violation.

(e) Air emission sources operating under the Western Backstop SO2 Trading Program will be assessed a civil penalty of at least $5,000 for each ton and each day of violation in excess of the applicable allowance limitation as determined by OAR chapter 340 division 228.

(f) [original text from -0049(4)] Any owner or operator of a confined animal feeding operation who that has not applied for or does not have a permit required by ORS 468B.050 shawill be assessed a civil penalty of $500.

(5) Any person who fails to pay an automobile emission fee when required by law or rule shall be assessed a civil penalty of $50.

Stat. Auth.: ORS 459.995, ORS 466, ORS 467, ORS 468.020, ORS 468.130, & ORS 468.996, & ORS 783.992
Stats. Implemented: ORS 466.785210, ORS 466.83580, –ORS 466.992895, ORS 468.090 – ORS 468.140, ORS 468.996, ORS 468A.990, ORS 468A.992, ORS 468B.220, & ORS 468B.450 & ORS 783.992.
Hist.: DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 9-2000, f. & cert. ef. 7-21-00; DEQ 1-2003, f. & cert. ef. 1-31-03

340-012-0160 [original text from -0045(3)]

Department Discretion Regarding Penalty Assessment

(1) In addition to that described in section (3) below, the department has the discretion to increase a base penalty determined under OAR 340-012-0140 to that derived using the next

highest penalty matrix. Factors that may be taken into consideration in increasing a base penalty include the respondent's compliance history, the likelihood of future violations, the degree of environmental or human health impact, the deterrence impact and other similar factors.

(~~3~~2) In determining a civil penalty, the ~~D~~director may reduce any penalty by any amount the ~~D~~director deems appropriate if the respondent~~when the person~~ has voluntarily disclosed the violation to the ~~D~~department. In deciding whether a violation has been voluntarily disclosed, the ~~D~~director may take into account any considerations~~ditions~~ the ~~D~~director deems appropriate, including whether the violation was:

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

(b) Voluntarily discovered;

(c) Promptly disclosed;

(d) Discovered and disclosed independent~~ly~~ of the government or a third party;

(e) Corrected and remedied;

(f) Prevented from recurringence;

(g) Not repeated;

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

(i) Disclosed and corrected in a cooperative manner.

(3) Regardless of any other penalty amount listed in this division, the director has the discretion to increase the penalty to $10,000 per violation per day of violation based upon the facts and circumstances of the individual case.

(4) For violations of a department-issued permit with more than one permittee, the department may issue separate civil penalties to each permittee, given compliance objectives, including the level of deterrence needed.

Stat. Auth.: ORS 468.020 & ORS 468.130
Stats. Implemented: ORS 183.745, ORS 459.376, ORS 459.995, ORS 465.900, ORS 465.992, ORS 466.990, ORS 466.994, ORS 468.090 – ORS 468.140, ORS 468.996 & ORS 468B.450

340-012-0162 [original text from -0045(4)]

Inability to Pay the Penalty

(14) After a penalty is assessed, ~~T~~the ~~D~~department ~~or Commission~~ may reduce ~~any~~ penalty based on the ~~R~~respondent's inability to pay the full penalty amount. In order to do so, the department must receive information regarding ~~If the Respondent seeks to reduce the penalty, the Respondent has the responsibility of providing to the Department or Commission documentary evidence concerning~~ Respondent's ~~inability to pay the full penalty amount~~financial condition on a form required by the department along with any additional documentation requested by the department.~~:~~

(2a) If~~When~~ the ~~R~~respondent is currently unable to pay the full penalty amount, the first option is ~~should be~~ to place the ~~R~~respondent on a payment schedule with interest. ~~on the unpaid balance for any delayed payments.~~ The ~~D~~department ~~or Commission~~ may reduce the penalty only after determining that the ~~R~~respondent is unable to meet a ~~long term~~ payment schedule of a length the department determines is reasonable.~~;~~

(3~~b~~) In ~~determin~~considering the ~~R~~respondent's ability to pay a civil penalty, the ~~D~~department may use the U.S. Environmental Protection Agency's ABEL, INDIPAY or MUNIPAY computer models to ~~determine~~ evaluate a ~~R~~respondent's financial condition or ability to pay the full civil penalty amount. ~~With respect to significant or substantial change in the model, the Department shall use the version of the model that the Department finds will most accurately calculate the Respondent's ability to pay a civil penalty.~~ Upon request of the ~~R~~respondent, the ~~D~~department will provide the ~~R~~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;

(4~~c~~) The department, at its discretion, may refuse to reduce an assessed civil penalty. In exercising this discretion, the department may take into consideration any factor related to the violations or the respondent, including but not limited to the respondent's mental state, whether the respondent has corrected the violation or taken efforts to ensure the violation will not be repeated, whether the respondent's financial condition poses a serious concern regarding respondent's ability to remain in compliance, respondent's future ability to pay, and respondent's real property or other assets. ~~In appropriate circumstances, the Department or Commission may impose a penalty that may result in a Respondent going out of business. Such circumstances may include situations where the violation is intentional or flagrant or situations where the Respondent's financial condition poses a serious concern regarding the ability or incentive to remain in compliance.~~

Stat. Auth.: ORS 468.020 & ORS 468.130
Stats. Implemented: ORS 454.635, ORS 454.645, ORS 459.376, ORS 459.995, ORS 465.900, ORS 465.992, ~~ORS 466.210,~~ ORS 466.88990 - ORS 466.89945, ORS 468.090 - ORS 468.140, ~~ORS 468.992, ORS 468A.990, ORS 468B.025,~~ ORS 468B.220 & ORS 468B.450
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-

1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 1-2003, f. & cert. ef. 1-31-03

340-012-0165~~048~~

Stipulated Penalties

Nothing in OAR ~~C~~chapter 340, ~~D~~division 12 ~~shall~~ affects the ability of the ~~C~~commission or ~~Director~~ department to include stipulated penalties in a Mutual Agreement and Order, Consent Order, Consent Judgment ~~Decree~~ or any other order or agreement issued under ORS Chapters 183, 454, 459, 465, 466, 467, 468, 468A, or 468B.

Stat. Auth.: ORS 454.625, ORS 459.995, ORS 468.020 & ORS 468.090~~996~~ – ORS 468.140
Stats. Implemented: ORS 183.745~~090~~, ~~& ORS 183.415~~ORS 454, ORS 459, ORS 465, ORS 466, ORS 468, ORS 468A & ORS 468B
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98

340-012-0170~~047~~

Compromise or Settlement of Civil Penalty by ~~Director~~ Department

(1) Any time after service of the formal enforcement action, ~~written notice of assessment of civil penalty,~~ the ~~D~~department~~irector~~ may compromise or settle ~~any~~ ~~unpaid~~ civil penalty at any amount that the ~~Director~~ department deems appropriate. ~~Any compromise or settlement executed by the Director shall be final.~~

~~(2) In determining whether a penalty should be compromised or settled, the Director~~ department may take into account the following:

(a) New information obtained through further investigation or provided by ~~R~~respondent ~~which~~ that relates to the penalty determination factors contained in OAR 340-012-0045;

(b) The effect of compromise or settlement on deterrence;

(c) Whether ~~R~~respondent has or is willing to employ extraordinary means to correct the violation or maintain compliance;

(d) Whether ~~R~~respondent has had any previous penalties which have been compromised or settled;

(e) Whether respondent has the ability to pay the civil penalty as determined by OAR 340-012-0160;

(fe) Whether the compromise or settlement would be consistent with the Ddepartment's goal of protecting the ~~public~~ human health and environment; and

(gf) The relative strength or weakness of the Ddepartment's ~~case~~ evidence.

Stat. Auth.: ~~ORS 459.995, ORS 466, ORS 467,~~ ORS 468.020 & ORS 468.~~996~~090 – ORS 468.140
Stats. Implemented: ORS 183.745~~090~~, ~~& ORS 183.415~~ORS 454, ORS 459, ORS 465, ORS 466, ORS 468, ORS 468A & ORS 468B
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; Renumbered from 340-12-075; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92

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Underground Storage Tank Expedited Enforcement

Proposed Rule Revision

OAR 340-150-0250

340-150-0250
Expedited Enforcement Process

(1) Nothing in this rule shall affect the department's use of OAR chapter 340, division 12 "Enforcement Procedures and Civil Penalties" for compliance with the UST regulations, except as specifically noted. ~~The field penalty amounts assigned in section (4) of this rule are only applicable to actions taken by the department under this rule.~~ Nothing in this rule requires the department to use the expedited enforcement process ~~assess any particular penalty amount~~ for any particular violation. The field penalty amounts assigned in section (4) of this rule are only applicable to actions taken by the department under this rule.

(2) An owner and permittee is excluded from participation in the expedited enforcement process if:

(a) The total field penalty amount for all violations identified during a single inspection or file review would exceed $300;

~~(b) The department documents one or more class I violation, as defined in OAR 340-012-0067(1);~~

~~(c)~~(b) The department has issued a field penalty or civil penalty to the owner or permittee for the same violation at the same UST facility within the previous three years; or

~~(d)~~(c) At its discretion, the department determines that an owner and permittee is not eligible for the expedited process. This determination will be done on a case by case basis. [One example may be when an owner and permittee of multiple UST facilities has received multiple field citations for the same or similar violations, but has not made corrections at all facilities.]

(3) For any owner and permittee with documented violations or conditions that exclude participation in the expedited enforcement process as provided in section (2) of this rule, the department will take appropriate enforcement action in accordance with OAR chapter 340, division 12.

(4) The following field penalties will be assessed for those documented violations or conditions cited using the expedited enforcement process under this rule, in lieu of the enforcement process in OAR chapter 340, division 12:

(a) A class I UST violation listed in OAR 340-12-0067(1): $100;

(b) ~~Each~~ A class II UST violation listed in OAR 340-012-0067(2) ~~is assigned a field penalty amount of~~ :$50,; and

~~except for class II violations meeting the following circumstances, which are assigned a field penalty amount of $75:~~

~~(a) Failure to conform to performance standards and requirements and third party evaluation and approval for UST system release detection methods by using a release detection method that does not have third party evaluation and approval;~~

~~(b) Use of a method or methods of release detection as the primary release detection method after the period allowed for such use by rule has expired;~~

~~(c) Failure to conduct required release detection monitoring and testing activities for USTs or piping by not monitoring or testing for the presence of a release every 30 days or~~

~~daily as required;~~

~~(d) Failure to conduct the required release detection monitoring and testing activities for USTs by not performing a tank tightness test in accordance with required schedule for a release detection method or as necessary for confirmation of a suspected release;~~

~~(e) Failure to conduct required release detection monitoring and testing activities for USTs or piping by failing to ensure that groundwater and vapor monitoring release detection systems are functioning properly to detect a release from all portions of the system that contain a regulated substance;~~

~~(f) Failure to conform to performance standards and requirements and third party evaluation and approval for UST system release detection methods or equipment by using the manual tank gauging release detection method for an UST larger than 2,000 gallons capacity;~~

~~(g) Failure to conform to performance standards and requirements and third party evaluation and approval for UST system release detection methods or equipment by not having a line leak detection device that is operational or able to detect a leak in underground piping;~~

~~(h) Failure to conduct required corrosion protection monitoring and testing activities for USTs or piping, by not conducting an inspection after the first six months of operation or subsequent tests according to schedule;~~

~~(i) Failure to conduct required corrosion protection monitoring and testing activities for USTs or piping by not conducting an initial tank integrity inspection or periodic internal lining inspections;~~

~~(j) Failure to have an operating certificate for all compartments or chambers of a multichambered or multicompartment UST when at least one compartment or chamber has an operating certificate;~~

~~(k) Failure to apply for a modified operation certificate when a change in tank ownership, permittee or property owner has occurred;~~

~~(l) Failure to provide complete documentation to demonstrate financial responsibility coverage; and~~

~~(m) Failure to have a trained UST system operator for an UST facility by FebruaryMarch 1, 2004.~~

~~(5)~~(c) ~~Each~~ A class III violation listed in OAR 340-012-0067(3) ~~is assigned a field penalty amount of $50~~ when an owner or permittee has received prior notice of the violation through a field citation and has not corrected the violation: $50. ~~Any violation of UST rules that also violates a final order incorporated into a field citation may be excluded from the expedited process at the department's discretion.~~

~~(6)~~(5) An owner or permittee issued a field citation has 30 calendar days from the date of issuance to submit payment for the total field penalty amount. Payment is deemed submitted when received by the department. A check or money order in the amount of the field penalty must be submitted to: Department of Environmental Quality - Business Office, 811 SW Sixth Avenue, Portland, OR 97204. Participation in the expedited enforcement process is voluntary -- by submitting payment, the owner and permittee agree to accept the field citation as the final order by the commission and to waive any right to an appeal or any other judicial review of the determination of violation, compliance schedule or assessment of the field penalty in the field citation.

Stat. Auth.: ORS 466.706 - ORS 466.835, ORS 466.994 & ORS 466.995
Stats. Implemented: ORS 466.746 & ORS 466.835

340-200-0040

State of Oregon Clean Air Act Implementation Plan

(1) This implementation plan, consisting of Volumes 2 and 3 of the State of Oregon Air Quality Control Program, contains control strategies, rules and standards prepared by the Department of Environmental Quality and is adopted as the state implementation plan (SIP) of the State of Oregon pursuant to the federal Clean Air Act, **42 U.S.C.A §§ 7401** to **7671q**.

(2) Except as provided in section (3), revisions to the SIP will be made pursuant to the Commission's rulemaking procedures in division 11 of this chapter and any other requirements contained in the SIP and will be submitted to the United States Environmental Protection Agency for approval.

(3) Notwithstanding any other requirement contained in the SIP, the Department may:

(a) Submit to the Environmental Protection Agency any permit condition implementing a rule that is part of the federally-approved SIP as a source-specific SIP revision after the Department has complied with the public hearings provisions of **40 CFR 51.102** (July 1, 2002); and

(b) Approve the standards submitted by a regional authority if the regional authority adopts verbatim any standard that the Commission has adopted, and submit the standards to EPA for approval as a SIP revision.

NOTE: Revisions to the State of Oregon Clean Air Act Implementation Plan become federally enforceable upon approval by the United States Environmental Protection Agency. If any provision of the federally approved Implementation Plan conflicts with any provision adopted by the Commission, the Department shall enforce the more stringent provision.

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 468A.035

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State of Oregon
Department of Environmental Quality **Memorandum**

Date: November 18, 2004

To: Environmental Quality Commission

From: Jane K. Hickman, Presiding Officer
Office of Compliance and Enforcement

Subject: Presiding Officer's Report for Rulemaking Hearing
Title of Proposal: Revised Rulemaking Proposal Regarding Enforcement Procedures and Assessment of Civil Penalties for Environmental Violations and Regarding the Expedited Enforcement Process for Underground Storage Tank Violations
Hearings Held: 8/24/04, 5:00 p.m. (informational briefing at 4:00 p.m.), Salem DEQ office
8/25/04, 11:00 a.m. (informational briefing at 10:00 a.m.), Portland DEQ Headquarters

Before each of the two public hearings, Anne Price, Administrator of the Office of Compliance and Enforcement, held an informational briefing detailing the proposed changes to Division 12 and the Tanks rules. Ms. Price answered questions from attendees (there were ten in Portland and one in Salem). The Department convened the rulemaking hearings on the proposal referenced above at the appointed times. People were asked to sign attendance sheets and to sign registration forms if they wished to present comments. People were also advised that the hearing was being recorded. No one testified at either of the public hearings.

The Department received written comments from ten parties during the public comment period, which ran from August 2 to September 10, 2004 (extended upon request from the originally published closing date of September 1, 2004). The following parties submitted written comments during the public comment period: Center for Environmental Equity, Weyerhauser, Center for Tribal Water Advocacy, U.S. Army (Umatilla Chemical Depot), Northwest Pulp and Paper Association, Associated Oregon Industries, Oregon Association of Clean Water Agencies, WaterWatch, U.S. Environmental Protection Agency, Boise Cascade Corporation. The Department will include these comments in the Summary of Comments and Agency Responses, Attachment B to the Memorandum for this rulemaking.

Responses to Comments on Proposed Amendments to OAR Chapter 340, Division 12

Public Comments were received from: U.S. Environmental Protection Agency – Region X, Association of Clean Water Agencies, U.S. Army (Umatilla Chemical Depot), Center for Environmental Equity, Weyerhaeuser, Associated Oregon Industries, Water Watch, Center for Tribal Water Advocacy, Northwest Pulp and Paper Association, and Boise Cascade.

OAR 340-012-0026(2) – ENFORCEMENT POLICY

Comment Summary: The Department's policy of endeavoring to eliminate the cause of the violation by conference, conciliation and persuasion should follow the exact language of the statute.

Response Summary: The Department will use the exact statutory language and reinsert "shall" into the policy section.

Comment #1: In OAR 340-012-0026(2) the Department proposes to delete "shall" from the description of its policy. This change is inconsistent with ORS 468.090(1) and (2) which provide that the Department "shall by conference, conciliation and persuasion endeavor to eliminate the source or cause of the pollution or contamination which resulted in the violation." . . . The term "shall" should be retained in OAR 340-012-0026(2). **(Umatilla)**

Response to Comment #1: The change was originally proposed as part of a statewide rule-grammar standardization effort. However, the Department will make this change so that the language tracks the language of the statute.

OAR 340-012-0026(5)(a) – BASIS FOR CLASSIFICATION OF VIOLATIONS

Comment Summary: The only basis for classification of violations should be likelihood of actual or potential impact to human health or the environment – not the "significance to the regulatory structure of the given environmental program."
Response Summary: The Department will continue to consider significance to the regulatory structure of the given environmental program as a basis for classification of violations, along with the likelihood of actual or potential impact to human health or the environment.

Comment #2: This proposed rule states that the classification system for violations used by the Department is to be based not only on the "likelihood of actual or potential impact to human health or the environment" but also on the "significance to the regulatory structure of the given environmental program." The second quoted phrase is obviously intended to provide a different basis for classification of violations than the first quoted phrase, that is, significance to the regulatory structure means something different than

impact to human health or the environment. However, the intended meaning is not apparent and appears to add a subjective element to the enforcement program. . . . [i]mpact to human heath and the environment, because it is the focus of Oregon's environmental regulatory programs, is the appropriate basis for classification of violations. If significance to the regulatory structure has any basis in such a classification process, the significance must only be considered if it is reflected in terms of impact to human health and the environment.

AOI requests that the Department delete the second quoted phrase that is without statutory support and revise OAR 340-012-0026(5)(a) to read:

> "(a) Classification of Violation. Each violation is classified as Class I, Class II or Class III. Class I violations have the greatest likelihood of actual or potential impact to human health or the environment [~~or are of the greatest significance to the regulatory structure of the given environmental program~~]. Class II violations are less likely than Class I violations to have actual or potential impact to human health or the environment. Class III violations have the least likelihood of actual or potential impact to human health and the environment. (See OAR 340-012-0050 to 340-012-0097.)" **(AOI)**

Response to Comment #2: The Department agrees that protection of human health and the environment is of primary importance. The "regulatory structure" of a program is intended to protect human health and the environment; therefore, violations that relate to the regulatory structure of a program can result in the potential for or actual impact to human health and the environment. For example, most permit programs are premised on monitoring, recordkeeping, and reporting by the regulated community. Violation of these "paperwork" requirements can delay detection and resolution of environmental problems which, in turn, may result in harm to human health and/or the environment. It is, therefore, important to retain "significance to the regulatory structure of the given environmental program" as a basis for classification of violations, and that language will be retained in the rule.

