

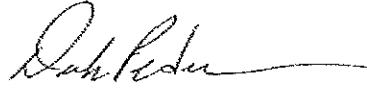
State of Oregon
Department of Environmental Quality

Memorandum

Date: Jan. 25, 2016

To: Environmental Quality Commission

From: Dick Pedersen, Director



Subject: Agenda item E, Action item: Request for dismissal of contested case re: AAM, Inc., OAH Case No. 1504109 and DEQ Case No. AQ/AB-WR-14-219
Feb. 3, 2016, EQC meeting

Why this is important Oregon statutes and rules specify how orders and penalties regarding environmental violations are to be issued and how recipient parties may contest them. Under Oregon's Administrative Procedures Act, ORS Chapter 183, parties are entitled to challenge these actions through a "contested case hearing" process that will result in a final order from the agency and commission. This item is a request from DEQ for the commission to dismiss a petition for review in a contested case, effectively upholding the proposed Final Order of the administrative law judge, due to the required filing deadlines and processes not being met by the respondent.

Background On Dec. 17, 2015, DEQ submitted a motion to dismiss the petition for review and contested case hearing regarding AAM, Inc., OAH Case No. 1504109 and DEQ Case No. AQ/AB-WR-14-219. The motion was based on the fact that the petitioner had not submitted a brief outlining exceptions to the proposed Final Order related to the petition within the statutory limit of 30 days from filing the petition, nor did the petitioner requested an extension of time to do so.

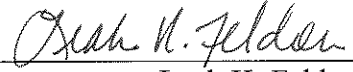
Based on Oregon Administrative Rules, a petitioner must file the Exceptions and Brief within 30 days of the filing of a petition for commission review. The Exceptions and Brief is a required document in the administrative process.

DEQ recommendation and commission action DEQ requests that the commission dismiss the petition for commission review regarding AAM, Inc., OAH Case No. 1504109 and DEQ Case No. AQ/AB-WR-14-219, and issue a Final Order upholding the administrative law judge's proposed Final Order.

Attachment A. Letter requesting dismissal, with supporting documentation
B. Proposed Final Order

Action item: Request for dismissal of contested case
Feb. 3, 2016, EQC meeting
Page 2 of 2

Approved:

A handwritten signature in cursive script, appearing to read "Leah K. Feldon", is written over a horizontal line.

Leah K. Feldon

Office of Compliance and Enforcement Manager

Report prepared by Stephanie Caldera
Commission assistant

Jan. 13, 2016

ENVIRONMENTAL
QUALITY
COMMISSION

Kieran O'Donnell
DEQ Environmental Law Specialist
811 SW 6th Avenue
Portland, Oregon 97204
By hand delivery

Re: Request for dismissal of Respondent's Petition for Commission Review in the Matter of AAM, Inc.
OAH Case No. 1504109
DEQ Case No. AQ/AB-WR-14-219

Hello,

The Environmental Quality Commission has received a motion to dismiss the above-referenced petition for commission review. The motion states that the Respondent did not file an Exceptions and Brief within the allotted time limits for the required filing.

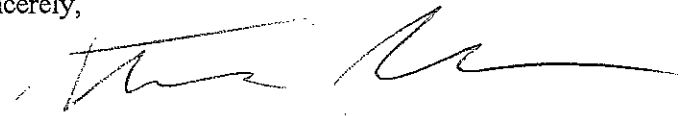
This motion and request will come for commission consideration as part of the Feb. 3, 2016, regularly-scheduled EQC meeting. That meeting will be at the State Library Room 103 in Salem, Oregon, and this item is tentatively scheduled for 1:15 p.m.

At the meeting, the commission will review the request and make a decision based on the administrative laws and rules governing its contested case process. The parties, including DEQ and any person or persons representing AAM, Inc. may attend the meeting in-person or by telephone. This item is scheduled to last approximately 15 minutes.

If a party wants to participate by telephone, please notify me by **Friday, Jan. 29, 2016**, so I can make suitable arrangements.

If you have any questions, please do not hesitate to contact me by phone or email.

Sincerely,


Stephanie Caldera
EQC assistant

Phone: 503-229-5301
Email: Caldera.Stephanie@deq.state.or.us

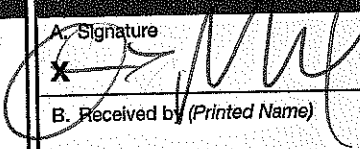
Encl.: Copy of motion to dismiss, dated Dec. 17, 2016, with supporting materials

CC: Geoffrey Silverman, Counsel for Respondent. 5160 SW Beaverton Hillsdale Highway, Suite 206,
Portland, OR 97221 - *Sent via certified U.S. Mail*



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



SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature  B. Received by (Printed Name) _____ C. Date of Delivery <u>1/19/16</u> D. Is delivery address different from item 1? ☐ Yes ☒ No If Yes, enter delivery address below: _____	
 Geoffrey Silverman Counsel for the Respondent 5160 SW Beaverton Hillsdale Highway, Suite 206 Portland, OR 97221		Service Type ☐ Certified Mail® ☐ Priority Mail Express™ ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ Collect on Delivery	
		4. Restricted Delivery? (Extra Fee) ☐ Yes ☒ No	
2. Article Number (Transfer from service label)		7014 2870 0001 3378 2498	
PS Form 3811, July 2013		Domestic Return Receipt	



Oregon

Kate Brown, Governor

Department of Environmental Quality

Headquarters
811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
FAX (503) 229-6124
TTY: 711

December 17, 2015

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

Re: Motion to Dismiss Respondent's Petition for Commission Review of Proposed Order
In the Matter of:
AAM, Inc.
OAH Case No. 1504109
DEQ Case No. AQ/AB-WR-14-219

Dear Mr. Pedersen:

Please find the enclosed Motion to Dismiss Respondent's Petition for Commission Review of a proposed order in the above referenced case.

Sincerely,

Kieran O'Donnell
Environmental Law Specialist
Office of Compliance and Enforcement

cc: Geoffrey Silverman, Counsel for Respondent, 5160 SW Beaverton Hillsdale Hwy., Ste.
206, Portland, OR 97221

RECEIVED

DEC 17 2015

Oregon DEQ
Office of the Director



BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF:
AAM, INC.

Respondent.

