

Part 1 of 2

OREGON

ENVIRONMENTAL QUALITY

COMMISSION MEETING

MATERIALS 12/22/2005



State of Oregon
**Department of
Environmental
Quality**

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Oregon Environmental Quality Commission

Public Forum
Request to Present Information

Kathleen Feehan
Name (Please print clearly)

PO Box 638 Pendleton OR 97801
Address

CTUIR

Affiliation

Email (optional)

Phone (optional)

Agenda Item ____ or

Topic of Presentation public statement.

①

Oregon Environmental Quality Commission

Public Forum
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LLEWELLYN MATTHEWS
Name (Please print clearly)

1300 114th AVE SE #200, BELLEVUE WA 98040
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NW PULP AND PAPER ASSOCIATION

Affiliation

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Agenda Item H or PUBLIC FORUM

Topic of Presentation TURBIDITY WATER QUALITY STANDARDS

3

Oregon Environmental Quality Commission

Public Forum
Request to Present Information

MARV LEWALLEN

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1300 SW 5th, Suite 500 PORTLAND 97201

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Agenda Item H or
Topic of Presentation

TURBIDITY

Oregon Environmental Quality Commission

2

Public Forum
Request to Present Information

Matt Russell

Name (Please print clearly)

2933 Bridgeport AV SE Salem OR 97301

Address

GP

Affiliation

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Phone (optional)

Agenda Item ____ or
Topic of Presentation

Turbidity

Please Sign In

Environmental Quality Commission Meeting
Room 3A 12/22/05 9:00AM -4:00PM

Name	Organization	Phone
SUE OLIVER	DEQ HERMISTON	541 567-8297 x26
JEREMIAH BAUMANN	OSPIRG	503-936-3200 x310
Lamy McAllister	DEQ	503 229 6412
Daniel Hermosillo	DEQ	503 229 6551
Monette Simpson	DEQ	503 / 229-5294
Christine Svetkovich	DEQ	503 229-5046
Dennis Jurriger	DEQ	229-5937
Mike Korfelt	DOU	503-229-5474
Kevin Masarson	DEQ	503-229-5615
Scott Manzoni	"	503-229-5185
James Nucvala	"	503 229-5415
Justin Klure	ODOE	503.373.1581
Maggie Vandenberg	DEQ	503 229-6878
Sam Siddle	ODOE	503 573.1084
Frank Hottle	Sierra Club	503 222 9572
Karen Tamer	DEQ	5988
McLoughlin	Alliance	503-226-1677
Robbie Thompson	Publi	503 823 1097
Barbara Grest	NATA	503 281-0475
Paulette Walynak	PSU	503-725-5347
Lisa Hatfield	PSU	503 725 4457
Brian Finneran	DEQ	x6278
Shelly Storm	Big Journal	503-274-8733
Jally Phunt	DEQ	x5397

Please Sign In

Environmental Quality Commission Meeting
Room 3A 12/22/05 9:00AM -4:00PM

Name	Organization	Phone
John Charles	CAI	242-0900
VINCE PATTON	K6W-TV	226-4996
Ken Mc Cormick	KAN	226-5111
Bob Baumgartner	DEQ	228-5323
Ley Garnett	OPB radio	2931986
Chris Hagenbauer	OEC	222-1965 x102
William Knight	DEQ	5696
TOM HARRIS	BNA	223-5225
Michelle Cole	Oregonian	227-1195
Ed Fincher	KATU-TV	503-231-3333
Don Slayton	KATU-TV	231-4265
Dan Schomach	DEQ	229-6893
Kevin Downing	DEQ	6549
Fred Hutton	1190 WAX	222-1929
Phil Allen	DEQ	229-6904
Gregg Dahn	DEQ	229-5108
Pete Jalke	DEQ	229-5588
Greg Alden	DEQ	229-6345
Darrell Fuller	OADS	503-233-5044
William McCall	AP	503-228-2169
David Collier	DEQ	229-5177
Kathy VanNatta	NWPDA	503-844-9540
Marcia Danab	DEQ	229-6488
Margaret Oliphant	DEQ	X5687
Sue Smith	DEQ	5186

Please Sign In

Environmental Quality Commission Meeting
Room 3A 12/22/05 9:00AM - 4:00PM

Name

Organization

Phone

Donna Dada	EQC	503 364-7654
James F. Egan	EQC	503-636-9995
Ralph G. Galley		503 630 5867
Lynne Perry	DOJ	503-229-5725
Larry Knudsen	DOJ	"
Charles Kopp	CWS	503 681 3604
Susan Hampton	EOC	541 379 1879
Steve Kopp	GAH	503-646-4143
Wesley Kopp	ALWA	503/236-6722
Jane Klichman	DEQ	x5555
Les Carluigh	DEQ	x5422
Andree Pollock	DEQ	x5355
Jeff Bachma	DEQ	x5950
Jim McCool	HAIA	
Jeff Smith	DEQ	229-5483
David Steves	RG	363 3457
Regina Cutler	DEQ	503-229 5058
Deborah Nash	DEQ	5340
Bill Blosser	Self	503 274-1369
Tom Beam	DEQ	541-967-8297 x70
Anne Morron	BPA	503 230 3100
Denius Murphy	DEQ	541/56-8297
Jordan Palmeri	DEQ	503 x 541 x 6766
Richard Whitman	DOT	229-5725
Judy Hatton	DEQ	229-5389

PPRC Remarks
Environmental Quality Commission
December 23, 2005
Oregon Proposed Turbidity Rule

Good Morning. My name is Matthew Russell, and I am Special Projects Director with the Pulp and Paperworkers Resource Council. PPRC is a grassroots labor coalition formed out of a concern toward excessive environmental regulation and government policies that could potentially affect our jobs. We represent over 1.5 million natural resource based workers and their families throughout the United States and are firm believers in science-based regulations. I have worked at the Georgia-Pacific Halsey Mill for 9 years. Georgia-Pacific operates several facilities in Oregon that will be impacted by the turbidity rule revisions you are considering today.

We fully support DEQ's proposed turbidity rule. It is an important refinement of Oregon's stringent water quality regulations. It updates a long-outdated standard that couldn't practically be applied to NPDES permits, such as those issued to facilities where I work. It appropriately positions Oregon as a leader in water

quality regulation, making Oregon's turbidity standard more rigorous than turbidity standards set by any other state.

While the proposed Oregon rule is tougher than other states', DEQ has relied on sound science to draw a line that would not adversely affect industry or local economies such as those around my mill in the mid-Willamette Valley.

Oregon's economy is recovering but remains fragile. Unrealistic rule-making could threaten well-paying jobs and discourage job growth here. Because DEQ took the time to develop its rule using the best available scientific data, the department was able to draft a proposal that respects Oregon's high standards for environmental protection and our need for a healthy economy.

Some detractors have questioned DEQ's objectivity in developing its proposed rule because the department used funds from the pulp and paper industry to conduct its required scientific review and collect information regarding similar regulation in other states. The charges are politically self-serving and turn logic on its ear.

First, the pulp and paper industry, through Northwest Pulp & Paper Association and National Council for Air and Stream

Improvement, the industry's national research arm, have, for decades, been significant contributors to national and state environment regulation through investments in environmental research used to help regulators develop sound environmental regulations. Other interests also have the opportunity to provide research that might assist rulemaking. The state's environmental policy, which Oregonians consider to be one of the strongest, was crafted with the help of scientific data funded by the pulp and paper industry, and other regulated industries

Funds for such research were NOT used to pay for the department's rulemaking itself. Like all interests with a stake in regulation, the industry has a voice in rulemaking. But industry funding of research provides no special access to the rulemaking process itself.

Are the critics proposing their groups pay for that research? Do they think regulated industries should shift the costs of such research to taxpayers? I don't think so. Plus, I'm sure if the critics had bothered to submit their peer reviewed research and studies it would have been considered.

I urge the commission to affirm the department's use of its receipts authority when needed. Asking regulated industries to bear the costs of research needed to produce better regulation is appropriate in all cases, including this one.

I strongly encourage the commission to adopt DEQ's proposed rule. It will improve Oregon's ability to protect the state's waterways while protecting family wage jobs that are vital to our state's economic health.

Thank you.

Questions and Answers About Oregon's Proposed Water Turbidity Rules

Why did NWPPA seek a change in the rules?

In early 2001, NWPPA began talking with DEQ about updating its old turbidity¹ rules. Discussions were triggered when DEQ's new interpretation applied the old rules to the National Pollutant Discharge Elimination System (NPDES) Permitting Program – the federal water quality program administered by DEQ that issues water discharge permits for point sources, such as pulp and paper mills and municipal sewage treatment plants.

The old rules, drafted more than 30 years ago, were written to regulate high turbidity caused by short-term activities, such as in-stream construction work and mining. The rules were based on concepts developed when very low turbidity could not be measured.² The rules were also not intended to apply toward point source dischargers.

New concepts were needed to address small turbidity changes caused by treated wastewater discharges, and modern analytical methods were needed to regulate point sources effectively.

Do new rules relax current water quality standards?

No. The new interpretation means point sources would, for the first time, be evaluated on their turbidity contributions to Oregon's waters. This could mean that DEQ could impose turbidity limits in NPDES permits. The proposed rules significantly strengthen Oregon's current regulation of water turbidity.

How do the proposed rules compare to other states?

The proposed rules, if adopted, will be the most stringent statewide turbidity rules in the country. The majority of states limit turbidity to 5 or 10 NTU increase above background. The proposed Oregon rule would require maximum discharge turbidity of just 3 NTU – 40 percent more stringent than the next strictest states.

¹ Turbidity refers to how cloudy water is. Turbidity occurs when there are suspended solids in the water. Solids may stay suspended due to a lack of water movement and/or the small size of particles.

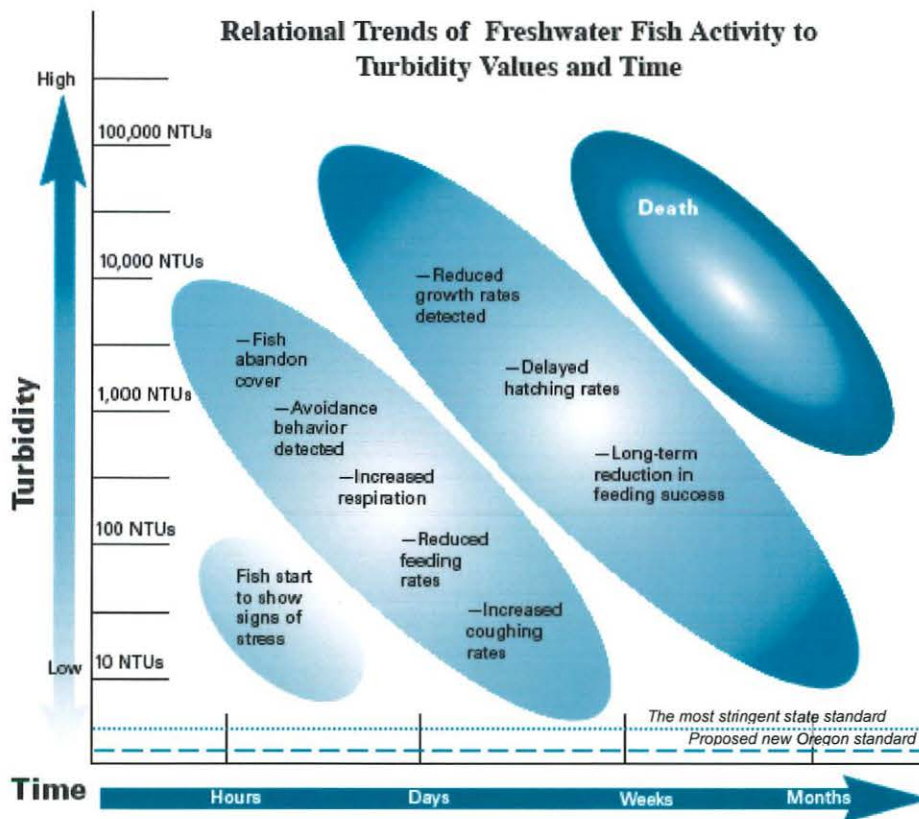
² Turbidity is measured using a turbidimeter, a device that shines a light beam through water and measures light scattered by suspended particles. Measurement units are called NTUs (Nephelometric Turbidity Units). Clear water measures 0 NTU. At 10 NTU, water appears slightly cloudy. At 20 NTU, water begins to look muddy. When Oregon's current rules were written (more than 30 years ago), turbidity was measured by an older method, the Jackson Candle Turbidimeter (measuring in Jackson Turbidity Units or JTUs). That method could not accurately measure turbidity below 25 NTU. In 1990, DEQ updated the rules to refer to NTUs, but the rules continued to reflect old concepts adopted in 1979.

Isn't turbidity, even at low levels, bad for fish?

For salmon, negative effects, such as reduced feeding and stress, occur when turbidity is in the 10-15 NTU range. Few studies have looked at the effects on salmon, if any, caused by very low turbidity increases (at or below the 3 NTU increase over background standard in the proposed rules).

One primary study cited by DEQ (Gregory and Northcote, 1993) examined a range of turbidities from 1 to 810 NTU, and found that foraging rates of juvenile salmon are reduced in clear water. The highest foraging rates occur in 35-150 NTU waters. The authors suggested that increased feeding in turbid waters may reflect reduced risk from predators. Numerous studies show that

juveniles of several species actively prefer turbid over clear water. Juvenile Chinook, for example, occupy turbid estuaries in the Pacific Northwest for a significant portion of their early life.



The chart (left) shows how turbidity, at various levels, may affect fish over time. The most stringent statewide turbidity standards in the country (5 NTU) are below where studies show impacts on fish. The proposed Oregon turbidity standard is 40 percent below that.

Isn't turbidity a major water quality problem in Oregon?

No. In DEQ's last statewide assessment report to EPA, 27,840 miles of Oregon rivers, streams and other bodies of water were surveyed. Just 88 miles (0.3 percent) were listed as impaired because of turbidity, mostly due to land use activities. No water bodies were found to be impaired for turbidity due to point source discharges. Of all the pollutants for which Oregon has standards, high turbidity contributes the least to reduced water quality in Oregon. Its "bottom-rung" ranking is a major reason why DEQ hadn't addressed revisions to the rules sooner.

Are you saying turbidity isn't a problem?

Very high turbidity can be a problem. It can limit a stream's ability to support aquatic life. Fish have to work harder to find food, and that may reduce feeding. Over time, suspended particles absorb heat, causing water temperatures to rise and oxygen levels to drop. Less light gets to lower levels of the water. But, in Oregon, such problems are not common and, when they occur, the cause is very unlikely to be due to point source discharges.

Are the proposed Oregon rules what NWPPA wanted?

NWPPA never took a position on what turbidity numbers Oregon should adopt as its standard. Our primary objective was an updated rule, based on good science. We sought a turbidity standard consistent with the most stringent standards adopted by other states – one that could be uniformly applied in NPDES permits – and would allow a level playing field for all industrial dischargers in all states.

What's the problem with applying the old rules to point sources?

Point sources have low turbidity levels, but discharge continuously. The rules were written for high levels of turbidity caused by limited duration in-stream activities. Consequently, the old rules regulate turbidity relative to background. That doesn't work very well with continuous, low-level point source discharges because background levels vary considerably (by 4 NTU or more), even in the course of one day. The variations created unanswered questions for agency permit writers: How should an effluent limit be devised? How would compliance be shown? To what background level would the turbidity level of treated discharge water be compared? For what length of time would it be measured? Updated rules were needed to apply turbidity standards to both point and nonpoint sources.

Why did NWPPA pay for DEQ to revise the rules?

When it became clear that DEQ lacked the resources needed to update the turbidity standard, DEQ asked NWPPA to pay for needed research under the Department's "receipts authority".³ DEQ staff had wanted to modernize the rules for more than 15 years, but had to forego revisions, once again, in order to address toxics and temperature. Very few waters are impaired by turbidity (0.3 percent) and, with limited resources, DEQ needed to address higher priorities. When environmental groups insisted the old standards be applied to point sources, the outdated rules posed significant difficulties, both for the agency and for the regulated community.

What were NWPPA funds used for, and what did DEQ funds pay for?

NWPPA funds covered the cost of a DEQ scientist, who spent approximately one year reviewing the science and preparing a report titled, "Technical Basis for the draft Turbidity Criteria Rule

³ "Receipts authority" is a program created by the legislature in 1997 (ORS 468.073), which allows DEQ to accept funds from regulated organizations for projects to expedite or enhance a regulatory or permitting process. The scientific review DEQ used to develop the framework for its proposed turbidity rules was funded by NWPPA using this authority. All contracts created under the receipts authority law must be reviewed by the Department of Justice.

(October 2003).” NWPPA’s contract with DEQ specified NWPPA would pay up to \$120,000. DEQ used \$100,000. During the rule-writing phase, DEQ spent another \$260,000 out of its own budget.

Did NWPPA provide DEQ with scientific material on turbidity?

Yes. NWPPA provided industry-prepared scientific reports on turbidity as a starting point for DEQ’s review. The contract clearly stated that DEQ would conduct an independent evaluation and verification of the information, and would conduct additional research to get the best possible information on the subject.⁴

Has the pulp and paper industry sponsored other environmental research in connection with rulemaking or permit requirements?

Frequently. The pulp and paper industry is proud of its sixty-year history, dating to the 1940s, of sponsoring environmental research for consideration in environmental policymaking, including many baseline studies for the Willamette and Columbia rivers. Environmental rulemaking at the federal level, and in most other states, relies on research funded by the regulated community. Private funding of research has always been essential to the protection and maintenance of our environment and informed regulatory decision-making, while lessening the burden on taxpayers.

What would happen if the regulated community didn’t provide research funding?

Neither government, nor industry, has infinite capability to fund environmental protection projects. However, good science is often expensive and good environmental regulation depends on good science. Regulation not based on science is worse than no regulation. Without good science to guide regulatory decisions, private and public financial resources are poorly allocated. The consequence is businesses that might contribute very little to an environmental problem may be forced to invest capital on controls that will not result in water quality improvements or, even worse, may create a more serious environmental problem than they solve.

What funding does DEQ receive from the regulated community?

DEQ relies on permits and fees from the regulated community for about two-thirds of its budget.⁵ For special studies and research, DEQ, like other environmental regulatory agencies, sometimes asks its regulated permittees, including municipalities, to fund scientific studies or provide scientific data. Under the federal Clean Water Act, DEQ has the authority to order the regulated community to perform scientific or other studies. Generating funding from those who are regulated reduces taxpayers’ burden.

⁴ The specific reports NWPPA provided were: “State Water Quality Standards: Turbidity,” NWPPA Report (January 2002); “Turbidity: A literature review on the biological effects of turbidity on aquatic organisms and an assessment of turbidity on two long-term receiving water study rivers in Oregon,” NCASI Technical Bulletin (2002); and “Evaluation of turbidity measurement in pulp and paper effluent and receiving waters,” NCASI Technical Bulletin 853 (September 2002).

⁵ The federal Clean Air Act actually mandates that permit fees support state Title V permit programs.

PACIFIC NORTHWEST TURBIDITY STANDARDS

State	Regulation	Classification of Water	Standard (NTU)	
			Condition or Value	Increase Allowed
Oregon	OAR 340-41-basin	Basin		10 % above control point
Washington	WAC 173.201A-030(2)(c)(vi)	Class A (Includes drinking water)	<= 50	5
		Class A	>50	10%
	173.201A-030(5)(c)(vi)	Lakes		
	173.201A-030(3)(c)(vi)	Class B (good)(All but drinking water)	<= 50	10
		Class B	>50	20%
	173.201A-030(4)(c)(vi)	Class C (fair) (marine)	<= 50	10
		Class C	>50	20%
Idaho	250.02(d) IDAPA	Cold Water Aquatic WQS	Instantaneous	50
	250.02(d)	Cold Water Aquatic WQS	10 Consect. Days	25
	252.01(b)(ii)(1)	Domestic Water Supply	<= 50	5
	252.01(b)(ii)(2)	Domestic Water Supply	>50	10% ;<25
	401.03(b)(i)	Industrial Treatment Require.	<= 50	5
	401.03(b)(ii)	Industrial Treatment Require.	>50	10% ;<25
Alaska	18AAC70.020(b)(1)(A)(i)	Drinking	<= 50	5
	18AAC70.020(b)(1)(A)(i)	Drinking	>50	10% ;<25
	(A)(ii)	Agriculture	Narrative3	
	(A)(iii)	Aquaculture		25
	(A)(iii);(B)(i);(B)(ii);C	Lakes		5
	(A)(iv)	Industrial	Narrative3	
	(B)(i)	Contact recreation	<= 50	5
	(B)(i)	Contact recreation	>50	10% ;<15
	(B)(ii)	Secondary recreat.	<= 50	10
	(B)(ii)	Secondary recreat.	>50	20% ;<15
	(C)	Aquatic life		25
Montana	Rule 17.30.622	A-1 (drinking water with conventional treatment)		No increase above
	Rule 17.30.623	B-1 (drinking, salmonids quality)		5 above natural
	Rule 17.30.624	B-2 (drinking, marginal salmonid)		10 above natural
	Rule 17.30.625	B-3 (drinking, non-salmonid)		10 above natural
	Rule 17.30.626	C-1 (non-drinking, salmonid)		5 above backgnd
	Rule 17.30.627	C-2 (non-drinking, marginal salmonid)		10 above backgnd.
	Rule 17.30.628	I (site specific adjustment for non-point sources)		No "injurious"
	Rule 17.30.629	C-3 (non-drinking, non-salmonid)		10 above backgnd.
	Rule 17.30.621	A-Closed (pristine)		No increase above

		OTHER STATE TURBIDITY STANDARDS		
Alabama	335-6-10-.09(1)(c)(9) and others	Each defined use	No substantial visual contrast	50 above backgnd.
Arizona	R18-11-109	Cold Water Fishery, strms, rivers	10	
		Cold Water Fishery, lakes, reserv., tanks, ponds	10	
		Warm water, strms, rivers	50	
		Warm water, lakes, reserv., tanks, ponds	25	
	18-11-112	Certain unique waters		3 5
Arkansas	Regulation 2.503	Listed waterbodies	10 to 75	
		Trout waterbodies	10	
		Lakes and Reserv.	25	
California	Central Valley Region		0-5	1
			5-50	20%
			50-100	10
			>100	10%
Colorado			No criteria	
Connecticut	RCSA	Drinking, aquatic life, recreat., agric., ind. supply		5 above ambient
Delaware	Section 11.1	General		10 above natural
Florida	62.302.530	All classifications		<= 29 above natural backgnd
Georgia	Ch.391-3-(6)(5)	General		Narrative 9
Hawaii	???			
Illinois	Title 35, Sub.C, Chap. 1, 302.203; 302.403; 302.515	General	Nar. criteria 7	
Indiana	327 IAC Article 2		No criteria	
Iowa	Rule 567 Ch.61.3			25 5
Kansas	KAR 28-16-28c(b)(8)	General	Nar. Criteria 6	
Kentucky	401 KAR 5:031(2)(c)		Nar. criteria 6	
Louisiana	LAC 33 IX.1113(B)(9)(b)(i)	Rivers - Group I	150	
	9(b)(ii)	Estuarine waters	50	
	9(b)(iii)	Rivers - Group II	50	
	9(b)(iv)	Freshwater lakes, reservoirs	25	
	9(b)(v)	Design. Scenic and outstanding waters	25	
	(9)(b)(vi)	Other and those exceeding listed i-v		10% above natural bckgnd. 5
Maine	Title 38, Ch.3, Sub.I, Art.4-A, 465		No criteria	
Maryland	26.08.02.03-3	Aquatic life I and recreat.; drinking; natural trout	150 instan. 2	
	26.08.02.03-3	Aquatic life I and recreat.; drinking; natural trout	50 mon. avg. 2	
Massachusetts	314 CMR 4.05(3)(a)(6)	Public water supply; general surface waters	Nar. Criteria 6	
Michigan	Part 31.4		Nar. criteria 1	
Minnesota	Chapter 7050.0220 Subp.3a(31)	Cold water aquatic life and rec.	10	
	Chapter 7050.0220 Subp.5a(20)	Warm water aquatic life and rec.	25	
Mississippi	WQC, Sect.2, (3)	General		50 outside 750 ft. mix. zone
Missouri	10 SCR 20-7(3)(C) and (4)(G)	General	Nar. Criteria 6	
Nebraska	Title 117, Ch.4 (005)	General	Nar. Criteria 6	
Nevada	NAC 445A.121	General	Nar. criteria 6	
	445A.119	Warm water aquatic life		50 above natural
	445A.120	Cold water aquatic life		10 above natural
	445A.147	Carson River	Annual Avg.	<=3
	445A.147	Carson River	Single value	<=5
New Hampshire	Ch.ENV-Ws 1703.11	Class A		No increase above natural
		Class B		10 above natural
		Certain named waters	Nar. Criteria 4	
New Jersey	NJAC 7:9B-1.1(c)14(i)	General Fresh Water	30 day avg. 15	
	NJAC 7:9B-1.1(c)14(i)	General Fresh Water	Max. 50	
	NJAC 7:9B-1.1(c)14(ii)	Saline Estuaries	30 day avg. 10	
	NJAC 7:9B-1.1(c)14(ii)	Saline Estuaries	Max. 30	
	NJAC 7:9B-1.1(c)14(iii)	Coastal Saline	10	
New Mexico	NMAC 1104(J)	General	Nat. criteria 8	
	2102 (B)	Rio Grande Caballo Reservoir	50	
New York	6 NYCRR Part 703.2	General		Narrative 9
	6 NYCRR Part 703.2	Class GA (groundwater)	5	
North Carolina	T15A:02B.0200(k)	Streams and lakes, trout	10	If >, no increase
	T15A:02B.0200(k)	Streams	50	If >, no increase
	T15A:02B.0200(k)	Lakes and reservoirs	25	If >, no increase
North Dakota	Ch. 33-16-02		No criteria	No Criteria
Oklahoma	Title 785, Ch.45-5-12(f)(7)(A)(i)	Cool Water Aquatic; Trout fishery	10	Footnote 10
	Title 785, Ch.45-5-12(f)(7)(A)(ii)	Lakes	25	Footnote 10
	Title 785, Ch.45-5-12(f)(7)(A)(iii)	All other surface waters	50	Footnote 10
Pennsylvania	25 PC 93.6		Nar. criteria 1	
Rhode Island	EVM112-88.91-1, Table 1.8D.(2).	Class A (includes Drinking Water)		5 above backgnd
		Class B and C (all but drinking water)		10 above backgnd.

South Carolina	Rf61-68 G.10h	Freshwater Lakes	25	
	Rf61-68 G.11h	Shellfish harvesting	25	
	Rf61-68 G.6a	Trout waters	10	10% above natural backgnd
	Rf61-68 G.9i	Freshwater rivers	50	
South Dakota	Chap. 74:51:01	General	No criteria	No Criteria
Tennessee	3.03(3)(d)	Fish and Aquatic life	Narrative 4	
	3.03(4)(d)	Recreation	No objection. appearance	
	Ch.1200-4-3.03(1)(f) & (2)(f)	Drinking water; industrial supply	Treatable by convent. treat.	
Texas	TAC Title 30,Part I, Ch.307.4		No crntena	No Criteria
Utah	R317.2.14	Recreation and aesthetics		10
Virginia	9 VAC 25-260-20.A	General	Narrative 7	
Vermont	3-03.2.B.1	Class A1, Ecological waters	10	
	3-03.3.B.1	Class A2, Public Water Supply	10	
	3-03.4.B.1.a	Class B, Cold water fish habitat	10	
	3-03.4.B.1.b	Class B, War, water fish habitat	25	
West Virginia	WVaCode 46 Sec.23(a)	Cold water fisheries and drinking water		10
		Warm water or nongame fisheries		15
Wyoming	Chap. 1, Sect. 23(a)	Cold water fisheries and drinking water		10
	Chap. 1, Sect. 23(b)	Warm water or nongame fisheries		15
Wisconsin	WAC NR 102.04		No criteria	

1 Narrative standard similar to: "None in quantities injurious....."

2 "...resulting from any discharge may not exceed...."

3 Narrative standard similar to: "...none which interfere with legitimate use..."

4 Narrative standard similar to: "...none which will materially affect...."

5 Caused by discharges

6 Narrative standard similar to "not aesthetically degraded by....objectionable turbidity"

7 Narrative standard similar to "...shall be free from..."

8 Narrative standard similar to "...shall not reduce light transmittance such that aquatic life is impaired or causes visible contrast..."

9 Narrative standard similar to "...no increase which will cause substantial visual contrast"

10 If background exceeds table value, turbidity from point sources shall not exceed ambient levels.

The Pulp and Paper Industry Funds Water Quality Science

The pulp and paper industry is proud of its history, dating to the 1940s of sponsoring or providing science relative to water quality, particularly on the Willamette River.

NWPPA is strongly committed to the view that it is in the best interests of the environment, the public, and the regulated industries that good science be used in writing environmental regulations.

All environmental rules must be updated from time to time to reflect newer and better science. It is not something that can just be done once and never thought about again. Like our houses, our cars and anything else, environmental regulations have to be maintained if they are to serve the environment and public.

Recently in the Pacific Northwest, the pulp and paper industry has sponsored:

- Long-time receiving water studies on the Willamette River;
- Temperature monitoring for two years on both the Willamette and Columbia Rivers; and
- Funding for baseline water quality monitoring on the Lower Columbia River in the early 1990's.

The industry also funds a research organization, NCASI, for the purpose of providing scientifically valid information on the environmental effects of the pulp and paper mills. Relevant NCASI research is provided to federal and state environmental agencies.

NCASI is an independent, non-profit research institute that focuses on environmental topics of interest to the pulp, paper, and forest products industry. NCASI was established in 1943 by the pulp and paper industry to provide technical assistance for the industry's goal of lowering the ecological impact of its spent pulping liquors. Since then, NCASI is recognized as the leading source of reliable data on environmental issues affecting this industry.

For example, the NCASI long-term receiving water research for the Willamette River was included in The Willamette River Basin Water Quality Data Summit in 2000, along with agency research from DEQ, USGS, EPA, USFWS, and ODFW. This research was also presented in at the Society of Environmental Toxicology and Chemistry Annual Meeting, November 2004, Portland, OR.

**PUBLICATIONS, PRESENTATIONS, AND MASTER'S THESES RELATED TO THE NCASI
LONG-TERM RECEIVING WATER STUDIES, INCLUDING THE WILLAMETTE R.**

LTRWS Publications - Peer Reviewed Journal or Book

- Thomas, J.F. 2005. How long should a long-term river study be? *Journal of Freshwater Ecology* 20:367-379.
- Hall, T.J., Thomas, J.F., Fisher, R.P., and Borton, D.L. 2004. Status of a long-term industry funded in-stream monitoring study to assess potential effluent effects in four U.S. receiving waters. In Borton, D.L., Hall, T.J., Fisher, R.P., and Thomas, J.F., eds, *Pulp and Paper Mill Effluent Environmental Fate and Effects*. DEStech Publications, Lancaster, PA, USA, pp 182-194.
- Thomas, J.F., and Hall, T.J. 2004. Spatial-temporal relationships between river biota, chemistry and mill effluent on Codorus Creek, Pennsylvania. In Borton, D.L., Hall, T.J., Fisher, R.P., and Thomas, J.F., eds, *Pulp and Paper Mill Effluent Environmental Fate and Effects*. DEStech Publications, Lancaster, PA, USA, pp 220-231.
- Landis, W.G., Bodensteiner, L.R., Obery, A.M., and Thomas, J.F. 2004. Ecological risk assessment as the framework for the prediction, confirmation and management of the Codorus Creek Watershed. In Borton, D.L., Hall, T.J., Fisher, R.P., and Thomas, J.F., eds, *Pulp and Paper Mill Effluent Environmental Fate and Effects*. DEStech Publications, Lancaster, PA, USA, pp 232-243.
- Hall, T.J., Arthurs, W.J., Borton, D.L., Erickson, C., Ikoma, J., and Streblow, W.R. 2004. Characterization of a bleached kraft mill effluent discharging to Codorus Creek, Pennsylvania, as part of a long-term monitoring study - chemical, biological and mesocosm measurements. In Borton, D.L., Hall, T.J., Fisher, R.P., and Thomas, J.F., eds, *Pulp and Paper Mill Effluent Environmental Fate and Effects*. DEStech Publications, Lancaster, PA, USA, pp 208-219.
- Thomas, J.F., and Hall, T.J. 2004. Pattern analysis of fish communities upstream/downstream of pulp and paper mill discharges on four U.S. receiving waters. In Borton, D.L., Hall, T.J., Fisher, R.P., and Thomas, J.F., eds, *Pulp and Paper Mill Effluent Environmental Fate and Effects*. DEStech Publications, Lancaster, PA, USA, pp 195-207.
- Rodgers, J.H., and Thomas, J.F. 2004. Evaluations of the fate and effects of pulp and paper mill effluents from a watershed multistressor perspective: Progress to date and future opportunities. In Borton, D.L., Hall, T.J., Fisher, R.P., and Thomas, J.F., eds, *Pulp and Paper Mill Effluent Environmental Fate and Effects*. DEStech Publications, Lancaster, PA, USA, pp 135-145.
- Dudley, J.L., Arthurs, W., and Hall, T.J. 2001. A comparison of methods used to estimate river rock surface areas. *Journal of Freshwater Ecology* 16:257-261.
- Dudley, J.L., and Hall, T.J. 2001. Physical and chemical characteristics of Codorus Creek and Oil Creek (York County, PA). *The Pennsylvania Academy of Science* 75:27-34.
- Hall, T.J., and Miner, R.A. 1997. Integrated long-term receiving water study methodology development. *Water Science and Technology* 35:315-320.

LTRWS Presentations – Conferences

- Hall, T., and Arthurs, W. 2004. Pulp and paper mill nutrient contributions to receiving waters in relation to biological effects at a watershed scale. Proceedings of the 31st Annual Aquatic Toxicity Workshop: October 2004, Charlottetown, Prince Edward Island.
- Thomas, J.F., and Hall, T.J. 2004. A comparison of the sensitivity of fish, benthic, and periphyton multimetric indices with multivariate statistics to detect effects along a wadeable stream in Pennsylvania. Society of Environmental Toxicology and Chemistry annual meeting, November 2004, Portland, OR.

- Thomas, J.F., and Hall, T.J. 2004. A comparison of the sensitivity of multimetric indices with multivariate statistics to detect effects along large rivers in Oregon. Society of Environmental Toxicology and Chemistry annual meeting, November 2004, Portland, OR.
- Thomas, J.F., and Hall, T.J. 2004. Site discrimination on rivers using boat versus backpack electrofishing gear. American Fisheries Society annual meeting, August 2004, Madison, WI.
- Thomas, J.F. 2004. How long should a long-term study be? 2004. North American Benthological Society annual meeting, June 2004, Vancouver, BC.
- Thomas, J.F., and Hall, T.J. 2004. Fish community patterns upstream and downstream of pulp and paper mill discharges on four U.S. receiving waters. National Water Quality Monitoring Conference, May 2004, Chattanooga, TN.
- Thomas, J.F., and Hall, T.J. 2003. A comparison of three relative risk model risk assessments. Society of Environmental Toxicology and Chemistry annual meeting, November 2003, Austin, TX.
- Thomas, J.F., and Hall, T.J. 2002. Turbidity on the Upper Willamette and Lower McKenzie Rivers from 1997 to 2001. Society of Environmental Toxicology and Chemistry annual meeting, November 2002, Salt Lake City, UT.
- Thomas, J.F., and Hall, T.J. 2002. Assessment of the effects of chironomidae taxonomic resolution on site differentiation using multivariate analysis. North American Benthological Society annual meeting, May-June 2002, Pittsburgh, PA.
- Thomas, J.F., and Hall, T.J. 2002. Turbidity on the Upper Willamette and Lower McKenzie Rivers from 1997 to 2001. Presented at the Pacific Northwest Chapter of the Society of Environmental Toxicology and Chemistry, May 2002, Portland, OR.
- Thomas, J.F., Bodensteiner, L.R., Hall, T.J., Obery, A.M., and Landis, W.G. 2001. Confirmation of a relative risk model ecological risk assessment using multivariate statistics. Society of Environmental Toxicology and Chemistry annual meeting, November 2001, Baltimore, MD.
- Hall, T.J. and Dudley, J.L. 2001. The effects of kraft mill effluent on periphyton and macroinvertebrates in streamside mesocosm studies. Society of Environmental Toxicology and Chemistry annual meeting, November 2001, Baltimore, MD.
- Thomas, J.F., Obery, A.M., and Landis, W.G. 2001. Use of a relative risk model ecological risk assessment as a predictive model for decision-making. Society of Environmental Toxicology and Chemistry annual meeting, November 2001, Baltimore, MD.
- Hall, T.J., Dudley, J.L., Fisher, R.P., and Borton D.L. 2001. A long-term monitoring study on the effects of pulp and paper mill effluents. Water Environment Federation annual meeting, October 2001, Atlanta, GA.
- Dudley, J.L., and Hall, T.J. 2001. The effects of kraft mill effluent on periphyton in three receiving waters. North American Benthological Society annual meeting, June 2001, LaCrosse, WI.
- Hall, T.J., Dudley, J.L., Fisher, R.P., and Borton, D.L. 2000. Monitoring parameters and examples of initial water quality, effluent quality, and biological characterizations for four long-term receiving water study locations in the U.S. Report 417. *Proceedings*, 4th International Conference on Environmental Impacts of the Pulp and Paper Industry, June 2000, Helsinki, Finland.
- Hall, T.J. 2000. Long-term study of Upper Willamette and McKenzie. Willamette River Basin Water Quality Data Summit, Corvallis, OR.
- Hall, T.J., Dudley, J.L., Fisher, R.P., and Borton, D.L. 1999. Integrated long-term receiving water studies: Site selection and a description of the selected study sites. TAPPI International Environmental Conference, April 1999, Nashville, TN.
- Dudley, J.D., and Hall, T.J. 1999. Impacts of pulping effluents in the aquatic environment. North American Benthological Society annual meeting, May 1999, Duluth, MN.

LTRWS Related Technical Bulletins

- The effects of a bleached kraft mill effluent on periphyton and macroinvertebrates in a streamside mesocosm study – Willamette River, Oregon. 2005. NCASI Technical Bulletin No. 899.
- Long-term receiving water study data compendium: September 2002 to August 2003. 2005. NCASI Technical Bulletin No. 897.
- Long-term receiving water study: Codorus Creek water quality assessment 1997 to 2003. 2005. NCASI Technical Bulletin No. 896.
- Long-term receiving water study data compendium: September 2001 to August 2002. 2004. NCASI Technical Bulletin No. 891.
- A quantitative approach to assessing the length of long-term river studies. 2004. NCASI Technical Bulletin No. 890.
- The effects of a bleached kraft mill effluent on periphyton and macroinvertebrates in a streamside mesocosm study - Leaf River, Mississippi. 2004. NCASI Technical Bulletin No. 889.
- Review and evaluation of EPA ambient water quality criteria for nutrients in rivers and streams. 2004. NCASI Technical Bulletin No. 888.
- Biocriteria: Summary and evaluation of the current state programs, 2004. 2004. NCASI Technical Bulletin No. 881.
- An evaluation of habitat assessment methods for determining gradients on rivers using long-term receiving water study data from Codorus Creek, Pennsylvania. 2004. NCASI Technical Bulletin No. 880.
- Long-term receiving water study data compendium: September 2000 to August 2001. 2003. NCASI Technical Bulletin No. 868.
- Integration of a relative risk multi-stressor risk assessment with the NCASI long-term receiving water studies to assess effluent effects at the watershed level, Leaf River, Mississippi. 2003. NCASI Technical Bulletin No. 867.
- Long-term receiving water study data compendium: September 1999 to August 2000. 2003. NCASI Technical Bulletin No. 856.
- Turbidity: A literature review on the biological effects of turbidity on aquatic organisms and an assessment of turbidity in two long-term receiving water studies in Oregon. 2002. NCASI Technical Bulletin No. 846.
- Long-term receiving water study data compendium: August 1998 to September 1999. 2002. NCASI Technical Bulletin No. 843.
- Integrated long-term receiving water studies: Site selection process and a description of the Selected study sites. 2002. NCASI Technical Bulletin No. 842.
- A compendium of field methods used in NCASI long-term receiving water studies. 2002. NCASI Technical Bulletin No. 841.
- Evaluation of aquatic nutrient criteria development. 2001. NCASI Technical Bulletin No. 834.
- Evaluation of nutrient criteria and response variables based upon the NCASI long-term receiving water study experience. 2001. NCASI Technical Bulletin No. 833.
- The effects of a bleached kraft mill effluent on periphyton and macroinvertebrates in streamside mesocosm studies. 2001. NCASI Technical Bulletin No. 829.
- The effects of an unbleached kraft mill effluent on periphyton and macroinvertebrates in streamside mesocosm studies. 2001. NCASI Technical Bulletin No. 828.

A synopsis of recent studies on the impacts of pulping effluents in the aquatic environment. 1998. NCASI Technical Bulletin No. 757.

A compendium of stream and river monitoring methods. 1998. NCASI Technical Bulletin No. 752.

LTRWS Publications Related to WWU Research Agreement

Luxon, M., and Landis, W.G. 2005. Application of the relative risk model to the Upper Willamette River and Lower McKenzie River, Oregon. In Landis, W.G., editor, *Regional Scale Ecological Risk Assessment: Using the Relative Risk Model*. CRC Lewis Press, Boca Raton, FL, pp 91-118.

Obery, A.M., Thomas, J.F., and Landis, W.G. 2005. Codorus Creek watershed: A regional ecological risk assessment with field confirmation of the risk patterns. In Landis, W.G., editor, *Regional Scale Ecological Risk Assessment: Using the Relative Risk Model*. CRC Lewis Press, Boca Raton, FL, pp 119-142.

Thomas, J.F. 2005. Codorus Creek: Use of the relative risk model ecological risk assessment as a predictive model for decision making. In Landis, W.G., editor, *Regional Scale Ecological Risk Assessment: Using the Relative Risk Model*. CRC Lewis Press, Boca Raton, FL, pp 143-158.

Obery, A.M., and Landis, W.G. 2002. A regional multiple stressor risk assessment of the Codorus Creek watershed applying the relative risk model. *Human and Ecological Risk Assessment* 8:405-428.

Landis, W.G., Luxon, M., and Bodensteiner, L.R. 2000. Design of a relative rank method regional-scale risk assessment with confirmational sampling for the Willamette and McKenzie Rivers, Oregon. In Price, F.T., Brix, K.V., and Lane, N.K., eds, *Ninth Symposium on Environmental Toxicology and Risk Assessment: Recent Achievements in Environmental Fate and Transport, ASTM STP1381* American Society for Testing and Materials, West Conshohocken, PA, pp 67-88.

LTRWS Master's Theses Related to WWU Research Agreement

Thomas, J. 2001. An evaluation of a relative risk model ecological risk assessment in predictive sustainability modeling. Western Washington University, Bellingham, WA.

Luxon, M. 2000. Application of the relative risk model for regional ecological risk assessment to the Upper Willamette and Lower McKenzie Rivers, Oregon. Western Washington University, Bellingham, WA.

Obery, A.M. 2000. A regional multiple stressor risk assessment of the Codorus Creek Watershed applying the relative risk model. Western Washington University, Bellingham, WA.

LTRWS Presentations Related to WWU Research Agreement

Obery, A.M., and Landis, W.G. 2000. Application of the relative risk model for Codorus Creek watershed relative ecological risk assessment: an approach for multiple stressors. 21st Annual Meeting of the Society of Environmental Toxicology and Chemistry, November 11-16, 2000, Nashville, TN.

Landis, W.G., Obery, A.M., Thomas, J.F., and Walker, R. 2000. Landscape Toxicology and the Development of Regional Risk Assessment. 21st Annual Meeting of the Society of Environmental Toxicology and Chemistry, November 11-16, 2000, Nashville, TN.

Landis, W.G., Luxon, M., Obery, A., Bodensteiner, L., and McLaughlin, J.F. 2000. Development of a Relative Risk Methodology for Multiple Stressors at Regional Scales. International Association for Landscape Ecology Annual Meeting, April 16-19, 2000, Ft. Lauderdale, FL.

Luxon, M.A., and Landis, W.G. 2000. Development and utility of the relative risk model in the assessment and management of freshwater systems. Tenth ASTM Symposium Environmental Toxicology and Risk Assessment: Science, Policy and Standardization-Implications for Environmental Decisions. April 10-12, 2000, Toronto, Canada.

Pfingst, A.J., and Landis, W.G. 2004. Conceptual model development for a multiple stressor landscape scale ecological risk assessment for the Androscoggin River, Maine. 25th Annual Meeting of the Society of Environmental Toxicology and Chemistry, November 14-18, 2004, Portland, OR.

NWPPA REMARKS
ENVIRONMENTAL QUALITY COMMISSION
DECEMBER 23, 2005
OREGON PROPOSED TURBIDITY RULES

Good Morning. My name is Llewellyn Matthews and I am the Executive Director of the Northwest Pulp and Paper Association. I am here with several other individuals representing the pulp and paper industry. Thank you for allowing us time on the agenda today. I am here to do to things:

- to defend the DEQ's proposed turbidity rules; and
- to defend the DEQ's use of the Receipts Authority provision enacted by the Legislature.

Both of these matters have been controversial. Both have been misrepresented. The scurrilous charges that NWPPA funding of DEQ's scientific review in any way affected the department's decision-making are false. I would like to make a few remarks about what the proposed rules do and then the role of the Receipts Authority.

What the Proposal Does

The proposed rules, if adopted by the EQC, will *be 40% more stringent than the standards adopted by the next most stringent group of states*. Let me repeat that. *The proposed rules will be 40% more stringent than the most stringent approaches adopted by other states*. The states that currently have the most stringent standards are based on a value of 5 NTU.

DEQ's proposal sets a value of 3 NTU above background for Oregon point sources. The DEQ staff had the same the same scientific information as the other states – it is commonly available – but chose an extra measure of conservatism in light of the fact that Oregon rivers and streams run quite clear in the summer. NWPPA would have preferred a standard more in accord with other states, such as Washington and Idaho, that are based on 5 NTU. However, DEQ has a rationale basis for its proposal and it deserves support. We intend to abide by it. The opponents to the rule have had three years and many

invitations to produce technical information supporting a different standard and have not done so. Instead they are now resorting to unfair attacks on the department and generating misleading and factually incorrect statements that have been widely reported in the press.

The main reason NWPPA supported DEQ's plan to update its turbidity rules is that the old rules, developed three decades ago, lacked the elements needed to be implemented in NPDES permits for point sources. DEQ generally did not include turbidity as a permit limitation because the old rules' deficiencies made implementation vague and uncertain. The few instances where DEQ tried to apply the old, out-of-date rules into modern NPDES permits led us to realize this situation is a recipe for litigation. The old rules were developed with in-stream construction and non-point sources in mind. To update them for NPDES permits, specific additional elements are needed to address compliance, averaging times, type of monitors and other technical matters. It is totally erroneous to claim that the rule is a *quote* "loosening of standards" *unquote*. To put it simply, the old rules were based on Jackson Candle Turbidimeter, which could not accurately measure below 25 NTU. Point sources were not regulated simply because their very low turbidity could not be measured for compliance purposes. Marv Lewallen will speak to this a bit more in a few minutes. The proposed rules close the gap. The proposed rules are finally aligned with modern science and can be applied effectively in NPDES permits.

I would like to say a few words about:

The role of science and funding (Receipts Authority)

Good science is the cornerstone of effective environmental regulation. Without good science, or the means to obtain it, our state environmental regulations run the risk of being ineffective and failing to protect environmental values. Alternately, they could result in unnecessary costs on the regulated community, without benefit. Neither outcome is in the public interest or of benefit to the environment. NWPPA's position is very simple: if our industry triggers the need for additional costs for science, we should step forward when asked to fund scientific data, rather than divert these costs to the taxpayers.

In regard to the turbidity rules, the DEQ *asked* our industry to provide funding under the receipts authority, a device created for the legislature for this purpose. While the receipts authority contract did not limit DEQ's use of the funds, we understood the funds would be used for a technical staff person for one year to conduct a scientific review. When that phase of the effort was concluded, DEQ had only billed us for \$100,000 of the potential \$120,000 allowed in the contract. NWPPA continues to support the receipts authority provision and remains willing to pay the full amount if DEQ needs this for a peer review of the technical support document.

"Receipts authority" is modern approach, created by the legislature in 2001, to standardize a long-standing practice of the regulated industries to pay for some of the costs related to their regulation. Since its creation, DEQ has used the receipts authority for a variety purposes, and other Oregon agencies have adopted similar approaches. The critics of the receipts authority are raising nothing more than a red herring. With or without the receipts authority provision, our industry would have responded to the DEQ's request for funding, just as we have always done and just as we anticipate doing in the future. In the past ten years, pulp and paper funding has been used for such purposes as baseline data gathering for the Columbia River, long-term receiving water studies for the Willamette River, and long-term temperature monitoring on both the Willamette and the Columbia rivers. In addition, we make a wide variety of industry research available for the record. Some of these are listed in the materials submitted to you today.

Industry supports good science

NWPPA and its sister organization, NCASI (the national environmental research arm of the pulp and paper industry), are proud of an over 70-year history of contributing scientific knowledge in Oregon's evolving effort to address water quality. The industry also makes similar contributions in other states and at the national level. The pulp and paper industry has long recognized the need to reduce the ecological effects of our manufacturing and the need to stay current with new and emerging scientific knowledge. We employ state of the art scientific methods and seek peer review of our work. We are

committed to continuous improvement through research. We are committed to compliance with our permits.

In conclusion, two things:

First, we urge you to support the proposed rules when they comes to you for your approval. Although the DEQ's proposed turbidity rules are more stringent than we would like and are more stringent than other states – we defend the process DEQ has used because it is based on credible science.

Secondly, we urge you to correct the misrepresentations made by critics about the DEQ's objectivity. Receipts authority provides a transparent tool for DEQ to fund regulatory research with money from the regulated community rather than from Oregon taxpayers or, worse, to proceed with a lack of science. Receipts policy is prudent, appropriate and this commission should make that clear.

Thank you.

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CONFEDERATED TRIBES
of the
Umatilla Indian Reservation
Department of Natural Resources
ADMINISTRATION

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Good morning Mr. Chairman, Commissioners and Director Hallock,

My name is Kathleen Feehan and I am a Water Quality Policy Analyst for the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). I address you this morning on behalf of Eric Quaempts, the Director of the Department of Natural Resources. The Director regrets that he could not be here in person this morning.

In the past the Umatilla Tribes have enjoyed an excellent and productive relationship with DEQ and the State of Oregon. We highly value these important relationships because the Tribe is a member, not an abstraction, of the Oregon community. Over the past three years many representatives of the Umatilla tribal government have spoken to the Commission and to Director Hallock requesting your action and DEQ's action to protect the health of tribal people by choosing water quality criteria for toxic chemicals that protect the health of people who eat fish from Oregon waters. The tribe raised their objections over DEQ's toxic criteria after careful consideration because it is the responsibility of the tribal government to protect the health of the people it represents. We also believe it is the responsibility of Oregon's government to protect all Oregonians; this includes tribal people when the matter is within Oregon's jurisdiction.

The Umatilla tribes have asked for DEQ's help because DEQ's toxic water quality criteria will not protect the health of Oregonians, including CTUIR members, who eat more than two fish meals per month. This problem is not esoteric or abstract in what it means to the members of the Umatilla tribes. DEQ has acknowledged that the Department understands that their toxic criteria will exclude the vast majority of tribal people from protection. In October the tribe's Board of Trustees was deeply disappointed to learn that our efforts to sway DEQ's decision to exclude active fish consumers from protection in Oregon's toxic criteria had failed.

The tribe strongly objected to the proposed toxic criteria and now objects to their approval by the Environmental Protection Agency. The DEQ and the Environmental Quality Commission are knowingly excluding tribal members and all active fish consumers from protection under Oregon's water quality criteria for toxic pollutants. The toxic criteria are not, as has been suggested, a matter of protecting "special populations" verses the general public in Oregon. This is a matter of Oregon choosing toxic criteria that do not support the designated use of fishing. This is a matter of Oregon choosing not to protect the health of Oregonians who eat more than two meals of fish per

month. This is a matter of DEQ choosing to ignore the risk to the health of Oregon children and mothers from toxic pollution.¹

For three years the tribe has tried to engage DEQ in a government-to-government effort to create a cooperative resolution to this problem. Nonetheless, DEQ has decided to delay protecting the health of fish consumers and tribal people until at least 2008. Such a decision only delays the discussion with municipalities and industry that is needed now to protect at risk Oregon families who eat fish. If it is sensible to protect the health of Oregon fish consumers in 2008 we are left to wonder why it is not sensible to protect the health of Oregon fish consumers now.

When we were last before you, we asked to have the opportunity to present to the Commission the results of an independent scientific panel's review of the threat to CTUIR members, and to other Oregonians, of the fish consumption rate used in DEQ's toxic criteria. Because this expert panel is doing their work strictly as volunteers, we have not yet seen the results and the work product is months past due. Though we have no control over that, I apologize to you for the delay. When that report is finalized if you so desire we will present it to you and will be happy to provide copies of the report.

The tribe will continue to work to protect the health of their tribal members and all fish eating Oregonians. The Governor's Oregon Principles state that "Oregon is a place where we value taking care of those who are the most vulnerable, including children, and seniors." We hope that in the near future that protection will be extended to demonstrably vulnerable tribal people and other members of the Oregon community who actively eat Oregon fish.

¹ U.S. Environmental Protection Agency. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (2000). Office of Water, Office of Science and Technology. EPA-822-B-00-004. p. 4-29, 4-30.

State of Oregon
Department of Environmental Quality

Memorandum

Date: December 9, 2005
To: Environmental Quality Commission
From: Cat Skaar
DEQ Director's Office
Subject: Additional materials: December meeting and October public forum

I have enclosed 3 more items for your review.

Transcription of October 21, 2005, public forum - Per Judy's request, the public forum of the last EQC meeting is transcribed and printed for your review.

Item A – Minutes from the October 21, 2005, EQC meeting is included here as well. Please add this under the "A" tab in the notebook sent out last week.

Item E – Rule Adoption: Renewal of 1200-C NPDES Stormwater Permit staff report. Please add this under the "E" tab in the notebook sent out last week.

Item G – Pollution Control Facility Tax Credit (Amendment). This staff report was sent to you in the notebook last week. This enclosure is an amendment to that report.

This completes the December meeting materials that you can expect prior to the meeting. As per our norm, you will receive the **Director's Dialogue** and the **Umatilla Chemical Weapons Facility** update in your white folders when you arrive at the meeting December 22.

Internal Working EQC Agenda—DRAFT version 11/30/05
Thursday, December 22-23, 2005
Portland, OR

Thursday, December 22

Time	Item	Topic	Presenter
9:00 a.m. (15 min.)	A	Approval of Minutes from October 21, 2005, EQC meeting	
9:15 a.m. (60 min.)	B	Contested Case: Gay Wescott	Anne Price, Susan Greco Lynne Perry
10:15 a.m. (30 min.)	C	UMCDF Update	Dennis Murphey
10:45 a.m. (15 min.)		Break	
11:00 a.m. (15 min.)	D	Governor Kulongoski comments	
11:15 a.m. (45 min.)		<i>Executive Session</i>	
Noon (90 min.)		Chair Reeve Farewell Luncheon	
1:30 p.m. (60 min.)	E	Action Item: Rule adoption—Renewal of 1200-C NPDES Stormwater Permit	Lauri Aunan Annette Liebe
2:30 p.m. (60 min.)	F	Action Item: Temporary Rule Adoption—Oregon Low Emission Vehicle Rules	Andy Ginsburg Dave Nordberg
3:30 p.m. (15 min.)		Adjourn	

Friday, December 23

Time	Item	Topic	Presenter
8:30 a.m. (60 min.)	G	Action Item: Pollution Control Facility Tax Credits	Sally Puent Maggie Vandehey
9:30 a.m. (60 min.)	H	Public Forum	
10:30 a.m. (15 min.)		Break	
10:45 a.m. (30 min.)	I	Director's Dialogue	Stephanie Hallock
11:15 a.m. (15 min.)	J	Commissioner reports	
11:30 a.m.		Adjourn	

**Environmental Quality Commission Meeting
December 22-23, 2005¹
DEQ Headquarters – Room 3A**

Thursday, December 22 – regular meeting begins at 9:00 a.m.

A. Approval of Minutes from October 21, 2005

The Commission will review, amend if necessary, and approve draft minutes of the October 21, 2005, Commission meeting.

B. Contested Case: LQ/T-NWR-02-094 in the Matter of Cynthia Wescott (formerly known as Cynthia Gay)

The Commission will consider a contested case in which Cynthia Wescott (formerly known as Cynthia Gay) appealed the order which assessed a \$6,072 penalty for four violations of the Department of Environmental Quality (DEQ) underground storage tank regulations.

Anne Price and Susan Greco, DEQ Office of Compliance and Enforcement; Lynne Perry, Oregon Department of Justice

Item C was cancelled

D. 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 2004, the Commission gave approval to start chemical weapon destruction at UMCDF and DEQ's Chemical Demilitarization Program continues close oversight of work at the facility.

E. Rule Adoption: Water Quality – Renewal of National Pollutant Discharge Elimination System General Permit #1200-C for Storm Water Runoff from Construction Activities

The Department proposes the EQC adopt the renewal of National Pollutant Discharge Elimination System (NPDES) General Permit #1200-C for stormwater runoff from construction activities that disturb one acre or more of land. The existing 1200-C permit will expire on December 31, 2005 and must be renewed so that new construction or development activities can be authorized.

Lauri Aunan and Annette Liebe, DEQ Water Quality Division

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>.

F. *Temporary Rule Adoption—Oregon Low Emission Vehicle Rules

DEQ will recommend that the EQC adopt temporary rules to require new light and medium-duty passenger vehicles sold in Oregon meet California motor vehicle emission standards. Adopting temporary rules now would preserve Oregon's opportunity to adopt the California standards for the 2009 model year as requested by Governor Kulongoski.

Andy Ginsburg and Dave Nordberg, DEQ Air Quality Division

Friday, December 23 – regular meeting begins at 9:30 a.m.

Prior to regular session, the Commission will hold an Executive Session to consult with counsel concerning legal rights and duties regarding current and potential litigation against the DEQ². Only representatives of the media may attend, and media representatives may not report on any deliberations during the session.

G. Action Item: Pollution Control Facility Tax Credits

DEQ will present its analyses and recommendations regarding Pollution Control Facilities Tax Credits.

Sally Puent and Maggie Vandehey, DEQ Management Services Division

H. Public Forum

The Commission will break the meeting 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.

I. Director's Dialogue

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

J. Commissioners' Reports

Future Environmental Quality Commission meeting dates for 2006 include:

March 2-3 April 27-28 June 22-23 August 10-11
October 5-6 December 14-15

² This executive session will be held pursuant to ORS 192.660(1)(h).

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 during the morning of Friday, December 23 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.

Please Sign In

Environmental Quality Commission Meeting
Room 3A 12/23/05 8:30AM -11:30AM

Name	Organization	Phone
James Britton		541-345-4975
David Quammen	Conrad Wood Preserving	503 556 1953
Maggie Vandehey	DEQ	x 6878
Jelly Hunt	PEQ	15379
John Wiser	Tax Fairness Oreg	503 533-8784
HARRIET STERIN	TFO	
Kathryn VanMatre	NWPPA	503-844-9540
Carol Whitaker	G-P	360-817-4690
LLEWELLYN MATTHEWS	NWPPA	425-455-1323
Matt Russell	G-P	503 585 8375
MARU LEWALLEN	Weyrhaeuser	503 553 8396
Bob Baumgartner	DEQ	5323
Kathleen Fehan	CTUIR	541-966-2357
Neil Mullane	DEQ	5287
Charles Hays	CWS	503 681 3604
Just Dillanpie	ALWA	503/236-6722
Michael Scheel	DEQ	503.229.6704
Richard Sattner	DEQ/CTUIR	503-229-5219
Karen Tarnu	DEQ	5988

Minutes
to be added

February 02, 2006

Thursday

February 2006

S	M	T	W	T	F	S
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26	27	28				

March 2006

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26	27	28	29	30	31	

Andy offsite	
7 am	
8 ⁰⁰	Hold time - take boys to school
9 ⁰⁰	
10 ⁰⁰	*rescheduled* Mtg with Al Kiphut, S.H., Jeff Christensen, Kurt Burkholder to brief on petition from John DiLorenzo (Stephanie's office)
11 ⁰⁰	
12 pm	Do Not Schedule if Possible
1 ⁰⁰	
2 ⁰⁰	
3 ⁰⁰	
4 ⁰⁰	Don't schedule
5 ⁰⁰	
6 ⁰⁰	



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

March 16, 2006

Via Certified and U.S. Mail

James F. Evans
Attorney at Law
200 S. W. Carey Lane
Portland, OR 97219

RE: Final Order
Cynthia Westcott (formerly Cynthia Gay)
OAH Case No. 11905
DEQ Case No. LQ/T-NWR-02-094

On January 25th, 2006, the Environmental Quality Commission issued a Final Order in the above-referenced case incorporating the Proposed Order issued on February 22, 2005, by Administrative Law Judge Elmore Leonard. The Final Order referenced an incorrect DEQ case number WQ/OS-ER-04-071. The correct case number is LQ/T-NWR-02-094.

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

Sincerely,

Cat Skaar
Assistant to the Commission

cc: Business Office, DEQ
Susan Greco, OCE, OD, DEQ
Land Quality Division DEQ
Deborah Nesbit, DEQ
Lynne Perry, DOJ





Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

February 7, 2006

Via Certified and U.S. Mail

James F. Evans
Attorney at Law
200 S. W. Carey Lane
Portland, OR 97219

RE: Final Order
Cynthia Westcott (formerly Cynthia Gay)
OAH Case No. 11905
DEQ Case No. LQ/T-NWR-02-094

On January 25th, 2006, the Environmental Quality Commission issued the attached Final Order in Case Number LQ/T-NWR-02-094, which found that you are liable for a civil penalty of \$6,072 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 this letter, 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 \$6,072 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 February 17, 2006, 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,

Cat Skaar
Assistant to the Commission

cc: Business Office, DEQ
Susan Greco, OCE, OD, DEQ

February 7, 2006
Page 2

Land Quality Division DEQ
Deborah Nesbit, DEQ
Lynne Perry, DOJ

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

In the Matter of)	
)	
Cynthia Wescott (formerly known	)	Final Contested Case
as Cynthia Gay)	)	Hearing Order
)	
Petitioner	)	No. WQ/OS-ER-04-071

On December 22, 2005, the Environmental Quality Commission considered Cynthia Wescott's petition for review of the Proposed Order issued by Administrative Law Judge Stephen H. Elmore on February 22, 2005 and incorporated herein as Attachment A. The Commission considered the exceptions and briefs submitted by James F. Evans and the briefs submitted on behalf of the Department of Environmental Quality by Susan Greco, Environmental Law Specialist and Lynne Perry, Assistant Attorney General. The Commission also considered oral arguments presented by Mr. Evans, Ms. Greco and Ms. Perry.

The Commission denies the Petitioner's requests for a remand or rehearing, and for appointment of a new Administrative Law Judge, and affirms the Proposed Order of the Administrative Law Judge in all respects. The Proposed order is hereby incorporated by reference into this Final/Contested Case Order.

Dated this 25th day of January 2006.

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

Notice of Appeal Rights

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

Attachment A
GENO9687

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

IN THE MATTER OF THE PROPOSED	)	ORDER ON MOTION FOR
ASSESSMENT OF CIVIL PENALTY	)	RULING ON LEGAL ISSUE AND
	)	PROPOSED AND FINAL ORDER
CYNTHIA WESCOTT)	
(formerly Cynthia Gay),	)	OAH Case No. 119055
Respondent	)	Dept. Case No. LQ/T-NWR-02-094

HISTORY OF THE CASE

The Department of Environmental Quality issued a Notice of Violation, Department Order, and Assessment of Civil Penalty June 24, 2002; and served it on the Respondent, Cynthia Wescott (then Cynthia Gay). Ms. Wescott filed her Request for Hearing and Answer July 15, 2002, admitting all factual allegations of the Notice except the allegation that a Ralph Hatley was the lessee of the subject property, denying the four alleged violations, and raising as an affirmative defense that the tank at issue was a "farm tank" and thus exempt under ORS 466.710(1)¹ from regulation as an underground storage tank.

The Department filed a Motion for Ruling on Legal Issues December 18, 2003. Ms. Wescott filed her response and her own Motion for Ruling on Legal Issues January 20, 2004. By order issued January 28, 2004, I denied Ms. Wescott's motion and granted the Department's motion, holding that the tank in question was not a "farm tank."

A hearing was scheduled for February 18, 2004, at the Department's office in Portland. Ms. Wescott did not appear for the hearing. Ralph Hatley appeared, indicated that Ms. Wescott had appointed him to represent her, provided a Power of Attorney to that effect, and confirmed that he was not licensed to practice law in Oregon. According to the provisions of ORS 183.457(2)(b), a person cannot be represented by an authorized representative unless the agency "allows, by rule, authorized representatives to appear on behalf of such participants in the type of contested case hearing being conducted." The record included no evidence that the Department had adopted such a rule, so the hearing was cancelled because of Ms. Wescott's failure to appear for the hearing. The Department then issued a Final Order February 18, 2004.

Ms. Wescott, through her attorney, James F. Evans, then filed a Petition for Rehearing and/or Reconsideration and Stay of Enforcement March 31, 2004. By letter issued May 26,

¹ "ORS 466.706 to 466.882 and 466.994 shall not apply to a:

(1) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes."

00078

2004, the Department denied the request for rehearing, but agreed to reconsider its February 18, 2004, Final Order and stay collection pending the reconsideration. The Department referred the matter to the Office of Administrative Hearings December 1, 2004, for a contested case hearing. By Notice of Hearing issued January 20, 2005, the Office of Administrative Hearings set the matter for hearing February 28, 2005. The Department filed a Motion for Ruling on Legal Issues January 28, 2005, serving Ms. Wescott through her attorney at his record address.²

By *ex parte* letter received at the Office of Administrative Hearings February 4, 2005, Mr. Evans sought assignment of a new administrative law judge and a reset of the scheduled hearing date. By letter issued February 7, 2005, the Chief Administrative Law Judge denied the request for reassignment. I then contacted Mr. Evans and the Department's representative by telephone February 8, 2005, to discuss Mr. Evans's reset request. Mr. Evans had not yet received the Chief ALJ's letter denying his request for a new ALJ, so he did not choose to participate. That same day Mr. Evans filed a letter seeking the Chief ALJ's reconsideration of his request for a new ALJ. The Chief ALJ again denied the request by letter issued February 10, 2005.

By *ex parte* telephone call to me February 14, 2005, Mr. Evans renewed his recusal request to me, and I also denied it. Mr. Evans also sought an extension of time to respond to the Department's Motion for Ruling on Legal Issues. I attempted to contact the Department's representative, but she was not available until February 17, 2005, so I did not address Mr. Evans's request for an extension of time.³ I forwarded to the Department's representative an e-mail setting forth the gist of the *ex parte* communication from Mr. Evans, and notified her that we would discuss Mr. Evans's request for an extension of time and for a reset February 17, 2005. I conducted a brief prehearing conference February 17, 2005, with Mr. Evans and the Department's representative participating. Mr. Evans argued his request for an extension of time, noting that he had not actually received the Department's motion until nearly two weeks after it had been mailed because his address had changed. He had not notified the Department of the address change until afterward. I denied the request, since Mr. Evans held sole control over his address and the Department's knowledge of it. I also denied the request for a reset of the hearing, because the hearing notice had been mailed January 20, 2005, Mr. Evans had not sought a reset for more than two weeks, and his request set forth no good cause for the reset.

The sole pending issue is the Department's Motion for Ruling on Legal Issues. Ms. Wescott's original answer admitted to all factual allegations except Mr. Hatley's alleged lessee status, and the Department in its motion stipulates that Mr. Hatley is not the lessee of the subject property. The sole affirmative defense raised by Ms. Wescott is that the tank at issue was a "farm tank," and therefore excluded from the enforcement sought. That issue was addressed by my January 28, 2004, order granting the Department's December 18, 2003, Motion for Ruling on Legal Issues and holding that the subject underground storage tank was not a "farm tank."

² The cover letter included with the motion indicated that Mr. Evans had until "February 14, 2004," to respond to the motion. The year obviously was incorrect, but the day also was incorrect. The Department's motion was mailed January 28, 2005, so the response deadline was February 11, 2005. See, OAR 137-003-0580(2), -0520(8).

³ I suggested that, in the ensuing three days, Mr. Evans diligently work to prepare his response. Nothing was submitted by February 17, and nothing has been received since.

Ms. Wescott has not responded to the Department's motion. The motion's factual allegations are well-supported by its accompanying affidavits and the record as a whole, and therefore are established as true. *See*, OAR 137-003-0580(10). Therefore, no genuine issue as to any material fact exists in this case. The legal conclusions argued in the Department's motion are the sole conclusions that could be reached in light of the un rebutted facts established.⁴ The Department therefore is entitled to a judgment as a matter of law. The Department's motion is granted, and its findings and conclusions are adopted here in their entirety.

FINDINGS OF FACT

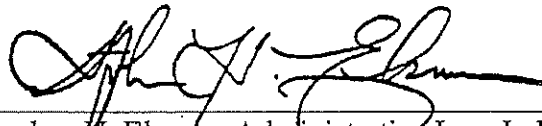
The Department's Findings of Fact are adopted in their entirety.

CONCLUSION OF LAW

The Department's Conclusions of Law are adopted in their entirety.

ORDER

The Department's Motion for Ruling on Legal Issues is granted. I therefore propose that the Department's Notice of Violation, Department Order, and Assessment of Civil Penalty issued June 24, 2002, be affirmed.



Stephen H. Elmore, Administrative Law Judge
Office of Administrative Hearings

MAILING AND ISSUANCE DATE:

February 22, 2005

⁴ The Department did not seek a civil penalty for certain of the violations alleged. Hence, the only potential unaddressed legal issue would be whether Ms. Wescott's civil penalty should be greater than that to which the civil penalty formula otherwise unerringly leads.

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 is 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.

00081

State of Oregon
Department of Environmental Quality

Memorandum

Date: December 22, 2005
To: Environmental Quality Commission
From: Stephanie Hallock, Director *S. Hallock*
Subject: Agenda Item B: Contested Case No. LQ/T-NWR-02-094 in the Matter of Cynthia Wescott (formerly known as Cynthia Gay) regarding December 22, 2005, EQC Meeting.

Appeal to the Environmental Quality Commission (EQC)

On March 24, 2005, Cynthia Wescott (Respondent) appealed the Order on Motion for Ruling on Legal Issue and Proposed and Final Order (Attachment K), which assessed a \$6,072 penalty for four violations of the Department of Environmental Quality (DEQ) underground storage tank regulations.

Key people involved

Cynthia Wescott (also known as Cynthia Rose Gay)	Respondent - property owner and UST permittee
James F. Evans	Attorney for Ms. Wescott
Lawrence Derr	Former Attorney for Ms. Wescott
Ralph Hatley	Ms. Wescott's life partner
Herrington Rose	Inspector, DEQ
Greg Toran	Inspector, DEQ
Susan Greco	Environmental Law Specialist, DEQ
Lynne Perry	Assistant Attorney General, Department of Justice

Background

In 1988, the Environmental Protection Agency promulgated rules requiring that all existing underground storage tanks (UST) be upgraded before December 22, 1998. These rules were subsequently adopted by the Department. (*See OAR Chapter 340, Division 150, pre-2003 version.*)¹ USTs that had not been upgraded by that date needed to be placed into temporary closure (i.e., emptied of fuel) and then permanently decommissioned (i.e., removed from the ground or filled in place) within one year. (*See OAR 340-150-0021, pre-2003 version.*) All persons who decommissioned an UST after December 1998 were required to comply with former OAR 340-150-

¹ On February 14, 2003, revisions to OAR Chapter 340, Division 150 became effective. The changes are not applicable to this matter since the alleged violations occurred prior to the effective date of these new regulations. All citations to "former OAR Chapter 340, Division 150," reference the pre-2003 version.

0166, which required that the permittee and owner of the UST give DEQ both thirty day notice and three working day notice before beginning the decommissioning. The law required that decommissioning be completed by a service provider licensed by DEQ. It also required submission to DEQ of a completed decommissioning checklist within thirty days of completing decommissioning.

Overview of events

Date	Facts	Cite
June 25, 2002	<p>DEQ issued Respondent a Notice of Violation, Department Order and Assessment of Civil Penalty (Notice and Order), which:</p> <ul style="list-style-type: none"> • Alleged that Respondent had violated former OAR 340-150-0021(3) and OAR 340-150-0166(4)(c) by failing to decommission an UST and assessed a civil penalty of \$2,272 for this violation. • Alleged that Respondent had violated former OAR 340-150-0166(3) by failing to provide both thirty day and three working day notice to DEQ before decommissioning an UST and assessed a civil penalty of \$1,800 for this violation. • Alleged that Respondent had violated former OAR 340-150-0166(5)(a) by failing to submit a completed decommissioning checklist within thirty days of decommissioning an UST and assessed a civil penalty of \$2,000 for this violation. • Alleged that Respondent had violated former OAR 340-150-0166(2)(d) by allowing the decommissioning of an UST by a person not licensed by DEQ. DEQ did not assess a civil penalty for this violation. • Ordered Respondent to submit a completed decommissioning checklist to DEQ and to have a qualified third party sample, in the area of the UST, for the presence of a release of petroleum. 	Attachment LL
July 15, 2002	Respondent's attorney at the time, Lawrence Derr, filed an Answer to the Notice and Order. In that Answer, Respondent raised the affirmative defense that the UST in question was a "farm tank," as defined in former OAR 340-150-0010 and thus was not subject to DEQ's UST	Attachment KK

Date	Facts	Cite
	regulations. The Answer admitted all other relevant issues.	
November 19, 2003	Respondent and DEQ were notified of a contested case hearing scheduled for January 14, 2004.	Attachment JJ
November 21, 2003	Susan Greco, DEQ, informed Mr. Ralph Hatley, the Respondent's partner, via telephone, that he could not represent the Respondent at a contested case hearing.	Attachment II
December 15, 2003	DEQ filed a Motion for Ruling on Legal Issues, requesting that Administrative Law Judge (ALJ) Stephen H. Elmore find, as a matter of law, that the UST in question was not a "farm tank."	Attachment HH
December 2003	Respondent requested postponement of the hearing to February 16, 2004, in order to complete discovery and address holiday business obligations. Because February 16 was a holiday, the parties agreed to reschedule the hearing to February 18.	Attachment GG
January 14, 2004	Respondent and DEQ were notified of a contested case hearing scheduled for February 18, 2004.	Attachment FF
January 16, 2004	Respondent filed a Response to DEQ Motion for Ruling on Legal Issues.	Attachment EE
January 28, 2004	ALJ Elmore issued an Order on Motions for Ruling on Legal Issue, finding that the UST in question was not a "farm tank."	Attachment DD
February 18, 2004	Ms. Greco, DEQ, received a letter from Respondent indicating that Mr. Hatley would represent Respondent at the hearing.	Attachment BB
February 18, 2004	A contested case hearing was held. Respondent did not appear at the hearing. Mr. Hatley appeared on Respondent's behalf. ALJ Elmore determined that Mr. Hatley was not the permittee or property owner so, under ORS 183.457, Respondent must be represented by herself or by an attorney. Mr. Hatley requested a continuance, which ALJ Elmore declined to grant on the basis that the hearing date had been scheduled for a considerable period of time. ²	Attachment AA
February 18, 2004	After the hearing, ALJ Elmore received a letter from Respondent indicating that Mr. Hatley would represent Respondent.	Attachment BB

² A written transcript of the February 18, 2004 hearing is included as Attachment AA.

Date	Facts	Cite
February 18, 2004	DEQ issued Findings of Fact, Conclusions of Law and Final Order (Final Default Order) finding that Respondent defaulted by failing to appear at the hearing.	Attachment Z
March 31, 2004	Respondent's attorney James F. Evans filed, with DEQ, a Petition for Rehearing and/or Reconsideration and a Request for a Stay.	Attachment Y
May 26, 2004	DEQ denied the petition for rehearing and the request for a stay but granted the petition for reconsideration.	Attachment X
November 22, 2004	DEQ Director, Stephanie Hallock, agreed to allow Ms. Wescott a hearing and dismissed the Final Default Order.	Attachment W and V
January 20, 2005	Mr. Evans and DEQ were notified of a contested case hearing scheduled for February 28, 2005.	Attachment U
January 25, 2005	ALJ Elmore requested clarification on whether the hearing will address the Petition for Rehearing and/or Reconsideration or whether DEQ has already addressed the issues.	Attachment T
January 28, 2005	DEQ provided ALJ Elmore with a copy of the Final Default Order, DEQ's Order in response to the Petition, and DEQ's letter allowing Ms. Wescott a hearing. Additionally DEQ filed a Motion for Ruling on Legal Issues.	Attachment S
February 3, 2005	Mr. Evans requested that a new ALJ be assigned to the case.	Attachment R
February 7, 2005	Chief ALJ Thomas E. Ewing denied Mr. Evans' request for a new ALJ.	Attachment Q
February 8, 2005	Mr. Evans requested that Mr. Ewing assign a new ALJ to the case.	Attachment P
February 10, 2005	Chief ALJ Ewing denied Mr. Evans' request for a new ALJ.	Attachment O
February 14, 2005	Mr. Evans called ALJ Elmore requesting that ALJ Elmore remove himself from the case. ALJ Elmore denied the request. Additionally, Mr. Evans requested additional time to respond to DEQ's January 28, 2005 Motion.	Attachment N
February 15, 2005	Mr. Evans requested that Mr. Ewing assign a new ALJ to the case.	Attachment M
February 17, 2005	Chief ALJ Ewing denied Mr. Evans' request for a new ALJ.	Attachment L
February 17, 2005	Prehearing conference was held. ALJ Elmore denied Mr. Evans request for additional time to respond to DEQ January	Attachment K

Date	Facts	Cite
	28, 2005 Motion.	
February 22, 2005	ALJ Elmore issued an Order on Motion for Ruling on Legal Issue and Proposed and Final Order granting DEQ's Motion and upholding DEQ's initial Notice and Order. Since this Order resolved all issues in the matter, the hearing scheduled for February 28, 2005, did not occur.	Attachment K
March 24, 2005	Mr. Evans filed a Petition for Commission Review of the Proposed Order.	Attachment J

Summary of ALJ Findings of Fact—see *ALJ Proposed Order [Attachment K]*

Because Respondent failed to respond to the Motion, ALJ Elmore adopted DEQ's Findings of Fact as set forth in its January 2005 Motion for Ruling on Legal Issues (Attachment S).

Date	Facts	Cite
October 29, 1991	Respondent applied for and was issued a permit for an UST located at 29388 S.E. Heiple Road, Eagle Creek, Oregon.	Exhibit C to DEQ Motion (Attachment S)
October 1, 1997	DEQ sent the Respondent a mailing indicating that the UST needed to be upgraded or temporarily closed prior to December 1998.	Exhibit D to DEQ Motion (Attachment S)
August 15, 1998	DEQ sent the Respondent a mailing indicating that the UST needed to be upgraded or temporarily closed prior to December 1998.	Exhibit D to DEQ Motion (Attachment S)
November 11, 1998	DEQ sent the Respondent a mailing indicating that the UST needed to be upgraded or temporarily closed prior to December 1998.	Exhibit D to DEQ Motion (Attachment S)
January 13, 1999	DEQ sent the Respondent a mailing indicating that the UST needed to be permanently decommissioned prior to December 22, 1999.	Exhibit D to DEQ Motion (Attachment S)
August 20, 1999	DEQ sent the Respondent a mailing indicating that the UST needed to be permanently decommissioned prior to December 22, 1999.	Exhibit D to DEQ Motion (Attachment S)
December 6, 1999	DEQ sent the Respondent a mailing indicating that the UST needed to be permanently decommissioned prior to December 22, 1999.	Exhibit D to DEQ Motion (Attachment S)
February 23, 2000	DEQ sent the Respondent a Notice of Noncompliance	Exhibit G to DEQ

Date	Facts	Cite
	(NON) informing her that she had violated environmental law by failing to permanently decommission the UST.	Motion (Attachment S)
October 30, 2000	DEQ sent the Respondent a NON informing her that she had violated environmental law by failing to permanently decommission the UST.	Exhibit G to DEQ Motion (Attachment S)
November 14, 2000	Greg Toran, DEQ, inspected the property and the UST. At that time, the UST had not been permanently decommissioned.	Exhibit G to DEQ Motion (Attachment S)
December 5, 2000	Mr. Toran sent the Respondent a letter, allowing her until June 30, 2001, to permanently decommission the UST. The letter outlined the requirements for decommissioning the UST, including requirements to give notice before beginning and to submit a checklist after completing the decommissioning.	Exhibit G to DEQ Motion (Attachment S)
January 28, 2002	DEQ sent the Respondent a NON informing her that she had violated environmental law by failing to permanently decommission the UST.	Exhibit F to DEQ Motion (Attachment S)
February 6, 2002	Ralph Hatley contacted Herrington Rose, DEQ Inspector, via telephone. Mr. Hatley informed Mr. Rose that he "removed the UST without notice."	Exhibit F to DEQ Motion (Attachment S)
March 14, 2002	DEQ sent Respondent a NON informing her that she had violated environmental law by failing to: <ul style="list-style-type: none"> - Provide notice prior to permanently decommissioning an UST; - Submit a completed decommissioning checklist within 30 days after completing the decommissioning; and - Pay an annual compliance fee. 	Exhibit F to DEQ Motion (Attachment S)
June 25, 2002	DEQ issued the Respondent a Notice of Violation, Department Order and Assessment of Civil Penalty.	Attachment LL
September 6, 2002	DEQ received a completed decommissioning checklist.	Exhibit F to DEQ Motion (Attachment S)

ALJ Conclusions of Law

The ALJ found that, because Respondent failed to respond to DEQ's January 28, 2005, Motion for Ruling on Legal Issues, there was no issue as to any material fact in the case. As such, the

findings of fact and conclusions of law set forth in that Motion and the Notice and Order were upheld.

Issues on Appeal

In the Exceptions and Brief (Attachment I), the Respondent requests that the Commission provide the following relief:

- (1) Assignment of a new administrative law judge;
- (2) A new hearing;
- (3) Reversal of ALJ Elmore's ruling that the UST was not a "farm tank" or, alternatively, a new hearing; and
- (4) Assignment of a new Environmental Law Specialist.

In its Answering Brief (Attachment E), DEQ requests that the Commission uphold the Proposed Order.

Summary of Exceptions and Response

Respondent's first exception

Respondent requests assignment of a new ALJ. Respondent argues that because ALJ Elmore ruled that her business partner could not represent her at the hearing in 2004, ALJ Elmore is prejudiced and not impartial.

DEQ response to first exception

The decision regarding whether a request for a new ALJ should be granted resides with the Chief Administrative Law Judge. The first request for a new ALJ must be timely. Any subsequent requests must also be supported by "good cause." In this case, Chief ALJ Ewing ruled correctly that none of Respondent's requests were either timely or supported by good cause. Regardless, assignment of a new ALJ is irrelevant unless the Commission grants a new hearing under either Exceptions 2 or 3.

Respondent's second exception

Respondent takes exception to ALJ Elmore's ruling denying her request for a postponement of the contested case hearing. Respondent offers two reasons why the hearing should have been postponed. First, Respondent's counsel was unable to take action because he had not paid his professional liability insurance. Second, Respondent's counsel was not allowed sufficient time to respond to DEQ's January 2005 Motion.

DEQ response to second exception

The ALJ has authority to postpone a hearing if the requestor shows "good cause." Although each reason showed poor planning on Respondent's counsel's behalf, neither reason constituted good cause.

Respondent's third exception

Respondent requests that ALJ Elmore's Order finding that the UST was not a "farm tank" be reversed or, alternatively, that the EQC remand the case for a hearing on this issue because she "was not afforded a hearing to present evidence."

DEQ response to third exception

The Attorney General rules governing contested cases allow for some of the issues in a case to be resolved by a Motion for Ruling on Legal Issues. Based on evidence provided by DEQ and the Respondent, ALJ Elmore found that the property was not devoted to the production of crops and thus the UST was not a "farm tank." The Respondent was provided with two opportunities, in response to DEQ Motions, to provide evidence on this issue. Respondent did provide evidence in the first instance but failed to do so the second time she was given an opportunity.

Respondent's fourth exception

Respondent requests that the Commission assign a new environmental law specialist (ELS) to represent DEQ in this matter because the ELS is prejudiced against her.

DEQ response to fourth exception

Respondent misunderstands the role of an ELS in a case. The ELS represents the Department, not Respondent. Respondent has provided no evidence that the ELS presently assigned to this matter has undermined DEQ process or procedures. Additionally, the ELS has limited authority. All decisions of the ELS in this case were approved by DEQ management. Assignment of the ELS is within the sole discretion of DEQ.

EQC authority

The Commission has the authority to hear this appeal under OAR 340-011-0575.

The Department's contested case hearings must be conducted by an ALJ.³ The Proposed Order was issued under current statutes and rules governing the ALJ Panel.⁴

Under ORS 183.600 to 183.690, the Commission's authority to change or reverse an ALJ's proposed order is limited.

The most important limitations are as follows:

- (1) The Commission may not modify the form of the ALJ's Proposed Order in any substantial manner without identifying and explaining the modifications.⁵

³ ORS 183.635.

⁴ ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.

⁵ ORS 183.650(2).

As noted above, the assignment of Environmental Law Specialists is within the sole discretion of DEQ. If the Commission remands the matter for any of the above reasons, it may request that DEQ assign a new Environmental Law Specialist.