OAR 340-012-0030 –DEFINITION OF "PRIOR SIGNIFICANT ACTION"

Comment Summary: The Department should not aggravate a civil penalty by counting prior violations that were self-reported to the Department in accordance with the agency's self-disclosure policy. The Department should have the discretion to not count some prior violations as an aggravating factor.
Response Summary: The Department will not adopt the suggestion, but will consider penalty mitigation for self reported violations not currently addressed in the self reporting policy, when it revises that policy over the coming months.

Comment #3: "…Where a respondent has satisfied the nine requirements for self-disclosure, the Department's Internal Management Directive on Self-Policing, Disclosure, and Penalty Mitigation directs the Department to reduce the gravity-based part of the civil penalty by 100% to zero. Because the Department's Directive recognizes

that such self-disclosure situations do not warrant assessment of a gravity-based penalty, the violation similarly should not be used as an aggravating factor for a gravity-based civil penalty for any future violation.

AOI requests that the Department recognize that there should be some discretion in determining whether a particular violation is a PSA and revise OAR 340-012-0030(16) to read:

> "(16) 'Prior Significant Action' means any violation cited in a formal enforcement action, with or without admission of a violation, that becomes final by payment of a civil penalty, by a final order of the commission or the department, or by judgment of a court, unless otherwise provided in the final order of the commission or the department or in the judgment of the court." **(AOI)**

Response to Comment #3: ORS 468.130(2) provides that, in imposing a penalty pursuant to Division 12, the Department take into account *both* the past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation; *and* any prior violations of statutes, rules, orders and permits pertaining to water or air pollution or air contamination or solid waste disposal. Even when the Department does not assess a penalty for a violation because it has been self-reported, the violation did occur and should remain on the violator's record. (The "older" a prior violation is, the less it aggravates a future civil penalty, and after ten years it no longer counts.) Even though a self-disclosed prior violation will be counted in future penalty assessments (for up to ten years), the amount of aggravation will be mitigated to the extent the violator corrected the prior self-disclosed violations (via the "H" factor; see OAR 340-012-0145(3)).

In addition, violators who meet the requirements of the Department's self-disclosure policy are given substantial mitigation (sometimes up to 100%) for self-reported violations. The Department will consider amending its self-disclosure policy to offer mitigation in situations not currently addressed by the policy.

OAR 340-012-0030 and -0038 SUBSTITUTION OF TERM "ALLEGED VIOLATION" for "DOCUMENTED VIOLATION"

Comment Summary: It is appropriate that the Department substitute the term "alleged" for "documented" in the Definitions section and in the section that describes the purpose of Warning Letters and Pre-Enforcement Notices. However, it is not appropriate to use that term when referring to formal enforcement actions (FEAs). (AOI)

Response Summary: The Department agrees and proposes to substitute "alleged" documentation for "documented" violation in OAR 340-012-0030(14), -0030(22) and -0038, but will delete the term "alleged" in OAR 340-012-0041(2)(a) and -0045(1) to make the use of the term consistent with the point in the enforcement process.

Comment #4: AOI supports the Department's proposal to separate the historic Notice of Noncompliance that was issued after an inspection during which a violation was

documented into two notices – a Warning Letter and a Pre-Enforcement Notice. AOI also agrees as provided in the proposed rule that the violations included in either of these notices are appropriately classified as "alleged violations" rather than "violations" or "documented violations."

Comment #5: In OAR 340-012-0045(1) the Department proposes to revise the regulation so that it may assess a civil penalty for "any alleged violation." The addition of "alleged" is inconsistent with ORS 468.130 which only allows DEQ to impose a civil penalty "for a particular violation." Further, the standard for upholding a civil penalty is that the violation must be proven by a preponderance of the evidence. An allegation alone is insufficient cause to apply formal enforcement actions. We recommend that "alleged" be deleted from OAR 340-012-0045(1). **(Umatilla)**

Response to Comment Nos. 4 & 5: Please see "Response Summary" above.

340-012-0038(1) and (2) – WARNING LETTERS AND PRE-ENFORCEMENT NOTICES

Comment and Response Summary: None.

Comment #6: AOI supports the Department's proposal to separate the historic Notice of Noncompliance that was issued after an inspection during which a violation was documented into two notices – a Warning Letter and a Pre-Enforcement Notice. **(AOI)**

Comment #7: We support these revisions in the proposed draft:
Clarifying the meaning of "formal enforcement action" and changing the name of "Notice of Noncompliance" to "Warning Letters" and "Pre-Enforcement Notices" and further specifying that both are informal rather than formal enforcement are important changes. **(ACWA)**

Response to Comments Nos. 6 & 7: Comments acknowledged.

Comment Summary: The Department should state in its response to comments for this rulemaking that inspectors should be willing to meet with the alleged violator when requested after issuing a Warning Letter or a Pre-Enforcement Notice. The rules should require that an informal enforcement notice be sent first before a formal enforcement action is issued, except in limited cases where such an informal notice is not warranted. The rules should require that the Department issue a letter to the person receiving a Warning Letter or a Pre-Enforcement Notice indicating the alleged violations have been resolved once the Department determines the alleged violations have been satisfactorily resolved.

Response Summary: The Department will provide in its enforcement guidance that, as resources allow, the inspector or appropriate staff should meet with recipients of informal notices upon request in order to fully develop the facts pertaining to the alleged violation. The Department will not make issuance of an informal notice a condition precedent to undertaking formal enforcement. The Department will specify in the rules that it intends to issue closure letters within a time certain as

appropriate upon finding that the violation did not occur. The Department will provide in the enforcement guidance (but not in the rules) that the Department should send closure letters if and when violations have been resolved.

Comment #8: AOI supports the recognition in the proposed rule that a person receiving either of the two notices "may provide information to the Department to clarify the facts surrounding the alleged violations." AOI believes that, in appropriate circumstances, the opportunity for a company to provide information to the Department after an inspector issues one of the two forms of notice will ensure that the Department has a complete understanding of the company's operations and how those operations fit into the applicable regulatory requirements implicated with the alleged violation.

Some Department inspectors in the past have been reluctant to meet with a company after the inspector has issued a Notice of Noncompliance. AOI understands that the Department does not want to commit in the enforcement rules to providing for such a meeting. However, AOI requests that the Department state in its response to comments for this rulemaking that inspectors should be willing to meet with a company when requested after issuing a Warning Letter or a Pre-Enforcement Notice and cannot refuse to meet simply because such a meeting is not required in the rules.

AOI believes that the Department should continue its historic practice of sending out an informal enforcement notice (currently a Notice of Noncompliance and proposed to be a Warning Letter or Pre-Enforcement Notice) before it issues a formal enforcement action. See existing OAR 340-001-0041(i)(c). Because such an informal enforcement notice allows the respondent to provide information to the Department relative to any alleged violations, the respondent has the opportunity to ensure the Department will have the full story before it proceeds with formal enforcement. Formal enforcement generally results in assessment of a civil penalty and may result in a press release and thus has significant reporting and other repercussions (including effects on financial capability) for a company. Because of these potential impacts to a company, it is important to require that an informal enforcement notice be sent first before a formal enforcement action is issued, except in limited cases where such an informal notice is not warranted.

Finally, AOI believes the Department should commit in its enforcement rules to issuing a letter to the person receiving a Warning Letter or a Pre-Enforcement Notice that indicates the alleged violations have been resolved once the Department determines the alleged violations have been satisfactorily resolved (through, for example, corrective action, supplying more information or explanation). The failure of the Department to "close out" Notices of Noncompliance that did not proceed to formal enforcement has created problems for companies in the past. AOI obtained a commitment from the Department in 1997 to provide such a closure letter and even received templates from the Department in January of 1997 for three forms of such letters the Department indicated it would use. However, close out letters are still not being consistently used. A commitment to send a close out letter should be included in the rules so that it is clear it will be sent in all cases.

AOI requests that the Department revise OAR 340-012-0038(1) and (2) to read:

"(1) Warning Letter: The Department may send a Warning Letter to a person notifying the person of alleged violations for which formal enforcement is not

anticipated. Warning Letters may contain an opportunity to correct noncompliance as a means of avoiding formal enforcement. A Warning Letter generally will identify the alleged violations found, what needs to be done to comply, and the consequences of further noncompliance. A person receiving a Warning Letter may provide information to the Department to clarify the facts surrounding the alleged violation(s). A Warning Letter is not a formal enforcement action and does not afford the person a right to a contested case hearing. If the Department does not issue a formal enforcement action for the alleged violation(s) in a Warning Letter, the Department will send a letter to the person to whom the Warning Letter was sent stating that the alleged violation(s) have been resolved, as soon as the Department determines the alleged violation(s) have been satisfactorily resolved.

"(2) Pre-Enforcement Notice: The Department may send a Pre-Enforcement Notice to a person notifying the person of alleged violations which will be considered for formal enforcement. A Pre-Enforcement Notice generally will identify the alleged violations found, what needs to be done to comply, the consequences of further noncompliance, and the formal enforcement process that may occur. A person receiving a Pre-Enforcement Notice may provide information to the Department to clarify the facts surrounding the alleged violations. [~~Failure to~~] The Department will send a Pre-Enforcement Notice or a Warning Letter regarding any alleged violation before issuing a formal enforcement action unless the alleged violation is a continuing alleged violation for which the Department has sent a prior Warning Letter or Pre-Enforcement Notice. A Pre-Enforcement Notice is not a formal enforcement action and does not afford the person a right to a contested case hearing. If the Department does not issue a formal enforcement action for the alleged violation(s) in a Pre-Enforcement Notice, the Department will send a letter to the person to whom the Pre-Enforcement Notice was sent stating that the alleged violation(s) have been resolved, as soon as the Department determines the alleged violation(s) have been satisfactorily resolved." **(AOI)**

Response to Comment #8: Regarding post-Warning Letter/Pre-Enforcement Notice meetings, the Department will provide guidance to staff that, as resources allow, they should meet with the recipient of an informal enforcement notice upon request to fully develop the facts pertaining to the alleged violation. Of course, an alleged violator can always send in information for review by the inspector and inclusion in the file. Department staff know that it is in the best interests of all parties that enforcement action be based on accurate facts and will make reasonable efforts to obtain those facts, whether by meeting with alleged violators or by reviewing information submitted by alleged violators.

The Department does not believe that adopting a requirement that the Department must send a Warning Letter or Pre-Enforcement Notice before formally enforcing a violation is appropriate in all circumstances. The Department already provides due process above and beyond what is required by statute (e.g., its general policy of issuing informal notices before issuing a formal enforcement action; allowing respondents to provide additional

information upon receipt of an informal notice; meeting with the respondent for an informal discussion upon issuance of a proposed civil penalty assessment). Sometimes a proposed civil penalty assessment will be based upon a slightly different citation than that included in the pre-enforcement notice. Sometimes a respondent has been issued warnings by local agencies that by statute are authorized to enforce on-site program requirements, and the Department should not be *required* to issue additional informal notices (although it generally does). Informal notice is not required by statute. For that reason, the Department does not want to create a technical affirmative defense to formal enforcement in the unusual cases where a respondent has not previously received an informal enforcement notice.

Regarding sending "closure" letters, the Department is specifying in the rules that it will withdraw violations upon finding that the violations did not occur (see question no. 63). The Department will endeavor to send other closure letters as resources allow, and when appropriate. A blanket requirement that the Department issue a letter when no formal enforcement action is taken after issuing a Warning Letter or Pre-Enforcement Notice is not feasible from a workload perspective, and not appropriate in some situations. For example, the Department sometimes does not take formal enforcement action on violations (especially Class II and III) that have not or cannot be corrected. This does not mean, however, that the violation did not occur or that it has been fully resolved.

OAR 340-012-0038(1) and (2) DISCRETIONARY VS. MANDATORY ISSUANCE OF WL AND PEN

Comment Summary: ACWA supports making issuance of informal notices discretionary and allowing a permittee to submit clarifying information. The Center for Environmental Equity, WaterWatch and Tribal Center for Water Advocacy want issuance of these informal notices to be mandatory.

Response Summary: The Department will substitute the definitions of "warning letter" and "pre-enforcement notice" (respectively) for the first sentences in OAR 340-012-0038(1) and (2). The enforcement guidance manual will provide direction for when each informal notice should be issued.

Comment #9: We support making the issuance of either of the informal notices discretionary rather than mandatory and allowing clarifying information to be submitted by the permittee regarding alleged violations are excellent changes. **(ACWA)**

Comment #10: The proposed rules remove mandatory enforcement requirements. The proposed rules substitute permissive and discretionary enforcement language (i.e. may enforce) for mandatory enforcement language (i.e. shall enforce). EPA audits -- and EPA reviews of DEQ permit administration and enforcement -- confirm significant shortfalls in DEQ's current capacity and willingness to enforce and administer federal environmental laws. Based on the proposed rule changes, DEQ has no evident intention to implement enforcement programs which insure both compliance with existing laws and regulations, and which provide deterrence.

The draft rules, for example, delete the following and other similar language in existing OAR 340-12: *"(1) Notice of Noncompliance (NON): ...Shall be issued for all classes of documented violations..."* Although DEQ routinely refuses – under current OAR 340-12 -- to issue NONs or to initiate other enforcement actions, the public can nonetheless seek judicial review or redress-of-last-resort through writ of mandamus. **(Center for Environmental Equity)**

Comment #11: DEQ has not adequately explained under what circumstances it would elect not to send WLs or PENs. The proposed rule would make sending WLs and PENs a discretionary action for DEQ, while the current system makes sending a Notice of Non-Compliance (NON), which WLs and PENs would replace, mandatory (OAR 340-012-0041(1)(c)). In its response to previous comments on this proposed change, DEQ states that it "intends to issue a WL or PEN for all alleged violations *unless there is a specific reason not to do so*." Notice of Proposed Rulemaking, Attachment B, at p. 3 (emphasis added).

DEQ never identifies what these "specific reason[s]" might be. The public cannot meaningfully evaluate how DEQ views the discretion it is seeking without knowing the comprehensive list of the "specific reasons" DEQ might invoke when deciding not to send a WL or PEN.

DEQ provides only one example of a situation where it would elect not to send a WL or PEN, that being "when DEQ is requested by a contract county to assist in enforcement of an on-site violation [where] the county may have already sent it own pre-enforcement notices." Based on this one example, we see no reason for DEQ to be granted discretion on this matter. To our knowledge, the Oregon legislature has not directed DEQ to delegate its enforcement authority to municipal or county governments. Similar issues may exist with respect to Environmental Protection Agency delegated programs (see third point below). ...We believe that this change is counterproductive to maintaining a fair, consistent and understandable system. Non-discretionary issuance of notices appears critical to maintaining state-wide systematic records regarding compliance with the laws and rules that DEQ enforces. There does not appear to be any proposed tracking system for violations which DEQ would, under the proposed rules, not send a WL or PEN for one of the unspecified "specific reasons." This not only makes public review problematic, but would likely impair DEQ's ability to deal appropriately with repeat offenders. **(WaterWatch)**

Comment #12: According to the Outline of the proposed changes contained in the rule, under 340-012-0038, a "warning letter" will "be issued when violation not anticipated to be referred for formal enforcement..." Attachment A, p.1. This provision however, does not describe the basis for which DEQ would "anticipate" that a violation does require formal enforcement and who makes this decision nor is the "anticipated" determination appealable by anyone. **(Tribal Water Advocacy)**

Comment #13: It is not clear whether DEQ's proposed system would fulfill the agency's duties under federal regulatory laws, including the Clean Water Act. To remove any

question regarding DEQ's intention to meet its enforcement duties, DEQ should change the proposed rule to make sending WLs and PENs mandatory. **(WaterWatch)**

Response to Comments #9-13: The Department received comments both in favor and in opposition to making issuance of informal enforcement notices mandatory vs. discretionary. It is the Department's policy and practice to issue an informal enforcement notice whenever it adequately documents the occurrence of a violation. However, there are cases where sending such a notice would serve no deterrence purpose; for example, where a local agency responsible for administering on-site requirements has sent repeated warnings; or where the driver of a private vehicle has an accident where a de minimis amount of fuel is spilled that is reported and immediately cleaned up; or unforeseeable discharges that occur as a result of catastrophic weather events. The Department is not changing its policy or practice of sending informal enforcement notices when it has documented a violation, but we will clarify in guidance the rare circumstances where such notices would serve no purpose and will therefore not be sent.

The Department does not agree that the draft rules remove any obligations the agency has to enforce delegated federal environmental laws. The commenter is in error that there is a minimum federal delegation requirement to issue pre-enforcement notices (*see* 40 Code of Federal Regulations 123.27). Furthermore, EPA was an auxiliary member of the Advisory Group addressing these rules, and provided comment during both of the public comment periods. EPA conducts periodic audits and performance reviews of DEQ's enforcement programs, and has never raised issuance or non-issuance of Notices of Noncompliance, Warning Letters or Pre-Enforcement Notices as a delegation issue.

OAR 340-012-0038(1) and (2) – LACK OF SPECIFICITY REGARDING PROCESS

Comment Summary: The rules should clarify how informal procedures impact the Department's discretion to take formal enforcement action.

Response Summary: The Department will not amend the rules to specify when formal enforcement will occur.

Comment #14: This section "makes clear that Warning Letters, Pre- Enforcement Notices and Notices of Permit Violations are informal enforcement actions…and…that alleged violator may present clarifying information regarding alleged violations." *Id.* Rather than directing that enforcement actions will automatically take place, when permit violations occur; this standard would impede protection of water quality by authorizing "informal procedures" that are undefined. In addition the section would authorize clarifying information without providing whether formal action will not take place once such information is provided or what is intended by "informal procedure" and when formal procedures would kick in during the process. **(Tribal Water Advocacy)**

Response to Comment #14: The Department does not have the resources to undertake formal enforcement for every violation that it finds. Since formal enforcement is a

resource-intensive process, we use it for those cases where we feel it is the best tool to achieve compliance and deterrence. The guidelines we use for deciding which violations should be referred are set forth in the Internal Management Directive regarding Enforcement Guidance. The purpose of the guidance manual is to foster consistent and equitable enforcement. It is not practical or advisable for the Department to specify in rule which cases will go forward to formal enforcement, as resource levels and environmental priorities change.

In addition to the more resource-intensive formal enforcement actions, the agency undertakes informal enforcement actions that also achieve compliance and deterrence. We allow the recipients of warning letters and pre-enforcement notices to provide clarifying information because we want to be as clear as possible what violations, if any, have occurred and the nature of the possible environmental impacts. An informal process for both sides to evaluate the facts and circumstances is needed to ensure that DEQ has all the information and is acting fairly. By ferreting out inaccuracies before formal enforcement, we can save resources for more important cases. If the recipient provides information showing that a violation did not actually occur or occurred differently, staff will be directed to send a letter withdrawing or modifying the warning letter or pre-enforcement notice. If the information provided by the recipient does not negate the fact that a violation occurred, the warning letter or pre-enforcement notice will not be affected and enforcement will proceed as stated in the informal notice.

OAR 340-012-0038(3) – NOTICE OF PERMIT VIOLATION ("NPV")

Comment: The rules should not list which permit violations are not eligible for an NPV.
Response: The Department will continue to propose listing the exceptions in order to promote clarity and certainty.