) DEQ'S MOTION TO DISMISS
) RESPONDENT'S PETITION FOR
) COMMISSION REVIEW

) OAH CASE NO. 1504109
) DEQ CASE NO. AQ/AB-WR-14-219

I. AUTHORITY

The Department of Environmental Quality (DEQ) issues this Motion to Dismiss Respondent's Petition for Commission Review (Motion) pursuant to Oregon Administrative Rule (OAR) 340-011-0575(4)(f) and Oregon Revised Statute (ORS) Chapter 183.

II. PROCEDURAL HISTORY

1. On October 16, 2015, Senior Administrative Law Judge Rackstraw issued a Proposed and Final Order (Proposed Order) in OAH Case No. 1504109, DEQ Case No. AQ/AB-WR-14-219, ordering Respondent to pay a total civil penalty of \$17,600 for violations of Oregon's environmental laws.

2. On November 4, 2015, counsel for Respondent petitioned the Commission to review the Proposed Order.

3. To date, Respondent has not filed a written exceptions and brief.

4. This Motion is filed within 45 days of Respondent's petition for Commission review of the Proposed Order.

III. CONCLUSION

Pursuant to OAR 340-011-0575(4)(a), "[w]ithin 30 days from filing of a petition, the participant(s) must file written exceptions and brief." In addition, the "[f]ailure to take an exception to a finding or conclusion in the brief, waives the participant's ability to later raise the exception." OAR 340-011-0575(4)(a). Finally, Pursuant to OAR 340-011-0575(4)(f), the Commission may dismiss a petition for review and file a final order upholding the proposed order upon motion of any participant if the party seeking review fails to file a timely exceptions and brief.

1 DEQ respectfully request that the Commission dismiss Respondent's request for Commission
2 review and enter a final order upholding the (Proposed Order) issued by the Office of Administrative
3 Hearings.

4
5
6
7 12/17/15
8 Date


Kieran O'Donnell
Environmental Law Specialist
Office of Compliance and Enforcement

CALDERA Stephanie

From: O'DONNELL Kieran
Sent: Thursday, November 05, 2015 4:48 PM
To: CALDERA Stephanie
Subject: FW: OAH 1504109 - AAM, Inc. - Petition for Review
Attachments: Petition for Review.pdf

Hi Stephanie,

I received this request for EQC. Let me know if you have any questions.

Best,
Kieran

From: Geoff Silverman [<mailto:gsilverman@hotmail.com>]
Sent: Wednesday, November 04, 2015 8:31 PM
To: O'DONNELL Kieran
Subject: OAH 1504109 - AAM, Inc. - Petition for Review

Hello,

Please find the attached petition for review.

Thank you

Geoffrey B. Silverman
The Law Office of Geoffrey B. Silverman, LLC
5160 SW Beaverton Hillsdale Hwy, Suite 206
Portland, OR 97221
t. (503) 222-1422 f. (503) 233-4191

To comply with IRS regulations, we are required to inform you that this message, if it contains advice regarding federal taxes, may not be used to avoid penalties that may be imposed under federal tax law. Any tax advice included in this communication is limited to the issues addressed in this message.

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

IN THE MATTER OF:	)	OAH Case No.: 1504109
	)	Agency Case No.: AQ/AB-WR-14-219
AAM, Inc.	)	
	)	RESPONDENT'S PETITION
	)	FOR REVIEW

RESPONDENT'S PETITION FOR REVIEW

Respondent requests that the Environmental Quality Commission review the Proposed and Final Order in this matter and reverse it. The Agency failed to meet its burden.

The Law Office of Geoffrey B. Silverman, LLC

/s/ Geoffrey B. Silverman

Geoffrey B. Silverman, OSB #010907
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that on November 4, 2015, I emailed a copy of this document to the opposing party Kieran O'Donnell: O'DONNELL.Kieran@deq.state.or.us.

The Law Office of Geoffrey B. Silverman, LLC

/s/ Geoffrey B. Silverman

Geoffrey B. Silverman, OSB #010907
Attorney for Respondent

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

IN THE MATTER OF:	)	OAH Case No.: 1504109
	)	Agency Case No.: AQ/AB-WR-14-219
AAM, Inc.	)	
	)	RESPONDENT'S PETITION
	)	FOR REVIEW

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The Law Office of Geoffrey B. Silverman, LLC

/s/ Geoffrey B. Silverman

Geoffrey B. Silverman, OSB #010907
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that on November 4, 2015, I emailed a copy of this document to the opposing party Kieran O'Donnell: ODONNELL.Kieran@deq.state.or.us.

The Law Office of Geoffrey B. Silverman, LLC

/s/ Geoffrey B. Silverman

Geoffrey B. Silverman, OSB #010907
Attorney for Respondent

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

IN THE MATTER OF
RESPONDENT

AAM, INC.

) **PROPOSED AND FINAL ORDER**
)
)
) OAH Case No. 1504109
) Agency Case No. AQ/AB-WR-14-219

HISTORY OF THE CASE

On January 12, 2015, the Oregon Department of Environmental Quality (Department or DEQ) issued a Notice of Civil Penalty Assessment and Order (Notice) to AAM, Inc. (Respondent). The Notice proposed to assess a \$19,200 civil penalty against Respondent for alleged violations of Oregon environmental laws. On January 28, 2015, Respondent's president, Walter S. Zwingli, requested an administrative hearing on Respondent's behalf.

On March 31, 2015, DEQ referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw to preside over the matter.

On May 15, 2015, ALJ Rackstraw convened a prehearing telephone conference. Steve Segal, on behalf of DEQ's Office of Compliance and Enforcement, represented DEQ. No one participated on Respondent's behalf. A hearing was scheduled for July 1, 2015. The OAH served Respondent with a Notice of Hearing.

On June 14, 2015, Respondent's attorney, Geoff Silverman, requested a postponement of the hearing due to the unavailability of a principal witness. DEQ objected to the request. ALJ Rackstraw determined that DEQ would not be prejudiced by a postponement and granted the request. The hearing was rescheduled for August 5, 2015.

On August 5, 2015, a hearing convened in Portland, Oregon. Kieran O'Donnell, an environmental law specialist with DEQ's Office of Compliance and Enforcement, represented DEQ. Attorney Silverman represented Respondent. DEQ Asbestos Specialists Martin Abts and Steve Croucher, as well as DEQ Chemist Eric Feeley, testified for DEQ. Mr. Zwingli and Respondent's former employee Del Haney testified for Respondent. The record remained open to allow the parties to submit written closing arguments.

On August 21, 2015, DEQ filed its Closing Argument. On August 28, 2015, Respondent filed its Closing Argument. The record closed on August 28, 2015.

