State of Oregon
Department of Environmental Quality Memorandum

Date: Oct. 15, 2024

To: Environmental Quality Commission

From: Leah Feldon, Director

Subject: Agenda item A, Action item: Contested Case No. 2023-ABC-06021 regarding *Mapleton Rock Products Inc.*, Oct. 25, 2024, EQC meeting

Introduction and Background

This case is an appeal of a DEQ enforcement action citing violations of a state water quality statute and the National Pollutant Discharge Elimination System Stormwater General Permit No. 1200-A, which applies to gravel quarries, and is administered by the Oregon Department of Geology and Mineral Industries ("DOGAMI"). DEQ and DOGAMI have overlapping authority for water quality, permitting, and industrial discharge from mining facilities. In consideration of this, the agencies entered into a Memorandum of Agreement ("MOA") that identifies each agency's responsibilities in the areas of permit administration, inspections and complaint response, compliance and enforcement, and electronic reporting. As relevant to this matter, DOGAMI agreed that it would implement the National Pollutant Discharge Elimination System Stormwater General Permit No. 1200-A. Implementation includes responding to complaints, investigating known or suspected violations of the permit, and referring cases to DEQ for enforcement when appropriate.

Respondent, Mapleton Rock Products Inc. ("Respondent" or "MRP") owns and operates a gravel quarry near Mapleton in Lane County. Upon receiving a complaint about turbid water in the vicinity of Respondent's mining facility, DOGAMI inspected Respondent's facility on April 11, 2022. During that inspection, DOGAMI's Lisa Reinhart ("Reinhart") documented a turbid plume of water in the Siuslaw River and, through further investigation, determined that Respondent's facility was the source. DOGAMI thereafter referred the site to DEQ for potential enforcement action. On Nov. 3, 2022, DEQ issued a Notice of Civil Penalty Assessment and Order (the "Notice"; Attachment E.1) to Respondent, alleging a violation of ORS 468B.025(1)(a),[1] alleging four violations of Respondent's National Pollutant Discharge Elimination System Stormwater (NPDES) General Permit No. 1200-A for Stormwater and Mine Dewatering Discharges (the "Permit"; Attachment D.1 (Exhibit A1)) in violation of ORS 468B.025(2),[2] assessing a civil penalty of $17,695, and ordering that Respondent submit a revised Stormwater Pollution Control Plan ("SWPCP") that met the requirements of the Permit to DOGAMI.

[1] ORS 468B.025(1)(a) provides as follows: "Except as provided in ORS 468B.050 or 468B.053, no person shall: (a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.
[2] ORS 468B.025(2) provides as follows: "No person shall violate the conditions of any waste discharge permit issued under ORS 468B.050."

On Nov. 25, 2022, Respondent timely requested a contested case hearing, also filing Motions to Dismiss, Affirmative Defenses, Response and Request for Hearing ("Hearing Request"; Attachment E.2).[3]

On Oct. 23, 2023, DEQ filed an Amended Notice of Civil Penalty Assessment and Order (the "Amended Notice"; Attachments E.3 and E.4) that reduced the civil penalty amount for alleged Violation 3 from $4,434 to $3,198, thereby reducing the total civil penalty amount to $16,459.

Administrative Law Judge ("ALJ") Alison Greene Webster presided over a contested case hearing via Webex from Oct. 24, 2023 through Oct. 26, 2003. ALJ Webster issued a Proposed Order on Nov. 27, 2023 (the "Proposed Order"; Attachment C) that found that DEQ established five violations, may assess a civil penalty of $16,459 and may require Respondent to submit a revised SWPCP to DOGAMI.

On Dec. 27, 2023, Respondent submitted a Petition for Commission Review to the Environmental Quality Commission (the "Commission") ("Respondent's Petition"; Attachment A.1). On April 5, 2024, Respondent submitted its *Exceptions & Brief* ("Respondent's Exceptions"; Attachment A.2) which, as explained by Respondent, "includes both factual exceptions and exceptions to conduct and rulings during and preceding to [sic] the Contested Case Hearing." This included challenges to much of the Proposed Order.

On May 13, 2024, DEQ submitted *DEQ's Answering Brief to Respondent's Exceptions and Brief* ("DEQ's Answer"; Attachment A.4). In that filing, DEQ requested that the EQC issue a Final Order consistent with the Proposed Order, with one exception: DEQ agreed with one of Respondent's arguments that would result in a $3,198 reduction in the civil penalty.

On June 17, 2024, Respondent submitted its *Reply Brief to DEQ's Answer* ("Respondent's Reply"; Attachment A.5).

This matter is now presented for your review.[4]

[3] As indicated by the name of the document, Respondent's filing also sought to dismiss the case on a number of theories. Administrative Law Judge Alison Greene Webster denied the motions to dismiss on Oct. 3, 2023 ("ALJ Ruling on Motion to Dismiss"; Attachment E.5.x).

[4] On the same date that Respondent submitted Respondent's Exceptions, Respondent also filed a *Motion to Dismissal [sic] for DEQ's Violations of OAR 137-003-0505; OAR 137-003-0515(3); OAR 137-003-0566(1)(b); OAR 137-003-0569(1); OAR 137-003-0575(3); OAR 137-003-0575(7); OAR 137-003-0525(1)(b); OAR 137-003-0595(1) and (2); OAR 137-003-0610(1); ORS 183.413; ORS 183.415; and ORS 183.417* ("Renewed Motion to Dismiss"; Attachment B.1) and *Renewed Motion for Summary Determination and Motion for Dismissal for Failure to Allege and Failure to Prove a Prima Facie Case of Violations 1, 2, 3, 4 and 5* ("Renewed Motion for Summary Determination"; Attachment B.2). Because these motions are outside of the scope of commission review contemplated by OAR 340-011-0575(4)(a), which focuses on specific findings and conclusions in an Administrative Law Judge's proposed order, it is not further discussed in this staff report. This report instead focuses on Respondent's Exceptions, DEQ's Answer, and Respondent's Reply.

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 Webster made 31 Findings of Fact regarding the alleged violations. These are listed on pages 3-13 of the Proposed Order.

Conclusions of Law

Based on the Findings of Fact, ALJ Webster made the following Conclusions of Law, listed on pages 13-14 of the Proposed Order, ruling in DEQ's favor on each of the issues raised and upholding the civil penalty and compliance order imposed in the Amended Notice:

1. On April 11, 2022, MRP caused or permitted highly turbid water to discharge from MRP's facility into a ditch adjacent to Mapleton Road and then into the Siuslaw River, causing pollution by altering the physical characteristics of waters of the state in violation of ORS 468B.025(1)(a).
2. MRP failed to monitor outfalls from the facility serving areas where stormwater or mine dewatering are exposed to industrial activities in violation of Permit Schedule B, condition 2.c.i and ORS 468[B].025(2).
3. MRP failed to document inspections and maintain inspection records on site in violation of Permit Schedule B, conditions 7.c.ii. and 9.b. and ORS 468B.025(2).
4. MRP failed to identify outfalls where discharges occurred in the facility's SWPCP in violation of Permit Schedule A, condition 8.b.viii. and ORS 468B.025(2).
5. On April 11, 2022, MRP failed to implement erosion and sediment control measures at the facility to meet the narrative technology based effluent limits in Permit Schedule A.1 in violation of Permit Schedule A, condition 1.a. and ORS 468B.025(2).
6. DEQ may assess a civil penalty totaling $16,459 against MRP for the above violations. Additionally, DEQ may require MRP to submit a revised SWPCP to DOGAMI in accordance with the Permit requirements.

