State of Oregon
Department of Environmental Quality Memorandum

Date: Jan. 12, 2017

To: Environmental Quality Commission

From: Richard Whitman, Director

Subject: Agenda item Q, Action item: Contested Case No. WQ/I-WR-09-092 regarding Bandon Pacific, Inc.
Jan. 17-19, 2017, EQC meeting

Background

The Oregon Department of Environmental Quality implements environmental protection laws. While most people voluntarily comply with the laws, DEQ may assess civil penalties and/or orders to compel compliance or create deterrence. When persons or businesses do not agree with DEQ's enforcement action, they have the right to appeal. The appeal takes the form of a contested case hearing before an administrative law judge. If they do not agree with the administrative law judge's decision, they then may appeal to the commission. In turn, EQC decisions may be appealed to the Oregon Court of Appeals.

On Nov. 30, 2009, DEQ issued a Notice of Civil Penalty Assessment and Order to Bandon Pacific, Inc., a seafood processor, for failing to comply with its wastewater discharge permit and other water quality laws. The Notice assessed Bandon Pacific the following penalties: 1) $174,766 for failing to conduct required monitoring on 2,248 occasions (Violation 1), 2) $18,000 for discharging waste to waters of the state without a permit on 915 occasions (Violation 2), and 3) $15,788 for failing to properly screen its wastewater prior to discharge on 915 occasions (Violation 3). In total, the Notice assessed Bandon a $208,554 penalty.

On Dec. 22, 2009, Bandon Pacific requested a contested case hearing. Bandon Pacific did not deny the violations, but claimed that the penalties were excessive and not in accordance with DEQ policy or Oregon law.

Administrative Law Judge John Mann conducted a contested case hearing on Feb. 23, 2011. Judge Mann issued a Proposed and Final Order on June 1, 2011, in which he found that Bandon Pacific had committed the violations alleged in DEQ's Notice and recommended a total penalty of $200,266 for the violations.

On Nov. 17, 2011, the EQC adopted as final Judge Mann's order assessing Bandon Pacific, Inc., a $200,266 civil penalty for violations of Oregon water quality law. Bandon Pacific appealed the EQC's order to the Oregon Court of

Appeals. On Oct. 14, 2015, the Court of Appeals issued an order remanding the case to EQC for reconsideration of the question of whether the violations at issue should have been assigned a magnitude of minor instead of moderate in the calculations that resulted in the $200,266 civil penalty amount.

Conclusions of the Court of Appeals

EQC's rules for calculating civil penalties require DEQ to assign a "magnitude" of minor, moderate or major to penalties. DEQ assigned a magnitude of moderate in the Bandon Pacific penalty calculations pursuant to OAR 340-012-0130(1), which states:

> "For each civil penalty assessed, the magnitude is moderate unless: (a) A selected magnitude is specified in 340-012-0135 and information is reasonably available to the department to determine the application of that selected magnitude; or (b) The department determines, using information reasonably available to it, that the magnitude should be major under section (3) or minor under section (4)."

In the Court of Appeals, Bandon Pacific argued that the violations should have been assigned a magnitude of minor pursuant to OAR 340-012-0130(2), which states:

> "If the department determines, using information reasonably available to the department, that a general or selected magnitude applies, the department's determination is the presumed magnitude of the violation, *but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude*."

Bandon Pacific relied on testimony provided by one of its witnesses that its discharges caused no more than de minimis actual environmental harm to the Coquille River. In its written opinion, the Court of Appeals found that the EQC did not adequately explain why the magnitude of the violations should not be reduced to minor given Bandon Pacific's evidence of lack of actual environmental harm.

Issues on appeal

In its brief, DEQ requested that EQC issue an order affirming that the magnitude of Bandon Pacific's penalized violations was moderate pursuant to OAR 340-012-0130 and assessing Bandon Pacific a civil penalty of $200,266 as calculated in its order of Nov. 17, 2011. DEQ further requested that EQC explain in its order that Bandon Pacific failed to rebut the presumption of moderate magnitude, despite Bandon Pacific's evidence as to actual environmental harm. The EQC order should explain why, when considering all reasonably available information, including Bandon Pacific's evidence, the magnitude is not minor because the duration of the violations and the degree of deviation from legal requirements undermine the integrity of the regulatory program and therefore posed a risk of more than de minimis adverse

environmental impact.

Bandon Pacific, in its brief, requested that EQC set aside its previous order and issue a new order assessing a penalty of $31,166 because the $200,266 penalty is inconsistent with other DEQ penalties and is not warranted by the facts in the case.

In its reply brief, DEQ argued that EQC should reject Bandon Pacific's consistency argument because the EQC considered and rejected that argument when it issued the order at issue in this case. DEQ also argued that Bandon Pacific had impermissibly included evidence in its brief that has not been admitted into the hearing record and that all such evidence should not be considered by the EQC in deciding this remand.

Bandon Pacific, in its reply brief, argued that the EQC is empowered to adjust the penalty beyond a finding of minor magnitude. Bandon also argued that the EQC should reduce the magnitude in the civil penalty calculation because the violations caused no actual harm and potential risk of harm should not be considered unless actual harm cannot be determined.

EQC authority

EQC has the authority to hear this appeal under OAR 340-011-0575. Under ORS 183.600 to 183.690, the EQC's authority to change or reverse an administrative law judge's proposed order is limited.

The most important limitations are as follows:

1. EQC may not modify the form of the Proposed and Final Order in any substantial manner without identifying the modification and explaining why it made the modification.[1]
2. EQC may not modify a historical finding of fact made by the administrative law judge unless it determines that there is clear and convincing evidence in the record that the finding was wrong.[2]
3. Evidence which was not presented to the administrative law judge cannot be considered by the commission. EQC may, based upon the filing of a motion and a showing of good cause, remand the matter to the administrative law judge to consider new evidence.[3]
4. If EQC remands the matter to the administrative law judge, the commission shall specify the scope of the hearing and the issues to be addressed.[4]

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[1] 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 to change a finding of fact.
[2] 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.
[3] OAR 340-011-0575(5) and 137-003-0655(5).
[4] OAR 137-003-0655(2).

Alternatives

The commission may:

1. As requested by DEQ, issue an amended final order finding that the magnitude in the civil penalty calculation should be moderate based on reasoning proposed by DEQ;
2. As requested by Bandon Pacific, issue a new final order reducing the penalty to $31,166 and state its reasoning for a new order and for the reduced penalty.
3. Issue an amended final order reducing the violation magnitude in the civil penalty calculations to minor and asses a civil penalty of $104,716 and explain its reasoning for doing so.

Attachments

A. Bandon Pacific, Inc. v. Environmental Quality Commission 399 Or App 355 (2015)
B. Briefs on Remand
C. Court of Appeals Briefs
D. Hearing Record on Appeal: Prior commission contested case, October 2011

- Staff report
- Attachments A1-D
- Attachment E
- Attachment F1-H

Approved:

Sarah G. Wheeler
Acting Manager, Office of Compliance and Enforcement

Report prepared by Jeff Bachman
Environmental Law Specialist

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

BANDON PACIFIC, INC.,
Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

Office of Administrative Hearings
1001950; A150445

Argued and submitted September 17, 2014.

Bruce L. Campbell argued the cause for petitioner. With him on the briefs were Kelly S. Hossaini and Miller Nash LLP.

Inge Wells, Assistant Attorney General, argued the cause for respondent. On the brief were Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Stephanie L. Striffler, Assistant Attorney General.

Before DeVore, Presiding Judge, and Ortega, Judge, and Garrett, Judge.*

GARRETT, J.

Reversed and remanded for reconsideration.

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* Ortega, J., *vice* Haselton, C. J.

GARRETT, J.

Petitioner seeks judicial review of a final order by the Environmental Quality Commission (EQC) that imposed a civil penalty of $200,266. Between January 2004 and December 2008, a seafood processing plant owned by petitioner committed numerous violations of its National Pollution Discharge Elimination System (NPDES) permit and state laws applicable to the disposal of solid fish waste. Conceding that the violations occurred, petitioner nonetheless argues, in four assignments of error, that the EQC erred in its calculation and imposition of the civil penalty. We reject three of those assignments without further discussion, writing only to address petitioner's argument that the EQC should have deemed the violations "minor" rather than "moderate" for purposes of calculating the penalty. For the reasons that follow, we conclude that EQC's determination that petitioner's violations were moderate in magnitude is not supported by substantial reason. We therefore reverse and remand.

We take the findings of historical fact as they were determined by the administrative law judge (ALJ), because those findings were adopted by the EQC and, in any event, petitioner does not challenge them on judicial reviews. *WaterWatch of Oregon, Inc. v. Water Resources Dept.*, 259 Or App 717, 720, 316 P3d 330 (2013), *rev allowed*, 355 Or 317 (2014). Petitioner owned and operated a seafood processing facility in Bandon, along the Coquille River, approximately one-half mile up from where the river enters the Pacific Ocean. Historically, the facility processed millions of pounds of fish each year. In 1999, however, petitioner stopped producing large quantities of seafood at that location and turned the site into a retail-only operation that processed only as much fish as needed to serve the facility's retail customers.

During the relevant time, January 2004 to December 2008, the facility processed between 49,000 and 59,000 pounds of fish per year. It operated under an NPDES permit issued by the Oregon Department of Environmental Quality (DEQ).[1] Although NPDES permits are required by the

[1] Technically, there were two permits: one in effect until September 2006, and a second, revised permit in effect from then until May 2011. However, the

federal Clean Water Act, in Oregon, the permitting program is administered by the DEQ. *See* *ONRC Action v. Columbia Plywood, Inc.*, 332 Or 216, 218, 26 P3d 142 (2001) (explaining permitting scheme). In this case, the permit imposed four requirements on petitioner. First, it required all "wastewaters" to pass through "at least a 40 mesh screen *** prior to discharge."[2] Second, it required petitioner to seek approval from DEQ before disposing "seafood processing residuals" into the waters of the state. Third, it required that petitioner monitor its wastewater by performing a series of specified tests and measurements. Fourth, it required petitioner to record the results of those measurements and submit a "discharge monitoring report" (DMR) to DEQ each month.

During the relevant period, petitioner violated the terms of the permit in several ways. The facility's employees flushed the wastewater from the processed fish through a square drain on the floor of the facility that emptied directly into the Coquille River. The drain had a screen that caught some solid waste, but that screen did not meet the "40 mesh" requirement of the permit. Employees discharged the "seafood processing residuals" (fish carcasses) onto a chute that led directly into the Coquille River without, as the permit required, first obtaining DEQ approval. Petitioner also did not monitor its wastewater discharge. From January 2004 to December 2008, it submitted monthly DMRs to DEQ that simply stated "no production."

On December 3, 2008, petitioner's attorney sent a letter to DEQ that advised the agency that petitioner had committed permit violations and submitted inaccurate DMRs. Petitioner later submitted corrected DMRs that provided estimates of the amount of seafood processed each month, but did not include any information about water sampling results or about solid waste disposal. Petitioner

relevant terms of the two permits were nearly identical in substance; the fact that two different permits were in effect at different times is immaterial to the issues on judicial review. Accordingly, we refer to the permits collectively as the "permit."

[2] In his proposed final order, the ALJ explained that "mesh" refers to "the number of openings per square inch on the screen. When a screen has a higher mesh count, each hole is normally smaller than would be the case with a lower mesh screen. When the mesh is higher, fewer solids can pass through the screen."

stopped disposing of solid wastes directly into the river sometime in December 2008. In January 2009, petitioner installed a drain screen that satisfied the "40 mesh" permit requirement. Eventually, petitioner connected the drain to the city sewer and stopped discharging wastewater directly into the Coquille River.

In November 2009, DEQ issued to petitioner a notice of civil penalty. According to the department's formula (which was included in the notice), the "base penalty" for a violation is determined in part by the magnitude of that violation. Thus, for example, a violation that is determined to be "moderate" will result in a higher penalty than a violation that is determined to be "minor." *See* OAR 340-012-0140. DEQ's notice classified all of petitioner's violations as "moderate" in magnitude. Petitioner requested a contested case hearing and argued, among other things, that the proposed penalty of $208,554 contained in DEQ's notice should be reduced because the violations should be classified as minor rather than moderate.

By administrative rule, DEQ has assigned specific magnitudes to some categories of violations. The violations that petitioner committed are not among those that are assigned a magnitude by rule. *See* OAR 340-012-0135. Violations that are not assigned a different magnitude by rule are presumed to be moderate. OAR 340-012-0130(1). That presumption, however, is rebuttable. According to OAR 340-012-0130(2), a party may prove that a lesser magnitude applies by producing evidence that a lesser magnitude is "more probable than the presumed magnitude." OAR 340-012-0130(4) explains what must be true for a violation to be minor:

> "The magnitude of the violation is minor if [DEQ] finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors. In making this finding, [DEQ] will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and [DEQ] rules, standards, permits or orders; the extent of actual or threatened effects

of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation."

At the contested case hearing, petitioner submitted evidence that included an underwater survey of the river near the processing facility. The ALJ made specific findings with respect to that evidence:

> "In 2010, [petitioner] retained the services of Alan Ismond, a chemical engineer, and his company Aqua-Terra Consultants. Mr. Ismond formed the company in 1993 to provide engineering and environmental consulting services to the seafood processing industry. In late 2010, Mr. Ismond commissioned a survey of the Coquille River bed in the area near [petitioner's] facility. The survey revealed no visible remains of fish carcasses. [Petitioner] discharged fish wastes in an area of the river near the mouth of the Pacific Ocean. Because of that proximity, currents and tidal exchanges were substantial and likely dispersed any discharges of wastewater and fish carcasses very quickly. Because the waste did not accumulate on the river bed, Mr. Ismond concluded that the material was likely quickly dispersed into the ocean with no significant impact on the environment."

Those findings were supported by the report by Aqua Terra Consultants, which concluded that there was "no evidence of impact by either solid or liquid disposal on the seabed." They were also supported by the testimony of Ismond. During the hearing, Ismond testified that he commissioned divers to survey the river near the facility. The divers did not see piles of fish carcasses or any other evidence of petitioner's activities. Based on the divers' observations, Ismond concluded that there was "no impact to the environment" at the time of the river survey.[3]

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[3] Ismond explained:

> "There were no visible remains from the discharge. And generally, the waste piles that I deal with are [from] clients that discharge substantial amounts of seafood waste and you'll end up with like a one to seven-acre waste pile. It can be twenty feet deep.
>
> "In the case of waste piles of that size and magnitude, you know you're having an impact on the seafloor, you know you're having an impact on benthic organisms.
>
> "But in the case of this survey, they couldn't find a waste pile, so my conclusion is if there's no waste pile, there's not likely to be any impact on the receiving environment."

Ismond's testimony did not end there, however. Ismond also hypothesized that the reason why no waste pile was found was that, because of the proximity to the mouth of the Coquille River, the waste was likely quickly dispersed into the ocean. Ismond testified that the discharged waste was "a non-toxic material" and that the amount of discharge was relatively small.[4] Based on those observations, Ismond opined that it was "more than likely" that petitioner's activities would have had no impact on the environment during the period covered by the alleged violations.[5]

DEQ put forth no evidence to contradict Ismond or the report by Aqua Terra Consultants. DEQ's cross-examination of Ismond was limited to questions about whether Ismond was familiar with other seafood processors and whether he knew of another facility that had submitted

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[4] Ismond testified as follows:

"Let me clarify one thing. We should characterize what the waste is that they discharged. It wasn't mercury. It wasn't oil. It wasn't gasoline. It was fish. So by its very nature, it's not a—it's a non-toxic material.

"And in terms of quantities, looking at the quantities that they processed and the receiving environment, I would not imagine there would be an adverse impact. The quantities were too small and the receiving environment is too energetic for me to expect an adverse impact."

[5] During the contested case hearing, the following exchange occurred between Ismond and petitioner's attorney:

"Q. When was the seafloor survey done again?

"A. The report is dated November 10, 2010, and the survey was done, I guess, November 4, 2010.

"Q. And was the plant processing then?

"A. The plant, I believe, was discharging to city sewer at the time.

"Q. Okay. And would you expect to have seen the results if this had been done when they were processing through the offal?

"A. More than likely.

"Q. And why is that?

"A. Because of the de minimis quantity process discharge and the receiving environment, I wouldn't expect there to be any significant impacts.

"Q. In your professional opinion, did the wastewater discharges from Bandon have more than a de minimis impact or threat to human health or the environment?

"A. No.

"Q. And why?

"A. Again, because of the type of material being discharged, the quantity of material being discharged, and the receiving environment that it was going into."

inaccurate DMRs indicating "no production." DEQ did not ask Ismond about the results of the river survey or the conclusions that he drew from it. Nor did DEQ question him about his impression of the river near the facility as "energetic" or his characterization of the waste that petitioner deposited into the river as "small" amounts of "non-toxic material." The ALJ did not make any credibility findings with respect to Ismond's testimony.

In its written closing arguments, the department agreed that there was no "direct evidence of actual harm to the environment." It argued, however, that the lack of evidence was attributable to petitioner's failure to monitor its wastewater. DEQ also argued that petitioner's violations posed more than a de minimis threat of harm to the environment because the failure to monitor and report wastewater discharges threatened the integrity of the state's permit system. DEQ argued that it needs the data contained in DMRs because, to make appropriate regulatory decisions, it needs "an accurate understanding of what pollutants are being discharged into Oregon waters."

The ALJ agreed with DEQ that petitioner's violations should be considered "moderate" rather than "minor." The ALJ reasoned as follows:

> "In this case, [petitioner] failed to perform required monitoring for five years. Given the passage of time, it is simply not possible to determine if [petitioner's] activities had an adverse impact on the environment or if they posed more than a de minimis threat to human health or other environmental receptors at the time of the various discharges. While there is no evidence of *current* environmental harm to the Coquille River in the area near the facility, whether more significant harm occurred in the past is simply a matter of conjecture."

(Emphasis in original.)

The ALJ also noted that one of the factors for determining whether a violation is minor is "the concentration, volume, or toxicity of the materials involved." *See* OAR 340-012-0130(4) (listing factors). The ALJ then concluded that, "[b]ecause [petitioner] did not perform its required monitoring obligations, the precise concentration, volume,

and toxicity of the discharged wastewater can never be known."

The ALJ did, however, reduce the proposed penalty by several thousand dollars, to $200,266, because DEQ failed to present evidence that petitioner had obtained an "economic benefit" from one of its violations. The EQC affirmed the ALJ's conclusion in its entirety, including the determination that the magnitude of petitioner's violations was moderate.

When reviewing a final order to determine whether a particular finding is supported by substantial evidence, our task is to determine whether "the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). Our standard of review requires that we defer to the agency's judgment "as to what inferences should be drawn from the evidence." *Tilden v. Board of Chiropractic Examiners*, 135 Or App 276, 281, 898 P2d 219 (1995). Furthermore, "[a]s part of our review for substantial evidence, we also review the board's order for substantial reason—that is, we determine whether the board provided a rational explanation of how its factual findings lead to the legal conclusions on which the order is based." *Arms v. SAIF*, 268 Or App 761, 767, 343 P3d 659 (2015). *See also Drew v. PSRB*, 322 Or 491, 500, 909 P2d 1211 (1996) (agencies "are required to demonstrate in their opinions the *reasoning* that leads the agency from the *facts* that it has found to the *conclusions* that it draws from those facts" (emphasis in original)).

Here, the EQC affirmed the ALJ's legal conclusion that petitioner failed to offer sufficient evidence to overcome the presumption that the proper magnitude classification for petitioner's violations is "moderate." As we understand it, the ALJ reached that conclusion for two reasons. First, the ALJ noted that determining the precise environmental impact in this case is complicated by the five-year duration of the violation. Second, the ALJ concluded that the river survey provided evidence that there was no "*current* environmental harm to the Coquille River," but shed no light on "whether more significant harm occurred in the past." (Emphasis in original.)

On judicial review, petitioner points out that it did submit evidence on the issue of past environmental harm. Ismond specifically testified that, more likely than not, the fish waste and wastewater that petitioner discharged into the river between 2004 and 2008 would have had no adverse affect on the environment during that period of time. Ismond's opinion was based partially on the results of the river survey. It was also, however, based on other factors, including Ismond's experience in the seafood industry and as a consultant for other seafood processing facilities, the relatively small amount of production occurring at the Bandon facility during the relevant time period, the type of waste being discharged, and the river's ability to quickly disperse discharged material into the ocean.

After considering the record, we agree with petitioner's characterization of the evidence that it submitted and conclude that the agency failed to provide substantial reason for its conclusion that petitioner's violations were moderate in magnitude. Under the applicable rule, petitioner does not have to prove the "precise concentration, volume, and toxicity of the discharged wastewater" in order to rebut the presumption of moderate magnitude. Rather, petitioner's burden is to demonstrate that a minor magnitude is "more probable than the presumed magnitude." OAR 340-012-0130(2). Petitioner submitted evidence that, if believed by the trier of fact, would satisfy that burden. Specifically, petitioner submitted corrected DMRs with estimates of how much seafood was processed each month, the results of the river survey, testimony about the characteristics of the river near the processing facility, and testimony about the type of waste that was discarded. The evidence also includes the opinion of an expert witness who specifically opined that "more than likely" petitioner's activities caused no environmental harm.

Although the rule requires the department to consider "all reasonably available information," which would include the evidence that petitioner put forward, it appears that the department and the ALJ focused entirely on the duration of the violation and petitioner's failure to report. Those are relevant factors, of course, but not the only factors. As to other factors, such as the toxicity of the material

that was discharged, petitioner offered evidence that went unrefuted. The department's order fails to offer a reasoned explanation of why, taking account of "*all* reasonably available information," petitioner failed to rebut the presumption of "moderate" magnitude. OAR 340-012-0130(4) (emphasis added).[6] Consequently, we reverse and remand for reconsideration.

Reversed and remanded for reconsideration.

[6] We do not mean to suggest that DEQ was necessarily required to submit evidence to rebut petitioner's evidence regarding the toxicity or likely harm caused by the discharge. The rule gives the department considerable latitude to determine whether, in light of "all reasonably available information," a petitioner has rebutted the presumption of "moderate" magnitude. But, where a petitioner does present affirmative evidence that a permit violation had little or no impact on the environment, and the department nevertheless deems the violation "moderate" rather than "minor," it is incumbent on the department to explain its reasons with reference to an accurate characterization of the information available to it.

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: BANDON PACIFIC, INC., Respondent.	OAH Case No.: 1001950 Agency Case No.: WQ/I-WR-09-092 **BANDON PACIFIC'S REPLY TO BRIEF ON REMAND**

The Department's opening brief improperly frames the issue before this Commission and needlessly complicates the analysis needed for it to render a decision. In the first instance, the Department incorrectly asserts that the Commission must either assess a penalty of $104,716 or a penalty of $200,266.[1] In the second instance, the Department conveniently disregards the unique facts and circumstances of this case[2] with a confusing analysis that turns on unnecessary technical distinctions.

In fact, this Commission has plenary authority to assess whatever penalty it feels is appropriate under the particular facts and circumstances of the case.[3] Moreover, the case itself is actually very simple: the Department asks this Commission to assess one of the highest water quality penalties ever paid in the State of Oregon against a small one-room, five-employee retail fish market which, the Department again concedes,[4] caused no environmental harm. The decision before this Commission is whether the circumstances justify a penalty of that amount.

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[1] DEQ Brief on Remand at 1:15-17.

[2] A summary of the complete factual history is included in Bandon Pacific's Opening Brief at 2-4.

[3] OAR 340-011-0575(6).

[4] DEQ Brief on Remand at 6:20-22.

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Bandon Pacific recognizes that a violation occurred and that a penalty is now appropriate. For the reasons detailed in its opening brief, Bandon Pacific respectfully suggests a penalty of $31,166. Such a penalty is consistent with the direction of the Oregon Court of Appeals, consistent with the Department's penalty rules and matrix, and consistent with other penalties assessed by the Department for similar violations.

INTRODUCTION

This case stems from a small one-room, five-employee retail fish market. It failed to comply with its permit but caused no environmental harm, as the Department concedes in its opening brief. A penalty is warranted, but assessing one of the highest penalties ever issued, over $200,000, is patently unfair and inconsistent with other penalties assessed by the Department. Such arbitrary and capricious enforcement and unfettered discretion undermines the regulatory system and creates an uneven playing field among regulated entities.

The court of appeals agreed with the fish market in finding that it had met its burden of showing no environmental harm from the violations so that a minor magnitude should be used in determining the penalty, not the Department's default to moderate magnitude.[5] The court further found that the Department had failed to present any contrary evidence or offer a reasoned explanation for finding that moderate magnitude should apply to the violations, and reversed and remanded the Commission's penalty order.[6] In its opening brief, the Department presents no additional evidence of environmental harm and admits that any harm was no more than de minimis.[7] It ignores the court of appeals' direction to consider "all reasonably available information" and continues to fail to offer a reasoned explanation for a penalty based on moderate magnitude—because there is no such explanation. Bandon Pacific recognizes and agrees that a reasonable civil penalty is warranted and is prepared to pay an appropriate sum to

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[5] *Bandon Pacific v. Environmental Quality Commission*, 273 Or App 355, 363, 359 P3d 394 (2015).

[6] 273 Or App at 363-64.

[7] DEQ Brief on Remand at 6:20-22.

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resolve the matter. It proposed a well-justified penalty of $31,166 in its opening brief, and requests that the Commission issue an order assessing that penalty amount to resolve the fish market's long-past violations. That penalty is based on the court of appeals' rationale in applying minor magnitude and on a more reasonable application of the Department's penalty rules and matrix, and results in a fair penalty that is more consistent with other DEQ penalties.[8]

ARGUMENT

1. The Commission has plenary authority to assess a penalty appropriate to the particular facts and circumstances of the case after considering "all reasonably available information."

The Department incorrectly asserts that the Commission must assess either a penalty of $104,716 or a penalty of $200,266. "The commission may substitute its judgment for that of the administrative law judge in making any particular finding of fact, conclusion of law, or order except as limited by ORS 183.650 and OAR 137-003-0665."[9] ORS 183.650 and OAR 137-003-0665 provide simply that the Commission must identify any modification to a proposed order and explain why it made the modification. Thus, the Commission is free to assess a penalty in line with those assessed by the Department in similar situations.

2. The Department's focus on "threat of harm" is misplaced. Threat analysis is appropriate only in situations where the harmful event does not actually occur.

The Department's purported justification for the exorbitant penalty turns on classification of the violations as "minor" vs. "moderate." The Commission need not focus on that issue in light of the court of appeals decision, which found that Bandon Pacific has already demonstrated that a minor magnitude is more probable than the presumed magnitude (moderate).[10] The Department did not rebut the evidence presented by Bandon Pacific, nor did it

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[8] *See infra* n. 25.

[9] OAR 340-011-0575(6).

[10] *Bandon Pacific*, 273 Or App at 363.

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explain why it believed that Bandon Pacific failed to meet its burden.[11] Thus, the court of appeals reversed and remanded for further consideration.[12]

Though the Department again concedes no actual environmental harm, the Department now asks the Commission to assess one of the highest penalties ever assessed in the State of Oregon due to an unsubstantiated claim that the violations "posed a threat of harm."[13] In so doing, the Department confusingly suggests that "threatened harm" of an event is greater than the actual harm of the event itself. In other words, though the Department concedes that events that actually occurred caused no more than de minimis harm, it suggests that the threat of harm from those same events exceeds the actual result.

Threat analysis is appropriate only in situations where the threatened event does not actually occur. For example, consider a fuel company that operates a large petroleum AST along a river. The tank has a valve at the bottom, the failure of which would cause the tank's contents to discharge into the river. The fuel company violates its permit by failing to inspect the valve monthly. If the valve does not actually fail, then there is no actual harm. Absent occurrence of the event, the Department necessarily must consider the "threat" of what might have happened.

This case is fundamentally different, as the events giving rise to the "threat" of harm actually took place. In such cases, analysis of the "threat" is supplanted by analysis of any harm that actually resulted. The "threat" of harm *if* an event occurs can be no greater than the harm that results when the event *does* occur.

The Department specifically focuses on three violations; first, failure by the market to employ screens with a sufficiently fine mesh to capture and remove all solids prior to discharge of water used in connection with cleaning fish carcasses. The "threat of harm" in

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[11] 273 Or App at 364.

[12] *Id.*

[13] DEQ Brief on Remand at 4:15-16.

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connection with improperly sized screens is that solids will be discharged into the nearby waterway. Here, that is exactly what happened, and the Department concedes that it caused "no more than de minimis adverse environmental impacts."[14]

The Department next focuses on the "threat of harm" from discharging fish carcasses without a permit. The perceived "threat of harm" from such action is that carcasses will be emptied back into the waterway. Here, fish carcasses were actually discharged and the Department again concedes that any environmental impact was de minimis.[15]

The Department finally focuses on the "threat of harm" from failing to monitor concentrations of chemicals in wastewater discharges. The "threat of harm" in connection with failure to monitor discharges is that exceedances will not be detected, that the lack of detection will prevent correction, and that the continued exceedances will harm human health or the environment. Here, the market did not continue to monitor discharges after Bandon Pacific shut down its processing facility. Any exceedances were not detected, any necessary corrections were not made, and any continued exceedances were allowed to continue. Again, despite that failure, the Department again admits that the failure to monitor "caused no more than de minimis adverse environmental impacts."[16]

Threat analysis is appropriate only in situations where it is impossible to measure actual impacts. In cases where the events giving rise to a "threat of harm" do actually occur, analysis of the *threat* must give way to analysis of the *result* actually observed. Here, each of the events giving rise to the Department's perceived "threat of harm" did actually occur and, by the Department's own repeated admission, resulted in de minimis environmental impacts. The "threat" of adverse impacts from occurrence of those events was thus also de minimis.

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[14] DEQ Brief on Remand at 6:20-22.

[15] *Id.*

[16] *Id.*

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3. The Department must consider "all reasonably available information" in evaluating the severity of the violations.

The Department correctly notes that OAR 340-012-0130(4) lists factors to consider when evaluating whether a violation is minor. The rule, however, and the court of appeals decision in this case, make clear that the Department must consider "all reasonably available information," including those factors.[17] The focus of the inquiry is whether the violations had no more than a de minimis adverse impact on human health or the environment and no more than a de minimis threat to human health or the environment and not on the degree to which any single factor is implicated.[18]

Despite the reversal of the Commission penalty order by the court of appeals and the admonition that the ALJ failed to consider "all reasonably available information,"[19] the Department once again makes the same mistake. It seems to justify this by highlighting a phrase in the penalty rules that reads: "the department may consider any single factor to be conclusive."[20] The Department, however, misinterprets that provision. While the Department may consider any single factor to be conclusive, it first has to consider all reasonably available information and offer a reasoned explanation of why the violations posed a more than de minimis threat even though the violations did not cause more than de minimis harm.

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[17] *Bandon Pacific*, 273 Or App at 364.

[18] "The magnitude of the violation is minor if DEQ finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or the environment. In making this finding, DEQ will consider all reasonably available information...." OAR 340-012-0130(4).

[19] "Although the rule requires the department to consider 'all reasonably available information,' which would include the evidence that petitioner put forward, it appears that the department and the ALJ focused entirely on the duration of the violation and petitioner's failure to report. Those are relevant factors, of course, but not the only factors. As to other factors, such as the toxicity of the material that was discharged, petitioner offered evidence that went unrefuted. The department's order fails to offer a reasoned explanation of why, taking account of '*all* reasonably available information,' petitioner failed to rebut the presumption of 'moderate' magnitude." *Bandon Pacific*, 273 Or App at 363-64.

[20] DEQ Brief on Remand at 4:24.

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Rather than consider all available facts, the Department again focuses entirely on the alleged duration of the violations.[21] It now further compounds that error by completely failing to link the alleged duration of the violations to adverse impacts or threats of adverse impacts. The Department cannot just multiply the number of missed monitoring events by the number of parameters to get a big number and then claim that the threat of harm is therefore greater than de minimis. It must explain why the alleged duration of the violation posed a greater than de minimis *threat* of harm after considering "all reasonably available information," including the lack of *actual* harm.

In addition to inappropriately focusing solely on duration, the Department also inappropriately applies that factor in making the magnitude determination. "Duration" refers to how long a particular violation continues and how the length of that violation creates harm or threatens to create harm, not to how often a violation occurs. Duration does not even logically apply to violations that take place instantaneously, such as failure to conduct monthly sampling and unpermitted discharge of fish carcasses. For example, a failure to conduct sampling in a month is a violation that occurs at a moment in time and not a violation that endures over time. Failure to conduct sampling in the next month is a separate and discrete event, and not a continuation of the first violation.[22] In contrast, operating without an appropriate screen is a type of violation that is susceptible to the duration factor as it endures over time. Still, the Department cannot rely solely on the fact that a violation continued for a specific length of time—it must explain *why* using a different screen posed a greater than de minimis threat after considering all reasonably available information, including the lack of actual harm.

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[21] The Department asserts that two factors are conclusive, duration and degree of deviation, but it really focuses on just one piece of information: the number of violations.

[22] The Department is free to consider the frequency of the violations when it makes the magnitude determination because it must consider all reasonably available information, but it must "offer a reasoned explanation" of how the frequency and other available information lead it to conclude that the violations posed more than a de minimis threat, given that the Department admits that the violations caused no more than a de minimis impact. *Bandon Pacific*, 273 Or App at 364.

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The Department similarly misapplies the "degree of deviation" factor. "Degree of deviation" refers to how much a violation deviates from an established statute or rule. The factor is not useful for evaluating binary events such as failure to monitor. A permittee either collects a sample or does not collect one. The degree-of-deviation factor applies naturally to exceedances of numerical standards and is illustrated by the "selected magnitude categories" in OAR 340-012-0135. For example, exceeding certain numeric water-quality standards by 25 percent or more is "major," while exceeding by 10 percent or less is "minor."[23] Exceeding the standards by 10 percent or less on 100 different occasions does not convert the violations into major violations. What matters is the "degree" of the violation, not the frequency. Yet as with duration, the Department simply counts up the number of alleged violations and asserts that the frequency establishes a large "degree of violation." The *frequency* of a violation has nothing to do with the *degree* of the violation. The Department is free to consider frequency, but it again must "offer a reasoned explanation" of how the frequency and all other reasonably available information demonstrate that the violations posed more than a de minimis threat when the Department admits that the violations caused no more than a de minimis impact.

In focusing solely on duration and degree of variation, the Department ignores other applicable factors entirely; specifically, the extent of actual effects of the violation and the concentration, volume, or toxicity of the materials involved. With respect to the first, the Department acknowledges that the violations caused no more than de minimis impacts, but conveniently sidesteps that fact entirely in its penalty determination analysis. With the respect to the second, the Department similarly fails to account for the complete lack of toxicity and the minuscule volume of discharge in its analysis.

The Department must consider all factors as part of its review of "all reasonably available information," and then must offer a reasoned explanation as to why the violations

[23] OAR 340-012-0135(2)(b).

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posed a greater than de minimis threat of harm even though the violations actually caused no harm and the discharges were nontoxic and low-volume. The Department's complete disregard of these factors coupled with its laser focus on the number of violations is improper, in direct conflict with the court of appeals decision, and an invitation for yet another appeal.

4. The Store at all times attempted to comply with Department requirements and directives.

The Department suggests in its opening brief that the market exhibited a "cavalier disregard" of its obligations, and that its activities constituted both a "gross deviation from permit requirements" and a "flagrant flouting of the law."[24] Such hyperbole is as disingenuous as it is factually inaccurate. As detailed in Bandon Pacific's opening brief, the market employees relied on what they understood to be instructions from Department staff in reporting "no production" on the DMR reports that it submitted each month to the Department. When the Store learned that the Department's instruction was incorrect, it voluntarily reported the issue to the Department and immediately came into compliance. Those factual circumstances distinguish this case from others addressed by the Department,[25] and should be considered mitigating factors in penalty analysis.

As discussed, Bandon Pacific agrees that a civil penalty is warranted despite the unique factual circumstances of the case and is fully prepared to pay an appropriate sum to resolve the matter. Bandon Pacific respectfully suggests a penalty of $31,166. Such a penalty is consistent with the direction of the Oregon Court of Appeals, consistent with the Department's penalty rules and matrix, and consistent with other penalties assessed by the Department for similar violations.

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[24] DEQ Brief on Remand at 5:17-26.

[25] It is apparently better to make no effort to comply with Department requirements than to try and fall short. Just two weeks ago the Department assessed a penalty of just $26,525 to a marble and granite company that discharged process wastewater slurry without a permit for seven years. *See* Exhibit 1. That penalty is similar to the $21,992 penalty assessed to Clausen Oysters for operating for five years without a permit. The Department has not offered a "reasoned explanation" of why Bandon Pacific's penalty should be an order of magnitude greater.

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CONCLUSION

Department penalty calculation rules are almost infinitely malleable and can be used to justify almost any penalty desired. Such discretion is appropriate to allow the Department sufficient flexibility to address a wide array of factual circumstances. Assessing one of the highest water quality penalties ever paid in Oregon against a small one-room retail fish store absent any evidence of environmental harm, however, constitutes an inappropriate application of that discretion. Bandon Pacific respectfully requests that the Commission, consistent with the directive of the Oregon Court of Appeals to consider "all reasonably available information," exercise its authority to correct this injustice and adopt an alternative order and penalty assessment of $31,166.

Dated: December 2, 2016.

MILLER NASH GRAHAM & DUNN LLP

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Attorneys for Respondent Bandon Pacific, Inc.

