

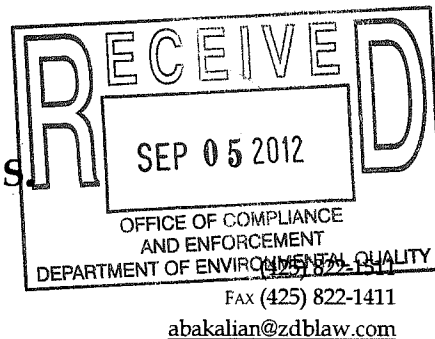
**ZENO DRAKE BAKALIAN P.S.**

**LEGAL AND ESCROW SERVICES**

4020 LAKE WASHINGTON BLVD. NE, SUITE 100  
KIRKLAND, WASHINGTON 98033-7862

G. Michael Zeno, Jr.  
Leslie A. Drake  
Allan B. Bakalian \*

\*also admitted in Oregon



August 31, 2012

Stephanie Caldera  
Assistant to the Environmental Quality  
Commission  
Oregon DEQ  
811 SW 6th Ave.  
Portland, OR 97204

**Re: Burns Johanson Oil Company  
OAH No.1102419  
Case No. LQ/T-NWR-10-248**

Dear Ms. Caldera:

I received your August 15<sup>th</sup> letter regarding scheduling of this case for hearing by the commission. We request this matter be heard at the December meeting in Portland. Thank you for your assistance.

Please let me know if you have any questions.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Allan Bakalian".

Allan Bakalian  
cc: Susan Elworth

Aug. 15, 2012

Allan B. Bakalian  
Zeno Drake Bakalian P.S.  
4020 Lake Washington Blvd. NE, #100  
Kirkland, WA 98033

Re: Scheduling EQC hearing of OAH Case No. 1102419/DEQ Case No. LQ/UST-NWR-10-248 in the matter of Burns-Johansen Oil Company

Dear Mr. Bakalian:

On July 25, 2012, the Oregon Environmental Quality Commission received your reply brief. That was the final document in the contested case process, and this item will be set for commission consideration at an upcoming regular EQC meeting.

The next commission meeting is Oct. 25-26, 2012, in Bend. The next Portland-area meeting is Dec. 6-7, 2012. Please let me know by Sept. 1, 2012, if you would like to schedule this item for the Bend meeting, or if you would prefer to wait and schedule this item at the December meeting to limit travel time. I have spoken with the DEQ staff involved with this item, and they are willing to present at either meeting.

Please note, the commission has heard contested cases by telephone, so you may exercise that option in lieu of appearing in-person. I can provide more information about this, or other, options if necessary.

If you have any questions about this process, please call me at 503-229-5301 or email me at [Caldera.Stephanie@deq.state.or.us](mailto:Caldera.Stephanie@deq.state.or.us).

Sincerely,



Stephanie Caldera  
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY  
Susan Elworth, DEQ environmental law specialist



811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-5696

Page 3 of 49  
**ELWORTH Susan**

---

**From:** Allan Bakalian [abakalian@zdblawn.com]  
**Sent:** Wednesday, July 25, 2012 4:58 PM  
**To:** CALDERA Stephanie  
**Cc:** ELWORTH Susan  
**Subject:** OAH 1102419, LQ/UST-10-248  
**Attachments:** DOC072512-07252012155352.pdf

Allan Bakalian

**ZENO DRAKE BAKALIAN P.S.**  
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Please consider the environment before printing this message.

A3

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:  
BURNS-JOHANSON OIL COMPANY,  
An Oregon Corporation,  
  
Respondent.

RESPONDENT'S REPLY THE  
DEPARTMENT'S ANSWER TO  
RESPONDENTS EXCEPTIONS  
AND BRIEF

**OAH No.1102419**  
**No. LQ/UST-NWR-10-248**

COMES NOW BURNS-JOHANSON OIL COMPANY ("Respondent"), by and through  
its attorneys Zeno Drake Bakalian P.S. and Allan B. Bakalian, and submits this Reply to the  
Department's Answer to Respondent's Exceptions and Brief in Opposition to the Proposed Order  
in this matter issued on March 26, 2012, by the Office of Administrative Hearings.

**I. INTRODUCTION**

The basis for Respondent's Exceptions to the Administrative Law Judge's (ALJ) March  
26, 2012 Proposed Order center on the unbridled discretion afforded the Department in assessing

RESPONDENT'S REPLY THE DEPARTMENT'S  
ANSWER TO RESPONDENTS EXCEPTIONS  
AND BRIEF

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PAGE - 1

1 a \$12,038 civil penalty for an alleged violation which Respondent immediately corrected, did not  
2 result in any release or harm to the environment. The ALF's ruling to uphold the Department's  
3 penalty calculations was error. Further, the ALJ improperly concluded that Respondent was not  
4 misled or unreasonably relied upon three previous inspections by the Department and EPA  
5 which confirmed Respondent was in compliance with the UST regulations.  
6

## 7 **II. DISCUSSION AND ARGUMENT**

8  
9 Following an August 2010 inspection, on August 23, 2011, the Department issued an  
10 Amended Notice of Civil Penalty Assessment and Order ("Amended Notice") as follows:

- 11 1) \$11,294 for failing to install release detection for piping and conducting line leak detector  
12 operation testing in violation of OAR 340-150-0410(2) and 0555(1)(d);  
13  
14 2) \$450 for failing to continuously maintain financial UST insurance in violation of OAR  
15 340-150-0163;  
16  
17 3) \$189 for failing to have the corrosion system inspected every three years in violation of  
18 OAR 340-150-0325(2);  
19  
20 4) \$150 for failure to post an Operating Certificate in violation of OAR 340-150-0163

21 The total civil penalty assessed was \$12,083. Violations 2-4 are relatively minor and  
22 immediately corrected. Respondent's Exceptions and Brief identified several errors in  
23 calculating those penalties which are not necessary to address in this Reply. Rather, the focus of  
24 this Reply is on the \$10,944 of the civil penalty that was assessed by the Department based on its  
25 alleged economic benefit to Respondent associated with the installation of a line leak detector.

26 Respondent asserts that the Department improperly, unfairly and arbitrarily assessed this  
27 civil penalty based upon the U.S. EPA's BEN Model which is designed to estimate the potential  
28

RESPONDENT'S REPLY THE DEPARTMENT'S  
ANSWER TO RESPONDENTS EXCEPTIONS  
AND BRIEF

PAGE - 2

ZENO DRAKE BAKALIAN P.S.  
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1 economic benefit gained from the alleged violation. Despite evidence introduced during the  
2 hearing to the contrary, the Department utilized the BEN model's default input values and used  
3 the resulting calculation as the civil penalty.  
4

5 Specifically, Respondent asserts that the Department improperly calculated the alleged  
6 civil penalties and that the principal deviation resulted from the Department's arbitrary and  
7 unsupported application of the "BEN" model in determining the so-called "economic benefit"  
8 realized from Respondent's alleged delayed compliance associated with installing a line leak  
9 detector on its pressurized UST fuel pipeline. OAR 340-012-0150.  
10

11 The Department's application of the model in this case is flawed. Burns-Johansson is a  
12 small family business, not a large corporation that employs accountants to depreciate pollution  
13 equipment and invest income in high interest bearing accounts. Burns-Johanson is a Subchapter  
14 S corporation that did not capitalize its UST equipment. It expensed it. These are all inputs into  
15 the BEN model, as is the tax rate, discount rate and time of delay. All of these inputs affect the  
16 EB. The Department failed to explain why or how it did not use these inputs or why it reverted  
17 to the default values when it had this information.  
18  
19

20  
21 Specifically, it was error for the hearing examiner to exclude Respondent's request to  
22 require the Department's witness who conducted and ran the BEN model to run the model using  
23 the actual input values provided by Respondent at the hearing. Indeed, OAR 340-012-0150(1)  
24 requires that: "***Upon request of the Respondent, the department will use the model in determining***  
25 ***the economic benefit competent of a civil penalty.***" Respondent has presented evidence that use of  
26 the actual input values results in a \$1,400, not \$10,944 economic benefit calculation. Ex R 17.  
27  
28

RESPONDENT'S REPLY THE DEPARTMENT'S  
ANSWER TO RESPONDENTS EXCEPTIONS  
AND BRIEF

PAGE - 3

ZENO DRAKE BAKALIAN P.S.  
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Respondent takes exception to Conclusions of Law 1 and 6, involving installing a line leak detector and the calculation and assessment of \$10,944 as the so-called "economic benefit" for Violation No. 1. This amount is in addition to the \$350 Base Penalty for failing to install a line leak detector, a Class I, minor magnitude violation in the Department's penalty matrix. See OAR 340-012-0067(1)(e) and (1)(j).

Pursuant to OAR 340-012-0045(1) and (2), the Department's "Civil Penalty Determination Procedure" requires the Department to take into account the nature, circumstances, extent and gravity of the alleged violations, with respect to the violator, ability to pay, prior history of such violations, degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. In this case, the Department simply ran the BEN Model using the default values to calculate what it asserts is the economic benefit enjoyed by Respondent - \$10,944. That was an abuse of the agency's discretion and defies logic and common sense.

If a company neither profits nor gains a tax advantage from deferring pollution controls, there is no economic benefit other than the time value of the capital which should have been invested (e.g., the interest earned on the principal/capital). Pursuant to OAR 340-012-0150(1) the EB is only meant to be "the approximate dollar value" of the benefit gained and the costs avoided or delayed from noncompliance. As previously noted, the BEN model was developed by the EPA for settlement negotiations, not as a rigid formula for determining civil penalties as it was used by the

RESPONDENT'S REPLY THE DEPARTMENT'S  
ANSWER TO RESPONDENTS EXCEPTIONS  
AND BRIEF

PAGE - 4

ZENO DRAKE BAKALIAN P.S.  
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Department in this case. DEQ's own regulations state that "the EB *may* be determined using the EPA's BEN computer model." OAR 340-12-0150(1) (emphasis added).

The discretion that must be applied by the Departments is assessing any economic benefit is clear from the agency's rule:

**340-012-0150**

**Determination of Economic Benefit**

- (1) The Economic Benefit (EB) is the *approximate dollar value* of the benefit gained and the costs avoided or delayed (without duplication) as a result of the respondent's noncompliance. *The EB may be determined using the U.S. Environmental Protection Agency's BEN computer model.* Upon request of the respondent, the department will provide the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate are presumed to apply to all respondents unless a specific respondent can demonstrate that the standard value does not reflect that respondent's actual circumstance. *Upon request of the Respondent, the department will use the model in determining the economic benefit competent of a civil penalty.*
- (2) The department may make, for use in the applicable model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent. Economic benefit will be calculated without duplicating or double-counting the advantages realized by respondent as a result of its noncompliance.
- (3) The department need not calculate the EB if the department makes a reasonable determination that the EB is de minimis or if there is insufficient information reasonable available to the department on which to make an estimate under section (2) of this rule.

(Emphasis added)

In this case, the Department seeks to arbitrarily utilize this discretion in a manner that led to an unfair and unreasonable penalty to Respondent that is not based on the facts in evidence. The ALJ upheld that abuse of discretion notwithstanding the testimony and evidence introduced at the hearing showing that Burns-Johanson is not and was not a profitable company from 1993 through 2003 when it ceased filing taxes as an entity. DEQ's decision to apply the BEN model

RESPONDENT'S REPLY THE DEPARTMENT'S  
ANSWER TO RESPONDENTS EXCEPTIONS  
AND BRIEF

PAGE - 5

ZENO DRAKE BAKALIAN P.S.  
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1 in this case was arbitrary because it was neither accurate nor reasonable. DEQ has essentially  
2 ignored that Burns-Johanson is a sole proprietorship and could not and cannot economically  
3 benefit from the alleged noncompliance. As a matter of policy, the BEN model is designed to  
4 recapture the economic benefit that a violator may have gained to prevent them from obtaining  
5 an unfair financial advantage. See 70 Fed. Reg. 50,326 (August 26, 2005). DEQ has  
6 unreasonably applied the BEN model to an entity that has lost money for over ten years and  
7 NEVER gained any economic advantage. DEQ's decision to treat Burns-Johansen and Alice  
8 Codd the same as it would a multi-billion dollar profit oil company is unfounded, arbitrary and  
9 an abuse of the agency's discretion. In essence, DEQ's use of the BEN model defaults has the  
10 unintended (or perhaps intended) outcome of potentially wiping out a small family business that  
11 has otherwise been in compliance with the law.  
12

13  
14 In addition to improperly using the BEN model default values, the ALJ erred by agreeing  
15 with the Department that the time the alleged line leak detector violation began was in 1990.  
16 That assumption ignores the fact that both EPA and DEQ (both agencies had jurisdiction over  
17 Respondent's facility until mid-2011 (FF 22), conducted inspections of the facility, in 1999 and  
18 2003, during which they did not cite or notify Respondent for this violation. Respondent utilized  
19 SIR (statistical inventory records) to confirm the UST system was not leaking during this time.  
20 Neither DEQ nor EPA disputed the use of SIR or informed Respondent that it must install a line  
21 leak detector. In fact, EPA and DEQ noted that Respondent was in compliance with the UST  
22 regulations.  
23

24 Respondent does not dispute that the line leak detector is required now, but believes the  
25 Department cannot in turn seek a penalty for the time period when it inspected the facility and  
26 determined it was in compliance. Indeed, based on the equitable doctrines of estoppel and  
27  
28

RESPONDENT'S REPLY THE DEPARTMENT'S  
ANSWER TO RESPONDENTS EXCEPTIONS  
AND BRIEF

PAGE - 6

ZENO DRAKE BAKALIAN P.S.  
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1 laches, the EB for this violation should have been based only on the time period preceding or  
2 following the DEQ and EPA inspections. Despite the ALJ's ruling, Respondent was both  
3 mislead and reasonably relied upon the agency's inspection reports which failed to notify or  
4 require Respondent install a line leak detector instead of using SIR. Contrary to the ALJ's  
5 decision, the fact that there was nothing in the EPA's 2003 Notice of Violation about the line  
6 leak detector that mislead Respondent is not the issue – it is the absence of such notice in the  
7 Notice itself that was misleading to Respondent. Respondent's continued use of SIR for leak  
8 detection constitutes justified reliance on this "innocent" yet misleading information. See *Swift*  
9 & *McCormick Metal Processors v. Durbin*, 117 Or.App 605, 608-609 (1992).  
10

11 Respondent notified DEQ exactly what it was doing with regard to leak detection, when  
12 it sent DEQ its completed UST survey in February 1999, after it upgraded its USTs. Respondent  
13 documented that it was performing SIR to calculate any leaks from its USTs and pipelines based  
14 upon OAR 340-150-0410(7), which authorizes alternative methods designed to detect releases  
15 from underground piping, set forth in OAR 340-150-0450 through OAR 340-150-0470, utilized  
16 by Respondent. DEQ did not object or otherwise notify Respondent it needed a line leak  
17 detector. Accordingly, if Respondent is required to obey the directions and commands of the  
18 DEQ and EPA inspectors, it is contradictory and disingenuous at best for DEQ (or the ALJ) to  
19 claim that Respondent cannot reasonably rely upon their inspection reports that did NOT cite this  
20 violation in 1999 or 2003. That reliance was clearly to its detriment. Laches is an  
21 "[u]nreasonable delay in pursuing a right or claim ~ almost always an equitable one ~ in a way  
22 that prejudices the party against whom relief is sought." (Black's Law Dictionary).  
23

24 The ALJ's decision not to allow cross examination of DEQ's EB witness, or having the  
25 Department demonstrate the actual use of the BEN model using EPA's current version of the  
26  
27  
28

RESPONDENT'S REPLY THE DEPARTMENT'S  
ANSWER TO RESPONDENTS EXCEPTIONS  
AND BRIEF

PAGE - 7

ZENO DRAKE BAKALIAN P.S.  
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1 BEN model that was downloaded on a laptop computer, was also error. As noted, DEQ seeks to  
2 impose a \$10,944 fine on respondent based on the alleged economic benefit the company gained  
3 for delaying compliance from December 1990 to October 2010. The discounted value of the  
4 2010 line leak detector is approximately \$2200 (e.g., in 1990 dollars). Thus, the department is  
5 seeking an additional 25% per year as the economic benefit ( $\$550 \times 20 \text{ years} = \$11,000$ ) to come  
6 up with this number using the BEN model. Such a result is absurd, unreasonable, arbitrary and  
7 an abuse of discretion. The testimony and evidence at the hearing was that Burns-Johanson  
8 could not and did not benefit from the alleged delay because it did not have the \$2200 to invest  
9 elsewhere as the BEN model default values presume. Indeed, DEQ's BEN calculations result in  
10 a fiction that Respondent benefited \$550 per year for 20 years by delaying installation of a \$2200  
11 line leak detector. This was confirmed by the testimony of Alice Codd and Steve Allen, the  
12 accountant. Burns-Johanson simply was not a profitable company and did not have any profit to  
13 invest let alone reap an \$11,000 benefit.

14  
15  
16 As set forth in OAR 340-012-0150(3), DEQ is not required to calculate the EB if it  
17 makes a reasonable determination that the EB was de minimis or if cannot make a reasonable  
18 estimate of the benefits gained and the costs avoided or delayed by the respondent. That is  
19 exactly the case here. DEQ's admitted use of the BEN model default values, despite the  
20 testimony and documentation introduced by Respondent that such default values are not  
21 applicable, was an abuse of discretion pursuant to ORS 183.482(8)(b) because it is inconsistent  
22 with the penalty calculation rules. DEQ has failed to provide any citation for use of the default  
23 calculations in this case, a requirement which is noted in prior agency decisions. *In the Matter*  
24 *of: Fortress Holdings, L.L.C.*, WPM/SW-NWR-00-160 (Or. Env. Qual. Com., April 1, 2002).  
25  
26  
27  
28

RESPONDENT'S REPLY THE DEPARTMENT'S  
ANSWER TO RESPONDENTS EXCEPTIONS  
AND BRIEF

PAGE - 8

ZENO DRAKE BAKALIAN P.S.  
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Kirkland, WA 98033  
(425) 822-1511



I certify that on July 25, 2012, I served a true copy of the foregoing **Respondent's Reply to the Department's Answer to Respondent's Exceptions and Brief** via E-Mail with a copy sent by First Class Mail:

Environmental Quality Commission  
c/o Stephanie Caldera  
811 SW Sixth Avenue  
Portland, OR 97204  
Caldera.stephanie@deq.state.or.us

Susan Elworth  
Department of Environmental Quality  
811 SW Sixth Ave.  
Portland, OR 97204

  
Allan Bakalian

ENVIRONMENTAL  
QUALITY  
COMMISSION

July 18, 2012

Allan B. Bakalian  
Zeno Drake Bakalian P.S.  
4020 Lake Washington Blvd. NE, #100  
Kirkland, WA 98033

Re: Request for one-week extension in which to file a reply brief for OAH Case No. 1102419/DEQ Case No. LQ/UST-NWR-10-248 in the matter of Burns-Johansen Oil Company

Dear Mr. Bakalian:

On July 18, 2012, the Oregon Environmental Quality Commission received your request for an extension of time to file a reply brief. The request was received via electronic mail at approximately 4 p.m., and was received prior to the deadline stated in a prior letter. Your request for one additional week is approved.

A reply brief is not required, and has no impact on whether the appeal moves forward. If you choose to file a reply brief, it must be received by 5 p.m. on Wednesday, July 25, 2012, per your request for a one-week extension.

Any and all materials must be provided to the Oregon Environmental Quality Commission, 811 SW 6<sup>th</sup> Ave., Portland, Ore. 97204, with a copy to Susan Elworth, DEQ environmental law specialist, at the same address.

Once all briefs have been filed, this item will be set for commission consideration at a regularly scheduled commission meeting, and I will notify you of the date and location by certified mail. Due to the meeting schedule of the commission, this item is likely to be scheduled at the October 25-26, 2012, meeting, to be held in Bend, or the Dec. 6-7, 2012, meeting, to be held in Portland. If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

  
Stephanie Caldera  
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY  
Susan Elworth, DEQ environmental law specialist



811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-5696

July 2, 2012

Allan B. Bakalian  
Zeno Drake Bakalian P.S.  
4020 Lake Washington Blvd. NE, #100  
Kirkland, WA 98033

Re: DEQ's answer brief for OAH Case No. 1102419/DEQ Case No. LQ/UST-NWR-10-248 in the matter of Burns-Johansen Oil Company

Dear Mr. Bakalian:

On June 28, 2012, the Oregon Environmental Quality Commission received DEQ's answer brief for the above-referenced case.

Per Oregon Administrative Rules OAR 340-011-0575, you have 20 days from the date of the brief's receipt to file a reply brief. A reply brief is not required, and has no impact on whether the appeal moves forward. If you choose to file a reply brief, it must be received by 5 p.m. on Wednesday, July 18, 2012. If you would like to request an extension of time, that request must be received in writing by the same date and time. The commission may extend any of the time limits contained in OAR 340-011-0575(5) if an extension request is made in writing and is filed with the commission before the expiration of the time limit.

Any and all materials must be provided to the Oregon Environmental Quality Commission, 811 SW 6<sup>th</sup> Ave., Portland, Ore. 97204, with a copy to Susan Elworth, DEQ environmental law specialist, at the same address.

Once all briefs have been filed, this item will be set for commission consideration at a regularly scheduled commission meeting, and I will notify you of the date and location by certified mail. Due to the meeting schedule of the commission, this item is likely to be scheduled at the October 25-26, 2012, meeting, to be held in Bend, or the Dec. 6-7, 2012, meeting, to be held in Portland. If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

  
Stephanie Caldera  
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY  
Susan Elworth, DEQ environmental law specialist



811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-5696

Page 16 of 49  
**ELWORTH Susan**

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**From:** ELWORTH Susan  
**Sent:** Thursday, June 28, 2012 3:07 PM  
**To:** CALDERA Stephanie; 'Allan Bakalian'  
**Subject:** Case no. LQ/UST-NWR-10-248  
**Attachments:** 20120628135620672.pdf

Stephanie – Attached please find the Department's Answer to Respondent's Exceptions and Brief in the above referenced case.

Susan M. Elworth  
Department of Environmental Quality  
Environmental Law Specialist  
(503) 229-5152

AG

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:  
BURNS-JOHANSON OIL COMPANY,  
RESPONDENT

)  
)  
)  
)  
)  
DEPARTMENT'S ANSWER TO  
RESPONDENT'S EXCEPTIONS  
AND BRIEF  
OAH No. 1102419  
NO. LQ/UST-NWR-10-248

The Department of Environmental Quality (Department), submits this Answer to the Environmental Quality Commission (Commission) in response to Respondent's Exceptions and Brief in Opposition to Proposed Final Order, filed May 29, 2012.

I. COMMISSION ACTION REQUESTED

The Department requests that the Commission issue a Final Order upholding the Proposed and Final Order, dated March 26, 2012.

III. APPLICABLE STANDARD OF REVIEW

Under ORS 183.600 to 183.690, the Commission's authority to change or reverse an administrative law judge's (ALJ) Proposed and Final Order is limited. The most important limitations are as follows:

1. The Commission may not modify the form of the ALJ's Proposed and Final Order in any substantial manner without identifying and explaining the modifications.<sup>1</sup>
2. The Commission may not modify a finding of fact made by the ALJ unless it determines that there is clear and convincing evidence in the record that the finding was wrong.<sup>2</sup>
3. The Commission may not consider any new or additional evidence, but may only remand the matter to the ALJ to take the evidence.<sup>3</sup>

In addition, the Commission has established, by rule, a number of other procedural provisions, including:

<sup>1</sup> ORS 183.650(2) and OAR 137-003-0665(3).

<sup>2</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>3</sup> OAR 137-003-0655(5).

- 1 1. The Commission will not remand a matter to the ALJ to consider new or additional facts  
2 unless the proponent of the new evidence has properly filed a written motion explaining  
3 why evidence was not presented to the ALJ.<sup>4</sup>
- 4 2. To the extent that a party seeks to have the Commission modify a finding of fact or  
5 conclusion of law, that party must cite to the portions of the record on which the party is  
6 relying in support of its proposed alternative findings of fact and conclusions of law.<sup>5</sup>

### 7 III. PETITIONER'S EXCEPTIONS TO CONCLUSIONS OF LAW

8 In its Petition, Respondent requested that the Commission modify the Conclusions of Law  
9 #1 through 6 set forth on Page 6 of the Proposed and Final Order. Each Conclusion of Law,  
10 Respondent's argument and the Department's Response is set forth below.

11 As a general matter, Respondent takes exceptions to the Conclusions of Law because, as  
12 Respondent argues, the violations did not result in any harm to the environment. *See Respondent's*  
13 *Exceptions and Brief, pages 5 and 11.* The environmental impact of a specific violation is a factor  
14 to be considered in the amount of the civil penalty and not a factor establishing whether a violation  
15 occurred. *See OAR 340-012-0026(6), OAR 340-012-0030(12) and OAR 340-012-0130.* In this  
16 case, the Department alleged and the ALJ determined that the magnitude of each of the violations  
17 should be minor as the evidence shows that the violations posed no more than a de minimis threat  
18 to human health or the environment. *See Exhibits 1 through 4 to the Amended Notice of Civil*  
19 *Penalty Assessment and Order, and the Proposed and Final Order, pages 17, 20, 21, and 22.*

- 20 1. Respondent violated 40 CFR 280.40, former OAR 340-150-0002 and OAR 340-150-0003,  
21 and current OAR 340-150-0410 and OAR 340-150-0555(1)(d) by failing to install and  
22 operate a method of release detection for piping and by failing to conduct annual line leak  
detector operation testing and line tightness testing.

23 *Applicable Law:* 40 CFR 280.40 requires that all existing UST systems be upgraded with  
24 release detection prior to the dates set forth in that rule. 40 CFR 280.41(b), as adopted and  
25 modified by former OAR 340-150-0003(19), required that pressurized piping have a method of  
26 release detection that includes both:

27  
<sup>4</sup> OAR 340-011-0575(5).

<sup>5</sup> OAR 340-011-0575(4)(a).

1. A line leak detector that meets the technical requirements in 40 CFR 280.44(a)  
**and**
2. Annual line tightness testing that meets the technical requirements in 40 CFR 280.44(b) **or** daily monitoring under 40 CFR 280.44(c) by any of the methods in 40 CFR 280.43(e) through (h). The methods listed in 40 CFR 280.43(e) through (h) include 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.

These requirements were effective until February 14, 2003 when OAR 340-150-0410 and OAR 340-150-0555 were adopted.<sup>6</sup> OAR 340-150-0555 reiterates the requirements in the federal regulations regarding when an UST system needed to be upgraded. OAR 340-150-0410(2) requires that pressurized piping must have a line leak detector. OAR 340-150-0410(3) requires that in addition to the line leak detector, annual line tightness testing must be conducted. In lieu of the annual line tightness testing, OAR 340-150-0410(7) allows monitoring under a method set forth in OAR 340-150-0450 through OAR 340-150-0470. Those methods include an automatic tank gauge, vapor monitoring, groundwater monitoring, interstitial monitoring, or by another method not specified in OAR 340-150-0410 through OAR 340-150-0465 which is approved by the Department.

*ALJ's Findings of Fact:* In December 2010, the Department received verification that Respondent had installed a line leak detector in October 2010 and completed a line tightness test on the pressurized diesel piping. During an inspection in 2010, Respondent was unable to provide the Department with any line tightness testing results for the diesel piping. Since the inspection, Respondent has not provided the Department with any line tightness test results or results of another acceptable release detection method for the diesel pressurized piping. *See Findings of Fact #12, #17 and #20, pages 4 and 5 of the Proposed and Final Order.*

<sup>6</sup> The repealed law is applicable in this case because the violation was ongoing from December 1990 until October 2010. *See page 10 of the Proposed and Final Order.*

1        *Respondent's Exceptions and the Department's Response:* First, Respondent argues that it  
2 was in compliance because it was conducting statistical inventory reconciliation (SIR) as a release  
3 detection method on the pressurized piping. SIR is not listed as an approved method for release  
4 detection for pressurized piping in either the CFRs or OARs. In fact, OAR 340-150-0435  
5 specifically states that SIR is not a valid release detection method for pressurized piping.

6        Secondly, Respondent argues that the Department is barred by the doctrine of estoppel  
7 from finding a violation for not having a line leak detector. Respondent relied upon an  
8 inspection report and a letter from the Environmental Protection Agency (EPA), a letter from the  
9 Department, and a document it submitted to the Department to support its argument. The  
10 application of the doctrine of estoppel is narrowly construed against an agency. At a minimum,  
11 Respondent would need to establish that the Department provided a misleading communication  
12 to Respondent and that Respondent justifiably and detrimentally relied on the misleading  
13 communication. *See page 17 of the Proposed and Final Order.* The ALJ, after reviewing all the  
14 evidence in the record, stated "Respondent provided no evidence to support a finding that it was  
15 misled by DEQ and justifiably and detrimentally relied on misleading conduct." *See page 17,*  
16 *paragraph 3 of the Proposed and Final Order.* The Commission may not modify a finding of fact  
17 made by the ALJ unless it determines that there is clear and convincing evidence in the record that  
18 the finding was wrong. *ORS 183.650(3).*

19        In regards to the EPA inspection report and letter, as the ALJ ruled, there is no evidence  
20 to support the conclusion that an EPA determination of compliance creates any waiver of or  
21 alleviates Respondent's duty to comply with the Department's rules. *See page 17, paragraph 4*  
22 *of the Proposed and Final Order.*

23        In regards to the 1999 letter from the Department, that letter is regarding two USTs that  
24 were decommissioned by Respondent and are not the USTs at issue in this case.<sup>7</sup> There is no  
25 evidence in the record to show that the Department ever communicated with Respondent about  
26

27        <sup>7</sup> 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.*

1 the compliance status of the three USTs **at issue in this case**. Again, after reviewing all the  
2 evidence in the record, the ALJ found that there was nothing in this letter or **any other**  
3 **communications** from DEQ that misled Respondent regarding its compliance status. *See page*  
4 *17, paragraph 3 of the Proposed and Final Order.*

5 In regards to Respondent's argument that it informed the Department that it was using  
6 annual line tightness testing as its release detection method for the pressurized piping, again there  
7 is no evidence that the Department told Respondent that line tightness testing was adequate to  
8 comply with the Department's rules.<sup>8</sup>

9 2. Respondent violated OAR 340-150-0163 by failing to continuously maintain a financial  
10 responsibility mechanism.

11 *Applicable Law:* Under OAR 340-150-0163(1)(i), the owner and permittee must  
12 continuously maintain a valid financial responsibility mechanism as required by OAR chapter  
13 340, Division 151.

14 *ALJ's Findings of Fact:* Respondent provided the Department with a certificate of  
15 insurance with an effective date of August 2, 2010. Respondent's prior insurance expired on June  
16 8, 2010. *See Finding of Fact #13, page 4 of the Proposed and Final Order.*

17 *Respondent's Exceptions and the Department's Response:* Respondent argues that it was  
18 still covered by its former insurance policy so there was no lapse in its financial responsibility  
19 coverage. There is no evidence in the record to support this contention. Respondent concedes as  
20 much by admitting that it has not attempted to confirm that the previous insurer was obligated to  
21 provide coverage after June 8, 2010. *See Respondent's Exceptions and Brief, page 4.*

22 3. Respondent violated OAR 340-150-0325(2) by failing to have the corrosion  
23 protection system inspected and tested for proper operation by a qualified cathodic protection  
24 tester at least every three years.

25 *Applicable Law:* Under OAR 340-150-0325(2), the corrosion protection system of an  
26 UST must be inspected and tested by a licensed corrosion protection tester at least once every  
27 three years.

<sup>8</sup> This exhibit actually shows that Respondent falsified records it submitted to the Department because Respondent did not conduct any line tightness testing prior to 2010.

1 *ALJ's Findings of Fact:* Respondent provided, to the Department, corrosion protection  
2 inspection and test results for tests completed in the years 2005 and 2009. *See Finding of Fact #15,*  
3 *page 4 of the Proposed and Final Order.*

4 *Respondent's Exceptions and the Department's Response:* Respondent doesn't argue that  
5 they completed the inspection and test every three years but instead argues that tests were  
6 performed "between the 3<sup>rd</sup> and 4<sup>th</sup> years" and the testing was at "most a few months beyond the 36  
7 month testing requirement." *See Respondent's Exceptions and Brief, page 4.* This argument is  
8 directly contradicted by the findings in the Proposed and Final Order stating that the inspection  
9 and test was completed in February 2005 and May 2009, which is over 4 years. *See pages 12 and*  
10 *22 of the Proposed and Final Order.*<sup>9</sup> Regardless of how long the delay, Respondent admits that it  
11 did not conduct a corrosion protection inspection and test at least once every three years as required  
12 by the law. Additionally, Respondent argues that the corrosion protection system passed the  
13 inspection and test. This is irrelevant to whether or not testing occurred within the timeframe  
14 required by the law.

15 4. Respondent violated OAR 340-150-0163(1) by failing to post Respondent's annual  
16 operating certificate in a conspicuous location clearly visible at the Facility.

17 *Applicable Law:* OAR 340-150-0163(1)(a) requires that the annual operating certificate  
18 be posted in a conspicuous location at the facility which is clearly visible.

19 *ALJ's Findings of Fact:* During an inspection, Respondent's operating certificate was  
20 inside of a binder. After the inspection, Respondent posted the operating certificate in a visible  
21 area. *See Finding of Fact #14, page 4 of the Proposed and Final Order.*

22 *Respondent's Exception and the Department's Response:* Respondent does not argue that  
23 the certificate was posted as required by the law but instead argues that it failed to post the  
24 certificate because it needed clarification on where to post the certificate. The law requires that  
25 the certificate be posted in a conspicuous location. Inside of a binder is not a conspicuous location.

26 5. Respondent violated OAR 340-150-0410(6) by failing to provide a method for the  
27 Department to readily determine compliance with the requirements set forth in that rule.

<sup>9</sup> "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, Proposed and Final Order.*

1       *Applicable Law:* OAR 340-150-0410(4) and (5) requires that suction piping must either  
2 have a line tightness test conducted every three years or the piping must be installed such that it  
3 has enough slope so that the product drains back into the tank and has only one check valve.  
4 Additionally, there must be a way for the Department to check that the piping is installed  
5 according to these requirements.

6       *ALJ's Findings of Fact:* During an inspection, Respondent was unable to provide the  
7 Department with a method of verification of the suction piping. On January 28, 2011, Respondent  
8 provided the Department with proof that the gasoline piping was installed as safe suction. *See*  
9 *Findings of Fact #12 and #19, pages 4 and 5 of the Proposed and Final Order.*

10       *Respondent's Exception and the Department's Response:* Respondent failed take an  
11 exception to this Conclusion of Law.

12       6. The appropriate civil penalty is \$12,083.

13       *Applicable Law:* Under OAR Chapter 340, Division 12, the formula for determining the  
14 amount of a civil penalty takes into consideration such factors as prior enforcement actions,  
15 whether the violation was repeated or on-going, the cause of the violation, the person's  
16 cooperativeness and any economic benefit gained by either delaying or avoiding the cost of  
17 compliance. The Department must first determine the class and magnitude of the violation to  
18 determine the base penalty. *OAR 340-012-0045.* The Department then increases or decreases the  
19 amount of the base penalty by application of the formula which is "BP = [(1 x BP) x (P + H + O  
20 + M + C)] + EB". *OAR 340-012-0145.*

21       The "EB" factor represents the approximate dollar sum of the economic benefit that could  
22 be gained through noncompliance, as calculated using the EPA BEN computer model. *OAR 340-*  
23 *012-0145.* The Department has discretion to not calculate the EB factor of the civil penalty  
24 formula if the EB factor is either de minimis or there is insufficient information on which to  
25 make an estimate of the costs of compliance. *OAR 340-012-0150(3).*

26       *ALJ's Findings of Fact:* The EB for violation #1 receives a value of \$10,994 for avoiding  
27 the costs of conducting line leak detector operational and line tightness testing in the amount of

1 \$225 on an annual basis and delaying \$3,900 to install a line leak detector. *See Findings of Fact*  
2 *#17 and #21, page 5, and page 20 of the Proposed and Final Order.*

3 *Respondent's Exceptions and the Department's Response:* Respondent argues that the  
4 Department abused its discretion in determining the amount of the civil penalty for violation #1,  
5 specifically in regards to the economic benefit portion of the penalty. An abuse of discretion  
6 occurs when an agency exercises its discretion in a manner that is: 1) outside the range of  
7 discretion committed to the agency by law; 2) inconsistent with agency rule, an officially-stated  
8 agency policy position, or a prior agency practice, if the inconsistency is not explained by the  
9 agency; or 3) otherwise in violation of a constitutional or statutory provision. *ORS 183.482(8)(b).*

10 First, Respondent argues that the Department abused its discretion for assessing EB when  
11 Respondent itself was not profitable. The calculation of EB in this instance is not in violation of  
12 a constitutional or statutory provision. There is no legal requirement that an entity realize any  
13 profit or be a profit-seeking entity for economic benefit to be appropriate.<sup>10</sup> The financial  
14 condition of an entity is not a factor in the Department's civil penalty formula. *See OAR 340-*  
15 *012-0145.* Respondent also failed to provide evidence that the penalty is inconsistent with an  
16 officially stated agency policy or prior agency practice. Respondent did not point to any past  
17 cases or an agency policy to support its contention that the Department cannot or should not  
18 assess the EB portion of the penalty formula when a person is not profitable. In fact, the law only  
19 allows the Department the discretion to not calculate the EB factor if the calculation is de  
20 minimis or there is insufficient information on which to make an estimate of the costs. *OAR 340-*  
21 *012-0150(3).* Neither of those circumstances is present in this case.<sup>11</sup> Finally, the EB portion of  
22 the penalty issued to Respondent is well within the range of authority provided to the  
23 Department. Oregon law authorizes the Department to issue a penalty of up to \$10,000 per day of  
24 violation of Oregon's statutes or rules. *ORS 468.130(1).* This violation was ongoing for over 20  
25 years, thus the \$11,294 civil penalty is clearly within the Department's authority.

26 <sup>10</sup> In fact, the BEN model allows the determination of an economic benefit for a not for profit entity and government  
27 entities.

<sup>11</sup> 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 #17 and #21, page 5 of the Proposed and Final Order.*

1 As a further note, Respondent's argument misconstrues the purpose of the EB portion of  
2 the civil penalty, which is twofold. One purpose is to put the entity in the same position as  
3 someone who did comply in a timely manner. The other equally important purpose is to deter  
4 potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs  
5 of compliance.<sup>12</sup> Basically, the economic benefit portion of the civil penalty formula is designed  
6 to make **all** entities financially indifferent to compliance and noncompliance. The U.S. Supreme  
7 Court has noted that deterrence is a primary purpose of a penalty<sup>13</sup> and that a penalty which fails  
8 to include sufficient economic benefit will fail to deter future violations.<sup>14</sup>

9 Secondly, Respondent argues that the Department abused its discretion for using the BEN  
10 computer model to calculate the economic benefit. The use of the BEN computer model in this  
11 instance is not in violation of a constitutional or statutory provision. ORS 468.130 directs the  
12 Commission to consider economic benefit in assessing a civil penalty. The Commission adopted  
13 OAR 340-012-0150 which allows the Department to use the BEN computer model to calculate  
14 the EB factor of the civil penalty formula. Respondent did not present any alternative to using  
15 the BEN computer model. Respondent failed to present evidence that using the BEN computer  
16 model is inconsistent with an officially stated agency policy or prior agency practice since  
17 Respondent has not pointed to any past cases where the Department has not used it. In fact, all of  
18 the testimony of the Department's employees confirmed that the Department has consistently  
19 used the BEN computer model in its enforcement cases over the years. The use of the BEN  
20 computer model is also within the range of authority provided to the Department under the  
21 applicable statutes and rules.