Issues on Appeal

The issues listed and summarized below track the arguments raised in Respondent's Exceptions. DEQ does not believe that all of these issues are exceptions appropriate for the EQC's consideration under OAR 340-011-0575(4)(a) or are otherwise appropriately before the EQC. DEQ, however, has nonetheless responded to Respondent's arguments in DEQ's Answer, to which Respondent replied. The briefing in this matter was extensive,[5] leading to a longer than typical staff summary of the exceptions, response, and reply. Respondent requests significant changes to the ALJ's Proposed Order as a result of the identified exceptions.[6]

1. Denial of Respondent's Motion to Dismiss

Respondent argues that the ALJ should have granted its motion to dismiss filed on Nov. 2, 2022, both because DEQ's response was late, exceeding the 14-day response period established by OAR 137-003-0580(2), and because the Notice failed to allege facts that would support a *prima facia* case of pollution.

[5] Respondent's Exceptions totals 217 pages; DEQ's Answer totals 38 pages; Respondent's Reply totals 76 pages.
[6] See Attachment A.3 ("Respondent's Proposed Findings and Conclusions").

In response to the procedural argument, DEQ argues that the time period applies to motions filed after referral to the Office of Administrative Hearings ("OAH") and ALJs are assigned, and DEQ here timely responded based on the briefing schedule established by the ALJ after referral. In response to the substantive argument, DEQ notes that the issues raised in the motions to dismiss were briefed by the parties and decided by ALJ Webster in an Oct. 3, 2023 ruling denying Respondent's motions (Attachment E.5.x), and that Respondent has identified no specific errors in that ruling.

In reply, the Respondent argues DEQ's rules (OAR 340-011-0530(2)) require the Respondent to raise affirmative defenses, which Respondent asserts are commonly contained in motions, in its request for hearing.

2. <u>Form and Content of DEQ Contested Case Notice and Notice of Right to Hearing</u>

Contested Case Notice – Respondent argues that the Notice failed to include all of the requirements of ORS 183.413 and OAR 137-003-0505. Respondent cites to ORS 183.413(3), which provides that a defective notice does not invalidate any determination or order unless a court finds that the failure affects the substantial rights of the complaining party. Respondent, however, asserts that the Notice prejudiced Respondent in multiple ways, including by failing to: identify the issues that would be addressed at hearing; indicate that Respondent may be represented by counsel and that legal aid organization might be able to assist; include a statement about the parties' rights to response to all issues properly before the presiding officer and to present evidence and witnesses on those issues; indicate whether discover is permitted and how it may be requested; include a general description of hearing procedure; include a statement regarding whether a record will be made of the proceedings and the manner of making the record available; inform Respondent of the function of record-making with respect to perpetuation of testimony and evidence and with respect to any appeal; identify whether an attorney would represent DEQ; include how testimony and evidence are taken and reviewed and who makes the determination and the effect of that person's determination; inform Respondent regarding its ability to request a recess if it determines that an attorney is necessary to protect its rights; inform Respondent regarding the opportunity for adjournment if it determines additional evidence should be brought to the attention of the agency and hearing reopened; inform Respondent regarding its right to review and object to findings, conclusions, and recommendations of hearing officer; and to describe the appeal process. ORS 183.413(2)(a), (c)–(o).

In response, DEQ argues that these are new arguments that were not raised in Respondent's request for hearing or before the ALJ and are, therefore, outside of the scope of EQC review, citing OAR 340-011-0530(2). DEQ also argues that pursuant to OAR 340-011-0575, the EQC's review is limited to the Proposed Order. DEQ also argues that, even if Respondent's argument is considered, ORS 183.413 does not apply to the Notice, but is instead satisfied by OAH's Notice of Contested Case Rights and Procedures, included in OAH's July 11, 2023 *Notice of Pre-Hearing Conference* ("Notice of Pre-Hearing Conference"; Attachment E.5.a, p.4-9) and July 14, 2023 *Notice of In-Person Hearing* ("Notice of In-Person Hearing"; Attachment E.5.i, p.4-9).

In reply, Respondent argues that OAH's Notice of Contested Case Rights and Procedures cannot satisfy the requirements of ORS 183.413(2) because that statute requires the

agency (i.e., not OAH) to serve the notice and because the ALJ notice does not include all the required information. Respondent also argues that its argument is timely because it could not have addressed an issue in its request for hearing that had not yet arisen.

Notice of Right to Hearing – Respondent argues that ORS 183.415 requires a notice of right to hearing distinct from the contested case notice required by ORS 183.413 and that the Notice did not include a reference to the particular sections of the statutes and rules involved (required by ORS 183.415(3)(c)) or a short and plain statement of the matters asserted or charged (required by ORS 183.415(3)(d)). Respondent specifically argues that the Notice should have included citations to statutes and regulations regarding the permitting scheme as well as regulations regarding turbidity water quality standards. Respondent also argues that the ALJ in the prehearing conference identified the Notice as the notice required by ORS 183.415 (and OAR 137-003-0505), specifically the "Conclusions" in the Notice, but the hearing involved more (including the exhibits with civil penalty calculations).

In response, DEQ makes the same timeliness and waiver arguments as it did in response to Respondent's arguments concerning the contested case notice (see above). DEQ also argues that if Respondent's argument is considered, it is undermined by the Notice itself, which identifies relevant law and includes a short and plain statement of the matters asserted. DEQ also argued about the irrelevance of the turbidity standard to the hearing and why it did not need to notify Respondent of that or other irrelevant statutes and regulations, noting that DEQ alleged a violation for causing pollution under ORS 468B.025(1)(a) (and not a violation of a water quality standard).

In reply, Respondent argues that its argument is timely because it cannot address an issue that has not yet arisen. Respondent also argues that it was prejudiced by not having DEQ identify a specific and objective standard that applies to MRP's alleged violations.

3. ALJ's Denial of Public Hearing and Grant of Virtual Hearing

Respondent argues that ALJ Webster inappropriately changed the format of the hearing to virtual after the prehearing conference and that she lacked authority to request names and email addresses for public attendees to join via the Webex link. Regarding the format, Respondent argues that DEQ lacked the authority to request, and the ALJ lacked authority to grant, the change to virtual, and that the change prejudiced Respondent in three ways: (1) it resulted in Respondent sharing hearing strategy earlier than it wanted; (2) Respondent's exhibits were difficult or impossible to use in a virtual setting; and (3) it allowed the ALJ to limit public attendance. Respondent notes that it requested to move to an in-person hearing three times during the hearing, but ALJ Webster denied those motions.

DEQ responds that, pursuant to OAR 137-003-0525, the ALJ's determination of the format is "subject to the approval of the agency," and nothing prevents DEQ from withdrawing its prior approval of a hearing location at any time for any reason. DEQ also notes that the change to virtual format occurred seven weeks before the hearing and that Respondent was able to prepare and share exhibits. DEQ notes that it was subject to the same issues when presenting evidence and that there was no prejudice. Finally, DEQ notes that the hearing was open to the public and that Respondent identified no party who was denied access; anyone with a link could have attended.

Respondent replies that once the agency approves the hearing format, it is fixed. Respondent also argues that its technological difficulties were greater than DEQ's and that the ALJ was unable to see some if its exhibits at all. Respondent also claims that MRP's elderly expert engineer struggled to track the ALJ's questions on the maps. Respondent further argues that the meeting was not truly open to the public because the attendees could not be anonymous.

4. Conduct and Rulings of Second Prehearing Conference

Respondent argues that the ALJ erred in allowing Reinhart to attend the second prehearing conference over Respondent's objection, thereby violating OAR 137-003-0575(1), and for not limiting that conference to the specific issues requested by Respondent, thereby violating OAR 137-003-0575(2). According to Respondent, this led to Respondent disclosing its strategy to impeach Reinhart — showing that a can identified as a used oil can in an inspection report was actually a can of Vienna sausage — thereby giving her time to blunt the impact of the impeachment testimony.