ISSUES

(1) Whether on October 22, 2014, Respondent failed to adequately wet friable asbestos-containing materials to ensure the materials remained wet during their removal and until their disposal, in violation of OAR 340-248-0270(7)(a).

(2) Whether on October 22, 2014, prior to abatement, Respondent failed to enclose an area with a negative pressure enclosure where friable asbestos materials were removed, in violation of OAR 340-248-0270(7)(d).

(3) Whether DEQ may impose a \$19,200 civil penalty under OAR 340-012-0045.

EVIDENTIARY RULINGS

DEQ's Exhibits A1 through A4 and Respondent's Exhibits R1 through R3 were admitted into the record without objection.

FINDINGS OF FACT

(1) During all times relevant to this matter, Respondent was an asbestos abatement contractor, located at 11225 SW Greenburg Road, in Tigard, Oregon. (*See* Exs. A2 at 1, A1 at 11.)

(2) Maughan Design & Remodel planned a construction project for a residential property located at 262 NE 18th Avenue, in Hillsboro, Oregon (the property). (*See* Ex. A3 at 1.)

(3) On September 3, 2014, JSE Labs performed a survey at the property and collected two samples for asbestos analysis. (Exs. A3 at 1-3, A2 at 1.) The first sample included a portion of popcorn ceiling in the garage of the property. The second sample included a portion of vinyl flooring in the kitchen of the property. (Ex. A3 at 1-2.)

(4) It is common for floors to have multiple flooring systems. When conducting an asbestos survey involving flooring, a surveyor will typically consider all the flooring layers, down to the subfloor. If there are multiple vinyl flooring systems, then a surveyor will typically take a sample of all of them. (Test. of Abts.)

(5) Vinyl flooring is a two-layer product, but it is viewed as one entity. The two layers consist of a surface layer and a fibrous backing layer that are typically stuck together with an adhesive, or mastic. Although a flooring sample may be separated into two layers under lab testing conditions, such separation does not occur in the field. (Test. of Abts, Feeley.)

(6) A JSE Lab Report dated September 4, 2014 described the vinyl flooring at the property as having two layers: layer one consisting of "[b]rown vinyl sheeting" and layer two consisting of "[g]ray fibrous back/tan mastic." (*Id.* at 2.) The Report showed that layer two contained 28 percent Chrysotile. A note on the Report stated, "Mastic not separable and is included in the fibrous backing analysis results. Mastic appears contaminated by the asbestos-

containing fibrous backing.” (*Id.*) Only one flooring system from the property was submitted for testing. (Test. of Abts; *see* Ex. A3.)

(7) Maughan Design & Remodel subsequently contracted with Respondent to perform asbestos removal at the property. On or about October 21, 2014, Respondent filed a “DEQ Project Notification Form for the Abatement of Friable Asbestos-Containing Material” (Project Notification Form) with regard to the property. (Ex. A2 at 1.) The Project Notification Form categorized the project as an “emergency” because of water damage that had occurred at the property. (*See id.*) The Form stated that the project would occur on October 22, 2014, between 8:30 a.m. and 4:00 p.m. (*Id.*) The Form also stated that JSE Labs had performed a survey of the structure. (*Id.*)

(8) When asked on the Project Notification Form to list the asbestos-containing material (ACM), the percentage of asbestos, and its location, Respondent wrote, “sheet vinyl flooring 28% kitchen and garage entry.” (Ex. A2 at 1.) Respondent noted on the Form that it planned to remove or encapsulate 320 square feet of asbestos material using the “Wet method” and a “Negative Pressure Enclosure.” (*Id.*) Respondent listed Alex Cortez, Esbanyell Zazuela, and Alberto Hernandez as Oregon Certified Supervisors on the project. Respondent listed Hillsboro Landfill as the asbestos disposal site and stated that Respondent would be hauling the ACM to the disposal site. (*Id.*)

(9) Respondent’s general procedure for performing an asbestos abatement project includes the following tasks: determine the scope of the work; communicate with the surveyor and/or lab; arrive at the work site, construct a delineated area; remove all non-asbestos items from the area; cover or seal non-asbestos items that cannot be removed from the area; turn off the HVAC; seal the furnace; don personal protective equipment; remove asbestos and non-asbestos materials; wet the material; and double bag the material. (Test. of Zwingli.) After removing all ACM, workers must clean the area, spray the area with an encapsulant, allow the encapsulant to settle, and then have an air clearance sample tested by a financially-independent company. (*Id.*; test. of Croucher; *see* OAR 340-248-0270.)

(10) It can take up to several hours for workers to set up an asbestos containment area. (Test. of Croucher; Zwingli.)

(11) At approximately 10:00 a.m. on October 22, 2014, DEQ inspectors Steve Croucher and Martin Abts (DEQ inspectors) arrived at the property. (Test. of Croucher, Abts; Ex. A2 at 1.) Two of Respondent’s employees (the workers) were at the property at that time. (Test. of Croucher.)

(12) The DEQ inspectors determined that the workers were performing active asbestos removal when the inspectors arrived. Because the inspectors observed what they believed were several asbestos abatement violations, they asked the workers to stop working. The workers complied. Inspector Croucher then dressed in the proper suiting and began conducting an in-containment inspection. (Test. of Croucher.)

(13) The DEQ inspectors observed that the workers had removed portions of vinyl flooring inside the containment work area. (Test. of Croucher, Abts; *see* Ex. A1 at 2.) The disturbed flooring consisted of brown sheeting, light gray fibrous backing, and particleboard underlayment, with mastic used to adhere the backing to the underlayment. (Test. of Abts; *see* Ex. A4 at 1.) In the opinion of Inspector Abts, and based on what he observed in the containment work area, it would be atypical for there to be another flooring system under the subfloor. (Test. of Abts; *see* Ex. A1 at 9.)

(14) Some of the disturbed flooring material remained out in the open in the containment work area. Some of the disturbed material, which included sheet vinyl flooring debris, had been placed into bags labeled as ACM. (Test. of Croucher, Abts; *see* Ex. A1 at 3, 5.)

(15) The general industry practice is that once material is bagged and labeled as ACM, it is treated as ACM. ACM must go to a specific part of a landfill. Treating waste as ACM is generally more expensive than treating it as non-ACM. (Test. of Croucher.) Respondent's general practice was to treat anything placed into an asbestos-labeled bag as ACM. (Test. of Zwingli.)