Attachments

- A. Letter from Cat Skaar to Respondent, dated October 26, 2005.
- B. Letter from Mr. Evans to the Commission, dated August 12, 2005.
- C. Letter from Cat Skaar to Mr. Evans, dated July 22, 2005.
- D. Letter from Cat Skaar to Lynne Perry, dated July 22, 2005.
- E. DEQ's Amended Answering Brief and cover letter, dated July 19, 2005.
- F. DEQ's Answering Brief and cover letter, dated June 27, 2005.
- G. Letter from Jane Hickman to Susan Greco, dated May 12, 2005.
- H. Letter from Susan Greco to Jane Hickman, dated May 9, 2005.
- I. Respondent's Exceptions and Brief, dated May 2, 2005.
- J. Respondent's Petition for Commission Review, dated March 24, 2005.
- K. Order on Motion for Ruling on Legal Issue and Proposed and Final Order, dated February 22, 2005.
- L. Letter from Mr. Ewing to Mr. Evans, dated February 17, 2005.
- M. Letter from Mr. Evans to Mr. Ewing, dated February 15, 2005.
- N. Email from ALJ Elmore to Ms. Greco, dated February 14, 2005.
- O. Letter from Mr. Ewing to Mr. Evans, dated February 10, 2005.
- P. Letter from Mr. Evans to Mr. Ewing, dated February 8, 2005.
- Q. Letter from Mr. Ewing to Mr. Evans, dated February 7, 2005.
- R. Letter from Mr. Evans to Ann Redding, dated February 3, 2005.
- S. DEQ's Motion for Ruling on Legal Issues, cover letter and attached exhibits A through G, dated January 28, 2005.
 - A. Notice of violation, Department Order and Assessment of Civil Penalty.
 - B. Request for Hearing and Answer.
 - C. Motion for Ruling on Legal Issues, dated December 15, 2003; Response and Motion for Ruling on Legal Issues, dated January 16, 2004; and Order on Motions for Ruling on Legal Issues, dated January 28, 2004.
 - D. Affidavit of Stephanie Holmes and attached Exhibits D1 through D6.
 - E. Affidavit of Leslie A. Carlough and attached Exhibit E1.
 - F. Affidavit of Herrington Rose and attached Exhibits F1 through F4.
 - G. Affidavit of Greg Toran and attached Exhibits G1 through G5.
- T. Letter from ALJ Elmore to Ms. Greco and Mr. Evans, dated January 25, 2005.
- U. Notice of Hearing, dated January 20, 2005.
- V. Letter from Director Hallock to Respondent and Mr. Evans, dated November 22, 2004.

- W. Memorandum from the Office of Compliance and Enforcement to Director Hallock, dated September 27, 2004.
- X. Letter from Director Hallock to Mr. Evans, dated May 26, 2004.
- Y. Petition for Rehearing and/or Reconsideration and Stay of Enforcement, dated March 30, 2004.
- Z. Findings of Fact, Conclusions of Law and Final Order, dated February 18, 2004.
- AA. Transcript of Hearing conducted on February 18, 2004.
- BB. Letter from Respondent to ALJ Elmore, dated February 17, 2004 (2 copies enclosed).
- CC. Order on Respondent's Request for Subpoena, dated February 12, 2004, Respondent's Requests for Subpoenas, dated February 10 and 12, 2004, and the Department's Response, dated February 12, 2004.
- DD. Order on Motion for Ruling on Legal Issue, dated January 28, 2004.
- EE. Respondent's Answer and Motion for Ruling on Legal Issues, cover letter and attached Exhibits, dated January 16, 2004.
 - A. Affidavit of Cynthia Gay.
 - B. Affidavit of John Bresko.
 - C. Clackamas County Assessor Map.
 - D. Aerial Photo.
 - E. Letter from Clackamas County Planning Department.
- FF. Notice of Hearing dated January 14, 2004.
- GG. Letter to ALJ Elmore from Respondent, dated December 19, 2003.
- HH. DEQ's Motion for Ruling on Legal Issues, cover letter and attached Exhibits, dated December 15, 2003.
 - A. Underground Storage Tank Permit Application.
 - B. Affidavit of Greg Toran.
 - C. Clackamas County Property Detail.
 - D. Secretary of State, Corporation Division Business Name Information for Skydive, Incorporation.
 - E. Secretary of State, Corporation Division Business Name Information for Skydive Eagle Creek.
 - F. Aerial Maps.
- II. Notice of Hearing, dated November 19, 2003.
- JJ. Phone note regarding conversation with Mr. Hatley, dated November 21, 2003.
- KK. Respondent's Request for Hearing and Answer, dated July 15, 2002.
- LL. Notice of Violation, Department Order and Assessment of Civil Penalty, dated June 25, 2002.

Additional Information

OAR Chapter 340, Division 150, pre-2003 version
Berwick v. AFSD, 74 Or App 460 (1985)

Agenda Item B: Contested Case No. LQ/T-NWR-02-094 in the Matter of Cynthia Wescott
(formerly known as Cynthia Gay)
December 22, 2005 EQC Meeting
Page 13 of 13

Campbell v. Board of Medical Examiners, 16 Or App 381 (1974)

Report Prepared by:	Cat Skaar
	Assistant to the Commission
Phone:	(503) 229-5301

- (2) The Commission may not modify a recommended finding of historical fact unless it finds that the recommended finding is not supported by a preponderance of the evidence.⁶ Accordingly, the Commission may not modify any historical fact unless it has reviewed the entire record or at least all portions of the record that are relevant to the finding.
- (3) The Commission may not consider any new or additional evidence, but may only remand the matter to the ALJ to take the evidence.

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

Alternatives

The Commission is faced with three distinct inquiries:

- (1) Whether Ms. Wescott's request for a new ALJ was improperly denied;
- (2) Whether Ms. Wescott's request for a continuance was improperly denied; and
- (3) Whether the ALJ erred in concluding that the UST was not a "farm tank."

1. With respect to the Chief ALJ's determination that Ms. Wescott's request for a new ALJ was not supported by "good cause," the Commission may:

- a. Affirm the decision, as requested by DEQ.
- b. Modify the decision, but only if the Commission finds that the determination regarding good cause was not supported by a preponderance of the evidence in the record.
- c. Remand the matter (and reopen the record on its own motion) to take additional evidence regarding the issue of "good cause" if the Commission determines that resolution of the issue requires new or additional evidence.

2. With respect to the ALJ's determination that Ms. Wescott's request for a continuance was not supported by "good cause," the Commission may:

- a. Affirm the decision, as requested by DEQ.
- b. Modify the decision, but only if the Commission finds that the ALJ determination regarding good cause was not supported by a preponderance of the evidence in the record.
- c. Remand the matter (and reopen the record on its own motion) to take additional evidence regarding the issue of "good cause," if the Commission determines that it lacks any evidence relevant to the issue.

⁶ ORS 183.650(3). A historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist either before or at the time of the hearing.

⁷ OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.

3. With respect to the ALJ's legal conclusion that the UST was a "farm tank," the Commission may:
- Affirm the ALJ's legal conclusion that the subject UST was not a "farm tank."
 - Reverse the ALJ's legal conclusion that the subject UST was not a "farm tank," if it determines that the ALJ misapplied the applicable legal standard, but only if the Commission explains the basis for its decision.
 - Reverse the ALJ's legal conclusion that the subject UST was not a "farm tank," if it determines that the preponderance of the evidence supports the opposite conclusion, but only if the Commission explains the basis for its decision.
 - Remand the matter to take additional evidence on this issue.

Given the alternative scenarios above:

If the Commission affirms the ALJ's legal conclusion on the farm tank issue and affirms the ALJ determinations regarding the absence of "good cause" for requesting a continuance and requesting a new ALJ, the Commission should uphold the Proposed Order.

If the Commission modifies the Chief ALJ's determination that the request for a new ALJ was not supported by "good cause" based on a preponderance of the evidence in the record, it should remand the matter for a new hearing before a new ALJ.

If the Commission modifies only the ALJ's determination that the request for a continuance was not supported by "good cause" based on a preponderance of the evidence in the record, it should remand the matter for further hearing before ALJ Elmore, the scope of which will be determined by its ruling on the "farm tank" issue.⁸

If the Commission determines that the ALJ's legal conclusion on the farm tank issue was not correct, it should either:

- reverse the ALJ's decision, if it determines that the ALJ either misapplied the law or misapplied the facts (i.e., the preponderance of the evidence in the record supports an opposite conclusion); or
- remand the matter for additional evidence on the farm tank issue (further hearing to be consistent with its other rulings here).

⁸ Note: In her Answer, Ms. Wescott admitted all relevant allegations, but raised the affirmative defense that the UST was a "farm tank." If the Commission affirms both the Chief ALJ's decision that the request for a new ALJ was not supported by good cause and the ALJ's legal conclusion that the tank was a farm tank, there will be no issues for resolution in a further hearing. Thus, whether the request for a continuance was supported by good cause or not would be moot.



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

October 26, 2005

Via Certified and U.S. Mail

James F. Evans
Attorney at Law
200 S. W. Carey Lane
Portland, OR 97219

Susan Greco
Environmental Law Specialist
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390

RE: EQC appeal scheduled
Cynthia Westcott (formerly Cynthia Gay)
OAH Case No. 11905
DEQ Case No. LQ/T-NWR-02-094

The appeal in the above referenced case has been set for the **December 22, 2005**, Environmental Quality Commission meeting, which will begin at 9:00 a.m. The meeting will be held at the Department of Environmental Quality Headquarters Building at 811 SW Sixth Avenue, Portland. As soon as the meeting agenda and Commission record for this case are available, I will forward these to you.

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

If you have any questions or need special accommodations for the meeting, please contact me at (503) 229-5301 or (800) 452-4011 ex. 5301 within the state of Oregon or by e-mail at skaar.cathy@deq.state.or.us.

Sincerely,

Cat Skaar
Assistant to the Commission

cc: Deborah Nesbitt, DEQ
Lynne Perry, Oregon Department of Justice

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DEC 1 2005

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon
503-636-4995

RECEIVED
AUG 12 2005

DEPT. OF ENVIRONMENTAL QUALITY

August 12, 2005

Environmental Quality Commission
811 S.W. Sixth Ave.
Portland, Oregon 97204

RE: Cynthia Wescott (formerly Cynthia Gay)
OHA Case No. 119055
DEQ Case No. LQT/-NWR-02-094

RESPONSE TO AMENDED ANSWER

TO THE COMMISSION:

THE BASICS

Ms. Wescott has a right to a hearing, so far she has never had an actual hearing. Yes, that is right with all the procedure so far she has never been able to appear before a decision maker. "In Hell there will be nothing but law, and due process will be meticulously observed." The department's position can be thus summed up. They use the law as a sword, but the law in administrative hearings is in reality a shield. The Department not only misstates the spirit of the law, but also the letter of the law.

THE LAW

The land mark case is BERWICK V. AFSD, 74 OrApp460(1985) This case has never been overruled and The Commission needs to read it because it spells out what obligations must be followed. This case states the petitioner is entitled to "full and fair inquiry" and this holding is reflected in present statute ORS 183.415(10) which states "The officer presiding at the hearing shall ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues..." Another case, CAMBELL V. BOARD OF MEDICAL EXAMINERS 160OrApp381(1974) states "Thus both the appearance and the reality of the hearing officer neutrality is crucial to the integrity of contested case process." BERWICK goes on "In short, the claimant and agency do not become total adversaries until the agency makes an adverse final decision and the claimant seeks judicial review." Petitioner also suggests Willamette Law Review vol.22 page 355 (1986) as a good exposition of the issues this case raises because the petitioner did not even get a hearing. BERWICK states "... the requirement of a full and fair hearing is implicit in the very right to a hearing..." ORS 183.450(1) states "all reliable evidence is admissible" what this means is the proceeding is not a court of law, but an equitable proceeding; in other words what is fair is the primary objective. BERWICK again, the ALJ "aims both at helping...(agency)...make the best decision possible and assuring the claimant a fair and full hearing." further it states remand is required when "Petitioner has been denied the full and fair hearing contemplated by the constitution, the statute and the rule.

THE FACTS

Petitioner gave full notice she would be represented by her business partner (Department acknowledges Mr. Hatley is her business partner in their Amended Answer). ORS183.457 states that lay representation shall be allowed, section (5) defines "authorized representative" as "participating partnership" Mr. Hatley is petitioners partner. ORS183.457 also states no agency rule shall preclude lay representation. Why is this so important? It is because not only did the ALJ not follow the law, but more importantly he violated ORS183.415(10) because he did not allow a continuance so either petitioner could get an attorney or appear herself for a hearing. To say petitioner is in default is manifestly not making a full and fair inquiry. Petitioner is right to feel this judge can not be fair after that kind of treatment. The actions of the ALJ subsequent only goes to show he was biased because a request for a continuance was reasonable, but it was denied.

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THE CONCLUSION

The way to settle this situation is to allow a new hearing with new ALJ and a new Envi. Spec.
At the end of the day does the commission want it be known that what they consider fair is no hearing and a
"participating partnership" not able to get its day before a decision maker.

JS | James F. Evans

James F. Evans
Attorney at law

CC. Susan Greco



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 22, 2005

James F. Evans
Attorney at Law
200 S. W. Carey Lane
Portland, OR 97219

RE: Request for extension
Cynthia Westcott (formerly Cynthia Gay)
OAH Case No. 11905
DEQ Case No. LQ/T-NWR-02-094

Dear Mr. Evans:

The Environmental Quality Commission (EQC) has approved a request from the Department of Justice to file the enclosed Amended Answering Brief in the above-referenced matter. The Amended Answering Brief dated July 19, 2005, supersedes the Answering Brief that the Department of Environmental Quality filed with the Commission on June 27, 2005. You now have 20 days (from the date the Amended Answering Brief was filed) to file any Reply Brief. Your Reply Brief will be filed on time if received by the Department on or before August 8, 2005. Please send your reply to the following address:

Environmental Quality Commission
c/o Cat Skaar, EQC Assistant
811 SW 6th Avenue
Portland, Oregon 97204.

If you have any questions, please contact me at (503) 229-5301 or by e-mail at skaar.cathy@deq.state.or.us. Thank you.

Sincerely,

Cat Skaar
Assistant to the Commission

Enclosure

c: Susan Greco, DEQ
Lynne Perry, DOJ

00022



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 22, 2005

Ms. Lynne Perry
Assistant Attorney General
Natural Resources Section
Department of Justice, General Counsel Division
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201

Re: In the Matter of: Cynthia (Gay) Westcott
DEQ No. LQ/T-NWR-02-094

Dear Ms. Perry:

The Environmental Quality Commission has received your July 19, 2005, request for permission to file an Amended Answering Brief in the above-referenced matter. The Commission has granted your request. The Amended Answering Brief, dated July 19, 2005, supersedes the brief that the Department of Environmental Quality filed with the Environmental Quality Commission on June 27, 2005. Thank you.

Sincerely,

Stephanie Hallock
Director

Enclosure

c: James Evans, Attorney for Petitioner
Susan Greco, DEQ
Cat Skaar, DEQ

00025



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

July 19, 2005

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

Re: In the Matter of: Cynthia (Gay) Westcott
DEQ No. LQ/T-NWR-02-094

Dear Director Hallock:

By this letter, we request permission to file an Amended Answering Brief in the above-referenced matter. The amended brief is attached. The amended brief would supercede and replace the brief filed by the Department with the Environmental Quality Commission on June 27, 2005. We expect that Petitioner would then have the full twenty days from the date the Amended Answering Brief is accepted for filing in which to file any Reply Brief.

Thank you for your consideration.

Sincerely,

Lynne Perry
Assistant Attorney General
Natural Resources Section

LAP:lss/GENN2837.DOC

Enclosure

c: James Evans, Attorney for Petitioner
Susan Greco, DEQ
Cat Skaar

00028

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:) DEPARTMENT'S AMENDED
CYNTHIA (GAY) WESCOTT,) ANSWERING BRIEF TO PETITIONER'S
PETITIONER) EXCEPTIONS AND BRIEF
NO. LQ/T-NWR-02-094
WASHINGTON COUNTY

The Department of Environmental Quality (the Department) submits this Amended Answering Brief to the Environmental Quality Commission (Commission) in response to Petitioner's Exceptions and Brief.

I. INTRODUCTION

This case was handled, as are all of the Department's contested case proceedings, by the Office of Administrative Hearings,¹ which assigned an Administrative Law Judge (ALJ) to hear the matter. The Department was represented, as in all of the Department's contested case proceedings, by an Environmental Law Specialist (ELS). A hearing was held on February 18, 2004, but Petitioner failed to appear and a Default Final Order was issued against her. The Department later granted Petitioner's Petition for Reconsideration and another hearing was set for February 28, 2005. That hearing was, however, rendered unnecessary by the Department's successful legal motion (to which Petitioner failed to respond). Petitioner nonetheless asserts before the Commission that she has somehow been deprived of her procedural rights. She not only requests a new hearing, but also a new administrative law judge and a new environmental law specialist. She also takes issue with the legal ruling against her.

II. COMMISSION ACTION REQUESTED

The Department requests that the Commission issue a Final Order upholding Judge Elmore's Order on Motion for Ruling on Legal Issue and Proposed and Final Order, dated February 22, 2005 (Proposed Order).

¹ When this matter commenced the Office of Administrative Hearings was known as the Hearing Officer Panel. The Panel was renamed in 2003.

III. CASE HISTORY

The Department issued Petitioner, Cynthia Gay (now Wescott), a Notice of Violation, Department Order and Assessment of Civil Penalty (Notice) on June 25, 2002. The Notice alleged four violations of the Department's underground storage tank (UST) rules and assessed civil penalties in the amount of \$6,072. Petitioner's then attorney filed her answer and request for hearing on July 15, 2002. Her answer expressly admitted all of the relevant factual findings but raised the affirmative defense that the subject tank was not an "underground storage tank" and was instead an exempt "farm tank."² The matter was referred to the Office of Administrative Hearings in September 2003, after an extended period of negotiation. The contested case hearing was set for January 14, 2004.

On December 15, 2003, the Department filed a Motion for Ruling on Legal Issues (Motion), requesting a ruling that the underground storage tank in question was not a "farm tank," as argued by Petitioner. Petitioner then requested that she be allowed until mid-January to respond to the Motion and that the hearing be postponed until February 2004. The Department agreed to give Petitioner additional time to respond to the Motion and agreed to reschedule the hearing for a later date. Petitioner filed her response to the Department's Motion on January 16, 2004. On January 28, 2004, ALJ Stephen Elmore ruled in the Department's favor on the Motion, finding that the underground storage tank in question was not a "farm tank."

On February 18, 2004, the contested case hearing was convened as scheduled but Petitioner failed to appear herself or through an attorney.³ As a consequence, a Default Final Order was entered against Petitioner on that date.

² The Answer denied only the statement in the Notice that a gentleman named Mr. Hatley was the lessee of the subject property. DEQ has since stipulated that Mr. Hatley was not the lessee of the subject property. Mr. Hatley's status as lessee is not, however, relevant to the case before the Commission.

³ OAR 137-003-0550(1) (natural persons must represent themselves or be represented by an attorney unless otherwise authorized by law); OAR 340-011-0515 (authorized representative allowed to appear for other than natural person). In November 2003, DEQ advised Mr. Hatley that Petitioner would need to represent herself or be represented by an attorney at the hearing.

1 On March 31, 2004, Petitioner's second attorney filed a Petition for Reconsideration and
2 Rehearing and a Request for a Stay. The Director granted the Petition for Reconsideration but
3 denied the Request for Rehearing and Request for a Stay. In response to the Petition for
4 Reconsideration, in November 2004, the Director agreed to allow Petitioner another contested case
5 hearing in the matter and referred the matter back to the Office of Administrative Hearings on
6 December 1, 2004.

7 The Office of Administrative Hearings sent notice of the second hearing on January 20,
8 2005. The new hearing was set for February 28, 2005. On January 28, 2005, the Department again
9 filed a Motion for Ruling on Legal Issues, this time arguing that because the only legal issue in the
10 case, namely whether the tank was a "farm tank," had already been resolved and there were no
11 relevant factual issues in dispute, that the motion should be granted.⁴

12 Rather than reply to the pending motion, Petitioner's attorney requested that the Office of
13 Administrative Hearings assign a new ALJ and postpone the hearing date. This initial request was
14 received on February 4, 2005. (Exhibit A.) Chief Administrative Law Judge Thomas Ewing
15 denied the request for a new ALJ on February 7, 2005, because it was untimely. (Exhibit B.) On
16 February 8, Petitioner's attorney again requested a new ALJ, and Judge Ewing again denied the
17 request both because it was untimely and because it did not evidence good cause. (Exhibits C and
18 D.) Petitioner's attorney renewed his request for a new ALJ for a third time on February 15, and
19 Judge Ewing again denied the request. (Exhibits E and F.)

20 On February 17, 2005, a pre-hearing conference was held via telephone to allow Petitioner
21 an opportunity to present argument in support of her request to postpone the February 28, 2005,
22 hearing and to have additional time to respond to the Department's pending motion. At the close of
23 the pre-hearing conference Judge Elmore denied both requests.

24
25
26 ⁴ The Department also attempted to serve the motion on Petitioner's attorney by facsimile but his phone had been
27 disconnected with no forwarding number. The motion was then mailed to Petitioner's attorney at his last known address
with the Oregon State Bar.

1 After Petitioner failed to respond to the Department's January 25 motion, Judge Elmore
2 issued the Proposed Order, thereby rendering the contested case hearing unnecessary because it
3 resolved the only relevant issue not already admitted by Petitioner.

4 Petitioner then petitioned the Commission for review of the Proposed Order.

5 **IV. APPLICABLE LAW**

6 The Commission's authority to review and reverse the decision of an ALJ is subject to
7 certain constraints, the most important of which are as follows:

8 (1) The Commission may modify the form of a Proposed Order but may not do so in any
9 "substantial manner" without identifying and explaining the modifications.⁵

10 (2) The Commission may modify a recommended finding of "historical fact" but only if it
11 finds that the recommended finding is not supported by a preponderance of the evidence in the
12 record.⁶ The Commission may not modify an historical fact unless it has reviewed the entire
13 record or at least those portions of the record relevant to the finding.

14 (3) The Commission may not consider any new or additional evidence on review. If the
15 Commission decides that new or additional evidence is needed, it may remand the matter to the
16 ALJ to take the additional evidence.⁷ Petitioner has not, however, filed a motion to submit new
17 or additional evidence in this matter.

18 **V. DEPARTMENT'S RESPONSE TO PETITIONER'S EXCEPTIONS**

19 In her Exceptions and Brief, Petitioner requests the following relief: (1) assignment of a
20 new administrative law judge; (2) a new hearing; (3) reversal of Judge Elmore's ruling on the "farm
21 tank" issue, or in the alternative, a new hearing; and (4) assignment of a new Environmental Law
22 Specialist.

23 ///

24
25 ⁵ OAR 137-003-0665(3). Any "substantial manner" refers to a modification having the effect of changing the
outcome or basis for the order or changing a finding of fact.

26 ⁶ OAR 137-003-0665(4). A "historical fact" is a determination that an event did or did not occur in the past or that a
circumstance or status did or did not exist either before or at the time of the hearing.

27 ⁷ OAR 137-003-0655(5); OAR 340-011-0575(6).

1 **Exception No. 1 (assignment of a new administrative law judge):**

2 Petitioner questions Judge Elmore's impartiality because Judge Elmore ruled against her on
3 a legal matter. (Exhibit E.)⁸ For that reason, Petition requests assignment of a new ALJ.

4 In 1999, the Oregon Legislature established the Hearing Officer Panel, now the Office of
5 Administrative Hearings, to address the perceived or actual bias when an agency staff person serves
6 as the adjudicator in a case. An ALJ is now assigned to each matter by the Office of Administrative
7 Hearings. ORS 183.615 to 183.625. The Department does not employ its own hearing officers or
8 use agency staff or a member of an agency's board to conduct hearings. Hearings are governed by
9 the procedural rules adopted by the Attorney General. ORS 183.630.

10 The procedure for requesting a new ALJ is set forth in OAR 471-060-0005. Such requests
11 are decided by the Chief Administrative Law Judge. First requests are automatically granted *unless*
12 the requesting party had a "reasonable opportunity" to request a change of ALJ but did not do so.
13 OAR 471-060-0005(3) and (4).⁹ "'Reasonable opportunity' is determined under the totality of
14 circumstances." OAR 471-060-0005(4). Subsequent requests for assignment of a new ALJ must
15 be timely, but must also be supported by a showing of "good cause."¹⁰

17 ⁸ It is probably worth noting that Petitioner's objection to Judge Elmore relates not to his ruling on the "farm tank"
18 issue, but on his determination that Petitioner needed to either represent herself or be represented by an attorney at
19 the January 2004 hearing. (Petitioner sent her business partner to represent her.) Judge Elmore was correct in
20 determining that this was inappropriate. ORS 183.457 allows parties other than the agency to be represented by an
21 "authorized representative" *only* if the agency, by rule, allows such representation. The Department's rules allow
22 authorized representatives to appear on behalf of nonnatural entities, such as a "corporation, partnership, limited
23 liability company, unincorporated association, trust, and government body." OAR 340-011-0515. A broader rule
24 (i.e., one allowing an authorized representative to appear on behalf of a natural person) would be inconsistent with
25 ORS 183.457. That statute limits authorized representatives to "a member of a participating partnership, an
26 authorized officer or regular employee of a participating corporation, association or organized group, or an
27 authorized office or employee of a participating governmental authority other than a state agency." ORS 183.457(5).
Thus the Department is prohibited by statute from adopting a rule allowing an authorized representative to appear
on behalf of a natural person. *See also*, OAR 137-003-0550(1) and (2) (distinguishing between representation of
natural persons and other entities).

⁹ "[N]o request shall be granted if a party or agency had a reasonable opportunity to request a change of
administrative law judge but did not do so." OAR 471-0060-0005(4).

¹⁰ Good cause is "any reason why an administrative law judge's impartiality might reasonably be questioned. It
includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or
any other interest that could be substantially affected by the outcome of the proceeding." OAR 471-060-0005(2)(b).

1 The Chief ALJ was correct as a matter of law in denying Petitioner's requests for a new
2 ALJ. The Chief ALJ initially denied Petitioner's first request because it was not made until two
3 weeks after notice identifying the ALJ was sent to her. The Chief ALJ determined that "[t]his is not
4 a 'reasonable opportunity' under all the circumstances." (Exhibit B.)

5 Moreover, in response to Petitioner's second request, the Chief ALJ noted that a timely
6 request should actually have been made over a year earlier:

7 "When I originally denied your request, I had not properly understood that some time ago
8 Judge Elmore had actually convened the hearing. A timely request would have been one
9 made shortly after notice of the *initial* assignment of Judge Elmore." (Exhibit D; emphasis
added.)

10 The Chief ALJ also determined that the second request was not supported by "good cause."
11 Petitioner sought a new ALJ because she disagreed with a legal ruling Judge Elmore made during
12 the first hearing. The Chief ALJ properly evaluated the request under the definition of "good
13 cause" in OAR 471-060-0005(2)(b) and determined that Judge Elmore's ruling did not constitute
14 "personal bias or prejudice" satisfying the "good cause" standard. (Exhibit D.)

15 Finally, the Chief ALJ was also correct in denying Petitioner's third request. As the Chief
16 ALJ noted in his February 17, 2005 letter:

17 I frequently get requests from both agencies and private citizens asking for the
18 recusal of an administrative law judge long after the initial assignment. The reason
19 generally, as in your case, is that the judge ruled against the party in an interim
20 order. With 40,000 cases per year, it would be impossible for the Office of
Administrative Hearings to operate efficiently and, not least, fairly if I were to
reassign judges every time they issue orders which agencies or parties do not like.
(Exhibit F.)

21 In sum, the Chief ALJ made the right decision. Petitioner's first, second, and third
22 requests were all subject to the same underlying requirement—that they be timely. There is
23 substantial evidence in the record that Petitioner did not seek assignment of a new ALJ in a
24 timely fashion despite having a reasonable opportunity to do so. Although "good cause"
25 would not save an untimely request, the Chief ALJ was also correct when he determined
26 that Petitioner had not established "good cause" to assign a new ALJ. This determination is
27 also supported by substantial evidence in the record. Further, assignment of a new ALJ

1 need only be addressed if the Commission grants a new hearing as requested in Petitioner's
2 second and third exceptions.

3 **Exception No. 2 (denial of request to postpone second hearing):**

4 Petitioner takes exception with the ALJ's ruling denying her request that the
5 February 2005 contested case hearing be postponed. The ALJ made the correct decision on
6 this issue as well.

7 The ALJ is given the authority to postpone a hearing only (1) for good cause, or (2) by
8 agreement of the agency. OAR 137-003-0525. "Good cause" refers to a legally sufficient reason.
9 Black's Law Dictionary, 235 (8th ed. 2004). The burden is on Petitioner to establish good cause.
10 *Id.*

11 Counsel for Petitioner offers two reasons why the hearing should have been postponed as
12 requested, neither of which constitute "good cause:"

13 (1) Counsel "could not take action due to a legal disability." (He had not paid his
14 professional liability insurance.) (Exceptions and Brief at 2; Exhibit C.)

15 (2) Counsel "could not take action * * * due to not getting the other sides [sic] paper
16 work." (He did not receive the Department's January 28, 2005 Motion at the same time it was filed
17 with the Office of Administrative Hearings.) (Exceptions and Brief at 2.)

18 The reasons given constitute poor planning but do not constitute "good cause." The second
19 reason may warrant some elaboration, however. As an initial matter, the hearing was still over two
20 weeks away when Counsel received the motion -- which would seem ample time to prepare given
21 that there were no issues remaining in the case.

22 More importantly, the delay in receiving the motion was solely attributable to Counsel's
23 own failure to timely update his change of address and telephone information with the Office of
24 Administrative Hearings, the Department, or the Oregon State Bar as he was required to do. *See*
25 OAR 137-003-0520(6) and Oregon State Bar Rules of Procedure, Rule 1.11. Thus, despite a
26
27

1 diligent effort to serve its motion, the Department was unable to do so until after it received the
2 change of address on February 7, 2005.¹¹

3 In sum, Petitioner has not shown good cause for postponing the hearing. The evidence in
4 the record supports Judge Elmore's decision not to postpone the hearing.

5 **Exception No. 3 (ruling on legal issue):**

6 Petitioner requests that the Commission reverse the Order on Motions for Ruling on
7 Legal Issues, dated January 28, 2004 or, in the alternative, that the Commission remand the case
8 because Petitioner "was not afforded a hearing to present evidence."

9 **a. Exception to legal ruling**

10 The procedural rules allow for some or all of the issues in a contested case to be resolved
11 through a process called a Motion for Ruling on Legal Issues (or Summary Judgment).¹² The ALJ
12 must grant the motion if the evidence in the record shows that there is no genuine issue as to any
13 material fact that is relevant to the legal issue as to which a decision is sought. If the ALJ's ruling
14 on the motion resolves all the issues in the case, then the judge must issue a proposed order.

15 The sole legal issue before Judge Elmore on the Department's Motion for Ruling on
16 Legal Issues, dated December 15, 2003 (Motion), was whether Petitioner's underground storage
17 tank was a "farm tank." Certain "farm tanks" are exempt from regulation as underground storage
18 tanks. A "farm tank" is "a tank located on a tract of land devoted to the production of crops or
19 raising animals, including fish, and associated residences and improvements. A farm tank must
20 be located on the farm property." 40 CFR 280.12, as adopted by former OAR 340-150-0010.

21 As the Department established in its Motion:
22

23 ¹¹ The Department made a diligent effort to promptly serve Counsel with its Motion by attempting to fax the Motion to
24 his last known fax number. After the Department learned that the fax number had been disconnected, it tried to reach
25 Counsel by telephone, but there was no forwarding number available. The Department then contacted both the Oregon
26 State Bar and directory assistance but no forwarding address or number was available. At that point, the Department
27 mailed the Motion to Counsel's last known address. Although Counsel received notice of the hearing on January 21,
2005, he chose to inform the Department and Office of Administrative Hearings of his change of address by letter, dated
February 3, 2005. That letter was received by the Department on February 7, 2005. The Department then mailed a
copy of the Motion to the new address as well.

¹² OAR 137-003-0580.

1 “[A]t least two business entities which are unrelated to production of crops list the
2 tract of land as their principal place of business. Since 1991, Respondent has used
3 the name of ‘Beaver Oaks Airport’ as the facility name. A portion of the property
4 has been rezoned from ‘exclusive farm use’ to ‘other improved property’. The
5 tract of land on which the UST was located was used for a landing strip.”
(Motion at 3; Annotations removed.)

6 After reviewing the Department’s Motion and Petitioner’s Response and attached
7 evidence, Judge Elmore found that:

8 “The affidavit and photographs of Department employee Greg Toran – un rebutted by the
9 affidavits of Ms. Wescott and her affiant, John Bresko - establish that the property still was
10 being identified as Beaver Oaks Airport in November 1998, and that a business called
11 “Skydive Eagle Creek” was being operated there. That Ms. Wescott and her partner
12 “harvested hay crops a number of years” and “had a communal garden” does not establish
13 that the property was “devoted to the production of crops.” (Order on Motions for Ruling
14 on Legal Issue, dated January 28, 2004, at 1.)

15 As noted above, the Commission may reverse or modify a finding of fact, but may do so
16 only if it finds that the finding of fact is not supported by a preponderance of the evidence in the
17 hearing record. The Commission may not modify an historical fact unless it has reviewed the
18 entire record or at least those portions of the record that are relevant to the finding. Thus, to
19 modify Judge Elmore’s findings, the Commission would need to review the Department’s
20 Motion, Petitioner’s Answer and Petitioner’s Motion for Ruling on Legal Issues dated January
21 16, 2004, as well as the exhibits attached thereto, and then determine that the findings of fact in
22 Judge Elmore’s January 28, 2004 Proposed Order are not supported by a preponderance of
23 evidence in the record.

24 A review of this record and the facts established by the Department therein would,
25 however, make it clear that Judge Elmore was correct in his determination that the subject
26 tank was regulated under the Department’s UST rules.

27 **b. Request for new hearing**

Petitioner argues in the alternative that she should be granted a new hearing because she
“was not afforded a hearing to present evidence” on the issue of whether or not the underground
storage tank was a farm tank. (Exceptions and Brief at 2.) This is not true. Petitioner has had
ample opportunity to present evidence.

1 Petitioner was afforded *and took* the opportunity to present evidence in the exhibits to her
2 response to the Department's December 2003 motion. The ALJ simply ruled against her.¹³ She
3 was also afforded a second opportunity to present additional evidence in the exhibits to her
4 response to the Department's January 2005 motion but, as noted above, Petitioner chose not to
5 respond to that motion.

6 Under these circumstances, Petitioner cannot reasonably argue that she has been denied
7 an opportunity to present evidence. Further, given that Petitioner elected to forego her
8 opportunity to present evidence on the sole legal issue in this matter and has admitted all of the
9 remaining relevant factual issues in her Answer, it is entirely unclear what purpose a new hearing
10 would serve.¹⁴ No further hearing is necessary.

11 **Exception No. 4 (request for a new ELS):**

12 Petitioner requests assignment of a new environmental law specialist. Petitioner takes issue
13 with the ELS assigned to this matter because, as Petitioner asserts, she had "no interest in protecting
14 [Petitioner's] procedural rights." (Exceptions and Brief at 2.)

15 As an initial matter, Susan Greco, the current ELS, is a trained professional who has ably
16 served the Department in this and similar contested case proceedings for five years. Exception 4 is
17 premised on a complete misunderstanding of Ms. Greco's role. Her role is to represent the
18 *Department* in this matter. She is responsible for drafting documents, presenting evidence, and
19 presenting factual and limited legal arguments to the ALJ and the Commission. Petitioner's
20 argument is akin to the Department arguing that Petitioner's attorney has failed to adequately
21 represent the Department. It's simply not Ms. Greco's job to represent Petitioner.

22
23 ¹³ In her exceptions and Brief, Petitioner repeats the same argument Judge Elmore rejected in his January 28, 2004
Proposed Order.

24 ¹⁴ The scope of the hearing is limited to those matters placed at issue by the answer. OAR 340-011-570. Petitioner's
25 Answer expressly admitted all of the Department's factual findings, except that Mr. Hatley was a lessee of the property,
26 an issue not relevant here. At no time during the three years since her Answer was filed has Petitioner filed an amended
27 answer denying any of the Department's factual findings. In her response to the Department's December 2003 Motion,
she did not deny any of the Department's factual findings but merely argued that that set of facts should lead to a
different legal conclusion.

1 With that said, the proceedings themselves are conducted by the ALJ pursuant to the
2 Attorney General's Model Rules of Procedure. ORS 183.630. Ms. Greco has construed ORS
3 183.457 consistent with the Attorney General's Model Rules, the Department's own rules, and
4 Judge Elmore's ruling on the issue. Petitioner's attorney seems to take issue with this. (Exhibit
5 G.) But it is wholly consistent with her role as a representative of the Department in this matter.
6 Petitioner presents no evidence, and to the best of our knowledge there is none in the record, that
7 Ms. Greco has done *anything* to undermine the process or procedures in this matter.

8 Staffing for a contested case proceeding is wholly within the discretion of the
9 Department. A new ELS can be assigned if the Commission determines that a new hearing is
10 called for as requested in Exceptions 2 or 3 and that reassignment would be appropriate for such
11 a hearing, but there is nothing in this record to indicate that reassignment is necessary. Further,
12 policy considerations weigh heavily against assigning a new ELS every time a Respondent or
13 Petitioner gets a decision with which they disagree. The Department simply does not have the
14 resources to reassign an ELS and bring a new ELS up to speed on a given case on demand and
15 without justification.

16 VI. CONCLUSION

17 The Department requests that the Commission issue a Final Order upholding the
18 Administrative Law Judge's Order on Motion on Ruling for Legal Issue and Proposed and Final
19 Order, dated February 22, 2005.

20
21 Dated this 19th day of July, 2005.

22
23 
24 Lynne Perry, OSB #90456
25 Assistant Attorney General
26
27

RECEIVED

FEB 04 2005

by Office of
Administrative Hearings

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219
503-636-4995

February 3, 2005

Ann Redding
Hearing Officer Panel, Transportation Section
1905 Lana Avenue N.E.
Salem, Oregon 97314

RE: OAH Case No.: 119055
Agency Case No.: LQ/T-NWR-02-094
IN THE MATTER OF:
Cynthia Gay (Wescott)
Request for New Administrative Law Judge
Request to Reset Hearing Date

Dear Ms. Redding:

As per phone call with you on this date Ms. Wescott requests a new Administrative Law Judge and requests to reset the hearing date presently set February 28, 2005. This is a first time request for both items.

Yours very truly,

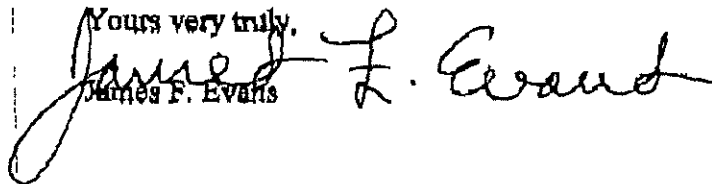

James F. Evans

EXHIBIT A
AMENDED ANSWERING BRIEF

00040



Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings
Employment Department
605 Cottage St. NE, Suite 201
Salem, OR 97301
(503) 378-4720
FAX (503) 378-2942

February 7, 2005

Steve
Elmore

James F. Evans
Attorney at Law
200 SW Carey Lane
Portland, OR 97219

Re: *In the Matter of Cynthia Gay (Wascott)*

Dear Mr. Evans:

Thank you for your letter of February 3, 2005 requesting the assignment of a different administrative law judge to the above-entitled matter. Regrettably, I must deny your request.

OAR 471-060-0005(4) allows a request if the party "had a reasonable opportunity to request a change of administrative law judge but did not do so. 'Reasonable' is determined under the totality of circumstances." In this case, the Notice of Hearing naming the administrative law judge was sent on January 20. Your request dated February 3, 2005, was made 14 days later. This is not "reasonable opportunity" under all the circumstances.

Yours very truly,

A handwritten signature in black ink, appearing to read "TE Ewing".

Thomas E. Ewing, Ph.D., J.D.
Chief Administrative Law Judge

EXHIBIT B
AMENDED ANSWERING BRIEF

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219
503-636-4995

February 8, 2005

Thomas E. Ewing, Ph.D, J.D.
Chief Administrative Law Judge
Office of Administrative Hearings
Employment Department
605 Cottage Street N.E., Suite 201
Salem, Oregon 97301

RECEIVED
FEB 10 2005
OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

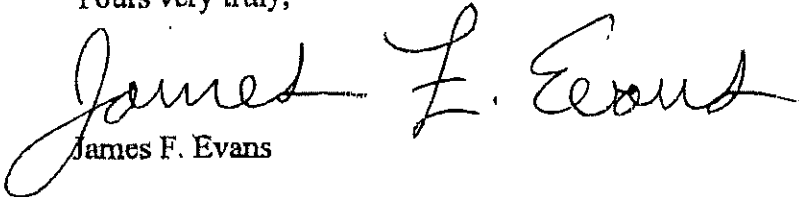
RE: OAH Case No.: 119055
Agency Case No.: LQ/T-NWR-02-094
IN THE MATTER OF:
Cynthia Gay (Wescott)
Request for New Administrative Law Judge
Request to Reset Hearing Date

Dear Judge Ewing:

Thank you for your letter of February 7, 2005. Please reconsider the request to remove Judge Elmore. On January 20, 2005 until February 2, 2005, I was not able to respond to the DEQ until my PLF was paid. Once that was done I called up Ann Redding and updated my address and phone number while at the same time inquiring as to the form of request for a new judge and request to reset hearing. She kindly said a letter would be fine and that the request should be no problem as it would be a first for both. I also indicated briefly that due to the "totality of the circumstances" it was very important a new judge get assigned because my client had no confidence in Judge Elmore due to prior rulings which prejudiced his rights to get a fair hearing on the merits. No, judge Elmore would have him get no hearing at all. Such as that is against the spirit of the administrative rules where the customer is the property owning citizen, and the idea is to reach the merits. So, Ms. Wescott renews the request. I respect your indication on the phone today that knowing the full "totality of the circumstances" a granted request seems appropriate. Thank you for your attention to this matter.

EXHIBIT C
AMENDED ANSWERING BRIEF

Yours very truly,


James F. Evans

✓ CC: Susan Greco
DEQ 811 Sixth Ave
Portland OR 97214



Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings
Employment Department
605 Cottage St. NE, Suite 201
Salem, OR 97301
(503) 378-4720
FAX (503) 378-2942

February 10, 2005

James F. Evans
Attorney at Law
200 SW Carey Lane
Portland, OR 97219

Re: *In the Matter of Cynthia Gay (Wescott)*

Dear Mr. Evans:

Thank you for your letter of February 8, 2005 requesting reconsideration of my earlier ruling denying the motion to recuse Administrative Law Judge Stephen Elmore in the above-entitled matter. I must again deny your request.

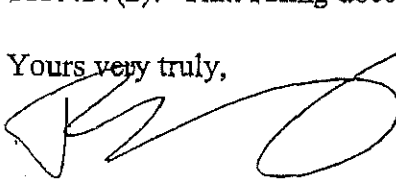
When I originally denied your request, I had not properly understood that some time ago Judge Elmore had actually convened the hearing. A timely request would have been one made shortly after notice of the initial assignment of Judge Elmore.

You also assert that your client does not have confidence in Judge Elmore's impartiality because of previous rulings. I construe that to be a "good cause" argument under OAR 471-060-0005(2)(b). "Good cause" is defined as

any reason why an administrative law judge's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.

Judge Elmore dismissed your client's case on the ground that the lay representative did not meet the legal conditions of representation set out in ORS 183.457(2). That ruling does not rise to "personal bias or prejudice."

Yours very truly,


Thomas E. Ewing, Ph.D, J.D.
Chief Administrative Law Judge

c: Stephen Elmore, ALJ
Susan Greco, DEQ

EXHIBIT D
AMENDED ANSWERING BRIEF

00044

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219
503-636-4995

RECEIVED

FEB 16 2005

THE OFFICE OF
ADMINISTRATIVE HEARINGS

February 15, 2005

Thomas E. Ewing, Ph.D, J.D.
Chief Administrative Law Judge
Office of Administrative Hearings
Employment Department
605 Cottage Street N.E., Suite 201
Salem, Oregon 97301

RE: OAH Case No.: 119055
Agency Case No.: LQ/T-NWR-02-094
IN THE MATTER OF:
Cynthia Gay (Wescott)
Request for New Administrative Law Judge
Request to Reset Hearing Date

Dear Judge Ewing:

I am in receipt of your letter of February 10, 2005. I am disappointed in your decision to leave Judge Elmore hearing this matter. I must renew my request for an impartial ALJ in light of your letter of February 10. Please review the record in this matter as this will make clear that my client's rights were prejudiced by Judge Elmore's actions.

Not allowing Ralph Hatley to act as Cynthia Wescott's personal representative was not simply an abuse of discretion, but a disregarding of the law. The Judge's refusal to reset the hearing so as to allow my client's matter to be heard on the merits demonstrated "...reason why an administrative law judge's impartiality might reasonably be questioned...". You cite ORS 183.457(2), for Judge Elmore's decision, but he did not recite findings from the record to justify his decision. In fact he did not even allow an offer of proof to make a record. ORS 183.457(1) states in part "... No rule adopted by a state agency shall have the effect of precluding lay representation..." This same type language is used again in the same paragraph. ORS183.457(2)

EXHIBIT E
AMENDED ANSWERING BRIEF
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which you cite is permissive unless certain conditions are found. "...May appear by authorized representative if..." (a) "...will not hinder the orderly and timely development of the record..." No record is present to support the Judge's ruling. It is an error of legal reasoning that my client does not assume to be benign and you should not disregard as a basis to recuse Judge Elmore.

The "Good cause" you cite includes the language "...It includes, but is not limited to, personal bias or prejudice..." that means it does not even need to "rise" to personal bias or prejudice, but that the subjective belief of my client is "reasonable" under the totality of the circumstances, or that the interest of justice- the appearance of being fair- would be promoted by removing the Judge. Here, the record reflects that Ms. Wescott sent a power of attorney naming Ralph Hatley her personal representative to Judge Elmore before the hearing, Mr. Hatley is the long time business partner and life partner of Ms. Wescott and was to whom much of the DEQ correspondence was addressed, see Petition for Rehearing and/or Reconsideration. Ms. Wescott also faxed a letter to Judge Elmore the day before the hearing stating Mr. Hatley was going to act on her behalf and that she would be available to the Judge at a stated telephone number if there were any questions. How easy would it have been to give Ms. Wescott a set over when it was quite clear a good faith misunderstanding had occurred on her part. The Judge had no interest in protecting the party's right to a hearing. It is manifestly reasonable for Ms. Wescott to want another judge, and it meets the test "...any reason why an administrative law judge's impartiality might reasonably be questioned."

I recite this record and duly include this letter in the record so that if necessary a reviewing body can evaluate my clients request and I am confident my clients position surpasses the minimal level of evidence needed to sustain her request for the Judge violated two of the most basic premises of administrative law; lay representation which expresses the less formal nature of the proceedings and the right to a hearing on the merits.

Thank you for your close attention to this matter.

Yours very truly,

151 James F. Evans
James F. Evans

cc; Susan Greco

Stephen Elmore ✓

Stephanie Hallock

EXHIBIT E
AMENDED ANSWERING BRIEF



Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings
Employment Department
605 Cottage St. NE, Suite 201
Salem, OR 97301
(503) 378-4720
FAX (503) 378-2942

February 17, 2005

Mr. James F. Evans
Attorney at Law
200 SW Carey Lane
Portland, OR 97219

Re: In the Matter of Cynthia Gay (Westcott)

Dear Mr. Evans:

Thank you for your letter of February 15, 2005. I must again decline your request to recuse Administrative Law Judge Stephen Elmore in the above-entitled matter.

Let me add an additional explanation. I frequently get requests from both agencies and private citizens asking for the recusal of an administrative law judge long after the initial assignment. The reason generally, as in your case, is that the judge ruled against the party in an interim order. With 40,000 cases per year, it would be impossible for the Office of Administrative Hearings to operate efficiently and, not least, fairly if I were to reassign judges every time they issue orders which agencies or parties do not like.

Further correspondence on this matter is unnecessary. Judge Elmore will continue to be the judge assigned to this case.

Yours very truly,

Thomas E. Ewing, Ph.D., J.D.
Chief Administrative Law Judge

c: Susan Greco, DEQ
Stephen Elmore, ALJ

EXHIBIT F
AMENDED ANSWERING BRIEF

RECEIVED

FEB 22 2005

Oregon DEQ
Office of the Director

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219
503-636-4995

February 18, 2005

Les Carlouch
Senior Policy Adviser
811 S.W. Sixth Avenue
Portland, Oregon 97204

Post-it Fax Note	7671	Date	7/13	# of pages	11
To	Lynne Perry	From	Susan Greco		
Co./Dept.	DOT	Co.	DEQ		
Phone #		Phone #	229 5157		
Fax #		Fax #			

RE: IN THE MATTER OF:
Cynthia Gay (Wescott)

Dear Mr. Carlouch:

I received a phone message from you on February 17, 2005 which stated you had spoken to Susan Greco, and she said there was no provision for Ms. Wescott to have lay representation in ORS183.457 and that is why the Judge defaulted Ms. Wescott; therefore, no basis existed for DEQ to make a written request for a new judge. You said you needed to take a look at the statute, but there was no reason for DEQ to take action based on Ms. Greco's representation. I called you and left a message that same day which encouraged you to look at ORS183.457(1) which specifically states: "...No rule adopted by a state agency shall have the effect of precluding lay representation..." Further I called you back and left another message asking you to review the document DEQ is required to provide parties in contested case hearings, and specifically at "2. Rights to an attorney" where it is quite clear a party can have lay representation, and that Ms. Wescott fulfilled all preliminary requirements. I have left several phone messages today, but have been unable to speak with you.

I am sorry, but Ms. Greco is either incompetent or is lying to your face. Her animus is clear, but what is striking is that she would lie to a fellow employee at the Department. I can only hope that her supervisor does not tolerate lying by subordinates. I would have preferred to speak with you over the phone, but this matter could not wait and it seemed clear based on your phone message she was telling you incorrect information when there is no explanation for her to be so ignorant. I would still like to speak you, but feel this must be brought to the attention of the Director.

Thank you for your attention to this matter.

Your very truly,

James F. Evans

cc: Stephanie Hallock ✓

EXHIBIT G
AMENDED ANSWERING BRIEF

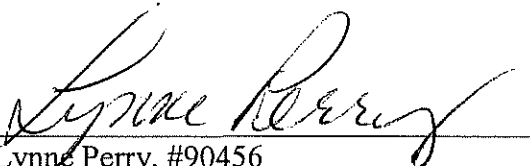
1 CERTIFICATE OF SERVICE

2 I hereby certify that on July 19, 2005, I served the original DEPARTMENT'S
3 AMENDED ANSWERING BRIEF TO PETITIONER'S EXCEPTIONS AND BRIEF
4 NO. LQ/T-NWR-02-094 WASHINGTON COUNTY by hand-delivery on:

5
6 Stephanie Hallock, Director
7 Department of Environmental Quality
8 811 SW Sixth Avenue
9 Portland, OR 97204

10 And a true and correct copy by first-class mail on:

11 James Evans
12 200 SW Carey Ln
13 Portland OR 97219

14 
15 Lynne Perry, #90456
16 Assistant Attorney General
17 Of Attorneys for DEQ
18
19
20
21
22
23
24
25
26



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

June 27, 2005

Environmental Quality Commission
c/o Jane K. Hickman, Acting Assistant to the Commission
811 S.W. 6th Avenue, 10th Floor
Portland OR 97204


Re: Cynthia Wescott (formerly Cynthia Gay)
Case No. LQ/T-NWR-02-094

Dear Ms. Hickman:

Attached you will find the Department's Answer to Respondent's Brief in the above referenced case. A copy of this document has been sent to Ms. Wescott's attorney of record, Mr. James F. Evans, as of this date.

If you have any questions, please call me at (503) 229-5152.

Sincerely,



Susan M. Greco
Environmental Law Specialist

Enclosure

cc: James F. Evans, Esq., 200 S.W. Carey Lane, Portland, OR 97219

00051

1 offered to settle the case. In August 2003, Mr. Derr countered with an offer of a nominal civil
2 penalty. Because the Department and Ms. Gay could not agree on a settlement, in September 2003,
3 the matter was referred to the Hearing Officer Panel for the setting of a contested case hearing date.

4 In October 2003, the Hearing Officer Panel informed the Department that Mr. Derr was no
5 longer representing Ms. Gay. At that time, the Hearing Officer Panel informed Ms. Gay that she
6 would need to be represented by either herself or another attorney as required by Oregon law. The
7 contested case hearing was not set until January 14, 2004 in order to allow Ms. Gay time to prepare
8 for the hearing. On December 15, 2003, the Department filed a Motion for Ruling on Legal Issues,
9 requesting a ruling that the underground storage tank in question was not a "farm tank."

10 On December 19, 2003, Ms. Gay requested that the hearing be postponed until February and
11 that she be allowed until mid-January to respond to the Department's motion. The Department
12 agreed to reschedule the hearing for February 18, 2004 and to allow Ms. Gay until January 16, 2004
13 to respond to the motion. On January 16, 2004, Ms. Gay filed a response to the Department's
14 Motion. On January 28, 2004, Administrative Law Judge Stephen Elmore issued an order finding
15 that the underground storage tank in question was not a farm tank.

16 On February 18, 2004, the contested case hearing was convened but Ms. Gay failed to
17 appear herself or to be represented by an attorney as required by ORS 183.457¹. Since Ms. Gay had
18 failed to appear at the hearing, she was in default and a Default Final Order was entered by the
19 Department on that date.

20 On March 31, 2004, the Department received a Petition for Reconsideration and Rehearing
21 and a Request for a Stay from Ms. Gay's new attorney Mr. James Evans. On May 26, 2004, the
22

23 ¹ORS 183.457 allows parties other than the agency to be represented by an "authorized
24 representative" if the agency, by rule, allows such representation. A natural person cannot be
25 represented by an authorized representative in contested case hearings before the Department
26 because ORS 183.457 has defined authorized representative to be "a member of a participating
27 partnership, an authorized officer or regular employee of a participating corporation, association
or organized group, or an authorized office or employee of a participating governmental authority
other than a state agency." Thus the Department is prohibited by statute from adopting a rule
allowing such representation.

1 Director granted the Petition for Reconsideration but denied the Request for a Stay since Mr. Evans
2 had not presented facts or reasons sufficient to show that Ms. Gay would suffer irreparable injury if
3 the order was not stayed. On November 22, 2004, the Director agreed to allow Ms. Gay a contested
4 case hearing on the matter.

5 On January 20, 2005, a notice of hearing was sent by the Office of Administrative Hearings,
6 setting the date of the hearing for February 28, 2005. On January 28, 2005, the Department filed,
7 via facsimile, a Motion for Ruling on Legal Issues. At the time of filing, the Department attempted
8 to fax the Motion to Mr. Evans, but learned that his phone number had been disconnected with no
9 forwarding number. The Motion was mailed to Mr. Evans last known address as listed with the
10 Oregon State Bar.

11 On February 3, 2005, Mr. Evans sent a letter to the Office of Administrative Hearings
12 requesting a new administrative law judge and a postponement of the hearing date. On February 7,
13 2005, the Chief Administrative Law Judge Thomas Ewing denied the request for a new
14 administrative law judge. On February 8th, Mr. Evans again requested a new administrative law
15 judge and Judge Ewing denied the request. On February 15th, Mr. Evans again requested a new
16 administrative law judge and Judge Ewing denied the request.

17 On February 17, 2005, a pre-hearing conference was held via telephone to allow Mr. Evans
18 to make his arguments for postponing the contested case hearing and for allowing him additional
19 time to respond to the Department's Motion. At the conclusion of the pre-hearing conference,
20 Judge Elmore denied both requests. When Mr. Evans failed to respond to the Department's Motion
21 by the established deadline, Judge Elmore issued an Order on Motion for Ruling on Legal Issue and
22 Proposed and Final Order (Order) on February 22, 2005 rendering the contested case hearing
23 unnecessary.

24 On March 24, 2005, the Commission received Ms. Gay's timely Petition for Commission
25 Review of the Order. On May 2, 2005, the Commission received Ms. Gay's Exceptions and Brief
26 (Brief).

27 ////

1 III. APPLICABLE LAW TO COMMISSION REVIEW OF A PROPOSED ORDER

2 The Order was issued under the statutes and procedural rules governing the Office of
3 Administrative Hearings, which requires that all contested case hearings be conducted by an
4 administrative law judge. The Commission's authority to review and reverse the administrative
5 law judge's decision is limited by the statutes and the rules of the Department of Justice. The
6 most important limitations are as follows:

7 (1) The Commission may not modify the form of the proposed order in any substantial
8 manner without identifying and explaining the modifications.²

9 (2) The Commission may not modify a recommended finding of historical fact unless it
10 finds that the recommended finding is not supported by a preponderance of the evidence in the
11 record.³ The Commission may not modify any historical fact unless it has reviewed the entire
12 record or at least all portions of the record that are relevant to the finding.

13 (3) The Commission may not consider any new or additional evidence, but may only
14 remand the matter to an administrative law judge to take the evidence.⁴

15 III. DEPARTMENT'S RESPONSE TO PETITIONER'S EXCEPTIONS AND ARGUMENT

16 In his Brief, Mr. Evans takes exception to the Order in four regards: (1) that the denial of the
17 request for a new administrative law judge be reversed; (2) that the denial of the request to reset the
18 hearing date be reversed; (3) that the Order on the Motion for Ruling on Legal Issues be reversed or
19 alternatively, Ms. Gay be provided a new hearing; and (4) that a new Environmental Law Specialist
20 be assigned to the matter.

21 **Exception No. 1:** Mr. Evans requests that the Commission assign a new administrative
22 law judge to the matter. Although not specifically stated in the Brief, it may be assumed that Mr.
23 Evans is also requesting that the Commission remand this matter for a new hearing under this
24 exception.

25 ² OAR 137-003-0665.

26 ³ OAR 137-003-0665. A historical fact is a determination that an event did or did not occur or
that a circumstance or status did or did not exist either before or at the time of the hearing.

27 ⁴ OAR 340-011-0575.

1 In 1999, the Oregon Legislature established the Hearing Officer Panel, now known as the
2 Office of Administrative Hearings, in order to prevent perceived or actual bias presented when an
3 agency staff person served as the adjudicator in a case. Under the law, state agencies such as the
4 Department, are not permitted to employ their own hearing officers or to use agency staff or a
5 member of an agency's board to conduct hearings. Contested case hearings must be held under the
6 procedural rules adopted by the Attorney General and the Office of Administrative Hearings. OAR
7 417-060-0005 sets forth the procedures for a request of a new administrative law judge. All such
8 requests must be sent to the Chief Administrative Law Judge who must decide the request. A first
9 request will be automatically granted unless the party did not avail itself of a "reasonable
10 opportunity" to do so. Any subsequent requests will be granted if the requestor can show "good
11 cause." Good cause is defined as "any reason why an administrative law judge's impartiality might
12 reasonably be questioned. It includes, but is not limited to: personal bias or prejudice, personal
13 knowledge of disputed facts, conflict of interest, or any other interest that could be substantially
14 affected by the outcome of the proceeding."⁵

15 First, it is the Department's contention that the Commission does not have the authority to
16 assign a new administrative law judge. Oregon Administrative Rules clearly place the authority to
17 do so within the power of the Chief Administrative Law Judge. The Commission could remand
18 this case for a new hearing, but there is no guarantee that a different administrative law judge would
19 be assigned. If the Commission does have the authority to assign a new administrative law judge,
20 such a decision would be in direct conflict with the purpose of the Office of Administrative
21 Hearings which is to ensure that contested case hearings are conducted by an impartial third party
22 not directly under the influence of the agency.

23 Second, the Department argues that Chief Administrative Law Judge Ewing made the
24 correct decision in denying each of Mr. Evans' requests for a new administrative law judge. Mr.
25 Evans' first request for a new administrative law judge was not made within a reasonable period of
26

27 ⁵ OAR 471-060-0005.

1 time. Each of Mr. Evans' subsequent requests did not present good cause why the requests should
2 be allowed. Specifically, Judge Ewing stated in his February 17, 2005 letter:

3 *I frequently get requests from both agencies and private citizens asking for the*
4 *recusal of an administrative law judge long after the initial assignment. The reason*
5 *generally, as in your case, is that the judge ruled against the party in an interim*
6 *order. With 40,000 cases per year, it would be impossible for the Office of*
7 *Administrative Hearings to operate efficiently and, not least, fairly if I were to*
8 *reassign judges every time they issue orders which agencies or parties do not like.*⁶

9 **Exception No. 2:** Mr. Evans takes exception to the ruling that the contested case
10 hearing not be postponed. Again, although not specifically stated in the Brief, it may be assumed
11 that Mr. Evans is also requesting that the Commission remand this matter for a new hearing under
12 this exception.

13 First, it is the Department's contention that the Commission does not have the authority to
14 postpone a contested case hearing. As previously stated, contested case hearings must be held
15 under the procedural rules adopted by the Attorney General and the Office of Administrative
16 Hearings. The authority to set the date and time of the hearing including any postponement, is
17 within the power of the administrative law judge.⁷ Thus the rules clearly place the authority to
18 postpone the hearing within the power of the administrative law judge.

19 Although not specifically requested by Mr. Evans, arguably the Commission could remand
20 this case for the setting of a new hearing. It is the Department's argument that Judge Elmore made
21 the correct decision in denying Mr. Evans' request for a postponement of the hearing. An
22 administrative law judge may postpone a hearing for good cause.⁸ Good cause is defined in
23 Black's Law Dictionary as a substantial or good reason that is beyond the proponent's reasonable
24 control. Mr. Evans provides three reasons why the hearing should have been postponed:

25 (1) Mr. Evans argues that he could not take action on this matter because of a "legal
26 disability." In a letter dated February 8, 2005 to Judge Ewing, Mr. Evans stated that his "legal
27

⁶ Letter from Thomas E. Ewing to James F. Evans, dated February 17, 2005.

⁷ OAR 137-003-0525.

⁸ OAR 137-003-0525.

1 disability" was the fact that he had not paid his professional liability insurance. This reason is not
2 good cause since Mr. Evans' decision regarding when to pay his professional liability insurance was
3 completely within his control.

4 (2) Mr. Evans argues that, because he did not receive the Department's Motion until
5 February 11, 2005, he did not have sufficient time to respond to the Motion in preparation for the
6 hearing. This reason is not good cause because Mr. Evans is required to update his address with the
7 Oregon State Bar, the Department and the administrative law judge.⁹ Mr. Evans received notice of
8 the hearing on January 21, 2005. He informed the Department and the Office of Administrative
9 Hearings of his change of address in a letter dated February 3, 2005.¹⁰ The Department made a
10 diligent effort to promptly serve Mr. Evans with its Motion by attempting to fax the Motion to his
11 last known fax number. When the Department learned that the number had been disconnected, the
12 Department attempted to contact Mr. Evans by telephone. There was no forwarding number
13 available for Mr. Evans telephone number. The Department then contacted the Oregon State Bar
14 and directory assistance but no forwarding address or number was available from either entity. At
15 that time, the Department mailed the Motion to Mr. Evans' last known address. Once the
16 Department learned of Mr. Evans change of address, it promptly mailed an additional copy of the
17 Motion to the new address.

18 (3) Mr. Evans argues that he did not have sufficient time to prepare for the hearing because
19 he was preoccupied with his requests for a new administrative law judge. Again, this reason is not
20 good cause, specifically, how much time Mr. Evans spends on the case and how he chose to
21 allocate his time were completely within his control.

22 **Exception No. 3:** Mr. Evans takes exception to the Order on Motions for Ruling on
23 Legal Issues and requests that the Commission reverse this Order. Alternatively, Mr. Evans is
24 requesting that the Commission remand the case "because Ms. Wescott was not afforded a hearing
25 to present evidence." Although Mr. Evans is not clear which Order he is referring to in his Brief,

26 ⁹ See OAR 137-003-0520(6) and Oregon State Bar Rules of Procedure, Rule 1.11.

27 ¹⁰ This letter was received by the Department on February 7, 2005.

1 the Department believes Mr. Evans is referring to the Order on Motions for Ruling on Legal
2 Issues dated January 28, 2004.

3 First, the Department argues that Judge Elmore was correct in his ruling that the
4 underground storage tank was not a "farm tank." As previously stated, contested case hearings
5 must be held under the procedural rules adopted by the Attorney General and the Office of
6 Administrative Hearings. The procedural rules allow for a portion or all of the issues in a
7 contested case to be resolved through a process called a Motion for Ruling on Legal Issues or
8 Summary Judgment.¹¹ The administrative law judge must grant the motion if the evidence in the
9 record shows that there is no genuine issue as to any material fact that is relevant to the legal issues
10 in the matter. If the judge's ruling on the motion resolves all the issues in the case, then the judge
11 must issue a proposed order.

12 While the Commission may reverse or modify a finding of fact, it can do so only if the
13 Commission finds that the finding is not supported by a preponderance of the evidence in the
14 hearing record. Additionally, the Commission may not modify any historical fact unless it has
15 reviewed the entire record or at least all portions of the record that are relevant to the finding.¹²
16 Thus, in order to modify Judge Elmore's findings in the January 2004 Order, the Commission
17 would need to review the Department's Motion for Ruling on Legal Issues dated December 15,
18 2003 and the exhibits attached thereto, along with Respondent's Answer and Motion for Ruling
19 on Legal Issues dated January 16, 2004 and the exhibits attached thereto, and make a
20 determination that the findings of fact in the Order are not supported by a preponderance of
21 evidence in the exhibits attached to the Motions.

22 Pursuant to the rules, "farm tank" is defined as "a tank located on a tract of land devoted
23 to the production of crops or raising animals, including fish, and associated residences and
24 improvements. A farm tank must be located on the farm property."¹³ The facts in the record

25
26 ¹¹ OAR 137-003-0580.

27 ¹² OAR 137-003-0665(4).

¹³ 40 CFR 280.12, as adopted by former OAR 340-150-0010.

1 show that the tract of land on which the underground storage tank was located was not devoted
2 to the production of crops. As stated in the Department's Motion for Ruling on Legal Issues,
3 dated December 15, 2003:

4 *Specifically, at least two business entities which are unrelated to production of*
5 *crops list the tract of land as their principal place of business. Since 1991,*
6 *Respondent has used the name of 'Beaver Oaks Airport' as the facility name. A*
7 *portion of the property has been rezoned from 'exclusive farm use' to 'other*
8 *improved property'. The tract of land on which the UST was located was used for*
9 *a landing strip. (annotations removed).¹⁴*

10 After reviewing the Department's Motion and Ms. Gay's Response and attached
11 evidence, the administrative law judge found that:

12 *The affidavit and photographs of Department employee Greg Toran – unrebutted by*
13 *the affidavits of Ms. Wescott and her affiant, John Bresko-establish that the property*
14 *still was being identified as Beaver Oaks Airport in November 1998, and that a*
15 *business called "Skydive Eagle Creek" was being operated there. That Ms. Wescott*
16 *and her partner "harvested hay crops a number of years" and "had a communal*
17 *garden" does not establish that the property was "devoted to the production of*
18 *crops."¹⁵*

19 The facts clearly show that the property on which the underground storage tank was
20 located, was not devoted to the production of crops and thus the underground storage tank
21 was not a "farm tank."

22 Second, Mr. Evans argues that Ms. Gay should be granted a new hearing because she "was
23 not afforded a hearing to present evidence" on the issue of whether or not the underground storage
24 tank was a farm tank. This is not true. Ms. Gay was afforded the opportunity to present evidence
25 as exhibits to her response to the Department's Motion. Simply because the administrative law
26 judge did not agree with Ms. Gay's position, does not mean that the process was "unfair" as
27 alleged by Mr. Evans. While a party to a contested case hearing has a right to appeal the
proposed order of an administrative law judge, the Office of Administrative Hearings was
established to ensure that contested case hearings are conducted by an impartial third party to

¹⁴ Department's Motion for Ruling on Legal Issues dated December 15, 2003, page 3.

¹⁵ Order on Motions for Ruling on Legal Issue, dated January 28, 2004, page 1.

1 ensure a fair process. If the Commission allowed a new hearing every time a party did not agree
2 with the proposed order of an administrative law judge, this process would be circumvented.

3 After being served with a formal enforcement action, a respondent has twenty days to file an
4 answer that either admits or denies all the facts alleged in the action. Any factual matters alleged in
5 a formal enforcement action that are not denied in the answer, are presumed to be admitted.¹⁶ An
6 administrative law judge must limit the scope of the hearing to those matters that are placed at issue
7 by the answer.¹⁷ The Commission created this process to ensure that both sides are informed about
8 the issues and can address the issues in a timely manner. Ms. Gay's answer expressly admitted all
9 of the Department's factual findings, except that Mr. Hatley was a lessee of the property. At no
10 time during the ensuing years of this case, has Ms. Gay filed an amended answer denying any of the
11 Department's factual findings. In fact, in Ms. Gay's answer to the Department's Motion, she again
12 did not deny any of the Department's factual findings but instead argued that those facts should
13 mean a different legal conclusion. Ms. Gay had many opportunities to present evidence to support
14 her case in this matter. Before an agency can deprive a person of at least some interests including
15 money, due process requires that persons be given adequate notice of the action and an opportunity
16 to contest that action. Ms. Gay was provided with both in this case.

17 **Exception No. 4:** Mr. Evans has requested that a new environmental law specialist be
18 assigned to this matter in order to protect Ms. Gay's "procedural rights".

19 Statute and rule allow the Department to be represented in formal enforcement matters by
20 an environmental law specialist.¹⁸ An environmental law specialist is specifically prohibited from
21 giving legal advice to the Department or the Commission. An environmental law specialist's role
22 in the contested case process is limited to drafting documents, presenting evidence, and presenting
23 factual and limited legal arguments to the administrative law judge and the Commission.

24 ////

25
26 ¹⁶ OAR 340-012-0530.

27 ¹⁷ OAR 340-011-0570.

¹⁸ ORS 183.452 and OAR 340-011-0510.

1 Mr. Evans argument is flawed in that he assumes that the environmental law specialist has
2 some influence over the outcome of the proceeding besides that which occurs due to the presenting
3 of evidence and arguments to the administrative law judge and the Commission. In reality, the
4 specific environmental law specialist merely serves as a representative of the Department and has
5 limited decision-making authority. For example, a recommendation to settle a case is generally first
6 reviewed by the regional manager overseeing administration of the program and must be approved
7 by the administrator of the Office of Compliance and Enforcement, subject to further review by the
8 Director of the Department.

9 The procedural process which the Department must follow when issuing a formal
10 enforcement action such as a civil penalty assessment, is set forth in statute, rule and policy.¹⁹ At
11 the time the Department issues a civil penalty, it is only a proposed penalty and does not become
12 final until the respondent has exhausted the appeal process. If the respondent believes the
13 Department's findings are incorrect or the civil penalty amount is too high, the respondent may file
14 an answer and a request for hearing and informal discussion. If the respondent provides
15 information at the informal discussion showing that the Department should mitigate the civil
16 penalty, the Department will often reduce the civil penalty. The majority of cases are settled after
17 the informal discussion with a reduced penalty. If the Department and the party are unable to reach
18 an agreement regarding settlement, then the case is scheduled for a contested case hearing. An
19 administrative law judge issues a proposed order after determining the facts in the matter and
20 applying those facts to the applicable law. A respondent has the right to appeal this proposed order
21 to the Commission along with the final order of the Commission to the Court of Appeals. This
22 particular case has been handled according to the statutes and rules the Department is required to
23 follow.

24 ////

25 ////


26
27 ¹⁹ For example, see ORS Chapter 183 and ORS Chapter 468.

IV. CONCLUSION

In conclusion, the Department requests that the Commission issue a Final Order upholding the Administrative Law Judge's Order on Motion on Ruling for Legal Issue and Proposed and Final Order, dated February 22, 2005.

Date

6/27/05


Susan M. Greco
Environmental Law Specialist

00063



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

May 12, 2005

Ms. Susan Greco
Office of Compliance and Enforcement
Oregon Department of Environmental Quality
811 S.W. Sixth Avenue
Portland, Oregon 97204

Re: Cynthia Westcott (formerly Cynthia Gay)
OAH Case No. 119055
DEQ Case No. LQ/T-NWR-02-094

Dear Ms. Greco:

On May 9, 2005, the Commission received your request for an extension of time to file the Department's Answering Brief, until June 27, 2005. Your request for extension was filed timely, and the Commission has granted your request.

If you have any questions, please call me at (503) 229-5555.

Sincerely,

Jane K. Hickman
Acting Assistant to the Commission

Cc: James F. Evans, 200 S.W. Carey Lane, Portland, OR 97219

00066



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

RECEIVED

MAY 09 2005

Oregon **DEQ**
Office of the Director

May 9, 2005


Jane Hickman
Acting Assistant to the Commission
811 S.W. 6th Avenue
Portland OR 97204

Re: Cynthia Gay (Wescott)
No. LQ/T-NWR-02-094

Dear Ms. Hickman:

Thank you for providing a copy of Ms. Wescott's Exceptions and Brief which was filed with the Environmental Quality Commission on May 2, 2005. The Department hereby requests that the time frame for filing of its Answering Brief be extended to June 27, 2005. At that time, a copy of the Answering Brief will be provided to Mr. Evans as required by OAR 340-011-0575.

Sincerely,


Susan M. Greco
Environmental Law Specialist

cc: James F. Evans, 200 S.W. Carey Lane, Portland, OR 97219

00069

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219

RECEIVED
MAY 02 2005
DEPT. OF ENVIRONMENTAL QUALITY

May 2, 2005

Jane K. Hickman
Acting Assistant to Commission
Environmental Quality Commission
811 S.W. Sixth Ave.
Portland, Oregon 97204

RE: Cynthia Wescott(formerly Cynthia Gay)
OAH Case No. 119055
DEQ Case No. LQ/T-NWR-02-094

EXCEPTIONS and BRIEF to Proposed Order of ALJ Elmore

Dear Commission:

This letter constitutes Ms. Wescott's Exceptions and Brief on the Proposed Order:

EXCEPTIONS

1. Ms. Wescott takes exception to denial of Request for new administrative law judge, OAR 471-060-0005(4). Relief Sought and Entitled to: a new administrative law judge impartial and fresh to the case.
2. Ms. Wescott takes exception to denial of Request to Reset Hearing Date(Denial of hearing). Relief Sought and Entitled to: a new hearing date to present witness's testimony and documentary evidence.
3. Ms. Wescott takes exception to Order on Motion for Ruling on Legal Issues.(Definition of 40 CFR 280.12 "...is a tank located on a tract of land devoted to..."farming.)OAR340-150-0010 Relief Sought and Entitled to: Reverse of Order on Motion for Ruling on Legal Issues. New Order declaring tank is on land devoted to farming so is a farm tank. In the alternative to Order a new administrative law judge to provide opportunity to present motions and a hearing to present witness's testimony and documentary evidence as to the factual contention that tank in question is a "farm tank".
4. Ms. Wescott takes exception to Susan Greco, Environmental Law Specialist , abusing Ms. Wescott's procedural due process rights to a fair hearing. Relief Sought and Entitled to: new Environmental Law Specialist assigned to in this Matter.

BRIEF

1. Ms. Wescott is entitled to new administrative law judge. Ms Wescott made a written request on February 3, 2005 for a new administrative law judge and request to reset hearing due to the fact that ALJ Elmore had earlier denied Ms. Wescott a hearing and after a petition for rehearing and or reconsideration, Ms. Hallock, Director of DEQ granted new hearing. This is not an

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interim order and the letter sent November 30, 2004 makes clear this is a new process. Letter sent February 15, 2005 makes clear the reasons why Judge Elmore is prejudiced against Ms. Wescott.

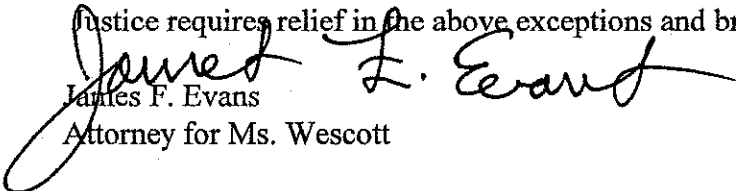
2. Ms. Wescott is entitled to a new hearing. The highest concept in administrative law is to have a hearing on the merits that is perceived to be fair by the parties and to have substance over form and to achieve that by an informal process that gives the parties an opportunity to be heard and present witnesses' testimony and documentary evidence. Ms. Wescott made a request to reset the hearing February 3, 2005. There was good cause because I could not take action due to legal disability and not getting the other sides paper work. I also was strongly requesting a new judge as above argued.

3. Ms. Wescott is entitled to reversal of the Order on Motions for Ruling on Legal Issues because the farm tank is on land devoted to farming. ALJ Elmore was wrong in declaring the tank was not on land devoted to farming. The tank was on land devoted to farming by way of use as a hay field and because it is land zoned for farming. Not all the land was "groomed" for an airstrip, but most was uneven and unusable for an airstrip because it was being used for growing hay. In the alternative the Commission should order a new hearing because Ms. Wescott was not afforded a hearing to present evidence. This is critical to the fairness issue.

4. Susan Greco should be removed for equity reasons so we can truly start over and end up with a fair result. She has been abusive all through the process with no interest in protecting Ms. Wescott's procedural rights.

CONCLUSION

Justice requires relief in the above exceptions and brief.


James F. Evans

Attorney for Ms. Wescott

cc: ELS: Susan
Anne Price

Petitioner CYNTHIA GAY (WESCOTT) OHA Case No. 119055
PETITION FOR COMMISSION REVIEW

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219
503-636-4995

RECEIVED
MAR 24 2005
DEPT. OF ENVIRONMENTAL QUALITY

March 24, 2005

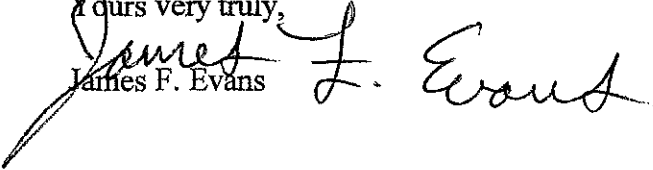
Department of Environmental Quality Commission
Stephanie Hallock
Director, Department of Environmental Quality
811 S.W. Sixth Avenue
Portland, Oregon 97204

RE: OAH Case No.: 119055
Agency Case No.: LQ/T-NWR-02-094
IN THE MATTER OF:
Cynthia Gay (Wescott)
Petition for Commission Review

Dear Ms. Hallock, and Commission:

This letter duly above captioned "Petition for Commission Review" and, captioned with petitioner's name and the above identification of the Petitioner by name and case numbers expresses Petitioners intent that the Commission review the proposed Order that the Administrative Law Judge has served on Petitioner. This letter duly constitutes service within 30 days and fulfilled the jurisdictional requirement as required by OAR 340-011-0575(3)(4).

Yours very truly,


James F. Evans

00075

for the
DEPARTMENT OF ENVIRONMENTAL QUALITY

OAH Case No. 119055
Dept. Case No. LQ/T-NWR-02-094

In the Matter of Cynthia Wescott
Page 1 of 4

2004, the Department denied the request for rehearing, but agreed to reconsider its February 18, 2004, Final Order and stay collection pending the reconsideration. The Department referred the matter to the Office of Administrative Hearings December 1, 2004, for a contested case hearing. By Notice of Hearing issued January 20, 2005, the Office of Administrative Hearings set the matter for hearing February 28, 2005. The Department filed a Motion for Ruling on Legal Issues January 28, 2005, serving Ms. Wescott through her attorney at his record address.²

By *ex parte* letter received at the Office of Administrative Hearings February 4, 2005, Mr. Evans sought assignment of a new administrative law judge and a reset of the scheduled hearing date. By letter issued February 7, 2005, the Chief Administrative Law Judge denied the request for reassignment. I then contacted Mr. Evans and the Department's representative by telephone February 8, 2005, to discuss Mr. Evans's reset request. Mr. Evans had not yet received the Chief ALJ's letter denying his request for a new ALJ, so he did not choose to participate. That same day Mr. Evans filed a letter seeking the Chief ALJ's reconsideration of his request for a new ALJ. The Chief ALJ again denied the request by letter issued February 10, 2005.

By *ex parte* telephone call to me February 14, 2005, Mr. Evans renewed his recusal request to me, and I also denied it. Mr. Evans also sought an extension of time to respond to the Department's Motion for Ruling on Legal Issues. I attempted to contact the Department's representative, but she was not available until February 17, 2005, so I did not address Mr. Evans's request for an extension of time.³ I forwarded to the Department's representative an e-mail setting forth the gist of the *ex parte* communication from Mr. Evans, and notified her that we would discuss Mr. Evans's request for an extension of time and for a reset February 17, 2005. I conducted a brief prehearing conference February 17, 2005, with Mr. Evans and the Department's representative participating. Mr. Evans argued his request for an extension of time, noting that he had not actually received the Department's motion until nearly two weeks after it had been mailed because his address had changed. He had not notified the Department of the address change until afterward. I denied the request, since Mr. Evans held sole control over his address and the Department's knowledge of it. I also denied the request for a reset of the hearing, because the hearing notice had been mailed January 20, 2005, Mr. Evans had not sought a reset for more than two weeks, and his request set forth no good cause for the reset.

The sole pending issue is the Department's Motion for Ruling on Legal Issues. Ms. Wescott's original answer admitted to all factual allegations except Mr. Hatley's alleged lessee status, and the Department in its motion stipulates that Mr. Hatley is not the lessee of the subject property. The sole affirmative defense raised by Ms. Wescott is that the tank at issue was a "farm tank," and therefore excluded from the enforcement sought. That issue was addressed by my January 28, 2004, order granting the Department's December 18, 2003, Motion for Ruling on Legal Issues and holding that the subject underground storage tank was not a "farm tank."

² The cover letter included with the motion indicated that Mr. Evans had until "February 14, 2004," to respond to the motion. The year obviously was incorrect, but the day also was incorrect. The Department's motion was mailed January 28, 2005, so the response deadline was February 11, 2005. See, OAR 137-003-0580(2), -0520(8).

³ I suggested that, in the ensuing three days, Mr. Evans diligently work to prepare his response. Nothing was submitted by February 17, and nothing has been received since.

Ms. Wescott has not responded to the Department's motion. The motion's factual allegations are well-supported by its accompanying affidavits and the record as a whole, and therefore are established as true. *See*, OAR 137-003-0580(10). Therefore, no genuine issue as to any material fact exists in this case. The legal conclusions argued in the Department's motion are the sole conclusions that could be reached in light of the un rebutted facts established.⁴ The Department therefore is entitled to a judgment as a matter of law. The Department's motion is granted, and its findings and conclusions are adopted here in their entirety.

FINDINGS OF FACT

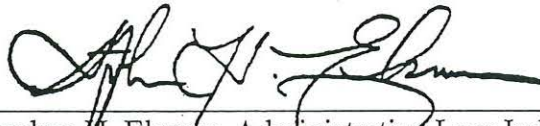
The Department's Findings of Fact are adopted in their entirety.

CONCLUSION OF LAW

The Department's Conclusions of Law are adopted in their entirety.

ORDER

The Department's Motion for Ruling on Legal Issues is granted. I therefore propose that the Department's Notice of Violation, Department Order, and Assessment of Civil Penalty issued June 24, 2002, be affirmed.



Stephen M. Elmore, Administrative Law Judge
Office of Administrative Hearings

MAILING AND ISSUANCE DATE:

February 22, 2005

⁴ The Department did not seek a civil penalty for certain of the violations alleged. Hence, the only potential unaddressed legal issue would be whether Ms. Wescott's civil penalty should be greater than that to which the civil penalty formula otherwise unerringly leads.

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 is 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.

00081

CERTIFICATE OF SERVICE

I certify that on February 22, 2005, I served the attached Order on Motion for Ruling on Legal Issue and 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:

JAMES F EVANS
ATTORNEY FOR CYNTHIA GAY
805 LIBERTY ST NE #3
SALEM OR 97301

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7004 2890 0001 8956 0016

CYNTHIA GAY (WESCOTT)
29388 SE HEIPLE RD
EAGLE CREEK OR 97022


BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7004 2890 0001 8956 0023

SUSAN GRECO
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, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

00082

PLEASE PLACE IN ORIGINAL FILE

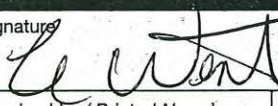
CASE NAME: CYNTHIA WESCOTT (GAY)

CASE NUMBER: 119055

AGENCY: DEQ (GRECO)

DATE: 2/22/05

☒ ORDER ON MOTION FOR RULING ON LEGAL ISSUED AND PROPOSED AND FINAL ORDER

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION: ON DELIVERY	
<ul style="list-style-type: none">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. 119055		<p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>X </p> <p>B. Received by (Printed Name) C. Date of Delivery 2-23</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p>	
1. Article Addressed to:		3. Service Type	
<div style="border: 1px solid black; padding: 10px; text-align: center;">CYNTHIA GAY (WESCOTT) 29388 SE HEIPLE RD EAGLE CREEK OR 97022</div>		<input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
2. Article Number (Transfer from service label)		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
7004 2890 0001 8956 0023			

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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MAR 01 2005

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

U.S. Postal Service TM	
CERTIFIED MAIL TM RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage \$	Postmark Here
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Sent To	
CYNTHIA GAY (WESCOTT)	
29388 SE HEIPLE RD	
EAGLE CREEK OR 97022	
PS Form 3800, June 2002 See Reverse for Instructions	

00083

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: CYNTHIA WESCOTT (GAY)

CASE NUMBER: 119055

AGENCY: DEQ (GRECO)

DATE: 2/22/05

☒ ORDER ON MOTION FOR RULING ON LEGAL ISSUED AND PROPOSED AND FINAL ORDER

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">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. 119055		<p>A. Signature X <i>[Signature]</i></p> <p>B. Received by (Printed Name) _____</p> <p>C. Date of Delivery _____</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
1. Article Addressed to: <div style="border: 1px solid black; padding: 5px; margin: 10px 0;">JAMES F EVANS ATTORNEY AT LAW 200 SW CAREY LANE PORTLAND OR 97219</div>		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
2. Article Number (Transfer from service label) 7004 2890 0001 8956 0030		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

U.S. Postal Service TM	
CERTIFIED MAIL TM RECEIPT	
(Domestic Mail Only. No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage	\$ _____
Certified Fee	_____
Return Receipt Fee (Endorsement Required)	_____
Restricted Delivery Fee (Endorsement Required)	_____
Total Postage & Fees	\$ _____
Postmark Here	
Sent To	
Street, Apt. No., or PO Box No.	
City, State, ZIP+4	
JAMES F EVANS ATTORNEY AT LAW 200 SW CAREY LANE PORTLAND OR 97219	

PS Form 3800, June 2002 See Reverse for Instructions

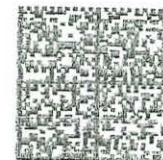
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AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

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Oregon

Office of Administrative Hearings
Transportation Hearings Division
1905 Lana Ave NE
Salem, OR 97314-0100



UNITED STATES POSTAGE
PITNEY BOWES
02 1A \$ 00.37⁰
0004377899 FEB 28 2005
MAILED FROM ZIP CODE 97301

SUSAN GRECO
DEQ
811 SW 6TH AVE
PORTLAND OR 97204

58000-

97204#1390





Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings
Employment Department
605 Cottage St. NE, Suite 201
Salem, OR 97301
(503) 378-4720
FAX (503) 378-2942

February 17, 2005

Mr. James F. Evans
Attorney at Law
200 SW Carey Lane
Portland, OR 97219

Re: In the Matter of Cynthia Gay (Westcott)

Dear Mr. Evans:

Thank you for your letter of February 15, 2005. I must again decline your request to recuse Administrative Law Judge Stephen Elmore in the above-entitled matter.