22 Next, Respondent argues that the Department abused its discretion for using the default  
23 values for the tax, inflation and discount rate. The use of the default values in this instance is not  
24 in violation of a constitutional or statutory provision. OAR 340-012-0150 states that the  
25 "model's standard values for income tax rates, inflation rate and discount rate shall be presumed  
26

27 <sup>12</sup> OAR 340-012-0026 sets forth the goals of the Department's enforcement program, one of which is general deterrence.

<sup>13</sup> See *Tull v. United States*, 481 U.S. 412 (1987).

<sup>14</sup> See *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, fn. 2 (2000).

1 to apply to all Respondents unless a specific Respondent can demonstrate that the standard value  
2 does not reflect the Respondent's actual circumstance." Although Respondent argues that the  
3 discount and inflation rates are excessive, as the ALJ determined, Respondent did not provide  
4 any evidence or alternative to the standard values that relates to Respondent's **actual**  
5 circumstances. In regards to the income tax rate, Respondent entered exhibits and testimony  
6 regarding the percentage of its income that it paid in state and federal taxes. As the Department's  
7 witnesses testified, the Department's policy is that an entity must provide its federal tax returns  
8 covering the entire period of the violation in order for the Department to determine if a  
9 modification of the federal tax rate used in the BEN model is appropriate. Unfortunately,  
10 Respondent has not provided the Department with federal tax returns for the entire period of the  
11 violation.<sup>15</sup> It is Respondent's responsibility to provide the necessary information to  
12 demonstrate that another value is more appropriate than the standard value. *OAR 340-012-*  
13 *0150(1)*. Respondent also failed to show that the use of the default values is inconsistent with an  
14 officially stated agency policy or prior agency practice as, again, Respondent has not pointed to  
15 any past cases where the Department has not used the default values. All of the testimony at the  
16 hearing showed that the Department has consistently used the default values in its enforcement  
17 cases over the years. The use of the default values is also within the range of authority provided  
18 to the Department under the applicable statutes and rules.

19 Respondent also argued that the Department used a default "time of delay." Dates are  
20 specific inputs into the BEN computer model. The law required Respondent to comply with the  
21 release detection requirements by December 22, 1990. *See page 10 of the Proposed and Final*  
22 *Order*. Respondent installed a line leak detector and conducted a line tightness test in October  
23 2010. *See Finding of Fact #17, page 5 of the Proposed and Final Order*. Respondent did not  
24 conduct a line tightness test prior to 2010. *See Finding of Fact #12, page 4 of the Proposed and*  
25  
26

27 <sup>15</sup> 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 information necessary to determine the appropriate  
federal tax rate.

1 *Final Order*. Based on the applicable law and the evidence, the correct date of violation was  
2 December 1990. Respondent corrected the violation in October 2010.<sup>16</sup>

3 IV. CONCLUSION

4 In conclusion, the Department requests that the Commission uphold the Proposed and Final  
5 Order, dated March 26, 2012, finding that (1) Respondent violated OAR 340-150-0410 and OAR  
6 340-150-0555(1)(d) (formerly OAR 340-150-0002 and OAR 340-150-0003 which adopted, by  
7 reference, 40 CFR Part 280) for which it is subject to a civil penalty in the amount of \$11,294; (2)  
8 Respondent violated OAR 340-150-0163 for which it is subject to a civil penalty in the amount of  
9 \$450; (3) Respondent violated OAR 340-150-0325(2) for which it is subject to a civil penalty in the  
10 amount of \$180; (4) Respondent violated OAR 340-150-0163(1)(a) for which it is subject to a civil  
11 penalty in the amount of \$150; and (5) Respondent violated OAR 340-012-0410(6) during an  
12 August 3, 2010 inspection.

13  
14  
15 Date

6/28/12

16 Susan M. Elworth

17 Environmental Law Specialist  
18  
19  
20  
21  
22  
23  
24  
25  
26

27 <sup>16</sup> In reality, the calculation is low since the BEN model will not allow a violation start date later than 17 years in the past. The calculation was based on a start date of January 1, 1993 over three years after the regulations required that Respondent install a line leak detector and conduct release detection testing (December 22, 1990).

June 1, 2012

Allan B. Bakalian  
Zeno Drake Bakalian P.S.  
4020 Lake Washington Blvd. NE, #100  
Kirkland, WA 98033

Re: Exceptions and brief for OAH Case No. 1102419/DEQ Case No. LQ/UST-NWR-10-248 in the matter of Burns-Johansen Oil Company

Dear Mr. Bakalian:

On May 29, 2012, the Oregon Environmental Quality Commission received your exceptions and brief for the above-referenced case.

Oregon Administrative Rules (OAR 340-011-0575) state that a representative of the Department of Environmental Quality may file an answering brief within 30 days from the filing of your exceptions, which must be received by 5 p.m. on June 28, 2012. The commission may extend any of the time limits contained in OAR 340-011-0575(5) if an extension request is made in writing and is filed with the Commission before the expiration of the time limit.

An answering brief is not required, and has no impact on whether an appeal moves forward. If an answering brief is filed, you will have 20 days from the date of filing to file a reply brief. A reply brief is not required, and has no impact on whether the appeal moves forward.

Once all briefs have been filed, this item will be set for commission consideration at a regularly scheduled commission meeting, and I will notify you of the date and location by certified mail. If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

  
Stephanie Caldera  
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY  
Susan Elworth, DEQ Environmental Law Specialist



811 SW Sixth Avenue  
Portland, OR 97204-1390  
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Page 29 of 49  
**ELWORTH Susan**

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**From:** Allan Bakalian [abakalian@zdblawn.com]  
**Sent:** Tuesday, May 29, 2012 5:09 PM  
**To:** CALDERA Stephanie  
**Cc:** ELWORTH Susan  
**Subject:** OAH 1102419, LQ/UST-10-248  
**Attachments:** ExceptionsBrief052912.pdf

Please see attached brief.  
Original sent via First Class Mail.

Allan Bakalian

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:  
BURNS-JOHANSON OIL COMPANY,  
An Oregon Corporation,  
  
Respondent.

RESPONDENT'S EXCEPTIONS  
AND BRIEF IN OPPOSITION TO  
PROPOSED FINAL ORDER  
  
No. LQ/UST-NWR-10-248

COMES NOW BURNS-JOHANSON OIL COMPANY ("Respondent"), by and through  
its attorneys Zeno Drake Bakalian P.S. and Allan B. Bakalian, and submits this Exceptions and  
Brief in Opposition to the Proposed Order in this matter issued on May 29, 2009, by the Office  
of Administrative Hearings. Respondents timely filed a Petition for Review of the Proposed  
Order on April 25, 2012.

**I. INTRODUCTION AND SUMMARY OF EXCEPTIONS**

This appeal is based upon several alleged errors of the Administrative Law Judge's (ALJ)  
Proposed Order that resulted in an improper civil penalty. The ALJ's Findings of Fact are

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 1

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1 detailed and well-written. However, Respondent takes exception to the conclusions and in  
2 particular, the \$12,083.00 civil penalty based upon the Department's August 23, 2011 Amended  
3 Notice of Civil Penalty Assessment and Order ("Amended Notice").

## 4 5 **II. LEGAL ISSUES**

6 This case involves a dispute over Respondent's compliance with the Environmental  
7 Protection Agency's (EPA) and DEQ's Underground Storage Tank (UST) regulations.  
8 Respondent disputes certain of the factual issues as well as the DEQ's application of its civil  
9 Enforcement Procedure and Civil Penalties at OAR 340-012-0026. Specifically, Respondent  
10 asserts that the Department improperly calculated the alleged civil penalties and that the  
11 principal deviation resulted from the Department's arbitrary and unsupported application of the  
12 "BEN" model in determining the so-called "economic benefit" realized from Respondent's  
13 alleged delayed compliance associated with installing a line leak detector on its pressurized UST  
14 fuel pipeline, OAR 340-012-0150.

## 15 16 17 **III. FACTS**

18 Respondent owns and operates a petroleum fuel storage facility located at 455 Industry  
19 Street, Astoria, OR. The facility was constructed and operated by two individuals, Mr. Burns  
20 and Mr. Johanson, who established the Burns-Johanson Oil Company. In the late 1970s, the  
21 Burns-Johanson Oil Company and the 455 Industry Street facility was acquired by Warren  
22 Bechtolt and Alice Codd. Warren Bechtolt passed away in 1989. Ms. Codd, who is now in her  
23 late 70s, continued to own the company and facility property; the petroleum business, consisting  
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RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 2

ZENO DRAKE BAKALIAN P.S.  
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1 of a commercial cardlock filling station and home heating oil storage facility, was operated by  
2 Niemi Oil Company, of which Ms. Codd is also an owner.

3 The Burns-Johanson Oil Company is a Subchapter S corporation and any company  
4 income was passed through and reported on the individual tax returns of Mr. Bechtolt and Ms.  
5 Codd. Burns-Johanson ceased filing taxes as a corporate entity in 2003. (Test. of Alice Codd  
6 and Steve Allen). DEQ conducted a UST compliance inspection at the Burns-Johanson facility  
7 on August 13, 2010. Previously, the Department conducted an inspection on February 11, 1999,  
8 and the U.S. Environmental Protection Agency conducted an inspection in October 2002. See  
9 Ex. R5&6. These inspections followed the EPA's 1998 UST rule revisions requiring cathodic  
10 protection, spill protection, insurance and other new requirements for UST operators.  
11

12 The Department's August 2010 inspection resulted in several alleged violations. The  
13 Amended Civil Penalty Assessment included:  
14

- 15 1) \$11,294 for failing to install release detection for piping and conducting line leak detector  
16 operation testing in violation of OAR 340-150-0410(2) and 0555(1)(d);
- 17 2) \$450 for failing to continuously maintain financial UST insurance in violation of OAR  
18 340-150-0163;
- 19 3) \$189 for failing to have the corrosion system inspected every three years in violation of  
20 OAR 340-150-0325(2);
- 21 4) \$150 for failure to post an Operating Certificate in violation of OAR 340-150-0163  
22

23 The total civil penalty assessed was thus \$12,083. Violations 2-4 are relatively minor and  
24 were disputed by Respondent as summarized below. They were also immediately corrected.  
25 Accordingly, there would be no appeal but for the \$11,294 civil penalty based upon alleged  
26 economic benefit to Respondent associated with the installation of a line leak detector.  
27  
28

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 3

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IV. ARGUMENT

There is little dispute regarding the facts underlying the four alleged violations. Respondent did present exhibits and testimony that disputed and/or mitigated the alleged violations 2, 3 and 4.

First, to the extent there was a lapse in Respondent's financial insurance – on paper – there was not necessarily a lapse in coverage. There is no dispute Respondent had financial UST insurance, it is only whether there was coverage during the change in insurers that resulted when Respondent's prior insurer got out of the UST insurance business. As a result, Respondent's insurance broker had to locate and find a new carrier, which it did. Coverage was in place shortly after the August 2010 inspection and to the extent there was a claim prior to that time, the previous insurance carrier would potentially have had liability under its policy tail provisions. In any event, the violation was temporary, unintended and insignificant. It would take more effort for Respondent to confirm the previous insurer was obligated to provide coverage during this so-called lapse than the alleged fine.

Second, Respondent regularly performed corrosion or cathodic protection inspections at this facility. Again, the issue is whether it met the DEQ's interpretation of the UST regulations. Indeed, Respondent performed corrosion tests between the 3<sup>rd</sup> and 4<sup>th</sup> years, and continuously every three years before and after. The confusion results from when DEQ determined the three year period began. The alleged violation elevates form over substance since the corrosion system testing was a most a few months beyond the 36 month testing requirement and the system has continuously passed the testing inspections.

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 4

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1 Third, the Operating Certificate was in the possession of the operator, who sought  
2 clarification where to post it at the facility, which consists of a vacant property with a metal  
3 overhead loading rack for dispensing the petroleum product to tanker trucks. There is no building  
4 or office at the facility. DEQ asserted the certificate could be posted on the loading rack itself,  
5 where it would be exposed to the elements along the Columbia River mouth. Respondent  
6 immediately complied.  
7

8  
9 Alleged violations 2-4 are thus minor, procedural and at best technical violations of the UST  
10 regulations. They did not result in any harm to the environment. Based on these facts, Respondent  
11 thus takes exception to Conclusions of Law 2, 3, 4 and 5  
12

13 Respondent also takes exception to Conclusions of Law 1 and 6, involving installing a line  
14 leak detector and the calculation and assessment of \$10,944 as the so-called "economic benefit" for  
15 Violation No. 1. This amount is in addition to the \$350 Base Penalty for failing to install a line leak  
16 detector, a Class I, minor magnitude violation in the Department's penalty matrix. See OAR 340-  
17 012-0067(1)(e) and (1)(j).  
18

19 The DEQ's application of the "Economic Benefit" or EB calculation formula in this case, is  
20 arbitrary, and an abuse of the agency's discretion. First, pursuant to OAR 340-012-0150(1) the EB  
21 is "the approximate dollar value" of the benefit gained and the costs avoided or delayed from  
22 noncompliance. Second, the EB or BEN model was developed by the EPA for settlement  
23 negotiations, not as an absolute formula for determining the civil penalty applicable to the alleged  
24 violation. DEQ's own regulations state that "the EB *may* be determined using the EPA's BEN  
25 computer model." OAR 340-12-0150(1) (emphasis added).  
26  
27  
28

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 5

ZENO DRAKE BAKALIAN P.S.  
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Kirkland, WA 98033  
(425) 822-1511

The Departments economic benefit rule is as follows:

**340-012-0150**

**Determination of Economic Benefit**

- (1) The Economic Benefit (EB) is the *approximate dollar value* of the benefit gained and the costs avoided or delayed (without duplication) as a result of the respondent's noncompliance. *The EB may be determined using the U.S. Environmental Protection Agency's BEN computer model.* Upon request of the respondent, the department will provide the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate are presumed to apply to all respondents unless a specific respondent can demonstrate that the standard value does not reflect that respondent's actual circumstance. *Upon request of the Respondent, the department will use the model in determining the economic benefit competent of a civil penalty.*
- (2) The department may make, for use in the applicable model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent. Economic benefit will be calculated without duplicating or double-counting the advantages realized by respondent as a result of its noncompliance.
- (3) The department need not calculate the EB if the department makes a reasonable determination that the EB is de minimis or if there is insufficient information reasonable available to the department on which to make an estimate under section (2) of this rule.

(Emphasis added)

At the hearing, Respondent's principal, Alice Codd, and accountant, Steve Allen, testified that Burns-Johanson was not a profitable company from 1993 through 2003 when it ceased filing taxes as an entity. DEQ's decision to apply the BEN model in this case was arbitrary because it was neither accurate nor reasonable. DEQ has essentially ignored that Burns-Johanson is a sole proprietorship and could not and cannot economically benefit from the alleged noncompliance. As a matter of policy, the BEN model is designed to recapture the economic benefit that a violator may have gained to prevent them from obtaining an unfair financial advantage. See 70 Fed. Reg. 50,326 (August 26, 2005). DEQ has unreasonably applied the BEN model to an

1 entity that has lost money for over ten years and has not gained any economic advantage. DEQ's  
2 decision to treat Burns-Johansen and Alice Codd the same as it would a multi-billion dollar  
3 profit oil company is unfounded, arbitrary and an abuse of the agency's discretion.

4  
5 The evidence submitted by Respondent, which included tax returns and testimony from  
6 its accountant, is that the alleged delay in not installing a line leak detector until October 2010  
7 did not result any actual economic benefit to the company. At best, the delay in installing this  
8 \$3,900 piece of equipment is the potential interest the company could gain if it had invested the  
9 discounted value of that money.

10  
11 It is important to recognize that Respondent immediately installed the line leak detector  
12 upon receiving notice from DEQ after its August 2010 inspection that it was necessary. It cost  
13 the company \$3,900 to install the line leak detector at that time. As noted in the ALJ's decision,  
14 both EPA and DEQ had jurisdiction over Respondent's facility until mid-2011 (FF 22). Further,  
15 both DEQ and EPA conducted inspections of the facility, in 1999 and 2003, during which they  
16 did not cite or notify Respondent for this violation. Respondent utilized SIR (statistical  
17 inventory records) to confirm the UST system was not leaking during this time. Neither DEQ  
18 nor EPA disputed the use of SIR.

19  
20 The ALJ ruled that DEQ was not equitably estopped from asserting, in calculating the EB  
21 for this violation, the time period preceding or following the DEQ and EPA inspections. That  
22 was error, because Respondent was misled by the DEQ and EPA inspection reports and the  
23 absence of any requirement or notice to install a line leak detector instead of using SIR.  
24 Contrary to the ALJ's decision, the fact that there was nothing in the EPA's 2003 Notice of  
25 Violation about the line leak detector that misled Respondent is not the issue – it is the absence  
26 of such notice in the Notice itself that was misleading to Respondent. Respondent's continued  
27 use of SIR for leak detection constitutes justified reliance on this "innocent" yet misleading  
28

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 7

ZENO DRAKE BAKALIAN P.S.  
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1 information. See *Swift & McCormick Metal Processors v. Durbin*, 117 Or.App 605, 608-609  
2 (1992).

3 Respondent notified DEQ exactly what it was doing with regard to leak detection, when  
4 it sent DEQ its completed UST survey in February 1999, after it upgraded its USTs. Respondent  
5 documented that it was performing SIR to calculate any leaks from its USTs and pipelines based  
6 upon OAR 340-150-0410(7), which authorizes alternative methods designed to detect releases  
7 from underground piping, set forth in OAR 340-150-0450 through OAR 340-150-0470, utilized  
8 by Respondent. DEQ did not object or otherwise notify Respondent it needed a line leak  
9 detector. Respondent is allowed to use SIR as a release detection method for both the gasoline  
10 and diesel USTs. OAR 340-150-0435. Respondent provided DEQ copies of its monthly SIR  
11 records for the gasoline and diesel UST systems during the August 3, 2010, inspection.  
12 If Respondent is required to obey the directions and commands of the DEQ and EPA inspectors,  
13 it is contradictory and disingenuous at best for DEQ (or the ALJ) to claim that Respondent  
14 cannot reasonably rely upon their inspection reports that did NOT cite this violation in 1999 or  
15 2003. That reliance was clearly to its detriment.  
16

17 The issue can further be refined in that Respondent is not so much challenging the  
18 alleged violation itself but the EB calculation of the penalty for such alleged violation. The  
19 remedy is to require DEQ to revise its EB calculation for this alleged violation using the actual  
20 factors and time periods applicable in this situation. The alleged penalty would be reduced  
21 almost ten times by simply by not including the period of time after DEQ's 1999 inspection, or at  
22 worst, EPA's 2003 inspection AND applying the actual EB factors applicable (such as the  
23 discount and tax rates) to Respondent rather than the default values which DEQ seeks to apply to  
24 Respondent. This is because the additional years of alleged noncompliance significantly and  
25 adversely affects the "O" and "EB" components of the civil penalty formula.  
26  
27  
28

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 8

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1 The ALJ's decision not to allow cross examination of DEQ's EB witness, or having him  
2 demonstrate the actual use of the BEN model using EPA's current version of the BEN model that  
3 was downloaded on a laptop computer, was also error. Respondent was denied an opportunity to  
4 learn exactly how DEQ utilized the mode.  
5

6 As noted, DEQ seeks to impose a \$10,944 fine on respondent based on the alleged  
7 economic benefit the company gained for delaying compliance from December 1990 to October  
8 2010. The discounted value of the 2010 line leak detector is approximately \$2200 (e.g., in 1990  
9 dollars). Thus, the department is seeking an additional 25% per year as the economic benefit  
10 (\$550 x 20 years=\$11,000) to come up with this number using the BEN model. Such a result is  
11 absurd, unreasonable, arbitrary and an abuse of discretion. The testimony and evidence at the  
12 hearing was that Burns-Johanson could not and did not benefit from the alleged delay because it  
13 did not have the \$2200 to invest elsewhere as the BEN model default values presume. Indeed,  
14 DEQ's BEN calculations result in a fiction that Respondent benefited \$550 per year for 20 years  
15 by delaying installation of a \$2200 line leak detector. This was confirmed by the testimony of  
16 Alice Codd and Steve Allen, the accountant. Burns-Johanson simply was not a profitable  
17 company and did not have any profit to invest let alone reap an \$11,000 benefit.  
18  
19

20 The Department's application of the model in this case is flawed. Burns-Johansson is a  
21 small family business, not a large corporation that employs accountants to depreciate pollution  
22 equipment and invest income in high interest bearing accounts. Burns-Johanson is a Subchapter  
23 S corporation that did not capitalize its UST equipment. It expensed it. These are all inputs into  
24 the BEN model, as is the tax rate, discount rate and time of delay. All of these inputs affect the  
25 EB. The Department failed to explain why or how it did not use these inputs or why it reverted  
26 to the default values when it had this information. Specifically, it was error for the hearing  
27 examiner to exclude Respondent's request to require the Department's witness who conducted  
28

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 9

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1 and ran the BEN model to run the model using the actual input values provided by Respondent at  
2 the hearing. Indeed, OAR 340-012-0150(1) requires that: "*Upon request of the Respondent, the*  
3 *department will use the model in determining the economic benefit competent of a civil penalty.*"  
4 Respondent has presented evidence that use of the actual input values results in a \$1,400, not  
5 \$10,944 economic benefit calculation. Ex R 17.  
6

7 As set forth in OAR 340-012-0150(3), DEQ is not required to calculate the EB if it  
8 makes a reasonable determination that the EB was de minimis or if cannot make a reasonable  
9 estimate of the benefits gained and the costs avoided or delayed by the respondent. That is  
10 exactly the case here. DEQ's admitted use of the BEN model default values, despite the  
11 testimony and documentation introduced by Respondent that such default values are not  
12 applicable, was an abuse of discretion pursuant to ORS 183.482(8)(b) because it is inconsistent  
13 with the penalty calculation rules. DEQ has failed to provide any citation for use of the default  
14 calculations in this case, a requirement which is noted in prior agency decisions. *In the Matter*  
15 *of: Fortress Holdings, L.L.C.*, WPM/SW-NWR-00-160 (Or. Env. Qual. Com., April 1, 2002).  
16

17 There is no hard and fast meaning for the phrase "abuse of discretion." *Far West*  
18 *Landscaping, Inc. v. Modern Merch., Inc.*, 287 Or 653, 664, 601 P2d 1237 (1979). As a result, a  
19 reviewing court must ask whether "the choice made is consistent with one or several objectives  
20 to be served by vesting discretion in the decision-maker, under circumstances pertinent to the  
21 decision to be made." *Liberty Northwest Ins. Corp.*, 164 Or App at 45.  
22

23 The ALJ's decision rests on the conclusion that DEQ "routinely uses the BEN model to  
24 calculate the economic benefit." Pg. 20. That does not justify DEQ's actions in this case and is  
25 precisely the reason the decision must be reversed and remanded: DEQ's routine use of the BEN  
26 model is flawed and arbitrarily penalizes small businesses than large corporations that can easily  
27 absorb the EB penalty and further actually do benefit from the delay in compliance.  
28

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER

PAGE - 10

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1 Notwithstanding the alleged Violations, and as documented by DEQ's inspection at the  
2 Facility, there is no evidence of any harm to the environment in this matter. DEQ failed to  
3 consider this and the other discretionary factors set forth in its civil penalty rules in determining  
4 and calculating the civil penalties for the alleged violation in this matter.  
5

6  
7 V. CONCLUSION

8 Respondents respectfully request that the ALJ's conclusions 1-6 be overturned, and the  
9 case remanded to DEQ for recalculation of the alleged civil penalties. In particular, the ALJ  
10 erred in upholding DEQ's economic benefit calculation for Violation 1, as there was simply no  
11 economic benefit to Respondent from the alleged violation. In the alternative, Respondent  
12 requests DEQ be ordered to recalculate the EB, using the time period 1990-1999, and the correct  
13 input values provided by Respondent regarding the tax rate, corporation, discount rate, expense  
14 and other accounting factors that are available in the BEN model formula.  
15  
16

17  
18 DATED this 29<sup>th</sup> day of May, 2012.  
19

20 ZENO DRAKE BAKALIAN P.S.

21  
22  
23 By:   
24 ALLAN B. BAKALIAN  
25 Attorney for Respondents  
26 OSB # 85134  
27  
28

RESPONDENT'S EXCEPTIONS AND BRIEF IN  
OPPOSITION TO PROPOSED FINAL ORDER


PAGE - 11

ZENO DRAKE BAKALIAN P.S.  
4020 Lake Washington Blvd. NE, Suite 100  
Kirkland, WA 98033  
(425) 822-1511

I certify that on May 29, 2012, I served a true copy of the foregoing **Respondent's Exceptions and Brief** via First Class Mail and E-Mail to:

Environmental Quality Commission  
c/o Stephanie Caldera  
811 SW Sixth Avenue  
Portland, OR 97204  
Caldera.stephanie@deq.state.or.us

Susan Elworth  
Department of Environmental Quality  
811 SW Sixth Ave.  
Portland, OR 97204



Mica Rabchuk-Wylie

BY CERTIFIED MAIL

April 30, 2012

Allan B. Bakalian  
Zeno Drake Bakalian P.S.  
4020 Lake Washington Blvd. NE, #100  
Kirkland, WA 98033

ENVIRONMENTAL  
QUALITY  
COMMISSION

Re: Petition for commission review of OAH Case No. 1102419/DEQ Case No. LQ/UST-NWR-10-248 in the matter of Burns-Johansen Oil Company

Dear Mr. Bakalian:

On April 25, 2012, the Oregon Environmental Quality Commission received your timely petition for review of the proposed order for the above-referenced case.

The proposed order and Oregon Administrative Rule 340-011-0575 set forth the process for commission review, including the requirement to file exceptions and briefs. You must file exceptions and a brief within 30 days from the filing of your request for commission review. Your exceptions must specify the findings and conclusions in the proposed order that you object to and alternative proposed findings. I have enclosed a copy of the applicable administrative rule.

To file your exceptions and brief, please mail these documents to: Oregon Environmental Quality Commission, c/o Stephanie Caldera, with a copy to Susan Elworth, both at 811 S.W. 6<sup>th</sup> Avenue, Portland, Oregon 97204. Your exceptions and brief must be received by 5 p.m. on Tuesday, May 29, 2012, or the commission may dismiss your petition for review.

Please note that this date is more than 30 days from your original filing; however, all DEQ office are closed Friday, May 25, 2012, for a mandatory furlough and closure, and will also be closed Monday, May 28, 2012, in honor of Memorial Day.

After both parties file their briefs, EQC will consider the briefs and hear arguments at a regularly scheduled commission meeting. I will notify you of the date and location of that meeting.

If you have any questions about this process, please call me at 503-229-5301. If you need additional time to file your exceptions and brief, you must request an extension of time in writing and make sure it arrives at the address listed above before May 29, 2012.

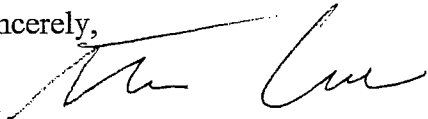


(over, please)

811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-5696

A9

Sincerely,

A handwritten signature in black ink, appearing to read 'Stephanie Caldera', written over a horizontal line.

Stephanie Caldera  
Assistant to the Oregon Environmental Quality Commission

Enclosure: OAR 340-011-0575

Cc: Susan Elworth, DEQ Environmental Law Specialist

## **Oregon Administrative Rules 340-011-0575**

### Review of Proposed Orders in Contested Cases

(1) For purposes of this rule, filing means receipt in the office of the director or other office of the department.

(2) Following the close of the record for a contested case hearing, the administrative law judge will issue a proposed order. The administrative law judge will serve the proposed order on each participant.

(3) Commencement of Review by the Commission: The proposed order will become final unless a participant or a member of the commission files, with the commission, a Petition for Commission Review within 30 days of service of the proposed order. The timely filing of a Petition is a jurisdictional requirement and cannot be waived. Any participant may file a petition whether or not another participant has filed a petition.

(4) Contents of the Petition for Commission Review. A petition must be in writing and need only state the participant's or a commissioner's intent that the commission review the proposed order. Each petition and subsequent brief must be captioned to indicate the participant filing the document and the type of document (for example: Respondents Exceptions and Brief; Department's Answer to Respondent's Exceptions and Brief).

(5) Procedures on Review:

(a) Exceptions and Brief: Within 30 days from the filing of a petition, the participant(s) filing the petition must file written exceptions and brief. The exceptions must specify those findings and conclusions objected to, and also include proposed alternative findings of fact, conclusions of law, and order with specific references to the parts of the record upon which the participant relies. The brief must include the arguments supporting these alternative findings of fact, conclusions of law and order. Failure to take an exception to a finding or conclusion in the brief, waives the participant's ability to later raise that exception.

(b) Answering Brief: Each participant, except for the participant(s) filing that exceptions and brief, will have 30 days from the date of filing of the exceptions and brief under subsection (5)(a), in which to file an answering brief.

(c) Reply Brief: If an answering brief is filed, the participant(s) who filed a petition will have 20 days from the date of filing of the answering brief under subsection (5)(b), in which to file a reply brief.

(d) Briefing on Commission Invoked Review: When one or more members of the commission wish to review the proposed order, and no participant has timely filed a Petition, the chair of the commission will promptly notify the participants of the issue that the commission desires the participants to brief. The participants must limit their briefs to those issues. The chair of the commission will also establish the schedule for filing of briefs. When the commission wishes to review the proposed order and a participant also

requested review, briefing will follow the schedule set forth in subsections (a), (b), and (c) of this section.

(e) Extensions: The commission or director may extend any of the time limits contained in section (5) of this rule. Each extension request must be in writing and filed with the commission before the expiration of the time limit. Any request for an extension may be granted or denied in whole or in part.

(f) Dismissal: The commission may dismiss any petition, upon motion of any participant or on its own motion, if the participant(s) seeking review fails to timely file the exceptions or brief required under subsection (5)(a) of this rule. A motion to dismiss made by a participant must be filed within 45 days after the filing of the Petition. At the time of dismissal, the commission will also enter a final order upholding the proposed order.

(g) Oral Argument: Following the expiration of the time allowed the participants to present exceptions and briefs, the matter will be scheduled for oral argument before the commission.

(6) Additional Evidence: A request to present additional evidence must be submitted by motion and must be accompanied by a statement showing good cause for the failure to present the evidence to the administrative law judge. The motion must accompany the brief filed under subsection (5)(a) or (b) of this rule. If the commission grants the motion or decides on its own motion that additional evidence is necessary, the matter will be remanded to an administrative law judge for further proceedings.

(7) Scope of Review: 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 137-003-0655 and 137-003-0665.

(8) Service of documents on other participants: All documents required to be filed with the commission under this rule must also be served upon each participant in the contested case hearing. Service can be completed by personal service, certified mail or regular mail.

Stat. Auth.: ORS 183.341 & 468.020

Stats. Implemented: ORS 183.460, 183.464 & ORS 183.470

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 115, f. & ef. 7-6-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0132 by DEQ 18-2003, f. & cert. ef. 12-12-03

Page 46 of 49  
**ELWORTH Susan**

---

**From:** Allan Bakalian [abakalian@zdblawn.com]  
**Sent:** Wednesday, April 25, 2012 2:16 PM  
**To:** ELWORTH Susan  
**Subject:** Notice of Appeal  
**Attachments:** NoticeofAppeal042512.pdf

Attached is a notice of appeal in the Burns Johanson matter.  
Please let me know if you have any questions.

Allan

Allan Bakalian

**ZENO DRAKE BAKALIAN P.S.**  
4020 Lake Washington Blvd. N.E., Suite 100  
Kirkland, WA 98033  
(425) 822-1511, ext. 224 - tel  
(425) 985-6527 - mobile  
(425) 822-1411 - fax

[abakalian@zdblawn.com](mailto:abakalian@zdblawn.com)

Please visit our new website at [ZDBLAW.COM](http://ZDBLAW.COM)

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AVO

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
FOR THE  
ENVIRONMENTAL QUALITY COMMISSION

IN THE MATTER OF:

BURNS-JOHANSON OIL COMPANY,  
An Oregon Corporation

Respondent.

RESPONDENTS' PETITION FOR  
COMMISSION REVIEW

**OAH Case No.: 1102419**  
**Agency Case No.: LQ/UST-NWR-**  
**10-248**

COMES NOW Burns-Johanson Oil Company ("Respondent"), by and through its attorneys Zeno Drake Bakalian P.S. and Allan B. Bakalian, and submit this Petition for Commission Review of the Proposed and Final Order in this matter issued on March 26, 2012 by the Office of Administrative Hearings.

Respondents' written exceptions and brief will be separately filed in accordance with OAR 340-011-0575.

RESPONDENTS' PETITION FOR COMMISSION  
REVIEW-- Page 1

ZENO DRAKE BAKALIAN P.S.  
4020 Lake Washington Blvd. N.E. Suite 100  
Kirkland, WA 98033  
(425) 822-1511

1  
2 DATED this 25 day of April, 2012.  
3  
4

5 ZENO DRAKE BAKALIAN P.S.  
6

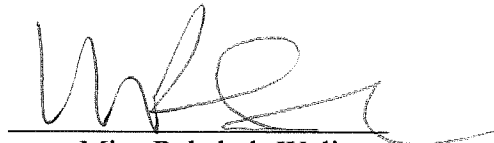
7 By:   
8

9 ALLAN B. BAKALIAN  
10 Attorney for Respondents  
11 OSB # 85134  
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I certify that on April 25, 2012, I served a true copy of the foregoing **Respondent's Petition for Commission Review** via First Class Mail, Facsimile and E-Mail to:

Environmental Quality Commission  
c/o Dick Pederson, Director, DEQ  
811 SW Sixth Avenue  
Portland, OR 97204  
F: (503) 229-6762

Susan Elworth  
Department of Environmental Quality  
811 SW 6<sup>th</sup> Ave.  
Portland, OR 97204

  
Mica Rabchuk-Wylie

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
ENVIRONMENTAL QUALITY COMMISSION**

IN THE MATTER OF: ) **PROPOSED AND FINAL ORDER**  
)  
**BURNS-JOHANSON OIL COMPANY,** )  
**An Oregon Corporation,** )  
Respondent. ) OAH Case No.: 1102419  
) Agency Case No.: LQ/UST-NWR-10-248

**HISTORY OF THE CASE**

On December 30, 2010, the Department of Environmental Quality for the State of Oregon (DEQ) issued a Notice of Civil Penalty Assessment and Order to Comply (Notice) to Burns-Johanson Oil Company (Respondent). On January 19, 2011, DEQ received Respondent's answer and request for hearing. DEQ referred the hearing request to the Office of Administrative Hearings (OAH) on July 21, 2011.

The OAH assigned the case to Senior Administrative Law Judge (ALJ) Monica A. Whitaker. The matter was scheduled for a hearing on October 25, 2011, but postponed at DEQ's request. The matter was rescheduled for hearing on January 25, 2012.

A hearing convened at DEQ's office in Portland, Oregon, on January 25, 2012.<sup>1</sup> Susan Elworth, a DEQ Environmental Law Specialist, represented DEQ. Attorney Allan Bakalian represented Respondent. Bob McCoy, a DEQ Underground Storage Tank Inspector, and Bryan Smith, a DEQ Environmental Law Specialist, testified on DEQ's behalf. Steve Allen, Respondent's Certified Public Accountant, Alice Codd, and Susan Elworth, testified on Respondent's behalf.

The evidentiary record closed at the conclusion of the hearing. ALJ Whitaker left the record open until February 8, 2012 for DEQ to file its closing argument and until February 22, 2012 for Respondent to file its closing argument. DEQ filed its closing argument on February 6, 2012. At Respondent's request, ALJ Whitaker extended Respondent's filing deadline to March 14, 2012. The record closed on March 14, 2012, after receipt of Respondent's closing argument.

**ISSUES**

1. Whether Respondent violated 40 CFR 280.40, *former* OAR 340-150-0002 and OAR 340-150-0003, and *current* OAR 340-150-0410 and OAR 340-150-0555(1)(d) by failing to install and operate a method of release detection for piping and by failing to conduct annual leak line detector operation testing and line tightness testing.

---

<sup>1</sup> Prior to the hearing, ALJ Whitaker denied Respondent's request to postpone the hearing.

2. Whether Respondent violated OAR 340-150-0163(1)(i) by failing to continuously maintain a required financial responsibility mechanism.
3. Whether Respondent violated OAR 340-150-0325(2) by failing to have the corrosion protection system inspected and tested for proper operation by a qualified cathodic protection tester at least every three years.
4. Whether Respondent violated OAR 340-150-0163(1)(a) by failing to post Respondent's annual operating certificate in a conspicuous location which was clearly visible at the Facility.
5. Whether Respondent violated OAR 340-150-0410(6) by failing to provide a method for DEQ to readily determine compliance with the requirements set forth in DEQ's administrative rule.
6. If any or all of the above violations are established, what is the appropriate civil penalty?

### **EVIDENTIARY RULINGS**

Exhibits A1 through A16, offered by DEQ, were admitted into the record without objection.

Respondent's Exhibits R1 through R3, R6 through R14, R16, and R27 were admitted into the record without objection. DEQ's objections to the admission of Respondent's Exhibits R4, R5, R15, R17, R19, and R20 through R26 were overruled and the Exhibits were admitted into the record. DEQ's objection to Respondent's Exhibit R18 was sustained, and Respondent subsequently withdrew Exhibit R18.

### **FINDINGS OF FACT**

1. Respondent owns and operates a facility with underground storage tanks (USTs) located at 455 Industry Street in Astoria, Oregon (the Facility). (Ex. A16 at 1; test. of Codd.) The USTs were installed in approximately 1975. (See Ex. A of Ex. A14.) Respondent, an S-Corporation, last paid federal income taxes on revenue in 2003. (Test. of Allen.)
2. In 1986, DEQ issued Respondent a UST Program Temporary Permit for five USTs at the Facility. (Ex. A16 at 1.)
3. In 1999, Respondent decommissioned two of its USTs. (Ex. A16 at 1.) Since February 17, 1999, Respondent has been the permittee for its remaining three USTs under General Permit Operating Certificate for facility number 7375. (*Id.*)
4. On February 11, 1999, DEQ conducted a UST inspection at the Facility. As a result, DEQ issued a Notice of Noncompliance to Respondent on March 10, 1999. The Notice of

Noncompliance listed, in relevant part, the following corrective measures necessary at the Facility:

- Tanks #BKKAC & BKKAD (550 gasoline), *Deficiency-spill/overflow, cathodic protection, financial responsibility (no upgrade checklist/report provided concerning Corrpro work on these tanks).*
- By **August 11, 1999**, perform tank and piping integrity tests on all your UST systems that have been upgraded, or are influenced by, the newly installed cathodic protection and provide the Department with copies of the completed integrity tests.

(Ex. R5; emphasis in original.)

5. On July 11, 2002, the Environmental Protection Agency (EPA) conducted a UST inspection at the Facility. (Ex. R6 at 1.) The EPA noted, in writing, the following item at the Facility that was noncompliant:

- Failure to provide copy of current "Certificate of Insurance" for covered facilities. (40 CFR 280.111(a)).