DEQ responds that Respondent requested the pre-hearing conference to request direction regarding the use of physical evidence at the virtual hearing. DEQ argues that Reinhart was appropriately attending because DOGAMI is DEQ's agent for implementing the Permit and because DOGAMI referred the matter to DEQ for enforcement. DEQ further notes that nothing required Respondent to reveal case strategy and that there was no prejudice because Reinhart admitted to being mistaken about the Vienna sausage can and it is speculation to argue that she would have testified any differently at hearing if she was unable to attend the second prehearing conference. DEQ further notes that the can is not relevant to any of the violations cited in the Amended Notice or relied on in the Proposed Order.

Respondent replies that ALJ Webster's rulings on discovery disputes clarified that DOGAMI is not a party to this case and that OAR 137-003-0575(1) thereby prohibited her from attending. Respondent also argues that it did need to reveal its strategy with the can because ALJ Webster asked, "What physical thing were you thinking you wanted [Reinhart] to address?"

5. ALJ's Denial of Motion to Compel Discovery

Respondent argues that ALJ Webster inappropriately denied Respondent's motion to compel discovery[7] and, having done so, she should have refused to admit into evidence Exhibits R38 and A24. Respondent's argument also invokes OAR 137-003-0566(1)(b)-(c), which require each party to provide documents and objects for inspection if the party intends to offer the documents or objects as evidence.

In response, DEQ argues that ALJ Webster appropriately denied Respondent's motion because Respondent sought documents that were in DOGAMI's, not DEQ's, possession. DEQ also notes that it, unlike Respondent, provided exhibits by the deadline established by ALJ Webster (Oct. 10, 2023), with only Exhibit A24 being provided after that date because DEQ did not obtain that document until later. DEQ provided Respondent a copy

[7] ALJ Webster denied Respondent's motion in an Oct. 16, 2023 Order ("ALJ Ruling on Discovery Motion"; Attachment E.5.hh).

of A24 on Oct. 17, 2023, the same date that Respondent provided its Exhibits R1 through R41. DEQ also notes that Respondent could have filed a public records request to DOGAMI to obtain all DOGAMI's files instead of trying to compel discovery through DEQ. DEQ also rejects Respondent's argument about prejudice concerning R38, a video taken by Reinhart during her April 11, 2022, inspection of Respondent's facility, because Respondent already had the video. Respondent identified it as an exhibit, and DEQ argues that no rule prohibits a party from referencing or relying on another party's exhibit. DEQ further notes that the ALJ informed Respondent in a prehearing communication that Respondent could rely on DEQ's exhibits at hearing even if those exhibits were not introduced by DEQ.

In reply, Respondent argues that DOGAMI, as DEQ's agent, had the lidar images in Exhibit A24 since at least April 16, 2022, and that DEQ should have provided them earlier, and that failing to do so deprived Respondent of an opportunity to review the evidence and obtain expert testimony, if necessary. Regarding Exhibit R38, Respondent argues that DEQ admitted to intending to use that exhibit at hearing, but forgot to produce it, and that Reinhart's hearing testimony suggests that DEQ had this document at the time of the discovery request. Respondent argues that DEQ's use at the hearing therefore violates OAR 137-003-0566(1)(b), OAR 137-003-0569(1), and ORS 183.450(2). Though Respondent admits that a party can reference another party's admitted exhibits, Respondent notes that it did not request that the exhibit be admitted, and ALJ Webster prevented Respondent from asking questions about an exhibit on DEQ's list (Exhibit A12).

6. <u>Conduct and Rulings of Contested Case Hearing</u>

Respondent argues it did not get a fair and impartial contested case hearing and that ALJ Webster's conduct during the hearing prohibited MRP from presenting evidence and taking testimony in violation of ORS 183.413(2)(e), from presenting evidence and argumentation on all issues in violation of ORS 183.417(1), and from completing cross-examination and the right to submit rebuttal evidence in violation of ORS 183.450(3). Respondent's arguments span nearly 70 single-spaced pages and include extensive excerpts of hearing testimony and related rulings. Respondent's arguments, which go from page 37 through 103 of Respondent's Exceptions, include the following subheadings (with clarifying notes in parentheticals where Respondent's heading does not speak for itself):

A. *Exhibit R38* (DEQ should not have been allowed to use for reasons outlined above)
B. *Exhibit R8* (cited in the Proposed Order and should be added to the admitted exhibits list)
C. *Exhibit A24* [DEQ should not have been allowed to use for reasons outlined above (including surprise and), because it was not best evidence, and because it included disclaimers referring users to primary data]
D. *Exhibit R27* (exhibit, which includes receipts for correction and mitigation efforts, should have been admitted to support a "-5" penalty mitigation finding under OAR 340-012-0145(6))
E. *Hearsay Admitted*

F. *Reinhart's Expert Testimony* (Reinhart should not have been allowed to testify on matters with which she lacked personal knowledge or as if she were a subject matter expert, e.g., engineer, geologist, or hydrologist)
G. *ALJ Webster refusing to let MRP testify to facts at issue, or question witnesses about facts at issue*
H. *MRP was not permitted to impeach a witness* [Reinhart] *for bias*
I. *Hearing officer objected to Sam McAllister* [MRP Representative] *using the word "discrete" in cross-examination of Reinhart, when he was just quoting her and asking her to explain why she called it "discrete"*
J. *Hearing officer overruled MRP's objection to testimony on relevancy, even though the hearing officer admitted that the testimony was NOT relevant*
K. *Exhibit A6 (*ALJ improperly pressed DEQ to admit an exhibit (photos) could not be authenticated)
L. *Hearing officer offering exhibits into evidence*
M. *Exhibits R1 and R9* [Respondent should have been able to use R1 (DOGAMI Suspension Order) and R9 (draft of Notice with Reinhart comments) to impeach, by prior statements of Reinhart, Reinhart's testimony regarding course of turbid water from a roadside ditch to the Siuslaw River and R1 to also discuss MRP's mitigation efforts and basis for preparation for hearing]
N. *Hearing officer wrongfully sustained DEQ's relevance objection* [regarding evidence of point source discharges], *then permitted DEQ to ask those identical questions of the same witness*
O. *Hearing officer testifies for DEQ during cross-examination of Lisa Reinhart*
P. *Hearing Officer permits Courtney Brown to testify for DEQ without being sworn, but doesn't permit cross examination or permit Brown to be directly examined by MRP*
Q. *Courtney Brown lies to MRP's expert engineer witness on cross-examination*
R. *The ALJ admits she doesn't understand the issues after 2 full days of the 3-day hearing*
S. *ALJ does not stop DEQ from abusing Michael N. McAllister, P.E., expert witness for MRP*
T. *The ALJ conducts a 30 minute direct examination of MRP's witness after DEQ has cross-examined him*

In response, DEQ argues that the allegations regarding the ALJ's competence are belied by the Proposed Order itself and that these "insults do not warrant a DEQ response." DEQ focuses instead on Respondent's arguments A (R38), C (A24), E (Hearsay), F (Reinhart Testimony), N and O (Respondent's questioning of DEQ's witness was "cut off" and ALJ's questioning was improper), M (DEQ's Enforcement Drafts), and P (Statements by Brown at hearing), as summarized below:

A. R38 – DEQ appropriately used R38, which Respondent itself offered as an exhibit, and which provides additional evidence of what DEQ alleged in the Amended Notice — namely, that Respondent discharged highly turbid water from its facility to a ditch adjacent to Mapleton Road and then to the Siuslaw River.