CERTIFICATE OF FILING AND SERVICE

I certify that I filed the original of this Bandon Pacific's reply to brief on remand on December 2, 2016, by messenger delivery in an envelope addressed to:

Ms. Stephanie Caldera, EQC Assistant
Oregon Department of Environmental Quality
700 N.E. Multnomah Street, Suite 600
Portland, Oregon 97232

and that on that same date I caused a true and correct copy of the foregoing to be delivered to the following party by the specified method:

VIA E-MAIL
Mr. Jeff Bachman
Environmental Law Specialist
Bachman.Jeff@deq.state.or.us
Oregon Department of Environmental Quality
Office of Compliance and Enforcement
811 S.W. Sixth Avenue
Portland, Oregon 97204-1390

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Exhibit 1

Oregon
Kate Brown, Governor

Department of Environmental Quality
Headquarters
811 SW 6th Ave
Portland, OR 97204-1390
(503) 229-5696
FAX (503) 229-6124
TTY: 711

November 17, 2016

CERTIFIED MAIL: 7014 2870 0001 3373 6101

Bella Pietra Marble and Granite LLC
c/o John C. Bravo, Registered Agent
1161 Wiltsey Road, SE
Salem, OR 97306

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/I-WR-2016-135

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued you a civil penalty of $26,525 for operating a discharge source from an industrial facility without a permit. Specifically, since you've been in business you have discharged process wastewater slurry from your facility to the ground surface where it was allowed to infiltrate and to a trench intentionally constructed to carry water away from the facility to a swale.

DEQ issued this penalty because the wastewater slurry is an industrial waste that could cause pollution or otherwise alter the physical, chemical or biological properties of nearby waters of the state, including groundwater. The operation of any industrial activity that could cause an increase in the discharge of wastes into waters of the state or which would otherwise alter its properties must be permitted by DEQ.

DEQ appreciates your efforts to correct the violation by ceasing the discharge and collecting and storing all process wastewater on site until it is transported offsite. DEQ considered these efforts when determining the amount of civil penalty.

If you wish to appeal this matter, DEQ must receive a request for a contested case hearing within 20 calendar days from your receipt of this letter. The hearing request must be in writing. Send your hearing request to DEQ Office of Compliance and Enforcement – Appeals:

Via mail – 700 NE Multnomah Street, Suite #600, Portland, Oregon 97232
Via fax - 503-229-5100

Once DEQ receives your request, we will arrange to meet with you to discuss this matter. If DEQ does not receive a timely written hearing request, the penalty will become due. Alternatively, you can pay the penalty by sending a check or money order to the above address.

The attached Notice further details DEQ's reasons for issuing the penalty and provides further instructions for appealing the penalty. Please review it and refer to it when discussing this case with DEQ.

DEQ may allow you to resolve part of your penalty through the completion of a Supplemental Environmental Project (SEP). SEPs are environmental improvement projects that you sponsor in lieu of paying your penalty. Enclosed is more detail on how to pursue a SEP. SEP documents are available

on the internet at http://www.deq.state.or.us/programs/enforcement/SEP.htm, or by calling the number below to request a paper copy.

DEQ's rules are available on the internet at http://www.deq.state.or.us/regulations/rules.htm, or by calling the number below to request a paper copy.

If you have any questions, please contact DEQ Environmental Law Specialist Courtney Brown, at (503) 229-6839. You may call toll-free within Oregon at 1-800-452-4011, extension 6839.

Sincerely,

Sarah G. Wheeler, Acting Manager
Office of Compliance and Enforcement

Enclosures

cc: David Cole, Northwest Region
Shaumae Hall, Accounting, DEQ
John Koestler, WQ, DEQ
Chris Bravo, CEO, Bella Pietra Marble and Granite, 3780 Boone Road SE, Suite #3, Salem, OR 97317

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: BELLA PIETRA MARBLE AND GRANITE LLC, Respondent.	NOTICE OF CIVIL PENALTY ASSESSMENT AND ORDER CASE NO. WQ/I-WR-2016-135

I. AUTHORITY

The Department of Environmental Quality (DEQ) issues this Notice of Civil Penalty Assessment and Order (Notice) pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through 468.140, ORS Chapter 183, ORS Chapter 468B, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012, and 045.

II. FINDINGS OF FACT

1. Since on or about January 6, 2009, through October 11, 2016, Respondent operated a facility located at 3780 Boone Road SE, in Salem, Oregon (the "facility").

2. Respondent's facility cuts and grinds rock products including granite, marble and stone. This process results in a wastewater slurry which may cause pollution to waters of the state by causing turbidity and changes in the physical or chemical or biological properties of those waters.

3. On or about January 6, 2009, through on or about January 26, 2016, Respondent discharged its wastewater from the facility to the ground behind the facility.

4. On or about January 26, 2016, through on or about April 28, 2016, Respondent discharged the wastewater slurry referred to in paragraph 2, above, from its facility to a constructed trench which drains into a natural swale.

5. The natural swale referred to in paragraph 4, above, is up-gradient of the East Fork of Pringle Creek, waters of the state. The natural swale infiltrates into the ground surface where it may be form a junction with underground waters of the state.

6. Respondent holds no permit authorizing the construction, installation or operation of a disposal system.

III. CONCLUSIONS

1. Wastewater slurry, referred to in Section II, paragraph 2 is considered "wastes" according to ORS 468B.005(9).

2. Respondent's facility and the constructed trench referred to in Section II, paragraph 4 are considered a "disposal system" according to ORS 468B.005(1).

3. On or about January 6, 2009, through on or about April 28, 2016, Respondent violated ORS 468B.050(1)(b) by constructing, installing and operating a disposal system without a permit. Specifically, from on or about January 6, 2009, through on or about January 26, 2016, Respondent discharged wastewater from its facility onto the ground surface behind its facility. From on or about January 26, 2016, through on or about April 28, 2016, Respondent discharged its wastewater slurry from its facility to a constructed trench where it discharged to a natural swale. This is a Class I violation according to OAR 340-012-0055(1)(d). DEQ has assessed a $26,525 civil penalty for this violation.

4. On or about January 26, 2016, through on or about April 28, 2016, Respondent violated ORS 468B.025(1)(a) by placing wastes where they are likely to escape or be carried into waters of the state by any means. Specifically, Respondent discharged wastewater slurry to a trench that drains to a natural swale that is up-gradient of the East Fork of Pringle Creek, waters of the state. The natural swale infiltrates into the ground where it may form a junction with underground waters, waters of the state. This is a Class II violation, according to OAR 340-012-0055(2)(c). DEQ has not assessed a civil penalty for this violation.

IV. ORDER TO PAY CIVIL PENALTY

Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is hereby ORDERED TO: Pay a total civil penalty of $26,525. The determination of the civil penalty is attached as Exhibit No.1 and is incorporated as part of this Notice.

If you do not file a request for hearing as set forth in Section V below, your check or money

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order must be made payable to "**State Treasurer, State of Oregon**" and sent to the **DEQ, Business Office, 700 NE Multnomah St. Suite 600, Portland, Oregon 97232-4100**. Once you pay the penalty, the Findings of Fact, Conclusions and Order become final.

V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

You have a right to a contested case hearing on this Notice, if you request one in writing. You must ensure that DEQ receives the request for hearing **within 20 calendar days** from the date you receive this Notice. If you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached exhibit(s), you must include them in your request for hearing, as factual matters not denied will be considered admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for further information about requests for hearing.) You must mail the request for hearing to: **DEQ, Office of Compliance and Enforcement - Appeals, 700 NE Multnomah St. Suite 600, Portland, Oregon 97232-4100**, or fax it to **503-229-5100**. An administrative law judge employed by the Office of Administrative Hearings will conduct the hearing, according to ORS Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be represented by an attorney at the hearing, or you may represent yourself unless you are a corporation, agency or association.

Active duty service-members have a right to stay proceedings under the federal Service members Civil Relief Act. For more information, please call the Oregon State Bar at 1-800-452-8260 or the Oregon Military Department at 1-800-452-7500. Additional information can be found online at the United States Armed Forces Legal Assistance (AFLA) Legal Services Locator website http://legalassistance.law.af.mil/content/locator.php.

If you fail to file a request for hearing in writing within 20 calendar days of receipt of the Notice, the Notice will become a final order by default without further action by DEQ, as per OAR 340-011-0535(1). If you do request a hearing but later withdraw your request, fail to attend the hearing

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or notify DEQ that you will not be attending the hearing, DEQ will issue a final order by default pursuant to OAR 340-011-0535(3). DEQ designates the relevant portions of its files, including information submitted by you, as the record for purposes of proving a prima facie case.

November 17, 2016
Date

Sarah Wheeler
Sarah G. Wheeler, Acting Manager
Office of Compliance and Enforcement

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Violating ORS 468B.050(1)(b) by constructing, installing and operating a disposal system without a permit since January 6, 2009, through April 28, 2016.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(d).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 applicable to this violation, and the information reasonably available to DEQ does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is $1,500 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(A).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(19), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because there are no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(c), because there is no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 3 according to OAR 340-012-0145(4)(c), because there were from seven to 28 occurrences of the violation. Respondent has been engaged in an industrial process that produces wastewater slurry since 2009. From 2009 through approximately February of 2016 Respondent discharged its wastewater to the ground behind the facility.

"M" is the mental state of the Respondent and receives a value of 4 according to OAR 340-012-0145(5)(c), because Respondent's conduct was negligent. By discharging wastewater slurry to the ground surface, and then to a constructed trench, Respondent failed to take reasonable care to avoid a foreseeable risk that it would violate Oregon environmental laws prohibiting discharges from industrial sources without a permit.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of -1 according to OAR 340-012-0145(6)(e), because Respondent made reasonable efforts to

ensure the violation would not be repeated. Respondent stopped discharging to the constructed trench on or about April 28, 2016, and began collecting, storing and transporting the wastewater off-site.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the Respondent's noncompliance. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of $24,145. This is the amount Respondent gained by avoiding spending $9,728 on a fee for a tier 2 Water Pollution Control Facilities Permit in 2010, $3,146 on a permit annual fee in 2011, $3,149 on a permit annual fee in 2012, $3,234 on a permit annual fee in 2013, $3,325 on a permit annual fee in 2014, $3,421 on a permit annual fee in 2015, and $3,832 on a permit annual fee in 2016. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: Penalty = BP + [(0.1 x BP) x (P + H + O + M + C)] + EB
= $1,500 + [(0.1 x $1,500) x (0 + 0 + 3 + 4 + -1)] + $24,125
= $1,500 + ($150 x 6) + $24,125
= $1,500 + $900 + $24,125
= $26,525

Oregon
Kate Brown, Governor

Department of Environmental Quality
Office of Compliance and Enforcement
700 NE Multnomah St Ste 600
Portland, OR 97232-4100
(503) 229-5696
FAX (503) 229-5100
TTY: 711

December 2, 2016

By Personnel Delivery

Oregon Environmental Quality Commission
c/o Stephanie Caldera
700 NE Multnomah Street, Suite 600
Portland, OR 97232

CERTIFIED MAIL 7014 2870 0001 3378 4300

Suzanne Lacampagne
Miller Nash LLP
111 SW Fifth Avenue, Suite 3400
Portland, OR 97204

Re: In the Matter of:
Bandon-Pacific, Inc.
OAH Case No. 1001950
DEQ Case No. WQ/I-WR-09-092

Dear Ms. Caldera and Ms. Lacampagne:

Please find enclosed the Department of Environmental Quality's Reply Brief on Remand in the referenced case.

Please call me at (503) 229-5950 if you have questions.

Sincerely,

Jeff Bachman
Office of Compliance and Enforcement

Enclosure

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: BANDON PACIFIC, INC. Respondent.	REPLY BRIEF ON REMAND No. WQ/I-WR-09-092 OAH Case No. 1001950

INTRODUCTION

This case is before the Environmental Quality Commission (EQC) on remand from the Oregon Court of Appeals. The court remanded after Bandon Pacific appealed an EQC order assessing Bandon Pacific a $200,266 civil penalty upon finding that the company had committed 4,078 violations of Oregon water quality protection law over a five year period. Specifically, the Court of Appeals rejected all of Bandon Pacific's defenses, except for the single question of whether the EQC adequately explained its decision in adopting the Department of Environmental Quality's (DEQ's) magnitude determination in the civil penalty calculations that resulted in the $200,266 penalty. The court directed the EQC to reconsider whether the magnitude of the violations should have been minor instead of moderate. A finding of minor would reduce the penalty from $200,266 to $104,716.

In its brief on remand, Bandon Pacific 1) tries to subvert the EQC's prior decision in this case by making again a fairness argument already rejected by the EQC, a decision which Bandon Pacific did not bother to appeal to the Court of Appeals, 2) impermissibly attempts to introduce new, and distorts existing, evidence in the record to support that argument, and 3) fails to address the issue of magnitude, the only issue the Court of Appeals did remand to the EQC for further consideration.

The Question of Fairness is not Before the EQC on Remand

Bandon Pacific implores the EQC to reduce the civil penalty to $31,166 because a higher penalty would be "unfair." By way of evidence, Bandon Pacific points to penalties DEQ has issued in other cases. The EQC, however, already rejected Bandon's fairness argument in its Final Order.

In its appeal to the Court of Appeals, Bandon Pacific did not challenge the EQC's ruling on fairness.

The EQC adopted as its Final Order the Proposed Order issued by Senior Administrative Law Judge (ALJ) John Mann, who found that the penalty assessed by DEQ "is well within the range of discretion granted to DEQ and is not grossly disproportionate to civil penalties assessed in other cases." In the Matter of Bandon Pacific, Inc., Proposed and Final Order, Oregon Office of Administrative Hearings Case No. 1001950 (2011), at 15.

The only issue remanded to EQC by the court was that of magnitude in the civil penalty calculations. Bandon Pacific, Inc. v. Environmental Quality Commission 399 Or App 355 (2015), at 356. Reconsideration of that question by the EQC can have only two results: Either EQC reaffirms its original finding that the magnitude of the violations was moderate and penalizes Bandon Pacific $200,266, or EQC determines that minor is the more appropriate magnitude and reduces the penalty to $104,716.

The EQC should reject Bandon Pacific's effort to reargue a question that the commission has already decided and limit its review and decision to magnitude, the only question the court remanded.

Bandon Pacific Impermissibly Attempts to Introduce New Evidence and Distorts the Existing Evidence in the Record

Parties to a contested case are prohibited from presenting new evidence on appeal before the EQC. Oregon Administrative Rule (OAR) 137-003-0655(5), adopted pursuant to OAR 340-011-0500 and OAR 340-011-0575(5). If a party wishes to introduce new evidence on appeal, they must include a motion along with its brief to the EQC. The motion must include a statement showing good cause for the failure to present the evidence to the administrative law judge. OAR 340-011-0575(5). Bandon Pacific has not made such a motion.

In its brief on remand, Bandon Pacific references DEQ enforcement actions against Caleb Siaw, Cain Petroleum, Inc., Eagle-Picher Industries, Weyerhauser Company, and Intel Corporation and includes several documents relating to DEQ enforcement as Attachments 1, 2 and 3. No

evidence regarding these prior enforcement actions nor any of the documents in the attachments were admitted to the hearing record and should not be considered by the EQC.

Bandon Pacific also mentions in its brief a settlement offer made by DEQ after the Court of Appeals issued its decision, which is also be new evidence. Bandon Pacific's inclusion of the offer is particularly questionable because settlement offers are not admissible evidence in either federal or Oregon court proceedings. Federal Rules of Evidence 408 and Oregon Revised Statute 40.190, Rule 408. While settlement offers are not expressly excluded in contested case hearings, irrelevant or immaterial evidence is. ORS 183.450(1). Irrelevance is one of the primary reasons settlement offers are inadmissible under the state and federal rules of evidence. See Notes of Advisory Committee on Proposed Rules, Rule 408, https://www.law.cornell.edu/rules/fre/rule_408.

In addition to improperly attempting to bring in new evidence, Bandon Pacific also distorts evidence in the record. In an effort to minimize the egregiousness of its conduct, Bandon Pacific repeatedly claims that its staff were told by a DEQ employee that the company could write "No Production" on its discharge monitoring reports and that it was not required to comply with the terms of its wastewater discharge permit. ALJ Mann considered the evidence on this claim and never made such a finding of fact.

In an attempt to create the appearance of dis-proportionality, Bandon Pacific characterizes itself "as a small, one room retail fish store." Respondent's Brief at 7. This is a distortion of the evidence in the record. As ample evidence in the record proves, the Bandon facility was operated by a corporation that processed millions of pounds of fish a year at Bandon Pacific's facility in Charleston, Oregon. Hearing Record, Exhibit R-15, bate stamp pages 668-688.

In its consideration of the magnitude question remanded by the Court of Appeals, the EQC should rely only on the evidence in the hearing record and disregard the new evidence and distortions in Bandon Pacific's brief.

Bandon Pacific's Violations are Moderate Magnitude

Despite Bandon Pacific's failure to address the question in its brief, the issue before the EQC is whether the magnitude to be assigned in the civil penalty calculation should be moderate or

minor. The Court of Appeals found that the EQC failed to adequately explain why it did not reduce the magnitude from moderate to minor after Bandon Pacific presented evidence that its violations caused no more than de minimis actual environmental harm.

On remand, EQC should issue a new order that acknowledges Bandon Pacific's evidence as to harm, but nevertheless determines that moderate magnitude is appropriate per OAR 340-012-0130(1) and -0130(4)[1] because of the extended duration of the violations and the extreme deviation from the conduct required by law they constituted.

For the EQC to make a finding of minor magnitude, it would need to determine that Bandon's violations posed no more than a de minimis risk of harm to human health or the environment. In committing 4,078 violations over the course of five years, Bandon Pacific demonstrated contempt for the laws protecting water quality that can only encourage others to

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[1] **340-012-0130**
Determination of Violation Magnitude
(1) For each civil penalty assessed, the magnitude is moderate unless:
(a) A selected magnitude is specified in 340-012-0135 and information is reasonably available to the department to determine the application of that selected magnitude; or
(b) The department determines, using information reasonably available to it, that the magnitude should be major under section (3) or minor under section (4).
(2) If the department determines, using information reasonably available to the department, that a general or selected magnitude applies, the department's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude.
(3) The magnitude of the violation is major if the department finds that the violation had a significant adverse impact on human health or the environment. In making this finding, the department will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.
(4) The magnitude of the violation is minor if the department finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors. In making this finding, the department will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive

violate, thus creating more than a de minimis risk of harm. This risk can only be minimized by assessing Bandon Pacific a civil penalty sufficient to deter other permittees from similar conduct.

CONCLUSION

On remand, Bandon Pacific has offered no argument as to why the magnitude should be minor instead of moderate, but instead claims the penalty is unfair – a claim that has already been rejected by the EQC. EQC should ignore Bandon Pacific's attempt at another bite at the apple and issue an order affirming that the magnitude of the violations was moderate pursuant to OAR 340-012-0130 and assessing Bandon Pacific a civil penalty of $200,266 as calculated in the EQC's order of November 17, 2011. The EQC should explain in its order that Bandon Pacific failed to rebut the presumption of moderate magnitude, despite Bandon Pacific's evidence as to actual environmental harm. Furthermore, the EQC should explain when considering all reasonably available information, including Bandon Pacific's evidence as to environmental harm, the magnitude is not minor because the duration of the violations and the degree of deviation from legal requirements undermine the integrity of the regulatory program and therefore posed a risk of more than de minimis adverse environmental impact.

DATED this 2nd day of December 2016.

Respectfully submitted,

Jeff Bachman,
Environmental Law Specialist
Oregon Department of Environmental Quality

Gary L. Vrooman, #075832
Assistant Attorney General
Attorney for Oregon Department of
Environmental Quality

BY U.S. MAIL

Nov. 18, 2016

Suzanne C. Lacampagne
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Re: In the Matter of Bandon Pacific, Inc.
OAH Case No. 1001950
DEQ Case No. WQ/I-WR-09-092

The Oregon Environmental Quality Commission received your brief on Nov. 17, 2016, and it was filed in a timely manner. The commission also received DEQ's brief in this matter on Nov. 17, per the agreement between the parties to have a simultaneous briefing schedule. Per the briefing schedule previously discussed, your reply brief is due by 5 p.m. on Friday, Dec. 2, 2016. DEQ's reply brief has the same deadline. After all briefs are received, this matter will be scheduled at a regular commission meeting.

Please provide all materials to Stephanie Caldera, EQC assistant, at 700 NE Multnomah St., Suite #600, Portland, OR 97232. Please also provide a copy of all submitted materials to the opposing party in this matter.

Sincerely,

Stephanie Caldera
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY – Jeff Bachman, Oregon Department of Environmental Quality

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: BANDON PACIFIC, INC., Respondent.	OAH Case No.: 1001950 Agency Case No.: WQ/I-WR-09-092 **BANDON PACIFIC'S OPENING BRIEF ON REMAND**

This case started with DEQ assessing the highest water quality penalty ever paid. It has a long and protracted history. It stems from a small, one-room, five-employee retail fish store (pictures included below) that operated in Bandon, Oregon, from approximately 1990 until 2010 (the "Store"). Bandon Pacific, Inc., no longer owns or operates the Store. DEQ admits that there is no evidence that operation of the Store caused environmental harm.[1]

In 2009, DEQ issued an extraordinary[2] penalty assessment of $208,554 against the Store for wastewater discharges that took place between January 2004 and December 2008. The penalty was subsequently reduced on two different occasions: first to $200,266 by the DEQ Administrative Law Judge (the "ALJ"), and then effectively to $104,716 by the Oregon Court of Appeals.[3]

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[1] "The Department agrees that there is no direct evidence of actual harm to the environment * * *." (DEQ Closing Argument Before ALJ at 15.)

[2] The use of the word "extraordinary" is not exaggeration. It is the 11th highest penalty assessed by DEQ since 1998. *See* Attachment 1. Only two parties have ever paid more than $200,000. Eagle-Picher Minerals, Inc., paid $303,000 in 2002 and The Weyerhaeuser Company paid $248,000 in 1993. *See* DEQ Enforcement Database Search, http://www.deq.state.or.us/programs/enforcement/EnfQuery.asp.

[3] The court of appeals held that DEQ failed to offer a reasoned explanation of its magnitude determination. Changing the magnitude from moderate to minor lowers the penalty to $104,716.

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Bandon Pacific recognizes and agrees that a civil penalty is warranted and is prepared to pay an appropriate sum to resolve the matter. The assessed amount, however, is wholly inconsistent with other penalties assessed by DEQ and is not justified by the facts of the case. Bandon Pacific respectfully requests that the EQC adopt an alternative order, as described below, assessing civil penalties of $31,166.

FACTUAL HISTORY

Various owners, including Bandon Pacific, owned and operated a large seafood processing facility at 250 First Street in Bandon, Oregon, from approximately 1979 through 1999. The processing facility had several processing lines, mainly for shrimp, crab, and black cod. In 1998, it processed approximately 1.6 million pounds of seafood. The processing facility operated under Oregon's General NPDES Permit No. 900-J.

Sometime in 1989 or 1990, the processing facility added a small retail store. The Store operated in conjunction with and sold products generated by the processing facility to local customers. The Store also purchased products from other suppliers and filleted, washed, and repacked some of those purchased products before selling them to the public. Bandon Pacific performed such tasks at a sink located behind the Store's retail counter. The following are pictures taken of the Store while it was still in operation:

Figure 1: Store

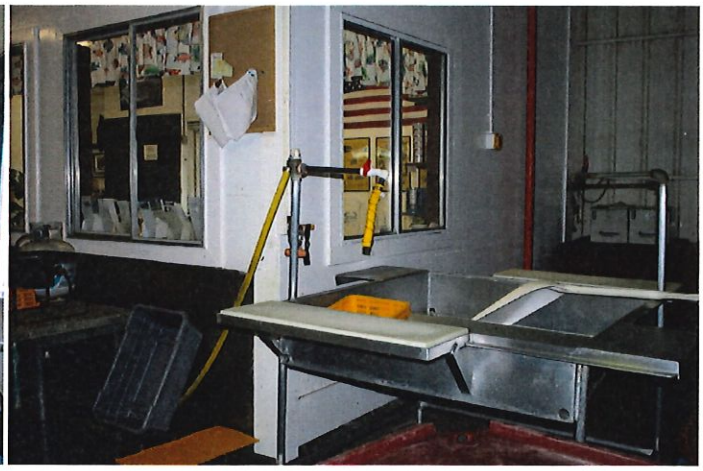

Figure 2: Preparation Area

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In approximately 1999, Bandon Pacific shut down the seafood processing facility, leaving only the Store. The Store continued to prepare seafood to serve its local retail customers.[4]

Wastewater from cleaning the fish sold at the Store emptied into a square drain on the floor. At all times during the operation of the Store, there was at least one stainless steel screen on top of the drain in the floor to capture solids. At some point after 1999 (when the site became retail-only), a second screen was installed below the first one to catch additional solids. Bandon Pacific employees removed the solids from the screens and placed them in a tote with fish carcasses and other discarded pieces of fish for disposal. Employees then emptied the tote onto a concrete chute that emptied into the Coquille River.[5] Occasionally, some of the fish carcasses caught on rocks before reaching the water. Those carcasses usually were carried away during high tides or consumed by birds or sea lions. Bandon Pacific presented evidence that these discharges more than likely caused no environmental harm. Significantly, there is no evidence in the record that the Store's discharges caused environmental harm, and DEQ has already conceded that there is no direct evidence of actual harm to the environment.[6]

Bandon Pacific's NPDES permit required it to submit monthly Discharge Monitoring Reports ("DMRs") to DEQ. The Store continued to submit monthly DMRs following shutdown of the processing facility in 1999. From February 1999 through August 2003, Bandon Pacific employee Cynthia Loshbaugh had primary responsibility for preparing the DMRs and for filing those reports with DEQ. Ruben Kretzschmar of DEQ told

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[4] Between 2004 and 2008, the Store prepared between 49,000 and 59,000 pounds of fish per year. By way of comparison, seafood processing facilities in Oregon process many times as many pounds per year and legally discharge almost ten times that amount in TSS per month. For example, in 2008, the Store prepared 46,298 pounds of fish. That same year, Pacific Coast (Warrenton, Oregon) processed 31 million pounds of seafood and was lawfully permitted to discharge 405,000 pounds of TSS. (Exhibit R4.)

[5] Similar disposal takes place at sport fishing cleaning tables all over the state.

[6] "The Department agrees that there is no direct evidence of actual harm to the environment * * *." (DEQ Closing Argument Before ALJ at 15.)

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Ms. Loshbaugh's manager, Curt Janke, that monitoring was not required because the Store was not a processing facility and instructed the Store to write "no production" on its DMRs. Ms. Loshbaugh followed DEQ's instruction and wrote "no production" on the DMRs that she submitted each month. She trained her successor to do the same.

In 2008, Bandon Pacific learned that Mr. Kretzschmar's instruction was incorrect; it was still required to monitor its wastewater, and writing "no production" on its DMRs was a mistake. Upon learning this new information, Bandon Pacific voluntarily reported the issue to DEQ by letter dated December 3, 2008. Bandon Pacific stopped disposing of fish carcasses in the Coquille River that same month.[7] DEQ initiated enforcement in May 2009 and assessed the $208,554 penalty in November 2009.

PROCEDURAL HISTORY

Bandon Pacific appealed DEQ's initial $208,554 penalty assessment and requested a contested case hearing. The ALJ recommended that DEQ reduce the penalty to $200,266 because there was no evidence in the record about the economic benefit gained from failing to use the appropriate screen. Although DEQ rules require it to consider "all reasonably available information," the ALJ focused only on the duration of the violation and on the Store's reports of "no production."[8] Bandon Pacific appealed the ALJ's decision to the EQC, which adopted the ALJ's proposed order without modification at its October 20, 2011, meeting.

Bandon Pacific next appealed the EQC's order to the Oregon Court of Appeals, where it argued that the EQC should have deemed its violations "minor" rather than "moderate" for purposes of calculating the penalty. The court of appeals reversed and remanded via decision dated August 26, 2015, holding that the EQC's classification of the violations as "moderate" was not supported by substantial reason. More specifically, the court of appeals found that "[t]he

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[7] The Store installed a "40 mesh" drain screen in January 2009 and diverted all its wastewater to the City of Bandon sanitary sewer system in April 2009. The Store stopped operating altogether in 2010. (ALJ Hearing Transcript at 42.)

[8] *Bandon Pacific v. Environmental Quality Commission.*, 273 Or App 355, 363, 359 P3d 394 (2015).

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department's order fails to offer a reasoned explanation of why, taking account of '*all* reasonably available information,' petitioner failed to rebut the presumption of 'moderate' magnitude."[9]

In 2016, DEQ offered to resolve the long-standing dispute for $104,716. Bandon Pacific believes that amount to be similarly unreasonable in light of the unique facts of the case: specifically, the inaccurate direction provided by DEQ to Bandon Pacific in 2001 and 2002, the size and nature of the operation, and the fact that it self-disclosed the violations. It once again appeals to the EQC for relief from the inequitable penalty assessment.

THE PENALTY IS UNFAIR AND INCONSISTENT WITH OTHER DEQ PENALTIES

DEQ has assessed very few penalties of this magnitude. In fact, DEQ's original penalty of $208,554 would constitute the highest water quality penalty ever paid. It would also constitute the 11th highest penalty of any type since 1998.[10] Only two parties have ever paid more than $200,000.[11] Only six others have paid more than $100,000. It is not exaggeration to describe the penalty assessed against the Store as extraordinary.[12]

Bandon Pacific lacks detailed information about the circumstances of these large penalties, but public information indicates that such large penalties have traditionally been reserved for only the most egregious offenses. For example, Caleb Siaw made the largest-ever water quality penalty payment ($173,175) for "long-standing environmental problems with sewage disposal at a mobile home park" and violating an MOA. Mr. Siaw had a long history of sewage violations at his mobile home parks and was criminally prosecuted in 1999 for second-degree water pollution for violations stemming from failure of the on-site sewage disposal system at one of his parks. In contrast to that case, Bandon Pacific at all times acted in good

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[9] 273 Or App at 364.

[10] *See* Attachment 1.

[11] Eagle-Picher Minerals, Inc. paid $303,000 in 2002 and The Weyerhaeuser Company paid $248,000 in 1993. *See* DEQ Enforcement Database Search, http://www.deq.state.or.us/programs/enforcement/EnfQuery.asp.

[12] There are more than 8,000 records in DEQ's enforcement database. *Id.*

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faith in reliance on direction from DEQ staff. Moreover, when it learned that DEQ's direction was incorrect, Bandon Pacific self-reported the issue for resolution.

In another case, Cain Petroleum paid $118,901 in 2002 for failure to investigate and clean up petroleum releases from underground storage tank systems at nine properties. According to DEQ, Cain repeatedly ignored requests from the Department to complete required (cleanup) actions at these properties.[13] At two of the properties, liquid petroleum was floating on groundwater, and most of the properties had levels of benzene, a known carcinogen, exceeding those established for the protection of human health and safety. This is a far cry from failing to properly screen wastewater from a small retail shop and the disposal of at most a few dozen fish carcasses per day in the Coquille River.

The case of Clausen Oysters demonstrates the manifest injustice of this penalty assessment in the seafood processing context. Clausen allowed its wastewater permit to expire for five years (November 2005 through January 2010) even while it continued to process seafood. In January 2010, Clausen Oysters obtained a wastewater permit, but for the subsequent five months failed to monitor its wastewater and report the results of that monitoring. Clausen Oysters also failed to pass its wastewater through a mesh screen.[14] Whereas DEQ assessed a penalty against the Store of $174,766 for failure to monitor wastewater and report its monitoring results for a period of five years, Clausen Oysters received a penalty of only $21,992 both for failing to have a wastewater permit for a period of five years and for failing to monitor and report even after it obtained its permit. Significantly, DEQ found that Clausen Oysters' failure to have a wastewater permit for the five-year period in that case was "reckless." Even so, DEQ assessed a penalty of just $16,349 for that violation.

Perhaps the case that best illustrates the unfairness of the Bandon penalty assessment is the recent DEQ enforcement at Intel, a company that reported profits of

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[13] *See* Attachment 2.

[14] (Exhibits R36, R37.)

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$9.6 billion in 2013.[15] Intel emitted fluoride for 36 years without disclosing it to DEQ and without a permit for the emissions. It also began construction of a multibillion-dollar factory without obtaining the proper air quality permit from DEQ.

Figure 3: Intel's Hillsboro Factory

For these violations, Intel was assessed a penalty of just $143,000—roughly 31 percent less than the original penalty assessed against the Store.[16]

Neither the record nor DEQ offers any justification for the above-illustrated disparities. Bandon Pacific recognizes and agrees that a civil penalty is warranted and is prepared to pay an appropriate sum to resolve the matter. A $104,000 penalty, however, is not justified by the facts of the case and is wholly inconsistent with other penalties assessed by DEQ. There is no reason that a small, one-room retail fish store that complied with DEQ reporting instructions and that caused no environmental harm should be required to pay a penalty greater than or even comparable to that assessed against a sophisticated, multibillion-dollar corporation

[15] *See* Attachment 2.

[16] This was the reported penalty assessment. Intel eventually paid a penalty of $28,600 and spent about $114,000 on a supplemental environmental project. E-mail from George Davis, DEQ, to Jeff Miller, Miller Nash Graham & Dunn LLP (Nov. 8, 2016).

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that discharged toxic air pollutants for 36 years without a permit.

SUGGESTED PENALTY

As DEQ admits, its penalty calculation rules are almost infinitely malleable and can be used to calculate whatever penalty is desired.[17] Bandon Pacific earlier proposed a penalty of $15,166 and provided sample calculations.[18] In the interest of settling the matter, Bandon Pacific now proposes that the EQC assess a penalty of $31,166, as calculated below using DEQ's own penalty calculation rules.

The civil penalty formula applicable to the violations in this case, under OAR 340-012-0045 is as follows: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$. Based on the calculations below, the total penalty that should be assessed against Bandon Pacific is $31,166.

A. Failure to Monitor Wastewater Discharges

The penalty for failure to monitor wastewater discharges is $18,166. This penalty reflects the following changes from DEQ's proposed penalty:

1. One penalty per year is assessed instead of one penalty per monitoring requirement violated per year.

2. The magnitude of the violations is minor, not moderate.

Penalty: $\$1,500 + [(0.1 \times \$1,500) \times (0 + 0 + 0 + 2 + 0)] = \$1,800$

$(\$1,800 \times 5) + \$9,166 = \$18,166$

B. Discharging Fish Carcasses Without a Permit

The penalty for discharging fish carcasses without a permit is $9,000. This penalty reflects the following changes from DEQ's proposed penalty:

The magnitude of the violations is minor, not moderate.

[17] (EQC Hearing Transcript at 17. (DEQ: "So [DEQ] was in a position where it could have assessed one penalty of somewhere $3,600 [sic] all the way up to 4,078 violations which would have resulted in a penalty of around $13 million.").)

[18] (Bandon Pacific's Exceptions at 6-7.)

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Penalty: $1,500 + [(0.1 × $1,500) × (0 + 0 + 0 + 2 + 0)] + 0 = $1,800

$1,800 × 5 + 0 = $9,000

C. Failure to Use a 40 Mesh Screen

The penalty for failure to use a 40 mesh screen is $4,500. This penalty reflects the following changes from DEQ's proposed penalty:

1. The magnitude of the violations is minor, not moderate.

2. No economic benefit, since there is no evidence in the record supporting the economic benefit calculation for this violation.

Penalty: $750 + [(0.1 × $750) × (0 + 0 + 0 + 2 + 0)] + 0 = $900

$900 × 5 + 0 = $4,500

ALTERNATIVE ORDER

Bandon Pacific proposes that DEQ issue the following order:

Bandon Pacific is ordered to pay civil penalties of $31,166.

CONCLUSION

For the foregoing reasons, Bandon Pacific respectfully requests that the EQC adopt Bandon Pacific's Exceptions and reduce the penalty against Bandon Pacific to $31,166.

DATED this 17th day of November, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that I filed the original of this Bandon Pacific's opening brief on remand on November 17, 2016, by messenger delivery in an envelope addressed to:

Ms. Stephanie Caldera, EQC Assistant
Oregon Department of Environmental Quality
700 N.E. Multnomah Street, Suite 600
Portland, Oregon 97232

and that on that same date I caused a true and correct copy of the foregoing to be delivered to the following party by the specified method:

VIA E-MAIL
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Environmental Law Specialist
Bachman.Jeff@deq.state.or.us
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Attachment 1

How Intel's $143,000 fluoride fine stacks up against DEQ's largest penalties

Construction on Intel's D1X fab in Hillsboro. *(Bruce Ely, The Oregonian)*

By **Katherine Driessen | The Oregonian/OregonLive**
Email the author | Follow on Twitter
on April 25, 2014 at 12:00 PM, updated April 25, 2014 at 12:02 PM

The Oregon Department of Environmental Quality's **$143,000 fine to Intel** for a fluoride reporting mistake is the third highest penalty the agency has issued for an air quality violation since 1998.

Across all DEQ departments, Intel's fine ranks as the 20th largest during that time frame, according to a DEQ spreadsheet.

Intel's fine came after it **surfaced last fall** that the company had failed to report its fluoride emissions and obtain the necessary permit at its Washington County operation. Thursday's fine also faults the company for operating without a needed permit at its Hillsboro D1X facility.

Here are the top five air quality fines since 1998 (and the **full list**):

1. **Eagle-Picher Minerals, Inc**: **$303,169** in 2002 for a violation in Vale where the company operated a mineral processing plant without a federal air pollution emission permit, called a Title 5 (the same permit Intel was seeking when the fluoride issue was dislcosed).
2. **Ash Grove Cement Company**: **$179,300** in 2005 for exceeding and failing to report carbon monoxide emission limits more than 100 times over two years in Durkee.
3. **Intel**: **$143,000** for failing to report its fluoride emissions, obtain a permit for those emissions and beginning construction at D1X without the correct permit.
4. **Cascade Kelly Holdings LLC, dba Columbia Pacific B**: **$117,292** in 2014 for operating a new crude oil transloading operation without an Air Contaminant Discharge Permit. The violation occurred at a Columbia Pacific Bio Reifnery facility in Clatskanie.
5. **Lynne Timmerman: $100,000** to the Pendleton resident in 2000 for lighting on fire a pile of creosote-treated railroad ties near Helix and then refusing to extinguish it, according to the state.

Here are the top five civil penalties issued across all DEQ departments since 1998 (**and a list of the top 50 violations**)

Item G 000052

1. **Gain Petroleum, Inc**: **$1.4 million** in 2002 for failing to investigate and clean up petroleum releases from underground storage tank systems at nine company owned or operated properties. This remains the record DEQ civil penalty assessed. But the final penalty the company paid was $118,901, according to DEQ records.