The EPA provided Respondent until August 11, 2002 to provide it with a current certificate of insurance. (*Id.*)

6. By letter dated February 25, 2005, the EPA notified Respondent that it had failed to provide the EPA with a certificate of insurance after the July 11, 2002 Facility inspection. (Ex. R8.)

7. By letter dated November 15, 2005, DEQ notified Respondent that it had violated DEQ's rules by failing to establish or maintain a financial responsibility mechanism. (Ex. R9.)

8. On July 22, 2010, DEQ UST Inspector Bob McCoy notified Respondent's attorney via email regarding a scheduled inspection at the Facility. (Test. of McCoy; Ex. A1.) The email stated, in part:

UST records DEQ will need to see for the inspection could include (depending on site design) UST insurance, equipment type and manufacturer, line leak tests, (or confirmation of safe suction) line leak detector tests, tank leak tests, the last two cathodic protection tests for each facility, 60 day cathodic protection records, proof of cathodic protection design by an expert, steel assessment records related to lining or cathodic protection, a printout of the setup for any automatic tank gauge, leak alarm history, \* \* \*.

(Ex. A1 at 1; test. of McCoy.)

9. The Facility consists of three USTs and associated piping. The piping transporting diesel to the dispenser is pressurized piping. The piping transporting gasoline to the dispenser is suction piping. The USTs and piping are protected from corrosion by an impressed current system. (Test. of McCoy; Exs. A3, A9, and A13.)

10. On August 3, 2010, Mr. McCoy and another DEQ UST inspector, Greg Toran, inspected the Facility. (Test. of McCoy.) The Facility's on-site equipment included three single-wall steel tanks, including two manifold diesel tanks, a bulk loading rack, two dispensers which were wrapped in plastic, and an impressed current rectifier. (Ex. A9; test. of McCoy.)

11. During the inspection, DEQ requested that Respondent provide proof of release detection monitoring. In response, Respondent provided DEQ with 12 months of statistical inventory reconciliation (SIR). (Test. of McCoy.)

12. During the inspection, the Facility's diesel piping did not have a leak line detector installed. (Test. of McCoy; Ex. A6.) Also during the inspection, Respondent was unable to provide DEQ with triannual line tightness testing results for the suction piping, or with documentation or another method of verification. (Test. of McCoy.) Respondent also could not provide DEQ with any line tightness test results since it became the owner and permittee of the USTs. (*Id.*)

13. During the inspection, Respondent could not provide DEQ with a current financial responsibility mechanism. (Test. of McCoy.) After the inspection, Respondent provided DEQ with a UST Financial Responsibility Certificate of Insurance with an effective date of August 2, 2010. (Ex. A4; test. of McCoy.) Respondent's prior financial responsibility mechanism had expired on June 8, 2010. (Ex. A2 at 1.)

14. During the inspection, Respondent's operating certificate was not posted. Rather, the operating certificate was located inside a binder. After the inspection, Respondent posted the operating certificate in a visible area. (Test. of McCoy.)

15. During the inspection, DEQ requested copies of the last two corrosion inspection and test results for the Facility. Respondent provided inspection and test results for the years 2005 and 2009. (Test. of McCoy; Exs. A5 and A9.)

16. On September 29, 2010, Mr. McCoy mailed a warning letter to Respondent outlining the violations from the Facility inspection of August 2, 2010. (Ex. A10.) The letter also listed five corrective actions Respondent needed to implement at the Facility, including:

1. Install a leak line detector on the pressure piping at the rack by October 25, 2010.
2. Maintain financial responsibility mechanism without letting it lapse.
3. Post current operating certificate immediately in a conspicuous location for viewing by fuel suppliers.

4. Perform line tightness tests on all lines by October 25, 2010.

5. Perform cathodic protection tests every three years.

(*Id.* at 2.)

17. In October 2010, Respondent installed a leak line detector on the pressurized piping which runs from the diesel portion of the loading rack to the USTs. Respondent paid \$3,900 for the installation. (Exs. A7, A9, and A11.)

18. On December 6, 2010, DEQ received from Respondent an Underground Storage Tank System Repair and Replacement Report and Checklist (Report). (Ex. A11.) In the Report, Respondent stated, "By request of DEQ we installed line leak detector and valves to allow testing of the line from tank to the riser from the loading rack. (*Id.* at 2.) The Report also included documentation that a passing line test had been performed at the Facility. (*Id.* at 3.)

19. On approximately January 28, 2011, Respondent provided DEQ with proof that the Facility's gasoline piping was configured with safe suction. (Test. of McCoy; Ex. A8.)

20. Since the August 2010 inspection, Respondent has not provided DEQ with any line tightness testing results or results of another acceptable release detection method. (Test. of McCoy.)

21. The typical cost for an annual line leak detector operational and line tightness test is \$225. The typical cost for a corrosion protection inspection and test is \$155. (Test. of McCoy.)

22. In February 2003, DEQ adopted its own regulations, which are modeled after the EPA's Cod of Federal Regulations (CRFs). Until approximately mid-2011, both DEQ and the EPA had jurisdiction over USTs located in Oregon. (Testimony of McCoy.)

23. DEQ determines the amount of a civil penalty by taking into consideration the following factors: a) the class of the violation; b) the magnitude of the violation; c) the base penalty for the violation; d) the P, H, O, M, and C values<sup>2</sup>; and e) the economic benefit (EB). (Test. of Smith.)

24. The EB portion of the civil penalty formula is the monetary benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. (Ex. A12 at 1; test. of Smith.)

25. DEQ generally relies on the EPA's "BEN" computer model to determine economic benefit. (Test. of Smith.) The BEN model relies on income-tax rates, inflation rates, and

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<sup>2</sup> Pursuant to OAR 340-012-0045(2)(d), these values represent the following: P = prior significant actions, H = history in correcting prior significant actions, O = repeated or ongoing violation, M = mental state of the violator and C = efforts to correct.

discount rates. The model allows the operator to input particular rates, but in the absence of operator input, the BEN model uses standard values based on the years of the violation, the state where the violation occurred and the entity's legal and profit status (*e.g.* C-corporation, other for profit, non-profit, municipality, or federal facility). The BEN model calculated inflation rates from the Plant Cost Index (PCI), published by the magazine *Chemical Engineering* and from the Consumer Price Index (CPI). (Ex. A12 at 2 and 3; test. of Smith.) Whether or not an entity realizes a profit does not impact DEQ's EB calculation. (Test. of Smith.)

### CONCLUSIONS OF LAW

1. Respondent violated 40 CFR 280.40, *former* OAR 340-150-0002 and OAR 340-150-0003, and *current* OAR 340-150-0410 and OAR 340-150-0555(1)(d) by failing to install and operate a method of release detection for piping and by failing to conduct annual leak line detector operation testing and line tightness testing.
2. Respondent violated OAR 340-150-0163 by failing to continuously maintain a financial responsibility mechanism.
3. Respondent violated OAR 340-150-0325(2) by failing to have the corrosion protection system inspected and tested for proper operation by a qualified cathodic protection tester at least every three years.
4. Respondent violated OAR 340-150-0163(1)(a) by failing to post Respondent's annual operating certificate in a conspicuous location clearly visible at the Facility.
5. Respondent violated OAR 340-150-0410(6) by failing to provide a method for DEQ to readily determine compliance with the requirements set forth in DEQ's administrative rule.
6. The appropriate civil penalty is \$12,083.

### OPINION

DEQ has alleged multiple violations of its UST regulations. DEQ has the burden of proof to establish those allegations by a preponderance of the evidence. ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

## **Violations**

### **1. Failure to install and operate a method of release detection piping, failure to conduct annual leak line detector operational testing and line tightness testing:**

OAR 340-150-0400 provides, in relevant part:

(1) An owner and permittee of petroleum UST systems must provide a method of release detection that:

(a) Can detect a release from any portion of the UST and the underground piping that routinely contains a regulated substance[.]

OAR 340-150-0410 provides, in relevant part:

(1) For underground piping that routinely contains a regulated substances [sic], an owner and permittee of a petroleum UST system must provide release detection which meets the requirements of this rule.

(2) Pressurized piping. For underground piping that conveys regulated substances under pressure, an owner and permittee must insure that the piping is equipped with an automatic line leak detector that alerts an owner and permittee to the presence of a leak by restricting or shutting off the flow of regulated substances through underground piping or by triggering an audible or visual alarm. Interstitial monitoring sensor systems or stand alone "sump" sensors are not an acceptable alternative for a line leak detector. In addition,

(a) The line leak detector must be approved by a national organization (e.g., the National Work Group on Leak Detection);

(b) The line leak detector must be capable of detecting a leak of three gallons per hour at ten pounds per square inch line pressure within one hour; and

(c) An annual test of the operation of the line leak detector must be conducted in accordance with the manufacturer's requirements.

(3) In addition to the requirements of section (2) of this rule, an owner and permittee with pressurized piping must conduct an annual line tightness test that can detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure. Interstitial monitoring sensors may replace the annual line tightness test if:

(a) The equipment is designed, constructed and installed to monitor all portions of the underground piping that routinely contains a regulated substance; and

(b) The requirements for interstitial monitoring (OAR 340-150-0465) are met.

(4) Suction piping. For underground piping that conveys a regulated substance under suction (i.e., piping that operates at less than atmospheric pressure), an owner and permittee must check the piping for the presence of air in the pipeline in accordance with the **National Fire Protection Association standard NFPA, 329 "Recommended Practices for Handling Releases of Flammable and Combustible Liquids and Gases"** Chapter 5, Release Detection of Tanks and Piping, subsection 5-2.3.2(b), if any of the following indicator conditions are observed by any person dispensing a regulated substance:

(a) If there are indications of air in the pipeline or other unusual operating conditions are observed (refer to **National Fire Protection Association standard NFPA, 329 subsection 5-2.3.2(a)** for specific indicators), the pipeline check valve should be inspected to determine if it is seated tightly. The check valve must be repaired, replaced or sealed off as appropriate depending on the results of the inspection; and

(b) The requirements of OAR 340-150-0350 through 340-150-0354 must be met for any repair, modification or replacement actions taken to correct a problem.

(5) In addition to the requirements of section (4) of this rule, an owner and permittee of suction piping must conduct a line tightness test at least once every three years in accordance with manufacturers requirements.

(6) Release detection is not required for suction piping that is designed and constructed to meet the following standards:

(a) The below grade underground piping operates at less than atmospheric pressure;

(b) The below grade underground piping is sloped so that the contents of the pipe will drain back into the UST if the suction is released;

(c) Only one check valve is present in each suction line;

(d) The check valve is located directly below and as close as practical to the suction pump; and

(e) A method is provided that allows the department to readily determine compliance with this section of the rule.

(7) In lieu of conducting line tightness tests on either pressurized or suction piping, an owner and permittee may conduct monthly monitoring by one of the applicable release detection methods described in OAR 340-150-0450 through 340-150-0470, if the method is designed to detect a release from any portion of the underground piping that routinely contains a regulated substance.

(8) An owner and permittee must retain at a minimum the last completed line test, line leak detector test or the most current 12 consecutive months of release detection records for piping.

(9) An owner and permittee must report to the department any leak test results or other observations or results indicating the possibility of a release within 24 hours as a suspected release (OAR 340-150-0500) and immediately begin investigation in accordance with 340-150-0510.

(Emphasis in original.)

OAR 340-150-0555 provides, in part:

(1) An owner and permittee must comply with all release detection requirements for a new or existing UST system or permanently close the UST system by the following schedule:

\* \* \* \* \*

(d) For UST systems installed between 1975 and 1979:

(A) December 22, 1990, for pressurized piping.

(B) December 22, 1992, for tanks and suction piping.

In 1988, the EPA adopted 40 CFR Part 280, titled "General requirements for all UST systems." From 1989 until 2003, DEQ adopted the CFRs by reference, but with some changes. *See former* OAR 340-150-0002 and OAR 340-150-0003.<sup>3</sup> In February 2003, DEQ adopted its

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<sup>3</sup> *Former* OAR 340-150-0002 provided:

Except as otherwise modified or specified by these rules, the rules and regulations governing the technical standards, corrective action, and financial responsibility requirements for owners and operators of underground storage tanks, prescribed by the United States Environmental Protection Agency in Title 40 CFR, Part 280, Subparts A, B, C, D, E, F, G, and H, amendments thereto promulgated prior to October 30, 1988 and Oregon rules listed in OAR 340-150-0003 are adopted and prescribed by the Commission to be observed by all persons subject to ORS 466.706 through 466.835, 466.994, and 466.995.

*Former* OAR 340-150-0003 provides, in relevant part:

own regulations, which are modeled after the CFRs pertaining to UST systems. Until 2011, both DEQ and the EPA had jurisdiction over USTs located in Oregon. (Testimony of McCoy.)

The Facility's USTs were installed in approximately 1975. 40 CFR 280.40 required that all existing UST systems installed between 1975 and 1979 comply with the release detection requirements for pressurized piping by December 22, 1990. 40 CFR 280.41(b), as adopted by *former* OAR 340-150-0003(19), required that pressurized piping have a method of release detection that included both a leak line detector that met the requirements set forth in 40 CFR 280.44(a) and annual line tightness testing that met the technical requirements in 40 CFR 280.44(b), or daily monitoring under 40 CFR 280.44(c) by any of the methods provided for in 40 CFR 280.43(e) through (h).<sup>4</sup>

The evidence establishes that at no time prior to the August 2010 inspection did Respondent install a line leak detector. Respondent did not establish that it had, at any time prior to the August 2010 inspection, conducted line tightness testing. Respondent also failed to establish that it implemented any methods specified in 40 CFR 280.43(e) through (h) prior to February 2003 or OAR 340-150-0450 through 340-150-0470 after February 2003.

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In addition to the regulations and amendments promulgated prior to October 30, 1998, as described in OAR 340-150-0002, the following rules substituting new language in lieu of Title 40 CFR Part 280, Subparts A, B, C, D, E, F, G, and H are adopted and prescribed by the Commission to be observed by all persons subject to ORS 466.706 through 466.835, 466.994 and 466.995 with the following exceptions:

\* \* \* \* \*

(19) The following language is substituted in lieu of 40 CFR 280.41(b)(1)(ii):  
Have an annual line tightness test conducted in accordance with §280.44(b) or have daily monitoring conducted in accordance with §280.44(c).

<sup>4</sup> The methods listed in 40 CFR 280.43 (e) through (h) included:

(e) Vapor monitoring. \* \* \*.

(f) Ground-water monitoring. \* \* \*.

(g) Interstitial monitoring. \* \* \*.

(h) Other methods. Any other types of release detection method, or combination if methods, can be used if:

(1) It can detect a 0.2 gallon per hour leak rate or a release of 150 gallons within a month with a probability of detection of 0.95 and a probability of false alarm of 0.05;  
or

(2) The implementing agency may approve another method if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in paragraphs (c) through (h) of this section. \* \* \*.

At the hearing, Respondent argued that it complied with DEQ's requirements because it conducted SIR testing as a release detection method on the Facility's pressurized piping. However, SIR testing is not listed as an approved method for release detection for pressurized piping in either the applicable CFRs or OARs. There is no evidence that DEQ approved SIR testing as an acceptable alternate method Respondent could use. Therefore, Respondent did not prove that it provided DEQ with any documentation that it conducted tests by any of the methods set forth in 40 CFR 280.43(e) through (h) prior to 2003, or *current* OAR 340-150-0450 through 340-150-0470 after 2003.

DEQ established that Respondent failed to install and operate a method of release detection for piping and failed to conduct annual leak line detector operation testing and line tightness testing, in violation of 40 CFR 280.40 and OAR 340-150-0410 and OAR 340-150-0555(1)(d).

**2. Failure to continuously maintain a required financial responsibility mechanism:**

OAR 340-150-0163 provides, in relevant part:

(1) To maintain compliance with the general permit registration certificate for operation, the permittee must operate and maintain the UST system in accordance with the following performance standards and requirements:

\* \* \* \* \*

(i) Continuously maintain a financial responsibility mechanism for petroleum UST systems (OAR chapter 340, division 151)[.]

DEQ alleged that Respondent failed to continuously maintain a financial responsibility mechanism for its UST systems. The evidence shows that Respondent's financial responsibility mechanism expired on June 8, 2010, and that its new financial responsibility mechanism did not take effect until August 2, 2010. DEQ established that Respondent failed to continuously maintain a financial responsibility mechanism for its USTs, in violation of OAR 340-150-0163(1)(i), for approximately two months.

**3. Failure to have corrosion protection system inspected and tested for proper operation by a qualified cathodic protection test at least every three years:**

OAR 340-150-0325 provides, in relevant part:

(2) An owner and permittee must have the corrosion protection system inspected and tested for proper operation by a qualified cathodic protection tester licensed by the department (OAR chapter 340, division 160), except as provided by 340-150-0156, in accordance with the following schedule:

(a) Within six months of installation; and

(b) At least once every three years thereafter.

Respondent provided corrosion protection system inspection test reports for the years 2005 and 2009. OAR 340-150-0325(2)(b) requires that the corrosion protection system be inspected and tested for proper operation by a qualified cathodic protection tester licensed by the department at least once every three years. Respondent did not present any evidence to show that a test was performed between the years 2005 and 2009, a four-year period. Therefore, Respondent violated OAR 340-150-0325(2)(b).

**4. Posting annual operating certificate in a conspicuous location clearly visible at the Facility:**

OAR 340-150-0163 provides, in relevant part:

(1) To maintain compliance with the general permit registration certificate for operation, the permittee must operate and maintain the UST system in accordance with the following performance standards and requirements:

(a) The valid annual operation certificate must be posted in a conspicuous location at the UST facility clearly visible to distributors depositing regulated substances into the UST (OAR 340-150-0150);

The evidence establishes that during the August 2010 inspection, Respondent did not have its operating certificate posted at the Facility. Rather, the Facility's operating certificate was located inside a binder. OAR 340-15-0163(1)(a) requires that the operation certificate be posted in a conspicuous location at the UST facility clearly visible to distributors. Therefore, Respondent violated OAR 340-150-00163(1)(a).

**5. Failure to provide a method for DEQ to readily determine compliance:**

OAR 340-150-0410(6) provides:

Release detection is not required for suction piping that is designed and constructed to meet the following standards:

\* \* \* \* \*

(e) A method is provided that allows the department to readily determine compliance with this section of the rule.

During the August 2010 inspection, Respondent was unable to show that the Facility's suction piping met the requirements for "safe suction." Respondent argued that during the inspection, DEQ failed to request that Respondent demonstrate that the suction piping met the requirements of OAR 340-150-0410(6). However, Respondent did not provide any evidence to contradict Mr. McCoy's firsthand testimony. The evidence establishes that Respondent failed to provide DEQ with a method that allowed DEQ to readily determine Respondent's compliance

with OAR 340-150-0410(6). Therefore, Respondent violated the requirements of OAR 340-150-0410(6)(e).

## **6. Civil Penalties**

OAR 340-012-0045 sets forth the criteria for calculating civil penalties as follows:

Except as provided in OAR 340-012-0038(3), in addition to any other liability, duty, or other penalty provided by law, the department may assess a civil penalty for any violation. Except for civil penalties assessed under 340-012-0155(2), the department determines the amount of the civil penalty using the following procedures:

- (1) The classification of each violation is determined by consulting OAR 340-012-0053 to 340-012-0097;
- (2) The magnitude of the violation is determined as follows:
  - (a) The selected magnitude categories in OAR 340-012-0135 are used.
  - (b) If a selected magnitude is not specified in OAR 340-012-0135, or if information is not reasonably available to determine which selected magnitude applies, 340-012-0130 is used to determine the magnitude of the violation.
  - (c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.
  - (d) The base penalty is adjusted by the application of aggravating or mitigating factors (P = prior significant actions, H = history in correcting prior significant actions, O = repeated or ongoing violation, M = mental state of the violator and C = efforts to correct) as set forth in OAR 340-012-0145.
  - (e) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.
- (2) The results of the determinations made in section (1) are applied in the following formula to calculate the penalty:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$ .
- (3) In addition to the factors listed in section (1) of this rule, the director may consider any other relevant rule of the commission in assessing a civil penalty and will state the effect that rule had on the penalty amount.

The values of the various aggravating or mitigating factors are set forth in OAR 340-012-0145 which provides, in relevant part:

(1) Each of the aggravating or mitigating factors is determined, as described below, and then applied to the civil penalty formula in OAR 340-012-0045(2).

(2) "P" is whether the respondent has any prior significant actions (PSAs). A violation becomes a PSA on the date the first FEA in which it is cited is issued.

(a) Except as otherwise provided in this section, the values for "P" and the finding that supports each are as follows:

(A) 0 if no PSAs or there is insufficient information on which to base a finding under this section.

(B) 1 if the PSA included one Class II violation or two Class III violations.

(C) 2 if the PSA (s) included one Class I violation or Class I equivalent.

(D) For each additional Class I violation or Class I equivalent, the value of "P" is increased by 1.

(b) The value of "P" will not exceed 10.

(c) If any of the PSAs were issued under ORS 468.996, the value of "P" will be 10.

(d) In determining the value of "P," the department will:

(A) Reduce the value of "P" by:

(i) 2 if all the formal enforcement actions in which PSAs were cited were issued more than three years before the date the current violation occurred.

(ii) 4 if all the formal enforcement actions in which PSAs were cited were issued more than five years before the date the current violation occurred.

(B) Include the PSAs:

(i) At all facilities owned or operated by the same violator within the state of Oregon; and

(ii) That involved the same media (air, water or land) as the violations that are the subject of the current FEA.

(e) In applying subsection (2)(d)(A), the value of "P" may not be reduced below zero.

(f) PSAs that are more than ten years old are not included in determining the value of "P."

(3) "H" is the respondent's history of correcting PSAs.

(a) The values for "H" and the finding that supports each are as follows:

(A) -2 if the Respondent corrected all violations cited as PSAs.

(B) -1 if the violations were uncorrectable and the respondent took reasonable efforts to minimize the effects of the violations cited as PSAs;  
or

(C) 0 if there is no prior history or if there is insufficient information on which to base a finding under paragraphs (3)(a)(A) or (B).

(b) The sum of values for "P" and "H" may not be less than 1 unless the respondent took extraordinary efforts to correct or minimize the effects of all PSAs. In no case may the sum of the values of "P" and "H" be less than zero.

(4) "O" is whether the violation was repeated or ongoing.

(a) The values for "O" and the finding that supports each are as follows:

(A) 0 if the violation existed for one day or less and did not recur on the same day, or if there is insufficient information on which to base a finding under paragraphs (4)(a)(B) through (4)(a)(D).

(B) 2 if the violation recurred on the same day, or existed for or occurred on more than one day up to and including six days, which need not be consecutive days.

(C) 3 if the violation existed for or occurred from seven to 28 days, which need not be consecutive days.

(D) 4 if the violation existed for or occurred on more than 28 days, which need not be consecutive days.

(b) The department may, at its discretion, assess separate penalties for each day that a violation occurs. If the department does so, the O factor for each affected violation will be set at 0.

(5) "M" is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply.

(a) The values for "M" and the finding that supports each are as follows:

(A) 0 if there is insufficient information on which to base a finding under paragraphs (5)(a)(B) through (5)(a)(D).

(B) 2 if the respondent's conduct was negligent or the respondent had constructive knowledge (reasonably should have known) that the conduct would be a violation. Holding a permit that prohibits or requires conduct is presumed to constitute at least constructive knowledge and may be actual knowledge depending on the specific facts of the case.

(C) 6 if the respondent's conduct was reckless, or the respondent had actual knowledge that its conduct would be a violation and respondent's conduct was intentional. A respondent that previously received a Notice of Noncompliance, WL, PEN or any FEA for the same violation is presumed to have actual knowledge. Holding a permit that prohibits or requires conduct may be actual knowledge depending on the specific facts of the case.

(D) 10 if respondent acted flagrantly.

(6) "C" is the respondent's efforts to correct the violation.

(a) The values for "C" and the finding that supports each are as follows:

(A) -3 if the respondent made extraordinary efforts to correct the violation, or took extraordinary efforts to minimize the effects of the violation.

(B) -2 if the respondent made reasonable efforts to correct the violation, reasonable affirmative efforts to minimize the effects of the violation, or extraordinary efforts to ensure the violation would not be repeated.

(C) -1 if the respondent eventually made efforts to correct the violation, or took affirmative efforts to minimize the effects of the violation.

(D) 0 if there is insufficient information to make a finding under paragraphs (6)(a)(A) through (6)(a)(C), or (6)(a)(E), or if the violation or the effects of the violation could not be corrected or minimized.

(E) 2 if the respondent did not address the violation as described in paragraphs (6)(a)(A) through (6)(a)(C) and the facts do not support a finding under paragraph (6)(a)(D).

**a. Failure to install and operate a method of release detection piping, failure to conduct annual leak line detector operational testing and line tightness testing:**

Respondent argues that DEQ is estopped from imposing civil penalties against Respondent for this violation because both DEQ and the EPA waived their rights to issue a violation or seek penalties for the line leak detector after previously inspecting the Facility. (See Respondent's Closing Brief at 8.)

The doctrine of equitable estoppel operates to prevent a person from taking a position that is contrary to that earlier taken where another person relied on the earlier position and chose a course of action. See *Schmidt v. Oregon Asphaltic Paving Co.*, 129 Or App 324, 329-330 (1994). Equitable estoppel will be applied against an agency only if it is shown that the person asserting it was misled by the agency and justifiably and detrimentally relied on the misleading conduct. *Employment Div. v. Western Graphics Corp.*, 76 Or App 608, 612-614 (1985). It is not necessary that there be proof of intent to mislead. Rather, the doctrine may be applied when conduct is "misleading," even if innocent. *Swift & McCormick Metal Processors v. Durbin*, 117 Or App 605, 608-609 (1992); See also *Pilgrim Turkey Packers v. Dept. of Rev.*, 261 Or 305 (1972).

Here, Respondent provided no evidence to support a finding that it was misled by DEQ and justifiably and detrimentally relied on misleading conduct. DEQ did not cite Respondent after the February 11, 1999 inspection for noncompliance with its line tightness requirements and detection methods for pressurized piping. Nonetheless, this was not misleading conduct on DEQ's part. After the inspection, DEQ issued a Notice of Noncompliance to Respondent, indicating defects in its UST system. Respondent fails to point to anything in this Notice, or in other representations made by DEQ, that misled it into believing violations or penalties would be waived. Respondent failed to establish that the doctrine of equitable estoppel applies in this case.

Respondent further argues that the doctrine of laches prevents DEQ from asserting or issuing any violations, civil penalties, or order with regard to the period occurring after February 1999, when DEQ completed an inspection of the Facility. (*Id.* at 9.) Respondent believes DEQ waived its right to penalize Respondent for noncompliance because DEQ relied upon the EPA's inspections for a majority of the period at issue in this case. However, there is no evidence to support such a conclusion. DEQ and the EPA had concurrent jurisdiction over UST systems for a number of years. Such concurrent jurisdiction did not create any type of waiver on DEQ's part and did not relieve Respondent of its duties to comply with DEQ's rules. Therefore, Respondent failed to show that DEQ is barred from imposing a civil penalty for this, or any other, violations involved in this case.

Pursuant to OAR 340-012-0067(1)(e) and (j), this is a Class I violation. Pursuant to OAR 340-012-0130(4), the magnitude of the violation is "minor" because the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors.

The Base Penalty for a Class I minor violation is \$250. OAR 340-012-0140(5)(b)(A)(iii) and OAR 340-012-0140(5)(a)(E).

**P factor:** DEQ proposed a value of 0 (zero) for the "P" factor. Because there is no evidence of a history of past violations, this value is appropriate.

**H factor:** DEQ proposed a value of 0 (zero) for the "H" factor. Because there is no evidence of a history of past violations, this value is appropriate.

**O factor:** DEQ proposed a value of 4 for the "O" factor because the violation was ongoing for more than 28 days. Respondent was required to install a line leak detector and to conduct release detection testing on its pressurized piping prior to December 22, 1990, but failed to do so until October 2010. Pursuant to OAR 340-012-0145(4)(a)(D), a value of 4 is appropriate.

**M factor:** DEQ proposed a value of 2 for the "M" factor because Respondent knew, or reasonably should have known, that its have a line leak detector installed and to conduct either line tightness testing or implement an approved release detection method on the pressurized piping would violate DEQ's rules. Pursuant to OAR 340-012-0145(5)(a)(B), holding a permit that requires conduct is presumed to constitute at least constructive knowledge.

Respondent contended that the "M" factor for this violation should be 0 (zero) because in 2005, the EPA informed Respondent that it was in compliance with the EPA's regulations. Respondent argued that it could not have reasonably known that a line leak detector was required. However, Respondent's position is not persuasive. The 2005 correspondence from the EPA to Respondent merely stated that Respondent had failed to supply information required in 2002. Therefore, a value of 2 for the "M" factor is appropriate.

**C factor:** DEQ proposed a value of -2 for the "C" factor because Respondent made reasonable efforts to correct the violation by installing a line leak detector in October 2010. Nothing in the record shows that Respondent made any extraordinary efforts to have this installation completed. Therefore, a value of -2 is appropriate.

**EB:** DEQ proposed the EB for this violation should be \$10,944. DEQ used the BEN computer model to compute the EB factor.

OAR 340-012-0150 provides, in relevant part:

(1) The Economic Benefit (EB) is the approximate dollar value of the benefit gained and the costs avoided or delayed (without duplication) as a result of the respondent's noncompliance. The EB may be determined using the U.S. Environmental Protection Agency's BEN computer model. Upon request of the respondent, the department will provide the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate are

presumed to apply to all respondents unless a specific respondent can demonstrate that the standard value does not reflect that respondent's actual circumstance. Upon request of the Respondent, the department will use the model in determining the economic benefit component of a civil penalty.

(2) The department may make, for use in the applicable model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent. Economic benefit will be calculated without duplicating or double-counting the advantages realized by respondent as a result of its noncompliance.

(3) The department need not calculate EB if the department makes a reasonable determination that the EB is de minimis or if there is insufficient information reasonably available to the department on which to make an estimate under section (2) of this rule.

(4) The department may assess EB whether or not it assesses any other portion of the civil penalty using the formula in OAR 340-012-0045.

(5) The department's calculation of EB may not result in a civil penalty for a violation that exceeds the maximum civil penalty allowed by rule or statute. However, when a violation has occurred or been repeated for more than one day, the department may treat the violation as extending over at least as many days as necessary to recover the economic benefit of the violation. When the purpose of treating a violation as extending over more than one day is to recover the economic benefit, the department has the discretion not to impose the base penalty portion of the civil penalty. Nothing in this section precludes the department from assessing a penalty of up to the maximum allowed for the violation by statute.

Respondent argues that DEQ's application of the economic benefit calculation formula in this case is arbitrary and an abuse of DEQ's discretion. Respondent contends that DEQ treats the use of the "BEN" model as an absolute determination of the civil penalty amount. Respondent further contends that because Respondent's company is not profitable, its failure to install a line leak detector until October 2010 did not result in any actual economic benefit to Respondent. Respondent believes that by using the BEN default values to calculate the civil penalty, DEQ failed to make a reasonable estimate of the actual benefits gained and the costs avoided or delayed by Respondent. Respondent argues that DEQ should have used the federal discount rate to calculate the economic benefit.

Pursuant to ORS 183.482(8)(b), the an agency has abused its discretion if: a) the agency acts outside the range of discretion delegated to the agency by law; b) the agency acts inconsistently with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or c) the agency is otherwise in violation of a constitutional or statutory provision.

Here, Respondent did not establish that DEQ abused its discretion in applying the default values for the BEN model to calculate the economic benefit. The evidence presented at hearing shows that DEQ routinely calculates the economic benefit by using the BEN model default values. Respondent did not show that DEQ acted inconsistently with its rules, an officially stated position, or with prior agency practice. That Respondent believes the federal discount rate should have been applied to the BEN model to calculate the economic benefit does not establish abuse of discretion in calculating the economic benefit. Further, Respondent failed to show that the federal discount rate reflected Respondent's *actual* circumstances and that the use of this rate was more appropriate than the use of the default values contained in the BEN model.

For these reasons, the BEN model value, as computed by DEQ, is applied to the following penalty calculation:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB = \text{penalty}$$

$$\$250 + [(0.1 \times \$250) \times (0 + 0 + 4 + 2 + -2)] + \$10,944$$

$$(\$250) + [\$25 \times 4] + \$10,994$$

$$\$250 + \$100 + \$10,944 = \$11,294$$

Therefore, the appropriate civil penalty for this violation is \$11,294.

**b. Failure to maintain required financial responsibility mechanism:**

Pursuant to OAR 340-012-0067(1)(b), this is a Class I violation. Pursuant to OAR 340-012-0130(4), the magnitude of the violation is "minor" because the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors.

The Base Penalty for a Class I minor violation is \$250. OAR 340-012-0140(5)(b)(A)(iii) and OAR 340-012-0140(5)(a)(E).

**P factor:** DEQ proposed a value of 0 (zero) for the "P" factor. Although there is some evidence that Respondent previously failed to provide the EPA with proof of a financial responsibility mechanism, there is no evidence to show that Respondent previously failed to actually maintain such a mechanism. Therefore, this value is appropriate.

**H factor:** DEQ proposed a value of 0 (zero) for the "H" factor. Because there is no evidence of a history of past violations, this value is appropriate.

**O factor:** DEQ proposed a value of 4 for the "O" factor because the violation was ongoing for more than 28 days. Pursuant to OAR 340-012-0145(4)(a)(D), that value is appropriate.

**M factor:** DEQ proposed a value of 6 for the "M" factor because Respondent's conduct was reckless. Considering Respondent did not have a valid financial responsibility mechanism in place for its Facility for almost two months, that value is appropriate.

**C factor:** DEQ proposed a value of -2 for the "C" factor because Respondent made reasonable efforts to correct the violation by obtaining a financial responsibility mechanism. Therefore, this value is appropriate.

**EB:** DEQ proposed the EB for this violation should be \$0 because any economic benefit gain would be de minimis. That finding is appropriate and supported by the record.

Applying the above values results in the following penalty calculation:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB = \text{penalty}$$

$$\$250 + [(0.1 \times \$250) \times (0 + 0 + 4 + 6 + -2)] + \$0$$

$$(\$250) + [\$25 \times 8] + \$0$$

$$\$250 + \$20 + \$0 = \$450$$

Therefore, the appropriate civil penalty for this violation is \$450.

**c. Failure to have corrosion protection system inspected and tested for proper operation by a qualified cathodic protection test at least every three years:**

Pursuant to OAR 340-012-0053(2), this is a Class II violation. Pursuant to OAR 340-012-0130(4), the magnitude of the violation is "minor" because the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors.

The Base Penalty for a Class II minor violation is \$125. OAR 340-012-0140(5)(b)(A)(iii) and OAR 340-012-0140(5)(a)(E).

**P factor:** DEQ proposed a value of 0 (zero) for the "P" factor. Because there is no evidence of a history of past violations, this value is appropriate.

**H factor:** DEQ proposed a value of 0 (zero) for the "H" factor. Because there is no evidence of a history of past violations, this value is appropriate.

**O factor:** DEQ proposed a value of 4 for the "O" factor because the violation was ongoing for more than 28 days. Pursuant to OAR 340-012-0145(4)(a)(D), that value is appropriate.

**M factor:** DEQ proposed a value of 2 for the "M" factor. Respondent knew, or reasonably should have known, that its failure to conduct a corrosion protection inspection and

test within three years would violate DEQ's rules. Pursuant to OAR 340-012-0145(5)(a)(B), holding a permit that requires conduct is presumed to constitute at least constructive knowledge. Therefore, a value of 2 for the "M" factor is appropriate.

**C factor:** DEQ proposed a value of -2 for the "C" factor because Respondent made reasonable efforts to correct the violation by conducting an inspection and test which showed that the corrosion protection system was properly operating.

**EB:** DEQ presented evidence that the approximate cost for the test was \$155. Respondent delayed the inspection and test for the period February 2008 through May 2009. DEQ used the BEN computer model to compute an EB factor of \$14. This amount is appropriate.

Applying the above values results in the following penalty calculation:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB = \text{penalty}$$

$$\$125 + [(0.1 \times \$125) \times (0 + 0 + 4 + 2 + -2)] + \$14$$

$$(\$125) + [\$12.5 \times 4] + \$14$$

$$\$125 + \$50 + \$14 = \$189$$

Therefore, the appropriate civil penalty for this violation is \$189.

**d. Failure to post annual operating certificate in a conspicuous location clearly visible at the Facility:**

Pursuant to OAR 340-012-0053(2), this is a Class II violation. Pursuant to OAR 340-012-0130(4), the magnitude of the violation is "minor" because the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors.

The Base Penalty for a Class II minor violation is \$125. OAR 340-012-0140(5)(b)(A)(iii) and OAR 340-012-0140(5)(a)(E).

**P factor:** DEQ proposed a value of 0 (zero) for the "P" factor. Because there is no evidence of a history of past violations, this value is appropriate.

**H factor:** DEQ proposed a value of 0 (zero) for the "H" factor. Because there is no evidence of a history of past violations, this value is appropriate.

**O factor:** DEQ proposed a value of 0 (zero) for the "O" factor because DEQ did not have sufficient evidence to establish that the violation existed on any date other than the date of the August 2010 inspection. Pursuant to OAR 340-012-0145(4)(a)(D), that value is appropriate.

**M factor:** DEQ proposed a value of 2 for the “M” factor. Respondent knew, or reasonably should have known, that its failure to conduct a corrosion protection inspection and test within three years would violate DEQ’s rules. Pursuant to OAR 340-012-0145(5)(a)(B), holding a permit that requires conduct is presumed to constitute at least constructive knowledge. Therefore, a value of 2 for the “M” factor is appropriate.

**C factor:** DEQ proposed a value of 0 for the “C” factor because it has insufficient evidence to make any other finding. Therefore, that value is appropriate.

**EB:** DEQ does not allege that Respondent realized any economic benefits for this violation and proposes an “EB” value of \$0. That amount is appropriate and supported by the record.

Applying the above values results in the following penalty calculation:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB = \text{penalty}$$

$$\$125 + [(0.1 \times \$125) \times (0 + 0 + 0 + 2 + 0)] + \$0$$

$$(\$125) + [\$12.5 \times 2] + \$0$$

$$\$125 + \$25 + \$0 = \$150$$

Therefore, the appropriate civil penalty for this violation is \$150.

**e. Failure to provide DEQ a method to readily determine compliance with OAR 340-150-0410(6):**

While DEQ proved this violation, DEQ did not propose assessing a civil penalty for this violation.

**f. Total civil penalties:**

The record establishes that Respondent should be assessed a civil penalty in the total amount of \$12,083 (\$11,294 + \$450 + \$189 + \$150).

## ORDER

I propose the DEQ issue the following order:

Burn-Johanson Oil Company is ordered to pay civil penalties of \$12,083 for the violations proven herein.



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Monica A. Whitaker  
Senior Administrative Law Judge  
Office of Administrative Hearings

## APPEAL RIGHTS

If you are not satisfied with this decision, you have the right to have the decision reviewed by the Oregon Environmental Quality Commission (Commission). To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date this order is served on you. Service, as defined in Oregon Administrative Rule (OAR) 340-011-0525, means the date that the decision is **mailed** to you, and not the date that you receive it.

The Petition for Review must comply with OAR 340-011-0575 and must be **received** by the Commission within 30 days of the date the Proposed and Final Order was mailed to you. You should mail your Petition for Review to:

Environmental Quality Commission  
c/o Dick Pedersen, Director, DEQ  
811 SW Sixth Avenue  
Portland, OR 97204.

You may also fax your Petition for Review to (503) 229-6762 (the Director's Office).