Let me add an additional explanation. I frequently get requests from both agencies and private citizens asking for the recusal of an administrative law judge long after the initial assignment. The reason generally, as in your case, is that the judge ruled against the party in an interim order. With 40,000 cases per year, it would be impossible for the Office of Administrative Hearings to operate efficiently and, not least, fairly if I were to reassign judges every time they issue orders which agencies or parties do not like.

Further correspondence on this matter is unnecessary. Judge Elmore will continue to be the judge assigned to this case.

Yours very truly,

Thomas E. Ewing, Ph.D., J.D.
Chief Administrative Law Judge

c: Susan Greco, DEQ
Stephen Elmore, ALJ

00087

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219
503-636-4995

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FEB 16 2005
THE OFFICE OF
ADMINISTRATIVE HEARINGS

February 15, 2005

Thomas E. Ewing, Ph.D, J.D.
Chief Administrative Law Judge
Office of Administrative Hearings
Employment Department
605 Cottage Street N.E., Suite 201
Salem, Oregon 97301

RE: OAH Case No.: 119055
Agency Case No.: LQ/T-NWR-02-094
IN THE MATTER OF:
Cynthia Gay (Wescott)
Request for New Administrative Law Judge
Request to Reset Hearing Date

Dear Judge Ewing:

I am in receipt of your letter of February 10, 2005. I am disappointed in your decision to leave Judge Elmore hearing this matter. I must renew my request for an impartial ALJ in light of your letter of February 10. Please review the record in this matter as this will make clear that my client's rights were prejudiced by Judge Elmore's actions.

Not allowing Ralph Hatley to act as Cynthia Wescott's personal representative was not simply an abuse of discretion, but a disregarding of the law. The Judge's refusal to reset the hearing so as to allow my client's matter to be heard on the merits demonstrated "...reason why an administrative law judge's impartiality might reasonably be questioned...". You cite ORS 183.457(2), for Judge Elmore's decision, but he did not recite findings from the record to justify his decision. In fact he did not even allow an offer of proof to make a record. ORS 183.457(1) states in part "... No rule adopted by a state agency shall have the effect of precluding lay representation..." This same type language is used again in the same paragraph. ORS183.457(2)

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which you cite is permissive unless certain conditions are found. "...May appear by authorized representative if:..." (a) "...will not hinder the orderly and timely development of the record..." No record is present to support the Judge's ruling. It is an error of legal reasoning that my client does not assume to be benign and you should not disregard as a basis to recuse Judge Elmore.

The "Good cause" you cite includes the language "...It includes, but is not limited to, personal bias or prejudice,..." that means it does not even need to "rise" to personal bias or prejudice, but that the subjective belief of my client is "reasonable" under the totality of the circumstances, or that the interest of justice- the appearance of being fair- would be promoted by removing the Judge. Here, the record reflects that Ms. Wescott sent a power of attorney naming Ralph Hatley her personal representative to Judge Elmore before the hearing, Mr. Hatley is the long time business partner and life partner of Ms. Wescott and was to whom much of the DEQ correspondence was addressed, see Petition for Rehearing and/or Reconsideration. Ms. Wescott also faxed a letter to Judge Elmore the day before the hearing stating Mr. Hatley was going to act on her behalf and that she would be available to the Judge at a stated telephone number if there were any questions. How easy would it have been to give Ms. Wescott a set over when it was quite clear a good faith misunderstanding had occurred on her part. The Judge had no interest in protecting the party's right to a hearing. It is manifestly reasonable for Ms. Wescott to want another judge, and it meets the test "...any reason why an administrative law judge's impartiality might reasonably be questioned."

I recite this record and duly include this letter in the record so that if necessary a reviewing body can evaluate my clients request and I am confident my clients position surpasses the minimal level of evidence needed to sustain her request for the Judge violated two of the most basic premises of administrative law; lay representation which expresses the less formal nature of the proceedings and the right to a hearing on the merits.

Thank you for your close attention to this matter.

Yours very truly,

151 James F. Evans
James F. Evans

cc: Susan Greco

Stephen Elmore ✓

Stephanie Hallock

From: Stephen H ELMORE
To: greco.susan@deq.state.or.us
Date: 2/14/05 12:23:51 p.m.
Subject: Gay/DEQ: OAH #119055

Ms. Greco--

I received an *ex parte* telephone call from James Evans, Ms. Gay's attorney, this morning at approximately 10:35, wanting to address his pending motions and yours. I attempted to call you but your voice mail said that you would be out of the office until Thursday, February 17.

Mr. Evans renewed his recusal request directly to me. Under the administrative rules, the question usually is one for the Chief Administrative Law Judge, not for me, and in this case the Chief ALJ already has twice denied the request. I told Mr. Evans that the only way I would recuse myself would be if I thought that I could not be fair to both parties. In this case I do not think that, so I denied the request.

Mr. Evans also seeks additional time to respond to the Department's Motion for Ruling on Legal Issues. I did not address the request, but suggested that he diligently seek to submit his response as soon as possible. I told him that I would set up a telephone conference for Thursday, February 17, at 10:00 a.m., to discuss his request. I spoke with Deborah in your office after speaking with Mr. Evans, and Deborah thought that you would be available at 10:00 a.m. that day.

I write this e-mail pursuant to the provisions of OAR 137-003-0625, which regulates the process for addressing *ex parte* contacts with an ALJ. You are entitled to respond, if you like, but are not required to do so. I think that this e-mail fairly sets out the gist of my nearly eight-minute conversation with Mr. Evans, and I have attached a WAV file recording of my that conversation as well. If you do not have the ability to play WAV files on your computer, we can discuss Thursday other means of getting a copy of the recording to you. I am mailing a copy of this e-mail to Mr. Evans today.

I will call you at your 503-229-5152 number for the brief **pre-hearing conference at 10:00 a.m., Thursday, February 17, 2005**, and will call Mr. Evans at 503-636-4995. If you are not available at that time, please contact Mr. Evans and my office to schedule a different time.

Stephen H. Elmore,
Administrative Law Judge
Office of Administrative Hearings

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Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings
Employment Department
605 Cottage St. NE, Suite 201
Salem, OR 97301
(503) 378-4720
FAX (503) 378-2942

February 10, 2005

James F. Evans
Attorney at Law
200 SW Carey Lane
Portland, OR 97219

Re: *In the Matter of Cynthia Gay (Wescott)*

Dear Mr. Evans:

Thank you for your letter of February 8, 2005 requesting reconsideration of my earlier ruling denying the motion to recuse Administrative Law Judge Stephen Elmore in the above-entitled matter. I must again deny your request.

When I originally denied your request, I had not properly understood that some time ago Judge Elmore had actually convened the hearing. A timely request would have been one made shortly after notice of the initial assignment of Judge Elmore.

You also assert that your client does not have confidence in Judge Elmore's impartiality because of previous rulings. I construe that to be a "good cause" argument under OAR 471-060-0005(2)(b). "Good cause" is defined as

any reason why an administrative law judge's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.

Judge Elmore dismissed your client's case on the ground that the lay representative did not meet the legal conditions of representation set out in ORS 183.457(2). That ruling does not rise to "personal bias or prejudice."

Yours very truly,

Thomas E. Ewing, Ph.D, J.D.
Chief Administrative Law Judge

c: Stephen Elmore, ALJ
Susan Greco, DEQ

RECEIVED
FEB 11 2005
OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

00096

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219
503-636-4995

February 8, 2005

Thomas E. Ewing, Ph.D, J.D.
Chief Administrative Law Judge
Office of Administrative Hearings
Employment Department
605 Cottage Street N.E., Suite 201
Salem, Oregon 97301



RE: OAH Case No.: 119055
Agency Case No.: LQ/T-NWR-02-094
IN THE MATTER OF:
Cynthia Gay (Wescott)
Request for New Administrative Law Judge
Request to Reset Hearing Date

Dear Judge Ewing:

Thank you for your letter of February 7, 2005. Please reconsider the request to remove Judge Elmore. On January 20, 2005 until February 2, 2005, I was not able to respond to the DEQ until my PLF was paid. Once that was done I called up Ann Redding and updated my address and phone number while at the same time inquiring as to the form of request for a new judge and request to reset hearing. She kindly said a letter would be fine and that the request should be no problem as it would be a first for both. I also indicated briefly that due to the "totality of the circumstances" it was very important a new judge get assigned because my client had no confidence in Judge Elmore due to prior rulings which prejudiced his rights to get a fair hearing on the merits. No, judge Elmore would have him get no hearing at all. Such as that is against the spirit of the administrative rules where the customer is the property owning citizen, and the idea is to reach the merits. So, Ms. Wescott renews the request. I respect your indication on the phone today that knowing the full "totality of the circumstances" a granted request seems appropriate. Thank you for your attention to this matter.

00099

Yours very truly,

James F. Evans
James F. Evans

✓ CC: Susan Groco
DEQ 811 Sixth Ave
Portland OR 97214

00100



Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings
Employment Department
605 Cottage St. NE, Suite 201
Salem, OR 97301
(503) 378-4720
FAX (503) 378-2942

February 7, 2005

Steve
Elmore

James F. Evans
Attorney at Law
200 SW Carey Lane
Portland, OR 97219

Re: *In the Matter of Cynthia Gay (Wescott)*

Dear Mr. Evans:

Thank you for your letter of February 3, 2005 requesting the assignment of a different administrative law judge to the above-entitled matter. Regretfully, I must deny your request.

OAR 471-060-0005(4) allows a request if the party "had a reasonable opportunity to request a change of administrative law judge but did not do so. 'Reasonable' is determined under the totality of circumstances." In this case, the Notice of Hearing naming the administrative law judge was sent on January 20. Your request dated February 3, 2005, was made 14 days later. This is not "reasonable opportunity" under all the circumstances.

Yours very truly,

A handwritten signature in black ink, appearing to read "Tom Ewing".

Thomas E. Ewing, Ph.D., J.D.
Chief Administrative Law Judge

00102

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FEB 04 2005

by Office of
Administrative Hearings

James F. Evans
Attorney at Law
200 S.W. Carey Lane
Portland, Oregon 97219
503-636-4995

February 3, 2005

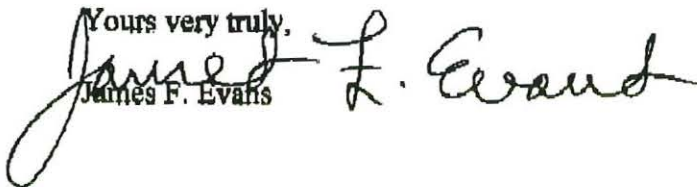
Ann Redding
Hearing Officer Panel, Transportation Section
1905 Lana Avenue N.E.
Salem, Oregon 97314

RE: OAH Case No.: 119055
Agency Case No.: LQ/T-NWR-02-094
IN THE MATTER OF:
Cynthia Gay (Wescott)
Request for New Administrative Law Judge
Request to Reset Hearing Date

Dear Ms. Redding:

As per phone call with you on this date Ms. Wescott requests a new Administrative Law Judge and requests to reset the hearing date presently set February 28, 2005. This is a first time request for both items.

Yours very truly,


James F. Evans

00105



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390

503-229-5696

TTY 503-229-6993

January 28, 2004

Via facsimile (without attachments) and regular mail

(503) 378-4067

Judge Stephen Elmore

Office of Administrative Hearings

P.O. Box 14020

Salem OR 97309-4020

RECEIVED

JAN 31 2005

THE OFFICE OF
ADMINISTRATIVE HEARINGS

RE: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

Enclosed you will find the Department's Motion for Ruling on Legal Issues in the above entitled matter. The Department is requesting a ruling in the Department's favor on all legal issues raised in the Department's Notice of Violation, Department Order and Assessment of Civil Penalty No. LQ/T-NWR-02-094 (Notice). Per Oregon Administrative Rule 137-003-0580, Ms. Gay's attorney has until February 14, 2004 to respond to this motion unless you establish a longer or shorter time period for the response. I have enclosed copies of the rules referenced in the Motion for your and Ms. Gay's review.

Additionally, in response to your request dated January 25, 2005, I have enclosed a copy of the Final Order issued by the Department on February 18, 2004, the Department's Order in response to Ms. Gay's Petition for Reconsideration and/or Rehearing, and the Department's letter allowing Ms. Gay a contested case hearing in this matter. The issues raised in the Petition for Reconsideration and/or Rehearing have already been addressed by the Department.

If you should have any further questions or need further clarification, please feel free to contact me at (503) 229-5152 or at the address listed above.

Sincerely,

Susan M. Greco

Environmental Law Specialist

Enclosures

cc: James F. Evans, 805 Liberty Street N.E. #3, Salem Oregon 97301

00108

DEQ-1

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:
CYNTHIA GAY

Respondent

) DEPARTMENT'S MOTION FOR
) RULING ON LEGAL ISSUES
) NO. LQ/T-NWR-02-094
) CLACKAMAS COUNTY

The Department of Environmental Quality (the Department), via this Motion for Ruling on Legal Issues filed pursuant to OAR 137-003-0580, moves that the Administrative Law Judge rule in the Department's favor on all legal issues raised in the Department's Notice of Violation, Department Order and Assessment of Civil Penalty No. LQ/T-NWR-02-094 (Notice). The Department is entitled to a favorable ruling as a matter of law with respect to both the violations cited and the civil penalties assessed in the Notice, as provided in OAR 137-003-0580. This motion is supported by the attached affidavits and documents, which together establish that there is no genuine issue as to any facts in this case (See Section IV of this Motion).

I. CASE HISTORY

On June 25, 2002, the Department issued to Respondent, Cynthia Gay, the Notice which alleged four violations and assessed civil penalties in the amount of \$6,072. The violations are as follows:

1. Failing to decommission an underground storage tank (UST). A civil penalty was assessed in the amount of \$2,272.
2. Failing to provide the Department with both thirty day and three working day notice prior to beginning permanent closure of an UST. A civil penalty was assessed in the amount of \$1,800.
3. Failing to submit a completed decommissioning checklist within thirty days of permanent closure of an UST. A civil penalty was assessed in the amount of \$2,000.
4. Allowing the decommissioning of an UST by a person not licensed by the Department. No civil penalty was assessed for this violation.

On July 15, 2002, the Department received a request for hearing and answer from Respondent. The answer expressly admitted all of the Department's factual findings, except that

1 Mr. Hatley was a lessee of the property. Ms. Gay raised the affirmative defense that the tank was
2 not an UST because it was a "farm tank," as that term is defined in 40 CFR 280.12 (as adopted by
3 former 340-150-0010). On January 28, 2004, Administrative Law Judge Stephen H. Elmore issued
4 an order finding that, as a matter of law, the UST was not a farm tank.

5 A contested case hearing was scheduled for February 18, 2004. Respondent failed to appear
6 herself or through an attorney at the hearing. Based on this default, the Department issued a Final
7 Order by Default on February 18, 2004. On March 31, 2004, the Department received a petition for
8 reconsideration and rehearing from Respondent. On May 26, 2004, the Department agreed to
9 reconsider the Final Order. In reconsideration of the Final Order, the Department agreed to allow a
10 contested case hearing on the matter. Respondent has not filed a new or amended answer.

11 II. LAW AT ISSUE

12 In 1988 the Environmental Protection Agency promulgated rules requiring that all existing
13 USTs to be upgraded before December 22, 1998. (*See 40 CFR 280.20, 280.21 and 280.22.*) These
14 rules were subsequently adopted by the Department. (*See former OAR Chapter 340, Division 150.*)¹
15 The Department issued a general permit registration certificate for operation for those USTs
16 upgraded before December 1998. USTs which had not received an operating permit by that date
17 needed to be placed into temporary closure and permanently decommissioned within one year. (*See*
18 *former OAR 340-150-0021.*) Former OAR 340-150-0019 required all persons who
19 decommissioned an UST after December 1998 to comply with former OAR 340-150-0160 through
20 OAR 340-150-0166. Former OAR 340-150-0166 required that the owner of the UST provide the
21 Department with both thirty day and three working day notice before beginning the
22 decommissioning. Within thirty days of completion of the decommissioning, a completed
23 decommissioning checklist must be submitted to the Department. Additionally, the

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26 ¹ On February 14, 2003, revisions to OAR Chapter 340, Division 150 became
27 effective. The changes are not applicable to this matter since the alleged
violations occurred prior to the effective date of these new regulations. A
copy of these regulations is attached to this Motion.

1 decommissioning must be completed by a service provider licensed by the Department. (*See*
2 *former OAR 340-150-0166.*)

3 III. EVIDENCE IN SUPPORT OF DEPARTMENT'S MOTION

4 Exhibit A – Notice of Violation, Department Order and Assessment of Civil Penalty, dated
5 June 25, 2002 including the cover letter and Exhibits 1 through 3 attached thereto.

6 Exhibit B – Request for Hearing and Answer of Respondent including the cover letter,
7 dated July 15, 2002.

8 Exhibit C – Department's Motion for Ruling on Legal Issues, dated December 15, 2003;
9 Respondent's Response to the Motion, dated January 16, 2004 and Order on Motions for Ruling on
10 Legal Issue dated January 28, 2004.

11 Exhibit D – Affidavit of Stephanie Holmes, Underground Storage Tank Program
12 Coordinator for the Department including Exhibits 1 through 6 attached thereto.

13 Exhibit E – Affidavit of Leslie Carlough, Senior Policy Advisor for the Department
14 including Exhibit 1 attached thereto.

15 Exhibit F – Affidavit of Herrington Rose, Environmental Specialist for the Department
16 including Exhibits 1 through 4 attached thereto.

17 Exhibit G – Affidavit of Greg Toran, Environmental Specialist for the Department
18 including Exhibits 1 through 5 attached thereto.

19 IV. FINDINGS OF FACTS

20 After being served with a Notice, a Respondent has twenty days to file an answer that either
21 admits or denies all the facts alleged in the Notice. Any factual matters alleged in the Notice that
22 are not denied in the answer are considered admitted. *OAR 340-011-0530.* An Administrative
23 Law Judge must limit the scope of the hearing to those matters in the Notice that are placed at issue
24 by the answer. *See OAR 340-011-0530.*

25 The basic facts are set forth in the Department's Notice and were admitted by Respondent
26 in her answer, with the exception of the Department's assertion that Mr. Hatley was a lessee of the
27 property. The Department is willing to stipulate that Mr. Hatley was not a lessee of the property.

1 This fact is not, however, relevant to the violations cited or the penalties assessed. Respondent did
2 raise the affirmative defense that the UST was a farm tank and thus not subject to the UST
3 regulations. As previously stated, on January 28, 2004, ALJ Elmore ruled against Respondent on
4 that issue, finding that, as a matter of law, the UST was not a farm tank. Thus there are no facts at
5 issue in this matter.

6 The facts, as set forth in the Department's Notice, are summarized below:

7 On or about October 29, 1991, Respondent was issued a temporary permit for an UST
8 located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon. Respondent is
9 both the permittee and the owner of the UST. Respondent did not apply for or obtain a general
10 permit registration certificate for operation of the UST by December 23, 1998. The UST was
11 used to store a regulated substance (gasoline) for fueling of airplanes until approximately 1997.
12 Respondent paid the annual UST general compliance fee from 1988 through 2001. Respondent
13 did not pay the annual compliance fee in 2002.

14 On or about October 1, 1997, August 15, 1998, November 11, 1998, January 13, 1999,
15 August 20, 1999 and December 6, 1999, the Department notified Respondent that the UST
16 needed to be decommissioned before December 1999, as required by the Department's rules. On
17 February 23, 2000 and October 30, 2000, the Department sent Respondent Notices of
18 Noncompliance (NON) for failure to decommission the UST. The NONs stated that the failure
19 to decommission the UST was a violation of the Department's rules and could result in the
20 assessment of civil penalties.

21 On November 14, 2000, Greg Toran, an employee of the Department, conducted an
22 inspection of the property and the UST. At that time, the UST had not been decommissioned.
23 By letter to Respondent dated December 5, 2000, the Department again outlined the requirements
24 for decommissioning the UST. The Department requested that the UST be decommissioned
25 before June 30, 2001.

26 ////

27 ////

1 On January 28, 2002, the Department again sent Respondent another NON for failure to
2 decommission the UST. The NON stated that the failure to decommission the UST was a
3 violation of the Department's rules and could result in the assessment of civil penalties.

4 In approximately May 2001, the UST was decommissioned but Respondent did not
5 provide either the thirty day notice or three working day notice to the Department before
6 decommissioning the UST or provide a completed decommissioning checklist within 30 days
7 after completing the decommissioning. Additionally, Respondent allowed Mr. Ralph Hatley to
8 decommission the UST.

9 On March 14, 2002, the Department sent Respondent an NON for improperly
10 decommissioning the UST. The NON requested that Respondent submit a completed
11 decommissioning checklist and outstanding annual compliance fees.

12 V. VIOLATIONS AND ASSESSED CIVIL PENALTIES

13 There are two issues in any case involving a violation and the resulting civil penalty
14 assessment. The first issue is whether a violation occurred. If so, the second issue is whether the
15 civil penalty assessment is correct. In this case because Respondent admitted all the factual
16 allegations in the Notice and because those factual allegations support both the violations and the
17 resulting civil penalty assessments, the Administrative Law Judge should grant the motion and
18 issue a proposed order upholding the Notice.

19 Penalty Calculation Rules

20 Under OAR Chapter 340, Division 12, the formula for determining the amount of a civil
21 penalty takes into consideration such factors as prior enforcement actions, whether the violation
22 was repeated, the cause of the violation, the person's cooperativeness and any economic benefit
23 gained by either delaying or avoiding the cost of compliance. The civil penalty formula that the
24 Department must use in determining the amount of a civil penalty is set forth in OAR 340-012-
25 0045. The Department must first determine the class and magnitude of the violation to determine
26 the base penalty. The Department then increases or decreases the amount of the base penalty by

27 ////

1 application of the formula which is " $BP = [(1 \times BP) \times (P + H + O + R + C)] + EB$ ". OAR 340-
2 012-0045.

3 The "P" factor is used to reflect any prior violations the Respondent may have for which
4 the Department issued a formal enforcement action and the "H" factor reflects whether
5 Respondent corrected those prior violations. The "O" factor reflects whether the violation was
6 repeated or continuous or occurred on one day only. The "R" factor reflects whether the
7 violation resulted from Respondent's negligent, intentional or flagrant act or omission. The "C"
8 factor reflects Respondent's efforts to correct the violation or minimize the effects of the
9 violation. The "EB" or economic benefit portion of the civil penalty formula is the monetary
10 benefit that an entity gained by not complying with the law. The "EB" represents the
11 approximate dollar sum of the economic benefit that Respondent gained through
12 noncompliance as calculated using the EPA BEN computer model. OAR 340-012-0045. This
13 formula was used to calculate the penalties for each of the three violations.

14 Violation #1

15 Former OAR 340-150-0021 required that, if a general permit registration certificate for
16 operation had not been issued for an UST prior to December 22, 1998, the UST needed to be placed
17 into temporary closure and permanently decommissioned before December 22, 1999. Respondent
18 failed to decommission the UST prior to December 22, 1999. Specifically, during an inspection
19 on November 14, 2000 by a Department employee, the UST had not been decommissioned. See
20 *Exhibit G*. Respondent admitted that the UST was not decommissioned until May 2001. See
21 *Exhibit F*.

22 The base penalty for violation #1 is set forth in the matrix listed in OAR 340-012-0042.
23 Under OAR 340-012-0067, this violation is classified as a Class II violation. The Department
24 determined that the magnitude of the violation is moderate because there is no selected
25 magnitude for this violation listed under OAR 340-012-0090 and there is insufficient information
26 to make a finding of major or minor magnitude, pursuant to OAR 340-012-0045. The base
27 penalty was correctly set at \$1000 for a Class II, moderate magnitude violation.

1 The Department increased the base penalty by a factor of 10 by applying the factors in the
2 civil penalty formula. The P and H factors were set at 0 because the Department has not issued
3 any prior formal enforcement actions against Respondent. The O factor was set at 2 since the
4 violation occurred on more than one day. Specifically, the violation occurred from December
5 1999 until approximately May 2001. *See Exhibit F.*

6 The R factor was set at 6 because the Respondent's conduct was intentional. Intentional
7 conduct means conduct by a person with a conscious objective to cause the result of the conduct.
8 *OAR 340-012-0030.* The Department informed Respondent that the UST needed to be
9 permanently closed by a certain date. *See Exhibits D, F and G.* Despite being given specific
10 deadlines to complete the permanent closure of the UST, Respondent allowed the deadlines to
11 expire without closing the UST.

12 The C factor was set at 2 because Respondent did not take reasonable efforts to correct
13 the violation or to minimize the effects of the violation. Although Respondent was sent
14 numerous letters and NONs directing that the UST be decommissioned, Respondent did not do
15 so until May 2001. Although Respondent eventually decommissioned the UST, allowing one
16 and one-half years to pass after compliance deadline for decommissioning when Respondent
17 knew of the regulatory deadline, was not a "reasonable effort to correct the violation". *See*
18 *Exhibits D, F, and G.*

19 Respondent delayed the approximate costs of decommissioning the UST, estimated at
20 \$5,000, from December 1999 until at least December 2000. *See Exhibits F and G.* Using the
21 BEN computer model, Respondent realized an economic benefit of \$272. *See Exhibit E.* The
22 Department only calculated the economic benefit for the period from December 1999 until
23 December 2000, which is a conservative calculation because Respondent did not actually
24 decommission the UST until May 2001.

25 Violation #2

26 Former OAR 340-150-0166 required that the owner of the UST provide the Department
27 with thirty day and three working day notice prior to beginning the decommissioning of an UST.

1 Respondent decommissioned the UST in May 2001 but did not provide the Department with either
2 notice. *See Exhibit F.*

3 The base penalty for violation #2 is set forth in the matrix listed in OAR 340-012-0042.
4 Under OAR 340-012-0067, this violation is classified as a Class II violation. The Department
5 determined that the magnitude of the violation is moderate because there is no selected
6 magnitude for this violation listed under OAR 340-012-0090 and there is insufficient information
7 to make a finding of major or minor magnitude, pursuant to OAR 340-012-0045. The base
8 penalty was correctly set at \$1000 for a Class II, moderate magnitude violation.

9 The Department increased the base penalty by a factor of 8 by applying the factors in the
10 civil penalty formula. The P and H factors were set at 0 because the Department has not issued
11 any prior formal enforcement actions against Respondent. The O factor was set at 2 because the
12 violation occurred on more than one day. Specifically, the violation occurred sometime prior to
13 May 2001 on two separate occasions (both thirty days and three days prior to beginning the
14 decommissioning). *See Exhibit F.*

15 The R factor was set at 6 because the Respondent's conduct was intentional. Intentional
16 conduct means conduct by a person with a conscious objective to cause the result of the conduct.
17 *OAR 340-012-0030.* Respondent knew that she needed to provide notice to the Department
18 before decommissioning the UST, yet she proceeded to decommission the UST without giving
19 the notice. Thus Respondent had the conscious objective to decommission the UST without
20 proper notice. Specifically, on November 14, 2000 during an inspection and again on December
21 5, 2000 in a letter, the Department informed Respondent of the need to provide the Department
22 with notice. *See Exhibit G.* Respondent decommissioned the UST without providing this notice.

23 Violation #3

24 Former OAR 340-150-0166 required that a completed decommissioning checklist must be
25 submitted to the Department within thirty days of completion of the decommissioning. Although
26 the decommissioning occurred in May 2001, the Department did not receive a completed
27 decommissioning checklist until September 2002. *See Exhibit F.*

1 The base penalty for violation #3 is set forth in the matrix listed in OAR 340-012-0042.
2 Under OAR 340-012-0067, this violation is classified as a Class II violation. The Department
3 determined that the magnitude of the violation is moderate because there is no selected
4 magnitude for this violation listed under OAR 340-012-0090 and there is insufficient information
5 to make a finding of major or minor magnitude, pursuant to OAR 340-012-0045. The base
6 penalty was correctly set at \$1000 for a Class II, moderate magnitude violation.

7 The Department increased the base penalty by a factor of 10 by applying the factors in the
8 civil penalty formula. The P and H factors were set at 0 because the Department has not issued
9 any prior formal enforcement actions against Respondent. The O factor was set at 2 because the
10 violation occurred on more than one day. Specifically, the violation first occurred sometime after
11 May 2001 and continued until September 2002. *See Exhibit F.*

12 The R factor was set at 6 because the Respondent's conduct was intentional. Intentional
13 conduct means conduct by a person with a conscious objective to cause the result of the conduct.
14 *OAR 340-012-0030.* Respondent knew that she needed to provide the Department with a
15 completed checklist after decommissioning the UST yet she failed to do so. Thus Respondent
16 had the conscious objective to avoid submitting the completed checklist. Specifically, on
17 November 14, 2000 during an inspection and again on December 5, 2000 in a letter, the
18 Department informed Respondent of the need to provide the Department with a completed
19 checklist. *See Exhibit G.* After Respondent informed the Department that the UST had been
20 decommissioned, the Department requested that Respondent provide the completed checklist in a
21 Notice of Noncompliance dated March 14, 2002. *See Exhibit F.*

22 The C factor was set at 2 because Respondent did not take reasonable efforts to correct
23 the violation or to minimize the effects of the violation. Although Respondent knew, prior to
24 decommissioning the UST, that she needed to provide the Department with a completed checklist
25 after decommissioning the UST, she did not do so until over one year after the decommissioning
26 was complete. *See Exhibits D, F, and G.* Although Respondent eventually provided the
27 checklist to the Department, she did not do so until after a civil penalty was assessed for her

1 failure to do so. Thus the eventual submittal of the checklist was not a "reasonable effort to
2 correct the violation".

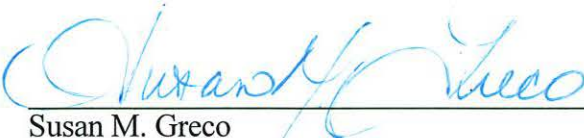
3 Violation #4

4 Under former OAR 340-150-0166, the decommissioning of an UST must be completed by
5 a service provider licensed by the Department. Respondent allowed Mr. Ralph Hatley to
6 decommissioned the UST in May 2001. Mr. Hatley is not a service provider licensed by the
7 Department. *See Exhibits B and F.* The Department did not assess a civil penalty for this violation.

8 VI. CONCLUSIONS

9 In conclusion, the Department moves that the Administrative Law Judge find, as a matter of
10 law, that there is no genuine issue as to any material fact that are relevant to resolution of the legal
11 issues in this matter. Based on such a ruling, the Department requests that the Administrative Law
12 Judge issue a proposed order upholding the Department's Notice.

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15 1/27/05
16 Date

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Susan M. Greco
Environmental Law Specialist

STATE OF OREGON

DEPARTMENT OF ENVIRONMENTAL QUALITY

MEMORANDUM

DATE: January 28, 2005

TO: Enforcement File
Case Name: Cynthia Gay
Case Number: LQ/T-NWR-02-094

FROM: Deborah Nesbit
Western Region - Salem

SUBJECT: Whereabouts of James F. Evans, Attorney at Law, representing Cynthia Gay

Susan Greco requested that I fax and mail a copy of the Motion for Ruling on Legal Issues dated January 28, 2005, to Mr. Evans. I called the phone number we had for Mr. Evans to attempt to get a FAX number and discovered that the phone had been disconnected. I verified the number, as well as the last known address for Mr. Evans, on the internet phone directory. It reflected the address and number we had on hand. I called 411 but could not get an updated phone number. I then checked the Oregon State Bar directory; once again, the information was unchanged. Attached is a printout of the information from the Oregon State Bar dated January 28, 2005.

No Fax
Deb- please fax
my letter and
motion to Mr. Evans
at the number
above.
2-10-05
mailed Susan

00120

OSB Membership Directory
Search for a Member

[New Search](#)
[Back to Results](#)

James F Evans

Bar Number: **89045**

Status: **Active**

Mailing Address: **James F Evans**
805 Liberty St NE #3

Salem OR 97301

County: **Marion**

Phone: **(503) 391-7101**

Fax:

Email:

Website:

dis connected number

*2111 had no listing
Nothing in white
pages*

00122

DATE/TIME = JAN-28-2005 12:03

JOURNAL No. = 12

COMM. RESULT = OK

PAGE(S) = 011

DURATION = 00:01:47

FILE No. = 357

MODE = MEMORY TRANSMISSION

DESTINATION = 915033784067

RECEIVED ID = / 5033784067

RESOLUTION = STD

*Motion for Ruling & Cover letter
Gay - LQ/T - NWR-02-094*

Judge Elmore

***** -

- ***** -

- *****



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

811 SW Sixth Avenue

Portland, OR 97204-1390

(503) 229-5696

TTY (503) 229-6993

June 25, 2002

CERTIFIED MAIL

7001 1140 0002 3546 2903

Cynthia Gay
29388 S.E. Heiple Road
Eagle Creek OR 97022

Re: Notice of Violation, Department Order and
Assessment of Civil Penalty
No. LQ/T-NWR-02-094
Clackamas County

In 1988, the Department issued to you a temporary operating permit for an underground storage tank (UST) located at the Beaver Oaks Airport, 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon. You also own the property on which the UST is located.

Numerous times since 1997 the Department informed you that any UST that was not upgraded prior to December 1998, needed to be decommissioned prior to December 22, 1999. On February 23, 2000 and October 30, 2000, the Department issued to you Notices of Noncompliance (NON) for the violation of failing to decommission the UST. As a result of the NONs, the Department conducted a site and UST inspection in November 2000, at the request of the lessee of the property, Ralph Hatley. As a follow-up to that site visit, Greg Toran with the Department sent you and Mr. Hatley a letter outlining the specific requirements for decommissioning the UST and a deadline of June 2001 for completing the decommissioning. When the Department did not receive any documentation regarding the decommissioning, a Notice of Noncompliance was issued to you on January 28, 2002. Via telephone in February 2002, Mr. Hatley informed the Department that he had removed the UST. You did not submit the required notification prior to the decommissioning, nor did you submit the required decommissioning checklist including the analytical results of any soil samples collected, within 30 days following the decommissioning. Additionally, Mr. Hatley is neither the owner or the permittee of the UST, nor a licensed UST service provider, and as such, could not legally decommission the UST.

Notification to the Department prior to a decommissioning ensures that the Department approves any methods of disposal for the UST, that the correct materials are used, and that the correct practices are followed. Testing for a release at the time of decommissioning ensures that any releases are documented, reported and promptly corrected prior to the spread of any contamination. Submittal of the checklist following decommissioning allows the Department to verify that the correct procedures were followed. On March 14, 2002, the Department issued to you a NON for failing to provide, to the Department, notice prior to the decommissioning and the checklist following the completion of the decommissioning.



00124



You are liable for a civil penalty because you have violated Oregon environmental law. The enclosed Notice assesses a civil penalty of \$6072. The amount of the penalty was determined using the procedures set forth in OAR 340-012-0045. The Department's findings and civil penalty determination are attached to the Notice as Exhibits 1 through 3. In addition to the civil penalty assessment, the enclosed Order requires you to either: (1) submit a completed decommissioning checklist including the results from the soil samples collected at the time of decommissioning; or (2) have a qualified third party measure for the presence of a release under the location of the decommissioned UST, and submit a completed decommissioning checklist and the annual UST compliance fees for the year 2002.

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


If you wish to discuss this matter, or believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, you may request an informal discussion by attaching a request to the appeal. The request to discuss this matter with the Department will not waive any right to a contested case hearing, if a timely answer is filed.

I look forward to your cooperation in complying with Oregon's environmental laws in the future. However, if any additional violations occur, you may be assessed additional civil penalties.

Copies of referenced rules are enclosed. Also enclosed is a copy of the Department's internal management directive regarding civil penalty mitigation for Supplemental Environmental Projects (SEPs). If you are interested in having a portion of the civil penalty fund an SEP, please review the enclosed SEP directive. Exceptional pollution prevention could result in partial penalty mitigation.

If you have any questions about this action, please contact Susan Greco with the Department's Office of Compliance and Enforcement in Portland at 229-5152 or toll-free at 1-800-452-4011, enforcement extension 5152.

Sincerely,



Stephanie Hallock
Director

Enclosures

cc: Herrington Rose, NWR, DEQ
LQ Division, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Clackamas County District Attorney
Ralph Hatley, 29388 S.E. Heiple Road, Eagle Creek, OR 97022

00125

1 Noncompliance (NON) for failure to decommission the UST. The NON stated that the
2 failure to decommission the UST was a violation of the Department's rules and could result in
3 the assessment of civil penalties.

4 6 On October 30, 2000, the Department sent Respondent an NON for failure to
5 decommission the UST.

6 7 On November 14, 2000, Greg Toran, an employee of the Department, conducted
7 an inspection of the property and the UST. At that time, the UST had not been decommissioned.

8 8 By letter to Respondent dated December 5, 2000, the Department again outlined
9 the requirements for decommissioning the UST. The Department requested that the UST be
10 decommissioned prior to June 30, 2001.

11 9 On January 28, 2002, the Department sent Respondent an NON for failure to
12 decommission the UST. The NON stated that the failure to decommission the UST was a
13 violation of the Department's rules and could result in the assessment of civil penalties.

14 10 On or before February 6, 2002, Ralph Hatley, the lessee of the property,
15 decommissioned the UST. Mr. Hatley is not a licensed underground storage tank service
16 provider.

17 11 Respondent did not provide either the thirty (30) day or three (3) working day
18 notices to the Department prior to decommissioning the UST, as required by OAR 340-150-
19 0166(3).

20 12 On March 14, 2002, the Department sent Respondent an NON for improperly
21 decommissioning the UST. The NON requested that Respondent submit a completed
22 decommissioning checklist and outstanding annual underground storage tank general permit
23 compliance fees prior to March 29, 2002.

24 13 As of June 15, 2002, Respondent has not submitted a completed decommissioning
25 checklist for the UST.

26 14 Respondent paid the annual UST general compliance fee from 1988 through 2001.
27 Respondent did not pay the annual compliance fee in 2002.

III. VIOLATIONS

1. On or about December 22, 1999 until sometime after December 5, 2000, Respondent violated OAR 340-150-0021(3) and OAR 340-150-0166(4)(c) by failing to decommission an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

2. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(3) by failing to provide both the thirty (30) day and three (3) working day notice to the Department before beginning permanent closure of an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(d).

3. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(5)(a) by failing to submit a completed decommissioning checklist within thirty (30) days of permanent closure of an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

4. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(2)(d) by allowing the decommissioning of an UST by a person not licensed by the Department. This is a Class II violation pursuant to OAR 340-012-0067(2)(h).

IV. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the violations cited in Section III, paragraphs 1 through 3 as follows:

<u>Violation</u>	<u>Penalty Amount</u>
1	\$2272
2	\$1800
3	\$2000

Respondent's total civil penalty is \$6072. The findings and determination of Respondent's civil penalty pursuant to OAR 340-012-0045 are attached and incorporated as Exhibit Nos. 1 through 3.

V. COMPLIANCE ORDER

Based on the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

////

1 1. Immediately initiate actions necessary to correct any continuing violations of
2 Oregon law.

3 2. Within thirty (30) days of receipt of this Notice,

4 a. Submit to the Department a completed decommissioning checklist for the
5 decommissioned UST, as required by 40 CFR 280.71(b) as adopted and modified by OAR 340-
6 150-0003(35). The checklist must have, as an attachment, the results from the sampling
7 completed at the time of decommissioning; or

8 b. Have a qualified third party measure for the presence of a release at the
9 location of the decommissioned UST, as required by 40 CFR 280.72(a) as adopted and modified
10 by OAR 340-150-0003(39), and OAR 340-122-0218, and submit to the Department a completed
11 decommissioning checklist. All outstanding annual UST compliance fees from the year 2002
12 must be paid at the time of the submittal of the decommissioning checklist.

13 VI. OPPORTUNITY FOR CONTESTED CASE HEARING

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

20 In the written Answer, Respondent shall admit or deny each allegation of fact contained in
21 this Notice, and shall affirmatively allege any and all affirmative claims or defenses to the
22 assessment of this civil penalty that Respondent may have and the reasoning in support thereof.

23 Except for good cause shown:

- 24 1. Factual matters not controverted shall be presumed admitted;
25 2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or
26 defense;

27 ////

00129

3. New matters alleged in the Answer shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

Send the request for hearing and Answer to: **Deborah Nesbit, Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for hearing and an Answer, Respondent will be notified of the date, time and place of the hearing.

Failure to file a timely request for hearing and Answer, or to appear at a scheduled hearing may result in the entry of a Default Order for the relief sought in this Notice.

If Respondent fails to file a timely request for hearing and Answer, the Notice and Order shall become a final and enforceable Order of the Environmental Quality Commission by operation of law without any further action or proceeding. If the Order becomes final by operation of law, the right to judicial review, if any, is outlined within ORS 183.480.

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

VII. OPPORTUNITY FOR INFORMAL DISCUSSION

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

VIII. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after an Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of \$6072 should be made payable to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

Date _____

Stephanie Hallock, Director

00131

EXHIBIT 1

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

VIOLATION 1: Failing to decommission an underground storage tank (UST).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

MAGNITUDE: The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

"BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.

"P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 since the violation occurred from December 22, 1999 through at least December 5, 2000.

"R" is the cause of the violation and receives a value of 6 because the Respondent's conduct was intentional. Intentional conduct means conduct by a person with a conscious objective to cause the result of the conduct. Numerous times since 1997, the Department informed Respondent that the UST needed to be permanently closed by a date certain. Despite being given specific deadlines to complete the permanent closure of the UST, Respondent allowed the deadlines to expire without closing the UST. Therefore, Respondent's conduct was intentional.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 since Respondent has not taken reasonable efforts to correct the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$272 as calculated using the BEN computer model, pursuant to OAR 340-012-0045(1)(c)(F). Respondent delayed decommissioning the UST at a cost of \$5,000. By delaying these costs, Respondent realized an economic benefit of \$272.

PENALTY CALCULATION: $Penalty = BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$
 $= \$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 6 + 2)] + \272
 $= \$1000 + (\$100 \times 10) + \$272$
 $= \$1000 + \$1000 + \$272$
 $= \$2272$

00132

EXHIBIT 2

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

- VIOLATION 2: Failure to provide 30 day and 3 working day notice prior to decommissioning an underground storage tank.
- CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0067(2)(d).
- MAGNITUDE: The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.
- CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$
- "BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.
- "P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).
- "H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).
- "O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 because the violation occurred on more than one day.
- "R" is the cause of the violation and receives a value of 6 because the cause of the violation was caused by Respondent's intentional conduct. Intentional means conduct by a person with a conscious objective to cause the result of the conduct. On December 5, 2000, the Department mailed to Respondent a letter outlining the decommissioning requirements including the need to provide notice to the Department prior to decommissioning the UST. Respondent knew that it needed to provide notice but proceeded to decommission the UST without giving the notice. Therefore, Respondent's conduct was intentional.
- "C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 since the violation cannot be corrected.
- "EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$0 because any economic benefit gained would be de minimis.

PENALTY CALCULATION: $Penalty = BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$
= $\$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 8 + 0)] + \0
= $\$1000 + (\$100 \times 8) + \$0$
= $\$1000 + \$800 + \$0$
= $\$1800$

00133

EXHIBIT 3

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

VIOLATION 3: Failure to submit a completed decommissioning checklist within 30 days after underground storage tank closure.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

MAGNITUDE: The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

"BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.

"P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 because the violation occurred on more than one day.

"R" is the cause of the violation and receives a value of 6 because the cause of the violation was caused by Respondent's intentional conduct. Intentional means conduct by a person with a conscious objective to cause the result of the conduct. On December 5, 2000, the Department mailed to Respondent a copy of the decommissioning checklist along with a letter outlining the decommissioning requirements. Respondent knew that it needed to submit the checklist but continued to fail to submit it. Therefore, Respondent's conduct was intentional.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 since Respondent has not taken reasonable efforts to correct the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$0 because any economic benefit gained would be de minimis.

PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} &= BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB \\ &= \$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 6 + 2)] + (\$0) \\ &= \$1000 + (\$100 \times 10) + \$0 \\ &= \$1000 + \$1000 + \$0 \\ &= \$2000 \end{aligned}$$

00134

Law Offices of
JOSSELYN, POTTER & ROBERTS
THE GREGORY • SUITE 306
425 NW 10TH AVENUE
PORTLAND, OREGON 97209
TELEPHONE: (503) 228-1455

July 15, 2002

Deborah Nesbit
Department of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204

Re: No. LQ/T-NWR-02-094
Clackamas County

Dear Ms. Nesbit:

Enclosed for filing is the Request for Hearing and Answer of Cynthia Gay in response to the Department's Notice of Violation, Department Order and Assessment of Civil Penalty in the above numbered proceeding.

The respondent requests an informal discussion with the Department.

Very truly yours,


Lawrence R. Derr

LRD/pb
enclosure

cc: client

RECEIVED
JUL 15 2002

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

EXHIBIT

B

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of:)
) REQUEST FOR HEARING AND ANSWER
CYNTHIA GAY) No. LQ/T-NWR-02-094
) CLACKAMAS COUNTY

REQUEST FOR HEARING

The respondent requests a contested case hearing in the above captioned matter.

ANSWER

For answer to the Notice of Violation, Department Order and Assessment of Civil Penalty, respondent alleges:

1. Respondent admits the allegations of Findings, paragraphs 1 through 9 and 11 through 14.

2 In answer to the allegations of Findings, paragraph 10, respondent admits that Ralph Hatley participated in removing the UST prior to June 30, 2000 under the direction of Respondent. Respondent admits that Hatley is not a licensed underground storage tank provider. Respondent denies that Hatley is the lessee of the property.

3. Respondent denies the allegations of Violations, paragraphs 1 through 4.

/ / /

/ / /

Page 1- Request for Hearing and Answer

JOSELSON, POTTER & ROBERTS
Attorneys at Law
425 NW 10th Avenue, Suite 306
Portland, Oregon 97209
Telephone: (503) 228-1455
Fax: (503) 228-0171

00137

1 For an Affirmative Defense, respondent alleges:

2 4. The UST was exempt from regulation pursuant to ORS
3 466.710(1):

4 (a) The tank was located on a tract of land devoted to the
5 production of hay;

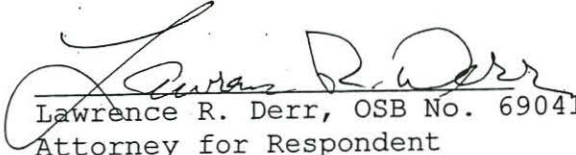
6 (b) The tank has a capacity of 1000 gallons;

7 (c) The tank was used to store motor gasoline; and

8 (d) The motor gasoline was used in farm vehicles, airplanes
9 and automobiles and not resold.

10 Wherefore, Respondent prays that the Notice of Violation,
11 Department Order and Assessment of Civil Penalty be dismissed.

12 Dated July 15, 2002.

13 
14 Lawrence R. Derr, OSB No. 69041
15 Attorney for Respondent
16
17
18
19
20
21
22
23
24

25 Page 2- Request for Hearing and Answer

26 JOSSELYN, POTTER & ROBERTS
27 Attorneys at Law
28 425 NW 10th Avenue, Suite 306
Portland, Oregon 97209
Telephone: (503) 228-1455
Fax: (503) 228-0171

00138

00139



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

RECEIVED

DEC 16 2003

by Office of
Administrative Hearings

December 15, 2003

Via facsimile and regular mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem OR 97314

Re: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

Enclosed you will find the Department's Motion for Ruling on Legal Issues in the above entitled matter. The Department is requesting a ruling that the underground storage tank in question in this matter, was not a "farm tank," as that term is defined in 40 CFR 280.12. Per OAR 137-003-0580, Ms. Gay has until January 1, 2004 to respond to this motion unless you establish either longer or shorter time period for the response. I would appreciate your prompt response on the due date of Ms. Gay's response so that the Department has sufficient time to review and respond, as necessary. I have enclosed copies of the rule for Ms. Gay's review.

If you should have any questions or need further information on this matter, you can reach me at (503) 229-5152.

Sincerely,


Susan M. Greco
Environmental Law Specialist

Enclosure (w/o exhibits via facsimile)

cc: Cynthia Gay, 29388 S.E. Heiple Road, Eagle Creek, OR 97022



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:	)	DEPARTMENT'S MOTION FOR
CYNTHIA GAY	)	RULING ON LEGAL ISSUES
	)	NO. LQ/T-NWR-02-094
Respondent	)	CLACKAMAS COUNTY

In response to the Department's Notice of Violation, Department Order and Assessment of Civil Penalty no. LQ/T-NWR-02-094 (Notice), Respondent raised, as an affirmative defense, that the underground storage tank (UST) located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon, was not subject to regulation because it fits the definition of a "farm tank." The Department of Environmental Quality (the Department), via this Motion for Ruling on Legal Issues filed pursuant to OAR 137-003-0580, moves that the Administrative Law Judge, as a matter of law, find that the underground storage tank in question is not a "farm tank".

I. LAW AT ISSUE

Former OAR 340-150-0010 adopted by reference all definitions contained in 40 CFR 280.12.¹ 40 CFR 280.12 defines underground storage tank as "any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. This term does not include any: (a) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes." 40 CFR 280.12 defines "farm tank" as "a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property."

II. BACKGROUND

On June 25, 2002, the Department issued the Notice to Respondent, Cynthia Gay. In response to the Department's allegations that the UST was a regulated tank, Respondent raised the

¹ On February 14, 2003, revisions to OAR Chapter 340, Division 150 became effective. The revisions did not change the definition of either underground storage tank or farm tank. Regardless, the changes are not applicable to this matter since the alleged violations occurred prior to the effective date of these new regulations.

1 affirmative defense that the UST was a farm tank. Specifically, in paragraph 4 of its Request for
2 Hearing and Answer, Respondent alleged that:

3 “ (a) The tank was located on a tract of land devoted to the production of hay;
4 (b) The tank has a capacity of 1000 gallons;
5 (c) The tank was used to store motor gasoline; and
6 (d) The motor gasoline was used in farm vehicles, airplanes and automobiles and not
7 resold.”²

8 The Department stipulates to sections 4(b), (c) and (d) as set forth above. The remaining issue, as
9 alleged in Respondent’s affirmative defense, is whether the tank was located on a tract of land
10 devoted to the production of hay.

11 III. EVIDENCE IN SUPPORT OF DEPARTMENT’S MOTION

12 Exhibit A – Oregon Department of Environmental Quality Underground Storage Tank
13 Permit Application and Notification for Underground Storage Tanks

14 Exhibit B – Affidavit of Greg Toran, UST Inspector for the Department along with attached
15 NWR UST Inspection Report, Memorandum to File and Attached Photos

16 Exhibit C – Clackamas County Property Detail for 29388 S.E. Heiple Road, Eagle Creek,
17 Oregon

18 Exhibit D – Business Entity Data for Skydive, Incorporated

19 Exhibit E – Business Entity Data for Skydive Eagle Creek

20 Exhibit F – Areal Maps of 29388 S.E. Heiple Road, Eagle Creek, Oregon

21 IV. ARGUMENTS

22 As previously stated, 40 CFR 280.12, as adopted by former OAR 340-150-0010, defines
23 “farm tank” as “a tank located on a tract of land **devoted** to the production of crops or raising
24 animals, including fish, and associated residences and improvements. A farm tank must be located
25 on the farm property.” (Emphasis added). The term ‘devoted’ is not defined in either statute or rule.
26 When a term is not defined in either statute or rule, the first level of analysis is to examine both the

27 ² Request for Hearing and Answer dated July 15, 2002, page 2.


1 text and context of the term used in the rule. If the Department's intent is clear, no further analysis
2 is necessary.³ "In reviewing the department's interpretation of a department rule as applied in a
3 formal enforcement action, an administrative law judge must follow the department's
4 interpretation if that interpretation is both plausible and reasonably consistent with the wording
5 of the rule and the underlying statutes."⁴

6 The plain meaning of the term 'devoted' is "to give or apply entirely to a particular
7 activity, pursuit, cause or person."⁵ Based on the facts in the record, the tract of land on which
8 the UST was located is not devoted to the production of crops. Specifically, at least two business
9 entities which are unrelated to production of crops list the tract of land as their principal place of
10 business. *See Exhibits D and E.* Since 1991, Respondent has used the name of 'Beaver Oaks
11 Airport' as the facility name. *See Exhibit A.* A portion of the property has been rezoned from
12 'exclusive farm use' to 'other improved property'. *See Exhibit C.* The tract of land on which the
13 UST was located was used for a landing strip. *See Exhibits B and F.*

14 V. CONCLUSIONS

15 In conclusion, the Department requests that the Administrative Law Judge find that the UST
16 located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon was a regulated
17 UST and not a farm tank, as that term is used in 40 CFR 280.12. Based on such a ruling, the
18 Department requests that the issues at the contested case hearing be limited to whether the
19 violations alleged in the Notice occurred and what civil penalty should be assessed for each of those
20 violations.

21
22
23 12/15/03
24 Date

23 
24 Susan M. Greco
Environmental Law Specialist

26 ³ *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993).

27 ⁴ OAR 340-011-0545.

⁵ *The American Heritage Dictionary*, 1978.

Oregon

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

October 22, 1991

Cindy Gay
Beaver Oaks Airport
29388 SE Heiple Rd
Eagle Creek, OR 97022

Re: UST Facility

Dear Ms Gay:

We have received a partial UST permit application for the tanks listed on your application received October 11, 1991. However, the:

☒ EPA notification form

☐ Oregon UST Permit Application

☒ \$25 per tank fee per year - 1989, 90, 91 - 1 tank @ \$25 x 3 yrs = \$75.00
(\$25 received 10/11/91 applied to 88 fees)

is missing and needs to be submitted before your application is complete. I have enclosed the appropriate form(s) and a copy of the original form that you submitted. Please fill out the form and return it to me. I will then be able to issue the permit for your tank(s).

Sincerely,

Barbara Nation

Barbara Nation
Office Specialist
UST Program

BLN
Enclosures



811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6998
DEQ-1 00144

EXHIBIT

A

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY UNDERGROUND STORAGE TANK PERMIT APPLICATION

TANK OWNER

PLEASE PRINT CLEARLY

NAME Cindy Gay

ADDRESS 29388 S.E. Heiple Road
Eagle Creek, OR 97022

X

Cindy Gay
TANK OWNER SIGNATURE

DATE 10-1-91

PHONE 503 630-5867

PERMIT FEE ASSESSMENT

1 Tanks at \$25 each = \$25.00
Number of tanks

AMOUNT REMITTED \$25.00

CK#839 \$25⁰⁰

OCT 11 1991

+ \$175-CK 840-10/29/91
17848 bn see letter

PROPERTY OWNER

PLEASE PRINT CLEARLY

NAME Cindy Gay

ADDRESS 29388 S.E. Heiple Road
Eagle Creek, OR 97022

X

Cindy Gay
PROPERTY OWNER SIGNATURE

FACILITY

10905 ✓
PLEASE PRINT CLEARLY

NAME Beaver Oaks Airport

ADDRESS 29388 S.E. Heiple Rd.
Eagle Creek, OR 97022

PHONE (503) 630-5867

SIC Code _____

PERMITTEE

112379
PLEASE PRINT CLEARLY

NAME Cindy Gay

ADDRESS 29388 S.E. Heiple Road
Eagle Creek, OR 97022

X

Cindy Gay
PERMITTEE SIGNATURE

PHONE 503-630-5867

NEW INSTALLATION

(PLEASE SUBMIT THIS APPLICATION 30 DAYS PRIOR
TO USING THE TANK.)

Each completed application must include
the signatures of the tank owner, the pro-
perty owner and the permittee.

All three signature lines must be signed.

00145

ORECON UST SURVEY

INSTRUCTIONS

Please fill in form to the best of your knowledge. If you do not know or cannot estimate an item requested, please mark "Unknown."

Facility Name:

Tank Identification No. (e.g. ABC-123) or Arbitrarily Assigned Sequential Number (e.g. 1,2,3...)	TANK NO.	TANK NO.	TANK NO.	TANK NO.
1. Status of Tank (check one <u>ONLY</u> if applicable)				
If temporarily out of use, Estimated time out of use:				
1 month-6 months	()	()	()	()
6 months-1 year	()	()	()	()
1 year-5 years	()	()	()	()
5 years or more	()	()	()	()
Estimated date tank is to be brought back into use (mo/yr)	()	()	()	()
2. Was tank new at time of installation? (Y/N)	(Y)	()	()	()
3. Containment Systems (check one)				
Single-walled tank	(X)	()	()	()
Double-walled tank	()	()	()	()
Pit-lining system	()	()	()	()
Unknown	()	()	()	()
4. Leak Detection System (check all that apply)				
Visual	(X)	()	()	()
Stock Inventory	(X)	()	()	()
Tile drain	()	()	()	()
Vapor wells	()	()	()	()
Sensor instrument (specify type):				
In-ground detector	()	()	()	()
Within walls of double-walled tank	()	()	()	()
Ground water monitoring wells	()	()	()	()
Continuous in piping	()	()	()	()
Pressure test	()	()	()	()
Internal inspection	()	()	()	()
Other, specify				
None	()	()	()	()
Unknown	()	()	()	()
5. Overfill Protection (Yes/No)	(N)	()	()	()
6. Location of Piping (check all that apply)				
No parts in contact with soil	()	()	()	()
Parts contacting the soil which are:				
Unprotected metal	()	()	()	()
Made of corrosion resistant materials	()	()	()	()
Corrosion-resisted coated	(X)	()	()	()
Cathodically protected	()	()	()	()
Double-walled	()	()	()	()
Within a secondary containment	()	()	()	()
Interior lined	()	()	()	()
Unknown	()	()	()	()
7. History of Tank Repairs (check one except as indicated)				
If tank repaired, Indicate date of last repairs (mo/yr)				
None	(X)	()	()	()
Unknown	()	()	()	()
8. History of Pipe Repairs (check one except as indicated)				
If pipe repaired, indicate date (mo/yr)				
None	(X)	()	()	()
Unknown	()	()	()	()
9. Tank Removed from the Ground				
Indicate date (mo/yr)				
(mark only if applicable — tank removed since May 1, 1988)	()	()	()	()

THANK YOU FOR YOUR ASSISTANCE

00146

VI. DESCRIPTION OF

GROUND STORAGE TANKS (Complete for each tank at this location)

Tank Identification No. (e.g., ABC-123), or Arbitrarily Assigned Sequential Number (e.g., 1,2,3...)	Tank No.	Tank No.	Tank No.	Tank No.	Tank No.
1. Use of Tank (Mark all that apply <input checked="" type="checkbox"/>) Currently in Use <input checked="" type="checkbox"/> Temporarily Out of Use <input type="checkbox"/> Permanently Out of Use <input type="checkbox"/> Brought into Use after 5/8/86 <input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Estimated Age (Years)	692				
3. Estimated Total Capacity (Gallons)	1000				
4. Material of Construction (Mark one <input checked="" type="checkbox"/>) Steel <input checked="" type="checkbox"/> Concrete <input type="checkbox"/> Fiberglass Reinforced Plastic <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Internal Protection (Mark all that apply <input checked="" type="checkbox"/>) Cathodic Protection <input checked="" type="checkbox"/> Interior Lining (e.g., epoxy resins) <input type="checkbox"/> None <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. External Protection (Mark all that apply <input checked="" type="checkbox"/>) Cathodic Protection <input type="checkbox"/> Painted (e.g., asphaltic) <input checked="" type="checkbox"/> Fiberglass Reinforced Plastic Coated <input type="checkbox"/> None <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Piping (Mark all that apply <input checked="" type="checkbox"/>) Bare Steel <input type="checkbox"/> Galvanized Steel <input checked="" type="checkbox"/> Fiberglass Reinforced Plastic <input type="checkbox"/> Cathodically Protected <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Substance Currently or Last Stored in Greatest Quantity by Volume (Mark all that apply <input checked="" type="checkbox"/>) a. Empty <input type="checkbox"/> b. Petroleum <input checked="" type="checkbox"/> Diesel <input type="checkbox"/> Kerosene <input type="checkbox"/> Gasoline (including alcohol blends) <input checked="" type="checkbox"/> Used Oil <input type="checkbox"/> Other, Please Specify _____ c. Hazardous Substance <input type="checkbox"/> Please Indicate Name of Principal CERCLA Substance _____ OR Chemical Abstract Service (CAS) No. _____ Mark box <input checked="" type="checkbox"/> if tank stores a mixture of substances d. Unknown <input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Additional Information (for tanks permanently out of service) a. Estimated date last used (mo/yr) 28 Sept 91 b. Estimated quantity of substance remaining (gal.) 90 gal c. Mark box <input type="checkbox"/> if tank was filled with inert material (e.g., sand, concrete) <input type="checkbox"/>	28 Sept 91 90 gal <input type="checkbox"/>	1 <input type="checkbox"/>	1 <input type="checkbox"/>	1 <input type="checkbox"/>	1 <input type="checkbox"/>

00147

Notification for Underground Storage Tanks

FORM APPROVED
OMB NO. 2050-0068
APPROVAL EXPIRES 9-30-97

Department of Environmental Quality
811 SW Sixth Ave. Portland 97204

In Oregon call Toll Free 1-800-452-4011

STATE USE ONLY

GENERAL INFORMATION

Notification is required by Federal law for all underground tanks that have been used to store regulated substances since January 1, 1974, that are in the ground as of May 8, 1986, or that are brought into use after May 8, 1986. The information requested is required by Section 9002 of the Resource Conservation and Recovery Act, (RCRA), as amended.

The primary purpose of this notification program is to locate and evaluate underground tanks that store or have stored petroleum or hazardous substances. It is expected that the information you provide will be based on reasonably available records; or, in the absence of such records, your knowledge, belief, or recollection.

Who Must Notify? Section 9002 of RCRA, as amended, requires that, unless exempted, owners of underground tanks that store regulated substances must notify designated State or local agencies of the existence of their tanks. Owner means—

(a) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances; and

(b) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such tank immediately before the discontinuation of its use.

What Tanks Are Included? Underground storage tank is defined as any one or combination of tanks that (1) is used to contain an accumulation of "regulated substances" and (2) whose volume (including connected underground piping) is 10% or more beneath the ground. Some examples are underground tanks storing: 1. gasoline, used oil, or diesel fuel, and 2. industrial solvents, pesticides, herbicides or fumigants.

What Tanks Are Excluded? Tanks removed from the ground are not subject to notification. Other tanks excluded from notification are:

1. farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;
2. tanks used for storing heating oil for consumptive use on the premises where stored;
3. septic tanks;

4. pipeline facilities (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968, or the Hazardous Liquid Pipeline Safety Act of 1979, or which is an intrastate pipeline facility regulated under State laws;
5. surface impoundments, pits, ponds, or lagoons;
6. storm water or wastewater collection systems;
7. flow-through process tanks;
8. liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;
9. storage tanks situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

What Substances Are Covered? The notification requirements apply to underground storage tanks that contain regulated substances. This includes any substance defined as hazardous in section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subtitle C of RCRA. It also includes petroleum, e.g., crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

When To Notify? 1. Owners of underground storage tanks in use or that have been taken out of operation after January 1, 1974, but still in the ground, must notify by May 8, 1986. 2. Owners who bring underground storage tanks into use after May 8, 1986, must notify within 30 days of bringing the tanks into use.

Penalties: Any owner who knowingly fails to notify or submits false information shall be subject to a civil penalty not to exceed \$10,000 for each tank for which notification is not given or for which false information is submitted.

INSTRUCTIONS

Please type or print in ink all items except "signature" in Section V. This form must be completed for each location containing underground storage tanks. If more than 5 tanks are owned at this location, photocopy the reverse side, and staple continuation sheets to this form.

Indicate number of continuation sheets attached

I. OWNERSHIP OF TANK(S)

Owner Name (Corporation, Individual, Public Agency, or Other Entity)

Cindy Gay

Street Address

29388 S.E. Heiple Road

County

Clackamas

City

Oregon City, OR

State

ZIP Code

97045

Area Code

Phone Number

503

630-5867

Type of Owner (Mark all that apply)

☒ Current

☐ State or Local Gov't

☒ Private or Corporate

☐ Former

☐ Federal Gov't (GSA facility I.D. no.)

☐ Ownership uncertain

II. LOCATION OF TANK(S)

(If same as Section I, mark box here ☐)

Facility Name or Company Site Identifier, as applicable

Beaver Oaks airport

Street Address or State Road, as applicable

29388 S.E. Heiple Road

County

Clackamas

City (nearest)

Eagle Creek,

State

OR

ZIP Code

97045

Indicate number of tanks at this location

1

Mark box here if tank(s) are located on land within an Indian reservation or on other Indian trust lands

☐

III. CONTACT PERSON AT TANK LOCATION

Name (If same as Section I, mark box here ☒)

Job Title

Area Code

Phone Number

IV. TYPE OF NOTIFICATION

☒ Mark box here only if this is an amended or subsequent notification for this location.

V. CERTIFICATION (Read and sign after completing Section VI.)

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.

Name and official title of owner or owner's authorized representative

Owner

Signature

Cynthia Gay

Date Signed

10-200148

CONTINUE ON REVERSE SIDE

BEFORE THE OREGON ENVIRONMENTAL
QUALITY COMMISSION

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

RECEIVED
DEC 12 2003

In the Matter of:

CYNTHIA GAY.

Case No. LQ/T-NWR-02-017

AFFIDAVIT

STATE OF OREGON

County of Multnomah

I, Greg Toran, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Greg Toran, have been employed by the Oregon Department of Environmental Quality as an Environmental Specialist since October 1, 1998.

2. That in the course of that employment, I conducted site inspections of underground storage tanks and drafted letters and memorandums in relation to those inspections.

3. That on or about November 14, 2000, I conducted a site inspection of an underground storage tank located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon.

4. During that site inspection, I took pictures of the land on which the underground storage tank was located. Additionally, during the site inspection, I noted that the underground storage tank was located in a field which was used as a landing strip for airplanes.

5. During the site inspection, I was told by Respondent's representative that the underground storage tank was used to fuel airplanes.

6. That on or about November 30, 2000, I drafted a memorandum setting forth my observations during the site inspection.

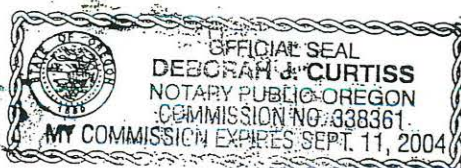
7. That the attached aforementioned pictures and memorandum are true and exact copies of the originals thereto.


Date: 12/12/03


Greg Toran
Department of Environmental Quality

Sworn and subscribed before me this 12 day of December 2003

SEAL




Notary Public for Oregon
My Commission Expires

Sept. 11, 2004

EXHIBIT

B

00150

NWR UST FIELD INSPECTION REPORT

Inspection Date: 11/14/00

Site Name: Beaver Oaks Airport

Total Time* 3.0 hr

Site Address: 29300 Heiple Rd

*Include inspection, travel, paperwork

Eagle Creek

DEQ Inspector: Greg Torma

File/Facility No: 10905
(both UST & UST Cleanup file #'s as appropriate)

Others Onsite: Ralph Hatley
(site operator)
(include company name)

Supervisor License No. : _____ Exp. date _____
(note the name of the license holder with **)

Inspection Type

Y---N---Decommissioning	Y---N---Install-New	Y---N---Complaint
Y- <u>(N)</u> ---1998 Compliance (full)	Y---N---Upgrade-Retrofit	Y---N---WQ-New Permit
Partial Compliance	Y---N---Service Provider Audit	Y---N---WQ-Exist Permit
Y---N---Leak Detection	Y---N---Cleanup	
Y---N---Financial Responsibility	Y---N---SWLA/Soil Treatment	
Y---N---Corrosion Protection	Y---N---Distributor Audit	
Y---N---NA Spill & Overfill		

Circle Y for.....Yes = inspected & in compliance (Y for data entry)

Circle N for.....No = inspected & NOT in compliance (N for data entry)

Leave Blank for.....Inspection not performed (no data entry necessary)

Photos Taken? (Y)-N (attach)

Samples Taken? Y-(N)(attach results)

Notes (use back of form as necessary)

D/water wells onsite, in Area. One UST contains gasoline, dispenser removed. Historic use in fueling small planes via transport truck and filtering system. Currently not used, operator to schedule product removal and sampling. UST closure in place or by removal to follow next summer as discussed.
See attached memo.

00151

State of Oregon

Department of Environmental Quality

Memorandum

Date: November 30, 2000

To: UST facility file 10905

From: Greg Toran ODEQ/NWR

Subject: Beaver Oaks UST status.

Site inspection to discuss current status of single UST. Met onsite with Ralph Hatley (reported as being owners rep). Hatley appears to meet the definition of Permittee. Site is being operated as an airport, jump school. Hatley appears to be operating other business concerns at this location. Inspection in response to phone call from Hatley, following recent NON issued by the Department.

Inspection to determine and discuss UST status and recent claim by Hatley of UST being farm tank. Property is zoned as farm use only, confirmed with county. Hatley claims to be raising hay as a crop, to be given away and not sold.

At the time of the inspection Hatley is most cooperative. Historic use of UST was for fueling small planes. At one time, fuel was pumped out of UST into transport truck containing filtering system. UST has been out of use as a fuel storage tank for planes for approx. 3 years. UST currently contains some measure of product, product has been siphoned out from time to time for various reasons, unrelated to planes according to Hatley. Dispenser/pump has been removed for 3 years according to Hatley.

Current amount of product in UST is unknown. Ground water in area is shallow within UST nest on a seasonal basis, according to Hatley. One drinking water well on the NE corner of the property. Other wells in the area. Hatley seems concerned with the possibility of impacts to the wells in the area and seems to have backed off from the initial claim of the UST being an unregulated farm tank.

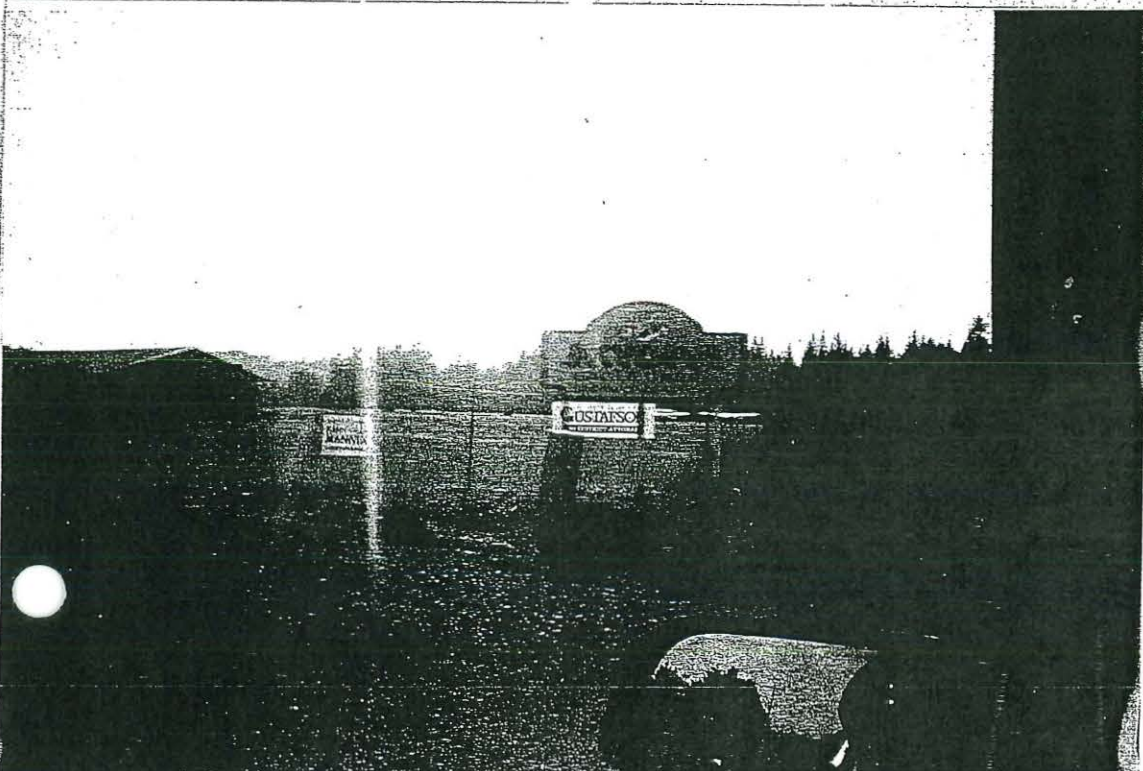
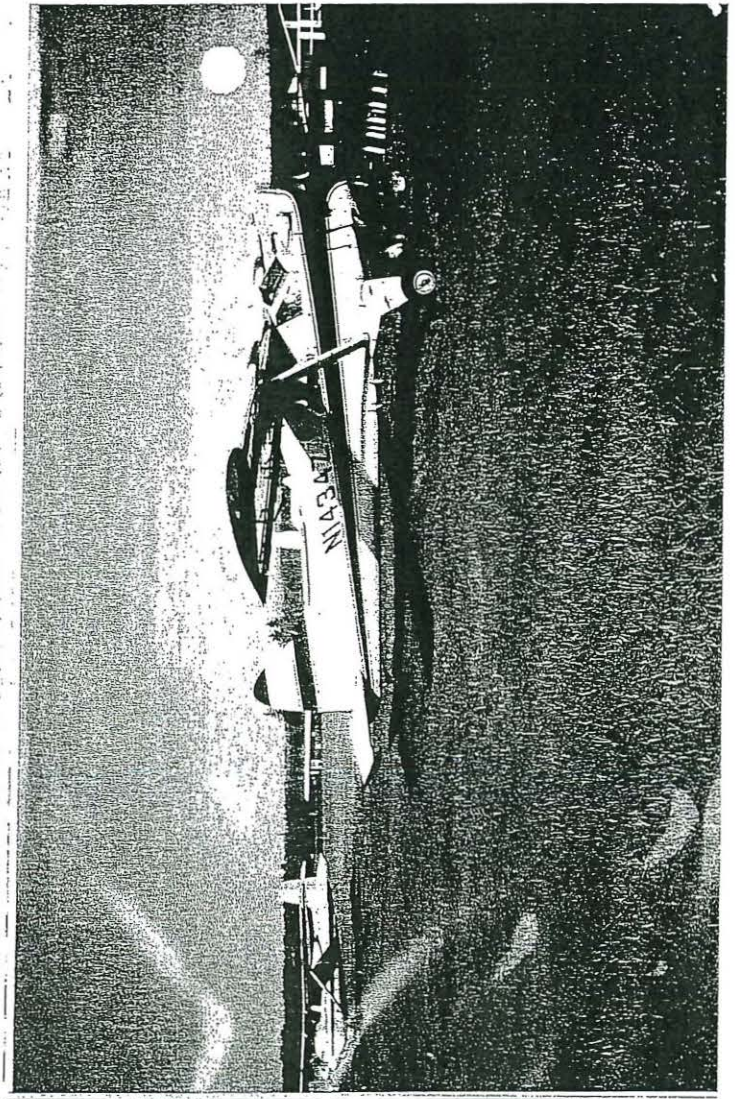
This UST is most certainly a regulated UST based on past use. Hatley seems agreeable in following Department direction to decommission the UST. I suggested the following:

Remove all product and water in UST immediately. Verification of completion of this task by a third party in writing. This is to be followed by sampling of soil and if necessary water, per UST cleanup and compliance rules. Hatley to provide a written schedule for completion of this work within 3 weeks. Schedule to also include a target date for completion of the decommissioning. The Department to approve a later decommissioning date (next summer) provided that

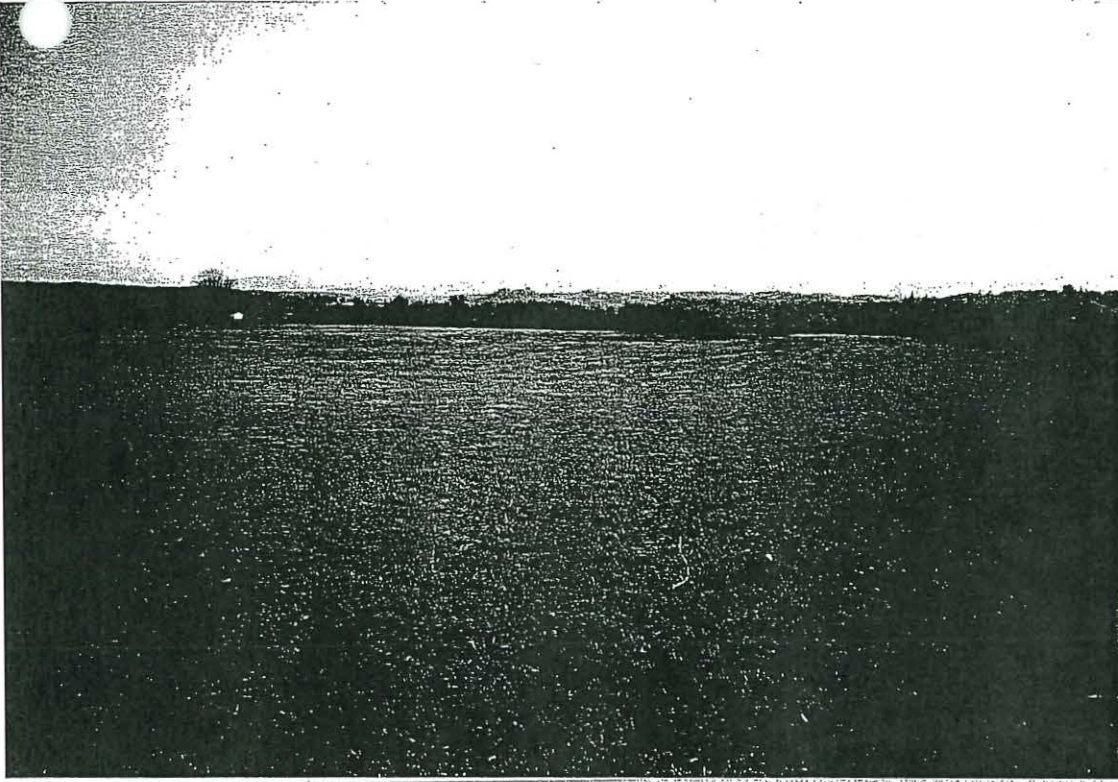
00152

Hatley follow through with his plans for submittal of the schedule and completion of the UST pumping and sampling. Completion of the UST pumping and sampling and records submittal to be accomplished by the date noted in option 2 of the most recent NON. The date specified in the NON was 90 days from the date of the notice. So the due date for completion of this phase of the work would be the end of January, 2001.

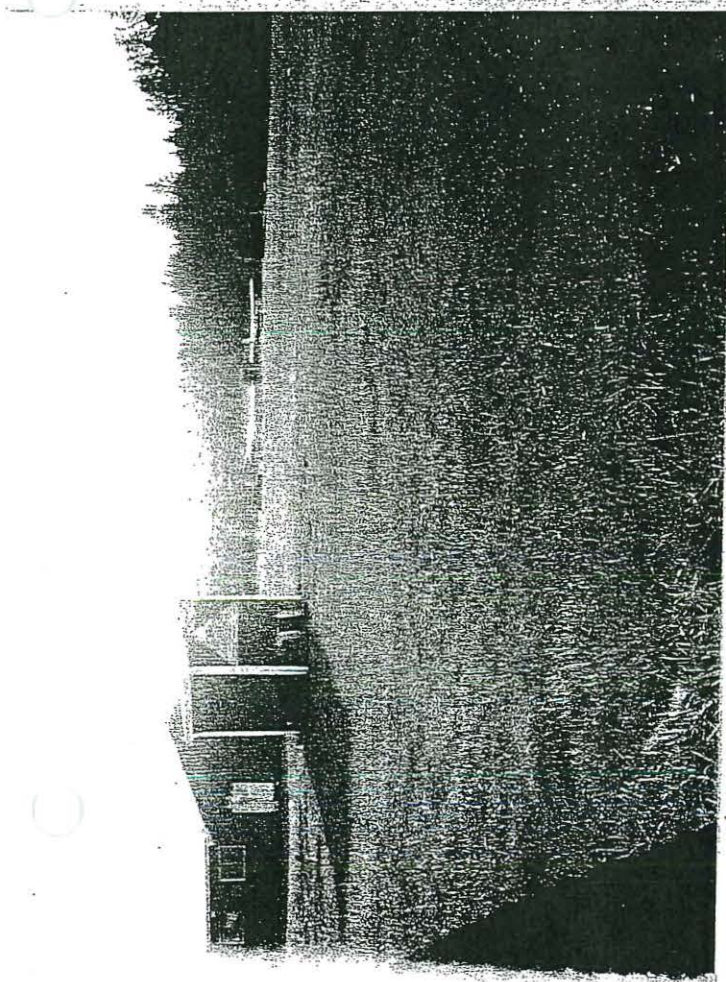
Mailing documentation to Hatley. This documentation to be a summery sheet that outlines these steps, UST closure requirements, forms for documenting closure, and a list of licensed supervisors. Hatley stated that he would be doing the decommissioning. I recommended he consult licensed service providers or supervisors.



10002
11/14/80
8054



11/14/98
\$ 10905



00155

0P/MI/11

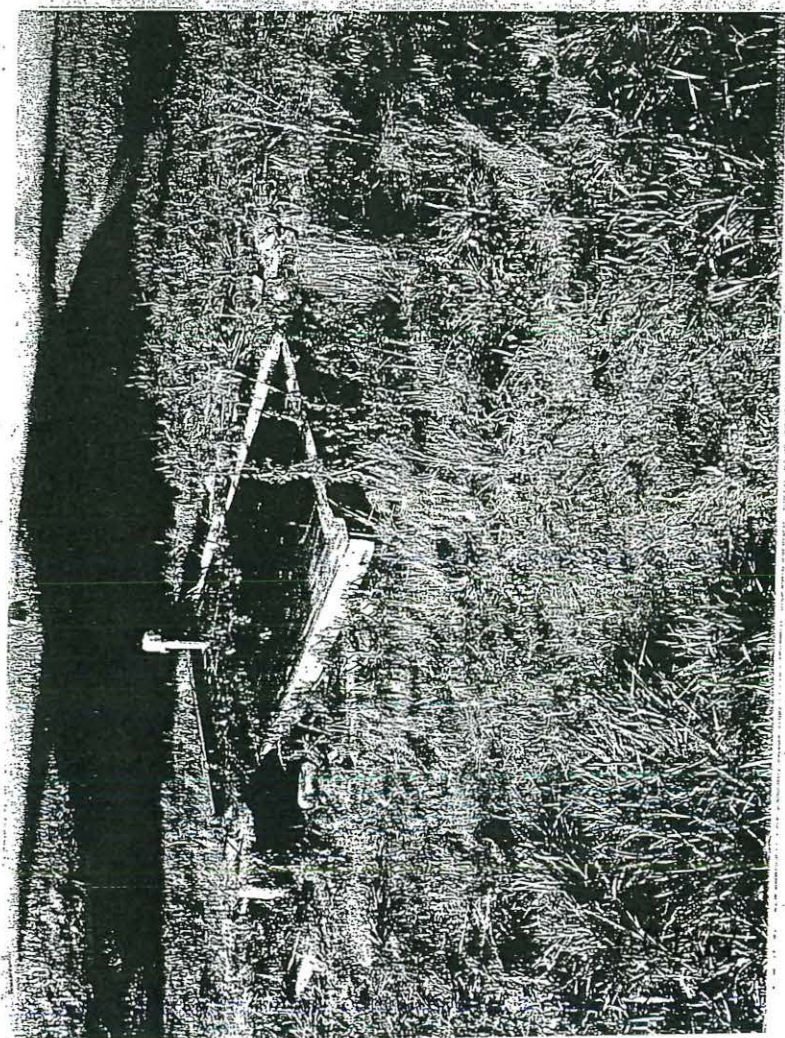
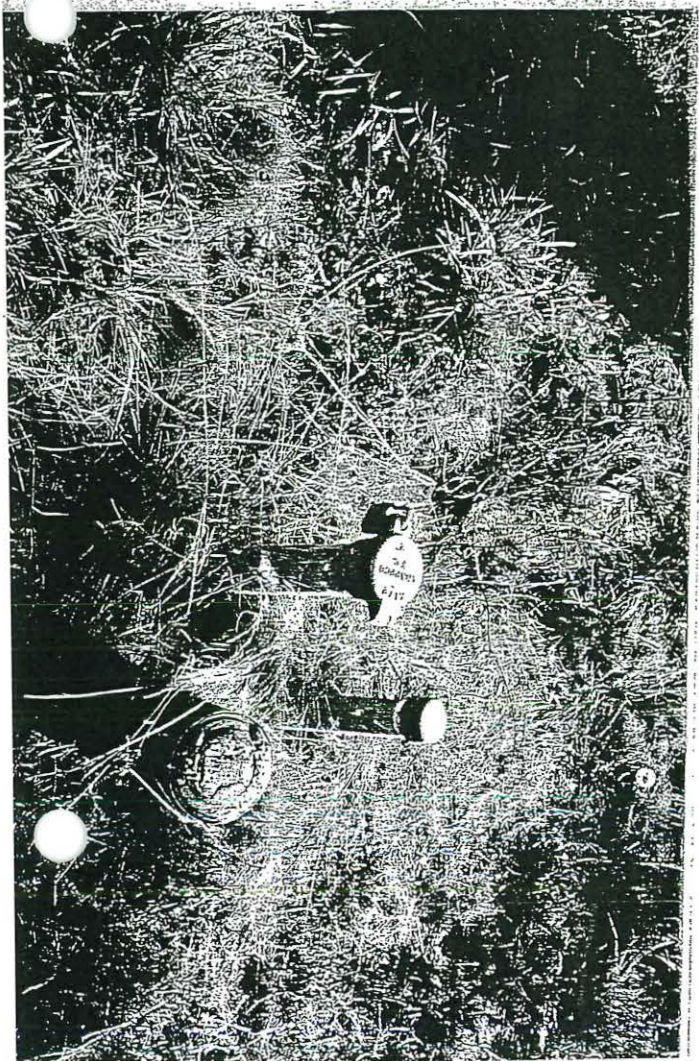
20P01 2



(No. 48) 762 Z2-03 M2491-12911 0-43



11/14/99
\$ 10905



Oregon - Clackamas County Property Detail



C1 Co Access 503-655-8671

Return to List	Return to Search Screen	Record Help
--------------------------------	---	-----------------------------

Address : 29388 H@

Records Current Through : 01/02/2002

Date Searched : 06/05/2002

Parcel Nbr : 00932904 Alt Parcel Nbr : 34E18 00603

Taxpayer : GAY CYNTHIA ROSE

Address : 29388 SE HEIPLE RD

EAGLE CREEK, OR 97022

Situa Addr : 29388 SE HEIPLE RD

EAGLE CREEK, OR 97022

Neighborhood : Estacada rural all other

Land Class : 551 - Exclusive farm use, land improved.