Comment #15: NWPPA is concerned that the Department is distorting the Notice of Permit Violation ("NPV") provisions in OAR 340-012-0038(3). ORS 468.126 states that the NPV notice provisions are inapplicable only if providing notice disqualifies the state from federal approval or delegation. We are unaware of a formal determination from EPA in regards to each of the identified programs that the issuance of a NPV disqualifies the state from delegation. Furthermore, there are permit conditions identified in the proposed language as being ineligible for NPV treatment that are authorized for NPV treatment by statute. For example, the proposed language characterizes all Title V permit conditions as ineligible for NPV treatment. However, virtually all Title V permits contain conditions that are not federally enforceable and that would be eligible for NPV treatment. Therefore, we reiterate our prior recommend that the language in OAR 340-012-0038(3)(a) strictly adhere to the statutory language and not try and list, in advance, all situations where NPVs do or do not apply. **(NWPPA)**

Response to Comment #15: EPA issued letters to the Department finding that an NPV requirement applicable to NPDES, UIC, municipal solid waste, Oregon Title V Operating Permits, and the State Implementation Plan violates the minimum delegation principles

for those programs. In each of these cases, the Oregon Attorney General's Office evaluated and concurred with EPA's interpretation. Oregon Title V Operating Permits are expressly excluded from the NPV requirement by ORS 468.126(2)(D). Given this history, the Department believes it is important to be as transparent as possible in the rule regarding which violations will be subject to the NPV requirement.

OAR 340-012-0041(1) – PERMIT REVOCATION AS A FORMAL ENFORCEMENT ACTION

Comment Summary: "Revocation of a permit" should not be listed as a formal enforcement action pursuant to Division 12.

Response Summary: The Department proposes to delete revocation of a permit as a consequence of a formal enforcement action pursuant to Division 12.

Comment #16: This proposed rule lists the formal enforcement actions the Department may take under Chapter 340 Division 12. Incorrectly included in this list is a formal enforcement action that may "result in revocation of a department - or commission - authorized license or permit." An action under Division 12 cannot result in revocation of a license or permit. The Oregon law establishes procedures separate from the procedures in ORS 468.130 (implemented through Division 12) for assessing civil penalties. See, for example, ORS 466.170, 468.070. As a result, OAR 340-012-0041(1) cannot include revocation of a license or permit among the actions the Department may pursue through formal enforcement under Division 12. ...Finally, as discussed immediately above, the Department should not reject its long-standing practice of pursuing informal enforcement first before proceeding to formal enforcement, by deleting the provision allowing the Department to issue a formal enforcement action without first sending a Warning Letter or Pre-Enforcement Notice.

AOI requests that the Department revise OAR 340-012-0041(1) to read:

> "(1) Formal enforcement actions may require that the respondent take action within a specified timeframe, or assess civil penalties [~~, or result in revocation of a department or commission authorized license or permit~~]. The Department may issue a Notice of Permit Violation [~~or formal enforcement action~~] whether or not it has previously issued a Warning Letter or Pre-[e]Enforcement Notice related to the issue or violation. Unless prohibited by statute or rule, the Department may issue a formal enforcement action without first issuing a Notice of Permit Violation." **(AOI)**

Response to Comment #16: The Department agrees that the authority to revoke permits is independent from its authority to assess civil penalties and subject to different procedures. The Department will delete reference to permit revocations in OAR 340-012-0041(1).

The proposed provision clarifying that issuance of an informal notice is not a condition precedent for formal enforcement does not change the Department's longstanding policy of attempting to resolve violations informally before proceeding to formal enforcement. This provision addresses those few situations where an informal notice has not been sent.

However, there are many avenues of communication between an alleged violator and the Department for resolving violations other than the warning letter and pre-enforcement notice, such as meetings or phone calls with the alleged violator or via the exchange and review of relevant information.

OAR 340-012-0041(3) and -0053(1)(a) – CONSENT ORDERS AND MUTUAL AGREEMENT AND ORDERS (MAO) AS ENFORCEABLE FORMAL ENFORCEMENT ACTIONS

Comment Summary: The Department should not assess civil penalties for violations of consent orders or MAOs. MAOs should not include stipulated penalties for violations of the MAO.

Response Summary: The Department disagrees and will not make the proposed change.

Comment #17: NWPPA requests that the Department revise the approach, both stated and unstated, in its rules for approaching consent orders. There are many times where the Department and a source have seen a need to enter into a consent order so that the Department could authorize the operation or implementation of some action that benefited the public. For example, one Oregon source entered into a consent order authorizing the immediate use of an air pollution control device in order to respond to neighbor concerns. The source was not violating any requirements, but arguably would have been if it had started up the control device prior to completion of the permit modification process.

However, the Department's rules define a Mutual Agreement and Order ("MAO") as a "formal enforcement action" to be taken into account when aggravating any future violations. An MAO should not be considered a formal enforcement action. In order for there to be a formal enforcement action, the respondent should be provided with a formal Notice of Civil Penalty Assessment ("CPA") or a unilateral order, and not an MAO. This is true for several reasons. First, the CPA or unilateral order provides information about the conduct at issue, identifies the consequences and creates the right to a contested case hearing. As MAOs do not in our experience separately give rise to a right to a contested case hearing, there does not appear to be a basis for including them within the scope of formal enforcement actions. Second, if an MAO is considered to be a formal enforcement action, there is the potential for a respondent to have both the CPA and the MAO counted as prior significant actions ("PSAs"). This kind of "double jeopardy" (or double-counting) is clearly unfair and inappropriate.

In addition, the Department's policy has been to require that MAOs include penalties. We believe that this policy is counter-productive and request that the Department both revise its rules to exclude MAOs from the definition of formal enforcement actions and specifically allow the Department to enter into MAOs with or without associated penalties. Clarifying that MAOs do not necessarily need to include penalties will assist the Department in being able to implement MAOs in situations where there is a public benefit, such as the example given above, or where a supplemental

environmental project is a preferred and agreed upon resolution between the party and the Department. **(NWPPA)**

Response to Comment #17: (*See* also Response to Comment #18.) The Department does not agree that the proposed change is necessary or advisable. The commenter is correct that MAOs are not always preceded by a CPA or an Order and are sometimes entered into to address and settle likely future violations. MAOs do not give rise to a contested case hearing on the settled items because the Department and the party agree to the settlement resolution instead. The MAO will specify how violations of the MAO itself are to be handled – either through the normal civil penalty assessment or Order process or through a stipulated penalty process that creates a right to appeal. It does not follow, however, that (1) violations cited in an MAO will automatically be counted as Prior Significant Actions, or (2) that the same violation will be counted twice if included in both a CPA and an MAO. By definition, Prior Significant Actions are violations that become final. This would not include a violation that has not occurred, even if that potential future violation is addressed in an MAO, and it would not cause the same violation to be counted more than once, regardless of whether that single violation is cited in multiple notices or orders. The Department also disagrees with the assertion that MAOs should not include penalties. The terms of an MAO are enforceable obligations. It is unclear why violation of such terms should not subject the violator to civil penalties, regardless of why the violator initially entered into the MAO (e.g., to settle past or potential future violations).

Comment Summary: Violations of consent orders should not result in civil penalties and should not be counted as "prior significant actions."

Response Summary: The Department will not delete consent orders from proposed OAR 340-012-0053(1)(a) ("violation of a requirement or condition of a commission or department order, consent order, agreement or consent judgment").

Comment #18: Consent Orders should not carry an "a priori" penalty

One can envision many occasions where entering into a consent order with DEQ should not automatically invoke a penalty. One example would be on a newly issued permit that neither DEQ nor the permittee caught an error in a permit condition. Both parties agree that this was an error but an order must be executed while a new permit is processed to avoid paperwork violations of this erroneous permit condition.

Another example would be a "responsible party" voluntarily trying to clean up a legacy hazardous waste site along a water way. A Corps of Engineer Nationwide permit (No. 38) would greatly streamline the permitting process but a state issued administrative order is a requirement of obtaining this permit.

In these examples, why should such orders automatically carry a penalty? Similarly, they should not count as PSA's.

Weyerhaeuser urges DEQ to maintain the flexibility to enter into consent orders without associated penalties and install this flexibility in the rule language. **(Weyerhaeuser)**

Response to Comment #18: (*See* also Response to Comment #17.) This comment is based on the premise that entering into a consent order with the Department will automatically invoke a penalty. Such orders do not need to include a penalty assessment. The terms of an order are, however, enforceable obligations. It is unclear why violation of such terms should *not* subject the violator to civil penalties, regardless of why the violator initially entered into the order. In fact, many orders include stipulated penalties by which the penalty for a future violation of the order is established upfront. Further, some orders are entered into to address ongoing violations. There is no reason why penalties should not be imposed for such violations simply because the violator has also settled future violations of the same type in the same order. (*See* also, Response to Comment #17.)

Comment Summary: "Agreement" and "judicial consent decree" should be deleted from proposed OAR 340-012-0053(1)(a) and (c).

Response Summary: The Department will not make the suggested change.

Comment #19: In paragraph (1)(a), two new terms have been added to the list of Department actions for which a person's actions can be classified as a Class I Violation if there is a violation of a requirement or condition – "agreement" and "judicial consent decree." It is unclear in paragraph (1)(a) to what the term "agreement" refers. If it is intended to include a Mutual Agreement and Order, then that phrase should be spelled out. It should not, however, be intended to include many of the voluntary agreements that a person can enter with the Department. For example, a person might enter a Receipts Authority Agreement under ORS 468.073 with the Department under which the person voluntarily agrees with the Department to take certain actions and to pay Department oversight costs in return for the Department's agreeing to perform a regulatory activity that the Department was not scheduled to perform. Failure of the person to follow the terms of such a voluntary agreement should not expose the person to civil penalties. If the person does not carry out a material term of the agreement, the Department has the ability to proceed against the person for breach of contract. Paragraph (1)(c) should also not include a judicial consent decree. Because the judicial consent decree will have been entered in court, the Department has the ability to pursue all available remedies in court if a person violates a judicial consent decree. The court that approved and entered the judicial consent decree should determine the appropriate remedy for a violation of the decree. These comments also apply to proposed paragraph (1)(c) in OAR 340-012-0053.

AOI requests that the Department revise OAR 340-012-0053 to state:

"(1) Class I:

"(a) Violation of a requirement or condition of a commission or department order, or consent order [~~, agreement or judicial consent decree~~];

"(c) Failure to provide access to premises or records as required by statute, permit, order, or consent order [~~, agreement or judicial consent decree~~]; **(AOI)**

Response to Comment #19: The Department will not revise proposed OAR 340-012-0053(1)(a) or (c) at this time, except that it will replace the term "judicial consent decree" with "consent judgment" consistent with 2003 legislation that eliminated the use of "decrees" in favor of "judgments." OAR 340-012-0053(1)(a) and (1)(c) do not and cannot make available to the Department enforcement remedies it does not already legally have at its disposal. If a judicial consent decree (now judgment) requires that the Department pursue its remedies in court, the Department will do so. The Department does not, however, intend to limit its available enforcement options with this rule where the document in question allows DEQ to pursue administrative remedies. Similarly, some Department agreements by their terms are enforceable via administrative remedies. These should also be included in OAR 340-012-0053(1)(a) and (c). Mutual Agreement and Orders are not intended to be included in the term "agreements" because these are a type of final Commission order.

OAR 340-012-0045 – CIVIL PENALTY DETERMINATION PROCEDURE

Comment and Response Summary: None.

Comment #20: This proposed rule allows the Department to assess a civil penalty for any alleged violation without limitation. First, the Department cannot issue a civil penalty for certain violations without providing advance notice in the form of a Notice of Permit Violation. See ORS 468.126; OAR 340-012-0038(3). Second, the Department has no authority to assess a civil penalty for an "alleged violation" only a "violation." See ORS 468.130. Finally, there is a typo that should be corrected in this provision.

AOI requests that the Department revise OAR 340-012-0045(1) to read:

"(1) Except as provided in OAR 340-012-0038(3), [~~I~~]in addition to any other liability, duty, or other penalty provided by law, the Department may assess a civil penalty for any [~~alleged~~] violation. Except for civil penalties assessed under OAR 340-012-0155(2), the Department determines the amount of civil penalty [~~is~~] using the following procedures:" **(AOI)**

Response to Comment #20: The Department will add the language to clarify the NPV exception to a civil penalty. The Department will delete the term "alleged" because it is not appropriately used at this point in the enforcement process. We will fix the typographical error.

OAR 340-012-0053 – VIOLATIONS THAT APPLY TO ALL PROGRAMS: "SUBMITTING FALSE, INACCURATE OR INCOMPLETE INFORMATION TO THE DEPARTMENT"

Comment Summary: Proposed OAR 340-012-0053(1)(b) ("submitting false, inaccurate or incomplete information to the department") is too broad and will

result in penalization of innocent "paperwork" mistakes. The classification should only apply to intentional submissions of false information.

Response Summary: **In order to narrow the scope of this classification to significant submittals, the Department will amend the proposed classification to read, "Submitting false, inaccurate or incomplete information to the department, where the submittal masked another separate violation or caused environmental harm or caused the department to misinterpret any substantive fact."**

Comment #21: NWPPA is concerned that the Department is inappropriately classifying as Class I violations any type of minor paperwork mistake. The proposed OAR 340-012-0053(1)(b) establishes as a Class I violation the submittal of any inaccurate or incomplete information to the Department. Thus, an inadvertent math error on a DMR or the inadvertent failure of a Title V source to submit a statement that it never triggered the 112(r) program during that six month certification period (assuming, as many do, that the permit requires this statement), would be an automatic Class I penalty. It would be a grave injustice to penalize an inadvertent paperwork error in this manner. There are many examples where a company or facility submits a voluntary correction letter upon discovering that an inadvertent mistake was made in a report. We believe that the intent was to classify as automatic Class I violations the **intentional** submittal of false, inaccurate or incomplete information to the Department. We strongly recommend that the Department limit OAR 340-012-0053(1)(b) to the intentional submittal of false, inaccurate or incomplete information. **(NWPPA)**

Comment #22: Insert "intentional" into the language in OAR 340-012-0053(1)(b). We believe DEQ must have intended to insert "intentional" into this "catch all" violation language. As proposed, the rule language would cause anything like a typographical error in a DMR to constitute a Class I violation. Weyerhaeuser doesn't believe this was the department's intent with this language. We also don't think "guidance" language would mitigate this problem. Guidance can be changed without public input. With third party litigation, the strict legal interpretation of the rule language is the only guiding factor. For these reasons, we believe inserting "intentional" into this OAR language would serve DEQ and the regulated community. **(Weyerhaeuser)**

Comment #23: Paragraph (1)(b) is likewise a significant departure from established enforcement requirements. Currently, it is a Class I violation for certain substantive areas to "intentionally" or "knowingly" submit false information to the Department. See, e.g., OAR 340-012-0055(1)(m), -0082(1)(h). The proposed rule deletes the culpable mental state and expands the list to include "inaccurate" or "incomplete" information. Thus, any unintentional and unknowing garden variety error in a submittal to the Department (including even typos) would be classified as a Class I violation. Also, reports prepared by a consultant for a company for submittal to the Department would impose civil penalty exposure as a Class I violation on the company for every inaccuracy or incompleteness in the reports. If submittals of information to the Department can rise to the level of a Class I violation, it should only be for false information intentionally submitted.

AOI requests that the Department revise OAR 340-012-0053 to state:

"(1) Class I:

"(b) Intentionally [S]submitting false [~~, inaccurate or incomplete~~] information to the Department; **(AOI)**

Response to Comment Nos. 21-23: The Department recognizes that in compiling the data required by a permit, people make innocent mistakes that cause no environmental harm or potential for environmental harm, and do not delay or prevent identification of problems at the facility. The Department does not intend to take formal enforcement action against these sorts of violations. Rather than adding a mental state requirement to the classification, which would make proof of some significant violations nearly impossible, the Department recommends limiting the scope of the classification to those submittals that cause environmental harm or the potential for environmental harm. The proposed addition makes clear which submittals of wrong information are Class I violations. The language for OAR 340-012-0053(1)(b) as now being proposed for adoption is "Submitting false, inaccurate or incomplete information to the department, where the submittal masked another separate violation or caused environmental harm or caused the department to misinterpret any substantive fact."

OAR 340-012-0053(2)(a) – VIOLATIONS THAT APPLY TO ALL PROGRAMS: "ANY OTHERWISE UNCLASSIFIED VIOLATION"

Comment Summary: The Class II "default" violation is too broad and will result in very minor violations being classified as Class II when they would be more appropriately classified as Class III.

Response Summary: The Department will add a Class III "default" violation to OAR 340-012-0053.

Comment #24: In each substantive area, there currently is a provision that makes a violation that "causes a major harm or poses a risk of major harm to human health or the environment" a Class I violation. See e.g., OAR 340-012-0050(1)(kk). There is not a similar general classification for Class II and Class III violations. However, the Department proposes to create in subsection (2) a catch-all provision that classifies "Any otherwise unclassified violation" as a Class II violation. Such an approach defies logic because it is a conclusion that all violations that pose a risk of harm that would otherwise be Class III violations based on a minor risk of harm would, nevertheless, be Class II violations because of subsection (2). It is also not appropriate because the proposed rules significantly increase the amount of civil penalties that will be assessed by, for example, increasing the amount of the matrices in OAR 340-012-0140. With those increases, it is not necessary also to create a catch-all provision that sweeps every minor violation that would otherwise be a Class III violation into the Class II category where it will be potentially subject to a civil penalty.

To reflect the true nature of violations based on the potential harm they pose, the DEQ should revise subsection (2) and create a new subsection (3) to recognize a catch-all

provision for Class II and Class III violations based on the harm caused and the risk of harm posed by the particular class of violation.

AOI requests that the Department revise OAR 340-012-0053 to state:

"(2) Class II:

"(a) Any otherwise unclassified violation that causes moderate harm or poses a risk of moderate harm to human health or the environment.

"(3) Class III:

"(a) Any otherwise unclassified violation that causes minor harm or poses a minor risk of harm to human health or the environment." **(AOI)**

Response to Comment #24: The Department agrees that there should be a general "default" violation that captures violations causing less harm or posing less risk than the Class I and Class II "default" violations and will add a Class III "default" violation. The Class III "default" violation will require findings that a violation is otherwise unclassified, and that the violation caused no more than a de minimis adverse impact on the environment, and posed no more than a de minimis threat to human health or other environmental receptors. We will not adopt the suggested change for the Class II "default" violation because of the additional, unreasonable burden of proof it would impose on the Department. Violations that do not meet the findings for a Class I or Class III will be considered Class II.

OAR 340-012-0054 - AIR QUALITY CLASSIFICATION OF VIOLATIONS

Comment and Response Summary: None, see comment and response #25 below.

Comment #25: The language in subsection (2)(a) contains a confusing redundancy and should be clarified. "Exceeding the yearly emission limitations of a permit, rule or order" is already identified as a Class I violation in subsection (1)(g). Therefore, such a violation is already covered under the phrase "Unless otherwise classified" in subsection (2)(a). The statement "other than an annual emission limitation" in subsection (2)(a) is redundant and also confusing because it refers to an "annual emission limitation" whereas subsection (1)(f) refers to the "yearly emission limitations." **(EPA)**

Response to Comment #25: The Department agrees that these classifications contain potential redundancies and will address this in Phase II of the rulemaking, when we will review most of the classifications. It should be noted that while the current language may be redundant, it does not create confusion as to how emission violations are classified.

OAR 340-012-0055 - WATER QUALITY CLASSIFICATION OF VIOLATIONS

Comment Summary: Both commenters state that the proposed revision regarding certain violations of pretreatment standards or requirements does not appropriately or accurately reflect who should be liable for those violations, and that the proposed

revision should be modified or withdrawn.
Response Summary: The Department will withdraw the proposed revision pending further review during Phase II of this rulemaking .

