

**Date:** Sept. 3, 2024  
**To:** Environmental Quality Commission  
**From:** Leah Feldon, Director  
**Subject:** Agenda item B, Action item: Contested Case No. WQ-NWR-2022-031 regarding *Bio-Oregon Protein, Inc., nka Pacific Bio Products – Warrenton, LLC*  
Sept. 26-27, 2024, EQC meeting

**Introduction and Background** On Feb. 17, 2022, DEQ issued a renewal National Pollutant Discharge Elimination System (NPDES) Permit to Bio-Oregon Protein, Inc. *nka Pacific Bio Products – Warrenton, LLC* (Bio-Oregon) (hereinafter referred to as the “Permit”).

On March 9, 2022, Bio-Oregon requested a contested case hearing, challenging several of the Permit’s effluent limits and monitoring requirements. Specifically, Bio-Oregon raised each of the following issues in the hearing:

1. Whether DEQ improperly included limits or set limits too low on total copper, mercury, zinc and thallium for Outfall 001.
2. Whether DEQ erred in applying OAR 340-041-0009(6) when setting enterococcus bacteria limits in the Permit for Outfalls 001 through 003.
3. Whether DEQ erroneously applied 40 CFR §§ 408.150 to 408.157 (fish meal effluent limitation guidelines (Fish Meal ELGs)) to develop technology-based effluent limitations (TBELs) for biological oxygen demand (BOD<sub>5</sub>), total suspended solids (TSS), and oil and grease (oil/grease) for Outfall 002, or alternatively, whether DEQ erred in its application of the factors listed in 40 CFR § 125.3(d).
4. If the Fish Meal ELGs are inapplicable, whether DEQ failed to exercise best professional judgment in establishing TBELs for Outfall 002 by:
  - Not engaging in a technical case-by-case analysis;
  - Not evaluating the total cost of the application of technology in relation to the effluent reduction benefits; or
  - Applying incorrect regulatory factors.Citing 40 CFR § 125.3(c) and (d) and 40 CFR § 401.16.
5. Whether DEQ erred in not granting a portion of the reserve capacity in the Columbia and Lower Snake Rivers Temperature Total Maximum Daily Load (TMDL) to the Bio-Oregon facility.
6. Whether DEQ erred in not providing an intake credit for the thermal load of the incoming water for Outfall 003. OAR 340-045-0105.
7. Whether DEQ erred in setting heavy metal limits and monitoring requirements for Outfalls 002 and 003 and not providing an intake credit for metals present in the intake water for Outfalls 002 and 003.
8. Whether DEQ erred in imposing monitoring requirements at Outfalls 001 and 003 for BOD<sub>5</sub>, TSS, oil/grease, ammonia, alkalinity and hardness and at Outfall 002 for alkalinity and hardness.

9. Whether DEQ erred in imposing effluent toxics characterization monitoring requirements and at an annual frequency.
10. Whether DEQ erred in imposing whole effluent toxicity (WET) testing requirements at Outfalls 001 through 003.

Administrative Law Judge (ALJ) Jennifer Rackstraw presided over a contested case hearing on the matter from Feb. 28–March 3, 2023. ALJ Samantha Fair issued a Proposed and Final Order on Oct. 17, 2023.

On Nov. 14, 2023, Bio-Oregon submitted a Petition for Commission Review to the Environmental Quality Commission (EQC). On Feb. 16, 2024, Bio-Oregon submitted its Exceptions and Brief in support of its Petition, requesting appeal of the Proposed and Final Order in its entirety. In this filing, Bio-Oregon also asserted that the Office of Administrative Hearings' (OAH) reassignment of the case from ALJ Jennifer Rackstraw, who presided over the contested case hearing, to ALJ Samantha Fair, who issued the Proposed and Final Order, was unlawful, and requested the commission grant Bio-Oregon a new contested case hearing.