Bldg Class :

Full Baths : 0

Bedrooms : 0

Year Built :

Half Baths : 0

Living Area :

Year Assessed :

Real Market Value Land : \$ 230,349 Total Acreage : 26.83

Real Mkt Val Improvements : \$ 18,620 Fire Patrol Acres :

Real Mkt Val Fire District : \$ 248,969

Gross Tax Due : \$ 696.14

Assessed Val Fire District : \$ 47,830 Net Tax Due : \$ 675.26

Total Assessed Value : \$ 47,830 Outstanding Tax : \$ 0.00

Total Taxable Value : \$

Sale Date :

Sale Price : \$

Total Exempted Value : \$ 0

Exemption Description :

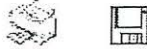
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OPENOnline Western Operations Customer Support (800) 454-6575



Oregon - Clackamas County Property Detail



Return to List	Return to Search Screen	Record Help
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Address : 29388 H@

Records Current Through : 01/02/2002

Date Searched : 06/05/2002

Parcel Nbr : 01825644 Alt Parcel Nbr : 24E32 04501

Taxpayer : GAY CYNTHIA ROSE

Address : 29388 SE HEIPLE RD

EAGLE CREEK, OR 97022

Situs Addr :

Neighborhood : Estacada rural all other

Land Class : 400 = unimproved property over 3 Ac, no

Bldg Class : other special designation

Full Baths : Bedrooms : Year Built :

Half Baths : Living Area : Year Assessed :

Real Market Value Land : \$ 130,813 Total Acreage :

Real Mkt Val Improvements : \$ 0 Fire Patrol Acres :

Real Mkt Val Fire District : \$ 130,813

Gross Tax Due : \$ 1,399.39

Assessed Val Fire District : \$ 96,319 Net Tax Due : \$ 1,357.41

Total Assessed Value : \$ 96,319 Outstanding Tax : \$ 0.00

Total Taxable Value : \$ Sale Date : 19990830

Sale Price : \$ 103,000

Total Exempted Value : \$ 0

Exemption Description :

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00159

Oregon - Clackamas County Property Detail



Return to List	Return to Search Screen	Record Help
--------------------------------	---	-----------------------------

Address : 29388 H@

Records Current Through : 01/02/2002

Date Searched : 06/05/2002

Parcel Nbr : 01637884 Alt Parcel Nbr : 24E32 04905

Taxpayer : GAY CYNTHIA R

Address : 29388 SE HEIPLE RD

EAGLE CREEK, OR 97022

Situa Addr :

Neighborhood : Estacada rural all other

Land Class : 400

Bldg Class :

Full Baths : Bedrooms : Year Built :

Half Baths : Living Area : Year Assessed :

Real Market Value Land : \$ 107,600 Total Acreage :

Real Mkt Val Improvements : \$ 0 Fire Patrol Acres : 1.00

Real Mkt Val Fire District : \$ 107,600

Gross Tax Due : \$ 853.26

Assessed Val Fire District : \$ 57,490 Net Tax Due : \$ 827.66

Total Assessed Value : \$ 57,490 Outstanding Tax : \$ 0.00

Total Taxable Value : \$ Sale Date : 19970801

Sale Price : \$ 115,000

Total Exempted Value : \$ 0

Exemption Description :

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00160

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Business Name Search

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Business Entity Data

Registry Nbr	Entity Type	Entity Status	Jurisdiction	Registry Date	Duration Date	Renewal Date
355290-80	DBC	ACT	OREGON	07-17-1993		
Entity Name	SKYDIVE, INCORPORATED					
Foreign Name						

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Associated Names

Type	PPB	PRINCIPAL PLACE OF BUSINESS			
Addr 1	29388 SE HEIPIE RD				
Addr 2					
CSZ	EAGLE CREEK	OR	97022	Country	UNITED STATES OF AMERICA

Type	AGT	REGISTERED AGENT		Start Date	07-17-1993	Resign Date	
Name	PATRICK	A	BUTLER				
Addr 1	522 SW 5TH AVE STE 905						
Addr 2							
CSZ	PORTLAND	OR	97204	Country	UNITED STATES OF AMERICA		

Type	MAL	MAILING ADDRESS				
Addr 1	29388 SE HEIPLE RD					
Addr 2						
CSZ	EAGLE CREEK	OR	97022		Country	UNITED STATES OF AMERICA

Type	PRE	PRESIDENT		
Name	RALPH	A	HATLEY	
Addr 1	29388 SE HEIPLE RD			
Addr 2				
CSZ	EAGLE CREEK	OR	97022	Country UNITED STATES OF AMERICA

Type	SEC	SECRETARY		
Name	RALPH	A	HATLEY	
Addr 1	29388 SE HEIPLE RD			
Addr 2				

EXHIBIT

00162

CSZ	EAGLE CREEK	OR	97		Country	UNITEL	DATES OF AMERICA
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Name History

Business Entity Name	Name Type	Name Status	Start Date	End Date
SKYDIVE, INCORPORATED	EN	CUR	07-17-1993	

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Summary History

Image Date	Action	Transaction Date	Effective Date	Status	Name/Agent Change	Dissolved By
06-11-2003	ANNUAL REPORT PAYMENT	06-11-2003		SYS		
06-12-2002	ANNUAL REPORT PAYMENT	06-12-2002		SYS		
06-14-2001	ANNUAL REPORT PAYMENT	06-14-2001		SYS		
06-28-2000	STRAIGHT RENEWAL	06-14-2000		FI		
06-17-1999	STRAIGHT RENEWAL	06-07-1999		FI		
7-17-1998	AMENDED RENEWAL	07-17-1998		FI		
07-01-1997	STRAIGHT RENEWAL	07-01-1997		FI		
07-08-1996	STRAIGHT RENEWAL	07-01-1996		FI		
10-19-1995	REINSTATEMENT	10-19-1995		FI		
09-15-1995	INVOL DISSOLUTION	09-07-1995		SYS		
07-21-1995	NOTICE	07-24-1995		SYS		
08-01-1994	AMENDED RENEWAL	08-01-1994		FI		
07-17-1993	NEW FILING	07-17-1993		FI		

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Business Name Search[New Search](#)[Printer Friendly](#)**Business Entity Data**

Registry Nbr	Entity Type	Entity Status	Jurisdiction	Registry Date	Duration Date	Renewal Date
471972-80	ABN	ACT		08-10-1995		
Entity Name	SKYDIVE EAGLE CREEK					
Foreign Name						
Affidavit?	N					

[New Search](#)[Printer Friendly](#)**Associated Names**

Type	PPB	PRINCIPAL PLACE OF BUSINESS				
Addr 1	29388 SE HEIPLE RD					
Addr 2						
CSZ	EAGLE CREEK	OR	97022		Country	UNITED STATES OF AMERICA

The Authorized Representative address is the mailing address for this business.

Type	REP	AUTHORIZED REPRESENTATIVE	Start Date	08-10-1995	Resign Date	
Of Record	355290-80	SKYDIVE, INCORPORATED				
Addr 1	29388 SE HEIPLE RD					
Addr 2						
CSZ	EAGLE CREEK	OR	97022	Country	UNITED STATES OF AMERICA	

Type	REG	REGISTRANT					
Of Record	355290-80	SKYDIVE, INCORPORATED					
Addr 1							
Addr 2							
CSZ					Country		

EXHIBIT

tabbles

E

[New Search](#)[Printer Friendly](#)**Name History**

Business Entity Name	Name Type	Name Status	Start Date	End Date
				00164

SKYDIVE EAGLE CREEK

EN JUR 08-10-1995

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Summary History

Image Date	Action	Transaction Date	Effective Date	Status	Name/Agent Change	Dissolved By
07-01-2003	RENEWAL PAYMENT	07-01-2003		SYS		
06-29-2001	RENEWAL PAYMENT	06-29-2001		SYS		
07-08-1999	STRAIGHT RENEWAL	06-28-1999		FI		
07-21-1997	STRAIGHT RENEWAL	07-08-1997		FI		
08-10-1995	NEW FILING	08-10-1995		FI		

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Counties

Counties Filed

Clackamas, Marion, Multnomah, Washington, Yamhill

Counties Not Filed (but not necessarily available)

Baker, Benton, Clatsop, Columbia, Coos, Crook, Curry, Deschutes, Douglas, Gilliam, Grant, Harney, Hood River, Jackson, Jefferson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Malheur, Morrow, Polk, Sherman, Tillamook, Umatilla, Union, Wallowa, Wasco, Wheeler

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00165



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34 km SE of Portland, Oregon, United States 07 Jul 1994

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0 200M 0 200yd

Image courtesy of the US Geological Survey.

OrigMetaTag = '4512246NW' Center Lon,Lat= -122.35440,45.31908 Running Time 0 ms Time 7/31/2002 4:21:43 PM to 7/31/2002 4:21:43 PM

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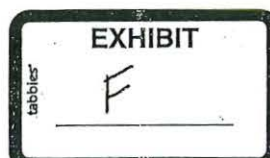
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00166

7/31/200:

33 km SE of Portland, Oregon, United States 07 Jul 1994

Zoom 1m



0 100M 0 100yd

Image courtesy of the US Geological Survey.

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RECEIVED

JAN 20 2004

by Office of
Administrative Hearings

Cynthia (Gay) Wescott
29388 SE Heiple Road
Eagle Creek, OR 97022
(503) 630-5867
fax # 503 630-5868

1/16/04

Via facsimile and certified mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem, OR 97314

Re: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

Enclosed you will find my motion for Ruling on Legal Issues in the above entitled matter. I am requesting a ruling that the underground storage tank in question was a "farm tank" located on EFU 20 property. I am enclosing 5 exhibits with this request.

If you should have any further questions relating to this case, I can be reached at (503) 630-5867.

Sincerely,


Cynthia (Gay) Wescott

Enclosure (w/o exhibits via facsimile)
cc: Susan Greco, 811 SW Sixth Avenue, Portland, OR 97204-1390

00168

1 Exhibit C - Certified true copy Clackamas County Assessor map
2 Section 18 T3 SR4E Tax Lot 603 dated 1-15-04

3 Exhibit D - Certified true copy of 5-19-79 aerial photo with
4 outlines of property from County Assessor office dated 1-15-04

5 Exhibit E - Clackamas County Planning Department letter dated
6 1-15-04

7 III. ARGUMENT

8 The department misstates and selectively chooses only a part of the
9 plain meaning of the term "devoted". The complete definition for the
10 term, as taken from the American Heritage Dictionary, 4th edition, 2000
11 is as follows:

12 "To give or apply (one's time, attention, or self) entirely to a
13 particular activity, pursuit; cause, or person. 2. To set apart for a
14 specific purpose or use: *land devoted to mining*. 3. To set apart by or
as if by a vow or solemn act; consecrate: *a temple devoted to Apollo*."

15 The interpretation of the term "devoted" by the department is neither
16 plausible nor reasonably consistent with the wording of the rule and
17 the underlying statute. The department argues that since a portion of
18 the property is used as a landing strip by aircraft, the property is
19 not "entirely given over to a particular activity," i.e., the
20 production of hay. Taken to its logical conclusion, the department's
21 interpretation would exclude from the farm tank exemption, any and all
22 property for which any portion is used for any purpose other than "the
23 production of crops or raising animals". Even a gravel road across a
24 tract of land used for farming would prevent the land from being
25 considered a farm since the entire tract is not "entirely given over
to" farming.

00170

1 The definition relied upon by the department, in its complete and
2 accurate terms, refers to actions taken by a person or individual. The
3 correct and plain meaning of "devoted" applicable here, is "to set
4 apart for a specific purpose or use", such as land devoted to mining
5 or land devoted to farming.

6 Respondent's fuel tank is located on land devoted to farming. It was
7 installed in 1981 on then existing tax lot 600, which consisted of
8 23.83 acres. *See Exhibits A and B.* The property is zoned for exclusive
9 farm use. *See Exhibits C and E.* The property has been used since being
10 owned by respondent to produce hay. An adjacent grass landing strip,
11 then known as tax lot 603 and consisting of 3 acres, was acquired by
12 respondent and her partner in 1981. *See Exhibits C and D.*

13 In 1989, the Clackamas County Tax Assessor joined tax lots 600 and 603
14 into one lot, known as tax lot 603, consisting of 26.83 acres. The
15 fact that slightly more than 10% of present day tax lot 603 is
16 available for use as a grass landing strip for aircraft does not mean
17 that tax lot 603 is not land devoted to the production of hay or other
18 crops. The property is still presently zoned for exclusive farm use.
19 It has been set aside for a particular purpose by the zoning
20 authorities, i.e., farm use. *See Exhibit E.* It has been used and
21 continues to be used for that purpose by respondent. A one acre
22 portion of it in the northeast corner where the pole barns are located
23 has been reclassified as improved exclusive farm use. The department
24 does not dispute the fact that the property, other than the landing
25 strip, has been and is used for the production of hay.

00171

IV. CONCLUSION

Respondent requests the Administrative Law Judge to find that the underground storage tank located at 29388 SE Heiple Rd., Eagle Creek, Oregon, is a farm tank and to dismiss the Notice of Violation and Department Order and Assessment of Penalty.


00172

CERTIFICATE OF SERVICE

I do hereby certify that on January 16, 2004 I served a copy of the attached motion to:

Susan Greco
Department of Environmental Quality
811 SW 6th Ave
Portland, OR 97204-1390

By mailing in a sealed envelope, certified mail, postage prepaid, and deposited in the mail at Estacada, Oregon and via facsimile.


Cynthia (Gay) Wescott

BEFORE THE OREGON ENVIRONMENTAL

QUALITY COMMISSION

In the Matter of:)
CYNTHIA GAY) AFFIDAVIT
Case No. LQ/T-NWR-02-017)
STATE OF OREGON)
County of Clackamas)

I, Cynthia Gay being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Cynthia Gay and my partner Ralph Hatley purchased tax lot 600 (consisting of 23.83 acres) of farmland from C.E. Odom July 12, 1977. At that time the property was zoned by Clackamas County as EFU 20.

2. On or about May 1981 we purchased a new 1000 gallon fuel tank and installed it on the property (tax lot 600).

3. My partner and I purchased the adjoining property known as tax lot 603, which consisted of the 3 acre grass landing strip owned by Jim and Candace Welch. This purchase date was February 19, 1981.

4. Clackamas County Assessor joined tax lot 600 into tax lot 603 June 9, 1989 and the property became tax lot 603 (now consisting of 26.83 acres) and continues to be zoned EFU 20.

5. Since the purchase of the property, in 1977 we have harvested hay crops a number of years. We also, have had a communal garden. We have allowed the land to lay fallow a few years in order to eradicate noxious

EXHIBIT 00174

A

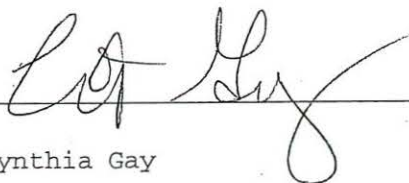
1 weeds in accepted farming practices. We have kept the land mowed and groomed
2 with our two farm tractors.

3 6. The fuel tank has held automotive fuel only (not for resale).
4 It has been used to fuel tractors, rototillers, automobiles, agricultural
5 aircraft (crop dusters). On one occasion emergency fuel was provided to an
6 Air Force search and rescue helicopter searching for a lost hunter in the
7 upper Clackamas River area.

8 7. At no time during my ownership of the property has the fuel
9 tank been located on the three acre landing strip (formerly known as tax lot
10 603).

11 8. The Clackamas County tax assessor changed one acre of the 26.83
12 acre property to improved EFU. This one acre is located in the Northeast
13 portion of the tax lot and includes the pole barn buildings that have been
14 constructed.

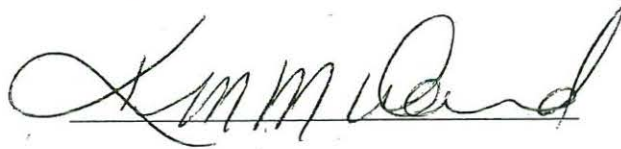
15 Date: 1-15-04

16 
17
18 Cynthia Gay

19
20 Sworn and subscribed before me this 15 date of January 2004



25 SEAL

21
22
23 
24 Notary Public for Oregon

My Commission Expires

4-5-04

EXHIBIT 00175

A
RESPONDENT

BEFORE THE OREGON ENVIRONMENTAL
QUALITY COMMISSION

In the Matter of:)
CYNTHIA GAY) AFFIDAVIT
Case No. LQ/T-NWR-02-017)
STATE OF OREGON)
County of Clackamas)

I, John Bresko, being duly sworn, depose and say that the following is true
to the best of my knowledge:

1. That, I, John Bresko have owned and operated Estacada Oil
Inc. 219 SE Highway 224, Estacada, OR 97023 for 35 years.

2. I have sold and delivered automotive gasoline to the UST 1000
gallon unregulated tank owned by Cindy Gay and Ralph Hatley since 1981.

3. In September 1991 John Wixon of the DEQ office visited my
place of business and informed me not to deliver automotive fuel to any
unregulated tanks located on the property located at 29388 SE Heiple Road,
Eagle Creek, OR 97022 (and owned by Cindy Gay and/or Ralph Hatley). At that
time I informed him that the tank that I delivered to on the property was a
1000 gallon or less capacity tank. And being a farm tank under the
regulations was not regulated. I further informed Mr. Hatley and Ms. Gay of
his visit and conversation.

4. In the past five years my fuel deliveries have been confined
to the two fuel trucks owned by Cindy Gay and Ralph Hatley.

EXHIBIT #0176
B
RESPONDENT

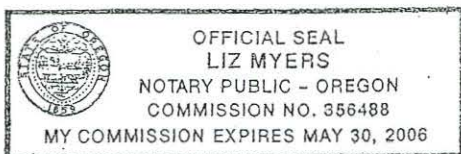
1 Date: 1-16-04

2
3 John Y Bresko

4 John Bresko, President

5 Estacada Oil Co

6
7 Sworn and subscribed before me this 16 day of January 2004



11
12 Liz Myers
Notary Public for Oregon

13 My Commission Expires

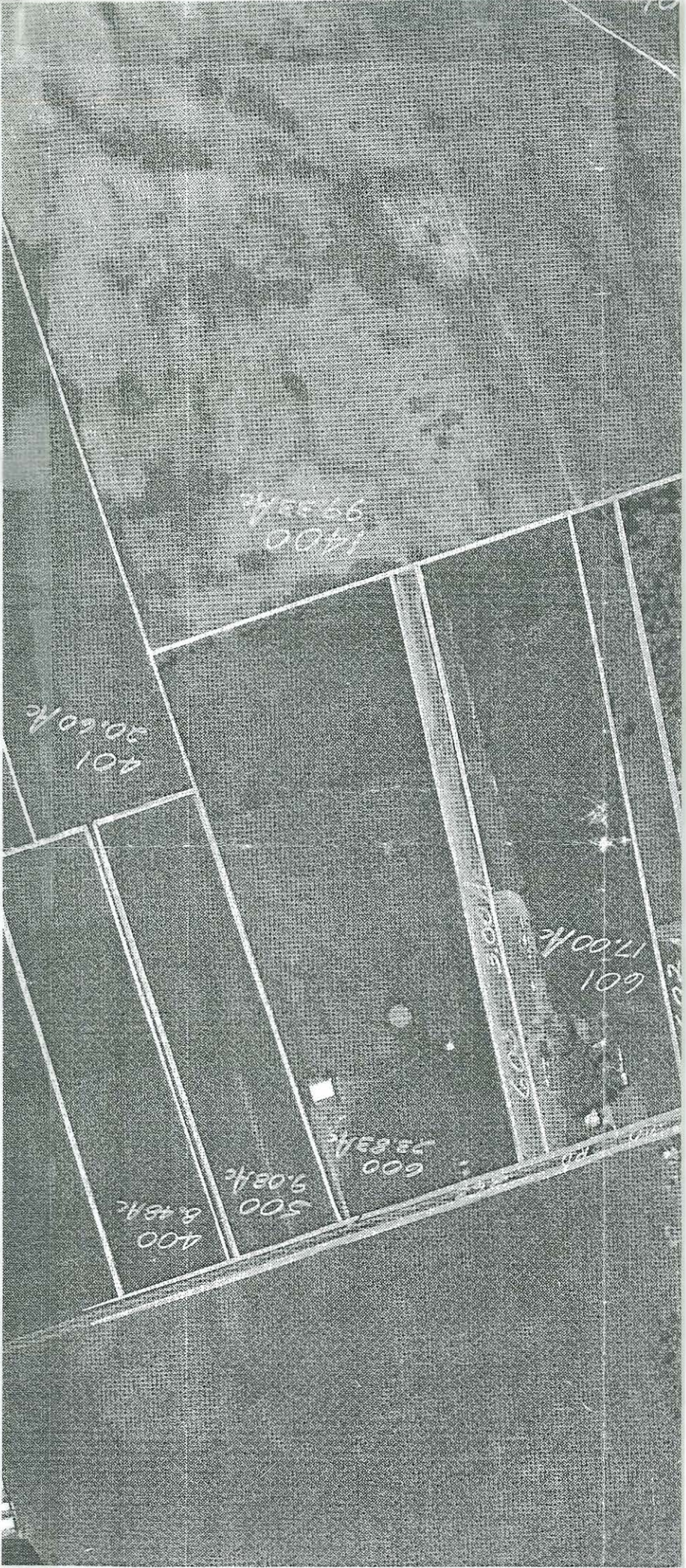
14 05-30-06

15 SEAL

16
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EXHIBIT 00177

B
RESPONDENT



00179 JAN 15 200 334818

34E18

62-61-5

18 19
19 19

CLACKAMAS RIVER

1590
14.54Ac

1700
62.67Ac

1450
42.09Ac

2200
4.69Ac

1450
3.37Ac

2100
2.19Ac

2000
1.09Ac

1901
2.46Ac

1900
2.11Ac

1800
2.86Ac

18 17
19 20

08100



SEE MAP 3 4E 7

NO. 42
NO. 41

CANCELLED TL'S

2300
2400
2500
1202
1288
600
2100
2002
1000
1100

-RRFF-5/MAC

E.F.U. / MAD

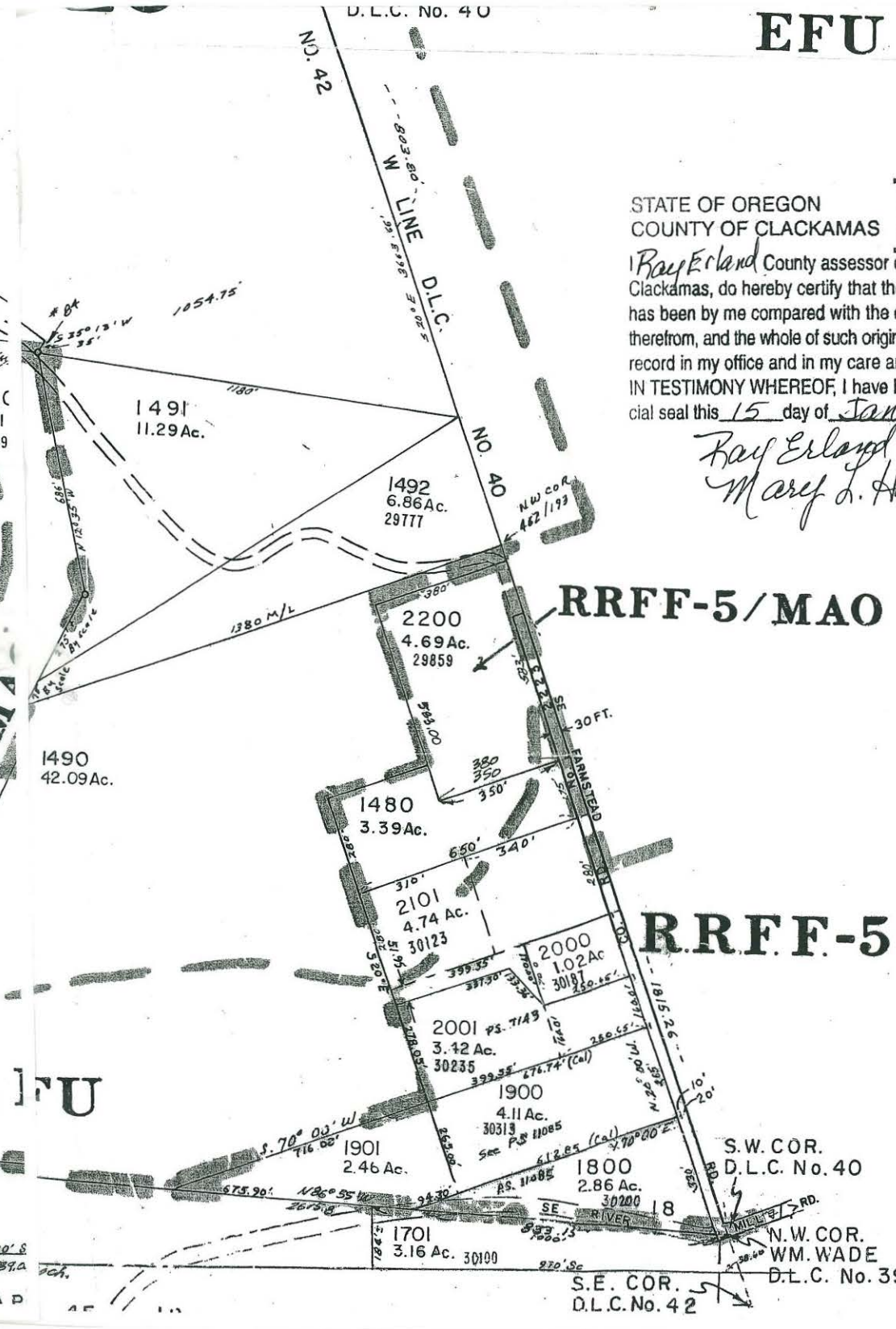
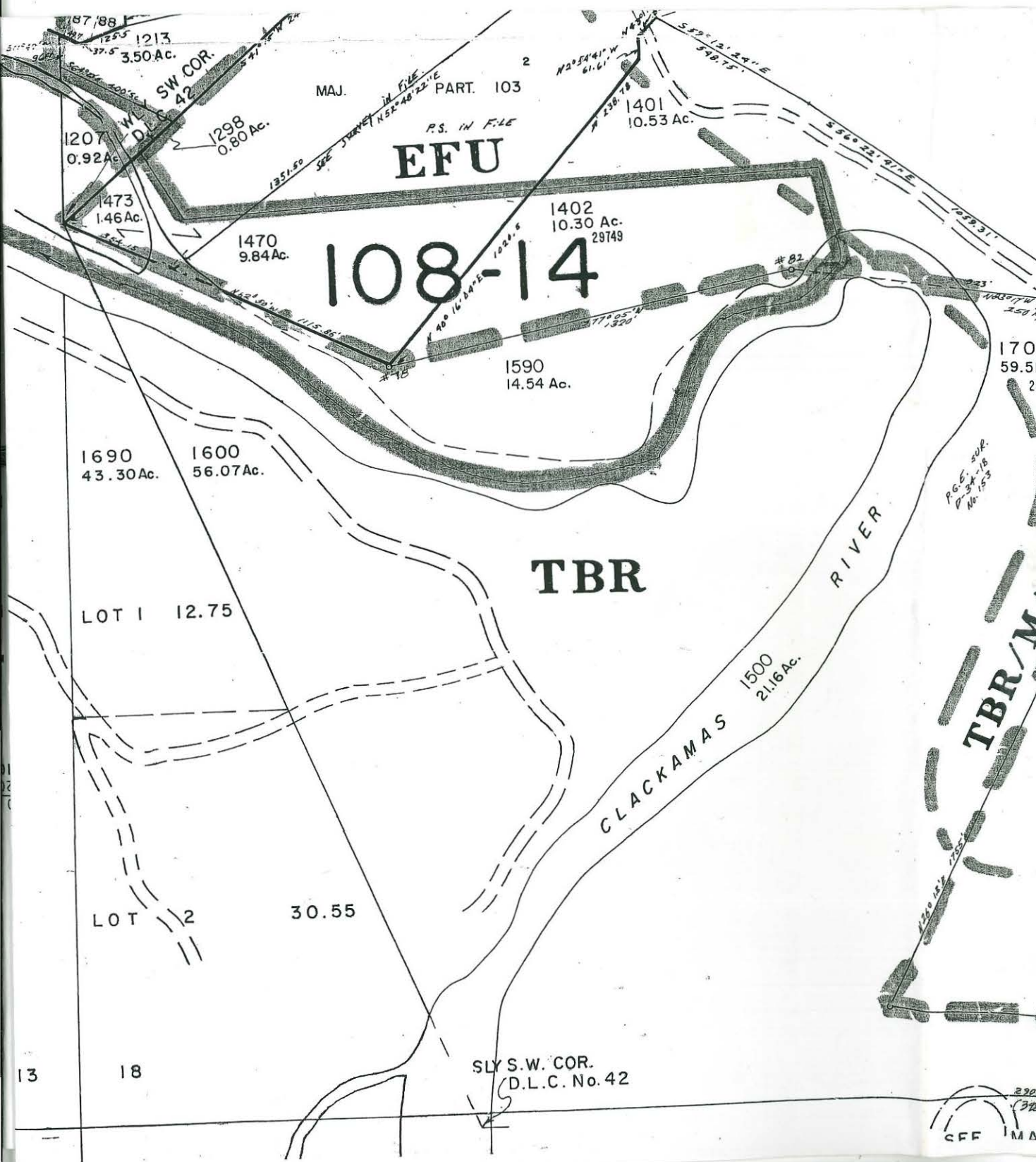
108-23

S.W. COR.
GEORGE CURRIN
D.L.C. No. 41

469.64'

N.W. COR.
HUGH CURRIN

3 4E 17



EFU

STATE OF OREGON }
COUNTY OF CLACKAMAS } SS
I, Ray Erland, County assessor of the State of Oregon for the County of Clackamas, do hereby certify that the foregoing copy of Assessor Map 29500 has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original, as the name appears on file and of record in my office and in my care and custody.
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal this 15 day of Jan, 2004.

Ray Erland
Mary L. Hanks

Assessor
Deputy

By:

EXHIBIT
C
RESPONDENT

82100

SCENIC RIVERS

30500 3 4E 18
JAN 14 2004



CLACKAMAS COUNTY

Board of Commissioners

January 15, 2004

To: Ginny Van Loo, BCC Assistant

From: Mike McCallister, Planning Staff

RE: Property Location 29388 SE Heiple Road; 3-4E-18 Tax Lot 603

BILL KENNEMER
CHAIR

LARRY SOWA
COMMISSIONER

MARTHA SCHRADER
COMMISSIONER

The above property is currently zoned Exclusive Farm Use (EFU). The property has continuously been zoned EFU since 1976.

18100

EXHIBIT

E RESPONSE

RECEIVED

FEB 02 2004

THE OFFICE OF
ADMINISTRATIVE HEARINGS

OAH Case No. 111013
 Dept. Case No. LQ/T-NWR-02-094

00183

away and the land was kept "groomed," the more reasonable conclusion is that the property was maintained as a grass landing strip.

Ms. Wescott argues that her use of the property necessarily is a farm use because the property is located in an exclusive farm use zone. As defined by ORS 215.203, however, "farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops * * *." Nothing in the record establishes that the subject property is devoted to "the primary purpose of obtaining a profit in money by raising, harvesting and selling crops." The record does establish, however, that the property clearly has been used as an airport or skydiving facility since installation of the underground storage tank. Any farm use at the property has been, at best, incidental. The tank therefore is not a "farm tank" as defined by the rule.

ORDER

The Department's motion for ruling on a legal issue is granted, and Ms. Wescott's motion for ruling on a legal issue is denied. The underground storage tank located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon, is not a "farm tank" as defined by 40 CFR 280.12. All other issues will be addressed at the contested case hearing February 18, 2004, or by the Department and Ms. Wescott should they reach agreement on resolution of the contested case before the hearing.



Stephen H. Elmore, Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE


I certify that on January 28, 2004, I served the attached Order on Motions for Ruling on Legal Issue by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

CYNTHIA WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 6675

SUSAN GRECO
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL



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

00185

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: Cynthia Wescott

CASE NUMBER: 111013

ALJ: Stephen Elmore

DATE: 1/28

☐ PHC NTC

☐ HRG NTC

OTHER Order on Motions
for Rubenstein on
Legal Issues

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:

CYNTHIA WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

2. Article Number

(Transfer from service label)

7001 1940 0000 1117 6675

PS Form 3811, August 2001

Domestic Return Receipt

2ACPRI-03-Z-0985

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X C. Wescott

☐ Agent

☐ Addressee

B. Received by (Printed Name)

Cynthia Wescott

C. Date of Delivery

1/29

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

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

OFFICIAL USE

Postage

\$

Certified Fee

Return Receipt Fee
(Endorsement Required)

Restricted Delivery Fee
(Endorsement Required)

Total Postage & Fees

\$

Postmark
Here

Sent To

Street, Apt. No.,
or PO Box No.

City, State, ZIP+ 4

CYNTHIA WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

PS Form 3800, January 2001

See Reverse for Instructions

RECEIVED

FEB 04 2004

THE OFFICE OF
ADMINISTRATIVE HOURS

BEFORE THE OREGON ENVIRONMENTAL
QUALITY COMMISSION

In the Matter of:)
CYNTHIA GAY.)
Case No. LQ/T-NWR-02-094) AFFIDAVIT
STATE OF OREGON)
County of Multnomah)

I, Stephanie Holmes, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Stephanie Holmes, am employed by the Oregon Department of Environmental Quality as the Underground Storage Tank Program Coordinator since March 1994.

2. That in the course of that employment, I mail documents regarding underground storage tank licenses and permits. That in the course of that employment I enter and retrieve information from the Department's database regarding the permittee and owner of underground storage tanks.

3. That based on the information contained in the Department's database, on or about November 20, 1991, the Department issued a temporary operating permit for an underground storage tank located at 29388 S.E. Heiple Road in Eagle Creek, Oregon to Cynthia Gay.

4. That based on information contained in the Department's database, the Department did not issue a General Permit Registration Certificate for Operation to Ms. Gay prior to December 23, 1998.

5. That based on information contained in the Department's database, the Department did not receive from Ms. Gay the 2002 annual compliance fee.

6. That on or about October 1, 1997, I mailed, via first class mail, a document entitled Upgrade Certification Form to Ms. Gay at the address listed on Ms. Gay's temporary operating permit.

7. That on or about August 15, 1998, I mailed, via first class mail, a document entitled Upgrade Certification Form to Ms. Gay at the address listed on Ms. Gay's temporary operating permit.

8. That on or about November 11, 1998, I mailed, via first class mail, a document entitled Decommissioning Tank Status Form to Ms. Gay at the address listed on Ms. Gay's temporary operating permit.

9. That on or about January 13, 1999, I mailed, via first class mail, a document entitled 30-Day Notice of Intent to Decommission to Ms. Gay at the address listed on Ms. Gay's temporary operating permit.

10. That on or about August 20, 1999, I mailed, via first class mail, a document entitled Don't Wait Until December 1999 to Decommission to Ms. Gay at the address listed on Ms. Gay's temporary operating permit.



11. That on or about December 6, 1999, I mailed, via first class mail, a document entitled Decommissioning Reminder to Ms. Gay at the address listed on Ms. Gay's temporary operating permit.

12. That the attached aforementioned documents marked as Exhibits 1 through 6 are true and exact copies of the originals thereto.

Date: 2/6/04

Stephanie A. Holmes
Stephanie Holmes
Department of Environmental Quality

Sworn and subscribed before me this 6th day of February 2004.

SEAL



Deborah K. Nesbit
Notary Public for Oregon
My Commission Expires
9/3/06

Ex 1

State of Oregon
Department of Environmental Quality
Underground Storage Tank Program

Upgrade Certification Form

To:

For Facility:

Recognizing that preventing leaks from underground storage tanks is key to protecting groundwater quality, the United States and the State of Oregon adopted the underground storage tank regulations. In 1988, a ten year clock began to tick for upgrading underground storage tank systems (USTs). On December 22, 1998 all USTs must have spill protection, overfill protection and corrosion protection for the tanks and piping. Leak detection and financial responsibility (insurance) are required now.

The State of Oregon recently changed the annual permit compliance fee for some tanks so that the Department can continue to provide technical assistance to those upgrading their tanks. Beginning January 1, 1998, the annual UST per tank compliance fee will rise to \$60.00 for tank systems which have not been upgraded. The annual fee for permittees who meet all state or federal upgrade requirements will remain unchanged at \$35.00 per tank per year. **To implement the revised law, the Department must ask all permittees to complete this upgrade certification form concerning the upgrade status of their tank system(s) and return it to the Department no later than October 31, 1997.**

Enclosed is a *Quick Early Compliance Checklist* designed to help you determine whether your tank systems meet the upgrade requirements. If you need further assistance, the Department recommends that you contact your DEQ licensed installation/retrofit service provider. **In order to meet the state or federal upgrade requirements, and to qualify for the lower fee, your tank system(s) must have spill protection, overfill protection, corrosion protection for the tank(s) and corrosion protection for the piping in accordance with 40 CFR 280.21 as adopted or as amended by OAR 340-150-003.**

According to our records you are currently the holder of temporary permits for the tank system(s) listed below. Please place a check mark in the **YES** column after those tank systems which currently meet all the upgrade requirements. For tank systems which do not meet one or more of the upgrade requirements on the day you complete this certification, place a check mark in the **NO** column. (Note: Tank systems which are upgraded in the interim period between submittal of this certification and December 22, 1998, will be invoiced for the lower fee in 1998 and/or 1999, as applicable, by completing a revised certification form as part of the required installation checklist or upgrade/retrofit checklist.)



Tank System

Upgraded?

Tank ID

Permit #

Gallons

Contents

YES

NO

Please check and sign the following upgrade certification statement and return it to the Department of Environmental Quality, UST Program, 811 SW Sixth Avenue, Portland, OR 97204. Permittees who do not return this upgrade certification form or fail to sign it will automatically be invoiced the non-refundable \$60.00 per tank fee.

Please note in accordance with ORS 466.765 and 40 CFR 280.34 as adopted or as amended by OAR 340-150-003, you are required to cooperate fully with inspections, monitoring and testing conducted by the Department, as well as requests for document submission, testing and monitoring pursuant to section 9005 of Subtitle I of the Resource Conservation and Recovery Act, as amended. The information you have submitted is subject to audit and verification by the Department's Underground Storage Tank Compliance Inspectors. A false certification may result in enforcement action being taken by the Department.

I hereby certify that the information provided on this form concerning the current upgrade status of my underground storage tank system(s) is accurate.

Signature (required): _____ Date: _____

The Department appreciates your cooperation in completing and returning this form to us.

For information or assistance with this form call your regional DEQ office or the UST HELPLINE: 1-800-742-7878 (Toll Free in Oregon). Regional office phone numbers are listed on the reverse side of the enclosed *Quick Early Compliance Checklist*.

FOR DEQ USE ONLY

INSPECTOR'S VERIFICATION SIGNATURE _____
DATE _____

Ex 2

State of Oregon
Department of Environmental Quality
Underground Storage Tank Program

Upgrade Certification Form

To:

For Facility:
UST fac. ID No.

Recognizing that preventing leaks from underground storage tanks is key to protecting groundwater quality, the United States and the State of Oregon adopted the underground storage tank regulations. In 1988, a ten year clock began to tick for upgrading underground storage tank systems (USTs). On December 22, 1998 all USTs must have spill protection, overfill protection and corrosion protection for the tanks and piping. Leak detection and financial responsibility (insurance) are required now.

Concurrent with the 1998 compliance deadline, the Department is also proposing to implement a general permit and registration certificate program to replace all existing temporary permits. Effective December 23, 1998, all existing temporary permits will be terminated. By the 23rd, all tank owners and permittees will need to register to operate under either the general permit to operate tanks or the general permit to decommission tanks by temporary or permanent closure. **To implement these proposed changes to the permit program, the Department is asking permittees to complete this upgrade certification form concerning the upgrade status of their tank system(s) and return it to the Department no later than September 20, 1998. Under a 1997 law, this information will also be used to determine the permittees 1999 annual compliance fee (\$35 for upgraded tanks, \$60 for non-upgraded tanks)**

Enclosed is a *Quick Early Compliance Checklist* designed to help you determine whether your tank systems meet the upgrade requirements. If you need further assistance, the Department recommends that you contact your DEQ licensed installation/retrofit service provider. **In order to meet the state or federal upgrade requirements, and to qualify for the lower fee, your tank system(s) must have spill protection, overfill protection, corrosion protection for the tank(s) and corrosion protection for the piping in accordance with 40 CFR 280.21 as adopted or as amended by OAR 340-150-003.**

According to our records you are currently the holder of temporary permits for the tank system(s) listed below. Please place a check mark in the YES column after those tank systems which currently meet all the upgrade requirements.

For tank systems which do not meet one or more of the upgrade requirements on the day you complete this certification, place a check mark in the NO column. (Note: Tank systems which are upgraded in the interim period between submittal of this certification and December 22, 1998, will be invoiced for the lower fee in 1999, by completing a revised certification form as part of the required installation checklist or upgrade/retrofit checklist.)



<u>Tank System</u>				<u>Upgraded?</u>	
Tank ID	Permit #	Gallons	Contents	YES	NO
				<input type="checkbox"/>	<input type="checkbox"/>
				<input type="checkbox"/>	<input type="checkbox"/>
				<input type="checkbox"/>	<input type="checkbox"/>
				<input type="checkbox"/>	<input type="checkbox"/>
				<input type="checkbox"/>	<input type="checkbox"/>
				<input type="checkbox"/>	<input type="checkbox"/>

For those who answered "no" in the box above, please identify the option or options that most closely represents your status or plans at this time:

- ☐ I plan to upgrade or replace my tanks before December 22, 1998
- ☐ I stopped using my tanks about _____
- ☐ I have sold this property (Please include name and address of new owner)
- ☐ I plan to decommission by permanent closure before December 22, 1999

Please check and sign the following upgrade certification statement and return it to the Department of Environmental Quality, UST Program, 811 SW Sixth Avenue, Portland, OR 97204.

Permittees who **do not** return this upgrade certification form or fail to sign it will automatically be invoiced the non-refundable \$60.00 per tank fee.

Please note in accordance with ORS 466.765 and 40 CFR 280.34 as adopted or as amended by OAR 340-150-003, you are required to cooperate fully with inspections, monitoring and testing conducted by the Department, as well as requests for document submission, testing and monitoring pursuant to section 9005 of Subtitle I of the Resource Conservation and Recovery Act, as amended. The information you have submitted is subject to audit and verification by the Department's Underground Storage Tank Compliance Inspectors. A false certification may result in enforcement action being taken by the Department.

I hereby certify that the information provided on this form concerning the current upgrade status of my underground storage tank system(s) is accurate.

Signature (required): _____

Date: _____

The Department appreciates your cooperation in completing and returning this form to us.

For information or assistance with this form call your regional DEQ office or the UST HELPLINE: 1-800-742-7878 (Toll Free in Oregon). Regional office phone numbers are listed on the reverse side of the enclosed *Quick Early Compliance Checklist*.

FOR DEQ USE ONLY	
INSPECTOR'S VERIFICATION SIGNATURE _____	

DATE _____

Quick Early Compliance Checklist

You are in early compliance with the upgrade requirements and are eligible for the lower tank fee if you can check off the four major items below for each of your *existing* UST systems:

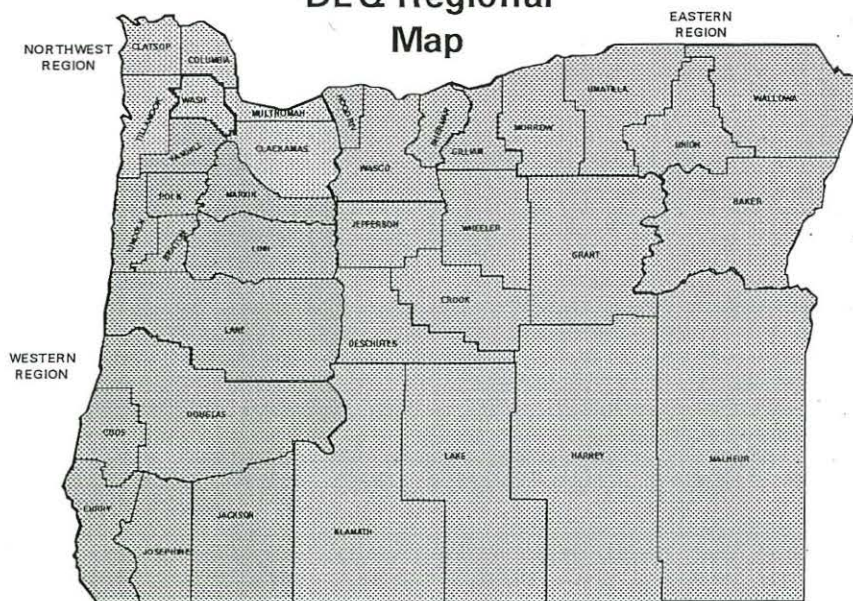
PLEASE ANSWER FOR PETROLEUM AND HAZARDOUS SUBSTANCE TANKS

- ☐ Spill protection provided by a catchment basin
- ☐ Overfill protection provided by an automatic shutoff device, overfill alarm, or ball float valve
- ☐ Corrosion protection for the tank provided by one of the following:
 - ☐ Steel tank has corrosion-resistant coating AND cathodic protection
 - ☐ Tank made of noncorrodible material (such as fiberglass)
 - ☐ Steel tank clad with (or enclosed in) noncorrodible material
 - ☐ Uncoated steel tank has cathodic protection system
 - ☐ Uncoated steel tank has interior lined with noncorrodible material
 - ☐ Uncoated steel tank has cathodic protection AND interior lined with noncorrodible material
- ☐ Corrosion protection for piping provided by one of the following:
 - ☐ Uncoated steel piping has cathodic protection
 - ☐ Steel piping has a corrosion-resistant coating AND cathodic protection
 - ☐ Piping made of (or enclosed in) noncorrodible material

PLEASE ANSWER FOR HAZARDOUS SUBSTANCE TANKS ONLY

- ☐ Hazardous Substance UST's only - Hazardous substance UST's must also have leak detection systems that include secondary containment and interstitial monitoring.

DEQ Regional Map



**RETURN COMPLETED AND SIGNED FORM TO
THE DEPARTMENT OF ENVIRONMENTAL QUALITY UST PROGRAM
REGIONAL OFFICE IN WHICH YOUR FACILITY IS LOCATED**

NORTHWEST REGION
2020 SW 4TH AVENUE, SUITE 400
PORTLAND, OR 97201-5884
FAX (503) 229-6945
Phone: (503) 229-5263

EASTERN REGION / THE DALLES
400 E SCENIC DRIVE, # 307
THE DALLES, OR 97058
FAX (541) 298-7330
Phone: (541) 298-7255

WESTERN REGION / SALEM
750 FRONT STREET NE, SUITE 120
SALEM, OR 97310
FAX (503) 373-7944
Phone: (503) 378-8240

EASTERN REGION / PENDLETON
700 SE EMIGRANT, SUITE 330
PENDLETON, OR 97801
FAX (541) 278-0168
Phone: (541) 276-4063

WESTERN REGION / MEDFORD
201 W MAIN STREET, SUITE 2-D
MEDFORD, OR 97501
FAX (541) 776-6262
Phone: (541) 776-6136, Ext. 233

EASTERN REGION / BEND
2146 NE 4TH, # 104
BEND, OR 97701
FAX (541) 388-8283
Phone: (541) 388-6146

WESTERN REGION / EUGENE
1102 LINCOLN STREET, SUITE 210
EUGENE, OR 97401
FAX (541) 686-7551
Phone: (541) 686-7838

UST HELPLINE: 1-800-742-7878
(Toll Free in Oregon)

UNDERGROUND STORAGE TANK PROGRAM
DECOMMISSIONING TANK STATUS
FOR HOLDERS OF TEMPORARY UST PERMITS

TO PERMITTEE:

FOR EXISTING FACILITY:

DEQ records indicate the following tanks have not been upgraded to meet one or more of the 1998 technical standards for corrosion control, spill and overfill prevention and leak detection and must be decommissioned in accordance with OAR 340-150-0166 prior to December 22, 1998. Tanks that do not meet the 1998 technical standards by December 22, 1998 must permanently close as of that date or, at a minimum, elect the temporary closure option which requires permanent decommissioning no later than December 22, 1999. Instructions on how to comply with the general permit to decommission conditions and requirements, including temporary and permanent closure or change-in-service, will be mailed to you in late December 1998.

IF INFORMATION ON YOUR TANK STATUS IS CORRECT (i.e. the following tanks do not, or will not, meet the 1998 technical standards for corrosion control, spill and overfill prevention and leak detection by December 22, 1998) **DO NOT RETURN THIS FORM.** You will be receiving further instructions about decommissioning these tanks in late December 1998.

IF OUR INFORMATION IS INCORRECT AND YOU DO INTEND TO OPERATE ONE OR MORE OF THE FOLLOWING TANKS on or after December 23, 1998, **PLEASE COMPLETE PAGE 2, THE GENERAL PERMIT REGISTRATION FORM TO OPERATE.** For any tanks listed below, just transfer the Tank ID Number and Tank Permit Number to page 2 and describe the facts pertaining to the installation, upgrading or retrofitting of the subject tanks. If necessary, please make extra copies of page 2 to register more tanks. Both the permittee and tank owner must sign the operating registration form and return it to the Department of Environmental Quality, UST Program, 811 SW 6th Avenue, Portland, OR 97204.

TANKS TO BE DECOMMISSIONED

Tank ID Number	Tank Permit Number	Tank ID Number	Tank Permit Number	Tank ID Number	Tank Permit Number

11/5/98



OREGON DEQ

Page 1 of 4 **00196**

NEW GENERAL PERMIT TO DECOMMISSION USTS

UNDERGROUND STORAGE TANK PROGRAM

DESCRIPTION:

On December 22, 1998 all the outstanding UST temporary permits for underground storage tanks will be terminated pursuant to Oregon Administrative Rule 340-150-0021 (1) recently adopted by the Environmental Quality Commission (EQC) on October 30, 1998. In lieu of issuing individual permits to facilities, the EQC adopted two general permits by rule, one to cover the conditions and requirements to operate USTs holding regulated substances and one to cover the conditions and requirements to decommission USTs by closure or change-in-service. Copies of the draft general permits to operate and decommission were mailed to all permittees and tank owners in August 1998.

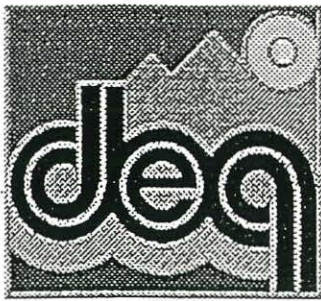
Tanks that our records indicate meet the 1998 technical standards for corrosion control, spill and overfill prevention and leak detection have been mailed a *General Permit Registration Form to Operate*. You have received this *Decommissioning Tank Status Form* as our records indicate the tanks listed on page 1 do not meet the 1998 technical standards. Tanks that do not meet the 1998 technical standards are not eligible to receive a *General Permit to Operate* and will not be authorized to receive regulated substances such as motor fuel on or after December 23, 1998.

INSTRUCTIONS:

1. According to our records; based on self-certification survey forms, non-response to self-certification survey forms or regional inspections, it is our understanding that the **tanks listed on page 1 do not meet the 1998 technical standards** for corrosion control, spill and overfill prevention and leak detection. As such, it will be necessary to manage these tanks in accordance with the conditions and requirements of the *General Permit to Decommission USTs* by temporary or permanent closure or change-in-service pursuant to OAR 340-150-0166.
2. **If our determination in Instruction #1 is correct, no action is required at this time.** Please keep these forms for your records. In late December 1998 we will mail you a decommissioning package with instructions on the decommissioning process.
3. **If you plan to operate any of the tanks listed on page 1, and deposit any regulated substance into the tanks after on or after December 23, 1998, you must return page 2, a completed and signed *General Permit to Operate Registration Form* to the Department by no later than 5:00 PM on Friday December 4, 1998.** If necessary, a copy of the completed form can be faxed to us at (503) 229-6954. We can not guarantee that we can process any forms received after December 4, 1998 by December 22, 1998. **Completed forms must be returned to:**

Department of Environmental Quality
UST Program
811 SW 6th Avenue
Portland, OR 97204

4. If for any reason your information does not correspond to our preliminary determination of tank status, please provide an explanation on page 2 of the form. After mailing the form to DEQ, contact the appropriate regional office listed on page 4 and discuss what changes you made on the tank status for this facility. It will speed the processing of your form.
5. If you have any other questions regarding this mailing, please call our toll-free UST Helpline at 1-800-742-7878 (In Oregon) or call direct (503) 229-6652.



Decommissioning Reminder

December 6, 1999

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

Final Reminder

This reminder notice is in reference to underground storage tanks located at the DEQ Facility ID Number listed above your name on the envelope used for this mailing. You were sent letters listing these tanks on January 13, 1999 and August 12, 1999. DEQ records indicate that a tank or tanks in temporary closure have not completed permanent decommissioning. If you have already done the work you or your contractor may still have to submit the required reports. The one year temporary closure period for tanks which closed due to the 1998 deadline expires December 22, 1999.

Decommissioning Requirements

You should already have submitted a 30-Day Notice form to decommission to your regional office. In addition, a telephone call to your regional office is required 3 days prior to beginning work. Your regional office must receive the UST Decommissioning Checklist along with the UST Decommissioning/Change-In-Service Report within 30 days following decommissioning.

UST Compliance Fees

Underground storage tanks are assessed an annual per tank compliance fee. The current fee is \$60.00 per tank per year.

- Any outstanding past due fees must be paid prior to decommissioning.
- Any tank in the ground after December 31, 1999 will be billed for and owe fees for the year 2000.
- If the Department does not receive a Decommissioning Checklist and Decommissioning/Change-In-Service Report by January 31, 2000 you will also be billed for and owe the 2000 fees.

Extension of Temporary Closure

If you have extenuating circumstances which prevent you from meeting the December 22, 1999 permanent decommissioning deadline please contact your DEQ regional office listed on the reverse of this notice immediately. Depending on your circumstances you may wish to request an extension of the one year temporary closure period. In accordance with DEQ rules, you must complete a site assessment, including sampling, before an extension can be applied for. Be advised that extending the temporary closure period will increase the cost of decommissioning as a second round of sampling must be performed at the time of actual decommissioning.

Enforcement Action

Tank owners who do not permanently decommission their tanks will be subject to enforcement action by the Department. The only exception is for tank owners who receive an extension of the temporary closure period by completing a site assessment prior to December 22, 1999. Initial enforcement action will be in the form of a notice of noncompliance. You will be asked to meet the terms and conditions of a compliance schedule negotiated with the Department. Failure to respond to the notice of noncompliance or violations of your compliance schedule may subject you to civil penalties.

C. R. GAY
29388 SE HEIPLE ROAD
EAGLE CREEK OR 97022
|||||

COPY 10905

EXHIBIT

D4



UNDERGROUND STORAGE TANK PROGRAM
OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
DON'T WAIT UNTIL DECEMBER 1999 TO DECOMMISSION

TO PERMITTEE:

C.R. Gay
29388 SE Heiple Road
Eagle Creek, OR 97022

FOR EXISTING FACILITY:

Facility ID Number: 10905
BEAVER OAKS AIRPORT
29388 SE HEIPLE RD
EAGLE CREEK, OR 97022

You received this notice because Department records indicate that the out of service tanks listed below have not, as yet, been decommissioned. If our information is incorrect please contact your regional office listed on page 3 immediately. Please note that a tank is not permanently decommissioned until all past due compliance fees have been paid and the Department has received the UST Decommissioning Checklist form and the UST Decommissioning/Change-in-Service form due within 30 days after decommissioning.

State and Federal regulations require that all tanks be permanently decommissioned by removal or filling in place no later than one year after the tanks have been taken out of service. **Tanks that closed due to the December 22, 1998 compliance deadline must be permanently decommissioned no later than December 22, 1999.** It is still possible to upgrade your tanks to meet the 1998 compliance standards, but your window of opportunity for upgrading also expires December 22, 1999. As a reminder you are required to manage your tanks even though they are out of service. If the tanks and/or piping have a corrosion control system, it must continue to be maintained and operated. All lines, pumps, manways and ancillary equipment must be secured. Vent lines must be left open and functioning.

Enclosed is a *30-Day Decommissioning Notice* which should be submitted to your regional office **now** if you have not already done so. The Department urges you to decommission your tanks during the remaining construction season. Delaying decommissioning until the rainy season may increase project costs. Finding a licensed service provider to perform the decommissioning could also be difficult and more costly if you wait until the last minute. Tank owners who do not decommission by December 22, 1999 may be subject to enforcement actions which can include civil penalties.

If you have any questions concerning the decommissioning requirements or the status of your tanks please contact your regional office. To request decommissioning forms or a list of licensed contractors leave a message with our toll-free (in Oregon) UST HELPLINE at 1-800-742-7878. Information and decommissioning forms are also available on our web site at <http://www.deq.state.or.us/wmc/tank/ust-lust.htm>.

TANKS TO BE DECOMMISSIONED

Tank ID Number	Tank Permit Number	Tank ID Number	Tank Permit Number	Tank ID Number	Tank Permit Number
1	BBGJH				



UNDERGROUND STORAGE TANK PROGRAM
30-DAY NOTICE OF INTENT TO DECOMMISSION
FOR NON-UPGRADED TANKS THAT EXISTED PRIOR TO 12/23/98

TO PERMITTEE:

C.R. Gay
29388 SE Heiple Road
Eagle Creek, OR 97022

FOR EXISTING FACILITY:

Facility ID Number: 10905
BEAVER OAKS AIRPORT
29388 SE HEIPLE RD
EAGLE CREEK, OR 97022

In early November 1998 we mailed you a Decommissioning Tank Status Report. The report listed tanks that we understood would be decommissioned based on DEQ records. Tanks that have not been upgraded to meet one or more of the 1998 technical standards for corrosion control or spill and overfill prevention must be decommissioned in accordance with OAR 340-150-0166 prior to December 22, 1998.

Tanks which are not decommissioned (permanently closed) as of December 22, 1998 must temporarily close as of that date, submit a 30-Day Notice of Intent to Decommission to the appropriate regional office and follow the requirements listed on page 2.

On December 22, 1998 all the outstanding UST temporary permits for underground storage tanks were terminated pursuant to Oregon Administrative Rule 340-150-0021 (1) recently adopted by the Environmental Quality Commission (EQC) on October 30, 1998. In lieu of issuing individual permits to facilities, the EQC adopted a general permit by rule to cover the conditions and requirements to decommission USTs by closure or change-in-service (converting from storing a regulated substance to a non-regulated substance). Copies of the draft general permit to decommission were mailed to all permittees and tank owners in August 1998. The EQC adopted the decommissioning rules as proposed without any substantive changes.

You have received this *30-Day Notice of Intent to Decommission* as our records indicate the tanks listed below do not meet the 1998 technical standards for corrosion control or spill and overfill prevention. Tanks that do not meet the 1998 technical standards are not eligible to receive a general permit to operate and are not authorized to receive deposits of regulated substances, such as motor fuel, on or after December 23, 1998.

TANKS TO BE DECOMMISSIONED

Tank ID Number	Tank Permit Number	Tank ID Number	Tank Permit Number	Tank ID Number	Tank Permit Number
1	BBGJH				



BEFORE THE OREGON ENVIRONMENTAL
QUALITY COMMISSION

In the Matter of:
CYNTHIA GAY

Case No. LQ/T-NWR-02-094

STATE OF OREGON
County of Multnomah

AFFIDAVIT

I, Leslie A. Carlough, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Leslie A. Carlough, am currently employed by the Oregon Department of Environmental Quality. That I am currently employed as a Senior Policy Advisor, and that I have been employed in this capacity for two years. That prior to this, I held other positions in the Department since 1994 including Environmental Law Specialist and Manager.

2. That in the course of my employment since 1994, I regularly perform calculations to determine the economic benefit portion of civil penalties assessed by the Department as prescribed in Oregon Administrative Rule 340-012-0045.

3. That I, pursuant to OAR 340-012-0045(1)(c)(F)(iii), make economic benefit calculations using the United States Environmental Protection Agency's "BEN" computer model.

4. That on June 6, 2002, I used BEN to calculate the economic benefit in Case No. LQ/T-NWR-02-094, which assessed a civil penalty against Cynthia Gay for failing to decommission an underground storage tank, a violation of Oregon Administrative Rules 340-150-0021(3) and 340-150-0166(4)(c).

5. That the economic benefit calculated by BEN was \$272.

6. That the economic benefit calculation was based on Ms. Gay delaying, from December 22, 1999 until at least December 2000, an estimated cost of \$5,000 for decommissioning the underground storage tank, and avoiding payment of the annual compliance fee for 2002.

7. That the attached Memorandum, dated June 6, 2002, and "BEN" calculation work sheet, dated June 6, 2002, were prepared by me in the normal course of my duties with the Department.

Date: 2/9/04

Leslie A. Carlough
Leslie A. Carlough

Department of Environmental Quality

Sworn and subscribed before me this 9th day of February 2004.

SEAL



Deborah K. Nesbit
Notary Public for Oregon
My Commission Expires

913106

State of Oregon
Department of Environmental Quality

Memorandum

Date: June 6, 2002
To: File
From: Les Carlough, Senior Policy Advisor, Office of Compliance and Enforcement
Subject: Ben calculation for Cynthia Gay.

General Purpose and Authority

The economic benefit portion of the civil penalty formula is simply the monetary benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance.

Oregon Revised Statute 468.130(2)(c,h) directs the Environmental Quality Commission to consider economic conditions of the entity in assessing a penalty as well as other factors that Commission makes relevant by rule. Accordingly, the Commission specified in Oregon Administrative Rule (OAR) 340-012-0045(1)(c)(F) that the penalty will contain an "approximated dollar sum of the economic benefit." That rule also specifies that, "[i]n determining the economic benefit component of a civil penalty, the Department may use the U.S. Environmental Protection Agency's BEN computer model . . ." and must use it on request of a respondent.

Theory of Economic Benefit

Compliance with environmental regulations may require an entity to expend financial resources. These expenditures support the public goal of better environmental quality, but often do not yield direct financial return to the entity. "Economic benefit" represents the financial gain that a violating entity accrues by delaying and/or avoiding such expenditures. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, the entity avoids the costs associated with obtaining additional funds for environmental compliance (opportunity cost). Economic benefit is the amount by which an entity is financially better off from not having complied with environmental requirements in a timely manner.

Economic benefit is "no fault" in nature. An entity need not have deliberately chosen to delay compliance (for financial or any other reasons), or in fact even have been aware of its noncompliance, for it to have accrued the economic benefit of noncompliance.

An appropriate economic benefit calculation represents the amount of money that would make the entity indifferent between compliance and noncompliance. If DEQ does not recover, through a civil penalty, at least this economic benefit, then the entity will retain a gain.



00205

Because of the precedent of this retained gain, other regulated companies may see an economic advantage in similar noncompliance, and the penalty will fail to deter potential violators. Economic benefit is designed to be neither punitive nor tort damage, but instead is the minimum amount by which the entity must be penalized so as to return it to the position it would have been in had it complied on time.

Basis of the Costs Considered

Ms. Gay should have decommissioned an underground storage tank in December of 1999 at a cost of \$5,000 and sent in the decommissioning checklist. Through delaying these costs until December 2000, and by not paying the 2002 annual compliance fee of \$60, Ms. Gay benefited by \$272.

Applicability of Standard Rates Presumed by Rule

The BEN model relies on income tax rates, inflation rates, and discount rates. The model allows the operator to input particular rates, but in the absence of operator input, the BEN model uses standard values based on the entity's corporate status, whether it acted for profit, and the state where the violations occurred. It calculates inflation rates from the Plant Cost Index published by the magazine *Chemical Engineering* and from the Consumer Price Index. EPA updates the standard values annually.

Pursuant to OAR 340-012-0045(1)(c)(F)(iii), the "model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect the Respondent's actual circumstance."

Description of the Attached Run

BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures. Such expenditures can include: (1) capital investments (*e.g.*, larger pollution control or monitoring equipment, costs of design and installation), (2) one-time nondepreciable expenditures (*e.g.*, permit fees, clean-up costs, setting up a reporting system, acquiring land needed for a capital improvement), (3) annually recurring costs (*e.g.*, routine operating and maintenance costs, utilities). Each of these expenditures can be either delayed or avoided. BEN's baseline assumption is that capital investments and one-time nondepreciable expenditures are merely delayed over the period of noncompliance, whereas annual costs are avoided entirely over this period.

The calculation incorporates the economic concept of the "time value of money." Stated simply, a dollar today is worth more than a dollar tomorrow, because you can invest today's dollar to start earning a return immediately. Thus, the further in the future the dollar is, the less it is worth in "present-value" terms. Similarly, the greater the time value of money (*i.e.*, the greater the "discount" or "compound" rate used to derive the present value), the lower the present value of future costs. To calculate an entity's economic benefit, BEN uses standard financial cash flow and net-present-value analysis techniques based on modern and generally accepted financial principles, which were subjected to extensive national notice-and-comment processes.¹

Inputs to the model include costs specific to the situation of the entity as well as the presumed standard indexes and rates described in the section above. These values are listed in the lower three-quarters of the table. Using these values, BEN makes a series of calculations listed at the top of the table as follows:

- A) On-Time Capital & One-Time Costs. What compliance would have cost had the entity complied on-time, adjusted for inflation and tax deductibility. The number is a present value as of the date of initial noncompliance. BEN derives this value by discounting the annual cash flows at an average of the cost of capital throughout this time period.
- B) Delay Capital & One Time Costs. What late compliance did cost, adjusted for inflation and tax deductibility. The number is a present value as of the date of initial noncompliance. BEN derives this value by discounting the annual cash flows at an average of the cost of capital throughout this time period. This value will be zero if the costs were avoided.
- C) Avoided Annually Recurring Costs. This sum is a present value as of the date of initial noncompliance. BEN derives this value by discounting the annual cash flows at an average of the cost of capital throughout this time period.
- D) Initial Economic Benefit (A - B + C). The delayed-case present value is subtracted from the on-time-case present value plus the sum of the avoided costs to determine the initial economic benefit as of the noncompliance date.

¹ See Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Request for comment, 61 Fed. Reg. 53025-53030 (Oct. 9, 1996); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Extension of time for request for comment, 61 Fed. Reg. 65391 (Dec. 12, 1996); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Advance notice of proposed action, response to comment, and request for additional comment, 64 Fed. Reg. 32947-32972 (June 18, 1999); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Advance notice of proposed action, response to comment, and request for additional comment, 64 Fed. Reg. 39135-39136 (July 21, 1999).

- E) Final Economic Benefit at Penalty Payment Date. BEN compounds the initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance.

Calculated Economic Benefit Likely an Underestimate

The economic benefit calculated above may underestimate the total economic benefit that the respondent received to date because it does not address uncertain indirect financial benefits, including:

- *Advantage-of-risk* – the value of (1) the risk of never getting caught and (2) keeping future options open by delaying a decision to institute a process or purchase capital.
- *Competitive advantage* – (1) beginning production earlier than would be possible if in compliance; (2) attracting clients by avoiding compliance costs, having a higher profit margin and therefore being able to offer goods or services at a lower cost than competitors; (3) keeping those clients attracted by lower prices because of brand loyalty or high switching costs; or (4) using the time or money saved to increase production.
- *Illegal profits* – selling illegal products or services.

However, I consider these other economic benefits to be "de minimis" in light of the difficulties in calculation. Pursuant to OAR 340-012-0045(1)(c)(F)(ii), the Department need not calculate an economic benefit if that benefit is de minimis.

Run Name = one	
Present Values as of Noncompliance Date (NCD),	22-Dec-1999
A) On-Time Capital & One-Time Costs	\$2,687
B) Delay Capital & One-Time Costs	\$2,477
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$210
E) Final Econ. Ben. at Penalty Payment Date,	
01-Jul-2002	\$272
<i>For-Profit (not C-Corp.) w/ OR tax rates</i>	
Discount/Compound Rate	10.8%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	05-Dec-2000
Capital Investment:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
# of Replacement Cycles; Useful Life	N/A; N/A
Projected Rate for Future Inflation	N/A
One-Time, Nondepreciable Expenditure:	
Cost Estimate	\$5,060
Cost Estimate Date	28-Jan-2002
Cost Index for Inflation	PCI
Tax Deductible?	Y
Annually Recurring Costs:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	
On-Time Compliance Capital Investment	N/A
Delay Compliance Capital Investment	
On-Time Compliance Replacement Capital	
Delay Compliance Replacement Capital	
One-Time Compliance Nondepreciable	
Delay Compliance Nondepreciable	

BEFORE THE OREGON ENVIRONMENTAL
QUALITY COMMISSION

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

RECEIVED
JAN 26 2005

In the Matter of:

CYNTHIA GAY.

Case No. LQ/T-NWR-02-094

AFFIDAVIT

STATE OF OREGON

County of Multnomah

I, Herrington Rose, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Herrington Rose, have been employed by the Oregon Department of Environmental Quality as an Environmental Specialist since 1992

2. That in the course of that employment, I conducted site inspections of underground storage tanks and drafted letters and memorandums in relation to those inspections.

3. That on or about January 28, 2002, I drafted and mailed, to Ms. Gay, a Notice of Noncompliance #NWR-UST-02-002 regarding an underground storage tank owned by Ms. Gay and located at 29388 S.E. Heiple Road in Eagle Creek, Oregon.

4. That on or about February 6, 2002, I received a telephone call from Mr. Ralph Hatley, as Ms. Gay's representative and that on that date, I drafted an UST Cleanup Telephone Use Report summarizing my conversation with Mr. Hatley.

5. That as follow-up to the information I obtained during the February 2002 telephone conversation with Mr. Hatley, on or about March 14, 2002, I drafted and mailed, to Ms. Gay, a Notice of Noncompliance #NWR-UST-02-010.

6. That based on my review of the Department's files regarding the underground storage tank owned by Ms. Gay, the Department did not receive, prior to September 2002, notice that the underground storage tank was to be or had actually been decommissioned. That on or about September 6, 2002, the Department received an Underground Storage Tank Decommissioning/Change-In-Service Report and attachments regarding the underground storage tank owned by Ms. Gay.

7. That based on my professional knowledge and experience, the cost to decommission a 1000 gallon underground storage tank using a licensed service provider would be approximately \$5,000.

8. That the attached aforementioned documents marked as Exhibits 1 through 4 are true and exact copies of the originals thereto.

Date: Jan. 25, 2005

Herrington Rose

Department of Environmental Quality



1 Sworn and subscribed before me this 25th day of January 2005 in the state of Oregon,
2 marion county.

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4 SEAL



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Jennifer J. Claussen
Notary Public for Oregon
My Commission Expires

11-4-2007



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

January 28, 2002

C.R. GAY
RALPH HATLEY
29388 SE HEIPLE ROAD
EAGLE CREEK OREGON 97022

Re: UST - Clackamas County
Beaver Oaks Airport
Facility #10905
NOTICE OF NONCOMPLIANCE
NWR-UST-02-002

Dear Mr. Hatley:

The violations documented include violations of environmental regulations (Oregon Administrative Rules or OAR) and statutes (Oregon Revised Statutes or ORS). The OARs incorporate by reference regulations from the Code of Federal Regulations (40 CFR); for simplicity, federal regulations are cited where applicable.

This Notice of Noncompliance (Notice) is issued in accordance with OAR 340-150-0166(4) for underground storage tank (UST) violations documented by the Oregon Department of Environmental Quality (DEQ) at the Beaver Oaks Airport facility located at 29388 SE Heiple Road, Eagle Creek, Oregon, Clackamas County, Oregon.

The purpose of this Notice is to inform you of a violation that has been confirmed. Based upon your response, additional violations may be identified. You will be informed in a subsequent Notice if additional violations are identified.

Beaver Oaks Airport violated 40 CFR 280.70(c), Subpart G as amended by OAR 340-150-0003 by failing to permanently close substandard UST systems at the end of the 12 month temporary closure period.

Based on historical site information, the Department understands that one out-of-service underground storage tanks exist on the property. The UST consists of a 1,000 (#BBGJH) gallon gasoline tank installed in June of 1985. The UST and associated piping do not meet the upgraded technical standards for leak detection, cathodic protection and spill/overfill protection.



00214

DEQ-1

Mr. Ralph Hatley
January 28, 2002
Page 2

On November 14, 2000, during a site inspection conducted by the Department, you agreed to submit a written schedule to permanently close the UST within three weeks of the date of the inspection. You failed to comply with the agreement. On December 5, 2000, the Department sent you a letter with a schedule to complete the UST decommissioning. You failed to respond to the Department's revised schedule. You have been issued two prior Notices of Noncompliance (NWR-UST-00-110/NWR-UST-00-169) for this violation. You have failed to correct the violation as requested in all instances.

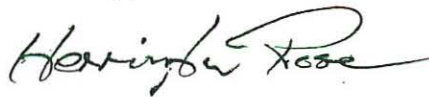
This is a Class II violation and is considered to be a serious violation of Oregon's environmental law. Therefore, we are referring this violation to the Department Enforcement Section with a recommendation to initiate a formal enforcement action. A formal enforcement action may include a civil penalty assessment for each day of violation.

By February 22, 2002, you are requested to take immediate action to correct the violation and provide documentation of the correction.

This Notice does not require you to implement Pollution Prevention. However, the Department strongly recommends that you consider Pollution Prevention options, where applicable, to prevent the violations outlined in this Notice from recurring. Pollution Prevention may also enable you to reduce environmentally driven costs, reduce operating costs, and reduce the regulatory requirements and fees applied to your firm. Please call our technical assistance staff for more information at (503) 229-5586.

Please contact me at (503) 229-6242 if you have any questions concerning this Notice or other UST issues.

Sincerely,



Herrington Rose
UST Cleanup Specialist
Northwest Region

cc: Office of Compliance and Enforcement-ODEQ/HQ
UST Policy-HQ
DEQ-UST-ER-The Dalles: Lissa Druback
DEQ-UST-WR-Eugene: Meryln Hough

UST CLEANUP TELEPHONE USE REPORT

CALL FROM/TO: Ralph Hatley DATE: 2-8-02
 WITH: Beaver Oaks TIME: 1430
 TELEPHONE NO: (503) 630-5867
 REGARDING: NON
 FILE NO: - -

SUMMARY OF CALL

Hatley removed UST without notice, said DEP "re-nig" on agreements so he pulled tank. Claimed his attorney wrongly instructed him to register UST, because he's litigation with county. ^{He said} UST shouldn't be regulated.

I asked if soil samples collected he said maybe. I said further violations will be cited. He said he published newspaper and that DEP should be careful. I clarified my profession, not personal, that lots of UST owners would love to hear his story. I advised he consult his attorney, reply to NON and send any available info.

H. Rose

Staff Signature

00216

EXHIBIT

tabbies

F2



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

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

CERTIFIED MAIL RETURN RECEIPT REQUESTED

March 14, 2002

C.R.GAY
RALPH HATLEY
BEAVER OAKS AIRPORT
29388 SE HEIPLE ROAD
EAGLE CREEK OREGON 97022

Re: UST – Clackamas County
Beaver Oaks Airport
Facility #10905
NOTICE OF NONCOMPLIANCE
NWR-UST-02-010

Dear Mr. Hatley:

The violations documented include violations of environmental regulations (Oregon Administrative Rules or OAR) and statutes (Oregon Revised Statutes or ORS). The OARs incorporate by reference regulations from the Code of Federal Regulations (40 CFR); for simplicity, federal regulations are cited where applicable.

This Notice of Noncompliance (Notice) is issued in accordance with OAR 340-150-0166(4) for underground storage tank (UST) violations documented by the Oregon Department of Environmental Quality (DEQ) at the Beaver Oaks Airport facility located at 29388 SE Heiple Road, Eagle Creek, Oregon, Clackamas County.

The purpose of this Notice is to inform you of violations that have been confirmed. Based upon your response, additional violations may be identified. You will be informed in a subsequent Notice if additional violations are identified.

VIOLATIONS

VIOLATION NO. 1, CLASS II:

Beaver Oaks Airport violated OAR 340-150-0166(3)(a-b) by failing to provide a written 30-day and verbal 3-day notice to the Department before permanently closing a regulated UST.

00217

EXHIBIT

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Ralph Hatley
March 14, 2002

340-150-0166 General Permit for Decommissioning of an UST by Temporary or Permanent Closure or, Conditions and Requirements

States the notification and reporting conditions and requirements applicable to the decommissioning of an UST that is holding, or held, a regulated substance are: (a) At least 30 days before beginning permanent closure, the Department must be notified of the intent to permanently close as required by 40 CFR 280.71 (a) as modified by OAR 340-150-0003 (34); (b) At least 3 working days before beginning permanent closure, notice of the confirmed date and time the permanent closure will begin must be provided as required by 40 CFR 280.71 (a) as modified by OAR 340-150-0003 (34), unless otherwise waived by the Department;

The Department understands from information you provided on February 6, 2002, that the UST was decommissioned after the inspection was conducted on November 14, 2000, without providing prior notice to the Department.

VIOLATION NO. 2, CLASS II:

Beaver Oaks Airport violated OAR 340-150-0166(5)(a-b) by failing to provide the Department completed decommissioning checklist and change-in-service reports within 30 days after tank closure.

As specified, the recordkeeping and report submission conditions and requirements applicable to the decommissioning of an UST that is holding, or held, a regulated substance are: (a) A completed decommissioning checklist and change-in-service report must be submitted to the Department within 30 days after tank closure as required by 40 CFR 280.71 (b) as modified by OAR 340-150-0003 (35), (b) Records of temporary or permanent closure and change-in-service, including records of the site assessment, must be maintained as required by 40 CFR 280.74 and 280.34 (b)(5);

No decommissioning reports have been submitted regarding the tank removal.

VIOLATION NO. 3, CLASS II:

Beaver Oaks Airport violated OAR 340-150-0166-5(g) by failing to pay the annual compliance fees for Department permitting expenses incurred on your former USTs.

340-150-0110 UST General Permit Compliance Fee

(1) Beginning March 1, 1989, the permittee must pay an annual underground storage tank general permit compliance fee of \$25 per tank per year. For calendar year 1994 and every year thereafter the permittee must pay an annual underground storage tank compliance fee of \$35 per tank per year, except that for calendar year 1998, permittees of tanks not in compliance with the 1998 technical standards must pay a permit fee of \$60 per tank. (2) Effective December 23, 1998 the permittee must pay an annual underground storage tank general permit compliance fee of \$35 per tank per year, except that for calendar year 1999, permittees of tanks not in compliance with the 1998 technical standards must pay a general permit compliance fee of \$60 per tank.

Ralph Hatley
March 14, 2002

Because you failed to notify the Department and failed to submit UST closure records, the Department has incurred permitting expenses associated with your facility and requests that you honor the outstanding permit fees currently totalling **\$105.00**.

Please be advised that before permanent closure is completed, the presence of a release must be measured for as required by 40 CFR 280.72 (a) as modified by OAR 340-150-0003 (39) and OAR 340-122-0205 through 340-122-0360.

These Class II violations and are considered to be serious violations of Oregon environmental law. Therefore, we are referring these violations to the Department's Office of Compliance and Enforcement with a recommendation to initiate a formal enforcement action. A formal enforcement action may include a civil penalty assessment for each day of violation.

REQUESTED ACTION

By March 29, 2002, you are requested to take immediate action to correct the violations and provide documentation of their correction, including;

- *30-Day Change-in-Service Report, (copy enclosed)*
- *30-Day Decommissioning Report, (copy enclosed)*
- *Receipts of disposal for sludge, tanks.*
- *Laboratory Analytical test results.*
- *A Written Closure Report describing the decommissioning and if available, with accompanying photographs.*
- *Honor payment of the outstanding UST compliance fee.*

If at the time you decommissioned the UST, you failed to assess for the presence of a release in the excavation, the Department recommends you secure a licensed UST service provider when fulfilling with request.

We request your cooperation and assistance in correcting these violations at this time.

This Notice does not require you to implement Pollution Prevention. However, the Department strongly recommends that you consider Pollution Prevention options, where applicable, to prevent the violations outlined in this Notice from recurring. Pollution Prevention may also enable you to reduce environmentally driven costs, reduce operating costs, and reduce the regulatory requirements and fees applied to your firm. Please call our technical assistance staff for more information at (503) 229-5586.

Ralph Hatley
March 14, 2002

Please contact me at (503) 229-6242 if you have any questions concerning this Notice or other UST issues.

Sincerely,



Herrington Rose
UST Cleanup Specialist
Northwest Region

Enclosures; UST Closure Reports

cc: Statewide Office of Compliance and Enforcement-ODEQ/HQ
UST Policy-HQ
Merlyn Hough-ODEQ/WR/Eugene
Lissa Druback-ODEQ/ER/Dalles
Stephanie Holmes-ODEQ/HQ/UST

00220

LAW OFFICES OF

JOSSELSOON, POTTER & ROBERTS
425 NW 10TH AVENUE, SUITE 306
PORTLAND, OREGON 97209

Telephone: (503) 228-1455
Facsimile: (503) 228-0171

FAX COVER SHEET

FAX NUMBER: 503-229-6762
DATE: September 6, 2002
TIME: 5:30 pm
NO. PAGES: 9 (including cover sheet)
TO: Susan Greco
FROM: Larry Derr

MESSAGE

Here is the additional information provided by Mr. Hatley.

This fax is also being sent by regular mail. X This is only being sent by fax.

The information contained in this fax is confidential and is intended only for the use of the individual or entity to whom it is addressed. It may contain information protected by the attorney-client privilege.

If you do not receive all pages, please call (503) 228-1455 and ask for Terri or Linda.

00222



FROM : WESTERN PARACHUTE SALES

FAX NO. : 503 630-5868

Sep. 05 2002 12:31PM P2



Report Date: July 22, 2002
Job Number: A20716BT
PO Number: None Provided
Project No: None Provided
Project Name: None Provided

Ralph Hatley
29388 SE Heiple Road
Eagle Creek, OR 97022

Analytical Narrative

The sample was received on 07/16/02 by Coffey Laboratories, Inc. (CLI). Sample Reception personnel under strict chain of custody protocol. The following information was provided at the time of sample reception:

Laboratory Sample ID	Field Identification	Matrix	Collection Date	Collection Time
A20716BT-1	1	Soil	NP	NP
A20716BT-2	2	Soil	NP	NP

The recommended holding time for each batch of analyses was in accordance with the data quality objectives as specified in the CLI Quality Assurance Plan unless otherwise noted.

Acceptable precision and accuracy were achieved for all analyses associated with this work order as demonstrated by the recoveries of the quality control samples analyzed concurrently with each batch.

The data submitted in this report is for the sole and exclusive use of the above-named client. All samples associated with the work order will be retained a maximum of 15 days from the report date or until the maximum holding time expires. All results pertain only to samples submitted.

Thank you for allowing Coffey Laboratories to be of service to you. If you have questions or need further assistance, please do not hesitate to call our Customer Services Department.

Sincerely,

Technical Services

TS /atc

00223

Coffey Laboratories, Inc.

12423 N.E. Whitaker Way • Portland, OR • 97230 • (503) 254-1794 • FAX (503) 254-1452

FROM : WESTERN PARACHUTE SALES

FAX NO. : 503 630-5868

Sep. 05 2002 12:32PM P3

**Analytical Data**

Ralph Hatley

Job Number: A20716BT

Page Number: 2 of 3

Lab Sample ID: A20716BT-1

Field ID: 1

Date/Time: None Provided

Matrix: Soil

EPA Category: Extractable Organics

Analysis Performed: NW TPH-HCID; TPH-HCID qualitative scan for hydrocarbons

Analysis Date: 07/17/02

Analyst: MKM

Parameter	Detection Limit	Laboratory Blank	Analytical Result
Diesel	40.	ND	ND
Gasoline	16.	ND	ND
Hydrocarbons heavier than C24	81.	ND	ND
o-Terphenyl (surr.)	—	—	124%

Results expressed as mg/kg unless otherwise noted.

