

State of Oregon
Department of Environmental Quality

Memorandum

Date: March 3, 2014

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item B, Action item: Contested Case No. WQ/SW-WR-12-088 regarding Johnson Rock Products, Inc.
March 19-20, 2014, 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 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 either party does not agree with the judge's decision, they may appeal to the commission.

On Aug. 29, 2012, DEQ issued a Notice of Violation and Order to Comply to Johnson Rock Products, Inc., referenced in this report as Respondent. The notice alleged violations of water quality law arising from a landslide that discharged fill dirt and sediment to Coalbank Slough in Coos Bay and DEQ ordered Respondent to stabilize the slope above the slope and remove fill that had been deposited in the slough.

On July 31, 2013, DEQ issued an Amended Notice of Violation and Order to Comply to Respondent. The Amended Notice assessed civil penalties of \$83,871 and revised the Order to Comply. On Aug. 12, 2013, DEQ amended the Notice to reduce the civil penalty for one of the violations by \$5,659, reducing the total penalty assessed to \$78,292.

Administrative Law Judge Dove L. Gutman presided at a contested case hearing Aug. 26, 2013. Judge Gutman issued a Proposed and Final Order Dec. 5, 2013, in which she found that Respondent had committed the violations alleged in the notice, assessed the penalties in the Amended Notice for Violations 2 and 3, directed DEQ to recalculate the economic benefit portion of the penalty assessed for Violation 1, and ordered Respondent to complete the tasks set forth in the compliance schedule in the Amended Notice in accordance with new deadlines to be determined by DEQ.

Findings of fact There are 44 numbered and lengthy findings of fact in the order, as well as

as determined by the administrative law judge findings of fact made within the *Opinion* section of the order itself. Those findings of fact at issue before the commission are identified in Attachments B1 and B3.

- Conclusions of the administrative law judge**
1. On or about April 3, 2012, Respondent violated ORS 468B.025(1)(a) by causing pollution of waters of the state.
 2. On or about April 3, 2012, Respondent violated ORS 468B.025(1)(b) by discharging a waste that reduced the quality of state waters below a water quality standard established by the Oregon Environmental Quality Commission.
 3. On or about Dec. 20, 2012, and May 22, 2013, Respondent violated ORS 468B.025(1)(a) by causing pollution of waters of the state.
 4. Respondent shall pay civil penalties as follows:
 - A. \$8,000 plus the recalculated economic benefit amount for the first violation. DEQ shall recalculate the economic benefit amount with the corrected amounts set forth in the opinion.
 - B. \$8,000 for the second violation
 - C. \$50,000 for the third violation.
 5. Respondent shall comply with the compliance schedule set forth in the Amended Notice, as modified by DEQ. DEQ shall modify the compliance schedule by establishing reasonable dates and timelines for Respondent's compliance.

The judge made additional conclusions of law throughout the text of her opinion. The conclusions at issue are referenced in Attachments B1 and B3.

- Issues on appeal**
1. Respondent proposes that the commission revise the proposed order's findings of fact 19, 23, 25, 26, 27 and 32 as set forth in pages two to three and 20 through 23 of Attachment B3.
 2. Respondent proposes that the commission make four additional findings of fact as set forth in pages three and 23-25 of Attachment B3 and pages 28 through 30 of Attachment B1.
 3. Respondent proposes a new evidentiary ruling (page two, Attachment C, Proposed and Final Order) regarding the admissibility of Exhibits A25 through 27 as set forth and described in pages two and three and 20 through 23 of

Attachment B3.

4. Respondent proposes that the commission reverse the judge's conclusions of law for the following reasons:

A. The judge failed to apply the "substantial factors" test when determining that Respondent caused the landslide from which the violations arose. Pages 13 through 18 of Attachment B3.

B. Respondent's placement of fill above Coalbank Slough was not a substantial factor in causing the landslide from which the violations arose. Pages 18 through 20, Attachment B3. Pages four through 28, Attachment B1.

**DEQ
recommendation
and EQC motion**

DEQ recommends that the commission issue a final order adopting Judge Gutman's proposed and final order for the following reasons as set forth in Attachment B2, DEQ's Brief. DEQ asserts that:

1. Judge Gutman correctly applied the "but for" test for factual causation in concluding Respondent violated ORS 468B.025(1)(a) and (b). Pages four through 14, Attachment B2.

A. The "but for" test for factual causation is the correct standard for this case, Pages five through 10, Attachment B2.

B. DEQ proved that Respondent caused pollution of, and a discharge of waste to, waters of the state in violation of ORS 468B.025(1) and DEQ is not required to prove that Respondent caused the landslide. Pages 10 through 12, Attachment B2.

C. Even under the "substantial factors" proposed by Respondent, DEQ has proved that Respondent violated ORS 468B.025(1)(a) and (1)(b). Pages 12 through 14, Attachment B2.

2. The commission should deny Respondent's exceptions to the findings of fact because the record does not contain clear and convincing evidence that the order's findings were wrong. Pages 14 through 21. Attachment B2.