DEQ submitted an Answer to Bio-Oregon's Exceptions and Brief on April 5, 2024. Thereafter on May 23, 2024, the commission requested that OAH review Bio-Oregon's exception related to the ALJ reassignment and provide a written response to that exception. On July 22, 2024, Chief Administrative Law Judge Jeffrey Rhoades responded to the commission's request explaining that any response would be beyond OAH's authority; moreover, since DEQ had already responded to that filed exception in its Answer, there did not appear any need for OAH's response.

The Matter of Bio-Oregon Protein, Inc., *nka Pacific Bio Products – Warrenton, LLC*, is now presented in its entirety for your review.

**Findings of Fact  
and Conclusions  
of Law  
as Determined  
by the  
Administrative  
Law Judge**

**Findings of Fact**

After considering the evidence in the record, ALJ Fair made extensive and detailed Findings of Fact (68 in total) regarding the alleged violations. These are listed on pages four through eighteen of Attachment C.1.

**Conclusions of Law**

Based on the Findings of Fact, ALJ Fair made the following Conclusions of Law, listed on page eighteen and nineteen of Attachment C.1, ruling in DEQ's favor on each of the issues raised by Bio-Oregon and upholding the permit requirements as lawful and based upon substantial evidence in the record:

1. DEQ's Permit limits on total copper, mercury, zinc and thallium for Outfall 001 are appropriate.
2. DEQ correctly applied OAR 340-041-0009(6) when setting enterococcus bacteria limits in the Permit for Outfalls 001 through 003.
3. DEQ correctly applied the Fish Meal ELGs to develop TBELs for BOD<sub>5</sub>, TSS, and oil and grease for Outfall 002, and DEQ did not err in its application of the factors listed in 40 CFR § 125.3(d).

4. Because DEQ appropriately applied the Fish Meal ELGs to the Bio-Oregon facility’s effluent, DEQ was not required to establish separate TBELs for the fish processing for Outfall 002.
5. DEQ did not err in denying an allocation of a portion of the thermal load reserve capacity of the Columbia River’s TMDL to Bio-Oregon to meet its WLA.
6. DEQ did not err in denying an intake credit for the thermal load of the incoming water for Outfall 003.
7. DEQ did not err in setting heavy metal limits and monitoring requirements for Outfalls 002 and 003, and DEQ did not err in denying an intake credit for metals present in the intake water for Outfalls 002 and 003.
8. DEQ did not err in imposing monitoring requirements at Outfalls 001 and 003 for BOD<sub>5</sub>, TSS, oil/grease, ammonia, alkalinity and hardness and at Outfall 002 for alkalinity and hardness.
9. DEQ did not err in imposing monitoring requirements and at the scheduled frequency rate for VOCs and cyanide.
10. DEQ did not err in imposing WET testing requirements at Outfalls 001 through 003.

**Issues on Appeal** In Bio-Oregon’s Exceptions and Brief, Bio-Oregon requests that the commission adopt extensive alternative findings of fact and conclusions of law and reverse the ALJ’s conclusion that the Permit is lawful and based upon substantial evidence. A brief summary of Bio-Oregon’s issues for appeal, and DEQ’s response, is provided below:

<b>Issue</b>	<b>Bio-Oregon’s Argument</b>	<b>DEQ’s Response</b>
Technology-Based Effluent Limits (TBELs)	Bio-Oregon argues that DEQ both applied improper effluent limitation guidelines (ELGs) and failed to engage in sound and sufficient case-by-case Best Professional Judgment (BPJ) analyses regarding Bio-Oregon’s other processes in a manner sufficient to impose TBELs on Bio-Oregon. Further, Bio-Oregon alleges DEQ failed to adequately consider what technologies were available, effective, and affordable to Bio-Oregon to comply with the new TBELs, and asserts that no feasible technologies are available that would allow it to comply with the Permit.	DEQ argues that the process and effluent characteristics from the Bio-Oregon facility are similar to those at the facilities studied by EPA when EPA established the Fish Meal ELGs and that consistent with applicable law this is all that is required for ELGs to be applicable. DEQ further argues that the resulting TBELs in the Permit would have been identical whether the agency conducted a case-by-case BPJ analysis or directly applied the ELGs. DEQ argues that its decision to rely on the exhaustive engineering and economic analysis EPA set forth in the ELGs is reasonable, allowable under EPA’s guidance, and supported by substantial evidence.
Water-Quality Based Effluent Limits	Bio-Oregon alleges DEQ erroneously imposed metal content limits that are so low that it can neither comply nor	DEQ responds that the data the agency relied upon to set the metals limits was submitted by Bio-Oregon with its permit