Comment #26: The proposed revision to subsection (f) [formerly subsection (i)] in response to a comment on the January 2004 rulemaking proposal appears to prevent the State from taking enforcement action against industrial users of a POTW. The response to comments document (Attachment B, page 8) also indicates that ODEQ's intent is not to enforce against noncompliance by industrial users. If this is the intent and effect of the revision to subsection (f), then EPA is concerned that ODEQ would no longer be able to show that its EPA-approved pretreatment program meets the requirements of 40 CFR 403.10(f)(1)(i) and (iv), that approved states have the legal authority to "require compliance by Industrial Users with Pretreatment Standards" and to "seek civil and criminal penalties and injunctive relief for noncompliance by the POTW with pretreatment conditions incorporated into the POTW permit, and for noncompliance with Pretreatment Standards by the industrial users..." **(EPA)**

Comment #27: ACWA appreciates the Department's responsiveness to its comments, and is generally satisfied with the proposed revisions, with one major exception. In proposed OAR 340-012-0055(f), the revised language does not meet the Department's goal of addressing ACWA's earlier comments related to enforcing pretreatment standards on the municipality, not the industrial user. In light of the Department's *Response to Comments* summary, we propose the following language to replace the proposed paragraph (f) in its entirety:

> *340-012-0055(f) "The failure of a municipal treatment works to comply with its approved enforcement response plan related to any violation of any pretreatment standard or requirement by a user of a municipal treatment works which either impairs or damages the treatment works, or causes a major harm or poses a major risk of harm to public health or the environment.*

If the Department does not agree with our suggested revision, then we prefer no changes be made to this section of the text of the existing rule. The current language reads:

> *340-012-055(g) "Any violation of any pretreatment standard or requirement by a user of a municipal treatment works which impairs or damages the treatment works, or causes a major harm or poses a major risk of harm to public health or the environment;* ***(ACWA)***

Response to Comment Nos. 26 & 27: The Department will not go forward with the proposed revision at this time. It will revisit this issue during Phase II of this rulemaking.

OAR 340-012-0068(1)(hh) – "VIOLATION OF ANY TSD FACILITY PERMIT CONDITION RLATED TO THE HANDLING, MANAGEMENT, TREATMENT, STORAGE OR DISPOSAL OF HAZARDOUS WASTE UNLESS OTHERWISE CLASSIFIED"

Comment Summary: This proposed revised hazardous waste classification is too broad. Not all materials labeled as "hazardous waste" are really hazardous, but this classification does not distinguish among different types of hazardous waste. Eliminate this classification, and either (1) determine based on the facts of each case what the classification for that permit condition violation should be; or (2) specifically classify each type of permit condition violation.

Response Summary: The Department will amend the rule to say "a" violation instead of "any" violation. Enforcement guidance provides that only violations of certain permit conditions are "related to hazardous waste transport, storage or disposal" and would be Class I; all others are Class II or III and would be handled according to the guidance that applies to those particular types of violations.

Comment #28: In OAR 340-012-0068(hh) the Department proposes to make any violation of a hazardous waste transport, storage or disposal (TSD) permit a Class I violation by default (unless it is otherwise specifically classified). In pursuing this proposed course for default circumstances, the Department is falling into the trap of "following the label" rather than basing the penalty classification on potential or actual harm to human health or the environment. This will lead to disparate treatment between permitted facilities and non-permitted facilities when the violations are exactly the same. In addition, not every otherwise unspecified violation at a TSD facility rises to a Class I level concern for health, safety and the environment. In part, this is because the materials involved, while being labeled "hazardous" for regulatory administration purposes may not be actually "hazardous" in real world terms. Many "derived from" wastes, in particular, fall into this description.

We suggest that the Department delete OAR 340-012-0068(hh).

Because the regulatory term "hazardous waste" covers such a wide range of materials with a wide range of real world potential impacts, we also suggest that it not be used at all for determining violation classifications (for example, as in proposed OAR 340-012-0068(a), (e), (f), (k), etc.). Instead, the Department should adopt criteria like that proposed for OAR 340-012-0130(2) and (3) for evaluating whether a violation involving the handling, treatment or storage of "hazardous waste" is a Class I, II or III violation (with Class II as a default).

This would make "hazardous waste" and "hazardous materials" violation classifications more closely reflect their potential for actual harm to safety or the environment. If the proposal remains as drafted, "hazardous waste" violation classification will not reflect "real world" conditions. **(Umatilla)**

Comment #29: This proposed rule is overbroad. The Department's authority under ORS Chapter 466 is confined to the treatment, storage and disposal of hazardous waste that occurs at a TSD facility. The permit issued to such a facility by the Environmental Quality Commission and the Department, including every condition it contains, thus is issued to assert regulatory authority over treatment, storage and disposal of hazardous waste. Under this proposed rule, as written, every violation of a condition in a TSD permit would be a Class I violation.

AOI believes that the Department's experience of more than fifteen years with the civil penalty classification system should allow the Department to identify all TSD violations that need to be specified as Class I violations. That fact coupled with the catch-all provision that classifies as Class I violations all hazardous waste violations that cause major harm or pose a major risk of harm to public health or the environment obviate the need for OAR 340-012-0068(1)(hh).

AOI requests that the Department delete OAR 340-012-0068(1)(hh):

"(hh) [~~Violation of any TSD facility permit condition related to the handling, management, treatment, storage or disposal of hazardous waste unless otherwise classified~~]" **(AOI)**

Response to Comments #28 and #29: Most TSD permit violations have always been classified as Class I violations in the rules. The Department agrees, however, that the proposed change may give the impression that the violation classification applies to all TSD permit violations. That is not the intent. The phrase "any TSD facility permit condition" will be revised to read "a TSD facility permit condition." The rest of the language, which excepts violations of TSD facility permit conditions otherwise classified, will remain as proposed. This is appropriate given that certain violations are carved out and classified as Class II violations. For example, the failure to label a tank or container of hazardous wastes with the words "Hazardous Waste," or with other words as required to identify the contents, is a Class II violation pursuant to OAR 340-012-0068(2)(b). The failure to keep a container of hazardous waste closed except when necessary to add or remove waste is a Class II violation pursuant to OAR 340-012-0068(2)(b).

The Department's enforcement guidance will clarify which violations of permit conditions are deemed "related to hazardous waste transport, storage, or disposal" such that they would be Class I. All other violations would be Class II or III and handled accordingly based on the guidance.

EXISTING OAR 340-012-0068(2)(c) – "FAILURE TO COMPLY WITH HAZARDOUS WASTE GENERATOR ANNUAL REPORTING REQUIREMENTS, TREATMENT, STORAGE, DISPOSAL AND RECYCLING FACILITY ANNUAL REPORTING REQUIREMENTS AND ANNUAL REGISTRATION INFORMATION, UNLESS OTHERWISE CLASSIFIED"

Comment Summary: The Department should not delete this existing classification at present but consider it further during the Phase II rulemaking.

Response Summary: The Department will not go forward with the proposed amendment at this time and will delay any revision to this section until Phase II of this rulemaking.

Comment #30: It is not clear why the Department is proposing to delete this hazardous waste violation classification based on reporting requirements (current OAR 340-012-0068(2)(c)). There is no explanation in the Department's response to comments included with the proposed rulemaking package. Also, the Department's response to comments, after discussing the proposed revisions to OAR 340-012-0068(1)(hh), states: "Other more specific comments regarding [whether] hazardous waste violations should be classified as I, II or III will be addressed during the Phase II rulemaking."

AOI requests that the Department not delete OAR 340-012-0068(2)(c) and consider it further in the Phase II rulemaking. **(AOI)**

Response to Comment #30: The Department will not go forward with the proposed amendment at this time and will delay any revision to this section until Phase II of this rulemaking.

OAR 340-012-0130– GENERAL MAGNITUDE DETERMINATION

Comment Summary: The general magnitude determination should be based only on the violation's actual impact to the environment, not on its potential impact to the environment.
Response Summary: The Department will make the change suggested by the commenter regarding major magnitude but will not make the suggested change regarding minor magnitude.

Comment #31: In keeping with the classification/magnitude determination scheme (actual/potential harm) used by DEQ and set forth in OAR 340-012-0026, we believe that magnitude determinations under OAR 340-012-130 should be based upon actual harm done to human health and not potential harm. **(Umatilla)**

Comment #32: OAR 340-012-0026(5)(b) in the proposed rules provides that magnitude is to be determined "based on the impact to human health and the environment resulting from that particular violation." OAR 340-012-0030 (11) in the proposed rules defines magnitude of the violation to mean "the extent and effects of a respondent's deviation from statutory requirements, rules, standards, permits or orders." Thus, magnitude concerns impact, extent and effect for the specific violation concerned.

OAR 340-012-0130(2) and (3) as proposed include not only actual impacts and effects of the specific violation concerned but also potential impacts and effects. Potential impacts and effects are considered in establishing the class for violations and are not appropriate for consideration in determining the magnitude of a specific violation.

AOI requests that the Department revise OAR 340-012-0130(2) and (3) to state:

"(2) The magnitude of the violation will be major if the Department finds that the violation had a significant adverse impact on the environment, or [~~posed a significant threat to~~] human health. In making this finding, the Department will

consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual [~~or threatened~~] effects of the violation; the concentration, volume or toxicity of the materials involved; and the duration of the violation. In making this finding, the Department may consider any single factor to be conclusive.

"(3) The magnitude of the violation will be minor if the Department finds that the violation had no more than a de minimis adverse impact on the environment[,] and [~~posed no more than a de minimis threat to~~] human health [~~or other environmental receptors~~]. In making this finding, the Department will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual [~~or threatened~~] effects of the violation; the concentration, volume or toxicity of the materials involved; and the duration of the violation. In making this finding, the Department may consider any single factor to be conclusive." **(AOI)**

Response to Comment Nos. 31 & 32: The Department will make the change suggested by the commenter regarding major magnitude; this limits the finding of major to those cases where significant actual harm can be proved. The Department will not make the change suggested for minor magnitude. The term "threat" in minor magnitude addresses actual and potential impacts that are difficult to prove but which would be more than "de minimis," which is the standard currently proposed.

Difficulty in proof may occur when the evidence is too expensive to collect. For example, a chemical spill to a stream can deteriorate the natural ecosystem. However, proof of that harm may require macroinvertebrate surveys or natural resources damage assessments which are generally performed by the Oregon Department of Fish and Wildlife. These studies are resource intensive and therefore not performed in most cases, leaving DEQ without direct evidence of the harm. Difficulty in proof may also occur when the evidence is impossible to collect because of timing. For example, exposure to even miniscule amounts of asbestos can cause cancers which result in suffering and death. However these actual effects may not be seen for years or decades after the exposure, making it difficult to prove actual harm at the time of enforcement for the asbestos mismanagement. While we believe most would agree that, depending on circumstances, harm may exist in these cases, the absence of direct evidence would make difficult a finding that the harm was more than "de miminis".

The Department must maintain the threat of harm to capture violation magnitudes that do not lend themselves to direct proof. Of course, any magnitude must be based on the specific facts of the violation – as stated in OAR 340-012-0026(5)(b) and OAR 340-012-0130. Furthermore, if a respondent does not agree with the Department's findings, it may require the Department to prove its case at hearing or prove an alternate theory of its own. See Response to Comment #33 below.

OAR 340-012-0135 – SELECTED MAGNITUDES

Comment Summary: Delete all selected magnitudes for hazardous waste violations and instead rely on the general magnitude determination set forth in OAR 340-012-0130.
Response Summary: The Department will not delete the selected magnitudes.

Comment #33: The selected magnitude categories in OAR 340-012-0135 are presumed to reflect the actual adverse impact on the environment and human health. The presumption is in fact not rebuttable and applies in all cases.

AOI believes that the Department should either allow a respondent to reject use of the selected magnitudes for its specific violation or make the presumption created by the magnitude boxes rebuttable. Otherwise, it is inequitable to focus magnitude on the particular violation concerned but then determine the magnitude based on one-size-fits-all categories.

AOI requests that the Department revise OAR 340-012-0130 by adding one of the two following provisions as subsection (4):

Alternative 1 – Creating a Rebuttable Presumption

"(4) If the Department determines, using information readily available to the Department, that a selected magnitude in 340-012-0135 applies, the Department's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude."

Alternative 2 – Allowing a Respondent to Elect Not to Use a Selected Magnitude

"(4) Notwithstanding the selected magnitudes specified in OAR 340-012-0135, a respondent may elect not to have the magnitude of a violation determined under OAR 340-012-0135 in the assessment of a civil penalty by the Department, by stating the respondent's election in the answer the respondent files to a Notice of Civil Penalty Assessment. If a respondent makes such an election, the Department will determine the magnitude of the violation under OAR 340-012-0130(1)(b), (2) or (3) as appropriate." **(AOI)**

Response to Comment #33: The selected magnitude violations are designed to establish consistency and certainty in the magnitude findings. However, the Department agrees that there may be circumstances in which differences of opinion exist about which particular magnitude application is the most appropriate description of the specific impact to public health or the environment. Therefore, the Department will add language to create a rebuttable presumption regarding the Department's application of a general or selected magnitude finding, and will allow a respondent to argue that a different magnitude should apply. The Department will further evaluate the relationship between the general magnitudes and the selected magnitudes in Phase II of the rulemaking.

Comment #34: We are also concerned that the selected magnitude categories in OAR 340-012-0135(3) will not accurately reflect damage to the environment or actual or potential threats to human health. This is because of the very wide variety of materials covered by the regulatory definition of "hazardous waste." These materials can range from harmless residues of hazardous waste treatment ("derived from" waste) to the most toxic of substances.

We recommend that the specific magnitude specifications of proposed OAR 340--012-0135(3) for violations involving hazardous waste be deleted because they will produce inaccurate indications of actual and potential harm. This will leave the default provisions of proposed OAR 340-012-0130 for making this determination. **(Umatilla)**

Response to Comment #34: The Department will not eliminate the selected magnitudes for hazardous waste because it believes that the consistency and certainty those rules create are important to the process. However, we agree there may be circumstances where a selected magnitude does not fit the situation and have addressed this concern by adopting the suggested language as discussed in more detail in the Response to Comment #33. While the Department does not believe it is appropriate to revisit in Division 12 the actual definition of hazardous waste already set forth in federal and state hazardous waste regulations, we will be reassessing all the selected magnitude violations during Phase II of this rulemaking.

OAR 340-012-0140 – PENALTY MATRICES

Comment Summary: The proposed penalty matrix assignments should not be based on who the violator is. The penalty calculation should consist of a single base penalty for all violations with multiplying factors for violation class and magnitude.

Response Summary: Because the proposal is so far-reaching, the Department will consider this suggestion during Phase II of the rulemaking.

Comment #35: In OAR 340-012-0140(2)(c) and its matrix system, the Department is (as described in its rulemaking summaries) attempting to address equity while achieving specific deterrence "based upon who the violator is." ORS 468.130 requires that the economic and financial conditions of the person incurring the penalty be considered. But in responding to previous comments, DEQ noted "A facility's ability to pay is handled in a different part of these rules and is not an issue in assigning a matrix category to a violator." Presumably, the Department is referring to proposed OAR 340-012-0162, "Inability to Pay the Penalty." "Who one is" (except for ability to pay) should not be a determining factor in assessing the size of civil penalties.

Potential and actual harm from violations are covered by violation classification and magnitude assignments. Aggravating and mitigating factors are determined by OAR 340-012-0145 (and the Department's penalty mitigation policy).

We believe the Department needs to step back and consider its proposed matrices in the Phase II rulemaking. We also suggest that "who the violator is" not be a factor,

resulting in a simplified single base penalty for all violations with multiplying factors for violation class and magnitude. As an example, such a matrix might look like:

- Base penalty $1,000
- Multiplying factors:
  - Class I 3
  - Class II 2
  - Class II 1
  - Minor Magnitude 1
  - Moderate Magnitude 2
  - Major Magnitude 3

Using this example, all Class II, Moderate Magnitude violations would garner a base penalty of $4,000 ($1,000 x 2 x 2). **(Umatilla)**

Response to Comment #35: The Department, in conjunction with the Advisory Group for this rulemaking, decided early on that we were not going to make significant structural changes to the penalty matrix approach. The Department does believe that consideration of "who" the violator is is important, not due to ability to pay considerations, but due to the differing levels of deterrence needed to gain future and immediate regulatory compliance. The Department believes it will be important to evaluate the effectiveness of this matrix approach over time and should the application of the matrices not result in the anticipated deterrence outcomes, then the Department will reconsider the matrix approach at that time.

Comment #36: NWPPA does not object to the idea of DEQ updating its penalty matrices to reflect increased base penalties. However, we are greatly concerned that the matrices impose enhanced penalties based on the type of permit the violator holds rather than the degree of environmental impact. For example, a source with a Title V air permit is automatically subject to the $8,000 matrix while most sources holding ACDPs are automatically subject to the $6,000 matrix. It strikes us as inherently unfair that a 5% opacity excursion at a paper mill (inevitably a Title V permit holder) would be subject to a greater penalty than a 15% opacity excursion at a source holding an ACDP. Other examples include that a holder of a "major industrial source NPDES permit" is subject to the $8,000 matrix, while a source holding a minor industrial source NPDES permit is subject to the $6,000 matrix. Likewise, a company that owns several facilities, each of which have a single underground storage tank ("UST") will be subject to the $8,000 matrix for a UST related violation while a company with one facility and twenty USTs would be subject to the $1,000 matrix for the same violation. We understood the Department's stated goal to be to key the penalty to the amount of real or potential harm, not the permit type or the size of the facility. As the Department well knows, some of the most serious environmental harms have resulted from releases at facilities with "smaller" permits. NWPPA recommends that the matrices distinguish based on type of violation, not type of permit or number of permits held corporation-wide. **(NWPPA)**

Comment #37: As NWPPA correctly points out in their comments, the type of permit and the number of permits held corporation-wide is not an adequate measure of real or

potential environmental impact of a violation. Weyerhaeuser suggests revising the penalty matrix to better reflect real or potential environmental insult. **(Weyerhaeuser)**

Comment #38: Boise believes that the severity of an environmental enforcement penalty should reflect the amount of real or potential harm due to the particular incident, not based simply on the type of permit or size of the facility. We believe this policy remains a clear objective of DEQ's enforcement rules, as stated in the proposed OAR 340-012-0026(3). With this in mind, however, we believe that the proposed penalty matrix approach clearly establishes a new policy, wherein the type of permit or size of a facility becomes a key determination of penalty severity and amount, rather than the degree of harm or potential harm from the alleged violation. Because our company operates many large facilities with complex permit monitoring, reporting and recordkeeping requirements, Boise believes the matrices would unfairly penalize its multiple facilities in the state. Boise requests that the matrices be revised to uniformly evaluate penalty assessment based on incident severity rather than the facility size, or permit complexity. **(Boise)**

Response to Comment Nos. 36-38: The penalty matrices in the currently existing rules generally do not make distinctions between types or scope of permits; almost all permit violations are assigned to the $10,000 matrix. The proposed penalty matrix assignments are based in part not so much on the type of permit held by the violator, but the scope of that permit. For example, the matrices differentiate between violations of a "regular" ACDP permit (assigned to the $6,000 penalty matrix) and violations of ACDP permits issued pursuant to New Source Review regulations or Prevention of Significant Deterioration regulations, and section 112(g) of the federal Clean Air Act (assigned to the $8,000 penalty matrix). The latter ACDPs are issued precisely to evaluate compliance with environmentally protective technologies and behaviors and therefore warrant a higher penalty.

