

State of Oregon  
Department of Environmental Quality

Memorandum

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**Date:** Feb. 19, 2025

**To:** Environmental Quality Commission

**From:** Leah Feldon, Director

**Subject:** Agenda item B, Action item: Contested Case No. 2022-ABC-05277 regarding *Gaston Heights LLC*, March 13-14, 2025, EQC meeting

**Introduction and Background** This case is an appeal of a DEQ enforcement action for unpermitted construction activities that would cause an increase in the discharge of wastes into the waters of the state or that would otherwise alter the physical, chemical or biological properties of any waters of the state in violation of ORS 468B.050(1)(d).

The City of Gaston annexed property under a Master Plan to develop a residential community in six phases. After a different entity developed Phase 1 years ago, respondent Gaston Heights, LLC (Respondent or Gaston Heights), planned to develop Phases 2 through 6 of the Master Plan (the Project). The different phases represent distinct geographical areas of the Project, and are shown in an attachment to the Administrative Law Judge's Proposed Order.

Respondent applied for permit coverage for Phase 2 (and incidental activities in Phase 3) of the Project under the National Pollution Discharge Elimination System (NPDES) Stormwater Discharge General Permit No. 1200-C, which was first issued in 2015 (the 2015 Permit). As part of that application, Respondent prepared and submitted to DEQ's agent, Clean Water Services (CWS), an Erosion and Sediment Control Plan (ESCP) for Phase 2. On Aug. 29, 2019, DEQ assigned Respondent permit coverage for Phase 2 under the 2015 Permit. As the 2015 Permit was set to expire on Dec. 14, 2020, Respondent applied for and received coverage under the 1200-C NPDES permit effective Dec. 15, 2020 (the 2020 Permit). In the renewal application, Respondent noted that DEQ had the most recent ESCP for Phase 2 of the Project.

On Feb. 3, 2021, CWS inspected the Project. During that inspection, CWS noted that various types of construction activities had occurred outside of the permitted Phase 2 area. On Feb. 15, 2021, CWS issued a Stop Work order requiring Respondent to cease all work outside of the areas permitted for Phase 2. On May 6, 2021, DEQ mailed a Pre-Enforcement Notice to Respondent alleging unpermitted construction activities and requesting that Respondent apply for expanded 1200-C coverage, warning that formal enforcement may follow.

On Sept. 15, 2021, DEQ issued Respondent a Notice of Civil Penalty Assessment and Order (the Notice; Attachment E.1). The Notice alleged that Respondent violated ORS 468B.050(1)(d) and OAR 340-045-0033(6) by engaging in unpermitted construction activity which would cause an increase in the discharge of wastes into the waters of the state, or which would otherwise alter the physical, chemical or biological properties of any waters of the state. The Notice assessed a civil penalty of \$82,891.

On Oct. 1, 2021, Respondent timely requested a hearing (Attachment E.2).

On Aug. 1, 2022, DEQ issued Respondent an Amended Notice of Civil Penalty Assessment and Order (Attachment E.3).

On Sept. 20, 2022, DEQ issued a Second Amended Notice of Civil Penalty Assessment and Order (the Second Amended Notice; Attachment E.4). The Second Amended Notice specifically identifies as unpermitted construction activity the stockpiling in the area designated as Phase 6 in the Master Plan; grading, terracing, and clearing and building roads in the area designated as Phase 3; and removing stumps and clearing brush in the areas designated as Phases 4, 5, and 6. The Second Amended Notice assessed a civil penalty of \$109,200 for these alleged violations of ORS 468B.050(1)(d). The Second Amended Notice also alleged a placing wastes violation, ORS 468B.025(1)(a), but did not assess a penalty for this violation. On Dec. 14, 2022, DEQ revised Exhibit 1 to the Second Amended Notice (Attachment E.6), but this amendment did not change the assessed penalty.

On Sept. 17, 2022, Respondent filed a Motion to Stay the contested case proceedings, or in the alternative to postpone the hearing. Respondent argued that the case should only proceed after the resolution of a criminal case regarding related water pollution matters, in which criminal charges had been recently filed against Tim McDonald, the principal of Gaston Heights, LLC. (Attachment E.7). The ALJ postponed the hearing, but did not rule on the motion to stay. Per the ALJ's briefing schedule, Respondent filed a supplement to its Motion to Stay on June 30, 2023, and DEQ responded on July 27, 2023 (Attachments E.9 and E.10). On Aug. 18, 2023, the ALJ denied Respondent's motion to stay, concluding that Mr. McDonald could not be compelled to testify at the administrative hearing, but Respondent, Gaston Heights, LLC, had no constitutional right against self-incrimination which should prevent the hearing from proceeding. The ALJ also found that there were other individuals involved in the development project that could testify for Respondent (aside from Mr. McDonald), and Respondent had not demonstrated undue prejudice to defend the case without McDonald's testimony. The ALJ also denied Respondent's motion to further postpone the hearing. (Attachment E.12).