(WQBELs) – Metals Limits	reasonably monitor and measure such limits. Bio-Oregon asserts the contested limits are based upon “inherently unreliable data,” and otherwise flawed analysis.	application and is reliable and sufficient to support DEQ’s conclusions, that DEQ is obligated under the Clean Water Act (CWA) to include WQBELs applicable to those pollutants in the Permit, and that Bio-Oregon has not demonstrated that it qualifies for an intake credit. In addition, DEQ argues that the source of the pollutants present in a facility’s effluent is irrelevant for purposes of setting Permit limits.
WQBELs – Thermal Load Limits	Bio-Oregon asserts that the thermal load limits are based on faulty data and methods, and that DEQ abused its discretion by failing to allocate a portion of the reserve capacity in the Columbia River Temperature TMDL to the facility or to provide an intake credit.	DEQ argues the limit was set by EPA in the Columbia River Temperature TMDL and that Bio-Oregon has not demonstrated it qualifies for allocation of reserve capacity under the TMDL or an intake credit under DEQ regulations, and therefore, under applicable law, Bio-Oregon has not met its burden to establish such qualifications.
WQBELs – Bacteria Limits	Bio-Oregon argues that the water quality standard from which the enterococcus limit is derived—OAR 340-041-0009(6)—applies only to fecal sources and that the Bio-Oregon facility is not a fecal source, thus the Permit limitation is unlawful and constitutes a change in agency position absent adequate explanation.	DEQ argues the fish materials processed at the facility contain fecal matter and testing has shown high levels of fecal coliform in the facility’s effluent, thus DEQ appropriately included a bacteria limit in the Permit.
Monitoring Requirements	Bio-Oregon seeks review of the monitoring requirements regarding BOD <sub>5</sub> , TSS, oil/grease, ammonia, alkalinity, hardness, VOCs, and cyanide, including whole-effluent-toxicity (WET) testing. Bio-Oregon argues that several of these monitoring requirements are not necessary nor supported by substantial evidence or reason, stating that Bio-Oregon does not utilize some of the afore-mentioned substances in	DEQ argues it has broad authority to impose monitoring requirements in NPDES permits. DEQ set forth a summary of the data and other evidence in the record that supports monitoring for each of the pollutants on pages forty-five through forty-nine of its Answering Brief (Attachment A.2). With respect to the WET testing requirement, DEQ argues that WET testing is reasonable because the facility is known to have toxic pollutants in its effluent

	its process. With respect to WET testing, Bio-Oregon argues the evidence does not reflect that Bio-Oregon uses toxic chemicals in its process and DEQ failed to consider that the chemicals may be coming from the intake water the facility uses.	and DEQ is required by law to impose permit conditions that ensure compliance with water quality standards, including the prohibition of the introduction of toxic substances in “amounts, concentrations, or combinations” that may be harmful to the environment.
ALJ Reassignment	Bio-Oregon argues that it is entitled to a new hearing because OAH assigned a different ALJ to draft the Proposed and Final Order than who presided over the contested case hearing, which Bio-Oregon alleges is a procedural error requiring a new hearing. Alternatively, Bio-Oregon asserts that this ALJ assignment was in error because it received no notice of the reassignment.	DEQ responded that there is no rule that prohibits a different ALJ from issuing the Proposed and Final Order than was assigned to preside at a hearing, that Bio-Oregon did not timely raise their objection to the reassignment with the Chief ALJ, and that Bio-Oregon has not alleged any specific harm caused by such an action.