(16) The DEQ inspectors noted that none of the removed flooring material (including that material which was bagged) appeared to have been wetted. The inspectors did not observe any wetting devices (*e.g.* a hose or sprayer) or water delivery systems for wetting ACM on the job site. (Test. of Croucher; *see* Ex. A1 at 1-3, 5.) The workers did, however, eventually bring out a pack sprayer once the inspectors discussed the wetting issue with them. (Test. of Croucher.)

(17) The DEQ inspectors observed that the workers had set up a "critical barrier" consisting of only a single flap of plastic between the containment work area and the unregulated area in the garage. (Test. of Croucher; *see* Ex. A1 at 1.) A negative air and HEPA filter machine was operating inside the work area. (Test. of Croucher; *see* Ex. A1 at 4.) The single flap of plastic was not a sufficient barrier for asbestos abatement. (Test. of Croucher.)

(18) The DEQ inspectors observed that a sheet of plastic that was not fully attached to the floor separated the containment work area from a hallway leading to a bathroom, both of which were outside the work area. The plastic sheet was not a sufficient barrier for asbestos abatement. (Test. of Croucher; *see* Ex. A1 at 5.)

(19) The DEQ inspectors observed personal items, such as a clock and a calendar, on a wall inside the containment work area. The items had not been covered or sealed in any way. Also inside the work area, the inspectors observed an uncovered and unsealed return air vent on the ceiling and a floor vent that simply had a handful of plastic sheeting stuffed inside of it. (Test. of Croucher; *see* Exs. A1 at 6-7, 9; A4 at 1.) For proper containment during asbestos abatement, the ceiling and floor vents should have been sealed and the personal items should have been covered or removed from the area. (Test. of Croucher.)

(20) The DEQ inspectors also observed an open piping duct inside the containment work area. The duct should have been sealed to maintain the integrity of the negative air containment area. (Test. of Croucher; *see* Ex. A1 at 8.)

(21) In addition, the inspectors noticed some time after their arrival at the property that the heat pump was running in the home.¹ Given the inspectors' determination that an active asbestos removal was in process, that the workers had not been wetting the disturbed material, and that the negative pressure enclosure was not adequately sealed, they had the heat turned off. (Test. of Croucher.)

(22) Respondent's workers were cooperative and responsive to the concerns of the DEQ inspectors. (Test. of Croucher.) The inspectors left the property sometime between 1:00 and 2:00 p.m. (Test. of Zwingli, Croucher.)

(23) Advantage Environmental, Inc. took two air clearance samples from the property on October 22, 2014. The first air sample was collected between 1:35 p.m. and 3:05 p.m., from the center of the living room. (Ex. R2 at 2.) The living room was outside of the work area. (Test. of Croucher.) The second air sample was collected between 6:30 p.m. and 8:00 p.m., from the center of the kitchen work area. (Ex. R2 at 3.) The first air sample showed 0.0045 fibers/cc of asbestos. The second air sample showed 0.0049 fibers/cc of asbestos. (*Id.* at 1-3.) The results indicated "normal" levels of asbestos in those areas. (Test. of Croucher.)

(24) Advantage Environmental, Inc. also took four dust wipe samples at the property on October 22, 2014.² Sample 1 was from the return vent in the kitchen; Sample 2 was from the top of the piano; Sample 3 was from a table in the entry way; and Sample 4 was from the furnace filter. After analyzing the samples using transmission electron microscopy, the designated laboratory detected no asbestos structures in the samples. (Ex. R3 at 1-3.)

(25) It can take 48 to 72 hours for an asbestos fiber to settle. Bundles of asbestos fibers typically settle more quickly. It is possible for a wipe test not to show a positive result for asbestos if the sample is taken the same day as a project that disturbs asbestos because the fibers could still be hanging in the air. (Test. of Haney.)

(26) DEQ did not test any of the flooring material that Respondent removed from the property on October 22, 2014 to confirm whether it was ACM. (Test. of Croucher.)

¹ According to Respondent's witness, Del Haney, the workers wanted to leave the property owner's heater running while they set up the containment area, so that the property owner was not without heat during a period of time when there was not actually any ACM removal occurring. (Test. of Haney.)

² The "Asbestos Chain of Custody" form does not indicate at what time Advantage Environmental, Inc. took the dust wipe samples. (See Ex. R3 at 3.)

CONCLUSIONS OF LAW

(1) On October 22, 2014, Respondent failed to adequately wet friable asbestos-containing materials to ensure the materials remained wet during their removal and until their disposal, in violation of OAR 340-248-0270(7)(a).

(2) On October 22, 2014, prior to abatement, Respondent failed to enclose an area with a negative pressure enclosure where friable asbestos materials were removed, in violation of OAR 340-248-0270(7)(d).

(3) DEQ may impose a \$17,600 civil penalty under OAR 340-012-0045.

OPINION

The Oregon Environmental Quality Commission (Commission) is the entity charged with promulgating administrative rules regarding asbestos abatement and the handling and disposal of waste materials containing asbestos.³ ORS 468A.745(8);⁴ ORS 468A.707(1)(a).⁵ DEQ, in turn, is required to implement and enforce the asbestos rules. ORS 468A.707(5);⁶ ORS 468A.725(1) and (2).⁷

³ “Asbestos” means “the asbestiform varieties of serpentine (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite (amosite), anthophyllite, actinolite and tremolite.” OAR 340-248-0010(5).

⁴ ORS 468A.745 states, in part:

The * * * Commission shall adopt rules to carry out its duties under ORS 279B.055 (2)(g), 279B.060 (2)(g), 279C.365 (1)(j), 468A.135 and 468A.700 to 468A.760. In addition, the commission may:

* * * * *

(8) Establish work practice standards, compatible with standards of the Department of Consumer and Business Services, for the abatement of asbestos hazards and the handling and disposal of waste materials containing asbestos.

⁵ ORS 468A.707(1)(a) states that the Commission by rule shall, “[e]stablish an asbestos abatement program that assures the proper and safe abatement of asbestos hazards through contractor licensing and worker training.”

⁶ ORS 468A.707(5) states as follows:

[DEQ] shall cooperate with the Department of Consumer and Business Services and the Oregon Health Authority to promote proper and safe asbestos abatement work practices and compliance with the provisions of ORS 279B.055 (2)(g), 279B.060 (2)(g), 279C.365 (1)(j), 468.126, 468A.135 and 468A.700 to 468A.760.

⁷ ORS 468A.725 states, in part:

Here, DEQ contends that Respondent should be ordered to pay a \$19,200 civil penalty for violating OAR 340-248-0270(7)(a) and (d). As the proponent of that position, DEQ has the burden of establishing, by a preponderance of the evidence, that the alleged violations occurred and that the proposed civil 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).