C. A24 – Respondent's surprise arguments lack merit because the exhibit was submitted a week before the hearing, on the same date that Respondent submitted most of its exhibits. The rules of evidence do not apply, and in any event, Reinhart testified regarding how she created the exhibit. DEQ did not have the document when Respondent submitted its discovery request and therefore could not have produced it then. In the event that an ALJ admits evidence not disclosed as ordered or requested, a party may request a continuance pursuant to OAR 137-003-0569(1), and Respondent made no such request.

E. Hearsay – Hearsay is not prohibited in contested case hearings. OAR 137-003-0610.

F. Reinhart Testimony – Reinhart's education and experience were established at the outset of the hearing and support her foundation for testifying on matters related to mining and natural resource regulation. Reinhart also testified on matters with which she had personal knowledge. The ALJ found Reinhart credible.

N and O. Respondent's questioning of DEQ's witness was "cut off" and ALJ's questioning was improper – Respondent cross-examined Reinhart for six hours. The ALJ, as a fact finder, has a duty to develop the record and understand the facts, and is expressly authorized to ask questions. OAR 137-003-0060(5).

M. DEQ's Enforcement Drafts – Drafts are early work product, not prior statements, and DEQ's and DOGAMI's exchange of drafts ensured that the Notice was correct.

P. Statements by Brown at hearing – The hearing record shows that Brown, as DEQ's authorized representative, was answering the ALJ's clarifying questions aimed and understanding DEQ's allegations and to discern the relevance of evidence. DEQ also withdraws its economic benefit calculation for Violation number three, so statements regarding Exhibit 3 are no longer relevant.

In reply, Respondent argues that its observations are not insults of the ALJ, and that the ALJ failed to base conclusions of law on factual findings. OAR 137-003-0645(3). Respondent also specifically responds to DEQ's arguments as follows:

A. R38 – Though Respondent identified R38 as a potential exhibit, it did not submit it, and DEQ therefore could not use it. DEQ's failure to identify it as its own exhibit surprised Respondent, including by introducing a new theory regarding the drainage pathway.

C. A24 – DEQ, before submitting Exhibit A24, never discussed its potential use of lidar imagery, and Respondent did not know about its ability to request a continuance because DEQ never provided Respondent with a written notice containing that right.

E. Hearsay – Respondent argues that hearsay is inherently unreliable and should have been excluded.

F. Reinhart Testimony – Reinhart, as a lay witness, did not limit her testimony to matters with which she has personal knowledge and provided testimony that exceeded her expertise.

N and O. ALJ cutting of Respondent's examination of witness and ALJ's improper questioning of witnesses – DEQ, not the ALJ, has the duty to present facts in support of the allegations in the Notice. The ALJ also cut off Respondent's testimony on the theory that it was argument, but testimony was designed to show that locations alleged to be outfalls were not outfalls. If issues were legal issues, ALJ Webster and Brown should not have been discussing them during the hearing.

7. Respondent's Exceptions to the Proposed Final Order[8]

Exceptions to Issues

For space considerations, the specific issues already discussed above are not again reproduced below.

Issue 1 – Respondent argues that the ALJ erred by adding "or permitted" to the following issue: "Whether, on April 11, 2022, MRP caused or permitted highly turbid water to discharge from MRP's facility into a ditch adjacent to Mapleton Road and then into the Siuslaw River, causing pollution by altering the physical characteristics of waters of the state in violation of ORS 468B.025(1)(a)."

In response, DEQ agrees, but argues that there was no prejudice because ALJ Webster specifically concluded that "a preponderance of the evidence establishes that MRP violated ORS 468.025(1)(a) by causing pollution to the waters of the state." Proposed Order, p. 18.

In reply, Respondent argues that the ALJ did not make the findings necessary to support that conclusion and suggests that the ALJ's lack of knowledge of the actual law and apparent attempt to lower DEQ's standard of proof was inherently prejudicial.

Issue 6 – Respondent argues that the issue regarding penalties is not whether DEQ may assess a civil penalty, as the ALJ identified the issue, but how DEQ calculated the penalty amount. Respondent also argues that the ALJ should have framed the issue regarding the submission of the SWPCP as requiring submission of an SWPCP that meets the permit requirements without suggesting that DOGAMI must approve the submission.

In response, DEQ agrees that the issue regarding civil penalties is not whether DEQ has that authority, but whether DEQ appropriately calculated civil penalties here. DEQ argues that no prejudice resulted from this error, however, because the Proposed Order addresses the penalty calculations, and Respondent's arguments thereto, in detail. Regarding the SWPCP, DEQ notes that the ALJ properly recognized DEQ's authority under ORS 468.100 to "institute actions or proceedings for legal or equitable remedies to enforce compliance thereto or to restrain further violations," and argues that the "terms of the compliance order are consistent with the Permit requirements and conditions."

In reply, Respondent argues that the ALJ's finding number six is based on this issue and the ALJ prohibited Respondent from questioning DEQ on these issues. Regarding the

[8] This summary focuses on exceptions related to specific issues, findings, and conclusions in the Proposed Order. As such, it does not summarize Respondent's exceptions to the History of the Case and to language in ALJ Webster's opinion.

compliance order, Respondent argues that DEQ's response conflicts with OAR 340-011-0570(1), which provides that "[e]quitable remedies will not be considered by an administrative law judge."

Alleged missing issue: What are the particular statutes and rules involved? – Respondent argues that the ALJ failed to identify controlling legal authority as an issue for the hearing.

In response, DEQ notes that it provided ample notice in the Notice of the applicable statutes and rules, that it is under no obligation to inform Respondent of the entire landscape of authorities that may inform the basis of its Permit, and that the specific regulation that Respondent repeatedly refers to (40 CFR 122.26(b)(9)[9]) does not apply.

In reply, Respondent argues that 40 CFR 122.26 does apply, and that ORS 183.415 requires DEQ to provide notice regarding the Clean Water Act authorities applicable to its Permit.

Exceptions to Findings of Fact

Respondent objects to 25 of the 31 Findings of Fact in the Proposed Order, including some that it admits are irrelevant. Respondent also complains that the ALJ's findings lack specific citations to the record and that the quality of hearing audio is poor. Respondent's specific objections, with DEQ's responses and Respondent's replies, are summarized below. For space considerations, the specific factual findings from the Proposed Order are not reproduced below.

Finding of Fact 2 – Respondent argues that this finding uses Reinhart's terminology for features that no maps use. Respondent also argues that the use of "basin" in the "central basin" is wrong because it is a hill. Respondent also argues that no intermittent streams that drain to the river run through the stockpile area, that Reinhart did not see or photograph any streams, that the photos relied on for this finding do not show an intermittent stream, and that Respondent's witnesses provided contrary testimony. Respondent also discusses certain emergency measures it undertook to move water to a vegetated hillside on the date of the inspection but argues that any water on that hillside would have infiltrated the hill (and not made it to the ditch below).

In response, DEQ argues that the labels were not official labels, but were intended as the Proposed Order used them — namely, provide a frame of reference for the enforcement action, and that Respondent did not provide contrary labels. DEQ also argues that the ALJ found Reinhart's testimony more credible than Respondent's witnesses. Regarding the emergency measures, DEQ notes that this is new argument not supported by the record.

In reply, Respondent argues that the ALJ's finding of a basin, a technical term, is not factual and is unsupported by the evidence.

[9] 40 CFR 122.26(b)(9) defines "outfall" as "point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States."

Finding of Fact 3 – Respondent argues that the evidence cited does not support the factual claim that Lacey Creek flows through natural channels, and that there is only one channel.

In response, DEQ argues that Respondent failed to provide evidence of a flow pattern for Lacey Creek at hearing and cannot wait until this briefing to present an alternative description of the facts. DEQ also argues that the ALJ based the finding on exhibits in the hearing record.

In Reply, Respondent argues that it bases its objections on the same evidence cited by the ALJ, which it contends do not support the finding.