2. **Kinzua Resources, LLC and partners**: **$790,062** for failing to "provide financial assurance for closure and post-closure maintenance" at Pilot Rock Sawmill Wood Waste Landfill in Pilot Rock in 2013, according to DEQ.

3. **City of Portland: $606,800** for "violating state water quality standards by allowing numerous sewage discharges into Willamette River and several streams flowing into the Willamette." according to DEQ. The city eventually paid DEQ $117,320 after agreeing to fund four water quality and fish passage improvements worth more than $500,000. The fine was issued in 2005.

4. **Lehman Development; Lehman Hot Springs; John Patrick Lucas**: **$532,275** for wastewater violations at the now-closed Lehman Hot Springs Resort east of Ukiah in 2010. "Most of the violations have involved improper sewage storage and sewage discharges into Warm Spring Creek," according to DEQ.

5. **Caleb Siaw, M.D.**: **$373,580** for "violating order to repair failing onsite (septic) system at Forest Lake Resort mobile home park by failing to submit information required for permit" in 2001, according to DEQ.

More reading:

- **Intel will pay $143,000 penalty for fluoride violations in Hillsboro**
- **Intel's fluoride error: What the $143,000 DEQ fine means for D1X construction and emissions**

- Katherine Driessen

50 Largest penalties issued 1998 through 4/23/2014

CASE NAME	PRG	CASE NO.	ISSUED	PENALTY ASSESSED
CAIN PETROLEUM, INCORPORATED	WPM/T	2001-197	15-May-02	1428720
KINZUA RESOURCES, L.L.C. ET AL	LQ/SW	2011-108	12-Aug-13	790062
PORTLAND, CITY OF	WQ/M	2005-170	18-Nov-05	606800
LEHMAN DEVELOPMENT; LEHMAN HOT SPRINGS; LUCAS, JOH	WQ/D	2009-082	24-Jun-10	532275
SIAW, CALEB	WQ/D	1999-186	31-Jul-01	373580
EAGLE-PICHER MINERALS, INC.	AQ/V	2000-002	08-Apr-02	303169
MEDFORD WATER COMMISSION	WQ/M	2010-145	30-Nov-10	278794
GUNDERSON LLC AND GUNDERSON MARINE LLC	LQ/HW	2007-038	08-Aug-08	254362
FOREST LAKES RESORT, LLC	WQ/D	2009-131	06-Oct-09	246412
GRANITE CONSTRUCTION COMPANY (YAQUINA RIVER CONST)	WQ/SW	2006-260	29-Aug-07	240000
BANDON PACIFIC, INC.	WQ/I	2009-092	30-Nov-09	208554
WASHINGTON DEMILITARIZATION CO. (UMATILLA DEPOT)	LQ/HW	2006-278	22-Jun-07	206400
MASTEC NORTH AMERICA, INC	WQ/SW	2004-003	09-Aug-04	205658
MORSMAN, PHILLIP DEAN & BRIGITTE RENATE, DBA TOPS	WQ/D	2007-186	19-Dec-07	194842
PACIFIC COAST SEAFOODS COMPANY	WQ/I	2002-132	07-Jun-05	186432
TEMPLETON, BRAD	LQ/T	2001-280	08-May-02	186059
NATIONAL TECHNICAL SYSTEMS, INC	LQ/T	2002-167	17-Jan-03	183400
ASH GROVE CEMENT COMPANY	AQ/V	2004-110	15-Sep-05	179300
LUCKY SITES LLC	LQ/T	2002-182	15-Jan-03	177144
INTEL CORPORATION	AQ/AC	2014-027	23-Apr-14	143000
WESTERN RENEWABLE RESOUCES; WESTERN TRUCKING; DESL	LQ/SW	2008-180	26-Dec-08	134306
FUEL PROCESSORS, INC. AND BRIGGS, WILMER L.	WMC/HW	1999-230	03-Dec-99	133000
SUMCO OREGON, FORMERLY MITSUBISHI SILICON AMERICA	WQ/I	2000-075	23-Oct-00	124800
MID-WILLAMETTE PRE-CUT, INC.	LQ/HW	2004-066	15-Dec-04	120120
OIL RE-REFINING CO., INC. (FUEL PROCESSORS/BRIGGS)	LQ/HW	2009-036	10-Sep-09	120000
CASCADE HEALTHCARE COMMUNITY, INC., DBA ST. CHARLE	LQ/SW	2006-001	27-Jan-06	119361
CASCADE KELLY HOLDINGS LLC, dba COLUMBIA PACIFIC B	AQ/AC	2014-014	27-Mar-14	117292
FUEL PROCESSORS, INC. (BILL BRIGGS)	WMC/HW	1999-207	07-Mar-00	114000
WASHINGTON DEMILITARIZATION CO., (UMATILLA DEPOT)	LQ/HW	2009-172	01-Dec-09	111000
SUPER SITES LLC	LQ/T	2002-158	15-Jan-03	110239
SIMON, ANTHONY M., DBA KING SILVER RV PARK & MARI	WQ/D	2009-206	15-Jan-10	108324
BRANMAT, L.L.C.; BRANDT, WILLIAM D.; MATHEWS, LARR	WQ/D	2002-147	22-Aug-03	108133
DENMAN, KARIN MARIE & TRUDEL, KATHY LOUISE	WQ/D	2012-038	23-May-12	105476
CADLE PROPERTIES OF OREGON, INC.	LQ/T	2002-058	23-May-02	105136
FRED MEYER, INC.	WPM/T	2001-046	10-Jul-01	104572
SIDHU, BUDH SINGH & KAUR, KARAMJIT	LQ/LUST	2011-200	27-Dec-11	102875
RSG FOREST PRODUCTS	WQ/I	2005-048	16-Nov-05	101873
HANDY ANDY'S AUTO REPAIR, INC., ANDEREGG, ET AL	WMC/T	1998-236	08-Apr-99	101352
TIMMERMANN, LYNNE	AQ/OB	1999-206	10-May-00	100000
SMURFIT NEWSPRINT COMPANY	WQ/I	2000-068	27-Jun-00	96280
CERTIFIED COATINGS OF CALIFORNIA, INCORPORATED	LQ/HW	2001-229	10-Feb-03	95563
MANN, GURBAND SINGH, dba MONITOR MARKET & DELI	LQ/LUST	2011-207	27-Dec-11	95473
YUMYUNG CORPORATION	WQ/D	2010-077	03-Jun-10	94283
MEDURI FARMS, INC.	WQ/I	2001-097	06-Jun-01	92838
WASHINGTON DEMILITARIZATION CO (UMATILLA CHEM FAC)	LQ/HW	2003-181	05-May-04	92400

50 Largest penalties issued 1998 through 4/23/2014

PRG MGR FOR ELIM. CHEM WEAPONS (UMATILLA CHEM)	LQ/HW	2003-182	05-May-04	92400
WILSON, CHARLES PATRICK (CASCADE MOBILE HOME PARK)	WQ/D	2009-099	24-Jul-09	90186
OREGON DEPARMENT OF TRANSPORTATION (ODOT)	WQ/SW	2006-259	04-May-07	90000
PORT OF ASTORIA	WQ/M	2005-118	09-Feb-06	89400
EASL PROPERTIES LLC, dba BELLE PASSI ESTATES	WQ/D	2012-053	21-Jun-12	88632

Attachment 2

News Release

For release: May 22, 2002

Contacts:
Susan Greco, Compliance & Enforcement, Portland, (503) 229-5152
Nina DeConcini, Communications & Outreach Manager, Portland, (503) 229-6271
Brian White, Communications & Outreach, Portland, (503) 229-6044

State of Oregon
Department of Environmental Quality

Communications & Outreach
811 SW 6th Avenue
Portland, OR 97204
Phone: (503) 229-5696
(800) 452-4011
Fax: (503) 229-6762

DEQ is a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water.

DEQ Fines Service Station Owner/Operator $1.43 Million For Soil and Groundwater Contamination in Portland Area

Nine sites in the Portland area remain contaminated due to lack of site investigation and cleanup efforts by Cain Petroleum

The Oregon Department of Environmental Quality (DEQ) has levied a total of $1,428,720 in civil penalties to Cain Petroleum Inc., Forest Grove, for failure to investigate and clean up petroleum releases from underground storage tank systems at nine properties Cain Petroleum owned or operated in Washington and Multnomah counties.

Cain Petroleum is responsible for the investigation and cleanup at each of the nine properties because it managed the underground storage tank systems at the time of the releases, which occurred over the past several years. The $1.43 million penalty amount represents the combined total of penalties issued at the nine properties. The penalty is the largest ever issued by DEQ.

Some of the releases were reported to DEQ as early as 1989. Officials from DEQ's Office of Compliance and Enforcement said that Cain Petroleum did not investigate or initiate cleanup of the releases as the Department had requested. Most of the contaminated properties are currently operating as gas stations.

"Over the years... Cain has repeatedly ignored requests from the Department to complete required (cleanup) actions at these properties, including actions that Cain itself indicated were of highest priority for completion", DEQ Director Stephanie Hallock wrote in a May 15 letter notifying Cain Petroleum of the penalty.

Although the extent of the contamination varies at the nine properties located in Portland, Beaverton, Hillsboro and Tigard, gasoline and diesel fuel has seeped into soil and/or groundwater at

the sites, creating public health hazards.

DEQ is particularly concerned about two properties where liquid petroleum is floating on groundwater. These properties are a gas station operating at 833 SE Baseline Road in Hillsboro, and Cain Petroleum's bulk petroleum plant at 2624 Pacific Ave. in Forest Grove. The presence of "free product" floating on groundwater has the potential to contaminate drinking water and surface waters. It can also generate vapors that can migrate into utility corridors, buildings and other enclosed spaces, creating explosion hazards and respiratory problems for workers and building occupants.

In addition, most of the nine properties have levels of benzene exceeding those established for the protection of human health and safety. Benzene, a constituent of gasoline, is a known carcinogen. Exposure to benzene via inhalation, skin or eye contact can cause upper respiratory tract irritation or eye irritation. Long-term exposure is known to cause a variety of health problems, including various types of cancer.

Vapor extraction and groundwater cleanup systems that remove petroleum contamination must be installed at the Baseline Road and bulk plant properties to protect public health and safety, DEQ officials said. The majority of the $1.43 million penalty ($1,138,976) is based on the economic benefit Cain Petroleum gained by avoiding the costs of installing and operating treatment systems at these two properties.

The properties covered by the enforcement action include:

- **833 SE Baseline Road, Hillsboro** (a currently operating gas station)
- **2624 Pacific Ave., Forest Grove** (Cain Petroleum bulk plant)
- **2339 Pacific Ave., Forest Grove** (a currently operating gas station)
- **12475 SW Canyon Road, Beaverton** (a former gas station site)
- **8710 SW Hall Boulevard, Beaverton** (a currently operating gas station)
- **7550 SW Beaverton-Hillsdale Highway, Portland** (former gas station site)
- **9 SE 82nd Ave., Portland** (a currently operating gas station)
- **3520 SW Cedar Hills Boulevard, Beaverton** (a currently operating gas station)
- **13970 SW Pacific Highway, Tigard** (a currently operating gas station)

Since the releases were reported to DEQ, Cain Petroleum has repeatedly ignored requests to complete the required investigation and cleanup at the nine properties. In May 2001, DEQ issued the

company a Notice of Noncompliance outlining all the violations and providing timelines for correcting the violations. Some of those violations have still not been corrected.

In addition to the penalty, DEQ has issued an order requiring Cain Petroleum to complete site investigations to determine the nature, magnitude and extent of groundwater and soil contamination at the sites, including quarterly groundwater monitoring. Cain Petroleum must also install and operate petroleum removal, groundwater treatment and vapor extraction systems at the Baseline Road and bulk plant properties within 30 days of the order.

Cain Petroleum has 20 days from the date of receiving the penalty to either pay the penalty or appeal.

Attachment 3

Intel will pay $143,000 penalty for fluoride violations in Hillsboro

Intel opened a new Hillsboro factory last year, called D1X, and is in the process of building a second phase at its Ronler Acres campus. *(Oregonian photo)*

By **The Oregonian/OregonLive**
Follow on Twitter
on April 24, 2014 at 2:32 PM, updated April 28, 2014 at 10:56 AM

By Mike Rogoway & Katherine Driessen | The Oregonian

Intel will pay $143,000 – one of the largest air-quality penalties in Oregon history – for violating environmental laws by failing to disclose fluoride emissions at its Washington County computer-chip factories.

The company's deal with the Oregon Department of Environmental Quality outlines additional steps Intel must take to correct its lapse, **first reported last fall**. But it doesn't stop production or shut down construction, and it opens to door for the company to win air-quality permits for a new, multibillion-dollar factory called D1X.

"We're prepared to pay the fine and implement the corrective actions outlined" in the agreement, Intel Oregon spokeswoman Chelsea Hossaini said Thursday afternoon.

Intel still needs a separate agreement with Neighbors for Clean Air, an environmental watchdog that had threatened to sue the company over the fluoride failure. And it's pursuing a "Good Neighbor Agreement" with that organization and nearby residents that would implement additional air-quality monitoring around Intel's Ronler Acres manufacturing and research campus in Hillsboro.

Neighbors for Clean Air attorney John Krallman said he thinks Thursday's agreement is an important acknowledgement of not only Intel's flub, but also DEQ's mistake. Initially, DEQ planned to move forward with an air-quality permit for Intel despite the fluoride admission.

Mentor Graphics' sale ends an era in the Silicon Forest

Mentor Graphics sells to Siemens for $4.5 billion

Moovel, Daimler's urban transportation subsidiary, will close Austin office and move jobs to Portland

Lake Oswego votes against city-backed internet service

Qorvo shares plunge on manufacturing problems linked to iPhone 7

All Stories

Item Q 000059

"DEQ has realized the mistake they made in rushing forward," Krallman said. "What they're asking of Intel is fair."

The fluoride issue has been a major public embarrassment to Intel in Oregon, but the fine will have negligible impact for a company that reported profits of $9.6 billion in 2013.

Intel acknowledged that it had failed to report fluoride emissions at its Oregon factories, a disclosure that is required under the state's environmental laws. State regulators and the company said fluoride emissions were within safe levels, but the lapse threw Intel's permitting status into confusion.

After at least seven months of talks, Thursday's agreement outlines several steps – in addition to the penalty – that Intel will have to take. These include:

• Submitting a new permit application by the end of the year;

• Disclosing fluoride emissions on a public website;

• Testing and measuring emissions to support its permit application.

The DEQ said it will take at least two years to complete Intel's permitting process, a period that includes time for public review and comment. The state will hold a public meeting sometime in May to discuss Thursday's agreement and what happens next.

DEQ permit writer George Davis said Intel will be paying a "relatively high fine," particularly for an air-quality violation. In the fall, the agency initially said Intel's omission was likely not a violation.

But Davis said DEQ reviewed the fluoride issue and realized there were three violations: the company did not disclose its fluoride emissions; it did not obtain a permit for those emissions; and it did not obtain the correct approval to begin construction on D1X.

"We concluded I was wrong about saying there was no violation," Davis said.

Neighbors had mixed reactions to the deal, with some saying they were glad to see Intel agree to a fine and more monitoring, but lamenting that the agreement doesn't establish stricter limits or oversight.

Anne Ferguson, who can see Intel's Ronler Acres factories from her home at Orenco Station, said she's excited there's an agreement but that she believes the overall level of air quality is too low.

"I don't think it's a big enough fine, but I don't want to get vindictive," Ferguson said. "I want to focus on the doughnut, and not the hole."

John Williams, who lives a little more than two miles east of Ronler Acres, said the agreement fails to spell out how DEQ settled on the size of Intel's penalty, and doesn't make clear how greenhouse gasses and other pollutants will be monitored.

Intel provides a huge economic boost for Oregon, Williams said, but the state needs to do a better job enforcing its environmental rules and the company needs to be more vigilant about its impact on the community.

"I think Intel could do more," he said. "I think they may be coming to the realization that they're not a power unto themselves."

Note: This article has been updated with additional comment from DEQ and Intel's neighbors.

More reading: What the $143,000 Intel fine means for D1X construction and emissions

- Mike Rogoway and Katherine Driessen

Oregon
Kate Brown, Governor

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November 17, 2016

By Personnel Delivery

Oregon Environmental Quality Commission
c/o Stephanie Caldera
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Portland, OR 97232

CERTIFIED MAIL 7014 2870 0001 3373 5647

Suzanne Lacampagne
Miller Nash LLP
111 SW Fifth Avenue, Suite 3400
Portland, OR 97204

Re: In the Matter of:
Bandon-Pacific, Inc.
OAH Case No. 1001950
DEQ Case No. WQ/I-WR-09-092

Dear Ms. Clark and Ms. Lacampagne:

Please find enclosed the Department of Environmental Quality's Brief on Remand in the referenced case.

Please call me at (503) 229-5950 if you have questions.

Sincerely,

Jeff Bachman
Office of Compliance and Enforcement

Enclosure

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: BANDON PACIFIC, INC. Respondent.	BRIEF ON REMAND No. WQ/I-WR-09-092 OAH Case No. 1001950

INTRODUCTION

Procedural History

On November 17, 2011, the Oregon Environmental Quality Commission (EQC) adopted as final an administrative law judge's order assessing Bandon Pacific, Inc., a $200,266 civil penalty for violations of Oregon water quality law. Bandon Pacific appealed the EQC's order to the Oregon Court of Appeals. On October 14, 2015, the Court of Appeals issued an order remanding the case to the EQC for reconsideration of the question of whether the violations at issue should have been assigned a magnitude of minor instead of moderate in the calculations that resulted in the $200,266 civil penalty amount. EQC must now issue an order either 1) reducing the magnitude to minor and assessing a penalty of $104,716, or 2) providing substantial reason for finding the penalized violations were of moderate magnitude as a basis for assessing a penalty of $200,266. The Department of Environmental Quality (DEQ) requests that the EQC issue a new order affirming the magnitude as moderate for the reasons set forth below.

Facts and Violations

On remand, the facts and violations in this case, as found in the EQC's order, are not in dispute. From 2004 through 2008, Bandon Pacific operated a fish-processing facility in Bandon, Oregon, pursuant to a wastewater discharge permit issued by DEQ. The permit authorized Bandon Pacific to discharge wastewater from its processing operation to the Coquille River if it complied with the conditions of the permit. Among the permit's conditions were requirements that Bandon Pacific monitor its wastewater and report the results of that monitoring to DEQ in a monthly Discharge Monitoring Report (DMR). The permit also required Bandon Pacific to pass its

wastewater through a 40 mesh screen (a screen with 40 holes per square inch) to remove pollutants prior to discharge to waters of the state.

For every month, January 2004 through December 2008, Bandon Pacific submitted DMRs stating "No Production" on the reporting form. On December 3, 2008, Bandon Pacific informed DEQ that although it had been writing "No Production" on its DMRs for January 2004 through December 2008, it had in fact been processing seafood at is facility during that period. At DEQ's request, Bandon Pacific submitted corrected DMRs on April 8, 2009.

The corrected DMRs indicated that on 915 days between January 1, 2004 and December 30, 2008 Bandon Pacific processed seafood at its facility. Bandon Pacific did not comply with any monitoring requirements during this period, committing 2,248 distinct violations of its permit. Bandon Pacific also violated its permit and ORS 468B.025(2) on each of the 915 occasions when it processed fish between January 1, 2004 through December 30, 2008 because it discharged wastewater to the Coquille River without passing it through a 40 mesh screen.

ORS 468B.050(1)(a) prohibits the discharge of wastes to the waters of the state unless that discharge is authorized by a permit. On the 915 occasions it processed fish between January 1, 2004 and December 30, 2008, Bandon Pacific violated ORS 468B.050(1)(a) by dumping fish carcasses in the Coquille River without permit authorization. In all, Bandon Pacific committed 4,078 violations of Oregon water quality law during the five year period, 3,163 violations of the monitoring and screening requirements of the permit and 915 violations of 468B.050(1)(a) when it dumped carcasses into the Coquille River.

On November 30, 2009, DEQ issued a notice of violation to Bandon Pacific for 56 occurrences of these violations and assessed a civil penalty of $200,266. As part of the penalty assessment for the violations, DEQ alleged that the magnitude of the violations was "moderate." After a hearing on February 23, 2010, ALJ John Mann issued a proposed order finding Bandon Pacific liable for the violations cited in DEQ's notice and upholding the proposed penalty assessment, including the finding of moderate magnitude The EQC affirmed the ALJ's proposed order upholding penalties for 56 occurrences of these violations to arrive at the total penalty of

$200,266. Bandon Pacific appealed that order to the Court of Appeals, which largely upheld the EQC order, but found that the order did not provide substantial reason for the moderate magnitude finding. The court remanded the order to the EQC for further action on that issue.

Magnitude of Violation

The procedure for calculating DEQ civil penalties is set forth in OAR 340-012-0045. The first step in calculating a penalty is to determine the "base penalty" by assigning the appropriate classification and magnitude to the violation. The process for assigning magnitude is set forth in OAR 340-012-0130(1)[1], which states: "For each civil penalty assessed, the magnitude is moderate unless: (a) A selected magnitude is specified in 340-012-0135 and information is reasonably available to the department to determine the application of that selected magnitude; or (b) The department determines, using information reasonably available to it, that the magnitude should be major under section (3) or minor under section (4)." The EQC originally upheld DEQ's determination that the magnitude of the violations in this matter was moderate because there was no applicable selected magnitude nor was there sufficient information reasonably available to determine that the magnitude was major or minor.

In the Court of Appeals, Bandon Pacific argued that the violations should have been assigned a magnitude of minor pursuant to OAR 340-012-0130(2), which states:

> "If the department determines, using information reasonably available to the department, that a general or selected magnitude applies, the department's determination is the presumed magnitude of the violation, *but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude.*"

Bandon Pacific relied on testimony provided by one of its witnesses that its discharges caused no more than de minimis actual environmental harm to the Coquille River. In its written opinion, the Court of Appeals found that the EQC did not adequately explain why the magnitude of the

///

[1] The version of OAR 340-012-0130 applicable in this case is that in effect in 2009 when the penalty was issued by DEQ. The EQC revised OAR 340-012-0130 in 2014.

violations should not be reduced to minor given Bandon Pacific's unrebutted evidence of lack of actual environmental harm. 399 Or App 355 (2015).

DISCUSSION

Moderate is the appropriate magnitude to be assigned the Bandon Pacific violations. The record supports that these violations posed more than a de minimis risk of harm to human health and/or environmental receptors, because of the extended duration of the violations and the extreme deviation from the conduct required by law. To address the Court of Appeals concerns, the EQC must adopt a new order explaining why Bandon Pacific's violations posed an environmental risk despite the lack of actual harm to the Coquille River.

The Appropriate Magnitude of the Bandon Pacific Violations is Moderate

To assign a magnitude of minor the EQC would have to find that the violation "had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors." OAR 340-012-0130(4). To warrant a magnitude of minor, Bandon Pacific's violations must not only have caused no harm, the violations must also have posed no threat of harm. DEQ has never argued that Bandon Pacific violations caused harm, but it is clear *that they posed a threat of harm* and moderate is therefore the appropriate magnitude.

"De minimis" is defined as "trifling" or "minimal." *Blacks Law Dictionary* 443 (7th edition 1999). In making a determination as to whether a violation caused or posed a threat of more than de minimis harm, DEQ is required to "...consider all reasonably available information, including, but not limited to: *the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders*; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; *and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.*" OAR 340-012-0130(4) (emphasis added).

OAR 340-012-0130(4) establishes several criteria for determining whether a violation is of minor magnitude, and any single factor may be conclusive. In this case, two factors are conclusive

in determining that Bandon Pacific's violations were not of minor magnitude: the degree of deviation from permit requirements and the duration of the violations. If Bandon Pacific had simply violated the monitoring or screening requirements on one or two occasions, a minor magnitude may have been appropriate. Bandon Pacific, however, failed to comply with a single substantive requirement of the permit for a period of *five years*, committing 3,163 permit violations during that period. Bandon Pacific also violated the statutory prohibition against unauthorized discharge of waste to waters of the state on 915 occasions during that five-year period by dumping fish carcasses into the Coquille River.

The regulatory system that protects water quality in Oregon is largely dependent on complete and accurate reporting by permittees. DEQ and the public need this information to determine whether permittees are harming water quality by violating their permit limits. Accurate monitoring also provides DEQ and stakeholders with the information they need to make well-informed decisions. Without monitoring data, DEQ and the public are blind. The importance of the permit monitoring requirements are particularly emphasized by the certification statement a permittee is required to sign on each DMR, which states that the permittee is "aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment." Bandon Pacific's cavalier disregard for its monitoring and screening obligations, to the tune of 3,163 violations for five years corrodes respect for the law and undermines the integrity of the system that protects Oregon waters. The extent and duration of Bandon Pacific's monitoring violations constituted a gross deviation from permit requirements and, as such, posed a threat of more than de minimis harm to the environment.

The same is true for Bandon Pacific's failure to pass its wastewater through a 40 mesh screen prior to discharge and its unpermitted disposal of fish carcasses into the Coquille River over the same period. At no time during the five-year period, did Bandon Pacific attempt to comply with *any* of the requirements for disposal of its wastewater and fish wastes.

Bandon's flagrant flouting of the law is not a trivial or minimal concern in maintaining respect for and promoting compliance with Oregon's regimen for protecting water quality. A

finding of minor magnitude would send a dangerous message regarding the importance of compliance to water quality permittees and others subject to environmental regulation.

The EQC Must Make a Reasoned Explanation Why the Magnitude is Moderate after Taking into Account all Reasonably Available Information

The Court of Appeals found that the EQC failed to offer a reasoned explanation as to why Bandon Pacific's evidence failed to rebut the presumption of moderate magnitude. 399 Or App 355, 364 (2015). In DEQ's opinion, the administrative law judge's order, adopted by the EQC, failed to explain the importance of consistent compliance with the regulatory scheme as a basis for not reducing the magnitude to minor in response to Bandon Pacific's evidence. Instead, the administrative law judge found Bandon Pacific's evidence unpersuasive because of 1) the lack of monitoring data, which he concluded made it impossible to determine actual environmental impact, and 2) the difficulty in determining the environmental impact of violations that occurred as much as five years prior.

DEQ, however, does not argue the magnitude should be moderate because it is difficult or impossible to ascertain whether Bandon Pacific's violations had an actual adverse impact on the Coquille River, because even if there was no actual harm to the river, that is insufficient to make a finding of minor magnitude. Per OAR 340-012-0130(4), a finding of de minimis harm is only halfway to minor magnitude. The violation must also pose no more than a de minimis threat of environmental harm.

To address the concerns raised by the Court of Appeals in its written opinion, the EQC should acknowledge that the reasonably available information indicates that Bandon Pacific's violations caused no more than de minimis adverse environmental impacts, but that minor magnitude is not warranted because of the threat of more than de minimis harm, as detailed above, resulting from those violations. While OAR 340-012-0130(4) sets forth several criteria to be considered in making a determination of minor, it does not rank those criteria. On the contrary, the rule states that in making the determination DEQ may find any single factor to be conclusive. EQC may find that a minor magnitude is not supported despite the evidence of no actual harm because

the duration of Bandon Pacific's violations and/or because the degree of deviation from required conduct posed more than a de minimis threat of adverse impact.

CONCLUSION

DEQ requests that the EQC issue an order affirming that the magnitude of the violations was moderate pursuant to OAR 340-012-0130 and assessing Bandon Pacific a civil penalty of $200,266 as calculated in its order of November 17, 2011. The EQC should explain in its order that Bandon Pacific failed to rebut the presumption of moderate magnitude, despite Bandon Pacific's evidence as to actual environmental harm. Furthermore, the EQC should explain when considering all reasonably available information, including Bandon Pacific's evidence, the magnitude is not minor because the duration of the violations and the degree of deviation from legal requirements undermine the integrity of the regulatory program and therefore posed a risk of more than de minimis adverse environmental impact.

DATED this 17th day of November 2016.

Respectfully submitted,

Jeff Bachman,
Environmental Law Specialist
Oregon Department of Environmental Quality

Gary L. Vrooman, #075832
Assistant Attorney General
Attorney for Oregon Department of Environmental Quality

BY EMAIL

Nov. 8, 2016

Suzanne C. Lacampagne
Attorneys for Bandon Pacific, Inc.
Miller Nash LLP
3400 U.S. Bancorp Tower
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Portland, OR 97204
Emailed to Suzanne.Lacampagne@MillerNash.com

Re: In the Matter of Bandon Pacific, Inc.
OAH Case No. 1001950
DEQ Case No. WQ/I-WR-09-092

The Environmental Quality Commission received your request for an extension Nov. 8, 2016. Your request was filed in a timely manner. As noted over email correspondence, DEQ does not object to your request of a one week extension, and your request is granted.

As per the previous agreement, this will be a simultaneous briefing process; therefore, materials from both parties must be received no later than 5 p.m. Nov. 17, 2016. Please provide one copy to Stephanie Caldera at 700 NE Multnomah Street, suite 600, Portland, Oregon 97232, with a copy to the other party's counsel.

If you have any questions about this process please call me at 503-229-5301.

Sincerely,
Stephanie Caldera
EQC assistant

Cc: BY HAND DELIVERY AND EMAIL – Jeff Bachman, Oregon Department of Environmental Quality

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

BY U.S. POSTAL MAIL

Oct. 11, 2016

Suzanne C. Lacampagne
Attorney for Bandon Pacific, Inc.
Miller Nash LLP
3400 U.S. Bancorp Tower
111 SW 5th Ave.
Portland, OR 97204

Re: In the Matter of Bandon Pacific, Inc.
OAH Case No. 1001950
DEQ Case No. WQ/I-WR-09-092

This matter was remanded to the Environmental Quality Commission for reconsideration. Per conversations among the parties, a briefing schedule for the reconsideration has been determined and is as follows:

- Briefs to be filed simultaneously within 30 days of this letter
- Simultaneous replies following those briefs by no more than 15 days

According to that schedule, the briefs in this matter are due no later than 5 p.m. on Thursday, Nov. 10, 2016. Please provide all materials to Stephanie Caldera, EQC assistant, at 700 NE Multnomah St., Suite #600, Portland, OR 97232. Please also provide a copy of all submitted materials to the opposing party in this matter.

Please note this is a new office location and address. If you intend to provide materials prior to Nov. 4, 2016, please contact me by email for the best address. My email address is Caldera.Stephanie@deq.state.or.us. You may also call me at 503-229-5301.

Sincerely,

Stephanie Caldera

Enclosed: Appellate court remand

Cc: BY HAND DELIVERY – Jeff Bachman, Oregon Department of Environmental Quality

811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BANDON PACIFIC, INC.,
Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

Office of Administrative Hearings
1001950

A150445

APPELLATE JUDGMENT

Argued and submitted on September 17, 2014.

Bruce L. Campbell argued the cause for petitioner.

Inge Wells, Assistant Attorney General, argued the cause for respondent.

Before DeVore, Presiding Judge; Ortega, Judge; and Garrett, Judge.

Reversed and remanded for reconsideration.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioner

[X] No costs allowed.

Appellate Judgment
Effective Date: October 14, 2015

COURT OF APPEALS
(seal)

fmc

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BANDON PACIFIC, INC.,

Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,

Respondent.

Department of Environmental Quality
DEQ Case No. WQ/I-WR-09-092
OAH Case No. 1001950

CA A150445

PETITIONER'S OPENING BRIEF

Appeal from an Order of the Environmental Quality Commission

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STATEMENT OF THE CASE

I. Nature of the Action or Proceeding.

This is an appeal from a November 17, 2011, order by the Environmental Quality Commission (the "EQC") to uphold a $200,266 penalty against Bandon Pacific, Inc. ("Bandon Pacific"). The Department of Environmental Quality ("DEQ") imposed the penalty for failure to monitor wastewater discharges, as required by the terms of Bandon Pacific's 900-J National Pollution Discharge Elimination System ("NPDES") permit, in violation of ORS 268B.025(2); for discharging waste into the waters of the state without a permit, in violation of ORS 468B.050(1)(a); and for failing to pass wastewater discharges through a 40 mesh screen, as required by the terms of Bandon Pacific's NPDES permit, in violation of ORS 468B.025(2). The relevant time period for the alleged violations was January 2004 through December 2008.

DEQ issued the original Notice of Civil Penalty Assessment and Order ("Notice of Civil Penalty") for the violations on November 30, 2009, in the amount of $208,554. On December 18, 2009, Bandon Pacific requested a contested case hearing, pursuant to OAR 340-011-0530. A contested case hearing was held on February 23, 2011, conducted by Administrative Law Judge John Mann (the "ALJ"). The ALJ issued a final order on June 1, 2011, which upheld the Notice of Civil Penalty, but reduced the penalty amount to $200,266. Bandon Pacific appealed the ALJ's final order to the EQC on June 30, 2011.

II. Nature of Judgment Sought to be Reviewed.

Bandon Pacific appeals from a November 17, 2011, EQC contested case hearing order (the "EQC Order") upholding a $200,266 penalty against Bandon Pacific for violations of an NPDES permit and state law.

III. Statutory Basis of Appellate Jurisdiction.

The court has jurisdiction over this appeal pursuant to ORS 183.482, which vests in the court of appeals jurisdiction to review final agency orders. ORS 183.482(1) requires that a petition for review be filed with the court of appeals within 60 days of the date the petitioning party has been served with the agency order. Bandon Pacific was served with the agency order on November 18, 2011, and Bandon Pacific appealed that order to the court of appeals on January 5, 2012, 48 days after it had been served.

IV. Nature and Jurisdictional Basis of Action of Agency.

The nature of the EQC Order being appealed here is a contested case hearing order stemming from a Notice of Civil Penalty for NPDES permit and state law violations. The EQC had authority to issue the Notice of Civil Penalty pursuant to ORS 468.100.

V. Questions Presented on Appeal.

1. The Notice of Civil Penalty expressly states that it did not penalize Bandon Pacific for any Class II wastewater monitoring violations. Nevertheless, the penalty imposed against Bandon Pacific necessarily includes Class II violations as well as Class I violations. Did the EQC erroneously penalize Bandon Pacific for violations that were not part of the Notice of Civil Penalty?

2. The Notice of Civil Penalty included penalties for January 2004 through December 2006, even though ORS 12.110(2) imposes a two-year statute of limitations on actions seeking penalties, and those years fall outside that two-year limitation. Did the EQC misinterpret state law when it determined that ORS 12.110(2) does not impose a time limitation on administrative actions seeking penalties?

3. OAR 340-012-0130 contains a rebuttable presumption that the magnitude of a civil penalty is moderate unless it can be shown that the

magnitude meets the criteria for being classified as minor. Did Bandon Pacific submit substantial evidence into the record to demonstrate that the magnitude of the violations for which Bandon Pacific was penalized were minor rather than moderate, and, if so, did DEQ fail to rebut that evidence to maintain a magnitude of moderate?

4. Oregon law recognizes corporations as separate legal entities and corporate form is not disregarded unless exceptional circumstances exist. Did DEQ impermissibly disregard corporate form and violate state and federal law by inflating the civil penalty against Bandon Pacific because Bandon Pacific is a wholly-owned subsidiary of Pacific Seafood Group?

VI. Summary of Answering Arguments.

1. DEQ improperly penalized Bandon Pacific for 16 Class II violations that were not part of the Notice of Civil Penalty. DEQ's explanations before the ALJ and the EQC of how it calculated the Notice of Civil Penalty are not consistent with the language of the Notice of Civil Penalty itself, or with the explanation that DEQ gave Bandon Pacific before Bandon Pacific appealed the Notice of Civil Penalty.

2. The EQC misinterpreted state law when it concluded that ORS 12.110(2) does not impose a time limitation on administrative actions seeking penalties, even though an examination of the statutory provision's text-in-context and caselaw direct otherwise.

3. Bandon Pacific met the rebuttable presumption set forth by OAR 340-012-0130 and demonstrated by substantial evidence that its violations were minor in magnitude and not moderate. The EQC erred in concluding that the evidence supported a finding of moderate magnitude.

4. DEQ impermissibly disregarded corporate form and violated state and federal law by inflating the civil penalty against Bandon Pacific based on

Bandon Pacific's relationship with Pacific Seafood Group, which is a separate corporation.

VII. Summary of Facts.

Various entities owned and operated a seafood processing facility at 250 First Street in Bandon, Oregon (the "Bandon Site") from approximately 1979 through 1999. Transcript of February 23, 2011, Contested Case Hearing with ALJ ("CCH Tr") at 87-89. Bandon Pacific purchased the facility in 1999. CCH Tr at 97. The processing facility that existed during that time had several large processing lines, mainly for shrimp, crab, and black cod. Record of Proceedings ("Rec") at 55. In 1998, for example, the facility at the Bandon Site processed approximately 1.6 million pounds of seafood. *Id.* At its peak, it processed between 4 and 5 million pounds of seafood and employed up to 100 people. CCH Tr at 85-87.

In approximately 1989 or 1990, the processing facility added a retail-only store. Rec at 55. The store was operated in conjunction with and sold products generated by the processing facility. *Id.* The store also purchased products from other suppliers, and filleted, washed, and repacked some of those purchased products before selling them to the public. *Id.* The processing facility was always covered by a 900-J Permit, which is a general waste discharge permit for seafood processing facilities. *Id.*

In approximately 1999, the seafood processing portion of the Bandon Pacific facility was shut down. Only the small, one-room store remained. Rec at 186. The store processed some seafood, but only what was necessary to serve its retail customers. *Id.* Between 2004 and 2008, the facility processed approximately 46,000 to 59,000 pounds of seafood per year, about one percent of what was processed before the processing lines were shut down, with approximately 99 percent of that seafood being sold to the public. Rec

at 186; CCH Tr at 91; Petitioner Exhibits in Proceedings Below ("Pet Ex") at R-4.[1] The store employed approximately six people. Rec at 185.

