State of Oregon
Department of Environmental Quality Memorandum

Date: Nov. 16, 2012

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item D, Action item: Contested Case No. LQ/UST-NWR-10-248 regarding Burns-Johanson Oil Company
Dec. 6-7, 2012, 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 they do not agree with the judge's decision, they may appeal to the commission.

On Dec. 30, 2010, DEQ issued a Notice of Civil Penalty Assessment and Order to Comply to Burns-Johanson Oil Company, which alleged violations related to its underground storage tanks located at 455 Industry Street in Astoria, Oregon. On Jan. 18, 2011, DEQ received a request for hearing and answer from Burns. On Aug. 23, 2011, DEQ issued an Amended Notice of Civil Penalty Assessment and Order to Burns, which alleged five violations related to the tanks. The Amended Notice assessed civil penalties in the amount of $12,083 for four of those violations. Burns did not file an amended answer to the Amended Notice.

Administrative Law Judge Monica Whitaker presided at a contested case hearing on Jan. 25, 2012. Judge Whitaker issued a Proposed and Final Order on March 26, 2012, in which she found that Burns had committed the violations alleged in the Amended Notice and assessed a total penalty of $12,083, the full amount assessed by DEQ, for the violations.

DEQ recommendation and EQC motion

DEQ recommends that EQC issue a final order adopting Judge Whitaker's Proposed and Final Order in its entirety.

Findings of fact as determined by the administrative law judge

In approximately 1975, Burns installed five underground storage tanks at 455 Industry Street in Astoria, Oregon. In 1999, DEQ issued an operating permit to Burns for three tanks, as Burns had decommissioned the other two tanks. After 1999, the facility consists of three underground storage tanks and associated piping. The facility uses pressurized piping for transporting diesel, and suction piping for gasoline. An impressed current system protects the tanks and piping from corrosion.

In 2002, EPA inspected the underground storage tanks, and noted that Burns did not have a current certificate of insurance and gave Burns until Aug. 11, 2002 to submit a certificate. EPA again notified Burns on Feb. 25, 2005 that EPA has not received a certificate. DEQ notified Burns in November 2005 that it had failed to maintain insurance.

DEQ conducted an inspection of the underground storage tanks on Aug. 3, 2010. DEQ informed Burns of the records DEQ would need to see during the inspection.

During the August 2010 inspection, Burns provided DEQ with results of corrosion protection inspections and tests conducted in 2005 and 2009. However Burns had failed to post the current operating certificate for the tanks and was unable to provide DEQ with triannual line tightness testing results for the suction piping, or documentation or verification that the suction piping was properly designed and constructed.DEQ also discovered that there was no line leak detector installed on the pressurized piping. Burns was unable to provide DEQ with any line tightness test results for the pressurized piping.

After the inspection, Burns submitted documentation of an insurance policy, effective Aug. 2, 2010. Burns' prior insurance policy had expired June 8, 2010. In January 2011 Burns submitted proof that the suction piping complied with OAR 340-150-0410(6), that Burns had installed a line leak detector on the pressurized piping in October 2010, and had conducted line tightness and a line leak detector test in December 2010. Since the August 2010 inspection, Burns has failed to provide DEQ with any line tightness testing or other release detection testing prior to 2010, on the pressurized piping.

The typical line leak detector operational and line tightness test costs $225 per year. The typical cost of a corrosion protection inspection and test is $155 every three years. Burns paid $3,900 to install the line leak detector.

Conclusions of the administrative law judge

Judge Whitaker concluded that Burns was liable for the following violations:

1. Burns failed to install and operate a method of release detection for pressurized piping and to conduct annual line leak detector operational testing and line tightness testing, in violation of OAR 340-150-0410 and OAR 340-150-0555(1)(d) (formerly OAR 340-150-0002 and OAR 340-150-0003 which adopted, by reference, 40 CFR Part 280).
2. Burns failed to continuously maintain a financial responsibility mechanism, in violation of OAR 340-150-0163.
3. Burns failed to have the corrosion protection system inspected and tested for proper operation by a qualified cathodic protection tester at least every three years, in violation of OAR 340-150-0325(2).
4. Burns failed to post its annual operating certificate in a conspicuous location, in violation of OAR 340-150-0163(1).
5. Burns failed to provide a method for DEQ to readily determine compliance with OAR 340-150-0410(6) for its suction piping.
6. For those violations, Burns is liable for a total civil penalty of $12,083.

Issues on appeal

In its Exceptions and Brief, Burns requested that the commission modify the Conclusions of Law #1 through #6 set forth on page six of the Proposed and Final Order. Burns' argument and DEQ's follows below.