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as provided in OAR 340-011-0575. The exceptions and brief must be **received** by the Commission within 30 days from the date the Commission received your Petition for Review. If you file a Petition but not a brief with exceptions, the Environmental Quality Commission may dismiss your Petition for Review.

If the Petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0575.

Unless you timely file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Commission 30 days from the date this Proposed Order is mailed to you. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. See ORS 183.480 et. seq.

**CERTIFICATE OF MAILING**

On March 26, 2012, I mailed the foregoing Proposed and Final Order issued on this date in OAH Case No. 1102419.

By: First Class and Certified Mail

Certified Mail Receipt # 7011 3500 0002 6984 1124

Allan Bakalian  
Zeno Drake Bakalian PS  
4020 Lake Washington Blvd NE Ste 100  
Kirkland WA 98033

By: First Class Mail

Susan Elworth  
Dept. of Environmental Quality  
811 SW 6th Ave  
Portland OR 97204

Carol Buntjer  
Administrative Specialist  
Hearing Coordinator

Dec. 6-7, 2012, EQC meeting  
Page 1 of 36

**From:** Allan Bakalian <abakalian@zdblawn.com>  
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**CC:** ELWORTH Susan <elworth.susan@deq.state.or.us>  
**Date:** 3/14/2012 5:02 PM  
**Subject:** Closing Brief attached NWR 10-248  
**Attachments:** Closingbrief.pdf

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:  
BURNS-JOHANSON OIL COMPANY,  
an Oregon corporation,  
  
Respondents.

RESPONDENTS CLOSING BRIEF  
IN OPPOSITION TO CIVIL  
PENALTY ASSESSMENT AND  
ORDER TO COMPLY

**No. LQ/UST-NWR-10-248**

I. INTRODUCTION

COMES NOW BURNS-JOHANSON OIL COMPANY ("Respondent"), by and through its attorneys Zeno Drake Bakalian P.S. and Allan B. Bakalian, and submits this Closing Brief regarding the Department of Environmental Quality's ("Department") claim for a civil penalty of \$12,083, based upon its August 23, 2011 Amended Notice of Civil Penalty Assessment and Order ("Amended Notice"). In January 2011, Respondent filed an Answer to the Department's original Notice of Civil Penalty Assessment and Order to Comply seeking \$19,302 in civil

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 1

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1 penalties that was issued on December 30, 2010. In its Answer, Respondent "denied and  
2 disputed" the Department's civil penalty assessment. The parties argued this matter at a  
3 contested case hearing on January 25, 2012, before Administrative Law Judge Monica Whitaker.  
4

## 5 II. LEGAL ISSUES

6 This case involves a dispute over Respondent's compliance with the Department's  
7 Underground Storage Tank (UST) regulations. The factual issues are straightforward and  
8 summarized below. The legal issue in this case involves the Department's application of its civil  
9 Enforcement Procedure and Civil Penalties at OAR 340-012-0026. Specifically, as identified in  
10 Respondent's Answer and presented at the contested case hearing, Respondent asserts that the  
11 Department improperly calculated the alleged civil penalties and that the principal deviation  
12 resulted from the Department's arbitrary and unsupported application of the "BEN Model" in  
13 determining the so-called "economic benefit" realized from Respondent's alleged delayed  
14 compliance associated with installing a line leak detector on its pressurized UST fuel pipeline.  
15  
16  
17  
18 OAR 340-012-0150.

## 19 III. FACTS

20  
21 Respondent own and operate a UST storage facility located at 455 Industry Street,  
22 Astoria, OR. The facility was constructed and operated by two individuals, Mr. Burns and Mr.  
23 Johanson, thus it was known as the Burns-Johanson facility. In approximately the late 1970s, the  
24 Burns-Johanson facility was acquired by Warren Bechtolt and Alice Codd. Alice Codd testified  
25 to this at hearing as did Steve Allen, her accountant who also submitted a declaration. After  
26 Warren Bechtolt passed away in 1989, Ms. Codd, who is now in her late 70s, continued to  
27  
28

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 2

ZENO DRAKE BAKALIAN P.S.  
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1 operate the facility as a commercial cardlock and home heating oil facility. Ms. Codd is also an  
2 owner of the Niemi Oil Company, which operated the USTs at the Burns-Johanson facility. Mr.  
3 Allen and Ms. Codd testified that Burns-Johanson ceased operating and filing taxes in 2003.  
4 Burns Johanson was a Subchapter S corporation and any company income was passed through  
5 and reported on the individual tax returns of Mr. Bechtolt and Ms. Codd.

7 The Department conducted a UST compliance inspection at the Burns-Johanson facility  
8 on August 13, 2010. Previously, the Department conducted an inspection on February 11, 1999,  
9 and the U.S. Environmental Protection Agency conducted an inspection in October 2002. See  
10 Ex. 5 and Ex. 6. These inspections followed the EPA's 1998 UST rule revisions requiring  
11 cathodic protection, spill protection, insurance and other new requirements for UST operators.

14 The Department's August 2010 inspection resulted in several alleged violations and  
15 associated civil penalties for:

- 17 1) \$11,294 for failing to install release detection for piping and conducting line leak detector  
18 operation testing in violation of OAR 340-150-0410(2) and 0555(1)(d);
- 19 2) \$450 for failing to continuously maintain financial UST insurance in violation of OAR  
20 340-150-0163;
- 21 3) \$189 for failing to have the corrosion system inspected every three years in violation of  
22 OAR 340-150-0325(2);
- 23 4) \$150 for failure to post an Operating Certificate in violation of OAR 340-150-0163

24 The total civil penalty assessed was thus \$12,083.

26 IV. ARGUMENT

28  
RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 3

ZENO DRAKE BAKALIAN P.S.  
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1        There is little dispute regarding the facts underlying the four alleged violations. Respondent  
2 did present exhibits and testimony that mitigates the alleged violations 2, 3 and 4, as follows. First,  
3 there was only a two or three month lapse in Respondent's financial insurance, resulting from  
4 Respondent's insurance broker changing carriers. Coverage was in place shortly after the August  
5 2010 inspection and to the extent there was a claim prior to that time, the previous insurance carrier  
6 would potentially have had liability under its policy tail provisions. In any event, the violation was  
7 temporary, unintended and insignificant.  
8  
9

10        Second, the corrosion test was performed between the 3<sup>rd</sup> and 4<sup>th</sup> year, and continuously  
11 every three years before and after. The confusion results from when DEQ determined the three year  
12 period began. Third, the Operating Certificate was in the possession of the operator, who sought  
13 clarification where to post it since there is no office, warehouse or other building at the facility.  
14 These are all minor, procedural violations that did not result in any harm to the environment and  
15 which Respondent could have elected not to assess or otherwise assess through its Field Citation  
16 program which involves an expedited procedure like a traffic ticket. See Ex. 15. Respondent  
17 disagrees with the Department's decision to escalate these minor violations through this proceeding.  
18  
19  
20

21        The essence of this appeal and argument at the contested case hearing involves the  
22 Department's calculation and assessment of \$10,944 as the so-called "economic benefit" for  
23 Violation No. 1. This amount is in addition to the \$350 Base Penalty for failing to install a line leak  
24 detector, a Class I, minor magnitude violation in the Department's penalty matrix. See OAR 340-  
25 012-0067(1)(e) and (1)(j). See Amended Notice of Civil Penalty Assessment, Exhibit 1 (Attached  
26 hereto as Ex. A). There is no question Respondent asserted that the Department failed to  
27  
28

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 4

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1 improperly calculate the economic benefit in this case. Because it did not refer to each and every  
2 one of the numerous BEN model inputs as error is irrelevant and no defense to these issues being  
3 heard in the contested case.  
4

5 The Department's application of the economic benefit calculation formula in this case,  
6 pursuant to OAR 340-012-0150(1) is an arbitrary, and an abuse of the agency's discretion. First, the  
7 Department seeks to impose a civil penalty using an economic benefit model developed by the EPA  
8 for settlement negotiations, called "BEN", as an absolute determination of the civil penalty  
9 applicable to the alleged violation. This is neither true nor required. The Department's own  
10 regulations state that "the EB *may* be determined using the U.S. Environmental Protection Agency's  
11 BEN computer model." OAR 340-12-0150(1) (emphasis added). The Departments economic  
12 benefit rule is as follows:  
13  
14

15 **340-012-0150**

16 **Determination of Economic Benefit**

- 17 (1) The Economic Benefit (EB) is the approximate dollar value of the benefit gained and the  
18 costs avoided or delayed (without duplication) as a result of the respondent's  
19 noncompliance. *The EB may be determined using the U.S. Environmental Protection*  
20 *Agency's BEN computer model.* Upon request of the respondent, the department will  
21 provide the name of the version of the model used and respond to any reasonable request for  
22 information about the content or operation of the model. The model's standard values for  
23 income tax rates, inflation rate and discount rate are presumed to apply to all respondents  
24 unless a specific respondent can demonstrate that the standard value does not reflect that  
25 respondent's actual circumstance. *Upon request of the Respondent, the department will*  
26 *use the model in determining the economic benefit competent of a civil penalty.*  
27  
28 (2) The department may make, for use in the applicable model, a reasonable estimate of the  
benefits gained and the costs avoided or delayed by the respondent. Economic benefit will  
be calculated without duplicating or double-counting the advantages realized by respondent  
as a result of its noncompliance.

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 5

ZENO DRAKE BAKALIAN P.S.  
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1 (3) The department need not calculate the EB if the department makes a reasonable  
2 determination that the EB is de minimis or if there is insufficient information reasonable  
3 available to the department on which to make an estimate under section (2) of this rule.

4 (Emphasis added)

5 At the hearing, Respondent's principal and accountant testified that Burns-Johanson was  
6 not a profitable company from 1993 through 2003 when it ceased doing business. Therefore, the  
7 alleged delay in not installing a line leak detector until October 2010 did not result any actual  
8 economic benefit to the company. At best, the delay in installing this \$3,900 piece of equipment  
9 is the potential interest the company could gain if it had invested the discounted value of that  
10 money in 1993. The Department seeks to impose a \$10,944 fine on respondent based on the  
11 alleged economic benefit the company gained for delaying compliance from December 1990 to  
12 October 2010. The discounted value of the 2010 line leak detector is approximately \$2200 (e.g.,  
13 in 1990 dollars). Thus, the department is seeking an additional 25% per year as the economic  
14 benefit (\$550 x 20 years=\$11,000) to come up with this number using the BEN model. Such a  
15 result is absurd, unreasonable, arbitrary and an abuse of discretion. There is no conceivable way  
16 Burns-Johanson benefited \$550 per year for 20 years by delaying installation of a \$2200 line  
17 leak detector. This was confirmed by the testimony of Alice Codd and Steve Allen, the  
18 accountant. Burns-Johanson simply was not a profitable company and did not have any profit to  
19 invest let alone reap an \$11,000 benefit.  
20

21 The Department's application of the model in this case is flawed. Burns-Johansson is a  
22 small family business, not a large corporation that employs accountants to depreciate pollution  
23 equipment and invest income in high interest bearing accounts. Indeed, Burns-Johanson is a  
24 Subchapter S corporation that did not capitalize its UST equipment. It expensed it. These are all  
25 inputs into the BEN model, as is the tax rate, discount rate and time of delay. All of these inputs  
26 affect the EB. The Department failed to explain why or how it did not use these inputs or why it  
27  
28

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 6

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1 reverted to the default values when it had this information. Specifically, it was error for the  
2 hearing examiner to exclude Respondent's request to require the Department's witness who  
3 conducted and ran the BEN model to run the model using the actual input values provided by  
4 Respondent at the hearing. Indeed, OAR 340-012-0150(1) requires that: "*Upon request of the*  
5 *Respondent, the department will use the model in determining the economic benefit competent of*  
6 *a civil penalty.*" Respondent has presented evidence that use of the actual input values results in a  
7 \$1,400, not \$10,944 economic benefit calculation. Ex. 17.

8  
9 As set forth in OAR 340-012-0150(3), the Department is not required to calculate the EB  
10 if it makes a reasonable determination that the EB was de minimis or if cannot make a reasonable  
11 estimate of the benefits gained and the costs avoided or delayed by the respondent. That is  
12 exactly the case here. The Department's admitted use of the BEN model default values, despite  
13 the testimony and documentation introduced by Respondent that such default values are not  
14 applicable, was an abuse of discretion pursuant to ORS 183.482(8)(b) because it is inconsistent  
15 with the penalty calculation rules. DEQ has failed to provide any citation for use of the default  
16 calculations in this case, a requirement which is noted in prior agency decisions. *In the Matter*  
17 *of: Fortress Holdings, L.L.C.*, WPM/SW-NWR-00-160 (Or. Env. Qual. Com., April 1, 2002).  
18

19  
20 There is no hard and fast meaning for the phrase "abuse of discretion." *Far West*  
21 *Landscaping, Inc. v. Modern Merch., Inc.*, 287 Or 653, 664, 601 P2d 1237 (1979). As a result, a  
22 reviewing court must ask whether "the choice made is consistent with one or several objectives  
23 to be served by vesting discretion in the decision-maker, under circumstances pertinent to the  
24 decision to be made." *Liberty Northwest Ins. Corp.*, 164 Or App at 45.

25  
26 The Department further arbitrarily seeks an economic benefit from 1990 to 2010, despite  
27 the fact that both it and EPA conducted inspections at the facility which did not result in  
28

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 7

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1 notification of this violation. First, the Department conducted an inspection on February 11,  
2 1999, in which it issued a formal Notice of NonCompliance and Corrective Measures that  
3 included corrosion protection, overspill protection, financial insurance and upgrade checklist.  
4 See Ex. 5. Respondent reasonably relied on the Department's Notice and achieved compliance.  
5 In 2002, EPA inspected the facility and noted a violation of the financial assurance requirement.  
6 Respondent corrected that as well.  
7

8 The Department's 2010 inspection and issuance of the line leak detector violation is not  
9 the dispute. Indeed, like before, Respondent immediately came into compliance. Respondent  
10 asserts that the Department is estopped from seeking any economic benefit for the period after  
11 February 1999 through October 2010, because both it and EPA waived their right to issue a  
12 violation or seek penalties for the line leak detector after those inspections. The Department  
13 argues that waiver and estoppel do not apply to it – that is incorrect and unreasonable under any  
14 application of law.  
15

16 Respondent also notified the Department exactly what it was doing with regard to leak  
17 detection, when it sent DEQ its completed UST survey in February 1999, after it upgraded its  
18 USTs. Respondent documented that it was performing Statistical Inventory Reconciliation (SIR)  
19 to calculate any leaks from its USTs and pipelines based upon OAR 340-150-0410(7), which  
20 authorizes alternative methods designed to detect releases from underground piping, set forth in  
21 OAR 340-150-0450 through OAR 340-150-0470, utilized by Respondent. The Department did  
22 not object or otherwise notify Respondent it needed a line leak detector. Respondent is allowed  
23 to use Statistical Inventory Reconciliation (SIR) as a release detection method for both the  
24 gasoline and diesel USTs. OAR 340-150-0435. Respondent provided DEQ copies of its  
25  
26  
27  
28

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 8

ZENO DRAKE BAKALIAN P.S.  
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1 monthly SIR records for the gasoline and diesel UST systems during the August 3, 2010,  
2 inspection.

3 Accordingly, DEQ is estopped and barred by the doctrine of laches from asserting or  
4 issuing any violations, civil penalties or orders with regard to Respondent's facility occurring  
5 after February 1999, when DEQ completed an inspection at the facility. The additional years of  
6 alleged noncompliance significantly and adversely affects the "O" and "EB" components of the  
7 civil penalty formula.  
8

9 Notwithstanding the alleged Violations, and as documented by DEQ's inspection at the  
10 Facility, there is no evidence of any harm to the environment in this matter. DEQ failed to  
11 consider this and the other discretionary factors set forth in its civil penalty rules in determining  
12 and calculating the civil penalties for the alleged violation in this matter.  
13

14  
15 V. CONCLUSION

16 Respondents respectfully request that the Department's economic benefit calculation for  
17 Violation 1 dismissed, as there is simply no economic benefit to Respondent from the alleged  
18 violation. In the alternative, Respondents request the Department be ordered to recalculate the  
19 EB, using the time period 1990-1999, and the correct input values provided by Respondent  
20 regarding the tax rate, corporation, discount rate, expense and other accounting factors that are  
21 available in the BEN model formula.  
22

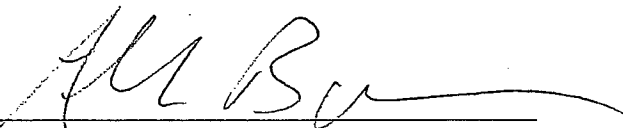
23  
24 DATED this 14<sup>th</sup> day of March, 2012.  
25  
26  
27  
28

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 9

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By:   
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Attorney for Respondents  
OSB # 85134

RESPONDENTS CLOSING BRIEF IN  
OPPOSITION TO CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 10

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Item D 000096

Dec. 6-7, 2012, EQC meeting  
Page 12 of 36

**From:** Monica A WHITAKER  
**To:** Drake, Leslie  
**CC:** elworth.susan@deq.state.or.us; Monica A WHITAKER; OAHREFERRAL, EMP  
**Date:** 2/15/2012 7:06 AM  
**Subject:** Re: Burns-Johnson Oil Company, OAH Case No. 1102419

Ms. Drake and Ms. Elworth:

Considering the nature of the request for the extension, and that Ms. Elworth is out of the office until February 21, 2012, I have decided to extend the deadline for Appellant's Closing Argument to March 14, 2012 by the close of business, at 5:00 p.m.

Sincerely,

Monica A. Whitaker  
Senior Administrative Law Judge  
Office of Administrative Hearings

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\*\*\*\*\*

>>> Leslie Drake <[ldrake@zdblawn.com](mailto:ldrake@zdblawn.com)> 2/9/2012 3:42 PM >>>

Judge Whitaker, I write to request an extension for the filing of a closing brief in the above matter. Mr. Allan Bakalian is the attorney handling this case. He suffered an injury last night that required surgery today. At this point, we do not know when he will be returning to work. He is the only attorney with our firm who has been working on this matter. Therefore, we request a 1 month extension for the filing of the closing brief. This should allow ample time for Allan to recover and return to work and prepare the brief.

If you have any questions or require additional information, please contact me.

Leslie A. Drake

Zeno Drake Bakalian, P.S.

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Kirkland, WA 98033

phone - 425-822-1511 x223

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Attachment C  
Dec. 6-7, 2012, EQC meeting  
Page 13 of 36

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Dec. 6-7, 2012, EQC meeting  
Page 14 of 36

**From:** ELWORTH Susan <elworth.susan@deq.state.or.us>  
**To:** "WHITAKER Monica.A" <Monica.A.WHITAKER@state.or.us>, "Allan Bakalian" ...  
**Date:** 2/6/2012 3:06 PM  
**Subject:** OAH case no. 1102419 (Burns-Johanson Oil Company)  
**Attachments:** 20120206120517167.pdf

Judge Whitaker and Mr. Bakalian - Attached please find the Department's Closing Argument in this case.

Thank you.

Susan M. Elworth  
Department of Environmental Quality  
Environmental Law Specialist  
(503) 229-5152

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:	)	DEPARTMENT'S CLOSING
BURNS-JOHANSON OIL COMPANY,	)	ARGUMENT
Respondent	)	NO. LQ/UST-NWR-10-248

The Department of Environmental Quality (the Department), via this Closing Argument, moves that the Administrative Law Judge rule in the Department's favor on all issues raised in the Department's Amended Notice of Civil Penalty Assessment and Order (Amended Notice) dated August 23, 2011.

I. CASE HISTORY

On December 30, 2010, the Department issued to Respondent a Notice of Civil Penalty Assessment and Order to Comply which alleged violations related to underground storage tanks (USTs) located at 455 Industry Street in Astoria, Oregon. On January 18, 2011, the Department received a request for hearing and answer from Respondent. On August 23, 2011, the Department issued to Respondent the Amended Notice which alleged five violations related to the USTs. The Amended Notice assessed civil penalties in the amount of \$12,083 for four of those violations. Respondent did not file an amended answer to the Amended Notice. A contested case hearing was held on January 25, 2012 before Administrative Law Judge Monica Whitaker.

II. LAW AT ISSUE

After being served with a formal enforcement action, a Respondent has twenty days to file a written request for a hearing. The written request for a hearing must admit or deny all the alleged facts and raise all alleged affirmative defenses and the reasoning in support of those defenses. *OAR 340-011-0530*. An Administrative Law Judge must limit the scope of the hearing to those matters in the formal enforcement action that are placed at issue by the formal enforcement action and written request for a hearing. *OAR 340-011-0570*.

The Department has the burden of establishing, by a preponderance of the evidence, that the alleged violations occurred and that the proposed penalty is appropriate. Proof by a preponderance

1 of the evidence means that the Administrative Law Judge is persuaded that the facts asserted are  
2 more likely than not true.

3 Penalty Calculation Rules

4 Under OAR Chapter 340, Division 12, the formula for determining the amount of a civil  
5 penalty takes into consideration such factors as prior enforcement actions, whether the violation  
6 was repeated or on-going, the cause of the violation, the person's cooperativeness and any  
7 economic benefit gained by either delaying or avoiding the cost of compliance. A person is  
8 strictly liable for any violation of the rules. *See ORS 468.130 and OAR 340-012-0145, and In the*  
9 *Matter of: City of Portland, Case no. WQ/I-NWR-01-100.* The civil penalty formula that the  
10 Department must use in determining the amount of a civil penalty is set forth in OAR 340-012-  
11 0045.<sup>1</sup> The Department must first determine the class and magnitude of the violation to  
12 determine the base penalty. *OAR 340-012-0045.* The Department then increases or decreases the  
13 amount of the base penalty by application of the formula which is "BP = [(1 x BP) x (P + H + O  
14 + M + C)] + EB". *OAR 340-012-0145.*

15 The "P" factor is used to reflect any prior violations the Respondent may have for which  
16 the Department issued a formal enforcement action and the "H" factor reflects whether  
17 Respondent corrected those prior violations. The "O" factor reflects whether the violation was  
18 repeated or continuous, or occurred on one day only. The "M" factor reflects whether the  
19 violation resulted from Respondent's negligent, intentional or flagrant act or omission. The "C"  
20 factor reflects Respondent's efforts to correct the violation or minimize the effects of the  
21 violation. The "EB" factor represents the approximate dollar sum of the economic benefit that  
22 was gained through noncompliance, as calculated using the EPA BEN computer model. *OAR*  
23 *340-012-0145.* The Department does not have discretion to not calculate the EB factor of the  
24 civil penalty formula unless the EB factor is either de minimis or there is insufficient information  
25 on which to make an estimate of the costs of compliance. *OAR 340-012-0150(3).*  
26

27 <sup>1</sup> Similarly, an administrative law judge may not reduce or mitigate the civil penalty below the amount established by  
the civil penalty formula. *OAR 340-011-0570(2).*

1 UST Compliance Rules

2 In 1988, Environmental Protection Agency (EPA) adopted 40 CFR Part 280 that required  
3 both existing and new USTs to meet certain regulations in order to prevent and detect releases.  
4 From 1989 until 2003, DEQ adopted the federal regulations by reference with some changes. *See*  
5 *former OAR 340-150-0002 and OAR 340-150-0003 which adopted, by reference, 40 CFR Part*  
6 *280.*<sup>2</sup> In February 2003, the Department adopted its own regulations which are modeled after the  
7 Code of Federal Regulations. Until 2011, both the Department and EPA had concurrent  
8 jurisdiction over USTs located in Oregon.

9 40 CFR 280.40 required that all existing UST systems be upgraded with release detection  
10 prior to the dates set forth in that rule. Release detection is important because at sites without it,  
11 leaks are discovered late, after contamination has spread, requiring costly cleanups and putting  
12 the public health and environment at risk. 40 CFR 280.41(b), as adopted and modified by OAR  
13 340-150-0003(19), required that pressurized piping have a method of release detection that  
14 includes both:

- 15 1. A line leak detector that meets the technical requirements in 40 CFR 280.44(a)
- 16 **and**
- 17 2. Annual line tightness testing that meets the technical requirements in 40 CFR
- 18 280.44(b) **or** daily monitoring under 40 CFR 280.44(c) by any of the methods in 40
- 19 CFR 280.43(e) through (h). The methods listed in 40 CFR 280.43(e) through (h)
- 20 includes vapor monitoring, groundwater monitoring, interstitial monitoring, or
- 21 another method that can meet the technical requirements in 40 CFR 280.44(c) or is
- 22 approved by the implementing agency.<sup>3</sup>

23 <sup>2</sup> For ease of reading, this argument will just refer to the federal regulation unless OAR 340-150-0003 adopted the  
24 regulation with changes, then the specific state rule adopting the regulation will be referenced.

25 <sup>3</sup> At the hearing, Respondent argued that 40 CFR 280.44 allows a permittee to use any of the three methods set forth  
26 in that regulation. The Department disagrees with this interpretation since 40 CFR 280.41(b) (as adopted by OAR  
27 340-150-0003) clearly states that a permittee must have a line leak detector plus other monitoring. 40 CFR 280.44  
merely sets forth the technical requirements. Under OAR 340-011-0545(3), when reviewing the department's  
interpretation of a department rule as applied in a formal enforcement action, "an administrative law judge must  
follow the department's interpretation if that interpretation is both plausible and reasonably consistent with the  
wording of the rule and the underlying statutes." When reviewing the CFRs as a whole, the Department's  
interpretation is both plausible and consistent.

1        These requirements were effective until February 14, 2003 when OAR 340-150-0410 and  
2        OAR 340-150-0555 was adopted, replacing the adoption by reference of the federal regulations.  
3        OAR 340-150-0555 reiterated the requirements in the CFRs regarding when an UST system  
4        needed to be upgraded. OAR 340-150-0410(2) requires that pressurized piping must have a line  
5        leak detector. OAR 340-150-0410(3) requires that in addition to the line leak detector, annual  
6        line tightness testing must be conducted. In lieu of the annual line tightness testing, OAR 340-  
7        150-0410(7) allows monitoring under a method set forth in OAR 340-150-0450 through OAR  
8        340-150-0470. Those methods include an automatic tank gauge, vapor monitoring, groundwater  
9        monitoring, interstitial monitoring, or by another method not specified in OAR 340-150-0410  
10       through OAR 340-150-0465 which is approved by the Department.

11       OAR 340-150-0410(4) and (5) requires that suction piping must either have a line  
12       tightness test conducted every three years or the piping must be installed such that it has enough  
13       slope so that the product drains back into the tank and has only one check valve. Additionally,  
14       there must be a way for the Department to check that the piping is installed according to these  
15       requirements.

16       In order for an impressed current system to provide corrosion protection, it must always  
17       be on and operating correctly. OAR 340-150-0325(2) requires that the corrosion protection  
18       system must be inspected and tested by a licensed corrosion protection tester every three years to  
19       ensure it is operating correctly.

20       A UST owner and permittee must demonstrate its financial ability to pay for the cost of  
21       cleaning up a leak and compensating other people for bodily injury and property damage caused  
22       by a leak. Most do so by purchasing a pollution insurance policy. OAR 340-150-0163(1)(i)  
23       requires that the owner and permittee must continuously maintain a valid financial responsibility  
24       mechanism.

25       OAR 340-150-0163(1)(a) requires that the owner and permittee post its annual operating  
26       certificate in a conspicuous location which is clearly visible at the UST facility.  
27

III. FACTS

The facts in this matter, as set forth in the Department's Notice and the Department's exhibits, are summarized below:

Since at least 1989, Respondent has been the owner and permittee of USTs located at 455 Industry Street in Astoria, Oregon. A notification submitted by Respondent in 1986 states that five USTs were installed in approximately 1975. *See Exhibit A of A14*. In 1999, the Department issued an operating permit to Respondent for three USTs, numbered BKKAK, BKKAA, and BKKAB. In 1999, Respondent decommissioned 2 USTs, numbered BKKAC and BKKAD. *See Exhibit A14*.

On August 3, 2010, the Department conducted an inspection of the USTs. *See Exhibit A13, and testimony of Bob McCoy*. Prior to conducting the inspection, the Department informed Respondent of the records the Department would need to see during the inspection. *See Exhibit A1*. Prior to the inspection, the Department reviewed its database and determined that the last insurance policy submitted to the Department expired on June 8, 2010. *See Exhibit A2*.

The facility consists of three USTs and associated piping. The piping transporting diesel to the dispenser is pressurized piping. The piping transporting gasoline to the dispenser is suction piping. The USTs and piping are protected from corrosion by an impressed current system. *See Exhibits A3, A9 and A13, and testimony of Bob McCoy*.

During the August 2010 inspection, Respondent provided the Department with the results of corrosion protection inspections and tests conducted in February 2005 and May 2009. *See Exhibits A5 and A9, and testimony of Bob McCoy*. During the inspection, Respondent had the current operating certificate for the USTs inside of a binder and it was not posted at the facility. *See Exhibit A9, and testimony of Bob McCoy*. During the inspection, Respondent was unable to provide the Department with triannual line tightness testing results for the suction piping, or documentation or another method of verification that the suction piping was designed and constructed to meet the requirements of OAR 340-150-0410(6). *See Exhibit A9, and testimony of Bob McCoy*. During the inspection, the Department discovered that there was no line leak

1 detector installed on the pressurized piping. Additionally, it is not possible that there was ever a  
2 line leak detector installed on the pressurized piping due to the construction of the facility. *See*  
3 *Exhibits A6, A9 and A13, and testimony of Bob McCoy.* Respondent was unable to provide the  
4 Department with any line tightness test results since it had been the owner and permittee of the  
5 USTs. Additionally, Respondent was unable to provide the Department with any records  
6 showing that it was conducting release detection under another method set forth in either 40 CFR  
7 280.43(e) through (h) or OAR 340-150-0450 through OAR 340-150-0470. *See Exhibit A9 and*  
8 *A13, and testimony of Bob McCoy.*

9 After the inspection, Respondent submitted, to the Department, documentation showing  
10 that:

- 11 1. Respondent had obtained an insurance policy with an effective date of August 2,  
12 2010. *See Exhibit A4.*
- 13 2. On January 28, 2011, a service provider determined that the suction piping was  
14 "safe suction" i.e., complied with OAR 340-150-0410(6). *See Exhibit A8.*
- 15 3. A line leak detector was installed on the pressurized piping by a licensed service  
16 provider in October 2010. *See Exhibits A9 and A11.*
- 17 4. A line tightness and line leak detector test was conducted on December 2, 2010.  
18 *See Exhibit A11.*

19 Since the inspection, Respondent has not provided, to the Department, any line tightness  
20 testing results or results of another release detection method set forth in either 40 CFR 280.43(e)  
21 through (h) or OAR 340-150-0450 through OAR 340-150-0470 which was conducted, prior to  
22 2010, on the pressurized piping. *Testimony of Bob McCoy.*

23 The typical cost of a line leak detector operational and line tightness test is \$225 per year.  
24 The typical cost of a corrosion protection inspection and test is \$155 every three years.  
25 *Testimony of Bob McCoy.* The actual cost of installing the line leak detector at the facility in  
26 question was \$3,900. *See Exhibit A7.*  
27

IV. VIOLATIONS AND ASSESSED CIVIL PENALTIES

There are two issues in any case involving a violation and the resulting civil penalty assessment. The first issue is whether a violation occurred. If so, the second issue is whether the civil penalty assessment is correct.

Violation #1:

Did Respondent fail 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)?

The evidence shows that the UST system was installed in approximately 1975. *See Exhibit A of A14.* 40 CFR 280.40 required that all existing UST systems installed between 1975 and 1979 comply with the release detection requirements for pressurized piping by December 22, 1990. 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. These requirements were effective until February 14, 2003 when OAR 340-150-0410 was adopted. That rule also required 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 the Department.

The evidence in the record shows that at no time prior to 2010 did Respondent install a line leak detector. *See Exhibits A6, A9 and A11, and testimony of Bob McCoy.* Additionally, the evidence in the record shows that Respondent has been unable to produce any records showing that any line tightness testing was completed prior to 2010. Finally, Respondent has not provided any evidence that it was conducting any of the methods listed in 40 CFR 280.43(e) through (h)

1 prior to 2003 or OAR 340-150-0450 through OAR 340-150-0470 after 2003. *Testimony of Bob*  
2 *McCoy.*

3 In its answer, Respondent argued it was in compliance because it was conducting  
4 statistical inventory reconciliation (SIR) as a release detection method on the pressurized piping.  
5 SIR is not listed as an approved method for release detection for pressurized piping in the either  
6 the CFRs or OARs. Respondent has not provided any evidence that it was conducting any of the  
7 methods listed in 40 CFR 280.43(e) through (h) prior to 2003. Respondent has not provided any  
8 evidence that it was conducting any of the methods listed in OAR 340-150-0450 through 0470  
9 after 2003. And even if it had been, these methods are not in lieu of having a line leak detector  
10 but instead are in lieu of annual line tightness testing. Additionally, OAR 340-150-0435  
11 specifically states that SIR is not a valid release detection method for pressurized piping.

12 What is the appropriate civil penalty for violation #1?

13 In its answer, Respondent raised several affirmative defenses to the Department assessing  
14 a civil penalty for this violation. First, Respondent argued that the Department is barred by the  
15 doctrine of estoppel from assessing a penalty because the Department agreed to postpone an  
16 inspection until after a service provider performed any necessary "upgrades" to the facility.  
17 There is no evidence in the record to support this allegation.

18 Next, Respondent relied upon an inspection report and a letter from EPA to support its  
19 argument that the Department is barred by the doctrine of laches and/or estoppel from assessing a  
20 penalty for this violation. *See Exhibits R6 and R8.* First, the Administrative Law Judge is  
21 prohibited from considering equitable remedies. *OAR 340-011-0570.* Additionally, it is well-  
22 settled that the defense of laches is not available against the government in a suit by it to enforce  
23 a public right or protect a public interest. The defense of laches is no more applicable in the  
24 context of an administrative proceeding.

25 The application of the doctrine of equitable estoppel is narrowly construed. At a  
26 minimum, Respondent would need to establish both that the Department misled them and that  
27 Respondent justifiably and detrimentally relied on the alleged misleading communication. The

1 violation must have somehow been caused or exacerbated by Respondent's compliance with or  
2 reliance on a communication from the Department.

3 Respondent argues that Exhibit R6 and R8 show that EPA found the facility to be in  
4 compliance in 2005. First, EPA and the Department have had concurrent jurisdiction over UST  
5 facilities in Oregon until the Department recently received state program delegation. An EPA  
6 determination regarding compliance is irrelevant to a Department determination of compliance.

7 Secondly, because the EPA person who drafted these documents was unavailable during  
8 the hearing and so could not be questioned regarding what was relied upon in drafting these  
9 documents, the exhibits carry little evidentiary weight except for what they plainly state on their  
10 face. Exhibit R8 merely states that Respondent corrected the violation cited in the 2002 Notice  
11 of Noncompliance sometime between February and July 2005, and does not state that  
12 Respondent's facility is in compliance with the release detection requirements. Similarly,  
13 Exhibit R6 does not state that Respondent is in compliance with the release detection  
14 requirements for pressurized piping.<sup>4</sup>

15 Respondent also has entered an exhibit into the record showing that it informed the  
16 Department that it was using annual line tightness testing as its release detection method for the  
17 pressurized piping. *See Exhibit R3*. Unfortunately, Respondent has failed to produce any  
18 evidence that the Department ever told Respondent that line tightness testing was adequate to  
19 comply with the Department's rules. Additionally, Respondent has not produced any evidence  
20 that it actually did conduct any line tightness testing prior to 2010.<sup>5</sup>

21 Similarly, Respondent has entered into the record an exhibit purporting to show that in  
22 1999 the Department informed Respondent of all the existing violations at the UST facility. *See*  
23 *Exhibit R5*. As the Department argued at the hearing, this exhibit is irrelevant to the proceeding  
24

25  
26 <sup>4</sup> The inspection form which is included as part of Exhibit R6 states that safe suction piping at the facility is in  
compliance. (See SafeS which is circled).

27 <sup>5</sup> This exhibit actually shows that Respondent did not have a line leak detector as long ago as 1995 and that  
Respondent falsified records it submitted to the Department because Respondent did not conducted any line tightness  
testing prior to 2010.

1 because it is a letter regarding violations and two USTs other than those at issue in this case.<sup>6</sup>  
2 And again, Respondent has failed to produce any evidence that the Department ever told  
3 Respondent that the three USTs **at issue in this case** were in compliance at all, so much as with  
4 the pressurized piping release detection requirements. Thus the doctrine of waiver is not  
5 applicable.

6 Respondent's compliance obligations are found in the rules and have been binding upon  
7 Respondent since 1990. At no time did the Department direct Respondents not to comply with  
8 the requirements set forth in the Department's rules or did the Department indicate to  
9 Respondent that it was in compliance with the release detection requirements in the rules.  
10 Ultimately, it is a permittee's duty to understand its permit, the regulatory requirements and to  
11 comply with the law. A person is strictly liable for any violation of the Department's rules.

12 **Base Penalty (BP):** The base penalty for violation #1 is set forth in the matrix in OAR  
13 340-012-0140(5)(b)(A)(iii) and is applicable to Respondent pursuant to OAR 340-012-  
14 0140(5)(a)(E) because Respondent is the permittee of one UST facility. *See Exhibit A14.* Under  
15 OAR 340-012-0067(1)(e) and (j), this violation is classified as a Class I violation. The  
16 Department determined that the magnitude of the violation is minor, pursuant to OAR 340-012-  
17 0130(4), as the information reasonably available to the Department indicates that the violation  
18 posed no more than a de minimis threat to human health or the environment. Respondent had  
19 line tightness testing conducted on the piping which showed that the piping had not leaked at a  
20 rate higher than the 0.1 gallon per hour rate. Under those findings, the base penalty was  
21 appropriately set at \$250 for a Class I, minor magnitude violation.

22 **P factor:** The P factor was set at 0 because Respondent has no prior significant  
23 actions in the same media as the violations that are the subject of this enforcement action.

24 **H factor:** The H factor was set at 0 because Respondent has no prior significant  
25 actions in the same media as the violations that are the subject of this enforcement action.

26 <sup>6</sup> Exhibit A14 shows that in 1999 and since that time, the Department has issued to Respondent an operating permit  
27 for three USTs, numbered BKKAK, BKKAA and BKKAB which are the USTs at issue in this case. Exhibit R5  
cites violations regarding BKKAC and BKKAD which were listed on the temporary permit from 1989. These two  
USTs were decommissioned in 1999.

1           **O factor:**       The O factor was set at 4 because the violation was ongoing for more than  
2 28 days. Respondent was required to install a line leak detector and to conduct release detection  
3 testing on its pressurized piping prior to December 22, 1990 but did not do so until 2010.

4           **M Factor:**       The M factor is the mental state of the Respondent and received a value of  
5 2 because Respondent had constructive knowledge (reasonably should have known) that the  
6 failure to have a line leak detector and to conduct either line tightness testing or another approved  
7 release detection method on the pressurized piping would be a violation. DEQ's rules state that  
8 holding a permit is presumed to constitute at least constructive knowledge of the permit's  
9 requirements. Respondent is the permittee for this facility. Additionally, Respondent had been  
10 trained on the compliance requirements for this facility which would have included the release  
11 detection requirements for pressurized piping. Respondent knew the piping was pressurized.  
12 *See Exhibit R3 and testimony of Bob McCoy.* Thus it had at least constructive knowledge of the  
13 release detection requirements for pressurized piping.