Finding of Fact 4 – Respondent repeats its argument about inaccurate terms ("basin") and argues about the location of Snell Creek and the haul road, noting the haul road as the only relevant piece.

In response, DEQ highlights the admitted irrelevance of much of the finding and does not further respond.

In reply, Respondent notes that OAR 137-003-0645(3)(f) prescribes the required findings and that they must correspond to material issues. Respondent also argues that the use of "basin" for a hill is incorrect and prejudicial.

Finding of Fact 9 – Respondent argues that this finding contradicts Finding 7, and notes that the Permit is effective Jan. 14, 2016, expiring Dec. 3, 2017, and that Respondent did not receive any assignment letter.

In response, DEQ argues that this exception is meaningless as the permit was in effect at the time of the violation and remains in effect as it was administratively extended.

In reply, Respondent maintains that the finding is inaccurate and that DEQ's claim about the Permit being administratively extended assumes facts not in the record.

Finding of Fact 10, 11, 12, 13 and 14 – Respondent argues that these findings incorrectly refer to Permit "conditions," asserting that Permit requirements or schedules are not conditions, and that ORS 468B.025(2) refers only to permit conditions.

In response, DEQ argues that this is a new argument and outside the scope of the EQC's review of the Proposed Order, citing OAR 340-011-0575(4)(a), OAR 340-0137-0645(2), and OAR 340-011-0530. DEQ further notes that all parts of the Permit are conditions, including schedules, and that "limitations," "requirements," and "conditions" are used interchangeably.

In reply, Respondent argues that it is not a new argument, but that it is DEQ's burden to prove each element of its claim. Respondent also argues that DEQ is providing a new argument after the hearing regarding the meaning of condition, and Respondent rejects that the Permit uses those terms interchangeably.

Finding of Fact 15 – Respondent argues that this finding is incomplete because it fails to include all erosion and sediment controls designed and implemented at the site.

Respondent also argues that it is inaccurate because it cites to the wrong pages of the SWPCP for Respondent's "Site controls/Best Management Practices."

In response, DEQ argues that Respondent misunderstands the finding, which describes erosion and sediment control techniques in Respondent's SWPCP and is not a finding regarding what controls Respondent implemented.

In reply, Respondent argues that the ALJ did need to find that MRP did not implement control measures in order to support a violation of A.1.a of the Permit (Violation 5), and that this incomplete finding cannot be used as a basis to support the alleged violation of A.1.a.

Finding of Fact 16 – Respondent argues that it is incorrect to describe the "site map" as being submitted "in connection" with the SWPCP because it was a required part of the SWPCP. Respondent also argues that the ALJ's incomplete list of what the Permit requires on this map is inappropriate.

In response, DEQ states that Respondent cited no authority to support its claim that the finding is inappropriate for being incomplete.

In reply, Respondent argues that all findings must be in accordance with what is at issue and that the ALJ cannot omit underlying facts when making a finding. Respondent notes that its concern relates to how this incomplete finding could impact Respondent in the future.

Finding of Fact 17 – Respondent argues that this finding is incorrect, misleading, and irrelevant. Respondent argues that all of Exhibit A5 is the SWPCP and that the finding is misleading because it omits two of the main controls designed and implement by Respondent.

In response, DEQ agrees that the finding suggests that the ALJ does not understand that the "narrative report" is part of the SWPCP but argues that it is harmless error with no prejudice to Respondent.

In reply, Respondent argues that the ALJ's misunderstanding of the SWPCP was prejudicial as it factored into the allegations against Respondent and the ALJ's findings regarding the SWPCP incorrectly give the impression that the SWPCP is deficient.

Finding of Fact 18 – Respondent argues that there was no testimony of "muddy water," but only testimony that someone called and said there was turbid water in Lacey Creek, and that complaint led to the inspection of Respondent's facility to determine if it was the cause. Respondent also argues that the record does not support that Reinhart was on site for about three hours because Reinhart testified that she spent approximately an hour of her three hours outside of the facility.

In response, DEQ argues that Respondent mischaracterizes the testimony and that Reinhart testified about the neighbor's complaint that discussed a large turbid plume observable in the Siuslaw River.

In reply, Respondent highlights that the ALJ cites no testimony or documents to support the claim about a complaining neighbor, and that the only reference comes from DEQ's opening statement, and Reinhart did not testify that a neighbor made any claims about the river.

Finding of Fact 19 – Respondent argues that the finding that "Reinhart located the inlet to the black pipe culvert in the roadside ditch on the north side of E. Mapleton Road" is "impossible and false." Respondent argues that the metal culvert under East Mapleton Road exits in the right-of-way of the county road to the surface and has no connection to a new black plastic pipe with turbid water hundreds of feet away by the river. Respondent also argues that the exit of the metal culvert shows clear water. Respondents also argues that neither Reinhart nor DEQ mentioned the black plastic pipe until the day of the hearing, and Respondent argues that this is the fourth version of how turbid water gets from the north side of the road, across to the south side, and travels hundreds of feet to arrive at either Lacey Creek or the Siuslaw River. Respondent also argues that there is no evidence showing when or how the water got turbid or whether it changed the turbidity of the river. Respondent also raises and argument about the legal standard for turbidity based on OAR 340-041-0036.

In response, DEQ argues that Respondent fails to point to contrary evidence in the record, and that Reinhart's testimony and inspection report provide credible evidence that the ALJ appropriately relied on. DEQ also argues that Respondent misinterprets the turbidity water quality standard and, in any event, that standard is not relevant here. DEQ cited Respondent for causing pollution in violation of ORS 468B.025(1)(a), and pollution is defined in ORS 468B005(5) to include any "change in ... turbidity."

In reply, Respondent argues that it cited exhibits and testimony in support of its exception. Respondent further notes that Reinhart herself testified that she never saw the inlet to the black plastic pipe, rendering the ALJ's finding inaccurate. Respondent challenges the validity of Reinhart's testimony, arguing that her beliefs are not probative and are accordingly not evidence. Respondent also argues that it was prevented from providing documents showing that Reinhart did not consider the black pipe significant until the hearing. Respondent also argues that DEQ's witness testified that turbid plumes at the mouth of creeks can be caused by the tide, that Reinhart testified that the water in the Siuslaw was less turbid downstream from the plume, and that DEQ provided no objective evidence of a change in turbidity.

Finding of Fact 20 – Respondent argues that Reinhart's conclusions regarding the source of turbid water as stormwater draining off of the gravel upper haul road and down the vegetated hillside slope into a roadside ditch along East Mapleton Road is not supported by any evidence. Respondent also argues that the evidence shows that the water in the ditch in the upper haul road is less turbid and a different color than the water in the ditch along East Mapleton Road, which is less turbid than the water entering the river. Respondent also challenges the finding that workers were crushing rock in the U.S. Forest Service (USFS) Quary at the time of the inspection, stating that crushing operations stopped two hours before Reinhart's arrival and never resumed. Respondent also argues that the portion of the finding regarding vehicles traveling on the haul road turning up soil and releasing muddy water drainage into the roadside ditch needs to be clarified as the ditch on the north side of the haul road, which will

run through the SWPCP stormwater controls, and not the ditch along East Mapleton Road.

DEQ responds that there was evidence to support the finding and that the ALJ found Reinhart's testimony more credible than the testimony of Respondent's witnesses. DEQ also notes that Respondent's arguments that it was not crushing rock is contradicted by arguments Respondent made in Respondent's Exceptions in response to Finding of Fact 2 — namely, that "Samuel McAllister was using a front end loader to load trucks with crushed rock."

In reply, Respondent argues that the ALJ needs to base her finding on more than someone else's (i.e., Reinhart's) conclusion. Respondent also argues that loading and selling crushed rock is different than the act of crushing rock, and that Respondent needs to hire a company for the latter.