ND means none detected at or above the detection limit listed.

00224

Coffey Laboratories, Inc.

12423 N.E. Whitaker Way • Portland, OR • 97230 • (503) 254-1794 • FAX (503) 254-1452

FROM : WESTERN PARACHUTE SALES

FAX NO. : 503 630-5868

Sep. 05 2002 12:32PM P4



Analytical Data

Ralph Hatley

Job Number: A20716BT
Page Number: 3 of 3

Lab Sample ID: A20716BT-2

Field ID: 2

Date/Time: None Provided

Matrix: Soil

EPA Category: Extractable Organics

Analysis Performed: NW TPH-HCID; TPH-HCID qualitative scan for hydrocarbons

Analysis Date: 07/17/02

Analyst: MKM

Parameter	Detection Limit	Laboratory Blank	Analytical Result
Diesel	40.	ND	ND
Gasoline	16.	ND	ND
Hydrocarbons heavier than C24	80.	ND	ND
o-Terphenyl (surr.)	--	--	128%

Results expressed as mg/kg unless otherwise noted.

ND means none detected at or above the detection limit listed.

00225

Coffey Laboratories, Inc.

12423 N.E. Whitaker Way • Portland, OR • 97230 • (503) 254-1794 • FAX (503) 254-1452

STATEMENT OF RALPH HATLEY

SEPTEMBER 5, 2002

In May, 2001 I operated a backhoe and removed the underground storage tank from the ground. The bottom of the tank was approximately 6 feet deep. There was no ground water in the excavation. There was no visible sign of contamination in the soil or any fuel odor. There were no holes in the tank. The surface corrosion was consistent over the entire surface of the tank. We had ceased to use the tank several years earlier and had pumped out all fuel out that could be reached from the pump inlet which is slightly above the bottom of the tank. At the time of tank removal I used a hose and pumped out the remaining liquid. There was approximately 15 gallons of fuel that I put into 5 gallon cans and used in farm equipment on the property. There was about a pint of water at the lowest point of the tank. There was no sludge. The tank is still on the property, out of the ground, not in use and available for inspection.

I took soil samples at each end of the tank about halfway down the tank side. Coffey Laboratories, inc. Tested the samples. The laboratory test results are attached.

Because the tank is intact without holes it could not have leaked. The only other possibility for soil contamination would be from spillage during filling. I was on the property every time the tank was filled. There were not more than one or two occasions over the years when I may have been called away to the phone. On all the other occasions I was present and observed the filling. I never saw any overflow or spillage. If there had been overflow it would have coated the surface of the tank at and below the fill opening and prevented rusting in that area. The surface corrosion on the tank was the same in this area as on all other areas of the tank.

From these facts I conclude that there was no leakage or spillage. Because there are no holes in the tank it was not necessary to take soil samples at the bottom of the tank location. The samples taken at the intermediate depth would have revealed any contamination from overflow spillage. The samples show no contamination.

00226

Oregon Department of Environmental Quality
UNDERGROUND STORAGE TANK DECOMMISSIONING/CHANGE-IN-SERVICE REPORT

DEQ FACILITY NUMBER: 10905 DATE: _____

FACILITY NAME: _____

FACILITY ADDRESS: _____

PHONE: _____

The following information MUST be submitted by the underground storage tank owner, operator or licensed DEQ Supervisor within 30 days following completion of the tank decommissioning or changing tank contents to a non-regulated substance. (OAR 340-150-001 through -150).

The attached supplemental checklist should be prepared by the person performing the decommissioning or service change. The checklist should be provided to DEQ and the tank owner to demonstrate that all required practices were followed.

Ordinarily the checklist is filled out by the DEQ licensed Service Provider or Supervisor. Owners who wish to personally decommission a tank or change service must follow all DEQ and other applicable standards. The owner should contact the DEQ Regional Office prior to starting the work to receive current copies of underground storage tank regulations.

1. DATES:

Decommissioning/Service Change Notice - Date Submitted: _____ (30 days before work starts).

Work Start Telephone Notice - Date Submitted: _____ (3 working days before work starts).

DEQ Person Notified: Gregory ToranDate Work Started: May 2001 Date Work Completed: May 2001

Note: Provide the following information if any soil or water contamination is found during the decommissioning or service change. Contamination must be reported by the UST owner or operator within 24 hours. The licensed service provider must report contamination within 72 hours after discovery unless previously reported.

Date Contamination Reported: - By: No Contamination Found

DEQ Person Notified: _____

Backfill Telephone Notice - Date Called: _____ (before backfilling).

DEQ Person Notified: _____

3. PERMITS: Note: DEQ permits may be needed where soil or water cleanup is required.

DEQ Water Discharge Permit #: _____ Date: _____

Disposed to (Location): _____

DEQ Solid Waste Disposal Permit #: _____ Date: _____

Soil Disposal or Treatment Location: _____



00227

C. TANK INFORMATION:

TANK ID #	DEQ-UST PERMIT #	TANK SIZE IN GALLONS	PRODUCT: GASOLINE, DIESEL, USED OIL, OTHER?		CLOSURE OR SERVICE CHANGE?			TANK TO BE REPLACED?	
			PRESENT	NEW	TANK REMOVAL	CLOSURE IN PLACE	OTHER USE	YES	NO
	10905	1000	gasoline	N/A	X				NO

- * Where decommissioned tank(s) are replaced by new underground storage tanks the UST owner or operator must submit a new permit application containing information on the new tanks 30 days before placing them in service.
- * Submit a soil sampling plan to the DEQ regional office and receive plan approval prior to starting work if 1) tank is to be decommissioned in-place, 2) tank contents are changed to a non-regulated substance, 3) tank contains a regulated substance other than petroleum, or 4) tank changed to non-regulated use.

D. DISPOSAL INFORMATION:

TANK ID #	TANK AND PIPING DISPOSAL METHOD				DISPOSAL LOCATION OF TANK CONTENTS	
	SCRAP	LAND-FILL	OTHER	IDENTIFY LOCATION & PROPERTY OWNER	LIQUIDS *	SLUDGES *
			X	29388 SE Heiple Rd Eagle Creek CR BAY TAX LOT 603		

* Note: The tank contents, the tank and the piping may be subject to the requirements of Hazardous Waste regulations. If you have questions, contact the DEQ regional office for your area.

E. CONTAMINATION INFORMATION: * Note: Sampling is required if groundwater is encountered. See cleanup rules.

TANK ID #	GROUND * WATER IN PIT ?	PRODUCT ODOR IN SOIL ?	PRODUCT STAINS IN SOIL ?	NUMBER OF SAMPLES	LABORATORY (NAME, CITY, STATE, PHONE)
	NO	NO	NO	2	COFFEY LABORATORIES
					PORTLAND OR 503-254-0794

G. WORK PERFORMED BY:

DEQ Service Provider's License #: _____ Construction Contractors License #: _____

Name: RALPH A HATLEYTelephone: 503 630 5867

DEQ Decommissioning Supervisor's License #: _____

Name: _____

Telephone: _____

DEQ Soil Matrix Service Provider's License #: _____ (If applicable)

Name: _____

Telephone: _____

DEQ Soil Matrix Supervisor's License #: _____ (If applicable)

Name: _____

Telephone: _____

H. ATTACHMENTS TO THIS REPORT:

1. Attach a copy of the laboratory report showing the results of all tests on all soil and water samples. The laboratory report must identify sample collection methods, sample location, sample depth, sample type (soil or water), type of sample container, sample temperature during transportation, types of tests, and copies of analytical laboratory reports, including QA/QC information. Include laboratory name, address and copies of chain-of-custody forms.
2. If contamination is detected and a Level 2 or Level 3 soil matrix cleanup standard is selected attach a copy of the soil matrix analysis for the site including methods of determining soil type, depth to groundwater, and sensitivity of uppermost aquifer.

I. REPORT FILING:

This report, signed by the tank owner or operator, complete with all applicable attachments must be filed with the DEQ regional office within 30 days after the excavation is backfilled or change-in-service is complete. Contact the DEQ regional office prior to filing this report where special circumstances exist at the site (such as water in pit, remaining pockets of contamination, etc.).

EASTERN REGION / BEND
Phone: Bend (541) 388-6146

EASTERN REGION / THE DALLES
Phone: The Dalles (541) 298-7255

EASTERN REGION / PENDLETON
Phone: Pendleton (541) 276-4063

WESTERN REGION / SALEM
Phone: Salem (503) 378-8240

WESTERN REGION / EUGENE
Phone: Eugene (541) 686-7838

WESTERN REGION / MEDFORD
Phone: Medford (541) 776-6136, Ext. 233

NORTHWEST REGION
Phone: Portland (503) 229-5263

NOTE: If contamination was found during site assessment at decommissioning or change-in-service and reported to the appropriate DEQ regional office, this report may be submitted with either the first interim cleanup report or the final cleanup report, whichever is first.

I have personally reviewed this report and the attachments and find them to be true and complete.

Signature: Ralph A Hatley

(Owner or Operator)

Date: 5 Sept 02

For information: (503) 229-5735 or Toll Free in Oregon UST HELPLINE 1-800-742-7878

BEFORE THE OREGON ENVIRONMENTAL
QUALITY COMMISSION

In the Matter of:

CYNTHIA GAY.

Case No. LQ/T-NWR-02-094

AFFIDAVIT

STATE OF OREGON

County of Multnomah

I, Greg Toran, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Greg Toran, have been employed by the Oregon Department of Environmental Quality as an Environmental Specialist since October 1, 1998.

2. That in the course of that employment, I conducted site inspections of underground storage tanks and drafted letters and memorandums in relation to those inspections.

3. That on or about February 23, 2000, I drafted and mailed, to Ms. Gay, a Notice of Noncompliance #NWR-UST-00-110 regarding an underground storage tank owned by Ms. Gay and located at 29388 S.E. Heiple Road in Eagle Creek, Oregon.

4. That on or about October 30, 2000, I drafted and mailed, to Ms. Gay, a Notice of Noncompliance #NWR-UST-00-169 regarding an underground storage tank owned by Ms. Gay and located at 29388 S.E. Heiple Road in Eagle Creek, Oregon.

5. That on or about November 14, 2000, I conducted an inspection of the underground storage tank and the property on which the underground storage tank was located. During the site inspection, I explained the decommissioning requirements to Mr. Ralph Hatley, who was acting as Ms. Gay's representative.

6. That on or about November 30, 2000, I drafted a memorandum setting forth my observations during the site inspection.

7. That on or about December 5, 2000, I drafted and mailed, to Ms. Gay, a letter setting forth the decommissioning requirements and requesting that Ms. Gay complete decommissioning of the underground storage tank by a date certain.

8. That on or about December 7, 2000, I received an email from Mr. Hatley stating that Ms. Gay had received the December 2000 letter and intended to remove the underground storage tank prior to June 1, 2001.

9. That based on my professional knowledge and experience, the cost to decommission a 1000 gallon underground storage tank using a licensed service provider would be approximately \$5,000.

10. That the attached aforementioned documents marked as Exhibits 1 through 5 are true and exact copies of the originals thereto.

Date: 1/27/05

Greg Toran

Department of Environmental Quality

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2 Sworn and subscribed before me this 27 day of January 2005
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Deborah J. Curtiss

Notary Public for Oregon

My Commission Expires

Sept 11, 2008



Oregon

John A. Kitzhaber, M.D., Governor

February 23, 2000

Department of Environmental Quality

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

C.R. GAY
29388 SE HEIPLE ROAD
EAGLE CREEK, OR 97022

re: **NOTICE OF NONCOMPLIANCE**
BEAVER OAKS AIRPORT
DEQ Facility # 10905
NWR-UST-00-110

You have received this Notice of Noncompliance (NON) because Department of Environmental Quality (Department) records indicate that the listed (see attached) out-of-service underground storage tank(s) (USTs) have not been decommissioned. State and Federal regulations require that all UST systems be permanently closed no later than 12 months after the tanks have been taken out of service.

Department records indicate that you are the registered property owner/tank owner/operator of the listed UST(s). Department records also indicate that the listed UST(s) are not in compliance with the standards established in 40 CFR § 280.20 or § 280.21 as amended by Oregon Administrative Rules (OAR) for new or upgraded USTs. Based on this information the Department issued a Decommissioning Permit (DP) for this facility in December of 1998. State and Federal regulations require these USTs to have been placed in Temporary Closure and to either upgrade the USTs to meet current standards or decommission the USTs prior to the end of the 12-month Temporary Closure period.

As of this date the Department has not received sufficient information to document that the listed USTs have been permanently decommissioned or upgraded to meet current standards. Failure to upgrade or decommission the UST(s) prior to the end of the 12-month Temporary Closure period is a violation of Oregon Administrative Rules (OAR) and is subject to formal enforcement action by the Department.

VIOLATION

Failure to comply with the conditions and requirements of a General Permit to Decommission an Underground Storage Tank.

OAR 340-150-0166 (4) (c) states: Except as provided in section (4)(d) of this general permit, the UST system must be permanently closed before the 12 month period expires if it does not meet either the new performance standards in 40 CFR 280.20 as modified by OAR 340-150-0003(9) through (14) or the upgrading requirements in 40 CFR 280.21 as modified by OAR 340-150-0003(41) as required by 40 CFR 280.70(c).

00235

EXHIBIT

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REQUIRED CORRECTIVE ACTION

A *Corrective Action Response Checklist* is enclosed with this Notice of Noncompliance along with a postage-paid, pre-addressed return envelope. The Department requires that you complete and sign the *Corrective Action Response Checklist* and return it to the Department within 30 days of the date of this NON.

Failure to permanently close your UST(s) is a Class II violation and is considered to be a significant violation of Oregon environmental law. Failure to respond to this Notice of Noncompliance in accordance with the requirements set forth above may result in additional enforcement action and may result in a civil penalty assessment. Civil penalties can be assessed for each day of violation.

NOTICE:

UST COMPLIANCE FEES DUE

Underground storage tanks are assessed an annual per tank compliance fee. The current fee is \$60.00 per tank per year.

- Any outstanding past due fees must be paid prior to decommissioning.
- Any tank in the ground after 12/31/1999 will be invoiced for and owe fees for the year 2000.
- Regardless of when the tanks were decommissioned, if the Department did not receive the required decommissioning documentation by 01/31/2000, 2000 compliance fees are owed.

If you have questions on any portion of this NON, please contact me in the Portland office at (503) 229-5496.

Sincerely,



Gregory Toran
Environmental Specialist
Underground Storage Tank Program

cc: Andree Pollock, Northwest Region Tanks Manager, DEQ
Stephanie Holmes: DEQ
Enforcement Section: DEQ
Enc.: UST Attachment
Corrective Action Response Checklist

00236

Wednesday, February 23, 2000

UST Attachment

UST FACILITIES WITH UNPERMITTED TANKS

FACILITY_ID 10905

FACILITY_COUNTY CLACKAMAS

FACILITY_NAME	TANK_ID	GALLONS
BEAVER OAKS AIRPORT	1	1000

FACILITY_ADDRESS 29388 SE HEIPLE RD

FACILITY_CITY EAGLE CREEK

00237



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

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

October 30, 2000

C.R. GAY
29388 SE HEIPLE ROAD
EAGLE CREEK OR 97022

Re: **NOTICE OF NONCOMPLIANCE**
BEAVER OAKS AIRPORT
DEQ Facility # 10905
29388 SE HEIPLE RD
NWR-UST-00-169
By Certified Mail

In February of 2000, you were mailed a notice of noncompliance informing you of the necessity to decommission your out-of-service (not upgraded) underground storage tanks (USTs) in accordance with the provisions of Oregon Administrative Rule (OAR) 340-150-0166 (4) (c) and Federal Rule 40 CFR 280.70 (c). According to Department of Environmental Quality (Department) records, it appears that you still have not removed the out-of-service, regulated USTs. Because you have failed to properly decommissions these USTs, at least one additional violation of the OAR's has occurred.

This is a violation of 40 CFR 280.70 (c) as amended by OAR 340-150-0003 which states in part:

"When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards for new UST systems (280.20) or the upgrading requirements (280.21). Owners and operators must permanently close the substandard UST system at the end of this 12 month period in accordance with 280.71 through 280.74".

This is a Class II violation and is considered to be a significant violation of Oregon environmental law. Should you fail to correct the violation in accordance with the correction schedule set forth below, **we will** refer your file to the Department's Enforcement Section with a recommendation to proceed with a formal enforcement action which may result in a civil penalty assessment. Civil penalties can be assessed for each day of violation.

00239

EXHIBIT

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G2

DEQ-1

Correction Schedule:

- 1) Decommission the USTs within 30 days of the date of this notice. Decommissioning includes filing of notices, payment of unpaid fees, a correctly completed site assessment, and the submittal of all related and required documents. This work must be completed by the owner or UST service provider having all required licenses for UST decommissioning in the State of Oregon; or,
- 2) Within 14 days of the date of this notice, provide the Department with a copy of a signed agreement with a properly licensed service provider indicating when the USTs are scheduled to be decommissioned. Decommissioning includes filing of notices, payment of unpaid fees, a correctly completed site assessment, and the submittal of all related and required documents. This work must be completed by the UST service provider having all required licenses for UST decommissioning in the State of Oregon by no later than 90 days from the date of this notice; or,
- 3) Within 14 days of the date of this notice, provide the Department with a signed access agreement granting permission to the Department to enter the property, empty the tanks and perform a site assessment. A copy of this agreement can be provided upon request. Please note that the costs of emptying the tanks and performing a site assessment will be billed to the responsible party and if not paid, a lien against real and personal property will be filed. The Department will not remove the tanks and the requirement that the tanks eventually be removed and properly disposed of will remain. If the tanks have been emptied of all product and water, please notify the Department when making your request for a copy of the agreement.

IMPORTANT NOTICE

Please be advised that if you do not comply with one of the three correction options listed above, the Department will seek a warrant to enter the property to empty the tanks and perform a site assessment. All costs to perform this work will be billed to the responsible party and if not paid, a lien against ALL real and personal property owned by you will be filed. The Department may seek to recover triple damages (three times the cost) for the failure to provide cooperation. The Department will not remove the tanks and the requirement that the tanks eventually be removed and properly disposed of will remain. Additionally, your file **will be** referred to the Departments Enforcement Section and also the EPA for possible Federal review and enforcement.

UST COMPLIANCE FEES DUE:

Underground storage tanks are assessed an annual per tank compliance fee.

- Any outstanding past due fees must be paid prior to decommissioning.
- Any tank in the ground after 12/31/2000 will be invoiced for and owe fees for the year 2001.
- Regardless of when the tanks were decommissioned, if the Department has not received ALL required decommissioning documentation (signed and complete) by 01/31/2001, 2001 compliance fees are owed.
- The Department will seek collections on all unpaid compliance fees.

Thank you for your cooperation. Please remember that the time frames provided for achieving compliance are short and the options for achieving compliance very specific. If you have any questions regarding this matter, please contact me at 503-229-5496.

Sincerely,



Gregory Toran
UST Compliance Specialist

cc: Enforcement Section-ODEQ/NWR
Stephanie Holmes-ODEQ/HQ
Gregory Toran-ODEQ/NWR

00241

NWR UST FIELD INSPECTION REPORT

Inspection Date: 11/14/00

Site Name: Beaver Oaks Airport

Total Time* 3.0 hr

Site Address: 29388 Heiple Rd

*Include inspection, travel, paperwork

Eagle Creek

DEQ Inspector: Greg Torma

File/Facility No: 10905
(both UST & UST Cleanup file #'s as appropriate)

Others Onsite: Ralph Hatley
(Site operator)
(include company name)

Supervisor License No. : _____ Exp. date _____
(note the name of the license holder with **)

Inspection Type

Y---N---Decommissioning

Y---N---Install-New

Y---N---Complaint

Y---N---1998 Compliance (full)

Y---N---Upgrade-Retrofit

Y---N---WQ-New Permit

Partial Compliance

Y---N---Service Provider Audit

Y---N---WQ-Exist Permit

Y---N---Leak Detection

Y---N---Cleanup

Y---N---Financial Responsibility

Y---N---SWLA/Soil Treatment

Y---N---Corrosion Protection

Y---N---Distributor Audit

Y---N---NA Spill & Overfill

Circle Y for.....Yes = inspected & in compliance (Y for data entry)

Circle N for.....No = inspected & NOT in compliance (N for data entry)

Leave Blank for.....Inspection not performed (no data entry necessary)

Photos Taken? (Y)N (attach)

Samples Taken? Y--(N) (attach results)

Notes (use back of form as necessary)

P/water wells onsite, in Area. one UST contains gasoline, dispenser removed. Historic use in fueling small planes via transport truck and filtering system. Currently not used, operator to schedule product removal and sampling. UST closure in place or by removal to follow next summer as discussed. See attached memo.

00243

EXHIBIT

tabbles
G3

State of Oregon

Department of Environmental Quality

Memorandum

Date: November 30, 2000

To: UST facility file 10905

From: Greg Toran ODEQ/NWR

Subject: Beaver Oaks UST status.

Site inspection to discuss current status of single UST. Met onsite with Ralph Hatley (reported as being owners rep). Hatley appears to meet the definition of Permittee. Site is being operated as an airport, jump school. Hatley appears to be operating other business concerns at this location. Inspection in response to phone call from Hatley, following recent NON issued by the Department.

Inspection to determine and discuss UST status and recent claim by Hatley of UST being farm tank. Property is zoned as farm use only, confirmed with county. Hatley claims to be raising hay as a crop, to be given away and not sold.

At the time of the inspection Hatley is most cooperative. Historic use of UST was for fueling small planes. At one time, fuel was pumped out of UST into transport truck containing filtering system. UST has been out of use as a fuel storage tank for planes for approx. 3 years. UST currently contains some measure of product, product has been siphoned out from time to time for various reasons, unrelated to planes according to Hatley. Dispenser/pump has been removed for 3 years according to Hatley.

Current amount of product in UST is unknown. Ground water in area is shallow within UST nest on a seasonal basis, according to Hatley. One drinking water well on the NE corner of the property. Other wells in the area. Hatley seems concerned with the possibility of impacts to the wells in the area and seems to have backed off from the initial claim of the UST being an unregulated farm tank.

This UST is most certainly a regulated UST based on past use. Hatley seems agreeable in following Department direction to decommission the UST. I suggested the following:

Remove all product and water in UST immediately. Verification of completion of this task by a third party in writing. This is to be followed by sampling of soil and if necessary water, per UST cleanup and compliance rules. Hatley to provide a written schedule for completion of this work within 3 weeks. Schedule to also include a target date for completion of the decommissioning. The Department to approve a later decommissioning date (next summer) provided that

00245

Hatley follow through with his plans for submittal of the schedule and completion of the UST pumping and sampling. Completion of the UST pumping and sampling and records submittal to be accomplished by the date noted in option 2 of the most recent NON. The date specified in the NON was 90 days from the date of the notice. So the due date for completion of this phase of the work would be the end of January, 2001.

Mailing documentation to Hatley. This documentation to be a summery sheet that outlines these steps, UST closure requirements, forms for documenting closure, and a list of licensed supervisors. Hatley stated that he would be doing the decommissioning. I recommended he consult licensed service providers or supervisors.



11/14/99
\$ 10905



10/11/11
2 1000





11/14/98
\$ 10905





Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

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

December 5, 2000

C.R. GAY
RALPH HATLEY
29388 SE HEIPLE ROAD
EAGLE CREEK OR 97022

Re: DEQ Facility # 10905

Mr. Hatley:

Thank you for taking the time to meet with me concerning assessment and decommissioning of the gasoline underground storage tank (UST) listed with the Department for this facility. The Department has issued a Notice of Noncompliance for failure to decommission this UST.

The Department has agreed to modify the correction schedule as follows:

Correction Schedule:

By January 31, 2001, pump out all water and or product remaining in the UST. Submit a written third party verification of this work.

By January 31, 2001, perform soil sampling and analysis as outlined in the Department's UST and UST Cleanup rules for decommissioning and submit verification of this work in writing. Include chain of custody documentation and laboratory data. Copies of the rules that describe sampling requirements are enclosed.

Contact the Department within 24 hours if contamination is discovered.

By January 31, 2001, submit 30 day notice of intent to decommission to the Department.

By January 31, 2001, submit a written schedule for completion of the decommissioning. The decommissioning is to be completed by June 30, 2001.

UST fees will be due for 2001 for all UST's not decommissioned before January 1, 2001.

I have enclosed copies of the forms and documentation that we discussed to assist you in properly performing and documenting decommissioning.

00247



UST fac 10905
December 5, 2000
Page 2

Thank you for your cooperation. If you have any questions regarding this matter, please contact me at 503-229-5496.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gregory Toran', with a long, sweeping horizontal line extending to the right.

Gregory Toran
UST Compliance Specialist

enclosures

cc: Stephanie Holmes-ODEQ/HQ
Gregory Toran-ODEQ/NWR

00248

TORAN Greg

From: HatleyD394@aol.com
Sent: Thursday, December 07, 2000 2:38 PM
To: TORAN Greg
Subject: Tank

Dear Greg,

I was surprised to receive your packet in the mail today. I was under the understanding that we would send a letter to you outlining the planned removal of the underground fuel tank here at Beaver Oaks Airport. We have not received a fuel delivery since your visit, therefore we have not determined the amount of fuel remaining in the tank. As per our agreement, I will notify you once this has been accomplished.

Our plans are to remove this tank by our agreed-upon date of 1 June 2001. As you are aware, we use our two aviation fuel trucks for fueling our aircraft. We do not sell fuel, the fuel trucks are for our aircraft uses only.

If you have further questions, please contact me.

Thank you,
Ralph A. Hatley

3/25/2002

00249





Oregon

Theodore R. Kulongoski, Governor

OFFICE OF ADMINISTRATIVE HEARINGS

Employment Department

Social Services Division

P.O. Box 14020

Salem, OR 97309-4020

Telephone (503) 378-8224

Fax (503) 378-4067

January 25, 2005

Ms. Susan Greco
Oregon Dept. of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204

Mr. James F. Evans
Attorney for Cynthia Gay
805 Liberty St. NE #3
Salem, OR 97301

Re: *In the matter of Cynthia Gay (Wescott)*
OAH Case No. 119055
Agency Case No. LQ/T-NWR-02-094

Dear Ms. Greco & Mr. Evans:

I received the file in the above case, which is scheduled for hearing at the DEQ offices in Portland February 28, 2005, at 9:30 a.m. The file includes Mr. Evans's Petition for Rehearing and/or Reconsideration, which was received by DEQ March 31, 2004. It also includes the petition's exhibits, which include the original Notice of Violation and Request for Hearing.

The file does not include a copy of DEQ's original Final Order by Default, nor does it include a DEQ order addressing Mr. Evans's Petition for Rehearing and/or Reconsideration. The extent of the hearing scheduled for February 28 therefore is not clear. Is it to be on the issues of rehearing/reconsideration only, the merits only, or both rehearing/reconsideration and the merits?

Please advise me of the extent of the hearing. If DEQ already has addressed the rehearing/reconsideration issues, please forward both a copy of the order addressing those issues and a copy of the order vacating the original Final Order by Default. In either case, please provide a copy of the original Final Order by Default.

I note that the agency does not seek a prehearing conference in this matter, so please clarify for me the extent of the hearing as soon as possible. Other than that, I will see you in Portland February 28.

Sincerely,

Stephen H. Elmore

cc: file

00252

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

IN THE MATTER OF:	)	NOTICE OF HEARING
)	
CYNTHIA GAY (WESCOTT))	
	)	OAH Case No.: 119055
	)	Agency Case No.: LQ/T-NWR-02-094

A hearing has been set in the above matter before the Office of Administrative Hearings.

Hearing Date: February 28, 2005 **Hearing Time:** 9:30 a.m.

Location: **DEQ**
 811 SW 6th Avenue
 Portland, Oregon

Your case has been assigned to **Administrative Law Judge Stephen H. Elmore** an employee of the Office of Administrative Hearings. The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency proposing the action.

The agency will not be represented by an assistant attorney general

Unless otherwise notified, all correspondence, inquiries, exhibits and filings should be sent to:

ALJ Stephen Elmore
Office of Administrative Hearings
PO Box 14020
Salem OR 97309-4020
FAX: (503) 378-4067

OAR 137-003-0520 requires a copy of any correspondences, exhibits or other filings to be provided to all parties and the agency at the same time they are provided to the ALJ.

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired, need a language interpreter or require another type of accommodation to participate in or attend the hearing, immediately notify the Office of Administrative Hearings at (503) 945-5547 or TDD at 1-800-735-1232 to make the appropriate arrangements. The Office of Administrative Hearings can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

00255

You are required to notify the Office of Administrative Hearings at (503) 945-5547 immediately if you change your address or telephone number prior to a decision in this matter.

Notice served on all non-agency parties by: First Class and Certified Mail.
Certified Mail Receipt #7002 2410 0001 7410 4386

Notice served on Agency by First Class Mail.

MAILED this 20th day of January, 2005. Mailed by: Ann Redding

This Notice has been provided to the following:

JAMES F EVANS
ATTORNEY FOR CYNTHIA GAY
805 LIBERTY ST NE #3
SALEM OR 97301

SUSAN GRECO
DEQ
811 SW 6TH AVE
PORTLAND OR 97204

CYNTHIA GAY (WESCOTT)
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

00256

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

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

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.
2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.
3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.
4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.
5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.
6. Interpreters. If you have a disability or do not speak English, the administrative law judge will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the administrative law judge a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.
7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the administrative law judge will have the opportunity to ask questions of all witnesses. DEQ or the administrative law judge will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

00257

8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

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

00258

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

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

00259

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: CYNTHIA GAY (WESCOTT)

CASE NUMBER: 119055

ALJ: ELMORE

DATE: 1/20/05

☐ PHC NTC

☒ HRG NTC

OTHER

Thanks, Ann ☺

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">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. 119055		<p>A. Signature <input checked="" type="checkbox"/> <i>Emily Greene</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>Emily Greene</i> C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
1. Article Addressed to: JAMES F EVANS ATTORNEY FOR CYNTHIA GAY 805 LIBERTY ST NE #3 SALEM OR 97301		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
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City, State, ZIP+4	805 LIBERTY ST NE #3
	SALEM OR 97301
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00261



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

November 22, 2004

Cynthia Gay Wescott
c/o James F. Evans
805 Liberty Street N.E. #3
Salem OR 97301

RE: Petition for Reconsideration
Case no. LQ/T-NWR-02-094

Dear Mr. Evans:

Thank you for your letter dated November 11, 2004. As you know, on May 26, 2004, the Department agreed to reconsider the Findings of Fact, Conclusions of Law and Final Order (Final Order) issued to your client on February 18, 2004. I apologize for the delay in reaching a conclusion on the reconsideration of the Final Order.

The Department, after reviewing the full record in this matter, has agreed to allow your client a contested case hearing on the matter. Based on this decision, the Final Order is now moot and all liens filed against Ms. Wescott's real property will be released. You will be contacted shortly by the Office of Administrative Hearings regarding scheduling of the hearing.

Sincerely,

Stephanie Hallock
Stephanie Hallock
Director, Department of Environmental Quality

cc: Susan Greco, OCE, DEQ

00264

State of Oregon

Department of Environmental Quality

Memorandum

To: Stephanie Hallock through
Anne Price, Office of Compliance and Enforcement
ABP

Date: September 27, 2004

From: Susan Greco, Office of Compliance and Enforcement

Subject: Petition for Reconsideration from Cynthia Gay - Case no. LQ/T-NWR-02-094

On June 25, 2002 the Department issued a Notice of Violation, Department Order and Assessment of Civil Penalty to Cynthia Gay. The Notice assessed a civil penalty in the amount of \$6,072 for Ms. Gay's failure to decommission an underground storage tank prior to the December 1998 deadline, for decommissioning an UST with providing notice to the Department and for failing to provide the paperwork to the Department following decommissioning of the UST. Under OAR Chapter 340, Division 150, both the owner and the permittee are responsible for compliance with state and federal UST rules. The Notice was issued to Ms. Gay because she is the sole owner of the property on which the UST was located, and she applied for and was issued a permit for the UST in 1991. On July 15, 2002, the Department received an answer and request for hearing from Ms. Gay's attorney. The answer raised the affirmative defense that the UST was a "farm tank" thus it was exempt from compliance with the UST regulations. Otherwise Ms. Gay generally agreed with the Department's factual findings.

On August 15, 2002, myself, Herrington Rose and Andree Pollock met with Ms. Gay's attorney and Ralph Hatley, Ms. Gay's partner. On June 27, 2003, I received documentation that the violations had been corrected. Based on this documentation, we offered to reduce the civil penalty to \$1700. In response to the reduction offer, Ms. Gay's attorney offer to settle the case for \$100. Since Ms. Gay and OCE could not agree on settlement, the case was forwarded to the Hearing Panel for scheduling of a contested case hearing.

In early October 2003, the Hearing Panel informed me that Ms. Gay's attorney was no longer representing her. At that time, the Hearing Panel informed Ms. Gay that she would need to either represent herself or be represented by an attorney at the hearing per OAR 137-003-0550.

At Ms. Gay's request, the hearing was not set for hearing until January 14, 2004 in order to allow her time to prepare for the hearing. On December 19th, she requested that the hearing be postponed until February. During a telephone conversation with Ms. Gay and the Administrative Law Judge on January 9th, I agreed to reschedule the hearing to February 18, 2004. On January 28, 2004, the Administrative Law Judge issued an order finding that the UST in question was not a farm tank and thus was subject to the UST regulations.

In the late afternoon on February 17th, Ms. Gay faxed a letter to me and the Administrative Law Judge stating that Mr. Hatley would be representing her at the hearing. This fax was received by me at approximately 8:30 am the next morning (the morning of the hearing). The Administrative Law Judge did not receive this fax until returning to his office following the hearing.

At the hearing, Mr. Hatley argued that he should be allowed to represent Ms. Gay based on the power of attorney for two reasons – (1) he was and has been Ms. Gay's business and life partner for 30 years and (2) the Department had sent letters in the past to him regarding issues



00267

with the UST. The Administrative Law Judge determined that Ms. Gay was named as the respondent in this case as an individual since she owns the property. She also applied for and was issued a permit for the UST in her name alone. Only an owner and a permittee are legally responsible for compliance with the UST regulations. The Department cannot allow representation by someone other than herself or an attorney since law does not allow such representation. Additionally, the Administrative Law Judge did not allow a recess in order for Ms. Gay to hire an attorney since the hearing had been scheduled for a significant period of time and she had had previous notice that Mr. Hatley could not represent her. Since Ms. Gay had failed to appear at the hearing, she was in default and a Default Final Order was entered against her.

On March 31, 2004, the Department received a Petition for Reconsideration and Rehearing and a Request for a Stay from Ms. Gay. The Department of Justice recommended that the Department granted the Petition for Reconsideration and reissue the Default Order with more factual findings to show that Ms. Gay had notice that she could not be represented by Mr. Hatley. On May 26, 2004, the Department granted the Petition for Reconsideration but denied the Petition for Rehearing and the Request for a Stay. At this point, the Department must determine what the next step should be in order to finalize this action.

There are essentially two possibilities of what we can do:

1. Reissue the default final order but add in additional factual findings to ensure that if the Court of Appeals is asked to review the order, there are sufficient facts for the Court to determine that the Department was not acting arbitrarily; or
2. Allow Ms. Gay a hearing. It should be noted that OCE will seek for the matter to be dismissed "summarily" since the only issue that Ms. Gay raised in defense to the violations (i.e., that the UST was a farm tank), has already been resolved by a Final Order by the Administrative Law Judge.

Ms. Gay's attorney has indicated that he will (1) appeal any decision by the Department to the Court of Appeals and (2) present the legislature with evidence of the "arbitrary actions" of the Department.



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

May 26, 2004

Cynthia Gay Wescott
c/o James F. Evans
805 Liberty Street N.E. #3
Salem OR 97301

RE: Petition for Rehearing and/or Reconsideration
Stay of Enforcement
Case no. LQ/T-NWR-02-094

Dear Mr. Evans:

The Department received your Petition for Reconsideration and/or Rehearing and Stay of Enforcement (Petition) on March 31, 2004 in the above referenced matter. By this letter, the Department hereby summarily denies the Petition in regards to its request for a rehearing, but agrees to reconsider the Findings of Fact, Conclusions of Law and Final Order (Final Order), dated February 18, 2004.

In order for an agency to grant a stay of a final order, Oregon Administrative Rule 137-003-0690 requires the person requesting the stay to submit a written motion to the agency. The motion must contain a statement of facts and reasons sufficient to show that (1) the person will suffer irreparable injury if the order is not stayed and (2) there is a colorable claim of error in the final order. Evidence relied upon to support the statement of facts, besides that which is already in the record, must be attached to the motion. The Petition states no reasons of how she will suffer irreparable injury nor is any evidence attached to the Petition to support such a claim.

Although your client failed to provide either a statement of facts or reasons sufficient to show that she will suffer irreparable injury if the order is not stayed, the Department agrees to stay collections on the Final Order during the pendency of the reconsideration of the Final Order. The Department does not intend to release its liens filed against Ms. Wescott's real property since your client failed to provide either a statement of facts or reasons sufficient to show that she will suffer irreparable injury if the liens are not released.

Sincerely,

Stephanie Hallock
Director

cc: Cynthia Gay Wescott, 29388 S.E. Heiple Road, Eagle Creek OR 97022

00270

CERTIFICATE OF MAILING

I hereby certify that I served: a letter Re: Petition for Rehearing
and/or Reconsideration Case No. LQ/T-NWR-02-094

Served upon:

CYNTHIA GAY WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

by mailing a true copy of the above by placing it in a sealed envelope, with postage

prepaid, at the U.S. Post Office in Portland, Oregon on May 26, 2004

Amy Smotherg
Department of Environmental Quality

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">■ 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.		<p>A. Signature <u>X</u> <u>[Signature]</u> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <u>[Signature]</u> C. Date of Delivery <u>5/27</u></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
Article Addressed to: CYNTHIA GAY WESCOTT 29388 SE HEIPLE RD EAGLE CREEK OR 97022		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
Article Number (Transfer from s) <u>7002 3150 0004 8588 3800</u>			

00271

CERTIFICATE OF MAILING

I hereby certify that I served a letter Re: Petition for Rehearing
and/or Reconsideration Case No. LQ/T-NWR-02-094

Served upon:

CYNTHIA GAY WESCOTT
C/O JAMES F. EVANS
805 LIBERTY ST NE #3
SALEM OR 97301

by mailing a true copy of the above by placing it in a sealed envelope, with postage

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Amy Smothers
Department of Environmental Quality

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00272

James F. Evans
Attorney at Law
805 Liberty Street N.E. #3
Salem, Oregon 97301
503-391-7101

March 30, 2004

Anne Price
Administrator, Department of Environmental Quality, Office of Compliance and Enforcement
811 S.W. 6th AV 10th floor
Portland OR 97204

RE: In the Matter of Cynthia Gay, No.:LQ/T-NWK-02-094, Rehearing/Reconsideration

Dear Ms. Price:

Enclosed is a petition of rehearing/reconsideration in the above matter.

Yours very truly,


James F. Evans
Attorney for Petitioner

cc; Shelly K. McIntyre, Sr. Assistant Attorney General, Natural Resources Section

RECEIVED
MAR 31 2004
OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

00275

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

IN THE MATTER OF) Case No.: LQ/T-NWK-02-094
Cynthia Gay,)
Respondent) PETITION FOR REHEARING AND/OR
RECONSIDERATION
STAY OF ENFORCEMENT



THE RESPONDENT is petitioning for a rehearing and/or reconsideration of this matter for a number of reasons. First, Cynthia Gay did not get an opportunity to present evidence or contest the state at her hearing on February 18, 2004. Administrative hearings are supposed to be less formal than legal proceedings and the overall policy goal is to have a case decided on its merits, not on a technicality.

The Administrative Law Judge relied on OAR 137-003-0550 to rule that Cynthia Gay was in default because she was not present at the proceeding. In her stead was Ralph Hatley who is her business partner and life partner for over 30 years.

The Administrative Law Judge made an error to exclude Ralph Hatley from representing Cynthia Gay in the matter and erred in not allowing Mr. Hatley to offer proof. ORS 183.457 controls all administrative proceedings stating "No rule adopted by a state agency shall have the effect of precluding lay

1
2 representation". OAR 137-003-0550 clearly states that a person can be
3 represented by other than an attorney. Even the Commission's own *Notice of*
4 *Contested Case Rights and Procedures*, Exhibit 1 (emphasis added), states a
5 person may be represented by a partner, officer, or an employee. Mr. Hatley
6 is a partner and officer regarding this action. Mr. Hatley and Cynthia Gay
7 are business partners with co-mingled assets and he has been acting for their
8 interest for over 30 years. Partners in a business can act for the benefit of
9 both. In the present case, the Administrative Law Judge erred in not allowing
10 Mr. Hatley to present Ms. Gay's interests.

11 The Administrative Law Judge had a power of attorney presented to him,
12 Exhibit 2, that was executed by Cynthia Westcott to allow Ralph Hatley to
13 represent her at the hearing yet this was completely ignored as was a FAX sent
14 to both Judge Stephen Elmore, Exhibit 3, of the Office of Administrative
15 Hearings and Susan Greco who represented the Commission at the hearing. This
16 FAX was received the day before the hearing yet no representative of the
17 Administrative Law Judge or Susan Greco made any attempt to contact Cynthia
18 Wescott to inform her that her life partner Ralph Hatley could not represent
19 her at the hearing.

20 Ms. Gay has substantial evidence she would like to present to the
21 Commission in regard to the issue of whether the underground storage tank
22 that was in ground was devoted to the production of crops.

23 The Administrative Law Judge in his Order on Motions for Ruling on Legal
24 issue OAH Case No. 111013, Department Case No. LQ/T-NWR-02-094, also makes
25 mention of Mr. Hatley as her partner by stating "that Ms. Wescott and her

1
2 partner..." To deny Mr. Hatley an opportunity to contest the case goes against
3 the entire intent of administrative law and this is to hear the case on the
4 merits and give all parties an opportunity to be heard. If the Commission
5 does not allow a new hearing and an opportunity for reconsideration, the
6 Commission will have defeated the spirit of the administrative law process as
7 well as the letter of the law in regard to who may appear before it. Mr.
8 Hatley is as financially impacted by the Commission order as Ms. Gay since
9 their finances are co-mingled. Mr. Hatley and Ms. Gay would also petition
10 to stay the enforcement of the final order because they do have a colorable
11 claim as to the merits and because there was clear error not to allow Mr.
12 Hatley to represent Ms. Gay. Ms. Gay hopes to be able to present her case
13 before the Commission in total and only rehearing/reconsideration will allow
14 that.

15 The history of this case is replete with references that make clear
16 Ralph Hatley is a concerned party to this action and has been for a very long
17 time. Minutes of the Shady Oaks Airport Ad Hoc Noise Advisory Committee
18 September 8, 1981, Exhibit 4, shows that Ralph Hatley has been involved with
19 this property for a very long time. The original pollution complaint dated 9-
20 20-91 names Ralph Hatley and Beaver Oak Airport, Exhibit 5, as the source of
21 the complaint. There is also an affidavit of Greg Toran dated December 12,
22 2003 which has as supporting documentation NWR UST Field Inspection Report
23 which lists Ralph Hatley as the site operator, Exhibit 6, and also a
24 Department of Environmental Quality Memorandum dated November 30, 2000 which
25 lists Ralph Hatley as being the owner's representative, Exhibit 7. All of

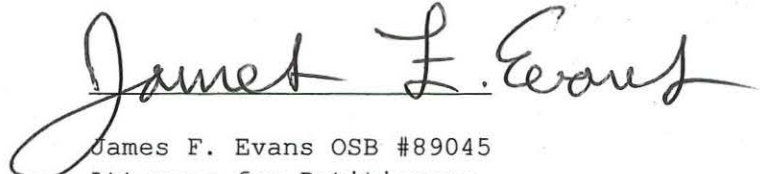
00278

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2 this was included in the Commission's own exhibit, but was ignored by the
3 Administrative Law Judge and Susan Greco. Their intent is obvious and
4 arbitrary and capricious and is to deny the respondent to have a fair hearing.
5 A letter dated December 5, 2000 from the Department of Environmental Quality
6 is even addressed to C.R. Gay and Ralph Hatley, Exhibit 8. It is impossible
7 to assume that the Commission did not know and understand that Ralph Hatley
8 was acting on behalf of Cynthia Wescott. In the notice of noncompliance dated
9 January 28, 2002, Exhibit 9, is addressed to C.R. Gay and Ralph Hatley and
10 starts out "Dear Mr. Hatley:" Again it is clear Mr. Hatley is intimately
11 involved in this enforcement action, yet the Administrative Law Judge did not
12 allow Mr. Hatley to present his case even though Mr. Hatley's name is all over
13 the documents relating to this administrative action.

14 A second notice of noncompliance dated March 14, 2002 also states "Dear
15 Mr. Hatley:", Exhibit 10. There is an enforcement timelines received February
16 6, 2002 which again has a statement where Ralph Hatley is mentioned as
17 contacting the Department about the decommissioning of the tank and is
18 referenced many times in the same document, Exhibit 11. There are emails
19 dated February 6, 2002, March 4, 2002 and March 8, 2002 which all list Mr.
20 Hatley as a principle actor in the enforcement action. ^{Ex-11 1/2} To say he is not an
21 interested party and cannot be heard by the Administrative Law Judge is
22 nonsensical because he has the personal knowledge about this action. Exhibit
23 12, is his statement dated September 5, 2002 which confirms his intimate
24 knowledge and actual actions—of course he is a partner in this business—what
25 else explains why he is so intimately involved in this administrative action.

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2 Included in this petition for rehearing and/or reconsideration are additional
3 documents which reflect Ralph Hatley's complete involvement in this.
4 administrative action.
5

6 SO in consideration of the former information, good cause is shown for a
7 rehearing/reconsideration and petitioner looks forward to that rehearing.
8

9 
10 James F. Evans OSB #89045
11 Attorney for Petitioners
12 Cynthia (Gay) Wescott and Ralph Hatley
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DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS
IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

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

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.
2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.
3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.
4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.
5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.
6. Interpreters. If you have a disability or do not speak English, the administrative law judge will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the administrative law judge a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.
7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the administrative law judge will have the opportunity to ask questions of all witnesses. DEQ or the administrative law judge will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented



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by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

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

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

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

EA NO PART OF ANY STEVENS-NESS FORM MAY BE REPRODUCED IN ANY FORM OR BY ANY ELECTRONIC OR MECHANICAL MEANS.



POWER OF ATTORNEY

CYNTHIA ROSE WESCOTT
 29388 SE HEIPLE RD
 EAGLE CREEK, OR 97022

To

RALPH A. HATLEY
 29388 SE HEIPLE RD
 EAGLE CREEK, OR 97022

After recording, return to (Name, Address, Zip):

STATE OF OREGON, } ss.
 County of _____

I certify that the within instrument was received for recording on _____, at _____ o'clock _____ M., and recorded in book/reel/volume No. _____ on page _____ and/or as fee/file/instrument/microfilm/reception No. _____, Records of this County.

SPACE RESERVED
 FOR
 RECORDER'S USE

Witness my hand and seal of County affixed.

NAME

TITLE

By _____, Deputy.

KNOW ALL BY THESE PRESENTS that I, CYNTHIA ROSE WESCOTT, have made, constituted and appointed and by these presents do make, constitute and appoint RALPH A. HATLEY my true and lawful attorney, for me and in my name, place and stead and for my use and benefit, to ACT AS MY REPRESENTATIVE IN ALL MATTERS INVOLVING OREGON DEQ, INCLUDING & LIMITED TO CASE # LQ/T-NWR-02-094.

giving and granting unto my attorney the full power and authority to do and perform each and every act and thing whatsoever requisite and necessary to be done, as fully, to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my attorney lawfully does or causes to be done by virtue hereof.

In construing this instrument, and where the context so requires, the singular includes the plural.

DATED 2-17-04

Cynthia Rose Wescott

EXHIBIT

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STATE OF OREGON, County of CLACKAMAS) ss.
 This instrument was acknowledged before me on FEBRUARY 17, 2004
 by CYNTHIA R WESCOTT

Notary Public for Oregon

My commission expires 11/03/07

PUBLISHER'S NOTE: Use of this form in connection with real estate may subject the user to real estate licensing requirements. To avoid the need to comply with those requirements: 1) record this form in the county or counties where the real estate is located; 2) specify the address(es) of the property to be managed, controlled, and/or sold; and 3) state that the agent, in dealing with the real property, may not receive any compensation that would require the agent to be licensed under ORS 696 or other applicable law.

00285

Cynthia Rose Wescott

29388 SE Heiple Road
Eagle Creek, OR 97022
(503) 630-5867
fax # 503 630-5868

2/17/04

Via facsimile and regular mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem, OR 97314

FAXED 2:52 PM
2-17-04

Re: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

I have empowered Ralph A. Hatley with the power of attorney to act in my behalf in the above referenced case. He will be appearing at the February 18, 2004, 9 a.m. scheduled hearing with the instrument in hand.

Ralph A. Hatley has been my partner since 1971 and remains so at this time. He has experience representing our interests in all issues with DEQ involving Shady Oaks/Beaver Oaks Airport, Tax Lot 600, and Tax Lot 603 since 1981.

I will be available by telephone if there are any questions as to my intent regarding this matter.

Sincerely,



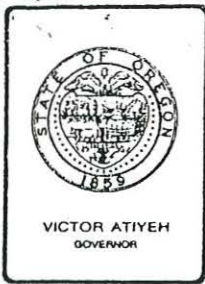
Cynthia Rose Wescott

Cc: Susan Greco via facsimile 503 229-6762

FAXED 4:42 PM
2-17-04



00287



Department of Environmental Quality

522 S.W. 5th AVENUE, BOX 1760, PORTLAND, OREGON 97207

Minutes of the Shady Oaks Airport Ad Hoc Noise Advisory Committee September 8, 1981

Committee Members: John Hector (DEQ), Ralph Hatley (representative, Shady Oaks Airport), Paul Burket (State Aeronautics Division), Paul Lawson (Clackamas County Planning Division), Linda Macpherson (LCD), Gary Linn (Citizen Representative), Terry Obteshka (DEQ)

Others Present: Carol Edwards (Port of Portland), Mr. & Mrs. Bob Furrow (concerned Citizens)

Results of Meeting

John Hector introduced all attending and explained the role of DEQ pursuant to OAR 340-35-045(5). Hector also informed the committee members that a representative of the Oregon Pilots Association, FAA, Oregon Aviation Advisory Committee and the Port of Portland were invited to attend and offer comments at the request of Ralph Hatley.

Committee members were informed that Mark Beisse, FAA, contacted Hector via telephone because prior commitments would prevent him from attending the meeting. A letter dated September 8, 1981 from Beisse was received by the DEQ on September 11, 1981. A copy of this letter is attached.

Ralph Hatley brought to the committee's attention an error in DEQ's noise report. It stated that the sampling site was located approximately one mile South of Shady Oaks Airport. Paul Lawson presented a Clackamas County plat map and it was the consensus of the advisory committee that the report be amended to read "a sampling site was located approximately one-half mile south"...

Terry Obteshka presented the 1981 Shady Oaks Airport Noise Survey and discussed its results with those attending. The citizens residing in the vicinity of the airport claimed that the survey documented their concerns relative to noise emissions from aircraft operated from Shady Oaks Airport. Hatley questioned the DEQ whether a truck or other loud activities may have adulterated the sample results. Hector informed Hatley it was possible, but the statistical noise levels appeared to rule out other extraneous noise sources.

A lengthy discussion revealed that misunderstandings existed between the airport and the citizens in its environs. The citizens claimed that a particular



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aircraft (a Cessna 180) was responsible for most of the noise impacts. Hatley claimed that he operates a Cessna 180 with a variable-pitched prop which may be louder than some other similar aircraft, but it is stock from the manufacturer. He informed the committee that aircraft are unlike other vehicles such as cars and motorcycles in that one cannot alter exhaust systems, etc., to increase noise outputs. Lawson questioned the reasons for the large disparities in noise emissions from the various aircraft and volunteered to research the matter and provide further information to the advisory committee.

The citizens in the vicinity of the airport claimed that another reason for their irritation is the flight patterns employed by some of the pilots operating out of the Shady Oaks Airport. Hatley stated that flights have been departing to the south at the request of a neighbor located to the north. He also stated that another neighbor requested that aircraft be directed away from his house so flight patterns were adjusted accordingly. Hatley was queried why aircraft operations could not be directed to the north to give residences located south of the airport some relief from noise. Hatley stated if wind conditions permit, flights could depart to the north.

Hatley expressed a willingness to work with the committee and the citizens in the airport environs to resolve this conflict. He agreed to try various operational procedure changes to reduce noise impacts if they do not compromise flight safety.

The meeting concluded with those in attendance agreeing to three recommendations. Hatley agreed to try them and offered complete cooperation.

Hatley agreed to alter departure/approach flight patterns when wind conditions permit. He will instruct all pilots to adhere to the flight paths selected to reduce impacts.

Hatley will direct the pilots to distribute the noise over a larger geographical area to give residents located south of the airport some relief from aircraft noise.

Paul Lawson agreed to provide information about noise emission levels from Cessna aircraft. DEQ will make sound level measurements for comparative purposes.

Adjournment

The meeting was adjourned at 3:00 P.M.

State of Oregon
Department of Environmental Quality
811 S.W. 6th Avenue
Portland, Oregon 97204

Number: _____

POLLUTION COMPLAINT

Pollution Type:

Date: 9/20/91

AQ _____ SW _____ WQ _____ ODOR _____
BYB _____ HW _____ OSS _____ UST X

Time: 8:45

Date and Time Observed: past few years

Source: Beaver Dam Airport Cole's: _____

(Ralph Hattley) Be careful - he has threatened
and harassed
neighbors.

Location: 29388 SE Hippel Rd
Estacada, Clark 97023
City _____ County _____ Zip _____ Phone _____

Description: Currently using a gas tank - installed
2-3 years ago - may not be permitted. An old
tank may have been removed at the same time.
Complainant will try to have more facts
by next week.

Reported by: Name: _____

Conf. _____
Yes X Address: _____
No _____ City: _____ Zip: _____
County: _____ Home Phone: _____ Work Phone: _____

Complaint taken by: L. G. G. Referred to: _____

Action taken: Did not find in UST listing.

Referred to (Agency or Person): _____ Date: _____

Site Visit Yes _____ No _____ Source Info. Updated _____ No. _____

Complainant Contacted Yes _____ Date: _____

Date Resolved _____ Time Spent _____

Correspondence Attached Yes _____ No _____

File Under _____



00291

RECEIVED
DEC 12 2003

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

BEFORE THE OREGON ENVIRONMENTAL
QUALITY COMMISSION

In the Matter of:
CYNTHIA GAY.
Case No. LQ/T-NWR-02-017

AFFIDAVIT

STATE OF OREGON
County of Multnomah

I, Greg Toran, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Greg Toran, have been employed by the Oregon Department of Environmental Quality as an Environmental Specialist since October 1, 1998.
2. That in the course of that employment, I conducted site inspections of underground storage tanks and drafted letters and memorandums in relation to those inspections.
3. That on or about November 14, 2000, I conducted a site inspection of an underground storage tank located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon.
4. During that site inspection, I took pictures of the land on which the underground storage tank was located. Additionally, during the site inspection, I noted that the underground storage tank was located in a field which was used as a landing strip for airplanes.
5. During the site inspection, I was told by Respondent's representative that the underground storage tank was used to fuel airplanes.
6. That on or about November 30, 2000, I drafted a memorandum setting forth my observations during the site inspection.
7. That the attached aforementioned pictures and memorandum are true and exact copies of the originals thereto.

Date: 12/12/03

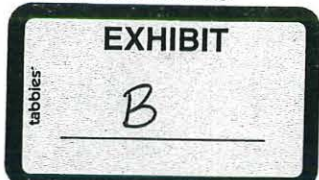

Greg Toran
Department of Environmental Quality

Sworn and subscribed before me this 12 day of December 2003

SEAL




Notary Public for Oregon
My Commission Expires
Sept. 11, 2004



NWR UST FIELD INSPECTION REPORT

Inspection Date: 11/14/00

Site Name: Beaver Oaks Airport

Total Time* 3.0 hr

Site Address: 29300 Heiple Rd

*Include inspection, travel, paperwork

Eagle Creek

DEQ Inspector: Greg Torm

File/Facility No: 10905
(both UST & UST Cleanup file #'s as appropriate)

Others Onsite: Ralph Hatley
(site operator)
(include company name)

Supervisor License No. : _____ Exp. date _____
(note the name of the license holder with **)

Inspection Type

- | | | |
|--|--------------------------------|-------------------------|
| Y---N---Decommissioning | Y---N---Install-New | Y---N---Complaint |
| Y-- <u>(N)</u> ---1998 Compliance (full) | Y---N---Upgrade-Retrofit | Y---N---WQ-New Permit |
| Partial Compliance | Y---N---Service Provider Audit | Y---N---WQ-Exist Permit |
| Y---N---Leak Detection | Y---N---Cleanup | |
| Y---N---Financial Responsibility | Y---N---SWLA/Soil Treatment | |
| Y---N---Corrosion Protection | Y---N---Distributor Audit | |
| Y---N---NA Spill & Overfill | | |

Circle Y for.....Yes = inspected & in compliance (Y for data entry)

Circle N for.....No = inspected & NOT in compliance (N for data entry)

Leave Blank for.....Inspection not performed (no data entry necessary)

Photos Taken? (Y)-N (attach)

Samples Taken? Y--(N)(attach results)

Notes (use back of form as necessary)

P/water wells onsite, in Area. One UST contains gasoline, dispenser removed. Historic use in fueling small planes via transport truck and filtering system. Currently not used, operator to schedule product removal and sampling. UST closure in place or by removal to follow next summer as discussed. See attached memo.

00293

EXHIBIT

tabbles

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State of Oregon
Department of Environmental Quality

Memorandum

Date: November 30, 2000

To: UST facility file 10905

From: Greg Toran ODEQ/NWR

Subject: Beaver Oaks UST status.

Site inspection to discuss current status of single UST. Met onsite with Ralph Hatley (reported as being owners rep). Hatley appears to meet the definition of Permittee. Site is being operated as an airport, jump school. Hatley appears to be operating other business concerns at this location. Inspection in response to phone call from Hatley, following recent NON issued by the Department.

Inspection to determine and discuss UST status and recent claim by Hatley of UST being farm tank. Property is zoned as farm use only, confirmed with county. Hatley claims to be raising hay as a crop, to be given away and not sold.

At the time of the inspection Hatley is most cooperative. Historic use of UST was for fueling small planes. At one time, fuel was pumped out of UST into transport truck containing filtering system. UST has been out of use as a fuel storage tank for planes for approx. 3 years. UST currently contains some measure of product, product has been siphoned out from time to time for various reasons, unrelated to planes according to Hatley. Dispenser/pump has been removed for 3 years according to Hatley.

Current amount of product in UST is unknown. Ground water in area is shallow within UST nest on a seasonal basis, according to Hatley. One drinking water well on the NE corner of the property. Other wells in the area. Hatley seems concerned with the possibility of impacts to the wells in the area and seems to have backed off from the initial claim of the UST being an unregulated farm tank.

This UST is most certainly a regulated UST based on past use. Hatley seems agreeable in following Department direction to decommission the UST. I suggested the following:

Remove all product and water in UST immediately. Verification of completion of this task by a third party in writing. This is to be followed by sampling of soil and if necessary water, per UST cleanup and compliance rules. Hatley to provide a written schedule for completion of this work within 3 weeks. Schedule to also include a target date for completion of the decommissioning. The Department to approve a later decommissioning date (next summer) provided that



00295

Hatley follow through with his plans for submittal of the schedule and completion of the UST pumping and sampling. Completion of the UST pumping and sampling and records submittal to be accomplished by the date noted in option 2 of the most recent NON. The date specified in the NON was 90 days from the date of the notice. So the due date for completion of this phase of the work would be the end of January, 2001.

Mailing documentation to Hatley. This documentation to be a summery sheet that outlines these steps, UST closure requirements, forms for documenting closure, and a list of licensed supervisors. Hatley stated that he would be doing the decommissioning. I recommended he consult licensed service providers or supervisors.



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

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

December 5, 2000

C.R. GAY
RALPH HATLEY
29388 SE HEIPLE ROAD
EAGLE CREEK OR 97022

Re: DEQ Facility # 10905

Mr. Hatley:

Thank you for taking the time to meet with me concerning assessment and decommissioning of the gasoline underground storage tank (UST) listed with the Department for this facility. The Department has issued a Notice of Noncompliance for failure to decommission this UST.

The Department has agreed to modify the correction schedule as follows:

Correction Schedule:

By January 31, 2001, pump out all water and or product remaining in the UST. Submit a written third party verification of this work.

By January 31, 2001, perform soil sampling and analysis as outlined in the Department's UST and UST Cleanup rules for decommissioning and submit verification of this work in writing. Include chain of custody documentation and laboratory data. Copies of the rules that describe sampling requirements are enclosed.

Contact the Department within 24 hours if contamination is discovered.

By January 31, 2001, submit 30 day notice of intent to decommission to the Department.

By January 31, 2001, submit a written schedule for completion of the decommissioning. The decommissioning is to be completed by June 30, 2001.

UST fees will be due for 2001 for all UST's not decommissioned before January 1, 2001.

I have enclosed copies of the forms and documentation that we discussed to assist you in properly performing and documenting decommissioning.



00297

UST fac 10905
December 5, 2000
Page 2

Thank you for your cooperation. If you have any questions regarding this matter, please contact me at 503-229-5496.

Sincerely,



Gregory Toran
UST Compliance Specialist

enclosures

cc: Stephanie Holmes-ODEQ/HQ
Gregory Toran-ODEQ/NWR

00298



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

January 28, 2002

C.R. GAY
RALPH HATLEY
29388 SE HEIPLE ROAD
EAGLE CREEK OREGON 97022

Re: UST - Clackamas County
Beaver Oaks Airport
Facility #10905
NOTICE OF NONCOMPLIANCE
NWR-UST-02-002

Dear Mr. Hatley:

The violations documented include violations of environmental regulations (Oregon Administrative Rules or OAR) and statutes (Oregon Revised Statutes or ORS). The OARs incorporate by reference regulations from the Code of Federal Regulations (40 CFR); for simplicity, federal regulations are cited where applicable.

This Notice of Noncompliance (Notice) is issued in accordance with OAR 340-150-0166(4) for underground storage tank (UST) violations documented by the Oregon Department of Environmental Quality (DEQ) at the Beaver Oaks Airport facility located at 29388 SE Heiple Road, Eagle Creek, Clackamas County, Oregon.

The purpose of this Notice is to inform you of a violation that has been confirmed. Based upon your response, additional violations may be identified. You will be informed in a subsequent Notice if additional violations are identified.

Beaver Oaks Airport violated 40 CFR 280.70(c), Subpart G as amended by OAR 340-150-0003 by failing to permanently close substandard UST systems at the end of the 12 month temporary closure period.

Based on historical site information, the Department understands that one out-of-service underground storage tanks exist on the property. The UST consists of a 1,000 (#BBGJH) gallon gasoline tank installed in June of 1985. The UST and associated piping do not meet the upgraded technical standards for leak detection, cathodic protection and spill/overflow protection.



00299



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

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

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

March 14, 2002

C.R. GAY
RALPH HATLEY
BEAVER OAKS AIRPORT
29388 SE HEIPLE ROAD
EAGLE CREEK OREGON 97022

Re: UST – Clackamas County
Beaver Oaks Airport
Facility #10905
NOTICE OF NONCOMPLIANCE
NWR-UST-02-010

Dear Mr. Hatley:

The violations documented include violations of environmental regulations (Oregon Administrative Rules or OAR) and statutes (Oregon Revised Statutes or ORS). The OARs incorporate by reference regulations from the Code of Federal Regulations (40 CFR); for simplicity, federal regulations are cited where applicable.

This Notice of Noncompliance (Notice) is issued in accordance with OAR 340-150-0166(4) for underground storage tank (UST) violations documented by the Oregon Department of Environmental Quality (DEQ) at the Beaver Oaks Airport facility located at 29388 SE Heiple Road, Eagle Creek, Oregon, Clackamas County.

The purpose of this Notice is to inform you of violations that have been confirmed. Based upon your response, additional violations may be identified. You will be informed in a subsequent Notice if additional violations are identified.

VIOLATIONS

VIOLATION NO. 1, CLASS II:

Beaver Oaks Airport violated OAR 340-150-0166(3)(a-b) by failing to provide a written 30-day and verbal 3-day notice to the Department before permanently closing a regulated UST.



00301

To: DEQ ENFORCEMENT SECTION
Enforcement Referral for UST/LUST Violations

RECEIVED
FEB 06 2002

Name of Violator: Gay, Cindy
~~Beaver Oaks Airport~~

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

County: Clackamas Facility ID Number: 10905

Region: NWR Recommended Enforcement Action: MAO/CP

Attachments:

<input checked="" type="checkbox"/> NON	<input type="checkbox"/> Location Maps	<input type="checkbox"/> Witness Statements
<input checked="" type="checkbox"/> Permit	<input checked="" type="checkbox"/> Sample Results	<input type="checkbox"/> Other Agency Reports
<input checked="" type="checkbox"/> Letters	<input checked="" type="checkbox"/> Original Photos	<input type="checkbox"/> Chain of Custody Form
<input checked="" type="checkbox"/> Memos	<input type="checkbox"/> Complaint Forms	<input type="checkbox"/> UST Ranking System Forms
<input type="checkbox"/> E-mail	<input checked="" type="checkbox"/> Inspection Reports	

CC: Site Assessment Section-NWR

CLEARANCES:

Herrington Rose

Prepared by

January 28, 2002

Date

Manager

Administrator

Date

Date

ENFORCEMENT SECTION USE ONLY

Case Number: LQ/T-NWR-02-026

Review By & Date: PRICE 2/28/02

Assigned to & Date: GRECO 2/28/02

Investigation Completion Date: 12/5/01 NON Date: 1/15/02

Violation(s): Failure to decommission

Location(s): Eagle Creek, Clackamas Co.

Is this a cost recovery case? If yes, give billing number and name of cost recovery case if different from violator's name, above.

The case will become Cost Recoverable if a release is detected during the decommissioning.

00302

RECEIVED
FEB 06 2002

ENFORCEMENT TIMELINESS

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

File Name: ~~Beaver Oaks Airport~~ Gay, Cindy

1. Initial Discovery/Inspection: 8/20/1999
2. Investigation Completed: 12/5/2000

Failed attempts by the Department to obtain voluntary compliance from the Violator.

3. Notice(s) of Noncompliance Sent: 1/15/2002

4. Referral Sent to Enforcement Section:
(explain if the time between 2 & 4 exceeds 25 days)

2-6-02 - No. 1
~~1/28/2002~~ did not sign till
2-6-02

5. Assigned to Enforcement Staff:

2/28/02

6. Referral Substantially Complete:
(explain if there is a difference between 5 & 6)

 / /

7. Documents Sent for Review/Approval:
(explain if the time between 6 & 7 exceeds 15 days)

 / /

8. Documents Sent for Signature:
(explain if the time between 7 & 8 exceeds 15 days)

 / /

Timeliness Summary:

Number of days from Completed Investigation to Director (items 2 to 8):

Director's Expectation:

55

Days Over/(Under) Director's Expectation:

Numbers 1 through 4 completed by field staff, numbers 5 through 8 completed by Enforcement Section.



00303

INVESTIGATION DETAILS:

1. Who is the responsible party? If the violator is a corporation list the registered agent's name and address. If the violator is an assumed business name list all parties of interest and their addresses. If the violator is an individual give complete name and address.

No changes from prior referral.

No business registry available at the Oregon Corporation Division-Business Registry

The tank owner, property owner and permittee are listed as:

Cindy Gay
29388 SE Heiple Road
Eagle Creek, Oregon 97022

2. Describe the violation and how you found out about it.

Most recent Notice of Noncompliance (NWR-UST02-010) issued after the Department was informed by telephone on February 6, 2002, by Ralph Hatley that the UST was decommissioned in year 2000 without providing notice or follow-up (Attachment A).

3. Describe tank ownership: who owns tank, which owns property, which is the permittee, etc.

Remains as provided in earlier enforcement referral on this site (LQ/t-NWR-02-026) and assigned to Susan Greco on February 28, 2002.

4. Describe the dates, time and place of Department inspections and observations made during the inspections. Be specific.

No changes since prior referral.

5. List specific statutes, OARs and/or CFRs violated.

340-150-0166 General Permit for Decommissioning a checklist and change-in-service report must be submitted to the Department within 30 days after tank closure as required by 40 CFR 280.71 (b) as modified by OAR 340-150-0003 (35).

OAR 340-150-0166(3)(a-b) by failing to provide a written 30-day and verbal 3-day notice to the Department before permanently closing a regulated UST.

(b) Records of temporary or permanent closure and change-in-service, including records of the site assessment, must be maintained as required by 40 CFR 280.74 and 280.34 (b)(5) ;

340-150-0110 UST General Permit Compliance Fee

Beginning March 1, 1989, the permittee must pay an annual underground storage tank general permit compliance fee of \$25 per tank per year. For calendar year 1994 and every year thereafter the permittee must pay an annual

underground storage tank compliance fee of \$35 per tank per year, except that for calendar year 1998, permittees of tanks not in compliance with the 1998 technical standards must pay a permit fee of \$60 per tank. (2) Effective December 23, 1998 the permittee must pay an annual underground storage tank general permit compliance fee of \$35 per tank per year, except that for calendar year 1999, permittees of tanks not in compliance with the 1998 technical standards must pay a general permit compliance fee of \$60 per tank and Requirements

6. List and briefly describe the evidence in support of the above violations.

Attachment B, telephone memo of Feb. 6, 2002.

Attachment C, DEQ Invoice

7. Did you interview the violator. Describe your interview and the violator's statements. Did the violator admit to the violations?

On February 6, 2002, in response to the prior NON ((NWR-UST-02-002), Hatley said the tank was decommissioned and argued that the tank was unregulated. He said he removed the tank in 2000 after receiving the Department letter December 5, 2000, stating terms he said he didn't agree to.

8. Was the violator cooperative in correcting or trying to correct the violation? Explain.

No, Hatley was argumentative and refused to agree that the UST was a regulated tank. He exhibited an uncooperative stance. Greg Toran-NWR-UST Compliance Specialist provided me with an email from Hatley (Attachment D) that clearly indicates the UST is a regulated tank.

9. Where did the violation occur?

Beaver Oaks Airport
29388 SE Heiple Road
Eagle Creek, Oregon

10. If you have reason to believe that an underground storage tank is leaking or the property is contaminated, please answer the following:

- A. Describe the evidence/documentation of the contamination.

Unknown, Hatley would not comment on the decommissioning..

Hatley decommissioned the UST in spite of the Department after receiving the Department's letter of December 5, 2000, because he believed the corrective schedule was not what he agreed to.

During the telephone conversation with Hatley on February 6, 2002, I inquired if soil samples were collected during the decommissioning. Hatley said "maybe".

- B. Were samples collected? If so, please describe the sample locations, sample results and chain-of-custody. Include a site diagram with this information on it.

Unknown

00305

- C. Describe the impact of the violations(s) including the amounts of materials involved, extent of contamination, toxicity of the materials, duration of the violations, vapor impacts (actual and potential), presence of free product, groundwater contamination, off-site impacts, environmental and habitat damage. (or attach LUST ranking system if completed).

Groundwater is shallow in the area and domestic water wells supply sole-source drinking water to the area. If a release by overflow spillage and/or a leaking tank occurred at the site, groundwater impacts would be immediate. Time is of the essence when groundwater is impacted.

11. Describe what activities you would like included in a Department Order or ECD Order.

30-Day Change-in-Service Report,
30-Day Decommissioning Report,
Receipts of disposal for sludge, tanks.
Laboratory Analytical test results.
Closure Report

if the violator is unable to provide a report documenting compliance with the Decommissioning requirements, they must have a phase 2 site assessment performed to determine if the tank leaked. DW

If contamination is discovered, or suspected the Violator must also:

Report the release to the DEQ with 24 hours of detection

Mitigate any routes of exposure,

Define the full magnitude and extent of contamination

Submit a cleanup report, complete with laboratory analytical results.

12. Did the violator gain an economic benefit as a result of the violation? If yes, state how much and show in detail how you determined that amount.

Yes the Violator saved the time and expense of notifying the DEQ of the tank removal and avoid submittal of closure records. The fate of the tank, piping and contents (sludge/rinsate) is unknown. If the Violator avoided these disposal costs the following would be EB:

Tank transport (\$125), tank disposal (\$75), rinsate reclaim (\$90),

If contamination removal was avoided, or ignored EB may exceed \$1,000, particularly if groundwater was impacted (> \$10,000)

The Violator has not honored UST compliance fees (\$105) (Attachment B).

13. Do you have any information concerning the economic condition (hardship) of the violator?

No information is available regarding the Violators economic condition. Based on observations made during the inspection, Beaver Oaks Airport operates "SkyDive Oregon" as a profitable business and conducts agricultural activities. There is no reason to suspect economic hardship.

↳ grow hay - Alfalfa.

14. Has there been any previous civil penalties or orders issued to the violator?

Not that we're aware of.

Cost to decommission = \$5000
Hatch couldn't legally decom himself (not owner or permittee)
00306

15. Comments or additional information, which you believe, will help us in reviewing the case.

Hatley explained that he runs a small newspaper and that this would make bad headlines for DEQ. I explained there are many UST owners that would appreciate the fact that all tank owners are held to equal standards.

GRECO Susan

From: ROSE Herrington
Sent: Wednesday, February 06, 2002 4:27 PM
To: GRECO Susan
Cc: PRICE Anne; MULLANE Neil; POLLOCK Andree; ROSE Herrington; TORAN Greg
Subject: Beaver Oaks Airport enforcement referral update

Our referred violation was for failure to close an out-of-service UST.

That has changed. I spoke with Ralph Hatley this afternoon and he said he pulled (removed) the UST after DEQ failed to honor a request originating from the site inspection. Evidently he didn't agree with the written follow-up schedule and close the tank on his own conditions without providing notice or close documents.

I explained that he created additional violations and requested he submit a written response to the NON and provide all available records, including soil sample results. He claimed that the UST was never a regulated UST and shouldn't have been permitted. I claimed otherwise and just asked him to respond in writing. He said he owned a newspaper and that this wouldn't look good for the agency.

The short of this is that additional, different violations have occurred at the facility, so please don't spend a lot of time on this until, if, we receive his written response. Either way, I'll be issuing additional violations.

Thanks,
Herrington
X6242



GRECO Susan

From: ROSE Herrington
Sent: Monday, March 04, 2002 9:44 AM
To: LEPPALUOTO Tina L; HOLMES Stephanie A.
Cc: POLLOCK Andree; TORAN Greg; GRECO Susan
Subject: RE: Fac #10905 - Beaver Oaks Airport

Stephanie, Your hunch regarding the regulatory status of this facility was right on.

The UST operator (Hatley) decommissioned the tank out of spite after receiving a letter from the DEQ after an inspection conducted by Toran. This facility has been referred for formal enforcement measures. Hatley argued to me about the regulatory status of the tank. I concurred with Toran, the tank was regulated. NO records have been submitted regarding the tank decommissioning. Hatley owes UST permit fees. Please keep the tank active until we have an opportunity to bring this violator into compliance.

Thanks,
Herrington Rose
X6242

-----Original Message-----

From: LEPPALUOTO Tina L
Sent: Monday, March 04, 2002 9:34 AM
To: ROSE Herrington
Cc: HOLMES Stephanie A.
Subject: FW: Fac #10905 - Beaver Oaks Airport

Herrington will give you the details on this one. Thanks Herrington!

-----Original Message-----

From: HOLMES Stephanie A.
Sent: Friday, March 01, 2002 11:00 AM
To: LEPPALUOTO Tina L
Cc: GOMEZ Dawn; TORAN Greg
Subject: Fac #10905 - Beaver Oaks Airport

I received an unpaid invoice from this abandoned tank site with the following statement: "The tank has been removed and fuel is no longer stored for farming purposes on the property." The tank is registered as a 1000 gallon tank. Please check to see if you received any documentation of the decommissioning. I'm also wondering if it is a regulated tank. I'll send you over a copy of the invoice for followup. Please let Dawn know how to proceed. Thanks!

Stephanie

GRECO Susan

From: ROSE Herrington
Sent: Friday, March 08, 2002 2:45 PM
To: GRECO Susan
Cc: POLLOCK Andree
Subject: RE: Walter Balzano

Balzano documents look good.

Also, in regards to Beaver Oaks Airport referral from Feb/2002. If you'll recall Ralph Hatley told me that out of spite, he decommissioned the tank and refused to submit any records to demonstrate compliance. So, I just sent out a second NON with additional violations and have a draft, updated referral coming your way.

Thank you,
Herrington Rose

-----Original Message-----

From: GRECO Susan
Sent: Thursday, March 07, 2002 4:08 PM
To: ROSE Herrington; POLLOCK Andree; MULLANE Neil
Subject: Walter Balzano

Attached are the documents for the Walter Balzano case. Let me know if you have any suggestions etc. Thanks - Susan

<< File: balzano notice.doc >> << File: balzano letter.doc >> << File: balzano exhibit a.doc >>

STATEMENT OF RALPH HATLEY

SEPTEMBER 5, 2002

In May, 2001 I operated a backhoe and removed the underground storage tank from the ground. The bottom of the tank was approximately 6 feet deep. There was no ground water in the excavation. There was no visible sign of contamination in the soil or any fuel odor. There were no holes in the tank. The surface corrosion was consistent over the entire surface of the tank. We had ceased to use the tank several years earlier and had pumped out all fuel out that could be reached from the pump inlet which is slightly above the bottom of the tank. At the time of tank removal I used a hose and pumped out the remaining liquid. There was approximately 15 gallons of fuel that I put into 5 gallon cans and used in farm equipment on the property. There was about a pint of water at the lowest point of the tank. There was no sludge. The tank is still on the property, out of the ground, not in use and available for inspection.

I took soil samples at each end of the tank about halfway down the tank side. Coffey Laboratories, inc. Tested the samples. The laboratory test results are attached.

Because the tank is intact without holes it could not have leaked. The only other possibility for soil contamination would be from spillage during filling. I was on the property every time the tank was filled. There were not more than one or two occasions over the years when I may have been called away to the phone. On all the other occasions I was present and observed the filling. I never saw any overflow or spillage. If there had been overflow it would have coated the surface of the tank at and below the fill opening and prevented rusting in that area. The surface corrosion on the tank was the same in this area as on all other areas of the tank.

From these facts I conclude that there was no leakage or spillage. Because there are no holes in the tank it was not necessary to take soil samples at the bottom of the tank location. The samples taken at the intermediate depth would have revealed any contamination from overflow spillage. The samples show no contamination.



00313

September 27, 1991

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

RALPH & CINDY HATLEY
BEAVER OAKS AIRPORT
29388 S E HEIPLE RD
EAGLE CREEK OR 97022

RE: Beaver Oaks Airport
NWR-UST-91-233
NOTICE OF NONCOMPLIANCE

Dear Ralph & Cindy Hatley:

On September 12, 1991, an inspection was conducted at your facility located at 29388 S.E. Heiple Road, Eagle Creek, Oregon. The purpose of the inspection was to determine your compliance with the Underground Storage Tank (UST) regulations. The inspection revealed that there may be at least one UST at the site. The Department has no record of any permitted tanks at this facility. Failure to obtain a permit for a regulated tank is a violation of Oregon Administrative Rules (OAR) 340-150-020 and 340-150-030.

On May 1, 1988, all regulated underground storage tank owners were required to submit permit applications prior to the installation, operation, bringing into operation, or decommissioning of an underground storage tank. This requirement applied to all owners of regulated tanks currently in operation; owners of regulated tanks that were taken out of operation between January 1, 1974, and May 1, 1988, and not permanently decommissioned in accordance with Section 340-150-130; and owners of regulated tanks that were taken out of operation before January 1, 1974, but still contain a regulated substance.

OAR 340-150-150 further states that after February 1, 1989, no person owning an underground storage tank shall deposit or cause to be deposited a regulated substance into that tank without first having applied for and received an operating permit issued by the department.



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

00315
DEQ-1



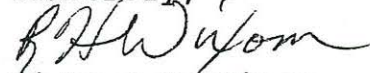
Beaver Oaks Airport
September 27, 1991
Page 2

In order for you to bring your underground storage tanks into compliance it will be necessary for you to apply for an underground storage tank permit within two (2) weeks upon receipt of this notice (the application packet was mailed to you last week). Continued noncompliance may be cause for further enforcement action.

Please notify me directly when the application has been submitted to our compliance section. If there is any additional information or facts about your particular situation that we should be aware of, please let me know.

Your cooperation is appreciated. If you have any questions please call me at (503) 229-6020.

Sincerely,



Richard H. Wixom
UST Compliance Specialist
Northwest Region

cc: Enforcement Section, RO
UST Compliance Section, HSW

00316

NWR UST FIELD INSPECTION REPORT

Inspection Date: 11/14/00

Site Name: Beaver Oaks Airport

Total Time* 3.0 hr

Site Address: 29300 Heiple Rd

*Include inspection, travel, paperwork

Eagle Creek

DEQ Inspector: Greg Terman

File/Facility No: 10905
(both UST & UST Cleanup file #'s as appropriate)

Others Onsite: Ralph Hatley
(Site operator)
(include company name)

Supervisor License No. : _____ Exp. date _____
(note the name of the license holder with **)

Inspection Type

Y---N---Decommissioning

Y---N---Install-New

Y---N---Complaint

Y-(N)-1998 Compliance (full)

Y---N---Upgrade-Retrofit

Y---N---WQ-New Permit

Partial Compliance

Y---N---Service Provider Audit

Y---N---WQ-Exist Permit

Y---N---Leak Detection

Y---N---Cleanup

Y---N---Financial Responsibility

Y---N---SWLA/Soil Treatment

Y---N---Corrosion Protection

Y---N---Distributor Audit

Y---N---NA Spill & Overfill

Circle Y for.....Yes = inspected & in compliance (Y for data entry)

Circle N for.....No = inspected & NOT in compliance (N for data entry)

Leave Blank for.....Inspection not performed (no data entry necessary)

Photos Taken? (Y)-N (attach)

Samples Taken? Y-(N) (attach results)

Notes (use back of form as necessary)

P/water wells onsite, in Area. One UST contains gasoline, dispenser removed. Historic use in fueling small planes via transport truck and filtering system. Currently not used, operator to schedule product removal and sampling. UST closure in place or by removal to follow next summer as discussed. See attached memo.

00317

EXHIBIT

14

UST CLEANUP TELEPHONE USE REPORT

CALL FROM/TO: Ralph Hatley DATE: 2-8-02
WITH: Beaver Oaks TIME: 1430
TELEPHONE NO: (503) 630-5867
REGARDING: NON
FILE NO: - -

SUMMARY OF CALL

Hatley removed UST without notice, said DEP
"re-nig" on agreements so he pulled tank.
Claimed his attorney wrongly instructed him
to register UST, because he's litigation with
county. ^{He said} UST shouldn't be regulated.

I asked if soil samples collected be sent
maybe. I said further violations will be cited
He said be published newspaper and that DEP
should be careful. I clarified my profession,
not personal, that lots of UST owners would
love to hear his story. I advised he consult
his attorney, reply to NON and send any
available info.

HR

Staff Signature



00318



Oregon

Theodore R. Kulongoski, Governor

FOR YOUR INFORMATION

Josselson, Potter & Roberts

Department of Environmental Quality

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

April 17, 2003

RECEIVED
APR 30 2003

RECEIVED
APR 24 2003

Lawrence R. Derr
Josselson, Potter & Roberts
425 S.W. 10th Avenue
Portland OR 97209

OFFICE OF COMPLIANCE
DEPARTMENT OF ENVIRONMENTAL QUALITY

RE: Notice of Violation, Department Order and
Assessment of Civil Penalty
Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Mr. Derr:

The purpose of this letter is to inform you of the status of the above referenced Notice and Order pending against your client for violations related to an underground storage tank located at 29388 S.E. Heiple Road in Eagle Creek, Oregon. When we last spoke in late February, you informed me that your client, Mr. Hatley, intended to collect the required two soil samples in order for the Department and your client to reach a possible settlement of the civil penalty.

The Department appreciates the fact that, as you stated in your February 28th letter, that Mr. Hatley intended to wait until the water table at the property lowered to collect the soil samples. It has been nearly a year since the Department issued the Notice and Order. As such, the Department needs to move forward with finalizing the same. In order for the Department to consider any reductions in the civil penalty assessed, the soil samples must be collected and the results submitted to the Department prior to May 16, 2003. Additionally, evidence of proper disposal of the underground storage tank also needs to be submitted by that date. If the Department does not receive this documentation prior to that date, the Department will schedule the pending Notice and Order for a contested case hearing. If you have any questions about these requirements, please feel free to contact me at (503) 229-5152.

Sincerely,

Susan M. Greco
Susan M. Greco
Environmental Law Specialist

cc: Andree Pollock, NWR, DEQ



DRO-1
00319



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

February 18, 2004

Cynthia (Gay) Wescott
29388 S.E. Heiple Road
Eagle Creek OR 97022

Re: Final Order
No. LQ/T-NWR-02-094

The enclosed Final Order has been entered against you in the above referenced case.

If the civil penalty remains unpaid for more than ten (10) days from the date of this letter, we will file the Final Order with any County Clerk in Oregon. This will result in a lien being placed on any real property you may own in any county. You will not be able to clear title of your property in a sale without paying your debt plus interest to this Department. We will also ask the Department of Revenue to pursue collection of the penalty.

Please promptly send a check or money order in the amount of \$6,072 and made payable to "Oregon State Treasurer" to: DEQ - Business Office, 811 SW 6th Avenue, Portland, Oregon 97204.

If you have any questions about this Final Order, please call Deborah Nesbit, Office of Compliance and Enforcement, at (503) 229-5340.