14           Respondent argued that the "M" factor should be zero because EPA informed respondent  
15 in 2005 that it was in compliance thus Respondent could not have reasonably known that a line  
16 leak detector was required. First, this contention is not supported by the facts. The letter from  
17 EPA merely states that Respondent correct the violation that was cited by EPA in 2002. But  
18 even if EPA had informed Respondent that it was in compliance in 2002, OAR 340-012-0145(5)  
19 states that if the evidence supports more than one mental state, the mental state with the highest  
20 value applies to the violation. The Department's rules require that each operator be trained on  
21 the compliance requirements. Respondent was trained after the 2002 inspection regarding the  
22 release detection requirements for pressurized piping<sup>7</sup>, thus Respondent reasonably should have  
23 known that a line leak detector and release detection testing was required for its pressurized  
24 piping.

25  
26           <sup>7</sup> Since February 2003, OAR 340-150-0200 and 0210 have required that UST operators be trained on the  
27 compliance requirements for UST systems. Mr. McCoy testified that the training covers the release detection  
requirements for pressurized piping and that he verified during the inspection that Respondent's employee who was  
present during the inspection had taken this training.

1           **C Factor:**     The C factor was set at -2 because Respondent made reasonably efforts to  
2 correct the violation by installing a line leak detector in October 2010 and conducted tightness  
3 testing in December 2010. At the hearing, Respondent argued that installing the line leak  
4 detector within several months of the inspection and having that installation completed by a  
5 licensed service provider should support a C factor of -3. In order for the value of -3 to be the  
6 appropriate C factor, Respondent needed to make extraordinary efforts to either correct the  
7 violation or to minimize the effects of the violation. *OAR 340-012-0145(6)(a)(A)*. Completing  
8 the actions necessary to come into compliance with the Department's regulations is not an  
9 "extraordinary" effort.

10           **Economic Benefit:**   The EB factor represents the approximate dollar sum of the  
11 economic benefit gained, either by avoiding or delaying the expenditure of compliance costs and  
12 is calculated using the EPA BEN computer model, pursuant to *OAR 340-012-0150*. The  
13 Department alleged that the EB factor for violation #1 should receive a value of \$10,994. This is  
14 the amount gained by avoiding the costs of conducting line leak detector operational and line  
15 tightness testing in the amount of \$225 on an annual basis since December 1991 through  
16 December 2010. Additionally, it is the estimated amount gained by delaying, from December  
17 1990 until October 2010, \$3,900 to install a line leak detector. *See Exhibit A12, and testimony of*  
18 *Bryan Smith.*

19           Economic benefit is "no fault" in nature. An entity need not have deliberately chosen to  
20 delay compliance, or even have been aware of its noncompliance, for an economic benefit of  
21 noncompliance to accrue. Similarly, an entity need not have realized any profit or even be a  
22 profit seeking entity for economic benefit to be appropriate, as is obvious from the fact that the  
23 BEN model determines an economic benefit for a not for profit entity. Simply stated, the  
24 financial condition of an entity is not a factor in the Department's civil penalty formula. Instead  
25 *OAR 340-012-0162*, allows the Department to exercise its discretion to reduce, in settlement, a  
26 penalty based on financial considerations.  
27

1 OAR 340-012-0026 sets forth the goals of the Department's enforcement program, one of  
2 which is deterrence. The EB factor of the civil penalty is not designed to reflect actual money  
3 gained by an entity, but instead is the approximately dollar sum that would put an entity in the  
4 same position as someone who did comply in a timely manner. Basically, the economic benefit  
5 portion of the civil penalty formula is designed to make entities indifferent to compliance and  
6 noncompliance. Specific deterrence is only one of the goals of the Department's enforcement  
7 program, as other regulated entities may see an economic advantage in similar noncompliance.  
8 Assessing an estimated economic benefit contributes to general deterrence which is one of the  
9 goals set forth in OAR 340-012-0026. The U.S. Supreme Court has noted that deterrence is a  
10 primary purpose of a penalty<sup>8</sup> and that a penalty which fails to include sufficient economic  
11 benefit will fail to deter future violations.<sup>9</sup>

12 Respondent argues, in its answer, that the Department incorrectly calculated the EB factor  
13 because the Department improperly calculated the duration of the violation. The regulations  
14 required that Respondent install a line leak detector and conduct release detection testing prior to  
15 December 22, 1990. In reality, the EB factor is low since the BEN model will not allow a  
16 violation start date later than 17 years in the past. The calculation was based on a compliance  
17 date of January 1, 1993 over three years after the violation began. *See Exhibit A12, and*  
18 *testimony of Bryan Smith.*

19 Next, Respondent argued that the Department abused its discretion by choosing to assess  
20 the EB factor for the full length of the violation. An abuse of discretion occurs when an agency  
21 exercises its discretion in a manner that is: 1) outside the range of discretion committed to the  
22 agency by law; 2) inconsistent with agency rule, an officially-stated agency policy position, or a  
23 prior agency practice, if the inconsistency is not explained by the agency; or 3) otherwise in  
24 violation of a constitutional or statutory provision. *ORS 183.482(8)(b)*. A reviewing tribunal is  
25

26  
27 <sup>8</sup> See *Tull v. United States*, 481 U.S. 412 (1987).

<sup>9</sup> See *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, fn. 2 (2000).

1 prohibited from substituting its judgment for that of the agency on any issue of agency discretion.  
2 *ORS 183.482(7)*.

3 Respondent does not contend that the penalty is in violation of a constitutional or  
4 statutory provision. Respondent also failed to state a case that the penalty is inconsistent with an  
5 officially stated agency policy or prior agency practice. Respondent did not point to any past  
6 cases or agency policy to support a contention that the penalty in this case is inconsistent with  
7 prior agency actions. In fact, all of the testimony at the hearing showed that the Department has  
8 consistently applied the BEN computer model (including the standard income tax, discount and  
9 inflation rates) in its enforcement cases over the years. Finally, the penalty issued to Respondent  
10 is well within the range of authority provided to the Department under the applicable statutes and  
11 rules. Oregon law authorizes the Department to issue a penalty of up to \$10,000 **per day** of  
12 violation of Oregon's statutes or rules. *ORS 468.130(1)*. This violation was ongoing for over 20  
13 years, thus the \$11,294 civil penalty is clearly within the Department's authority.

14 At the hearing, Respondent argued that the standard inflation, discount and tax rates are  
15 inappropriate in this case. Respondent is precluded from making this argument at this late date.  
16 OAR 340-011-0570 states that the scope of a hearing is limited to those matters raised in the  
17 notice and answer. Respondent did not raise an inappropriate or inaccurate discount, inflation or  
18 tax rate as an affirmative defense in its answer. Instead Respondent argued that the Department  
19 improperly calculated the duration of the violation, affecting the economic benefit and O factors  
20 of the penalty formula.<sup>10</sup>

21 In regard to the substance of Respondent's arguments, the BEN model uses standard  
22 values for inflation, discount and tax rates, and specific values for the years of the violation, the  
23 state where the violation occurred, the cost to comply and the entity's legal and profit status (*e.g.*,  
24 C-corporation, other for profit, non-profit, municipality, or federal facility). It uses inflation and  
25 discount rates from standardized cost indexes including those published by the magazine  
26 *Chemical Engineering* and from the Consumer Price Index. These standard values and the

27  
<sup>10</sup> See page 6 of Respondent's answer.

1 techniques used to calculate economic benefit in the BEN model are based on generally accepted  
2 financial principles, which were subjected to an extensive notice-and-comment process. *See*  
3 *Exhibit A12*. OAR 340-012-0150 states that the “model’s standard values for income tax rates,  
4 inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific  
5 Respondent can demonstrate that the standard value does not reflect the Respondent’s **actual**  
6 circumstance.”

7 In regards to the discount rate, Respondent entered information regarding the federal  
8 discount rate. This is not evidence that the standard discount rate in the BEN model did not  
9 reflect Respondent’s **actual** circumstances. The federal discount rate is not specific to  
10 Respondent’s actual circumstances. Although Respondent argues that the discount and inflation  
11 rates are excessive, it has not provided any evidence or alternative to the standard values that  
12 relates to Respondent’s actual circumstances.

13 In regards to the income tax rate, Respondent entered exhibits and testimony regarding  
14 the percentage of its income that it paid in state and federal taxes. As Mr. Smith testified, if the  
15 Department has an entity’s federal tax returns covering the entire period of the violation and  
16 EPA’s consultant determined that this information showed that the tax rate in the model was not  
17 appropriate, the Department would modify the tax rates used in the BEN model. Unfortunately,  
18 Respondent has not provided the Department with federal tax returns for the entire period of the  
19 violation.<sup>11</sup>

20 Applying each of these factors to the base penalty of \$250 resulted in a civil penalty of  
21 \$350 + \$10,944 in economic benefit for a total civil penalty of \$11,294 for violation #1.

22 Violation #2

23 Did Respondent fail to continuously maintain a required financial responsibility mechanism  
24 in violation of OAR 340-150-0163?

25  
26 <sup>11</sup> Although Exhibits R20 through R27 include tax returns for the majority of the years of violation, many of the  
27 years only include a state tax return which would not provide the information necessary to determine the appropriate  
federal tax rate. For example, see the attachments to Exhibit R25 for the years 1998, 1999, 2000 and 2001. It is  
Respondent’s responsibility to provide the necessary information to demonstrate that another value is more  
appropriate than the standard value. *OAR 340-012-0150(1)*.

1 The evidence shows that Respondent did not have a valid insurance policy from June 8,  
2 2010 until August 2, 2010. *See Exhibits A2 and A4.* In its answer, Respondent argued that  
3 Respondent was still covered by its former insurance policy or its new insurer. There is no  
4 evidence in the record to support this contention.

5 What is the appropriate civil penalty for violation #2?

6 **Base Penalty (BP):** The base penalty for violation #2 is set forth in the matrix in OAR  
7 340-012-0140(5)(b)(A)(iii) and is applicable to Respondent pursuant to OAR 340-012-  
8 0140(5)(a)(E) because Respondent is the permittee of one UST facility. *See Exhibit A14.* Under  
9 OAR 340-012-0067(1)(b), this violation is classified as a Class I violation. The Department  
10 determined that the magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as  
11 the information reasonably available to the Department indicates that the violation posed no more  
12 than a de minimis threat to human health or the environment. Respondent allowed its financial  
13 responsibility mechanism to lapse for less than two months, during which time, the information  
14 reasonably available to the Department does not indicate that Respondent needed to use its  
15 financial responsibility mechanism. Under those findings, the base penalty was appropriately set  
16 at \$250 for a Class I, minor magnitude violation.

17 **P factor:** The P factor was set at 0 because Respondent has no prior significant  
18 actions in the same media as the violations that are the subject of this enforcement action.

19 **H factor:** The H factor was set at 0 because Respondent has no prior significant  
20 actions in the same media as the violations that are the subject of this enforcement action.

21 **O Factor:** The O factor was set at 4 because the violation was ongoing for more than  
22 28 days. Respondent did not have a financial responsibility mechanism from June 8 to August 2,  
23 2010.

24 **M Factor:** The M factor was set at 6 because Respondent's conduct was reckless.  
25 Reckless means the Respondent consciously disregarded a substantial and unjustifiable risk that  
26 the result of its conduct would occur. Respondent has a permit for its facility. Each year, the  
27 Department requires permittees to submit proof of a valid financial responsibility mechanism.

1 *Testimony of Bob McCoy.* In 2002, EPA issued to Respondent a Notice of Noncompliance for  
2 failing to provide evidence of a current financial responsibility mechanism for this facility. *See*  
3 *Exhibit A15.* In 2005, the Department sent Respondent a Warning Letter for failing to provide  
4 evidence of a valid financial responsibility mechanism. *See Exhibit R9.* Respondent knew that it  
5 needed to continuously maintain a financial responsibility mechanism and by failing to renew its  
6 policy in a timely manner, Respondent disregarded a substantial and unjustifiable risk that its  
7 conduct would be a violation.

8 **C Factor:** The C factor was set at -2 because Respondent made reasonable efforts to  
9 correct the violation by obtaining a financial responsibility mechanism in August 2010.

10 **Economic Benefit:** The EB factor represents the approximate dollar sum of the  
11 economic benefit gained, either by avoiding or delaying the expenditure of compliance costs and  
12 is calculated using the EPA BEN computer model pursuant to OAR 340-012-0150. The  
13 Department alleged that the EB factor for violation #2 should be \$0 because any economic  
14 benefit gained would be de minimis.

15 Applying each of these factors to the base penalty of \$250 resulted in a civil penalty of  
16 \$450 for violation #2.

17 Violation #3

18 Did Respondent fail to have the corrosion protection system inspected and tested for proper  
19 operation by a qualified cathodic protection tester at least every three years, in violation of OAR  
20 340-150-0325(2)?

21 The evidence shows that Respondent had the corrosion protection system inspected and  
22 tested in February 2005 and May 2009, a period of over 4 years. *See Exhibits A3 and A5, and*  
23 *testimony of Bob McCoy.*

24 What is the appropriate civil penalty for violation #3?

25 **Base Penalty (BP):** The base penalty for violation #3 is set forth in the matrix in OAR  
26 340-012-0140(5)(b)(A)(iii) and is applicable to Respondent pursuant to OAR 340-012-  
27 0140(5)(a)(E) because Respondent is the permittee of one UST facility. *See Exhibit A14.* Under

1 OAR 340-012-0053(2), this violation is classified as a Class II violation. The Department  
2 determined that the magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as  
3 the information reasonably available to the Department indicates that the violation posed no more  
4 than a de minimis threat to human health or the environment. Although Respondent failed to  
5 conduct the inspection and test in 2008, a test conducted in 2009 shows that the corrosion  
6 protection system was operating properly and was likely operating properly prior to 2009.  
7 Under those findings, the base penalty was appropriately set at \$125 for a Class II, minor  
8 magnitude violation.

9 **P factor:** The P factor was set at 0 because Respondent has no prior significant  
10 actions in the same media as the violations that are the subject of this enforcement action.

11 **H factor:** The H factor was set at 0 because Respondent has no prior significant  
12 actions in the same media as the violations that are the subject of this enforcement action.

13 **O Factor:** The O factor was set at 4 because the violation was ongoing for more than  
14 28 days. Respondent was required to conduct an inspection and test within three years of the test  
15 it conducted in February 2005 (February 2008), but did not conduct an inspection and test until  
16 May 2009.

17 **M Factor:** The M factor is the mental state of the Respondent and was set at 2  
18 because Respondent had at least constructive knowledge (reasonably should have known) that  
19 the failure to conduct a corrosion protection inspection and test within 3 years would be a  
20 violation. DEQ's rules state that holding a permit is presumed to constitute at least constructive  
21 knowledge of the permit's requirements. Respondent is the permittee for this facility.  
22 Respondent had at least constructive knowledge of the testing requirements for corrosion  
23 protection.

24 **C Factor:** The C factor was set at -2 because Respondent made reasonably efforts to  
25 minimize the effects of the violation by conducting an inspection and test, albeit late, which  
26 indicated that the corrosion protection system was operating correctly throughout the period of  
27 the violation.

1       **Economic Benefit:**   The EB factor represents the approximate dollar sum of the  
2   economic benefit gained, either by avoiding or delaying the expenditure of compliance costs and  
3   is calculated using the EPA BEN computer model pursuant to OAR 340-012-0150. The  
4   Department determined that EB factor should be \$14. This is the amount gained by delaying the  
5   costs of a corrosion protection inspection and test in the amount of \$155 from February 2008  
6   until May 2009. *See Exhibit A12, and testimony of Bryan Smith.*

7       Applying each of these factors to the base penalty of \$125 resulted in a civil penalty of  
8   \$189 for violation #3.

9   Violation #4

10       Did Respondent fail to post Respondent's annual operating certificate in a conspicuous  
11   location which is clearly visible, in violation of OAR 340-150-0163(1)(a).?

12       The evidence shows that Respondent did not have its operating certificate posted at the  
13   facility during the inspection on August 3, 2010. Mr. McCoy testified that Respondent had the  
14   operating certificate inside of a binder. *See Exhibit A9, and testimony of Bob McCoy.*

15   What is the appropriate civil penalty for violation #4?

16       **Base Penalty (BP):**   The base penalty for violation #4 is set forth in the matrix in OAR  
17   340-012-0140(5)(b)(A)(iii) and is applicable to Respondent pursuant to OAR 340-012-  
18   0140(5)(a)(E) because Respondent is the permittee of one UST facility. *See Exhibit A14.* Under  
19   OAR 340-012-0053(2), this violation is classified as a Class II violation. The Department  
20   determined that the magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as  
21   the information reasonably available to the Department indicates that the violation posed no more  
22   than a de minimis threat to human health or the environment. Although the operating certificate  
23   was not posted properly during the Department's inspection, Respondent is the only distributor  
24   who delivers fuel at this facility so that there was minimal risk that a distributor would deliver  
25   fuel without the operating certificate being valid. Under those findings, the base penalty was  
26   appropriately set at \$125 for a Class II, minor magnitude violation.

1       **P factor:**       The P factor was set at 0 because Respondent has no prior significant  
2 actions in the same media as the violations that are the subject of this enforcement action.

3       **H factor:**       The H factor was set at 0 because Respondent has no prior significant  
4 actions in the same media as the violations that are the subject of this enforcement action.

5       **O Factor:**       The O factor was set at 0 because the Department does not have sufficient  
6 information to allege that the violation existed on any date besides the date of the inspection.

7       **M Factor:**       The M factor is the mental state of the Respondent and was set at 2  
8 because Respondent had constructive knowledge (reasonably should have known) that the failure  
9 to post its operating certificate would be a violation. The Department's rules state that holding a  
10 permit is presumed to constitute at least constructive knowledge of the permit's requirements.  
11 Respondent is the permittee for this facility. Additionally, the certificate states that it must be  
12 posted where it is visible. *See Exhibit D of Exhibit A14.*

13       **C Factor:**       The C factor was set at of 0 because the Department had insufficient  
14 information to make any other finding. The violation cannot be corrected as Respondent cannot  
15 retroactively post the operating certificate.

16       **Economic Benefit:**   The EB factor represents the approximate dollar sum of the  
17 economic benefit gained, either by avoiding or delaying the expenditure of compliance costs and  
18 is calculated using the EPA BEN computer model pursuant to OAR 340-012-0150. The  
19 Department alleged that the EB for violation #4 should be \$0 because any economic benefit  
20 gained would be de minimis.

21       Applying each of these factors to the base penalty of \$125 resulted in a civil penalty of  
22 \$150 for violation #4.

23       Violation #5

24       Did Respondent fail to provide a method for the Department to readily determine  
25 compliance with OAR 340-012-0410(6) during an August 3, 2010 inspection?

26       Mr. McCoy testified that, during the August 3, 2010 inspection, Respondent was unable to  
27 confirm that the suction piping met the requirements for "safe suction". *See Exhibit A9, and*

1 *testimony of Bob McCoy.* In its answer, Respondent argued that the Department failed to request,  
2 during the inspection, that Respondent verify or demonstrate that the suction piping met the  
3 requirements of OAR 340-150-0410(6). Respondent has not provided any evidence to contradict  
4 Mr. McCoy's testimony.

5 Additionally, at the hearing, Respondent argued that they were unable to verify that the  
6 piping was "safe suction" because the Department had not provided Respondent with notice that it  
7 would need to do so. First, Respondent's argument is not supported by the facts in the case.  
8 Exhibit A1 states "UST records DEQ will need to see for the inspection include... confirmation of  
9 safe suction." But more importantly, Respondent's compliance obligations are found in the rules.  
10 The Department is under no obligation to inform Respondent of its compliance obligations.  
11 Ultimately, it is a permittee's duty to understand its permit, the regulatory requirements, and to  
12 comply with the law.

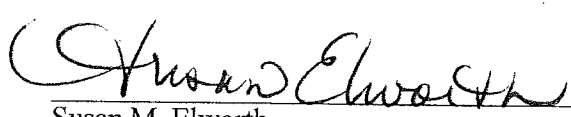
13 The Department did not assess a civil penalty for this violation.

#### 14 IV. CONCLUSIONS

15 In conclusion, the Department requests that the Administrative Law Judge find that  
16 violation nos. 1 through 5 occurred and that the Department's civil penalty assessment of \$12,083  
17 as set forth in the Amended Notice be upheld.

18  
19  
20  
21 Date

2/6/12

22  
23  
24  
25  
26  
27  
  
Susan M. Elworth  
Environmental Law Specialist

# Attachment D

**MCCOY Bob**

---

**From:** MCCOY Bob  
**Sent:** Thursday, July 22, 2010 9:51 AM  
**To:** 'Allan Bakalian'; 'niemiol@pacifier.com'  
**Subject:** FW: Inspections at 6897 Hiway Service, 7471 Landwehr's, and 7375 Burns-Johanson Bulk Plant.

---

Hi Allan,

You asked about cathodic protection records on file. You know it is the responsibility of the permittee to maintain and supply records, they must be kept readily available. I do hope everyone has been keeping the required records, but if you need copies of cathodic protection tests, you should be able to obtain copies from the tester(s).

Also, Greg Toran does not store UST records, they are public and available here at our NWR office. You can request copies of anything in the files. I know we did get some cathodic protection related test records from Greg Brennan. You can contact Paula Carson at 503-229-5321 to schedule a file review or get copies.

UST records DEQ will need to see for the inspection could include (depending on site design) UST insurance, equipment type and manufacturer, line leak tests, (or confirmation of safe suction) line leak detector tests, tank leak tests, the last two cathodic protection tests for each facility, 60 day cathodic protection records, proof of cathodic protection design by an expert, steel assessment records related to lining or cathodic protection, a printout of the setup for any automatic tank gauge, leak alarm history, operator training certification for class "A", "B", and "C" operators, lining inspection records, third party records for leak detection devices, and signage for emergency response.

The cathodic protection records should include the tests from 2009 and the previous set from 2006. UST sites and situations are so diverse, we find that it's best to have all the historic UST compliance records (not cleanup) available, that way nothing gets overlooked. So just bring all the records, and we can help look through them, there might be an as-built or historic upgrade or install record that answers all our questions.

I will need to see any sumps, fill drop tubes, under-dispenser containments, spill buckets, vents, cathodic protection rectifiers, and the outside alarm (or other overfill) which are part of each UST system. Overfill devices need to be confirmed as functional either before or on the day of the inspection, this usually requires a UST Service Provider. I also need to confirm equipment type and if possible the manufacturer.

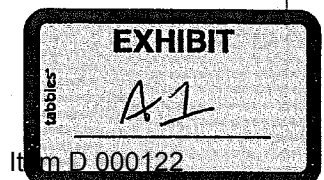
The inspections will start at the Hiway Service facility at 3108 Marine Drive in Astoria at 9:30 A.M. on Thursday July 29, 2010, then continue at the Burns-Johanson Bulk plant at 455 Industry St., then finish up at the Landwehr's facility at 34908 Hwy 101. Please arrange to have someone at the sites to open sumps and dispensers and assist with equipment verification.

Thanks for your cooperation. If you have questions or concerns please email me at this email address.

Sincerely,  
Bob McCoy  
503-229-5048

---

**From:** Allan Bakalian [mailto:abakalian@zdblawn.com]  
**Sent:** Tuesday, July 20, 2010 11:27 AM  
**To:** MCCOY Bob



Attachment D

Dec. 6-7, 2012, EQC meeting

Page 2 of 237

Cc: niemioil@pacifier.com

Subject: RE: Inspections at Hiway Service, Landwehr's, and Burns-Johanson Bulk Plant.

Thanks, Bob.

I have spoken to Greg about the inspections, but since you will be the inspector, I would appreciate it if you would provide a list of what you will need.

In case you did not know, last year Niemi had Greg Brennan with Universal Applicators do the cathodic protection testing for these 3 sites. They all passed and Greg Toran has the records. Please make sure you get them from Greg.

Thanks and please let me know if you have any questions.

Allan

Allan Bakalian

ZENO DRAKE BAKALIAN P.S.  
4020 NE Lake Washington Blvd., Ste. 100  
Kirkland, WA 98033  
(425) 822-1511, ext. 224 - tel  
(425) 986-6527 - mobile  
(425) 822-1411 - fax

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Please consider the environment before printing this message.

---

**From:** MCCOY Bob [mailto:MCCOY.Bob@deq.state.or.us]  
**Sent:** Tuesday, July 20, 2010 7:54 AM  
**To:** Allan Bakalian  
**Cc:** niemioil@pacifier.com  
**Subject:** FW: Inspections at Hiway Service, Landwehr's, and Burns-Johanson Bulk Plant.

Hi Allan,

Follows a list of service providers which we believe would perform UST services adequately for your purposes:

Northwest Pump: 866-405-2117  
Mascott Equipment: 800-452-5019  
Patriot Environmental: 503-423-7589

We need to set that August 3<sup>rd</sup> date in stone. If you wish an earlier date I can arrange it, but August 3<sup>rd</sup> is absolutely our drop-dead date.

Greg Toran tells me that he has already provided you with a comprehensive list of needs and expectations on our part. If you need further information please email me or call me at 503-229-5048.

Thanks Allen.

Bob McCoy

Received Time Oct. 26, 2009 1:52 PM No. 3108

## Certificate of Insurance Storage Tank Systems

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.	Producer
USC 5892654-04	06/08/2009	06/08/2010	06/08/2009	65478000

Named Insured and Mailing Address:  
NIEMI OIL CO  
PO BOX 989  
ASTORIA OR 97103

Producer:  
USASSURE INSURANCE SERVICES, INC.  
PO BOX 10630  
JACKSONVILLE FL 32247-0630

### CERTIFICATE:

1. Zurich American Insurance Company, the Insurer, as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

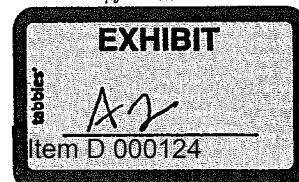
Per Attached Scheduled Locations and

Scheduled Storage Tank(s) Systems

for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; arising from operating the underground storage tank(s) identified above.

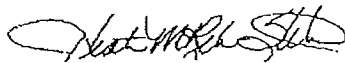
The limits of liability are \$1,000,000 each occurrence and \$1,000,000 annual aggregate, exclusive of legal defense costs which are subject to a separate limit under the policy. This coverage is provided under policy # USC 5892654-04. The effective date of said policy is 06/08/2009.

2. The Insurer further certifies the following with respect to the insurance described in Paragraph 1:
  - a. Bankruptcy or insolvency of the insured shall not relieve the Insurer of its obligations under the policy to which this certificate applies.
  - b. The Insurer is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third party, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in 40 CFR 280.95-280.102.
  - c. Whenever requested by a Director of an implementing agency, the Insurer agrees to furnish to the Director a signed duplicate original of the Policy and all endorsements.
  - d. Cancellation or any other termination of the insurance by the Insurer, except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the Insured. Cancellation for non-payment of premium or misrepresentation by the Insured will be effective only upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured.



- e. The insurance covers claims otherwise covered by the Policy that are reported to the Insurer within six (6) months of the effective date of cancellation or non-renewal of the Policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.

I hereby certify that the wording of this instrument is identical to the wording in 40 CFR 280.97 (b) (2) and that the insurer is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.



Heather M. Rehm-Stelter  
Product Line Manager  
Authorized Representative of  
Zurich American Insurance Company  
One Liberty Plaza  
New York, New York 10006

## Scheduled Storage Tank Systems Attachment



Policy No. USC 5892654-04

Named Insured: NIEMI OIL CO

Location Number: 1

Location Name: WARRENTON 76

Location Address: 238 SE MAIN

WARRENTON OR 97146

Total Number of Tanks 3

Tank #	Type	Installation Date	Capacity	Contents
1	UST	01/01/1978	1,000	Gasoline

Cleanup Costs Retroactive Date

06/08/2005

Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date 06/08/2005

Tank #	Type	Installation Date	Capacity	Contents
2	UST	01/01/1978	1,000	Gasoline

Cleanup Costs Retroactive Date

06/08/2005

Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date 06/08/2005

Tank #	Type	Installation Date	Capacity	Contents
3	UST	01/01/1978	1,500	Gasoline

Cleanup Costs Retroactive Date

06/08/2005

Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date 06/08/2005

Location Number: 2

Location Name: LANDWEIERS 76

Location Address: 34908 HWY 101 BUS

ASTORIA OR 97103

Total Number of Tanks 3

Tank #	Type	Installation Date	Capacity	Contents
1	UST	01/01/1989	1,500	Gasoline

Cleanup Costs Retroactive Date

06/08/2005

Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date 06/08/2005

U-ENVL-UF-108-C CW (03/08)

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
2	UST	01/01/1989	5,000	Gasoline	06/08/2005	06/08/2005
Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
3	UST	01/01/1989	5,000	Gasoline	06/08/2005	06/08/2005

Location Number: 3  
 Location Name: 76 HIWAY STATION  
 Location Address: 3108 MARINE DR  
 ASTORIA OR 97103  
 Total Number of Tanks 3

#6897

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
1	UST	01/01/1977	1,500	Gasoline	06/08/2005	06/08/2005
Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
2	UST	01/01/1977	4,000	Gasoline	06/08/2005	06/08/2005

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
3	UST	01/01/1977	4,000	Gasoline	06/08/2005	06/08/2005

Location Number: 4  
 Location Name: 76 CARDLOCK  
 Location Address: 455 INDUSTRY  
 ASTORIA OR 97103  
 Total Number of Tanks 3

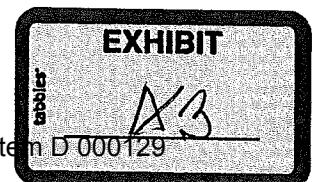
Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
1	UST	01/01/1978	10,000	Diesel	06/08/2005	06/08/2005

#7375

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
2	UST	01/01/1978	10,000	Diesel	06/08/2005	06/08/2005

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
3	UST	01/01/1978	20,000	Gasoline	06/08/2005	06/08/2005

Inspection item	7375 Bulk Plant	6897 Hiway Service
Type of cathodic protection	Impressed	Impressed
Cathodic protection testing & design tank & Piping	Tank & piping	Tank & piping
Meter reading last	None	None
3 year Cathodic Protection (Last 2) on schedule	2/23/2005 & 5/1/2009	2/23/2005 & 5/1/2009
60 day Cathodic Protection log	Yes	Yes
UST Insurance	6/8/2010	6/8/2010
tank type (Material, dw?)	sw steel	sw steel
Tank manufacturer	Unk	Unk
Pipe type	Suction/Pressure	Suction
Pipe manufacturer	Unk	Unk
Piping material	steel	steel
line leak test date (US suction and pressure lines only)	Not avail, needs leak detector	Unk
leak detector test date (pressure lines only)	Not avail	NA
tank leak detection (SIR) 12 months	Yes	yes
confirmation of safe suction	No	Not yet
class a, b, and c operator training documentation		Needs C
Expert design for CP system	CorPro	CorPro
Tank steel evaluation for CP install	MTCF See file	MTCF See file
Tanks Lined	No	1500 only
Tank lining assessments	NA	Yes
Number of tanks match	Yes	Yes
Tank sizes match records on file	Yes	Yes
Federal forms received	Yes	Yes
Closure records on file	Unk	Unk
Need statement for method of delivery	Yes	Yes
Op Cert accurate	At office needs correction	At office
Lining install date	NA	2/16/1999
cathodic protection install date	Unk	2/16/1999
Need to sort and combine files	Yes	Yes
Spill	Buckets	Buckets
Overfill	Drop tube	Drop tube
Last lining inspection date	NA	2/16/1999
Comments	Extra vents (5)	
Comments		
Comments		



7471 Landwehr's	7476 Warrenton BP
Impressed	Impressed
Tank & piping	Tank only
None	None
2/23/2005 & 5/1/2009	install & 5/1/2009
Yes	Yes
6/8/2010	6/8/2010
(2) sti-P3 and (1) sw steel	sw Steel
Unk	Unk
Suction	Safe Suction
Ameron	Smith
FRP and steel	FRP
Unk	NA
NA	NA
Yes	yes
Not yet	Yes
Needs C	A & B
CorPro	Yes
MTCF See file	Yes
2000	Yes
Yes	Yes
No	Yes
No	Yes
In lust file	Yes
No See file	Yes
Yes	On file
At office, needs correction for size	Yes
2/16/1999	2/1/1999
2/16/1999	2/1/1999
Yes	No
Buckets	Buckets
Drop tube	Drop tube
2/16/1999	

Kerosene tanks 86 HOT & Storage?

One dispenser removed, 2 out of service

Op cert copy lists tank sizes and permit numbers for Warrenton site

sti-P3 tanks have FRP pipe accoring to OEM

Tanks are (2) 5k sti-P3 and (1) 2k sw steel

HUDSON SPECIALTY INSURANCE  
COMPANY

(A New York Domiciled Corporation)

ECO-SITE<sup>(SM)</sup>

*Underground Storage Tank Financial Responsibility  
Certificate of Insurance*

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

In consideration of the premium paid, it is hereby understood and agreed that the following shall apply to:

Policy Number: ST-2170-11-10-01

Effective Date: August 2, 2010

This endorsement modifies insurance provided under the Storage Tank and Environmental Policy Claims Made and Reported Form STE - 0809- 200.

Storage Tank and Environmental Policy Claims Made and Reported Form  
Certificate of Insurance

Name: [name of each covered location]:

See Attached Tank and Locations Schedule Endorsement STE 0809-202.

Address: [address of each covered location]

See Attached Tank and Locations Schedule Endorsement STE 0809-202.

Period of Coverage: [current policy period]

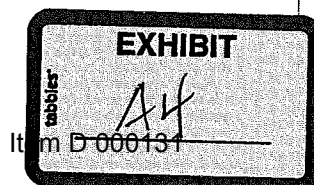
See Attached Policy Declarations STE 0809-100.

Name of Insurer: Hudson Specialty Insurance Company

Address of Insurer: 17 State Street, 30<sup>th</sup> Floor  
New York, NY 10004

Name of Insured: See Attached Policy Declarations STE 0809-100.

Address of Insured: See Attached Policy Declarations STE 0809-100.



Certification:

1. Hudson Specialty Insurance Company [the "Insurer"], as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

See Attached Tank and Locations Schedule Endorsement STF 0809-202.

for taking corrective action and/or compensating third parties for bodily injury and property damage caused by either sudden accidental releases or non-sudden accidental releases or accidental releases; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy.

The limits of liability are exclusive of legal defense costs, which are subject to a separate limit under the policy. See Policy Declarations for allocated limits.

This coverage is provided under the policy number referenced on page 1 of this endorsement.

The effective date of said policy is referenced on page 1 of this endorsement.

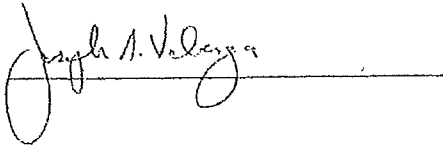
2. The Insurer further certifies the following with respect to the insurance described in Paragraph 1:

- a. Bankruptcy or insolvency of the insured shall not relieve the Insurer of its obligations under the policy to which this certificate applies.
- b. The Insurer is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in 40 CFR 280.95-280.102.
- c. Whenever requested by a Director of an implementing agency, the Insurer agrees to furnish to the Director a signed duplicate original of the policy and all endorsements.
- d. Cancellation or any other termination of the insurance by the Insurer, except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured.
- e. The insurance covers claims otherwise covered by the policy that are reported to the Insurer within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.

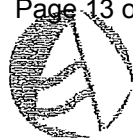
I hereby certify that the wording of this instrument is identical to the wording in 40 CFR 280.97(b)(2) and that the Insurer is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

Applies to all SCHEDULED LOCATIONS listed on the Tank and Locations Schedule  
Endorsement STE 0809-202.

*All other policy terms and conditions shall remain the same.*

A handwritten signature in dark ink, appearing to read "Joseph A. Valenza", is written over a horizontal line.

Joseph A. Valenza  
Authorized Representative of Hudson Specialty Insurance Company  
17 State Street  
New York, NY 10004


**HUDSON**  
 INSURANCE

# STORAGE TANK AND ENVIRONMENTAL LIABILITY DECLARATIONS

"THIS IS EVIDENCE OF INSURANCE PROCURED AND DEVELOPED UNDER THE OREGON SURPLUS LINE LAWS. IT IS NOT COVERED BY THE PROVISIONS OF ORS 734.510 TO 734.710 RELATING TO THE OREGON INSURANCE GUARANTY ASSOCIATION. IF THE INSURER ISSUING THIS INSURANCE BECOMES INSOLVENT, THE OREGON INSURANCE GUARANTY ASSOCIATION HAS NO OBLIGATION TO PAY CLAIMS UNDER THIS EVIDENCE OF INSURANCE."

## Hudson Specialty Insurance Company

(A New York Domiciled Corporation)

 17 State Street, 29<sup>th</sup> Floor

New York, NY 10004

Please check this policy and endorsements against original order. Griffin Underwriting Services assumes no responsibility for errors.

## ECO-SITE<sup>(SM)</sup>

### Storage Tank and Environmental Liability Policy Claims Made and Reported Coverage Form

PLEASE READ THE POLICY CAREFULLY.

Policy Number: ST 2170-11-10-01

Item I: Named Insured: Nicmi Oil Co.

 34908 Highway 101 Business  
 Astoria, OR 97103

Broker of Record:

Griffin Underwriting Services

 6645 NE 78<sup>th</sup> Court

Suite C5

Portland, OR 97218

NOTICE: Report all losses to Griffin Underwriting Services, PO Box 3867, Bellevue, WA 98009; Phone: 800-562-8095; claims@gogus.com

Item II: Policy Period: From: August 2, 2010 To: August 2, 2011

*At 12:01 am Standard Time at your mailing address shown above*

#### Item III: Limits of Liability

<u>This Policy Consists of the Following Coverage Parts:</u>		<u>Included or Not Applicable:</u>
<u>A. COVERAGE A &amp; B - LIMITS OF LIABILITY AND DEDUCTIBLE</u>		
<u>UNDERGROUND STORAGE TANKS (combined single limit)</u>		
COVERAGE A - CLAIMS FOR BODILY INJURY OR PROPERTY DAMAGE - UNDERGROUND STORAGE TANKS		Included
COVERAGE B - CLAIMS FOR CORRECTIVE ACTION DUE TO UNDERGROUND STORAGE TANKS		Included
\$ 1,000,000	Each CLAIM Limit	
\$ 2,000,000	Aggregate Limit	
\$ 50,000	Deductible	
<u>B. COVERAGE A &amp; B - LEGAL DEFENSE LIMIT - UNDERGROUND STORAGE TANKS (combined single limit)</u>		
\$ 500,000	Aggregate CLAIMS EXPENSES Limit (Equals 50% of Coverage A & B Aggregate Limit)	
<u>C. COVERAGE C &amp; D - LIMITS OF LIABILITY AND DEDUCTIBLE</u>		
<u>POLLUTION CONDITIONS AT A SCHEDULED LOCATION (combined single limit)</u>		
COVERAGE C - CLAIMS FOR BODILY INJURY OR PROPERTY DAMAGE		No Coverage
COVERAGE D - CLAIMS FOR CLEAN-UP COSTS		No Coverage
\$ N/A	Each CLAIM Limit	
\$ N/A	Aggregate Limit	
\$ N/A	Deductible	



## STORAGE TANK AND ENVIRONMENTAL LIABILITY DECLARATIONS

Item IV: Coverages A and B - UNDERGROUND STORAGE TANK SYSTEM(S) at SCHEDULED LOCATION(S): See Endorsement STE 0809-202 if Item III.A of this Declarations applies.