The Department believes that the proposed penalty matrices achieve the goal of creating deterrence by considering both the extent of environmental harm and by tailoring the size of the penalty to the violator. Larger facilities are more likely to discharge or emit larger amounts of pollutants. For this reason they are more likely to have a Title V air permit which allows more emissions or an individual industrial major NPDES surface water discharge permit. Smaller facilities are more likely to have ACDPs which allow lower air emissions or WPCF permits which prohibit discharge to surface waters. While likelihood of environmental harm is a major factor in assigning a base penalty, in this rulemaking the Department is also attempting to take into account the level of sophistication of the source, the compliance resources available to the source, and the relative amount of penalty needed to achieve compliance.

Comment Summary: The proposed rules do not specify which penalty matrix particular violations are assigned to and give the Department unlimited discretion to make these assignments.

Response Summary: The proposed rules do specify which violations are assigned to which penalty matrix.

Comment #39: Under 340-012-0140, under the determination of the base penalty, the Rules would add "a new mid-range ($6,000) penalty matrix [which] provides additional differentiation of violations to be assigned to different matrices." *Id* at 3. Instead of requiring a specific violation, therefore, this language would authorize either higher or lower values to be assigned to the different matrices at DEQ's discretion. How would such decisions be made? Who makes such decisions and would the decision be appeal able if it did not adequately protect the resource? That this provision would substantially weaken the rules is illustrated by the fact that small or potentially less sophisticated violators are assigned to lower penalty matrices. Some penalties will be lower as a result of these base penalty determinations..." *Id* at 4.

In addition, the Civil Penalty Schedule Matrix in 340-012-0042 has been virtually eliminated from the rules including the established monetary amounts for certain violations. These mandatory penalties have been replaced with standards and conditions that virtually turn the more restrictive mandatory penalties provisions into discretionary standards. **(Tribal Water Advocacy)**

Response to Comment #39: The Department is not proposing to eliminate the penalty matrix. The matrix section has been renumbered from -0042 to -0140. The proposed regulations set forth the violations assigned to each penalty matrix. The Department's determination of which penalty matrix applies can be appealed by the respondent.

OAR 340-012-0145(2) – PRIOR VIOLATIONS AS AN AGGRAVATING FACTOR

Comment Summary: The prior significant action factor is too severe. Various options proposed: eliminate PSAs when a facility is sold; for respondents that own multiple facilities, count each facility's PSAs separately; don't count PSAs from all company facilities within the state; eliminate PSAs once a company puts an EMS in place; only count PSAs within the same program.
Response Summary: The Department will continue counting prior violations from all facilities owned by the respondent but is proposing to amend the rule to count only violations involving the same environmental media. The Department will consider amending its self-disclosure policy to give more credit towards the initial civil penalty for violations by a respondent who has instituted an environmental management system (EMS) and violations that were self-reported by the violator, but will still count those violations as prior violations if the facility is assessed a civil penalty in a later enforcement action.

Comment #40: The calculation of Prior Significant Actions (PSA) is unfair for multiple facility corporations.

Weyerhaeuser has over 40 independently managed facilities in Oregon. These include nurseries, recycling operations, box plants, sawmill, plywood mills, paper mills,

and engineered wood facilities. Consider how three historic PSA's would impact future enforcement at our 40 facilities vis-à-vis a single site corporation. Under the proposed rules, these three PSA's would count the same for the single site facility as well as a company like Weyerhaeuser.

We urge DEQ to consider some normalization procedure to better reflect historical PSA's. From a statistical standpoint, the three PSA's over 40 facilities represents a much lower occurrence rate than three PSA's at a single ownership facility. In the unfortunate occurrence of enforcement, Weyerhaeuser should not incur increased penalties simply for being a large corporation.

The model that Oregon uses for safety enforcement reflects the independent nature of mulit-facilty corporations. Oregon's safety regulations recognize the independent management aspect of a site and only look at historical violations at that specific site. While Oregon's approach on safety may not be acceptable to DEQ, some normalization or mitigation scheme should be implemented.

NWPPA's comments suggest using the implementation of an Environmental Management System to mitigate historic PSA's. Weyerhaeuser would be very supportive of this type of mitigation for historical PSA's. **(Weyerhaeuser)**

Comment #41: This provision provides the introduction to the use of prior significant actions (PSAs) in determining the gravity-based part of a civil penalty. Historically, there has been a disagreement among some respondents and certain formal enforcement personnel about whether an earlier violation at one facility owned by a company qualifies as a PSA for a later violation at another facility owned by the same company and involving a different environmental program than the earlier violation.

AOI does not believe that an earlier violation from a different facility involving a different environmental program should qualify as a PSA and be used as an aggravating factor in assessing a civil penalty at a different facility simply because both facilities are owned by the same company. A company fortunate enough to have more than one facility in Oregon should not be subject to a business disadvantage in terms of civil penalty exposure by tying one facility's violations to another facility.

AOI requests that the Department revise OAR 340-012-0145(2) to read:

"(2) 'P' is whether the respondent has any prior significant actions (PSAs) <u>at the same facility or any PSAs involving the same environmental program at any other Oregon facility owned by the respondent.</u> A violation becomes a PSA on the date the formal enforcement action in which it is cited is issued." **(AOI)**

Comment #42: A concerning aspect of the proposed rules is the excessive penalization of companies that have invested in Oregon by operating more than one facility in the state. NWPPA has long thought that it was the state's goal to encourage additional investment in manufacturing facilities in Oregon. However, the proposed rules potentially escalate penalties for a company that does have multiple facilities in the state.

NWPPA members are some of the most vulnerable to DEQ's proposed rule change, which increases penalties based on company-wide operations in the state. Some of NWPPA's members operate more than forty individual facilities in the state. These facilities may range from recycling collection stations to sawmills to pulp and paper mills. The proposed rules seek to impose a penalty aggravation factor of up to ten (which would double the penalty) based upon the number of alleged violations of any type at any type of facility owned by the same parent corporation over the prior decade. While all our members strive to maintain 100 percent compliance at all times at all facilities, violations can be alleged at the best of companies. It is not fair or reasonable for the Department to increase penalty size at one plant based on the conduct at a different plant, under a different manager's control and potentially in an entirely different business sector, and/or an entirely different region of the state. Therefore, NWPPA proposes that the aggregation of non-compliance incidents and penalties at facilities with the same corporate ownership be dropped, unless the facilities are adjacent or contiguous, within the same 2 digit SIC code and the facilities are under common ownership or control. Limiting the PSAs, to facilities in the same 2 digit SIC code is not particularly helpful, by itself, for facilities in the wood products sector. The major code for wood products facilities includes everything from kitchen cabinet manufacturers to particleboard plants to planing mills.

Additionally, we recommend that the Department only consider as PSAs, violations in the same media, and that PSAs not be considered if they pre-date the implementation of an environmental management system. We believe that it is not appropriate to aggravate penalties based upon issues that have arisen in totally different media as an issue in one media is rarely indicative of environmental compliance in another media. If a company is suffering from a systemic failure to comply with environmental requirements, this aggravation factor will not be the appropriate means of addressing the issue anyway. Consistent with the idea of trying to target this aggravation factor to encourage appropriate conduct, NWPPA also suggests that PSAs that pre-date the implementation of an environmental management system not be considered PSAs. We believe that it is in the state's and public's best interest to encourage active environmental management system development. These changes would promote that end where companies have put in place measures to minimize the potential for future violations and, therefore, the prior violations should not serve to aggravate the penalty. **(NWPPA)**

Comment #43: Boise operates multiple facilities in Oregon, and we believe the proposed rules which increase penalties at one facility due to previous violations or penalties at other facilities is not necessary or reasonable. It is particularly unreasonable in situations where the facilities operate in separate divisions of the company under different local and corporate management control. For example, we operate a veneer mill and a paper mill in St. Helens, Oregon. Even though these two facilities are located in close proximity, management is divided up through the senior vice president level within the corporation. Other than buying and selling of wood chips, these two facilities have no direct business interaction, and the individual facilities should not be adversely impacted by penalty aggregation factors that are the result of an action at another facility

in the state. Boise can find no sound justification or reason for an escalation of penalties against those companies that have made a significant financial commitment to the region by operating multiple facilities in Oregon. **(Boise)**

Response to Comment Nos. 40-43: In determining the value of the "P" factor, the Department counts all prior violations by the respondent. This practice encourages those who manage a company to know what is going on at all of its facilities and, if there is a violation at one facility, to ensure that violation does not occur at its other facilities. Even if separate facilities are managed by different managers, the Department expects companies under the same ownership to share information to maximize environmental compliance. It is hoped that higher "P" values for more violations under the same corporate umbrella will encourage that communication.

The Department is proposing to amend the "P" factor calculation by counting only those prior violations in the same environmental media (i.e., water quality; air quality; land quality, etc.), or related to the same media. This significantly reduces the potential "P" factor for many multiple facility respondents.

Comment Summary: For purposes of calculating the "P" factor in a civil penalty assessment, the date of the prior violation should be the date the prior violation occurred rather than the date of issuance of the formal enforcement action in which the prior violation was cited.
Response Summary: The Department will not make the suggested change.

Comment #44: NWPPA recommends that the Department revise OAR 340-012-0145 so that PSAs are determined based on when the underlying conduct took place instead of when DEQ got around to issuing the formal enforcement action. The effect of PSAs on the "P" aggravation factor is based upon when the formal enforcement action relating to the PSAs was issued. The Department sometimes has a lag of multiple years between when conduct allegedly occurred and when the Department issues the formal enforcement action, as noted in the discussion above. This leaves the respondent having a hard time responding to the allegations and means that the allegations will impact penalty calculations potentially 15 years after the conduct. This is yet one more way that DEQ tardiness negatively impacts Oregon industry. NWPPA suggests that OAR 340-012-0145(2) be revised to state that the violation becomes a PSA on the earlier of the date when the conduct last occurred or the date the formal enforcement action is issued. **(NWPPA)**

Response to Comment #44: The purpose of the "P" factor is to account for the number of formal enforcement interactions the violator had before the current violations. The Department uses the time period from the date the first formal enforcement action was issued to the date of the current violation because it provides a firm, easily established start date. The Department strives to move enforcement cases as quickly as possible through the system, as resources and negotiations with violators allow.

OAR 340-012-0145(5) – MENTAL STATE AS AN AGGRAVATING FACTOR

Comment Summary: Eliminate mental state as an aggravating factor.
Response Summary: The Department will not eliminate mental state as an aggravating factor.

Comment #45: Simplify the "mental state aggravation" factors. Weyerhaeuser supports the simplification procedure suggested by NWPPA. This enforcement rule package is complex (79 pages) compared to other states and should be simplified as much as practicable. **(Weyerhaeuser)**

Response to Comment #45: Members of the advisory group indicated that mental state is an important consideration in calculation of civil penalties, and the Department agrees. The section on mental state has been expanded to allow for consideration of a broader range of fact situations, to tailor the civil penalty more accurately to the violation.

Comment Summary: Amend explanation of "constructive knowledge" to mean what a person "reasonably" should have known. Delete presumption about actual knowledge.
Response Summary: The Department will add the language about "reasonably" should have known but will not delete the presumption about what constitutes actual knowledge.

Comment #46: This proposed rule should be edited in several ways. First, in paragraph (5)(a)(B), constructive knowledge means that a person "reasonably" should have known. The standard for constructive knowledge should be objective – based on a reasonable person – rather than subjective – based on the individual person involved. Further, simply having a permit that prohibits or requires conduct should not be presumed to be constructive knowledge because of the historic tendency of some Department inspectors to cite permittee's for violations of permit conditions that are ambiguous or open to differing interpretations.

Second, having received a Notice of Noncompliance, Warning Letter, Pre-Enforcement Notice or a formal enforcement action "for the same violation" should not be presumed to be actual knowledge for all situations. For example, being cited for a paperwork violation should not automatically make a respondent subject to a "6" value for mental state when the respondent is cited for the same violation, if the respondent handles hundreds or even thousands of the same paperwork a year. Because the chance for an inadvertent slip up increases with the volume of paperwork involved, conduct should not be categorized as reckless simply because a repeat violation occurs when a respondent is dealing with a large volume of paperwork.

AOI requests that the Department revise OAR 340-012-0145(5)(a)(B) and (C) to read:

> "(B) 2 if the respondent's conduct was negligent or the respondent had constructive knowledge (reasonably should have known) that the conduct would be a violation. Holding a permit that prohibits or requires conduct [~~is presumed to~~

~~constitute at least~~] may be constructive knowledge and may be actual knowledge depending on the specific facts of the case.

"(C) 6 if the respondent's conduct was reckless or the respondent had actual knowledge that its conduct would be a violation. A respondent that previously received a notice of noncompliance, warning letter, pre-enforcement notice or any formal enforcement action for the same violation [~~is presumed to~~] may have actual knowledge depending on the specific facts of the case. Holding a permit that prohibits or requires conduct may be actual knowledge depending on the specific facts of the case." **(AOI)**

Response to Comment #46: (*See* also Response to Comment #48.) The Department does apply an objective standard for determining knowledge and will add the term "reasonably" to subsection (B) but will not delete the proposed presumptions, which are rebuttable by the respondent. A specific requirement in a permit or other official communication should trigger heightened awareness of a requirement, subject to rebuttal. The purpose of stating the presumptions is to provide more certainty and consistency in how the Department calculates the mental state factor. These presumptions are reasonable and put a respondent on notice about how the Department treats receipt of a permit or prior informal or formal enforcement notice in its penalty assessments.

Comment Summary: The Department should assign a 0 for mental state when the violation was an unavoidable accident.
Response Summary: There is no need to specify a mental state factor for unavoidable accidents, because these are not referred for formal enforcement.

Comment #47: Boise works very hard to eliminate accidents within our environmental programs and within our safety programs. Environmental protection and worker safety is important to us, and has been made the highest priority at all of our facilities. While Boise does recognize that most accidents can be avoided with reasonable precautions, sometimes accidents happen that are unavoidable. Therefore, Boise opposes the elimination of the "unavoidable accident" clause from the mental state aggravating factors calculation. To us, it does not appear reasonable to assign a "0" ranking to only those violations for which there is insufficient information on which to base a finding. **(Boise)**

Response to Comment #47: The Department removed reference to "unavoidable accidents" because such violations are not referred for formal enforcement, making the language unnecessary and confusing. Whether an avoidable violation will be referred for formal enforcement will be addressed in guidance.

Comment Summary: Delete the presumptions contained in the mental state factors, that holding a permit that prohibits or requires conduct is presumed to constitute at least constructive knowledge; and prior receipt of an enforcement notice for the same violations is presumed to constitute actual knowledge.
Response Summary: The Department will not delete the presumption from the explanation of "negligence" contained in proposed OAR 340-012-0145(5)(a)(B) but

will modify the presumption contained in the explanation of reckless/actual knowledge in proposed OAR 340-012-0145(5)(a)(C). Under this new rule, receipt of Warning Letter or Pre-Enforcement Notice would only be used to create a presumption that the person had actual knowledge of the requirement.

Comment #48: NWPPA is concerned that the proposed mental state aggravation factor values in OAR 340-012-0145(5)(a)(B) and (C) are inconsistent with other parts of the rules and unfairly penalize respondents under common situations. First, the aggravation factors under these two subsections have historically always addressed "negligent" and "intentional" conduct. The proposed revisions seek to clarify the definition of "negligent" in the definitional section (OAR 340-012-0030) in a manner that we believe is reasonable. However, the Department has suggested adding language to the rules in –0145(5)(a) that apply those definitions in an effort to expand those terms wildly beyond that defined in –0030. The term "negligent" is expanded to include not just negligent conduct, but also **any** conduct that violates a permit. This outcome is grossly exaggerated/overstated and unfair as there are often multiple ways to read a permit condition. There are also occasions when an administrative or operational mistake occurs causing the permit compliance incident, but which in no way results from negligent action or behavior on the part of the operator or permittee. To dictate in the rules that any permit violation is negligent is entirely inappropriate. The OAR 340-012-0145(5)(a)(B) two point aggravation factor should only apply where the respondent's conduct was clearly negligent.

Similarly, the Department proposes to revise OAR 340-012-0145(5)(a)(C) to add a six point aggravation factor not just when the conduct was reckless, but also whenever the respondent previously received a notice of noncompliance, warning letter, pre-enforcement notice or any formal enforcement action for the same violation. This proposed revision is also grossly inappropriate. A source that receives a warning letter, pre-enforcement notice or notice of permit violation has no right to a contested hearing and no legal ability to force a final resolution of an alleged violation. It is not unusual for a facility to receive the current equivalent of a warning letter or pre-enforcement notice and to vehemently disagree with the Department's initial conclusion of noncompliance, based on relevant facts concerning the incident. Frequently, facilities will respond back to the Department refuting the allegations in a Notice of Noncompliance and never hear anything further about the matter. It would be completely inappropriate for the Department to then assess a six point aggravation factor if ten years later the Department tried to impose a penalty for similar conduct. The six point mental state aggravation factor currently addresses intentional conduct. We believe that it should stay that way, but do not have strong objection to the Department switching the term to reckless conduct. However, NWPPA is strongly opposed to the Department bootstrapping onto the defined term "reckless" other conduct that is not in the least reckless. We request that the Department only assess the six point aggravation factor for reckless conduct and delete the remainder of the proposed language in OAR 340-012-0145(5)(a)(C). **(NWPPA)**

Response to Comment No. 48: (*See* Responses to Comments #46 and #47.) The Department will modify the presumption contained in the explanation of reckless/actual knowledge contained in proposed OAR 340-012-0145(5)(a)(C) but will not delete the presumption from the explanation of "negligence" contained in proposed OAR 340-012-0145(5)(a)(B). Under this new rule, receipt of Warning Letter or Pre-Enforcement Notice would only be used to create a presumption that the person had actual knowledge of the requirement.

We do not agree that the proposed language makes all permit violations negligent. Negligence, defined at OAR 340-012-0030(12), is based on a combination of things a respondent should have reasonably known and things a respondent should have reasonably done. The existence of a permit condition creates a presumption of what the respondent should reasonably have known because the Department believes that those who apply for and are issued permits should know the terms of their permits. In fact, permit recipients frequently assist in the drafting of their permits and sign certifications that they know the contents of their permit and will abide by the terms of the permit. A respondent may overcome that presumption by showing that there is ambiguity or confusion about the condition. Furthermore, a respondent may challenge whether it acted unreasonably even if it had knowledge of the permit condition.

The Department agrees that proposed OAR 340-012-0145(5)(a)(C) did make the receipt of a Warning Letter or Pre-enforcement Notice equivalent to "reckless" conduct in significance. The Department also agrees that as proposed, the rule would have placed inappropriate weight on prior actions by the respondent that were not subject to appeal. The Department agrees to amend OAR 340-012-0145(5)(a)(C) that rule to state: "6 if the respondent's conduct was reckless, or the respondent had actual knowledge that its conduct would be a violation and Respondent's conduct was intentional." Under this new rule, receipt of Warning Letter or Pre-Enforcement Notice would only create a presumption that the person had actual knowledge of the requirement. A respondent could overcome that presumption by demonstrating that there was ambiguity or confusion about the law and could also challenge whether its conduct was intentional.

Comment Summary: The proposed rules would reduce enforcement by providing that violations would not be enforced in certain circumstances.
Response Summary: The circumstances listed by the commenter are mitigating and aggravating factors that are taken into account when a penalty is assessed and do not bear on whether the violation is referred for formal enforcement action or on the amount of the base penalty.

