BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:	)	**FINAL CONTESTED CASE HEARING ORDER**
	)	
SAFETY-KLEEN SYSTEMS, INC.,	)	
	)	OAH Case No. 2021-ABC-04375
Respondent.	)	Agency Case No. LQ/HW-NWR-2018-049

This matter came before the Environmental Quality Commission (Commission) at its regular meeting on September 27, 2024, in Portland, Oregon, on the petition of the Department of Environmental Quality (DEQ) for review of the proposed contested case order issued on July 22, 2022, by Senior Administrative Law judge Jennifer H. Rackstraw (the PO). The PO is included as Attachment A to this Final Order and incorporated into this Final Order as stated herein. This Final Order modifies the PO as described below.

History

The history of this case as described in the PO on pages 1 to 3 is adopted by the Commission.

After the issuance of the PO DEQ filed exceptions and requested Commission review of the PO pursuant to OAR 340-011-0575. Because the PO relied significantly on the Oregon Court of Appeals opinion in *PNW Metal Recycling, Inc. v. Oregon Dept. of Envtl. Quality,* 317 Or App 207 (2022) *(PNW Metal I)* and review of that opinion was pending in the Oregon Supreme Court at the time exceptions were filed in this matter, the parties agreed to and the Director of DEQ approved an extension to the briefing schedule until the Oregon Supreme Court issued its opinion in the case.

The Oregon Supreme Court ultimately reversed the Oregon Court of Appeals in *PNW Metal Recycling, Inc. v. Oregon Dept. of Envtl. Quality,* 371 Or 673 (2023) *(PNW Metal II)*. Upon issuance of the supreme court opinion the parties proceeded with briefing and appeared before the Commission to argue the matter. The Commission considered the PO, the exceptions and briefs of the parties, and the oral argument provided by Environmental Law Specialist Jeff Bachman and Senior Assistant Attorney Geneal Gary Vrooman on behalf of DEQ, and Jennifer Gates on behalf of Respondent, Safety-Kleen Systems, Inc.

Statement of Issues

The statement of the issues as described in the PO is adopted by the Commission and is set out below for reference:

1. 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 September 1, 2013 to November 1, 2014, and the period November 1 to October 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.

2. Whether DEQ may assess any civil penalties against Respondent for alleged violations of 40 CFR §264.147(a), as adopted by reference in OAR 340-100-0002(1).

Findings of Fact

Neither party filed exceptions to any findings of fact in the PO. Accordingly, the findings of fact set out in the PO at pages 4 to 23 are adopted by the Commission.

Conclusions of Law

The Commission adopts the following conclusions of law in lieu of those in the PO.

1. Respondent's insurance policy covering its Clackamas facility during the relevant time periods does not comply with 40 CFR §264.147(a), as adopted by reference in OAR 340-100-0002(1), because it provided liability coverage for facilities other than hazardous waste treatment, storage, and disposal facilities (TSDFs).

2. The Commission exercises its discretion not to cite Respondent for any violations or assess a civil penalty for any of the violations of 40 CFR §264.147(a), as adopted by reference in OAR 340-100-0002(1), described in DEQ's Amended Notice.

Opinion

The Commission adopts pages 23 to 34 of the opinion section in the PO. Provided that the Commission does not adopt the PO's discussion or analysis of deference on pages 29 to 31 of the PO, as that discussion is not relevant to the resolution of the issue before the Commission. DEQ is not requesting deference from the Commission for its interpretation,[1] nor is the Commission seeking deference from a reviewing court at this point in the proceeding. The Commission does not adopt the analysis portion of the opinion section of the PO on pages 34 to 40. The Commission adopts the following analysis of the issues in lieu of that in the PO.

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[1] OAR 340-011-0545(3), cited in the PO, describes the requirement that an administrative law judge defer to DEQ interpretations in certain instances:

> In reviewing DEQ's interpretation of a DEQ rule as applied in a formal enforcement action, an administrative law judge must follow DEQ's interpretation if that interpretation is both plausible and reasonably consistent with the wording of the rule and the underlying statutes. The administrative law judge may state, on the record, an alternative interpretation for consideration on appeal.