ALJ Fair presided over a contested case hearing in Portland on Feb. 27 and Feb. 28, 2024. ALJ Fair issued a Proposed Order on June 11, 2024 (the Proposed Order; Attachment B), that found that DEQ established violations of ORS 468B.050(1)(d) and may assess a civil penalty of \$30,000. ALJ Fair reduced the civil penalty proposed by DEQ in the Second Amended Notice by reducing the mental state factor (M factor) from flagrant (M=10) to intentional conduct with actual knowledge of the permit requirement (M=8) for both violations 1 and 2. ALJ Fair also rejected the assessment of multiple penalties for violation 2, because DEQ had tied its higher penalty proposal to the flagrant mental state.<sup>1</sup>

Specifically, in the Proposed Order, ALJ Fair found the violations and assessed the penalties as identified below:

- *Violation 1*: Unpermitted stockpiling in Phase 6 (\$12,939);

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<sup>1</sup> DEQ does not contest the M factor findings or the reduced \$30,000 penalty in the ALJ's Proposed Order.

- *Violation 2*: Unpermitted terracing, grading, and road building in Phase 3 (\$8,000); and
- *Violation 3*: Unpermitted stumping in Phase 4 (\$9,061).
- *Violation 4*: Placing wastes (no penalty).

On July 11, 2024, Respondent submitted a Petition for Commission Review to the Environmental Quality Commission (the Commission or EQC) (Attachment A.1). On Sept. 10, 2024, Respondent submitted *Respondent Gaston Height's Exceptions and Brief* ("Respondent's Exceptions"; Attachment A.2).

On Oct. 22, 2024, DEQ submitted *DEQ's Answering Brief to Respondent's Exceptions and Brief* (DEQ's Answer; Attachment A.3). In that filing, DEQ requested that the EQC issue a Final Order consistent with the Proposed Order, with one exception: to fix a typo on page 39 that refers to ORS 468B.020(1)(a) instead of ORS 468B.025(1)(a), the statute DEQ cited in its Second Amended Notice and which Respondent did not contest.

On Nov. 5, 2024, Respondent submitted *Respondent Gaston Height's Reply in Support of Its Exceptions and Briefs* (Respondent's Reply; Attachment A.4).

This matter is now presented for your review.

**Findings of Fact  
and Conclusions  
of Law  
as Determined  
by the  
Administrative  
Law Judge**

**Findings of Fact**

After considering the evidence in the record, ALJ Fair made 59 Findings of Fact regarding the alleged violations. These are listed on pages 4 through 23 of the Proposed Order.

**Conclusions of Law**

Based on the Findings of Fact, ALJ Fair made the following Conclusions of Law, listed on page 23 of the Proposed Order, ruling in DEQ's favor on each of the alleged violations but reducing the total civil penalty to \$30,000:

1. Gaston Heights conducted the following construction activities without a permit (in violation of ORS 468B.050(1)(d)), the conduct of which would cause an increase in the discharge of wastes into waters of the state or would otherwise alter the physical, chemical, or biological properties of waters of the state:
  - a) Placing a stockpile of construction spoils in Phase 6 of the Project on or about Aug. 31, 2020, through March 16, 2021;
  - b) Grading, terracing, clearing, and building roads in Phase 3 of the Project on or about Feb. 3, 2021, through Feb. 15, 2021; and
  - c) Removing stumps and clearing brush in Phase 4 of the Project on or about April 19, 2021.
2. Gaston Heights placed wastes in a location where such wastes were likely to escape or be carried into waters of the state by engaging in construction activities in Phase 3 of the Project on or about March 15, 2021.
3. Gaston Heights should be assessed civil penalties for the three violations of

ORS 468B.050(1)(d) in the total amount of \$30,000.<sup>2</sup>

**Issues on Appeal** As outlined in the Conclusion at page 12 of its Exceptions, Respondent requests that the commission reject the ALJ’s conclusions of law regarding the unpermitted activity, adopt a different conclusion (that Respondent instead violated the permit requirement requiring ESCP revisions), and recalculate the penalty. Respondent also asks the EQC to hold that Respondent was deprived of the ability to defend itself based on its principal’s invocation of the right against self-incrimination and to order a new hearing.

