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**Date:** Aug. 2, 2013

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director

**Subject:** Agenda item J, Action item: Contested Case No. WQ/D-ER-09-082 regarding John Patrick Lucas, Lehman Development Corp., and Lehman Hot Springs, LLC Aug. 21-22, 2013, 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 June 24, 2010, DEQ issued a Notice of Civil Penalty Assessment and Order to John Patrick Lucas, Lehman Development Corporation, and Lehman Hot Springs, LLC, collectively known here as Respondents<sup>1</sup>, which alleged violations related to sewage treatment lagoons located at the Lehman Hot Springs Resort near Ukiah, Oregon. Respondents filed a timely request for a contested case hearing.

On May 2, 2012, DEQ filed a Motion for Summary Determination, requesting resolution of whether as a matter of law, four of the five violations alleged in the notice occurred on specified dates. Administrative Law Judge Bernadette House granted DEQ's motion in part, ruling that DEQ was entitled to summary determination on the following:

1. Respondents were in violation of ORS 468B.050(1)(b) by operating the system without the required Water Pollution Control Facilities permit on April 6, 2009.
2. Respondents violated ORS 448.415(2)(a) by operating the system without a certified operator as required on at least Feb. 3 and 13, 2009.
3. Respondents violated ORS 468B.050(1)(a) on April 6, 8, 10, and 14,

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<sup>1</sup> Because all of the parties to this matter are both Petitioners and Respondents, because there is no good short-hand reference for Mr. Lucas, Lehman Development Corp., and Lehman Hot Springs LLC collectively, and because they are "Respondents" throughout the record, for consistency and ease of understanding, DEQ uses "Respondents" to reference them here.

2009, by placing wastewater-containing sewage in a location where they were likely to escape or be carried into waters of the state, Warm Spring Creek.

4. Respondents violated OAR 340-052-0015 when they made unauthorized changes, modifications or alterations to a facility that is required to operate under a Water Pollution Control Facilities permit.

Administrative Law Judge Rick Barber presided at a contested case hearing Aug. 6 and 7, 2012. Judge Barber issued a Corrected Proposed and Final Order Dec. 13, 2012, in which he found that Respondents had committed the violations alleged in the notice and assessed a total penalty of \$300,267.

**Findings of fact as determined by the administrative law judge**

There are 45 numbered and lengthy findings of fact in the order, as well as findings of fact made within the *Opinion* section of the order itself. Those findings of fact at issue before the commission are identified in Attachment A, the Exceptions Table.

**Conclusions of the administrative law judge**

1. Respondents discharged wastes into Warm Springs Creek on 23 occasions between April 2009 and May 2010, thereby violating ORS 468B.050(1)(a) and OAR 340-045-0015(1)(a), and should be required to pay a civil penalty of \$153,600 for this violation.
2. Respondents operated a wastewater disposal system without a permit from Nov. 30, 2002 through the date of the notice, thereby violating ORS 468B.050(1)(b) and OAR 340-045-0015(1)(b), and should be required to pay a civil penalty of \$10,792 for this violation.
3. Respondents operated a wastewater disposal system without a certified operator from Feb. 3, 2009, through the date of the notice, thereby violating ORS 448.415(2)(a) and OAR 340-049-0015(3), and should be required to pay a civil penalty of \$9,375 for this violation.
4. Respondents have, since at least April 6, 2009, caused wastes to be placed in a location where the wastes are likely to escape or be carried into the waters of the state, thereby violating ORS 468B.025(1)(a), and should be required to pay a civil penalty of \$126,500 for this violation.
5. Respondents committed the violations set forth above, and should be required to pay a total civil penalty of \$300,267.
6. Respondents have, since approximately 2000, made unauthorized changes, modifications or alterations in the facility that is required to have a Water Pollution Control Facilities permit, without seeking DEQ approval, thereby violating OAR 340-052-0015.

The judge made additional conclusions of law throughout the text of his opinion. The conclusions at issue are referenced in attachment A, the Exceptions Table.

<b>Issues on appeal</b>	All of the issues on appeal are detailed in Attachment A. Respondents' exceptions are labeled R-1 through R-11. DEQ's exceptions are labeled D-1 through D-6.
<b>DEQ recommendation and EQC motion</b>	DEQ recommends that the commission issue a final order incorporating the alternate findings of fact and conclusions of law proposed in DEQ's Exceptions and Brief.
<b>Alternatives for commission action</b>	<p>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.</p> <p>The commission may:</p> <ol style="list-style-type: none"><li>1. Issue a final order adopting Judge Barber's Corrected Proposed and Final Order; or</li><li>2. Accept DEQ's recommendation seen above and issue a final order determining that the findings of fact and conclusions of law reached by Judge Barber should be modified as requested by DEQ; or</li><li>3. 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</li><li>4. 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.</li></ol>
<b>EQC authority</b>	<p>The commission has the authority to hear this appeal under OAR 340-011-0575.</p> <p>DEQ's contested case hearings must be conducted by an administrative law judge.<sup>2</sup> The proposed order was issued under current statutes and rules governing the Administrative Law Judge Panel.<sup>3</sup> The commission may substitute its judgment for that of the administrative law judge in making any</p>

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<sup>2</sup> ORS 183.635.

