

Date: Sept. 3, 2024

To: Environmental Quality Commission

From: Leah Feldon, Director

Subject: Agenda item C, Action item: Contested Case No. LQ/HW-NWR-2018-049 regarding Safety-Kleen Systems, Inc.
Sept. 26-27, 2024, EQC meeting

**Introduction
and Background**

On Jan. 26, 2021, DEQ issued an Amended Notice of Civil Penalty Assessment and Order, to Safety-Kleen Systems, Inc. (Safety-Kleen or Respondent), alleging violations of certain financial assurance requirements that apply to Safety-Kleen's hazardous waste treatment storage and disposal (TSD) facility in Clackamas, Oregon.

On Feb. 17, 2021, Safety-Kleen timely requested a contested case hearing, challenging DEQ's interpretation of the regulation at issue.

Administrative Law Judge (ALJ) Jennifer Rackstraw presided over a contested case hearing on the matter on Sept. 23 and 24, 2021, and issued a Proposed and Final Order (PO) on July 22, 2022.

The PO described the issue between the parties as follows:

whether DEQ may hold Respondent liable for alleged violations of 40 CFR §264.147(a), as adopted by reference in OAR 340-100-0002(1), for the period Sept. 1, 2013 to Nov. 1, 2014, and the period Nov. 1 to Oct. 31 during the years 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 (time periods at issue) on the ground that Respondent failed to demonstrate financial responsibility for sudden accidental occurrences because the Pollution and Remediation Legal Liability insurance policy covering Respondent's Clackamas facility during those time periods provided third-party liability coverage for both hazardous waste treatment, storage, and disposal (TSD) facilities and non-TSD facilities.¹

40 CFR 264.147(a) states, as relevant to this matter:

An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the

¹ The PO also states a second issue, whether DEQ could assess a civil penalty for the alleged violation. DEQ has since dropped its assessment of a civil penalty, leaving only the first issue live between the parties.

amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs[.]

DEQ alleged that Safety-Kleen violated this requirement because the insurance policies covering Safety-Kleen's Clackamas hazardous waste treatment, storage and disposal (TSD) facility also covered non-TSD facilities.

The PO concluded that DEQ could not hold Safety-Kleen liable for the violations at issue because the rule was susceptible to more than one plausible interpretation, and DEQ's reinterpretation of the rule as applied to Safety-Kleen was an act of discretion that must be promulgated through rulemaking.

On Aug. 19, 2022, DEQ submitted a Petition for Commission Review to the Environmental Quality Commission (EQC). On March 7, 2024, DEQ submitted its Exceptions and Brief in support of its Petition. DEQ took exception to the PO's legal reasoning and interpretation of 40 CFR 264.147(a) and the resulting conclusion of law that Safety-Kleen was not liable for the alleged violations. Safety-Kleen submitted a Response brief on April 15, 2024, and DEQ submitted a Reply brief on May 6, 2024.

The issue of whether DEQ may hold Safety-Kleen liable for violations of 40 CFR 264.147(a), as adopted by reference in OAR 340-100-0002(1), because its insurance policies cover both TSD facilities and non-TSD facilities, is now presented 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 Rackstraw made extensive and detailed Findings of Fact (50 in total) regarding the alleged violations. These are listed on pages 4 to 22 of the PO, Attachment B. Neither party has taken exception to any of the findings of fact.

Conclusions of Law

Based on the Findings of Fact, as relevant to the appeal, ALJ Rackstraw made the following Conclusions of Law, on page 23 of the PO, Attachment B:

DEQ may not hold Respondent liable for alleged violations of 40 CFR §264.147(a), as adopted by reference in OAR 340-100-0002(1), for the time periods at issue on the ground that Respondent failed to demonstrate financial responsibility for sudden accidental occurrences because the Pollution and Remediation Legal Liability insurance policy covering Respondent's Clackamas facility during those time periods provided third-party liability coverage for both TSD facilities and non-TSD facilities.

As explained in ALJ Rackstraw's opinion on pages 34-40 of the PO, Attachment B, this Conclusion of Law is based on the ALJ's determination that DEQ's application of the rule against Safety-Kleen constituted a new interpretation of the rule that had to be adopted through rulemaking before it could be enforced.

Issues on Appeal The issues on appeal are: (1) Whether the PO correctly concludes that additional EQC rulemaking was needed prior to DEQ advancing its proposed interpretation of the rule, and (2) If not, whether DEQ's or Safety-Kleen's proposed interpretation of the rule is correct.