At all times between 1979 and 2010, the Bandon Site was leased from the Port of Bandon under a 100-year lease. CCH Tr at 106, 133-134. In 2010, the Port of Bandon bought out the remainder of the lease in settlement of litigation, and all processing and retail operations at the Bandon Site ceased. CCH Tr at 108.

From 2004 through 2008, the period covered by the Notice of Civil Penalty, Bandon Pacific processed the seafood associated with the retail store in the back of the store. Most of the seafood processed at the store was bottomfish. Rec at 221; Pet Ex at R-4. Wastewater from cleaning the fish emptied into a square drain on the floor. Rec at 221. At all times during the operation of the retail store, there was at least one stainless steel screen on top of the drain in the floor to capture solids. CCH Tr at 100. At some point after the Bandon Site became retail only, a second screen was installed below the first one to catch additional solids. *Id.* Bandon Pacific employees regularly removed the solids from the screens and placed them in a large plastic bin with fish carcasses and other discarded pieces of fish for disposal. CCH Tr at 101-102. Employees then emptied the bin onto a concrete chute that emptied into the Coquille River. *Id.* Occasionally, some of the fish carcasses would catch on rocks before reaching the water. *Id.* Those carcasses were usually carried away during high tides or were consumed by birds or sea lions. CCH Tr at 102-103. The Bandon Pacific employees stopped disposing of the solids in this manner in 2008 when DEQ instructed Bandon Pacific to no longer do so. CCH Tr at 44-45.

[1] In the proceedings below, Petitioner Exhibits were listed as R-1 through R-51.

The Bandon Pacific facility was covered by an NPDES permit from August 1999 through May 2004. Respondent Exhibits in Proceedings Below ("Resp Ex") at A-118.[2] That permit, by its terms, expired on May 31, 2004. Because Bandon Pacific applied for a renewal, however, the permit extended until September 2006 when DEQ issued a revised 900-J permit. CCH Tr at 38. DEQ renewed Bandon Pacific's coverage under the revised 900-J permit on September 5, 2006. That coverage extended through May 2011. Resp Ex at A-119. Both permits required Bandon Pacific to process wastewater through a screen of not less than 40 mesh.[3] Both permits allowed Bandon Pacific to discharge "seafood processing residuals" as part of DEQ's Fisheries Enhancement Program, but only with prior DEQ approval. Resp Ex at A-118 at 3-4, and at A-119 at 4, 6. Bandon Pacific did not obtain DEQ approval to participate in the Fisheries Enhancement Program. CCH Tr at 45.

From at least 2001 through December 2008, after passing through one or more floor screens, wastewater from the facility's drain emptied into a sump, and from there drained into the Coquille River. CCH Tr at 103-104. There is no evidence that the floor screens, either alone or together, met the 40-mesh screen requirement under the NPDES permits. In February 2009, Bandon Pacific installed a mesh hydrosieve screen that met or exceeded the permit requirement to catch solids. Pet Ex at R-15 at 4. Bandon Pacific

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[2] In the proceedings below, Respondent Exhibits were listed as A-1 through A-124.

[3] "Mesh" refers to the number of openings per square inch on the screen. When a screen has a higher mesh count, each hole is normally smaller than would be the case with a lower mesh screen. When the mesh is higher, fewer solids can pass through the screen. Thus, a screen with 20 mesh would screen out fewer solids than would one with 40 mesh. A 120-mesh screen would filter out more solids than would a 40 mesh screen. The NPDES permits required a screen of not less than 40 mesh, and would have allowed a screen with a higher mesh. Rec at 220 n.1.

removed the hydrosieve in April 2009, when it connected the drain to the city sewer system. Pet Ex at R-19 and R-20.

The August 1999 NPDES permit required Bandon Pacific to monitor the following eight parameters of its discharge at varying frequencies: total suspended solids, biochemical oxygen demand, oil and grease, pH levels, effluent flow, raw product processed, waste solids generated, and waste solids disposed. Resp Ex at A-118 at 4. The September 2006 NPDES permit required Bandon Pacific to monitor the following ten parameters of its discharge at varying frequencies: total suspended solids, biochemical oxygen demand, oil and grease, pH levels, effluent flow, fecal coliform bacteria, e-coli, raw product processed, waste solids generated, and waste solids disposed. Resp Ex at A-119 at 5.

Both the August 1999 and September 2006 NPDES permits required Bandon Pacific to submit monthly Discharge Monitoring Reports ("DMRs"), on DEQ-approved forms, for each calendar month. The permits required the DMRs to be submitted no later than the 15th day of the following calendar month. Resp Ex at A-118 at 7, and A-119 at 7. From February 1999 through August 2003, Cynthia Loshbaugh, Bandon Pacific's controller, was primarily responsible for preparing DMRs for the retail business and for filing those reports with DEQ. Pet Ex at R-2. Sometime in 2001, Ms. Loshbaugh's manager, Curt Janke, told her that, because the Bandon facility was no longer a seafood-processing facility but only a retail facility, Ruben Kretzschmar of DEQ had informed him that Bandon Pacific need only report "no production" on the DMRs. *Id.* Sometime in 2002, Mr. Janke told Ms. Loshbaugh that, also according to Mr. Kretzschmar, no monitoring would be required given the retail-only activity at the Bandon Site. *Id.*

Bandon Pacific submitted monthly DMRs to DEQ from February 2004 through January 2009. Resp Ex at A-62 through A-117; Pet Ex at R-2.

On each page of the DMRs, Bandon Pacific wrote "no production," consistent with Ms. Loshbaugh's testimony. *Id.* From January 2004 through December 2008, Bandon Pacific did not perform the wastewater monitoring requirements set forth in its NPDES permits, consistent with Ms. Loshbaugh's understanding of DEQ's requirements. CCH Tr at 118-119, 142.

On December 3, 2008, DEQ received a letter from Bandon Pacific's attorney that disclosed that Bandon Pacific's DMRs were inaccurate from at least 2006. Pet Ex at R-11. The letter stated that the Bandon Pacific retail facility had been processing between 28,000 to 56,000 pounds of seafood every year since 2006, but had been reporting "no production" on the DMRs, and had not been performing wastewater monitoring. *Id.* The letter stated that the reason for the noncompliance was likely that production levels had fallen dramatically from prior years when a processing facility had been sited there, and that the levels of production for some types of seafood fell below the minimum threshold for monitoring requirements. *Id.*

On April 6, 2009, DEQ received corrected monthly DMRs from Bandon Pacific for January 2004 through December 2008. Resp Ex at A-1 through A-61. The DMRs included the amount of seafood processed for each month, but did not include information about water sampling results or solid waste disposal. According to the corrected DMRs, Bandon Pacific processed seafood on 195 days in 2004, 116 days in 2005, 187 days in 2006, 190 days in 2007, and 175 days in 2008. *Id.* Bandon Pacific discharged wastewater into the Coquille River on each day of production, and did not perform any sampling or analysis of the wastewater produced, as noted above.

In 2009, Bandon Pacific retained the services of Alan Ismond, chemical engineer, and his company Aqua-Terra Consultants. CCH Tr at 151. Mr. Ismond formed the company in 1993 to provide engineering and environmental consulting services to the seafood processing industry, and stated

that, overall, he had 35 years of experience serving that industry. CCH Tr at 149-150; Pet Ex at R-8. In late 2010, Mr. Ismond commissioned a survey of the Coquille River bed in the area near the Bandon Pacific facility. Pet Ex at R-6. The survey revealed no visible remains of fish carcasses and no signs of damage to the seafloor. CCH Tr at 160-163; Pet Ex at R-6. Bandon Pacific discharged fish wastes in an area of the river near the mouth of the Pacific Ocean. *Id.* Because of the proximity to the ocean, currents and tidal exchanges were substantial and likely dispersed any discharges of wastewater and fish carcasses very quickly. *Id.* Further, because the waste was composed of non-toxic organic material, was small in volume, and did not accumulate on the river bed, Mr. Ismond concluded that the material was likely quickly dispersed into the ocean with no adverse impact on the environment. *Id.*

On November 30, 2009, DEQ issued a Notice of Civil Penalty to Bandon Pacific for violations of its wastewater discharge permit at the Bandon Site that occurred during the five-year period between January 1, 2004, and January 31, 2009. Pet Ex at R-27; Excerpt of Record ("ER")-30 through 41. The breakdown of the penalties is as follows:

a. Monitoring Violations: The Notice of Civil Penalty stated that all monitoring violations occurring before March 31, 2006, are Class II violations, and all such violations occurring after that date are Class I violations.[4] Pet Ex at R-27 at 4-5 of Order; ER-33-34. The Notice of Civil Penalty further stated that no penalties were being assessed for the

[4] The post-March 31, 2006, violations were categorized as Class I violations pursuant to OAR 340-012-0055(1)(o),which carry a higher penalty than class II violations and are considered more serious. The pre-March 31, 2006, violations were categorized as a Class II violations pursuant to the version of OAR 340-012-0055(2)(f) in existence at that time, which made a Class II violation "[a]ny violation of a management, monitoring, or operational plan established pursuant to a waste discharge permit, that is not otherwise classified in these rules."

pre-March 31, 2006, Class II monitoring violations. Pet Ex at R-27 at 1 of Exhibit 1 of Order; ER-36. The Notice of Civil Penalty assessed 46 separate penalties for the monitoring violations, and arrived at that number "by assessing one penalty per monitoring requirement violated per year." Pet Ex at R-27 at 2 of Exhibit 1 of Order; ER-37.

b. Solid Waste Discharge to Coquille River: The Notice of Penalty identified placing of the seafood carcasses in the Coquille River to be Class I violations, and assessed five separate penalties for these violations. Pet Ex at R-27 at 4 of Order; ER-33; Pet Ex at R-27 at 2 of Exhibit 2 of Order; 39. The Notice of Penalty stated that the five penalties were arrived at by assessing one penalty per year in which the violations occurred. *Id.*

c. Mesh Screen Violation: The Notice of Penalty identified Bandon Pacific's failure to pass its wastewater through a 40 mesh screen as a Class II violation. Pet Ex at R-27 at 4-5 of Order; ER-33-34. The Notice of Civil Penalty assessed five separate penalties for the monitoring violations, arrived at by assessing one penalty per year in which the violations occurred. Pet Ex at R-27 at 2 of Exhibit 3 of Order; ER-41.

On March 30, 2010, Bandon Pacific requested that DEQ clarify how it arrived at its calculation of 46 monitoring violations in the Notice of Civil Penalty. Pet Ex at R-34 at 6. After receiving no reply from DEQ, on August 30, 2010, Bandon Pacific again requested that DEQ clarify how it had arrived at the 46 monitoring violations. Pet Ex at R-38 at 1. On September 21, 2010, Jeff Bachman, of DEQ's Office of Compliance and Enforcement, responded to those requests by setting forth the formula he had used in arriving at that number. Pet Ex at R-40. Mr. Bachman, who was responsible for preparing the Notice of Civil Penalty, CCH Tr at 61-64; 79-81, reiterated that DEQ arrived at the 46 violations "by assessing a penalty for one violation per year for each of the permit's monitoring and reporting requirements violated by

Bandon." Pet Ex at R-40 at 1. Specifically, Mr. Bachman stated that DEQ had assessed three penalties each for failing to monitor for e-coli and fecal coliform bacteria, as these requirements were only in effect from 2006 through 2008, and five penalties each, for the years 2004 through 2008, for the other eight parameters for which testing or monitoring was required. *Id.* This calculation added up to 46 penalties, as displayed in the Penalty Table.[5] ER-27-28.

On December 18, 2009, Bandon Pacific requested a contested case hearing on the Notice of Civil Penalty. The hearing occurred on February 23, 2011, and was conducted by an ALJ. The ALJ issued a final order on June 1, 2011, which upheld the Notice of Civil Penalty, but reduced the penalty amount from $208,554 to $200,266, because the ALJ determined that DEQ had failed to provide sufficient evidence as to how it calculated the economic benefit portion of the penalty for Bandon Pacific's failure to use a 40 mesh screen.

On June 30, 2011, Bandon Pacific requested that EQC review the ALJ's decision. The EQC held a hearing on October 20, 2011, and later upheld the $200,266 penalty against Bandon Pacific. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The Notice of Civil Penalty erroneously penalized Bandon Pacific for 16 Class II wastewater monitoring violations, even though the Notice of Civil Penalty states that it did not include penalties for any such violations. As a consequence, the penalties for those 16 Class II violations must be deducted from the total penalty assessed against Bandon Pacific.

I. Preservation of Error.

Bandon Pacific raised this issue as part of its request for a contested case hearing before the ALJ and its appeal to the EQC. *See* Rec

[5] Although not found in the original record as submitted by DEQ, the official record was supplemented to include the Penalty Table through an EQC order dated March 28, 2012, which was filed with the court on April 9, 2012.

at 53-52, 185-184, 197, 255, 272-270 (arguing that the civil penalty improperly included Class II penalties).

II. Standard of Review.

There are two standards of review applicable to this assignment of error. The first is ORS 183.417(8)(c), which requires the court to set aside or remand the EQC Order if the court finds that the order is not supported by substantial evidence in the record. Substantial evidence supports a finding of fact "when the record, viewed as a whole, would permit a reasonable person to make that finding." *Id.* The second is ORS 183.470(2), which requires an order in a contested case hearing to be accompanied by findings of fact and conclusions of law, and to articulate a substantial connection between the facts it used and the conclusions it drew from those facts. *Drew v. Psychiatric Sec. Review Bd.*, 322 Or 491, 500-501, 909 P2d 1211 (1996).

ARGUMENT

The Notice of Civil Penalty assessed $174,766 against Bandon Pacific for violating the wastewater discharge monitoring requirements contained in its NPDES permit. Pet Ex at R-27 at 2 of Exhibit 1 of Order; ER-37. The Notice of Civil Penalty states on its face that no penalties for Class II occurrences of these violations were assessed; instead, the assessments were for only Class I occurrences.[6] Pet Ex at R-27 at 1-2 of Exhibit 1 of Order; ER-36-37. The Notice of Civil Penalty also states that the total amount of the penalty was calculated by "assessing one penalty per monitoring requirement

[6] Class II violations are violations that occurred before March 31, 2006, under a version of administrative rules that existed between 2004 and March 31, 2006, before they were amended to their present form. The pre-March 31, 2006, version of OAR 340-012-0055(2)(f) makes a Class II violation "[a]ny violation of a management, monitoring, or operational plan established pursuant to a waste discharge permit, that is not otherwise classified in these rules." Class II violations carry a $1,500 base penalty as compared to the $3,000 base penalty for Class I violations.

violated per year," for a total of 46 violations.[7] Pet Ex at R-27 at 2 of Exhibit 1 of the Order; ER-37.

Assessing one penalty per monitoring requirement violated per year, however, amounts to only 30 Class I occurrences, not 46. *See* ER-27-28. This is because 16 of the 46 occurrences for which Bandon Pacific was penalized occurred in 2004 and 2005, which made them Class II occurrences. Although the undisputed evidence in the record confirms that DEQ erroneously included 16 Class II occurrences in its calculation, DEQ refused to drop the penalties for those 16 occurrences, which would drop the penalty for wastewater discharge monitoring requirements to $117,166. DEQ has steadfastly refused to correct its error even though it is not mathematically possible to reach 46 Class I occurrences using DEQ's stated methodology for doing so. Therefore, the EQC Order is not supported by substantial evidence in the record, because it states that it is not assessing any penalties for Class II violations, when it necessarily does so to in order to achieve the stated penalty. The EQC Order also violates ORS 183.470(2), because it fails to articulate a substantial reason connecting the facts in the record, i.e., it asserts that Class II violations were not penalized, yet the penalty calculation includes Class II violations.

A. The Notice of Civil Penalty and DEQ's Pre-EQC Hearing Position.

As set forth above, the Notice of Civil Penalty states on its face that DEQ was not assessing penalties for Class II wastewater discharge monitoring violations.[8] If, as the Notice of Civil Penalty states, DEQ is not

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[7] DEQ's stated protocol of "one penalty per one monitoring requirement violated per year" is consistent with the way DEQ assessed the penalties for the solid waste discharge and mesh screen violations, which were assessed at one penalty for each requirement violated per year.

[8] DEQ reconfirmed that it did not intend to assess any penalties for these

assessing penalties for Class II violations, it is mathematically impossible to reach 46 violations for the Class I violations that occurred between March 16, 2006, and the end of 2008. The Notice of Civil Penalty states that DEQ arrived at the 46 violations "by assessing one penalty per monitoring requirement per year." Pet Ex at R-27 at 2 of Exhibit 1 of Order; ER-37. Because this explanation was ambiguous, Bandon Pacific requested further explanation from DEQ. In a letter dated September 21, 2010, Mr. Bachman stated on behalf of DEQ:

> "As explained in Exhibit 1 of the Notice of Civil Penalty Assessment, DEQ arrived at 46 violations by assessing a penalty for one violation per year for each of the permit's monitoring and reporting requirements violated by Bandon. DEQ assessed three penalties each for failing to monitor for e.coli and fecal coliform bacteria because these requirements were only in effect in 2006 through 2008. DEQ assessed five penalties each, 2004-2008, for the following eight parameters: total suspended solids, biochemical oxygen demand, oil & grease, pH, flow, raw product processed, waste solids generated, and waste solids disposed." Pet Ex at R-40.

The 46 penalties, then, include 16 penalties (eight parameter violations, times two years (2004 and 2005)) for alleged violations occurring before March 31, 2006, which are Class II violations for which the Notice of Civil Penalty explicitly states it is not assessing. This is graphically displayed in the Penalty Table. ER-27-28. According to both Mr. Nichols and Ms. Wheeler of DEQ, Mr. Bachman was responsible for preparing the Notice of Civil Penalty. CCH Tr at 61-64, 79-81. Thus, Mr. Bachman's September 21, 2010, letter, which explains his penalty calculations, is conclusive evidence that the penalties stated in the Notice of Civil Penalty were incorrectly calculated.

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alleged Class II violations in its March 16, 2011, closing argument before the ALJ. Rec at 75.

Furthermore, Mr. Nichols, DEQ's staff for Water Quality Permitting and Compliance, testified that the preparation of the Notice of Civil Penalty was a collaborative process between himself and Mr. Bachman. CCH Tr at 62-64. In both his testimony and an earlier e-mail, Mr. Nichols acknowledged that he probably made a mistake with respect to whether all the penalties included in the May 13, 2009, Pre-enforcement Notice and the Notice of Civil Penalty were Class I violations. CCH Tr at 59-61; Pet Ex at R-48. Mr. Nichols admitted that the earlier violations in the five-year penalty window were probably Class II violations, not Class I violations, and also admitted that he did not double-check which violations were being penalized in the Notice of Civil Penalty even though Bandon Pacific asked him to do so. CCH Tr at 59-61; Pet Ex at R-48.

B. The ALJ's Decision.

Following the February 23, 2011, contested case hearing, the ALJ issued a decision, which later became the EQC Order. The ALJ's decision contains a confusing conclusion as to why the ALJ believed that DEQ did not include any Class II violations in the 46 violations. Rec at 405-404; ER-10-11. For example, the decision provides that because the Notice of Civil Penalty states that it did not penalize Bandon Pacific for any Class II violations, DEQ's statement that it arrived at the 46 violations "by assessing one penalty per monitoring requirement per year,"

> "is more reasonably interpreted as setting forth the rationale for selecting only 46 violations, and not more. DEQ chose to impose a limit on the number of violations for which it would impose a penalty. It established that limit by multiplying the number of monitoring requirement violations times the number of years at issue. Nevertheless, it applied that number solely to post-March 31, 2006 Class I violations." Rec at 405; ER-10.

This explanation is at odds with the plain meaning of the words in the Notice of Civil Penalty as well as DEQ's explanation in its September 21,

2010, letter. Based on this inconsistency, the EQC order is defective because the ALJ's decision (as incorporated by the EQC Order) fails to articulate a substantial reason that connects the facts to its legal conclusions as required by ORS 183.470(2), and because it is not supported by substantial evidence in the record, in contravention of ORS 183.417(8)(c).

C. DEQ's EQC Hearing Position.

At the EQC contested case hearing, Mr. Bachman[9] confirmed again that DEQ intended only to assess penalties for Class I violations, not Class II violations, as clearly stated in the Notice of Civil Penalty. Transcript of October 21, 2011, EQC Review of Contested Case Hearing ("EQC Tr") at 21-22. Bandon Pacific does not dispute that this was DEQ's intent. The point is that DEQ erroneously assessed penalties for Class II violations, and there is nothing in the record to demonstrate otherwise. Although Mr. Bachman suggested that all 46 violations were chosen from Class I occurrences, he could not adequately explain how that contention is consistent with the "one penalty per monitoring requirement violated per year" language in the Notice of Civil Penalty. EQC Tr at 23-24. The EQC appeared troubled by his explanation, given the evidence in the record and the Penalty Table, but Mr. Bachman insisted that, despite what the Notice of Civil Penalty said and what the Penalty Table revealed, only Class I occurrences were penalized. EQC Tr at 24.

Later during the EQC hearing, an EQC commissioner asked again how DEQ arrived at the 46 Class I penalties. EQC Tr at 46. In response, DEQ's counsel asserted that, despite what the Penalty Table showed, all 46 penalties were taken from only the last three years of the penalty window, i.e., 2006 through 2008. EQC Tr at 47. This explanation, however, was different than before. Counsel stated that DEQ first decided it wanted the

[9] Mr. Bachman is erroneously referred to as Mr. Flackman in the EQC hearing transcript.

penalty to be substantial and "had a number in mind of what that penalty might be," then figured out how to reach that predetermined number based on the violations. *Id.* An EQC commissioner then tried to sum it up:

> "Unidentified Speaker [EQC Commissioner]: Okay. So the 46 is really your judgment or number that you wanted to go for?
>
> "Unidentified Speaker [DEQ counsel]: Correct.
>
> "Unidentified Speaker [EQC Commissioner]: And there's really no --
>
> "Unidentified Speaker [DEQ counsel]: And then it also references that we also got verified considering how many years of violation there had been and how many -- how many parameters --
>
> "Unidentified Speaker [EQC Commissioner]: Because going through that process, you can account for something besides 46. Forty -- just 46 seemed to be sort of a range of where you wanted to be and you had to pick a number?
>
> "Unidentified Speaker [DEQ counsel]: Right." EQC Tr at 47-48.

In other words, contrary to the methodology explained in the Notice of Civil Penalty, and contrary to Mr. Bachman's explanation of that methodology in his September 21, 2010, letter, DEQ's position before the EQC was that there was no such methodology for the wastewater discharge monitoring penalty. Instead, DEQ simply "picked a final number" it wanted to reach and then backed into it. This departure from DEQ's approach in the Notice of Civil Penalty as affirmed by Mr. Bachman in his September 21, 2010, letter, continued to create confusion throughout the hearing.

> "Unidentified Speaker [EQC Commissioner #1]: Going back to your previous statement, you know, it's like - you know, if somebody robs 25 banks, and the state says, okay, well, I'm only going to prosecute you on five of them. The state gets to pick that five. As long as that number doesn't exceed 25, they can pick whatever five they want to prosecute him on or whatever.

"So, you know, the 46, seems like to me as long as it's less than the total number of violations, DEQ gets to pick it. I'm not sure if they have to have a rational argument on where they got the 46.

"Unidentified Speaker [EQC Commissioner #2]: Well, it says in here, by assessing one penalty per monitoring requirement.

"Unidentified Speaker [EQC Commissioner #1]: I know that's what they said, but -

"Unidentified Speaker [EQC Commissioner #2]: And that's how they got to 46. I mean, it does say how they got there.

"Unidentified Speaker [EQC Commissioner #1]: Right. But they could have got there any other way.

"Unidentified Speaker [EQC Commissioner #2]: Right.

"Unidentified Speaker [EQC Commissioner #1]: You know, I mean, that - that analysis wasn't necessary to get to the 46. The 46 just has to be less than the total number of violations." EQC Tr at 53-54.

In its decision, the EQC did not require DEQ to adhere to any methodology, let alone one consistent with the Notice of Civil Penalty and the evidence in the record. The EQC ultimately concluded that as long as the final penalty amount was somewhere within the range of possible penalties DEQ might have been able to impose, it did not matter how DEQ arrived at that penalty or whether DEQ's true "methodology" comported with the calculations underlying the Notice of Civil Penalty.

The Oregon Administrative Rules require more of DEQ. OAR 340 Division 12 sets out procedures and requirements for DEQ enforcement actions. These administrative rules contain very detailed procedures and carefully prescribed substantive factors for assessing civil penalties. OAR 340-012-0026(5); OAR 340-012-0045.[10] The substantive factors to be considered

[10] The factors set out in this section mirror the factors required to be considered in imposing civil penalties, as set forth in ORS 468.130(2).

include rules regarding classifying violations, determining violation magnitude, considering aggravating and mitigating factors, and determining economic benefit. OAR 340-012-0045(2)(e) even sets forth a quantitative formula for how all the substantive factors should interact to determine the end penalty amount for a given violation. The factors set out in this section mirror the factors required to be considered in imposing civil penalties, as set forth in ORS 468.130(2). Similarly, OAR 340-012-0130 through 0135 identify the method for calculating the magnitude of a violation with painstaking specificity. Once DEQ arrives at a penalty, it may send the regulated entity a Notice of Civil Penalty Assessment and Order, pursuant to OAR 340-012-0041(2) and (3).

The administrative rules, then, are structured to ensure that civil penalties are consistently and methodically calculated, and then clearly communicated to the regulated entity in such a way as to apprise that regulated entity as to the basis for the penalties and the manner in which they were computed. In this case, the Notice of Civil Penalty appears to attempt to meet the requirements of OAR 340 Division 12. It sets out findings of fact, conclusions derived from those facts, an order to pay a certain amount, and detailed exhibits explaining how a penalty was arrived at for each violation. The penalty calculation (as set forth in Exhibit 1 to the Notice of Civil Penalty), however, is not consistent with the conclusions contained in the Notice of Civil Penalty or even with Exhibit 1 itself. The EQC could not properly overlook that error merely by assuring itself that DEQ could have reached the same penalty a different way or that the end amount is probably within the range of possible penalties. The EQC violated the requirements of ORS 468.130(2), as well as the provisions of OAR 340 Division 12, by allowing the civil penalties against Bandon Pacific to be untethered from their administrative moorings.

D. Conclusion.

The Notice of Civil Penalty is the controlling document as to the civil penalty assessed against Bandon Pacific. To the extent there was any ambiguity in the Notice of Civil Penalty, DEQ removed that ambiguity when it provided Bandon Pacific a written explanation as to how it calculated the penalty. The EQC Order is not supported by substantial evidence in the record, because it states that it is not assessing any penalties for Class II violations when, in fact, it does just that. The EQC Order also violates ORS 183.470(2), because it fails to articulate a substantial reason connecting the facts in the record to its conclusions; namely, that DEQ did not penalize Bandon Pacific for Class II violations, when the penalty imposed necessarily included Class II violations.

SECOND ASSIGNMENT OF ERROR

DEQ erred in assessing penalties for January 2004 through December 2006, because ORS 12.110(2) imposes a two-year statute of limitations on administrative enforcement actions seeking penalties.

I. Preservation of Error.

Bandon Pacific raised this issue as part of its request for a contested case hearing before the ALJ and its appeal to the EQC. *See* Rec at 40, 184-183, 254, and 269-263 (arguing that DEQ misconstrued the statute of limitations applicable to administrative enforcement actions seeking penalties).

II. Standard of Review.

There are two standards of review applicable to this assignment of error. The first is ORS 183.417(8)(a), which requires the court to set aside or modify the EQC Order if the court finds that the agency has made an erroneous interpretation of law through the order. The second standard of review is ORS 183.417(8)(b)(C), which requires the court to set aside or remand the EQC Order if the court finds that it violates a constitutional or statutory provision.

ARGUMENT

ORS 12.110(2) requires that "[a]n action upon a statute for a forfeiture or penalty to the state or county shall be commenced within two years." The EQC Order concluded that the statute does not apply to a statutory penalty brought by the state pursuant to ORS Chapter 183, Sections 183.310-.690 (the Administrative Procedures Act). Rec at 407-405; ER-8-10. Instead, the EQC interpreted the ORS 12.110(2) limitation to apply only to the imposition of statutory penalties brought by the state in *court*, thereby concluding that administrative penalties have no time limitation. As detailed below, this interpretation of ORS 12.110(2) is in error—ORS 12.110(2) applies to statutory penalties imposed by the state through administrative procedures, as well as through proceedings in court.

PGE v. Bureau of Labor and Industries, 317 Or 606, 859 P2d 1143 (1993), set out the process by which state statutes must be interpreted, and has since been modified by ORS 174.020 and *State v. Gaines*, 346 Or 160, 206 P3d 1041 (2009). Collectively, these authorities require that a reviewing body first examine the text of the subject statute in its context. If the legislative intent is not obvious from the text and context, then legislative history may be examined, although legislative history may be considered at the time text in context is examined "where that legislative history appears useful to the court's analysis." *Gaines*, 346 Or at 172. If the intent of the legislature remains unclear after examining the text in context and legislative history, then general maxims of statutory construction may be used.

A. The Text in Context Supports the Inclusion of Administrative Proceedings in ORS 12.110(2).

There is no question that DEQ (a state administrative body) has imposed upon Bandon Pacific a statutory penalty. There is also no question that ORS 12.110(2) restricts to two years statutory penalties imposed by the

state. The only question, then, is whether the legislature intended the word "action" in ORS 12.110(2) to be restricted to only a statutory penalty imposed through a judicial proceeding and not through an administrative proceeding. The text itself is ambiguous, as the term "action" is not modified to restrict it to a court proceeding, and so it is not clear on its face that ORS 12.110(2) would not apply to a penalty imposed administratively. Further, the term "action" is not defined in ORS Chapter 12. Therefore, nothing in the text of ORS 12.110(2) or the surrounding statutes suggests that an "action" is confined to a proceeding in court. Considering that the subject of this statute is to impose a time limitation for the state to bring a penalty proceeding, it would appear that the limitation in ORS 12.110(2) should apply whether the proceeding is brought judicially or administratively.

In the EQC Order, DEQ concluded that ORS 12.020 provides context for ORS 12.110(2), and implicitly defines the term "action" as a court action by describing when an "action" will deemed to have commenced. Rec at 407-405; ER-8-10. ORS 12.020 states:

> "**12.020 When action deemed begun.** (1) Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on the defendant . . ."

According to the EQC Order, because an action is deemed commenced "when the complaint is filed, and the summons served on the defendant," an administrative proceeding cannot be an "action," because there are no complaints or summonses in administrative proceedings. Rec at 406-405; ER-9-10.

DEQ reads ORS 12.020 too narrowly. Although Oregon courts have not decided the issue, the Washington Supreme Court addressed the applicability of a nearly identical state statute of limitations to an administrative

penalty action brought by the state. In *U.S. Oil & Refining Co. v. State Dept. of Ecology*, 633 P2d 1329 (1981), the court concluded that RCW 4.16.100(2), which imposes a two-year limit on "[a]n action upon a statute for a forfeiture or penalty to the state," applies to administrative penalty proceedings. In *U.S. Oil*, the Washington Department of Ecology ("DOE") imposed penalties pursuant to RCW 90.48.144, which allows the DOE to issue penalties for violations of the state's Water Pollution Control Act. The Washington Supreme Court determined that RCW 4.16.100(2) was applicable even though there was no complaint or summons in the administrative proceeding. *U.S. Oil*, 633 P2d at 1333. Although the notice of penalty at issue in *U.S. Oil* was not technically a complaint or summons, the court observed that the notice does, as a practical matter, "commence the action and apprise the penalized party of it . . . The notice has much the same effect as a complaint or summons." *Id.* Thus, the court held that the statute applied to administrative proceedings as well as to court cases.

Like Washington administrative proceedings, Oregon administrative proceedings require notice through a mechanism analogous to a summons and complaint. ORS 183.415 defines the notice owed to parties affected by agency action as follows: "The Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to the actions." The statute goes on to define the "notice" as including the party's right to a hearing, a statement of the jurisdiction and authority under which the hearing will be held, a statement of the "matters asserted" with reference to applicable statutes or rules, the time allotted to request a hearing in order to appear and defend, and a statement about the circumstances under which an order by default will be entered. *Id.* This notice is required when an agency imposes a "civil penalty" under ORS 183.745.

ORS 52.110 defines a "summons" in a civil action in court. By way of comparison, the summons must contain the name of the court in which the complaint was filed, the cause of action asserted, the time allotted to appear and defend, and a statement about the circumstances under which a default judgment will be entered. Thus, a summons contains information comparable to that required under ORS 183.415. The "notice" applicable in administrative actions and the "summons" applicable in court proceedings, then, are functionally identical. The EQC Order relied on the difference in wording between "notice" and "summons" without looking behind the labels to determine their legal definitions. When the meanings of the words are taken into account, it is clear that the function served by a summons is identical to that of a notice.

Oregon courts have considered the general issue of the equivalency of administrative enforcement proceedings to proceedings in court. For example, in *Donovan v. Barnes*, 274 Or 701, 548 P2d 980 (1976), the Oregon Supreme Court rejected the University of Oregon's argument that it could never be held liable for malicious prosecution because its proceedings were "administrative" in nature rather than "judicial." The basis for the Court's decision applies with equal force here:

> "We see no reason to apply a different set of rules to actions for malicious prosecution based on administrative proceedings of an adjudicatory nature than those which are applied to similar actions based on judicial proceedings. Since the adjudicatory function performed is essentially the same, we believe that the same criteria should be applied to the actions of both types of bodies.
>
> * * *
>
> "In our judgment no other conclusion would be tenable. When private as well as public rights more and more are coming to be determined by administrative proceedings, it would be anomalous to have one rule for them and another for the courts in respect to

> redress for abuse of their powers and processes." *Id.* at 704-705 (quoting *Melvin v. Pence*, 130 F2d 423, 426-427 (DC Cir 1942)).

Insurance companies have also sought to use DEQ's argument that administrative proceedings are not "actions" to avoid their obligations to policyholders. Many liability policies require insurers to defend their policyholders against "suits." When policyholders were faced with administrative actions by agencies such as DEQ, the insurers denied coverage, arguing that an administrative action is not a "suit." The Oregon Supreme Court rejected that argument:

> "In *School Dist. No. 1 v. Mission Ins. Co.*, the policy, as is the case here, provided that the insurer had a duty to defend a 'suit * * * seeking damages' and to pay 'all sums which the insured shall become legally obligated to pay.' We rejected the argument that "suit" does not include administrative proceedings." *St. Paul Fire v. McCormick & Baxter Creosoting*, 126 Or App 689, 701 (1994) (internal quotations and citations omitted).

If ORS 12.110(2) is construed narrowly to apply only to judicial proceedings, it sets up an irrational outcome when ORS 468.100 is considered. When bringing an enforcement action, DEQ has the choice of pursuing that action in state court, pursuant to ORS 468.100, or through an administrative proceeding, pursuant to ORS Chapter 183. If ORS 12.110(2) is held not to apply to administrative proceedings, the two-year limitations period becomes meaningless because DEQ can simply circumvent the statute by choosing to proceed administratively, not judicially. DEQ should not be able to make an end run around a limitations period by the simple expedient of choosing one functionally equivalent forum over another. ORS 12.110(2) should not be interpreted in a manner that creates that effect.

For all the foregoing reasons, the term "action" in ORS 12.110(2) should be construed to apply to statutory penalty actions brought in administrative proceedings as well as in court cases.

B. Legislative History Does Not Require that ORS 12.110(2) be Restricted to Only Court Actions.

As noted above, any legislative intent that may be helpful in interpreting ORS 12.110(2) can be brought forward at the initial stages of the interpretation inquiry. Unfortunately, there is no legislative intent that can guide this inquiry, because ORS 12.110(2) was originally enacted in 1862, 95 years before the first administrative procedures were adopted into what is now ORS Chapter 183. Further, ORS 12.110(2) has changed little since its enactment, so there is no subsequent legislative history that may be helpful. What seems clear, however, is that ORS 12.110(2) was meant to be a statute of general applicability and a limit on state authority to impose a statutory penalty. Given that, there does not appear to be a good argument to support a proposition that, had administrative proceedings existed back in 1862, the legislature would have exempted that functionally equivalent forum from the scope of ORS 12.110(2).

It should also be noted that the language in ORS 12.020 has been a part of Oregon's statutes in substantially the same form for nearly 150 years. *See 1 The Codes and Laws of Oregon* 138 (William L. Hill ed, 2d ed 1892). Like the language in ORS 12.110(2), it was enacted before the advent of administrative laws and procedures and when enforcement actions of state administrative bodies took place exclusively in courts. Therefore, like ORS 12.110(2), it should not be read to exempt the state from statutory time limitations as long as the state brings the action through an administrative proceeding rather than in court.

THIRD ASSIGNMENT OF ERROR

The EQC erred in classifying the penalties for the three sets of violations as moderate in magnitude. Bandon Pacific overcame the presumption of moderate magnitude with substantial evidence that the magnitude of the violations was minor and DEQ did not rebut that evidence.

I. Preservation of Error.

Bandon Pacific raised this issue as part of its request for a contested case hearing before the ALJ and its appeal to the EQC. *See* Rec at 552-49, 184, 254, and 270-269 (arguing that DEQ improperly classified the penalties in the Notice of Civil Penalty as moderate instead of minor).

II. Standard of Review.

There are two standards of review applicable to this assignment of error. The first is ORS 183.417(8)(a), which requires the court to set aside or modify the EQC Order if the court finds that the agency has made an erroneous interpretation of a provision of law through that order. The second standard of review is ORS 183.417(8)(c), which requires the court to set aside or remand the EQC Order if the court finds that the EQC Order is not supported by substantial evidence in the record. Substantial evidence supports a finding of fact "when the record, viewed as a whole, would permit a reasonable person to make that finding." *Id.*

ARGUMENT

The EQC Order erroneously concludes that Bandon Pacific's violations were "moderate," which is the default under OAR 340-012-0130(1), rather than "minor," as provided by OAR 340-012-0130(4). At the EQC hearing, Bandon Pacific introduced evidence that the magnitude was "minor," thereby rebutting the presumption of "moderate" and meeting its burden under OAR 340-012-0130(2). Nevertheless, the EQC ignored that evidence and, instead, affirmed the violations as "moderate," based solely on Bandon Pacific's failure to monitor over the five-year penalty period, which the EQC concluded made it impossible to know the resulting environmental harm. Rec at 404-403; ER-11-12.