That rule requires an administrative law judge to defer to DEQ interpretations of rules it administers if those interpretations are reasonable and plausible. That rule does not apply to EQC review of decisions by an administrative law judge where it is the Commission's role to interpret its rules and such Commission interpretations would be subject to deference as appropriate in the courts.

Rulemaking is not required.

The PO relied significantly on the Oregon Court of Appeals opinion *PNW Metals I* in its conclusion that rulemaking was required for DEQ to advance its interpretation of the rule at issue in this matter. The PO reasoned that DEQ had adopted a new interpretation of 40 CFR 2641.47(a) when it alleged that covering non-TSDFs in addition to TSDFs when providing financial assurance pursuant to the rule was impermissible. The PO determined that the new interpretation, consistent with *PNW Metals I*, must be adopted through rulemaking. Because DEQ had not gone through rulemaking, DEQ could not hold Respondent liable for violating the financial assurance requirements. After the issuance of the PO, the Oregon Supreme Court overruled *PNW Metals I*. Respondent argued to the Commission that, notwithstanding the overruling of *PNW Metals I,* rulemaking is still required under *PNW Metals II* for DEQ to pursue its interpretation in this matter. We disagree.

The Supreme Court's opinion in *PNW Metals II* undermines the rationale in the PO that rulemaking was required in this matter. We understand *PNW Metals II* to stand for the proposition that rulemaking is required for agency action where the statutes underlying that action require rulemaking. 371 Or at 685 (stating "[w]hether an agency must use rulemaking in a particular situation is a function of the agency's substantive authority as defined by its enabling statutes"). Absent a statutory requirement for rulemaking an agency is free to use other methods available under the Administrative Procedures Act to accomplish its purposes, including contested case proceedings like this one. *Id*. at 688 (stating "the [Administrative Procedures Act] specifically allows agencies to use the contested case process to adopt general policies that may be applied prospectively to different parties").

We see no statutory requirement for rulemaking on the narrow issue of interpretation presented in this case. The Commission has adopted a substantial body of regulation for hazardous waste, including extensive financial assurance requirements. Those requirements are consistent with federal hazardous waste program requirements for delegated state programs. There is no statutory requirement for rulemaking to resolve a potential ambiguity in interpretation of those rules at the level involved in this matter. The resolution of a dispute over the meaning of a regulation as applied in a specific instance like this one is the normal type of legal dispute that is resolved through a contested case proceeding.

The statutory schemes at issue in the *PNW Metals* cases and here are quite similar. Both the state solid waste program at issue in the *PNW Metals* cases and the state hazardous waste program at issue in this matter contain extensive statutory requirements for the management of waste materials along with broad rulemaking authority to implement those requirements. Notwithstanding that broad rulemaking authority, the court in *PNW Metals II* did not determine that rulemaking was required to sort out the interpretive issue presented in that case. We see no reason that a different outcome is required in this case.

Furthermore, we see the agency action at issue in this matter as even less "rule like" than the action *PNW Metals II* found did not required rulemaking. In the *PNW Metals* cases the agency had a considered, well-articulated and consistent regulatory position, which it changed, and which the

court of appeals concluded it needed to go through rulemaking to change. Here there appears to be no evidence in the record that DEQ had specifically considered the legal issue presented in this matter prior to this enforcement action, nor was there a well-articulated and consistent regulatory position on the issue that the agency changed. *PNW Metals II* found that rulemaking was not required to pursue the agency interpretation at issue in that case. Given that this case presents agency action that is even less "rule like" than that at issue in *PNW Metals II*, we do not believe that the case law stands for the proposition that rulemaking is required here. Rather the issue in this matter is the correct interpretation of the rule language.