The PNW Metal Recycling, Inc. Case

The PO relied on Oregon Court of Appeals case *PNW Metal Recycling, Inc. v. Oregon Dept. of Env'tl. Quality*, 317 Or App 207 (2022) (*PNW Metal I*) in its conclusion that rulemaking was required for DEQ to advance its interpretation in this matter. In *PNW Metals I*, the Court of Appeals concluded that DEQ could not change its interpretation of a statutory exemption from solid waste site permitting requirements without going through rulemaking. After the issuance of the PO, the Oregon Supreme Court overruled *PNW Metals I* in *PNW Metal Recycling, Inc. v. Oregon Dept. of Env'tl. Quality*, 371 Or 673 (2023) (*PNW Metals II*). *PNW Metals II* concluded that DEQ did not need to go through rulemaking to advance its interpretation of the statutory exemption at issue in that case.

DEQ argues in its briefs that, as in *PNW Metals II*, rulemaking was not required for it to advance its interpretation in this case. Safety-Kleen argues that, notwithstanding the overruling of *PNW Metals I*, DEQ still needed to undertake rulemaking to advance its interpretation in this case.

40 CFR §264.147(a)

The ultimate issue in this case is the correct interpretation of 40 CFR §264.147(a). DEQ argues in its briefs that the plain language and related context of the rule require that only TSD facilities to be covered by the required insurance policies. Safety-Kleen argues that the plain language and context allow the required insurance policies to include facilities other than TSD facilities on the policies. The PO did not resolve the issue of the correct interpretation of the regulation. Rather, the PO reviewed both party's arguments in detail and concluded that both interpretations were plausible.

Recommendations to the EQC

DEQ recommends the EQC adopt a final order consistent with its interpretation of 40 CFR §264.147(a), as described in its briefing of the matter.

Safety-Kleen recommends the EQC adopt the ALJ's conclusion of law but modify the reasoning around the *PNW Metals* cases to account for the intervening overruling of *PNW Metals I*. Alternatively, Safety-Kleen recommends that the EQC adopt its interpretation of 40 CFR §264.147(a), as described in its briefing of the matter.

EQC Authority The EQC has the authority to hear this appeal under OAR 340-011-0575. The EQC 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.²
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.³
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.⁴
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.⁵

Alternatives

The EQC may either:

1. Adopt a Final Order of the commission consistent with DEQ's recommended interpretation of 40 CFR §264.147(a).
2. Adopt a Final Order of the commission consistent with Safety-Kleen's recommended interpretation of the requirements for rulemaking or Safety-Kleen's interpretation of 40 CFR §264.147(a).
3. Take any other action within the commission's authority.

Attachments

A. Documents regarding Petition for Review

1. DEQ Petition for Review, dated Aug. 19, 2022
2. DEQ's Exceptions and Brief, dated March 7, 2024.
3. Safety-Kleen's Response Brief, dated April 15, 2024
4. DEQ's Reply Brief, dated May 6, 2024.
5. Scheduling emails:
 - a. E-Mail from Richard Whitman establishing briefing schedule, dated Sept. 15, 2022.
 - b. E-Mail from Leah Feldon establishing revised briefing schedule, dated Feb. 1, 2024.
 - c. E-mail from Stacey O'Neil on behalf of Leah Feldon revising briefing schedule, dated March 22, 2024.

B. ALJ's Proposed Order, dated July 22, 2022

C. Hearing Record

1. Safety-Kleen Pre-Hearing Memorandum, dated Sept. 9, 2021.
2. DEQ's Hearing Exhibits, A-1 through A-6
3. Safety-Kleen's Hearing Exhibits R1-R46.
4. Transcript of In Person Hearing, Sept. 23 and 24, 2021
5. DEQ's written closing argument, dated Oct. 29, 2021
6. Safety-Kleen's written closing argument, dated Nov. 29, 2021
7. Oral closing arguments (audio file), dated Dec. 7, 2021

D. Pre-Hearing Documents

1. Amended Notice of Civil Penalty and Order, dated Jan. 26, 2021
2. Amended Request for Contested Case Hearing, Feb. 17, 2021

² 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.

³ 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.

⁴ OAR 340-011-0575(5) and OAR 137-003-0655(5).

⁵ OAR 137-003-0655(2).

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3. Pre-Hearing Conference (audio file), dated May 13, 2021
4. Notice of In-Person Hearing, dated May 13, 2021

E. Authority Cited

1. *PNW Metal Recycling, Inc. v. Oregon Dept. of Envtl. Quality*, 371 Or 673 (2023) (*PNW Metals II*)