<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>
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.<sup>6</sup>
3. The commission may not consider any new or additional evidence, but may only remand the matter to the judge to take the evidence.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>
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.<sup>10</sup>

#### **Attachments**

- A. Exceptions Table and Corrected Proposed and Final Order, issued by ALJ Barber Dec. 13, 2012
- B. Correspondence regarding review by EQC
- C. Briefing to EQC:
  1. DEQ's Reply Brief to Respondents' Answer, dated June 18, 2013
  2. Respondents' Reply Brief, dated June 18, 2013

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<sup>4</sup> OAR 340-011-0575(6).

<sup>5</sup> ORS 183.650(2) and OAR 137-003-0665(3).

<sup>6</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>7</sup> OAR 137-003-0655(5).

<sup>8</sup> OAR 137-003-0655(8), referring to ORS Chapter 244; OAR 137-003-0660.

<sup>9</sup> OAR 340-011-0575(5).

<sup>10</sup> OAR 340-011-0575(4)(a).

3. DEQ's Answering Brief to Respondents' Exceptions and Brief, dated May 29, 2013
  4. Respondents' Answering Brief, dated May 29, 2013
  5. DEQ's Exceptions and Brief, dated April 29, 2013
  6. Respondents' Exceptions and Opening Brief, dated April 29, 2013
  7. DEQ's petition for commission review, dated Jan. 11, 2013
  8. Respondents' petition for commission review, dated Dec. 31, 2012
- D. DEQ's Request for Correction of Proposed Order, dated Dec. 5, 2012
- E. Proposed and Final Order, issued by ALJ Barber Dec. 4, 2012
- F. Closing Arguments:
1. Closing Argument – Answering Brief of Respondent John Patrick Lucas, dated Oct. 12, 2012
  2. Closing Argument – Answering Brief of Respondents Lehman Hot Springs and Lehman Development, dated Oct. 12, 2012
  3. DEQ's Reply to Respondents' Closing Arguments, dated Oct. 12, 2012
  4. Closing Argument of Respondent John Patrick Lucas, dated September 28, 2012 and amended Oct. 1, 2012
  5. Closing Argument of Respondents Lehman Hot Springs and Lehman Development, dated Sept. 28, 2012
  6. DEQ's Closing Argument, dated Sept. 28, 2012
- G. Transcript, Volume 1 of contested case hearing (Aug. 6, 2012)
- H. Transcript, Volume 2 of contested case hearing (Aug. 7, 2012)
- I. DEQ's Exhibits from August 6 and 7, 2012 contested case hearing, numbered A1 through A90
- J. Respondents' Exhibits from August 6-7, 2012 contested case hearing, numbered R1 through R55
- K. Notices, rulings, and correspondence from the Office of Administrative Hearings
- L. Record on DEQ's Motion for Summary Determination:
1. Ruling on Motion for Summary Determination, issued by ALJ House on July 30, 2012
  2. DEQ's Reply to Respondents' Response to DEQ's Motion for Summary Determination and Affidavit of Sarah G. Wheeler, dated June 29, 2012
  3. Respondents' Supplemental Response to Motion for Summary Determination, Declaration of J. Patrick Lucas, and supporting exhibits R1-R49, dated June 13, 2012
  4. Ruling Denying Respondents' Motion to Postpone Hearing and to Extend Time for Response to Motion for Summary Determination, issued by ALJ House on May 23, 2012

5. Respondents' Opposition to Department's Motion for Summary Determination and Declaration of Darian A. Stanford and Respondents' Motion to Postpone Hearing and to Extend Time for Response to Motion for Summary Determination and Declarations of Patrick J. Lucas and Darian A. Stanford, dated May 15, 2012
6. Department's Motion for Summary Determination and Affidavit of Sarah G. Wheeler and supporting exhibits, dated May 2, 2012
- M. Respondents' Amended Request for Contested Case Hearing, dated May 15, 2012
- N. Respondents' Request for Hearing and Answer, dated July 12, 2010
- O. Notice of Civil Penalty Assessment and Order, dated June 24, 2010

**Available upon request**

1. Audio recording of the Aug. 6-7, 2012, contested case hearing

Approved:

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Leah K. Feldon  
Manager, Office of Compliance and Enforcement

Report prepared by: Sarah G. Wheeler  
Environmental Law Specialist