1. Alleged Violation of OAR 340-248-0270(7)(a)

DEQ alleges that Respondent conducted an asbestos abatement project at the property on October 22, 2014, and that it violated OAR 340-248-0270(7)(a) by failing to adequately wet the asbestos-containing material (ACM) prior to disposal.

OAR 340-248-0270 is titled "Asbestos Abatement Work Practices and Procedures" and provides, in relevant part:

Except as provided for in OAR 340-248-0250, the following procedures must be employed by any person who conducts or provides for the conduct of an asbestos abatement project.

* * * * *

(1) [DEQ] may suspend or revoke an asbestos abatement license issued to a contractor under ORS 468A.720 if the licensee:

* * * * *

(b) Fails at any time to satisfy the qualifications for a license or to comply with rules adopted by the * * * Commission under ORS 468A.700 to 468A.760.

(c) Fails to meet any applicable state or federal standard relating to asbestos abatement.

* * * * *

(e) Employs a worker who fails to comply with applicable state or federal rules or regulations relating to asbestos abatement.

(2) [DEQ] may suspend or revoke the license or certification of any person who violates the conditions of ORS 468A.700 to 468A.755 or rules adopted under ORS 468A.700 to 468A.755.

(7) For friable asbestos materials being removed or stripped:

(a) Adequately wet the materials to ensure that they remain wet until they are disposed of in accordance with OAR 340-248-0280.

A. Whether Respondent conducted an asbestos abatement project

Respondent contends that it had not yet conducted an asbestos abatement project at the property on October 22, 2014, when the DEQ inspectors arrived at approximately 10:00 a.m. Respondent asserts that at that time, its employees were still in the set-up phase of the project, and they had not yet disturbed or removed any ACM. Respondent insists that the flooring material its employees had already disturbed, removed, and partially bagged that morning was non-ACM.

OAR 340-248-0010(6) defines an “asbestos abatement project” as follows:

“Asbestos abatement project” means any demolition, renovation, repair, construction or maintenance activity of any public or private facility⁸ that involves the repair, enclosure, encapsulation, removal, salvage, handling, or disposal of any asbestos-containing material with the potential of releasing asbestos fibers from asbestos-containing material into the air.

ACM refers to “any material containing more than one-percent asbestos by weight,” and “friable” ACM means “any asbestos-containing material that hand pressure can crumble, pulverize or reduce to powder when dry.” OAR 340-248-0010(8), (25).

The record establishes that on October 21, 2014, Respondent filed a Project Notification form with DEQ for an October 22, 2014 project involving the abatement of friable ACM at the property.⁹ See Exhibit A2 at 1. The record further establishes that on October 22, 2014,

⁸ The property at issue meets the definition of a “facility” under OAR 340-248-0010(24) (defining a “facility” as “all or part of any public or private building, structure, installation, equipment, vehicle or vessel”).

⁹ OAR 340-248-0260 states, in part:

Except as provided for in OAR 340-248-0250, written notification of any asbestos abatement project must be provided to the Department on a form prepared by and available from the Department, accompanied by the appropriate fee[.]

* * * * *

(4) The following information must be provided for each notification:

(a) Name and address of person conducting asbestos abatement.

Respondent's workers handled, removed, and partially bagged brown sheet vinyl and fibrous flooring material at the property (referred to hereafter as "the disturbed material" or "the disturbed flooring"). See Exhibits A1 and A4; testimony of Abts and Croucher. The issue is whether the disturbed material is more likely than not friable ACM (hereinafter referred to as merely "ACM").¹⁰

Respondent contends that DEQ "failed to present any evidence that the disturbed flooring was ACM." Respondent's Closing Argument at 3. Respondent further contends that DEQ could have used readily available analytic tests to conclusively confirm the presence (or absence) of asbestos in the disturbed material, but that DEQ instead chose to rely on mere speculation.

DEQ contends that the disturbed flooring is more likely than not ACM because it matches the description of the ACM listed on the Project Notification form; it matches the description of the ACM on the JSE lab report; Respondent's workers packaged it as ACM; and there is no evidence of any other similar flooring material at the work site that may have been both ACM and undisturbed when the DEQ inspectors were at the work site on October 22, 2014.

First, DEQ asserts that the disturbed material matches the narrative description of the ACM listed on the Project Notification form. That description includes "sheet vinyl flooring" located in the "kitchen and garage entry." Exhibit A2 at 1. At hearing, DEQ Inspectors Croucher and Abts both described the disturbed material they observed on October 22, 2014 as

* * * * *

(c) Method of asbestos abatement to be employed.

* * * * *

(f) Name and address or location of the waste disposal site where the asbestos-containing waste material will be deposited.

(g) Description of asbestos disposal procedure.

* * * * *

(B) Address or location where the asbestos abatement project is to be accomplished[.]

* * * * *

(j) Scheduled starting and completion dates of asbestos abatement work.

(k) Description of the asbestos type, approximate asbestos content (percent), and location of the asbestos-containing material.

(l) Amount of asbestos to be abated[.]

¹⁰ There is no dispute as to whether any ACM at issue was friable.

“sheet vinyl flooring.” Testimony of Croucher and Abts. Inspector Croucher further testified that the disturbed material shown in multiple broken pieces in Exhibit 1 at page 3 was located in the “kitchen area.” Testimony of Croucher. The evidence conclusively demonstrates that the disturbed material the DEQ inspectors observed on October 22, 2014 matches the description of the ACM on the Project Notification form.

Second, DEQ asserts that the disturbed material matches the narrative description of the ACM listed on the JSE lab report. The chain of custody page of the report lists the sample description and location as “Vinyl Flooring/Kitchen.” Exhibit A3 at 1. The sample is described in the JSE lab report as having two layers, one consisting of “brown vinyl sheeting” and the other described as “[g]ray fibrous back/tan mastic.” *Id.* DEQ asserts that the narrative description of the sample tested by JSE matches the color of the flooring materials shown in Exhibits A1 and A4. At hearing, Mr. Abts and Mr. Croucher both described the disturbed material as brown vinyl flooring and Mr. Abts described the fibrous back of the disturbed material as being “light” in color, but not actually white, as it appears in some of the photos in Exhibit A1. Testimony of Croucher and Abts.