Finding of Fact 21 – Respondent argues that there is no "outfall" at the slope of the "central drainage basin" (or "hill," according to Respondent), and that Reinhart admitted to never seeing one. Respondent also argues that the ALJ's finding that Reinhart determined that the "outfall at the base of the slope in the central drainage basin should have been identified as a point source discharge on MRP's SWPCP" is in error because DEQ, at hearing, specifically stated that DEQ has not alleged any "point sources" and the ALJ agreed, preventing Respondent from asking questions about point sources. Respondent further argues that the finding of an outfall is inconsistent with the definition of outfall in 40 CFR 122.26(b)(9) (quoted in full at n.9 of this staff report).

In response, DEQ argues that the federal regulation cited by Respondent applies to municipal separate stormwater sewer discharges, which does not apply here. DEQ argues that Reinhart provided testimony regarding a "discrete conveyance," which she described as an outfall. DEQ also notes that the Permit defines "point source discharge" to include a "discrete conveyance," and the ALJ appropriately found that the outfall should have been identified as a point source discharge in the SWPCP.

In reply, Respondent argues that the federal regulation is relevant and critical to this case by way of 40 CFR 122.1 and 122.2. Respondent also argues that the finding regarding a point source is inappropriate since the Notice did not identify a point source discharge and DEQ argued in the hearing that point sources were irrelevant to the Notice.

Findings of Fact 22 and 23 – Respondent argues that the Notice does not allege that Respondent caused pollution via operations in the USFS Quarry, that Monitoring Point B had turbid discharges, or any pollution from the eastern drainage area, and that such findings are irrelevant. Respondent also argues that findings regarding waste are unsupported by the record and irrelevant. Respondent also discusses its testimony about a landslide as a source of turbid water.

In response, DEQ argues that activities observed by Reinhart suggest that those were the source of turbidity observed in Lacey Creek and that ultimately discharged to the Siuslaw River, and the ALJ found Reinhart's observations about the source of turbidity more credible than Respondent's. DEQ notes that the ALJ's reference to a

waste can (which was instead a Vienna sausage can) was not used by the ALJ to support any findings, and DEQ did not rely on it in the Notice.

In reply, Respondent again argues that the Notice only alleges pollution originating in the central basin, so any findings about the Forest Service quarry, Lacey Creek before the point where the roadside ditch allegedly intersects, or Reinhart's observations of Monitoring Point B are not permitted because they are irrelevant to the matters alleged in the Notice. Respondent also argues that findings about waste are unrelated to allegations in the Notice and Respondent was unable to defend itself from allegations with which it had no notice.

Finding of Fact 24 – Respondent argues this finding not supported by DOGAMI's Inspection Report (Ex. A4), and that the photos (Ex. A24) that are alleged to show an intermittent stream are unverified.

In response, DEQ argues that the ALJ found Reinhart's testimony credible.

In Reply, Respondent states that its exception is based on the ALJ's finding that Reinhart documented something that she did not document in the Inspection Report.

Finding of Fact 25 – Respondent argues that this finding inappropriately relies on lidar and Reinhart's interpretation of the same, and that Respondent provided expert testimony that conflicted with Reinhart's interpretations. Respondent also renews its objections to the use of the term "outfall."

In response, DEQ states that Reinhart's testimony under oath is evidence and that the ALJ found it credible.

In Reply, Respondent argues that Reinhart's testimony is not evidence and that the lidar includes disclaimers regarding its use, and which refer users to "primary data and information sources."

Finding of Fact 26 – Respondent argues that this finding is irrelevant to the Notice and just quotes language from the inspection report.

In response, DEQ notes that Respondent's argument that the finding is irrelevant warrants no response.

In reply, Respondent argues that the finding is prohibited by OAR 340-011-0570(1) as the findings are not relevant to the allegations in the Notice.

Finding of Fact 27 – Respondent argues that this finding consists of lies that Reinhart admitted to during the hearing. Respondent also argues that the finding is irrelevant to the allegation in the Notice.

In response, DEQ notes that what Reinhart admitted was incorrect was the Notice's Finding of Fact 5, which is different than the ALJ's Finding of Fact 27 and that the ALJ's finding is accurate.

In reply, Respondent argues that the ALJ's Finding of Fact must be relevant, if at all, to Violation 5, and that if DEQ's basis for pursuing Violation 5 as alleged in the Notice is incorrect, the ALJ cannot make a finding to allow a violation under a different theory. Respondent also argues that the finding inappropriately relies on Reinhart's testimony regarding the appropriateness of stormwater controls.

Finding of Fact 29 – Respondent argues that this finding, which is focused on the contents of the Pre-Enforcement Notice, is irrelevant.

In response, DEQ notes that Respondent introduced the Pre-Enforcement Notice for impeachment purposes, and that the ALJ properly ignored the notice's impeachment value.

In reply, Respondent argues that the finding is outside of the scope of the hearing pursuant to OAR 340-011-0570(1).

Finding of Fact 30 – Respondent argues that what DEQ determined and included in the Notice is part of the history of the case, but it does not address whether those matters were proven. Respondent also notes that the citation to Reinhart's testimony for the penalty assessment is inaccurate as she never testified about the assessment. Respondent also argues that DEQ did not allege or prove that Respondent failed to conduct inspections. Instead, DEQ only alleged a failure to document.

In response, DEQ agrees that whether Respondent conducted inspections was not an issue in the case and that DEQ has withdrawn the $3,198 civil penalty associated with the violation.

Finding of Fact 31 – Respondent argues that this finding is misleading because stormwater from its facility does not drain directly into the river. Respondent also argues that the finding inappropriately conflates "turbidity" and "sediment," and that DEQ's expert testified regarding the potential danger of sediment.

In response, DEQ argues that the finding accurately notes that stormwater from Respondent's facility drains into the river, albeit through a series of conveyances. DEQ also argues that "turbidity" is a blanket term for cloudiness in the water column and "sediment" in that column causes turbidity, and that therefore the findings that "even small amounts of turbidity and sediment pose a risk of harm to aquatic life" is accurate.

In reply, Respondent argues that not listing how the stormwater is conveyed is misleading, and the DEQ is wrong that "turbidity" is a "blanket term" justifying the ALJ's finding.

Exceptions to Conclusions of Law

Conclusion 1 – *On April 11, 2022, MRP caused or permitted highly turbid water to discharge from MRP's facility into a ditch adjacent to Mapleton Road and then into the Siuslaw River, causing pollution by altering the physical characteristics of waters of the state in violation of ORS 468B.025(1)(a).*

Respondent argues that the ALJ inappropriate added "or permitted" to the conclusion. Respondent also argues that DEQ failed to prove the essential elements of a violation of ORS 468B.025(1)(a): (a) exceeding what is provided for in the Permit; (b) causation; (c) pollution; and (d) waters of the State. Regarding (a), Respondent argues that DEQ had the burden to prove that Respondent's alleged actions were not authorized by the Permit and failed to do so. Regarding (b), Respondent argues that DEQ needed to, and failed to, prove that Respondent caused any turbidity, and that DEQ failed to prove that turbid water in the roadside ditch was conveyed to a point source where it leaves the facility without having been controlled to remove sediments. Respondent argues that Reinhart never saw how water was getting into the ditch, but merely theorized that it was coming down the hillside from the ditch next to the haul road, which conflicts with Respondent's expert testimony. Respondent also argues that DEQ failed to provide evidence on how turbid water from the ditch on the side of East Mapleton Road reaches the Siuslaw River, and that the plastic culvert theory was first introduced at hearing and is not credible. Regarding (c) and (d), Respondent argues that DEQ needed to, and failed to, prove an alteration or change in waters of the State, which it alleges the ditch on the north side of Mapleton Road is not.

