

State of Oregon  
Department of Environmental Quality

Memorandum

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**Date:** Sept. 12, 2019

**To:** Environmental Quality Commission

**From:** Leah Feldon, Deputy Director

**Subject:** Agenda item H, Action item: Contested Case No. LQ/HW-WR-2016-179  
regarding General Property Group LLC  
Sept. 26-27, 2019, EQC meeting

**Introduction** DEQ implements environmental protection laws. DEQ may assess civil penalties and orders to compel compliance and create deterrence. When persons or businesses do not agree with DEQ's enforcement action, they may appeal the order and request a contested case hearing before an Administrative Law Judge. Either party may appeal the judge's decision to the commission.

On Aug. 1, 2017, DEQ issued a Notice of Civil Penalty Assessment and Order to General Property Group. The Notice alleged that General Property Group committed the following four violations:

1. Storing hazardous waste for more than 90 days without a permit, in violation of ORS 466.095(1)(a) and 40 CFR 262.34(a);
2. Failing to comply with a DEQ Remedial Action Order issued on Aug. 30, 2016;
3. Storing hazardous waste in containers that were not handled or stored in a manner to prevent leaking, in violation of 40 CFR 262.34(a)(1)(i); and
4. Failing to submit an annual report, in violation of OAR 340-102-0041(2).

The Notice assessed a total civil penalty of \$29,417 for the first two violations listed above. On Sept. 26, 2017, General Property Group filed a timely request for a contested case hearing with an Administrative Law Judge.

On Sept. 6, 2018, DEQ issued an Amended Notice of Civil Penalty Assessment and Order to General Property Group. The Amended Notice alleged the same four violations set forth in the Notice but only assessed one civil penalty of \$16,217 for storing hazardous waste without a permit, Exhibit 1 to the Amended Notice. General Property Group did not file a response to the Amended Notice.

On Oct. 23, 2018, Administrative Law Judge Barber presided over the contested case hearing requested by General Property Group. Judge Barber reviewed Exhibits A-1 through A-22 submitted by DEQ, and Exhibit R-1 submitted by

General Property Group, along with the testimony of two witnesses. Additionally, prior to the hearing, DEQ provided to General Property Group and Judge Barber sixteen federal guidance documents, which were also incorporated into the hearing record.<sup>1</sup>

On Dec. 6, 2018, Judge Barber issued a Proposed and Final Order that found General Property Group liable for all four of the violations set forth in the Amended Notice and for the \$16,217 civil penalty set forth in Exhibit 1 to the Amended Notice.

General Property Group filed a petition for review with the commission on Jan. 4, 2019.

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

**Findings of Fact**

After considering the evidence in the record, Judge Barber made twenty-two Findings of Fact regarding the alleged violations. These are listed on pages two through seven of Attachment B1.

**Conclusions of Law**

Based on the Findings of Fact, Judge Barber made the following Conclusions of Law, listed on page seven of Attachment B1:

1. Respondent violated ORS 466.095(1)(a) by storing hazardous waste for more than 90 days without a permit;
2. Respondent violated a final order of DEQ by failing to comply with the Remedial Action Order;
3. Respondent violated 40 CFR § 262.34(a)(1)(i), as adopted by OAR 340-100-0002 by storing hazardous waste in containers that were not handled or stored in a manner that would prevent leaking;
4. Respondent violated OAR 340-102-0041(2) by failing to submit a timely annual report; and
5. Respondent is liable for a \$16,217 civil penalty.

**Issues on appeal**

First, General Property Group argues that Judge Barber did not make a finding that it was a generator of hazardous waste, and therefore the conclusions that it violated ORS 466.095(1)(a) and is liable for a civil penalty as a generator are invalid. General Property Group also argues that the evidence in the record does not support any conclusion that it was a generator of hazardous waste.