The EQC's finding and conclusion misconstrue what Bandon Pacific is required to demonstrate under the applicable administrative rule, and,

therefore, constitutes an erroneous interpretation of OAR 340-012-0130. Further, there is not substantial evidence in the record to support a finding that the violations are moderate in magnitude in light of Bandon Pacific's evidence that those violations were minor.

As set forth in OAR 340-012-0130(1), absent other factors, the default magnitude of a civil penalty is "moderate." Even so, "the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude." OAR 340-012-0130(2). In other words, once the DEQ decided to impose the default magnitude of "moderate," it was up to Bandon Pacific to provide evidence that another magnitude was more "probable." Bandon Pacific did so, and the EQC Order even accepts much of that information as true. Rec at 410; ER-5. Specifically, a Bandon Pacific consultant, Alan Ismond, testified at the ALJ hearing that, in his professional opinion, there was no adverse impact or threat of adverse impact on human health or the environment from the Bandon Facility discharges. CCH Tr at 160-163. He based his opinion on (1) his over 35 years in the seafood and food industry (CCH Tr at 150); (2) his work with over 40 seafood processing facilities (*Id.*); (3) the small size of the retail facility and its small amount of production over the 2004-2008 time period (CCH Tr at 160-163); (4) the type of material being discharged, i.e., seafood waste, not inherently toxic material (*Id.*); (5) the receiving environment's capacity to disperse the amount of material being discharged (*Id.*); and (6) the November 2010, seafloor survey that showed no adverse impacts in the discharge area (*Id.*).

DEQ did not rebut any of Bandon Pacific's evidence, and, in fact, conceded that there was no evidence of environmental harm. CCH Tr at 55-56, 66, 70; Rec at 74. Under OAR 340-012-0130(2), then, Bandon Pacific met its burden and demonstrated that the "minor" magnitude was more probable, and

DEQ should have reduced the magnitude of the violations accordingly. But DEQ did not reduce the magnitude to minor. Instead, DEQ chose to retain the "moderate" magnitude as the most appropriate, and the reason given in the EQC Order for doing so was that because Bandon Pacific had failed to perform the required monitoring during the violation period, "it is simply not possible to determine if Bandon Pacific's activities had an adverse impact on the environment or if they posed more than a de minimis threat to human health or other environmental receptors at the time of the various discharges." Rec at 403; ER-12. DEQ reinterpreted the OAR 340-012-0130(2) standard, then, to be not one of burden shifting, but a "per se" rule that cannot be rebutted when the violation is a failure to monitor. That is not the standard under OAR 340-012-0130(2).

The EQC Order also erroneously concluded that the violations cannot be "minor" because, due to the lack of monitoring during the relevant time period, "the precise concentration, volume and toxicity of the discharged wastewater can never be known." Rec at 403; ER-12. First, OAR 340-012-0130(4), from which the EQC Order paraphrased, does not require that the *precise* concentration, volume, and toxicity of the discharged wastewater must be *known* before a violation can be deemed "minor." OAR 340-012-0130(4) does not set out any degree of certainty that must be met for a violation to qualify as "minor." OAR 340-012-0130(2) gives such guidance, however, and requires only that a "minor" magnitude be more *probable* than another magnitude. Second, Bandon Pacific *did* submit corrected DMRs to DEQ that identified the approximate amount of seafood processed on a given day. Therefore, it was not as if the record was devoid of any evidence as to what or how much seafood was being processed. There is evidence in the record of composition and volume of seafood that was processed, how that seafood was processed, controls that were in place to keep solids from being discharged into

the Coquille River from the retail operation, and estimates of the volume of solids that likely made it to the river. Pet Ex at R-4, R-15, and R-16; CCH Tr at 90-96, 98-106, 108-110, 121-124, 126-128, 152-163. None of this evidence was rebutted, and the EQC made no finding that the evidence was inadequate or unreliable.

For the reasons stated above, the magnitude of the civil penalties assessed against Bandon Pacific should be minor, not moderate. DEQ misinterpreted OAR 340-012-0130(2) by construing it as a per se rule rather than a burden-shifting rule, and there is not substantial evidence in the record to support DEQ's determination that the magnitude of the violations was moderate rather than minor. Instead, the evidence in the record establishes that it is more probable that the violations were minor in character.

FOURTH ASSIGNMENT OF ERROR

The EQC impermissibly disregarded corporate form and violated state and federal law by upholding the civil penalty, which was based on Bandon Pacific's relationship with Pacific Seafood Group.

I. Preservation of Error.

Bandon Pacific raised this issue as part of its request for a contested case hearing before the ALJ and its appeal to the EQC. *See* Rec at 40-37 (ER-42-45), 182, 191-189 (ER-7-9), 254, and 263-261 (arguing that DEQ impermissibly disregarded corporate form and violated state and federal law through the imposition of multiple penalties).

II. Standard of Review.

The standard of review for this assignment of error is ORS 183.417(8)(b)(C), which requires the court to remand the EQC Order if the agency's exercise of discretion is in violation of a constitutional or statutory provision.

ARGUMENT

Bandon Pacific is a subsidiary of Pacific Seafood Group. As such, it is a separate legal entity, which is independently controlled and operated. Pet Ex at R-41. Under Oregon law, corporate form is not disregarded "unless exceptional circumstances exist." *City of Salem v. H.S.B.*, 302 Or 648, 655, 733 P2d 890 (1987). DEQ neither alleged nor proved any exceptional circumstances that would warrant disregarding Bandon Pacific's independent legal status from Pacific Seafood Group. DEQ, however, admitted that it took Bandon Pacific's relationship with Pacific Seafood Group into account as a factor in assessing a penalty for Bandon Pacific, and then took the position that it was not improper to do so. Rec at 82; ER-46. As revealed by the record, the impetus for DEQ imposing multiple penalties against Bandon Pacific, which in turn inflated the total DEQ penalty to an exceptionally high level, was DEQ's misplaced focus on Pacific Seafood Group. This reliance on the conduct of a separate entity is inconsistent with both state and federal law, and the EQC Order erred in not striking the multiple penalties from DEQ's penalty calculation, as a result.

Bandon Pacific submitted evidence into the record demonstrating that the penalty DEQ assessed against Bandon Pacific's small, one-room retail facility for the Clean Water Act ("CWA") violations is far above the amount assessed by DEQ for any other CWA violation since 2006. Pet Ex at R-5. In fact, the next highest penalty was $90,000 assessed against the Oregon Department of Transportation ("ODOT") in 2007 for violations of its stormwater discharge permit in 2006 and 2007 during a construction project in the Coast Range along Highway 20. Pet Ex at R-44.[11] According to DEQ's press release associated with that penalty, ODOT's violations caused multiple

[11] DEQ noted in its press release for the penalty against Bandon Pacific that it was the 11th largest it had ever issued. Pet Ex at R-47.

slope failures into stream beds, mud flows, and discharges of highly turbid stormwater. Discharge of sediment harms aquatic life by covering up food sources, wearing down fish gills, smothering fish eggs and invertebrate organisms, and impairs the ability of fish to feed and reproduce. The substantial amounts of sediment discharged into the Yaquina River and its tributaries caused "significant adverse impact" to fish habitat in the project area. Although DEQ found actual significant adverse impacts from ODOT's violations, it admitted that it did not find any adverse impact as a result of Bandon Pacific's CWA violations. Even so, Bandon Pacific was fined nearly $120,000 more than ODOT.[12]

It is difficult to understand why a one-room retail facility processing small amounts of seafood for sale on-site would receive a penalty nearly 2.5 times higher than the one ODOT received for discharging significant amounts of sediments into the Yaquina River, and more than eight times higher than an oyster processor that "recklessly" failed to even *have* a wastewater permit while it was operating. Rec at 38, n.9; Pet Ex at R-36 and R-37. DEQ, however, acknowledged that its goal was not to punish Bandon Pacific, but to punish Pacific Seafood Group, a company that DEQ characterized as a "large, integrated group of companies with considerable resources and a history of noncompliance." Pet Ex at R-29. DEQ's long and singular focus on Pacific

[12] Other examples of CWA penalties imposed by DEQ that are far less severe than the penalty imposed on Bandon Pacific for its less significant violations are detailed in Bandon Pacific's February 22, 2011, hearing memo. Rec at 45-43. For example, Johnny Cat, Inc., a Jacksonville-based construction contractor was issued a penalty of only $29,600 in 2006 for construction activities in the Rogue River that caused increased turbidity of the water, forcing a shut-down of the City of Gold Hill's drinking water filtration plant. Rec at 44. Even though Johnny Cat had been earlier contracted by DEQ over concern about its discharges, Johnny Cat continued and even increased the work causing the turbidity, culminating in the $29,600 fine, which was ultimately reduced to $19,600. *Id.*

Seafood Group as the real target of its penalty action against Bandon Pacific is set forth in the following parts of the record: Rec at 40-37, 82-81, 191-189; ER-42-50 (justifying the penalty in part on Bandon Pacific's relationship to Pacific Seafood Group, "a large seafood processing conglomerate that has a significant environmental non compliance history"; Rec at 81; ER-47).

In response to this evidence and argument, the EQC Order states that, "even assuming such an improper motive, Bandon Pacific did not explain how DEQ staff used information about Bandon Pacific's corporate status to inflate the penalty." Rec at 399; ER-16. In its rebuttal, however, Bandon Pacific clearly set out the linkage between DEQ's decision to assess multiple penalties and DEQ's ultimate target being Pacific Seafood Group. *See* Rec at 191-189; ER-48-50. It was the decision to assess multiple penalties that inflated what would have been a standard penalty for the types of violations committed by Bandon Pacific into a penalty that even DEQ admitted made the history books. Pet Ex at R-47.

DEQ's disregard of corporate form not only violates state law, as described above, it also violates Bandon Pacific's procedural due process rights. In particular, DEQ inflated Bandon Pacific's penalty on the basis of alleged actions of non-parties without any legally sufficient showing as to why Bandon Pacific could be held responsible for those outside actions. (Never mind that DEQ has never identified what those actions even were.) Consequently, by penalizing Bandon Pacific for the actions of non-parties, Bandon Pacific had no opportunity to defend itself against those charges or to seek contribution from those non-parties in violation of its procedural due process rights. *See, e.g., Foss v. Nat'l Marine Fisheries Serv.*, 161 F3d 584, 588 (9th Cir 1998) (procedural due process requires a protectible liberty or property interest, government deprivation of that interest, and a denial of adequate procedural protections).

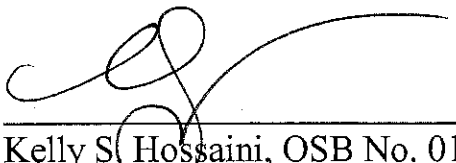
Because DEQ violated state and federal law by punishing Bandon Pacific for the alleged acts of Pacific Seafood Group, DEQ abused its discretion in applying multiple penalties against Bandon Pacific.

CONCLUSION

For the foregoing reasons, Bandon Pacific respectfully requests that the court remand the EQC Order with instructions to strike the 16 Class II violations, apply a two-year statute of limitations, reduce the magnitude of the violations to minor, and strike the use of multiple penalties from the Notice of Civil Penalty.

DATED this 24th day of July, 2012.

MILLER NASH LLP



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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,911 words.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

MILLER NASH LLP

Kelly S. Hossaini
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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

In the Matter of Bandon Pacific, Inc., Petitioner	)	Final Contested Case Hearing Order No. WQ/I-WR-09-092 OAH Case No. 1001950

On October 20, 2011, the Environmental Quality Commission considered Bandon Pacific's petition for review of the Proposed and Final Order issued by Sr. Administrative Law Judge John Mann on June 1, 2011, and incorporated herein as Attachment A. The Commission considered the exceptions and brief submitted by Bandon Pacific and the brief submitted on behalf of the Department of Environmental Quality. The Commission also considered oral arguments presented by Suzanne LaCampagne on behalf of Bandon Pacific and Jeff Bachman, Environmental Law Specialist, and Gary L. Vrooman, Assistant Attorney General, on behalf of the Department.

The Commission affirms the Proposed Order of Sr. Administrative Law Judge Mann in all respects and it is incorporated by reference into this Order.

Dated this _17_ day of November, 2011.

William Blosser, Chair
Oregon Environmental Quality Commission

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 day you received the Order. If this Order was mailed to you, the date of service is the day it was *mailed*, 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.

Attachment A

3059937-v1

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
ENVIRONMENTAL QUALITY COMMISSION

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
BANDON PACIFIC, INC.	) OAH Case No.: 1001950
	) Agency Case No.: WQ/I-WR-09-092

HISTORY OF THE CASE

On November 30, 2009 the Oregon Department of Environmental Quality (DEQ) issued a Notice of Civil Penalty Assessment and Order to Bandon Pacific, Inc. On December 22, 2009, Bandon Pacific, Inc. requested a hearing.

The DEQ referred the hearing request to the Office of Administrative Hearings (OAH) on Sepetember 21, 2010. Senior Administrative Law Judge (ALJ) Robert Goss was assigned to preside at hearing. ALJ Goss convened a prehearing conference on November 12, 2010. Suzanne Lacampagne, attorney at law, appeared on behalf of Bandon Pacific, Inc. The DEQ representative did not appear.

On December 3, 2010, the OAH reassigned the case to Senior ALJ John Mann for hearing. ALJ Mann held a prehearing conference on December 10, 2010. Ms. Lacampagne appeared on behalf of Bandon Pacific, Inc. Jeff Bachman appeared as the authorized representative of DEQ. The parties agreed to hold the hearing on February 23 and 24, 2011.

ALJ Mann conducted a hearing on February 23, 2011 at the offices of Miller Nash, LLP in Portland, Oregon. Ms. Lacampagne represented Bandon Pacific, Inc., along with co-counsel Jeff Miller. Mr. Bachman represented DEQ. Steve Nichols and Sarah Wheeler testified for DEQ. Graydon Stinnett and Alan Ismond testified for Bandon Pacific, Inc. ALJ Mann held the record open to allow the parties to submit written closing briefs.

On March 4, 2011, Bandon Pacific, Inc. filed a Motion for Discovery. On March 30 and April 1, 2011, DEQ provided copies of all documents in its possession requested by the Motion. Bandon Pacific, Inc. did not request to submit the additional documents as evidence. ALJ Mann reviewed the documents and concluded that it was unnecessary to reopen the record for additional evidence. The record closed on April 5, 2011 after submission of closing briefs.

ISSUES

1. Whether Bandon Pacific, Inc. failed to monitor wastewater discharges, as required under the terms of a 900-J National Pollution Discharge permit, from January 2004 through December 2008, in violation of ORS 468B.025(2).

2. Whether Bandon Pacific, Inc. discharged waste into the waters of the state without a permit, from January 2004 through December 2008, in violation of ORS 468B.050(1)(a).

3. Whether Bandon Pacific, Inc. failed to pass wastewater discharges through a 40 mesh screen, as required under the terms of a 900-J National Pollution Discharge permit, from January 2004 through December 2008, in violation of ORS 468B.025(2).

4. Whether Bandon Pacific, Inc. is subject to a civil penalty and, if so, in what amount.

EVIDENTIARY RULING

Exhibits A1 through A124, offered by the DEQ, and Exhibits R1 through R51 were admitted into the record without objection.

FINDINGS OF FACT

1. Bandon Pacific, Inc. (Bandon Pacific) owned and operated a retail seafood business at 250 First Street in Bandon, Oregon from 1998 through 2010. The business was located adjacent to the Coquille River, approximately one-half mile from the point that the river fed into the Pacific Ocean. Bandon Pacific leased the property from the City of Bandon for $1 per year pursuant to a 100 year lease. In 2008 or 2009, the City filed suit against Bandon Pacific seeking to terminate the lease. In 2010, the City purchased Bandon Pacific, and closed the facility, as part of a settlement of the litigation. (Test. of Stinnett.)

2. Various owners, including Bandon Pacific, operated a large-scale fish processing business at the same location, processing several million pounds of seafood per year, from 1979 through 1999. Sometime in 1999, Bandon Pacific ceased operating the fish processing business at that location and operated exclusively as a retail operation. The facility continued to process fish as necessary to serve its retail customers, but no longer in the large quantities it processed in the past. Between 2004 and 2008, the facility processed approximately 49,000 to 59,000 pounds of seafood per year. The retail facility sold approximately 99 percent of that seafood to the general public. (Test. of Stinnett.)

3. From 2004 through 2008 (the period covered by the Notice) Bandon Pacific processed fish in a room in the back of the retail operation. Wastewater from cleaning the fish emptied into a square drain on the floor of the room. Bandon Pacific installed a stainless steel screen on the top of the drain to capture solids. Bandon Pacific employees would remove solids from the screen and place them in a tote with fish carcasses and other discarded pieces of fish for disposal. Employees then emptied the tote onto a concrete chute that emptied into the Coquille River. Occasionally some of the fish carcasses would catch on some rocks prior to reaching the water. Usually those carcasses would be carried away during high tides or would be consumed by birds or sea lions. Sometime after December 2008, Bandon Pacific stopped disposing carcasses into the river. (Test. of Stinnett.)

4. Bandon Pacific's facility was covered by a 900-J National Pollution Discharge (NPDES) permit from August 1999 through May 2004. (Ex. A118.) That permit, by its terms, expired on May 31, 2004. However, because Bandon Pacific applied for a renewal, the permit extended until September 2006 when DEQ issued a revised 900-J permit. (Test. of Nichols.) DEQ renewed Bandon Pacific's coverage under the revised 900-J permit on September 5, 2006. That coverage extended through May 2011. (Ex. A119.) Both permits required Bandon Pacific to process wastewater through a screen of not less than 40 mesh.[1] Both permits allowed Bandon Pacific to discharge "seafood processing residuals" as part of DEQ's Fisheries Enhancement Program but only with prior DEQ approval. (Exs. A118 at 3-4; A119 at 3-5.) Bandon Pacific did not obtain DEQ approval to participate in the Fisheries Enhancement Program. (Test. of Nichols.)

5. From at least 2001 through December 2008, wastewater from the facility's drain emptied into a sump, and then drained into the Coquille River. A steel grate was installed at the top of the drain to catch some solids. The grate was less than the 40-mesh screen required under the NPDES permits. In January 2009 Bandon Pacific installed a 120 mesh hydrosieve screen to catch solids. Bandon Pacific removed the hydrosieve in April 2009 when it connected the drain to the city sewer system. (Test. of Nichols; Ex. R21 at 4.)

6. The August 1999 NPDES permit required Bandon Pacific to monitor its wastewater discharge on a daily basis for effluent flow. The August 1999 NPDES permit also required Bandon Pacific to sample and analyze its wastewater at least once per month for total suspended solids, biochemical oxygen demand, oil and grease, and pH levels. (Ex. A118 at 5.)

7. The September 2006 NPDES permit required Bandon Pacific to monitor its wastewater discharge on a daily basis for effluent flow. The September 2006 NPDES permit also required Bandon Pacific to sample and analyze its wastewater at least once per month for total suspended solids, biochemical oxygen demand, oil and grease, pH levels, turbidity, fecal coliform bacteria, and e-coli. (Ex. A119 at 6.)

8. Both versions of the NPDES permits required Bandon Pacific to submit monthly monitoring Discharge Monitoring Reports (DMRs), on DEQ approved forms, for each calendar month. The permits required the DMRs to be submitted no later than the 15th day of the following calendar month. (Exs. A118 at 7; A119 at 7.) From February 1999 through August 2003, Cynthia Loshbaugh, Bandon Pacific's Controller, was primarily responsible for preparing DMRs for the retail business and for filing the reports with DEQ. Sometime in 2001, Ms. Loshbaugh's manager, Curt Janke, told her that Ruben Kretzschmar of DEQ had informed him that Bandon Pacific could report "no production" on the DMRs. Sometime in 2002, Mr. Janke told Ms. Loshbaugh that Bandon Pacific no longer needed to monitor its discharges as required under the permit. (Ex. R2.)

[1] "Mesh" refers to the number of openings per square inch on the screen. When a screen has a higher mesh count, each hole is normally smaller than would be the case with a lower mesh screen. When the mesh is higher, fewer solids can pass through the screen. Thus, a screen with 20 mesh would screen out fewer solids than would one with 40 mesh. A 120 mesh screen would filter out more solids than would a 40 mesh screen. The NPDES permits required a screen of not less than 40 mesh, but would have allowed a screen with a higher mesh. (Test. of Nichols.)

9. Each month from February 2004 through January 2009, Bandon Pacific submitted DMRs to DEQ, covering the period from January 2004 through December 2008. On each page of the DMRs, Bandon Pacific wrote "no production." (Exs. A62 through A117.)

10. Bandon Pacific performed none of the wastewater monitoring required under its NPDES permits during the period from January 2004 through December 2008. (Test. of Stinnett.)

11. On December 3, 2008, DEQ received a letter from Bandon Pacific's attorney which disclosed that Bandon Pacific's DMRs were inaccurate from at least 2006. The letter disclosed that Bandon Pacific had production of between 28,000 to 56,000 pounds of seafood every year since 2006 but had been reporting "no production" on the DMRs and had not been performing wastewater monitoring. (Ex. R11.)

12. On April 6, 2009, DEQ received corrected DMRs from Bandon Pacific for the period from January 2004 through December 2008. The DMRs included the amount of seafood processed for each month, but did not include any information about water sampling results or about solid waste disposal. (Exs. A1 through A61.)

13. The corrected DMRs revealed that Bandon Pacific processed seafood on 195 separate days in 2004, 116 separate days in 2005, 187 separate days in 2006, 190 separate days in 2007, and 175 separate days in 2008. (Exs. A1 through A61.) Bandon Pacific discharged wastewater into the Coquille River on each day of production and did not perform any sampling or analysis of the wastewater as required under the terms of its permits. (Test. of Stinnett.)

14. In 2010, Bandon Pacific retained the services of Alan Ismond, a chemical engineer, and his company Aqua-Terra Consultants. Mr. Ismond formed the company in 1993 to provide engineering and environmental consulting services to the seafood processing industry. In late 2010, Mr. Ismond commissioned a survey of the Coquille River bed in the area near the Bandon Pacific facility. The survey revealed no visible remains of fish carcasses. (Test. of Ismond; Ex R6.) Bandon Pacific discharged fish wastes in an area of the river near the mouth of the Pacific Ocean. Because of that proximity, currents and tidal exchanges were substantial and likely dispersed any discharges of wastewater and fish carcasses very quickly. Because the waste was composed of non-toxic organic material, and because the waste did not accumulate on the river bed, Mr. Ismond concluded that the material was likely quickly dispersed into the ocean with no significant impact on the environment. (Test. of Ismond.)

15. DEQ calculated a portion of the proposed penalties for failure to conduct necessary wastewater monitoring using the U.S. Environmental Protection Agency's BEN computer model. DEQ estimated that Bandon Pacific avoided costs of $185 per month for wastewater monitoring from January 2004 through July 2006 and $285 per month from August 2006 through December 2008. Using the BEN model, DEQ concluded that Bandon Pacific gained an economic benefit of $3,744 for the period of January 2004 through July 2006 and $5,422 for the period from August 2006 through December 2008. (Test. of Wheeler; Ex. A120.)

CONCLUSIONS OF LAW

1. Bandon Pacific failed to monitor wastewater discharges, as required under the terms of a 900-J National Pollution Discharge permit, from January 2004 through December 2008, in violation of ORS 468B.025(2).

2. Bandon Pacific discharged waste into the waters of the state without a permit, from January 2004 through December 2008, in violation of ORS 468B.050(1)(a).

3. Bandon Pacific failed to pass wastewater discharges through a 40 mesh screen, as required under the terms of a 900-J National Pollution Discharge permit, from January 2004 through December 2008, in violation of ORS 468B.025(2).

4. Bandon Pacific is subject to a civil penalty of $174,766 for failing to monitor wastewater discharges in violation of ORS 468B.025(2), $18,000 for discharging waste into the waters of the state without a permit in violation of ORS 468B.050(1)(a), and $7,500 for failing to pass wastewater discharges through a 40 mesh screen in violation of ORS 468B.025(2). The total amount of civil penalties is $200,266.

OPINION

DEQ contends that Bandon Pacific violated conditions of an NPDES permit and discharged wastes into the waters of the state without a permit. DEQ also contends that Bandon Pacific must pay a civil penalty. As the proponent of these contentions, DEQ has the burden of establishing, by a preponderance of the evidence, that the violations set forth in the November 30, 2009 Notice of Civil Penalty Assessment and Order occurred, and that the proposed penalty is appropriate. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Bandon Pacific did not seriously contest the violations, but, instead, raised concerns about the amount of the proposed civil penalty. The evidence in the record established all of the violations alleged in the Notice.

ORS 468B.025(2)[2] prohibits violation of the terms of an NPDES permit. Bandon Pacific operated under the terms of two successive NPDES permits from January 2004 through December 2008. Schedule B of both permits required Bandon Pacific to conduct monthly chemical sampling and analysis of its wastewater. Bandon Pacific did not do so. Both permits also required Bandon Pacific to perform daily monitoring of its wastewater for effluent flow. Bandon Pacific failed to meet this requirement as well. Thus, the evidence established that Bandon Pacific violated the terms of its NPDES permits in violation of ORS 468B.025(2). The violations occurred on every day of production at the facility when Bandon Pacific failed to monitor its effluent flow. Furthermore, because Bandon Pacific was required to monitor its wastewater discharges for multiple constituents, its failure to conduct the required sampling resulted in multiple violations each month.

Both permits also required Bandon Pacific to pass its wastewater through screen of not less than 40 mesh. Graydon Stinnett, the former manager of the facility testified that, at various times, he believed that the facility had screens of higher mesh connected to the drain. However, he was unable to recall precisely when the various screens were placed on the drains and was uncertain about the mesh count. During an April 2009 inspection, Bandon Pacific employees informed a DEQ inspector that Bandon Pacific removed the 120 mesh hydroseive screen when it ceased large scale operations. Bandon Pacific reinstalled that screen in January 2009. Thus, the evidence established, more likely than not, that Bandon Pacific failed to pass its wastewater through a 40 mesh or greater screen during the entire five year period at issue.

ORS 468B.050(1)(a)[3] prohibits the discharge of waste into the waters of the state from any industrial or commercial activity without a permit to do so. The NPDES permits in this case allowed Bandon Pacific to discharge "seafood processing residuals" into waters of the state, as part of its Fisheries Enhancement Program, but only with prior Department approval. Bandon Pacific did not obtain such approval prior to disposing of fish carcasses and fish waste into the Coquille River. Bandon Pacific violated ORS 468B.050(1)(a) on every day of production throughout the five year period at issue.

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[2] ORS 468B.025(2) provides:

> No person shall violate the conditions of any waste discharge permit issued under ORS 468B.050.

ORS 468B.050 provides, in relevant part:

> (1) Except as provided in ORS 468B.053 or 468B.215, without holding a permit from the Director of the Department of Environmental Quality or the State Department of Agriculture, which permit shall specify applicable effluent limitations, a person may not:
>
> (a) Discharge any wastes into the waters of the state from any industrial or commercial establishment or activity or any disposal system.

[3] *See* footnote 2.

Civil Penalties

Bandon Pacific conceded that it failed to file accurate DMRs and failed to perform required monitoring for the five year period covered by the Notice. However, Bandon Pacific contends that some of the penalties are barred by the statute of limitations. Furthermore, Bandon Pacific argues, on various grounds, that DEQ abused its discretion and incorrectly calculated the proposed civil penalties. Each of those assertions is addressed separately below.

1. Statute of Limitations

Bandon Pacific asserts that a portion of the proposed civil penalties are barred by the statute of limitations. Bandon Pacific argues, alternatively, that the appropriate statute of limitations is either five years, under the federal Clean Water Act, 28 USC § 2462, or two years under ORS 12.110(2). DEQ argues that neither limitation period applies to the violations alleged in this case.

With regard to the federal Clean Water Act, DEQ correctly notes that it has alleged violations of state law, and not violations of the Clean Water Act. Bandon Pacific however, notes that the violations are predicated on violations of the terms of a discharge permit issued under the auspices of the Clean Water Act. Nevertheless, Bandon Pacific has cited no authority for the proposition that the federal statute of limitations applies to violations of state law. Nor has Bandon Pacific demonstrated that the Clean Water Act requires states to apply the federal statute of limitations. In the absence of a federal mandate imposing such a limitation, Oregon is not prohibited from enforcing state law violations beyond the five year limitation period established under federal law.

As an alternative argument, Bandon Pacific asserts that a portion of the civil penalties are barred by ORS 12.110(2) which provides:

> An action upon a statute for a forfeiture or penalty to the state or county shall be commenced within two years.

DEQ contends that the above statute applies only to civil litigation, and does not apply to actions under the Administrative Procedures Act. According to DEQ, the term "action" is equivalent to the term "suit" and should apply solely to bar litigation in circuit court.

Interpretation of statutory terms is governed by the analytical method first announced in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). In *PGE*, the Oregon Supreme Court explained that to determine legislative intent, a court begins by examining a statute's text, taken in its statutory context. If the legislative intent is unambiguous, the court stops at that first level of analysis.[4] *PGE*, 317 Or at 610-11.

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[4] The Court in *PGE* stated:

> In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent [citations omitted]. In trying to ascertain the meaning of a statutory provision,

The context of a statute includes provisions in related statutes. ORS 12.110(2) is part of ORS Chapter 12, which generally imposes statutes of limitation on "actions" and "suits." Of particular note, ORS 12.020 provides

> **12.020 When action deemed begun.** (1) Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, *when the complaint is filed, and the summons served* on the defendant, or on a codefendant who is a joint contractor, or otherwise united in interest with the defendant.
>
> (2) If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction shall be deemed to have been commenced upon *the date on which the complaint in the action was filed.*

(Italics added; bold in original.) Thus, for purposes of ORS Chapter 12, an "action" is commenced by filing a "complaint" and by serving a "summons." A complaint and a summons

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> and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute, including, for example, the statutory enjoinder "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning [citations omitted].
>
> Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes [citations omitted]. Just as with the court's consideration of the text of a statute, the court utilizes rules of construction that bear directly on the interpretation of the statutory provision in context. Some of those rules are mandated by statute, including, for example, the principles that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all," ORS 174.010, and that "a particular intent shall control a general one that is inconsistent with it," ORS 174.020. Other such rules of construction are found in case law, including, for example, the rules that use of a term in one section and not in another section of the same statute indicates a purposeful omission, *Emerald PUD v. PP&L*, 302 Or. 256, 269, 729 P2d 552 (1986), and that use of the same term throughout a statute indicates that the term has the same meaning throughout the statute, *Racing Com. v. Multnomah Kennel Club*, 242 Or. 572, 586, 411 P2d 65 (1966).
>
> If the legislature's intent is clear from the above-described inquiry into text and context, further inquiry is unnecessary.

PGE, 317 Or at 610-11.

are particular to court proceedings. Under ORS 12.110(2) an "action" must be "commenced" within two years. The statutory context makes it clear that an action can *only* be commenced by filing a complaint in a court of law. Neither a complaint nor a summons is required, or even contemplated, under the APA. Rather, commencement of administrative proceedings is initiated by serving a "notice" on each party to the proceeding. ORS 183.413 and 183.415.

The statutory context demonstrates that the limitations period set forth in ORS 12.110(2) applies to proceedings in courts of law. It does not apply to cases under the APA. Therefore, DEQ is not barred from enforcing violations that took place more than two years prior to the date of the Notice in this case.

2. Penalties for Violations Occurring Prior to April 2006

DEQ asserted in its Notice that it had identified 2,248 separate violations of ORS 468B.025(2). This was apparently derived by the number of separate daily monitoring and monthly reporting requirements not met by Bandon Pacific during the five year period at issue. However, the Notice stated that DEQ had elected to impose a civil penalty based upon 46 violations "by assessing one penalty per monitoring requirement violated per year." (Notice, Exhibit 1 at 2.) DEQ calculated all 46 violations as Class I. Bandon Pacific argues that this language demonstrated that DEQ was imposing penalties for Class II violations that occurred prior to April 2006. DEQ asserts that it did not intend to impose *any* penalties for such violations that occurred prior to April 2006, but chose to impose penalties for 46 violations that occurred after March 31, 2006.

DEQ's Notice explicitly acknowledged that, prior to April 2006, *former* OAR 340-012-0055(2)(f) classified all violations of ORS 468B.025(2) as Class II. After that date, OAR 340-012-0055(1)(o) classified such violations as Class I. The Notice explains:

> Of the 2,248 occurrences of the violation, the Department elects to assess separate penalties for 46 Class I occurrences of the violation. The Department arrived at 46 violations by assessing one penalty per monitoring requirement per year.

(Notice, Exhibit 1 at 2.) Construing the Notice as a whole, the evidence established that DEQ intended to impose penalties solely for 46 post-March 31, 2006 violations. The Notice explicitly acknowledged that the earlier violations were Class II. The Notice also explicitly asserts that it is imposing penalties *only* for Class I violations. This necessarily implies that DEQ was not seeking to impose any penalties for the earlier Class II violations. The last sentence in the above quoted paragraph is, admittedly, ambiguous. It could be interpreted to suggest that the proposed penalties are "for" violations occurring in each of the five years at issue. However, taken in context, the last sentence is more reasonably interpreted as setting forth the rationale for selecting only 46 violations, and not more. DEQ chose to impose a limit on the number of violations for which it would impose a penalty. It established that limit by multiplying the number of monitoring requirement violations times the number of years at issue. Nevertheless, it applied that number solely to post-March 31, 2006 Class I violations.

Nothing in the APA, or the applicable statutes, required DEQ to impose penalties for the earlier Class II violations. Similarly, nothing in the APA, or the applicable statutes, prohibited DEQ from imposing civil penalties for only a small portion of the post-March 31, 2006 violations. DEQ chose to impose penalties for only 46 such violations and provided a reasonable explanation for using that number. Bandon Pacific was not prejudiced by the Notice or by DEQ's failure to impose penalties for the earlier violations.

3. Magnitude of the Violations

In calculating the civil penalties for violations of ORS 468B.025(2), DEQ found that the magnitude of each violation was "moderate." The methodology for determining the magnitude of a violation is set forth in OAR 340-012-0130 which provides, in relevant part:

> (1) For each civil penalty assessed, the magnitude is moderate unless:
>
> (a) A selected magnitude is specified in 340-012-0135 and information is reasonably available to the department to determine the application of that selected magnitude; or
>
> (b) The department determines, using information reasonably available to it, that the magnitude should be major under section (3) or minor under section (4).
>
> (2) If the department determines, using information reasonably available to the department, that a general or selected magnitude applies, the department's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude.
>
> * * * * *
>
> (4) The magnitude of the violation is minor if the department finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors. In making this finding, the department will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.

Bandon Pacific presented unrebutted and credible expert testimony to establish that there is currently no evidence of actual harm to the environment that was directly caused by its violations. Therefore, Bandon Pacific asserts, it has demonstrated that the violations had no more than a de minimis adverse impact on the environment and should be assessed as "minor" magnitude violations under OAR 340-012-0130(4).

However, under OAR 340-012-0130(1), a violation is considered "moderate" unless there is evidence to establish a lesser magnitude. In this case, Bandon Pacific failed to perform required monitoring for five years. Given the passage of time, it is simply not possible to determine if Bandon Pacific's activities had an adverse impact on the environment or if they posed more than a de minimis threat to human health or other environmental receptors at the time of the various discharges. While there is no evidence of *current* environmental harm to the Coquille River in the area near the facility, whether more significant harm occurred in the past is simply a matter of conjecture.

Among the factors to be considered in assessing whether a violation is properly categorized as "minor" are "the concentration, volume, or toxicity of the materials involved." Because Bandon Pacific did not perform its required monitoring obligations, the precise concentration, volume, and toxicity of the discharged wastewater can never be known. While it is fortunate that there appears to be no lasting impact on the Coquille River in the area near the facility, the violations in this case prevent a meaningful assessment of past harm, or past threats of harm, that may have existed from 2004 though 2008. The evidence thus supports a magnitude of "moderate" for each of the violations at issue.

4. Failure to Follow Internal Directive

Bandon Pacific asserts that DEQ violated its own Internal Management Directive on Assessment of Multiple Penalties in this case. Pursuant to that Directive, Bandon Pacific asserts, DEQ should have imposed penalties on only three violations; two for violation of ORS 468B.025(2) (failing to monitor wastewater in violation of the terms of an NPDES permit and failing to pass wastewater through a 40 mesh screen), and one for violation of ORS 468B.050(1)(a) (discharging fish wastes into the waters of the state without a permit).

The difficulty with Bandon Pacific's argument is that the Directive itself specifically states that it "is intended solely as guidance for Enforcement staff" that "does not create any rights, duties, obligations, or defenses" to any third parties. More importantly, the Directive states that "DEQ may take action which varies from this Directive." (Exhibit R9 at 1.) Furthermore, the Directive includes specific factors to consider in determining "whether to assess separate class-and-magnitude based penalties for more than one violation or day of violation." (Exhibit R9 at 4.) This necessarily implies that it may be appropriate, in a given case, to assess separate penalties for multiple violations and multiple days of violation. Under the Directive, staff is directed to consider whether the violations were "willful" or "flagrant," whether the individual violations had the potential to cause significant harm to the environment or public health, and whether the violator had sufficient resources and expertise to prevent the violation. (Exhibit R9 at 4.)