In response, DEQ agrees that the ALJ erred by adding "or permitted," but that this error does not undermine the ALJ's finding that Respondent did cause highly turbid water to discharge from its facility to a ditch adjacent to East Mapleton Road and then into the Siuslaw River on April 11, 2024. Regarding the essential elements discussed by Respondent, DEQ argues that Respondent is wrong regarding all elements. Regarding (a), DEQ argues that the Permit only allows discharges in conformance with all of the "requirements, limitations and conditions set forth in the Permit," and the evidence shows that Respondent failed to comply with Permit conditions (Conclusions 2 through 5), and that Respondent's discharges were therefore not covered or allowed by the permit. Regarding (b), DEQ points to the ALJ conclusion that "a preponderance of evidence establishes that MRP violated ORS 468B.025(1)(a) by *causing pollution* to waters of the state." Regarding (c), DEQ argues, based on the definition of pollution in ORS 468B.005(5), that DEQ need not prove that the change in turbidity actually caused harm, but only that the properties of the river were altered (including via turbidity), which it did and which the ALJ appropriately relied upon. DEQ also argues that DEQ need not prove a violation of a water quality standard to show a violation of ORS 468B.025(1)(a).

In reply, Respondent argues that DEQ provided no evidence on, and the ALJ made no findings on, the issue of Respondent's compliance with the Permit and its impact of the alleged violations of ORS 468B.025(1). Respondent then focuses on causation, arguing that the evidence does not support a finding that Respondent caused a turbid discharge that reached the Siuslaw River or that any such discharge changed the river's turbidity, again arguing that Reinhart testified that the river was more turbid upstream.

Conclusion 2 – *MRP failed to monitor outfalls from the facility serving areas where stormwater or mine dewatering are exposed to industrial activities in violation of Permit Schedule B, condition 2.c.i and ORS 468.025(2).*

Respondent argues that this conclusion is poorly written, and that "mine dewatering" should be "mine dewatering water" and that the cite should be to ORS 468B.025(2). Respondent also argues that that statute requires the existence of a permit condition and a violation of that condition. Respondent argues that Schedule B.2.c.i of the Permit is not a

condition of the Permit. Respondent also argues that even if it were considered a condition, DEQ did not meet its burden to prove a violation. According to Respondent, DEQ failed to provide evidence of outfall locations that are not monitored and instead submitted only Reinhart's testimony that she believes two more outfalls exist.

In response, DEQ notes that the arguments that Schedule B, condition 2.c.i of the Permit is not a condition is raised for the first time in Respondent's Exceptions and must be rejected under OAR 340-011-0530(2), OAR 340-011-0575, and OAR 137-003-0645. DEQ also argues that, while condition is not defined in ORS 468B, its plain meaning is equivalent to "requirement," and the Permit expressly requires compliance with all "requirements, limitations and conditions" in the Permit. According to DEQ, it would be absurd to interpret ORS 468B.025(2) to apply to only parts of the Permit. Regarding outfalls, DEQ notes that while the Permit does not define "outfalls," it does define "point source discharge" to mean "a discharge from any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch change, tunnel or conduit." DEQ argues that it is apparent from the Permit, including other conditions such as Schedule A, condition 8.b.vii, that an "outfall" is a "point source discharge." DEQ also argues that the ALJ appropriately rejected Respondent's outfall arguments, finding that DEQ's interpretation of an "outfall" as the same as a "point source discharge" as plausible and consistent with the Permit and the underlying statute, citing OAR 340-011-0545(3) (discussing ALJ deference to DEQ rule interpretations, though noting that the Permit is not a rule). DEQ finally argues that the ALJ correctly found that DEQ presented evidence of two discernible and discrete conveyances that were not monitored.

In reply, Respondent argues that up through the hearing, DEQ never provided a definition of outfall and claimed that it need not allege or prove point sources. The ALJ also forbade Respondent from asking DEQ witnesses about point sources. Respondent also argues that the Permit does not use "outfall" and "point source discharge" interchangeably. Respondent also argues that DEQ did not present evidence of two discernible and discrete conveyances in that the photos relied upon do not show outfall locations and Reinhart denied seeing any actual outfalls.

Conclusion 3 – *MRP failed to document inspections and maintain inspection records on site in violation of Permit Schedule B, conditions 7.c.ii. and 9.b. and ORS 468B.025(2).*

Respondent argues again that Permit Schedule B, conditions 7.c.ii and 9.b. are not conditions and therefore the violation of them would not support a violation of ORS 468B.025(2).

In response, DEQ disagrees, referring back to its response to Respondent's exception to Conclusion 2.

Conclusion 4 – *MRP failed to identify outfalls where discharges occurred in the facility's SWPCP in violation of Permit Schedule A, condition 8.b.viii. and ORS 468B.025(2).*

Respondent argues that this conclusion uses terms inconsistent with their federal definitions and that the phrasing makes it seem like a discharge is occurring at a location called the SWPCP. Respondent also argues that there is no violation of a permit condition. Again, Respondent argues that DEQ failed to establish that the cited portions

of the Permit are conditions. Respondent also argues again that DEQ failed to provide evidence of additional sources that need to be added to Respondent's SWPCP.

In response to the conditions argument, DEQ again rejects this argument, referring back to its response to Respondent's exception to Conclusion 2. In response to Respondent's argument that DEQ provided no evidence of additional point sources or discharges, DEQ states that it did present evidence of two outfalls that were not included in the SWPCP and that the ALJ found it persuasive.

In reply, Respondent again refers to DEQ's objection at the hearing that point sources were outside the scope of the Notice and the fact that Reinhart denied knowing the meaning of a point source. Respondent also argues that to find facts that would support the existence of two outfalls that need to be identified on the SWPCP, there needs to be a definition of outfall, and the one that should apply is the one set forth in 40 CFR 122.26(b)(9).

Conclusion 5 – *On April 11, 2022, MRP failed to implement erosion and sediment control measures at the facility to meet the narrative technology based effluent limits in Permit Schedule A.1 in violation of Permit Schedule A, condition 1.a. and ORS 468B.025(2).*

Respondent again argues that DEQ failed to establish this permit schedule as a condition or that Respondent violated it. Respondent argues that DEQ previously asserted in the Notice that Respondent only implemented overburden and reject material as controls. Respondent argues that this is false and that the evidence shows that Respondent implemented dozens of different controls.

In response to the conditions argument, DEQ again objects, referring back to its prior responses to these same arguments. DEQ also argues that the ALJ determined that Respondent failed to implement erosion and sediment controls in violation of Schedule A, condition 1.a on the theory that if those controls were adequate, Respondent would not have caused pollution to the Siuslaw River. DEQ also argues that the ALJ did not rely solely on Finding of Fact 5 in the Amended Notice, which Reinhart conceded was wrong, in her conclusions.

In reply, DEQ argues that the finding that erosion and sediment control measures were inadequate is outside the scope of the Notice. Respondent also argues that it has implemented controls that minimize erosion of soil and sedimentation as required by the Permit. Respondent also argues that the ALJ made no finding that Respondent violated effluent limits.

Conclusion 6 – *DEQ may assess a civil penalty totaling $16,459 against MRP for the above violations. Additionally, DEQ may require MRP to submit a revised SWPCP to DOGAMI in accordance with the Permit requirements.*

Respondent argues that this conclusion is unsupported by factual findings. Factual Finding 30 is a recitation of DEQ's determinations, and DEQ provided no testimony on how they were calculated and did not permit Respondent to cross examine witnesses on the calculations. Respondent also argues that the conclusion is erroneous because Respondent never received notice that the calculations were an issue for hearing or that

Respondent could present evidence on the same. Respondent also argues that Respondent was not permitted to present evidence on mental state, but was told it could address this in closing, but then there was insufficient time in closing. Respondent argues that its inability to present evidence and cross examine regarding the penalty calculations at hearing violates ORS 183.415(3), ORS 183.413(2)(e), ORS 183.450(3), and ORS 183.457(3)(a) & (c).