Burns cites that the Conclusions of Law alleges that the violations did not result in any harm to the environment. The environmental impact of a specific violation is a factor to be considered in the amount of the civil penalty and is not a factor in establishing whether a violation occurred. *See OAR 340-012-0026(6), OAR 340-012-0030(12) and OAR 340-012-0130.* In this case, DEQ alleged and Judge Whitaker determined that the magnitude of each of the violations should be minor as the evidence shows that the violations posed no more than a de minimis threat to human health or the environment.

Conclusion of Law #1 - Burns failed to install and operate a method of release detection for pressurized piping and test annually line leak detector operations and line tightness.

Burns' argument and DEQ's reply:
First, Burns argued it complied because it was conducting statistical inventory reconciliation as a release detection method on the pressurized piping. After hearing all the evidence and reviewing the applicable law, Judge Whitaker ruled that while statistical inventory reconciliation is not an approved method for release detection for pressurized piping in either the Code of Federal Regulations or the Oregon Administrative Rules, Burns had not provided any evidence that it was conducting any of the methods listed in 40 CFR 280.43(e)

through (h) prior to 2003[1], and that Burns had not provided any evidence that it was conducting any of the methods listed in OAR 340-150-0450 through 0470 after 2003.[2] *See Proposed and Final Order, page 11.* And even if it had been, these methods are not in lieu of having a line leak detector but instead are in lieu of annual line tightness testing.

Secondly, Burns argues that DEQ is estopped from assessing a civil penalty for its failure to install a line leak detector, alleging that DEQ misled the company about its compliance status. In support of its argument, Burns relied on an EPA inspection report and a letter, a letter from DEQ and a document it submitted to DEQ. The application of the doctrine of estoppel is narrowly construed against an agency meaning at a minimum, Burns would need to establish that DEQ provided a misleading communication to Burns and that Burns justifiably and detrimentally relied on the misleading communication. *See page 17 of the Proposed and Final Order.*

In regards to the EPA inspection report and letter, as Judge Whitaker ruled, there is no evidence in the record to support the conclusion that an EPA determination of compliance creates any waiver of or alleviates Burns' duty to comply with DEQ's rules. The 1999 letter from DEQ that Burns references regards underground storage tanks that were decommissioned and are not the tanks at issue in this case.[3] Ultimately, as Judge Whitaker ruled, there is no evidence in the record that there was anything in any communication from DEQ that misled Burns regarding its compliance status. Additionally, at no time did DEQ direct Burns not to comply with the requirements in DEQ's rules or in any way communicate to Burns that it was in compliance with the release detection requirements.

Finally, Burns argues that Judge Whitaker erred by determining that the violation began in 1990. The underground storage tank system was installed in approximately 1975. 40 CFR 280.40 required that all existing underground storage tank systems installed between 1975 and 1979 comply with the release

[1] 40 CFR 280.41(b), as adopted and modified by OAR 340-150-0003(19), required that pressurized piping have a line leak detector **and** either annual line tightness testing or daily monitoring by vapor monitoring, groundwater monitoring, interstitial monitoring, or another method that can meet the technical requirements in 40 CFR 280.44(c) or is approved by the implementing agency.

[2] OAR 340-150-0410 was adopted in 2003. That rule requires that pressurized piping have a line leak detector **and** annual line tightness testing or monitoring by an automatic tank gauge, vapor monitoring, groundwater monitoring, interstitial monitoring, or by other method not specified in OAR 340-150-0410 through OAR 340-150-0465 which is approved by DEQ. Additionally, OAR 340-150-0435 specifically states that SIR is not a valid release detection method for pressurized piping.

[3] The letter cites violations regarding USTs numbered BKKAC and BKKAD which were decommissioned in 1999. Respondent's permit is for three USTs, numbered BKKAK, BKKAA and BKKAB, which are the USTs at issue in this case. *See Finding of Fact #3 of the Proposed and Final Order.*

detection requirements for pressurized piping by Dec. 22, 1990. Judge Whitaker correctly ruled that Burns was required to comply with the pressurized piping release detection requirements, including installation of a line leak detector, by Dec. 22, 1990.

Conclusion of Law #2 - Burns failed to continuously maintain a financial responsibility mechanism.

Burns' argument and DEQ's reply:
Burns argues that it was still covered by its former insurance policy so there was no lapse in its financial responsibility coverage. There is no evidence in the record to support this contention.

Conclusion of Law #3 – Burns failed to have the corrosion protection system inspected and tested for proper operation by a qualified cathodic protection tester at least every three years.