Item V: Coverages C and D - SCHEDULED LOCATION(S): No Coverage

Coverages C and D - ABOVEGROUND STORAGE TANK(S) at SCHEDULED LOCATION(S): No Coverage

Item VI: Retroactive Dates:

Coverage	Retroactive Date
----------	------------------

Coverage A:	See Endorsement STE 0809-202
-------------	------------------------------

Coverage B:	See Endorsement STE 0809-202
-------------	------------------------------

Coverage C:	No Coverage
-------------	-------------

Coverage D:	No Coverage
-------------	-------------

POLICY FEE: \$350.00

STATE TAX: \$216.12

SLSC: \$15.00

Item VII: Terrorism Premium: \$ No Coverage

Total Policy Premium: \$ 10,456

Item VIII: Forms applicable to this policy:

Common Coverage Endorsements

Storage Tank and Environmental Liability Policy  
Claims Made and Reported Coverage Form  
Common Policy Conditions and Exclusions  
Tank and Locations Schedule  
Underground Storage Tank Financial Responsibility  
Certificate of Insurance  
Amendment of the Definition of Insured  
Service of Suit - OR

Form Number

STE 0809-200

STE 0809-201

STE 0809-202

STE 0809-203

STE 0809-204

ESB-SS-1108-238

Terrorism Endorsements

Terrorism - Certified Acts Exclusion

Form Number

STE-1108-997

These declarations together with the Common Policy Conditions, Coverage Part Coverage forms(s), Forms, Endorsements, Applications and other information and representations made by the Named Insured relevant to the underwriting of this Policy used to form a part thereof, complete the above numbered Policy.

By: 

President and Chief Executive Officer

# HUDSON SPECIALTY INSURANCE COMPANY

(A New York Domiciled Corporation)

## ECO-SITE<sup>(SM)</sup> STORAGE TANK AND ENVIRONMENTAL LIABILITY POLICY *Tank and Locations Schedule Endorsement*

In consideration of the premium paid, it is hereby understood and agreed that the following shall apply to:

Policy Number: ST-2170-11-10-01  
Effective Date: August 2, 2010

This endorsement modifies insurance provided under the Storage Tank and Environmental Liability Policy, Form STE-0809-200.

### SCHEDULED LOCATIONS AND TANK ENDORSEMENT

Coverages A and B - UNDERGROUND STORAGE TANK SYSTEM(S) at SCHEDULED LOCATION(S):

Location #	Address	Tank #	Date Installed	Contents	Construction	Capacity	Retroactive Date
1	238 SE Main Warrentown, OR	1	1978	Gasoline	SW Steel	1,000	6/8/2005
		2	1978	Gasoline	SW Steel	1,000	6/8/2005
		3	1978	Gasoline	SW Steel	1,500	6/8/2005
		4	1977	Gasoline	SW Steel	1,500	6/8/2005
2	34908 Hwy. 101 Bus. Astoria, OR	5	1977	Gasoline	SW Steel	4,000	6/8/2005
		6	1977	Gasoline	SW Steel	4,000	6/8/2005
3	3108 Marine Dr. Astoria, OR	7	1989	Gasoline	Cathodically Protected Steel	1,500	6/8/2005
		8	1989	Gasoline	Cathodically Protected Steel	5,000	6/8/2005
		9	1989	Gasoline	Cathodically Protected Steel	5,000	6/8/2005
4	455 Industry Astoria, OR	10	1978	Gasoline	SW Steel	10,000	6/8/2005
		11	1978	Gasoline	SW Steel	10,000	6/8/2005
		12	1978	Gasoline	SW Steel	20,000	6/8/2005

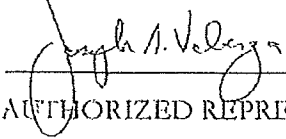
Coverages C and D - SCHEDULED LOCATION(S):

Loc. No.	Address
N/A	N/A

Coverages C and D - ABOVEGROUND STORAGE TANK(S) at SCHEDULED  
LOCATION(S):

<u>Location #</u>	<u>Address</u>	<u>Tank #</u>	<u>Date Installed</u>	<u>Contents</u>	<u>Construction</u>	<u>Capacity</u>	<u>Retrospective Date</u>
	N/A						

*All other policy terms and conditions shall remain the same.*

  
\_\_\_\_\_  
AUTHORIZED REPRESENTATIVE

7375

## Oregon Department of Environmental Quality Cathodic Protection Test Form

UST Owner		UST Facility	
NAME:		NAME: NEIMI OIL BULK	ID#: 7375
ADDRESS:		ADDRESS 455 INDUSTRIAL ST	
CITY:	STATE:	CITY: ASTORIA	STATE: OR
<b>Cathodic Protection Tester</b>			
TESTER'S NAME: GREG BRENNAN		CP TESTER'S LICENSE #: 10438	
COMPANY NAME:		EXPIRATION DATE: 9/09	
ADDRESS: 2357 se 50 <sup>TH</sup> AVE		PHONE NUMBER: 503-236-6359	
CITY: PORTLAND	STATE: OR	NACE CERTIFICATION #:	
Cathodic protection system is: <input type="checkbox"/> Galvanic <input checked="" type="checkbox"/> Impressed current      Date Last Tested: 05			
Weather Conditions at Time of Testing/Inspection: COOL AND DAMP			
Temperature: 54      Soil/Backfill Conditions (circle): moist dry sand gravel soil Describe:			

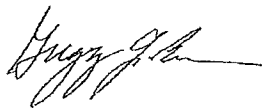
### Cathodic Protection System Certification

Identify which of the following testing situations is being recorded:

- ☐ Test required within 6 months of installation of CP system (installation date was \_\_\_/\_\_\_/\_\_\_)  
☒ Test required at least every 3 years after installation/test noted above  
☐ Test required within 6 months of any repair activity

The cathodic protection system is effective, testing was performed according to NACE Standard RP-0285-2002, and is providing cathodic protection to all tanks and product lines: ☒ Yes ☐ No

Signature of Tester

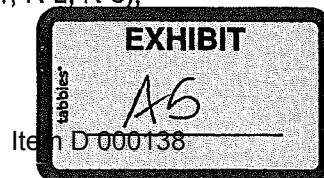


Date 5/1/09

### UST SYSTEM INFORMATION

TANK #	YR TANK INSTALLED	CAPACITY	TANK MATERIAL	LINED? Y/N Date	YR CP INSTALLED	PIPING MATERIAL	YR CP INSTALLED
1	1975	10	STEEL			STEEL	NA
2	75	20					
3	1975	10					

**UST SITE PLAN** – On the back draw a diagram showing the important parts of the facility (tanks, lines, manway locations, turbines, vents, rectifier, pump islands, buildings). Indicate reference cell locations where structure-to-soil potential or continuity measurements have been made and label (R-1, R-2, R-3); location of all anodes and wires; location of CP test stations.

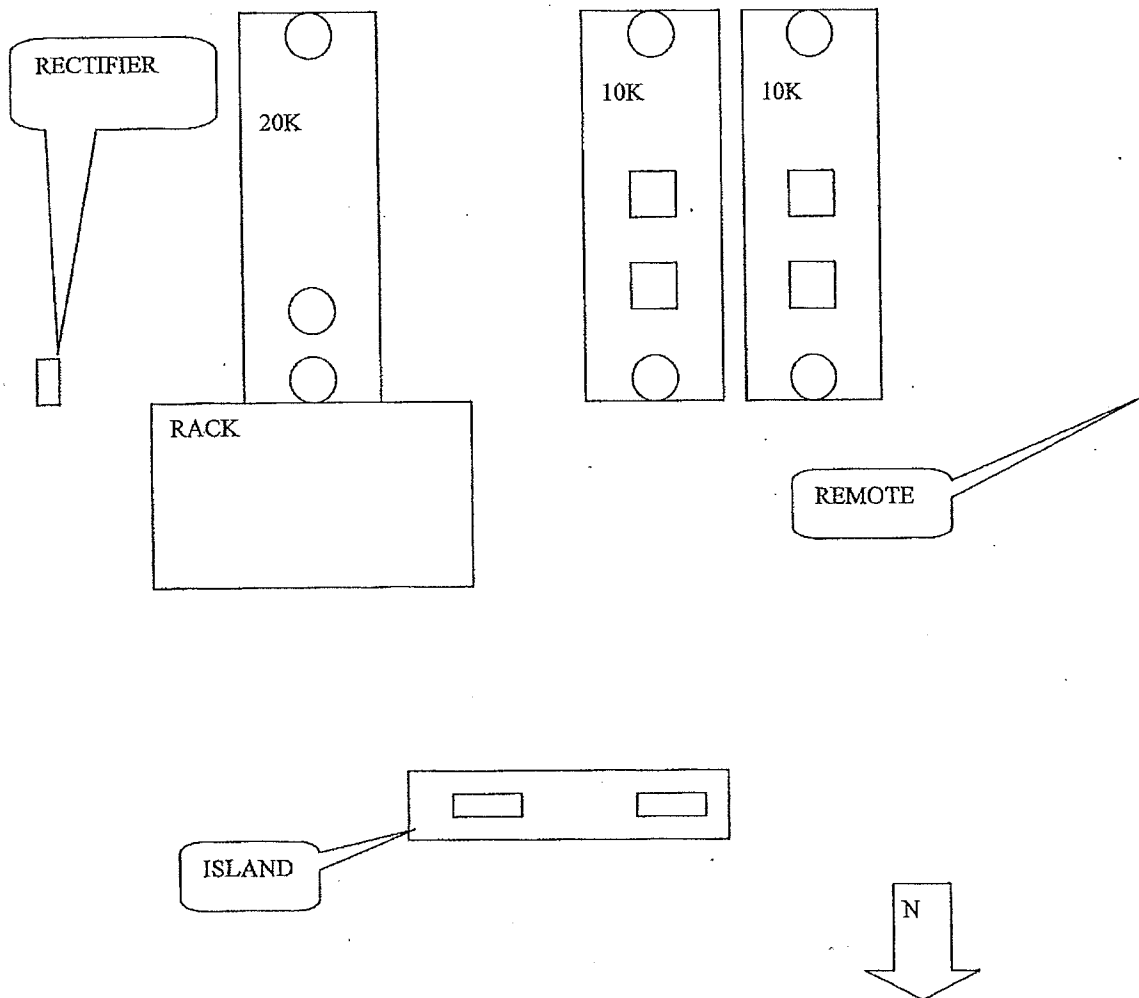


IMPRESSED CURRENT CP TEST REPORT PAGE							
RECTIFIER DATA							
RECTIFIER MANUFACTURER: CORPRO				RATED DC OUTPUT: 60 VOLTS 8 AMPS			
RECTIFIER MODEL: CSAYSA60-8Z				RECTIFIER SERIAL NUMBER: 983239			
RECTIFIER OUTPUT AS INITIALLY DESIGNED OR LAST RECOMMENDED (if available): VOLTS 60 AMPS 8							
	DATE	TAP SETTINGS		DC OUTPUT		HOUR METER	COMMENTS
		Course	Fine	Volts	AMPS		
"As Found"	05/01/09	D	5	59	1.2		SET HIGH BUT OK
"As Left"	05/01/09	D	5	59	1.2		
STRUCTURE TO SOIL POTENTIAL MEASUREMENTS							
ID	STRUCTURE	CONTACT POINT	REFERENCE CELL ID	ON	INSTANT OFF	100MV	
						NATIVE	CHANGE
1	TANK	VENT	CUCUSO4 AT BERM IN ASPHALT	1126	906		
2	TANK	VENT	CUCUSO4 AT BERM IN ASPHALT	1129	908		
3	TANK	VENT	CUCUSO4 AT BERM IN ASPHALT	1125	916		
1	PIPE	PIPE	SAME	1067			
2	PIPE	PIPE	SAME	1079			
3	DISP	PIPE	SAME	1067			
CP TEST STATION REQUIREMENTS							
Have previous CP system test records been reviewed? Y				Has this CP test been performed consistent with previous CP system tests? Y			
If test procedures have changed since last test please explain:							
Have potential measurements been made at all tanks and piping including any buried flex-connectors?							
COMPLETE IF ANY REPAIRS OR MODIFICATIONS TO THE CP SYSTEM ARE MADE OR ARE NECESSARY							
Complete if any repairs or modifications to the cathodic protection system are made or are necessary.							
Additional anodes for an impressed current system (attach corrosion experts design)							
<input type="checkbox"/> Repairs or replacement of rectifier (explain below)							
Anode header cables repaired and/or replaced (explain below)							
<input type="checkbox"/> Impressed current protected tanks/piping not electrically continuous (explain)							
Remarks/Other::							

2375

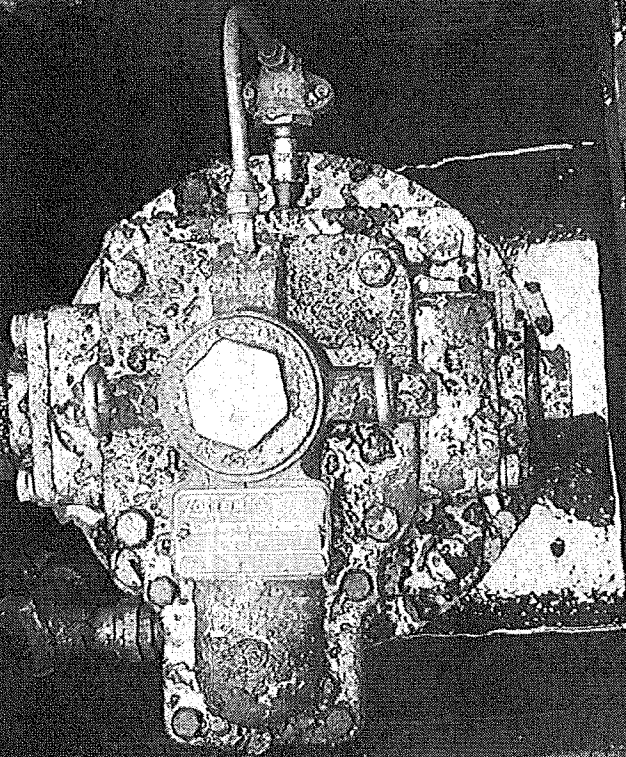
# CONTINUITY

STRUCTURE TO REMOTE	FILL	TLS	TUR	VENT
TANK 1	1679	1679	1679	1679
TANK 2	1679	1678	1678	1679
TANK 3	1679	1679	SUCTION PUMP	1679
	TO PIPING			
PIPE 1	1679			
PIPE 2	1679			
PIPE 3	1679			



TORHEIM PRESSURE PUMP WITHOUT LEAK DETECTION

08-03-2010 10:25

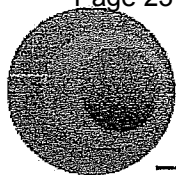


EXHIBIT

A6

EXHIBIT





# Universal Applicators, Inc.

## Tank & Environmental Services

2357 SE 50th Ave., Portland, OR 97215 503-236-6359  
CCB# 65928 www.universalap.com FAX: 503-233-9804

### Invoice

DATE	INVOICE #
11/02/2010	16401
TERMS	DUE DATE
Due on receipt	11/02/2010

BILL TO
Niemi Oil Inc 34908 Hwy 101 Astoria, OR 97103

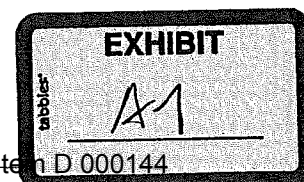
SHIP TO
Niemi Oil Inc 490 Industry St Astoria, OR 97103

AMOUNT DUE	ENCLOSED
\$3,900.00	

Please detach top portion and return with your payment.

TRACKING #
624

Activity	Quantity	Rate	Amount
• Install Leak Detection		3,900.00	3,900.00
SUBTOTAL			\$3,900.00
TAX (8.2%)			\$0.00
TOTAL			\$3,900.00



Item D 000144



Since 1960

Don Reeves  
Mascott Equipment Company  
435 NE Hancock  
Portland, OR 97212  
January 28, 2011

*Received 2/1/11  
via email*

Cary Bechtolt  
Owner  
Niemi Oil Company Inc.  
34908 HWY 5  
Astoria, OR 97103

Regarding:

Bulk Rack in Astoria

Cary,

Your site at 455 Industry is configured as safe suction. The piping is installed with a swing check valve directly before the aboveground Blackmer suction pump at the rack. This conforms to current Oregon DEQ rules. Please contact me if I can be of any further assistance.

Sincerely,

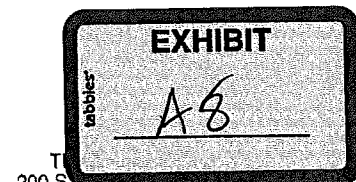
Don Reeves

A handwritten signature in dark ink, appearing to read 'D. Reeves'.

CC: Allan Bakalian

CC: Allan Bakalian  
PORTLAND  
435 NE Hancock  
Portland, OR 97212  
(503) 282-2587

SEATTLE  
6530 5th Place South  
Seattle, WA 98108  
(800) 481-7311



200 S.  
Pasco, WA 99301  
(509) 543-2018

State of Oregon

Department of Environmental Quality

Memorandum

To: File #7375  
UST/Land Quality

Date: 08/05/2010

From: UST/Land Quality

Subject: Burn's-Johanson Bulk Plant Compliance Inspection August 3<sup>rd</sup>, 2010

On August 3<sup>rd</sup>, 2010, the DEQ conducted a compliance inspection of facility #7375, Burns-Johanson Bulk Plant at 455 Industry Street in Astoria, Oregon.

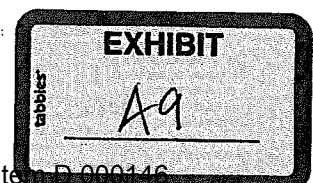
People present at the inspection were myself (Bob McCoy), DEQ inspector, Greg Toran, DEQ Inspector, and Cary Bechtolt, facility owner.

Equipment on the site included three single-wall steel tanks including two manifolded diesel tanks, a bulk loading rack, two dispensers which were wrapped in plastic, and an impressed current rectifier. The northernmost tank is a diesel slave to the center tank, which has a turbine. Piping is composed of single-wall steel pipe. The diesel portion of the loading rack has a pressure system which is manually turned on for loading, and is only under pressure during loading. The loading rack pressure system does not have a line leak detector. The gasoline portion of the loading rack is suction, but it is unknown whether it is safe suction. All steel equipment is cathodically protected. Overfill is accomplished by a flapper valve in each fill pipe. Mr. Bechtolt will need to document that the tanks are filled with tight-fill gravity drops to show that this method of overfill protection is effective. If he reopens the two dispensers he will also need to provide proof that dispenser suction systems are safe suction. There are 5 vent pipes at the site. Owner claims that two of the tanks are "double vented". He will need to produce proof that two tanks are double vented, and that the extra two vents don't belong to two regulated but unregistered tanks.

Mr. Bechtolt was able to produce 12 months of passing SIR tests for the tanks on site, the last two cathodic protection tests, and the 60-day logs for the impressed current system. He did not have insurance papers on site, but did email them to me after the inspection. The insurance he provided had a starting date of 8/2/2010. His old insurance lapsed on 6/8/2010. He was effectively without insurance for a little less than two months. The cathodic protection tests were done 4 years apart instead of three years apart, but since they showed no failing tests we can safely assume that the system was functioning during the extra year.

The operating certificate was not on display at this facility. The operating certificate at the Niemi office is incorrect, claiming heating oil in the gasoline tank.

Emergency response signage was not in evidence.



**Equipment found:**

- Three cathodically protected single-walled steel tanks.
- One bulk loading rack with a suction component and a pressure component.
- Two dispensers which were disabled and wrapped in plastic.
- Impressed current rectifier for cathodic protection of metal tanks and metal piping.
- Drop tubes with flappers for overfill prevention.
- Five vents. (two extras)

**Records provided:**

- 12 months of passing SIR testing
- The last two cathodic protection tests-4 years apart
- 60 day rectifier log
- Proof of insurance beginning 8/2/2010. Previous insurance lapsed on 6/8/2010
- Operating certificate with incorrect tanks listed.

**Confirmed violations:**

- Insurance lapse of two months.
- No three-year pressure tests or proof of safe suction.
- No emergency response signage.
- Certificate not posted in a conspicuous place.
- No line leak detector on the pressure line.

**Required actions:**

- Obtain proof of safe suction for rack suction line.
- Install line leak detector on rack pressure line.
- Post operating certificate in a conspicuous place.
- Document class "C" operator training for all employees who dispense fuel.
- Maintain insurance.
- Document that the tanks are filled with tight-fill gravity drops.
- Repeat operator training.
- Prove that tanks are double-vented.

Previous 3 year SOC inspection was performed by EPA on July 11, 2002.





# Oregon

Theodore R. Kulongoski, Governor

## Department of Environmental Quality

Northwest Region

2020 SW 4th Ave, Suite 400

Portland, OR 97201

(503) 229-5263

FAX (503) 229-6945

OTRS 1-800-735-2900

Certified Mail: 70092250000446780464

September 29, 2010

Cary Bechtolt  
Burns-Johanson Oil Company  
P.O. Box 989  
Astoria, Oregon 97103-0989

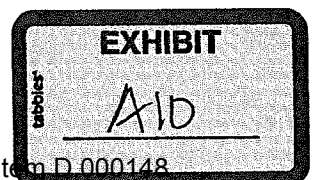
RE: Pre-Enforcement Notice  
Burns-Johanson Bulk Plant  
PEN-NWR-UST - 10-0006  
**UST Facility #7375**  
Clatsop County

Dear Mr. Bechtolt:

On August 3, 2010, the Department of Environmental Quality (DEQ) conducted an inspection at the Burns-Johanson Bulk Plant located at 455 Industry Street in Astoria, Oregon. During the inspection several violations were noted. Based upon this inspection of your facility, DEQ has concluded that Niemi Oil is responsible for the following violations of Oregon environmental law:

**VIOLATIONS:**

- (1) [OAR 340-150-0400(1)(a)]; **(Class I)**. Failure to install a method or combination of methods for release detection such that the method can detect a release from any portion of the UST system. During the inspection it was noted that there is a pressure line on the diesel portion of the loading rack which does not have a line leak detector on it.
- (2) [OAR 340-150-0410(5)]; **(Class I)**. Failure to perform line tightness test every three years. Safe suction has not been documented for the suction line at the rack. Unless there is documentation that the system is a safe suction system, the line tightness test must be performed every three years.
- (3) [OAR 340-150-0010]; **(Class I)**. Failure to maintain a required financial responsibility mechanism. Insurance forms submitted during the inspection had a starting date of 8/2/2010 (the day before the inspection). The previous insurance forms for this site showed an ending date of 6/8/2010. The site was without insurance for nearly two months.
- (4) [OAR 340-150-0325(2)(b)]; **(Class I)**. Failure to conduct one of the two three-year corrosion protection tests within the last six years. Corrosion protection test results were



submitted by the permittee with dates of February 23, 2005 and May 1, 2009, a total of four years and two months apart. The rule calls for the test every three years.

- (5) [OAR 340-150-0150(1)]: **(Class II)**. Failure to post operating certificate in a conspicuous location so it can be readily viewed by a fuel distributor. The operating certificate was not posted at the site.

(Class I violations are the most serious violations; Class III violations are the least serious.

Failure to monitor for leaks can bring catastrophe to your community in the form of contaminated drinking water. It can also cost you a great deal of money if the contamination from your leaking system causes physical harm to others, or causes them to lose business due to fumes. Allowing the insurance to lapse could cost you your business if you do not have the funding to clean up a massive leak and one occurs.

To correct violation(s) or minimize the impacts of the violation(s) cited above, the Department strongly suggests you take the following actions by the date indicated:

#### **Corrective Action(s) Requested**

To Correct Violations:

- 1) Install a line leak detector on the pressure piping at the rack by October 25, 2010.
- 2) Maintain financial responsibility mechanism without letting it lapse.
- 3) Post current operating certificate immediately in a conspicuous location for viewing by fuel suppliers.
- 4) Perform line tightness tests on all lines by October 25, 2010.
- 5) Perform cathodic protection tests every three years.

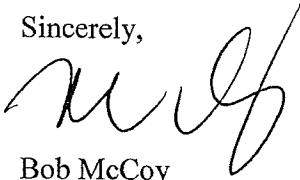
Your timely and responsive action on these items will be taken into consideration in any civil penalty assessment issued by the Department.

The violation(s) cited above posed the risk of significant environmental harm and the matter is being referred to the Department's Office of Compliance and Enforcement for formal enforcement action. The violations listed are not eligible for the field citation process. Formal enforcement action may result in assessment of civil penalties and/or a Department order. A formal enforcement action may include a civil penalty assessment for each day of violation.

If you believe any of the facts in this Pre-Enforcement Notice are in error, you may provide written information to me at the address shown at the top of the letter. The Department will consider new information you submit and take appropriate action.

The Department endeavors to assist you in your compliance efforts. Should you have any questions about the content of this letter, feel free contact me in writing or by phone at 503-229-5048. In addition, if you desire any follow-up technical assistance, please contact Bob McCoy at the above listed number.

Sincerely,

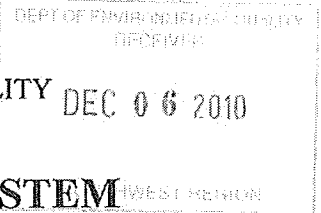
A handwritten signature in black ink, appearing to read 'mcb', written over the word 'Sincerely,'.

Bob McCoy  
Natural Resource Specialist III

Cc: Susan Greco, Office of Compliance and Enforcement, DEQ Headquarters



OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY  
Underground Storage Tank Program



## UNDERGROUND STORAGE TANK SYSTEM REPAIR AND REPLACEMENT REPORT AND CHECKLIST

This report and checklist may be filled out by a DEQ licensed supervisor or repair service technician to satisfy the repair and replacement record keeping requirements described in OAR 340-150-0350 (9) and 340-150-0354 (3). The purpose of this report and checklist is to document that the repair or replacement of underground storage tank (UST) system components complied with OAR 340-150-0350 or 340-150-0354. While use of this repair and replacement report and checklist form is optional, permittee and tank owner compliance with the record keeping requirements of OAR 340-150-0350 (9) and 340-150-0354 (3) is mandatory.

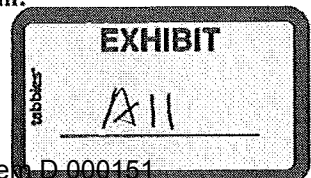
A copy of this repair or replacement report and checklist should be provided to the UST permittee along with instructions to the permittee that this repair or replacement report and checklist, and any attachments, must be retained for the operating life of the UST systems. DEQ UST inspectors may request to review repair or replacement records at any time during the operating life of the UST system.

### DEFINITION CHECKLIST ✓

- ☒ A repair was completed. To repair means to restore any portion of an UST system that has failed. However, metal piping and fittings that have released a regulated substance must be replaced.
- ☒ A replacement was completed. To replace means to change any part of an UST system by exchanging one unit for a like or similar unit.

### REMINDER CHECKLIST ✓

- ☒ Before beginning the repair or replacement work, obtained any local planning, building or fire department approvals or permits that were needed to complete the work. Copies are attached.
- ☒ Documentation is attached, including equipment receipts, for any equipment that was repaired or replaced. Documentation such as tank manufacturer's certifications, third party certifications, tank or piping tightness tests results, cathodic protection testing results, structural integrity assessments, is also attached, if applicable.
- ☒ Petroleum-contaminated soil or groundwater encountered during repairs or replacements was reported to DEQ, if applicable.
- ☒ A site assessment was performed to characterize the level of soil or groundwater contamination. A copy of the site assessment is attached and has been sent to DEQ.
- ☒ A copy of the completed form, including all applicable attachments (examples listed above), has been provided to the UST permittee. Please note that a copy does not need to be provided to DEQ.
- ☒ The permittee has been informed of the requirements to keep a copy of this repair or replacement report and checklist, including attachments, for the operating life of the UST system.



**1. UST SYSTEM PERMITTEE AND LOCATION (PLEASE PRINT):**

DEQ UST Facility Name: Neimi Oil Bulk Plant- Cardlock  
Facility (location) Address: 455 490 Industry St  
Astoria, OR 97103  
UST permittee or customer name: Neimi Oil  
Permittee or customer Telephone: \_\_\_\_\_

**2. REPAIR OR REPLACEMENT WORK PERFORMED BY:**

**IF APPLICABLE:**

Company: UAI DEQ License Number 12630  
(Please Print Company Name)  
Address: 2357 SE 50th Ave Lic. Expiration Date: 05/10/11  
Portland, OR 97215  
Telephone: 503-236-6359  
Supervisor or technician: Greg Brennan DEQ License Number 10436  
(Please Print Name) Lic. Expiration Date: 09/21/11

**3. TANK AND ASSOCIATED PIPING SYSTEM INFORMATION**

TANK SIZE (GALLONS)	TYPE OF TANK (steel, fiberglass, double-walled, steel with internal lining, etc.)	PRODUCT STORED	TYPE OF ASSOCIATED PIPING (i. e. metal, fiberglass, flexible, single-walled, double-walled, etc.)
20000	Steel	# 2	Steel all with C/P

**4. BRIEF DESCRIPTION OF REPAIR OR REPLACEMENT WORK COMPLETED**

By request of DEQ we installed line leak detector and valves to allow testing of the line from tank to the riser from the loading rack.



☒ PORTLAND  
435 N.E. HANCOCK  
PORTLAND, OR 97212  
503-282-2587

☐ TRICITIES  
200 S. 20TH AVE.  
PASCO, WA 99301  
509-543-2018

☐ SEATTLE  
6530 5TH PLACE SOUTH  
SEATTLE, WA 98108  
206-763-7867

Site Name: Niemi Oil Co.  
Address: \_\_\_\_\_  
City, State, Zip: Astoria, OR 97103

Test Date: 12/2/10  
Technician Name: D. Reeves  
Tech Signature: Don Reeves  
2010.12.02 10:12:40 -08'00'

Product: Diesel  
Type of Leak Detector: VMI LD3000  
Type of Product Line: Single wall steel

3 GPH Test: Pass: ☒ Fail: ☐ Type of New Leak Detector: \_\_\_\_\_  
Replaced Leak Detector?: Yes: ☐ No: ☐ S/N: \_\_\_\_\_  
New Leak Detector: Pass: ☐ Fail: ☐

Product: \_\_\_\_\_  
Type of Leak Detector: \_\_\_\_\_  
Type of Product Line: \_\_\_\_\_

3 GPH Test: Pass: ☐ Fail: ☐ Type of New Leak Detector: \_\_\_\_\_  
Replaced Leak Detector?: Yes: ☐ No: ☐ S/N: \_\_\_\_\_  
New Leak Detector: Pass: ☐ Fail: ☐

Product: \_\_\_\_\_  
Type of Leak Detector: \_\_\_\_\_  
Type of Product Line: \_\_\_\_\_

3 GPH Test: Pass: ☐ Fail: ☐ Type of New Leak Detector: \_\_\_\_\_  
Replaced Leak Detector?: Yes: ☐ No: ☐ S/N: \_\_\_\_\_  
New Leak Detector: Pass: ☐ Fail: ☐

Product: \_\_\_\_\_  
Type of Leak Detector: \_\_\_\_\_  
Type of Product Line: \_\_\_\_\_

3 GPH Test: Pass: ☐ Fail: ☐ Type of New Leak Detector: \_\_\_\_\_  
Replaced Leak Detector?: Yes: ☐ No: ☐ S/N: \_\_\_\_\_  
New Leak Detector: Pass: ☐ Fail: ☐

WO# : \_\_\_\_\_

Line Identification	Pass / Fail	Net Volume Change per Hour	Date Tested
Diesel	PASS	-.0005	12/2/10

DATA CHART FOR USE WITH PETROTITE LINE TESTER

WO#: \_\_\_\_\_  
DATE: 12/2/10

STATION NUMBER: \_\_\_\_\_

1 LOCATION: Niemi Oil Co. —Bulk plant on Industry— Astoria, OR 97103

2 OWNER: Niemi Oil Co.

3 OPERATOR: Niemi Oil Co.

4 REASON FOR TEST: ANNUAL COMPLIANCE TESTING

5 TEST REQUESTED BY: Niemi Oil Co.

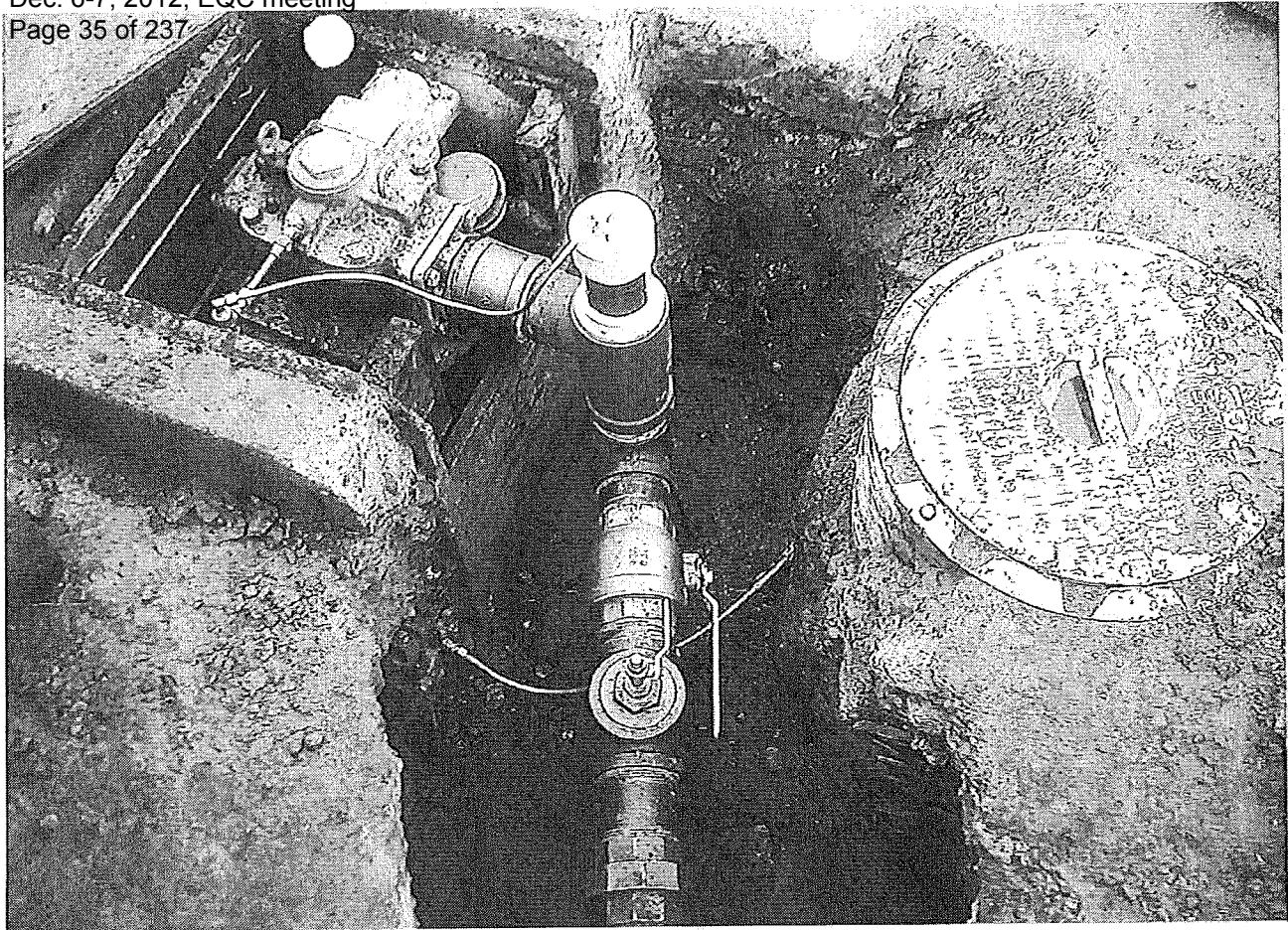
6 SPECIAL INSTRUCTIONS: \_\_\_\_\_

7 CONTRACTOR OR COMPANY MAKING TEST MECHANIC(S) NAME: MASCOTT EQUIPMENT CO. D. REEVES

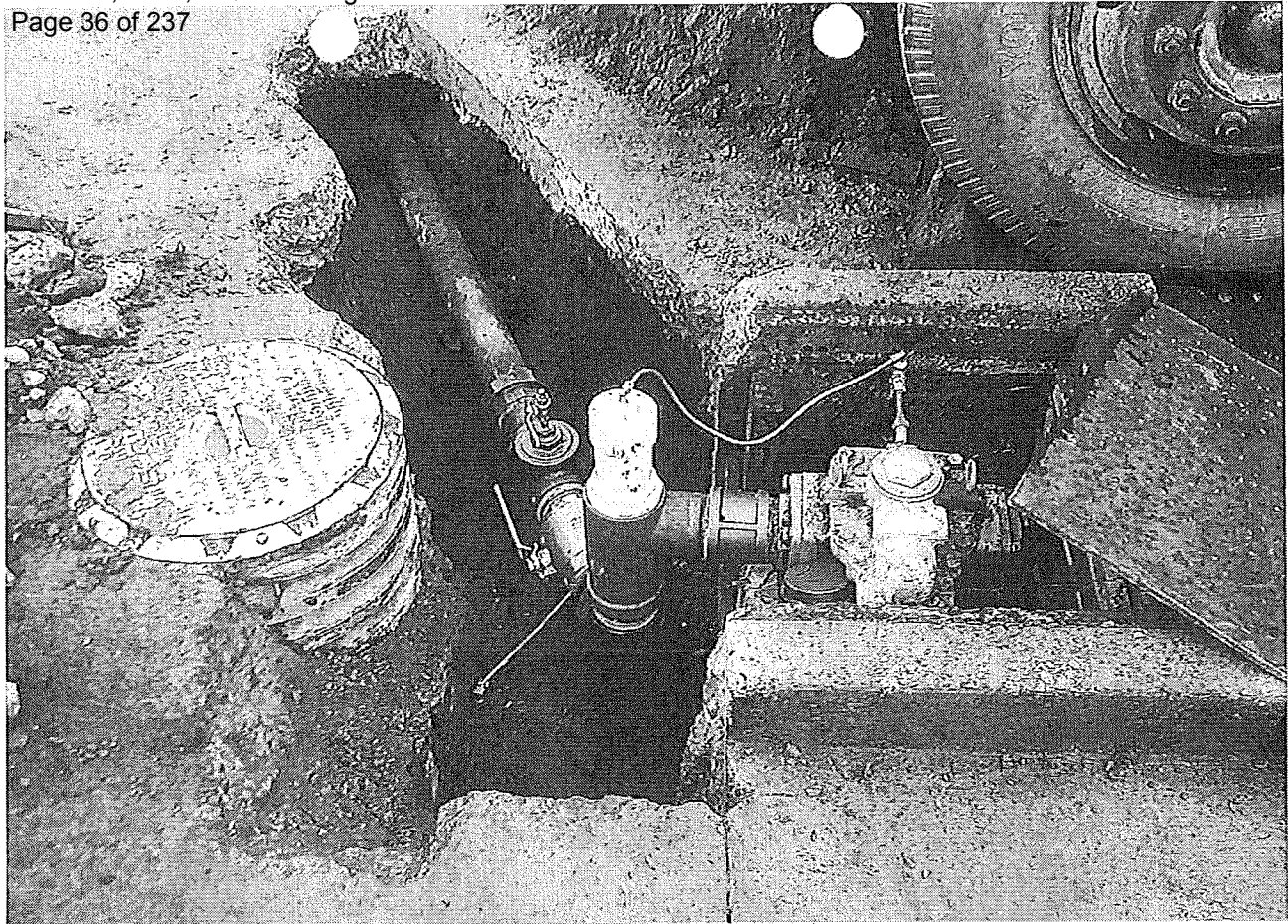
8 IS A TANK TEST TO BE MADE WITH THIS LINE TEST? ☐ YES ☒ NO 9 MAKE AND TYPE OF PUMP OR DISPENSER (SUCTION OR SUBMERSIBLE) Tohheim 5 HP submersible

10 WEATHER Cold TEMPERATURE IN TANKS 56 °F °C COVER OVER LINE Mixed BURIAL DEPTH 12"

11 IDENTIFY EACH LINE AS TESTED	12 TIME (MILITARY)	13 LOG OF TEST PROCEDURES, AMBIENT TEMPARATURE, WEATHER, ETC	14 PRESSURE		15 VOLUME			16 REMARKS SIZE, LENGTH & TYPE OF LINE, # FLEX CONNECTORS CONCLUSION, REPAIRS AND COMMENTS
			Psi OR kPa		READING		NET CHANGE	
			BEFORE	AFTER	BEFORE	AFTER		
	Pre-test @ 0815	Set up for line test. Pressurize line and observe.	80					APPROX. 27'- 3" Single wall steel
	0845	Drop pressure to test level. Wait and observe. 30 min.		70				Method of isolation: BALL VALVE
	0900	Begin testing		70		.0720		
	0915	First reading	66	70	.0720	.0715	-.0005	
	0930	Second reading	70	70	.0715	.0715	+.0000	
	0945	Third reading	70	70	.0715	.0715	+.0000	
	1000	End of test	70	70	.0715	.0715	+.0000	LINE BLEEDBACK = 8 ml



- Niemi Oil Cardlock UST  
455 Industry Street, Astoria
1. Turbine
  2. Line Leak-Detector (with brass valve and pressure test fitting)
  3. UST Fill Port Lid



- Niemi Oil Cardlock UST  
455 Industry Street, Astoria
1. UST fill port lid
  2. Line Leak-Detection (with new brass valve and pressure test fitting)
  3. Turbine

State of Oregon

Department of Environmental Quality

**Memorandum**

**Date:** August 15, 2011  
**To:** File *Bryan Smith*  
**From:** Bryan Smith, Environmental Law Specialist, Office of Compliance and Enforcement  
**Subject:** BEN calculation for Burns-Johanson Oil Company

## **I. General Purpose and Authority**

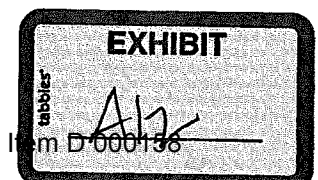
The economic benefit portion of the civil penalty formula is simply the monetary benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance.