The evidence in this case demonstrated that Bandon Pacific knew of its obligations under the NPDES permit, but chose to discontinue monitoring. Bandon Pacific contends that an employee reported that a DEQ representative informed him that Bandon Pacific could discontinue monitoring and could report "no production" on its DMRs. However, in light of Bandon Pacific's actual knowledge that it had *some* production, it was not reasonable to rely on this alleged advice without taking additional steps to verify its legal obligations. If the

employee's report was accurate, then the DEQ employee was advising Bandon Pacific to submit DMRs that Bandon Pacific knew were false. Before acting on such unusual advice, a reasonable person, at a minimum, would try to confirm, in writing if possible, that the DEQ had authorized the process. While this conduct may not rise to the level of a "flagrant" violation, it demonstrates that Bandon Pacific knowingly chose not to perform its obligations under the NPDES permit.

Furthermore, Bandon Pacific clearly had the resources and expertise to perform its obligations because it had submitted accurate DMRs, and performed required monitoring, in the past. Finally, a failure to monitor wastewater discharges over a five year period had the potential to cause significant harm, even if there is no evidence that such harm exists presently. Under these circumstances, DEQ staff appears to have given reasonable consideration to factors set forth in the Directive.

It is also noteworthy that the Directive suggests that staff generally should consider not imposing penalties for each and every violation where a person has multiple similar violations over an extended period. The general thrust of the Directive is to suggest that individuals not be assessed the maximum number of penalties available under Oregon law. That is precisely what DEQ has proposed in this case. Although the total amount of the penalties is significant, they were imposed for only 56 out of a total of more than 4,000 possible violations. Although Bandon Pacific has no specific, enforceable, right to have penalties assessed in conformity with the Directive, the evidence established that DEQ's proposed civil penalties are consistent with those general guidelines.

5. Failure to Provide Written Advance Warning of Civil Penalties – ORS 468.126(1)

ORS 468.126(1) provides:

> No civil penalty prescribed under ORS 468.140 shall be imposed for a violation of an air, water or solid waste permit issued by the Department of Environmental Quality until the permittee has received five days' advance warning in writing from the department, specifying the violation and stating that a penalty will be imposed for the violation unless the permittee submits the following to the department in writing within five working days after receipt of the advance warning:
>
> (a) A response certifying that the permitted facility is complying with applicable law;
>
> (b) A proposal to bring the facility into compliance with applicable law that is acceptable to the department and that includes but is not limited to proposed compliance dates; or
>
> (c) For a water quality permit violation, a request in writing to the department that the department follow the procedures prescribed under ORS 468B.032,

> Notwithstanding the requirement for a response to the department within five working days, the permittee may file a request under this paragraph within 20 days from the date of service of the notice.

Bandon Pacific asserts that DEQ may not impose civil penalties for the violations in this case because it failed to issue the five-day advance written warning required under ORS 468.126(1). Bandon Pacific is incorrect.

ORS 468.126(2)(e) provides:

> (2) No advance notice shall be required under subsection (1) of this section if:
>
> * * * * *
>
> (e) The requirement to provide such notice would disqualify a state program from federal approval or delegation.

On September 26, 2000, the federal Environmental Protection Agency (EPA) notified DEQ that application of ORS 468.126(1) would disqualify DEQ from continued federal approval of its NPDES program. (Exhibit A124.) On February 14, 2001, the Oregon Department of Justice informed EPA that it concurred in the assessment and would, therefore, no longer issue letters under ORS 468.126(1) for violations of NPDES permits.

EPA's conclusion was supported by federal law. The version of 40 CFR § 123.27(a)(3)(i) (July 1, 2000) in effect at the time of the correspondence provided that "civil penalties shall be recoverable for the violation of any NPDES permit condition." Under the provisions of ORS 468.126(1), a party could avoid a civil penalty by submitting a proposal to come into compliance with the law. This is contrary to the mandatory provisions of the federal regulation. *Former* CFR § 123.63(a)(3) expressly allowed the EPA to withdraw approval of NDPES program when the state does not have enforcement procedures that met federal standards. The current versions of those federal regulations remain unchanged. EPA was correct that application of ORS 468.126(1) for violations of NPDES permits could result in Oregon losing program approval. Therefore, under ORS 468.126(2)(e), DEQ was not required to provide advance written notice prior to imposing a penalty.

6. Disproportionality – Improper Motivation

Bandon Pacific asserts that the proposed civil penalties in this are far in excess of those imposed on other entities. It also contends that DEQ, in imposing the penalties, was motivated, in part, by Bandon Pacific's status as a subsidiary of a larger corporate parent. For these reasons, Bandon Pacific asserts that the propose penalties amount to an abuse of discretion.

Under the APA, review for abuse of discretion is limited to the factors enumerated in ORS 183.482(8). *Labor Ready Northwest, Inc. v. BOLI*, 208 Or App 195 (2006) *rev. denied* 342 Or 473 (2007). ORS 183.482(8) states:

> The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, the court shall:
>
> (A) Set aside or modify the order; or
>
> (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.
>
> (b) The court shall remand the order to the agency if the court finds the agency's exercise of discretion to be:
>
> (A) Outside the range of discretion delegated to the agency by law;
>
> (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
>
> (C) Otherwise in violation of a constitutional or statutory provision.

The proposed penalties, assessed for a small fraction of the total number of violations, are well within the range of discretion delegated to the agency. The penalties do not violate a statute or a constitutional provision. The penalties are consistent with DEQ rules and are not inconsistent with an officially stated agency position.

Bandon Pacific appears to argue that the size of the proposed civil penalties in relation to penalties imposed in other cases constitutes a departure from a "prior agency practice." In support of that argument, Bandon Pacific notes that it has identified 332 cases in which DEQ has issued civil penalties for water quality violations since January 1, 2006. The highest civil penalty identified during that period was for $90,000. Only six other penalties exceeded $20,000, only 21 penalties exceeded $10,000. The overwhelming number of cases involved penalties of less than $10,000. Assuming that summary is accurate, Bandon Pacific has failed to establish that the penalties in these cases established an agency practice that would limit DEQ's discretion in this case.

Bandon Pacific cites a penalty of $90,000, assessed against the Oregon Department of Transportation, for violations of a stormwater discharge permit in 2006 and 2007 and a $32,000 civil penalty imposed on a berry processing facility for discharges of highly organic water. In both cases, Bandon Pacific asserts that the violations resulted in actual harm to the environment. Bandon Pacific also identified other cases, involving lower civil penalties, where the actual impact on the environment was greater than in the present case. However, Bandon Pacific has identified no other case involving a failure to perform necessary daily and monthly monitoring, under an NPDES permit, for a period of multiple years. A simple comparison of the relative size of civil penalties alone is insufficient to establish a prior agency practice.

Bandon Pacific has identified no prior cases involving facts similar to the present case. However, Bandon Pacific did provide a copy of a Notice of Civil Penalty Assessment and Order

issued in August 2010 to Clausen Oysters, a seafood processing facility that operated for five years without an NPDES permit. The proposed penalty in that case was $24,992. (Ex. R36.) While there appear to be some similarities between to the present case, the Notice in the Claussen Oysters case does not contain sufficient information to determine the precise magnitude of the violations at issue. In the present case, the evidence established multiple violations, on multiple days of production, over a five year period. The Claussen Oysters Notice says nothing about the volume of production. In addition, it is not clear whether Claussen Oysters appealed the Notice, or whether DEQ ever issued a final order in the case. In any event, the Claussen Notice itself does not demonstrate an agency "practice" that would prevent DEQ from imposing the proposed penalties in the present case.

Bandon Pacific appears to suggest that DEQ is required to impose greater civil penalties for violations that cause actual environmental harm than in cases where no actual harm is shown. Where all other factors are equal, that approach is reasonable and is required under DEQ's rules. OAR 340-012-0130(3) provides that a violation will have a magnitude of "major" if the violation had a "significant adverse impact on human health or the environment." OAR 340-012-0140 provides that the base penalty for a major violation is twice the base penalty for a moderate violation and four times the amount of a minor violation. Thus, where all other factors are the same, where a violation causes significant harm to the environment the violator can expect to pay a substantially greater civil penalty. However, other factors, including the number and type of violations at issue, can also result in higher penalties. It is not surprising that a party with multiple violations over a five year period might be assessed lower civil penalties than would a party with fewer violations over a shorter period of time.

The amount of civil penalties proposed in this case is largely a function of the number of years involved and the total number of violations at issue. When the penalties are prorated over the five year period at issue, they amount to less then $42,000 per year. While this amount is substantial, it is well within the range of discretion granted to DEQ and is not grossly disproportionate to civil penalties assessed in other cases.

Finally, Bandon Pacific asserts that DEQ was improperly motivated by Bandon Pacific's status as a subsidiary of Pacific Seafood Group. As a result of this alleged motive, Bandon Pacific asserts that DEQ staff inflated the proposed civil penalty. Bandon Pacific asserts that DEQ staff relied on Bandon Pacific's relationship with Pacific Seafood Group to justify the amount of the penalty in press releases. However, even assuming such an improper motive, Bandon Pacific did not explain how DEQ staff used information about Bandon Pacific's corporate status to inflate the penalty. Bandon Pacific concedes that DEQ properly determined that Bandon Pacific did not have a history of past violations. Nothing in the civil penalty calculations set forth in the Notice appears to have any relationship to any violations by Pacific Seafood Group or other associated entities. Thus, to the extent that DEQ staff was cognizant of Bandon Pacific's relationship with larger entities, there is no evidence that that resulted in any change to the specific factors used to calculate the civil penalties.

7. Penalty Calculations

OAR 340-012-0045 sets forth the criteria for calculating civil penalties as follows:

Except as provided in OAR 340-012-0038(3), in addition to any other liability, duty, or other penalty provided by law, the Department may assess a civil penalty for any violation. Except for civil penalties assessed under OAR 340-012-0155(2), the department determines the amount of the civil penalty using the following procedures:

(1) The classification of each violation is determined by consulting OAR 340-012-0053 to 340-012-0097;

(2) The magnitude of the violation is determined as follows:

(a) The selected magnitude categories in OAR 340-012-0135 are used.

(b) If a selected magnitude is not specified in OAR 340-012-0135, or if information is not reasonably available to determine which selected magnitude applies, OAR 340-012-0130 is used to determine the magnitude of the violation.

(c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.

(d) The base penalty is adjusted by the application of aggravating or mitigating factors (P = prior significant actions, H = history in correcting prior significant actions, O = repeated or ongoing violation, M = mental state of the violator and C = efforts to correct) as set forth in OAR 340-012-0145.

(e) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.(2) The results of the determinations made in section (1) are applied in the following formula to calculate the penalty: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB.

(3) In addition to the factors listed in section (1) of this rule, the director may consider any other relevant rule of the commission in assessing a civil penalty and will state the effect that rule had on the penalty amount.

The above values are then applied to the formula in OAR 340-012-0045(2)(e), as follows:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB = \text{penalty}$$

DEQ has proposed three separate civil penalties for the violations. The calculations for those penalties are addressed separately below.

a. Violations of ORS 468B.025(2) – Failure to Monitor Wastewater Discharges

DEQ seeks to impose penalties for 46 post-March 31, 2006 violations of ORS 468B.025(2) for failing to monitor wastewater discharges. These were Class I violations pursuant to OAR 340-012-0055(1)(o). As discussed earlier in this opinion, the magnitude of the violations was moderate. The appropriate base penalty is therefore $3,000. OAR 340-12-0140(3)(a)(E)(iii) and 340-12-0140(3)(b)(A)(ii).

DEQ proposed a value of 0 (zero) for the "P" and "H" factors. Because there is no evidence of a history of past violations, those values are appropriate. DEQ also assigned a value of 0 (zero) for the "O" factor because it chose to assess separate penalties for multiple occurrences of the violations. That is also appropriate and supported by the record.

DEQ proposed a value of 2 to the "M" factor because it found that Bandon Pacific was negligent in ceasing all monitoring for a period of five years. That finding is appropriate. OAR 340-012-0145(5) provides, in relevant part:

> (5) "M" is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply.
>
> (a) The values for "M" and the finding that supports each are as follows:
>
> * * * * *
>
> (B) 2 if the respondent's conduct was negligent or the respondent had constructive knowledge (reasonably should have known) that the conduct would be a violation. Holding a permit that prohibits or requires conduct is presumed to constitute at least constructive knowledge and may be actual knowledge depending on the specific facts of the case.

Bandon Pacific knew of its permit obligations. However, Bandon Pacific alleged that it relied on third-hand information from a DEQ representative who allegedly told Bandon Pacific to stop performing its duties under the NPDES permits and to file knowingly false DMRs. It was unreasonable for Bandon Pacific to rely on such information. This supports a finding of negligence.

Bandon Pacific asserted that DEQ uses an incorrect value for the "C" factor because, it argues, Bandon Pacific took reasonable efforts to correct the violations. The value of the "C" factor is determined in accordance with OAR 340-012-0145(6) which provides:

> "C" is the respondent's efforts to correct the violation.
>
> (a) The values for "C" and the finding that supports each are as follows:

(A) -3 if the respondent made extraordinary efforts to correct the violation, or took extraordinary efforts to minimize the effects of the violation.

(B) -2 if the respondent made reasonable efforts to correct the violation, reasonable affirmative efforts to minimize the effects of the violation, or extraordinary efforts to ensure the violation would not be repeated.

(C) -1 if the respondent eventually made efforts to correct the violation, or took affirmative efforts to minimize the effects of the violation.

(D) 0 if there is insufficient information to make a finding under paragraphs (6)(a)(A) through (6)(a)(C), or (6)(a)(E), or if the violation or the effects of the violation could not be corrected or minimized.

Bandon Pacific asserts that the correct "C" value should be -2 because it self-reported the violations and took efforts to correct the violations. However, nothing in the above rule suggests that self-reporting a violation, by itself, would require an adjustment to the "C" factor. Moreover, the nature of the violations is such that it is impossible to correct them. Bandon Pacific cannot retroactively perform the required monitoring. Nor is there any evidence of "extraordinary efforts" to prevent future violations. Rather, it appears that Bandon Pacific took reasonable steps to come into compliance with the law and to meet its ongoing legal obligations; that is, it filed amended DMRs and stopped discharging wastewater into the Coquille River. Further, there is no evidence of any kind of activity to minimize the effects of the violations, most of which took place several years prior to the self-disclosure. Under these circumstances, the appropriate "C" value is 0 (zero.)

OAR 340-012-0150 is titled "Determination of Economic Benefit" and provides in relevant part:

(1) The Economic Benefit (EB) is the approximate dollar value of the benefit gained and the costs avoided or delayed (without duplication) as a result of the respondent's noncompliance. The EB may be determined using the U.S. Environmental Protection Agency's BEN computer model. Upon request of the respondent, the department will provide the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate are presumed to apply to all respondents unless a specific respondent can demonstrate that the standard value does not reflect that respondent's actual circumstance. Upon request of the Respondent, the department will use the model in determining the economic benefit component of a civil penalty.

(2) The department may make, for use in the applicable model, a reasonable estimate of the benefits gained and the costs avoided or

> delayed by the respondent. Economic benefit will be calculated without duplicating or double-counting the advantages realized by respondent as a result of its noncompliance.

DEQ estimated that Bandon Pacific avoided costs of $185 per month for wastewater monitoring from January 2004 through July 2006 and $285 per month from August 2006 through December 2008. Using the U.S. Environmental Protection Agency's BEN computer model, DEQ calculated an economic benefit of $3,744 for the period of January 2004 through July 2006 and $5,422 for the period from August 2006 through December 2008. Bandon Pacific did not dispute these estimates, but contended that a portion of the economic benefit was barred by the statute of limitations under the Clean Water Act. As explained earlier in this decision, the penalties in this case are not subject to such a limitation.

Because there are multiple violations, DEQ calculated the amount of the violation for each violation, multiplied the result by 46 violations, then added the economic benefit amount to the result. That approach is reasonable and consistent with DEQ's rules. *See,* OAR 340-12-0150(2) ("Economic benefit will be calculated without duplicating or double-counting the advantages realized by respondent as a result of its noncompliance.")

The amount of the civil penalties for the violations is calculated as follows:

$$((BP + [(0.1 \times BP) \times (P + H + O + M + C)]) \times 46) + EB$$

$$(($3,000 + [(0.1 \times $3,000) \times (0 + 0 + 2 + -0)]) \times 46) + ($3,744 + $5,422)$$

$$(($3,000 + ($300 \times 2)) \times 46) + $9,166$$

$$(($3,000 + $600) \times 46) + $9,166$$

$$($3,600 \times 46) + $9,166$$

$$$165,600 + $9,166 = $174,766$$

The appropriate civil penalties for 46 post-March 31, 2006 violations of ORS 468B.025(2), for failing to monitor wastewater discharges, is $174,766 as calculated above.

b. Violations of ORS 468B.050(1)(a) – Discharging Waste without a Permit

DEQ seeks to impose penalties for five violations of ORS 468B.050(1)(a) for discharging its seafood processing remnants into to the Coquille River without a permit.[5] These were Class I violations pursuant to OAR 340-012-0055(1)(c). As discussed earlier in this opinion, the magnitude of the violations was moderate. The appropriate base penalty is therefore $3,000. OAR 340-12-0140(3)(a)(E)(iii) and 340-12-0140(3)(b)(A)(ii).

[5] Although there were significantly more such violations, DEQ proposed penalties for one violation per year.

DEQ proposed a value of 0 (zero) for the "P" and "H" factors. Because there is no evidence of a history of past violations, those values are appropriate. DEQ also assigned a value of 0 (zero) for the "O" factor because it chose to assess separate penalties for multiple occurrences of the violations. That is also appropriate and supported by the record.

DEQ proposed a value of 2 to the "M" factor because it found that Bandon Pacific was negligent. That finding is appropriate. OAR 340-012-0145(5). Bandon Pacific should have known that it was not permitted to dispose of such wastes without prior approval as set forth in its NPDES permits.

Bandon Pacific asserts that the correct "C" value should be -2 because it self-reported the violations and took efforts to correct the violations. However, the nature of the violations is such that it is impossible to correct them. Nor is there any evidence of "extraordinary efforts" to prevent future violations. Rather, it appears that Bandon Pacific took reasonable steps to come into compliance with the law and to meet its ongoing legal obligations; that is, it stopped disposing of fish processing remnants in the river. Further, there is no evidence of any kind of activity to minimize the effects of the violations, most of which took place several years prior to the self-disclosure. Under these circumstances, the appropriate "C" value is 0 (zero.)

DEQ did not find that Bandon Pacific received an economic benefit from these violations. The amount of the civil penalties for the violations is calculated as follows:

$$(BP + [(0.1 \times BP) \times (P + H + O + M + C)]) \times 5$$

$$(\$3{,}000 + [(0.1 \times \$3{,}000) \times (0 + 0 + 2 + -0)]) \times 5$$

$$(\$3{,}000 + [\$300 \times 2]) \times 5$$

$$(\$3{,}000 + \$600) \times 5$$

$$\$3{,}600 \times 5 = \$18{,}000$$

The appropriate civil penalties for five violations of ORS 468B.050(1)(a) for discharging its seafood processing remnants into to the Coquille River without a permit, is $18,000 as calculated above.

c. Violations of ORS 468B.025(2) – Failure to Use a 40 Mesh Screen

DEQ seeks to impose penalties for five violations of ORS 468B.025(2) for failing to pass wastewater through a 40 mesh screen.[6] These were Class II violations pursuant to OAR 340-012-0053(2)(a) and *former* OAR 340-012-0055(2)(f). As discussed earlier in this opinion, the magnitude of the violations was moderate. The appropriate base penalty is therefore $1,500. OAR 340-012-0140(3)(a)(E)(iii) and 340-012-0140(3)(b)(B)(ii).

[6] Although there were significantly more such violations, DEQ proposed penalties for one violation per year.

DEQ proposed a value of 0 (zero) for the "P" and "H" factors. Because there is no evidence of a history of past violations, those values are appropriate. DEQ also assigned a value of 0 (zero) for the "O" factor because it chose to assess separate penalties for multiple occurrences of the violations. That is also appropriate and supported by the record. DEQ proposed a value of 2 to the "M" factor because it found that Bandon Pacific was negligent. That finding is appropriate.

Bandon Pacific asserts that the correct "C" value should be -2 because it self-reported the violations and took efforts to correct the violations. However, the nature of the violations is such that it is impossible to correct them. Nor is there any evidence of "extraordinary efforts" to prevent future violations. Rather, it appears that Bandon Pacific took reasonable steps to come into compliance with the law and to meet its ongoing legal obligations; that is, it temporarily connected an appropriate screen and then connected its drain to the public sewer. There is no evidence of any kind of activity to minimize the effects of the violations, most of which took place several years prior to the self-disclosure. Under these circumstances, the appropriate "C" value is 0 (zero.)

In the Notice, DEQ calculated an economic benefit of $6,788 based on the cost avoided by not purchasing a hydrosieve. Bandon Pacific contends that it did not avoid such a cost because it was eventually able to borrow a hydroseive, at no cost, and then eliminated the need for the screen by connecting to a public sewer. It is unnecessary to address these arguments, however, because DEQ failed to present any evidence to establish how it calculated the alleged economic benefit. With its written closing argument, Bandon Pacific attached a copy of an October 29, 2009 memorandum from Sarah Wheeler at DEQ which appears to explain how DEQ calculated the economic benefit for these violations. However, that memorandum was not offered at the hearing and was not authenticated. Although Ms. Wheeler testified, her testimony was limited to her calculation of the economic benefit associated with failing to monitor wastewater discharges. There is no evidence in the record regarding the economic benefit calculation with regard to the failure to use an appropriate screen. Therefore, the record does not support a finding of an economic benefit for these violations.

The amount of the civil penalties for the violations is calculated as follows:

$$(BP + [(0.1 \times BP) \times (P + H + O + M + C)]) \times 5$$

$$(\$1{,}500 + [(0.1 \times \$1{,}500) \times (0 + 0 + 2 + -0)]) \times 5$$

$$(\$1{,}500 + [\$150 \times 2]) \times 5$$

$$(\$1{,}500 + \$300) \times 5$$

$$\$1{,}800 \times 5 = \$7{,}500$$

The appropriate civil penalties for five violations of ORS 468B.025(2) for failing to pass wastewater through a 40 mesh screen, is $7,500 as calculated above.

Total Civil Penalties

For the reasons set forth above, Bandon Pacific is subject to a civil penalty of $174,766 for failing to monitor wastewater discharges in violation of ORS 468B.025(2), $18,000 for discharging waste into the waters of the state without a permit in violation of ORS 468B.050(1)(a), and $7,500 for failing to pass wastewater discharges through a 40 mesh screen in violation of ORS 468B.025(2). The total amount of civil penalties is $200,266.

ORDER

I propose the DEQ issue the following order:

Bandon Pacific, Inc. is ordered to pay civil penalties of $200,266 for the violations proven herein.

John Mann
Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

If you are not satisfied with this decision, you have the right to have the decision reviewed by the Oregon Environmental Quality Commission (Commission). To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date this order is served on you. Service, as defined in Oregon Administrative Rule (OAR) 340-011-0525, means the date that the decision is **mailed** to you, and not the date that you receive it.

The Petition for Review must comply with OAR 340-011-0575 and must be **received** by the Commission within 30 days of the date the Proposed and Final Order was mailed to you. You should mail your Petition for Review to:

Environmental Quality Commission
c/o Dick Pedersen, Director, DEQ
811 SW Sixth Avenue
Portland, OR 97204.

You may also fax your Petition for Review to (503) 229-6762 (the Director's Office).

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as provided in OAR 340-011-0575. The exceptions and brief must be **received** by the Commission within 30 days from the date the Commission received your Petition for Review. If you file a Petition but not a brief with exceptions, the Environmental Quality Commission may dismiss your Petition for Review.

If the Petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0575.

Unless you timely file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Commission 30 days from the date this Proposed Order is mailed to you. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. See ORS 183.480 et. seq.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BANDON PACIFIC, INC., Petitioner, v. ENVIRONMENTAL QUALITY COMMISSION, Respondent.	Agency No. 1001950 Appellate Court No. A150445 AMENDED CORRECTED RECORD AND ORDER ON MOTION TO CORRECT THE RECORD

This case comes to the court on judicial review of an order of the Environmental Quality Commission. Petitioner filed with the Commission a motion to correct the record on review by adding a document, "Exhibit A," which had been omitted. The Commission has granted petitioner's motion. Pursuant to ORAP 4.22(3), a copy of the Commission's order granting the motion, together with previously omitted document, is attached.

The Commission previously filed in this court a corrected record and order, but neglected to include the omitted document. The Commission is filing this amended corrected record to correct that error.

Respectfully submitted,

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ANNA M. JOYCE #013112
Solicitor General

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Department of Environmental Quality
Headquarters
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(503) 229-5696
FAX (503) 229-6124
TTY: 711

ORDER GRANTING MOTION TO CORRECT THE RECORD

Bandon Pacific, Inc. v. Environmental Quality Commission (A150445)

On March 13, 2012, Petitioner filed a motion with the Environmental Quality Commission to Correct/Amend the Record. Petitioner moved the Commission to correct the hearing record by including a document referred to as "Exhibit A" that was submitted to the Commission during October 20, 2011 oral argument in this case. Exhibit A was properly submitted to the Commission, and as a demonstrative exhibit containing only evidence previously admitted to the record, the Commission grants Petitioner's motion.

ORDER

The Motion to Correct/Amend is granted.

Dated at Portland, Oregon this 28th day of March 2012.

for Dick Pedersen, Director
Department of Environmental Quality

CLASS I/CLASS II MONITORING VIOLATIONS CALCULATION

Based on November 30, 2009, Notice of Civil Penalty and Assessment and September 21, 2010, DEQ Letter to Suzanne Lacampagne

1. The years for which monitoring penalties were assessed are 2004 through 2008. (See Attachment E, pages 614-618.)

2. Monitoring violations occurring between 2004 and 2005 were Class II violations. Monitoring violations occurring between 2006 and 2008 are Class I violations. (See Attachment E, page 617.)

3. Only Class I monitoring violations were assessed penalties, i.e., violations occurring between 2006 and 2008. (See Attachment E, page 620.)

4. DEQ assessed penalties for 46 monitoring violations, arriving at the 46 violations "by assessing one penalty per monitoring requirement per year." (See Attachment E, page 621; Attachment E, page 681.) The 46 penalties, then, can be graphically displayed as follows:

Year	Penalties (One per permit parameter)	Class I or Class II	Total Penalties
2004	Total suspended solids Biochemical oxygen demand Oil & grease pH Flow Raw product processed Waste solids generated Waste solids disposed	Class II	8
2005	Total suspended solids Biochemical oxygen demand Oil & grease pH Flow Raw product processed Waste solids generated Waste solids disposed	Class II	8
2006	E. coli Fecal coliform Total suspended solids Biochemical oxygen demand Oil & grease pH	Class I	10

	Flow Raw product processed Waste solids generated Waste solids disposed		
2007	E. coli Fecal coliform Total suspended solids Biochemical oxygen demand Oil & grease pH Flow Raw product processed Waste solids generated Waste solids disposed	Class I	10
2008	E. coli Fecal coliform Total suspended solids Biochemical oxygen demand Oil & grease pH Flow Raw product processed Waste solids generated Waste solids disposed	Class I	10
		Total Penalties	46

As shown on the table, 16 Class II violations were included in the penalty, when DEQ's own documents state that they should not have been. Reducing the 46 Class I and Class II violations to only 30 Class I violations reduces the penalty by $57,600.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Amended Corrected Record and Order on Motion to Correct the Record to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on April 9, 2012.

I further certify that I directed the Amended Corrected Record and Order on Motion to Correct the Record to be served upon Kelly S. Hossaini, attorney for petitioner, on April 9, 2012, by mailing a copy, with postage prepaid, in an envelope addressed to:

Kelly S. Hossaini #010598
Miller Nash LLP
111 SW Fifth Avenue, Suite 3400
Portland, Oregon 97201
Telephone: (503) 205-2332
Email: kelly.hossaini@millernash.com

MICHAEL A. CASPER #062000
Deputy Solicitor General
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Attorney for Respondent

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: BANDON PACIFIC, INC., an Oregon corporation, Respondent.	)	NOTICE OF CIVIL PENALTY ASSESSMENT AND ORDER NO. WQ/I-WR-09-092

I. AUTHORITY

This Notice of Civil Penalty Assessment and Order is issued pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012, and 045.

II. FINDINGS OF FACT

1. From or about January 1, 2004, through January 31, 2009, Respondent operated a seafood processing and retail sales facility at 250 SW First Street in Bandon, Oregon (Bandon facility).

2. On August 5, 1999, the Department of Environmental Quality (the Department) assigned Respondent's corporate predecessor, Bandon Bay Fisheries, National Pollutant Discharge Elimination System Permit General Permit 900-J. The permit authorized Respondent to discharge wastewater to waters of the state only in conformance with the requirements, limitations and conditions set forth in the permit. The permit expired on May 31, 2004, but was administratively extended as Respondent filed a timely renewal application.

3. On September 5, 2006, the Department renewed Respondent's assignment under the 900-J permit.

4. Respondent's 900-J permit was in effect at all material times.

5. On the dates set forth in the following table, Respondent processed seafood at its Bandon facility.

///

///

	2004	2005	2006	2007	2008
January	1, 2, 4, 7, 8, 12, 15, 16, 19, 22, 23, 25, 26, 27, 29, and 30	4, 7, 11, 14, 18, 22, 25, 26, 28, and 31	6, 9, 12, 13, 16, 17, 18, 19, 20, 25, 26, 27, and 30	2, 3, 5, 8, 10, 16, 17, 19, 22, 24, 28, and 29	4, 9, 10, 11, 15, 16, 17, 19, 21, 24, 25, 29 and 30
February	3, 4, 6, 7, 12, 13, 15, 16, 17, 18, 20, 22, 24, and 27	1, 2, 4, 6, 8, 12, 14, 15, 18, 20, 21, 22, and 25.	2, 3, 4, 7, 10, 12, 13, 17, 19, 20, 23, 24, 26 and 27	2, 9, 13, 15, 16, 19, 20, 23, and 26	1, 5, 6, 8, 13, 15, 16, 17, 19, 20, 22, 25, 26, 27, 28 and 29
March	1, 2, 5, 6, 9, 10, 12, 16, 19, 21, 23, 25, 26, 27, and 30	1, 4, 6, 7, 8, 11, 12, 13, 15, 16, 18, 19, 21, 22, 23, 24, 25, 27, and 29	3, 6, 9, 10, 14, 15, 16, 17, 22, 23, 24, 30, and 31	1, 2, 3, 5, 8, 9, 12, 13, 14, 16, 18, 19, 20, 21, 22, 23, 27, 29, and 30	2, 5, 6, 7, 10, 14, 18, 20, 21, 22, 24, 25, and 28
April	1, 2, 4, 5, 6, 7, 8, 9, 13, 14, 16, 20, 22, 23, 24, 26, 27, 29, and 30	1, 2, 5, 8, 9, 12, 15, 17, 18, 19, 21, 22, 25, 26, 28 and 29	2, 3, 6, 7, 13, 14, 20, 21, 24, 25, 26, 27, 28 and 29	1, 2, 4, 6, 11, 13, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, and 30	2, 3, 4, 7, 8, 11, 15, 16, 18, 22, 25, 28 and 29
May	1, 4, 6, 7, 10, 11, 13, 14, 17, 18, 19, 20, 21, 22, 24, 25, 27, 28, 29, and 31	2, 3, 4, 6, 7, 9, 10, 13, 15, 16, 17, 20, 23, 24, 26, 27 and 30	2, 5, 9, 10, 12, 15, 16, 18, 19, 22, 23, 26, 30, and 31	1, 3, 4, 8, 9, 11, 15, 17, 18, 19, 20, 21, 22, 25 and 29	2, 5, 9, 13, 16, 18, 20, 21, 22, 23, 27, 29 and 30
June	1, 2, 3, 4, 7, 8, 11, 12, 15, 18, 21, 22, 23, 24, 25 and 29	1, 3, 5, 7, 8, 10, 12, 13, 14, 16, 17, 19, 21, 22, 23, 24, 26, 28, 29, and 30	1, 2, 6, 7, 9, 12, 13, 14, 15, 16, 19, 20, 21, 23, 27, 29 and 30	1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 19, 21, 22, 23, 26, 27, 28 and 29	1, 3, 5, 6, 10, 12, 13, 14, 17, 19, 20, 22, 24, 25, 26, 27, and 30
July	2, 3, 6, 7, 9, 11, 12, 13, 15, 16, 18, 20, 22, 23, 27, 29, and 30	1, 3, 5, 7, 8, 11, 12, 13, 14, 15, 16, 18, 19, 21, 22, 23, 25, 26, 27, 28 and 29	1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, and 31	2, 3, 6, 10, 11, 12, 13, 14, 17, 18, 19, 20, 22, 24, 25, 27, 28, 29, 30, and 31	1, 3, 4, 7, 8, 10, 11, 15, 16, 17, 18, 19, 21, 22, 24, 25, 29 and 31

	2004	2005	2006	2007	2008
August	2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 24, 27, 30 and 31	1, 2, 3, 5, 9, 11, 12, 13, 16, 18, 19, 24, 26, 29 and 30	1, 2, 3, 4, 7, 8, 9, 11, 12, 15, 18, 20, 21, 22, 23, 26, 29, 30 and 31	1, 3, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 19, 20, 21, 23, 24, 27, 28, 29, 30 and 31	1, 5, 8, 11, 12, 14, 15, 18, 19, 22, 26, 27 and 29
September	1, 2, 3, 8, 9, 10, 12, 13, 14, 15, 17, 18, 20, 21, 23, 24, and 28	2, 3, 5, 6, 7, 9, 13, 14, 16, 19, 20, 23, 24, 28, and 30	1, 5, 6, 8, 11, 12, 15, 17, 18, 19, 20, 21, 22, 26, 29, and 30	4, 5, 7, 13, 14, 17, 18, 20, 25, 27 and 28	2, 3, 5, 6, 8, 9, 11, 12, 15, 16, 19, 23, 26 and 30
October	1, 2, 4, 5, 6, 8, 11, 12, 15, 17, 19, 22, 26, and 29	3, 4, 6, 7, 11, 13, 18, 20, 21, 22, 24, 25, 28, 30, and 31	3, 5, 6, 8, 9, 10, 13, 16, 17, 19, 20, 24, 25, 27 and 31	1, 2, 4, 5, 8, 9, 12, 15, 16, 17, 19, 23, 26, 27, 29 and 31	1, 2, 3, 9, 13, 15, 17, 20, 21, 22, 23, 24, 27, 28, 30 and 31
November	2, 5, 7, 9, 10, 11, 12, 16, 17, 19, 21, 23, 24, 26, and 30	7, 8, 19, 22, 25	1, 3, 5, 6, 7, 10, 14, 17, 20, 21, 28, and 30	4, 5, 8, 9, 14, 15, 16, 23, 26, 27, 28, and 30	4, 5, 6, 7, 11, 14, 17, 18, 19, 21, 25, and 26
December	2, 3, 9, 10, 14, 15, 17, 21, 22, 24, 28, and 31	2, 7, 9, 16, 20, 23, 27, 28, and 30	7, 8, 11, 12, 15, 18, 21, 22, 24, 27, 28, 29, and 30	1, 2, 6, 7, 10, 12, 14, 19, 21, 23, 24, 27, 28, 29, and 30	1, 2, 5, 7, 8, 9, 10, 12, 13, 17, 18, 19, 22, 23, 26, 27, and 30

6. On the dates set forth in Paragraph 5, Respondent disposed of its wastewater from seafood processing operations in the Coquille River without first passing the wastewater through a 40 mesh screen or equivalent control mechanism.

7. On the dates set forth in Paragraph 5, Respondent disposed of carcasses from seafood processing by dumping them in the Coquille River.

8. On the dates set forth in Paragraph 5, Respondent did not monitor its wastewater for effluent flow.

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9. During the months set forth in Paragraph 5, Respondent did not sample and analyze its wastewater for total suspended solids, biochemical oxygen demand, oil and grease, or pH.

10. On each and every month from September 2006 through December 2008, Respondent did not sample and analyze its wastewater for e. coli and fecal coliform bacteria.

11. For the months set forth in Paragraph 5, Respondent did not report the amount of raw product processed daily or the amount of waste solids generated on its Discharge Monitoring Reports.

12. For the dates listed in Paragraph 5 above, Respondent did not report the amount, location and date of deposition of waste solids disposed on its Discharge Monitoring Reports.

III. CONCLUSIONS

1. Respondent has violated ORS 468B.025(2) by violating conditions of its wastewater discharge permit. Specifically, Respondent has violated Schedule B, Condition 1(a) of its 900-J permit by failing to monitor its wastewater and report the results of its monitoring as described in Section II, Paragraphs 6 through 12. All violations occurring on or after March 31, 2006, are Class I violations pursuant to OAR 340-012-0055(1)(c). Violations occurring prior to March 31, 2006, are Class II violations pursuant to OAR 340-012-0055(2)(f). DEQ hereby assesses a $174,766 civil penalty for these violations.

2. Respondent has violated ORS 468B.050(1)(a) by discharging wastes to waters of the state without a permit authorizing such discharge. Specifically, Respondent placed seafood carcasses in the Coquille River on or about the dates set for in Paragraph 5, above. These are Class I violations pursuant to OAR 340-012-0055(1)(c). DEQ hereby assesses an $18,000 civil penalty for these violations.

3. Respondent has violated ORS 468B.025(2) by violating a condition of its wastewater discharge permit. Specifically, on the dates set forth in Section II, Paragraph 5 of this Notice, Respondent violated Schedule A, Condition 1 of its 900-J permit by failing pass its wastewater through a 40 mesh screen or equivalent control device prior to discharge to the Coquille

River. All violations occurring on or after March 31, 2006 are Class II violations pursuant to OAR 340-012-0053(2)(a). All violations occurring prior to March 31, 2006, are Class II violations pursuant to OAR 340-012-0055(2)f). DEQ hereby assesses a civil penalty of $15,788 for these violations.

IV. ORDER TO PAY CIVIL PENALTY

Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is hereby ORDERED TO:

Pay a total civil penalty of $208,554. The determinations of the civil penalties are attached as Exhibits 1, 2 and 3 and are incorporated as part of this Notice.