Comment #49: DEQ would incorporate additional factors and circumstances in which the rules would not be enforced even in the event a violation occurs by providing: 1) that respondent's history of correcting prior violations may, in some cases, "completely negate" the aggravation of a civil penalty; 2) "greater range of options for respondent to get credit for addressing past violations;" 3) that "respondent can receive a broader range of credit for efforts to correct the current violations;" and 4) "greater range of options

under the occurrence factor (number of days or number of occurrences of the violation.)" *Id.* **(Tribal Water Advocacy)**

Response to Comment #49: The examples given by the commenter represent aggravating and mitigating factors that are applied once the Department has decided to pursue enforcement and a base penalty has already been calculated. They are not factors used to determine whether a violation is referred for formal enforcement (or is assessed a penalty) to begin with. Therefore the commenter is not accurately stating that these factors create situations in which the Department's "rules would not be enforced."

OAR 340-012-0150 – ECONOMIC BENEFIT

Comment Summary: The rules should clarify that economic benefit will be determined by either assessing costs avoided or delayed, or wrongful profits (but not both). The Department should not eliminate the provision that a respondent may request use of the BEN model.

Response Summary: The Department will make these suggested changes.

Comment #50: This proposed rule in the first sentence should make clear that "benefits gained" and "costs avoided or delayed" should not both be used to determine economic benefit if the only benefit gained by a violation is an avoidance of costs or a delay in incurring costs. In other words, double counting should be avoided.

The final sentence proposed to be deleted in this rule should be retained. The final sentence that is proposed to be deleted from OAR 340-012-0150(1) was included in current OAR 340-012-0045(1)(c)(F)(iii) in 1998 based on public comment. The reason the Department provided at the time for including the sentence still applies: "DEQ considers the US EPA BEN model to be the best tool, which is reasonably-available, to calculate economic benefit of noncompliance. A respondent should be entitled to its use upon request." Attachment E, page 1, Agenda Item O, Environmental Quality Commission Meeting, August 7, 1998 Meeting.

AOI requests that the Department revise OAR 340-012-0150(1) to read:

"(1) The Economic Benefit (EB) is the approximate dollar value of the benefit gained and the costs avoided or delayed (without duplication) as a result of the respondent's noncompliance that resulted in the violation(s) [~~and noncompliance~~]. The economic benefit may be determined using the U.S. Environmental Protection Agency's BEN computer model. Upon request of the respondent, the Department will provide 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 are 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." **(AOI)**

Response to Comment #50: The Department agrees with the comments about duplication and use of the model upon request and will recommend adoption of those proposed revisions. The Department is adding the following sentence to OAR 340-012-150(2) to address the commenter's concern regarding duplication: "Economic Benefit will be calculated without duplicating or double-counting the advantages realized by the respondent as a result of the noncompliance."

Comment Summary: The rules should not allow wrongful profits to be assessed as part of economic benefit.
Response Summary: The Department will add language to clarify that economic benefit cannot be double-counted but will keep the proposed language that would allow wrongful profits to be assessed as economic benefit in those rare situations that do not lend themselves to calculation as delayed or avoided costs.

Comment #51: NWPPA previously commented on the Department's proposed revisions to the definition of economic benefit in the new OAR 340-012-0150. Oregon's existing rules define economic benefit as "the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance." The proposed language defines economic benefit as "the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of respondent's violations and noncompliance" (emphasis added). In response to our concern that the change expands the Oregon definition of economic benefit, the Department stated that the purpose of this change was to enable it to capture economic benefit in those limited situations where economic benefits cannot be described in terms of avoided or delayed costs of compliance. The example the Department uses is of a facility that operates for a period of time in a location where, if the respondent had applied for the necessary permits, the Department would have been unable to issue them. In those discrete situations, the Department wants to be able to make the respondent forfeit any profits earned to the state.

NWPPA questions the legitimacy of the proposed approach as it is inconsistent with DEQ's historic approach to economic benefit. NWPPA also questions why the cost of avoided compliance cannot be calculated in this situation the way it is in any other. If the respondent at issue was categorically prohibited from discharging wastewater and it discharged wastewater, economic benefit can be determined from the alternate cost of disposal. If the respondent was a "wildcat" composting facility that could not be permitted due to land use restrictions, the Department could estimate the additional cost of situating in a legitimate location and determine economic benefit on that basis. In short, NWPPA believes that the Department should not increase its regulatory authority to authorize the confiscation of corporate profits based on the potential rare situation where economic benefit cannot be characterized in terms of delayed or avoided costs. In such a situation, economic benefit should not be recharacterized in order to enhance the penalty.

NWPPA suggests that the rule language remain more faithful to the current regulatory language and state:

"The Economic Benefit is the approximate dollar value of the costs avoided and delayed as a result of the respondent's noncompliance."

This language avoids unnecessary duplication of words and retains the intent of the economic benefit penalties. **(NWPPA)**

Response to Comment #51: The Department believes that the rule already prohibits double-counting of benefits but will propose adding language to make this clear. However, the Department intends to retain the language it previously proposed to address those rare situations that do not lend themselves to calculation as delayed or avoided costs for two reasons.

First, an appropriate economic benefit estimate represents the amount of money that would make the entity indifferent between compliance and noncompliance. In determining what should be included in the estimate, the Department attempts to reconstruct which reasonable financially-conservative alternative the entity would have taken. While in nearly every case these alternatives can be described as avoided or delayed costs, there are rare cases where the only realistic alternative would have been for the entity to not engage in the business in the first place. For these cases, the best reasonable conservative economic benefit might be based on illegal profits. The commenter suggests using the re-siting costs for this kind of situation. In cases where those costs are reasonable we would use them to estimate the economic benefit. However, if those costs far exceed the illegal profits of the enterprise, then illegal profits might be the more reasonable financially-conservative alternative. The Department needs to be able to assess all of the reasonable alternatives to create a fair, conservative and consistent estimate. A respondent may certainly challenge that estimate with information showing that it would have taken a different compliance alternative.

Second, the current rule which includes only delayed and avoided costs is not consistent with federal law which allows recapture of illegal profits in these kinds of situations.

OAR 340-012-0155 - ALTERNATE OR ADDITIONAL PENALTIES

Comment #52: EPA supports the addition of this penalty provision to meet the requirements of the Western Backstop SO2 Trading Program. This provision will meet the requirements of federal regulations at 40 CFR 51.209(h)(4)(x). **(EPA)**

Response to Comment #52: Comment acknowledged.

OAR 340-012-0160 - DEPARTMENT DISCRETION REGARDING PENALTY ASSESSMENT

Comment Summary: Commenters expressed differing opinions about the proposed section that sets forth the director's discretion to increase a penalty to $10,000 per day per violation based upon the facts and circumstances of the individual case.

One commenter suggests deleting the section. Another commenter suggests making use of the discretion mandatory in specific situations. A third commenter suggests limiting exercise of the discretion.

Response Summary: The Department will not delete or amend the proposed rule language.

Comment #53: This proposed rule (-0160(3)) is unnecessary. The Department has through other revisions to the rules significantly increased the potential amount for civil penalties that will be assessed when the proposed rules become final. The Department is also creating authority in OAR 340-012-0160(1) to use the next higher penalty matrix to increase the amount of a civil penalty and also is refining its policy on multiple day violations to increase the potential amount of civil penalties. The Department should not create a vague unfettered discretion to increase the amount of a civil penalty to the statutory maximum.

AOI requests that the Department delete OAR 340-012-0160(3):

"(3) [~~Regardless of any other penalty amount listed in this division, the director has the discretion to increase the penalty to $10,000 per violation per day of violation based upon the facts and circumstances of the individual case.~~]" **(AOI)**

Comment #54: Enforcement of the rules and DEQ decision making is made more difficult by increasing the agency's discretion to increase penalty matrices and assessed penalties rather than making increases automatic in specific situations. *See e.g.,* 340-012-0160. **(Tribal Water Advocacy)**

Comment #55: NWPPA does not challenge the concept that the Department should retain the discretion to increase penalties to as high as $10,000 per violation per day. In certain egregious situations, such penalties may well be appropriate. However, we believe that this authority should be explicitly reserved to egregious circumstances. Therefore, we suggest that OAR 340-012-0160(3) be revised as follows:

> "Regardless of any other penalty amount listed in this division, the director has the discretion to increase the penalty to $10,000 per violation per day of violation <u>where</u> ~~based upon~~ the facts and circumstances of the individual case <u>indicate that the respondent's conduct was reckless and/or there was a serious impact to the environment</u>."

This change will allow the Department to act is a manner proportionate to the conduct being addressed while assuring the regulated community that the $10,000 per day penalties are reserved for extreme situations. **(NWPPA)**

Response to Comments #53-55: This section does not give the Department discretion it does not already have. The proposed section simply repeats the authority provided to the Department by statute to issue a penalty of up to $10,000 per day per violation. The statute does not impose limitations on exercise of this discretion. The Department does not believe the additional language suggested is necessary and would create confusion with the potential use of the $100,000 penalty "matrix" under OAR 340-012-0155(1)(a)

which uses language similar to that proposed by the commenter. Because it is impractical to anticipate and specify with particularity those cases where exercise of such discretion would be warranted, and because the statute does not impose particular limitations on this discretion, the Department will not make use of this discretion automatic in specific situations.

Comment Summary: Comments varied about the proposed rule that would clarify that the director may decline to issue a formal enforcement action if the Department has created excessive delay in issuing the formal enforcement action. Two commenters oppose the proposed rule; one commenter supports it; while two others state that the rules should provide a one-year deadline for issuance of formal enforcement actions.
Response Summary: The Department will delete the proposed section and will add a statement in the Policy section that the Department will endeavor to issue formal enforcement actions within six months from when the investigation of the violation is complete.

Comment #56: ODEQ proposes to add a new subsection (5) which states: "The director has the discretion not to proceed with a formal enforcement action if the department has created excessive delay in issuing the formal enforcement action." EPA believes that this is part of ODEQ's existing enforcement discretion and should not be added to the Oregon Administrative Rules. Specifically identifying one instance where ODEQ has enforcement discretion might be used as a basis for arguing that ODEQ does not have enforcement discretion in some other instance that is not specifically identified in the rule. In addition, this provision could needlessly invite litigation regarding whether or not ODEQ is responsible for "excessive delay" in issuing a formal enforcement action. ODEQ would then need to define excessive delay, which may not be the same for different cases. Also, EPA is concerned that ODEQ may not always have adequate resources to prevent delay in all cases. Such delays may then be interpreted as excessive and preclude issuing a formal enforcement action that was otherwise justified. This resource-driven constraint could have a negative impact on the ODEQ's ability to deter noncompliance. **(EPA)**

Comment #57: Establish time limits for processing enforcement activities. As noted in NWPPA comments, under current DEQ procedures the length of time an enforcement action can stay unresolved is problematic for the alleged violator, DEQ and the public. Weyerhaeuser recognizes that the investigation of some enforcement activities can take a significant amount of time. However, when formal enforcement activities occur (NON, NOV, etc), DEQ should implement and follow guidelines to either formally withdraw the action or have it come to timely resolution. Timely resolution would seem to be in everyone's best interests. Speaking from personal experience, during our internal audits, it's difficult to assess an issue with an auditor with an unresolved NON or other enforcement action open in a site's compliance file. **(Weyerhaeuser)**

Comment #58: Although AOI is certain the Environmental Protection Agency (EPA) will complain about this proposed rule, AOI supports the proposed rule because it reflects

prudent policy. EPA recognizes that timeliness is significant by imposing an enforcement timeline on the Department directing that a civil penalty be assessed within three to six months after discovery or confirmation of a significant violation. See Enforcement and Compliance Strategy, EPA Region 10 (1997). This proposed rule is consistent with completing a formal enforcement action in a timely manner and without excessive delay. **(AOI)**

Comment #59: In addition, the rules would allow DEQ to completely ignore enforcement at anytime by giving it "discretion not to proceed with a formal enforcement action if the department has created excessive delay in issuing the formal enforcement action." *See e.g.,* 340-012-0160(5). Therefore, the agency could choose not to enforce a particular permit based on political issues or for any other reason simply by determining to delay enforcement until such delay becomes "excessive" and the public would have no ability to challenge or contest such decision. **(Tribal Water Advocacy)**

Comment #60: Boise strongly echoes the comments provided by NWPPA on the issue of the Department's timeliness. The Department clearly expects the regulated community to respond to alleged violations in a timely manner, and the regulated community should have the same expectations for the Department in order that factual information can be communicated efficiently with the Department, and so that open enforcement issues do not linger in an unresolved state. **(Boise)**

Comment #61: NWPPA similarly believes that the Department has a duty to move all enforcement actions along at a reasonable pace and that this duty should be reflected in the rules. It is not unusual (although things are much better now than they were a few years ago) for an enforcement action to languish within the Department for years. Intervening changes in personnel, agency disconnect between permit writer/inspector and penalty development staff, and fading memories make it very difficult for sources to respond when communications get dragged out over long periods of time. NWPPA appreciates the change that the Department has proposed that the Director may decline to issue a civil penalty in cases where the Department has caused an excessive delay in issuing the enforcement action. However, we believe that this does not go far enough. We recommend that the rules state that if the Department does not formally respond to information provided in a formal or informal enforcement action within one year, that enforcement action is terminated by law. We are not suggesting that the Department adopt a one year statute of limitations. The Department would be free to reissue a new notice to the extent allowed by law. However, this change would ensure that if the Department did not consider the action high enough priority to move along, that the notice would not be blemishing the source's record as a result of the Department's failure to respond. Simply saying that the Director can choose not to assess a penalty does not address the impact to a facility of having an enforcement action drag out over years. What respondents need is an automatic termination in the event of Department inaction. Otherwise dormant enforcement proceedings can impact facilities' records for years. **(NWPPA)**

Response to Comments #56 - 61: DEQ appreciates these concerns and over the past few years has improved its timeliness in getting formal enforcement actions issued. In those few instances where there has been excessive delay that is due to the Department's own acts or omissions, the director has declined to issue a formal enforcement action. On the other hand, with fewer resources, it is more difficult to complete investigations and issue formal enforcement actions quickly, and while it is inconvenient and uncertain for violators to wait for issuance of the FEA and resolution of the case, the goals of deterrence and equity would not be accomplished by putting a rigid time limit on issuance of FEAs.

The Department agrees with the concerns raised by EPA and therefore proposes to delete the subsection that specifically states the Director may choose not to issue an enforcement action if the Department has created excessive delay. The Director already has this discretion.

However, the Department is proposing an addition to OAR 340-012-0026(6) which will now state that it is the Department's intention to issue a formal enforcement action within six months from the date of the completed investigation. This is intended to send a strong message regarding the Department's commitment to timeliness, but also to acknowledge that delays in completing the investigation (after an inspection) can occur for a number of reasons, such as: reduction in agency staffing levels caused by budget cutbacks; waiting for lab analyses of samples; waiting for information from alleged violators; waiting for criminal investigation and disposition; and waiting for third parties to provide requested information. All of these in a given case may be reasonable (and often unavoidable) causes for delay.

Comment Summary: The Department should delete the proposed section that would allow for assessment of civil penalties against each co-permittee for permit violations.
Response Summary: The Department will keep the proposed section.

Comment #62: Proposed OAR 340-012-0160(4) states that where there is a permit with more than one permittee, the Department may issue separate civil penalties to each permittee. The proposal is inconsistent with ORS 468.140(1), which limits the Department's enforcement authority to "any person who violates" an enumerated statute or Department regulation, order or permit. The proposal ignores a common co-permittee situation; that of an owner permittee with a separate operator permittee. In an instance where there is a violation by only one, it is impermissible under the statute to bring an enforcement action against the other. In addition, the proposal is inconsistent with ORS 468.130(1), which establishes "the amount of [a] civil penalty that may be imposed for a particular violation." The imposition of separate penalties on each permittee, in a case where there has been a violation by only one of the permittees, would be contrary to this express statutory limitation on the Department's authority.

The better approach is to issue citations to culpable parties on a joint and several basis. The joint and several liability approach is also the one followed by EPA in pursuing violations at RCRA facilities where both owners and operators must sign as

permittees and both are held responsible for the conduct of operations. See, for example, *In the Matter of Globe Aevo Ltd., Inc., and the City of Lakeland, Florida*, 1996 WL 316516 (E.P.A.). We recommend that proposed OAR 340-012-0160(4) be deleted. **(Umatilla)**

Response to Comment #62: Each permittee has separate liability for each violation of the permit. As a result, each co-permittee is liable for a civil penalty for each violation of the permit issued to that co-permittee. The Department recognizes, and the proposed rule reflects, that it would not achieve compliance and deterrence to issue a penalty to each co-permittee in every case. The proposed amendment makes clear the Department will do so if it would further compliance or deterrence. By retaining the ability to issue separate penalties, the Department can achieve more specific deterrence in those cases where multiple permittees are each involved in aspects of permitted activities. The Department still retains the ability to combine penalty actions as appropriate, for example, where violations can not be attributed to any one co-permittee.

Comment Summary: The rules should provide that if an alleged violator provides reasonable evidence that the conduct identified in a Warning Letter, Pre-Enforcement Notice or Notice of Permit Violation did not constitute a violation, the Department must respond within 90 days and withdraw the notice.
Response Summary: The Department will propose a new section stating that, if the Department finds that the conduct identified in the Warning Letter or Pre-Enforcement Notice did not occur, the Department will send a letter withdrawing or amending the Warning Letter or Pre-Enforcement Notice, as appropriate, within thirty days.

Comment #63: NWPPA had previously commented regarding our members concern about the Department's failure to close out allegations in the Department's files as well as to complete formal enforcement actions in a timely manner. The Department responded to our comment by recognizing the importance of closing all warning letters and pre-enforcement notices, but by refusing to burden itself with the requirement to act in a timely fashion. Instead, the Department stated that it would clarify its internal enforcement guidance manual to encourage staff to formally withdraw warning letters and pre-enforcement notices should evidence be submitted indicating the alleged violation did not occur. NWPPA does not believe that this important aspect of the enforcement rules should be relegated to guidance; we assume that this instruction has previously been given to DEQ staff and it does not appear to have worked. Furthermore, it is our understanding that there is a disconnect in many regions between those persons conducting site inspections and compliance auditing activities, and those that make a final penalty determination. This increases the chances for delays and the likelihood that personnel changes or communication issues may result in an enforcement action getting "lost in the system" for an extended period of time. Therefore, we reiterate our recommendation that the Department specifically require in its rules that if an alleged violator provides reasonable evidence that the conduct identified in a Warning Letter, Pre-Enforcement Notice or Notice of Permit Violation did not constitute a violation, that the Department will respond within 90 days and withdraw the notice. This is a courtesy

to the respondent and ensures that the public is not misled as to the compliance status of facilities in their vicinity. **(NWPPA)**

Response to Comment #63: The Department understands the commenter's need and desire to conclude violation issues in a timely manner and will include a statement in the rules about timely response in these matters. That change acknowledges in OAR 340-012-0038(1) & (2) that "If the Department finds that the conduct identified in the [Warning Letter or Pre-Enforcement Notice] did not occur, the Department will withdraw or amend the [Warning Letter or Pre-Enforcement Notice], as appropriate, within 30 days." It is reasonable to expect that the Department will withdraw a Warning Letter or Pre-Enforcement Notice, once the Department corroborates information presented by the alleged violator that the violation did not occur, or if the Department ascertains otherwise that the alleged violation did not occur. The Department is committing to issuing the withdrawal or amendment letter within 30 days of determining that the violation or conduct did not occur. The Department's deadline runs from the date it makes the determination rather than the date the alleged violator submits the information disputing the violation, because the amount of time it will take to corroborate additional information will vary, depending on, among other things, the nature of information submitted.