Oregon Revised Statute 468.130(2)(c,h) directs the Environmental Quality Commission to consider economic conditions of the entity in assessing a penalty as well as other factors that Commission makes relevant by rule. Accordingly, the Commission adopted economic benefit as part of its penalty calculation in Oregon Administrative Rules (OAR) 340-012-0045(1)(e) and -0155. Pursuant to OAR 340-012-0150, the Department generally uses the U.S. Environmental Protection Agency's BEN computer model to determine economic benefit and will use it upon request of a respondent.

## **II. Theory of Economic Benefit**

Compliance with environmental regulations may require an entity to expend financial resources. These expenditures support the public goal of better environmental quality, but often do not yield direct financial return to the entity. Economic benefit is the amount by which an entity is financially better off from not having complied with environmental requirements in a timely manner. If an entity avoids an expenditure, it increases its profit margin or has additional funds available for other profit-making activities. Sometimes the benefit may not be intuitive. For example, if an entity would have had to obtain a loan to make the expenditure, it might seem that the entity did not enjoy the benefit of the extra money – but avoiding the need to repay a loan is a direct financial advantage. If an entity did not make the expenditure on time, but later did make the expenditure, it might seem that the entity did not retain an economic advantage – but temporary access to the monies it should have spent is equivalent to an interest-free loan during the period of noncompliance which is also a direct financial advantage. For this reason BEN generally ignores the potential or likely source of the monies not used.

Economic benefit is "no fault" in nature. An entity need not have deliberately chosen to delay compliance, or even have been aware of its noncompliance, for it to accrue an economic benefit of noncompliance. An economic benefit may accrue before the entity is in actual violation because planning costs, permitting fees, and similar costs often must be paid long before beginning the regulated activity that is in violation.



Memo To: File  
08/15/11  
Page 2

An appropriate economic benefit calculation represents the amount of money that would make the entity indifferent between compliance and noncompliance. If DEQ does not recover, through a civil penalty, at least this economic benefit, then the entity will retain a gain. Because of the precedent of this retained gain, other regulated companies may see an economic advantage in similar noncompliance. The U.S. Supreme Court has noted that deterrence is a primary purpose of a penalty<sup>1</sup> and that a penalty which fails to include sufficient economic benefit to remove the advantage of noncompliance will fail to deter future violations.<sup>2</sup>

### III. Basis of the Costs Considered

Determining economic benefit always requires evaluating circumstances to determine what necessary or reasonable costs would have been required to obtain compliance or to determine what benefits were received from noncompliance. Often, an entity has more than one option to reach compliance and the Department evaluates the circumstances to determine what probable or reasonable steps the entity should have taken. The Department then estimates the reasonable costs and benefits pursuant to OAR 340-012-0150(2).

Burns-Johanson Oil Company should have spent \$3,900 to install a line leak detector on or before December 22, 1990. By delaying this cost until October 27, 2010, Respondent benefitted by an estimated ~~\$8,512~~ <sup>6,649 (85%)</sup>. Respondent also should have spent \$155 to conduct annual line leak detector and line tightness testing between December 22, 1991, and December 2, 2010. By avoiding this annual recurring cost Respondent benefitted by an estimated **\$4,245**. Respondent also should have spent \$500 to maintain financial responsibility on or before June 8, 2010, but delayed this cost until August 2, 2010. By delaying this cost Respondent benefitted by an estimated **\$2**. Respondent also should have spent \$125 to conduct a corrosion protection test on or before February 23, 2008, but delayed this cost until May 1, 2009. By delaying this cost Respondent benefitted by an estimated **\$14**.

### IV. Applicability of Standard Rates Presumed by Rule

The BEN model relies on income-tax rates, inflation rates, and discount rates. The model allows the operator to input particular rates, but in the absence of operator input, the BEN model uses standard values based on the years of the violation, the state where the violation occurred and the entity's legal and profit status (*e.g.*, C-corporation, other for profit, non-profit, municipality, or federal facility). It calculates inflation rates from the Plant Cost Index (PCI) published by the

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<sup>1</sup> See *Tull v. United States*, 481 U.S. 412 (1987) (finding that the legislature intended penalties for environmental violations under the Clean Water Act to create deterrence). Note also OAR 340-012-0026(1)(c) which states that a goal of enforcement under the Oregon Environmental Quality Commission rules is deterrence.

<sup>2</sup> See *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, fn. 2 (2000) (discussing the insufficiency of the economic benefit portion of a penalty for hazardous waste violations).

Memo To: File  
08/15/11  
Page 3

magazine *Chemical Engineering* and from the Consumer Price Index. Alternative optional inflation indices include:

Abbreviation and Full Name		Description	Typical Applications
2.5%	Constant rate of 2.5%	Assumes annual inflation rate is constant at 2.5 percent.	
CCI	Construction Cost Index	Construction costs (based on 1.128 tons Portland cement, 1,088 bd. ft. 2x4 lumber) and 200 common labor.	General construction costs, especially where labor costs are a high proportion of total costs.
ECI	Employment Cost Index	Total civilian compensation for all workers, seasonally adjusted.	One-time nondepreciable expenditures or annual costs that comprise mainly labor.
GDP	Gross Domestic Product Implicit Price Deflator	Measured by U.S. Commerce Department through the Bureau of Economic Analysis. Equals GDP in current dollars divided by GDP in constant dollars.	general expenses that affect multiple sectors of the economy (e.g., labor and construction).
PCI	Plant Cost Index	Plant cost index published by <i>Chemical Engineering</i> .	Standard default and for plant equipment costs.
PPI	Producer Price Index for Finished Goods	Reflects the price level for processing finished goods.	Processing finished goods, general expenses that affect multiple sectors of the economy (e.g., labor and construction).

Pursuant to OAR 340-012-0150(1), 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.”

Memo To: File  
08/15/11  
Page 4

## V. Description of the Attached Run

BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures. Such expenditures can include: (1) capital investments (*e.g.*, larger pollution control or monitoring equipment, costs of design and installation), (2) one-time non-depreciable expenditures (*e.g.*, permit fees, clean-up costs, setting up a reporting system, acquiring land needed for a capital improvement), (3) annually recurring costs (*e.g.*, routine operating and maintenance costs, utilities). Each of these expenditures can be either delayed or avoided. BEN's baseline assumption is that capital investments and one-time non-depreciable expenditures are merely delayed over the period of noncompliance, whereas annual costs are avoided entirely over this period.

The calculation incorporates the economic concept of the "time value of money." Stated simply, a dollar today is worth more than a dollar tomorrow, because you can invest today's dollar to start earning a return immediately. Thus, the further in the future the dollar is, the less it is worth in "present-value" terms. Similarly, the greater the time value of money (*i.e.*, the greater the "discount" or "compound" rate used to derive the present value), the lower the present value of future costs. To calculate an entity's economic benefit, BEN uses standard financial cash flow and net-present-value analysis techniques based on modern and generally accepted financial principles, which were subjected to extensive national notice-and-comment processes.<sup>3</sup>

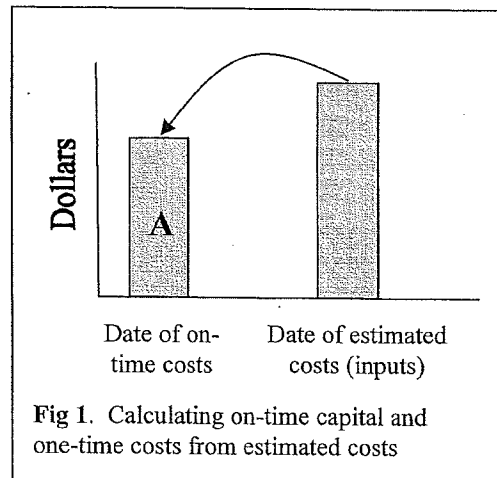
Inputs to the model include costs specific to the situation of the entity which include the values described in Section III as well as the presumed standard indexes and rates described in Section IV. The values used are listed in the lower three-quarters of the attached BEN Run Table. Using these values, BEN makes a series of calculations the results of which are listed in the top of the attached BEN Run Table by the letter indicated below.

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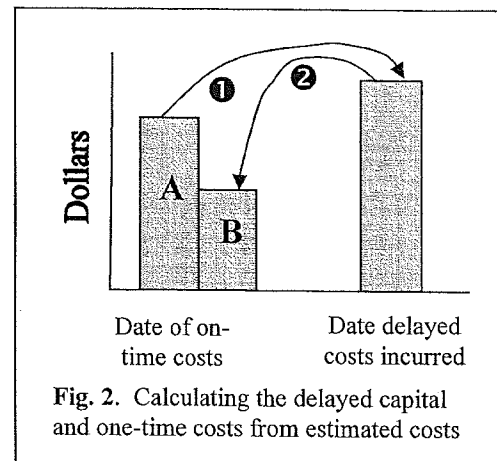
<sup>3</sup> See Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Request for comment, 61 Fed. Reg. 53025-53030 (Oct. 9, 1996); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Extension of time for request for comment, 61 Fed. Reg. 65391 (Dec. 12, 1996); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Advance notice of proposed action, response to comment, and request for additional comment, 64 Fed. Reg. 32947-32972 (June 18, 1999); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Advance notice of proposed action, response to comment, and request for additional comment, 64 Fed. Reg. 39135-39136 (July 21, 1999); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Notice of final action and response to comment, 70 Fed. Reg. 50326-50345 (August 26, 2005) available at <http://www.epa.gov/EPA-GENERAL/2005/August/Day-26/g17033.htm>.

Memo To: File  
08/15/11  
Page 5

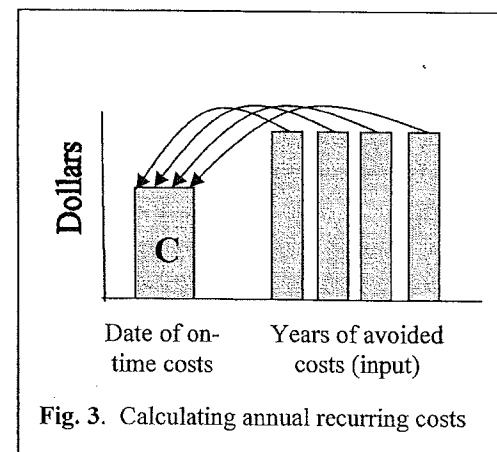
A) **On-Time Capital & One-Time Costs.** This is what compliance would have cost had the entity made its purchases of capital on time or paid its one-time costs on time. BEN calculates this value from the estimated costs as of the date the costs are estimated by discounting the annual cash flows at an average of the cost of capital throughout this time period. The value of the costs is adjusted to account for tax deductibility and depreciation. "A" is the value of noncompliance as of the date of initial noncompliance. (See Fig. 1) If "A" is zero, there are no capital or one-time costs in the calculation.



B) **Delay Capital & One Time Costs.** If the entity eventually did pay or will pay the costs of compliance in the future, BEN calculates what the entity would have needed to set aside on the date of noncompliance so as to have sufficient funds as of the date of delayed compliance. This number is used to mitigate the economic benefit by considering the known amount the entity will pay. BEN derives this number by: (1) determining the predicted delayed costs by adjusting for inflation and to account for tax deductibility in the year in which the funds were or will be spent and also for future depreciation tax shields, and (2) discounting the annual cash flows at an average of the cost of capital throughout this time period to account for interest. (See Fig. 2) "B" will be zero if all costs were avoided.

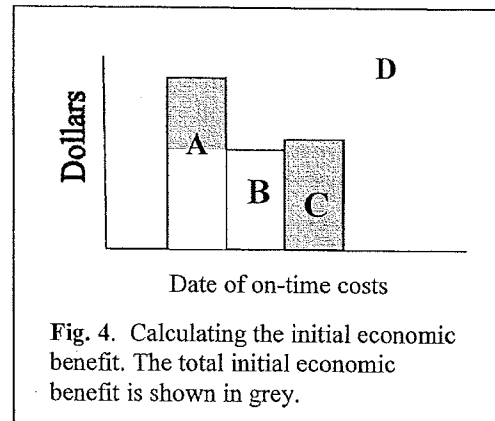


C) **Avoided Annually Recurring Costs.** This is the value of the avoided annual recurring costs as of the date of initial noncompliance. BEN derives this value by discounting the annual cash flows at an average of the cost of capital throughout this time period and accounting for tax deductibility. (See Fig. 3) "C" will be zero if there are no recurring annual costs.

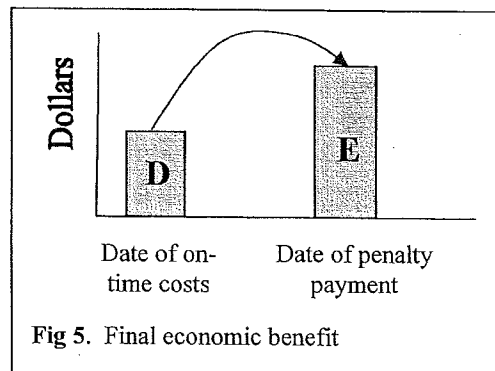


Memo To: File  
08/15/11  
Page 6

D) **Initial Economic Benefit ( $A - B + C$ )**. The values for A, B, and C are all values as of the date of noncompliance. The economic benefit received as of the date of noncompliance is determined by taking the on-time capital and one-time costs that should have been paid (A), subtracting the delayed capital and one-time costs which had been or will be paid (B), and adding the avoided annually recurring costs (C). The result is the economic benefit received as of the date of noncompliance. (See Fig. 4) The economic benefit is often much lower than the originally-estimated costs. This is because inflation tends to make more recent costs higher than historical costs and because the entity could have taken a tax deduction for the year in which the expenditure was made.



E) **Final Economic Benefit at Penalty Payment Date**. BEN compounds the initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance. (See Fig. 5) Occasionally an entity loses money because the economic benefit is a negative number. In that case the economic benefit used in the penalty calculation is zero.



#### IV. Final Economic Benefit Is Likely an Underestimate

The economic benefit calculated above may underestimate the total economic benefit that the respondent received to date because it is based on conservative assumptions and does not include unknown or incidental costs. It also does not address uncertain indirect financial benefits, including:

- *Advantage-of-risk* – the value of (1) the risk of never getting caught and (2) keeping future options open by delaying a decision to institute a process or purchase capital;
- *Competitive advantage* – (1) beginning production earlier than would be possible if in compliance; (2) attracting clients by avoiding compliance costs, having a higher profit margin and therefore being able to offer goods or services at a lower cost than competitors; (3) keeping those clients attracted by lower prices because of brand loyalty or high switching costs; or (4) using the time or money saved to increase production; and

Memo To: File  
08/15/11  
Page 7

- *Illegal profits* – selling illegal products or services.

EPA has undertaken a review of these indirect factors and may craft an economic method for calculating them.<sup>4</sup> Until that evaluation is complete, I consider these other economic benefits to be "de minimis" in light of the difficulties in calculation. Pursuant to OAR 340-012-0150(3), the Department need not calculate an economic benefit if that benefit is de minimis.

Another reason that the estimate above may be an underestimate is that the calculation is based on the time value of money, and is sensitive to when delayed costs are actually incurred and when penalties are actually paid. When the Department calculates an economic benefit for incorporation in a Notice of Civil Penalty Assessment, it often assumes the entity will comply with the schedule in the Order and that the penalty will be paid without the delays required for an appeal. This results in a lower economic benefit than would be obtained if the actual dates were initially known and used. For this reason the Department may recalculate the economic benefit for the hearing or in settlement so as to reach a more accurate final economic benefit.

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<sup>4</sup> See EPA Office of Enforcement and Compliance Assurance, "*Identifying and Calculating Economic Benefit That Goes Beyond Avoided and/or Delayed Costs*," (May 25, 2003) available at <http://www.epa.gov/compliance/resources/publications/civil/programs/econben-costs.pdf>; EPA Illegal Competitive Advantage Economic Benefit Advisory Panel of the Science Advisory Board, Advisory no. EPA-SAB-ADV-05-003, (Sept. 7, 2005) available at [http://www.epa.gov/sab/pdf/ica\\_eb\\_sab-adv-05-003.pdf](http://www.epa.gov/sab/pdf/ica_eb_sab-adv-05-003.pdf); EPA Office of Enforcement and Compliance Assurance, Response to advisory, (July 19, 2006) available at [http://www.epa.gov/sab/pdf/sab-adv-05-003\\_response\\_07-19-06.pdf](http://www.epa.gov/sab/pdf/sab-adv-05-003_response_07-19-06.pdf).

Run Name = detector	
Present Values as of Noncompliance Date (NCD),	01-Jan-1993
A) On-Time Capital & One-Time Costs	\$1,859
B) Delay Capital & One-Time Costs	\$556
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$1,303
E) Final Econ. Ben. at Penalty Payment Date,	
15-Oct-2011	\$6,699
For-Profit (not C-Corp.) w/ OR tax rates	
Discount/Compound Rate	9.1%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	27-Oct-2010
Capital Investment:	
Cost Estimate	\$3,900
Cost Estimate Date	27-Oct-2010
Cost Index for Inflation	PCI
Consider Future Replacement (Useful Life)	y (25)
One-Time, Nondepreciable Expenditure:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Tax Deductible?	N/A
Annually Recurring Costs:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	N/A
On-Time Capital Investment	
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

Run Name = annual testing	
Present Values as of Noncompliance Date (NCD),	01-Jan-1993
A) On-Time Capital & One-Time Costs	\$0
B) Delay Capital & One-Time Costs	\$0
C) Avoided Annually Recurring Costs	\$826
D) Initial Economic Benefit (A-B+C)	\$826
E) Final Econ. Ben. at Penalty Payment Date,	
15-Oct-2011	\$4,245
For-Profit (not C-Corp.) w/ OR tax rates	
Discount/Compound Rate	9.1%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	02-Dec-2010
Capital Investment:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Consider Future Replacement (Useful Life)	N/A (N/A)
One-Time, Nondepreciable Expenditure:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Tax Deductible?	N/A
Annually Recurring Costs:	
Cost Estimate	\$225
Cost Estimate Date	15-Aug-2011
Cost Index for Inflation	PCI
User-Customized Specific Cost Estimates:	N/A
On-Time Capital Investment	
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

Run Name = financial respon	
Present Values as of Noncompliance Date (NCD),	08-Jun-2010
A) On-Time Capital & One-Time Costs	\$283
B) Delay Capital & One-Time Costs	\$282
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$2
E) Final Econ. Ben. at Penalty Payment Date,	
15-Oct-2011	\$2
<i>For-Profit (not C-Corp.) w/ OR tax rates</i>	
Discount/Compound Rate	7.1%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	02-Aug-2010
Capital Investment:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Consider Future Replacement (Useful Life)	N/A (N/A)
One-Time, Nondepreciable Expenditure:	
Cost Estimate	\$500
Cost Estimate Date	15-Aug-2011
Cost Index for Inflation	PCI
Tax Deductible?	y
Annually Recurring Costs:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	N/A
On-Time Capital Investment	
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

Run Name = corrosion test	
Present Values as of Noncompliance Date (NCD),	23-Feb-2008
A) On-Time Capital & One-Time Costs	\$70
B) Delay Capital & One-Time Costs	\$60
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$11
E) Final Econ. Ben. at Penalty Payment Date,	
15-Oct-2011	\$14
For-Profit (not C-Corp.) w/ OR tax rates	
Discount/Compound Rate	7.2%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	01-May-2009
Capital Investment:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Consider Future Replacement (Useful Life)	N/A (N/A)
One-Time, Nondepreciable Expenditure:	
Cost Estimate	\$125
Cost Estimate Date	15-Aug-2011
Cost Index for Inflation	PCI
Tax Deductible?	y
Annually Recurring Costs:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	N/A
On-Time Capital Investment	
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

**SMITH Bryan**

---

**From:** ELWORTH Susan  
**Sent:** Monday, August 15, 2011 10:22 AM  
**To:** SMITH Bryan  
**Subject:** EB for Burns-Johnason Oil Company (revised)

Bryan – We are issuing an Amended Notice so I need the following EBs reran.

Failure to install a line leak detector

Cost: \$3900

Estimate date: October 27, 2010

Violation date: December 22, 1990

Corrected: October 27, 2010

Delayed

*Replacement life = 25 years*

Failure to conduct annual line leak detector and line tightness testing

Cost: \$225

Estimate date: today

Avoided every year starting on 12/22/1991

Corrected: 12/2/2010

Failure to maintain financial responsibility

Cost: \$500

Violation date: 6/8/2010

Corrected: 8/2/2010

Estimate date: today

Failure to conduct a corrosion protection test:

Cost: \$125

Violation date: 2/23/2008

Corrected: 5/1/2009

Estimate date: today

Qtime – 40572

Thanks!

Susan M. Elworth  
Department of Environmental Quality  
Environmental Law Specialist  
(503) 229-5152

BEFORE THE OREGON ENVIRONMENTAL  
QUALITY COMMISSION

In the Matter of: )  
BURNS-JOHANSON OIL COMPANY )  
Case No. LQ/UST-NWR-10-248 ) AFFIDAVIT  
)

I, Greg Toran, being duly sworn, depose and say that the following is true to the best of my knowledge:

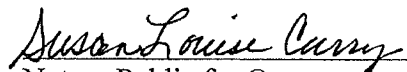
1. That I am employed by the Oregon Department of Environmental Quality as a Natural Resource Specialist in the Underground Storage Tank program.
2. That I have been employed in that capacity for 13 years.
3. That in the course of that employment I regularly conduct inspections of USTs.
4. That on August 3, 2010, I, along with Bob McCoy, another Natural Resource Specialist with the Department, conducted a compliance inspection of an UST facility located at 455 Industry Street in Astoria, Oregon.
4. That during the course of that inspection, I completed the attached checklist detailing the equipment installed at the facility and records that were made available by Respondent during the inspection on August 3, 2010.
6. That the attached aforementioned document marked as Exhibit A is a true and exact copy of the original thereto.

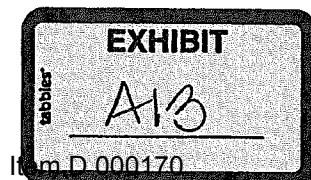
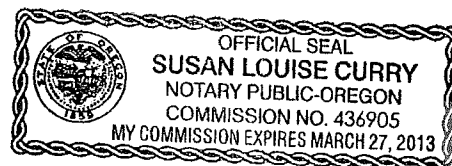
Date: 1/20/12

  
\_\_\_\_\_  
Greg Toran  
Department of Environmental Quality

Sworn and subscribed before me this 20 day of January 2012.

SEAL

  
\_\_\_\_\_  
Notary Public for Oregon  
My Commission Expires Mar. 27, 2013



Type of cathodic protection	7375 Bulk Plant	6897 Hiway Service
Cathodic protection testing & design tank & Piping	Impressed	Impressed
Meter reading last	Tank & piping	Tank & piping
3 year Cathodic Protection (Last 2) on schedule	None	None
60 day Cathodic Protection log	2/23/2005 & 5/1/2009	2/23/2005 & 5/1/2009
UST Insurance	Yes	Yes
tank type (Material, dw?)	6/8/2010	6/8/2010
Tank manufacturer	sw steel	sw steel
Pipe type	Unk	Unk
Pipe manufacturer	Suction/Pressure	Suction
Piping material	Unk	Unk
line leak test date (US suction and pressure lines only)	steel	steel
leak detector test date (pressure lines only)	Not avail, needs leak detector	Unk
tank leak detection (SIR) 12 months	Not avail	NA
confirmation of safe suction	Yes	yes
class a, b, and c operator training documentation	No	Not yet
Expert design for CP system	CorPro	Needs C
Tank steel evaluation for CP install	MTCF See file	CorPro
Tanks Lined	No	MTCF See file
Tank lining assessments	NA	1500 only
Number of tanks match	Yes	Yes
Tank sizes match records on file	Yes	Yes
Federal forms received	Yes	Yes
Closure records on file	Unk	Unk
Need statement for method of delivery	Yes	Yes
Op Cert accurate	At office needs correction	At office
Lining install date	NA	2/16/1999
cathodic protection install date	Unk	2/16/1999
Need to sort and combine files	Yes	Yes
Spill	Buckets	Buckets
Overfill	Drop tube	Drop tube
Last lining inspection date	NA	2/16/1999
Comments	Extra vents (5)	
Comments		
Comments		

EXHIBIT

Aof

Item D 000171

Cathodic protection testing &amp; design tank &amp; Piping

Meter reading last

3 year Cathodic Protection (Last 2) on schedule

60 day Cathodic Protection log

UST Insurance

tank type (Material, dw?)

Tank manufacturer

Pipe type

Pipe manufacturer

Piping material

line leak test date (US suction and pressure lines  
only)

leak detector test date (pressure lines only)

tank leak detection (SIR) 12 months

confirmation of safe suction

class a, b, and c operator training documentation

Expert design for CP system

Tank steel evaluation for CP install

Tanks Lined

Tank lining assessments

Number of tanks match

Tank sizes match records on file

Federal forms received

Closure records on file

Need statement for method of delivery

Op Cert accurate

Lining install date

cathodic protection install date

Need to sort and combine files

Spill

Overfill

Last lining inspection date

Comments

Comments

Comments

7471 Landwehr's

Impressed

Tank &amp; piping

None

2/23/2005 &amp; 5/1/2009

Yes

6/8/2010

(2) sti-P3 and (1) sw steel

Unk

Suction

Ameron

FRP and steel

Unk

NA

Yes

Not yet

Needs C

CorPro

MTCF See file

2000

Yes

No

No

In lult file

No See file

Yes

At office, needs correction for size

2/16/1999

2/16/1999

Yes

Buckets

Drop tube

2/16/1999

Kerosene tanks 86 HOT &amp; Storage?

One dispenser removed, 2 out of service

Op cert copy lists tank sizes and permit numbers for Warrenton site

sti-P3 tanks have FRP pipe accoring to OEM

Tanks are (2) 5k sti-P3 and (1) 2k sw steel

Inspection Item	
Type of cathodic protection	Impressed
Cathodic protection testing & design tank & Piping	Tank only
Meter reading last	None
3 year Cathodic Protection (Last 2) on schedule	install & 5/1/2009
60 day Cathodic Protection log	Yes
UST Insurance	6/8/2010
tank type (Material, dw?)	sw Steel
Tank manufacturer	Unk
Pipe type	Safe Suction
Pipe manufacturer	Smith
Piping material	FRP
line leak test date (US suction and pressure lines only)	NA
leak detector test date (pressure lines only)	NA
tank leak detection (SIR) 12 months	yes
confirmation of safe suction	Yes
class a, b, and c operator training documentation	A & B
Expert design for CP system	Yes
Tank steel evaluation for CP install	Yes
Tanks Lined	Yes
Tank lining assessments	Yes
Number of tanks match	Yes
Tank sizes match records on file	Yes
Federal forms received	Yes
Closure records on file	Yes
Need statement for method of delivery	On file
Op Cert accurate	Yes
Lining install date	2/1/1999
cathodic protection install date	2/1/1999
Need to sort and combine files	No
Spill	Buckets
Overfill	Drop tube
Last lining inspection date	
Comments	
Comments	
Comments	



# Oregon

John A. Kitzhaber, MD, Governor

## Department of Environmental Quality

Headquarters

811 SW Sixth Avenue

Portland, OR 97204-1390

(503) 229-5696

FAX (503) 229-6124

TTY: 711

## BEFORE THE OREGON ENVIRONMENTAL QUALITY COMMISSION

In the Matter of:

BURNS-JOHANSON OIL COMPANY )

Case No. LQ/UST-NWR-10-248 )

AFFIDAVIT

I, Mitch Scheel, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That I am employed by the Oregon Department of Environmental Quality as the Underground Storage Tank Policy Coordinator.
2. That in the course of that employment I enter and retrieve information from the Department's database and files regarding the permittee and owner of underground storage tanks (USTs).
3. That based on the information contained in the Department's database and files, on or about March 28, 1986, the Department received from Respondent a Notification of Underground Storage Tanks (USTs) for USTs located at 455 Industry Street in Astoria, Oregon.
4. That based on the information contained in the Department's database and files, that since 1989 Respondent has been the permittee of three USTs located at 455 Industry Street in Astoria, Oregon.
5. That based on the information contained in the Department's database and files, that Respondent is the owner or permittee of one UST facility in the state of Oregon.
6. That the attached aforementioned documents marked as Exhibits A, B, C, and D are true and exact copies of the originals thereto.

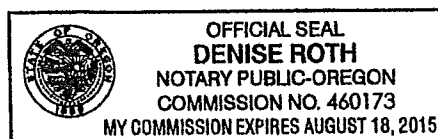
Date: 1/23/12

Mitch Scheel

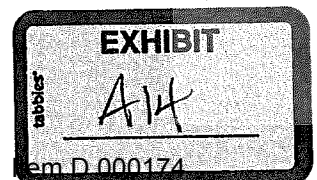
Department of Environmental Quality

Sworn and subscribed before me this 23rd day of January 2012.

SEAL



Notary Public for Oregon

My Commission Expires 8-18-2015

Dec. 6-7, 2012, EQC meeting

## Notification for Underground Storage Tanks

FORM APPROVED  
OMB NO. 2050-0049  
APPROVAL EXPIRES 6-30-88Return To: Oregon Department of Environmental Quality  
Underground Storage Tank Program  
P.O. Box 1760  
Portland, Oregon 97207STATE USE ONLY  
I.D. Number 7375  
Date Received

## GENERAL INFORMATION

Notification is required by Federal law for all underground tanks that have been used to store regulated substances since January 1, 1974, that are in the ground as of May 8, 1986, or that are brought into use after May 8, 1986. The information requested is required by Section 9002 of the Resource Conservation and Recovery Act, (RCRA), as amended.

The primary purpose of this notification program is to locate and evaluate underground tanks that store or have stored petroleum or hazardous substances. It is expected that the information you provide will be based on reasonably available records, or, in the absence of such records, your knowledge, belief, or recollection.

**Who Must Notify?** Section 9002 of RCRA, as amended, requires that, unless exempted, owners of underground tanks that store regulated substances must notify designated State or local agencies of the existence of their tanks. Owner means—

(a) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, and

(b) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such tank immediately before the discontinuation of its use.

**What Tanks Are Included?** Underground storage tank is defined as any one or combination of tanks that (1) is used to contain an accumulation of "regulated substances," and (2) whose volume (including connected underground piping) is 10% or more beneath the ground. Some examples are underground tanks storing: 1. gasoline, used oil, or diesel fuel, and 2. industrial solvents, pesticides, herbicides or fumigants.

**What Tanks Are Excluded?** Tanks removed from the ground are not subject to notification. Other tanks excluded from notification are:

1. farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;
2. tanks used for storing heating oil for consumptive use on the premises where stored;

3. septic tanks;

4. pipeline facilities (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968, or the Hazardous Liquid Pipeline Safety Act of 1979, or which is an intrastate pipeline facility regulated under State laws;

5. surface impoundments, pits, ponds, or lagoons;

6. storm water or waste water collection systems;

7. flow-through process tanks;

8. liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;

9. storage tanks situated underground area (such as a basement, cellar, mineworking drift, shaft, or tunnel) the storage tank is situated upon or above the surface of the floor.

**What Substances Are Covered?** The notification requirements apply to underground storage tanks that contain regulated substances. This includes any substance defined as a hazardous substance in 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subtitle C of RCRA. It also includes petroleum, e.g., crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

**Where To Notify?** Completed notification forms should be sent to the address given at the top of this page.

**When To Notify?** 1. Owners of underground storage tanks in use or that have been taken out of operation after January 1, 1974, but still in the ground, must notify by May 8, 1986. 2. Owners who bring underground storage tanks into use after May 8, 1986, must notify within 30 days of bringing the tanks into use.

**Penalties:** Any owner who knowingly fails to notify or submits false information shall be subject to a civil penalty not to exceed \$10,000 for each tank for which notification is not given or for which false information is submitted.

## INSTRUCTIONS

Please type or print in ink all items except "signature" in Section V. This form must be completed for each location containing underground storage tanks. If more than 5 tanks are owned at this location, photocopy the reverse side, and staple continuation sheets to this form.

Indicate number of continuation sheets attached.

## I. OWNERSHIP OF TANK(S)

Owner Name (Corporation, Individual, Public Agency, or Other Entity)

BURNS-JOHANSON OIL CO INC

Street Address

455-INDUSTRY ST - P.O. BOX 3

County

CLATSOP

City

ASTORIA

State

OR

Zip Code

97123

Area Code Phone Number

503-325-2341

Type of Owner (Mark all that apply)

☒ Current☐ State or Local Gov't.☒ Private or

Corporate

☐ Federal Gov't.☐ Ownership☐ (GSA facility I.D. no.)

uncertain

☐ Former

13108

## II. LOCATION OF TANK(S)

(If same as Section I, mark box here ☐)

Facility Name or Company Site Identifier, as applicable

BURNS-JOHANSON BULK PLANT

Street Address or State Road, as applicable

455-INDUSTRY ST.

County

CLATSOP

City (nearest)

ASTORIA

State

OR

Zip Code

97123

Indicate number of tanks at this location

5

Mark box here if tank(s) are located on land within an Indian reservation or on other Indian trust lands

☐

## III. CONTACT PERSON AT TANK LOCATION

Name (if same as Section I, mark box here ☐)

Job Title

Area Code

Phone Number

## IV. TYPE OF NOTIFICATION

☐ Mark box here only if this is an amended or subsequent notification for this location.

## V. CERTIFICATION (Read and sign after completing Section VI.)

I certify under penalty of law that I have personally examined and am familiar with the information submitted in the documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information submitted information is true, accurate, and complete.

Name and official title of owner or owner's authorized representative

WARREN E. BERGHEUS PRESIDENT

Signature

[Signature]

Date Signed

3/20/86

CONTINUE ON REVERSE SIDE

EXHIBIT

A

**OREGON UNDERGROUND STORAGE TANK (UST) SURVEY**

The underground storage tank program will soon include performance standards for new tanks and regulations for leak detection/prevention and corrective actions which will affect owners and operators of underground storage tanks. In preparation for these new requirements, the Department has prepared a state-wide survey. The Department requests that owners of underground storage tanks complete the survey questions.

Your response to these questions will assist the Department in developing a cost-effective and responsive state-wide regulatory program. In addition, owners of underground storage tanks may find the survey useful in the management of such tanks.

**INSTRUCTIONS**

Please type or print in ink all items. Please complete one survey form for each location containing underground storage tanks. Tank 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 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621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2

**VI. DESCRIPTION OF UNDERGROUND STORAGE TANKS (Complete for each tank at this location.)**

Tank Identification No. (e.g., ABC-123), or Arbitrarily Assigned Sequential No. (e.g., 1, 2, 3...)	Tank No. <u>1</u>	Tank No. <u>2</u>	Tank No. <u>3</u>	Tank No. <u>4</u>	Tank No. <u>5</u>
1. Status of Environmental Quality (Mark all that apply) <b>RECEIVED MAR 28 1988</b> Currently in Use <input checked="" type="checkbox"/> Temporarily Out of Use <input type="checkbox"/> Permanently Out of Use <input type="checkbox"/> Brought into Use after 5/8/86 <input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
2. Estimated Age (Years)	<u>11</u>	<u>11</u>	<u>11</u>	<u>11</u>	<u>11</u>
3. Estimated Total Capacity (Gallons)	<u>10,000</u>	<u>10,000</u>	<u>20,000</u>	<u>550</u>	<u>550</u>
4. Material of Construction (Mark one <input checked="" type="checkbox"/> ) Steel <input checked="" type="checkbox"/> Concrete <input type="checkbox"/> Fiberglass Reinforced Plastic <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
5. Internal Protection (Mark all that apply <input checked="" type="checkbox"/> ) Cathodic Protection <input type="checkbox"/> Interior Lining (e.g., epoxy resins) <input type="checkbox"/> None <input type="checkbox"/> Unknown <input checked="" type="checkbox"/> Other, Please Specify _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. External Protection (Mark all that apply <input checked="" type="checkbox"/> ) Cathodic Protection <input type="checkbox"/> Painted (e.g., asphaltic) <input checked="" type="checkbox"/> Fiberglass Reinforced Plastic Coated <input type="checkbox"/> None <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
7. Piping (Mark all that apply <input checked="" type="checkbox"/> ) Bare Steel <input type="checkbox"/> Galvanized Steel <input checked="" type="checkbox"/> Fiberglass Reinforced Plastic <input type="checkbox"/> Cathodically Protected <input type="checkbox"/> Unknown <input type="checkbox"/> Other, Please Specify _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
8. Substance Currently or Last Stored in Greatest Quantity by Volume (Mark all that apply <input checked="" type="checkbox"/> ) a. Empty <input type="checkbox"/> b. Petroleum Diesel <input checked="" type="checkbox"/> Kerosene <input type="checkbox"/> Gasoline (including alcohol blends) <input type="checkbox"/> Used Oil <input type="checkbox"/> Other, Please Specify <u>P.S. 300</u> c. Hazardous Substance Please Indicate Name of Principal CERCLA Substance _____ or Chemical Abstract Service (CAS) No. _____ Mark box <input checked="" type="checkbox"/> if tank stores a mixture of substances <input type="checkbox"/> d. Unknown <input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
9. Additional information (for tanks permanently taken out of service) a. Estimated date last used (mo/yr) <u>/</u> b. Estimate quantity of substance remaining (gal.) _____ c. Mark box <input checked="" type="checkbox"/> if tank was filled with inert material (e.g., sand, concrete) <input type="checkbox"/>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>	<u>/</u>

**REMEMBER...**

**If you are an owner:**

1. Affix mailing label to form
2. Complete EPA Form 7530-1
3. Sign Section V of EPA Form
4. Complete Oregon UST Survey Information
5. Fold form on dotted lines
6. Make sure DEQ address is visible
7. Mail to DEQ by May 8, 1986

FOLD HERE

RETURN ADDRESS

Affix  
Postage  
Here

Affix Mailing Label

13/08

**OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY**  
P.O. Box 1760  
Portland, Oregon 97207

Attachment D

Dec. 6-7, 2012, EQC meeting

Page 58 of 237

FACILITY REPORT AND APPLICATION FOR PERMIT MODIFICATION

This is the information that DE has in records for your facility.