Burns' argument and DEQ's reply:
Burns argues that tests were performed "between the 3rd and 4th years" and the testing was at "most a few months beyond the 36 month testing requirement." *See Respondent's Exceptions and Brief, page four.* This argument is directly contradicted by the findings in the Proposed and Final Order stating that an inspection and test was completed in February 2005 and May 2009, which is over four years. *See pages 12 and 22 of the Proposed and Final Order.*[4]

Additionally, Burns argues that the corrosion protection system passed the inspection and test. This is irrelevant to whether or not testing occurred within the timeframe required by the law.

Conclusion of Law #4 – Burns failed to post its annual operating certificate in a conspicuous location.

Burns' argument and DEQ's reply:
Burns does not argue that the certificate was posted as required by the law but instead argues that it failed to post the certificate because it needed clarification on where to post the certificate. The law requires that the certificate be posted in a conspicuous location.

Conclusion of Law #5 – Burns failed to provide a method for DEQ to readily determine compliance with OAR 340-150-0410(6) for its suction piping.

[4] "Respondent did not present any evidence to show that a test was performed between the years of 2008 and 2009, a four year period." *Page 12 of the Proposed and Final Order.*

Burns' argument and DEQ's reply:
Burns failed to take a specific exception to this Conclusion of Law.

Conclusion of Law #6 – Burns is liable for a total civil penalty of $12,083.

Burns' argument and DEQ's reply:
Burns argues that DEQ abused its discretion in determining the amount of the civil penalty for violation #1, specifically with regards to the economic benefit portion of the penalty. An abuse of discretion occurs when an agency exercises its discretion in a manner that is outside the range of discretion committed to the agency by law; inconsistent with agency rule, an officially-stated agency policy position, or a prior agency practice, if the inconsistency is not explained by the agency; or otherwise in violation of a constitutional or statutory provision. *ORS 183.482(8)(b).*

Burns argues that DEQ abused its discretion for assessing economic benefit when Burns itself was not profitable. The calculation of economic benefit in this instance is not in violation of a constitutional or statutory provision. There is no legal requirement that an entity is profitable or be a profit-seeking entity for economic benefit to be appropriate.[5] Nor is the financial condition of an entity a factor in DEQ's civil penalty formula. *See OAR 340-012-0145.* Burns failed to provide evidence that the penalty is inconsistent with an officially stated agency policy or prior agency practice, as Burns did not point to any past cases or an agency policy to support its contention. In fact, the law only allows DEQ the discretion to not calculate the economic benefit factor if the calculation is de minimis or there is insufficient information on which to make an estimate of the costs. *OAR 340-012-0150(3).* Neither of those circumstances is present in this case.[6] Finally, the economic benefit portion of the penalty is well within the range of authority provided to DEQ. Oregon law authorizes DEQ to issue a penalty of up to $10,000 per day of violation of Oregon's statutes or rules. *ORS 468.130(1).* This violation was ongoing for over 20 years, thus the $10,944 economic benefit factor of the $11,294 civil penalty is clearly within DEQ's authority.[7]

Secondly, Burns argues that DEQ abused its discretion for using the BEN computer model to calculate the economic benefit. The use of the BEN

[5] The BEN model allows the determination of an economic benefit for both a not for profit and government entity.
[6] The Department's Internal Management Directive on the Penalty Factor for Economic Benefit states that de minimis means that the BEN model calculation is less than $10. The Department used the actual cost of the compliance in calculating the EB. *See Findings of Fact #17and #21, page 5 of the Proposed and Final Order.*
[7] Per OAR 340-012-0150(5), DEQ is allowed to treat a violation as extending over as many days as necessary to recover the EB portion of the violation.

computer model in this instance is not in violation of a constitutional or statutory provision. The commission adopted OAR 340-012-0150 which allows DEQ to use the BEN computer model to calculate the economic benefit factor of the civil penalty formula. Burns has not presented any alternative to using the BEN computer model or any evidence that using the BEN computer model is inconsistent with an officially stated agency policy or prior agency practice. The use of the BEN computer model is also within the range of authority provided to DEQ under the applicable statutes and rules. *See OAR 340-012-0150.*

Burns argues that DEQ abused its discretion for using the default values in the BEN model for the tax, inflation and discount rate. The use of the default values in this instance is not in violation of a constitutional or statutory provision. OAR 340-012-0150 states that the "model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect the Respondent's actual circumstance." Although Burns argues that the discount and inflation rates are excessive, Judge Whitaker determined that Burns did not provide any evidence or alternative to the standard values that relates to Burns' actual circumstances. In regards to the income tax rate, Burns entered exhibits and testimony regarding the percentage of its income that it paid in state and federal taxes. But Burns has not provided federal tax returns for the entire period of the violation.[8] It is Burns' responsibility to provide the necessary information to demonstrate that another value is more appropriate than the standard value. *OAR 340-012-0150(1).*

Burns also failed to show that the use of the default values is inconsistent with an officially stated agency policy or prior agency practice as, again, Burns has not pointed to any past cases where DEQ has not used the default values. All of the testimony at the hearing showed that DEQ has consistently used the default values in its enforcement cases over the years. The use of the default values is also within the range of authority provided to DEQ under the applicable statutes and rules as OAR 340-012-0150 states that the model's standard values will apply.