The Department currently issues Notices of Noncompliance (and in the future will issue Warning Letters and Pre-Enforcement Notices) to give the recipient raw information about violations it believes may have occurred and to convey guidance on how to correct the problem. These documents are not reviewed by legal staff or evaluated by independent factfinders unless they are incorporated into a formal enforcement action. In that event, regional staff work closely with staff in the Office of Compliance and Enforcement to evaluate the information, including new information provided by the recipient of the Pre-Enforcement Notice, and in developing the case. Often, the Department must exert considerable resource in evaluating and resolving conflicting information provided by the recipient and others.

In an effort to support the timeliness of Department action, we are taking several additional steps. First, the Department is upgrading its internal compliance database. This revised database will have the ability to produce template closure letters which should greatly reduce the potential staff time commitment to this part of the compliance process. In addition, the revised database will allow for increased and improved management oversight of the specific compliance actions, including whether the actions are being "closed" in a timely fashion. Some subset of this information will be made readily available on our external webpage, as allowed under DAS website requirements. Second, we are developing a response protocol that may include form letters as appropriate. The new system will be adopted into an Internal Management Directive which will direct staff on how to process timely responses. We will also train compliance staff to send the "closure" letters in our upcoming training on the Division 12 rules, assuming they will be adopted by the Commission.

Other Comments --

Comment #64: Penalty Classification

NWPPA is still deeply troubled by the inconsistencies within the penalty classifications. We appreciate that the Department is going to further address these issues in future rulemakings, however, the ambiguity and inconsistencies cause us concern with this rule. We encourage the Department to carefully assess the specified violations and classify them according to actual environmental impact. For example, the failure to submit a manifest discrepancy report (a purely paperwork violation) should no longer be classified the same as the illegal disposal of hazardous waste. Likewise, certain classes envelop all of the other violations. For example, under OAR 340-012-0055, the Department classifies any violation causing pollution of waters of the state to be classified as a Class I violation. However, there are specific classifications that involve pollution of waters of the state that are Class II and Class III violations. We believe that generic violation classifications, such as classifying any violation causing pollution of waters of the state as a Class I violation, lead to confusion. If there is a specific violation that is not identified in OAR 340-012-0050 through -0105 then classification should be made pursuant to a generic process based upon the level and imminence of harm to human health or the environment. **(NWPPA)**

Response to Comment #64: The Department appreciates this input and will consider these comments when it reviews classifications during Phase II of this rulemaking.

Comment #65: Watershed Permit Context

We remain unclear on how the new enforcement rules would apply in the watershed permit context. The Department appears to be indicating that there is no additional enforcement burden intended for either co-permittees on a permit or to a permittee with multiple facilities on one permit. However, ACWA would like to reserve the opportunity to meet with the Department and discuss various alternate scenarios within the watershed permit context and see how the rules would apply. ACWA and DEQ (as well as the U.S. Environmental Protection Agency) recognize the potential for environmental improvement by use of watershed permits, and ACWA believes it is in the best interests of the public and the environment to make sure that the proposed enforcement rules do not unduly penalize or discourage watershed permitting. **(ACWA)**

Response to Comment #65: The Department would welcome the opportunity to meet with ACWA to discuss rule implementation and its impact on watershed permittees.

Comment #66: Self Disclosure

The current proposal does not include changes to DEQ's Internal Management Directive on Self-Policing, Disclosure and Penalty Mitigation, even though in commentary the Department points to it as providing for mitigation of penalties. At least one aspect of this policy should be changed. The current policy is interpreted by DEQ as disallowing mitigation when the self-reporting of a violation condition is required by a permit. In DEQ's terms, such a report is not voluntary. We suggest that self-reporting of a violation

condition, even when required by a permit (and certainly if it is not required as part of a federal program delegation) should be considered a voluntary action by the permittee and eligible for mitigation. Of course, failure to report when required by a permit would remain a permit violation itself. **(Umatilla)**

Response to Comment #66: The Department appreciates the commenter's concern and will be looking at possible ways to address it during its upcoming revisions to the Self Disclosure Policy.

Comment #67: DEQ fails to enforce existing laws and regulations.
DEQ routinely asserts, under current rules, discretionary authority not to initiate enforcement actions. Because Oregon law does not provide for citizen enforcement, public challenges to DEQ's enforcement actions, or failures to enforce, are difficult and rare. Often, when DEQ fails to enforce existing enforcement laws and regulations, federal agencies and private entities become unwitting defendants in lawsuits.

The proposed 340-12 rules are likely to be weakened further by DEQ's implementation guidance to DEQ staff. The implementation guidance -- which is not part of the rule making process -- further insulates DEQ rules from public review. **(Center for Environmental Equity)**

Response to Comment #67: While the Department understands the commenter's concern, implementation of rules by guidance is a necessary part of the administrative process. It would be unworkable to place every possible scenario in rule. Especially given the reality that resource levels do require the Department to prioritize compliance and enforcement efforts. Once completed, the enforcement guidance will be made generally available to the public on our website. The Department is willing to meet with parties to discuss concerns about program implementation.

The fact that Oregon law does not provide for citizen enforcement provisions is beyond the scope of this rulemaking, since, as the Department understands, it would require a statutory change.

Comment #68: The proposed changes to DEQ's enforcement rules are inconsistent with EPA/DEQ partnership agreements. DEQ's proposed rules sever Oregon's delegated authority to administer federal environmental laws pending EPA making the following findings:

a) that ambiguous mandatory enforcement and mandatory penalties are retained in all enforcement rules; and,

b) that the State of Oregon grants citizen enforcement. **(Center for Environmental Equity)**

Response to Comment #68: EPA was an auxiliary member of the Advisory Group addressing these rules and provided comments during both of the public comment

periods. The detail of those comments is available upon request. EPA conducts periodic audit and performance reviews of DEQ's enforcement programs, and has never raised inconsistency with EPA/DEQ partnership agreements.

Comment #69: DEQ enforcement decisions are not subjected to judicial review, unlike enforcement decisions of similar agencies in other Western states. Until direct, third-party judicial and administrative reviews are added to Oregon statutes, discretionary enforcement authority is unacceptable. **(Center for Environmental Equity)**

Response to Comment #69: (*See* Response to Comment #67.)

Relationship to Federal Requirements

Answers to the following questions identify how the proposed rulemaking relates to federal requirements and potential justification for differing from federal requirements. The questions are required by OAR 340-011-0029.

1. Are there federal requirements that are applicable to this situation? If so, exactly what are they? Not directly. There are no federal statutes or regulations that directly apply to DEQ's compliance and enforcement program, but DEQ's enforcement regulations and policies are developed in consultation with EPA. In order to keep delegation of federal environmental programs, including those related to air quality, water quality and hazardous waste, EPA requires that DEQ adequately enforce the requirements of its federally-delegated programs. EPA generally focuses on whether DEQ's civil penalties are consistent with the requirements of the federal programs. These amendments, if adopted, will be submitted to the U.S. Environmental Protection Agency (EPA) as a revision to the State Implementation Plan, which is a requirement of the Clean Air Act.

2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling? N/A

3. Do the applicable federal requirements specifically address the issues that are of concern in Oregon? Was data or information that would reasonably reflect Oregon's concern and situation considered in the federal process that established the federal requirements? N/A

4. Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later? There is no proposed requirement, as the proposed rules do not result in any new duties or obligations for the regulated community. However, the proposed rules may result in an increased or decreased civil penalty for a violation of program requirements, depending on the nature of the violation or violator. By making the enforcement process clearer, the penalty calculation process more flexible and some penalties higher, the proposed rules encourage regulated individuals and businesses to invest in compliance rather than spend the extra money to pay civil penalties and correct the environmental impacts of violations.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements? N/A

6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth? N/A

7. Does the proposed requirement establish or maintain reasonable equity in the

requirements for various sources? The proposed rules do not change the substantive requirements or duties of the regulated community. The proposed rules relate to how the department conducts its enforcement program and how it calculates civil penalties for violations of program requirements. Two of the main objectives for this rulemaking are to provide greater clarity to the regulated community on the enforcement process and to address potential inequities associated with the penalty calculation formula. This proposed rulemaking includes changes that are intended to improve the organization and clarity of the rules. The rules are reorganized to mirror the actual flow of the penalty calculation process. Definitions and terms throughout are updated and clarified to eliminate uncertainty. The Department is proposing changes to the penalty matrices that are intended to better align the penalty to be assessed with the deterrence needed to gain compliance. Therefore, the penalties at the higher end of the penalty range have increased somewhat, while the the lower end of the penalty range has been tailored to more equitably impact smaller entities or those less likely to know their regulatory obligations.

8. **Would others face increased costs if a more stringent rule is not enacted?** N/A

9. **Does the proposed requirement include procedural requirements, reporting or monitoring requirements that are different from applicable federal requirements? If so, Why? What is the "compelling reason" for different procedural, reporting or monitoring requirements?** N/A

10. **Is demonstrated technology available to comply with the proposed requirement?** N/A

11. **Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain?** As stated in the answer to question 4, if the clearer process and higher penalties contained in these rules deter environmental violations, pollution will be prevented and less money will be spent on civil penalties and potentially expensive correction of violations.

Attachment F

DEPARTMENT OF ENVIRONMENTAL QUALITY
Chapter 340
Proposed Rulemaking
STATEMENT OF NEED AND FISCAL AND ECONOMIC IMPACT
This form accompanies a Notice of Proposed Rulemaking

Title of Proposed Rulemaking:	Rule Revisions Regarding Enforcement Procedures and Assessment of Civil Penalties for Environmental Violations (OAR chapter 340, division 012) (discussed under "A") and Regarding the Expedited Enforcement Program for Tanks Violations (OAR chapter 340, division 150) (discussed under "B")
Need for the Rule(s)	**A)** During the 2000-2001 legislative session, members of the legislature raised the issue of whether DEQ is fair and consistent in its formal enforcement actions. Stephanie Hallock, Director of the Department, asked the Office of Compliance and Enforcement (OCE) to conduct an in-depth review of its enforcement rules to ensure civil penalty assessments are appropriate and fair in achieving deterrence. The Director asked OCE to propose any changes necessary to make the enforcement process more equitable and understandable. **B)** The amendments proposed for the expedited enforcement program for Tanks violations are necessary to make field penalties in that program more predictable by assigning a $50 field penalty for all Class II violations, rather than assigning a $75 field penalty for some Class II violations. The Department is proposing to remove the prohibition against citing Class I violations using the expedited enforcement process, as stakeholders requested that the Department consider allowing some Class I violations to be enforced in the expedited enforcement program. The department proposes to assign a $100 field penalty for any Class I violations that are handled in the expedited enforcement program.
Documents Relied Upon for Rulemaking	**A)** The Department relied upon the following documents in developing this rule proposal: • The Department's Internal Management Directive entitled "Compliance and Enforcement Guidance for Field Staff, 2002" • EPA's RCRA Penalty Policy (1990) • Public Comments from 1/04 Proposed Rulemaking **B)** The Department did not rely upon any documents in developing this rule proposal.
Fiscal and Economic Impact	
Overview	**A)** The goal of the rulemaking is to ensure that the most serious violations receive penalties sufficient to achieve deterrence, without overly penalizing the smaller violators. Therefore, bigger businesses may be assessed larger penalties for serious violations and smaller businesses and individuals may receive smaller penalties for the same violations and for less serious violations. With the exception of the lower civil penalties expected to be assessed in the Underground Storage Tanks (Tanks) program, it is unknown whether the proposed changes to OAR chapter 340, division 012 would result in a fiscal impact to the state, and whether the impact would be a net cost or benefit. With the exception of civil penalties for Tanks and spills violations (discussed further below), civil penalty monies collected for environmental violations go to the General Fund and not to the agency's budget. It is possible that more respondents will appeal their civil penalty assessments if penalty amounts increase. Appeals result in more staff time. For the small percentage of cases that go forward to contested case hearing, DEQ incurs the cost of the hearing officer, staff time, and sometimes legal fees paid to the Department of Justice. If more cases are appealed to the state Circuit Court of Appeals as a result of these rule changes, the state would incur additional legal fees and the cost of additional staff time. It is just as likely that there would be a positive fiscal impact to the state as a result of the proposed rule amendments. Some penalties will be reduced, especially for those violators who have historically been more likely to seek a contested case hearing, so there may be fewer contested case hearings. In addition, the proposed amendments will make the enforcement process more understandable and transparent. One of the amendments clarifies that the Department may recoup wrongful profits as part of the economic benefit portion of a civil penalty, thereby making compliance more cost effective than noncompliance. This is intended to be used in situations where recouping avoided or delayed compliance costs is not possible. In these situations, the regulated community may be more able to accurately predict the financial consequences of noncompliance and increase efforts to avoid violations, thereby reducing the cost of formal enforcement. Changes to penalty matrix assignments in the Tanks and spills programs that increase or decrease civil

	penalty amounts will have a more direct fiscal impact to DEQ's budget, because those civil penalties are deposited into the Department's Tanks and spills program budgets rather than the General Fund. A negative fiscal impact to the state is more likely to result from the proposed changes to penalty matrix assignments for Tanks violations, because most of the Tanks regulated community will be subject to lower civil penalties as a result of the proposed change to the penalty matrix assignments. Conversely the fiscal impact to the small segment of the regulated community that is subject to formal enforceme would be positive. Since the base penalty for most spills violations is proposed to be increased, the fiscal impact to the Department from the change in spills penalty matrix assignments will more likely be positive (although the number of civil penalty assessments for spills violations has been historically relatively small). Conversely, the impact on the small segment of the regulated community that is subject to formal enforcement would be negative. **B)** The proposed amendments to OAR chapter 340, division 150 may result in a direct fiscal impact to the regulated community and to DEQ. Tanks penalties (collected from both the traditional formal enforcement process and from the expedited enforcement program) go into the Tanks budget, unlike penalties from other program violations, which go to the General Fund. Field penalties for Class I violations ($100) would be significantly lower than the penalties assessed pursuant to the penalty matrix assignments proposed in OAR chapter 340, division 012 (which would range from $8,000 for a Class I major magnitude violation by the owner of ten or more UST facilities or by a licensed service provider, to $1,000 for a Class I major magnitude violation by the owner of one UST facility). During the period January 2003 to June 2004, the Department issued eight formal enforcement actions that included penalty assessments for Class I violations, but the number of formal enforcement actions fluctuates from year to year. Possibly more significant than the reduction in civil penalties, Class I violations handled via the expedited enforcement process would not be subject to the additional assessment of the economic benefit component that is imposed pursuant to OAR chapter 340, division 012. The economic benefit portion of a civil penalty "levels the playing field" by ensuring that noncompliers do not profit by their noncompliance. Economic benefit is the monetary amount gained by a violator from his or her failure to take the steps necessary to come into compliance. The economic benefit component of Division 012 penalties often totals thousands of dollars. The fiscal impact of the proposed reduction of some Class II field penalties from $75 to $50 is mc predictable. People who receive field penalties for Class II violations may receive smaller penalties becaus all such penalties will be $50. From February 2004 (start of implementation of the expedited enforcement program) through June 2004, the Department issued thirty $75 field penalties. If the proposed rules had been in effect for the same period, each of these penalties would have instead been assessed at $50, resulting in total savings to the violators of $750, with a commensurate loss of $750 to the Tanks budget.
General public	**A)** The proposed amendments reformat and clarify the existing rules, making it easier for the regulated community to understand the consequences of noncompliance. Since increased understanding may lead to increased deterrence, there may be fewer violations and therefore fewer penalty assessments. Civil penalties for violations committed by members of the general public, especially residential home owner-occupants, are likely to decrease due to penalty matrix reassignments. **B)** Civil penalties for violations of Tanks program requirements will likely be smaller.
Small Business	**A)** The proposed amendments reformat and clarify the existing rules, making it easier for the regulated community to understand the consequences of noncompliance. Since increased understanding may lead to increased deterrence, there may be fewer violations and therefore fewer penalty assessments. Civil penalties for some violations committed by small businesses are likely to decrease due to penalty matrix reassignments. For example, under the current rules, all violations of Tanks laws are assigned to the $10,000 penalty matrix. Most of the businesses subject to Tanks rules are small businesses, so the small segment of the regulated community that is subject to enforcement would receive lower civil penalties and therefore a positive fiscal impact. The proposed rules assign Tanks violators to penalty matrices depending on the number of facilities owned by the alleged violator. Owners of fewer than five facilities, which comprise the majority of Tanks owners, would receive lower penalties under the proposed rules. **B)** Most of the regulated community affected by the Tanks program are small businesses. Since the proposed amendments to the expedited enforcement program would result in smaller civil penalties, the fiscal impact to the few small businesses subject to enforcement is likely to be positive.

	penalty amounts will have a more direct fiscal impact to DEQ's budget, because those civil penalties are deposited into the Department's Tanks and spills program budgets rather than the General Fund. A negative fiscal impact to the state is more likely to result from the proposed changes to penalty matrix assignments for Tanks violations, because most of the Tanks regulated community will be subject to lower civil penalties as a result of the proposed change to the penalty matrix assignments. Conversely, the fiscal impact to the small segment of the regulated community that is subject to formal enforcement would be positive. Since the base penalty for most spills violations is proposed to be increased, the fiscal impact to the Department from the change in spills penalty matrix assignments will more likely be positive (although the number of civil penalty assessments for spills violations has been historically relatively small). Conversely, the impact on the small segment of the regulated community that is subject to formal enforcement would be negative. **B)** The proposed amendments to OAR chapter 340, division 150 may result in a direct fiscal impact to the regulated community and to DEQ. Tanks penalties (collected from both the traditional formal enforcement process and from the expedited enforcement program) go into the Tanks budget, unlike penalties from other program violations, which go to the General Fund. Field penalties for Class I violations ($100) would be significantly lower than the penalties assessed pursuant to the penalty matrix assignments proposed in OAR chapter 340, division 012 (which would range from $8,000 for a Class I major magnitude violation by the owner of ten or more UST facilities or by a licensed service provider, to $1,000 for a Class I major magnitude violation by the owner of one UST facility). During the period January 2003 to June 2004, the Department issued eight formal enforcement actions that included penalty assessments for Class I violations, but the number of formal enforcement actions fluctuates from year to year. Possibly more significant than the reduction in civil penalties, Class I violations handled via the expedited enforcement process would not be subject to the additional assessment of the economic benefit component that is imposed pursuant to OAR chapter 340, division 012. The economic benefit portion of a civil penalty "levels the playing field" by ensuring that noncompliers do not profit by their noncompliance. Economic benefit is the monetary amount gained by a violator from his or her failure to take the steps necessary to come into compliance. The economic benefit component of Division 012 penalties often totals thousands of dollars. The fiscal impact of the proposed reduction of some Class II field penalties from $75 to $50 is more predictable. People who receive field penalties for Class II violations may receive smaller penalties because all such penalties will be $50. From February 2004 (start of implementation of the expedited enforcement program) through June 2004, the Department issued thirty $75 field penalties. If the proposed rules had been in effect for the same period, each of these penalties would have instead been assessed at $50, resulting in total savings to the violators of $750, with a commensurate loss of $750 to the Tanks budget.
General public	**A)** The proposed amendments reformat and clarify the existing rules, making it easier for the regulated community to understand the consequences of noncompliance. Since increased understanding may lead to increased deterrence, there may be fewer violations and therefore fewer penalty assessments. Civil penalties for violations committed by members of the general public, especially residential home owner-occupants, are likely to decrease due to penalty matrix reassignments. **B)** Civil penalties for violations of Tanks program requirements will likely be smaller.
Small Business	**A)** The proposed amendments reformat and clarify the existing rules, making it easier for the regulated community to understand the consequences of noncompliance. Since increased understanding may lead to increased deterrence, there may be fewer violations and therefore fewer penalty assessments. Civil penalties for some violations committed by small businesses are likely to decrease due to penalty matrix reassignments. For example, under the current rules, all violations of Tanks laws are assigned to the $10,000 penalty matrix. Most of the businesses subject to Tanks rules are small businesses, so the small segment of the regulated community that is subject to enforcement would receive lower civil penalties and therefore a positive fiscal impact. The proposed rules assign Tanks violators to penalty matrices depending on the number of facilities owned by the alleged violator. Owners of fewer than five facilities, which comprise the majority of Tanks owners, would receive lower penalties under the proposed rules. **B)** Most of the regulated community affected by the Tanks program are small businesses. Since the proposed amendments to the expedited enforcement program would result in smaller civil penalties, the fiscal impact to the few small businesses subject to enforcement is likely to be positive.