A. Because the challenged findings of fact are supported by substantial evidence in the record, the commission should reject Respondent's objection to the judge's reliance on Exhibit A26 and Pamela Blake's testimony. Pages 16 through 18, Attachment B2.

B. DEQ is authorized to order Johnson Rock Products to remediate the

landslide as prescribed in the order. Pages 18 through 20, Attachment B2.

C. The commission should deny Respondent's objection to the alleged omission of four findings of fact because the proposed additional findings are not required to resolve the case or support the proposed order. Pages 20 and 21, Attachment B2.

3. The order's ruling on DEQ's evidentiary submissions should be modified to comport with the events and ruling made at the hearing. Pages 21 and 22, Attachment B2.

**Alternatives for
commission
action**

The commission may:

1. Issue a final order adopting Judge Gutman's Proposed and Final Order;
or
2. Issue a final order determining that the findings of fact and conclusions of law reached by Judge Gutman should be modified as requested by Respondents; or
3. Issue a final order with modified findings of fact and conclusions of law in any combination of the judge's findings and conclusions and the findings and conclusions proposed by Respondents and DEQ.

The commission should carefully consider the positions of the judge, DEQ, the respondents and the supporting record, with respect to each of the exceptions. The commission should decide whether it is appropriate to modify the order as requested in each exception. If the commission concludes it is not appropriate to make the requested change, it should adopt the judge's proposal. If the commission decides it does have adequate grounds to modify the order, the commission must articulate the basis for making the change, and if it proposes to change a finding of historical fact it must also identify the clear and convincing evidence in the record demonstrating that the judge's finding was wrong.

EQC authority

The commission has the authority to hear this appeal under OAR 340-011-0575.

DEQ's contested case hearings must be conducted by an administrative law judge.¹ The proposed order was issued under current statutes and rules governing the Administrative Law Judge Panel.² The commission may substitute its judgment for that of the administrative law judge in making any

¹ ORS 183.635.

² ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.

particular finding of fact, conclusion of law, or order, except as limited by OAR 340 137-003-0655 and 137-003-0665.³

The most important limitations are as follows:

1. The commission may not modify the form of the judge's Proposed and Final Order in any substantial manner without identifying and explaining the modifications.⁴
2. The commission may not modify a finding of historical fact made by the judge unless it determines that there is clear and convincing evidence in the record that the finding was wrong.⁵
3. The commission may not consider any new or additional evidence, but may only remand the matter to the judge to take the evidence.⁶

The rules implementing these statutes also have more specific provisions addressing how commissioners must declare and address any ex parte communications and potential or actual conflicts of interest.⁷

In addition, the commission has established, by rule, a number of other procedural provisions, including:

1. The commission will not remand a matter to the judge to consider new or additional facts unless the proponent of the new evidence has properly filed a written motion explaining why evidence was not presented to the judge.⁸
2. To the extent that a party seeks to have the commission modify a finding of fact or conclusion of law, that party must cite to the portions of the record on which the party is relying in support of its proposed alternative findings of fact and conclusions of law.⁹

Attachments

- A. Correspondence regarding review by the commission
- B. Briefing to EQC
 1. Respondent's Reply Brief, dated Feb. 12, 2014
 2. DEQ's Answering Brief, dated Jan. 23, 2014
 3. Respondent's Petition for Commission Review, Exceptions and Brief, dated Dec. 24, 2013
- C. Proposed and Final Order, issued by Judge Gutman, Dec. 5, 2013

³ OAR 340-011-0575(6).

⁴ ORS 183.650(2) and OAR 137-003-0665(3).

⁵ 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.

⁶ OAR 137-003-0655(5).

⁷ OAR 137-003-0655(8), referring to ORS Chapter 244; OAR 137-003-0660.

⁸ OAR 340-011-0575(5).

⁹ OAR 340-011-0575(4)(a).

D. Closing Arguments

1. DEQ Reply Brief, dated Sept. 13, 2013
2. Respondent's Closing Reply, dated Sept. 13, 2013
3. DEQ's Closing Argument, dated Sept., 6, 2013
4. Respondent's Closing Argument, dated Sept. 6, 2013

E. Respondent's Hearing Memorandum, dated Aug. 23, 2013

F. DEQ's exhibits from Aug. 26, 2013, contested case hearing, numbered A1 through A9 and A11 through A-2

G. Respondents Exhibits from Aug. 26, 2013, contested case hearing, numbered R1 through R14, R16 through R18 and R25 through R29.

H. Amended Civil Penalty Exhibit 1, submitted August 12, 2013

I. Amended Notice of Violation and Order to Comply, dated July 31, 2013.

J. Respondent's Request for Contested Case Hearing, dated Sept. 19, 2012.

K. DEQ's Notice of Violation and Order, dated Aug. 29, 2012.

L. Correspondence

**Available upon
request**

1. Audio recording of the Aug. 26, 2013, contested case hearing

Approved:

Leah K. Feldon
Manager, Office of Compliance and Enforcement

Report prepared by: Jeff Bachman
Environmental Law Specialist