

Date: Feb. 19, 2025

To: Environmental Quality Commission

From: Leah Feldon, Director

Subject: Agenda item D, Action item: Contested Case No. WQ/SW-NWR-2023-544 regarding *Wood Waste Management, LLC* March 13-14, 2025, EQC meeting

Introduction and Background

The Wood Waste Management facility (WWM Facility or Facility) is a wood waste and yard debris recycling facility located in the City of Portland (City). (See Attachment B.1. at p.28 for an aerial image of the facility). The Facility accepts yard debris waste and waste concrete from the public and sells landscape products—including gravel, sand, and topsoil—which it stores onsite in large open bunkers. Equipment and vehicle cleaning, fueling, and maintenance activities also occur onsite at the Facility. Most stormwater from the Facility discharges to a large onsite retention pond which is fitted with an overflow pipe designed to discharge to Ferrous Ditch—a waterway which flows parallel to the facility to the Columbia Slough. Stormwater from the facility’s driveway flows to City-managed stormwater catch basins and green street facilities which discharge to the Columbia Slough.

On July 6, 2023, the Department of Environmental Quality (DEQ or Department), on behalf of the Environmental Quality Commission (EQC or Commission), issued a Notice of Civil Penalty Assessment and Order (Notice; Attachment D.1) to Wood Waste Management, LLC (Respondent or WWM) assessing a civil penalty of \$11,320 for operating an industrial facility without obtaining coverage under the Department’s National Pollutant Discharge Elimination System (NPDES) Industrial Stormwater Discharge General Permit No. 1200-Z (the 1200-Z Permit). Additionally, the Notice ordered WWM to apply for 1200-Z Permit coverage.

On July 24, 2023, Respondent requested a contested case hearing, challenging the Department’s authority to require 1200-Z Permit coverage for the Facility (Attachment D.2). On Jan. 24, 2024, the Department issued Notice of Civil Penalty Assessment and Order Amendment No. 1 (Amended Notice; Attachment D.5) alleging additional factual findings related to the alleged violations but making no alteration to the penalty amount.

Administrative Law Judge (ALJ) Joe L. Allen convened an in-person hearing on Jan. 31 and Feb. 1, 2024. Respondent raised the following issues at the hearing, and in the briefing before the ALJ:

1. Whether under the Clean Water Act, and relevant Oregon statutes and administrative rules, the state can require 1200-Z Permit coverage for potential discharges or whether the state can only regulate actual discharges.

- WWM argued that the stormwater retention pond at the Facility has never overflowed because WWM manually manages the pond level, therefore WWM cannot be liable for a civil penalty and DEQ cannot require a 1200-Z Permit.
2. WWM argued that the stormwater that runs off the Facility's driveway into the City's municipal separate storm sewer system (MS4) is not industrial stormwater and thus DEQ cannot require 1200-Z Permit coverage for the driveway discharges. WWM further argued that the stormwater from WWM's driveway includes stormwater from other parties who use the driveway. Accordingly, WWM argued it cannot be liable for the stormwater of other parties, cannot be liable for a civil penalty and DEQ cannot require 1200-Z Permit coverage for these discharges.
 3. Further, WWM argued that contrary to DEQ's position, stormwater exiting WWM's driveway and flowing into the City's MS4 is sheet flow. WWM argued that DEQ failed to show that stormwater from the Facility reaches a point source and because WWM does not discharge to a point source, WWM argued it cannot be liable for a civil penalty and DEQ cannot require 1200-Z Permit coverage for this stormwater discharge.

After the contested case hearing, ALJ Allen issued a Proposed and Final Order on May 7, 2024 (Proposed Order; Attachment B.1), affirming DEQ's Amended Notice and ordering WWM to pay a civil penalty of \$11,320.

On June 6, 2024, Respondent submitted a Petition for EQC Review (Attachment A.1). On Aug. 19, 2024, Respondent submitted its Exceptions and Brief (Attachment A.2) in support of its Petition, requesting the Commission reverse and remand the ALJ's Proposed Order.

DEQ submitted an Answer to WWM's Exceptions and Brief on Oct. 18, 2024 (Attachment A.3). On Nov. 21, 2024, Respondent submitted its Reply (Attachment A.4). The Matter of *Wood Waste Management, LLC*, is now presented in its entirety 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 Allen made 38 Findings of Fact regarding the alleged violations. These are listed on pages 3-8 of the Proposed Order.

Conclusions of Law

Based on the Findings of Fact, ALJ Allen made the following Conclusions of Law, listed on page 8 of Proposed Order, ruling in DEQ's favor on each of the issues raised by Respondent:

1. Respondent violated ORS 468B.050(1)(d), OAR 340-045-0015(2), OAR 340-045-0033(6), and OAR 340-045-0033(11)(g) by operating an industrial facility without first obtaining coverage under the 1200-Z Permit;
2. The Department may assess a civil penalty of \$11,320 against Respondent for failing to obtain coverage under the 1200-Z Permit.

