

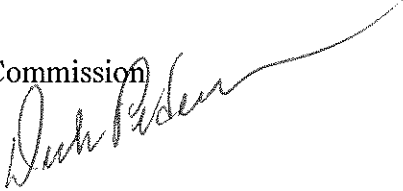
State of Oregon

Department of Environmental Quality

Memorandum

Date: March 27, 2015

To: Environmental Quality Commission

From: Dick Pedersen, Director 

Subject: Agenda item E, Contested Case No. LQ/UST-NWR-14-036 regarding M&G Collections, LLC
April 15-16, 2015, EQC meeting

Background 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 EQC.

On April 8, 2014, DEQ issued to M&G Collections, LLC a Notice of Civil Penalty Assessment and Order which alleged violations of underground storage tank statutes at its property located at 1021 East Baseline Street in Cornelius, Oregon. On May 12, 2014, DEQ received a request for hearing and answer from M&G.

On Sep. 25, 2014, DEQ filed a Motion for Summary Determination and exhibits 1 through 5. On Oct. 23, 2014, M&G filed a Response in Opposition to the Motion and exhibits R1 through R13. On Nov. 4, 2014, an administrative law judge issued a Corrected Ruling on Motion for Summary Determination, and Proposed and Final Order¹ (Proposed and Final Order) in which she found that M&G had committed the violations alleged in the 2014 Notice and assessed a total penalty of \$4,690 for the violations. On Dec. 3, 2014, M&G filed a Petition for Review with EQC. M&G requested that the commission remand the case to the administrative law judge for a hearing on the magnitude of the violation, and the "M" and "EB" factors of the civil penalty formula.

Findings of fact as determined by the administrative In 2006, DEQ received a report that petroleum products had been released from an underground storage tank system located at 1021 East Baseline Street in Cornelius, Oregon. On May 18, 2009, M&G became the owner of that

¹ Judge Gutman issued the Corrected Ruling on Motion for Summary Determination, and Proposed and Final Order to correct a citation on page 23 of the original Ruling on Motion for Summary Determination, and Proposed and Final Order issued on November 3, 2014.

property.

On Oct. 25, 2011, DEQ issued to M&G a Notice of Civil Penalty Assessment and Order to Comply. M&G failed to appeal the 2011 Notice and it became final Nov. 17, 2011.

The 2011 Notice required M&G to:

- Within 30 days, submit to DEQ a complete application for temporary closure general permit, the permit fee and evidence of a current, valid financial responsibility mechanism or a 30-day notice of permanent closure with the permit fee and begin decommissioning the UST as set forth in OAR 340-150-0168; and a complete modification application and a \$75 general permit modification fee; and the information required by OAR 340-122-0240(3) for any field work completed at the property prior to the issuance of this Notice and Order; and
- Within 60 days, to complete an investigation regarding the full nature, magnitude and extent of soil and groundwater contamination associated with the release of petroleum at the Property. This investigation, as required under OAR 340-122-0240, must include installation of a sufficient number of monitoring wells capable of adequately characterizing both site hydrogeology and the vertical and horizontal magnitude and extent of groundwater contamination unless Respondent can demonstrate to DEQ that the groundwater contamination presents no potential threat to human health or the environment; and collection of a sufficient number of soil samples to determine the areal and vertical extent of soil contamination.
- Within 45 days of completing any investigation field work, submit a report to DEQ summarizing all steps taken to complete the investigation and all sampling results unless DEQ approves, in writing, an alternative reporting schedule; and begin quarterly groundwater monitoring from any monitoring wells either currently on the property or adjacent properties or installed in the future.
- Within 45 days of each monitoring event, submit groundwater monitoring reports unless DEQ approves, in writing, an alternative reporting schedule.

In March 2013, M&G submitted to DEQ a report summarizing a groundwater sampling event which occurred in December 2012. DEQ has not received any other reports or the other documentation required by the 2011 Notice.

Conclusions of
the
administrative
law judge

The administrative law judge concluded that M&G had failed to comply with the 2011 Notice, which was a final agency order, and is liable for a civil penalty of \$4,690 for violating that order.

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*.

Respondent takes exception to the judge's ruling that there were no genuine issues of material fact and requests that EQC remand the case for a hearing in regards to the magnitude of the violation, and the "M" and "EB" factors of the civil penalty formula.