A summary of Respondent’s arguments, and DEQ’s response, is provided below. Arguments #1-5 are outlined using the same numbering used in Respondent’s Exceptions, and the final argument is labeled #6, as it is in DEQ’s Answer.

Issue #	Respondent’s Argument	DEQ’s Response
1	<p>Respondent obtained coverage under the 2015 Permit. Therefore, its activities during that timeframe of permit coverage, though outside of the area covered by the permit and ESCP, were, at most, permit violations and not violations of ORS 468B.050(1)(d). The EQC should revise the ALJ’s conclusions of law regarding Violations 1 and 2 to find that Respondent did not engage in unpermitted construction activity but instead violated the 2015 Permit’s requirement to revise and keep current the ESCP.</p> <p>The ALJ’s conclusions that Respondent conducted unpermitted construction activity in violation of ORS 468B.050(1)(d) are legally impermissible under <i>Environmental Quality Commission v. City of Coos Bay</i>, 171 Or App 106 (2000). DEQ cannot cite Respondent for both violating the terms of a permit and operating without a permit.</p>	<p>The ALJ properly concluded that Respondent engaged in unpermitted construction activity, in violation of ORS 468.050(1)(d) outside the scope and geography authorized by the 2015 permit and the 2020 Permit. Submitting a revised ESCP was the mechanism to expand permit coverage under the 2015 Permit and Respondent failed to comply with this 2015 Permit requirement. Under the 2020 Permit, Respondent required a separate permit to expand the geographical scope of the development.</p> <p>Respondent’s argument based on the <i>Coos Bay</i> case is a new affirmative defense not properly before the EQC. This case is distinguishable from the <i>Coos Bay</i> case. Unlike the discharge of sewage in <i>Coos Bay</i>, which the Court of Appeals found to be covered by a water quality permit, the construction activities in this case are not covered activities under the 1200-C permit.</p>
2	Regarding Violations 1 and 2, there is not substantial evidence that Respondent moved its stockpile or graded, terraced, cleared, and built	Violations 1 and 2 did begin in 2020, but continued until 2021, when they were first observed during a CWS inspection. Therefore, the ALJ’s

<sup>2</sup> The ALJ’s analysis of the civil penalties is at pages 29 through 39; the specific penalty amounts for each violation are listed in the ALJ’s Order on page 39.

	roads after Fall 2020. The alleged conduct occurred while the 2015 Permit applied, and not under the 2020 Permit.	conclusions of law as to the timeframe of the violations, corresponding to the timeframes alleged in DEQ’s Amended Notice, are appropriate.
3	<p>The penalty calculation for Violations 1 and 2 should be based on permit violation, and not failure to obtain a permit.</p> <p>The economic benefit component of the penalty for Violations 1 and 2 should be based on delaying obtaining a permit, not avoiding the permit.</p>	<p>Respondent’s arguments are derivative of its arguments in issue #1 above.</p> <p>Respondent did not pay for or obtain a permit for Phase 6 (Violation 1). The Proposed Order does not include an economic benefit for the unpermitted activity in Phase 3 (Violation 2).</p>
4	Regarding Violation 1, moving a stockpile to a safer location is a Best Management Practice (BMP), not a construction activity for which a permit is required.	“Stockpiling” is a “construction activity” as defined in the 2015 Permit and the 2020 Permit.
5	Regarding Violation 3, Respondent’s removal of stumps and brush is exempt from the requirement to obtain a 1200-C permit under 40 CFR § 122.3(e) because the stumping was for agricultural purposes.	Based on the evidence presented at the hearing, the ALJ properly rejected Respondent’s arguments that the stump removal was in furtherance of farming activity.
6	In the conclusion to its Exceptions, Respondent argues that the EQC should hold that Respondent was deprived of the ability to defend itself in Mr. McDonald’s absence and should order a new hearing following resolution of criminal charges against Mr. McDonald.	The ALJ properly concluded, in a prior ruling in this case (Attachment E.12), that Gaston Heights LLC and not Mr. McDonald is the Respondent in this matter, and that other witnesses were able to testify – and did testify - on behalf of the LLC. Respondent does not make any new arguments in its exceptions and a new hearing is not warranted.

#### **DEQ Recommendation**

DEQ requests that the EQC issue a Final Order consistent with the Proposed Order, with one exception: Correcting the Proposed Order to fix a typo on page 39 which erroneously refers to ORS 468B.020(1)(a) instead of ORS 468B.025(1)(a).