Respondent contends that the flooring material that the workers removed on the morning of October 22, 2014 was not the ACM referred to in the JSE lab report. Respondent asserts that the disturbed flooring shown in the photographs (Exhibit A1 at 1-9 and Exhibit A4) is brown on top, and that the part that could contain asbestos — the mastic and backing — appears black and white in the photos. At hearing, the DEQ inspectors testified that some of the backing that looks white in the photos was actually light gray. Nonetheless, the JSE lab report lists the ACM as having a “[g]ray fibrous back” and “tan mastic.” Exhibit A3 at 2. Respondent asserts that regardless of whether the white in the photos is actually gray, “the mastic is very clearly black” in the photos and “[n]one of the photos show any tan mastic as called out in the Lab Report as being part of the ACM.” Respondent’s Closing Argument at 2. Instead, Respondent asserts that the photos show “flooring with a brown top, white backing and black mastic.” *Id.*

DEQ concedes that it is common for there to be multiple layers of vinyl flooring (*i.e.* multiple flooring systems) on top of one another, separated by wood or a wood product. However, DEQ asserts that because the disturbed flooring was the only vinyl and fibrous material that Inspectors Croucher and Abts observed at the work site on October 22, 2014, it had to be the vinyl flooring classified as ACM in the JSE lab report. At hearing, Mr. Abts described the flooring system shown in Exhibits A1 and A4 as consisting of joists, floorboard or primary sub-floor, particle board with nails, and then topped with the disturbed flooring material (which consisted of brown vinyl with light gray fibrous backing). Testimony of Abts. Neither of the DEQ inspectors observed any other floor system, vinyl flooring, or flooring material at the project site that matched the narrative description of the ACM on the Project Notification form or in the JSE lab report.

Respondent asserts that because neither DEQ inspector looked under the visible floor boards to ascertain whether there was an additional layer of flooring underneath, the inspectors would not know whether another flooring system was present. However, Inspector Abts testified credibly at hearing that it would not be typical for another flooring system to exist under the subfloor he observed (and which is shown in Exhibit A1 at 9). Testimony of Abts.

There is no evidence of another flooring system that matches the description of the ACM on the Project Notification form and in the JSE lab report. The JSE surveyor who took a sample of the flooring for asbestos testing on September 3, 2014 took a sample of only *one* flooring system. The workers did not tell the inspectors on October 22, 2014 that there was another layer of flooring with ACM that the workers intended to remove that day. No one who testified at hearing observed the workers actually remove another layer of flooring on October 22, 2014. None of the workers testified at the hearing or submitted affidavits to support the theory that another layer of flooring (with ACM) existed under that seen in Exhibits A1 and A4. Neither of Respondent's hearing witnesses testified that the workers told them that there was an additional layer of undisturbed vinyl flooring (with ACM) below that which is visible in Exhibits A1 and A4. This indicates, more likely than not, that there was only one flooring system (*i.e.* one layer of vinyl flooring) in the kitchen of the subject property.

Next, DEQ asserts that placing the disturbed material in bags labeled as ACM makes it more likely than not that the disturbed material was ACM. However, Respondent's witness, Mr. Zwingli, credibly testified at hearing that for a small project such as the one at issue, workers tended to bag all removed materials (ACM and non-ACM) in the same bags and dispose of them together as ACM so that only one disposal site stop was necessary. Thus, the bagging of the disturbed material in bags marked as ACM does not tend to make it more likely that the material was, in fact, ACM.

Respondent asserts that because the air and wipe samples (R2 and R3) showed no alarming levels of asbestos, this constitutes further support for the proposition that no ACM had been disturbed or removed when the DEQ inspectors arrived at the property at approximately 10:00 a.m. on October 22, 2014. Given that Respondent's witness, Del Haney, admitted at hearing that it can take up to 48 to 72 hours for an asbestos fiber to settle, the wipe test results do not preclude the presence of asbestos in the tested areas on October 22, 2014.

As to the air clearance tests, DEQ asserts that they do not suggest, one way or another, whether the disturbed material was ACM. The first air clearance test sample was taken at "3:00 p.m." in the "living room," which was outside the project area. *See* Exhibit R2 at 2. The second air clearance sample was taken at "6:30 p.m." in the "center of kitchen work area-Post floor vinyl removal." *Id.* at 3. DEQ contends that the timing of the second sample suggests that the testing may have been rushed. DEQ's Closing Argument at 6. DEQ arrived at the work site at 10:00 a.m. and remained there for approximately four hours. If the disturbed material present during the inspector's visit was not ACM, and another layer of vinyl flooring (containing ACM) was actually present below that which is visible in Exhibits A1 and A4, the workers would have had to clean up the disturbed material, finish the containment process, remove the additional layer of approximately 320 square feet of vinyl flooring to complete the asbestos abatement project, spray the area with an encapsulant, wait for the encapsulant to settle (as per OAR 340-248-0270(13)(b)¹¹), and then take the air clearance sample. Mr. Zwingli testified at hearing that they

¹¹ OAR 340-248-0270(13)(b) states, in relevant part:

(13) Final Air Clearance Sampling Requirements apply to projects involving more than 160 square feet or 260 linear feet of asbestos-containing material.

sometimes “wait hours” to take a clearance test after applying encapsulant. DEQ asserts that the timing of the second test suggests that either 1) it is unlikely that there existed an additional layer of brown vinyl flooring that contained ACM and that was removed by the workers after the inspectors left the property; or 2) the test was rushed and potentially inaccurate because it was taken without sufficient time for the encapsulant to settle.

After consideration of the above, the record establishes, more likely than not, that the disturbed material the DEQ inspectors observed when they arrived at the property at approximately 10:00 a.m. on October 22, 2014 was ACM, and that Respondent was conducting an asbestos abatement project at that time. *See* OAR 340-248-0010(6).

B. Whether Respondent failed to adequately wet the ACM

Pursuant to OAR 340-248-0270(7)(a), Respondent was required to “[a]dequately wet” the disturbed ACM and ensure that the material remained wet until disposal. OAR 340-248-0010(3) defines “adequately wet” as follows:

“Adequately wet” means to sufficiently mix or penetrate asbestos-containing material with liquid to prevent the release of particulate asbestos materials. An asbestos-containing material is not adequately wetted if visible emissions originate from that material[.]

The record establishes that Respondent’s employees did not wet the ACM prior to handling and removing it. *See* testimony of Croucher and Abts; Exhibits A1 and A4. Respondent does not argue to the contrary. Consequently, DEQ has established that Respondent violated OAR 340-248-0270(7)(a).

Before containment around such an area is removed, the person performing the abatement must have at least one air sample collected that documents that the air inside the containment has no more than 0.01 fibers per cubic centimeter of air. The air sample(s) collected may not exceed 0.01 fibers per cubic centimeter of air[.]