Regarding Respondent's notice arguments, DEQ argues that the penalty calculations were included as exhibits attached to and incorporated into DEQ's Notice and Respondent's own Hearing Request references those exhibits. DEQ also argues that the prehearing conference discussed penalties as an issue for hearing. DEQ also notes that Reinhart testified regarding the elements of the civil penalty formula and Respondent could have cross examined Reinhart or presented its own direct testimony on these calculation elements.

In reply, Respondent argues that ALJ Samantha Fair did not mention civil penalty calculations at the prehearing conference. Respondent also denies that it had an opportunity to cross-examine Reinhart, stating that the hearing record shows that the ALJ prevented Respondent from asking such questions. Respondent also denies that it had an opportunity to present direct testimony, stating that the hearing record shows that the ALJ objected to such testimony. Respondent also argues that the ALJ's lack of relevant findings to support the penalty is consistent with Issue 6, which only asks whether DEQ may assess a civil penalty (and not whether the penalty assessed was appropriately calculated).

Exceptions to Compliance Order – Respondent argues that nothing allows DEQ to obtain an order requiring Respondent to submit a SWPCP stamped by a licensed professional engineer or certified engineering geologist for DOGAMI approval.

In response, DEQ argues that, pursuant to ORS 468.100, DEQ has broad authority to ensure compliance and restrain further violations.

In reply, Respondent argues that DEQ and its agents lack authority to judge the control measures, and that the order contains no process or standards by which Respondent can prepare an "approvable" SWPCP. Respondent also cites to OAR 340-011-0570, which provides that "equitable remedies will not be considered by an administrative law judge." Relying on this regulation, Respondent argues that the compliance order is prohibited by DEQ rules.

DEQ Recommendation

DEQ requests that the EQC issue a Final Order consistent with the Proposed Order, with one exception: DEQ withdraws the civil penalty described in Amended Exhibit 3 of the Amended Notice and associated with Violation No. 3, reducing the civil penalty for Violation No. 3 by $3,198 (for a total civil penalty of $13,261).

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.[10]
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.[11]
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.[12]
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.[13]

Alternatives

The commission may either:

1. As requested by DEQ, revise the Proposed Order to only withdraw the civil penalty for Violation No. 3, and then adopt the Proposed Order as the Final Order of the Commission.
2. As requested by Respondent, enter its proposed findings of fact and conclusions of law (see Attachment A.3).
3. Take any other action within the commission's authority.

Attachments

A. **Documents Regarding Petition for Review**
   1. Respondent's Petition for Review, received Dec. 26, 2023
   2. Respondent's Exceptions and Brief, dated April 5, 2024
   3. Respondent's Proposed Findings and Conclusions, dated April 5, 2024
   4. DEQ's Answering Brief, dated May 13, 2024
   5. Respondent's Reply Brief, submitted June 17, 2024
   6. Email correspondence regarding Petition for Review and briefing schedule

B. **Supplemental Outstanding Filings Not Subject to EQC Review**
   1. Renewed Motion to Dismiss
   2. Renewed Motion for Summary Determination

C. **ALJ's Proposed Order**, dated Nov. 27, 2023

D. **Hearing Record**
   1. DEQ's Admitted Exhibits
   2. Respondent's Admitted Exhibits
   3. Excluded Exhibits Challenged by Respondent
   4. Transcript of July 11, 2023 and Oct. 6, 2023 Pre-Hearing Conferences and Oct.24-26, 2023 Hearing
   5. Respondent's Closing Argument

E. **Pre-Hearing Documents**
   1. Notice of Civil Penalty Assessment and Order, dated Nov. 3, 2022
   2. Respondent's Motions to Dismiss, Affirmative Defenses, Response and Request for Hearing, dated Nov. 25, 2022

[10] 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.
[11] 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.
[12] OAR 340-011-0575(5) and OAR 137-003-0655(5).
[13] OAR 137-003-0655(2).

3. Amended Notice of Civil Penalty Assessment and Order, Oct. 3, 2023
4. Amended Exhibit No. 3, Oct. 3, 2023
5. Additional Pre-Hearing Documents
   a.i Returned Certified Mail PHC Notice
   a. *Notice of July 11, 2023, Pre-Hearing Conference* (June 13, 2023) and OAH mailing (item 5.a.i)
   b. DEQ request for ALJ change (July 10,2023)
   c. OAH email courtesy copy PHC to Respondent (July 10, 2023)
   d. McAllister Inquiry email (July 11, 2023)
   e. Respondent Consent to Electronic service email (July 11, 2023)
   f. *ALJ Ruling on Request for Change* (July 11, 2023)
   g. [*intentionally left blank*]
   h. OAH post PHC email (July 12, 2023)
   i. *Notice of In-Person Hearing* (July 14, 2023)
   j. DEQ email seeking clarification on Respondent's Motion to Dismiss (Sept. 1, 2023)
   k. ALJ Reply to DEQ email seeking clarification & establishing new exhibit and witness list deadline (Sept. 5, 2023)
   l. DEQ Motion to change to a virtual hearing (Sept. 7, 2023)
   m. *ALJ ruling on DEQ motion to change to virtual hearing* (Sept. 13, 2023)
   n. Amended Notice of Video Conference Hearing (Sept. 13, 2023)
   o. [*intentionally left blank*]
   p. DEQ Reply to Respondent's Motion to Dismiss
   p.i. Affidavit of Lisa Reinhart (Sept. 15, 2023)
   q. Respondent Discovery Request (Sept. 15, 2023)
   r. Respondent email question re: admitting objects (Sept. 25, 2023)
   s. Respondent email re: physical objects (Sept. 28, 2023)
   t. Emails regarding PHC availability (Sept. 29, 2023)
   u. Emails regarding PHC and hearing format (Sept. 29, 2023)
   v. *Notice of October 6, 2023 Pre-Hearing Conferences* (Oct. 2, 2023)
   w. Email re: Sarah Wheeler appearing at PHC for DEQ (Oct. 2, 2023)
   x. *ALJ Ruling on Respondent's Motion to Dismiss* (Oct. 3, 2023)
   y. Email correspondence regarding Wheeler Notice of Appearance and DOGAMI at PHC (Oct. 4, 2023)
   z. *[intentionally left blank]*
   aa. Emails re: DEQ/Respondent question about exhibits (Oct. 11, 2023)
   bb. Emails re: Respondent/ALJ question about exhibits (Oct. 11, 2023)
   cc. Email correspondence between DEQ/Resp regarding incorporating DEQ exhibits, witness list (Oct. 12, 2023)
   dd. Email correspondence DEQ/Resp regarding exhibits (Oct. 13, 2023)
   ee. Respondent's Discovery Request (Oct. 13, 2023)
   ff. Respondent's Motion to Order Discovery (Oct. 16, 2023)
   gg. Respondent's Memorandum of Objection re PHC, undated (Oct. 16, 2023)
   hh. DEQ's email reply to Respondent's Motion to Order Discovery (Oct. 17, 2023)
   ii. *ALJ Ruling on Motion to Compel Discovery* (Oct. 17, 2023)
   jj. Emails regarding Respondent's question about statutes (Oct. 18, 2023)

kk. Respondent's Pre-Hearing Brief (Oct. 20, 2023)

F. **Audio Recordings of Hearing and Pre-Hearing Conferences**

Report prepared by Nathan Karman
Senior Assistant Attorney General, Oregon Department of Justice

Translation or other formats

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