If you do not file a request for hearing as set forth in Section V below, your check or money order must be made payable to **"State Treasurer, State of Oregon"** and sent to the **DEQ, Business Office, 811 S.W. Sixth Avenue, Portland, Oregon 97204.** Once you pay the penalty, the Findings of Fact, Conclusions and Order become final.

V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ must receive the request for hearing **within 20 calendar days** from the date you receive this Notice. The request should include any affirmative defenses and either admit or deny each allegation of fact in this Notice. (See OAR 340-011-0530.) You must mail the request for hearing to: **DEQ, Office of Compliance and Enforcement - Appeals, 811 SW Sixth Avenue, Portland, Oregon 97204**, or fax to **(503) 229-5100.** An administrative law judge employed by the Office of Administrative Hearings will conduct the hearing, according to ORS Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be represented by an attorney at the hearing, or you may represent yourself unless you are a corporation, agency or association.

If you fail to file a request for hearing in writing within 20 calendar days of receipt of the Notice, the Notice will become a final order by default without further action by DEQ, as per OAR 340-011-0535(5). If you do request a hearing but later withdraw your request, fail to attend

the hearing, or notify DEQ that you will not be attending the hearing, DEQ will issue a final order by default pursuant to OAR 137-003-0670. DEQ designates the relevant portions of its files, including information submitted by you, as the record for purposes of proving a prima facie case.

11/30/2009
Date

Leah E. Koss
Leah E. Koss, Interim Manager
Office of Compliance and Enforcement

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Violating a condition of a wastewater discharge permit in violation of ORS 468B.025(2).

CLASSIFICATION: The occurrences of this violation occurring after March 31, 2006, are Class I violations pursuant to OAR 340-012-0055(1)(o). Those violations occurring prior to March 31, 2007, are Class II violations pursuant to OAR 340-012-0055(2)(f).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the Department does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$$

"BP" is the base penalty. The Department is not assessing a penalty for any of the Class II violations. The penalty for a Class I, moderate magnitude violation is $3,000 in the matrix listed in OAR 340-012-0140(3)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(iii).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant action(s) and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior significant actions.

"O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(b), because the Department is assessing separate penalties for multiple occurrences of the violation.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent's conduct was negligent or Respondent reasonably should have known that the conduct would be a violation. The monitoring requirements are

express in Respondent's permit. Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation when it failed to familiarize itself with the requirements of its permit and conform its conduct to those requirements.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because the violation or the effects of the violation could not be corrected or minimized.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of $9,166. This is the amount Respondent gained by avoiding monthly monitoring costs of $185 per month for the period beginning in January 2004 through August 2006 and costs of $285 per month for the period beginning in September 2006 through January 2009. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY FORMULA:

Gravity Based Penalty x Number of Violations Penalized + Economic Benefit = Total Penalty

GRAVITY BASED PENALTY CALCULATION

Penalty = BP + [(0.1 x BP) x (P + H + O + M + C)]
= $3,000 + [(0.1 x $3,000) x (0 + 0 + 0 + 2 + 0)]
= $3,000 + [($300 x 2)]
= $3,000 + $600 + $0
= $3,600

Of the 2,248 occurrences of the violation, the Department elects to assess separate penalties for 46 Class I occurrences of the violation. The Department arrived at 46 violations by assessing one penalty per monitoring requirement violated per year.

TOTAL PENALTY CALCULATION

$3,600 x 46 + 9,166 = $174,766

EXHIBIT 2

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 2: Discharging wastes to waters of the state without a permit authorizing such discharge in violation of ORS 468B.050(1)(a).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(c).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the Department does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:
$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is $3,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(iii).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant action(s) and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has prior significant actions.

"O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(b), because the Department is assessing separate penalties for multiple occurrences of the violation.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent's conduct was negligent or Respondent reasonably should have known that the conduct would be a violation. Respondent's permit does not authorize the disposal of fish carcasses into waters of the state. By failing to ascertain and comply with the legal requirements for fish carcass disposal, Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because the violation or the effects of the violation could not be corrected or minimized.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of $0 as the Department does not have sufficient information to arrive at a reasonable estimate of what disposal costs Respondent avoided.

PENALTY FORMULA:

Gravity Based Penalty x Number of Violations Penalized + Economic Benefit = Total Penalty

GRAVITY BASED PENALTY CALCULATION

Penalty= BP + [(0.1 x BP) x (P + H + O + M + C)]
= $3,000 + [(0.1 x $3,000) x (0 + 0 + 0 + 2 + 0)]
= $3,000 + [($300 x 2)]
= $3,000 + $600 + $0
= $3,600

Of the 915 occurrences of the violation, the Department elects to assess separate penalties for five occurrences of the violation. The Department arrived at five violations by assessing one penalty per year in which Respondent illegally disposed of fish carcasses by dumping them in the Coquille River.

TOTAL PENALTY CALCULATION

$3,600 x 5 + 0 = $18,000

EXHIBIT 3

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 3: Violating a condition of a wastewater discharge permit in violation of ORS 468B.025(2).

CLASSIFICATION: These are Class II violations pursuant to OAR 340-012-0053(2)(a) and OAR 340-012-0055(2)(f).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the Department does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$$

"BP" is the base penalty, which is $1,500 for a Class II, moderate magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(B)(ii) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(iii).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant action(s) and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior significant actions.

"O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(b), because the Department is assessing separate penalties for multiple occurrences of the violation.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent's conduct was negligent or Respondent reasonably should have known that the conduct would be a violation. The requirement to pass all fish processing wastewater through a screen prior to discharge is express in Respondent's permit. Respondent failed to exercise reasonable care to avoid the foreseeable risk of

committing the violation when it failed to familiarize itself with the requirements of its permit and conform its conduct to those requirements.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because the violation or the effects of the violation could not be corrected or minimized.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of $6,788. This is the amount Respondent gained by avoiding the $6,420 cost to purchase a hydrosieve. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY FORMULA:

Gravity Based Penalty x Number of Violations Penalized + Economic Benefit = Total Penalty

GRAVITY BASED PENALTY CALCULATION

Penalty = BP + [(0.1 x BP) x (P + H + O + M + C)]
= $1,500 + [(0.1 x $1,500) x (0 + 0 + 0 + 2 + 0)]
= $1,500 + [($150 x 2)]
= $1,500 + $300
= $1,800

Of the 915 occurrences of the violation, the Department elects to assess separate penalties for five of the violations. The Department arrived at five by assessing one penalty per year in which Respondent discharged wastewater without first passing it through a screen.

TOTAL PENALTY CALCULATION

$1,800 x 5 + $6,788 = $15,788

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III. DEQ Improperly Penalized Bandon for Violations Occurring Before November 30, 2004

The statute of limitations for penalty actions under the Clean Water Act is five years. Sierra Club v. Chevron U.S.A., Inc., 834 F2d 1517, 1520-22 (9th Cir 1987); United States v. Telluride Company, 146 F3d 1241 (10th Cir 1998) ("The parties do not dispute 28 U.S.C. § 2462 is the applicable federal statute of limitations to the Government's actions for civil penalties under the [Clean Water] Act."). The five-year statute of limitations period begins on the date of the alleged violation. Federal Election Commission v. Williams, 104 F3d 237, 240 (9th Cir 1996) (rejecting application of the discovery rule to the running of limitations periods under § 2462).

DEQ issued the Notice of Civil Penalty on November 30, 2009. That notice and the attached exhibits indicate that DEQ penalized Bandon Pacific for alleged violations occurring before November 30, 2004, i.e., January through October 2004. Because of the five-year statute of limitations, it may not issue penalties for alleged violations occurring before that date and the penalty should be remanded for adjustment. See ORS 183.482(8)(b)(3).

DEQ may attempt to evade the five-year statute of limitations by arguing that it issued penalties on an annual basis, and because Bandon Pacific violated its permit for one month in 2004, i.e., December, it is appropriate for it to issue penalties for 2004. We disagree with this assessment because, again, the statute of limitations is a bright line before which DEQ cannot assess any penalties. Further, to issue a one-month penalty for the same amount as a subsequent full year penalty would be arbitrary and capricious, fundamentally inconsistent with DEQ's policy of ensuring "an appropriate and consistent statewide enforcement program," and would not be supported by a preponderance of evidence, as required by OAR 340-012-0026(1)(d).

IV. DEQ Was Improperly Motivated by Irrelevant Factors in Imposing the Excessive Penalty Against BPI

When calculating the civil penalty for all three alleged violations using the formula required by OAR Chapter 340, Division 12, DEQ implicitly acknowledged in two ways that Bandon Pacific is an independent corporation, separate from Pacific Seafood Group. First, DEQ accurately determined "no prior significant actions" (the "P" value) for Bandon Pacific in the same media as the violations at issue and occurring at a facility owned or operated by Bandon Pacific. (See Exhibit R27.) Second, and consistent with DEQ's treatment of the "P" value, DEQ accurately calculated no history of correcting prior significant actions (the "H" value) for Bandon Pacific in any of the three alleged

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violations, because DEQ determined that Bandon Pacific had no prior significant actions. (Id.) Even so, as set forth below, the evidence in the record demonstrates that DEQ staff apparently did not want to be constrained by Bandon Pacific's lack of previous violations in assessing the current penalty, and that the fact that Bandon Pacific was somehow connected to Pacific Seafood Group warranted an increased penalty that staff rightly understood could not be directly assessed through the civil penalty formula.

Bandon Pacific is a subsidiary of Pacific Seafood Group, but it is a separate legal entity and is independently controlled and operated. (See Exhibit R41.) Under Oregon law, corporate form is not disregarded "unless exceptional circumstances exist." City of Salem v. H.S.B., 302 Or 648, 655, 733 P2d 890 (1987). Such exceptional circumstances include fraud, inadequate capitalization, and debt evasion. There is no allegation from DEQ that any such circumstances exist here. Even so, from information in the record it is clear that DEQ's real intent in assessing the disproportionately large penalty against Bandon Pacific is to punish Pacific Seafood Group. It is also clear from the record that DEQ staff was improperly influenced and motivated by information they had with respect to Pacific Seafood Group and other Pacific Seafood Group subsidiaries to inflate the civil penalty ultimately imposed on Bandon Pacific, and that DEQ staff then relied on this same information to publicly justify the penalty amount.

On November 30, 2009, DEQ issued to Bandon Pacific the Notice of Civil Penalty in the amount of $208,554 for violations of its wastewater permit. The particular wastewater permit in question is assigned specifically to Bandon Pacific, Inc. As noted above, in the civil penalty formula calculation for this permit, DEQ did not assign any prior violations to Bandon Pacific, because Bandon Pacific had none. It is clear, however, that DEQ staff considered the penalty levied against Bandon Pacific to be at least partially directed at Pacific Seafood Group and its other subsidiaries. In particular, on November 12, 2009, Jeff Bachman e-mailed the draft enforcement documents for the civil penalty to others at DEQ describing those documents as pertaining to Bandon Pacific, Inc., "which is a part of the Pacific Seafood Group of companies." (See Exhibit R26.) This reference to Pacific Seafood Group is not just an afterthought, but an important driver throughout the penalty process. For example, in anticipation of DEQ's December 9, 2009, news release, on December 3, 2009, Leah Koss e-mailed Mr. Bachman and other staff persons asking for summaries on each of three DEQ enforcement actions that Ms. Koss apparently believed to be related to the Bandon Pacific enforcement action. (See Exhibit R28.) In that e-mail, Ms. Koss asks for case summaries for Pacific Surimi Co., Pacific Shrimp Co., and Pacific Coast Seafoods Co., in order to use that information as part of "a robust news release that includes some history with 'Pac Seafoods' as well as talking points for what will likely be a number of

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calls from reporters and legislators when the press release goes out." Mr. Bachman and Jenny Root responded with the requested information. (See Exhibit R28.)

From this e-mail string it is evident that DEQ staff felt insecure about the large penalty they had decided to assess against a small seafood processor.[9] Staff clearly believed they needed additional information to bolster the credibility of that penalty both in the press release itself, and as a defense against questions by the press and legislators. Indeed, in its December 9, 2009, news release, DEQ first set forth the penalties it had assessed to Bandon Pacific, but then quickly followed up with a catalog of the legally irrelevant penalties that DEQ had issued against "Pacific Coast Seafoods" and its subsidiaries in the past.[10] (See Exhibit R47.) Further, in a December 9, 2009, e-mail to DEQ staff, Mr. Bachman related how he had answered newspaper reporters' questions about the nature of Bandon Pacific. (See Exhibit R29.) Specifically, he stated, "I also spoke about the fact that Bandon Pacific is not just a mom and pop operation operating out a store front but one piece of a large, integrated group of companies with considerable resources and a history of noncompliance."

DEQ's reliance on Bandon Pacific's relationship to Pacific Seafood Group to justify the size of the civil penalty can also be seen in the internal media relations document that DEQ staff used to respond to news reporter questions after the December 9, 2009, press release. (See Exhibit R30.)

In his September 21, 2010, letter to Suzanne Lacampagne, Mr. Bachman responds to an earlier request from Ms. Lacampagne asking for clarification as to why DEQ decided to assess multiple penalties against Bandon Pacific, which, in large part,

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[9] For example, on Augnst 24, 2010, DEQ issued a news release announcing a $24,992 penalty against Clausen Oysters, a coastal seafood processor that operated for five years without a wastewater permit. Even after obtaining a wastewater permit it failed to monitor according to the requirements of that permit for the first five months. Clausen Oysters also failed to pass its wastewater through a mesh screen. (See Exhibit R37.) Whereas Bandon Pacific was penalized $174,766 alone for failure to monitor wastewater and report its monitoring results for a period of five years, Clausen Oysters received a penalty of only $21,992 for both failing to have a wastewater permit for a period of five years, and for failing to monitor and report even after it obtained its permit. We also note that DEQ found that Clausen Oysters' failure to have a wastewater permit for the five-year period was "reckless." Even so, Clausen Oysters only received a penalty of $16,349 for that violation. As noted earlier, it appears that Bandon Pacific would have been better off if it had "recklessly" failed to have a wastewater permit.

[10] In the press release, as well as in some of its internal communications, DEQ incorrectly identified the parent company of Bandon Pacific and other subsidiaries as Pacific Coast Seafoods Company, Inc., when it is actually Pacific Seafood Group.

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had the effect of making the civil penalty unusually large.[11] Mr. Bachman explained that DEQ has discretion in deciding whether to assess multiple penalties, and, in this case, the decision to assess such penalties was motivated, in part, "because Bandon is a wholly owned subsidiary of Dulcich, Inc., a large parent corporation with other subsidiaries that have a history of noncompliance with the 900-J permit and Oregon water quality law." (See Exhibit R39.) In other words, DEQ's intent in issuing the disproportionate penalty against Bandon Pacific was at least partially intended to punish Frank Dulcich and Pacific Seafood Group for other alleged violations that were in no way related to the alleged violations of Bandon Pacific, a separate corporation. This motivation may also explain why DEQ has been so resistant to decreasing the penalty at all.

In issuing civil penalties DEQ is constrained by the civil penalty formula, as set forth by OAR 340, Division 12. When that penalty formula is used, it corresponds to a particular respondent, in this case Bandon Pacific, and to a particular assigned permit. DEQ staff understood those constraints when they attached a "zero" value to both the "P" and "H" values in the Bandon Pacific civil penalty formula. Even so, the record makes it clear that DEQ staff was at least in part improperly motivated by alleged violations connected to Pacific Seafood Group and its other subsidiaries in deciding to assess multiple penalties against Bandon Pacific, thereby abusing its discretion and improperly inflating the civil penalty.

Conclusion

Based on the evidence and testimony in the record, and as contained in this memorandum, we respectfully request that you reduce the penalty to Bandon Pacific for the enumerated violations to $21,204.

Very truly yours,

Suzanne C. Lacampagne

[11] The other factor that contributed to the outsized penalty was the classification of the monitoring failure as "moderate," instead of minor, which is the classification that should have been applied.

Because the penalty in question is not inconsistent with prior agency practice, it cannot be an abuse of discretion. Even if the penalty is considered to be inconsistent with prior agency practice, in that it is larger than some but not all other penalties issued by DEQ, that purported inconsistency is explained by the unique facts surrounding the Bandon Pacific violations. In either event, the penalty amount is not an abuse of discretion.

DEQ's Consideration of the Factual Context of the Violation is not an Abuse of Discretion.

Bandon Pacific also claims that DEQ improperly considered the fact that Bandon Pacific is a subsidiary of Pacific Seafood Group in exercising its discretion relating to the imposition of penalties. It is not improper for DEQ to consider the fact that Bandon Pacific is owned by Pacific Seafood Group.

DEQ does not dispute that Bandon Pacific and Pacific Seafood Group are separate legal entities. DEQ did not, as Bandon Pacific appears to contend, attempt to hold Pacific Seafood Group liable in any way for Bandon Pacific's actions. DEQ neither attempted to "pierce the corporate veil" by bringing an enforcement action against Pacific Seafood Group, nor did DEQ apply Pacific Seafood Group's past violations in determining the penalty amount for Bandon Pacific. The theory of "piercing the corporate veil" applies when the separate legal existence of a corporation is disregarded and the owners of the corporation are held liable for the actions of the corporation. *See State ex rel. Neidig v. Nat. Ins. Co.*, 343 Or 434, 453-454 (2007). Because the separate legal existence of Bandon Pacific was not disregarded and DEQ is attempting to hold only Bandon Pacific liable in this enforcement action, Bandon Pacific's arguments and case law relating to piercing the corporate veil are not applicable to this situation.

However, the fact that Bandon Pacific is owned by Pacific Seafood group is nonetheless relevant to the nature of Bandon Pacific's violations, and DEQ did appropriately consider that fact in exercising its discretion as to how to assess penalties for the over 4,000 possible separate violations committed by Bandon Pacific. Bandon Pacific's status as a subsidiary of Pacific Seafood Group shows that Bandon Pacific is not a small time, mom-and-pop type operation that violated environmental laws because it did not know any better, Bandon Pacific's apparent claims to the

contrary in its brief notwithstanding. Bandon Pacific is part of a sophisticated operation that is one of the largest of its type in the United States. Further, Pacific Seafood Group has a long history of environmental violations of the type alleged in this action. At the least, Bandon Pacific should have been aware of its environmental responsibilities based on the fact that it is owned by a large seafood processing conglomerate that has a significant environmental non compliance history. When sophisticated commercial operations that should know better blatantly ignore their environmental responsibilities it has the potential to cause great harm to the environment and to significantly undermine the regulatory system. Oregon's regulatory system relies on self monitoring and self reporting to a great degree. Here Bandon Pacific blatantly ignored those obligations. The fact that it is a subsidiary of a large national seafood processing conglomerate makes that fact especially damaging to the system. If DEQ were to ignore those factors DEQ would be ignoring the reality of these violations.

It was not inappropriate for DEQ to consider the full factual context for the violation in determining the number of violations to assess. Therefore, DEQ did not abuse its discretion by taking into account the ownership of Bandon Pacific and how that ownership reflects on the violations at issue.

DEQ Penalties are Intended to Create General as well as Specific Deterrence

Bandon Pacific claims that the civil penalty assessed is far in excess of what was necessary to encourage the company to comply with the regulations. That is a debatable point given the history of noncompliance by Bandon Pacific's sister companies in the Pacific Seafood Group. The specific deterrence of a particular respondent is not, however, DEQ's only deterrence consideration when deciding how to exercise its enforcement discretion. DEQ also seeks to promote general deterrence by assessing penalties that will put other members of the regulated community on notice that violations will be the subject of enforcement. This policy is codified in OAR 340-012-0026(1)(c) which states that the goals of enforcement include deterrence of "future violators and violations." The principle of general deterrence is also included in the Department's Multiple Penalty IMD, which states that one of the objectives of enforcement is "*To create "general"*

These circumstances militate toward a finding of minor magnitude, especially when combined with other facts relevant to potential threat of harm that DEQ does not dispute. These include the fact that, based on evidence from Bandon Pacific's expert witness, the receiving environment has substantial tidal exchanges, currents, and depth such that it was capable of dispersing the small amount of fish waste discharge quickly (see Transcript, pages 72-74), and the fact that the nature of the discharges, i.e., fish waste, is nontoxic (see Transcript, pages 73-74).

Bandon Pacific believes that the preponderance of evidence in the record meets its burden to prove that the minor magnitude applies and that the minor magnitude is more probable than the moderate magnitude, pursuant to OAR 340-012-0130(2). Based on all of the evidence in the record, DEQ's position to the contrary is an abuse of discretion, and the amount of the penalty should be reduced accordingly by an additional $64,800, as set forth in the Appropriate Penalty Calculation section below.

IV. DEQ Impermissibly Disregarded Corporate Form When it Used Bandon Pacific's Relationship with Pacific Seafood Group as a Factor in Computing Bandon Pacific's Penalty

In its closing argument, DEQ admits that it "consider[ed] the fact that Bandon Pacific is owned by Pacific Seafood Group" as a factor in its decision-making as to the penalty for Bandon Pacific. (DEQ Closing Argument, page 7.) DEQ's defense is that it was both appropriate and proper for it to do so. DEQ also argues that it did not "pierce the corporate veil," because it did not bring this enforcement action against Pacific Seafood Group, and because it did not apply Pacific Seafood Group's "past violations" in determining the penalty amount for Bandon Pacific. (Id.) Bandon Pacific agrees that this action was not formally brought against Pacific Seafood Group, but disagrees that the law requires DEQ to take that step before it can be found to have improperly disregarded corporate form. Bandon Pacific also disagrees that DEQ did not include consideration of Pacific Seafood Group's alleged past actions in the Bandon Pacific penalty calculus. In fact, the statement that it did not do so is at odds with other statements in that same section of DEQ's closing argument, as explained below. Further, through evidence and testimony in the record that came directly from DEQ, it is clear that DEQ did, in fact, rely heavily on Pacific Seafood Group's alleged past actions when determining Bandon Pacific's penalty.

As set forth in Bandon Pacific's February 22, 2011, hearing memorandum, DEQ's use of Bandon Pacific's ownership by Pacific Seafood Group in the penalty calculus was improper under state law, because by doing so DEQ disregarded the fact that Bandon Pacific is a separate, independent company and is not responsible for the actions of its parent company or other subsidiaries owned by its parent company. City of Salem v. H.S.B., 302 Or 648, 733 P2d 890 (1987). DEQ's defense appears to be that as long as it did not formally name Pacific Seafood Group or any of its other subsidiaries as part of this enforcement action, DEQ has not disregarded corporate form. DEQ provided no legal support for this position and Bandon Pacific has found none. Indeed, if corporate form could be so easily and legally disregarded in this backdoor way, it would provide a very large loophole in the law. Through the record in this case, DEQ has made it clear that the large penalty it imposed on Bandon Pacific is DEQ's way of punishing Pacific Seafood Group through its subsidiary, Bandon Pacific.

In the DEQ Closing Argument, DEQ takes the position that it was not improper of it to consider Pacific Seafood Group's ownership of Bandon Pacific in the penalty calculus. (DEQ Closing Argument, page 7.) DEQ further states that Pacific Seafood Group's ownership is "relevant to the nature of Bandon Pacific's violations," and that "DEQ did appropriately consider that fact in exercising its discretion" in assessing penalties against Bandon Pacific. (Id.) But these statements are at odds with its protestation in that same closing argument section where DEQ claims that it did not "apply Pacific Seafood Group's past violations in determining the penalty amount for Bandon Pacific." (Id.) DEQ's protestation is also at odds with other DEQ evidence and testimony in the record that clearly demonstrates that DEQ's beliefs about and biases against Pacific Seafood Group and its other subsidiaries weighed heavily in determining the Bandon Pacific penalty. This is evidenced by all of the internal staff e-mails, work products, and press release cited in Bandon Pacific's February 22, 2011, hearing memorandum, pages 17 through 20, and staff's consistent focus on Pacific Seafood Group and its subsidiaries at the February 23, 2011, contested case hearing, as noted in Bandon Pacific's March 16, 2011, closing argument, page 5.

The strength of DEQ's focus on Pacific Seafood Group in the Bandon Pacific penalty calculation is again evident in the DEQ Closing Argument. Specifically, DEQ states:

> "Bandon Pacific is part of a sophisticated operation that is one of the largest of its type in the United States. Further, Pacific Seafood Group has a long history of environmental violations of the type alleged in this action. At the least, Bandon Pacific should have been aware of its environmental responsibilities based on the fact that it is owned by a large seafood processing conglomerate that has a significant environmental non compliance history. When sophisticated commercial operations that should know better blatantly ignore their environmental responsibilities it has the potential to cause great harm to the environment and to significantly undermine the regulatory system. [* * *] The fact that [Bandon Pacific] is a subsidiary of a large national seafood processing conglomerate makes that fact especially damaging to the system." DEQ Closing Argument, page 8.

DEQ's misplaced focus on and obvious animus against Pacific Seafood Group helps to explain why Bandon Pacific's penalty was $208,554, while Clausen Oysters' penalty for arguably more egregious violations was $24,992. The biggest difference in how DEQ handled the Clausen Oysters penalty compared to how it handled Bandon Pacific's was that in the Bandon Pacific penalty DEQ used its discretion to assess multiple penalties against Bandon Pacific, while Clausen Oysters received no multiple penalties. Instead of receiving multiple penalties, Clausen Oysters received a much more modest "O" factor of "4."

DEQ's disregard of the corporate form also violates Bandon Pacific's due process rights. Bandon Pacific's substantive due process rights have been violated, because DEQ has exercised its power to enforce its rules against Bandon Pacific in an arbitrary way. Lumbreras v. Roberts, 319 F Supp 2d 1191, aff'd 156 Fed Appx 952 (2004). In particular, DEQ inflated Bandon Pacific's penalty on the basis of alleged actions of non-parties without any legally sufficient showing as to why Bandon Pacific can legally be held responsible for those outside

actions. Further, by penalizing Bandon Pacific for the actions of non-parties, Bandon Pacific had no opportunity to defend itself against those charges or to seek contribution from those non-parties in violation of its procedural due process rights. Holman v. City of Warren, 242 F Supp 2d 791 (2002) (setting forth the requirements of procedural due process); Philip Morris USA v. Williams, 127 S Ct 1057, 166 L Ed 2d 940 (2007) (finding that financially penalizing a defendant company to punish it for alleged harm to non-parties is a taking of property from the defendant without due process).

Because the force behind DEQ's use of multiple penalties against Bandon Pacific was its desire to punish Pacific Seafood Group, and because this action violates state and federal law, DEQ abused its discretion in applying those penalties. Assuming the overall penalty is reduced by amounts consistent with no Class II violations, the five-year Clean Water Act statute of limitations, and a minor magnitude, as discussed above, the Bandon Pacific penalty should be further reduced to eliminate the multiple penalties, and instead reflect an "0" factor of "4," as was used in the Clausen Oysters enforcement action. This will reduce the penalty by an additional $58,800, as set forth in the Appropriate Penalty Calculation section below.

APPROPRIATE PENALTY CALCULATION

Based on the foregoing information, the ALJ should reduce Bandon Pacific's penalty to $12,950, for the following reasons:

1. DEQ erroneously assessed Bandon Pacific for Class II violations, when it stated it was not doing so. Effect: Decrease of $57,600 to **$150,954**. ($208,554 - $57,600 = $150,954).

2. DEQ violated the five-year statute of limitations under the Clean Water Act for the violations. Effect: Decrease of $6,997 to **$143,957**. ($150,954 – 6,997 = $143,957).

3. DEQ erroneously applied the moderate magnitude to the violations, when the appropriate magnitude is minor. Effect: Decrease of $64,800 to **$79,157**. ($143,957 - $64,800 = $79,157).

4. DEQ illegally assessed multiple penalties against Bandon Pacific in an effort to punish a non-party, Pacific Seafood Group, for that non-party's alleged past actions and those of its other subsidiaries. Effect: Decrease of $58,800 to **$20,357**. ($79,157 - $58,800 = $20,357).

5. DEQ incorrectly calculated the economic benefit for Violation 3 and used the incorrect value for the "C" civil penalty factor. (See Bandon Pacific's Final Argument and Hearing Memorandum.) Effect: Decrease of $7,407 to **$12,950**. ($20,357 - $7,407 = $12,950).

CERTIFICATE OF SERVICE

I certify that on July 24, 2012, I served two true copies of this petitioner's opening brief on:

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CERTIFICATE OF FILING

I certify that on July 24, 2012, I filed the original and thirteen copies of this petitioner's opening brief with the Appellate Court Administrator at this address:

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IN THE COURT OF APPEALS OF THE STATE OF OREGON

BANDON PACIFIC, INC., Petitioner, v. ENVIRONMENTAL QUALITY COMMISSION, Respondent.	Office of Administrative Hearings No. 1001950 CA A150445

RESPONDENT'S ANSWERING BRIEF

Petition for Judicial Review of the Final Order of the Environmental Quality Commission

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

The Environmental Quality Commission ("EQC" or "the Commission") accepts petitioner's (or "Bandon Pacific's") statement of the case as adequate for review, except as supplemented in the argument.

Questions Presented on Judicial Review

1. The notice of civil penalty provided that the Department of Environmental Quality ("DEQ" or "the Department") was assessing 46 Class I penalties for monitoring violations, out of over 2000 total possible such penalties for a five year period. In response to petitioner's inquiry, DEQ explained that the total number of penalties was arrived at based on the kinds of violation and the number of years of violations. Did substantial evidence support the EQC's determination that DEQ did not intend to assess any Class II penalties?

2. Did the EQC correctly determine that the two year statute of limitations for "actions upon a penalty" in ORS 12.110(2) did not apply to bar DEQ's administrative penalties?

3. DEQ determined that for purposes of calculating its penalties, the magnitude of the violations was "moderate." Did substantial evidence support the conclusion that petitioner failed to meet its burden of proving that another magnitude should apply?

4. Did the Commission abuse its discretion in calculating the penalty, in particular by taking into account that petitioner was owned by a large seafood processing company?

Summary of Argument

Petitioner does not contest the EQC's finding that it unlawfully discharged waste and failure to monitor its discharges, violating multiple DEQ discharge and monitoring requirements for a period of five years. Rather, petitioner incorrectly contends that the penalties assessed were required to be smaller.

1. The EQC's conclusion that DEQ intended to assess 46 Class I violations rather than a combination of Class I and Class II violations is supported by substantial evidence. Contrary to petitioner's assertion, the Department did not make a mathematical error in choosing to assess 46 Class I penalties. While the Department calculated the *total number* of violations it chose to assess based on the total number of years in which petitioner violated its permit and monitoring requirements, the 46 violations for which penalties were actually assessed were Class I violations. Nor were the Department's penalties inconsistent with the notice of penalty, which clearly stated that the violations were Class I violations.

2. The two year statute of limitations in ORS 12.110(2) did not bar any of the penalties, because that statute of limitations does not apply to

administrative proceedings. The text and context of the statute demonstrate that the limitation is intended to apply to "actions," which – unlike the present administrative proceedings – occur *in court.* This court has so interpreted the term "action" with respect to a related statute of limitations, *Reynolds Metals v. Rogers*, 157 Or App 147,151, 967 P2d 1251 (1998).

3. Substantial evidence in the record supported the conclusion that petitioner failed to overcome the presumption that the violations were "moderate" in magnitude; in particular, petitioner failed to show that a "minor" magnitude was more probable. Under applicable rules, to make a finding of "minor," the agency would have to find that the violation had "no more than a *de minimus* adverse impact on human health or the environment," and posed "no more than a *de minimus* threat to human health or other environmental receptors." Petitioner's evidence of current lack of harm to the environment did not demonstrate a lack of harm in prior years when petitioner unlawfully failed to monitor discharges. In addition, other factors beyond actual harm determine the magnitude. In this case, petitioner's absolute failure to comply with monitoring requirements for five years constituted substantial evidence of more than a *de minimus* threat of harm to the environment, especially given the threat such conduct poses to the integrity of the permit system.

4. The Commission did not improperly "pierce the corporate veil" by taking into account petitioner's status as a wholly owned subsidiary of a large

seafood processing company. The Commission did not charge petitioner's owner with any violations, and did not abuse its discretion in determining the amount of penalties.

Background regarding penalty calculations.

Because this case involves the assessment of penalties, the Commission provides a brief summary of DEQ's penalty authority. The Department is authorized to issue a penalty of up to $10,000 per day of violation of Oregon's statutes or rules protecting water quality. ORS 468.130(1). Each day a violation occurs constitutes a separate offense. ORS 468.140(2); *see also* OAR 340-011-0540 ("[e]ach and every violation is a separate and distinct violation, and in cases of continuing violations, each day's continuance is a separate and distinct violation"). With exceptions that do not apply to this case, "the department may assess a civil penalty for any violation."[1] OAR 340-012-0045. In this case, DEQ assessed Bandon Pacific for only 56 of the 4,078 violations that occurred over a five-year period.

The exact amount of each penalty for each violation that DEQ may assess in a given situation is determined by a formula provided for by administrative rule, OAR 340-012-0140. The procedure for calculating DEQ civil penalties is

[1] A "violation" is defined as "a transgression of any statute, rule, order, license, permit, or any part thereof and includes both acts and omissions." OAR 340-012-0030(12).

set forth in OAR 340-012-0045. The first step in calculating a penalty is to determine the "base penalty" by assigning the appropriate classification and magnitude to the violation. Once the base penalty is determined, various mitigating and aggravating factors are considered and applied to the base penalty to arrive at the "gravity-based" portion of the penalty. OAR 340-012-0045. The gravity-based portion of the penalty is then added to any economic benefit gained through committing the violation.

After applying the regulatory formula to the 56 violations DEQ assessed, DEQ ultimately determined that the total penalty for those 56 violations was $200,266.[2] The Department's findings, determinations and civil penalty calculations are set forth in Exhibits 1, 2 and 3 of the Notice. ER 36-41. That total falls well below the maximum possible penalty authorized by the applicable statutes and rule for 56 violations occurring over a five year period.

ANSWER TO FIRST ASSIGNMENT OF ERROR

The EQC did not err in imposing all penalties for Class I violations.

Preservation of Error

The EQC agrees that this claim of error is preserved.

[2] That penalty amount of $208,554 in the notice was changed to $200,266 based on a change in the economic benefit calculation. .

Standard of Review

The court reviews to determine whether substantial evidence in the record supports the EQC's finding that DEQ intended to impose all Class I violations. ORS 183.482(8)(c).

ARGUMENT

Petitioner takes issue with the penalties assessed for wastewater discharge monitoring violations, contending that some of the monitoring violations should have been treated as "Class II" violations rather than "Class I." The terms "Class I" and "Class II" relate to the timing of violations: Class II violations would be violations under the rules in effect before March 31, 2006. After that date, the classification for these violations was increased to Class I, which carries a potentially higher base penalty. Petitioner contends that the order is not consistent with the notice of civil penalty and that the EQC violated ORS 468.130(2)[3] and unspecified administrative rules. (App Br. 19).

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[3] ORS 468.130(2) provides:

> (2) In imposing a penalty pursuant to the schedule or schedules authorized by this section, the commission and regional air quality control authorities shall consider the following factors:
>
> (a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

Footnote continued…

Petitioner contends that the EQC order, which assesses all of the violations as Class I violations, is based on an arithmetical error and is not supported by substantial evidence. But as described below, petitioner misstates DEQ's basis for determining the number of penalties assessed. DEQ intended to impose penalties solely for the post-March 2006 violations.

Petitioner's theory is that some of the violations occurred prior to March 31, 2006, when the violation classification changed from Class II to Class I, and that therefore the Department was required to calculate some of the penalties as Class II violations. Petitioner apparently bases that claim on

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(…continued)

(b) Any prior violations of statutes, rules, orders and permits enforceable by the commission or by regional air quality control authorities.

(c) The economic and financial conditions of the person incurring a penalty.

(d) The gravity and magnitude of the violation.

(e) Whether the violation was repeated or continuous.

(f) Whether the cause of the violation was an unavoidable accident, negligence or an intentional act.

(g) The violator's cooperativeness and efforts to correct the violation.

(h) Whether the violator gained an economic benefit as a result of the violation.

(i) Any relevant rule of the commission.

language from the Notice's Exhibit 1, which states: "Of the 2,248 occurrences of the violation, the Department elects to assess separate penalties for 46 Class I occurrences of the violation. The Department arrived at 46 violations by assessing one penalty per monitoring requirement violated per year." The penalties assessed are consistent with that notice.

As the order concluded:

> Construing the Notice as a whole, the evidence established that DEQ intended to impose penalties solely for the 46 post-March 31, 2006 violations. The Notice explicitly acknowledged that the earlier violations were Class II. The Notice also explicitly asserts that it is imposing penalties only for Class I violations. This necessarily implies that DEQ was not seeking to impose any penalties for the earlier Class II violations.
> ER 10.

Bandon Pacific thus confuses the *time period* of the violations for which a penalty was assessed with the manner in which DEQ calculated *the total number* of violations on which to base the penalty. Bandon Pacific fails to show that the order is incorrect.

The Department could have assessed separate penalties for over 2,000 violations of the monitoring requirement. The Department understood that among the 2,248 violations some were Class I and some were Class II.[4] The

[4] The Notice states "All violations occurring on or after March 31, 2006, are Class I violations pursuant to OAR 340-012-0055(1)(o). Violations occurring prior to March 31, 2006, are Class II violations pursuant to OAR 340-012-0055(2)(f)."

Department was free to assess penalties for any and all of the 2,248 violations of monitoring requirements. And the notice explicitly states that the Department chose to assess penalties for 46 "Class I occurrences of the violation." The "per year" language is included only to explain how the Department arrived at the total number of violations for which to penalize. The notice did not state that the Department was assessing penalties for violations that occurred *in each year* that Bandon Pacific committed violations.