Issues on Appeal In Respondent's Exceptions and Brief, Respondent requests that the Commission adopt alternative findings of fact and conclusions of law. Respondent requests that the Commission reverse and remand the ALJ's conclusions that WWM failed to obtain a 1200-Z Permit and DEQ may require WWM to pay a civil penalty for that violation. A brief summary of Respondent's issues for appeal, and DEQ's responses, are provided below.

Respondent's Appeal of DEQ's Requirement to Obtain 1200-Z Permit Coverage

DEQ provided two independent grounds for why 1200-Z Permit coverage is required for the WWM Facility and why a civil penalty is therefore appropriate: (1) DEQ alleged that the Facility discharges industrial stormwater from its driveway to the City's MS4 which discharges to the Columbia Slough; and (2) DEQ alleged that the stormwater retention pond at the Facility has the potential to overflow and discharge to Ferrous Ditch, which flows to the Columbia Slough. Respondent appeals both bases on the following grounds:

1. First Basis for DEQ's Requirement to Obtain 1200-Z Permit Coverage: DEQ argued, and the ALJ agreed, that the WWM Facility requires 1200-Z Permit coverage because the WWM Facility discharges industrial stormwater from its driveway to the City's MS4 (a point source) which discharges to the Columbia Slough (a water of the state).
 - a. Respondent's Argument #1: On appeal, Respondent argues that its driveway is not "directly related" to the industrial parts of the WWM Facility and thus does not trigger the need for 1200-Z Permit coverage. In short, Respondent argues that because the runoff from the WWM Facility's driveway is a small non-confined amount of water that can be attributed to multiple users, the ALJ erred in finding that the water is directly related to WWM's industrial activities.
 - i. DEQ Response: DEQ responds that discharges from Facility access roads, such as WWM's driveway, explicitly fall within the state's definition of "stormwater discharge associated with industrial activity" and thus 1200-Z Permit coverage is required. DEQ's definition is consistent with EPA's definition of the same term.
 - b. Respondent's Argument #2: Second, WWM argues that the "small amount" of driveway discharge is not a point source discharge but rather nonpoint source sheet flow.
 - i. DEQ Response: DEQ responds that 1200-Z Permit coverage is required for facilities that "may discharge industrial stormwater to surface waters or to conveyance systems that discharge to surface waters of the state." The 1200-Z Permit defines "stormwater conveyance" as "a sewer, ditch, or swale that is designed to carry stormwater." The stormwater catch basins and green street facilities outside the WWM Facility on NE 47th Avenue are part of the city's storm sewer system, which is a conveyance system designed to carry stormwater to surface waters of the state. WWM does not dispute that stormwater from the Facility's driveway enters these stormwater catch basins and green street facilities. There is also no dispute that the city's MS4

discharges to waters of the state, specifically the Columbia Slough. Thus, pursuant to the plain language of the 1200-Z Permit, WWM must obtain permit coverage for the stormwater it admits it discharges to the city's MS4 (a point source).

- c. Respondent's Argument #3: Respondent argues that DEQ has not proven that stormwater from the driveway ever makes it to a water of the state, and therefore 1200-Z Permit coverage is not required.
 - i. DEQ Response: DEQ responds that it demonstrated at hearing, and WWM admitted, that stormwater from the Facility's driveway enters the city's MS4 which discharges to the Columbia Slough. The 1200-Z Permit requires coverage for facilities that discharge industrial stormwater to conveyance systems that discharge to surface waters of the state, thus no further analysis is necessary under Oregon law.
2. Second Basis for DEQ's Application of the 1200-Z Permit: In addition to, and independent of the first basis, above, DEQ argues, and the ALJ agreed, that 1200-Z Permit coverage is required for the WWM Facility because WWM's stormwater retention pond has the potential to overflow and discharge to Ferrous Ditch, which flows to the Columbia Slough (a water of the state).
 - a. Respondent's Argument #1: WWM argues that (a) Oregon is prohibited from adopting a permitting requirement that is more expansive than the federal requirement because the State derives its permitting authority from the Clean Water Act and (b) that the "would cause" language in ORS 468B.050(1)(d) does not provide sufficient statutory support for DEQ to require WWM to obtain permit coverage merely because the Facility "may discharge" industrial stormwater. According to WWM, the ALJ misinterpreted the law by concluding that "would" is synonymous with "may." Therefore, WWM asks the EQC to reverse and remand the ALJ's conclusion.
 - i. DEQ Response: The alleged violation in this case is a provision of state, not federal, law. Oregon's water quality statutes predate the federal National Pollutant Discharge Elimination System (NPDES) program. Furthermore, states that implement the federal NPDES program are explicitly authorized to impose more stringent requirements pursuant to state law. DEQ argues, and the ALJ concluded, that the federal requirements are a floor, not a ceiling; taken together, the relevant statutes and regulations clearly require facilities with the potential to discharge industrial stormwater to waters of the state to obtain 1200-Z Permit coverage before those discharges occur.
 - b. Respondent's Argument #2: Respondent argues that the ALJ committed legal error by concluding that WWM's Facility, through its stormwater retention pond, would discharge stormwater through a point source. According to WWM, at most, DEQ proved that the on-site pond might discharge stormwater, and that the ALJ therefore erred in finding that DEQ met its burden of proof that 1200-Z Permit coverage is required.
 - i. DEQ Response: DEQ responds that the 1200-Z Permit does not require the