Sincerely,

Susan M. Greco
Environmental Law Specialist

Enclosure

cc: Greg Toran, NWR, DEQ
LQ Division, DEQ

00322

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

5 IN THE MATTER OF:
6 CYNTHIA GAY

7 Respondent

) NO. LQ/T-NWR-02-094
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND FINAL ORDER

8 THIS MATTER came before the Director of the Department of Environmental Quality
9 (Department or DEQ) acting on behalf of the Environmental Quality Commission (Commission)
10 pursuant to Oregon Administrative Rules (OAR) 340-011-0535, on the Motion of the Office of
11 Compliance and Enforcement of the DEQ. Having considered the Motion, records, and files in
12 this case, and being fully cognizant of the contents thereof, on behalf of the Commission, I
13 hereby make the following Findings of Fact, Conclusions of Law, and Final Order.

14 FINDINGS OF FACT AND CONCLUSIONS OF LAW

15 By Notice of Violation, Department Order and Assessment of Civil Penalty (Notice and
16 Order) dated June 25, 2002, from the Director of the DEQ to Respondent, Cynthia Gay, a civil
17 penalty in the amount of \$6,072 was assessed for one or more violations specified therein. On
18 July 15, 2002, Respondent filed a timely Request for Hearing and Answer with the Department.
19 A contested case hearing was scheduled for February 18, 2004, notice of which was provided to
20 Respondent on January 14, 2003. Respondent sent another person to appear on her behalf. Per
21 OAR 137-003-0550, a natural person must be represented by either themselves or an attorney.
22 As such, Respondent failed to appear at the hearing and has defaulted. In light of Respondent's
23 default, pursuant to OAR 340-011-0535, I find that all the matters alleged in the Notice and
24 Order are true and adopt them as Findings of Fact and Conclusions of Law.

25 FINAL ORDER

26 IT IS HEREBY ORDERED that Respondent pay the Department the \$6,072 civil penalty
27 plus interest pursuant to Oregon Revised Statute (ORS) 82.010, from the date this Final Order is

1 signed below until paid; and that if the civil penalty remains unpaid for more than ten (10) days,
2 this Final Order may be filed with each County Clerk and execution shall issue therefor.
3 Additionally, the Compliance Order as set forth in Section V of the Notice and Order is now final
4 and in effect.

5 Pursuant to ORS 183.480 and 183.482, appeal of this Order may be initiated by filing a
6 petition for judicial review with the Oregon Court of Appeals within 60 days of this date.

7
8
9 2/18/04
Date

ENVIRONMENTAL QUALITY COMMISSION

Anne R. Price, Administrator
Office of Compliance and Enforcement
Department of Environmental Quality
Pursuant to OAR 340-011-0505

James F. Evans
Attorney at Law
805 Liberty Street N.E. #3
Salem, Oregon 97301
503-391-7101

April 21, 2004

Anne Price, Administrator
Office of Compliance and Enforcement
Department of Environmental Quality
811 S.W. Sixth Ave. 10th Floor
Portland, OR 97204

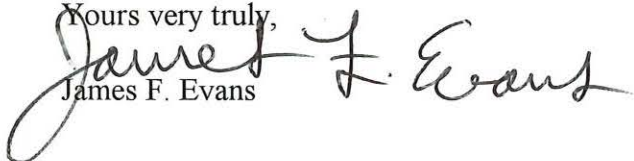


RE: Case No.: LQ/T-NWK-02-094
Transcript of the hearing on February 18, 2004

Dear Ms. Price:

Please find enclosed the transcript of the hearing on February 18, 2004.

Yours very truly,


James F. Evans

C. Shelly K. McIntyre
C. Ralph Hetler

00327

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4 In the Matter of

5 DEPARTMENT OF ENVIRONMENTAL QUALITY,

6 Plaintiff,

7 v.

8 CYNTHIA WESCOTT,

9 Defendant.

10

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12 TRANSCRIPT OF PROCEEDINGS

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22

23 Transcribed by:
24 Robin Curl
Court Transcriber
25 P. O. Box 5966
Salem, OR 97304
(503)585-7252

00328

1

2

3 (Whereupon, the following proceedings were had, to-wit:)

4

5 ALJ: We are on the record and being
6 recorded in the matter of the Department of Environmental
7 Quality and Cynthia Wescott. I am Steven Elmore. I'm
8 the administrative law judge with the Office of
9 Administrative Hearings of the State of Oregon. That is
10 an agency independent of the Department of Environmental
11 Quality. The issues for hearing today are whether the
12 respondent violated the administrative rule by failing to
13 decommission an underground storage tank, whether the
14 respondent violated the administrative rule by failing to
15 provide both 30 day and three working day notices to the
16 Department before beginning permanent closure of an
17 underground storage tank, whether the respondent violated
18 the administrative rule by failing to submit completed
19 decommissioning checklists within 30 days of permanent
20 closure of an underground storage tank, and whether the
21 respondent violated administrative rule by allowing
22 decommissioning of an underground storage tank by a
23 person not licensed by the Department. Ms. Wescott
24 apparently is not here today and the preliminary issue
25 before we get to anything else in this hearing, if we get

1 to anything else in this hearing, is where is Ms. Wescott
2 and, sir, you are here purporting to represent her?

3 MR. HATLEY: Ralph Hatley. That is
4 correct, sir.

5 ALJ: Okay. Let me ask you to spell that,
6 please. R-a-l-p-h?

7 MR. HATLEY: That is correct.

8 ALJ: Okay. And last name?

9 MR. HATLEY: H-a-t-l-e-y.

10 ALJ: H-a-t-l-e-y. Can you tell me what
11 your relationship to Ms. Wescott is.

12 MR. HATLEY: Cindy and I are partners and
13 have been for 30 plus years.

14 ALJ: Business partners or --

15 MR. HATLEY: We're life partners.

16 ALJ: Emotional partners? Okay.

17 MR. HATLEY: Business partners.

18 ALJ: And where is Ms. Wescott today, Mr.
19 Hatley?

20 MR. HATLEY: She is at 29388 Southeast
21 Hipole (phonetic) Road.

22 ALJ: Do you know why she's not here?

23 MR. HATLEY: Yes. Because I am here
24 representing our interests as partners.

25 ALJ: Are you -- the State, I believe,

1 initiated this action against Ms. Wescott singly. Do you
2 and she operate a business partnership and file business
3 partnership returns?

4 MR. HATLEY: We own property together, we
5 file our taxes together, we have been together for over
6 34 years.

7 ALJ: You file a business partnership
8 return?

9 MR. HATLEY: The business is in her name.
10 I am an officer in the corporation.

11 ALJ: What corporation?

12 MR. HATLEY: Well, let's see, we have a
13 number of corporations, and she is officers in my
14 corporations and I'm officers in her corporations.

15 ALJ: Okay. I guess I better go to Ms.
16 Wescott at this point and hear what the State's position
17 is regarding who the respondent is. The State obviously
18 has made just Ms. Wescott the respondent and no corporate
19 entities or partnerships or other people are named.

20 MS. GRECO: That's correct.

21 ALJ: Can you tell me about that.

22 MS. GRECO: It's just we originally just
23 named Ms. Wescott because she's the property owner and
24 was also listed as the permittee of the underground
25 storage tank. It was not listed under any corporate

1 names.

2 ALJ: She is the only listed property
3 owner?

4 MS. GRECO: Correct.

5 ALJ: And the only listed permittee?

6 MS. GRECO: Yes. Only the tank owner and
7 the permittee has a legal responsibility to do the
8 decommissioning and any attending things associated with
9 that.

10 ALJ: Mr. Hatley, are you listed on the
11 title?

12 MR. HATLEY: I would make an offer of
13 proof, Your Honor. At the onset of this association with
14 the DEQ, I have in my hand a copy of a letter that they
15 sent to us acknowledging my position.

16 ALJ: My question, sir, is are you one of
17 the property owners of the subject property?

18 MR. HATLEY: Yes.

19 ALJ: And are you listed at the registrar's
20 office as an owner?

21 MR. HATLEY: The property is in Cynthia's
22 name.

23 ALJ: You're not on the title?

24 MR. HATLEY: It's not in my name. No.

25 ALJ: You have no legal obligation on the

1 property so far as you know other than any agreements you
2 have with --

3 MR. HATLEY: We have our partnership
4 agreements. I have a power of attorney that I want to
5 submit to you as an offer of proof.

6 ALJ: But you're not a property owner in
7 the eyes of the county or the state?

8 MR. HATLEY: Well, let's see. Since 1978,
9 I have been a partner in all of the litigation that has
10 been evolving around this property. Clackamas County v.
11 Gay, Case No. 78-4-272.

12 ALJ: Okay, sir. Again, my question is,
13 are you listed as a property owner? Does the county
14 taxing authority treat you as an owner on the property?

15 MR. HATLEY: My name is not on the title.

16 MS. GRECO: If you want, I actually have a
17 copy of the printout from Clackamas County that shows
18 this.

19 ALJ: Okay. But he said he's not on the
20 title.

21 MS. GRECO: Yes. And this was actually
22 Exhibit C to my motion.

23 ALJ: Ms. Greco, are there any
24 administrative rules or statutes related to the
25 Department of Environmental Quality regarding authorized

1 representatives differ any from the Oregon Administrative
2 Rules in contested case hearings for authorized
3 representatives?

4 MS. GRECO: Not in terms of natural
5 persons.

6 ALJ: Mr. Hatley, do you have any citations
7 of authority for the right to represent an individual in
8 a DEQ hearing?

9 MR. HATLEY: Under ORS 183.413(2), and it
10 says, you may represent yourself at the hearing or be
11 represented by an attorney or an authorized
12 representative such as a partner, officer or employee.
13 I am an authorized representative and a partner and 25
14 years of litigation confirms this, and I can cite you
15 case after case. I have brought a ton of evidence here
16 that would be very repetitive that we can prove -- use
17 the term beyond a reasonable doubt --

18 ALJ: Okay. Mr. Hatley --

19 MR. HATLEY: -- my position.

20 ALJ: This is not a criminal case of beyond
21 a reasonable doubt.

22 MR. HATLEY: I understand that.

23 ALJ: This is an administrative proceeding
24 regarding a fairly narrow issue, regarding an underground
25 storage tank as regulated by the State of Oregon through

1 its Department of Environmental Quality. An authorized
2 representative is defined by the administrative rules in
3 the contested case provisions of Oregon law to be the
4 representative of a partnership or a corporation that is
5 in essence part of the unit. In this case, the State has
6 brought this against the property owner and only the
7 property owner, and so you don't have authority to
8 represent Ms. Wescott in this proceeding.

9 MR. HATLEY: Once again, I offered my proof
10 that I have represented this issue and this property in
11 front of DEQ --

12 ALJ: Mr. Hatley, it's not whether you
13 represented --

14 MR. HATLEY: -- since 1981.

15 ALJ: Okay. The issue is whether you are
16 a property owner of the subject property here, and you've
17 told me that you're not.

18 MR. HATLEY: I do not own the property with
19 my name on the property. However, we have it in our
20 wills, we have it in all of our business, all of our
21 personal relationships and all of our --

22 ALJ: If you're not on the property list,
23 I don't have any authority to allow you to represent her.
24 Ms. Greco, the State, believe in these proceedings as the
25 authority to issue the default order.

1 MS. GRECO: Yes.

2 ALJ: Does the State need to put on any
3 proof or does the State rest on its record?

4 MS. GRECO: We rest on the record. So it's
5 actually done by us.

6 ALJ: Okay. I don't have anything else.
7 Ms. Greco, anything else from the State?

8 MS. GRECO: No.

9 ALJ: Anything else for the State?

10 MS. GRECO: No.

11 ALJ: Mr. Hatley, I know that you're not
12 happy about the outcome because you expected to represent
13 Ms. Wescott in this case, and there are cases in the
14 administrative arena, of course a variety of different
15 ones, where lay people can represent individuals, often
16 in welfare type cases and that sort of thing where
17 someone has a right to speak for someone else. In this
18 case, you don't have the right under law to speak for Ms.
19 Wescott, so the State will issue a default order in this
20 case that will include the appeal rights and of course
21 that issue is preserved should you or Ms. Wescott want to
22 pursue it on appeal.

23 MR. HATLEY: Well, Your Honor, this is an
24 indication of the obstacles that we have faced in the
25 last 25 years in dealing with this organization and

1 they've been very arbitrary, they have been capricious in
2 their pursuance --

3 ALJ: Mr. Wescott (sic), it's not the
4 organization, it's the administrative law judge that's
5 making this ruling. It's not an arbitrary ruling, sir.
6 It is the law. I am not at liberty to ignore the law.
7 I have to do what the law tells me that I have to do.

8 MR. HATLEY: And my power of attorney has
9 no effect in this case?

10 ALJ: That's correct, sir. Power of
11 attorney does not --

12 MR. HATLEY: That's your ruling?

13 ALJ: Yes, sir. Power of attorney -- to
14 make it clear, power of attorney does not give you the
15 authority to represent a person in a contested case
16 proceeding where the provisions of the contested case
17 rules apply unless those specific rules -- or rules of
18 the Department of Environmental Quality, in this case the
19 initiating agency -- give you greater rights to
20 representation than the contested case rules do. In this
21 case I have no evidence that they do.

22 MR. HATLEY: There's no evidence in the
23 past history and testimony that we have no grandfathered
24 rights in here.

25 ALJ: That's correct, sir.

1 MR. HATLEY: We have no rights then, I
2 understand.

3 ALJ: You have no grandfathered rights for
4 anything that's happened in the past. What I have to
5 look at is the law as it exists at the time of this
6 proceeding.

7 MR. HATLEY: Do we have time to ask for a
8 recess to call for counsel to represent?

9 ALJ: Sir, that's something that could have
10 been brought up earlier. At this late date, no, sir.
11 This matter has been pending for some months now. You
12 still have the right to seek counsel to represent her on
13 any subsequent proceedings, exceptions to the
14 Department's final order or appeal of the Department's
15 final order. You have the right to seek counsel then,
16 but at this date, we're sitting here ready to go. I
17 don't have the respondent and I don't have an attorney.
18 Ms. Wescott will get a copy of the Department's order in
19 the mail and you might just pass on to her that she does
20 have that right to file exceptions to the Department's
21 final order. She then has the right to appeal to the
22 appellate courts.

23 MR. HATLEY: And we shall appeal. We shall
24 appeal.

25 ALJ: All right, sir. Okay. And that will

1 close the record. It's now 9:29.

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(Concluded)

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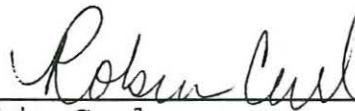
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25

I, Robin Curl, do hereby certify that I am a court transcriber in and for the State of Oregon.

I further certify that the proceedings were tape recorded and supplied to me, and thereafter reduced to typewriting by me, and that the foregoing is an accurate and complete transcript to the best of my ability of such tape recorded proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Salem, County of Marion, State of Oregon, this 10th day of April, 2004.



Robin Curl
Court Transcriber

Cynthia Rose Wescott
29388 SE Heiple Road
Eagle Creek, OR 97022
(503) 630-5867
fax # 503 630-5868

2/17/04

Via facsimile and regular mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem, OR 97314

FAXED
2-17-04 2:52 PM

Re: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

I have empowered Ralph A. Hatley with the power of attorney to act in my behalf in the above referenced case. He will be appearing at the February 18, 2004, 9 a.m. scheduled hearing with the instrument in hand.

Ralph A. Hatley has been my partner since 1971 and remains so at this time. He has experience representing our interests in all issues with DEQ involving Shady Oaks/Beaver Oaks Airport, Tax Lot 600, and Tax Lot 603 since 1981.

I will be available by telephone if there are any questions as to my intent regarding this matter.

Sincerely,



Cynthia Rose Wescott

Cc: Susan Greco via facsimile 503 229-6762

*Received 1st thing 2/18/04 am.
mj*

00343

Cynthia Rose Wescott
29388 SE Heiple Road
Eagle Creek, OR 97022
(503) 630-5867
fax # 503 630-5868

RECEIVED

FEB 17 2004

by Office of
Administrative Hearings

2/17/04

Via facsimile and regular mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem, OR 97314

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I will be available by telephone if there are any questions as to my intent regarding this matter.

Sincerely,



Cynthia Rose Wescott

Cc: Susan Greco via facsimile 503 229-6762

REC'D AT MY DESK AFTER RETURNED FROM SCHEDULED
HEARING IN PORTLAND. — Elmore 2/18/04

00342

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

**In the Matter of the
Proposed Assessment of Civil Penalty**

Cynthia Wescott, formerly Cynthia Gay,
Respondent

)
)
)
**ORDER ON RESPONDENT'S
REQUEST FOR SUBPOENA**

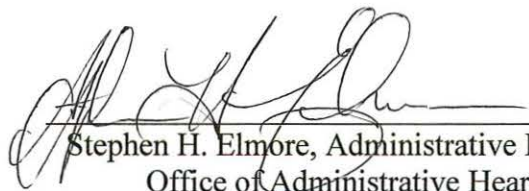
) OAH Case No. 111013
) Dept. Case No. LQ/T-NWR-02-094

By letter received at the Office of Administrative Hearings February 10, 2004, the Respondent requested that DEQ employees Herrington Rose, Andree Pollock, Greg Toran, and Jack Whalen be subpoenaed to the hearing in this case scheduled for February 18, 2004. The request includes no "showing of general relevance and reasonable scope of the evidence sought," as required by the provisions of OAR 137-003-0585. The request therefore must be denied.

Because the hearing now is barely one week away, no further subpoena or discovery requests will be entertained in this matter. All other issues will be addressed at the hearing.

ORDER

The Respondent's request for subpoenas is denied.



Stephen H. Elmore, Administrative Law Judge
Office of Administrative Hearings

RECEIVED

FEB 13 2004

00345

**THE OFFICE OF
ADMINISTRATIVE HEARINGS**

CERTIFICATE OF SERVICE


I certify that on February 12, 2004, I served the attached Order on Respondent's Request for Subpoena by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

CYNTHIA WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

**BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 7238**

SUSAN GRECO
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL



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

00346



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

February 12, 2004

Via fax (503) 945-5305
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem OR 97314

RE: Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

I am in receipt of Ms. Wescott's letter of this afternoon requesting subpoenas for Herrington Rose, Andree Pollock, Greg Toran and Jack Whalen. As I informed Ms. Wescott this afternoon, Mr. Rose and Mr. Toran will be present at the hearing, as such subpoenas for their appearance is not necessary. Mr. Whalen is no longer employed by the Department.

In regards to the request for subpoenas for Mr. Whalen and Mr. Pollock, the Department would argue that these requests be denied. Ms Wescott's request for a subpoena is untimely under Oregon Administrative Rule 340-011-0555, a copy of which is enclosed. This rule requires that service of subpoenas for the attendance of a witness be served at least 7 days prior to the hearing. Ms. Wescott, at this point, would not be able to comply with this requirement.

Additionally, the Department would argue that any testimony that Mr. Pollock could provide in this matter would be unduly repetitious and, as such, unnecessary. Mr. Pollock is employed as the manager of the Department's Underground Storage Tank program in our Northwest Region office. Mr. Pollock has no independent knowledge of any of the facts in this matter, instead his knowledge has been derived from his employees, specifically, Mr. Rose and Mr. Toran. Any testimony by Mr. Pollock would merely be a repetition of the testimony provided by Mr. Rose and Mr. Toran.

I will be out of the office starting Friday February 13th until Tuesday, February 17th but in my absence, you can contact Anne Price at (503) 229-6585.

Sincerely,

A handwritten signature in cursive script, appearing to read "Susan M. Greco".

Susan M. Greco
Environmental Law Specialist

CC: Cynthia Wescott via facsimile at (503) 630-5868

00347

Cynthia (Gay) Wescott

29388 SE Heiple Road
Eagle Creek, OR 97022
(503) 630-5867
fax # 503 630-5868

2/12/04

Via facsimile and regular mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem, OR 97314

*Steve
Elmore*

Re: Cynthia Gay
Case no. LQ/T-NWR-02-094

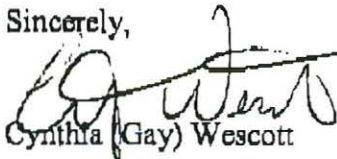
Dear Judge Elmore:

I am requesting that DEQ and the courts subpoena Michael Judd, Assistant County Counsel of Clackamas County, Oregon, and be in attendance at the upcoming hearing scheduled 2/18/04, 811 SW 6th Ave. Portland, OR (9 a.m.—Conference Room A) regarding the above referenced matter.

Michael Judd's testimony is relevant and imperative to establish my position.

Michael Judd can be located at the Office of County Counsel (Clackamas County) 906 Main Street, Oregon City, OR 97045.

Sincerely,


Cynthia (Gay) Wescott

Cc: DEQ via certified mail

00348

FEB. -10' 04 (TUE) 15:29

OFFICE OF ADMIN. HEARINGS

TEL: 503 945 5304

P. 001

FROM : WESTERN PARACHUTE SALES

FAX NO. : 503 630-5868

Feb. 10 2004 02:34PM P1

Cynthia (Gay) Wescott

29388 SE Heiple Road

Eagle Creek, OR 97022

(503) 630-5867

fax # 503 630-5868

2/10/04

Via facsimile and regular mail

(503) 945-5304

Judge Stephen Elmore

Office of Administrative Hearings

1905 Lana Avenue N.E.

Salem, OR 97314

Re: Cynthia Gay

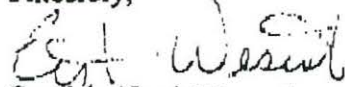
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

I am requesting that the following DEQ employees be subpoenaed and in attendance at the upcoming hearing scheduled 2/18/04, 811 SW 6th Ave. Portland, OR (9 a.m.— Conference Room A) regarding the above referenced matter:

Herrington Rose, Andree Pollock, Greg Toran, and Jack Whalen.

Sincerely,



Cynthia (Gay) Wescott

00349

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON

for the
DEPARTMENT OF ENVIRONMENTAL QUALITY

RECEIVED

FEB 02 2004

THE OFFICE OF
ADMINISTRATIVE HEARINGS

In the Matter of the
Proposed Assessment of Civil Penalty

Cynthia Wescott, formerly Cynthia Gay,
Respondent

) ORDER ON MOTIONS FOR
) RULING ON LEGAL ISSUE
)

) OAH Case No. 111013
) Dept. Case No. LQ/T-NWR-02-094

The Department of Environmental Quality issued a Notice of Violation, Department Order, and Assessment of Civil Penalty June 24, 2002, and served it on the Respondent, Cynthia Wescott (then Cynthia Gay). Ms. Wescott requested a hearing July 15, 2002. A hearing was scheduled for January 14, 2004, but subsequently was postponed to February 18, 2004.

The Department filed a Motion for Ruling on Legal Issues December 18, 2003. Ms. Wescott filed her response and her own Motion for Ruling on Legal Issues January 20, 2004.

The issue that both motions address is whether the underground storage tank, the focus of the entire proceeding, is a "farm tank," as that term is defined by 40 CFR 280.12 (incorporated by reference in former OAR 340-150-0010, the rule in effect at the time the original notice was issued). I conclude that the underground storage tank is not a "farm tank," as defined by the rule, and therefore grant the Department's motion and deny Ms. Wescott's motion.

According to 40 CFR 280.12, a farm tank "is a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. 'Farm' includes fish hatcheries, rangeland and nurseries with growing operations." In this case, nothing in the affidavits or exhibits submitted by the Department or Ms. Wescott establishes that the property on which the tank is located is "a tract of land devoted to the production of crops" (neither the Department nor Ms. Wescott alleges that the provisions of the rules related to raising animals or fish apply).

In October 1991, Ms. Wescott applied for a permit for the underground storage tank, listing herself as the property owner and permittee, and identifying the facility as "Beaver Oaks Airport." The affidavit and photographs of Department employee Greg Toran—unrebutted by the affidavits of Ms. Wescott and her affiant, John Bresko—establish that the property still was being identified as Beaver Oaks Airport in November 1998, and that a business called "Skydive Eagle Creek" was being operated there. That Ms. Wescott and her partner "harvested hay crops a number of years" and "had a communal garden" does not establish that the property was "devoted to the production of crops." In light of the evidence that any hay grown was given

00352

away and the land was kept "groomed," the more reasonable conclusion is that the property was maintained as a grass landing strip.

Ms. Wescott argues that her use of the property necessarily is a farm use because the property is located in an exclusive farm use zone. As defined by ORS 215.203, however, "'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops * * *." Nothing in the record establishes that the subject property is devoted to "the primary purpose of obtaining a profit in money by raising, harvesting and selling crops." The record does establish, however, that the property clearly has been used as an airport or skydiving facility since installation of the underground storage tank. Any farm use at the property has been, at best, incidental. The tank therefore is not a "farm tank" as defined by the rule.

ORDER

The Department's motion for ruling on a legal issue is granted, and Ms. Wescott's motion for ruling on a legal issue is denied. The underground storage tank located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon, is not a "farm tank" as defined by 40 CFR 280.12. All other issues will be addressed at the contested case hearing February 18, 2004, or by the Department and Ms. Wescott should they reach agreement on resolution of the contested case before the hearing.



Stephen H. Elmore, Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE


I certify that on January 28, 2004, I served the attached Order on Motions for Ruling on Legal Issue by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

CYNTHIA WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

BY FIRST CLASS MAIL AND CERTIFIED MAIL
BY CERTIFIED MAIL RECEIPT # 7001 1940 0000 1117 6675

SUSAN GRECO
OREGON DEQ
OFFICE OF COMPLIANCE AND ENFORCEMENT
811 SW 6TH AVE
PORTLAND OR 97204

BY FIRST CLASS MAIL



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

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: Cynthia Wescott

CASE NUMBER: 111013

ALJ: Stephen Elmore

DATE: 1/28

☐ PHC NTC

☐ HRG NTC

OTHER Order on Motions
for Rulings on
Legal Issues

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none">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.	A. Signature <input checked="" type="checkbox"/> <u>C. Wescott</u> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee
	B. Received by (Printed Name) <u>Cindy Wescott</u>
	C. Date of Delivery <u>1/29</u>
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No
1. Article Addressed to: <div>CYNTHIA WESCOTT 29388 SE HEIPLE RD EAGLE CREEK OR 97022</div>	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.
2. Article Number (Transfer from service label)	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes
7001 1940 0000 1117 6675	

PS Form 3811, August 2001

Domestic Return Receipt

2ACPRI-03-Z-0985

U.S. Postal Service CERTIFIED MAIL RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
OFFICIAL USE	
Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$
Sent To	
CYNTHIA WESCOTT 29388 SE HEIPLE RD EAGLE CREEK OR 97022	
PS Form 3800, January 2001	

See Reverse for Instructions

RECEIVED
FEB 04 2004
THE OFFICE OF
ADMINISTRATIVE HEARINGS

RECEIVED

JAN 20 2004

by Office of
Administrative Hearings

Cynthia (Gay) Wescott
29388 SE Heiple Road
Eagle Creek, OR 97022
(503) 630-5867
fax # 503 630-5868

1/16/04

Via facsimile and certified mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem, OR 97314

Re: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

Enclosed you will find my motion for Ruling on Legal Issues in the above entitled matter. I am requesting a ruling that the underground storage tank in question was a "farm tank" located on EFU 20 property. I am enclosing 5 exhibits with this request.

If you should have any further questions relating to this case, I can be reached at (503) 630-5867.

Sincerely,


Cynthia (Gay) Wescott

Enclosure (w/o exhibits via facsimile)
cc: Susan Greco, 811 SW Sixth Avenue, Portland, OR 97204-1390

00357

1 BEFORE THE OREGON ENVIRONMENTAL
2 QUALITY COMMISSION
3

4 In the Matter of:) RESPONDENTS ANSWER AND MOTION FOR
5 CYNTHIA GAY) RULING ON LEGAL ISSUES
6 Respondent) No. LQ/T-NWR-02-094
) CLACKAMAS COUNTY
7)
8)
9)
10)
11)

11 I. LAW AT ISSUE

12 Respondent opposes the Department's motion for ruling on Legal Issues
13 and via this motion, moves the Administrative Law Judge to find, as a
14 matter of law, the underground storage tank in question is a "farm
15 tank". In support of her motion, respondent relies upon the attached
16 affidavits of Cindy Gay and John Bresko.

17 The department stipulates that respondent's UST meets all the
18 conditions for qualifying as an exempt tank, with the exception of the
19 tank being a "farm tank" as defined by the regulations. A "Farm Tank"
20 is defined as "a tank located on a tract of land devoted to the
21 production of crops or raising animals, including fish, and associated
22 residences and improvements". 40 CFR 280.12

23 II. EVIDENCE IN SUPPORT OF RESPONDENTS MOTION

24 Exhibit A - Affidavit Cynthia Gay, property owner

25 Exhibit B - Affidavit John Bresko, fuel supplier, owner Estacada

Oil

1 Exhibit C - Certified true copy Clackamas County Assessor map
2 Section 18 T3 SR4E Tax Lot 603 dated 1-15-04

3 Exhibit D - Certified true copy of 5-19-79 aerial photo with
4 outlines of property from County Assessor office dated 1-15-04

5 Exhibit E - Clackamas County Planning Department letter dated
6 1-15-04

7 III. ARGUMENT

8 The department misstates and selectively chooses only a part of the
9 plain meaning of the term "devoted". The complete definition for the
10 term, as taken from the American Heritage Dictionary, 4th edition, 2000
11 is as follows:

12 "To give or apply (one's time, attention, or self) entirely to a
13 particular activity, pursuit, cause, or person. 2. To set apart for a
14 specific purpose or use: *land devoted to mining*. 3. To set apart by or
as if by a vow or solemn act; consecrate: *a temple devoted to Apollo*."

15 The interpretation of the term "devoted" by the department is neither
16 plausible nor reasonably consistent with the wording of the rule and
17 the underlying statute. The department argues that since a portion of
18 the property is used as a landing strip by aircraft, the property is
19 not "entirely given over to a particular activity," i.e., the
20 production of hay. Taken to its logical conclusion, the department's
21 interpretation would exclude from the farm tank exemption, any and all
22 property for which any portion is used for any purpose other than "the
23 production of crops or raising animals". Even a gravel road across a
24 tract of land used for farming would prevent the land from being
25 considered a farm since the entire tract is not "entirely given over
to" farming.

1 The definition relied upon by the department, in its complete and
2 accurate terms, refers to actions taken by a person or individual. The
3 correct and plain meaning of "devoted" applicable here, is "to set
4 apart for a specific purpose or use", such as land devoted to mining
5 or land devoted to farming.

6 Respondent's fuel tank is located on land devoted to farming. It was
7 installed in 1981 on then existing tax lot 600, which consisted of
8 23.83 acres. *See Exhibits A and B.* The property is zoned for exclusive
9 farm use. *See Exhibits C and E.* The property has been used since being
10 owned by respondent to produce hay. An adjacent grass landing strip,
11 then known as tax lot 603 and consisting of 3 acres, was acquired by
12 respondent and her partner in 1981. *See Exhibits C and D.*

13 In 1989, the Clackamas County Tax Assessor joined tax lots 600 and 603
14 into one lot, known as tax lot 603, consisting of 26.83 acres. The
15 fact that slightly more than 10% of present day tax lot 603 is
16 available for use as a grass landing strip for aircraft does not mean
17 that tax lot 603 is not land devoted to the production of hay or other
18 crops. The property is still presently zoned for exclusive farm use.

19 It has been set aside for a particular purpose by the zoning
20 authorities, i.e., farm use. *See Exhibit E.* It has been used and
21 continues to be used for that purpose by respondent. A one acre
22 portion of it in the northeast corner where the pole barns are located
23 has been reclassified as improved exclusive farm use. The department
24 does not dispute the fact that the property, other than the landing
25 strip, has been and is used for the production of hay.

IV. CONCLUSION

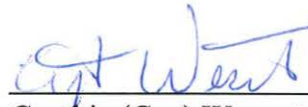
Respondent requests the Administrative Law Judge to find that the underground storage tank located at 29388 SE Heiple Rd., Eagle Creek, Oregon, is a farm tank and to dismiss the Notice of Violation and Department Order and Assessment of Penalty.

CERTIFICATE OF SERVICE

I do hereby certify that on January 16, 2004 I served a copy of the attached motion to:

Susan Greco
Department of Environmental Quality
811 SW 6th Ave
Portland, OR 97204-1390

By mailing in a sealed envelope, certified mail, postage prepaid, and deposited in the mail at Estacada, Oregon and via facsimile.



Cynthia (Gay) Wescott

00362

BEFORE THE OREGON ENVIRONMENTAL

QUALITY COMMISSION

In the Matter of:)
CYNTHIA GAY) AFFIDAVIT
Case No. LQ/T-NWR-02-017)
STATE OF OREGON)
County of Clackamas)

I, Cynthia Gay being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Cynthia Gay and my partner Ralph Hatley purchased tax lot 600 (consisting of 23.83 acres) of farmland from C.E. Odom July 12, 1977. At that time the property was zoned by Clackamas County as EFU 20.

2. On or about May 1981 we purchased a new 1000 gallon fuel tank and installed it on the property (tax lot 600).

3. My partner and I purchased the adjoining property known as tax lot 603, which consisted of the 3 acre grass landing strip owned by Jim and Candace Welch. This purchase date was February 19, 1981.

4. Clackamas County Assessor joined tax lot 600 into tax lot 603 June 9, 1989 and the property became tax lot 603 (now consisting of 26.83 acres) and continues to be zoned EFU 20.

5. Since the purchase of the property, in 1977 we have harvested hay crops a number of years. We also, have had a communal garden. We have allowed the land to lay fallow a few years in order to eradicate noxious

EXHIBIT
00363 A
RESPONDENT


1 weeds in accepted farming practices. We have kept the land mowed and groomed
2 with our two farm tractors.

3 6. The fuel tank has held automotive fuel only (not for resale).
4 It has been used to fuel tractors, rototillers, automobiles, agricultural
5 aircraft (crop dusters). On one occasion emergency fuel was provided to an
6 Air Force search and rescue helicopter searching for a lost hunter in the
7 upper Clackamas River area.

8 7. At no time during my ownership of the property has the fuel
9 tank been located on the three acre landing strip (formerly known as tax lot
10 603).

11 8. The Clackamas County tax assessor changed one acre of the 26.83
12 acre property to improved EFU. This one acre is located in the Northeast
13 portion of the tax lot and includes the pole barn buildings that have been
14 constructed.

15 Date: 1-15-04

16
17 
18 Cynthia Gay

19
20 Sworn and subscribed before me this 15 date of January 2004



25



Notary Public for Oregon

My Commission Expires

4-5-04

SEAL

EXHIBIT
00364 **A**
RESPONDENT

BEFORE THE OREGON ENVIRONMENTAL

QUALITY COMMISSION

In the Matter of:)
CYNTHIA GAY) AFFIDAVIT
Case No. LQ/T-NWR-02-017)
STATE OF OREGON)
County of Clackamas)

I, John Bresko, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, John Bresko have owned and operated Estacada Oil Inc. 219 SE Highway 224, Estacada, OR 97023 for 35 years.

2. I have sold and delivered automotive gasoline to the UST 1000 gallon unregulated tank owned by Cindy Gay and Ralph Hatley since 1981.

3. In September 1991 John Wixon of the DEQ office visited my place of business and informed me not to deliver automotive fuel to any unregulated tanks located on the property located at 29388 SE Heiple Road, Eagle Creek, OR 97022 (and owned by Cindy Gay and/or Ralph Hatley). At that time I informed him that the tank that I delivered to on the property was a 1000 gallon or less capacity tank. And being a farm tank under the regulations was not regulated. I further informed Mr. Hatley and Ms. Gay of his visit and conversation.

4. In the past five years my fuel deliveries have been confined to the two fuel trucks owned by Cindy Gay and Ralph Hatley.

EXHIBIT
B

00365 RESPONDENT

1 Date: 1-16-04

2
3 John I Bresko

4 John Bresko, President

5 Estacada Oil Co

6
7 Sworn and subscribed before me this 16 day of January 2004



11 Liz Myers

12 Notary Public for Oregon

13 My Commission Expires

14 05-30-06

15 SEAL

16
17
18
19
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22
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24
25

EXHIBIT
B
RESPONDENT

00366



CLACKAMAS COUNTY

Board of Commissioners

January 15, 2004

To: Ginny Van Loo, BCC Assistant

From: Mike McCallister, Planning Staff

RE: Property Location 29388 SE Heiple Road; 3-4E-18 Tax Lot 603

BILL KENNEMER
CHAIR

LARRY SOWA
COMMISSIONER

MARTHA SCHRADER
COMMISSIONER

The above property is currently zoned Exclusive Farm Use (EFU). The property has continuously been zoned EFU since 1976.

EXHIBIT

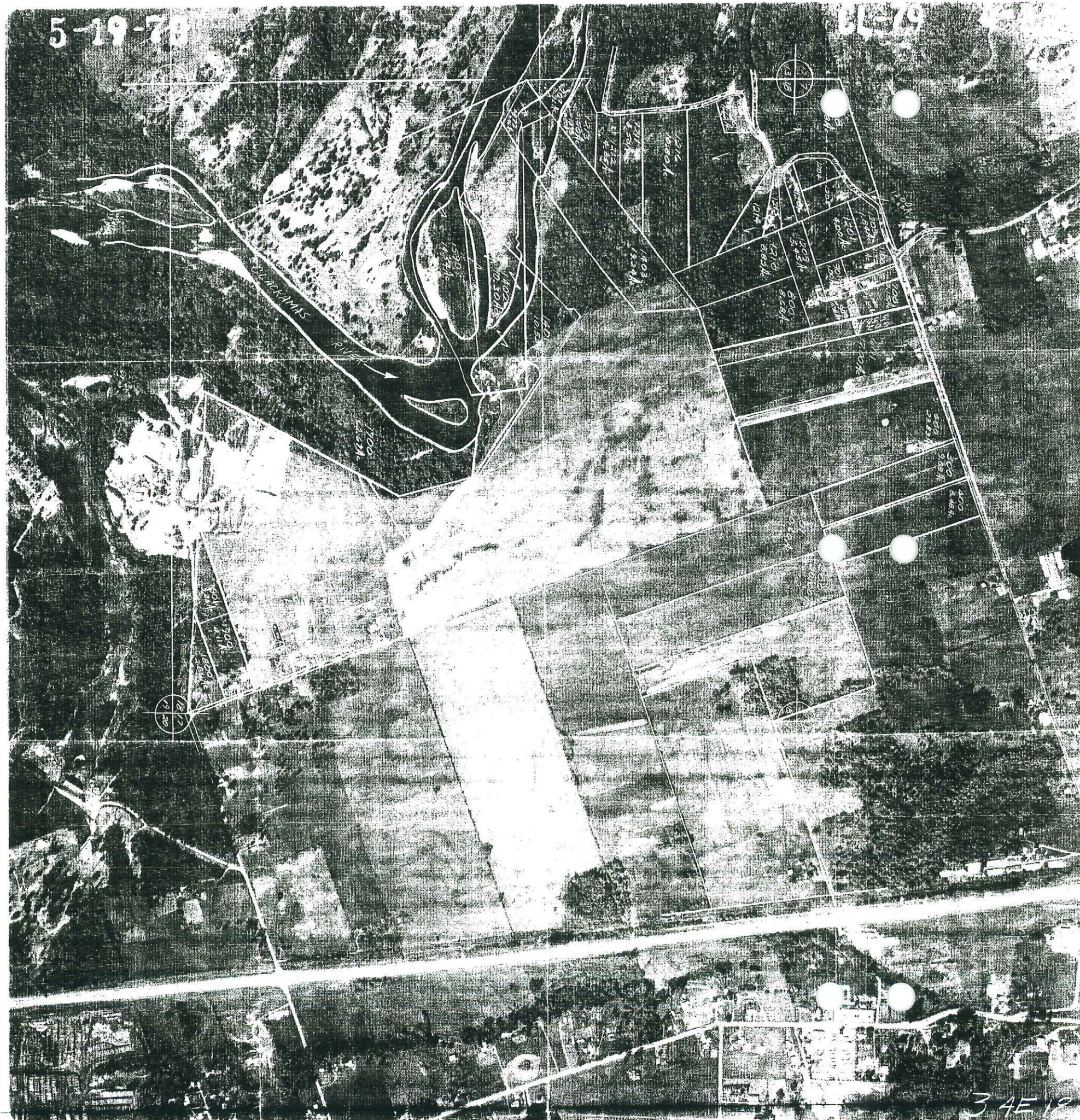
E

RESPONSE

00363

5-19-78

11-79



34E12

STATE OF OREGON }
COUNTY OF CLACKAMAS } ss

I Ray Erland County assessor of the State of Oregon for the County of Clackamas, do hereby certify that the foregoing copy of ASSESSOR map has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original, as the name appears on file and of record in my office and in my care and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal this 15 day of Jan, 2024

Ray Erland
Mary L. Hanks By:

Assessor

Deputy

EXHIBIT

D
RESPONDENT

This map was prepared for assessment purpose only.

SECTION 18 T.3S. R.4E. WM.

3 4E 18

CLACKAMAS COUNTY

1"=400'

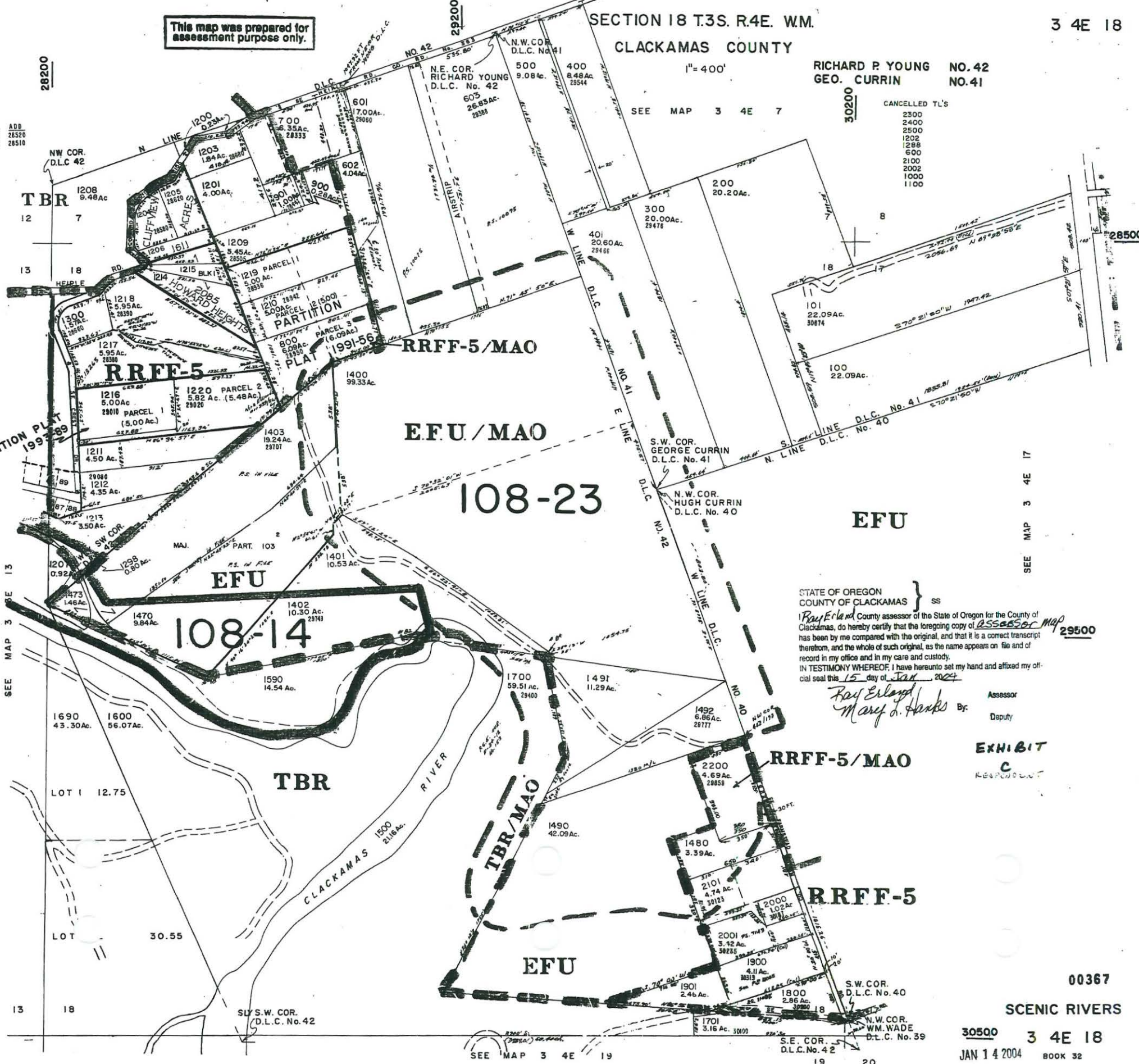
RICHARD P. YOUNG NO. 42
GEO. CURRIN NO. 41

SEE MAP 3 4E 7

CANCELLED T.L.S.

2300
2400
2500
1202
1288
600
2100
2002
1000
1100

TL ADD
1206 28520
1215 28510



STATE OF OREGON }
COUNTY OF CLACKAMAS } SS
I, Ray Erland, County assessor of the State of Oregon for the County of
Clackamas, do hereby certify that the foregoing copy of Assessor Map 29500
has been by me compared with the original, and that it is a correct transcript
thereof, and the whole of such original, as the name appears on file and of
record in my office and in my care and custody.
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my off-
cial seal this 15 day of Jan, 2004

Ray Erland
Mary J. Hanks By: Assessor
Deputy

EXHIBIT
C
RECORDED

00367

SCENIC RIVERS

30500 3 4E 18
JAN 14 2004 BOOK 32



Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings

Transportation Hearings Division
Employment Department
1905 Lana Avenue NE
Salem, OR 97314
(503) 945-5547
FAX (503) 945-5304
TTY 1-800-735-1232

NOTICE OF HEARING

Date Mailed: January 14, 2003⁴

CYNTHIA GAY
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

SUSAN GRECO
DEPT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVENUE
PORTLAND OR 97204

BY FIRST CLASS AND CERTIFIED MAIL.
CERTIFIED MAIL RECEIPT #7001 1940 0000 1117 6514

RE: *In the Matter of Cynthia Gay*
For the Oregon Department of Environmental Quality
Office of Administrative Hearings Case No. 111013
Agency Case No. LQ/T-NWR-02-094

RECEIVED

JAN 15 2004

THE OFFICE OF
ADMINISTRATIVE HEARINGS

A hearing has been set in the above-entitled matter before the Office of Administrative Hearings.

Hearing Date: February 18, 2004 **Hearing Time:** 9:00 a.m.

Location: Dept of Environmental Quality – Conf Rm 6A
Check in with Receptionist on the 7th Floor
811 SW Sixth Ave
Portland OR 97204-1390

The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency for whom the hearing is held. Your case has been assigned to Administrative Law Judge Stephen Elmore, an employee of the Office of Administrative Hearings.

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired or need a language interpreter at the hearing, immediately notify the Office of Administrative Hearings at (503) 945-5547 or TDD at 1-800-735-1232. The Office of Administrative Hearings can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

lease notify the Office of Administrative Hearings at (503) 945-5547 immediately if you change your address or telephone number at any time prior to a final decision in this matter.

00372

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

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

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.
2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.
3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.
4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.
5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.
6. Interpreters. If you have a disability or do not speak English, the administrative law judge will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the administrative law judge a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.
7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the administrative law judge will have the opportunity to ask questions of all witnesses. DEQ or the administrative law judge will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented

by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

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

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

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: CYNTHIA GAY

CASE NUMBER: 111013

ALJ: STEVE ELMORE

DATE: 1/14/04

☐ PHC NTC

☒ HRG NTC

OTHER

Thanks, Ann ☺

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. 111013

1. Article Addressed to:

CYNTHIA GAY
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

2. Article Number

(Transfer from service label)

7001 1940 0000 1117 6514

PS Form 3811, August 2001

Domestic Return Receipt

2ACPRI-03-Z-0985

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X *Cynthia Gay*

☐ Agent

☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

1-15

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

**U.S. Postal Service
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(Domestic Mail Only. No Insurance Coverage Provided)

OFFICIAL USE

Postage \$

Certified Fee

Return Receipt Fee
(Endorsement Required)

Restricted Delivery Fee
(Endorsement Required)

Total Postage & Fees \$

Postmark
Here

Sent To

Street, Apt. No.,
or PO Box No.

City, State, ZIP+4

CYNTHIA GAY
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

PS Form 3800, January 2001

See Reverse for Instructions

RECEIVED

JAN 30 2004

THE OFFICE OF
ADMINISTRATIVE HEARINGS

00376



Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings

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Employment Department
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10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

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

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

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: CYNTHIA GAY

CASE NUMBER: 111013

ALJ: STEVE ELMORE

DATE: 1/14/04

☐ PHC NTC

☒ HRG NTC

OTHER

Thanks, Ann ☺

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">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. 111013		<p>A. Signature X <i>Cynthia Gay</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>Cynthia Gay</i> C. Date of Delivery <i>1-15</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes if YES, enter delivery address below: <input type="checkbox"/> No</p>	
1. Article Addressed to: <div>CYNTHIA GAY 29388 SE HEIPLE RD EAGLE CREEK OR 97022</div>		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
2. Article Number (Transfer from service label)		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
7001 1940 0000 1117 6514			
PS Form 3811, August 2001		Domestic Return Receipt 2ACPRI-03-Z-0985	

U.S. Postal Service CERTIFIED MAIL RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
OFFICIAL USE	
Postage \$	
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Sent To CYNTHIA GAY 29388 SE HEIPLE RD EAGLE CREEK OR 97022	
PS Form 3800, January 2001 See Reverse for Instructions	

RECEIVED
JAN 30 2004
THE OFFICE OF
ADMINISTRATIVE HEARINGS

Cynthia (Gay) Wescott

29388 SE Heiple Road
Eagle Creek, OR 97022
(503) 630-5867
fax # 503 630-5868

12/19/03

via certified mail

Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem, OR 97314

RE: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

Enclosed please find my motion to continue. I need the extra time to complete discovery.
I am also preoccupied with the holiday seasons business obligations.

Sincerely,



Cynthia (Gay) Wescott

cc: Susan Greco, 811 SW Sixth Avenue, Portland, OR 97204-1390

00379

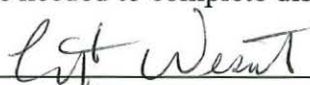
BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of:)	
CYNTHIA GAY)	
Case No. LQ/T-NWR-02-017	)	MOTION TO CONTINUE
Respondent)	

Comes now the respondent Cynthia (Gay) Wescott and moves the commission to extend the hearing date, time to respond from January 1, 2004 to February 2, 2004 and to extend the hearing from January 14, 2004 to February 16, 2004.

The motion is made to give respondent the time needed to complete discovery.

Dated 12-19-03



Cynthia (Gay) Wescott

CERTIFICATE OF SERVICE

I do hereby certify that on December 19, 2003 I served a copy of the attached motion to continue on:

Susan Greco
Department of Environmental Quality
811 SW 6th Ave
Portland, OR 97204-1390

By mailing in a sealed envelope, postage prepaid, and deposited in the mail at Estacada, Oregon.


Cynthia (Gay) Wescott



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

RECEIVED

DEC 16 2003

by Office of
Administrative Hearings

December 15, 2003

Via facsimile and regular mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem OR 97314

Re: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

Enclosed you will find the Department's Motion for Ruling on Legal Issues in the above entitled matter. The Department is requesting a ruling that the underground storage tank in question in this matter, was not a "farm tank," as that term is defined in 40 CFR 280.12. Per OAR 137-003-0580, Ms. Gay has until January 1, 2004 to respond to this motion unless you establish either longer or shorter time period for the response. I would appreciate your prompt response on the due date of Ms. Gay's response so that the Department has sufficient time to review and respond, as necessary. I have enclosed copies of the rule for Ms. Gay's review.

If you should have any questions or need further information on this matter, you can reach me at (503) 229-5152.

Sincerely,


Susan M. Greco
Environmental Law Specialist

Enclosure (w/o exhibits via facsimile)

cc: Cynthia Gay, 29388 S.E. Heiple Road, Eagle Creek, OR 97022

00334

DEQ-1

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:	)	DEPARTMENT'S MOTION FOR
CYNTHIA GAY	)	RULING ON LEGAL ISSUES
	)	NO. LQ/T-NWR-02-094
Respondent	)	CLACKAMAS COUNTY

In response to the Department's Notice of Violation, Department Order and Assessment of Civil Penalty no. LQ/T-NWR-02-094 (Notice), Respondent raised, as an affirmative defense, that the underground storage tank (UST) located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon, was not subject to regulation because it fits the definition of a "farm tank." The Department of Environmental Quality (the Department), via this Motion for Ruling on Legal Issues filed pursuant to OAR 137-003-0580, moves that the Administrative Law Judge, as a matter of law, find that the underground storage tank in question is not a "farm tank".

I. LAW AT ISSUE

Former OAR 340-150-0010 adopted by reference all definitions contained in 40 CFR 280.12.¹ 40 CFR 280.12 defines underground storage tank as "any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. This term does not include any: (a) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes." 40 CFR 280.12 defines "farm tank" as "a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property."

II. BACKGROUND

On June 25, 2002, the Department issued the Notice to Respondent, Cynthia Gay. In response to the Department's allegations that the UST was a regulated tank, Respondent raised the

¹ On February 14, 2003, revisions to OAR Chapter 340, Division 150 became effective. The revisions did not change the definition of either underground storage tank or farm tank. Regardless, the changes are not applicable to this matter since the alleged violations occurred prior to the effective date of these new regulations.

1 affirmative defense that the UST was a farm tank. Specifically, in paragraph 4 of its Request for
2 Hearing and Answer, Respondent alleged that:

3 “ (a) The tank was located on a tract of land devoted to the production of hay;
4 (b) The tank has a capacity of 1000 gallons;
5 (c) The tank was used to store motor gasoline; and
6 (d) The motor gasoline was used in farm vehicles, airplanes and automobiles and not
7 resold.”²

8 The Department stipulates to sections 4(b), (c) and (d) as set forth above. The remaining issue, as
9 alleged in Respondent’s affirmative defense, is whether the tank was located on a tract of land
10 devoted to the production of hay.

11 III. EVIDENCE IN SUPPORT OF DEPARTMENT’S MOTION

12 Exhibit A – Oregon Department of Environmental Quality Underground Storage Tank
13 Permit Application and Notification for Underground Storage Tanks

14 Exhibit B – Affidavit of Greg Toran, UST Inspector for the Department along with attached
15 NWR UST Inspection Report, Memorandum to File and Attached Photos

16 Exhibit C – Clackamas County Property Detail for 29388 S.E. Heiple Road, Eagle Creek,
17 Oregon

18 Exhibit D – Business Entity Data for Skydive, Incorporated

19 Exhibit E – Business Entity Data for Skydive Eagle Creek

20 Exhibit F – Areal Maps of 29388 S.E. Heiple Road, Eagle Creek, Oregon

21 IV. ARGUMENTS

22 As previously stated, 40 CFR 280.12, as adopted by former OAR 340-150-0010, defines
23 “farm tank” as “a tank located on a tract of land **devoted** to the production of crops or raising
24 animals, including fish, and associated residences and improvements. A farm tank must be located
25 on the farm property.” (Emphasis added). The term ‘devoted’ is not defined in either statute or rule.
26 When a term is not defined in either statute or rule, the first level of analysis is to examine both the

27 ² Request for Hearing and Answer dated July 15, 2002, page 2.

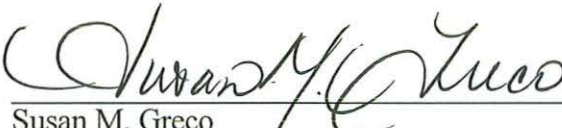
1 text and context of the term used in the rule. If the Department's intent is clear, no further analysis
2 is necessary.³ "In reviewing the department's interpretation of a department rule as applied in a
3 formal enforcement action, an administrative law judge must follow the department's
4 interpretation if that interpretation is both plausible and reasonably consistent with the wording
5 of the rule and the underlying statutes."⁴

6 The plain meaning of the term 'devoted' is "to give or apply entirely to a particular
7 activity, pursuit, cause or person."⁵ Based on the facts in the record, the tract of land on which
8 the UST was located is not devoted to the production of crops. Specifically, at least two business
9 entities which are unrelated to production of crops list the tract of land as their principal place of
10 business. *See Exhibits D and E.* Since 1991, Respondent has used the name of 'Beaver Oaks
11 Airport' as the facility name. *See Exhibit A.* A portion of the property has been rezoned from
12 'exclusive farm use' to 'other improved property'. *See Exhibit C.* The tract of land on which the
13 UST was located was used for a landing strip. *See Exhibits B and F.*

14 V. CONCLUSIONS

15 In conclusion, the Department requests that the Administrative Law Judge find that the UST
16 located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon was a regulated
17 UST and not a farm tank, as that term is used in 40 CFR 280.12. Based on such a ruling, the
18 Department requests that the issues at the contested case hearing be limited to whether the
19 violations alleged in the Notice occurred and what civil penalty should be assessed for each of those
20 violations.

21
22
23 12/15/03
24 Date

25
26 
27 Susan M. Greco
Environmental Law Specialist

28 ³ *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993).

29 ⁴ OAR 340-011-0545.

30 ⁵ *The American Heritage Dictionary*, 1978.

Oregon

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

October 22, 1991

Cindy Gay
Beaver Oaks Airport
29388 SE Heiple Rd
Eagle Creek, OR 97022

Re: UST Facility

Dear Ms Gay:

We have received a partial UST permit application for the tanks listed on your application received October 11, 1991. However, the:

☒ EPA notification form

☐ Oregon UST Permit Application

(\$25 received 10/11/91 applied to 88 fees)

☒ \$25 per tank fee per year - 1989,90,91 - 1 tank @ \$25 x 3 yrs = \$75.00

is missing and needs to be submitted before your application is complete. I have enclosed the appropriate form(s) and a copy of the original form that you submitted. Please fill out the form and return it to me. I will then be able to issue the permit for your tank(s).

Sincerely,

Barbara Nation
Office Specialist
UST Program

BLN
Enclosures



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

00388



OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY UNDERGROUND STORAGE TANK PERMIT APPLICATION

TANK OWNER

PLEASE PRINT CLEARLY

NAME Cindy Gay

ADDRESS 29388 S.E. Heiple Road
Eagle Creek, OR 97022

X *Cindy Gay*
TANK OWNER SIGNATURE

DATE 10-1-91

PHONE 503 630-5867

PERMIT FEE ASSESSMENT

1 Tanks at \$25 each = \$25.00
Number of tanks

AMOUNT REMITTED \$25.00

CK#839 \$25⁰⁰

OCT 11 1991

+ \$175-CK840-10/29/91
17848 bn see letter

PROPERTY OWNER

PLEASE PRINT CLEARLY

NAME Cindy Gay

ADDRESS 29388 S.E. Heiple Road
Eagle Creek, OR 97022

X *Cindy Gay*
PROPERTY OWNER SIGNATURE

FACILITY

PLEASE PRINT CLEARLY

NAME Beaver Oaks Airport

ADDRESS 29388 S.E. Heiple Rd.
Eagle Creek, OR 97022

PHONE (503) 630-5867

SIC Code _____

PERMITTEE

PLEASE PRINT CLEARLY

NAME Cindy Gay

ADDRESS 29388 S.E. Heiple Road
Eagle Creek, OR 97022

X *Cindy Gay*
PERMITTEE SIGNATURE

PHONE 503-630-5867

NEW INSTALLATION

(PLEASE SUBMIT THIS APPLICATION 30 DAYS PRIOR
TO USING THE TANK.)

Each completed application must include
the signatures of the tank owner, the pro-
perty owner and the permittee.

All three signature lines must be signed.

00389

9/99

OREGON UST SURVEY

INSTRUCTIONS

Please fill in form to the best of your knowledge. If you do not know or cannot estimate an item requested, please mark "Unknown."

Facility Name:

Tank Identification No. (e.g. ABC-123) or Arbitrarily Assigned Sequential Number (e.g. 1,2,3...)	TANK NO.	TANK NO.	TANK NO.	TANK NO.
1. Status of Tank (check one <u>ONLY</u> if applicable) If temporarily out of use, Estimated time out of use: 1 month-6 months 6 months-1 year 1 year-5 years 5 years or more Estimated date tank is to be brought back into use (mo/yr)	() () () () ()	() () () () ()	() () () () ()	() () () () ()
2. Was tank new at time of installation? (Y/N)	(Y)	()	()	()
3. Containment Systems (check one) Single-walled tank Double-walled tank Pit-lining system Unknown	(X) () () ()	() () () ()	() () () ()	() () () ()
4. Leak Detection System (check all that apply) Visual Stock Inventory Tile drain Vapor wells Sensor instrument (specify type): In-ground detector Within walls of double-walled tank Ground water monitoring wells Continuous in piping Pressure test Internal inspection Other, specify None Unknown	(X) (X) () () _____ () () () () () () () _____ () ()	() () () () _____ () () () () () () () _____ () ()	() () () () _____ () () () () () () () _____ () ()	() () () () _____ () () () () () () () _____ () ()
5. Overfill Protection (Yes/No)	(N)	()	()	()
6. Location of Piping (check all that apply) No parts in contact with soil Parts contacting the soil which are: Unprotected metal Made of corrosion resistant materials Corrosion-resisted coated Cathodically protected Double-walled Within a secondary containment Interior lined Unknown	() () () (X) () () () () () ()	() () () () () () () () () ()	() () () () () () () () () ()	() () () () () () () () () ()
7. History of Tank Repairs (check one except as indicated) If tank repaired, Indicate date of last repairs (mo/yr) None Unknown	_____ (X) ()	_____ () ()	_____ () ()	_____ () ()
8. History of Pipe Repairs (check one except as indicated) If pipe repaired, indicate date (mo/yr) None Unknown	_____ (X) ()	_____ () ()	_____ () ()	_____ () ()
9. Tank Removed from the Ground Indicate date (mo/yr) (mark only if applicable — tank removed since May 1, 1988)	_____ ()	_____ ()	_____ ()	_____ ()

THANK YOU FOR YOUR ASSISTANCE

00390

VI. DESCRIPTION OF UNDERGROUND STORAGE TANKS (Complete for each tank at this location.)

Tank Identification No. (e.g., ABC-123), or Arbitrarily Assigned Sequential Number (e.g., 1,2,3...)	Tank No.	Tank No.	Tank No.	Tank No.	Tank No.
1. Status of Tank (Mark all that apply <input checked="" type="checkbox"/>) Currently in Use <input checked="" type="checkbox"/> Temporarily Out of Use <input type="checkbox"/> Permanently Out of Use <input type="checkbox"/> Brought into Use after 5/8/86 <input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Estimated Age (Years)	69				
3. Estimated Total Capacity (Gallons)	1000				
4. Material of Construction (Mark one <input checked="" type="checkbox"/>) Steel <input checked="" type="checkbox"/> Concrete <input type="checkbox"/> Fiberglass Reinforced Plastic <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Internal Protection (Mark all that apply <input checked="" type="checkbox"/>) Cathodic Protection <input checked="" type="checkbox"/> Interior Lining (e.g., epoxy resins) <input checked="" type="checkbox"/> None <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. External Protection (Mark all that apply <input checked="" type="checkbox"/>) Cathodic Protection <input checked="" type="checkbox"/> Painted (e.g., asphaltic) <input checked="" type="checkbox"/> Fiberglass Reinforced Plastic Coated <input type="checkbox"/> None <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Piping (Mark all that apply <input checked="" type="checkbox"/>) Bare Steel <input checked="" type="checkbox"/> Galvanized Steel <input type="checkbox"/> Fiberglass Reinforced Plastic <input type="checkbox"/> Cathodically Protected <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Substance Currently or Last Stored in Greatest Quantity by Volume (Mark all that apply <input checked="" type="checkbox"/>) a. Empty <input type="checkbox"/> b. Petroleum <input checked="" type="checkbox"/> Diesel <input type="checkbox"/> Kerosene <input type="checkbox"/> Gasoline (including alcohol blends) <input checked="" type="checkbox"/> Used Oil <input type="checkbox"/> Other, Please Specify _____ c. Hazardous Substance <input type="checkbox"/> Please Indicate Name of Principal CERCLA Substance _____ OR Chemical Abstract Service (CAS) No. _____ Mark box <input checked="" type="checkbox"/> if tank stores a mixture of substances d. Unknown <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Additional Information (for tanks permanently taken out of service) a. Estimated date last used (mo/yr) b. Estimated quantity of substance remaining (gal.) c. Mark box <input type="checkbox"/> if tank was filled with inert material (e.g., sand, concrete)	38 Sept 91 90 gal <input type="checkbox"/>	/ <input type="checkbox"/>	/ <input type="checkbox"/>	/ <input type="checkbox"/>	/ <input type="checkbox"/>

Notification for Underground Storage Tanks

FORM APPROVED
OMB NO. 2050-0068
APPROVAL EXPIRES 3-30-91

Department of Environmental Quality

811 SW Sixth Ave.

Portland 97204

In Oregon call Toll Free 1-800-452-4011

STATE USE ONLY

GENERAL INFORMATION

Notification is required by Federal law for all underground tanks that have been used to store regulated substances since January 1, 1974, that are in the ground as of May 8, 1986, or that are brought into use after May 8, 1986. The information requested is required by Section 9002 of the Resource Conservation and Recovery Act (RCRA), as amended.

The primary purpose of this notification program is to locate and evaluate underground tanks that store or have stored petroleum or hazardous substances. It is expected that the information you provide will be based on reasonably available records or, in the absence of such records, your knowledge, belief, or recollection.

Who Must Notify? Section 9002 of RCRA, as amended, requires that, unless exempted, owners of underground tanks that store regulated substances must notify designated State or local agencies of the existence of their tanks. Owner means—

(a) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, and

(b) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such tank immediately before the discontinuation of its use.

What Tanks Are Included? Underground storage tank is defined as any one or combination of tanks that (1) is used to contain an accumulation of "regulated substances;" and (2) whose volume (including connected underground piping) is 10% or more beneath the ground. Some examples are underground tanks storing: 1. gasoline, used oil or diesel fuel, and 2. industrial solvents, pesticides, herbicides or fumigants.

What Tanks Are Excluded? Tanks removed from the ground are not subject to notification. Other tanks excluded from notification are:

1. farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;

2. tanks used for storing heating oil for consumptive use on the premises where stored;

3. septic tanks;

4. pipeline facilities (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968, or the Hazardous Liquid Pipeline Safety Act of 1979, or which is an intrastate pipeline facility regulated under State laws;
5. surface impoundments, pits, ponds, or lagoons;
6. storm water or waste water collection systems;
7. flow-through process tanks;
8. liquid traps or associated venting lines directly related to oil or gas production and gathering operations;
9. storage tanks situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

What Substances Are Covered? The notification requirements apply to underground storage tanks that contain regulated substances. This includes any substance defined as hazardous in section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subtitle C of RCRA. It also includes petroleum, e.g., crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

When To Notify? 1. Owners of underground storage tanks in use or that have been taken out of operation after January 1, 1974, but still in the ground, must notify by May 8, 1986. 2. Owners who bring underground storage tanks into use after May 8, 1986, must notify within 30 days of bringing the tanks into use.

Penalties: Any owner who knowingly fails to notify or submits false information shall be subject to a civil penalty not to exceed \$10,000 for each tank for which notification is not given or for which false information is submitted.

INSTRUCTIONS

Please type or print in ink all items except "signature" in Section V. This form must be completed for each location containing underground storage tanks. If more than 5 tanks are owned at this location, photocopy the reverse side, and staple continuation sheets to this form.

Indicate number of continuation sheets attached

I. OWNERSHIP OF TANK(S)

Owner Name (Corporation, Individual, Public Agency, or Other Entity)

Cindy Gay

Street Address

29388 S.E. Heiple Road

County

Clackamas

City

Oregon City, OR

State

ZIP Code

97045

Area Code

Phone Number

503

630-5867

Type of Owner (Mark all that apply)

☒ Current

☐ State or Local Gov't

☒ Private or Corporate

☐ Former

☐ Federal Gov't (GSA facility I.D. no.)

☐ Ownership uncertain

II. LOCATION OF TANK(S)

(If same as Section 1, mark box here ☐)

Facility Name or Company Site Identifier, as applicable

Beaver Oaks airport

Street Address or State Road, as applicable

29388 S.E. Heiple Road

County

Clackamas

City (nearest)

Eagle Creek,

State

OR

ZIP Code

97045

Indicate number of tanks at this location

One

Mark box here if tank(s) are located on land within an Indian reservation or on other Indian trust lands

☐

III. CONTACT PERSON AT TANK LOCATION

Name (If same as Section I, mark box here ☒)

Job Title

Area Code

Phone Number

IV. TYPE OF NOTIFICATION

☒ Mark box here only if this is an amended or subsequent notification for this location.

V. CERTIFICATION (Read and sign after completing Section VI.)

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.

Name and official title of owner or owner's authorized representative

Owner

Signature

French

Date Signed

10-24-91

CONTINUE ON REVERSE SIDE

RECEIVED
DEC 12 2003

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

BEFORE THE OREGON ENVIRONMENTAL
QUALITY COMMISSION

In the Matter of:
CYNTHIA GAY.
Case No. LQ/T-NWR-02-017

AFFIDAVIT

STATE OF OREGON
County of Multnomah

I, Greg Toran, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Greg Toran, have been employed by the Oregon Department of Environmental Quality as an Environmental Specialist since October 1, 1998.

2. That in the course of that employment, I conducted site inspections of underground storage tanks and drafted letters and memorandums in relation to those inspections.

3. That on or about November 14, 2000, I conducted a site inspection of an underground storage tank located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon.

4. During that site inspection, I took pictures of the land on which the underground storage tank was located. Additionally, during the site inspection, I noted that the underground storage tank was located in a field which was used as a landing strip for airplanes.

5. During the site inspection, I was told by Respondent's representative that the underground storage tank was used to fuel airplanes.

6. That on or about November 30, 2000, I drafted a memorandum setting forth my observations during the site inspection.

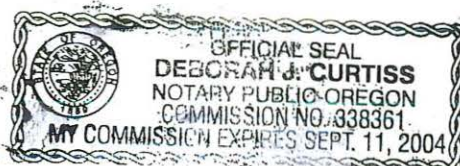
7. That the attached aforementioned pictures and memorandum are true and exact copies of the originals thereto.

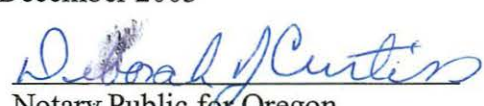
Date: 12/12/03


Greg Toran
Department of Environmental Quality

Sworn and subscribed before me this 12 day of December 2003

SEAL




Notary Public for Oregon
My Commission Expires

Sept. 11, 2004

EXHIBIT

B

00394

NWR UST FIELD INSPECTION REPORT

Inspection Date: 11/14/00

Site Name: Beaver Oaks Airport

Total Time* 3.0 hr

Site Address: 29398 Heiple Rd

*Include inspection, travel, paperwork

Eagle Creek

DEQ Inspector: Greg Torma

File/Facility No: 10905

Others Onsite: Ralph Hatley

(both UST & UST Cleanup file #'s as appropriate)

(site operator)
(include company name)

Supervisor License No. : _____ Exp. date _____
(note the name of the license holder with **)

Inspection Type

Y---N---Decommissioning

Y---N---Install-New

Y---N---Complaint

Y-(N)-1998 Compliance (full)

Y---N---Upgrade-Retrofit

Y---N---WQ-New Permit

Partial Compliance

Y---N---Service Provider Audit

Y---N---WQ-Exist Permit

Y---N---Leak Detection

Y---N---Cleanup

Y---N---Financial Responsibility

Y---N---SWLA/Soil Treatment

Y---N---Corrosion Protection

Y---N---Distributor Audit

Y---N---NA Spill & Overfill

Circle Y for.....Yes = inspected & in compliance (Y for data entry)

Circle N for.....No = inspected & NOT in compliance (N for data entry)

Leave Blank for.....Inspection not performed (no data entry necessary)

Photos Taken? (Y)-N (attach)

Samples Taken? Y-(N) (attach results)

Notes (use back of form as necessary)

P/water wells onsite, in Area. One UST contains gasoline, dispenser removed. Historic use in fueling small planes via transport truck and filtering system. Currently not used, operator to schedule product removal and sampling. UST closure in place or by removal to follow next summer as discussed.

See attached memo.

00395

State of Oregon
Department of Environmental Quality

Memorandum

Date: November 30, 2000

To: UST facility file 10905

From: Greg Toran ODEQ/NWR

Subject: Beaver Oaks UST status.

Site inspection to discuss current status of single UST. Met onsite with Ralph Hatley (reported as being owners rep). Hatley appears to meet the definition of Permittee. Site is being operated as an airport, jump school. Hatley appears to be operating other business concerns at this location. Inspection in response to phone call from Hatley, following recent NON issued by the Department.

Inspection to determine and discuss UST status and recent claim by Hatley of UST being farm tank. Property is zoned as farm use only, confirmed with county. Hatley claims to be raising hay as a crop, to be given away and not sold.

At the time of the inspection Hatley is most cooperative. Historic use of UST was for fueling small planes. At one time, fuel was pumped out of UST into transport truck containing filtering system. UST has been out of use as a fuel storage tank for planes for approx. 3 years. UST currently contains some measure of product, product has been siphoned out from time to time for various reasons, unrelated to planes according to Hatley. Dispenser/pump has been removed for 3 years according to Hatley.

Current amount of product in UST is unknown. Ground water in area is shallow within UST nest on a seasonal basis, according to Hatley. One drinking water well on the NE corner of the property. Other wells in the area. Hatley seems concerned with the possibility of impacts to the wells in the area and seems to have backed off from the initial claim of the UST being an unregulated farm tank.

This UST is most certainly a regulated UST based on past use. Hatley seems agreeable in following Department direction to decommission the UST. I suggested the following:

Remove all product and water in UST immediately. Verification of completion of this task by a third party in writing. This is to be followed by sampling of soil and if necessary water, per UST cleanup and compliance rules. Hatley to provide a written schedule for completion of this work within 3 weeks. Schedule to also include a target date for completion of the decommissioning. The Department to approve a later decommissioning date (next summer) provided that

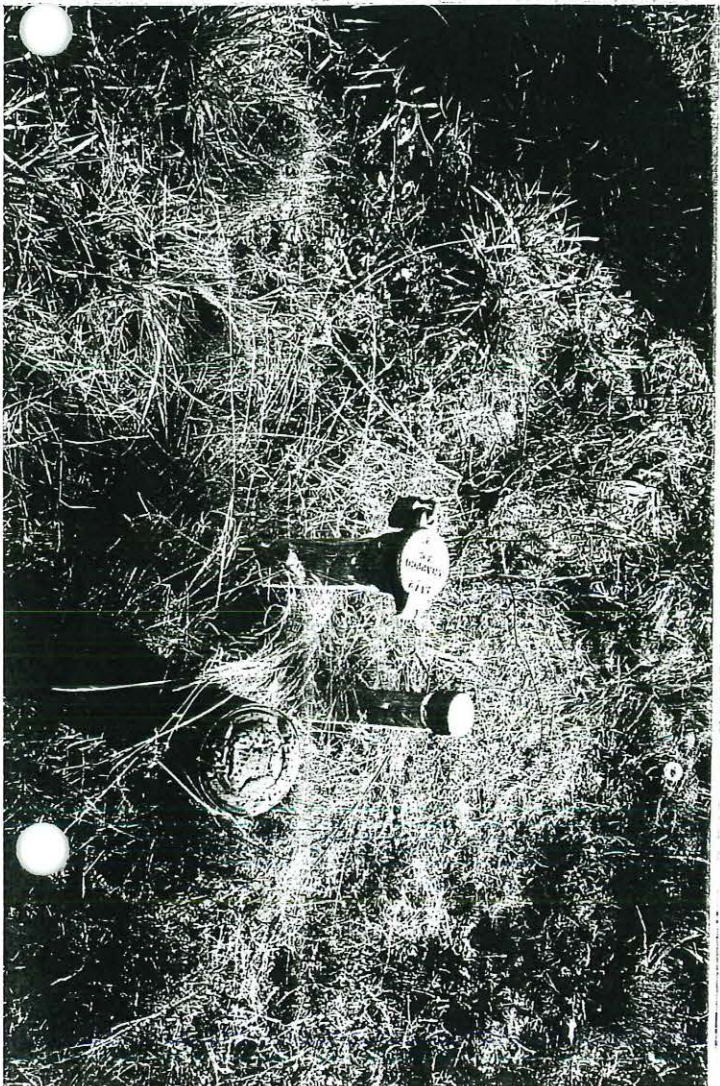
00396

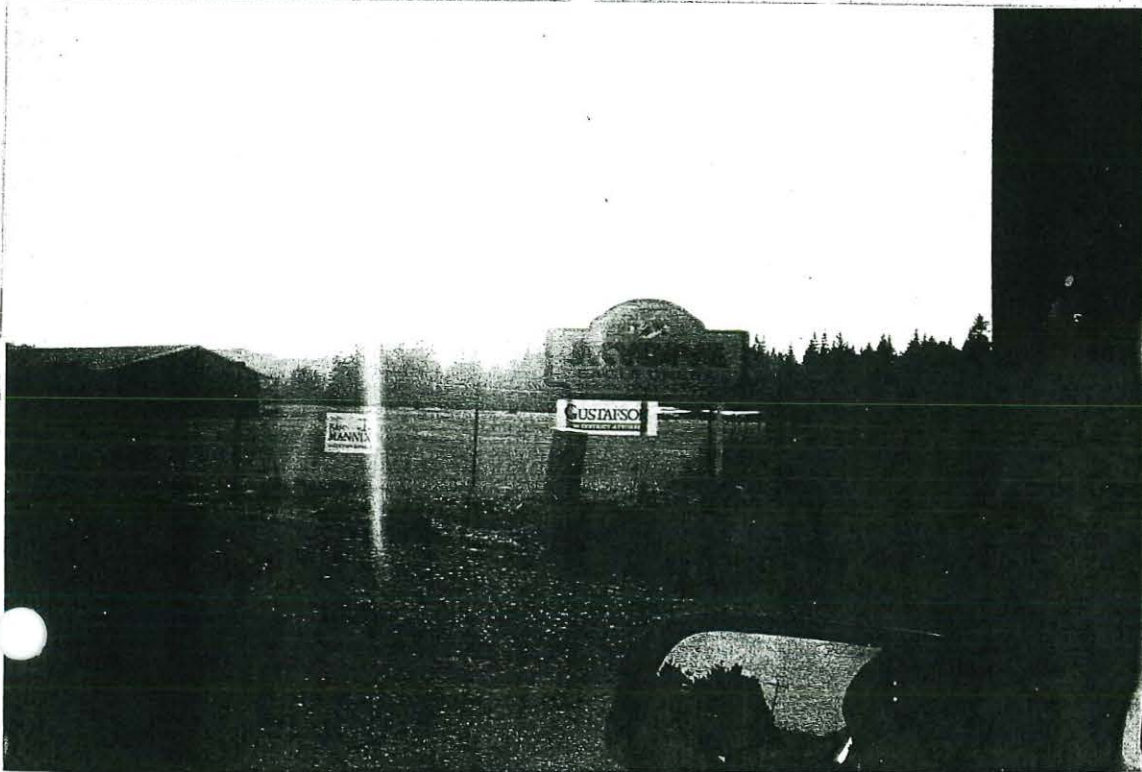
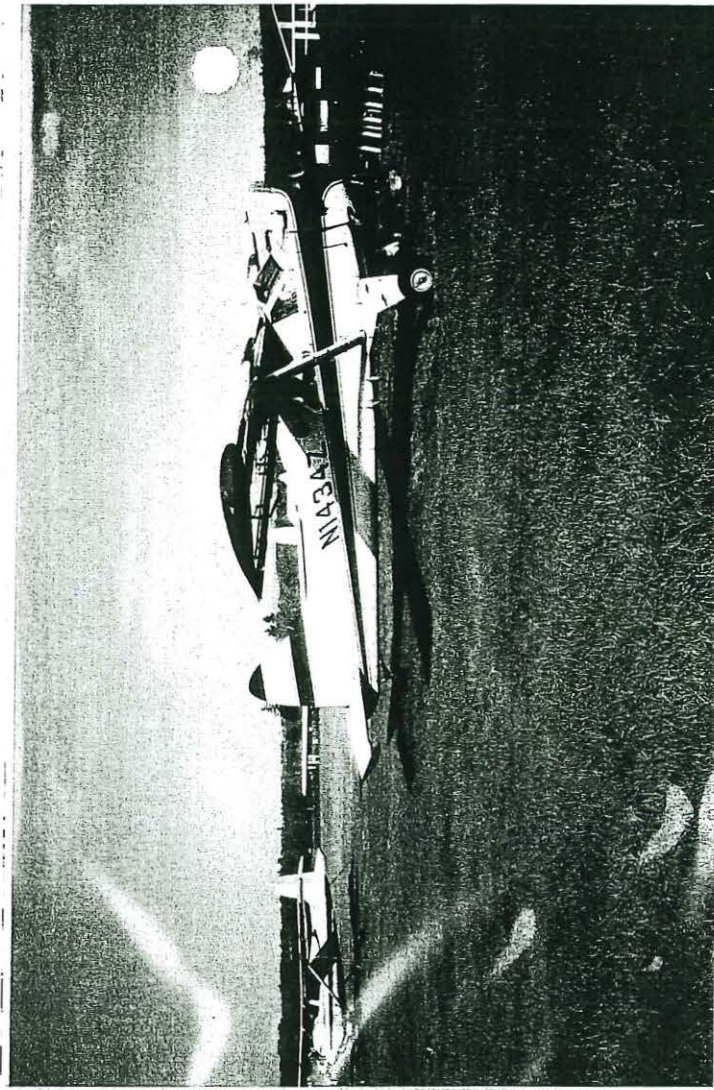
Hatley follow through with his plans for submittal of the schedule and completion of the UST pumping and sampling. Completion of the UST pumping and sampling and records submittal to be accomplished by the date noted in option 2 of the most recent NON. The date specified in the NON was 90 days from the date of the notice. So the due date for completion of this phase of the work would be the end of January, 2001.

Mailing documentation to Hatley. This documentation to be a summery sheet that outlines these steps, UST closure requirements, forms for documenting closure, and a list of licensed supervisors. Hatley stated that he would be doing the decommissioning. I recommended he consult licensed service providers or supervisors.



11/14/99
\$ 10905

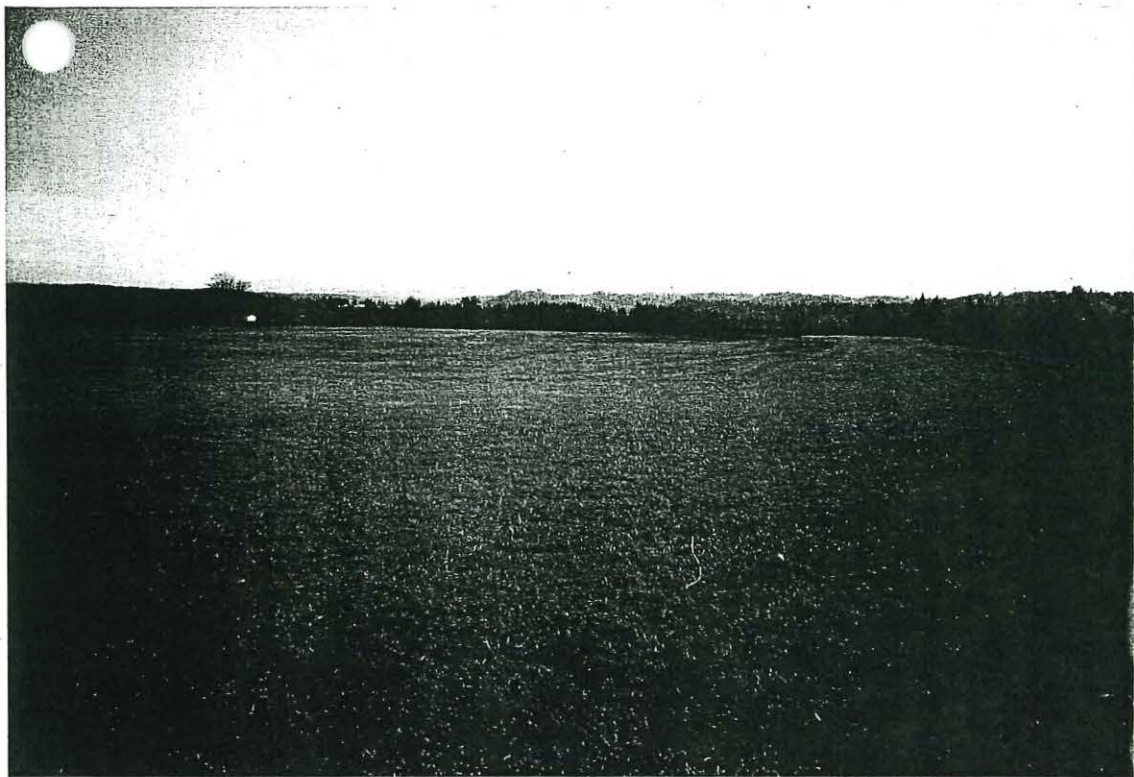




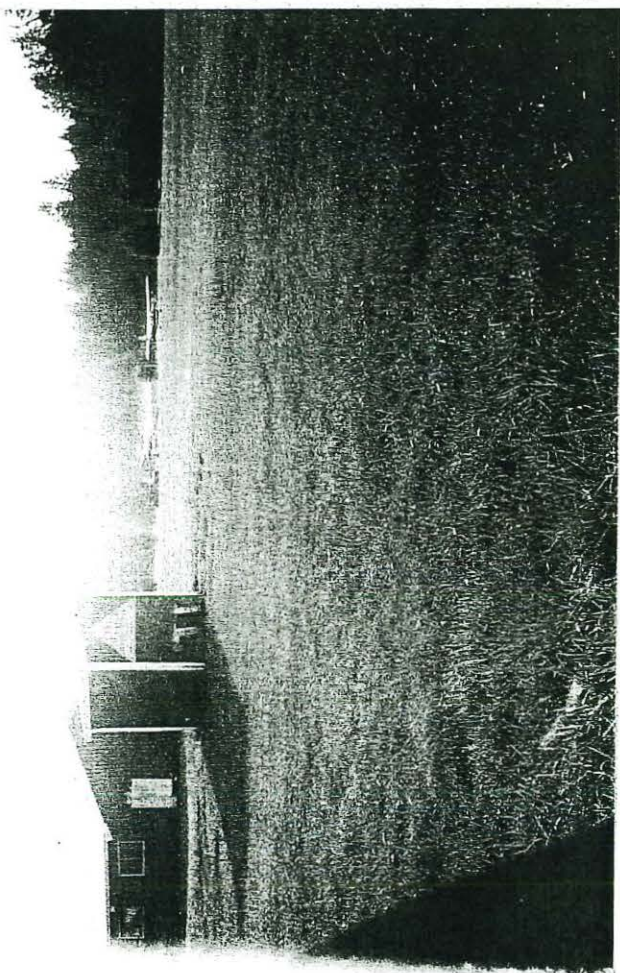
2 10002

11/12/10

00399



11/14/98
\$ 10905



00400

20P/11/11

20P01 2



CMC. 48767 22-03 112721-1001 6-48

00401

Oregon - Clackamas County Property Detail



C1 Co Assess 503-655-8671

[Return to List](#)[Return to Search Screen](#)[Record Help](#)

Address : 29388 H@

Records Current Through : 01/02/2002

Date Searched

: 06/05/2002

Parcel Nbr : 00932904 Alt Parcel Nbr : 34E18 00603

Taxpayer : GAY CYNTHIA ROSE

Address : 29388 SE HEIPLE RD

EAGLE CREEK, OR 97022

Situs Addr : 29388 SE HEIPLE RD

EAGLE CREEK, OR 97022

Neighborhood : Estacada rural all other

Land Class : 551

Bldg Class :

Exclusive farm use, land improved.