In response, DEQ argues that Judge Barber thoroughly reviewed the evidence and found that General Property Group was a generator of hazardous waste and

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<sup>1</sup> Under OAR 340-100-0002, the commission adopted by reference federal regulations governing the management of hazardous waste. As such, DEQ uses federal guidance as a basis for interpreting hazardous waste regulations.

was liable for the penalty set forth in Exhibit 1 of the Amended Notice. DEQ argues that the judge's findings are supported by substantial evidence in the record.

Second, General Property Group argues that DEQ did not provide adequate notice of the allegations against it because DEQ incorrectly cited a rule reference in Exhibit 1 of the Amended Notice. Specifically, Exhibit 1 of the Amended Notice cites OAR 340-012-0140(2)(b)(A)(ii) as the magnitude when that citation should be OAR 340-012-0140(2)(b)(A)(i). Respondent argues that the error using the moderate magnitude citation instead of the major magnitude citation should be construed in its favor, resulting in a reduction in the base penalty from \$12,000 to \$6,000.

In response, DEQ argues that although the magnitude citation in Exhibit 1 is inaccurate, the Exhibit states in two other places that DEQ is alleging a major magnitude, thus DEQ provided adequate notice of its allegations. Additionally, General Property Group failed to raise this as a defense prior to or during the hearing, nor has it pointed to any law, precedent, or agency policy to support its contention that a citation error should be construed in the manner it proposes.

**EQC authority**

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

1. If the commission modifies a proposed order in any substantial manner, it must identify the modification and explain to the parties why the commission made the modification.<sup>2</sup>
2. The commission may modify a finding of historical fact made by the ALJ only if it determines that there is clear and convincing evidence in the record that the finding was wrong.<sup>3</sup>
3. The commission may not consider evidence that was not presented to the ALJ. The commission may, based upon the filing of a motion and a showing of good cause, remand the matter to the ALJ to consider the evidence.<sup>4</sup>
4. If the commission remands the matter to the ALJ, the commission shall specify the scope of the hearing and the issues to be addressed.<sup>5</sup>

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

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

<sup>4</sup> OAR 340-011-0575(5) and OAR 137-003-0655(5).

<sup>5</sup> OAR 137-003-0655(2).

**Alternatives**

The commission may either:

1. As requested by General Property Group, find that it was not the generator of the hazardous waste and that DEQ's Amended Notice was inadequate and vacate the Proposed and Final Order; or reduce the base penalty to \$6,000 and remand to the ALJ for recalculation;
2. As requested by DEQ, issue a final order adopting Administrative Law Judge Barber's Proposed and Final Order; or
3. Take any other action within the commission's authority.

**Attachments**

- A. Documents regarding Petition for Review
  1. Letter from Stephanie Caldera, dated Aug. 15, 2019
  2. General Property Group's Reply Brief, dated May 1, 2019
  3. DEQ's Answering Brief, dated April 11, 2019
  4. Email from Stephanie Caldera, dated March 12, 2019;
  5. Letter from Stephanie Caldera, dated Feb. 13, 2019
  6. General Property Group's Exceptions and Brief, dated Feb. 11, 2019
  7. Email from Stephanie Caldera, dated Feb. 1, 2019
  8. General Property Group's Request for Filing Extension, dated Jan. 31, 2019
  9. Letter from Stephanie Caldera, dated Jan. 9, 2019
  10. General Property Group's Petition for Commission Review, dated Jan. 4, 2019
- B. Hearing Record
  1. Proposed and Final Order, dated Dec. 6, 2018
  2. DEQ's Exhibits A1-A22 admitted into record
  3. List of Authorities
  4. General Property Group's Exhibit R1 admitted into the record
- C. Pre-Hearing Documents
  1. Notice of Telephone Hearing
  2. Notice of Prehearing Conference
  3. Amended Notice of Civil Penalty Assessment and Order, dated Sept. 6, 2018
  4. Request for Hearing, dated Sept. 26, 2017
  5. Notice of Civil Penalty Assessment and Order, dated Aug. 1, 2017
- D. Audio Recording of Prehearing Conference and Hearing

Report prepared by Susan Elworth  
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