Finally, Burns argues that DEQ should be estopped from assessing an economic benefit for the period after the 1999 letter from DEQ because DEQ did not inform Burns of the violation at that time. Alternatively, Burns argues that DEQ should be stopped from assessing an economic benefit for the period after the 2002 EPA inspection. As explained above, neither the inspection nor

[8] Although Exhibits R20 through R27 include tax returns for the majority of the years of violation, many of the years only include a state tax return which would not provide the appropriate federal tax rate.

the letter meets the requirements for the doctrine of estoppel to apply. It is Burns' duty to understand its permit and the regulatory requirements, and to comply. Under ORS 468.130 and OAR 340-012-0145, the violator's mental state is a factor to consider in regards to the "M" factor of the civil penalty and not the economic benefit factor.

EQC authority

EQC 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.[9] The proposed order was issued under current statutes and rules governing the Administrative Law Judge Panel.[10] Under ORS 183.600 to 183.690, EQC's authority to change or reverse an administrative law judge's proposed order is limited.

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.[11]
2. The commission may not modify a finding of fact made by the judge unless it determines that there is clear and convincing evidence in the record that the finding was wrong.[12]
3. The commission may not consider any new or additional evidence, but may only remand the matter to the judge to take the evidence.[13]

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.[14]

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

[9] ORS 183.635.
[10] ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.
[11] ORS 183.650(2) and OAR 137-003-0665(3).
[12] 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.
[13] OAR 137-003-0655(5).
[14] OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.

evidence was not presented to the judge.[15]

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.[16]

Alternatives

The EQC may either:

1. Issue a final order adopting Judge Whitaker's Proposed and Final Order; or
2. Issue a final order determining that the conclusions of law reached by Judge Whitaker should be modified as requested by Burns. The final order must identifying and explaining each modification.

Attachments

A. Documents regarding review by EQC:
   1. Letter from Zeno Drake Bakalian, dated Aug. 31, 2012.
   2. Letter from Stephanie Caldera, dated Aug. 15, 2012.
   3. Burns' Reply Brief, dated July 25, 2012.
   4. Letter from Stephanie Caldera, dated July 18, 2012.
   5. Letter from Stephanie Caldera, dated July 2, 2012.
   6. DEQ's Answer Brief, dated June 28, 2012.
   7. Letter from Stephanie Caldera to Respondent, dated June 1, 2012.
   8. Burns' Exceptions and Brief, dated May 29, 2012.
   9. Letter from Stephanie Caldera to Respondent, dated April 30. 2012.
   10. Respondent's Petition for Commission Review, dated April 25, 2012.

B. Proposed and Final Order, issued by Judge Whitaker on March 26, 2012.

C. Closing Arguments:
   1. Burns' Closing Brief, dated March 14, 2012.
   2. Burns' extension request and extension approval.
   3. DEQ's Closing Argument, dated Feb. 6, 2012.

D. Exhibits from Jan. 25, 2012 contested case hearing, numbered A1 through A16, R1 through R17 and R19 through R26.

E. Pre-hearing documents:
   1. Notice of Rescheduled In-Person Hearing, dated Oct. 5, 2011.
   2. Emails regarding rescheduling of Oct. 25, 2011, hearing.
   3. Notice of In-Person Hearing, dated Aug. 5, 2011.

F. Amended Notice of Civil Penalty Assessment and Order, dated Aug. 23, 2011.

G. Request for Hearing and Answer, dated Jan. 18, 2011.

H. Notice of Civil Penalty Assessment and Order to Comply, dated Dec. 30,

[15] OAR 340-011-0575(5).
[16] OAR 340-011-0575(4)(a).

2010.

Available upon request

1. Recording of the Jan. 25, 2012, contested case hearing.

Approved:

Division: Leah C. Kost

Report prepared by: Susan Elworth

Due to the sensitive and personal nature of the documents, DEQ has removed specific pages containing tax information from the publicly available attachments for this item. The tax information was submitted as part of the full record for the case heard before the administrative law judge. The tax information was provided to the commissioners as part of their full record, and will be retained in the official record for this item.

Because of the removal, the Bates numbering in the lower-right corner will jump in portions of attachment D. These jumps reflect where the tax information was removed, and are not an error.