* * * * *

(b) Before final air clearance sampling is performed the following must be completed:

(A) All visible asbestos-containing material and asbestos-containing waste material must be removed according to the requirements of this section;

(B) The air and surfaces within the containment must be sprayed with an encapsulant;

(C) Air sampling may commence when the encapsulant has settled sufficiently so that the filter of the sample is not clogged by airborne encapsulant[.]

2. Alleged Violation of OAR 340-248-0270(7)(d)

DEQ also contends that Respondent violated OAR 340-248-0270(7)(d), which requires a person to employ the following procedure when removing or stripping friable asbestos material:

Enclose the area where friable asbestos materials are to be removed with a negative pressure enclosure prior to abatement unless written approval for an alternative is granted by the Department.

OAR 340-248-0010(30) defines a “negative pressure enclosure” as follows:

“Negative pressure enclosure” means any enclosure of an asbestos abatement project area where the air pressure outside the enclosure is greater than the air pressure inside the enclosure and the air inside the enclosure is changed at least four times an hour by exhausting it through a HEPA filter.

There is no evidence that DEQ granted approval to Respondent for an alternative to a negative pressure enclosure. Moreover, the record establishes that there were several gaps in the negative air pressure enclosure when the DEQ inspectors arrived at the property on October 22, 2014. *See* testimony of Croucher and Abts; Exhibits A1 and A4. Respondent does not argue to the contrary. Because Respondent had, more likely than not, already removed, handled, and bagged ACM when the inspectors arrived, the record establishes that Respondent conducted abatement activities without an adequate negative pressure enclosure in place. DEQ has therefore proven a violation of OAR 340-248-0270(7)(d).

3. Civil penalty

ORS 468.130(1) directs the Commission to adopt administrative rules setting forth a schedule of civil penalties that may be imposed for violations of environmental law. ORS 468.130(2) requires the Commission to consider the following:

- (a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.
- (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

In addition, ORS 468.130 provides, in part:

- (3) The penalty imposed under this section may be remitted or mitigated upon such terms and conditions as the commission or regional authority considers proper and consistent with the public health and safety.
- (4) The commission may by rule delegate to the Department of Environmental Quality, upon such conditions as deemed necessary, all or part of the authority of the commission provided in subsection (3) of this section to remit or mitigate civil penalties.

OAR 340-012-0045 provides, in relevant part:

DEQ * * * determines the amount of the civil penalty using the following formula: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$.

- (1) BP is the base penalty and is determined by the following procedure:
 - (a) The classification of each violation is determined according to OAR 340-012-0053 to 340-012-0097.
 - (b) The magnitude of the violation is determined according to OAR 340-012-0130 and 340-012-0135.
 - (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.
- (2) The base penalty is adjusted by the application of aggravating or mitigating factors set forth in OAR 340-012-0145.
- (3) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.

DEQ has proposed that Respondent pay civil penalties totaling \$19,200 for the violations of OAR 340-248-0270(7)(a) and (d).

A. Violation of OAR 340-248-0270(7)(a)

Base penalty

OAR 340-012-0054(1)(l) provides that Class I violations include “[v]iolating a work practice requirement for asbestos abatement projects.” An asbestos violation has a “major” magnitude if there was a “potential for human exposure to asbestos fibers” and the violation involved more than 160 square feet of ACM. OAR 340-012-0135(1)(h)(A).

DEQ contends that the violation of OAR 340-248-0270(7)(a) was a Class I major violation, and the record supports that contention. Pursuant to OAR 340-012-0140(3)(b)(A)(i) and (3)(a)(B),¹² the base penalty for the violation is \$8,000.

Aggravating and mitigating factors

The base penalty of \$8,000 may be adjusted upward or downward based on the aggravating or mitigating factors set forth in OAR 340-012-0145.

(1) Prior significant actions and history of corrections

OAR 340-012-0145 states, in part:

(2) “P” is whether the respondent has any prior significant actions (PSAs).¹³ A violation becomes a PSA on the date the first formal enforcement action (FEA) in which it is cited is issued.

¹² OAR 340-012-0140(3)(b)(A)(i) and (3)(a)(B) provide:

(3) \$8,000 Penalty Matrix:

(a) The \$8,000 penalty matrix applies to the following:

* * * * *

(B) Any violation of an asbestos statute, rule, permit or related order except those violations listed in section (5) of this rule.

* * * * *

(b) The base penalty values for the \$8,000 penalty matrix are as follows:

(A) Class I:

(i) Major — \$8,000.

(a) Except as otherwise provided in this section, the values for “P” and the finding that supports each are as follows:

(A) 0 if no PSAs or there is insufficient information on which to base a finding under this section.

(B) 1 if the PSAs included one Class II violation or two Class III violations[.]

* * * * *

(d) In determining the value of “P,” DEQ will:

(A) Reduce the value of “P” by:

(i) 2 if all the FEAs in which PSAs were cited were issued more than three years before the date the current violation occurred.

(ii) 4 if all the FEAs in which PSAs were cited were issued more than five years before the date the current violation occurred.

(B) Include the PSAs:

(i) At all facilities owned or operated by the same respondent within the state of Oregon; and

(ii) That involved the same media (air, water or land) as the violations that are the subject of the current FEA.

(e) In applying subsection (2)(d)(A), the value of “P” may not be reduced below zero.

(f) PSAs that are more than ten years old are not included in determining the value of “P.”

DEQ contends that the value of “P” should be 1 because Respondent has a prior significant action that includes a Class II violation in case number AQ/AB-WR-14-101. However, DEQ provided no evidence to support its contention, and (aside from Civil Penalty Calculations marked by DEQ as Exhibits 1 and 2) the record does not include any reference to the prior violation or a copy of the notice involving the violation. Thus, it is unknown when the

¹³ OAR 340-012-0030(19) defines a “Prior Significant Action” as “any violation cited in an FEA, with or without admission of a violation, that becomes final by payment of a civil penalty, by a final order of the commission or DEQ, or by judgment of a court.”

alleged prior significant action occurred. Respondent has been operating since 2005,¹⁴ so it is possible that the prior action occurred more than three years ago, five years ago, or even 10 years ago. Pursuant to OAR 340-012-0145(2)(d)(A)(i) and (ii), and (2)(f), the value of “P” would therefore be zero. In sum, there is insufficient evidence in the record on which to base a finding regarding any prior significant actions, and under OAR 340-012-0145(2)(a)(A), the value of “P” is zero.