Bio-Oregon Requests the Commission Accept Proposed Alternative Findings of Fact and Conclusions of Law

Bio-Oregon requests that the commission strike the TBELs, metal limits, bacteria limits, thermal load limit, and monitoring requirements from the Permit and adopt proposed alternative findings of fact, which are set forth in pages 66–78 of Bio-Oregon’s Exceptions and Brief (Attachment A.3).

DEQ’s specific responses to Bio-Oregon proposed alternative findings of fact can be found on the following pages of DEQ’s Answering Brief (Attachment A.2):

- WQBELs for metals and toxics on pages 19–21,
- WQBELs for bacteria on page 25,
- Thermal load on pages 30–31,
- TBELs on pages 41–45, and
- Monitoring requirements on page 51.

DEQ’s Recommendation

DEQ recommends that the commission uphold the ALJ’s findings of fact and conclusions of law, with one exception, because the evidence presented at hearing and included in the record establish by substantial evidence that the Permit was developed in accordance with state and federal law.

The one exception DEQ recommends is that the commission remove the mercury limits in Schedule A of the Permit for Outfalls 002 and 003. DEQ agrees with Bio-Oregon that the 2011 monitoring results from Columbia Analytical Services (Attachment D.1 \_ Exhibit A8) indicated that mercury was undetected in the samples

taken from Outfalls 002 and 003. DEQ will modify the mercury limits for those outfalls using more recent data collected by Bio-Oregon.

Specifically, DEQ recommends that the commission make the following changes to the ALJ's Proposed and Final Order issued on Oct. 17, 2023:

- Strike the word “mercury” from the sixth sentence of Finding of Fact #25 and strike the seventh sentence entirely.
- Revise Finding of Fact #30 to indicate that Columbia Analytical Services found mercury to be undetected in Outfall 002 and 003 on all four samples.
- Revise Conclusion of Law #7 to read “DEQ did not err in setting limits and monitoring requirements for Total Arsenic, Total Copper, and Total Zinc for Outfall 002 or for denying an intake credit for metals present in the intake water for Outfalls 002 and 003. DEQ erred in setting mercury limits and monitoring requirements for Outfalls 002 and 003 based on monitoring data in the record.”

### **EQC Authority**

The commission has the authority to hear this appeal under OAR 340-011-0575. The commission may substitute its judgment for that of the ALJ in making any particular finding of fact, conclusion of law, or order except as limited by ORS 183.650 and OAR 137-003-0665. The major limitations are as follows:

1. If the commission modifies a proposed order in any substantial manner, it must identify the modification and explain to the parties why the commission made the modification.<sup>1</sup>
2. The commission may modify a finding of historical fact made by the ALJ only if it determines that there is clear and convincing evidence in the record that the finding was wrong.<sup>2</sup>
3. The commission may not consider evidence that was not presented to the ALJ. The commission may, based upon the filing of a motion and a showing of good cause, remand the matter to the ALJ to consider the evidence.<sup>3</sup>
4. If the commission remands the matter to the ALJ, the commission shall specify the scope of the hearing and the issues to be addressed.<sup>4</sup>

### **Alternatives**

The commission may either:

1. As requested by DEQ, uphold the ALJ's Proposed Order supporting the Permit, with the exception of the mercury limits for Outfall 002 and 003 which DEQ has conceded, and adopt it as the Final Order of the commission.
2. As requested by Bio-Oregon, strike the disputed TBELs, metal limits, bacteria limits, thermal load limits, and monitoring requirements, and reject the findings of fact and conclusions of law to which Bio-Oregon objects in its Exceptions and Brief, or otherwise, require the completion of a new contested case hearing due to the change in ALJ as between the hearing and issuance of a proposed and final order.
3. Take any other action within the commission's authority.