Magnitude: Respondent argues that the Exhibit R11 shows that there is a genuine issue of material fact in regards to the magnitude of the violation because it is: "the opinion of the environmental consultants ... that the Property is "relatively clean" ..., and that petroleum concentrations were lower than anticipated". *Respondent's Exceptions and Brief, page 5*. Exhibit R11 contains the results of four groundwater samples without any explanation from a consultant or other qualified person of the significance of these results. The administrative law judge ruled that these results alone are not enough to meet Respondent's burden of proof² to determine if the violation had no more than a de minimis adverse impact on human health or the environment. *Proposed and Final Order, page 18-19*.

"M" Factor: Respondent contends that it is unable to pay for the work necessary to comply with the 2011 Notice and that this contention raises an issue of material fact relevant to the "M" factor. The administrative law judge ruled Respondent's financial condition was not relevant or material to the issues in the case. *Proposed and Final Order, page 16*. DEQ agrees. Financial condition is not relevant to determining the amount of a civil penalty or for determining any of the factors in the civil penalty formula. *OAR 340-012-0045*. Additionally, there is no relevant and material evidence³ in the record supporting Respondent's contention that Respondent is unable to pay for the

² Respondent has the burden of proving the magnitude should be different than the magnitude alleged by the Department. *OAR 340-012-0130(2)*.

³ Relevant and material evidence is "a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs". *ORS 183.450(1)*.

required work.⁴

“EB” factor: Similarly, Respondent contends that its financial condition raises an issue of material fact relevant to the “EB” factor. *See Respondent’s Exceptions and Brief, page 7.* Again, the administrative law judge ruled Respondent’s financial condition was not relevant or material to the issues in the case. *Proposed and Final Order, page 16.* DEQ agrees, as financial condition is not relevant to determining any of the factors in the civil penalty formula. Specifically, the “EB” factor is determined by inputting estimated costs into the BEN computer model, regardless of the entity’s financial condition. *OAR 340-012-0150(1).*

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.⁵
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.⁶
3. Evidence which was not presented to the administrative law judge cannot be considered by the commission. 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.⁷
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.⁸

DEQ recommendation and EQC alternatives DEQ recommends that the commission issue a final order adopting the Proposed and Final Order.
The EQC may either:

⁴ Although Respondent asserts that it is financially unable to comply, the only evidence in the record evaluating Respondent’s financial condition shows that it does have the ability to pay for investigation, cleanup and oversight costs. *See letter dated Dec. 14, 2010, attached to Respondent’s Request for Appeal.*

⁵ 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.

⁶ 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.

⁷ OAR 340-011-0575(5) and 137-003-0655(5).

⁸ OAR 137-003-0655(2).

1. As requested by M&G, remand the matter back to the administrative law judge for a hearing regarding any or all of the following: the magnitude of the violation, and the "M" and "EB" factors of the civil penalty formula. In order to do so, the EQC would need to modify the Proposed and Final Order by concluding that there is a genuine issue of material fact, explain why the EQC made the modification and specify the scope of the hearing and issues to be addressed; 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 regarding scheduling
 2. Respondent's Reply, dated Feb. 17, 2015.
 3. Department's Answer Brief, dated Jan. 27, 2015.
 4. Letter from Stephanie Caldera to Respondent, dated Jan. 16, 2015.
 5. Respondent's Exceptions and Brief, dated Jan. 2, 2015.
 6. Letter from Stephanie Caldera to Respondent, dated Dec. 12, 2014.
 7. Respondent's Petition for Review, dated Dec. 3, 2014.
- B. Corrected Ruling on Motion for Summary Determination, and Proposed and Final Order, issued on Nov. 4, 2014.
- C. Ruling on Motion for Summary Determination, and Proposed and Final Order, issued on Nov. 3, 2014.
- D. Respondent's Response in Opposition to Department's Motion for Summary Determination, and attached Exhibits R1 through R13.
- E. Department's Motion for Summary Determination, and attached Exhibits 1 through 5.
- F. Pre-hearing Documents:
 1. Notice of In-Person Hearing.
 2. Letter regarding Notice of Contested Case Rights and Procedures.
 3. Notice of Prehearing Conference.
- G. Request for Appeal, dated May 12, 2014.
- H. Notice of Civil Penalty Assessment and Order, dated April 8, 2014.

Approved:

Section: 

Sarah Wheeler

Office of Compliance and Enforcement Acting Manager

Report prepared by Susan Elworth
Environmental Law Specialist