

State of Oregon
Department of Environmental Quality

Memorandum

Date: Oct. 15, 2014

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item H, Action item: Contested Case No. AQ/AB-WR-12-025 regarding David and Barbara Sullivan
Nov. 5-7, 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 participant does not agree with the judge's decision, they may appeal to the commission.

On May 21, 2012, DEQ issued a Notice of Civil Penalty Assessment and Order to David and Barbara Sullivan. The Notice alleged that the Sullivans violated Oregon environmental laws by allowing an unlicensed individual to perform an asbestos abatement project without the required license and openly accumulating asbestos-containing waste material. The Notice assessed a civil penalty of \$7,200 for the first violation, and no civil penalty for the second violation.

On June 28, 2012, DEQ informally met with the Sullivans to discuss the violations, civil penalty assessment and opportunities for settlement.

On Dec. 3, 2013, Administrative Law Judge Rick Barber presided at a contested case hearing on the matter. Judge Barber issued a Proposed and Final Order Jan. 22, 2014, in which he found that the Sullivans had committed the violations alleged in the Notice, and were liable for a \$7,200 civil penalty.

On Feb. 7, 2014, the Sullivans filed their Petition for Commission Review. In their subsequent Reply Brief, David Sullivan made a direct request to DEQ Director Dick Pedersen to consider "dropping the case or waiving the fine." Director Pedersen carefully considered the matter, but denied the request.

Findings of fact There are 12 numbered findings of fact in the order, as well as findings of fact

as determined by the administrative law judge made within the *Opinion* section of the order itself. Those findings of fact at issue before the commission are identified in attachment C3, Respondents' Exceptions and Brief, and attachment C1, Respondents' Reply Brief.

Conclusions of the administrative law judge

1. The Sullivans violated ORS 468A.715(1) and OAR 340-248-0110(2) by allowing an unlicensed individual to perform an asbestos abatement project.
2. The Sullivans should be assessed a civil penalty in the amount of \$7,200.
3. The Sullivans violated OAR 340-248-0205(1) by openly accumulating asbestos-containing waste material.

The judge made additional conclusions of law throughout the text of his opinion. The conclusions at issue are referenced in attachments C3 and C1.

Issues on appeal The Sullivans propose that the commission reverse the judge's findings of fact and conclusions of law for the following reasons:

1. DEQ's administrative rules concerning management and disposal of asbestos-containing materials are inconsistent with Oregon's hazardous waste laws. Please see pages 2-6 of attachment C3 and pages 10-14 of attachment C1.
2. Requiring removal of the new sheetrock and underlying asbestos-containing popcorn ceiling is inconsistent with DEQ's policy goals of preventing asbestos fiber release and exposure. Please see pages 4-6 of attachment C3 and pages 15-23 of attachment C1.
3. The Sullivans' attempt to "encapsulate" friable asbestos popcorn ceiling behind a layer of sheetrock is a safer method of managing asbestos-containing materials than removing and disposing of friable asbestos-containing waste materials in a landfill. Please see pages 6-8 of attachment C3 and pages 15-23 of attachment C1.

DEQ recommendation and EQC motion

DEQ recommends that the commission issue a final order adopting Judge Barber's proposed and final order.

DEQ asserts that:

1. The Sullivans' exceptions are not relevant to the violations at issue in this case, that is, whether the Sullivans allowed an unlicensed individual to perform an asbestos abatement project, and whether the Sullivans openly accumulated asbestos-containing waste materials.

2. The Sullivans were not licensed to abate asbestos, regardless of the method they used.
3. DEQ's asbestos rules are not inconsistent nor conflict with Oregon hazardous waste laws because asbestos is not regulated as a hazardous waste.
4. Asbestos is classified and regulated as a hazardous air pollutant under ORS 468A and under OAR, Chapter 340, Division 248. These laws specifically regulate how asbestos is to be managed and disposed of in Oregon, as correctly applied by Judge Barber in his Proposed Order.
5. Allowing the Sullivans to leave the popcorn ceiling in place would have posed a substantial risk of exposure to a future tenant or owner of the duplex.
6. The Sullivans' attempt to abate friable asbestos disturbed the asbestos, making it even more friable.
7. The commission should deny the Sullivans' exceptions to the findings of fact or conclusions of law because the record does not contain evidence that the Proposed Order's findings or conclusions were wrong.

**Alternatives for
commission
action**

The commission must 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.

The commission may:

1. Issue a final order adopting Judge Barber's Proposed and Final Order; or
2. Issue a final order determining that the findings of fact and conclusions of law reached by Judge Barber 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.

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 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

¹ ORS 183.635.

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

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).

proposed alternative findings of fact and conclusions of law.⁹

Attachments

- A. Correspondence regarding review by the EQC
- B. Correspondence from Director Pedersen to Mr. Sullivan, Aug. 11, 2014.
- C. Briefing to EQC:
 - 1. Respondent's Reply Brief, June 24, 2014
 - 2. DEQ's Reply to Petitioners' Exceptions and Brief, May 5, 2014
 - 3. Respondent's Exceptions and Brief, March 7, 2014
 - 4. Respondent's Petition for Commission Review, Feb. 7, 2014
- D. Respondent's Request for Hearing Recording, Feb. 3, 2014
- E. Proposed and Final Order, issued by ALJ Barber, Jan. 22, 2014
- F. DEQ's Exhibits from Dec. 3, 2013, contested case hearing, numbered A1 through A10
- G. Respondents Exhibits from Dec. 3, 2013, contested case hearing, numbered B through H, J, K, M through S, and V through Y.
- H. Notice of In-Person Hearing, issued by Judge Barber, Sept. 19, 2013
- I. Correspondence from Judge Barber to Jenny Root, DEQ, and David and Barbara Sullivan, Sept. 19, 2013
- J. Motion for Jury Trial, filed by David Sullivan, Sept. 19, 2013
- K. Notice of Prehearing Conference, issued by Judge Barber, Aug. 21, 2013
- L. Respondent's Request for Contested Case Hearing, dated May 23, 2012.
- M. DEQ's Notice of Civil Penalty Assessment and Order, dated May 21, 2012.
- N. Correspondence

Available upon request

- 1. Audio recording of the Dec. 3, 2013, contested case hearing

Approved:

Leah K. Feldon, Manager
Office of Compliance and Enforcement

Report prepared by Jenny Root

⁹ OAR 340-011-0575(4)(a).