The regulation does not allow inclusion of facilities other than TSDFs.

After reviewing the text, context and history of the rule we agree that DEQ's interpretation of the rule language is the correct interpretation. 40 CFR 264.147(a) does not allow inclusion of facilities other than TSDFs in the required coverage for sudden accidental occurrences.

The plain language of 40 CFR 264.147(a) requires that the insurance amounts stipulated must be available for permitted hazardous waste treatment storage and disposal facilities. The rule states:

> "An owner or operator of *a hazardous waste treatment or storage 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*."(emphasis added).

The language is stating requirements for TSDFs and groups of TSDFs. There is no mention of non-TSDF facilities. The rule continues:

> "*[t]he owner or operator must have and maintain* liability coverage for sudden accidental occurrences in the amount of *at least $1 million per occurrence with an annual aggregate of at least $2 million*, exclusive of legal defense costs." (emphasis added).

The only reasonable interpretation of the "owner or operator" language is that it refers to the owner or operator of the TSDF or group of TSDFs discussed in the previous sentence, not to an owner or operator of a TSDF and any other non-TSDF business or facility. If non-TSDFs were included in the liability coverage, there would be no guarantee that the required limits would be met because claims against non-TSDFs could exhaust the policies. Accordingly, polices that include non-TSDFs in the aggregate limits do not meet the requirements of the rule because they do not provide the clearly required amount for TSDFs.

With respect to the context of the rule, the parties have not identified and we do not find anything in the financial assurance rules or the hazardous waste program more generally that would lead us to believe that the financial assurance for TSDFs is subject to diminishment by business operations that have nothing to do with hazardous waste. The purpose of 40 CFR 264.147(a) is to ensure that there are adequate funds available to make whole people harmed by hazardous waste, not to enable an entity to meet its insurance needs generally through a single policy. This is consistent with the legislative policy stated in OSR 466.010 to "[p]rotect the public health and

safety and environment of Oregon to the maximum extent possible" and to "[e]xercise the maximum amount of control over actions within Oregon relating to hazardous waste." To fulfill that purpose in the context of the rules at issue in this matter the full amount of required coverage must be available for sudden accidental occurrences related to hazardous waste at TSDFs. Allowing that coverage to be depleted, for example, by a claim from a delivery driver who is injured in a slip and fall at a non-TSD facility means that less than the full amount required by the regulation would be available for occurrences at TSDFs and defeats the purpose of the regulation.

Finally, we see nothing in the federal Environmental Protection Agency (EPA) rulemaking history or other EPA guidance on the subject that definitively speaks to the issue before us either way.[2] It does not appear that EPA clearly considered and articulated a position on this matter in its more formal pronouncements or interpretations regarding financial assurance. The only clear EPA statement on the issue comes from the evidence presented at the hearing by EPA employees and the legal authorization for EPA to appear at the hearing. While those statements by EPA also do not definitively resolve the issue, they are consistent with the position taken by the Commission in the Final Order and suggest that the Commission's interpretation of the regulation is consistent with the requirement to maintain a state hazardous waste program that is a least as stringent as the federal hazardous waste program.

Violations and Civil Penalty

Given the history of this matter, DEQ requested that the Commission exercise its discretion to assess no penalty to Respondent in this Final Order. The Commission agrees, and assesses no penalty, and does not cite Respondent with violations for Respondent's past failure to comply with 40 CFR §264.147(a), as adopted by reference in OAR 340-100-0002(1).

Order

Respondent must prospectively comply with the provisions of 40 CFR §264.147(a), as adopted by reference in OAR 340-100-0002(1), as those requirements are explained in this Final Order.

Dated this ___ day of January, 2025.

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Leah Feldon, Director
Oregon Department of Environmental Quality
On behalf of the

[2] See comment to OAR 340-100-0002, stating "[t]he Department uses the federal preamble accompanying the federal regulations and federal guidance as a basis for regulatory decision-making."

Notice of Appeal Rights

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