OAR 340-012-0145 states, in part:

(3) “H” is the respondent’s history of correcting PSAs. The values for “H” and the finding that supports each are as follows:

* * * * *

(c) 0 if there is no prior history or if there is insufficient information on which to base a finding under paragraphs (3)(a) or (b).

DEQ contends that the value of “H” should be 0 because there is insufficient information on which to base a finding. The record supports that contention.

(2) Whether current violation was repeated or ongoing

OAR 340-012-0145 states, in part:

(4) “O” is whether the violation was repeated or ongoing. A violation can be repeated independently on the same day, thus multiple occurrences may occur within one day. Each repeated occurrence of the same violation and each day of a violation with a duration of more than one day is a separate occurrence when determining the “O” factor. Each separate violation is also a separate occurrence when determining the “O” factor. The values for “O” and the finding that supports each are as follows:

(a) 0 if there was only one occurrence of the violation, or if there is insufficient information on which to base a finding under paragraphs (4)(b) through (4)(d).

DEQ contends that the appropriate value of “O” is zero because there was only one occurrence of the violation. The record supports that contention.

(3) Respondent’s mental state

OAR 340-012-0045 states, in part:

¹⁴ See Respondent’s Closing Argument at 3.

(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. The values for “M” and the finding that supports each are as follows:

(a) 0 if there is insufficient information on which to base a finding under paragraphs (5)(b) through (5)(d).

(b) 2 if the respondent had constructive knowledge (reasonably should have known) of the requirement.

(c) 4 if the respondent’s conduct was negligent.

(d) 8 if the respondent’s conduct was reckless or the respondent acted or failed to act intentionally with actual knowledge of the requirement.

(e) 10 if respondent acted flagrantly.

DEQ contends that the value of “M” should be 4 because the violation resulted from Respondent’s negligent conduct. OAR 340-012-0030(15) provides the following definition:

“Negligence” or “Negligent” means the respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation.

Respondent concedes that, to the extent its employees committed a violation of OAR 340-248-0270(7)(a), the violation was due to negligence. The record supports a value of 4 for the “M” factor.

(4) Efforts to correct current violation

OAR 340-012-0045 states, in part:

(6) “C” is the respondent’s efforts to correct or mitigate the violation. The values for “C” and the finding that supports each are as follows:

(a) -5 if the respondent made extraordinary efforts to correct the violation or to minimize the effects of the violation, and made extraordinary efforts to ensure the violation would not be repeated.

(b) -4 if the respondent made extraordinary efforts to ensure that the violation would not be repeated.

(c) -3 if the respondent made reasonable efforts to correct the violation, or took reasonable affirmative efforts to minimize the effects of the violation.

DEQ contends that the value of "C" should be -3 because Respondent made reasonable efforts to mitigate the effects of the violation by wetting the disturbed material after the DEQ inspectors identified the violation. The record supports that determination.

Economic Benefit

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 will be determined using the U.S. Environmental Protection Agency's BEN computer model. DEQ may make, for use in the model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent.

* * * * *

(3) DEQ need not calculate EB if DEQ makes a reasonable determination that the EB is de minimis or if there is insufficient information on which to make an estimate under this rule.

The Department contends that the value of "EB" is zero, and there is no evidence that Respondent received any economic benefit from the violation. Thus, the record supports an EB of zero.

Calculation

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

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

$$\$8,000 + [(0.1 \times \$8,000) \times (0 + 0 + 0 + 4 + (-3))] + \$0$$

$$\$8,000 + (\$800 \times 1) + \$0$$

$$\$8,000 + \$800 + \$0$$

$$\$8,800 = \text{penalty}$$

Based on the record before me, the appropriate civil penalty for Respondent's violation of OAR 340-248-0270(7)(a) is \$8,800.

B. Violation of OAR 340-248-0270(7)(d)

Base penalty

For the reasons discussed with respect to the violation of OAR 340-248-0270(7)(a), the violation of OAR 340-248-0270(7)(d) is a Class I major violation. Pursuant to OAR 340-012-0140(3)(b)(A)(i) and (3)(a)(B), the base penalty for the violation is \$8,000.

Aggravating and mitigating factors

The base penalty of \$8,000 may be adjusted upward or downward based on the aggravating or mitigating factors set forth in OAR 340-012-0145.

(1) Prior significant actions and history of corrections

As previously discussed, there is insufficient evidence in the record on which to base a finding regarding prior significant actions, and under OAR 340-012-0145(2)(a)(A), the value of "P" is zero. Similarly, the value of "H" is zero.

(2) Whether current violation was repeated or ongoing

DEQ contends that the appropriate value of "O" is zero because there was only one occurrence of the violation. The record supports that contention.

(3) Respondent's mental state

DEQ contends that the value of "M" should be 4 because the violation resulted from Respondent's negligent conduct. Respondent concedes that, if a violation occurred, its employees negligently caused it. The record supports a value of 4 for the "M" factor.

(4) Efforts to correct current violation

DEQ contends that the value of "C" should be -3 because Respondent made reasonable efforts to mitigate the effects of the violation by adequately enclosing the area after the DEQ inspectors identified the violation. The record supports that determination.

Economic Benefit

The Department contends that the value of "EB" is zero, and there is no evidence that Respondent received any economic benefit from the violation. Thus, the record supports an EB of zero.

Calculation

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

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

$$\$8,000 + [(0.1 \times \$8,000) \times (0 + 0 + 0 + 4 + (-3))] + \$0$$

$$\$8,000 + (\$800 \times 1) + \$0$$

$$\$8,000 + \$800 + \$0$$

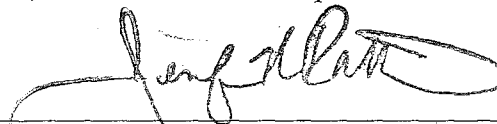
$$\$8,800 = \text{penalty}$$

Based on the record before me, the appropriate civil penalty for Respondent's violation of OAR 340-248-0270(7)(d) is \$8,800.

For the reasons set forth above, Respondent is liable to pay a total civil penalty of \$17,600 (\$8,800 + \$8,800) for the violations of OAR 340-248-0270(7)(a) and (d).

ORDER

AAM, Inc. shall pay a total civil penalty of \$17,600 for the violations proven herein.



Jennifer H. Rackstraw
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 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.*

CERTIFICATE OF MAILING

On October 16, 2015, I mailed the foregoing Proposed and Final Order issued on this date in OAH Case No. 1504109.

By: First Class Mail

Geoffrey Silverman
Attorney at Law
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