agency to show that an actual discharge has occurred. DEQ need only show that it is more likely than not that a discharge may occur. DEQ argues that it has established that it is more likely than not that the Facility may discharge stormwater from its retention pond to waters of the state, based on the capacity and condition of the pond.

WWM Requests that the Commission Modify the Proposed Order and Make New Findings of Fact and Conclusions of Law

WWM takes exception to Conclusions of Law 1 and 2 (as set forth above) and asks the EQC to reverse the ALJ's Proposed Order and find that 1200-Z Permit coverage is not required for the Facility and that WWM is not required to pay a civil penalty. WWM also takes exception to five Findings of Fact, as set forth in pages 3–4 of WWM's Exceptions and Brief. DEQ's specific responses to WWM's proposed alternative findings of fact can be found on pages 17–18 of DEQ's Answer, as follows:

1. Finding of Fact 13: Whether stormwater has escaped a small depression (page 17);
2. Finding of Fact 21: Whether the Facility discharges stormwater to the MS4 (page 17);
3. Finding of Fact 27: Whether the Facility's pond has ever discharged unintentionally (page 17);
4. Finding of Fact 29: Whether stormwater from the Facility ever reached an MS4 outflow to a water of the state (page 17–18);
5. Finding of Fact 30: Whether EPA considers stormwater from an industrial facility that enters and is subsequently discharged through an MS4 to be a discharge requiring a 1200-Z Permit (page 18).

DEQ Recommendation

DEQ recommends that the Commission uphold the ALJ's Proposed Order in its entirety. Specifically, DEQ recommends that the Commission order WWM to pay a civil penalty of \$11,320 and submit an application for 1200-Z Permit coverage to the City of Portland's Bureau of Environmental Services (BES)¹ within 30 days of the date of the Final Order.

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.²

¹ The City of Portland is an authorized agent for DEQ. In its capacity as an agent, BES is responsible for receiving 1200-Z Permit applications and administering the permit for sites within the City of Portland.

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 change a finding of fact.

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.³
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.⁴
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.⁵

Alternatives

The Commission may either:

1. As requested by DEQ, uphold the ALJ's Proposed Order in its entirety and order WWM to submit a 1200-Z Permit application to BES.
2. As requested by WWM, reject the findings of fact and conclusions of law to which WWM objects in its Exceptions and Brief and issue a final order reversing the ALJ's decision and finding the WWM Facility is not required to obtain 1200-Z Permit coverage or liable for a civil penalty.
3. Take any other action within the commission's authority.

Attachments

A. Documents regarding Petition for Review

1. WWM Petition for Commission Review, dated June 6, 2024
2. WWM Exceptions and Brief in Support of Petition for Review, dated Aug. 19, 2024
3. DEQ's Answer to WWM's Exceptions and Brief, dated Oct. 18, 2024
4. WWM's Reply Brief, dated Nov. 21, 2024

B. ALJ's Proposed Order

1. WWM Proposed Order, dated May 7, 2024

C. Hearing Record

1. DEQ's Exhibits A1-A23, admitted into record
2. WWM's Exhibits R1-R7, R9-11.11, R12.1-R12.2, R13-R20, R23-R24, and R31-R35, admitted into the record
3. DEQ and WWM's Closing Briefs
 - i. DEQ's Closing Brief
 - ii. WWM's Closing Brief
 - iii. DEQ's Closing Response Brief
 - iv. WWM's Closing Response Brief
4. Hearing Recordings & Written Transcripts

D. Pre-Hearing Documents

1. Notice of Civil Penalty Assessment and Order, dated July 6, 2023,
2. Notice of Appeal and Request for Contested Case Hearing, dated July 24, 2023
3. Prehearing Conference Follow-Up Correspondence, dated Oct. 31, 2023
4. WWM's Hearing Memorandum, dated Jan. 22, 2024
5. Amended Notice of Civil Penalty Assessment and Order, dated Jan. 23, 2024

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 OAR 137-003-0655(5).

⁵ OAR 137-003-0655(2).

*Report prepared by Sara Urch
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Translation or other formats

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