Full Baths : 0

Bedrooms : 0

Year Built :

Half Baths : 0

Living Area :

Year Assessed :

Real Market Value Land : \$ 230,349 Total Acreage : 26.83

Real Mkt Val Improvements : \$ 18,620 Fire Patrol Acres :

Real Mkt Val Fire District : \$ 248,969

Gross Tax Due : \$ 696.14

Assessed Val Fire District : \$ 47,830 Net Tax Due : \$ 675.26

Total Assessed Value : \$ 47,830 Outstanding Tax : \$ 0.00

Total Taxable Value : \$

Sale Date :

Sale Price : \$

Total Exempted Value : \$ 0

Exemption Description :

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OPENonline Western Operations Customer Support (800) 454-6575

00402

EXHIBIT

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C

Oregon - Clackamas County Property Detail

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Address : 29388 H@

Records Current Through : 01/02/2002

Date Searched

: 06/05/2002

Parcel Nbr : 01825644 Alt Parcel Nbr : 24E32 04501

Taxpayer : GAY CYNTHIA ROSE

Address : 29388 SE HEIPLE RD

EAGLE CREEK, OR 97022

Situs Addr :

Neighborhood : Estacada rural all other

Land Class

: 400

Bldg Class

= unimproved property over 3 Ac, no
other special designation

Full Baths :

Bedrooms :

Year Built :

Half Baths :

Living Area :

Year Assessed :

Real Market Value Land : \$ 130,813 Total Acreage :

Real Mkt Val Improvements : \$ 0 Fire Patrol Acres :

Real Mkt Val Fire District : \$ 130,813

Gross Tax Due : \$ 1,399.39

Assessed Val Fire District : \$ 96,319 Net Tax Due : \$ 1,357.41

Total Assessed Value : \$ 96,319 Outstanding Tax : \$ 0.00

Total Taxable Value : \$ Sale Date : 19990830

Sale Price : \$ 103,000

Total Exempted Value : \$ 0

Exemption Description :

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00403

Oregon - Clackamas County Property Detail

[Return to List](#)[Return to Search Screen](#)[Record Help](#)Address : **29388 H@**Records Current Through : **01/02/2002**

Date Searched

: **06/05/2002**Parcel Nbr : **01637884** Alt Parcel Nbr : **24E32 04905**Taxpayer : **GAY CYNTHIA R**Address : **29388 SE HEIPLE RD****EAGLE CREEK, OR 97022**

Situs Addr :

Neighborhood : **Estacada rural all other**Land Class : **400**

Bldg Class :

Full Baths : Bedrooms : Year Built :

Half Baths : Living Area : Year Assessed :

Real Market Value Land : **\$ 107,600** Total Acreage :Real Mkt Val Improvements : **\$ 0** Fire Patrol Acres : **1.00**Real Mkt Val Fire District : **\$ 107,600**Gross Tax Due : **\$ 853.26**Assessed Val Fire District : **\$ 57,490** Net Tax Due : **\$ 827.66**Total Assessed Value : **\$ 57,490** Outstanding Tax : **\$ 0.00**Total Taxable Value : **\$** Sale Date : **19970801**Sale Price : **\$ 115,000**Total Exempted Value : **\$ 0**

Exemption Description :

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00404

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Business Name SearchNew SearchPrinter Friendly**Business Entity Data**

Registry Nbr	Entity Type	Entity Status	Jurisdiction	Registry Date	Duration Date	Renewal Date
355290-80	DBC	ACT	OREGON	07-17-1993		
Entity Name	SKYDIVE, INCORPORATED					
Foreign Name						

New SearchPrinter Friendly**Associated Names**

Type	PPB	PRINCIPAL PLACE OF BUSINESS					
Addr 1	29388 SE HEIPIE RD						
Addr 2							
CSZ	EAGLE CREEK	OR	97022		Country	UNITED STATES OF AMERICA	

Type	AGT	REGISTERED AGENT			Start Date	07-17-1993	Resign Date	
Name	PATRICK		A	BUTLER				
Addr 1	522 SW 5TH AVE STE 905							
Addr 2								
CSZ	PORTLAND	OR	97204		Country	UNITED STATES OF AMERICA		

Type	MAL	MAILING ADDRESS				
Addr 1	29388 SE HEIPLE RD					
Addr 2						
CSZ	EAGLE CREEK	OR	97022		Country	UNITED STATES OF AMERICA

Type	PRE	PRESIDENT					
Name	RALPH	A	HATLEY				
Addr 1	29388 SE HEIPLE RD						
Addr 2							
CSZ	EAGLE CREEK	OR	97022		Country	UNITED STATES OF AMERICA	

Type	SEC	SECRETARY				
Name	RALPH	A	HATLEY			
Addr 1	29388 SE HEIPLE RD					
Addr 2	<div>EXHIBIT</div> <div>00406</div>					

EXHIBIT

00406

CSZ | **EAGLE CREEK** | **OR** | **97** | **Country** | **UNITED STATES OF AMERICA**

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[Printer Friendly](#)

Name History

Business Entity Name	Name Type	Name Status	Start Date	End Date
SKYDIVE, INCORPORATED	EN	CUR	07-17-1993	

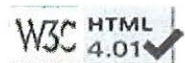
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Summary History

Image Date	Action	Transaction Date	Effective Date	Status	Name/Agent Change	Dissolved By
06-11-2003	ANNUAL REPORT PAYMENT	06-11-2003		SYS		
06-12-2002	ANNUAL REPORT PAYMENT	06-12-2002		SYS		
06-14-2001	ANNUAL REPORT PAYMENT	06-14-2001		SYS		
06-28-2000	STRAIGHT RENEWAL	06-14-2000		FI		
06-17-1999	STRAIGHT RENEWAL	06-07-1999		FI		
07-17-1998	AMENDED RENEWAL	07-17-1998		FI		
07-01-1997	STRAIGHT RENEWAL	07-01-1997		FI		
07-08-1996	STRAIGHT RENEWAL	07-01-1996		FI		
10-19-1995	REINSTATEMENT	10-19-1995		FI		
09-15-1995	INVOL DISSOLUTION	09-07-1995		SYS		
07-21-1995	NOTICE	07-24-1995		SYS		
08-01-1994	AMENDED RENEWAL	08-01-1994		FI		
07-17-1993	NEW FILING	07-17-1993		FI		

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00407

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Business Name Search[New Search](#)[Printer Friendly](#)**Business Entity Data**

Registry Nbr	Entity Type	Entity Status	Jurisdiction	Registry Date	Duration Date	Renewal Date
471972-80	ABN	ACT		08-10-1995		
Entity Name	SKYDIVE EAGLE CREEK					
Foreign Name						
Affidavit?	N					

[New Search](#)[Printer Friendly](#)**Associated Names**

Type	PPB	PRINCIPAL PLACE OF BUSINESS					
Addr 1	29388 SE HEIPLE RD						
Addr 2							
CSZ	EAGLE CREEK	OR	97022		Country	UNITED STATES OF AMERICA	

The Authorized Representative address is the mailing address for this business.

Type	REP	AUTHORIZED REPRESENTATIVE			Start Date	08-10-1995	Resign Date	
Of Record	355290-80		SKYDIVE, INCORPORATED					
Addr 1	29388 SE HEIPLE RD							
Addr 2								
CSZ	EAGLE CREEK	OR	97022		Country	UNITED STATES OF AMERICA		

Type	REG	REGISTRANT					
Of Record	355290-80	SKYDIVE, INCORPORATED					
Addr 1							
Addr 2							
CSZ					Country		

EXHIBIT

tabbles

E

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Business Entity Name	Name Type	Name Status	Start Date	End Date

SKYDIVE EAGLE CREEK

EN

UR

08-10-1995

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Summary History

Image Date	Action	Transaction Date	Effective Date	Status	Name/Agent Change	Dissolved By
07-01-2003	RENEWAL PAYMENT	07-01-2003		SYS		
06-29-2001	RENEWAL PAYMENT	06-29-2001		SYS		
07-08-1999	STRAIGHT RENEWAL	06-28-1999		FI		
07-21-1997	STRAIGHT RENEWAL	07-08-1997		FI		
08-10-1995	NEW FILING	08-10-1995		FI		

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Counties

Counties Filed

Clackamas, Marion, Multnomah, Washington, Yamhill

Counties Not Filed (but not necessarily available)

Baker, Benton, Clatsop, Columbia, Coos, Crook, Curry, Deschutes, Douglas, Gilliam, Grant, Harney, Hood River, Jackson, Jefferson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Malheur, Morrow, Polk, Sherman, Tillamook, Umatilla, Union, Wallowa, Wasco, Wheeler

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00409

34 km SE of Portland, Oregon, United States 07 Jul 1994

Zoom 2m



0 200M 0 200yd

Image courtesy of the US Geological Survey.

OrigMetaTag = '4512246NW' Center Lon,Lat= -122.35440,45.31908 Running Time 0 ms Time 7/31/2002 4:21:43 PM to 7/31/2002 4:21:4

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00410





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33 km SE of Portland, Oregon, United States 07 Jul 1994

Zoom 1m



0 100M 0 100yd

Image courtesy of the US Geological Survey.

OrigMetaTag = '4512246NW' Center Lon,Lat= -122.36077,45.32002 Running Time 0 ms Time 7/31/2002 4:22:23 PM to 7/31/2002 4:22:23 PM

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While You Were Out

To _____

Date 11/21/03 Time _____

Ralph Hatter called

of _____

Phone _____

☐ Telephoned

☐ In person

☐ Please call

☐ Wants to see you

☐ Will call again

☐ Returned your call

Message Wanted to talk about

hearing notice. Informed

him again that couldn't

rep her - explained would

need to be present or atty.

Taken by _____

FORM Z5-097883

00413



Oregon

Theodore R. Kulongoski, Governor

Office of Administrative Hearings

Transportation Hearings Division

Employment Department

1905 Lana Avenue NE

Salem, OR 97314

(503) 945-5547

FAX (503) 945-5304

TTY 1-800-735-1232

NOTICE OF HEARING

Date Mailed: November 19, 2003

CYNTHIA GAY
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

SUSAN GRECO
DEPT OF ENVIRONMENTAL QUALITY
811 SW 6TH AVENUE
PORTLAND OR 97204

RE: *In the Matter of Cynthia Gay*
For the Oregon Department of Environmental Quality
Office of Administrative Hearings Case No. 111013
Agency Case No. LQ/T-NWR-02-094

A hearing has been set in the above-entitled matter before the Office of Administrative Hearings.

Hearing Date: January 14, 2004 Hearing Time: 9:00 a.m.

Location: Dept of Environmental Quality – Conf Rm 10
Check in with Receptionist on the 7th Floor
811 SW Sixth Ave
Portland OR 97204-1390

The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency for whom the hearing is held. Your case has been assigned to Administrative Law Judge Stephen Elmore, an employee of the Office of Administrative Hearings.

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired or need a language interpreter at the hearing, immediately notify the Office of Administrative Hearings at (503) 945-5547 or TDD at 1-800-735-1232. The Office of Administrative Hearings can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

Please notify the Office of Administrative Hearings at (503) 945-5547 immediately if you change your address or telephone number at any time prior to a final decision in this matter.

00416

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

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

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.
2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.
3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.
4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.
5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.
6. Interpreters. If you have a disability or do not speak English, the administrative law judge will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the administrative law judge a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.
7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the administrative law judge will have the opportunity to ask questions of all witnesses. DEQ or the administrative law judge will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented

by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

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

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

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

LAW OFFICES OF
JOSSELYN, POTTER & ROBERTS
THE GREGORY • SUITE 306
425 NW 10TH AVENUE
PORTLAND, OREGON 97209
TELEPHONE: (503) 228-1455

July 15, 2002

Deborah Nesbit
Department of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204

Re: No. LQ/T-NWR-02-094
Clackamas County

Dear Ms. Nesbit:

Enclosed for filing is the Request for Hearing and Answer of Cynthia Gay in response to the Department's Notice of Violation, Department Order and Assessment of Civil Penalty in the above numbered proceeding.

The respondent requests an informal discussion with the Department.

Very truly yours,


Lawrence R. Derr

LRD/pb
enclosure

cc: client



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of:)
CYNTHIA GAY) REQUEST FOR HEARING AND ANSWER
) No. LQ/T-NWR-02-094
) CLACKAMAS COUNTY

REQUEST FOR HEARING

The respondent requests a contested case hearing in the above captioned matter.

ANSWER

For answer to the Notice of Violation, Department Order and Assessment of Civil Penalty, respondent alleges:

1. Respondent admits the allegations of Findings, paragraphs 1 through 9 and 11 through 14.

2 In answer to the allegations of Findings, paragraph 10, respondent admits that Ralph Hatley participated in removing the UST prior to June 30, 2000 under the direction of Respondent. Respondent admits that Hatley is not a licensed underground storage tank provider. Respondent denies that Hatley is the lessee of the property.

3. Respondent denies the allegations of Violations, paragraphs 1 through 4.

/ / /

/ / /

Page 1- Request for Hearing and Answer

JOSSELYN, POTTER & ROBERTS
Attorneys at Law
425 NW 10th Avenue, Suite 306
Portland, Oregon 97209
Telephone: (503) 228-1455
Fax: (503) 228-0171

00422

1 For an Affirmative Defense, respondent alleges:

2 4. The UST was exempt from regulation pursuant to ORS
3 466.710(1):

4 (a) The tank was located on a tract of land devoted to the
5 production of hay;

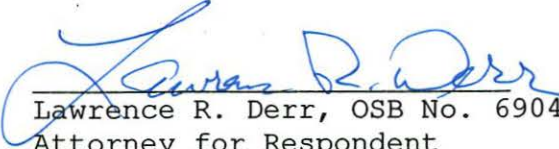
6 (b) The tank has a capacity of 1000 gallons;

7 (c) The tank was used to store motor gasoline; and

8 (d) The motor gasoline was used in farm vehicles, airplanes
9 and automobiles and not resold.

10 Wherefore, Respondent prays that the Notice of Violation,
11 Department Order and Assessment of Civil Penalty be dismissed.

12 Dated July 15, 2002.

13
14 
Lawrence R. Derr, OSB No. 69041
Attorney for Respondent



Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

811 SW Sixth Avenue

Portland, OR 97204-1390

(503) 229-5696

TTY (503) 229-6993

June 25, 2002

CERTIFIED MAIL

7001 1140 0002 3546 2903

Cynthia Gay
29388 S.E. Heiple Road
Eagle Creek OR 97022

Re: Notice of Violation, Department Order and
Assessment of Civil Penalty
No. LQ/T-NWR-02-094
Clackamas County

In 1988, the Department issued to you a temporary operating permit for an underground storage tank (UST) located at the Beaver Oaks Airport, 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon. You also own the property on which the UST is located.

Numerous times since 1997 the Department informed you that any UST that was not upgraded prior to December 1998, needed to be decommissioned prior to December 22, 1999. On February 23, 2000 and October 30, 2000, the Department issued to you Notices of Noncompliance (NON) for the violation of failing to decommission the UST. As a result of the NONs, the Department conducted a site and UST inspection in November 2000, at the request of the lessee of the property, Ralph Hatley. As a follow-up to that site visit, Greg Toran with the Department sent you and Mr. Hatley a letter outlining the specific requirements for decommissioning the UST and a deadline of June 2001 for completing the decommissioning. When the Department did not receive any documentation regarding the decommissioning, a Notice of Noncompliance was issued to you on January 28, 2002. Via telephone in February 2002, Mr. Hatley informed the Department that he had removed the UST. You did not submit the required notification prior to the decommissioning, nor did you submit the required decommissioning checklist including the analytical results of any soil samples collected, within 30 days following the decommissioning. Additionally, Mr. Hatley is neither the owner or the permittee of the UST, nor a licensed UST service provider, and as such, could not legally decommission the UST.

Notification to the Department prior to a decommissioning ensures that the Department approves any methods of disposal for the UST, that the correct materials are used, and that the correct practices are followed. Testing for a release at the time of decommissioning ensures that any releases are documented, reported and promptly corrected prior to the spread of any contamination. Submittal of the checklist following decommissioning allows the Department to verify that the correct procedures were followed. On March 14, 2002, the Department issued to you a NON for failing to provide, to the Department, notice prior to the decommissioning and the checklist following the completion of the decommissioning.

00426



You are liable for a civil penalty because you have violated Oregon environmental law. The enclosed Notice assesses a civil penalty of \$6072. The amount of the penalty was determined using the procedures set forth in OAR 340-012-0045. The Department's findings and civil penalty determination are attached to the Notice as Exhibits 1 through 3. In addition to the civil penalty assessment, the enclosed Order requires you to either: (1) submit a completed decommissioning checklist including the results from the soil samples collected at the time of decommissioning; or (2) have a qualified third party measure for the presence of a release under the location of the decommissioned UST, and submit a completed decommissioning checklist and the annual UST compliance fees for the year 2002.

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

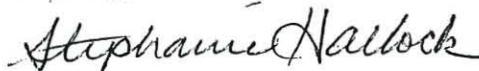
If you wish to discuss this matter, or believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, you may request an informal discussion by attaching a request to the appeal. The request to discuss this matter with the Department will not waive any right to a contested case hearing, if a timely answer is filed.

I look forward to your cooperation in complying with Oregon's environmental laws in the future. However, if any additional violations occur, you may be assessed additional civil penalties.

Copies of referenced rules are enclosed. Also enclosed is a copy of the Department's internal management directive regarding civil penalty mitigation for Supplemental Environmental Projects (SEPs). If you are interested in having a portion of the civil penalty fund an SEP, please review the enclosed SEP directive. Exceptional pollution prevention could result in partial penalty mitigation.

If you have any questions about this action, please contact Susan Greco with the Department's Office of Compliance and Enforcement in Portland at 229-5152 or toll-free at 1-800-452-4011, enforcement extension 5152.

Sincerely,



Stephanie Hallock
Director

Enclosures

cc: Herrington Rose, NWR, DEQ
LQ Division, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Clackamas County District Attorney
Ralph Hatley, 29388 S.E. Heiple Road, Eagle Creek, OR 97022

00427

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:
CYNTHIA GAY

Respondent.

NOTICE OF VIOLATION,
DEPARTMENT ORDER AND
ASSESSMENT OF CIVIL
PENALTY
No. LQ/T-NWR-02-094
CLACKAMAS COUNTY

I. AUTHORITY

This Notice of Violation, Department Order and Assessment of Civil Penalty (Notice) is issued to Respondent, Cynthia Gay, by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 183 and 468, ORS 466.765 and 466.810, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 11 and 12.

II. FINDINGS

1. On or about October 29, 1991, Respondent was issued a temporary permit for an underground storage tank (UST) located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon. Respondent is both the permittee and the owner of the UST.

2. The UST was used to store a regulated substance (gasoline) for fueling of airplanes until approximately 1997.

3. Respondent did not apply for or obtain a general permit registration certificate for operation of the UST by December 23, 1998. The UST has not been upgraded to meet either the new performance standards contained in 40 CFR 280.20, as adopted by OAR 340-150-0002 and as amended by OAR 340-150-0003(9) through (14), or the upgrading requirements contained in 40 CFR 280.21, as adopted by OAR 340-150-0002.

4. On or about October 1, 1997, August 15, 1998, November 11, 1998, January 13, 1999, August 20, 1999 and December 6, 1999, the Department sent Respondent mailings indicating that the UST needed to be decommissioned, prior to December 1999, in compliance with the Department's rules.

5. On February 23, 2000, the Department sent Respondent a Notice of

1 Noncompliance (NON) for failure to decommission the UST. The NON stated that the
2 failure to decommission the UST was a violation of the Department's rules and could result in
3 the assessment of civil penalties.

4 6 On October 30, 2000, the Department sent Respondent an NON for failure to
5 decommission the UST.

6 7. On November 14, 2000, Greg Toran, an employee of the Department, conducted
7 an inspection of the property and the UST. At that time, the UST had not been decommissioned.

8 8. By letter to Respondent dated December 5, 2000, the Department again outlined
9 the requirements for decommissioning the UST. The Department requested that the UST be
10 decommissioned prior to June 30, 2001.

11 9. On January 28, 2002, the Department sent Respondent an NON for failure to
12 decommission the UST. The NON stated that the failure to decommission the UST was a
13 violation of the Department's rules and could result in the assessment of civil penalties.

14 10. On or before February 6, 2002, Ralph Hatley, the lessee of the property,
15 decommissioned the UST. Mr. Hatley is not a licensed underground storage tank service
16 provider.

17 11. Respondent did not provide either the thirty (30) day or three (3) working day
18 notices to the Department prior to decommissioning the UST, as required by OAR 340-150-
19 0166(3).

20 12. On March 14, 2002, the Department sent Respondent an NON for improperly
21 decommissioning the UST. The NON requested that Respondent submit a completed
22 decommissioning checklist and outstanding annual underground storage tank general permit
23 compliance fees prior to March 29, 2002.

24 13. As of June 15, 2002, Respondent has not submitted a completed decommissioning
25 checklist for the UST.

26 14. Respondent paid the annual UST general compliance fee from 1988 through 2001.
27 Respondent did not pay the annual compliance fee in 2002.

III. VIOLATIONS

1. On or about December 22, 1999 until sometime after December 5, 2000, Respondent violated OAR 340-150-0021(3) and OAR 340-150-0166(4)(c) by failing to decommission an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

2. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(3) by failing to provide both the thirty (30) day and three (3) working day notice to the Department before beginning permanent closure of an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(d).

3. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(5)(a) by failing to submit a completed decommissioning checklist within thirty (30) days of permanent closure of an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

4. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(2)(d) by allowing the decommissioning of an UST by a person not licensed by the Department. This is a Class II violation pursuant to OAR 340-012-0067(2)(h).

IV. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the violations cited in Section III, paragraphs 1 through 3 as follows:

<u>Violation</u>	<u>Penalty Amount</u>
1	\$2272
2	\$1800
3	\$2000

Respondent's total civil penalty is \$6072. The findings and determination of Respondent's civil penalty pursuant to OAR 340-012-0045 are attached and incorporated as Exhibit Nos. 1 through 3.

V. COMPLIANCE ORDER

Based on the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

////

1 1. Immediately initiate actions necessary to correct any continuing violations of
2 Oregon law.

3 2. Within thirty (30) days of receipt of this Notice,
4 a. Submit to the Department a completed decommissioning checklist for the
5 decommissioned UST, as required by 40 CFR 280.71(b) as adopted and modified by OAR 340-
6 150-0003(35). The checklist must have, as an attachment, the results from the sampling
7 completed at the time of decommissioning; or

8 b. Have a qualified third party measure for the presence of a release at the
9 location of the decommissioned UST, as required by 40 CFR 280.72(a) as adopted and modified
10 by OAR 340-150-0003(39), and OAR 340-122-0218, and submit to the Department a completed
11 decommissioning checklist. All outstanding annual UST compliance fees from the year 2002
12 must be paid at the time of the submittal of the decommissioning checklist.

13 VI. OPPORTUNITY FOR CONTESTED CASE HEARING

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

20 In the written Answer, Respondent shall admit or deny each allegation of fact contained in
21 this Notice, and shall affirmatively allege any and all affirmative claims or defenses to the
22 assessment of this civil penalty that Respondent may have and the reasoning in support thereof.

23 Except for good cause shown:

- 24 1. Factual matters not controverted shall be presumed admitted;
25 2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or
26 defense;

27 ////

3. New matters alleged in the Answer shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

Send the request for hearing and Answer to: **Deborah Nesbit, Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for hearing and an Answer, Respondent will be notified of the date, time and place of the hearing.

Failure to file a timely request for hearing and Answer, or to appear at a scheduled hearing may result in the entry of a Default Order for the relief sought in this Notice.

If Respondent fails to file a timely request for hearing and Answer, the Notice and Order shall become a final and enforceable Order of the Environmental Quality Commission by operation of law without any further action or proceeding. If the Order becomes final by operation of law, the right to judicial review, if any, is outlined within ORS 183.480.

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

VII. OPPORTUNITY FOR INFORMAL DISCUSSION

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

VIII. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after an Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of \$6072 should be made payable to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

Date

6-24-02

Stephanie Hallock, Director

Stephanie Hallock

EXHIBIT 1

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

VIOLATION 1: Failing to decommission an underground storage tank (UST).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

MAGNITUDE: The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

"BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.

"P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 since the violation occurred from December 22, 1999 through at least December 5, 2000.

"R" is the cause of the violation and receives a value of 6 because the Respondent's conduct was intentional. Intentional conduct means conduct by a person with a conscious objective to cause the result of the conduct. Numerous times since 1997, the Department informed Respondent that the UST needed to be permanently closed by a date certain. Despite being given specific deadlines to complete the permanent closure of the UST, Respondent allowed the deadlines to expire without closing the UST. Therefore, Respondent's conduct was intentional.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 since Respondent has not taken reasonable efforts to correct the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$272 as calculated using the BEN computer model, pursuant to OAR 340-012-0045(1)(c)(F). Respondent delayed decommissioning the UST at a cost of \$5,000. By delaying these costs, Respondent realized an economic benefit of \$272.

PENALTY CALCULATION: $Penalty = BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$
 $= \$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 6 + 2)] + \272
 $= \$1000 + (\$100 \times 10) + \$272$
 $= \$1000 + \$1000 + \$272$
 $= \$2272$

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EXHIBIT 2

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

- VIOLATION 2: Failure to provide 30 day and 3 working day notice prior to decommissioning an underground storage tank.
- CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0067(2)(d).
- MAGNITUDE: The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.
- CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$
- "BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.
- "P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).
- "H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).
- "O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 because the violation occurred on more than one day.
- "R" is the cause of the violation and receives a value of 6 because the cause of the violation was caused by Respondent's intentional conduct. Intentional means conduct by a person with a conscious objective to cause the result of the conduct. On December 5, 2000, the Department mailed to Respondent a letter outlining the decommissioning requirements including the need to provide notice to the Department prior to decommissioning the UST. Respondent knew that it needed to provide notice but proceeded to decommission the UST without giving the notice. Therefore, Respondent's conduct was intentional.
- "C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 since the violation cannot be corrected.
- "EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$0 because any economic benefit gained would be de minimis.

PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} &= BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB \\ &= \$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 8 + 0)] + \$0 \\ &= \$1000 + (\$100 \times 8) + \$0 \\ &= \$1000 + \$800 + \$0 \\ &= \$1800 \end{aligned}$$

00434

EXHIBIT 3

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

VIOLATION 3: Failure to submit a completed decommissioning checklist within 30 days after underground storage tank closure.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

MAGNITUDE: The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

"BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.

"P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 because the violation occurred on more than one day.

"R" is the cause of the violation and receives a value of 6 because the cause of the violation was caused by Respondent's intentional conduct. Intentional means conduct by a person with a conscious objective to cause the result of the conduct. On December 5, 2000, the Department mailed to Respondent a copy of the decommissioning checklist along with a letter outlining the decommissioning requirements. Respondent knew that it needed to submit the checklist but continued to fail to submit it. Therefore, Respondent's conduct was intentional.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 since Respondent has not taken reasonable efforts to correct the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$0 because any economic benefit gained would be de minimis.

PENALTY CALCULATION: $Penalty = BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$
 $= \$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 6 + 2)] + (\$0)$
 $= \$1000 + (\$100 \times 10) + \$0$
 $= \$1000 + \$1000 + \$0$
 $= \$2000$

00435

CERTIFICATE OF MAILING

I hereby certify that I served CYNTHIA GAY

Case No. LA/T-NWR-02-094

Served upon:

CYNTHIA GAY
29388 SE HEIPLE ROAD
EAGLE CREEK, OR 97022

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> 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. 		<p>A. Received by (Please Print Clearly) _____</p> <p>B. Date of Delivery <u>6/21</u></p>	
<p>1. Article Addressed to:</p> <p>CYNTHIA GAY 29388 SE HEIPLE ROAD EAGLE CREEK, OR 97022</p> <p><i>6260</i></p>		<p>C. Signature <u>[Signature]</u></p> <p><input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p>	
<p>2. Article Num <u>7001 1140 0002 3546 2903</u></p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952</p>		<p>3. Service Type</p> <p><input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>	
		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	

by placing it in a sealed envelope, with postage
Portland, Oregon on 6/26/02

AC
Department of Environmental Quality

00436

00437

DIVISION 150

UNDERGROUND STORAGE TANK RULES

340-150-0001

Purpose and Scope

(1) These rules are promulgated in accordance with and under the authority of ORS 466.706 through 466.835, 466.994 and 466.995.

(2) The purpose of these rules is:

(a) To provide for the regulation of underground storage tanks to protect the public health, safety, welfare and the environment from the potential harmful effects of spills and releases from underground tanks used to store regulated substances; and

(b) To establish requirements for the prevention and reporting of releases and for taking corrective action to protect the public and the environment from releases from underground storage tanks.

(3) A secondary purpose is to obtain state program approval to manage underground storage tanks in Oregon in lieu of the federal program.

(4) Scope:

(a) OAR 340-150-0002 incorporates, by reference, underground storage tank technical and financial responsibility regulations of the federal program, included in 40 CFR 280, Subparts A, B, C, D, E, F, G and H. Persons must consult these Subparts of 40 CFR 280 to determine applicable underground storage tank requirements. Additionally, persons must consult OAR Chapter 340, Division 122 for the applicable release reporting and corrective action requirements for underground storage tanks containing petroleum;

(b) OAR 340-150-0003 incorporates new language to be used in lieu of the underground storage tank technical and financial responsibility regulations of the federal program, included in 40 CFR 280, Subparts A, B, C, D, E, F, G, and H;

(c) OAR 340-150-0010 through 340-150-0166 establishes requirements for underground storage tank general permits, notification requirements for persons who sell underground storage tanks, and persons who deposit or cause to have deposited a regulated substance into an underground storage tank.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the agency.]

Stat. Auth.: ORS 465.200 - ORS 465.455 & ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 465.205, ORS 465.400, ORS 466.715, ORS 466.720 & ORS 466.746

Hist.: DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 26-1990, f. & cert. ef. 7-6-90; DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0002

**Adoption of United States Environmental Protection Agency
Underground Storage Tank Regulations**

Except as otherwise modified or specified by these rules, the rules and regulations governing the technical standards, corrective action, and financial responsibility requirements for owners and operators of underground storage tanks, prescribed by the United States Environmental Protection Agency in Title 40 CFR, Part 280, Subparts A, B, C, D, E, F, G, and H, amendments thereto promulgated prior to October 30, 1998 and Oregon rules listed in OAR 340-150-0003 are adopted and prescribed by the Commission to be observed by all persons subject to ORS 466.706 through 466.835, 466.994, and 466.995.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the agency.]

Stat. Auth.: ORS 465.200 - ORS 465.455 & ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 465.400, ORS 466.720 & ORS 466.746

Hist.: DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 26-1990, f. & cert. ef. 7-6-90; DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0003

Federal Underground Storage Tank Technical Standards

In addition to the regulations and amendments promulgated prior to October 30, 1998, as described in OAR 340-150-0002, the following rules substituting new language in lieu of Title 40 CFR Part 280, Subparts A, B, C, D, E, F, G, and H are adopted and prescribed by the Commission to be observed by all persons subject to ORS 466.706 through 466.835, 466.994 and 466.995 with the following exceptions:

(1) The following language is substituted in lieu of 40 CFR 280.10(a):

The requirements of this Part apply to all owners and operators of an UST system as defined in 280.12 except as otherwise provided in paragraphs (b), (c), and (d) of this section. Any UST system listed in paragraph (c) of this section must meet the requirements of 280.11. Any UST system listed in paragraph (c)(5) of this section must meet the requirements of 280.22.

(2) The following language is substituted in lieu of 40 CFR 280.11(b):

Notwithstanding paragraph (a) of this section, an UST system without corrosion protection may be installed at a site that is determined by a corrosion expert and the implementing agency not to be corrosive enough to cause it to have a release due to corrosion during its operating life. Owners and operators must maintain records that demonstrate compliance with the requirements of this paragraph for the remaining life of the tank.

(3) The following language is substituted in lieu of 40 CFR 280.12

"Cathodic protection tester":

"Cathodic protection tester" means a person licensed as an Underground Storage Tank Supervisor of Cathodic Protection System Testing through meeting the requirements of OAR Chapter 340, Division 160.

(4) The following language is substituted in lieu of 40 CFR 280.12 "Implementing agency":

"Implementing agency" means the Oregon Department of Environmental Quality.

(5) The following language is substituted in lieu of 40 CFR 280.12 "Operator":

"Operator" means permittee as defined in OAR 340-150-0010(16).

(6) The definition of "Owner" in OAR 340-150-0010(11) is used in lieu of the definition of "Owner" in 40 CFR 280.12.

(7) The definition of "Release" in OAR 340-150-0010(13) is used in lieu of the definition of "Release" in 40 CFR 280.12.

(8) The following language is substituted in lieu of 40 CFR 280.12 "Residential tank":

"Residential tank" is a tank located on property used primarily for single family dwelling purposes.

(9) The following language is substituted in lieu of 40 CFR 280.20(a)(2):

The tank is constructed of steel and cathodically protected in the following manner:

(i) The tank is coated with a suitable dielectric material;

(ii) A permanent cathodic protection test station is installed.

[NOTE: The test station can be separate or combined with an existing box and must be located near the protected structure and away from an anode. The test station must provide, as a minimum, an electrical connection to the structure and access for placing a reference cell in contact with the soil or backfill. When located below the surface of the ground, the test station design must prevent run off of surface water into the soil.]

(iii) Field-installed cathodic protection systems are designed by a corrosion expert;

(iv) Impressed current systems are designed to allow determination of current operating status as required in § 280.31(c); and

(v) Cathodic protection systems are operated and maintained in accordance with § 280.31 or according to guidelines established by the implementing agency; or

(10) The following language is substituted in lieu of 40 CFR 280.20(a)(4)(i):

The tank is installed at a site that is determined by a corrosion expert and the implementing agency not to be corrosive enough to cause it to have a release due to corrosion during its operating life; and

[NOTE: For the purpose of complying with Paragraph 280.20(a)(4)(i), approval by the Department will be given after reviewing the data and information submitted by the corrosion expert and a finding that the corrosion expert's determination is justified.]

(11) The following language is substituted in lieu of 40 CFR 280.20(a)(5):

The tank construction and corrosion protection are determined by the implementing agency to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than paragraphs (a)(1) through (4) of this section.

[NOTE: For the purpose of complying with Paragraph 280.20(a)(5), approval by the Department will be given after reviewing the data and information submitted by a corrosion expert and a finding that the corrosion expert's determination is justified.]

(12) The following language is substituted in lieu of 40 CFR 280.20(b)(3)(i):

(i) The piping is installed at a site that is determined by a corrosion expert and the implementing agency to not be corrosive enough to cause it to have a release due to corrosion during its operating life; and

[NOTE: For the purpose of complying with Paragraph 280.20(b)(3)(i), approval by the Department will be given after reviewing the data and information submitted by the corrosion expert and a finding that the corrosion expert's determination is justified.]

(13) The following language is substituted in lieu of 40 CFR 280.20(b)(4):

The piping construction and corrosion protection are determined by the implementing agency to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the requirements in paragraphs (b)(1) through (3) of this section.

[NOTE: For the purpose of complying with Paragraph 280.20(b)(4), approval by the Department will be given after reviewing the data and information submitted by a corrosion expert and a finding that the corrosion expert's determination is justified.]

(14) The following language is substituted in lieu of 40 CFR 280.20(e):

(e) Certification of installation. All owners and operators must ensure that one or more of the following methods of certification, testing, or inspection is used to demonstrate compliance with paragraph (d) of this section by providing a certification of compliance on the UST notification form in accordance with § 280.22.

(1) The installer has been licensed by the implementing agency; or

(2) The installation has been inspected and certified by a registered professional engineer with education and experience in UST system installation; or

(3) The owner and operator have complied with another method for ensuring compliance with paragraph (d) of this section that is determined by the implementing agency to be no less protective of human health and the environment.

(15) The following language is substituted in lieu of 40 CFR 280.22(a):

(a) Any owner who brings an underground storage tank system into use after May 8, 1986, must, 30 days prior to installing, closing, using, or bringing such tank into use, submit, in the form prescribed in Sections I through VI of Appendix I of this Part (or appropriate state form), a notice of existence of such tank system to the Implementing Agency.

(16) The following language is substituted in lieu of 40 CFR 280.22(d): Notices required to be submitted under paragraph (a) of this section must provide all of the information in Sections I through VI of the prescribed form (or appropriate state form) for each tank for which notice must be given. Notices for tanks installed after December 22, 1988 must, within 30 days after bringing such tank into use, also provide all of the information in Section VII of the prescribed form (or appropriate state form) for each tank for which notice must be given.

(17) In addition to the provisions of 40 CFR 280.22, the following is added: Unless the implementing agency agrees to waive the requirement, at least 3 working days before beginning work to install, replace, decommission or upgrade an UST, owners and operators or the licensed service provider performing the work must notify the implementing agency of the confirmed date and time the work will begin to allow observation of the work by the implementing agency.

(18) The following language is substituted in lieu of 40 CFR 280.41(a): Tanks. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43(d), (g) and (h) or must be monitored daily for releases using one of the methods listed in § 280.43 (e) and (f) except that:

(19) The following language is substituted in lieu of 40 CFR 280.41(b)(1)(ii):

Have an annual line tightness test conducted in accordance with § 280.44(b) or have daily monitoring conducted in accordance with § 280.44(c).

(20) In addition to the provisions of 40 CFR 280.43, the following is added: The ground water monitoring system is determined by the implementing agency to be designed so that the risk to human health and the environment is not increased.

[NOTE: For the purpose of complying with the requirements of this section, approval by the implementing agency will be given after reviewing the data and design information submitted by a registered professional engineer or a registered geologist who is especially qualified by education and experience to design release detection systems and a finding that the leak detection system is designed so that the risk to human health and the environment is not increased.]

(21) The following language is substituted in lieu of 40 CFR 280 Subpart

F:

Subpart F — Release Response and Corrective Action for UST Systems Containing Hazardous Substances.

(22) The following language is in lieu of 40 CFR 280.60:

§ 280.60 General.

Owners and operators or responsible persons of hazardous substance UST systems must, in response to a confirmed release from the UST system, comply with the requirements of this subpart except for USTs excluded under § 280.10(b), where UST systems contain petroleum, and UST systems subject to RCRA Subtitle C corrective action requirements under section 3004(u) of the Resource Conservation and Recovery Act, as amended.

[NOTE: Release Response and Corrective Action for UST Systems Containing Petroleum must meet the requirements of OAR 340-122-0205 through 340-122-0360.]

(23) The following language is substituted in lieu of 40 CFR 280.61(a):

(a) Report the release to the implementing agency (e.g., by telephone or electronic mail);

(1) All below-ground releases from the UST system in any quantity;

(2) All above-ground releases to land from the UST system in excess of reportable quantities as defined in OAR Chapter 340, Division 108, if the owner and operator or responsible person is unable to contain or clean up the release within 24 hours; and

(3) All above-ground releases to the waters of the state.

(24) The following language is substituted in lieu of 40 CFR 280.62(a):

Unless directed to do otherwise by the implementing agency, owners and operators or responsible persons must perform the following abatement measures.

(25) The following language is substituted in lieu of 40 CFR 280.62(a)(4):

Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement, or corrective action activities. If these remedies include treatment or disposal of soils, the owner and operator or responsible person must comply with applicable state and local requirements.

(26) The following language is substituted in lieu of 40 CFR 280.62(b):

Within 20 days after release confirmation, or within another reasonable period of time determined by the implementing agency, owners and operators or responsible persons must submit a report to the implementing agency summarizing the initial abatement steps taken under paragraph (a) of this section and any resulting information or data.

(27) In addition to the provisions of 40 CFR 280.62, the following is added:

The owner and operator, or responsible person must provide any additional information beyond that required under paragraph (b) of this section, as requested by the implementing agency.

(28) The following language is substituted in lieu of 40 CFR 280.63(a)(4):

Results of the free product investigations required under § 280.62(a)(6), to be used by owners and operators or responsible persons to determine whether free product must be recovered under § 280.64.

(29) The following language is substituted in lieu of 40 CFR 280.64 Free Product Removal:

§ 280.64 Free product removal.

At sites where investigations under § 280.62(a)(6) indicate the presence of free product, owners and operators or responsible persons must remove free product to the maximum extent practicable as determined by the implementing agency while continuing, as necessary, any actions initiated under §§ 280.61 through 280.63, or preparing for actions required under §§ 280.65 through 280.66. In meeting the requirements of this section, owners and operators or responsible persons must:

(30) The following language is substituted in lieu of 40 CFR 280.64(d): Unless directed to do otherwise by the implementing agency, prepare and submit to the implementing agency, within 45 days after confirming a release, a free product removal report that provides at least the following information:

- (1) The name of the person(s) responsible for implementing the free product removal measures;
- (2) The estimated quantity, type, and thickness of free product observed or measured in wells, boreholes, and excavations;
- (3) The type of free product recovery system used;
- (4) Whether any discharge will take place on-site or off-site during the recovery operation and where this discharge will be located;
- (5) The type of treatment applied to, and the effluent quality expected from, any discharge;
- (6) The steps that have been or are being taken to obtain necessary permits for any discharge;
- (7) The disposition of the recovered free product; and
- (8) Other matters deemed appropriate by the implementing agency.

(31) The following language is substituted in lieu of 40 CFR 280.65:

§ 280.65 Corrective Action.

Corrective action for cleanup of releases from underground storage tanks containing regulated substances other than petroleum must meet the requirements of OAR 340-122-0010 through 340-122-0110.

(32) The following language is substituted in lieu of 40 CFR 280.66:

[NOTE: OAR 340-122-0010 through 340-122-0110 contains equivalent requirements.]

(33) The following language is substituted in lieu of 40 CFR 280.67:

[NOTE: OAR 340-122-0010 through 340-122-0110 contains equivalent requirements.]

(34) The following language is substituted in lieu of 40 CFR 280.71(a): At least 30 days before beginning either permanent closure or a change-in-service under paragraphs (b) and (c) of this section, or within another

reasonable time period determined by the implementing agency, owners and operators must notify the implementing agency, on a form provided by the implementing agency, of their intent to permanently close or make the change-in-service, UNLESS such action is in response to corrective action. Unless the implementing agency agrees to waive the requirement, at least 3 working days before beginning this permanent closure, owners and operators or the licensed service provider performing the work must notify the implementing agency of the confirmed date and time the closure will begin to allow observation of the closure by the implementing agency. The required assessment of the excavation zone under § 280.72 must be performed after notifying the implementing agency but before completion of the permanent closure or a change-in-service.

(35) The following language is substituted in lieu of 40 CFR 280.71(b):

(b) To permanently close a tank, owners and operators must empty and clean it by removing all liquids and accumulated sludges, and dispose of all liquids and accumulated sludges by recycling or disposal. The disposal method must be approved by the implementing agency prior to disposal. All tanks taken out of service permanently must also be either removed from the ground or filled with an inert solid material. Tanks removed from the ground must be disposed of in a manner approved by the implementing agency. The owner and operator must document the name of the disposal firm, the disposal method and disposal location for all liquids, sludges and UST system components including tanks, piping and equipment. The owner and operator or licensed service provider must provide a completed decommissioning checklist and change-in-service report to the implementing agency within 30 days after tank closure.

[NOTE: Liquids, sludges and UST system components may require management as a hazardous waste if contaminated with hazardous materials. Contact the implementing agency prior to disposal of these items to insure these wastes are correctly managed.]

(36) The following language is substituted in lieu of 40 CFR 280.71(c):

Continued use of an UST system to store a non-regulated substance is considered a change-in-service. Before a change-in-service, owners and operators must empty and clean the tank by removing all liquid and accumulated sludge and conduct a site assessment in accordance with § 280.72.

(37) In addition to the provisions of 40 CFR 280.71, the following is added:

(d) The following cleaning and closure procedures shall be used to comply with this section unless the implementing agency has approved alternate procedures and determined these alternate procedures are designed to be no less protective of human health, human safety and the environment:

(1) American Petroleum Institute Recommended Practice 1604, "Removal and Disposal of Used Underground Petroleum Storage Tanks";

(2) American Petroleum Institute Publication 2015, "Cleaning Petroleum Storage Tanks";

(3) American Petroleum Institute Recommended Practice 1631, "Interior Lining of Underground Storage Tanks," may be used as guidance for compliance with this section; and

(4) The National Institute for Occupational Safety and Health "Criteria for a Recommended Standard... Working in Confined Space" may be used as guidance for conducting safe closure procedures at some hazardous substance tanks.

(38) In addition to the provisions of 40 CFR 280.72, the following is added:

(c) The owner and operator must notify the implementing agency and meet the requirement of Subparts E and F if contaminated soil, contaminated ground water, or free product as a liquid or vapor is discovered during the measurement for the presence of a release.

(39) The following language is substituted in lieu of 40 CFR 280.72(a):

Before permanent closure or a change-in-service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the method of closure, the nature of the stored substance, the type of backfill, the depth to ground water, and other factors appropriate for identifying the presence of a release. For USTs containing petroleum, the owner and operator must measure for the presence of a release by following the sampling and analytical procedures specified in OAR 340-122-0205 through 340-122-0360. A minimum of two samples must be taken below the bottom of the tank. Samples must be taken below any piping where there is evidence of contamination. A petroleum release is considered to have occurred if the contaminant levels are found to exceed the confirmed release levels specified in OAR 340-122-0205 through 340-122-0360. For USTs containing regulated substances other than petroleum and for USTs to be closed in-place, the owner and operator must submit a sampling plan to the implementing agency for its approval prior to beginning closure.

(40) The following language is substituted in lieu of 40 CFR 280 Appendix II:

[Appendix not included. See ED. NOTE.]

(41) In addition to the provisions of 40 CFR 280.21, the following is added:

At least 30 days before beginning the upgrading of an existing UST system under paragraphs (b) and (c) of this section, or within another reasonable time period determined by the implementing agency, owners and operators must notify the implementing agency, on a form provided by the implementing agency, of their intent to upgrade an existing underground storage tank system. Unless the implementing agency agrees to waive the requirement, at least 3 working days before beginning the upgrade, owners and operators or the licensed service provider performing the work must notify the implementing agency of the confirmed date and time the upgrade will begin to allow observation by the

implementing agency. The owner and operator or licensed service provider must provide a completed installation check list within 30 days after completion of work.

(42) The following language is used in lieu of 40 CFR 280.34(a):

Reporting. Owners and operators must submit the following information to the implementing agency:

(1) Notification for all UST systems (§ 280.22), which includes certification of installation for all new UST systems (§ 280.22(e));

(2) Reports of all releases that are required to be reported including suspected releases (§ 280.50), spills and overfills (§ 280.53), and confirmed releases (§ 280.61);

(3) Correction actions planned or taken including initial abatement measures (§ 280.62), initial site characterization (§ 280.63), free product removal (§ 280.64), investigation of soil and ground-water cleanup (§ 280.65), and correction action plan (§ 280.66);

(4) A notification before permanent closure or change-in-service (§ 280.71); and

(5) A notification before upgrading an existing UST system (§ 280.21).

(43) The following language is used in lieu of 40 CFR 280.41(a)(3):

Tanks with capacity of 1,000 gallons or less may use weekly tank gauging (conducted in accordance with § 280.43(b)).

(44) The following language is used in lieu of 40 CFR 280.42(a):

Release detection at existing UST systems must meet the requirements for petroleum UST systems in § 280.41. By December 22, 1998, all existing hazardous substance UST systems must meet the release detection requirements for new systems in paragraph (b) of this section.

(45) The following language is used in lieu of 40 CFR 280.43(b)(5):

Only tanks of 1,000 gallons or less nominal capacity may use this as the sole method of release detection. Tanks of 1,001 to 2,000 gallons may use the method in place of manual inventory control in § 280.43(a). Tanks of greater than 2,000 gallons nominal capacity may not use this method to meet the requirements of this subpart.

[ED. NOTE: The Appendix referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

[Publications: The publications referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 465.200 - ORS 465.455 & ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 465.400 & ORS 466.746

Hist.: DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 26-1990, f. & cert. ef. 7-6-90;

DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0010

Definitions

(1) The definitions of terms contained in this rule modify, or are in addition to, the definitions contained in 40 CFR 280.12 and 40 CFR 280.92.

(2) "Bringing into operation" has the same meaning as operate or operation.

- (3) "Cleanup" or "cleanup activity" has the same meaning as "corrective action" as defined in ORS 466.706 or "remedial action" as defined in ORS 465.200.
- (4) "Corrective Action" means remedial action taken to protect the present or future public health, safety, welfare or the environment from a release of a regulated substance. "Corrective Action" includes but is not limited to:
- (a) The prevention, elimination, removal, abatement, control, investigation, assessment, evaluation or monitoring of a hazard or potential hazard or threat, including migration of a regulated substance; or
 - (b) Transportation, storage, treatment or disposal of a regulated substance or contaminated material from a site.
- (5) "Decommission" means temporary or permanent closure, including temporary or permanent removal from operation, filling in place, removal from the ground or change-in-service to a non-regulated status.
- (6) "Department" means the Oregon Department of Environmental Quality.
- (7) "Director" means the Director of the Oregon Department of Environmental Quality or the Director's authorized representative.
- (8) "Fee" means a fixed charge or service charge.
- (9) "Install" or "installation" means the physical construction of an underground storage tank system, including but not limited to, activities such as excavating; backfilling; testing; proper placement of the tank, piping, leak detection devices, corrosion protection systems, spill and overfill devices and associated administrative activities such as notifications, recordkeeping and record submissions.
- (10) "Investigation" means monitoring, surveying, testing or other information gathering.
- (11) "Multi-Chamber" or "Multi-Compartment" means an underground storage tank that contains two or more chambers or compartments created by the presence of interior baffles so that two or more regulated substances can be stored at the same time within a single tank shell. Even if the same regulated substance is stored in all chambers or compartments, the tank is a multi-chambered or multi-compartmented tank for the purpose of these rules.
- (12) "OAR" means Oregon Administrative Rule.
- (13) "Operate" or "Operation" means depositing a regulated substance into; storing a regulated substance in or dispensing a regulated substance from an underground storage tank; and such other activities, including but not limited to performing leak detection, maintaining corrosion protection, preventing spills and overfills, investigating and confirming suspected releases, conducting repairs, maintaining financial assurance and keeping and submitting records on the tank and piping's performance.
- (14) "ORS" means Oregon Revised Statute.
- (15) "Owner" means the owner of an underground storage tank.
- (16) "Permittee" means the person designated on a general permit registration form who is in control of or has responsibility for the daily operation or daily maintenance of an underground storage tank in accordance with the conditions and requirements of a general permit pursuant to OAR 340-150-0160 through 340-150-0166.

(17) "Registration Certificate" means a document issued by the Department that authorizes a person to install, operate or decommission an underground storage tank under a general permit pursuant to OAR 340-150-0019 and OAR 340-150-0160 through 340-150-0166.

(18) "Release" means the discharge, deposit, injection, dumping, spilling, emitting, leaking or placing of a regulated substance from an underground storage tank into the air or into or on land or the waters of the state, other than as authorized by a permit issued under state or federal law.

(19) "Responsible person" means any person ordered or authorized to undertake remedial actions or related activities under ORS 465.200 through 465.455.

(20) "Underground storage tank" or "UST" means "Under-ground storage tank," as defined in 40 CFR 280.12.

(21) "Seller" or "Distributor" means person who is engaged in the business of selling regulated substances to the owner or permittee of an underground storage tank.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the agency.]

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995

Stats. Implemented: ORS 465.200, ORS 465.400, ORS 466.706 & ORS 466.746

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 3-1989, f. & cert. ef. 3-10-89; DEQ 21-1989(Temp), f. & cert. ef. 9-18-89; DEQ 10-1990, f. & cert. ef. 3-13-90; DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0015

Exempted Tanks

The following regulated underground storage tanks are exempt from the requirements of these rules. The exempt underground storage tanks are the underground storage tanks defined by 40 CFR 280.10.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the agency.]

Stat. Auth.: ORS 466.706 - ORS 466.895 & ORS 466.995

Stats. Implemented: ORS 466.706 & ORS 466.710

Hist.: DEQ 10-1990, f. & cert. ef. 3-13-90; DEQ 20-1990, f. & cert. ef. 6-7-90

340-150-0016

Multi-Chamber or Multi-Compartment Tanks, Conditions and Requirements

For the purposes of the underground storage tank general permit program established by OAR 340-150-0019 through 340-150-0166, each chamber or compartment of a multi-chambered or multi-compartmented tank is considered a separate tank and must be registered as such.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746, ORS 466.750 & ORS 466.760

Hist.: DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0019

Compliance With Underground Storage Tank General Permit
Required

Effective December 23, 1998, any person who installs, operates or decommissions an underground storage tank intended to hold, is holding, or that held a regulated substance must comply with the conditions and requirements of a general permit pursuant to OAR 340-150-0160 through 340-150-0166.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746, ORS 466.750 & ORS 466.760

Hist.: DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0020

Underground Storage Tank General Permit Registration
Certificate Required

(1) After December 22, 1998, any person who installs, operates or decommissions an underground storage tank must first obtain an underground storage tank general permit registration certificate as defined in OAR 340-150-0010(17) from the Department, except as otherwise provided in OAR 340-150-0021(3) for persons who must decommission temporarily permitted tanks on or after December 23, 1998.

(2) After December 22, 1998, any person wanting to obtain a modification of a general permit registration form must file a new general permit registration certificate pursuant to subsections 3(a) and (b) of this section.

(3) After December 22, 1998, general permit registration certificates are issued to the person designated as the permittee for the activities and operations of record and terminate:

(a) 120 days after any change of ownership of property in which the tank is located; ownership of tank or permittee;

(b) 120 days after a change in the nature of activities and operations from those of record in the last registration; or

(c) Upon issuance of a new or modified general permit registration certificate for the same operation.

(4) General permit conditions and requirements may be modified upon adoption of new or revised rules by the Commission.

Stat. Auth.: ORS 465.200 - ORS 465.455 & ORS 466.705 - ORS 466.995

Stats. Implemented: ORS 466.746 & ORS 466.760

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0021

Termination of Existing Temporary Permits

(1) On December 23, 1998, all existing temporary permits issued pursuant to OAR 340-150-0020(5) or OAR 340-150-0040(5) terminate.

(2) All persons holding a temporary permit on or before December 22, 1998 and operating underground storage tanks, including depositing regulated substances into said tanks, on or after December 23, 1998 must have a general permit registration certificate for operation pursuant to OAR 340-150-0020 and must provide the general permit registration certificate number to their distributor pursuant to OAR 340-150-0150(2). To obtain a general permit registration certificate, such persons must submit a general permit registration form pursuant to OAR 340-150-0040.

(3) All persons holding a temporary permit on or before December 22, 1998 who have not obtained a general permit registration certificate for operation of USTs by December 23, 1998 must decommission the USTs in accordance with the conditions and requirements of the general permit for decommissioning an UST by temporary or permanent closure or change-in-service pursuant to OAR 340-150-0166 on or after December 23, 1998. Such persons are not permitted to operate the USTs or deposit a regulated substance into the USTs on or after December 23, 1998.

[NOTE: Persons decommissioning under subsection (3) of this section are not required to submit a general permit registration form. The Department will provide a copy of the general permit requirements for decommissioning an UST by temporary or permanent closure or change-in-service after December 23, 1998.]

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746, ORS 466.750 & ORS 466.760

Hist.: DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0030

Underground Storage Tank Permit Application Required

(1) On or before May 1, 1988 the following persons must apply for an underground storage tank permit from the Department:

(a) An owner of an underground storage tank currently in operation;

(b) An owner of an underground storage tank taken out of operation between January 1, 1974, and May 1, 1988 and not permanently decommissioned in accordance with OAR 340-150-0130; and

(c) An owner of an underground storage tank that was taken out of operation before January 1, 1974, but that still contains a regulated substance.

(2) After May 1, 1988 the owner of an underground storage tank must apply for an underground storage tank permit from the Department prior to installation of the tank and placing an existing underground storage tank in operation or modifying an existing permit.

[NOTE: After December 22, 1998 all persons must comply with the general permit program established by OAR 340-150-0019, 340-150-0020 and OAR 340-150-0160 through 340-150-0166 in lieu of compliance with this rule.]

Stat. Auth.: ORS 465.200 - ORS 465.455 & ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746, ORS 466.750 & ORS 466.760

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0040

Underground Storage Tank General Permit Registration Form

(1) Any person required to obtain a general permit registration certificate pursuant to OAR 340-150-0020 must submit a general permit registration form provided by the Department. General permit registration forms must be submitted at least 30 days before installing, operating or decommissioning an underground storage tank under a general permit. All general permit registration forms must be completed in full, including all required exhibits and information as specified by OAR 340-150-0050.

(2) General permit registration forms that are obviously incomplete, unsigned, or do not contain the required exhibits (clearly identified) will be returned to the applicant for completion. The general permit registration form will not be considered complete for processing until the required information is received. The general permit registration form will be considered to be withdrawn if the applicant fails to submit the required information within 90 days of the date the form was returned.

(3) General permit registration forms that appear complete will be accepted by the Department for processing and a numbered underground storage tank general permit registration certificate will be issued.

(4) If, the Department determines that compliance with a general permit is not required, the Department will notify the registrant in writing of this determination. Such notification constitutes final action by the Department on the general permit registration form.

(5) Any person applying for a general permit registration certificate for an existing UST system not previously reported as required by OAR 340-150-0030 must complete and submit a general permit registration form as specified in this section. Payment for required permit and annual compliance fees must accompany this form.

(a) Applicable general permit registration fee as required by OAR 340-150-0070; and

(b) Any outstanding annual compliance fees which should have been paid for earlier calendar years as required by OAR 340-150-0110.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746 & ORS 466.760

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0050

Information Required on the General Permit Registration Form

(1) The following information on the underground storage tank general permit registration form is required:

(a) The legal name and mailing address of the owner of the underground storage tank;

(b) The legal name and mailing address of the owner of the real property in which the underground storage tank is located;

(c) The legal name and mailing address of the proposed permittee of the underground storage tank;

(d) The signatures of the owner of the underground storage tank, the owner of the real property and the proposed permittee, except as otherwise provided in subsection (4) of this section;

(e) The facility name and location address;

(f) The substances currently stored, to be stored or last stored;

(g) The operating status of the tank;

(h) The estimated age of the tank;

(i) A description of the tank, including tank design and construction materials used;

(j) A description of piping, including piping design and construction materials used;

(k) A complete history of tank system repairs, including repair date(s);

(l) A description of the type of leak detection and overfill protection for the tank; and

(m) The federal notification form, Sections I through VI of Appendix I of 40 CFR 280 (or appropriate state form).

(2) For multi-chambered or multi-compartmented tanks, information required by subsections (f) through (m) of this section must be provided for each chamber or compartment.

(3) The registrant must specify which general permit or permits (installation, operation or decommission) the registrant is applying for.

(4) The property owner's signature is not required on general permit registration forms submitted by persons currently holding a temporary permit issued on or before December 22, 1998.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the agency.]

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746 & ORS 466.760

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0060

Authorized Signatures, General Permit Registration Form

The following persons must sign a general permit registration form submitted to the Department.

(1) The owner of an underground storage tank storing a regulated substance.

(2) The owner of the real property in which an underground storage tank is located.

(3) The proposed permittee.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746 & ORS 466.760

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0070

Underground Storage Tank General Permit Registration Form Fee

(1) A general permit registration fee of \$35 per tank must accompany each underground storage tank general permit registration form. For registration forms received after December 22, 1998, the per tank general permit registration form fee will also be considered the first per tank compliance fee required by OAR 340-150-0110.

(2) For multi-chambered or multi-compartmented tanks, the per tank general permit registration fee must be paid on each chamber or compartment.

(3) No general permit registration form fee is required if the registration is solely for the purpose of recording a change in ownership of the underground storage tank, ownership of the real property, of the permittee, or a change in operation of the underground storage tank.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.785

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0080

Denial of Underground Storage Tank General Permit Registration Certificate

An underground storage tank general permit registration certificate for installation or operation may be denied if the underground storage tank installation or operation is not in conformance with these underground storage tank rules, general permit conditions and requirements pursuant to OAR 340-150-0160 or 340-150-0163 or ORS 466.706 through 466.835, ORS 466.994 and 466.995.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.775

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0090

Revocation of Underground Storage Tank General Permit Registration Certificate

An underground storage tank general permit registration certificate may be revoked if there was a material misrepresentation or false statement in the general permit registration form, the underground storage tank installation or operation is not in conformance with the underground storage tank general permit conditions and requirements pursuant to OAR 340-150-0160 or 340-150-0163 or these underground tank rules or there is a violation of ORS 466.706 through 466.835, ORS 466.994 and 466.995.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.775

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0100

Procedures for Denial and Revocation of General Permit Registration Certificates

The provisions of ORS 183.310 to 183.550 for a contested case proceeding apply to the denial or revocation of general permit registration certificates.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.775

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0110

Underground Storage Tank General Permit Compliance Fee

(1) Beginning March 1, 1989, the permittee must pay an annual underground storage tank general permit compliance fee of \$25 per tank per year. For calendar year 1994 and every year thereafter the permittee must pay an annual underground storage tank compliance fee of \$35 per tank per year, except that for calendar year 1998, permittees of tanks not in compliance with the 1998 technical standards must pay a permit fee of \$60 per tank.

(2) Effective December 23, 1998 the permittee must pay an annual underground storage tank general permit compliance fee of \$35 per tank per year, except that for calendar year 1999, permittees of tanks not in compliance with the 1998 technical standards must pay a general permit compliance fee of \$60 per tank.

(3) For multi-chambered or multi-compartmented tanks, the annual per tank general permit compliance fee must be paid for each chamber or compartment.

(4) The underground storage tank general permit compliance fee must be paid for each calendar year (January 1 through December 30) or part of a calendar year that an underground storage tank is not permanently closed in accordance with 40 CFR 280.71.

(5) The general permit compliance fee must be made payable to the Department of Environmental Quality.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the agency.]

Stat. Auth.: ORS 466.706 - ORS 466.995 & OL 1997, Ch. 767

Stats. Implemented: ORS 466.785

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 20-1989(Temp), f. & cert. ef. 8-1-89 (and corrected 8-3-89); DEQ 34-1989, f. & cert. ef. 12-14-89; DEQ 20-1990, f. & cert. ef. 6-7-90; DEQ 7-1994, f. & cert. ef. 3-22-94; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0112

UST Fee Waiver

(1) The UST general permit registration fee required by OAR 340-150-0070 may be waived by the Director.

(2) An annual UST general permit compliance fee required by OAR 340-150-0110 may be waived by the Director.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.785

Hist.: DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0115

Delegation of Program Administration

(1) Any agency of this state or a local unit of government wishing to administer all or part of the underground storage tank program covered by these rules shall submit a written application describing the portions of the Department's underground storage tank program they wish to administer. The application shall contain the following:

(a) A description in narrative form of the scope, structure, coverage and procedures of the proposed program;

(b) A description, including organization charts, of the organization and structure of applicant, including:

(A) The number of employees, occupation and general duties of each employee who will carry out the activities of the program;

(B) An itemized estimate of the cost of establishing and administering the program, including the cost of personnel listed in paragraph (A) of this subsection and administrative and technical support;

(C) An itemization of the source and amount of funding available to meet the costs listed in paragraph (B) of this subsection, including any restrictions or limitations upon this funding;

(D) A description of applicable procedures, including permit procedures;

(E) Copies of the permit form, application form and reporting form that will be used in the program;

(F) A complete description of the methods to be used to assure compliance and for enforcement of the program;

(G) A description of the procedures to be used to coordinate information with the Department, including the frequency of reporting and report content; and

(H) A description of the procedures the applicant will use to comply with trade secret laws under ORS 192.500 and 468.910.

(2) Within 30 days after receiving the application, the Department will review the application for completeness and request any additional information needed in order for the application to be complete. The Department will notify the applicant in writing when the application is complete.

(3) Within 120 days after the application is complete, the Department will:

(a) Prepare and mail a written and signed agreement or contract, outlining the terms and conditions under which the Department will delegate a portion or all of the underground storage tank program described by these rules, to the applicant; or

(b) Deny the application where the Department finds the program described by the application is not equivalent to the Department's underground storage tank program.

(4) The agreement or contract may be terminated by either party by providing 30 days prior notice in writing.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.730

Hist.: DEQ 20-1990, f. & cert. ef. 6-7-90

340-150-0125

Approval of More Stringent Performance Standards

(1) Any local unit of government supplying water for municipal purposes from an underground source that could be jeopardized by releases from UST systems may petition the Department for more stringent UST performance standards for UST systems in the vicinity of the underground water source. Administrative rules on more stringent performance standards may be adopted where the Commission determines through facts and findings that it is necessary to protect the underground water supply through more stringent UST performance standards.

(2) The petition shall be made to the Department in writing and shall include the following information:

(a) A description of the underground water resource including, but not limited to:

(A) The geographical limits of the area where more stringent UST performance standards are required;

(B) The geographical limits of the groundwater recharge zone;

(C) The geographical limits of the underground water resource;

(D) The geology within both the recharge zone and the underground water resource;

(E) Location, size and present use of wells within the limits of the underground water resource;

(F) Estimated capacity of the underground water resource.

(b) A description of the existing threats to the groundwater resource including, but not limited to:

(A) Location, type and number of underground storage tanks;

(B) Agricultural effluent and rainwater runoff;

(C) Industrial effluent and rainwater runoff; and

(D) Rainwater runoff from roads and parking lots.

(c) A description of the underground storage tank performance standards required, including UST technical standards, operating standards, and administrative procedures;

(d) A description of the emergency conditions, where the petitioner requests adoption of emergency rules.

(3) Within 30 days after receiving the petition, the Department will review the petition for completeness and request any additional information needed in order for the petition to be complete. The Department will notify the petitioner in writing when the petition is complete.

(4) Within 120 days after the petition is complete, the Department shall:

(a) Initiate rulemaking; or

(b) Recommend denial of the petition where the Department finds that more stringent UST performance standards are not necessary to protect the underground water supply.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746

Hist.: DEQ 20-1990, f. & cert. ef. 6-7-90

340-150-0130

Permanent Decommissioning of an Underground Storage Tank

The permanent decommissioning requirements for underground storage tanks are described in 40 CFR 280.70 through 280.74, Subpart G - Out of Service UST Systems and Closure.

[Publications: The publication(s) referred to or incorporated by reference in this rule is available from the agency.]

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 15-1989, f. & cert. ef. 7-28-89 (and corrected 8-3-89); DEQ 20-1990, f. & cert. ef. 6-7-90

340-150-0140

Requirement to Notify the Underground Storage Tank Owner and Operator

After December 22, 1998 any person who sells an underground storage tank must notify the new owner or permittee of the tank in writing of the requirements for obtaining an underground storage tank general permit registration certificate.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0150

Depositing Regulated Substances in Underground Storage Tanks

(1) After December 22, 1998, any person who deposits or causes to be deposited a regulated substance into an underground storage tank that has not been issued a general permit registration certificate for operation by the Department is in violation of these rules.

(2)(a) After December 22, 1998, before arranging future deliveries of a regulated substance, the permittee must provide the underground storage tank general permit registration certificate number to any person depositing a regulated substance into the tank; and

(b) If a general permit registration certificate is revoked or terminated, the permittee must provide written notice of the change in general permit registration certificate status to any person previously notified under subsection (2)(a) of this rule.

(3) After December 22, 1998, no person may deposit or cause to have deposited a regulated substance into an underground storage tank unless the tank has been issued a general permit registration certificate by the Department for the operation of the tank.

(4)(a) After December 22, 1998, sellers and distributors must maintain a written record of the general permit registration certificate number for each underground storage tank into which they deposit a regulated substance; and

(b) If requested by the Department, a seller or distributor must provide a written record, including the general permit registration certificate number, for tanks into which they have deposited a regulated substances during the last three years of record.

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats. Implemented: ORS 466.746

Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 3-1989, f. & cert. ef. 3-10-89; DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0160

General Permit for an UST Installation, Conditions and Requirements

(1) There shall be a general permit for the installation of an underground storage tank that is intended to hold a regulated substance in accordance with ORS 466.706 through 466.995 and OAR 340 — Division 150.

(2) The general conditions and requirements applicable to the installation of an UST intended to hold a regulated substance are:

(a) The definitions found in OAR 340-150-0010 and 40 CFR 280.12 as modified by OAR 340-150-0003 (3 through 8) are applicable;

(b) The proposed installation is for an UST as defined by OAR 340-150-0010(20) and does not include exempt tanks as listed in OAR 340-150-0015;

(c) The proposed tank will hold a regulated substance as defined by 40 CFR 280.12;

(d) No person other than the tank owner, property owner, permittee or a Service Provider and Supervisor licensed in accordance with OAR 340 — Division 160 may perform tank installation work.

(e) A general permit registration and annual compliance fee must be paid in accordance with ORS 466.785 and OAR 340-150-0070 and OAR 340-150-0110;

(f) After December 23, 1998, no regulated substance may be deposited into an UST until a general permit registration certificate for operating an UST has been issued and the seller or distributor has been informed of the general permit registration certificate number as required by OAR 340-150-0150(2);

(g) No permittee may install an UST that does not meet the conditions and requirements of this general permit and all other applicable rules and laws. The permittee has the duty to immediately take such actions as are necessary to bring the UST installation into compliance with the conditions and requirements of this general permit and all applicable rules and laws;

(h) For purposes of determining compliance with the general permit for installation conditions and requirements and applicable Oregon Revised Statutes and Oregon Administrative Rules, any employee or authorized representative of the Department may enter the site at any reasonable time to interview persons, inspect equipment and site conditions, collect samples, take still or video pictures, conduct an investigation, or review and copy records pursuant to ORS 466.805; and

(i) A general permit registration certificate for installation may be revoked in accordance with ORS 466.775 and OAR 340-150-0090 if the Department finds:

(A) A material misrepresentation or false statement in the registration for a permit;

(B) Failure to comply with the general permit conditions and requirements for installation; or

(C) Violation of any applicable statute, rule or order.

(3) The notification conditions and requirements applicable to the installation of an UST holding a regulated substance are:

(a) A notice of intent to install must be submitted at least 30 days before installing an UST as required by 40 CFR 280.22(a) as modified by OAR 340-150-0003(15); and

(b) At least 3 working days before beginning installation, a notice of the confirmed date and time the installation will begin must be provided as required by 40 CFR 280.22(h) as modified by OAR 340-150-0003(17), unless otherwise waived by the Department.

(4) The technical conditions and requirements applicable to the installation of an UST holding a regulated substance are:

(a) To prevent releases due to structural failure or corrosion, the tank must meet the corrosion control performance standards in 40 CFR 280.20(a) as modified by OAR 340-150-0003(9), (10) and (11);

(b) The piping that routinely contains regulated substances and is in contact with the ground must meet the corrosion control performance standards in 40 CFR 280.20(b) as modified by OAR 340-150-0003(12) and (13);

(c) To prevent spilling and overfilling associated with product transfers to the UST systems, the system must meet the spill and overfill performance standards in 40 CFR 280.20(c);

(d) To detect a release from any portion of the tank and the connected underground piping that routinely contains a regulated substance, the system must meet the release detection performance standards in 40 CFR 280.40 through 280.44 as modified by OAR 340-150-0003(18), (19), (20), (43), (44) and (45); and

(e) All tanks and piping must be installed according to the installation performance standards in 40 CFR 280.20(d).

(5) The financial responsibility conditions and requirements applicable to the installation of an UST holding a regulated substance is that either the tank owner or permittee must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury or property damage by complying with the per occurrence and annual aggregate financial responsibility amounts found in 40 CFR 280.93 by using one, or a combination of mechanisms found in 40 CFR 280.94 through 280.107 before operating an UST.

(6) The recordkeeping and reporting conditions and requirements applicable to the installation of an UST holding a regulated substance are:

(a) The installation must be certified by submitting the documentation required by 40 CFR 280.20 (e) as modified by OAR 340-150-0003(14) and 40 CFR 280.22 (e); and

(b) The tank owner or permittee must certify compliance with the financial responsibility requirements by submitting to the Department the documentation required by 40 CFR 280.110 (b);

[NOTE: Tank Owners, permittees and service providers can satisfy the reporting requirements of section (6) (a & b) of this section by submitting the Tank Installation Checklist, as built drawings, and completing and submitting Section VII of the general permit registration form. Copies of the checklist and Section VII of the registration form are available from the Department.]

(7) Any person who fails to comply with general permit conditions and requirements for installing an UST are subject to enforcement action pursuant to ORS 466.810, 466.835, 466.994 and 466.995 and OAR 340 — Division 12.

[Publications: The publications referred to or incorporated by reference in this rule are available from the agency]

Stat. Auth.: ORS 466.706 - ORS 466.995

Stats Implemented: ORS 466.706, ORS 466.710, ORS 466.740, ORS 466.746, ORS 466.750, ORS 466.760, ORS 466.765, ORS 466.770, ORS 466.775, ORS 466.785, ORS 466.800, ORS 466.805, ORS 466.810 & ORS 466.815

Hist.: DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0163

General Permit for Operating an UST, Conditions and Requirements

(1) There shall be a general permit for the operation of an UST that holds a regulated substance in accordance with ORS 466.706 through 466.995 and OAR 340 — Division 150 and ORS 465.200 through 465.455 and OAR 340-122-0010 through 340-122-0360.

(2) The general conditions and requirements applicable to operating an UST holding a regulated substance are:

(a) The definitions found in OAR 340-150-0010 and 40 CFR 280.12 as modified by OAR 340-150-0003(3) through (8) are applicable;

(b) This general permit applies to the operation of an UST as defined by OAR 340-150-0010(20) and does not include exempt tanks as listed in OAR 340-150-0015;

(c) This general permit applies to the operation of an UST that holds a regulated substance as defined by 40 CFR 280.12;

(d) No person other than the tank owner, property owner, permittee or a Service Provider and Supervisor licensed in accordance with OAR 340 — Division 160 may perform UST repair or upgrade work. If there is a release of petroleum, no person other than the tank owner, property owner, permittee or a Service Provider and Supervisor licensed in accordance with OAR 340 — Division 162 may perform soil matrix corrective action work;

(e) An annual general permit compliance fee must be paid in accordance with ORS 466.785 and OAR 340-150-0110;

(f) No permittee or other person may deposit a regulated substance into an UST that has not been issued a general permit registration certificate for operating an UST and for which the fuel seller or distributor has not been informed of the general permit registration certificate number as required by OAR 340-150-0150;

(g) The general permit registration certificate for an UST will terminate within 120 days if there is a change of ownership of the property, ownership of the tank, permittee or change in the nature of the activities and operations from those of record pursuant to OAR 340-150-0020(3);

(h) No permittee may operate an UST that does not meet the conditions and requirements of this general permit and all other applicable rules and laws. The permittee has the duty to:

(A) Immediately take such actions as are necessary to bring the UST into compliance with the conditions and requirements of this general permit and all applicable rules and laws; or

(B) Apply for a decommissioning general permit and immediately begin to manage the UST in compliance with conditions and requirements of the general permit for decommissioning in accordance with OAR 340-150-0166.

(i) For purposes of determining compliance with the general permit for operation conditions and requirements and applicable Oregon Revised Statutes and Oregon Administrative Rules, any employee or authorized representative of the Department may enter the site at any reasonable time to interview persons, inspect equipment and site conditions, collect samples, take still or video pictures, conduct an investigation, or review and copy records pursuant to ORS 466.805; and

(j) The general permit registration certificate for operation may be revoked as provided in ORS 466.775 and OAR 340-150-0090 if the Department finds:

(A) A material misrepresentation or false statement in the registration for a general permit for operation;

(B) Failure to comply with the general permit conditions and requirements for operation; or

(C) Violation of any applicable statute, rule or order.

(3) The notification and reporting conditions and requirements applicable to operating an UST holding a regulated substance are:

(a) A notice of intent must be submitted at least 30 days prior to operating an UST as required by 40 CFR 280.22(a) as modified by OAR 340-150-0003(15);

(b) A notice of intent to upgrade an existing UST system must be submitted at least 30 days prior to upgrading an UST as required by 40 CFR 280.21(e) as modified by OAR 340-150-0003(41) and 280.34(5) as modified by OAR 340-150-0003(42);

(c) At least 3 working days before beginning an upgrade of an UST, a notice of the confirmed date and time the upgrade will begin must be submitted as required by 40 CFR 280.22(h) as modified by OAR 340-150-0003(17), unless otherwise waived by the Department;

(d) Any spills and overfills must be reported as required by 40 CFR 280.30(b), 280.34(a)(2) and 280.53 and OAR 340-122-0010 through 340-122-0360;

(e) Suspected releases of regulated substances from UST systems must be reported as required by 40 CFR 280.50. Suspected releases of petroleum must also be reported in accordance with OAR 340-122-0205 through 340-122-0360;

(f) Confirmed releases of regulated substances from UST systems must be reported as required by 40 CFR 280.61 as amended by OAR 340-150-0003(23). Confirmed releases of petroleum must also be reported in accordance with OAR 340-122-0205 through 340-122-0360; and

(g) Within 10 days after commencement of voluntary or involuntary proceeding under Title 11 (Bankruptcy), U. S. Code or other incapacity of the owner, permittee or financial assurance provider, the Department must be notified as required by 40 CFR 280.114.

(4) The technical conditions and requirements applicable to operating an UST holding a regulated substance are:

(a) The UST system must be made of, or must be lined with, materials that are compatible with the regulated substance stored in the UST system as required by 40 CFR 280.32;

(b) Releases due to corrosion must be prevented for as long as a steel UST system with corrosion protection is used to store regulated substances as required by 40 CFR 280.31;

(c) Procedures must be in place that provide, calibrate, operate and maintain a method, or combination of methods, of leak detection that can detect a release from any portion of the tank and the connected underground piping that routinely contains a regulated substance as required by 40 CFR 280.40 through 280.44 as modified by OAR 340-150-0003(18), (19), (20), (43), (44) and (45);

(d) Spilling and overfilling must be prevented as required by 40 CFR 280.30(a);

(e) Any spills and overfills must be investigated and cleaned up as required by 40 CFR 280.30(b) and 280.53 and OAR 340-122-0010 through 340-122-0360; and

(f) Repairs must prevent releases due to structural failure and corrosion for as long as the UST system is used to store regulated substances as required by 40 CFR 280.33.

(5) The recordkeeping and report submission conditions and requirements applicable to operating an UST holding a regulated substance are:

(a) Records must be maintained to demonstrate compliance with the corrosion protection requirements of section (4)(b) of this rule as required by 40 CFR 280.31(d) and 280.34(b)(2);

(b) Records must be maintained to demonstrate compliance with the release detection requirements of section (4)(c) of this rule as required by 40 CFR 280.34(b)(4) and 280.45;

(c) Records of each repair must be maintained as required by 40 CFR 280.33(f) and 280.34(b)(3);

(d) A copy of corrective action reports prepared under OAR 340-122-0205 through 340-122-0360 must be maintained for 10 years after the first transfer of property as required by OAR 340-122-0360(2);

(e) Evidence must be maintained of all financial assurance mechanisms used to document compliance with financial responsibility as required by 40 CFR 280.111;

(f) In the case of a release, failure to obtain alternate coverage, commencement of voluntary or involuntary bankruptcy, suspension or revocation of the authority of a financial assurance provider, failure of a guarantor, other incapacity of a financial assurance provider, failure to meet the self-insurance test or cancellation or non-renewal by a financial assurance provider, the tank owner or permittee must submit current evidence of financial responsibility to the Department as required by 40 CFR 280.110 (a); and

(g) The records required by subsections (5)(a), (b), (c), (d), (e) and (f) of this section must be kept and made available, upon request, as required by 40 CFR 280.34(c) and 40 CFR 280.110 and 280.111.

(6) The release response and corrective action conditions and requirements applicable to operating an UST holding a regulated substance are:

(a) Unless corrective action for a release of regulated substances is undertaken pursuant to ORS 465.200 to 465.455 and OAR 340-122-0010 through 340-122-0360 as required by 40 CFR 280.60 as modified by OAR 340-150-0003(21) and (22), investigation of suspected releases and off-site impacts must begin immediately as required by 40 CFR 280.51 and 280.52;

(b) Release response and corrective action for petroleum releases must be undertaken in accordance with ORS 465.200 to 465.455 and OAR 340-122-0205 through 340-122-0360 as required by 40 CFR 280.60 as modified by OAR 340-150-0003(21) and (22); and

(c) Release response and corrective action for hazardous substance releases must be undertaken in accordance with 40 CFR Part 280 — Subpart F as modified by OAR 340-150-0003(21) through (33) and ORS 465.200 to 465.455 and OAR 340-122-0010 through 340-122-0110.

(7) The financial responsibility conditions and requirements applicable to operating an UST holding a regulated substance are:

(a) Either the tank owner or permittee must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury or property damage by complying with the per occurrence and annual aggregate financial responsibility amounts found in 40 CFR 280.93 by using one, or a combination of mechanisms found in 40 CFR 280.94 through 280.107; and

(b) If at any time after a standby trust is funded, the full amount in the standby trust is reduced below the full amount of coverage required, the tank owner or permittee must replenish the standby trust or acquire another financial assurance mechanism as required by 40 CFR 280.115.

(8) Any person who fails to comply with general permit conditions and requirements for operating an UST is subject to enforcement action pursuant to ORS 465.900 and ORS 466.810, 466.820, 466.830, 466.835, 466.994 and 466.995 and OAR 340 — Division 12.

[Publications: The publications referred to or incorporated by reference in this rule are available from the agency]

Stat. Auth.: ORS 466.706 - ORS 466.995 & ORS 465.200 - ORS 465.990

Stats Implemented: ORS 465.200, ORS 465.210, ORS 465.255, ORS 465.260, ORS 466.706, ORS 466.710, ORS 466.740, ORS 466.746, ORS 466.750, ORS 466.760, ORS 466.765, ORS 466.770, ORS 466.775, ORS 466.785, ORS 466.800, ORS 466.805, ORS 466.810 & ORS 466.815

Hist.: DEQ 24-1998, f. & cert. ef. 11-2-98

340-150-0166

General Permit for Decommissioning of an UST by Temporary or Permanent Closure or Change-in-Service, Conditions and Requirements

(1) There shall be a general permit for decommissioning an UST that is holding, or held, a regulated substance in accordance with ORS 466.706 through 466.995 and OAR 340 — Division 150 and ORS 465.200 through 465.455 and OAR 340 — Division 122.

(2) The general conditions and requirements applicable to the decommissioning of an UST that is holding, or held, a regulated substance are:

(a) This general permit applies to the decommissioning of an UST as defined by OAR 340-150-0010(20) and does not include exempt tanks as listed in OAR 340-150-0015;

(b) This general permit applies to the decommissioning of an UST that is holding, or held, a regulated substance as defined by 40 CFR 280.12;

(c) No person may deposit a regulated substance into an UST being managed under a general permit for decommissioning;

(d) No person other than the tank owner, property owner, permittee, or a Service Provider and Supervisor licensed pursuant to OAR 340 — Division 160 may perform UST decommissioning work. If there is a release of petroleum, no person other than the tank owner, property owner, permittee or a Service Provider and Supervisor licensed pursuant to OAR 340 — Division 162 may perform soil matrix corrective action work;

(e) Annual compliance fees must be paid in accordance with ORS 466.785 and OAR 340-150-0110;

(f) This general permit for decommissioning terminates within 120 days if there is a change of ownership of the property, ownership of the tank, permittee or change in the nature of the activities and operations from those of record as required by OAR 340-150-0020(3);

(g) No permittee may perform a decommissioning of an UST unless such decommissioning meets the conditions and requirements of this general permit and all other applicable rules and laws. The permittee has the duty to immediately take such actions as are necessary to bring the UST decommissioning into compliance with the conditions and requirements of this general permit and all applicable rules and laws; and

(h) For purposes of determining compliance with the general permit for decommissioning conditions and requirements and applicable Oregon Revised Statutes and Oregon Administrative Rules, any employee or authorized representative of the Department may enter the site at any reasonable time to interview persons, inspect equipment and site conditions, collect samples, take still or video pictures, conduct an investigation, or review and copy records pursuant to ORS 466.805.