### **Attachments**

#### **A. Documents Regarding Petition for Review**

---

<sup>1</sup> ORS 183.650(2) and OAR 137-003-0665(3). “Substantial manner” is when the modification would change the outcome or the basis for the order or change a finding of fact.

<sup>2</sup> 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.

<sup>3</sup> OAR 340-011-0575(5) and OAR 137-003-0655(5).

<sup>4</sup> OAR 137-003-0655(2).

1. Respondent's Reply Brief, dated May 31, 2024
2. DEQ's Answering Brief, dated April 5, 2024
3. Respondent's Exceptions and Brief, dated Feb. 16, 2024
4. Respondent's Petition for Review, dated Nov. 14, 2023
5. Respondent's Motion for Extension of Time, dated Dec. 5, 2023
6. Dir. Feldon's Approval of Respondent's Motion for Extension of Time, dated Dec. 14, 2023
7. Respondent's Motion for Extension of Time, dated May 6, 2024
8. Dir. Feldon's Approval of Respondent's Motion for Extension of Time, dated May 10, 2024

**B. EQC Request to Office of Administrative Hearings**

1. OAH Response to EQC Request, dated July 22, 2024
2. EQC Request to OAH RE: ALJ Reassignment, dated May 23, 2024
3. Respondent's Letter to OAH Objecting to EQC Request, dated June 7, 2024
4. Respondent's Objection or Alternative Request to Respond, dated May 17, 2024
5. Dir. Feldon's Denial of Respondent's Request for Add'l Briefing, dated May 30, 2024
6. Emails between Respondent's Counsel and Gary Vrooman, EQC Counsel, dated May 29, 2024
7. Staff Report for Agenda F, May 2024 EQC Meeting, dated May 23, 2024

**C. ALJ's Proposed Order**

1. Bio-Oregon Proposed and Final Order, dated Oct. 17, 2023

**D. Hearing Record**

1. DEQ's Exhibits A1 through A27, admitted into record
2. Respondent's Exhibits R1 through R34, admitted into record
3. DEQ & Respondent's Closing Arguments
  - i. DEQ's Initial Closing Memorandum, dated April 12, 2023
  - ii. Respondent's Initial Closing Memorandum, dated April 12, 2023
  - iii. DEQ's Closing Reply Brief, dated April 26, 2023
  - iv. Respondent's Closing Reply Brief, dated April 26, 2023
4. Hearing Recording & Transcript
5. DEQ's Motion for Summary Determination
  - i. Decision on DEQ's Motion for Summary Determination, dated Feb. 9, 2023
  - ii. DEQ's Motion for Summary Determination, dated Oct. 14, 2022
  - iii. Respondent's Opposition to DEQ's MSD, dated Nov. 11, 2023
  - iv. DEQ's Reply to Respondent's MSD Opposition, dated Dec. 2, 2022
6. Amended Notice of Video Conference Hearing, dated Feb. 16, 2023
7. Schedule Adjustment Emails, dated Feb. 7-16, 2023
8. Notice of Video Conference Hearing, dated July 26, 2022
9. ALJ Rackstraw's Summary of Prehearing Conference, dated July 26, 2022
10. Referral Letter, dated May 16, 2022

**E. Pre-Hearing Documents**

1. Pacific Bio Products Warrenton, LLC Request for Hearing, dated March 9, 2022
2. NPDES Permit Issued to Bio-Oregon Protein, Inc, dated Feb. 17, 2022

*Report prepared by Anika Marriott  
Senior Assistant Attorney General, Oregon Department of Justice*

**Translation or other formats**

[Español](#) | [한국어](#) | [繁體中文](#) | [Русский](#) | [Tiếng Việt](#) | [العربية](#)  
800-452-4011 | TTY: 711 | [deqinfo@deq.oregon.gov](mailto:deqinfo@deq.oregon.gov)

**Non-discrimination statement**

DEQ does not discriminate on the basis of race, color, national origin, disability, age or sex in administration of its programs or activities. Visit DEQ's [Civil Rights and Environmental Justice page](#).