Large Business	**A)** The proposed amendments reformat and clarify the existing rules, making it easier for the regulated community to understand the consequences of noncompliance. Since increased understanding may lead to increased deterrence, there may be fewer violations and therefore fewer penalty assessments. Civil penalties for some violations committed by big businesses may increase, especially for certain violations of air quality and water quality permits, hazardous waste and emergency response rules. Due to increased deterrence as a result of the proposed rules, there may be fewer violations and therefore fewer penalty assessments. It is therefore not known whether the fiscal impact would be a net loss or gain. **B)** There are few large businesses who are subject to Tanks program requirements, but for the small number of those that may be in noncompliance and are subject to enforcement through the expedited enforcement program, the fiscal impact of these proposed rule changes will be the same as for small businesses, since field penalty amounts do not depend on the size of the violator. The net fiscal impact to violators would therefore be positive.
Local Government	**A)** Civil penalties for some violations committed by local governments will likely decrease due to penalty matrix reassignments. Due to increased deterrence as a result of the proposed rules, there may be fewer violations and therefore fewer penalty assessments. **B)** Local governments owning regulated USTs will be affected by the operator training and enforcement requirements the same as either large or small business owners. The fiscal impact of these proposed amendments would therefore be positive.
State Agencies	
DEQ	**A)** It is not possible to predict whether the net fiscal impact from the proposed amendments to chapter 340, division 012 would be positive or negative. Adoption of these rules may result in a greater number of contested case hearings due to some higher penalties, or may result in fewer contested case hearings due to decreased civil penalties for some violations and violators. If the rules result in a greater number of contested case hearings, DEQ may incur a fiscal impact. DEQ pays an average of approximately $200 to the state Department of Transportation (DOT) for the hearing officer for each contested case hearing. As discussed under "Overview above," the fiscal impact to the Tanks program budget may be negative. The fiscal impact to the spills program budget may be positive. **B)** As discussed under "Overview" above, DEQ may incur a negative fiscal impact to its Tanks program budget if the proposed amendments to chapter 340, division 150 result in lower penalty assessments. Any such reduction may be offset somewhat by the lower cost of enforcement using the expedited enforcement program which uses less staff time than traditional formal enforcement.
Other agencies	**A)** The Department of Transportation (DOT) would incur additional costs for staff time if the number of contested case hearings increases. Conversely, if the number of hearings decreases, DOT would spend less on staff time. State agencies that violate certain laws or permits may be assessed higher civil penalties. If there are fewer violations and therefore fewer penalty assessments, the Department of Revenue would spend less on collection efforts. **B)** State agencies owning regulated USTs will be affected by the operator training and enforcement requirements the same as either large or small business owners. The fiscal impact of these proposed amendments would therefore be positive.
Assumptions	Not applicable.
Housing Costs	**A)** The Department has determined that this proposed rulemaking will have no effect on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on that parcel. **B)** The same is true for the proposed amendments to OAR chapter 340, division 150.

Administrative Rule Advisory Committee	**A)** The Department established an external Advisory Group in January 2003, after the internal agency rulemaking team narrowed the scope of issues and developed an initial draft of proposed amendments to chapter 340, division 012. The Advisory Group was comprised of thirteen regular members and two auxiliary members. The regular members represented big and small businesses, small cities, public water management agencies, the Association of Oregon Industries and environmental groups. The auxiliary members represented Lane Regional Air Pollution Agency and the U.S. Environmental Protection Agency. The Advisory Group met seven times, from February 2003 to January 2004. The Advisory Group discussed enforcement policies and reviewed draft versions of the rules prior to the public comment period. Some Advisory Group members submitted written comments on these early rule drafts. The Advisory Group was not charged with reaching consensus on recommendations and did not produce a written product. The Advisory Group process generated significant valuable discussion and input. **B)** Regarding the proposed amendments to chapter 340, division 150, the UST Advisory Committee was consulted and agreed with the Department that all Class II violations should be assigned a field penalty amount of $50. The Committee further recommended the Department allow some Class I violations to be cited using the expedited enforcement process.

Jane K Hickman	Jane K. Hickman	7/15/04
Prepared by	Printed name	Date
J R Kay	James Roys	7/15/04
Approved by DEQ Budget Office	Printed name	Date

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Jane K Hickman Prepared by	Jane K. Hickman Printed name	7/15/04 Date
JRRay Approved by DEQ Budget Office	JAMES ROYS Printed name	7/15/04 Date

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Rule Revisions Regarding Civil Penalty Assessments

Land Use Evaluation Statement

1. Explain the purpose of the proposed rules.
This proposal would make the enforcement process more understandable and civil penalties more equitable while achieving compliance. The rule is updated to include violation classifications for new program requirements and statutory changes. This proposal would also amend a rule in the underground storage tanks program to provide that all Class II violations eligible for expedited enforcement will receive a $50 field penalty (some are currently set at $75). Another proposed amendment to the tanks rule would allow some Class I violations to be handled via the expedited enforcement process (currently Class I violations are not eligible for that program). Field penalties for Class I violations handled in the expedited enforcement program are set at $100.

2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program?

   Yes___ No X

   a. If yes, identify existing program/rule/activity:

   b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?

   Yes____ No_____ (if no, explain):

   c. If no, apply the following criteria to the proposed rules.

      Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and rules that relate to statewide land use goals are considered land use programs if they are:

1. Specifically referenced in the statewide planning goals; or

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

In applying criterion 2 above, two guidelines should be applied to assess land use significance:
- The land use responsibilities of a program/rule/action that involved more than one agency, are considered the responsibilities of the agency with primary authority.
- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

The Department has reviewed the criteria and the proposed rules will not affect land use. The rules do not establish any new substantive program requirements but may affect the amount of civil penalty assessed for a violation of program requirements. The proposed rules do not affect the any existing land use programs.

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

Director's Office — Division

Intergovernmental Coordinator

7-13-04 — Date

1. Specifically referenced in the statewide planning goals; or

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

In applying criterion 2 above, two guidelines should be applied to assess land use significance:
- The land use responsibilities of a program/rule/action that involved more than one agency, are considered the responsibilities of the agency with primary authority.
- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

The Department has reviewed the criteria and the proposed rules will not affect land use. The rules do not establish any new substantive program requirements but may affect the amount of civil penalty assessed for a violation of program requirements. The proposed rules do not affect the any existing land use programs.

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

Director's Office — Division

Intergovernmental Coordinator

7-13-04 — Date

Implementation Plan Outline for Division 12 Rules
for December 9, 2004 through effective date of June 1, 2005

A full and detailed implementation plan is available upon request. What follows is an outline of the key implementation plan pieces.

Staff Training

- Schedule and conduct field staff trainings for January and February
- Training will be done, for the most part, by program, with some cross program issue training where most applicable (e.g., spills guidance training for the WQ staff).
- Training will be done in three parts:
  1. **General Enforcement Process Training:** (including the shifts to the warning letters and pre-enforcement notices and some general cross training (e.g., the umbrella violations, frequently used cross program violations)). This training is likely to be three hours.
  2. **Program Specific WL, PEN and Referral Guidance Training:** Each of the following program areas have separate Division 12 violations and related guidance and will receive separate training:
     - **Water Quality** – Permits, stormwater – and **WQ Onsite**
     - **Air Quality** – Permits, asbestos, open burning
     - **Hazardous Waste and Used Oil**
     - **Dry Cleaners**
     - **Solid Waste and Waste Tires**
     - **Underground Storage Tanks, LUST and Heating Oil Tanks**
     - **Spills**
     - **Ballast Water**
     - **Cleanup**
     - **Contingency Planning**
  3. **Centralized Compliance Database Training:** This training will address conversion to and use of the new centralized compliance database. Final database training will likely be held in April 2005.

Enforcement Guidance

- Complete development of the enforcement guidance by February 2005 and make available to staff prior to the training.
- Finalize enforcement guidance in May 2005 after completion of the staff trainings.

Centralized Compliance Database (CCD) Development:

- After initial prototype review in December 2004 and January 2005, complete final database changes in March and April 2005.
- Final database training to be completed in April or May 2005.
- Decisions regarding the number of database systems that will link directly into the new CCD and the schedule for creating those links will be finalized in January 2005.

Proposed Div. 12 Violation Language	Draft Proposed Guidance
AQ 0054(1)(o) 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;	"A" response, send PEN and refer, in most cases but when dealing with CAB materials or floor tile, refer to Attachment A which may justify a "B" response, send WL. Send a PEN with a referral on the second violation of the same requirement within 60 months or referral on the third violation of a different asbestos handling requirement within 60 months.
AQ 0054(1)(p) Storage or accumulation of friable asbestos material or asbestos-containing waste material from an asbestos abatement project which causes a potential for public exposure to asbestos or release of asbestos into the environment;	"A" response, send PEN and refer, in most cases but when dealing with CAB materials or floor tile, refer to Attachment A, which may justify a "B" response, send WL. Send a PEN with a referral on the second violation of the same requirement within 60 months or referral on the third violation of a different asbestos handling requirement within 60 months.
AQ 0054(1)(q) Visible emissions of asbestos during an asbestos abatement project or during collection, processing, packaging, transportation, or disposal of asbestos-containing waste material;	"A" response send PEN and refer.
AQ 0054(1)(r) Conduct of an asbestos abatement project by a person not licensed as an asbestos abatement contractor;	"A" response, send PEN and refer. This violation would normally be referred the first time, as contractors should be aware of the possible presence of asbestos and especially those licensed with the State Contractors Board who receive training in the identification of asbestos. However a "B" response, a WL, is appropriate when: • A determination is made, using Attachment A, that the potential for public exposure or release did not reasonably exist; or • The violator is a less sophisticated and unlicensed contractor. Judgment will have to be used in this determination. If a "B" response is appropriate, there would be a PEN and referral on the second violation within 60 months.
AQ 0054(1)(s) Violation of a disposal requirement for asbestos-containing waste material which causes a potential for public exposure to asbestos or release of asbestos	"A" response, send PEN and refer, in most cases but when dealing with CAB materials or floor tile, refer to Attachment A which may justify a "B" response, send WL. Send a PEN with a referral on the second violation of the same requirement within 60 months or referral on the third violation of a different asbestos handling requirement within 60 months.

into the environment;	
AQ 0054(1)(t) Failing to hire a licensed contractor to conduct an asbestos abatement project which results in the potential for public exposure to asbestos or release of asbestos into the environment;	"A" response, send PEN and refer, if the violation was by someone other than a residential owner-occupant or if it was a residential owner-occupant and they had received a previous warning letter from DEQ for any asbestos violation or if the residential owner-occupant had been advised in any way of the presence of asbestos. "B" response, send WL, if the residential owner-occupant did not know of the presence of asbestos nor the requirement to hire a licensed asbestos abatement contractor. Send PEN and refer upon the second violation within 60 months for repeated violations of the same requirement, for which a warning letter (or warning letter with opportunity to correct) has been sent (or self reporting has occurred) or upon the third violation within 60 months for repeated violations of different requirements, for which warning letters (including those with opportunity to correct) have been sent (or self reporting has occurred).
AQ 0054(2)(i) Failure to comply with asbestos abatement licensing, certification, or accreditation requirements;	"B" response send WL. Send PEN with referral on the second violation within 60 months for repeated violations of the same requirement or the third violation within 60 months for repeated violations of different requirement, for which a warning letter (or warning letter with opportunity to correct) has been sent. Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.
AQ 0054(2)(j) Failure to provide notification of an asbestos abatement project;	"B" response send WL. Send PEN with referral on the second violation of this requirement within 60 months when a warning letter has been sent (or self reporting has occurred) OR third violation of different asbestos requirements within 60 months when a warning letter has been sent (or self reporting has occurred). Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.
AQ 0054(2)(k) Violation of a work practice requirement for asbestos abatement projects that does not cause a potential for public exposure to asbestos and does not release asbestos into the environment;	"B" response send WL. "A" response, send PEN and refer for the second violation within 60 months for repeated violations of the same requirement or the third violation within 60 months for repeated violations of different requirement, for which a warning letter (or warning letter with opportunity to correct) has been sent. Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.
AQ 0054(2)(l) Violation of a disposal requirement for asbestos-containing waste material that does not cause a potential for public exposure to asbestos and does not release asbestos into the environment;	"B" response send WL. "A" response, send PEN and refer for the second violation within 60 months for repeated violations of the same requirement or the third violation within 60 months for repeated violations of different requirement, for which a warning letter (or warning letter with opportunity to correct) has been sent. Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.

into the environment;	
AQ 0054(1)(t) Failing to hire a licensed contractor to conduct an asbestos abatement project which results in the potential for public exposure to asbestos or release of asbestos into the environment;	"A" response, send PEN and refer, if the violation was by someone other than a residential owner-occupant or if it was a residential owner-occupant and they had received a previous warning letter from DEQ for any asbestos violation or if the residential owner-occupant had been advised in any way of the presence of asbestos. "B" response, send WL, if the residential owner-occupant did not know of the presence of asbestos nor the requirement to hire a licensed asbestos abatement contractor. Send PEN and refer upon the second violation within 60 months for repeated violations of the same requirement, for which a warning letter (or warning letter with opportunity to correct) has been sent (or self reporting has occurred) or upon the third violation within 60 months for repeated violations of different requirements, for which warning letters (including those with opportunity to correct) have been sent (or self reporting has occurred).
AQ 0054(2)(i) Failure to comply with asbestos abatement licensing, certification, or accreditation requirements;	"B" response send WL. Send PEN with referral on the second violation within 60 months for repeated violations of the same requirement or the third violation within 60 months for repeated violations of different requirement, for which a warning letter (or warning letter with opportunity to correct) has been sent. Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.
AQ 0054(2)(j) Failure to provide notification of an asbestos abatement project;	"B" response send WL. Send PEN with referral on the second violation of this requirement within 60 months when a warning letter has been sent (or self reporting has occurred) OR third violation of different asbestos requirements within 60 months when a warning letter has been sent (or self reporting has occurred). Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.
AQ 0054(2)(k) Violation of a work practice requirement for asbestos abatement projects that does not cause a potential for public exposure to asbestos and does not release asbestos into the environment;	"B" response send WL. "A" response, send PEN and refer for the second violation within 60 months for repeated violations of the same requirement or the third violation within 60 months for repeated violations of different requirement, for which a warning letter (or warning letter with opportunity to correct) has been sent. Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.
AQ 0054(2)(l) Violation of a disposal requirement for asbestos-containing waste material that does not cause a potential for public exposure to asbestos and does not release asbestos into the environment;	"B" response send WL. "A" response, send PEN and refer for the second violation within 60 months for repeated violations of the same requirement or the third violation within 60 months for repeated violations of different requirement, for which a warning letter (or warning letter with opportunity to correct) has been sent. Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.

AQ 0054(2)(m) Failure to perform a final air clearance test or submit an asbestos abatement project air clearance report for an asbestos abatement project;	"A" response, send PEN and refer, when no air clearance was performed and should have been. "A" response, send PEN and refer, with the fourth violation within 24 months for repeated violations of the same requirement. "B" response, send WL, for all other cases. Also, Class II violations occurring along with Class I violations will be referred at the same time as the Class I violations. Whether they receive a penalty will be determined according to OCE's multiple penalty policy.
AQ 0054(3)(c) Improper notification of an asbestos abatement project;	Class III violations that are found on their own will be referred according to RDA discretion and discussed at the Regional Division Administrator's meetings. Class III violations occurring along with Class I or Class II violations will be referred at the same time as the higher classified violations.
AQ 0054(3)(d) Failure to submit a completed renewal application for an asbestos abatement license in a timely manner;	Class III violations that are found on their own will be referred according to RDA discretion and discussed at the Regional Division Administrator's meetings. Class III violations occurring along with Class I or Class II violations will be referred at the same time as the higher classified violations.

Attachment A

Guidance for determine whether or not an asbestos-related violation has the potential for public exposure to asbestos

This two-step process will rarely be applied; the nature of these violations (Violation of a work practice requirement under AQ 0054(1)(o), storage or accumulation of friable asbestos material or asbestos-containing waste material under AQ 0054(1)(p), abatement by an unlicensed contractor under AQ 0054(1)(r); or violation of a disposal requirement under ; AQ 0054(1)(s)) is such that it is the exceptional situation in which it is even arguable that no potential for public exposure to asbestos exists. However, these situations do exist, and we recognize the need for a fair and consistent manner of making this determination.

Step One: The Threshold Determination

When the inspector and the ELS are analyzing an enforcement referral, they will apply the six factors to the facts in the referral. If they decide that three or more of these six factors are present, then they have made a threshold determination that it is possible that the violation may have had no potential for public exposure. Conversely, if fewer than three factors are found to exist, then there will be a determination that the violation caused the potential for public exposure to asbestos.

However, it is critical to understand that the inquiry does not stop with this threshold determination. For example, it is possible to determine that a violation caused the potential for public exposure even if three or more factors are present, because the application of these six factors is not mechanical or rigid. This threshold determination simply makes it possible to move on to step two.

Step Two: The Ultimate Determination

Once this threshold determination is made, the inspector and the ELS can use their discretion and their experience to analyze the case on its own unique facts and make the ultimate determination as to whether or not the violation caused the potential for public exposure to asbestos. This framework should be applied in a balanced manner that allows for some discretion, yet also achieves consistency and fairness.

THE FACTORS

1. Type of asbestos:
If chrysotile, then this factor is met.

2. Type of Material:
If the asbestos was contained in a generally non-friable matrix material (prior to being abated), then this factor is met.

3. Percentage of Asbestos:
If the percentage is five percent or below, then this factor is met.

4. Likelihood of actual public exposure to asbestos:
If the facts of the case indicate that this likelihood is extremely low, based upon factors such as the location of the abatement project (inside or outside, urban or rural), then this factor is met.

5. Duration of open accumulation of asbestos:
If the asbestos openly accumulated for 48 hours or less, then this factor is met.

6. Fiber release mitigation:
If the manner in which the asbestos was openly accumulated involved some factors that mitigated or prevented actual fiber release, such as partial packaging or covering, or wetting of the material, then this factor is met.

However, it is critical to understand that the inquiry does not stop with this threshold determination. For example, it is possible to determine that a violation caused the potential for public exposure even if three or more factors are present, because the application of these six factors is not mechanical or rigid. This threshold determination simply makes it possible to move on to step two.

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1. Type of asbestos:
If chrysotile, then this factor is met.

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If the percentage is five percent or below, then this factor is met.

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6. Fiber release mitigation:
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