Petitioner does not deny that there were 46 post-March 2006 violations. Rather, Bandon Pacific relies on a letter from DEQ in which it explained how it arrived at the 46 violations. App Br 14, R-40. But the letter is consistent with the notice. In the letter, the Department explained that it reached the number 46 by multiplying the eight kinds of required monitoring by five years of violation, and adding two other kinds of monitoring times three, the number of years during which that kind of violation took place:

> * * *DEQ arrived at 46 violations by assessing a penalty for one violation per year for each of the permit's monitoring and reporting requirements violated by Bandon. DEQ assessed three penalties each for failing to monitor for e.coli and fecal coliform bacteria because these requirements were only in effect in 2006 through 2008. DEQ assessed five penalties each, 2004-2008, for the following eight parameters: total suspended solids, biochemical oxygen demand, oil & grease, pH, flow, raw product processed, waste solids generated, and waste solids disposed." Ex. R-40.

Bandon Pacific refers to the letter as "conclusive evidence" that DEQ made an arithmetical miscalculation and actually intended to impose penalties for Class II violations. (App Br. 14). But the letter used the same language as the Notice, and — as in the notice — nowhere stated that penalties were being assessed *for violations occurring in each of the five years* of the violation period. Thus, petitioner attempts to manufacture an inconsistency where there is none.

In sum, the Department did not make a mathematical error in choosing to assess 46 Class I penalties; nor were the Department's penalties inconsistent with the notice of penalty, which clearly stated that the violations were Class I violations. The EQC order is supported by substantial evidence and consistent with the notice of penalty.

ANSWER TO SECOND ASSIGNMENT OF ERROR

The EQC correctly determined that ORS 12.110(2) did not bar DEQ from assessing penalties for violations occurring before December 2006.

Standard of Review

The court reviews the EQC's conclusion for errors of law. ORS 183.417(8)(a).

Preservation

The EQC agrees that this claim of error was preserved.

ARGUMENT

According to Bandon Pacific, the EQC was barred by the statute of limitations in ORS 12.110(2) from imposing penalties for violations older than two years. ORS 12.110(2) states: "An action upon a statute for a forfeiture or penalty to the state or county shall be commenced within two years." The EQC correctly found that the statute does not apply to this administrative penalty proceeding.

The text in context of ORS 12.110(2) demonstrate that it does not apply to this administrative proceeding, because such proceedings are not "actions." Although the term "action" has different potential meanings, the first definition is "a legal proceeding by which one demands or enforces one's right in a court of justice." *Webster's Third New Int'l Dictionary.* The context of this statute makes clear that the legislature intended that an "action," as that term is used in ORS 12.110(2), to be a proceeding brought in court, not an administrative proceeding. The related statute, ORS 12.020, which describes when an action under ORS chapter 12 is deemed to have begun, refers to proceedings in court, providing:

> (1) Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, when *the complaint is filed, and the summons served* on the defendant, or on a codefendant who is a joint contractor, or otherwise united in interest with the defendant.

> (2) If the first publication of *summons or other service of summons* in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom *the court* by such service has acquired jurisdiction shall be deemed to have been commenced upon the date on which the complaint in the action was filed. (emphasis added)

An "action" is thus a proceeding that is commenced when a complaint is filed and a summons is served. "Complaints" and "summons" are procedures used to begin court proceedings and do not occur in administrative proceedings like the present proceeding. The statute also refers to "the court" gaining jurisdiction. Further, ORS chapter 12 is part of a set of statutes that control procedures in civil court proceedings. The Oregon Rules of Civil Procedure state that for civil proceedings in Oregon courts, "[t]here shall be one form of action known as a civil action." ORCP 2. That context demonstrates that those are the type of "actions" contemplated by ORS 12.110(2) and they do not include proceedings under the Administrative Procedures Act.

For analogous reasons, this court has held that the term "action" in a related section in ORS Chapter 12 does not refer to administrative claim proceedings (in the context of workers' compensation claims). *Reynolds Metals v. Rogers*, 157 Or App 147,151, 967 P2d 1251 (1998). There, the Court of Appeals held that ORS 12.140, providing a limitation for "an action for any cause not otherwise provided for," did not apply to workers' compensation claims:

> Insurers' argument is further deflated by the fact that ORS 12.140 does not apply to workers' compensation claims. Instead, the Workers' Compensation Act is the "complete statement of the parties' rights and obligations, and they are sui generis." * * * ORS 12.140 states that an *action* must be commenced within 10 years. ORS 12.020(1) provides that an action is commenced when a complaint is filed and summons served on a defendant. *See also* ORCP 3 (*action* is commenced by the filing of a complaint with the clerk of the court). In contrast, a workers' compensation claim is not an action. No complaint is ever filed with the clerk of the court when a workers' compensation claim is made. Rather, a notice of a claim is filed with the employer. ORS 656.265(1). There is no service of a summons on the "defendant" because there is no defendant in a workers' compensation case. (citation omitted)

Similarly, in this APA proceeding, there is no summons and complaint. The Oregon APA contains its own procedural requirements that are distinct from those of the civil court system. *See e.g.* ORS 183.415 (describing notice requirements); ORS 183.425 (describing discovery requirements); ORS 183.450 (describing evidentiary requirement). Because the APA does not contain any general statutes of limitations and the state statutes that give rise to this DEQ enforcement action also contain no statute of limitations applicable to this DEQ administrative penalty proceeding, there is no statute of limitations applicable to this DEQ administrative penalty proceeding.

Petitioner's authorities are not to the contrary. First, petitioner cites a Washington case, in which a statute with text similar to ORS 12.110 was applied to an administrative proceeding, *U.S. Oil & Refining Co. v. State Dept. of Ecology*, 96 Wash 2d 85, 633 P2d 1329 (1981). However, even if that

decision constituted authority in Oregon, the Washington court was not directly presented with the question presented here, as to whether the statute applied at all to an administrative penalty. Rather, the Washington court determined that the statute had not been impliedly repealed, and the court considered when the "action" commenced for purposes of determining how it applied.

Second, petitioner also cites Oregon cases finding general similarities between administrative and judicial proceedings. Those cases do not overcome the specific text in context of the statute at issue here. In *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 126 Or App 689, 701, 870 P2d 260 (1994), the court construed the word "suit" in an insurance policy to include administrative action because it determined that that was the intent of the parties under those circumstances. The word "suit" was not defined in the policy and the court interpreted the policy to determine that the term was broad enough to include a DEQ administrative cleanup action and that the parties intended that it provide such coverage. Here, the terms of ORS 12.110(2), read in context, apply to court proceedings, not administrative proceedings under the APA.

In *Donovan v. Barnes*, 274 Or 701, 548 P2d 980 (1976), the court determined that a claim for malicious prosecution could be brought on the basis of university disciplinary proceedings. Malicious prosecution is a common law tort claim and the court recognized that there was no reason that it should not

apply to a proceeding that was administrative, as opposed to judicial. *Id*. at 705. But the case did not interpret any statute, much less ORS 12.110(2).

While it is perhaps true that administrative proceedings are similar in some respects to judicial proceedings, they are not the same and the Oregon legislature has provided the separate procedural requirements for each. The general similarity of civil judicial proceedings to administrative proceedings does not justify the application of judicial procedural requirements to administrative proceedings when the legislature has not done so.[5]

The Commission correctly determined that ORS 12.110(2) does not apply to this proceeding. As shown above, the text and context of ORS 12.110(2) demonstrate that it was intended to apply to judicial court proceedings and not administrative proceedings.

ANSWER TO THIRD ASSIGNMENT OF ERROR

The EQC's finding that the violations were "moderate" under OAR 340-012-0130(1) is supported by substantial evidence.

[5] The Clean Water Act also contains no requirement that a state adopt a particular statute of limitations for federal approval of the delegated program. *See generally* 40 CFR 123.27 (describing enforcement requirements for a delegated state program under the Clean Water Act, with no mention of a statute of limitations).

Standard of Review

The court reviews to determine whether substantial evidence in the record supports the EQC's finding that petitioner did not overcome the presumption that the violations were "moderate." ORS 183.482(8)(c).

Preservation of Error

The Commission agrees that these claims of error are preserved.

ARGUMENT

Petitioner challenges the determination of the magnitude of the violation used to calculate the penalty. For purposes of calculating the amount of a civil penalty, the applicable rule provides that the magnitude of a violation is "moderate" unless DEQ determines, "using information reasonably available to it," that the magnitude should instead be major or minor. OAR 340-012-0130(1).[6] Once DEQ makes that determination, "the department's

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[6] OAR 340-012-0130(4) provides:

> The magnitude of the violation is minor if the department finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors. In making this finding, the department will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.

determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude." OAR 340-012-0130(2). Thus, the rule provides for a rebuttable presumption. In this case, DEQ determined that the magnitude of each violation was moderate, and the EQC agreed.

Bandon Pacific argues that the EQC incorrectly found that the magnitude of the violation was moderate, because Bandon Pacific presented evidence that the magnitude should have been minor. According to petitioner, the magnitude should be minor, because petitioner introduced evidence that the violations "only had *de minimus* impact on human health and/or the environment." (App Br 27). Petitioner is incorrect.

While petitioner did present evidence as to current lack of environmental harm, substantial evidence nonetheless supported the finding that the violations were moderate. First, as the order notes, Bandon Pacific's evidence does not demonstrate the environmental harm caused by the violations. That evidence addresses only the current state of the river, not any harm caused by the violations in the past. As DEQ found, because Bandon Pacific did not perform the monitoring required by its permit there was no evidence of the harm caused

by its earlier discharges.[7]

More importantly, additional factors are relevant to the magnitude determination besides the actual environmental harm. To make a finding of "minor," the Department must find both: 1) that the violation had "no more than a *de minimus* adverse impact on human health or the environment," and 2) that the violation posed "no more than a *de minimus* threat to human health or other environmental receptors." OAR 340-012-0130(4). In making that determination:

> "the department will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive." OAR 340-012-0130(3).

Here, as explained below, substantial evidence supports the conclusion that

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[7] If petitioner means to contend that it automatically overcame the rebuttable presumption because it presented *some evidence*, that would be wrong. *See generally Lawrence v. Clackamas County*, 164 Or App 462, 466-467, 992 P2d 933 (1991). In *Lawrence*, the court compared the "bursting bubble theory" of rebuttable presumptions – by which a presumption can be rebutted by the introduction of *any* evidence tending to show the presumed fact is not true – to the view that a presumption must be overcome by a preponderance of the evidence. The court stated that legislature refers to the latter view of "rebuttable presumption" unless it specifically states otherwise. Here, the rules expressly require a showing that a different magnitude is "more probable" than not.

Bandon Pacific's violations posed more than a *de minimus threat* of harm to the environment.

As noted above, the rules establish several criteria for determining whether a violation is of minor magnitude, and any single factor may be conclusive. In this case, DEQ found two factors to be conclusive in determining that Bandon Pacific's violations were not of minor magnitude: the degree of deviation from permit requirements and the duration of the violations. Substantial evidence supports that determination. It is undisputed that for a period of five years, Bandon Pacific failed to comply with a single substantive requirement of the permit.

Petitioner's violations threatened harm, in particular by threatening the integrity of the permit system. The regulatory system that protects water quality in Oregon is wholly dependent on complete and accurate reporting by permittees. The Department and the public need the data not only to ensure that sources of discharges are in compliance with their permits, but also to maintain an accurate understanding of what pollutants are being discharged to Oregon waters. Regulatory decisions that substantially impact the quality of Oregon's waters and members of the regulated community are based on those data, such as the establishment of permit limits and total maximum daily loads. The importance of the permit monitoring requirements is emphasized by the certification statement a permittee is required to sign on each monitoring report,

which states that the permittee is "aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment." Bandon Pacific's total disregard for its permit legal obligations for five years significantly undermines the integrity of the system that protects Oregon waters and constitutes a gross deviation from permit requirements that presents a threat of more than *de minimus* harm to the environment. The same is true for its failure to pass its wastewater through 40 mesh screen prior to discharge and its unpermitted disposal of fish carcasses into the Coquille River over the same period.

Bandon Pacific makes two arguments as to why the order's emphasis on the lack of data is misplaced. First, Bandon Pacific contends that the Commission's decision amounts to a "per se" rule that a moderate finding cannot be rebutted when the penalty is assessed for failure to monitor. But as discussed above, violations based on failures to monitor present a particularly troubling scenario. And the record supports the finding under the specific circumstances presented here, when there was a total failure to monitor for such an extended period of time.

Second, Bandon Pacific relies on the fact that it eventually submitted corrected monitoring reports to identify the approximate amount of seafood actually processed during the five years when it had submitted false reports. While that attempt at correction may be laudable, it is not contemporaneous

direct evidence. Further, reliance on that attempt does not take into account the other factors considered in determining threat of harm.

In sum, substantial evidence supports the conclusion that Bandon Pacific did not show that it was more probable than not that the violations were "minor" instead of "moderate."

ANSWER TO FOURTH ASSIGNMENT OF ERROR

The penalty fell within the range of discretion delegated to the agency and did not improperly take into account the fact that Bandon Pacific is a subsidiary of the Pacific Seafood Group.

Preservation of Error

The EQC agrees that this claim of error is preserved.

Standard of Review

The court reviews to determine whether the EQC abused its discretion. ORS 183.482(8)(b)(A).

ARGUMENT

Bandon Pacific challenges the penalty on the ground that DEQ improperly took into account Bandon Pacific's relationship with Pacific Seafood Group in determining the penalty. (App Br 31). Bandon Pacific is a wholly owned subsidiary of Pacific Seafood Group, one of the largest seafood conglomerates on the west coast. Relying on *City of Salem v. H.S.B.*, 302 Or 648, 733 P2d 890 (1987), Bandon Pacific contends that the order improperly

disregards corporate form.[8] The penalty fell well within the Commission's discretion.

First, the fact that Bandon Pacific is owned by a large seafood processor is relevant to considerations that DEQ regularly and appropriately looks at when exercising its discretion to issue administrative penalties for violations of environmental laws. Such considerations include whether the violator was or should have been aware of its environmental responsibilities, whether it had the resources and expertise to comply with those responsibilities, whether its violations were innocent mistakes, or the product of negligence or some level of intention, and other similar considerations. Specifically, Bandon Pacific's ownership by Pacific Seafood group belies Bandon Pacific's continued contention that Bandon Pacific is a simple "mom and pop" type operation.

Second, the Commission did not in fact "pierce the corporate veil" and hold Pacific Seafood Group accountable for the actions of Bandon Pacific. The

[8] Petitioner says that "the impetus for DEQ imposing multiple penalties against Bandon Pacific, which in turn inflated the total DEQ penalty to exceptionally high level was DEQ's misplaced focus on Pacific Seafood Group." Petitioner claims that it demonstrated below that Pacific Seafood was the "real target" (App Br 33) but does not detail how it did so. The court should not be required to search the record to find such information. In any event, the items cited in petitioner's brief include Bandon Pacific's briefing below, which in turn simply cites a press release and emails and a letter from DEQ to Bandon Pacific's counsel (R-26, R28, R39). Nothing in those documents warrants a conclusion contrary to the EQC's order.

EQC did not calculate the penalty based on Pacific Seafood Group's history of environmental violations, or attempt to hold Pacific Seafood Group accountable in any way for Bandon Pacific's actions.

Below, petitioner inferred from documents in the record that DEQ's intent was to "punish Pacific Seafood," (Rec 40-37) which petitioner now refers to as "misplaced focus." Petitioner also relies on a comparison of other DEQ penalties to this one. (App Br 32). However, to the extent Bandon Pacific makes that comparison to suggest that DEQ improperly departed from prior agency practice, the record supports the ALJ's contrary conclusion. As the order states, Bandon Pacific identified no prior case similar to this one, and in particular no other case like this one, involving a failure to perform daily and monthly monitoring in violation of a permit, for a period of multiple years. ER 15.

Moreover, as the order also states, Bandon Pacific does not show how any consideration of Bandon Pacific's ownership improperly influenced the penalty. The penalty fell well within DEQ's range of discretion, and it was correctly calculated according to the regulatory penalty matrix. Petitioner does not contend otherwise. The record supports that conclusion. For similar reasons, petitioner's contention that Bandon Pacific's due process rights were violated because DEQ based the penalty on actions of non-parties (App Br 33) is not well taken.

Accordingly, the EQC did not abuse its discretion in issuing the penalty.

CONCLUSION

This court should affirm the Commission's final order.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 6, 2013, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system. I further certify that on June 6, 2013, I directed the Respondent's Answering Brief to be served upon Kelly S. Hossaini, attorney for petitioner, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,257 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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IN THE COURT OF APPEALS OF THE STATE OF OREGON

BANDON PACIFIC, INC.,

Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,

Respondent.

Department of Environmental Quality
DEQ Case No. WQ/I-WR-09-092
OAH Case No. 1001950

CA A150445

PETITIONER'S REPLY BRIEF

Appeal from an Order of the Environmental Quality Commission

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REPLY ARGUMENT ON FIRST ASSIGNMENT OF ERROR

Bandon Pacific's first assignment of error addresses the inconsistency between the penalty that the Department of Environmental Quality ("DEQ") imposed against Bandon Pacific and the plain text of the Notice of Civil Penalty Assessment and Order (the "Notice of Civil Penalty"). Whereas the Notice of Civil Penalty stated that DEQ was not penalizing Bandon Pacific for any Class II violations, it necessarily did so in light of the penalty calculation contained in an exhibit to the Notice of Civil Penalty and an explanatory penalty calculation letter that DEQ provided to Bandon Pacific.

The Environmental Quality Commission ("EQC") takes the position that no Class II violations were included in the 46 monitoring violations for which Bandon Pacific was penalized. The EQC explanation appears to be that even though DEQ arrived at the number of violations—46—by counting one violation per monitoring requirement per year of the violation period, which included both Class I and Class II violations, DEQ later disavowed its reliance on that formula and instead stated that it had imposed the 46 penalties for only Class I violations. This explanation is inconsistent with the plain language of the Notice of Civil Penalty, the explanatory penalty letter, and other evidence in the record.

In its brief, EQC argues that neither the Notice of Civil Penalty nor Jeff Bachman's September 21, 2010, penalty explanation letter "stated that penalties were being assessed for violations occurring in each of the five years of the violation period." Answering Br. at 10. The problem with that argument is that it ignores the express language of both documents. The Notice of Civil Penalty states:

> "Of the 2,248 occurrences of the violation, the Department elects to assess separate penalties for 46 Class I occurrences of the violation. The Department arrived at 46 violations by assessing *one penalty per monitoring requirement violated per year*." Pet.

> Ex. at R-27 at 2 of Exhibit 1 of the Order; ER-37 (emphasis added).

Similarly, Mr. Bachman's penalty letter states:

> "As explained in Exhibit 1 of the Notice of Civil Penalty Assessment, DEQ arrived at 46 violations by assessing *a penalty for one violation per year for each of the permit's monitoring and reporting requirements violated by Bandon*." Pet. Ex. at R-40 (emphasis added).

Further, in both testimony and an e-mail, Steve Nichols, DEQ staff, acknowledged that he had probably made a mistake with respect to whether all the penalties included in the May 13, 2009, Pre-enforcement Notice and the Notice of Civil Penalty were Class I violations. CCH Tr. at 59-61; Pet. Ex. at R-48. Mr. Nichols also admitted that the earlier violations in the five-year penalty window were probably Class II violations, not Class I violations, and that he did not double-check which violations were being penalized in the Notice of Civil Penalty, even though Bandon Pacific had asked him to do so. CCH Tr. at 59-61; Pet. Ex. at T-48.

There is substantial evidence in the record to support Bandon Pacific's contention that DEQ included Class II violations in its penalty calculation for the permit monitoring requirements. The evidence in the record does not support EQC's position that the penalty does not include Class II violations.

REPLY ARGUMENT ON SECOND ASSIGNMENT OF ERROR

Bandon Pacific's second assignment of error challenges EQC's determination that the two-year limitations period expressed in ORS 12.110(2) for "action[s] upon a statute for a forfeiture or penalty to the state" does not apply to administrative actions such as the one at issue here. In addressing this question, the parties agree that the interpretation of the statute is governed by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified by ORS 174.020, and *State v. Gaines*, 346 Or 160, 206 P3d 1042

(2009). As explained below, under *PGE* and *Gaines*, the term "action" as used in ORS 12.110(2) applies to administrative as well as judicial proceedings.

Beginning with the first-level "text in context" analysis, EQC correctly acknowledges that the term "action" has different potential meanings, Answering Br. at 11, such that it does not necessarily apply only to judicial proceedings. Thus, EQC turns to the context of the statute, arguing that a related statute "makes clear that the legislature intended that an 'action,' as that term is used in ORS 12.110(2), to be a proceeding brought in court, not an administrative proceeding." Answering Br. at 11. Specifically, EQC argues that ORS 12.020(1), which states that in determining whether an action has been timely commenced, the action "shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on the defendant," shows that ORS 12.110(2) does not apply to administrative proceedings. Because there are no summonses and complaints in administrative proceedings, EQC reasons that the legislature intended that the term "action" apply only to judicial proceedings.

In advancing this argument, EQC overlooks the fact that the Oregon legislature enacted the predecessor to ORS 12.110(2) in 1862.[1] *See* 1 *The Codes and Laws of Oregon* § 13, at 138 (William L. Hill ed, 2d ed 1892). Because the statute was enacted 95 years before Oregon created any administrative enforcement procedures, *see* Or Laws 1957, ch 717, §§ 1-16, the legislature could not have had administrative proceedings in mind when it created the statute. Thus, the context surrounding ORS 12.110(2) does not shed any light on the question whether the legislature intended that the term "action" apply to judicial proceedings while excluding administrative proceedings.

[1] Chapter 1, Title II, Section 8, of the Code of Civil Procedure stated: "Within two years[,] * * * [a]n action upon a statute for a forfeiture or penalty to the state."

Turning to the second-level analysis, neither party offers any legislative history to elucidate the meaning of the term "action" in ORS 12.110(2), and there does not appear to be any available legislative history given the age of the statute. As a consequence, it is appropriate to proceed to the third-level analysis to discern the meaning of the term "action" as used in ORS 12.110(2).

The third-level analysis under *PGE* and *Gaines* involves applying relevant canons of construction to determine the meaning of a statute. In this case, the most applicable canons are that the court assumes that the legislature did not intend an unreasonable result, *State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996), and that the court should attempt to determine what the legislature would have intended had it thought of the problem. *Carlson v. Myers*, 327 Or 213, 225, 959 P2d 31 (1998).

Beginning with the maxim that the legislature would not have intended an unreasonable result, if ORS 12.110(2) were construed narrowly to apply only to judicial proceedings, it would create an irrational outcome. DEQ has the option of bringing enforcement actions in state court under ORS 468.100 or administratively under ORS Chapter 183. If ORS 12.110(2) were interpreted to apply only to judicial proceedings, the two-year limitations period would be effectively rendered meaningless because DEQ could simply circumvent the statute by proceeding administratively, not judicially. Because EQC's proposed interpretation creates the "absurd result" that DEQ would be barred from bringing a penalty proceeding in court after two years, but could bring the same proceeding administratively *forever*, the court should reject that interpretation. *See Pete's Mountain Homeowners v. Ore. Water Resources*, 236 Or App 507, 522, 238 P3d 395 (2010) (court should favor construction of statute that does not lead to an "absurd result").

Indeed, the close parallels between judicial and administrative proceedings have led a number of state courts to interpret statutes of limitations that refer to "actions" or "suits" to apply to administrative actions as well as to judicial actions. For example, in *U.S Oil & Refining Co. v. State Dep't of Ecology*, 633 P2d 1329 (Wash 1981), the Washington Supreme Court concluded that RCW 4.16.100(2), which imposes a two-year limit on "[a]n action upon a statute for a forfeiture or penalty to the state," applies to administrative penalty proceedings. Although the notice of penalty in *U.S. Oil* did not involve the issuance of a complaint or summons, which is required to commence an action in court under RCW 4.16.170, the supreme court held that "the action was commenced, for tolling purposes, with the notice of the penalties," which have much the same effect as a complaint or summons. 633 P2d at 1333.[2]

Similarly, in *Commonwealth v. Ky. Ins. Guar. Ass'n*, 972 SW2d 276 (Ky Ct App 1997), the court held that a seven-year limitations statute for "suits" against a surety applied to administrative actions and judicial actions. In reaching its decision, the court noted that administrative hearings officers "have quasi-judicial powers; they make findings of fact which are binding on appeal to the circuit and appellate courts unless not supported by substantial evidence." 972 SW2d at 279. The court went on to observe that it would be an "absurd result" to apply a statute of limitations to court proceedings but not to administrative proceedings that are quasi-judicial in nature:

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[2] In its brief, EQC attempts to distinguish *U.S Oil* on the ground that it addressed the question whether RCW 4.16.100(2) had been impliedly repealed. Answering Br. at 14. While it is true that the *U.S. Oil* court determined that the statute had not been impliedly repealed, that was only part of the court's analysis. As set forth in Bandon Pacific's brief and summarized above, the court also ruled that under RCW 4.16.100(2), the "action" was commenced when the Department of Ecology began the administrative process by issuing a notice of penalties. EQC simply ignores this salient portion of *U.S. Oil*.

> "The legislative preference for prompt resolution of claims which underlies all statutes of limitation is equally compelling whether the forum is a court or a quasi-judicial tribunal. As the circuit court stated in this case: 'It would be an absurd result if, for example, the Cabinet could commence a proceeding before a hearing officer of the Cabinet on a cause of action which arose ten years earlier, even though the action would be barred by the statute of limitations in every other tribunal of the Commonwealth.'
>
> "Avoidance of the absurd result which concerned the circuit court does not require expanding the definition of 'court.' Courts in numerous jurisdictions, including Kentucky, when confronted with administrative boards conducting quasi-judicial proceedings but operating without any express limitations period in the enabling statute have applied by analogy the statute of limitation applicable to the common law predecessor to, or counterpart of, the administrative action." 972 SW2d at 280-81.

Because the proceeding at issue was "simply an administrative counterpart to a common law contract action against a surety," the court concluded that although the statute of limitations was "not literally applicable," it "applies by analogy" to the administrative proceeding. 972 SW2d at 281. *See also Cuadra v. Bradshaw*, 62 Cal Rptr 2d 102 (Ct App 1997) *aff'd* 952 P2d 704 (1998) (noting the anomaly of concluding that the application of the statute of limitations to an administrative proceeding would be different from a civil action).

The maxim that the court should attempt to determine what the legislature would have intended had it thought of the problem also favors applying the statutory limitations period to administrative proceedings. Assuming that the legislature had enacted ORS 12.110(2) when there were dual and functionally equivalent routes for enforcing statutory penalties, it strains credulity to believe that the legislature would have imposed a two-year limitation on judicial penalty proceedings, while allowing quasi-judicial administrative penalty proceedings to have no limitations period whatsoever. This is all the more true given the legislature's disdain for allowing stale claims

to proceed, which is the very reason that the legislature enacted statutes of limitations and of ultimate repose in the first place. *See, e.g.*, *Wilder v. Haworth*, 187 Or 688, 695, 213 P2d 797 (1950) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.") (internal quotation marks and citation omitted).

This reasoning is consistent with the fact that courts interpreting statutes that impose limitations periods for "actions" have concluded that the term applies to parallel administrative proceedings. Several courts have applied the "general" rule that a statute of limitations applies to administrative proceedings, *see, e.g.*, *Sahu v. Iowa Bd. of Med. Exam'rs*, 537 NW2d 674, 676 (Iowa 1995) ("Courts usually apply general statutes of limitation to administrative proceedings in the absence of a specifically applicable provision.") (internal quotation marks and citation omitted); *Associated Coca Cola v. Special Disability Trust Fund*, 508 So 2d 1305, 1306 n.2 (Fla Dist Ct App 1987) ("general statute of limitations may be applied to administrative proceedings in the absence of a specially applicable statute of limitations"),[3] while others have read the term "action" expansively to apply to administrative proceedings. *See Marsicovetere v. Dep't. of Motor Vehicles*, 772 A2d 540, 542 (Vt 2001) ("We find that where [Vt Stat Ann tit. 12,] § 517 states '[a]n action to

[3] The presence of a "specifically applicable statute of limitations" in the Oregon workers' compensation statutes illustrates why EQC's reliance on *Reynolds Metals v. Rogers*, 157 Or App 147, 967 P2d 1251 (1998), is misplaced. In *Reynolds Metals*, this court ruled that the claimant had timely filed his claim under the 180-day period set forth in ORS 656.807(1) (1979). *Reynolds Metals*, 157 Or App at 150-51 & n.2. Because the Oregon Workers' Compensation Act contains a specifically applicable limitations provision, which the claimant met when his doctor submitted medical records and billings, the general statutes of limitations in Chapter 12, including the statute of ultimate repose, were inapplicable. *Reynolds Metals* simply has no bearing on the present dispute.

recover money paid under protest for taxes,' the term 'action' applies equally to DMV administrative proceedings and court actions."). Still others have "borrowed" the limitations period from the analogous statute for judicial actions and used that period as the basis for a laches defense in an administrative proceeding. *See, e.g., Fountain Valley Reg'l Hosp. & Med. Ctr. v. Bontá*, 89 Cal Rptr 2d 139, 144 (Ct App 1999) ("Thus, '[i]n cases in which no statute of limitations directly applies [such as administrative proceedings] but there is a statute of limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit of reasonable delay in determining laches.'") (quoting *Brown v. Cal. State Personnel Bd.*, 213 Cal Rptr 53, 58 (Ct App 1985)). Cf. *Hilterbrand v. Carter*, 175 Or App 335, 342, 27 P3d 1086 (2001) (analogous statute of limitations provides guidance in determining whether equitable claim is barred by laches).

The common principle underlying these cases is that imposing a strict limitations period on judicial proceedings, while freeing analogous quasi-judicial administrative proceedings from any limitations period whatsoever, runs counter to common sense and sound public policy. Had the Oregon legislature faced the question whether the two-year limitations period for actions imposing statutory penalties applied to administrative as well as judicial proceedings, it is logical to assume that the legislature would have drafted the statute such that it applied to both judicial and administrative proceedings.

Because application of the *PGE* and *Gaines* test for statutory interpretation leads to the conclusion that ORS 12.110(2) applies to both judicial and administrative proceedings, the court should reverse EQC's ruling that DEQ's claims are not subject to a two-year limitations period.

REPLY ARGUMENT ON THIRD ASSIGNMENT OF ERROR

In its third assignment of error, Bandon Pacific argued that the EQC Order erred in upholding a magnitude of moderate for the National Pollution Discharge Elimination System permit violations because Bandon Pacific had presented evidence that rebutted the presumption of a moderate magnitude and demonstrated that a minor magnitude was more probable.

I. There is Not Substantial Evidence in the Record to Support a Finding of Moderate Magnitude

In its brief, EQC notes that a "rebuttable presumption" cannot be overcome with just "any" evidence. Answering Br. at 17-18. Bandon Pacific concurs, which is why it introduced substantial evidence into the record that the magnitude of the violations should be minor, not moderate. Pet. Br. at 28. This evidence included expert testimony, a sea floor survey, and information about the types and quantity of discharge during the violation period. This evidence demonstrated not only that there was no current adverse impact on human health or other environmental receptors, but that it was also more probable than not that there was never more than a de minimis threat to human health or the environment at any time during the violation period. EQC not only failed to rebut any of the offered evidence—it conceded that there was no evidence of environmental harm. *Id*. It is the EQC Order, then, that lacks substantial evidence to support its conclusion that environmental harm could not be known, thereby requiring a magnitude of moderate. In fact, there is no evidence at all underlying EQC's determination of a moderate magnitude—it is simply the default when there is a lack of evidence to support a greater or lesser magnitude. Once Bandon Pacific introduced its evidence, there no longer was a lack of evidence to support a lesser magnitude. On the contrary, there is substantial evidence to support a finding of minor magnitude for the entire

violation period, and EQC's failure to explain why that undisputed evidence does not rebut the presumption of a moderate magnitude is error.

II. EQC Cannot Supplement Its Order on Appeal With New Grounds to Support That Order.

The sole basis stated in the EQC Order to support its finding that Bandon Pacific's violations were moderate in magnitude under OAR 340-012-0130(1) was that Bandon Pacific's lack of monitoring during the violation period made it "simply not possible to determine if Bandon Pacific's activities had an adverse impact on the environment or if they posed more than a de minimis threat to human health or other environmental receptors at that time of the various discharges." Rec. at 403; ER-12. As set forth in its brief, Bandon Pacific rebutted this finding with substantial evidence to the contrary. In response, EQC now attempts to shore up its determination that the violations were moderate with post hoc policy arguments and justifications that are not contained in the EQC Order. Answering Br. at 19-21. It is the EQC Order that is on appeal, and that order must stand alone. Judicial review of the EQC Order is on the record. ORS 183.482(7). Therefore, supplementary bases for a decision that may be given by an agency in an answering brief are irrelevant.

EQC states that "[i]n this case, DEQ found two factors to be conclusive in determining that Bandon Pacific's violations were not of minor magnitude: the degree of deviation from permit requirements and the duration of the violations." Answering Br. at 19. That contention is not reflected anywhere in the EQC Order. EQC then goes on to include post hoc policy justifications explaining how DEQ views permit violations to support its newly added bases for a finding that Bandon Pacific's violations were moderate. Answering Br. at 19-21. It may or may not be that DEQ staff believed the two factors now presented in the Answering Brief were conclusive when it issued the penalty, but neither the Administrative Law Judge ("ALJ") nor EQC

adopted those bases as reasons to find that the violations were moderate, and neither factor was included as a basis in either the ALJ Order or the EQC Order. EQC is not free to supplement the EQC Order on appeal with additional justifications for a determination otherwise made and explained in that order. Therefore, those new justifications cannot be considered bases on which the EQC Order can be upheld.

REPLY ARGUMENT ON FOURTH ASSIGNMENT OF ERROR

In its fourth assignment of error, Bandon Pacific argued that DEQ impermissibly disregarded corporate form and violated state and federal law by inflating the civil penalty against Bandon Pacific based on Bandon Pacific's relationship with Pacific Seafood Group, which is a separate corporation.

In response to this assignment of error, EQC first argues that it is both standard practice and perfectly proper for DEQ to take the identity of corporate shareholders into account when issuing administrative penalties. Answering Br. at 22. Bandon Pacific's position has consistently been that this practice violates the law because it disregards corporate form. In the context of administrative penalties against a corporation, the knowledge of the corporation's management may be relevant, but the knowledge of nonmanagement shareholders is not.

EQC next argues that it did not pierce the corporate veil because it did not hold Pacific Seafood accountable for the actions of Bandon Pacific. On that there is no disagreement: Bandon Pacific has never claimed that Pacific Seafood was held accountable. Bandon Pacific's position is the opposite, i.e., DEQ held Bandon Pacific accountable for what DEQ believes are the past actions of Pacific Seafood. Specifically, DEQ was improperly influenced by the fact that Bandon Pacific is a subsidiary of Pacific Seafood Group, and as a result of DEQ's prejudices and beliefs about Pacific Seafood, DEQ inflated the penalty that it levied against Bandon Pacific. In its brief, EQC's response to

Bandon Pacific's actual position, as just summarized, is threefold: (1) a bare denial; (2) an erroneous statement that Bandon Pacific identified no similar case with a substantially different penalty; and (3) a statement that the penalty that DEQ assessed is within the range of penalties that it could have theoretically assessed, and so, ipso facto, cannot be an abuse of discretion.

With respect to EQC's bare denial, in its brief Bandon Pacific set forth evidence supporting its contention that the penalty was improperly inflated. That evidence has not been rebutted. With respect to EQC's statement that Bandon Pacific has pointed to no similar cases, in its brief Bandon Pacific noted several other DEQ enforcement actions that prove its point, including one in which an oyster processor allowed its permit to lapse, but then continued to process oysters for four years without a permit. Pet. Br. at 32; Rec. at 38 n.9; Pet. Ex. at R-36 to 37. The oyster processor then obtained a new permit, but violated the terms and requirements of that permit. *Id*. Even so, DEQ assessed a $24,992 penalty in that case—about 10 percent of the penalty that DEQ assessed against Bandon Pacific.

With respect to the defensibility of DEQ's decision to penalize Bandon Pacific over $200,000 for the violations, a chosen penalty can fall within the range from which a regulator may technically have the authority to impose, but still constitute an abuse of discretion. OAR 340, Division 12, sets out procedures and requirements for DEQ enforcement actions, which contain very detailed procedures and carefully prescribed substantive factors for assessing civil penalties. OAR 340-012-0026(5); OAR 340-012-0045. Any penalty imposed must adhere to those factors and be supported by substantial evidence, thus belying DEQ's assertion throughout the proceedings below that any penalty that it had chosen to impose would have been justifiable so long as it was within the range of theoretical penalties, no matter how extreme that

range might be.[4] Failure to follow the administrative rules in arriving at a penalty and instead using improper factors, such as the perceived acts of a different corporate entity, to arrive at a penalty is an abuse of discretion, regardless of whether the penalty is still within a theoretical range of penalties.

CONCLUSION

For the foregoing reasons, Bandon Pacific respectfully requests that the court remand the EQC Order with instructions to strike the 16 Class II violations, apply a two-year statute of limitations, reduce the magnitude of the violations to minor, and strike the use of multiple penalties from the Notice of Civil Penalty.

DATED this 1st day of August, 2013.

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[4] For example, in its closing argument to the ALJ, DEQ justified the penalty that it imposed on Bandon Pacific by stating that it could have assessed penalties for over 4,000 violations, which would have brought the penalty to $11.2 million. Rec. at 85. An assertion that the penalty could have been much worse is not a justification for the penalty imposed, especially when that penalty is a product of reliance on impermissible factors.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

This brief (1) exceeds the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,038 words. Concurrently filed with this brief is Petitioner's Motion—File Extended Reply Brief.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 1st day of August, 2013, I served the foregoing Petitioner's Reply Brief on:

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Item Q
Links for attachment D

D. Hearing Record on Appeal: Prior commission contested case, October 2011

- Staff report
  - http://www.deq.state.or.us/about/eqc/agendas/attachments/2011oct/F-BandonPacificStaffRpt.pdf
- Attachments A1-D
  - http://www.deq.state.or.us/about/eqc/agendas/attachments/2011oct/F-AttA1-D.pdf
- Attachment E
  - http://www.deq.state.or.us/about/eqc/agendas/attachments/2011oct/F-AttE.pdf
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