#### **EQC Authority**

The Commission has the authority to hear this appeal under OAR 340-011-0575. The Commission may substitute its judgment for that of the ALJ in making any particular finding of fact, conclusion of law, or order except as limited by ORS 183.650 and

OAR 137-003-0665. The major limitations are as follows:

1. If the Commission modifies a proposed order in any substantial manner, it must identify the modification and explain to the parties why the commission made the modification.<sup>3</sup>
2. The Commission may modify a finding of historical fact made by the ALJ only if it determines that there is clear and convincing evidence in the record that the finding was wrong.<sup>4</sup>
3. The Commission may not consider evidence that was not presented to the ALJ. The Commission may, based upon the filing of a motion and a showing of good cause, remand the matter to the ALJ to consider the evidence.<sup>5</sup>
4. If the Commission remands the matter to the ALJ, the Commission shall specify the scope of the hearing and the issues to be addressed.<sup>6</sup>

#### **Alternatives**

The Commission may either:

1. As requested by DEQ, revise the Proposed Order only to fix the typo.
2. As requested by Respondent, issue a final order finding no violations of ORS 468B.050(1), and revise the Proposed Order's findings, conclusions and penalty as requested by Respondent in the Conclusion to its Exceptions.
3. As requested by Respondent, order a new hearing following resolution of McDonald's criminal charges.
4. Take any other action within the Commission's authority.

#### **Attachments**

##### **A. Documents Regarding Petition for Review**

1. Respondent's Petition for Review, received July 11, 2024
2. Respondent's Exceptions and Brief, dated Sept. 10, 2024
3. DEQ's Answering Brief, dated Oct. 22, 2024
4. Respondent's Reply Brief, dated Nov. 5, 2024

##### **B. ALJ's Proposed Order**, issued June 11, 2024

##### **C. Motion and ALJ Ruling, Subsequent to Proposed Order**

1. DEQ's Motion to Clarify, dated June 25, 2024
2. Respondent's Response to DEQ's Motion to Clarify, dated July 5, 2024
3. ALJ's Ruling on Motion to Clarify, dated July 8, 2024

##### **D. Hearing Record**

1. DEQ's Admitted Exhibits
2. Respondent's Admitted Exhibits
3. Transcript of Feb. 27-28, 2024, Hearing
4. DEQ's Closing Argument, dated March 5, 2024
5. Respondent's Offer of Proof, dated March 6, 2024
6. Respondent's Closing Argument, dated March 15, 2024
7. DEQ's Reply to Respondent's Closing, dated March 21, 2024

##### **E. Pre-Hearing Documents**

1. Notice of Civil Penalty Assessment and Order, dated Sept. 15, 2021

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<sup>3</sup> 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 change a finding of fact.

<sup>4</sup> 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.

<sup>5</sup> OAR 340-011-0575(5) and OAR 137-003-0655(5).

<sup>6</sup> OAR 137-003-0655(2).

2. Respondent's Request for Hearing, dated Oct. 1, 2021
3. Amended Notice of Civil Penalty Assessment and Order, dated Aug. 1, 2022
4. Second Amended Notice of Civil Penalty Assessment and Order, dated Sept. 20, 2022
5. Revised Exhibit 1 to Second Amended Notice, dated Dec. 12, 2022
6. Revised Exhibit 1 to Second Amended Notice, dated Dec. 14, 2022
7. Respondent's Motion to Stay Case and Alternative Motion to Postpone Hearing, filed Dec. 17, 2022
8. ALJ Ruling to Postpone Hearing, dated Dec. 19, 2022
9. Respondent's Supplement Motion to Stay Case, dated June 30, 2023
10. DEQ's Response to Motion to Stay, dated July 27, 2023
11. DEQ (corrected) Declaration of Courtney Brown in Support of DEQ's Response, dated July 28, 2023
12. ALJ Ruling on Motion to Stay, dated Aug. 18, 2023
13. DEQ's Request to Postpone Hearing and ALJ Ruling on Motion to Postpone Hearing, dated Sept. 15, 2023
14. Respondent's Motion for Judicial View of Property, dated Feb. 19, 2024
15. ALJ Correspondence Regarding Motion for Judicial View of Property, dated Feb. 21, 2024
16. DEQ's Response to Motion for Judicial View of Property, dated Feb. 22, 2024
17. ALJ Ruling on Motion for Judicial View of Property, dated Feb. 23, 2024

#### **F. Audio Recordings**

*Report prepared by Nathan Karman  
Senior Assistant Attorney General, Oregon Department of Justice*

#### **Translation or other formats**

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