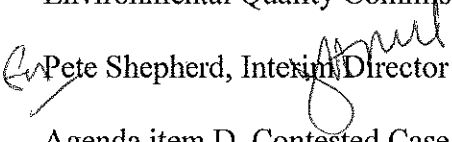


State of Oregon
Department of Environmental Quality

Memorandum

Date: May 20, 2016

To: Environmental Quality Commission

From:  Pete Shepherd, Interim Director

Subject: Agenda item D, Contested Case No. WQ/I-WR-14-125 regarding Charles Vincent Case
June 8-9, 2016, EQC meeting

The Oregon Department of Environmental Quality implements environmental protection laws. DEQ may assess civil penalties and orders to compel compliance or create deterrence. When persons or businesses do not agree with DEQ's enforcement action, they have the right to an appeal and request a contested case hearing before an administrative law judge. If they do not agree with the judge's decision, they may appeal to the EQC.

On Oct. 9, 2014, DEQ issued a Notice of Civil Penalty Assessment and Order to Mr. Case, which alleged that he had caused pollution of waters of the state by placing approximately 2,500 pounds of mink carcasses into the Port of Brookings Harbor marina. The Notice assessed a civil penalty of \$13,370. Mr. Case filed an answer to the Notice on Nov. 12, 2014.

On Oct. 2, 2015, DEQ filed a Motion for Summary Determination and Exhibits 1 through 9. Mr. Case failed to respond to that motion. On Nov. 13, 2015, an Administrative Law Judge issued the Proposed and Final Order which found that Mr. Case had caused pollution and was liable for a \$10,970 civil penalty.¹

On Dec. 14, 2015, Mr. Case filed a Petition for Review with the EQC. Mr. Case requested that the EQC reduce the penalty because he has already been fined for the same conduct and that the imposition of the penalty is an extreme hardship.

**Findings of fact
as determined
by the
administrative
law judge**

Mr. Case is a commercial fisherman who uses skinned mink carcasses as crab bait. In early 2014, the freezer Mr. Case used to store the mink at the Port of Brookings Harbor broke, causing the mink to rot. On the evening of April 1, 2014, Mr. Case, while loading the rotten mink onto his vessel, caused approximately 2,500 pounds of mink carcasses to enter the harbor. The

¹ DEQ agreed, in its Motion, to reduce the value of the "C" factor from 2 to -2, resulting in a \$10,970 civil penalty.

carcasses left an oily residue on the water and created a noxious stench. Harbor personnel spent two days retrieving mink carcasses from the harbor. The Harbor is part of the Chetco River Estuary. On Nov. 6, 2014, Mr. Case plead guilty to one count of unlawful water pollution for disposing of the carcasses in the harbor.

Conclusions of the administrative law judge

The administrative law judge concluded that Mr. Case violated ORS 468B.025(1)(a) by dumping approximately 2,500 pounds of mink carcasses into the port of Brookings Harbor and is liable for a civil penalty of \$10,970 for that violation.

Issues on appeal

An administrative law judge shall grant a motion for summary determination if, considering all evidence in a manner most favorable to the non-moving party, the record shows that: 1) there is no genuine issue as to any material fact that is relevant to resolution of the legal issues, and 2) the moving party is entitled to a favorable ruling as a matter of law. *OAR 137-003-0580*. The non-moving party must, in its response to the motion for summary determination, present relevant and material evidence that shows a genuine issue of fact exists that requires a fact-finding hearing. *OAR 137-003-0580(10) and Oregon Attorney General's Administrative Law Manual, pages 151-152*.

Mr. Case did not take any specific exceptions to the findings of fact set forth on pages 2 and 3 of the Proposed and Final Order. He did not take any specific exceptions to the judge's ruling that there are no genuine issues of material fact in regards to either that the violation occurred or the amount of the civil penalty.

Mr. Case argued that the penalty should be reduced or eliminated for two reasons.

1. He argued that he should not have to pay the civil penalty because he has already been fined for the same conduct in the criminal proceeding. In response, Mr. Case has not pointed to any law, past cases or agency policy to support its contention that DEQ cannot or should not assess a penalty when the person has paid a criminal sanction for the same conduct.
2. He argues that the imposition of the civil penalty will be an extreme hardship. In response, the financial condition of an entity is not a factor in DEQ's civil penalty formula.

Finally, Mr. Case did raise a specific exception to the judge's conclusion that the dumping of the mink into the harbor resulted in pollution. He argued that the mink did not cause any permanent harm so the dumping of the mink carcasses did not cause pollution. In response, the record shows that that the mink changed the physical properties of the harbor for at least as long as the mink carcasses were present in the harbor. Permanent damage is not required

for pollution to have occurred.

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. The EQC may not modify the form of the Proposed and Final Order in any substantial manner without identifying the modification and explaining why the EQC made the modification.²
2. The 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.³
3. Evidence which was not presented to the administrative law judge cannot be considered by the EQC. The 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 the evidence.⁴
4. If the EQC remands the matter to the administrative law judge, the EQC shall specify the scope of the hearing and the issues to be addressed.⁵

Alternatives The EQC may either:

1. As requested by Mr. Case, reduce or eliminate the penalty. In order to do so, the EQC would need to modify the Proposed and Final Order and explain why the EQC made the modification; or
2. As requested by DEQ, issue a final order adopting the Proposed and Final Order.

Attachments

- A. Documents regarding review by the EQC:
 1. Letter from Stephanie Caldera, dated May 9, 2016.
 2. DEQ's Answer Brief, dated Feb. 10, 2016.
 3. Letter from Stephanie Caldera, dated Jan. 25, 2016.
 4. Letter from DEQ to Stephanie Caldera, dated Jan. 14, 2016
 5. Petition for Review and Exceptions and Brief, dated Dec. 14, 2015.
- B. Ruling on Motion for Summary Determination, and Proposed and Final Order, issued on Nov. 13, 2015.
- C. DEQ's Motion for Summary Determination, and attached Exhibits 1 through 9.
- D. Pre-hearing Documents:

² 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.

³ 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.

⁴ OAR 340-011-0575(5) and 137-003-0655(5).

⁵ OAR 137-003-0655(2).

Action item: Contested case hearing (Charles Vincent Case)
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1. Notice of In-Person Hearing scheduled for Nov. 17, 2015.
 2. Letter regarding Motion for Summary Determination, dated Oct. 7, 2015
 3. Letter regarding Notice of Contested Case Rights and Procedures, dated Sept. 9, 2015.
 4. Notice of Prehearing Conference, scheduled for Sept. 3, 2015 and July 28, 2015.
- E. Request for Appeal, dated Nov. 12, 2014.
F. Notice of Civil Penalty Assessment and Order, dated Oct. 9, 2014.

Approved:



Sarah Wheeler
Office of Compliance and Enforcement, Acting Manager

Report prepared by Susan Elworth
Environmental Law Specialist