(3) The notification and reporting conditions and requirements applicable to the decommissioning of an UST that is holding, or held, a regulated substance are:

(a) At least 30 days before beginning permanent closure, the Department must be notified of the intent to permanently close as required by 40 CFR 280.71 (a) as modified by OAR 340-150-0003(34);

(b) At least 3 working days before beginning permanent closure, notice of the confirmed date and time the permanent closure will begin must be provided as required by 40 CFR 280.71 (a) as modified by OAR 340-150-0003(34), unless otherwise waived by the Department;

(c) If contaminated soils or water or free product are discovered during permanent closure or change-in-service, the release of regulated substances from UST systems must be reported as required by 40 CFR 280.72 (b) and (c) as modified by OAR 340-150-0003(38);

(d) At least 30 days before beginning a change-in-service, the Department must be notified of the intent to make the change-in-service as required by 40 CFR 280.71 (a) as modified by OAR 340-150-0003(34); and

(e) Within 10 days after commencement of voluntary or involuntary proceeding under Title 11 (Bankruptcy), U. S. Code or other incapacity of the owner, permittee or financial assurance provider, the tank owner or permittee must notify the Department as required by 40 CFR 280.114.

— (4) The technical conditions and requirements applicable to the decommissioning of an UST that is holding, or held a regulated substance are:

(a) When an UST system is temporarily closed for 3 months or less, operation and maintenance of corrosion protection for steel tanks must continue, release detection must be performed if the tank is not empty and compliance with release reporting and corrective action must occur, if a release is detected, as required by 40 CFR 280.70(a);

(b) When an UST system is temporarily closed for 3 months or more but less than 12 months, in addition to complying with section (4)(a) of this general permit, all lines, pumps, manways and ancillary equipment, except the vent lines, must be capped and secured as required by 40 CFR 280.70(b);

(c) Except as provided in section (4)(d) of this general permit, the UST system must be permanently closed before the 12 month period expires if it does not meet either the new performance standards in 40 CFR 280.20 as modified by OAR 340-150-0003(9) through (14) or the upgrading requirements in 40 CFR 280.21 as modified by OAR 340-150-0003(41) as required by 40 CFR 280.70(c);

(d) In order to manage an UST system in temporary closure for more than 12 months, a site assessment must be conducted in accordance with 40 CFR 280.72 as modified by OAR 340-150-0003(38) and (39) and prior approval must be received from the Department as required by 40 CFR 280.70(c);

(e) Permanent closure performance standards for the tank and tank residues must be met as required by 40 CFR 280.71(b) and (d) as modified by OAR 340-150-0003(35) and (37); and

(f) Before permanent closure is completed, the presence of a release must be measured for as required by 40 CFR 280.72(a) as modified by OAR 340-150-0003(39) and OAR 340-122-0205 through 340-122-0360.

(5) The recordkeeping and report submission conditions and requirements applicable to the decommissioning of an UST that is holding, or held, a regulated substance are:

(a) A completed decommissioning checklist and change-in-service report must be submitted to the Department within 30 days after tank closure as required by 40 CFR 280.71(b) as modified by OAR 340-150-0003(35);

(b) Records of temporary or permanent closure and change-in-service, including records of the site assessment, must be maintained as required by 40 CFR 280.74 and 280.34(b)(5);

(c) A copy of corrective action reports prepared under OAR 340-122-0205 through 340-122-0360 must be maintained for 10 years after the first transfer of property as required by OAR 340-122-0360(2);

(d) Evidence of all financial assurance mechanisms used to document compliance with financial responsibility must be maintained as required by 40 CFR 280.111;

(e) In the case of a release, failure to obtain alternate coverage, commencement of voluntary or involuntary bankruptcy, suspension or revocation of the authority of a financial assurance provider, failure of a guarantor, other incapacity of a financial assurance provider, failure to meet the self-insurance test or cancellation or non-renewal by a financial assurance provider, the tank owner or permittee must submit current evidence of financial responsibility as required by 40 CFR 280.110; and

(f) The records required by subsections (5)(a), (b), (c), (d) and (e) of this section must be kept, and made available upon request, as required by 40 CFR 280.34(c), 40 CFR 280.110 and 280.111 and OAR 340-122-0360.

(6) The change-in-service conditions and requirements applicable to an UST that is holding, or held, a regulated substance are:

(a) In lieu of permanent closure, or bringing a temporarily closed tank back into service by meeting the new tank performance standards, an UST system may continue to be used to store a non-regulated substance if the change-in-service requirements are met pursuant to 40 CFR 280.71(c) as modified by OAR 340-150-0003(36); and

(b) Before a change-in-service is completed, the presence of a release must be measured for as required by 40 CFR 280.71 as modified by OAR 340-150-0003(36) and 40 CFR 280.72(a) as modified by OAR 340-150-0003(39) and OAR 340-122-0010 through 340-122-0360.

(7) The release response and corrective action conditions and requirements applicable to an UST that is holding, or held, a regulated substance are:

(a) Release response and corrective action for petroleum releases discovered during permanent closure or a change-in-service must be undertaken pursuant to ORS 465.200 to 465.455 and OAR 340-122-0205 through 340-122-0360 as required by 40 CFR 280.60 as modified by OAR 340-15-0003(21) and (22); and

(b) Release response and corrective action for hazardous substance releases discovered during permanent closure or change-in-service must be undertaken as required by 40 CFR Part 280 - Subpart F as modified by OAR 340-150-0003(21) through (33) and ORS 465.200 to 465.455 and OAR 340-122-0010 through 340-122-0110.

(8) The financial responsibility conditions and requirements applicable to decommissioning an UST that is holding, or held, a regulated substance are:

(a) Until an UST system is permanently closed, or if corrective action is required, after the corrective action is completed, the tank owner or permittee must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury or property damage by complying with the per occurrence and annual aggregate financial responsibility amounts found in 40 CFR 280.93 by using one, or a combination of, mechanisms found in 40 CFR 280.94 through 280.107 as required by 40 CFR 280.113; and

(b) If at any time after a standby trust is funded, the full amount in the standby trust is reduced below the full amount of coverage required, the tank owner or permittee must replenish the standby trust or acquire another financial assurance mechanism as required by 40 CFR 280.115.

(9) Any person who fails to comply with general permit conditions and requirements for decommissioning an UST is subject the permittee to enforcement action pursuant to ORS 465.900 and ORS 466.810, 466.820, 466.830, 466.835, 466.994 and 466.995 and OAR 340 — Division 12.

[Publications: The publications referred to or incorporated by reference in this rule are available from the agency]

Stat. Auth.: ORS 466.706 - ORS 466.995 & ORS 465.200 - ORS 465.990

Stats Implemented: ORS 465.200, ORS 465.210, ORS 465.255, ORS 465.260, ORS 466.706, ORS 466.710, ORS 466.740, ORS 466.746, ORS 466.750, ORS 466.760, ORS 466.765, ORS 466.770, ORS 466.775, ORS 466.785, ORS 466.800, ORS 466.805, ORS 466.810 & ORS 466.815

Hist.: DEQ 24-1998, f. & cert. ef. 11-2-98

In the Matter of VIOLET BERWICK, Petitioner, v. ADULT AND FAMILY
SERVICES DIVISION, Department of Human Resources, Respondent

CA No. A31538

COURT OF APPEALS OF OREGON

74 Ore. App. 460; 703 P.2d 994; 1985 Ore. App. LEXIS 3490

January 30, 1985, Submitted on record and briefs
July 17, 1985, Filed

SUBSEQUENT HISTORY: [***1] Submitted on record and briefs January 30, 1985; Reconsideration Denied September 27, 1985; petition for review denied November 26, 1985

Reconsideration Denied September 27, 1985. Petition for Review Denied November 26, 1985 (300 Or 332).

PRIOR HISTORY: Judicial Review from Adult and Family Services Division. No. 5-1501-EW0091-5.

DISPOSITION:

Reversed and remanded for new hearing.

LexisNexis(R) Headnotes

COUNSEL:

Debra F. J. Lee, Jackson County Legal Services, Medford, filed the brief for petitioner.

Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Philip Schradle, Assistant Attorney General, Salem, filed the brief for respondent.

JUDGES:

Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

OPINIONBY:

GILLETTE

OPINION:

[*462] [**995] Petitioner seeks judicial review of a final order of the Adult and Family Services Division,

entered after a hearing, which terminated her General Assistance (GA) benefits. She asserts, first, that the hearings officer's determination that she was no longer unemployable is not supported by substantial evidence and that his conclusion to that effect does not follow from the facts he found. She also asserts that the hearings officer should have assisted [***2] her in presenting evidence in her favor. We agree with the latter point and reverse and remand for a new hearing.

Petitioner is a widow in her early 50's, with an eighth grade education. n1 She has not worked for over 10 years, largely because of extensive physical and mental problems, including a history of several vascular surgeries, most recently the correction of cerebral aneurysms in 1982. She has also been diagnosed as manic depressive and as having a schizophrenic reaction; she was committed to the Oregon State Hospital in 1981 for the first problem. Although formerly she was energetic, she presently has little initiative. She lives in a small house next to that of her parents and does not do even the simplest housekeeping. She has heat in the house only when someone else builds a fire. She complains of poor vision, of being constantly dizzy, of falling down and of bumping into walls and furniture.

n1 We describe the facts in detail, because a full understanding of them will indicate the ways in which the hearings officer's failure to give petitioner adequate assistance in presenting her case affected the outcome. We do not reweigh the evidence.

[***3]

Petitioner began receiving GA most recently on December 14, 1981. In May, 1982, she had surgery on her cerebral aneurysms, followed by six months of recuperation. In January, 1983, AFSD arranged for a full medical

evaluation. On April 11, 1983, the Medical Review Team (MRT) reviewed the file, including the reports of the January evaluation, and determined that, despite her problems, petitioner did not meet the criteria for unemployability. Petitioner requested a hearing; the hearings officer found that she was still eligible and ordered her GA continued for four months. He noted that petitioner had multiple complex problems which kept her from working and that "[t]here is a definite [*463] strangeness about her." He therefore ordered a psychiatric examination before the next review, along with such other tests as MRT might desire.

Soon after the hearings officer's determination, AFSD arranged for Dr. Pearson, a psychologist, to evaluate petitioner. n2 Her MMPI scores indicated serious psychological problems, but Pearson gave them little weight, because he thought they were inconsistent with his interview with her. In his opinion, petitioner was exaggerating her complaints [***4] and was not psychologically unemployable. He did note that petitioner might be suffering subtle effects of her [**996] vascular disease and that a neuropsychological evaluation might be appropriate. Petitioner had no evaluations after Pearson's. MRT again reviewed her file on November 23, 1983, and adhered to its April opinion. In its decision, it referred to a report of February 10, 1983, from Dr. Campagna, petitioner's neurosurgeon, which stated that petitioner had had excellent results from her operation and that she had no problems. It did not mention two reports from Campagna dated May 18, 1983, which were also in petitioner's file. In one, he stated that petitioner "is considered disabled for the next 60 days" and gave a final diagnosis of residual encephalopathy secondary to cerebral and vascular infarctions; in the other, he said that she was "not capable of sustaining gainful employment." AFSD again notified petitioner of its intent to close her grant and she again requested a hearing.

n2 Petitioner does not suggest that this examination did not comply with the hearings officer's order, although Pearson is a psychologist rather than a psychiatrist and the record and Pearson both suggest that petitioner's mental problems may have a physical component.

[***5]

The hearing was held by telephone on February 9, 1984. Petitioner, her parents and a friend testified. Her father acted as her spokesman, describing petitioner's medical background and current condition. He read into the record a letter from Campagna dated January 19, 1984, in which he repeated his previous opinion that petitioner was not capable of gainful employment. At the

hearings officer's request, petitioner's father sent the letter for inclusion in the file. The hearings officer did not indicate that the letter was inadequate or suggest that petitioner get a more detailed report. At the close [*464] of the hearing, petitioner's father emphasized the importance of Campagna's opinion:

"I still say the only one that's qualified to say whether she's able to work or not is Dr. Mario Campagna because he's the one that's been in her head. He's the one that's been treating her. And he's the one that knows what's wrong with her."

The hearings officer upheld the termination of benefits. He treated most of the medical evidence as of only historical importance because of the age of the reports, found that Campagna's note was insufficiently detailed to support [***6] a finding that petitioner suffered from a physical impairment and concluded that he was not persuaded that petitioner was disabled and unable to work. n3

n3 Although the hearings officer did not rely on MRT's opinions that claimant was ineligible, we note that those opinions were based, in large part, on a statement by Campagna which was ambiguous in its context and which was more conclusory than the later one which the hearings officer considered inadequate for the purposes of this case.

Petitioner's first assignment is that the hearings officer's findings are not supported by substantial evidence and that his conclusions do not follow from those findings. This assignment fails. The current medical evidence on petitioner's condition was limited and did not compel a finding that petitioner was unemployable. The previous hearings officer's determination that petitioner was unemployable was based in part on his perception that she was "strange" and his resulting concern about her mental condition. Pearson's [***7] report, if accepted, removed that concern. This hearings officer also adequately explained why the evidence did not convince him that petitioner had shown herself to be unemployable.

The fact that the record contains substantial evidence supporting the hearings officer's findings and the further fact that he explained his decision does not mean that the decision was right or that it was the best decision AFSD could make under the circumstances. Although we review agency factual determinations only to decide whether there is substantial evidence to support them, the

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agency in making its decision weighs all the evidence in the record and finds, it is to be hoped, in accordance with it. ORS 183.450(5). The agency [*465] tries to be right; we only decide whether it has been rational. However, for an agency to make an informed decision, it should acquire and consider all the relevant evidence. Petitioner's second assignment, that the hearings officer erred in failing to assist her in presenting such evidence, is [**997] well founded and requires that we reverse and remand. We first consider the agency's role in a case of this sort.

An agency contested case proceeding [***8] to determine if someone is eligible for benefits is not -- or at least should not be -- wholly adversarial. See *Richardson v. Perales*, 402 U.S. 389, 403, 91 S Ct 1420, 28 L Ed 2d 842 (1971). AFSD is required to grant assistance in accordance with its rules and regulations and on the basis of need. ORS 411.710(1). The purpose of the contested case procedure is partly to protect a claimant who is improperly denied assistance, but it is also partly to aid AFSD in making the correct decision by giving those concerned an opportunity to bring out and explain all evidence relevant to the decision. AFSD's goal is to give assistance to those who are eligible as well as to deny it to those who are not; it is not trying to avoid paying damages to someone it may have injured, like a defendant in a lawsuit. Although a claimant may seek to overturn AFSD's administrative determination of ineligibility, and to that extent the hearing appears adversarial, the claimant -- at least in theory -- faces, on the other side, not an implacable adversary bent on denying her relief, but a decision maker whose tentative decision is far from final. If the claimant is eligible, his or her interest is [***9] the same as that of the agency. Whether the hearings officer upholds or reverses the administrative decision, AFSD will "win" if the final decision is the right one.

The non-adversarial nature of AFSD hearings explains much of their character. The claimant is the only party to the proceeding, for AFSD is the decider, not the opponent. The hearings officer is an AFSD employee, not an independent adjudicator, because the hearing is part of the agency decision making process, not an appeal from it. The hearing is relatively informal and all reliable relevant evidence is admissible. ORS 183.450(1). Except in unusual circumstances, the claimant may not seek judicial relief before the final order in the contested case, ORS 183.480(3), because, until then, AFSD has not made its decision. In short, the claimant and agency do not become total adversaries until the [*466] agency makes an adverse final decision and the claimant seeks judicial review.

The hearings officer's responsibilities are shaped by the character of the hearing. The hearings officer is not a

disinterested adjudicator observing two parties fighting. Rather, he or she aims both at helping AFSD make the best [***10] possible decision and at assuring the claimant a fair and full hearing. The two goals are not antithetical. Each aspect of those duties requires the hearings officer to make sure that the claimant is able to present all significant favorable evidence. When the claimant is represented by an attorney, the hearings officer can normally rely on the attorney to produce that evidence. However, when the claimant is unrepresented or is represented by a lay person, as petitioner was and as many AFSD claimants are, the hearings officer's responsibility is greater. An unrepresented claimant may not know how to present favorable evidence in the best light or even what evidence is favorable. Hearings officers must assist claimants, in part by following up on potentially favorable lines of inquiry and in part by helping claimants present their evidence in its best light. n4 The hearings officer has broad discretion in how to carry out this duty but, if the officer acts outside the range of that discretion, we may remand for further proceedings. ORS 183.482(8)(b)(A). n5

n4 The decision of the first hearings officer to continue petitioner's benefits pending an additional evaluation was consistent with this obligation.

[***11]

n5 AFSD emphasizes that the burden to prove continuing eligibility is on the claimant. OAR 461-09-097(5). This burden is not inconsistent with the hearings officer's role as we have outlined it. Although the hearings officer should assist the claimant in presenting evidence favorable to the claimant's position, it remains the claimant's responsibility to present evidence which persuades the hearings officer that the administrative determination should be changed. In the light of the informal and non-adversarial nature of these hearings, that is all that the burden of proof means. See *Dobrowolsky v. Califano*, 606 F2d 403, 406 (3rd Cir 1979).

[**998] Although we think the foregoing view of the hearings officer's role is not to be gainsaid, no Oregon appellate opinion has ever really discussed it, much less attempted to spell out its parameters and the consequences of failing to perform it adequately. We can, however, obtain some guidance from analogous federal decisions. Federal Social Security disability benefit hearings are similar to AFSD benefits hearings in the

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respects outlined [***12] above. Cases involving them have developed [*467] a rule that, when the claimant is not represented by counsel, "a duty devolves on the hearing examiner to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts surrounding the alleged claim of right or privilege." *Hennig v. Gardner*, *Hennig v. Gardner*, 276 F Supp 622, 624-25 (ND Tex 1967), quoted in *Gold v. Secretary of Health, Education and Welfare*, 463 F2d 38, 43 (2d Cir 1972). The examiner (now Administrative Law Judge or ALJ) "must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." *Rosa v. Weinberger*, 381 F Supp 377, 381 (ED NY 1974), quoted in *Cox v. Califano*, 587 F2d 988, 991 (9th Cir 1978).

Some of the cases applying the rule rely in part on the requirement in former 20 CFR § 404.927 (repealed August 5, 1980; similar provision in present 20 CFR § 404.944) that a claimant receive a full and fair hearing. n6 As the courts construed it, the regulation required the ALJ to make sure that the claimant receives such a hearing. However, the requirement of a full and fair hearing is implicit in the [***13] very right to a hearing, and it appears that the federal courts would require the same of an ALJ, whether or not the regulation existed. See, e.g., *Broz v. Schweicker*, 677 F2d 1351, 1364 (11th Cir 1982); *Thompson v. Schweicker*, 665 F2d 936, 941 (9th Cir 1982); *Cowart v. Schweicker*, 662 F2d 731, 735 (11th Cir 1981); *Smith v. Harris*, 644 F2d 985, 989 (3rd Cir 1981); *Dobrowolsky v. Califano*, *supra* n 5; *Smith v. Secretary of Health, Ed. and Welfare*, 587 F2d 857 (7th Cir 1978). This requirement benefits both the claimant and the agency; we believe it to be appropriate to Oregon and adopt it for contested cases involving individual benefits.

n6 The 1985 legislature enacted a law which will place in the Oregon Administrative Procedures Act a provision which is more explicit concerning the hearings officer's responsibility than is the rule on which the federal cases relied. The bill would amend ORS 183.415 by adding the following provision: "The officer presiding at the hearing shall insure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case." Or Laws 1985, ch 757 § 1.

[***14]

Under the federal rule, the ALJ's duty of scrupulous inquiry requires that he play an active role in eliciting evidence. He does not satisfy the duty simply by assisting an unrepresented claimant in presenting evidence

which the claimant wishes to present; he must also pursue lines of [*468] inquiry which the claimant might not even know were available. The federal appellate courts have reversed ALJ decisions not only when the judge obviously lacked sympathy for the claimant's case, but also when he failed to develop a full record or to follow up on indications that favorable evidence might be available. The courts impose that duty, even when it appears that the claimant should have known that the evidence was available and would have helped his case. Several cases provide instructive examples.

In *Thompson v. Schweicker*, *supra*, the unrepresented claimant had a history of alcoholism and epilepsy and had been living in a sheltered environment for several years. The ALJ asked no questions about the claimant's alcoholism, the frequency and severity of his seizures, the conditions of his sheltered environment or a number of other issues. Concern with the claimant's work [***15] history to the exclusion of all else denied him a fair hearing. The hearing examiner in *Gold v. Secretary of Health, Education and Welfare*, *supra*, [***999] was concerned almost exclusively with the claimant's job history and with her receipt of World War II reparations from the West German government. He did not suggest that she call witnesses, because he considered her case unpersuasive. The claimant's husband was present at the hearing in *Cowart v. Schweicker*, *supra*, but the examiner did not question him about the claimant's condition. Although the claimant indicated that she was taking medication, the examiner did not elicit testimony on the effect of the medication on her ability to work. Because the claimant in *Smith v. Secretary of Health, Ed. and Welfare*, *supra*, had limited education and was suffering from psychological and physical disabilities, the court held it to be the ALJ's duty to suggest the desirability of producing, and to give her the opportunity to produce, expert testimony on those disabilities and their effect on her capacity to work. The ALJ in *Cox v. Califano*, *supra*, misread a physician's letter advising the claimant to begin vocational [***16] rehabilitation as a release to return to work rather than as a trial designed to determine whether he could return. The judge made no effort, and gave the claimant little opportunity, to elaborate on the meaning of the letter. Finally, the court in *Dobrowolsky v. Califano*, *supra* n 5, described two areas in which the ALJ failed to fulfil his duty of inquiry. First, the claimant's medical history indicated that he might have a condition which would [*469] be a *per se* qualification for benefits. Counsel would have pursued that possibility and the ALJ should have sought additional evidence. Secondly, the judge's examination of the vocational expert was inadequate, because he did not ask the expert to explain his conclusion that the claimant could perform certain sedentary jobs and because it was not clear that

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the hypothetical questions to the expert considered all of the claimant's problems.

Those cases are cited as examples only. We do not need to give the hearings officers' responsibility the scope which some of the federal cases have given it in order to hold that, in this case, the hearings officer did not properly carry out his duty. Petitioner relied on Campagna's [***17] opinion; her father stressed it at the very end of the hearing. The hearings officer heard Campagna's opinion read over the telephone and knew then that it was conclusory. He did not tell petitioner that it was inadequate, and he did not suggest that she get a more detailed report. He could have granted a continuance for that purpose. OAR 461-09-099. n7 Without Campagna's statement, there is no current information in the record on petitioner's physical condition, one way or the other, although such information was clearly both desirable and available. Despite Pearson's report, the testimony indicated that something was wrong with petitioner; Campagna's report showed that he believed her to be unemployable. The hearings officer did not state that he found petitioner to be employable but only that there was insufficient evidence for him to find that she was unemployable. A detailed evaluation from Campagna could have supplied the missing evidence and produced a different result. Because of the hearings officer's failure to assist petitioner in presenting this evidence, there is a strong possibility that petitioner has been denied benefits to which [*470] she is entitled. [***18] We hold that that failure constitutes an abuse of the hearings [**1000] officer's broad discretion in controlling a hearing. ORS

183.415(7), (9); 183.450; 183.482(8)(b). Petitioner has been denied the full and fair hearing contemplated by the constitution, the statute and the rule.

n7 It may be that the hearings officer did not realize that Campagna's statement was inadequate until after he read it or until he began preparing his order. He could still have reopened the hearing to give petitioner an opportunity to obtain a more complete statement. Cf. *Cowart v. Schweitzer*, *supra*, (ALJ arranged for two physicians to examine the claimant after the hearing and received their reports in evidence; the claimant should have had an opportunity to cross-examine the physicians). We do not suggest that a hearing should be reopened for every evidentiary problem. However, when it appears as clearly as it does here that an unrepresented claimant may be able to provide decisive evidence with little additional effort and that the hearings officer must have known that fact before issuing the final order, both fairness to the claimant and the accuracy of the agency's decision making require the hearings officer to take reasonable steps to secure the evidence.

[***19]

Reversed and remanded for a new hearing.

00475

CAMPBELL, Petitioner, v. BOARD OF MEDICAL EXAMINERS, Respondent

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF OREGON

16 Ore. App. 381; 518 P.2d 1042; 1974 Ore. App. LEXIS 1201

November 28, 1973, Argued
February 11, 1974

SUBSEQUENT HISTORY: [***1]

Petition for Review Denied May 21, 1974.

PRIOR HISTORY: Judicial Review of the findings of fact, conclusions of law and order of denial of the Board of Medical Examiners for the State of Oregon.

DISPOSITION:

Reversed and remanded.

LexisNexis(R) Headnotes

COUNSEL:

Nels Peterson, Portland, argued the cause for petitioner. With him on the brief were Peterson, Chaivoe & Peterson, and Phillip M. Margolin, Portland.

John W. Burgess, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

JUDGES:

Thornton, Judge. Schwab, Chief Judge, and Foley, Judge.

OPINIONBY:

THORNTON

OPINION:

[*383] [**1043] This is a proceeding for judicial review of an order of the Board of Medical Examiners.

[*384] In 1957 petitioner was granted a license to practice medicine in Oregon. In 1967 petitioner's license registration was changed to inactive, out-of-state, when

he moved to [**1044] Oklahoma to accept a position with a federal agency. In 1971 petitioner returned to Oregon and submitted an application for active registration to respondent Board. The Board, after considering the matter, denied petitioner's [***2] application, stating that it based its refusal on ORS 677.170 (3). n1

n1 ORS 677.170 (3) provides:

"If any person licensed to practice medicine in this state and registered under ORS 677.150 changes his location of practice to some other state or country, he shall be listed by the board as inactive. * * * Before resuming practice in this state, he shall notify the board of his intention to resume active practice in this state and obtain a certificate of active registration for the year he returns. * * * He shall file an affidavit with the board in which he describes his activities during his absence from this state. If, in the judgment of the board, his conduct has been such, during his absence, that he would have been denied a license if applying for an initial license to practice medicine in this state, the board shall deny active registration."

Petitioner sets forth numerous assignments of error. The basic issue, however, is whether the proceedings were in conformity with applicable statutes and [***3]

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complied with due process requirements, so as not to prejudice substantial rights of the petitioner.

The following is a chronology of the events that led up to the challenged hearing:

In December 1970, while working in Oklahoma, petitioner requested information from the Oregon Board of Medical Examiners concerning a change of registration from inactive to active upon his return to this state. The Board advised petitioner by letter that he would have to file an affidavit concerning his activities since leaving the state in 1967.

[*385] On August 2, 1971, petitioner informed the Board that he was practicing medicine at the Astoria Clinic in Astoria, Oregon. On August 3 the Board advised petitioner that he could not practice medicine without an active license and requested him to file an affidavit describing his activities since leaving the state. This affidavit, dated August 4, was filed with the Board on August 5.

The Board's answer, dated August 25, 1971, stated in part:

"The Board conducted an investigation based upon the information furnished to the Board in your affidavit. The results of this investigation disclosed that your conduct has been such during your [***4] absence from the state that if you had been applying for an initial license to practice medicine in this state, the Board would have denied such initial license. Therefore, the Board is required by Oregon law to deny you active registration in the State of Oregon (ORS 677.170 (3))."

On September 2, 1971, petitioner requested a hearing before the Board on its denial of active registration. On December 28, 1971, the Board notified petitioner that he was granted a hearing. However, it was not until January 3, 1972, that the Board notified petitioner of the particular conduct it considered in denying his application. This notification was contained in an explicit "Bill of Particulars" which was requested by petitioner's counsel, and which stated that, pursuant to ORS 677.170 (3), the Board denied petitioner's application for active registration because of six specified "acts, statements or conduct." A hearing was subsequently held before a hearing officer appointed by the chairman of the Board, following which the Board issued its Order of Denial.

[*386] Petitioner argues that he did not receive adequate notice of the grounds for the denial prior to the hearing thereon [***5] because the only statute referred to in either the denial letter or the Bill of Particulars was

ORS 677.170 (3). At the hearing the assistant attorney general representing the Board announced that the denial was based on lack of good moral character. ORS 677.100 (1)(e).

ORS 677.208 provides that when the Board refuses to issue or proposes to revoke or suspend a license, a hearing shall be accorded as provided in ORS 183.310 to 183.500. ORS 183.415 (2) provides that notice shall include a "(c) * * * reference [**1045] to * * * statutes and rules involved" and a "(d) * * * statement of the matters asserted or charged."

The Bill of Particulars sufficiently sets forth "matters asserted or charged." ORS 183.415 (2) (d). *The Grog House v. OLCC*, 12 Or App 426, 507 P2d 419 (1973). This conduct referred to in the Bill of Particulars relates to the moral character requirement of ORS 677.100 (1) (e); however no reference to this statute was made by the Board prior to the hearing. The allegations in the Bill of Particulars, as well as the evidence which was introduced at the hearing, tended to show that petitioner had violated ORS 677.080 (1) (making false and misleading statements [***6] on the August 4 affidavit) and ORS 677.080 (4) (practicing medicine in Oregon without an active license).

Petitioner's right, as a licensee (or applicant for active registration) to practice medicine, may be denied only by procedures satisfying the due process clause of the United States Constitution. *Board of Medical Examiners v. Buck*, 192 Or 66, 232 P2d 791 (1951), 200 Or 488, 258 P2d 124 (1953), *appeal dismissed* [*387] 346 U.S. 919 (1954); *Board of Medical Examiners v. Cusick*, 234 Or 533, 383 P2d 69 (1963); *see also, Willner v. Committee on Character*, 373 U.S. 96, 83 S Ct 1175, 10 L Ed 2d 224 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S Ct 752, 1 L Ed 2d 796, 64 ALR2d 288 (1957). Primary among these procedures is that petitioner be afforded adequate notice prior to a hearing thereon.

Prior to 1971, the statutes required only that notice "state the time, place and issues involved." ORS 183.420 (repealed Oregon Laws 1971, ch 734, § 21, p 1786). In 1971 the legislature adopted ORS 183.415, specifically setting out four requirements of notice. n2 Oregon Laws 1971, ch 734, § 13, p 1779.

n2 ORS 183.415 (2) provides:

"(2) The notice shall include:

"(a) A statement of the party's right to hearing, or a statement of the time and place of the hearing;

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"(b) A statement of the authority and jurisdiction under which the hearing is to be held;

"(c) A reference to the particular sections of the statutes and rules involved; and

"(d) A short and plain statement of the matters asserted or charged."

[***7]

The requirement of notice is primarily to allow petitioner an opportunity to prepare an adequate defense. *Goldberg v. Kelly*, 397 U.S. 254, 90 S Ct 1011, 25 L Ed 2d 287 (1970); see also, 1 Davis, Administrative Law 523, 525, § 8.04 (1958).

While the Bill of Particulars afforded petitioner here did not include references to all the particular sections of the statutes and rules which were conceivably involved (ORS 183.415 (2)(c)), it did spell out in sufficient detail all the conduct which was the basis of the Board's denial action. As in *The Grog House*, 12 Or App at 433-34, the record in the case at bar [*388] clearly shows that petitioner had detailed advance knowledge and was fully aware of the specific facts and charges which formed the basis of the action taken, in order to enable him to prepare his defense. He did not ask for a continuance. Therefore we cannot say that the failure of the Board to append references to ORS 677.100 (1)(e) and ORS 677.080 (1) and (4) amounted to a denial of due process of law. *The Grog House v. OLCC*, supra. To the same effect, see also, *Swift & Company v. United States*, 393 F2d 247 (7th Cir 1968); *Sisto v. Civil Aeronautics* [***8] Board, 179 F2d 47, 52 (DC Cir 1949); *Brahya v. Federal Radio Commission*, 59 F2d 879 (DC Cir 1932).

Next, petitioner argues that the hearing officer should have been disqualified because he is also the executive secretary of the Board.

Although so far as we can determine this question has never previously been passed upon by an appellate court in [***1046] this state, it appears that the weight of authority elsewhere is that the fact that a hearing officer performs more than one function for the agency involved does not render the hearing unfair. *Richardson v. Perales*, 402 U.S. 389, 91 S Ct 1420, 28 L Ed 2d 842 (1971); *Marcello v. Bonds*, 349 U.S. 302, 75 S Ct 757, 99 L Ed 1107 (1954); *Converse v. Udall*, 262 F Supp 583 (D Or 1966), affirmed 399 F2d 616 (1968), cert denied 393 U.S. 1025 (1969). See also, 2 Davis, Administrative Law 235, 237, § 13.10 (1958); 1 Cooper, State Administrative Law 338, § 5 (1965). Further, we note that here

there is no statutory provision for disqualifying the hearing officer. Even assuming arguendo that a right to disqualify a hearing officer exists without the necessity of a specific statute authorizing it, our review [***9] of the record fails to reveal [*389] any bias or prejudice by the hearing officer. See, *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 34, 514 P2d 888 (1973), Sup Ct review denied (1974); cf., *Whitney v. Morgan*, 9 Or App 289, 291, 497 P2d 865 (1972).

Petitioner also contends that under ORS 677.170 (3) only evidence of activities outside the state of Oregon is relevant to a determination whether to grant an active license. Evidence of conduct within Oregon, he argues, is therefore irrelevant and inadmissible.

The Bill of Particulars n3 sets forth six alleged acts of petitioner, only two of which relate to alleged improper conduct outside Oregon. Petitioner argues that evidence as to the other four is inadmissible as being outside the scope of the Board's determination. We do not agree.

n3 The allegations of the Bill of Particulars may be summarized as follows:

I

Treating patients at the Astoria Clinic notwithstanding prior notification that he could not practice until an active license was issued.

II

Falsely informing the Board under oath that he had not been denied an active license in another state (Minnesota).

III

Falsely informing the Board under oath that no claim for malpractice against him had ever been settled.

IV

Petitioner was removed from a position with a federal agency in Oklahoma for misuse of government aircraft, certifying after an inadequate medical examination, misuse of official title, duty time and government materials, sending a letter to the President of the University of Oklahoma, containing unfounded statements, which embarrassed his employer.

V

Falsely informing the Board under oath that he had been cleared for licensure in Kansas.

VI

Failing to live up to a contractual commitment to the Scripps Institute of Oceanography, San Diego, California.

[***10]

[*390] Under ORS 677.170 (3), the Board may deny active registration to an inactive licensee if his conduct during his absence was such that the Board would have denied the petitioner an initial license. ORS 677.100 (1)(e) provides that an applicant for an initial license must prove good moral character. Therefore, the Board may issue an active registration only if the applicant establishes that his conduct since becoming inactive has been consistent with good moral character.

The term "good moral character" is not defined in our medical practice act. Therefore we must look elsewhere for a definition of that term.

In *State v. Louisiana State Board of Medical Examiners*, 238 La 502, 115 So2d 833 (1959), the court, in defining the above term under a Louisiana statute requiring that an applicant for a license to practice medicine be "of good moral character," said:

"The Legislature has not defined good moral character but this term is generally well understood by the courts, even though the term itself is unquestionably ambiguous and may be defined in many different ways. However, no great difficulty is encountered as to the true meaning of the term when applied [***11] to the professions of law or medicine. It has [*1047] been said that the term may be broadly defined to include the elements of simple honesty, fairness, respect for the rights of others and for the laws of State and Nation. See *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 * * *." 238 La at 515, n 2, 115 So2d at 839.

Some of the conduct alleged in the Bill of Particulars, if proved, could establish violations of ORS 677.080 (1) and (4). These violations could constitute grounds for denial of an initial license, ORS 677.100 (1)(e), as well as suspension or revocation of an active [*391] license, ORS 677.190 (1), (9) and (19). It follows that this conduct could constitute grounds for denial of an active registration to an inactive licensee. ORS 677.170 (3). For this reason we conclude that the inquiry contemplated by ORS 677.170 (3) includes all conduct of petitioner, *within as well as without* the state, from the

time his license registration was changed to inactive, to and including the date of the affidavit filed with the request for active registration. Therefore, evidence pertaining to conduct within Oregon is relevant [***12] and admissible.

Petitioner also assigns as error the admission of certain documentary evidence pertaining to conduct outside of Oregon. Petitioner argues that this evidence is inadmissible as hearsay.

This evidence consisted of certified copies of petitioner's application for licensure in Minnesota, the minutes of the Minnesota Board meeting at which the application was denied, and a document entitled "Notification of Personnel Action" from petitioner's personnel record with a federal agency in Oklahoma. These documents are public writings, ORS 677.250, n4 ORS 43.010 and 43.020, and are therefore admissible. ORS 43.330; *Finchum v. Lyons*, 247 Or 255, 428 P2d 890 (1967); *State v. Wikum*, 6 Or App 405, 488 P2d 815, Sup Ct review denied (1971).

n4 See also, MSA § 147.01.

Petitioner further assigns as error the action of the hearing officer in issuing commissions to take depositions of three out-of-state witnesses. Petitioner objected on the ground that a hearing officer does not have authority [***13] to issue such commissions.

It is of course a settled principle of law that [*392] administrative agencies do not have the general judicial powers of a court. They are limited to those powers conferred by statute, either expressly or by necessary implication. *Board of Medical Examiners v. Buck*, 192 Or 66, 82, 232 P2d 791 (1951), 200 Or 488, 258 P2d 124 (1953), *appeal dismissed* 346 U.S. 919 (1954). ORS 183.425 provides that depositions may be taken "in the manner prescribed by law for depositions in civil actions." This language, the Board argues, grants administrative agencies the same authority to order depositions of out-of-state witnesses as the court has under ORS 45.320.

We agree with the Board that ORS 183.425, by necessary implication, permits the hearing officer to issue commissions for the taking of out-of-state depositions. Cf., *Bernard v. Bd. of Dental Examiners*, 2 Or App 22, 465 P2d 917 (1970) (in-state depositions).

Petitioner also assigns as error the following:

Before issuing its final Order of Denial, the Board did not serve petitioner with proposed findings and order, nor grant petitioner an opportunity to file exceptions to the findings [***14] and order. However, petitioner did

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file a petition for rehearing and reconsideration, listing his exceptions to the Board's findings, conclusions and order. Under both ORS 183.460 and Oregon Administrative Rules, ch 847, § 60-005 (6), the respondent is not required to serve a petitioner with proposed findings and order unless a majority of the Board did not consider the record. The Board's order, on its face, indicates that the entire Board reviewed the record before rendering its decision. Petitioner has not shown that a majority of the Board did not consider the record. Therefore, as [**1048] we recently held in *Von Weidlein/Northwest Bottling v. OLCC*, 16 Or App 81, [*393] at 90, 517 P2d 295 (1973), Sup Ct review denied (1974), this contention is without merit.

Having reviewed the entire record we conclude that the Board's order, except as hereinafter noted, is supported by reliable, probative and substantial evidence as required by ORS 183.480 (7)(d). *Board of Medical Examiners v. Mintz*, 233 Or 441, 378 P2d 945 (1963); *Ward v. Ore. State Bd. of Nursing*, 266 Or 128, 510 P2d 554 (1973); *Sch. Dist. No. 48 v. Fair Dis. App. Bd.*, 14 Or App 634, 514 [***15] P2d 1114 (1973).

The evidence established that (1) petitioner did practice medicine at the Astoria Clinic on August 3 and 4, 1971, without an active license, contrary to ORS 677.080 (4), after having been warned that he could not do so; (2) petitioner made false and misleading statements in his affidavit for active registration, contrary to ORS 677.080 (1). As in *Board of Medical Examiners v. Mintz*, supra, proof of such conduct in direct violation of the medical practice act would establish lack of good moral character without the necessity of expert opinion outside the Board of Medical Examiners to support the conclusion. *Accord: Ward v. Ore. State Bd. of Nursing*, supra. The conclusion necessarily follows from (1) and (2) above that petitioner did not establish good moral character as required by ORS 677.100 (1)(e).

As to the charges based on petitioner's removal from a position with a federal agency in Oklahoma, we conclude that the proof is insufficient to establish lack of good moral character on this account. The evidence here consisted only of a certified copy of petitioner's personnel record with the agency listing the matters referred to in n 3, para IV, and [***16] petitioner's own testimony giving his version of the affair. A mere listing [*394] of the purported reasons for petitioner's removal would be insufficient. Without additional proof of what the conduct actually consisted, we cannot say that this establishes lack of good moral character as a matter of law.

Likewise, we cannot sustain respondent's action on the basis of the charge arising out of petitioner's disputed employment contract with the Scripps Institute in San Diego. That contract was apparently rescinded by mu-

tual consent. While an official of the Institute testified that defendant had failed to live up to his contractual commitment, there was evidence from which it could be inferred that petitioner's failure to perform fully was because he was unable to obtain assurance from Scripps of future permanent employment with a substantial increase in salary. Where the contract was rescinded by mutual consent, we cannot say that petitioner's actions demonstrated a lack of good moral character justifying refusal to issue a license.

One more assignment must be considered. At the beginning of the hearing, the hearing officer announced that the Chairman of the Board of [***17] Medical Examiners had disqualified himself from all participation in this case. The Board's Findings of Fact, Conclusions of Law and Order of Denial was signed by the chairman, Dr. Kostol. This order, on its face, indicates that Dr. Kostol participated in the final determination. The opening paragraph of the order reads in part:

"* * * The Board having reviewed the transcript of the hearing and now being fully apprised in the premises, does hereby enter the following * * *."

[*395] A similar issue was presented in *State v. Nagel*, 185 Or 486, 202 P2d 640 (1949), and *Creel v. Shadley*, 266 Or 494, 513 P2d 755 (1973). In *Nagel*, the presiding judge disqualified himself from a criminal trial, but thereafter excused jurors from the jury panel and ordered the summoning of replacement jurors. The excused jurors had fulfilled their required duty; therefore the court found that these were "ordinary ministerial acts performed by the judge in administering the business of his court." 185 Or at 499.

In *Creel*, the Supreme Court reversed a civil action wherein the disqualified presiding [**1049] judge excused two jurors from the jury panel. The court found [***18] that the judge excused the jurors for prejudice. Therefore the judge was participating in the qualification of jurors and was not performing a ministerial function. 266 Or at 497-98. The court said that a judge who is disqualified in a case is without authority to act further in any judicial capacity involving the case. 266 Or at 497. The analogy in the present case is much closer to *Creel* than to *Nagel*.

Where, as here, an administrative body is charged with the duty to render a quasi-judicial decision, it should do so with the outward indicia of fairness as well as the actuality thereof. We conclude that Dr. Kostol should not have participated in any manner after disqualifying himself. If in fact Dr. Kostol did not participate in the Board's determination, the Order of Denial

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should have been signed by the vice chairman or a
chairman pro tem rather than Dr. Kostol. n5

n5 We note that the vice chairman, Dr.
Sprang, signed the Bill of Particulars in this case.

[*396] We find petitioner's other [***19] assign-
ments to be without merit.

Reversed and remanded for further proceedings not
inconsistent with this opinion.

CERTIFICATE OF MAILING

I hereby certify that I served CYNTHIA GAY

Served upon:

CYNTHIA GAY
29388 SE HEIPLE ROAD
EAGLE CREEK, OR 97022

*I have
attached
(middle 2
pages)*

-094

by placing it in a sealed envelope, with postage

Portland, Oregon on

6/26/02

Department of Environmental Quality

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly)

B. Date of Delivery

6-27

C. Signature

X

☐ Agent

☐ Addressee

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

1. Article Addressed to:

CYNTHIA GAY
29388 SE HEIPLE ROAD
EAGLE CREEK, OR 97022

6260

2. Article Number

7001 1140 0002 3546 2903

PS Form 3811, July 1999

Domestic Return Receipt

102595-00-M-0952

7004 2890 0001 8956 0023

PLEASE PLACE IN ORIGINAL FILE

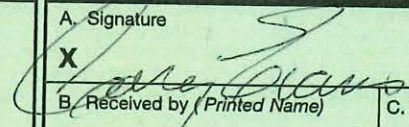
CASE NAME: CYNTHIA WESCOTT (GAY)

CASE NUMBER: 119055

AGENCY: DEQ (GRECO)

DATE: 2/22/05

☒ ORDER ON MOTION FOR RULING ON LEGAL ISSUED AND PROPOSED AND FINAL ORDER

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">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.		<p>A. Signature </p> <p><input checked="" type="checkbox"/> B. Received by (Printed Name) <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>C. Date of Delivery</p>	
1. Article Addressed to:		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
<div>JAMES F EVANS ATTORNEY AT LAW 200 SW CAREY LANE PORTLAND OR 97219</div>		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
2. Article Number (Transfer from service label)		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
7004 2890 0001 8956 0030			

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

U.S. Postal Service™ CERTIFIED MAIL™ RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage \$	Postmark Here
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Sent To	JAMES F EVANS ATTORNEY AT LAW 200 SW CAREY LANE PORTLAND OR 97219
Street, Apt. No., or PO Box No.	
City, State, ZIP+4	

PS Form 3800, June 2002 See Reverse for Instructions

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OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY

Oregon

Office of Administrative Hearings
Transportation Hearings Division
1905 Lana Ave NE
Salem, OR 97314-0100



SUSAN GRECO
DEQ
811 SW 6TH AVE
PORTLAND OR 97204

97204#1390





Oregon

John A. Kitzhaber, M.D., Governor

Department of Environmental Quality

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

June 25, 2002

CERTIFIED MAIL
7001 1140 0002 3546 2903

Cynthia Gay
29388 S.E. Heiple Road
Eagle Creek OR 97022

Re: Notice of Violation, Department Order and
Assessment of Civil Penalty
No. LQ/T-NWR-02-094
Clackamas County

In 1988, the Department issued to you a temporary operating permit for an underground storage tank (UST) located at the Beaver Oaks Airport, 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon. You also own the property on which the UST is located.

Numerous times since 1997 the Department informed you that any UST that was not upgraded prior to December 1998, needed to be decommissioned prior to December 22, 1999. On February 23, 2000 and October 30, 2000, the Department issued to you Notices of Noncompliance (NON) for the violation of failing to decommission the UST. As a result of the NONs, the Department conducted a site and UST inspection in November 2000, at the request of the lessee of the property, Ralph Hatley. As a follow-up to that site visit, Greg Toran with the Department sent you and Mr. Hatley a letter outlining the specific requirements for decommissioning the UST and a deadline of June 2001 for completing the decommissioning. When the Department did not receive any documentation regarding the decommissioning, a Notice of Noncompliance was issued to you on January 28, 2002. Via telephone in February 2002, Mr. Hatley informed the Department that he had removed the UST. You did not submit the required notification prior to the decommissioning, nor did you submit the required decommissioning checklist including the analytical results of any soil samples collected, within 30 days following the decommissioning. Additionally, Mr. Hatley is neither the owner or the permittee of the UST, nor a licensed UST service provider, and as such, could not legally decommission the UST.

Notification to the Department prior to a decommissioning ensures that the Department approves any methods of disposal for the UST, that the correct materials are used, and that the correct practices are followed. Testing for a release at the time of decommissioning ensures that any releases are documented, reported and promptly corrected prior to the spread of any contamination. Submittal of the checklist following decommissioning allows the Department to verify that the correct procedures were followed. On March 14, 2002, the Department issued to you a NON for failing to provide, to the Department, notice prior to the decommissioning and the checklist following the completion of the decommissioning.



You are liable for a civil penalty because you have violated Oregon environmental law. The enclosed Notice assesses a civil penalty of \$6072. The amount of the penalty was determined using the procedures set forth in OAR 340-012-0045. The Department's findings and civil penalty determination are attached to the Notice as Exhibits 1 through 3. In addition to the civil penalty assessment, the enclosed Order requires you to either: (1) submit a completed decommissioning checklist including the results from the soil samples collected at the time of decommissioning; or (2) have a qualified third party measure for the presence of a release under the location of the decommissioned UST, and submit a completed decommissioning checklist and the annual UST compliance fees for the year 2002.

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

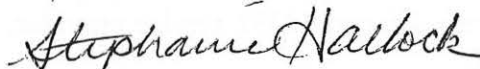
If you wish to discuss this matter, or believe there are mitigating factors which the Department might not have considered in assessing the civil penalty, you may request an informal discussion by attaching a request to the appeal. The request to discuss this matter with the Department will not waive any right to a contested case hearing, if a timely answer is filed.

I look forward to your cooperation in complying with Oregon's environmental laws in the future. However, if any additional violations occur, you may be assessed additional civil penalties.

Copies of referenced rules are enclosed. Also enclosed is a copy of the Department's internal management directive regarding civil penalty mitigation for Supplemental Environmental Projects (SEPs). If you are interested in having a portion of the civil penalty fund an SEP, please review the enclosed SEP directive. Exceptional pollution prevention could result in partial penalty mitigation.

If you have any questions about this action, please contact Susan Greco with the Department's Office of Compliance and Enforcement in Portland at 229-5152 or toll-free at 1-800-452-4011, enforcement extension 5152.

Sincerely,



Stephanie Hallock
Director

Enclosures

cc: Herrington Rose, NWR, DEQ
LQ Division, DEQ
Department of Justice
Environmental Protection Agency
Environmental Quality Commission
Clackamas County District Attorney
Ralph Hatley, 29388 S.E. Heiple Road, Eagle Creek, OR 97022

1 Noncompliance (NON) for failure to decommission the UST. The NON stated that the
2 failure to decommission the UST was a violation of the Department's rules and could result in
3 the assessment of civil penalties.

4 6 On October 30, 2000, the Department sent Respondent an NON for failure to
5 decommission the UST.

6 7. On November 14, 2000, Greg Toran, an employee of the Department, conducted
7 an inspection of the property and the UST. At that time, the UST had not been decommissioned.

8 8. By letter to Respondent dated December 5, 2000, the Department again outlined
9 the requirements for decommissioning the UST. The Department requested that the UST be
10 decommissioned prior to June 30, 2001.

11 9. On January 28, 2002, the Department sent Respondent an NON for failure to
12 decommission the UST. The NON stated that the failure to decommission the UST was a
13 violation of the Department's rules and could result in the assessment of civil penalties.

14 10. On or before February 6, 2002, Ralph Hatley, the lessee of the property,
15 decommissioned the UST. Mr. Hatley is not a licensed underground storage tank service
16 provider.

17 11. Respondent did not provide either the thirty (30) day or three (3) working day
18 notices to the Department prior to decommissioning the UST, as required by OAR 340-150-
19 0166(3).

20 12. On March 14, 2002, the Department sent Respondent an NON for improperly
21 decommissioning the UST. The NON requested that Respondent submit a completed
22 decommissioning checklist and outstanding annual underground storage tank general permit
23 compliance fees prior to March 29, 2002.

24 13. As of June 15, 2002, Respondent has not submitted a completed decommissioning
25 checklist for the UST.

26 14. Respondent paid the annual UST general compliance fee from 1988 through 2001.
27 Respondent did not pay the annual compliance fee in 2002.

III. VIOLATIONS

1. On or about December 22, 1999 until sometime after December 5, 2000, Respondent violated OAR 340-150-0021(3) and OAR 340-150-0166(4)(c) by failing to decommission an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

2. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(3) by failing to provide both the thirty (30) day and three (3) working day notice to the Department before beginning permanent closure of an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(d).

3. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(5)(a) by failing to submit a completed decommissioning checklist within thirty (30) days of permanent closure of an UST. This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

4. Sometime prior to February 6, 2002, Respondent violated OAR 340-150-0166(2)(d) by allowing the decommissioning of an UST by a person not licensed by the Department. This is a Class II violation pursuant to OAR 340-012-0067(2)(h).

IV. ASSESSMENT OF CIVIL PENALTIES

The Director imposes civil penalties for the violations cited in Section III, paragraphs 1 through 3 as follows:

<u>Violation</u>	<u>Penalty Amount</u>
1	\$2272
2	\$1800
3	\$2000

Respondent's total civil penalty is \$6072. The findings and determination of Respondent's civil penalty pursuant to OAR 340-012-0045 are attached and incorporated as Exhibit Nos. 1 through 3.

V. COMPLIANCE ORDER

Based on the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

////

1 1. Immediately initiate actions necessary to correct any continuing violations of
2 Oregon law.

3 2. Within thirty (30) days of receipt of this Notice,

4 a. Submit to the Department a completed decommissioning checklist for the
5 decommissioned UST, as required by 40 CFR 280.71(b) as adopted and modified by OAR 340-
6 150-0003(35). The checklist must have, as an attachment, the results from the sampling
7 completed at the time of decommissioning; or

8 b. Have a qualified third party measure for the presence of a release at the
9 location of the decommissioned UST, as required by 40 CFR 280.72(a) as adopted and modified
10 by OAR 340-150-0003(39), and OAR 340-122-0218, and submit to the Department a completed
11 decommissioning checklist. All outstanding annual UST compliance fees from the year 2002
12 must be paid at the time of the submittal of the decommissioning checklist.

13 VI. OPPORTUNITY FOR CONTESTED CASE HEARING

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

20 In the written Answer, Respondent shall admit or deny each allegation of fact contained in
21 this Notice, and shall affirmatively allege any and all affirmative claims or defenses to the
22 assessment of this civil penalty that Respondent may have and the reasoning in support thereof.

23 Except for good cause shown:

24 1. Factual matters not controverted shall be presumed admitted;

25 2. Failure to raise a claim or defense shall be presumed to be a waiver of such claim or
26 defense;

27 ////

3. New matters alleged in the Answer shall be presumed to be denied unless admitted in subsequent pleading or stipulation by the Department or Commission.

Send the request for hearing and Answer to: **Deborah Nesbit, Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon 97204.** Following receipt of a request for hearing and an Answer, Respondent will be notified of the date, time and place of the hearing.

Failure to file a timely request for hearing and Answer, or to appear at a scheduled hearing may result in the entry of a Default Order for the relief sought in this Notice.

If Respondent fails to file a timely request for hearing and Answer, the Notice and Order shall become a final and enforceable Order of the Environmental Quality Commission by operation of law without any further action or proceeding. If the Order becomes final by operation of law, the right to judicial review, if any, is outlined within ORS 183.480.

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

VII. OPPORTUNITY FOR INFORMAL DISCUSSION

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

VIII. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after an Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of \$6072 should be made payable to "State Treasurer, State of Oregon" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

Date

6-24-02

Stephanie Hallock, Director

Stephanie Hallock

EXHIBIT 1

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

VIOLATION 1: Failing to decommission an underground storage tank (UST).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

MAGNITUDE: The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

"BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.

"P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 since the violation occurred from December 22, 1999 through at least December 5, 2000.

"R" is the cause of the violation and receives a value of 6 because the Respondent's conduct was intentional. Intentional conduct means conduct by a person with a conscious objective to cause the result of the conduct. Numerous times since 1997, the Department informed Respondent that the UST needed to be permanently closed by a date certain. Despite being given specific deadlines to complete the permanent closure of the UST, Respondent allowed the deadlines to expire without closing the UST. Therefore, Respondent's conduct was intentional.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 since Respondent has not taken reasonable efforts to correct the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$272 as calculated using the BEN computer model, pursuant to OAR 340-012-0045(1)(c)(F). Respondent delayed decommissioning the UST at a cost of \$5,000. By delaying these costs, Respondent realized an economic benefit of \$272.

PENALTY CALCULATION:

$$\begin{aligned} \text{Penalty} &= BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB \\ &= \$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 6 + 2)] + \$272 \\ &= \$1000 + (\$100 \times 10) + \$272 \\ &= \$1000 + \$1000 + \$272 \\ &= \$2272 \end{aligned}$$

EXHIBIT 2

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

- VIOLATION 2:** Failure to provide 30 day and 3 working day notice prior to decommissioning an underground storage tank.
- CLASSIFICATION:** This is a Class II violation pursuant to OAR 340-012-0067(2)(d).
- MAGNITUDE:** The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.
- CIVIL PENALTY FORMULA:** The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$
- "BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.
- "P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).
- "H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).
- "O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 because the violation occurred on more than one day.
- "R" is the cause of the violation and receives a value of 6 because the cause of the violation was caused by Respondent's intentional conduct. Intentional means conduct by a person with a conscious objective to cause the result of the conduct. On December 5, 2000, the Department mailed to Respondent a letter outlining the decommissioning requirements including the need to provide notice to the Department prior to decommissioning the UST. Respondent knew that it needed to provide notice but proceeded to decommission the UST without giving the notice. Therefore, Respondent's conduct was intentional.
- "C" is Respondent's cooperativeness in correcting the violation and receives a value of 0 since the violation cannot be corrected.
- "EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$0 because any economic benefit gained would be de minimis.

PENALTY CALCULATION: $Penalty = BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

$$\begin{aligned} &= \$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 8 + 0)] + \$0 \\ &= \$1000 + (\$100 \times 8) + \$0 \\ &= \$1000 + \$800 + \$0 \\ &= \$1800 \end{aligned}$$

EXHIBIT 3

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

VIOLATION 3: Failure to submit a completed decommissioning checklist within 30 days after underground storage tank closure.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0067(2)(e).

MAGNITUDE: The magnitude of the violation is moderate because there is no selected magnitude for this violation and there is insufficient information to make another finding.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$

"BP" is the base penalty, which is \$1000 for a Class II moderate magnitude violation in the matrix listed in OAR 340-012-0042.

"P" is Respondent's prior significant action(s) and receives a value of 0 since Respondent has no prior significant actions as defined in OAR 340-012-0030(14).

"H" is the past history of Respondent in taking all feasible steps or procedures necessary to correct any prior significant action(s) and receives a value of 0 since Respondent has had no prior significant actions as defined in OAR 340-012-0030(14).

"O" is whether or not the violation was a single occurrence or was repeated or continuous during the period of the violation and receives a value of 2 because the violation occurred on more than one day.

"R" is the cause of the violation and receives a value of 6 because the cause of the violation was caused by Respondent's intentional conduct. Intentional means conduct by a person with a conscious objective to cause the result of the conduct. On December 5, 2000, the Department mailed to Respondent a copy of the decommissioning checklist along with a letter outlining the decommissioning requirements. Respondent knew that it needed to submit the checklist but continued to fail to submit it. Therefore, Respondent's conduct was intentional.

"C" is Respondent's cooperativeness in correcting the violation and receives a value of 2 since Respondent has not taken reasonable efforts to correct the violation.

"EB" is the approximate dollar sum of the economic benefit that the Respondent gained through noncompliance, and receives a value of \$0 because any economic benefit gained would be de minimis.

PENALTY CALCULATION: $Penalty = BP + [(0.1 \times BP) \times (P + H + O + R + C)] + EB$
= $\$1000 + [(0.1 \times \$1000) \times (0 + 0 + 2 + 6 + 2)] + (\$0)$
= $\$1000 + (\$100 \times 10) + \$0$
= $\$1000 + \$1000 + \$0$
= $\$2000$

LAW OFFICES OF
JOSSelson, POTTER & ROBERTS
THE GREGORY • SUITE 306
425 NW 10TH AVENUE
PORTLAND, OREGON 97209
TELEPHONE: (503) 228-1455

July 15, 2002

Deborah Nesbit
Department of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204

Re: No. LQ/T-NWR-02-094
Clackamas County

Dear Ms. Nesbit:

Enclosed for filing is the Request for Hearing and Answer of Cynthia Gay in response to the Department's Notice of Violation, Department Order and Assessment of Civil Penalty in the above numbered proceeding.

The respondent requests an informal discussion with the Department.

Very truly yours,


Lawrence R. Derr

LRD/pb
enclosure

cc: client

RECEIVED
JUL 15 2002

OFFICE OF COMPLIANCE
AND ENFORCEMENT
DEPARTMENT OF ENVIRONMENTAL QUALITY



FACSIMILE: (503) 228-0171

LAWRENCE R. DERR
OF COUNSEL

E-MAIL: jpr@jprlaw.com

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of:)
CYNTHIA GAY) REQUEST FOR HEARING AND ANSWER
No. LQ/T-NWR-02-094
CLACKAMAS COUNTY

REQUEST FOR HEARING

The respondent requests a contested case hearing in the above captioned matter.

ANSWER

For answer to the Notice of Violation, Department Order and Assessment of Civil Penalty, respondent alleges:

1. Respondent admits the allegations of Findings, paragraphs 1 through 9 and 11 through 14.

2 In answer to the allegations of Findings, paragraph 10, respondent admits that Ralph Hatley participated in removing the UST prior to June 30, 2000 under the direction of Respondent. Respondent admits that Hatley is not a licensed underground storage tank provider. Respondent denies that Hatley is the lessee of the property.

3. Respondent denies the allegations of Violations, paragraphs 1 through 4.

/ / /

/ / /

Page 1- Request for Hearing and Answer

JOSSELYN, POTTER & ROBERTS
Attorneys at Law
425 NW 10th Avenue, Suite 306
Portland, Oregon 97209
Telephone: (503) 228-1455
Fax: (503) 228-0171

1 For an Affirmative Defense, respondent alleges:

2 4. The UST was exempt from regulation pursuant to ORS
3 466.710(1):

4 (a) The tank was located on a tract of land devoted to the
5 production of hay;

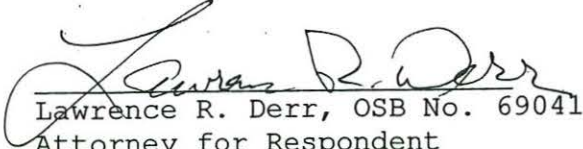
6 (b) The tank has a capacity of 1000 gallons;

7 (c) The tank was used to store motor gasoline; and

8 (d) The motor gasoline was used in farm vehicles, airplanes
9 and automobiles and not resold.

10 Wherefore, Respondent prays that the Notice of Violation,
11 Department Order and Assessment of Civil Penalty be dismissed.

12 Dated July 15, 2002.

13
14 
Lawrence R. Derr, OSB No. 69041
Attorney for Respondent
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24



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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

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DEC 16 2003

by Office of
Administrative Hearings

December 15, 2003

Via facsimile and regular mail

(503) 945-5304
Judge Stephen Elmore
Office of Administrative Hearings
1905 Lana Avenue N.E.
Salem OR 97314

Re: Cynthia Gay
Case no. LQ/T-NWR-02-094

Dear Judge Elmore:

Enclosed you will find the Department's Motion for Ruling on Legal Issues in the above entitled matter. The Department is requesting a ruling that the underground storage tank in question in this matter, was not a "farm tank," as that term is defined in 40 CFR 280.12. Per OAR 137-003-0580, Ms. Gay has until January 1, 2004 to respond to this motion unless you establish either longer or shorter time period for the response. I would appreciate your prompt response on the due date of Ms. Gay's response so that the Department has sufficient time to review and respond, as necessary. I have enclosed copies of the rule for Ms. Gay's review.

If you should have any questions or need further information on this matter, you can reach me at (503) 229-5152.

Sincerely,


Susan M. Greco
Environmental Law Specialist

Enclosure (w/o exhibits via facsimile)

cc: Cynthia Gay, 29388 S.E. Heiple Road, Eagle Creek, OR 97022



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:	)	DEPARTMENT'S MOTION FOR
CYNTHIA GAY	)	RULING ON LEGAL ISSUES
	)	NO. LQ/T-NWR-02-094
Respondent	)	CLACKAMAS COUNTY

In response to the Department's Notice of Violation, Department Order and Assessment of Civil Penalty no. LQ/T-NWR-02-094 (Notice), Respondent raised, as an affirmative defense, that the underground storage tank (UST) located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon, was not subject to regulation because it fits the definition of a "farm tank." The Department of Environmental Quality (the Department), via this Motion for Ruling on Legal Issues filed pursuant to OAR 137-003-0580, moves that the Administrative Law Judge, as a matter of law, find that the underground storage tank in question is not a "farm tank".

I. LAW AT ISSUE

Former OAR 340-150-0010 adopted by reference all definitions contained in 40 CFR 280.12.¹ 40 CFR 280.12 defines underground storage tank as "any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. This term does not include any: (a) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes." 40 CFR 280.12 defines "farm tank" as "a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property."

II. BACKGROUND

On June 25, 2002, the Department issued the Notice to Respondent, Cynthia Gay. In response to the Department's allegations that the UST was a regulated tank, Respondent raised the

¹ On February 14, 2003, revisions to OAR Chapter 340, Division 150 became effective. The revisions did not change the definition of either underground storage tank or farm tank. Regardless, the changes are not applicable to this matter since the alleged violations occurred prior to the effective date of these new regulations.

1 affirmative defense that the UST was a farm tank. Specifically, in paragraph 4 of its Request for
2 Hearing and Answer, Respondent alleged that:

3 “ (a) The tank was located on a tract of land devoted to the production of hay;
4 (b) The tank has a capacity of 1000 gallons;
5 (c) The tank was used to store motor gasoline; and
6 (d) The motor gasoline was used in farm vehicles, airplanes and automobiles and not
7 resold.”²

8 The Department stipulates to sections 4(b), (c) and (d) as set forth above. The remaining issue, as
9 alleged in Respondent’s affirmative defense, is whether the tank was located on a tract of land
10 devoted to the production of hay.

11 III. EVIDENCE IN SUPPORT OF DEPARTMENT’S MOTION

12 Exhibit A – Oregon Department of Environmental Quality Underground Storage Tank
13 Permit Application and Notification for Underground Storage Tanks

14 Exhibit B – Affidavit of Greg Toran, UST Inspector for the Department along with attached
15 NWR UST Inspection Report, Memorandum to File and Attached Photos

16 Exhibit C – Clackamas County Property Detail for 29388 S.E. Heiple Road, Eagle Creek,
17 Oregon

18 Exhibit D – Business Entity Data for Skydive, Incorporated

19 Exhibit E – Business Entity Data for Skydive Eagle Creek

20 Exhibit F – Areal Maps of 29388 S.E. Heiple Road, Eagle Creek, Oregon

21 IV. ARGUMENTS

22 As previously stated, 40 CFR 280.12, as adopted by former OAR 340-150-0010, defines
23 “farm tank” as “a tank located on a tract of land **devoted** to the production of crops or raising
24 animals, including fish, and associated residences and improvements. A farm tank must be located
25 on the farm property.” (Emphasis added). The term ‘devoted’ is not defined in either statute or rule.
26 When a term is not defined in either statute or rule, the first level of analysis is to examine both the

27 ² Request for Hearing and Answer dated July 15, 2002, page 2.

1 text and context of the term used in the rule. If the Department's intent is clear, no further analysis
2 is necessary.³ "In reviewing the department's interpretation of a department rule as applied in a
3 formal enforcement action, an administrative law judge must follow the department's
4 interpretation if that interpretation is both plausible and reasonably consistent with the wording
5 of the rule and the underlying statutes."⁴

6 The plain meaning of the term 'devoted' is "to give or apply entirely to a particular
7 activity, pursuit, cause or person."⁵ Based on the facts in the record, the tract of land on which
8 the UST was located is not devoted to the production of crops. Specifically, at least two business
9 entities which are unrelated to production of crops list the tract of land as their principal place of
10 business. *See Exhibits D and E.* Since 1991, Respondent has used the name of 'Beaver Oaks
11 Airport' as the facility name. *See Exhibit A.* A portion of the property has been rezoned from
12 'exclusive farm use' to 'other improved property'. *See Exhibit C.* The tract of land on which the
13 UST was located was used for a landing strip. *See Exhibits B and F.*

14 V. CONCLUSIONS

15 In conclusion, the Department requests that the Administrative Law Judge find that the UST
16 located at 29388 S.E. Heiple Road in Eagle Creek, Clackamas County, Oregon was a regulated
17 UST and not a farm tank, as that term is used in 40 CFR 280.12. Based on such a ruling, the
18 Department requests that the issues at the contested case hearing be limited to whether the
19 violations alleged in the Notice occurred and what civil penalty should be assessed for each of those
20 violations.

21
22
23 12/15/03
24 Date

25
26 
27 Susan M. Greco
Environmental Law Specialist

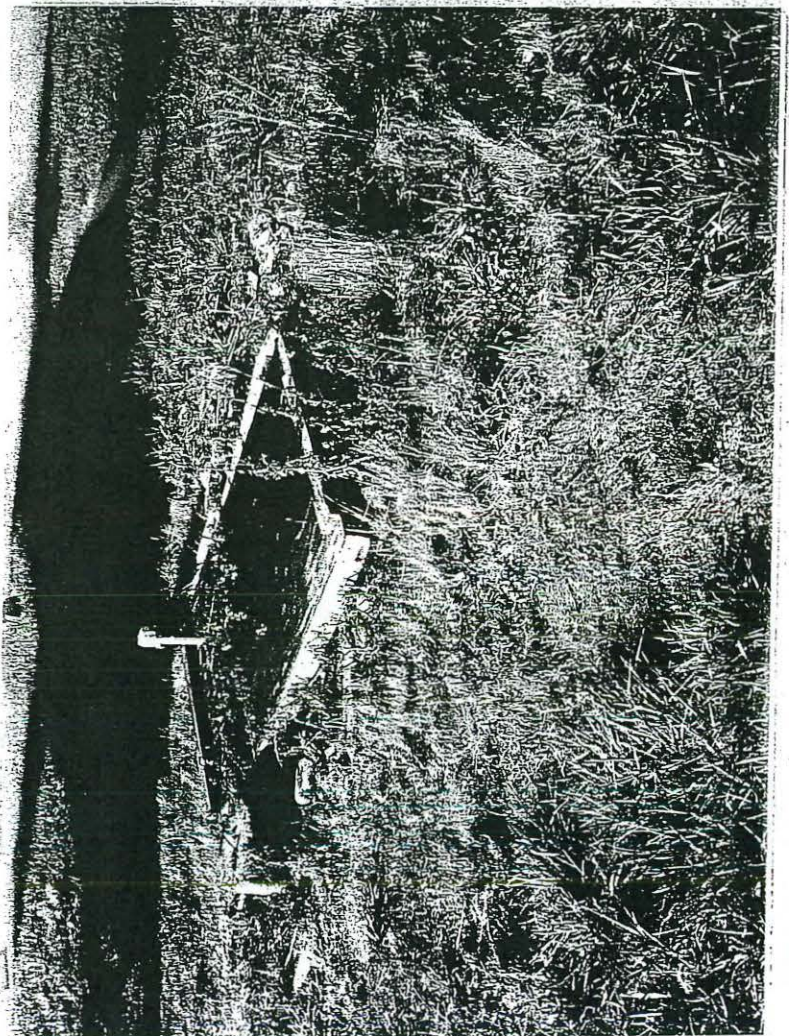
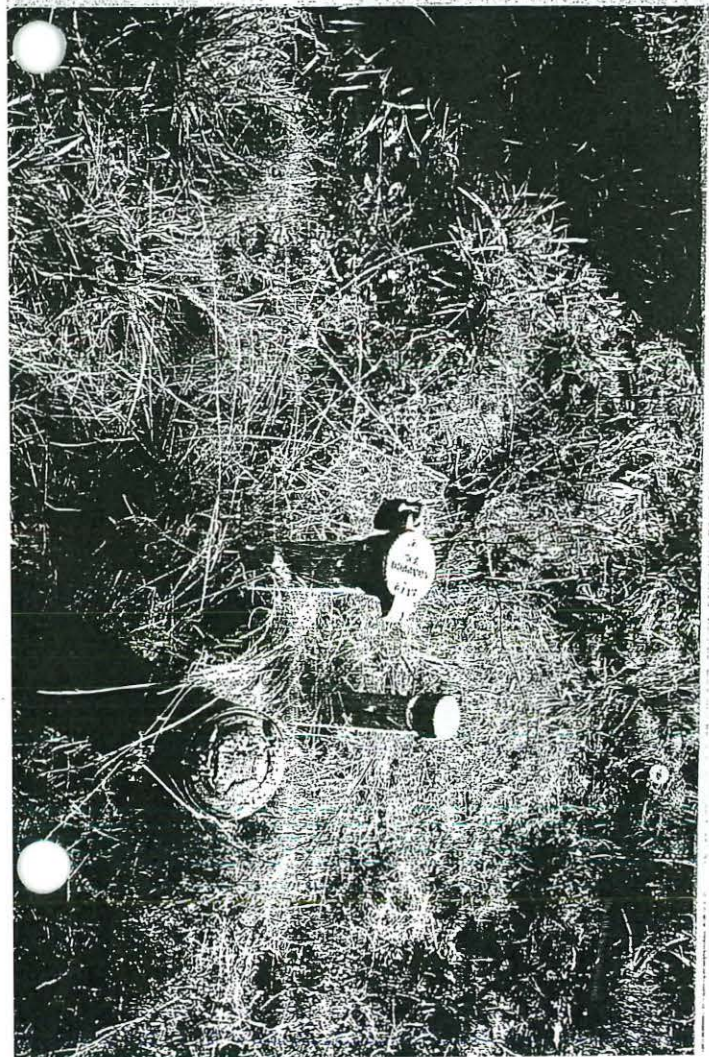
28 ³ *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993).

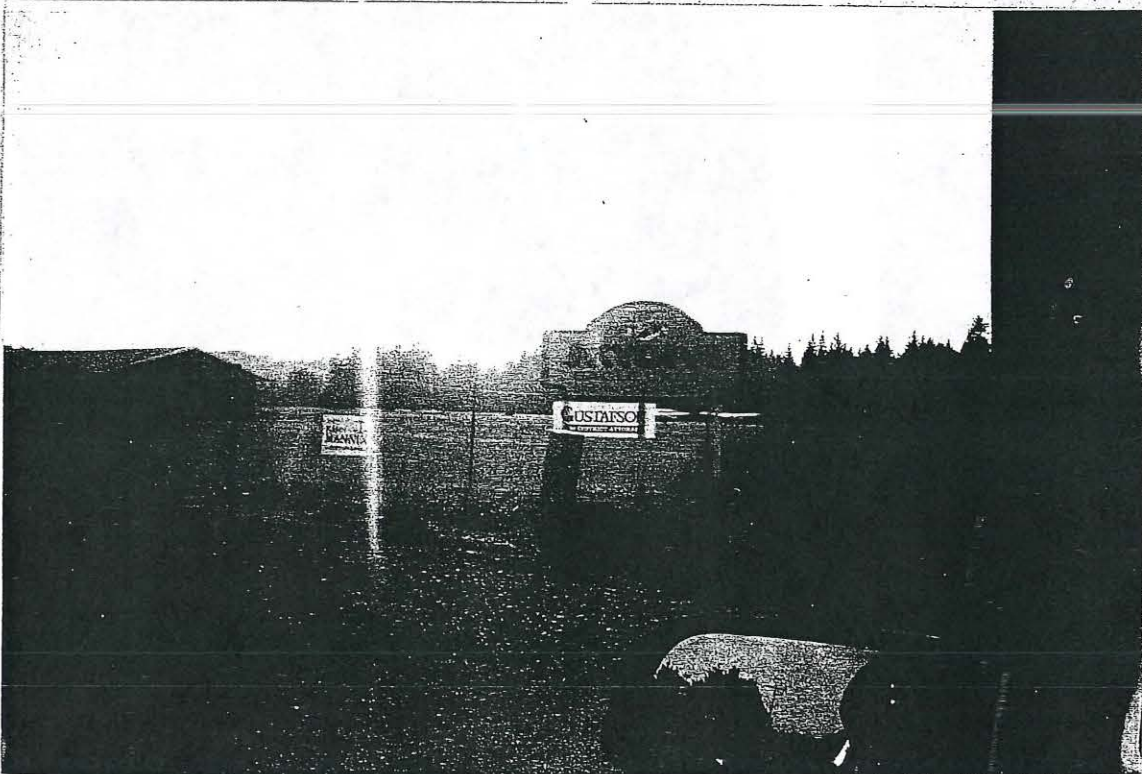
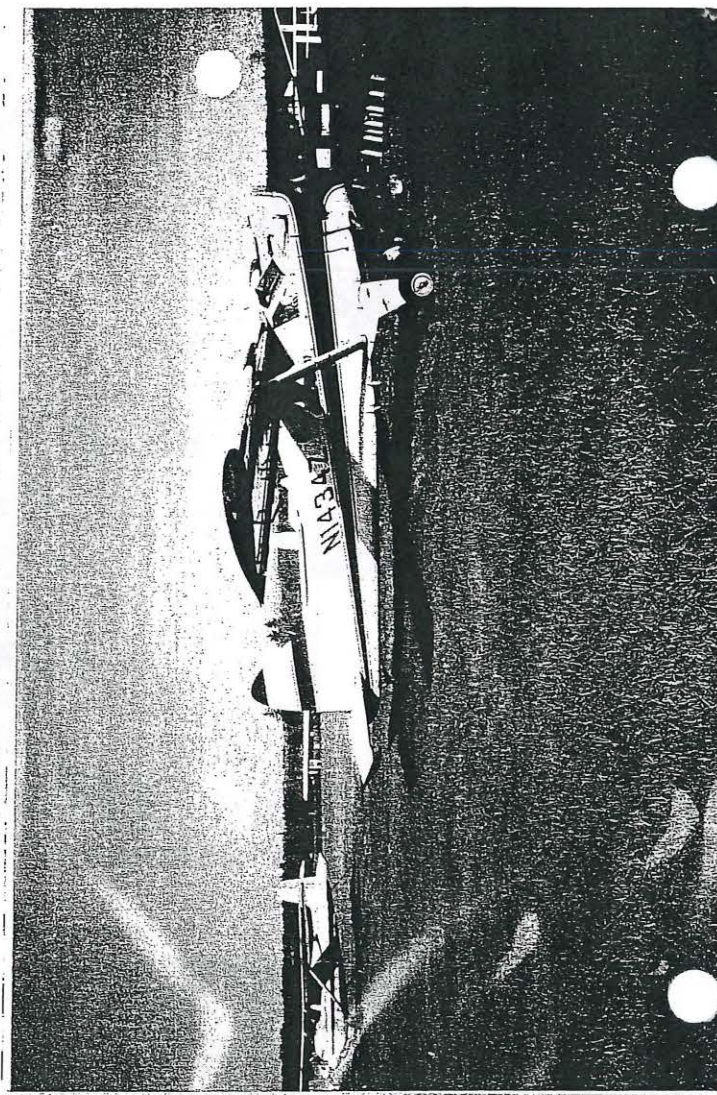
29 ⁴ OAR 340-011-0545.

30 ⁵ The American Heritage Dictionary, 1978.



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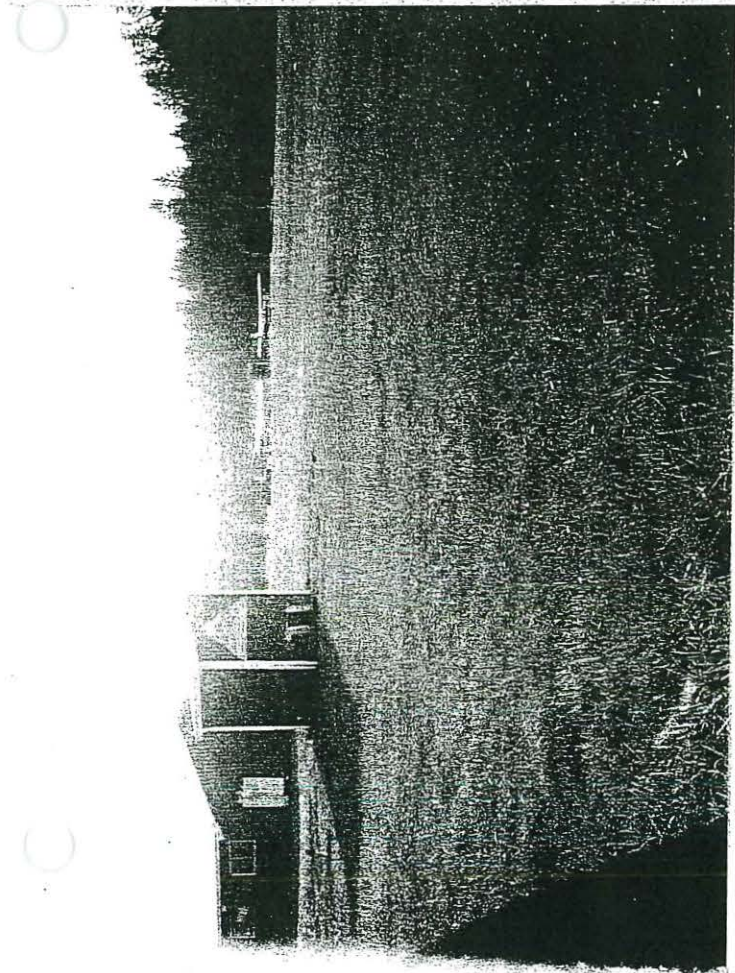




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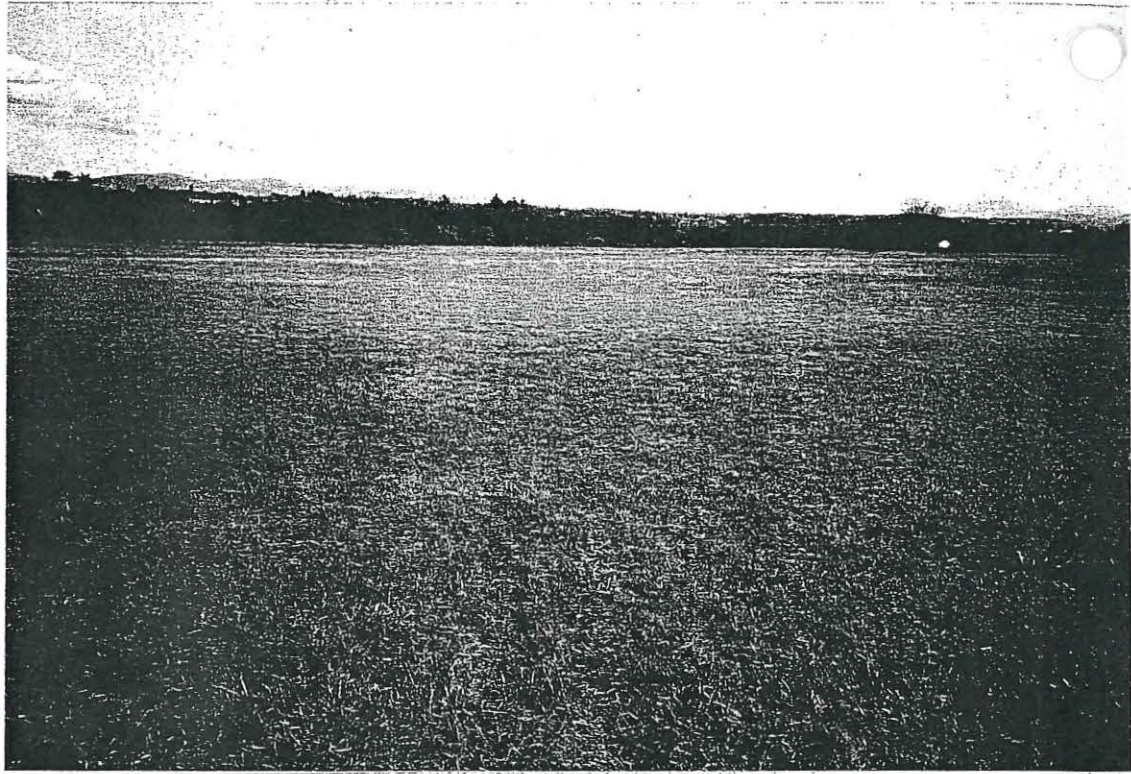


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Image courtesy of the US Geological Survey.
OrigMetaTag = '4512246NW' Center Lon,Lat= -122.36077,45.32002 Running Time 0 ms Time 7/31/2002 4:22:23 PM to 7/31/2002 4:22:23 PM

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CASE NUMBER: 119055

ALJ: ELMORE

: 1/20/05

☐ PHC NTC

☒ HRG NTC

IER

Thanks, Ann ☺

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JAMES F EVANS
ATTORNEY FOR CYNTHIA GAY
805 LIBERTY ST NE #3
SALEM OR 97301

2. Article Number
(Transfer from service label)

7002 2410 0001 7410 4386

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X *Emily Greene* ☐ Agent ☐ Addressee

B. Received by (Printed Name)
Emily Greene

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

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

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage \$
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees \$

Postmark Here

Sent To
JAMES F EVANS
ATTORNEY FOR CYNTHIA GAY
805 LIBERTY ST NE #3
SALEM OR 97301

PS Form 3800, June 2002 See Reverse for Instructions

CERTIFICATE OF MAILING

I hereby certify that I served:

a letter Re: Petition for Rehearing
and/or Reconsideration Case No. LQ/T-NWR-02-094

Served upon:

CYNTHIA GAY WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

Item B
attach X
(last 2 pgs)

by mailing a true copy of the above by placing it in a sealed envelope, with postage

prepaid, at the U.S. Post Office in Portland, Oregon on May 26, 2004

Amy Smotherg
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.

Article Addressed to:

CYNTHIA GAY WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent
☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

5/27

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

Article Number

(Transfer from s

7002 3150 0004 8588 3800

CERTIFICATE OF MAILING

I hereby certify that I served a letter Re: Petition for Rehearing
and/or Reconsideration Case No. LQ/T-NWR-02-094

Served upon:

CYNTHIA GAY WESCOTT
C/O JAMES F. EVANS
805 LIBERTY ST NE #3
SALEM OR 97301

by mailing a true copy of the above by placing it in a sealed envelope, with postage

prepaid, at the U.S. Post Office in Portland, Oregon on May 26, 2004

Amy Smothers
Department of Environmental Quality

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark
Here

Delivered To
CYNTHIA GAY WESCOTT
C/O JAMES F. EVANS
805 LIBERTY ST NE #3
SALEM OR 97301

PS Form 3800, June 2002
See Reverse for Instructions

3150 0004 8588 3817

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: Cynthia Wescott

CASE NUMBER: 111013

ALJ: Stephen Elmore DATE: 1/28

☐ PHC NTC

☐ HRG NTC

OTHER

Order on Motions
for Ruben on
al issues

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:

CYNTHIA WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

2. Article Number
(Transfer from service label) 7001 1940 0000 1117 6675

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

4. Restricted Delivery? (Extra Fee) ☐ Yes

5. Delivery Address
A. Agent ☐
B. Addressee ☐
C. Date of Delivery 1/29
D. Is delivery address different from item 1? ☐ Yes
if YES, enter delivery address below: ☐ No

PS Form 3811, August 2001 Domestic Return Receipt 2ACPRI-03-Z-0985

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

OFFICIAL USE

Postage \$
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees \$

Sent To
Street, Apt. No., or PO Box No.
City, State, ZIP+ 4

CYNTHIA WESCOTT
29388 SE HEIPLE RD
EAGLE CREEK OR 97022

PS Form 3800, January 2001 See Reverse for Instructions

RECEIVED

FEB 04 2004

THE OFFICE OF
ADMINISTRATIVE HEARINGS