FINANCIAL ASSISTANCE CONTACT

Alice N. Bechtolt  
245 West Irving  
PO Box 989  
Astoria, OR 97103

FACILITY INFORMATION

Make Corrections Here

ID 7375  
NAME BURNS-JOHNSON BULK PLANT  
  
455 INDUSTRIAL ST.  
  
ASTORIA, OR 97103

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TANK INFORMATION

Permit Number	Tank ID
BKKAK	1
BKKAB	3
BKKAD	5

Permit Number	Tank ID
BKKAA	2
BKKAC	4

TANK OWNER

Make Corrections Here

Burns-Johanson Oil Co.  
455 Industry Street  
PO Box 989  
Astoria, OR 97103

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Signature \_\_\_\_\_

PROPERTY OWNER

Burns-Johanson Oil Co.  
455 Industry Street  
PO Box 989  
Astoria, OR 97103

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Signature \_\_\_\_\_

PERMITTEE

Burns-Johanson Oil Co.  
455 Industry Street  
PO Box 989  
Astoria, OR 97103

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Signature \_\_\_\_\_

If the facility, tank owner, property owner, or permittee information is incorrect, you will need to submit this form as a modified permit application. If any of your tanks are not registered or permitted, you will need to submit a permit application.

EXHIBIT

tabbles

Item D-000179



Oregon Department of Environmental Quality  
811 SW Sixth Avenue  
Portland, Oregon 97204-1334  
229-5559 and in Oregon 1-800-452-4011

## PERMITTEE

Burns-Johanson Oil Co.  
455 Industry Street  
P.O. Box 789  
Astoria, OR 97103

## UNDERGROUND STORAGE TANK PROGRAM TEMPORARY PERMIT

### FACILITY

Facility I.D. Number:

7375

BURNS-JOHNSON BULK PLANT  
455 INDUSTRIAL ST.  
ASTORIA, OR 97103

PERMIT NUMBER:

BKKAD

ISSUE DATE:

22-SEP-89

Tank I.D. Number:

5

Tank Contents:

Gasoline

The Department of Environmental Quality issues this temporary permit with the understanding that the Permittee is to comply with the conditions on the reverse side of this temporary permit.

Fred Hansen  
Director  
Department of Environmental Quality



Department of Environmental Quality  
811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-6652

## UNDERGROUND STORAGE TANK PROGRAM **GENERAL PERMIT OPERATING CERTIFICATE**

**ISSUED TO:**

Burns-Johanson Oil Co.  
455 Industrial Street  
P.O. Box 989  
Astoria, OR 97103

**OPERATING CERTIFICATE**

**NUMBER:** 04 - 7375 - 1999 - OPER

**FACILITY NAME AND LOCATION:**

Burns-Johanson Bulk Plant  
455 Industrial Street  
Astoria, OR 97103

**TANK OWNER:**

Burns-Johanson Oil Co.

**PERMITTEE:**

Burns-Johanson Oil Co.

**REGISTRATION TYPE:** Operate

Regulated Substance Delivery Authorized

**TANK PERMIT NO:**

BKKAK  
BKKAA  
BKKAB

**TANK ID NO:**

1  
2  
3

**TANK SIZE:**

10,000 gallons  
10,000 gallons  
20,000 gallons

**TANK CONTENTS:**

Diesel  
Diesel  
PS 300

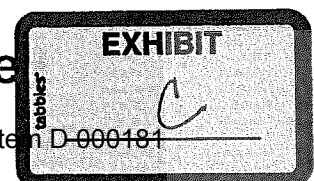
Issued in accordance with the provisions of ORS Chapter 466.706 to 466.835, 466.994 and 466.995 and OAR 340-150-0001 to -0166 and ORS 465.200 to 465.455 and 465.990 and OAR 340-122-0205 to -0360.

The Oregon Department of Environmental Quality issues this operating certificate with the understanding that the permittee will operate in accordance with the conditions and requirements of the general permit to operate an underground storage tank pursuant to OAR 340-150-0163. This operating certificate remains valid until such time as a modified registration form is received by the department or the department suspends or revokes the operating certificate for failure by the permittee to comply with the conditions and requirements of the general permit to operate or applicable statutes or rules.

**ISSUE DATE:** 02/17/1999

Michael H. Kortenhof, Manager  
UST Compliance and Cleanup Program  
Waste Management and Cleanup Division

**Regulated Substance Delivery Authorized**





State of Oregon  
Department of  
Environmental  
Quality

# CERTIFICATE TO OPERATE UNDERGROUND STORAGE TANKS REGISTRATION CERTIFICATE NUMBER

4-7375-2010-OPER

## FACILITY NAME AND LOCATION

BURNS-JOHANSON BULK PLANT  
455 INDUSTRIAL ST  
ASTORIA, OR 97103

## PERMITTEE

Burns-Johanson Oil Company  
PO Box 989  
Astoria, OR 97103

## TANK PERMIT:

BKKAA

BKKAB

BKKAK

## TANK ID NO:

2

3

1

## TANK SIZE:

10,000 GALLONS

20,000 GALLONS

10,000 GALLONS

## TANK CONTENTS:

DIESEL

HEATING OIL

DIESEL

# CERTIFICATE EXPIRES: June 30, 2011

ISSUE DATE: 06/09/2010

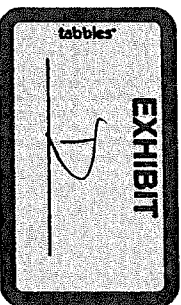
DEQSQL1PROD

*Andree Pollock*

Andree Pollock  
UST Program Manager  
Land Quality Division

Post this certificate where it is visible to the person delivering fuel.

Rev. 20100510



# EPA UST Program Field Notice of Non-compliance

No.

748

The Environmental Protection Agency (EPA) is responsible for the enforcement of underground storage tank (UST) laws that protect human health and the environment. Pursuant to federal regulation at 40 CFR Part 280, during an inspection on

7/11/02 the following items of UST non-compliance were observed at your facility:

1	Description: Failure to provide copy of current "Certificate of Insurance" for covered facilities (40 CFR 280.11(a))	Correction Required: Submit current "Certificate of Insurance" and attachment showing facilities/tanks covered.	Deadline: 8/11/02
2	Description:	Correction Required:	Deadline:
3	Description:	Correction Required:	Deadline:
4	Description:	Correction Required:	Deadline:

## WARNING

The EPA wishes to work cooperatively with you as the owner and/or operator of this facility to resolve the violations(s) listed above at this time. Therefore, no penalty will currently be assessed. However, if you fail to complete the above noted compliance task(s) before the listed deadline(s), you will become subject to citation and/or formal enforcement action. Such enforcement actions mandate compliance and carry monetary penalties as high as \$10,000 for every day of continued violation on each underground tank.

Notify your EPA contact person (listed below) immediately if you are unable to perform the required actions within the specified dates.

EPA Inspector	
Name:	Robert B. Cutler
Office Address:	USEPA Washington Operations Office; 300 Dismant Dr SE, Ste. 102, Lacey, WA 98503
Phone:	360-753-9543
Signature:	Robert B. Cutler / [Signature]

Facility Information	
Name of Facility:	Hay Sec. / B-Tank Plant / Landwehr's
Facility ID #	026897/7375/7471
Address:	3108 Marine Dr, Astoria, OR 97103 465 Industrial St. 34908 Hay 105
Contact:	Cory Beckwith
Phone:	503-925-1792
Signature:	Cory Beckwith

EXHIBIT

A15

Item D-000183

**COPY**

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF: ) AMENDED NOTICE OF CIVIL  
BURNS-JOHANSON OIL COMPANY, ) PENALTY ASSESSMENT AND ORDER  
an Oregon corporation, )  
Respondent. ) NO. LQ/UST-NWR-10-248

I. AUTHORITY

This Amended Notice of Civil Penalty Assessment and Order is issued pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through 468.140, ORS 466.706 through 466.835, ORS 466.994, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012 and 150.

II. FINDINGS OF FACT

1. In 1986, Respondent submitted a Notification of Underground Storage Tanks to DEQ for five underground storage tanks (USTs) located at 455 Industry Street in Astoria, Oregon (the Facility). The Notification stated that the estimated age of the tanks was 11 years.

2. In 1989, DEQ issued Respondent an UST Program Temporary Permit for the five USTs at the Facility.

3. In 1999, Respondent decommissioned two of the USTs.

4. Since February 17, 1999, Respondent has been the permittee for the remaining three USTs under General Permit Operating Certificate for facility no. 7375.

5. On August 3, 2010, DEQ inspected the Facility.

6. During the inspection, Respondent provided DEQ with the results of two corrosion protection tests, conducted on February 23, 2005 and May 1, 2009.

7. During the inspection, Respondent provided to DEQ a financial responsibility mechanism with an effective date of the policy of August 2, 2010. Respondent's prior financial responsibility mechanism expired on June 8, 2010.

8. During the inspection, DEQ was unable to readily determine if the suction piping which runs from the gasoline portion of the loading rack to the USTs was designed and

constructed to meet the requirements of OAR 340-150-0410(6).

9. During the inspection, DEQ discovered that the pressurized piping which runs from the diesel portion of the loading rack to the USTs was not equipped with an automatic line leak detector. Respondent was unable to provide DEQ with the results of line tightness testing for this pressurized piping.

10. During the inspection, Respondent's operating certificate was not posted at the Facility.

11. On or about October 27, 2010, Respondent installed a line leak detector on the pressurized piping which runs from the diesel portion of the loading rack to the USTs.

12. On or about December 2, 2010, Respondent had the pressurized piping which runs from the diesel portion of the loading rack to the USTs tightness tested.

13. On or about February 1, 2011, DEQ received documentation showing that the suction piping which runs from the gasoline portion of the loading rack to the USTs was designed and constructed to meet the requirements of OAR 340-150-0410(6).

### III. CONCLUSIONS

1. Respondent violated 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 including 40 CFR 280.40 and 280.41) by failing to install and operate a method of release detection for piping and by failing to conduct annual line leak detector operational testing and line tightness testing as described in Section II, Paragraph 9. These are Class I violations pursuant to OAR 340-012-0067(1)(e) and OAR 340-012-0067(1)(j). DEQ hereby assesses a \$11,294 civil penalty for this violation.

2. Respondent violated OAR 340-150-0163 by failing to continuously maintain a required financial responsibility mechanism as described in Section II, Paragraph 7. This is a Class I violation pursuant to OAR 340-012-0067(1)(b). DEQ hereby assesses a \$450 civil penalty for this violation.

3. Respondent violated OAR 340-150-0325(2) by failing to have the corrosion protection system inspected and tested for proper operation by a qualified cathodic protection tester at least every three years. As described in Section II, Paragraph 6, Respondent did not have the corrosion protection system inspected and tested for over 4 years. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ hereby assesses a \$189 civil penalty for this violation.

4. Respondent violated OAR 340-150-0163(1)(a) by failing to post Respondent's annual operating certificate in a conspicuous location which is clearly visible at the Facility as described in Section II, Paragraph 10. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ hereby assesses a \$150 civil penalty for this violation.

5. Respondent violated OAR 340-012-0410(6) by failing to provide a method for DEQ to readily determine compliance with the requirements in that rule section, as described in Section 11, Paragraph 8. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ did not assess a civil penalty for this violation.

#### IV. ORDER TO PAY CIVIL PENALTY

Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is hereby ORDERED TO pay a total civil penalty of \$12,083. The determination of the civil penalty is attached as Exhibit Numbers 1 through 4, which are incorporated as part of this Notice.

If you do not file a request for hearing as set forth in Section V below, your check or money order must be made payable to "State Treasurer, State of Oregon" and sent to the DEQ, Business Office, 811 S.W. Sixth Avenue, Portland, Oregon 97204. Once you pay the penalty, the Findings of Fact, Conclusions and Order become final.

#### V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ must receive the request for hearing **within 20 calendar days** from the date you receive this Notice. The request should include any affirmative defenses and either admit or deny each allegation of fact in this Notice. (See OAR 340-011-0530.) You must mail the request for hearing to: **DEQ, Office of Compliance and Enforcement - Appeals, 811 SW Sixth Avenue,**

1 **Portland, Oregon 97204**, or fax to **(503) 229-5100**. An administrative law judge employed by  
2 the Office of Administrative Hearings will conduct the hearing, according to ORS Chapter 183,  
3 OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be  
4 represented by an attorney at the hearing, or you may represent yourself unless you are a  
5 corporation, agency or association.

6 If you fail to file a request for hearing in writing within 20 calendar days of receipt of the  
7 Notice, the Notice will become a final order by default without further action by DEQ, as per  
8 OAR 340-011-0535(5). If you do request a hearing but later withdraw your request, fail to attend  
9 the hearing, or notify DEQ that you will not be attending the hearing, DEQ will issue a final  
10 order by default pursuant to OAR 137-003-0670. DEQ designates the relevant portions of its  
11 files, including information submitted by you, as the record for purposes of proving a prima facie  
12 case.

13  
14 Date

8/23/11

Leah E. Koss

Leah E. Koss, Manager  
Office of Compliance and Enforcement

AMENDED EXHIBIT NO. 1  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Failing to install and operate a method of release detection for piping and failing to conduct line leak detector operational testing and line tightness testing, in violation of OAR 340-150-0410(2) and OAR 340-150-0555(1)(d).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0067(1)(e) and (1)(j).

MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as the information reasonably available to the Department indicates that the violation posed no more than a de minimis threat to human health or the environment. Respondent had line tightness testing conducted on the piping which showed that the piping was not leaking at a rate higher than 0.1 gallon per hour rate.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$250 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent was required to comply with all the release detection requirements by December 22, 1990. Respondent installed the equipment in October 2010 and had the testing completed in December 2010.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the

permittee. Respondent has had a permit for its facility and as such, has at least constructive knowledge that it must install a line leak detector on pressurized piping.

"C" is Respondent's efforts to correct the violation and receives a value of -2 according to OAR 340-012-0145(6)(a)(D), because Respondent made reasonable efforts to correct the violation by installing a line leak detector in October 2010 and conducting testing in December 2010.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of \$10,944. This is the amount Respondent gained by delaying spending approximately \$3,900 to install a line leak detector from December 1990 until October 2010 (\$6,699) and by avoiding spending \$225 every year, starting in December 1991 through December 2010, for line tightness testing and line leak detector operational testing (\$4,245). This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$250 + [(0.1 \times \$500) \times (0 + 0 + 4 + 2 - 2)] + \$10,944$   
 $= \$250 + (\$25 \times 4) + \$10,944$   
 $= \$250 + \$100 + \$10,944$   
 $= \$11,294$

Per OAR 340-012-0150(5), DEQ is treating the violation as extending over as many days as necessary to recover the economic benefit of the violation. The violation was on-going from December 1990 until December 2010.

AMENDED EXHIBIT NO. 2  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 2: Failing to continuously maintain a financial responsibility mechanism, in violation of OAR 340-150-0163.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0067(1)(b).

MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Respondent allowed its financial responsibility mechanism to lapse for less than two months, during which time, the information reasonably available to DEQ does not indicate that Respondent needed to use its financial responsibility mechanism.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$250 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C); because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent did not have a current valid financial responsibility mechanism from June 8 to August 2, 2010.

"M" is the mental state of the Respondent and receives a value of 6 according to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. Reckless means the Respondent consciously disregarded a substantial and unjustifiable risk that the result of its conducts would occur. Respondent has had a permit for its facility. Each year, DEQ requires permittees to submit proof of a valid financial responsibility mechanism. In 2002, EPA issued Respondent a Notice of Noncompliance for failing to provide evidence of a current financial responsibility mechanism for this facility. Respondent knew that it

needed to continuously maintain a financial responsibility mechanism and by failing to renew its policy in a timely manner, Respondent disregarded a substantial and unjustifiable risk that its conduct would be a violation.

"C" is Respondent's efforts to correct the violation and receives a value of -2 according to OAR 340-012-0145(6)(a)(B), because Respondent made reasonable efforts to correct the violation by obtaining a financial responsibility mechanism in August 2010.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$0 because DEQ finds that economic benefit gained by delaying obtaining a financial responsibility mechanism from June 2010 to August 2010 would be de minimis.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$250 + [(0.1 \times \$250) \times (0 + 0 + 4 + 6 - 2)] + \$0$   
 $= \$250 + (\$25 \times 8) + \$0$   
 $= \$250 + \$200 + \$0$   
 $= \$450$

AMENDED EXHIBIT NO. 3  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 3: Failing to have a corrosion protection system inspected and tested for proper operation at least every three years, in violation of OAR 340-150-0325(2).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0053(2).

MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Although Respondent failed to conduct the inspection and test conducted in 2008, a test conducted in 2009 shows that the corrosion protection system was operating properly and was likely operating properly prior to the inspection and test in 2009.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$125 for a Class II, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(B)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent was required to conduct an inspection and test within three years of the test it conducted in February 2005 (February 2008), but did not conduct an inspection and test until May 2009.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the permittee. Respondent has had a permit for its facility and as such, has at least

constructive knowledge that it must conduct a corrosion protection inspection and test every three years.

"C" is Respondent's efforts to correct the violation and receives a value of -2 according to OAR 340-012-0145(6)(a)(B), because Respondent made reasonable efforts to correct the violation by conducting the inspection and test.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$14. This is the amount Respondent gained by delaying, from February 2008 until May 2009, spending approximately \$125 to conduct a corrosion protection inspection and test. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$125 + [(0.1 \times \$125) \times (0 + 0 + 4 + 2 - 2)] + \$14$   
 $= \$125 + (\$12.50 \times 4) + \$14$   
 $= \$125 + \$50 + \$14$   
 $= \$189$

AMENDED EXHIBIT NO. 4  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

- VIOLATION 4: Failing to post the annual operating certificate in a conspicuous location which is clearly visible, in violation of OAR 340-150-0163(1)(a).
- CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0053(2).
- MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Although the operating certificate was not posted properly during DEQ's inspection, Respondent is the only distributor who delivers fuel at this facility so that there was minimal risk that a distributor would deliver fuel without the operating certificate being valid.
- CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$
- "BP" is the base penalty, which is \$125 for a Class II, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(B)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.
- "P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.
- "H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.
- "O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(a)(A), because DEQ does not have sufficient information to allege that the violation existed on any date besides the date of the inspection.
- "M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the permittee. Respondent has had a permit for its facility and as such, has at least constructive knowledge that it must post the operating certificate in a conspicuous place.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because DEQ has insufficient information to make a finding under OAR 340-012-0145(6)(a)(A) through (6)(a)(C) or OAR 340-012-0145(6)(a)(E).

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$0 because DEQ finds that economic benefit gained would be de minimis.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$125 + [(0.1 \times \$125) \times (0 + 0 + 0 + 2 + 0)] + \$0$   
 $= \$125 + (\$12.50 \times 2) + \$0$   
 $= \$125 + \$25 + \$0$   
 $= \$150$

FA

HB

CHECKLIST - PERMIT APPLICATION PROCESSING

Facility Number: 7375  
Application Number: UST-4107  
Date Received: 9/6/89

Permittee Information Entered ✓  
SIC Code Entered N.G.  
Tank Contents checked ✓  
Tank ID number checked ✓  
Permit Ordered 9/25  
Date: 9/25

PERMIT NUMBERS:

BKKAK, BKKAA, BKKAB, BKKAC, BKKAD

Property Owner Information Entered ✓  
Corrections made to tank information ✓  
Date:                     

Other actions needed:

Returned to owner/permittee                       
Date:                     

Incomplete                       
Other                     

Received back from owner/permittee                       
Date:                     

Comments: 4 tanks (#2, 3, 4, 5) decommissioned  
Permits terminated 5-4-90  
Owner (Property & Tank) & Permittee ID # 13108  
HB # <sup>404</sup> ~~100~~ 6-13-90 - Past due sent 11/20/90. L. Reactivated tanks  
UST94H-1415 (\$546 - 4 tanks not decomm'd as thought) 11/18/94  
Tanks still active per Rich R. NWR

Respondent's  
Exhibits (No 18)  
"R" 1-27

EXHIBIT 1

Complete this form **ONLY** if you intend to operate any of the tanks listed as **TANKS TO BE DECOMMISSIONED** on the reverse side of this page. Also include any new tanks which you have installed, only if you have not already received a general permit to operate registration form for these tanks in the mail. Please print your facility number in the space above.

This form must be mailed to the address on the instruction page. Both the permittee and tank owner must sign. Make a copy of this form for your records. Lastly, please call your DEQ regional office listed on page 4 of the instructions and discuss these changes you are making. It will help to speed up the processing of this registration form.

Tank ID Number	Tank Permit Number
<u>1</u>	<u>BKKAK</u>

WAITING FOR CATHODIC

PROTECTION FROM

Tank ID Number	Tank Permit Number
<u>2</u>	<u>BKKAA</u>

CORRPRO COMPANIES INC.

WOULD LIKE TO CONTINUE

Tank ID Number	Tank Permit Number
<u>3</u>	<u>BKKAB</u>

OPERATING AFTER 12-22-97

7375  
ISSUE  
DECOM  
Permits  
12-11-98

Note: Failure to register and receive a general permit registration certificate to operate under the recently adopted rules means that after December 22, 1998 regulated substance cannot be deposited into the tanks.

BUENS-JOHANSON OIL CO.  
Legal Name\* of Tank Owner as registered with the Secretary of State, Corporations Division

CARY BELHTOLT  
Name of Official (Please Print)

Cary Belhtolt 12/4/98  
Signature of Official Date

BJ BULK PLANT  
Legal Name\* of Permittee as registered with the Secretary of State, Corporations Division

CARY BELHTOLT  
Name of Official (Please Print)

Cary Belhtolt 12/4/98  
Signature of Official Date

I hereby register to operate the USTs described above in accordance with the conditions and requirements of the general permit pursuant to OAR 340-150-0163. I also certify that these tanks meet the 1998 technical standards for corrosion control, spill and overfill prevention and leak detection and I have arranged financial responsibility.

\* If you are not registered with the Secretary of State, Corporations Division, provide the name that you currently use to identify your business to customers.

11/5/98

OREGON DEQ

Page 2 of 4

**UNDERGROUND STORAGE TANK PROGRAM  
GENERAL PERMIT REGISTRATION FORM TO OPERATE  
FACILITY ID NUMBER: 7375**

Complete this form **ONLY** if you intend to operate any of the tanks listed as **TANKS TO BE**

**DECOMMISSIONED** on the reverse side of this page. Also include any new tanks which you have installed, only if you have not already received a general permit to operate registration form for these tanks in the mail. Please print your facility number in the space above.

This form must be mailed to the address on the instruction page. Both the permittee and tank owner must sign. Make a copy of this form for your records. Lastly, please call your DEQ regional office listed on page 4 of the instructions and discuss these changes you are making. It will help to speed up the processing of this registration form.

Tank ID Number	Tank Permit Number
4	BKKAC

WOULD LIKE INFO

Tank ID Number	Tank Permit Number
5	BKKAD

FOR STIMULATED ORDER

Tank ID Number	Tank Permit Number

TO CONTINUE OPERATION

Note: Failure to register and receive a general permit registration certificate to operate under the recently adopted rules means that after December 22, 1998 regulated substance cannot be deposited into the tanks.

BURNS - JOHNSON OIL CO.  
Legal Name\* of Tank Owner as registered with the Secretary of State, Corporations Division

CARY BECHTOLT  
Name of Official (Please Print)

Cary Bechtolt 12/4/98  
Signature of Official Date

BS BULK PLANT  
Legal Name\* of Permittee as registered with the Secretary of State, Corporations Division

CARY BECHTOLT  
Name of Official (Please Print)

Cary Bechtolt 12/4/98  
Signature of Official Date

I hereby register to operate the USTs described above in accordance with the conditions and requirements of the general permit pursuant to OAR 340-150-0163. I also certify that these tanks meet the 1998 technical standards for corrosion control, spill and overfill prevention and leak detection and I have arranged financial responsibility.

\* If you are not registered with the Secretary of State, Corporations Division, provide the name that you currently use to identify your business to customers.

Item # VC1C The Drawing Board, Dallas, Texas 75268-0429  
© Wheeler Group, Inc., 1982

REPLACES CHECK 024341 9-26-89

Item D 000199

## UST SURVEY

### Department of Environmental Quality

Date: March 16, 1995

Dear Owner/Permittee:

You are requested to complete the following survey by checking the responses which apply to your facility. This information will be used to evaluate future program requirements including the level of technical assistance we will need to provide. It will also enable us to update tank information in our computer database. **PLEASE RETURN THIS SURVEY WITH YOUR INVENTORY CONTROL RECORDS.**

Facility ID # 7375 Facility Name: B.T.

Your name: CARL RECHTAL Owner      Permittee      Operator ☒

Mailing Address: PO Box 989 Astoria OR Zip Code 97103 Phone # (503) 325-1972

- What method(s) of leak detection do you use for your tanks? Check all that apply.  
☒ Inventory Control      Automatic Tank Gauges (ATGs) ☒ Manual Tank Gauging  
     Groundwater Monitoring      Vapor Monitoring      Interstitial Monitoring - Tank  
     Statistical Inventory Reconciliation (SIR)      Other - specify
- What method(s) of leak detection do you use for your piping?  
Pressurized Piping:      Line Leak Detector ☒ Annual Line Tightness Testing      SIR  
     Interstitial Monitoring - Piping      Groundwater Monitoring      Vapor Monitoring  
Suction Piping: ☒ Line Tightness Test Every 3 Years      Not Required-Check Valve at Pump
- Do you have spill containment around the fill pipe? NO
- What type of overfill prevention equipment do you have? Please check all that apply.  
     Overfill Alarm      Automatic Shutoff Device      Ball Float Valve      Flow Restrictor
- Do you have corrosion protection for the tanks?  
☒ Not Yet      FRP (fiberglass) Tanks      Composite Tank      Cathodic Protection (sacrificial anode)  
     Impressed Current      Other - specify
- Do you have corrosion protection for the piping?  
☒ Not Yet      FRP (fiberglass) Pipes      Cathodic Protection (sacrificial anode)  
     Impressed Current      Other - specify
- Federal rules require you to have UST insurance or otherwise demonstrate financial responsibility.  
Have you met this requirement? ☒ Yes      No DEFERRED PER CONSENT AGREEMENT
- You are required to upgrade, replace or decommission your tanks by December 31, 1998 even if UST financial assistance is not available. What do you plan to do?  
☒ Upgrade tanks (facility will remain open)      Tanks already upgraded      Decommission tanks (facility will be closed)      Tanks have already been decommissioned (facility now closed).

# EXHIBIT 3

**INSTALLER'S OATH:** I certify that I have been the Oregon DEQ licensed supervisor present on site during the above listed upgrade/retrofit/replacement activities and to the best of my knowledge they have been conducted in compliance with all state and federal laws, regulations and industry standards and procedures pertaining to underground storage tanks. I further certify that the information contained in this report and checklist is true to the best of my belief and knowledge.

Installer: KEVIN LOOMIS  
(Print Name)

[Signature]  
(Signature)

Position: Corrosion Technician

Company: Corpro Companies Inc

Date: 2-11-99

UST Service Provider Firm, Executive Officer:

Thomas J. Marchesani  
(Print Name)

[Signature]  
(Signature)

2-11-99  
(Date)

### UST FACILITY OWNER/OPERATOR UPGRADE CERTIFICATION STATEMENT:

I hereby certify that the information provided on this checklist concerning the upgrade status of my tank system(s) is accurate.

CARY BECHTOLD  
(Print Name)

[Signature]  
(Signature)

2-11-99  
(Date)

### OWNER'S FINANCIAL RESPONSIBILITY INFORMATION SECTION:

The tank owner has financial responsibility, if applicable, in accordance with OAR 340-150-004. Please specify:

Method of financial responsibility: UNDERGROUND STORAGE TANK POLLUTION LIABILITY

Insurer: UNITED CAPITAL INS. Policy Number: TNK 8001488

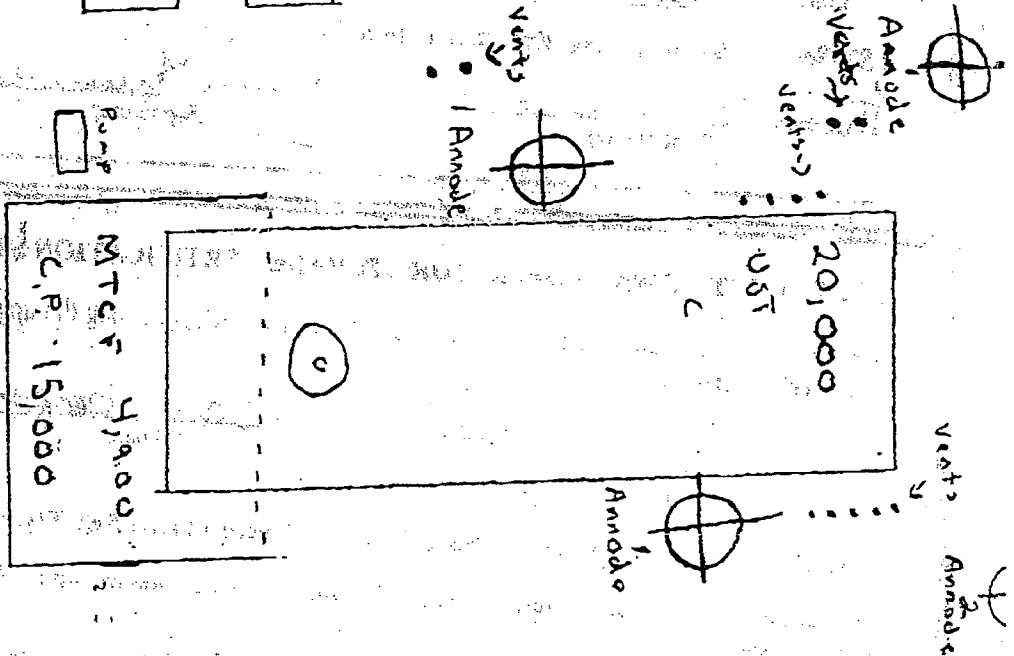
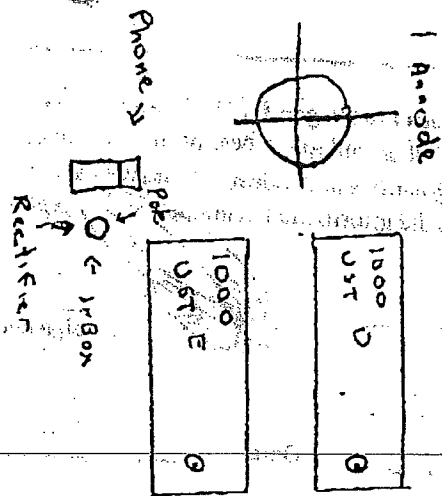
This form must be mailed to the appropriate DEQ Regional Office within 30 days after the upgrade/retrofit project is completed. For information, call the appropriate DEQ Regional Office or the toll free number, 1-800-742-7878.

**DEQ INSPECTIONS:** This form may be used by DEQ Inspectors for oversight purposes. A DEQ inspector is not required to inspect the upgrade/retrofit. A DEQ inspector may or may not be on site or available during all of the inspections listed on this form. In the case of an oversight inspection, the DEQ inspector should check all boxes that are appropriate for the inspection(s) and forward a copy to the appropriate Regional Office for the facility file.

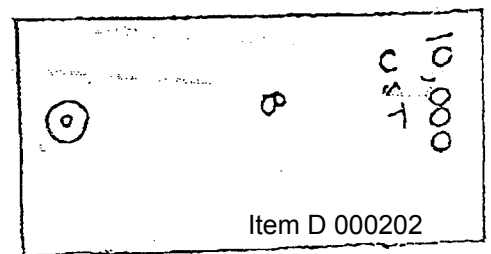
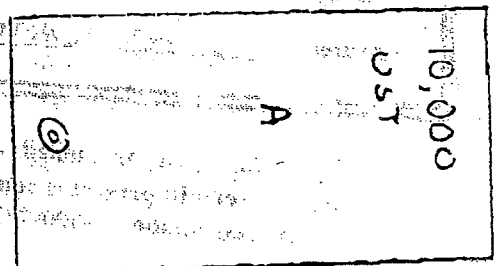
DEQ Inspector's Signature: \_\_\_\_\_

Inspection Date(s): \_\_\_\_\_

INDUSTRIAL ASTORIA



Dispenser





State of Oregon  
Department of  
Environmental  
Quality

# CERTIFICATE TO OPERATE

## UNDERGROUND STORAGE TANKS REGISTRATION CERTIFICATE NUMBER:

4-7375-2008-OPER

### FACILITY NAME AND LOCATION PERMITTEE

BURNS-JOHANSON BULK PLANT  
455 INDUSTRIAL ST  
ASTORIA, OR 97103  
Burns-Johanson Oil Company  
PO Box 989  
Astoria, OR 97103-0989

### TANK PERMIT

BKKAK  
BKKAA  
BKKAB

### TANK ID NO

1  
2  
3

### TANK SIZE

10,000 Gallons  
10,000 Gallons  
20,000 Gallons

### TANK CONTENTS

Diesel  
Diesel  
Heating Oil

# CERTIFICATE EXPIRES: June 30, 2009

ISSUE DATE: 06/05/2008

*Andree Pollock*

Andree Pollock, UST Program Manager  
Land Quality Division

Post this certificate where it is visible to the person delivering fuel.



**DEQ**

State of Oregon  
Department of  
Environmental  
Quality

# CERTIFICATE TO OPERATE

## UNDERGROUND STORAGE TANKS

REGISTRATION CERTIFICATE NUMBER:

4-7375-2009-OPER

### FACILITY NAME AND LOCATION

BURNS-JOHANSON BULK PLANT

455 INDUSTRIAL ST

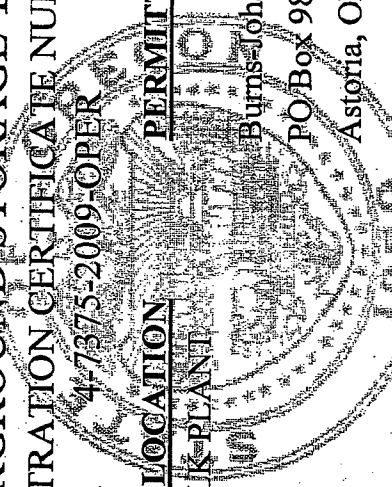
ASTORIA, OR 97103

### PERMITTEE

Burns-Johanson Oil Company

PO Box 989

Astoria, OR 97103-0989



### TANK PERMIT

BKKAK

BKKAA

BKKAB

### TANK ID NO

1

2

3

### TANKS SIZE

10,000 Gallons

10,000 Gallons

20,000 Gallons

### TANK CONTENTS

Diesel

Diesel

Heating Oil

CERTIFICATE EXPIRES:

June 30, 2010

ISSUE DATE: 06/19/2009

*Andree Pollock*

Andree Pollock, UST Program Manager

Land Quality Division

Post this certificate where it is visible to the person delivering fuel.



State of Oregon  
Department of  
Environmental  
Quality

# CERTIFICATE TO OPERATE UNDERGROUND STORAGE TANKS REGISTRATION CERTIFICATE NUMBER

4-7375-2010-OPER

## FACILITY NAME AND LOCATION

BURNS-JOHANSON-BULK PLANT  
455 INDUSTRIAL ST  
ASTORIA, OR 97103

## PERMITTEE

Burns-Johanson Oil Company  
PO Box 989  
Astoria, OR 97103

## TANK PERMIT:

BKKAA  
BKKAB  
BKKAK

## TANK ID NO:

2  
3  
1

## TANK SIZE:

10,000 GALLONS  
20,000 GALLONS  
10,000 GALLONS

## TANK CONTENTS:

DIESEL  
HEATING OIL  
DIESEL

# CERTIFICATE EXPIRES: June 30, 2011

ISSUE DATE: 06/09/2010

DEQSQL1\PROD

A handwritten signature in black ink, appearing to read "Andree Pollock".

Andree Pollock

UST Program Manager

Land Quality Division

Post this certificate where it is visible to the person delivering fuel.

Rev. 20100510



**Oregon**  
John A. Kitzhaber, M.D., Governor

October 1, 1999

**Department of Environmental Quality**

Northwest Region  
2020 SW Fourth Avenue  
Suite 400  
Portland, OR 97201-4987  
(503) 229-5263 Voice  
TTY (503) 229-5471

Burns-Johanson Oil Co.  
455 Industry Street  
Astoria, OR 97103

Facility ID 7375

Dear Tank Owner/Permittee:

We received a 30 day decommissioning notice for removal of underground storage tank(s) located at:

BURNS-JOHANSON BULK PLANT  
455 INDUSTRIAL ST  
ASTORIA, OR 97103

Checking our records, it appears the tanks are registered, permit fees are current, and the contractor is licensed. You are required to confirm the date of upgrade at least 72 hours prior to start of work, by calling (503) 229-5263 and asking for the UST Duty Officer. If you have any further questions about your permit fees, facility information or DEQ Licensed Contractors please call Victor Beard at (503) 229-5159.

An assessment must be conducted at all tank sites and contamination must be reported within 24 hours of discovery. OAR 340-122-205 through 340-122-360 contains the sampling requirements necessary when decommissioning underground storage tanks. As soon as contamination is identified in any manner, including observations of visible staining or odors, it must be reported. If obvious signs of contamination are present in the excavation, **DO NOT** wait until you receive the sample results to report the contamination.

If you need to report contamination or have any general questions regarding site cleanup or UST compliance issues, please call (503) 229-5263 and ask to speak with the UST Duty Officer.

**REMINDER:** The UST Decommissioning/Change-In-Service Report form and the UST Decommissioning Checklist form must be submitted within 30 days after completion of work.

Sincerely,

Victor Beard  
UST Cleanup and Compliance

cc: Stephanie Holmes, WMC  
NWR facility file # 7375  
Service Provider if known

**EXHIBIT 4**



# Oregon

John A. Kitzhaber, M.D., Governor

March 10, 1999

Department of Environmental Quality

Northwest Region  
2020 SW Fourth Avenue  
Suite 400  
Portland, OR 97201-4987  
(503) 229-5263 Voice  
TTY (503) 229-5471

CARY BECHTOLT  
ETU OIL/NIEMI OIL COMPANY  
PO BOX 969  
ASTORIA OREGON 97103

Re: UST Facilities #, 6897, 7375, 7471, 7476  
NWR-UST-99-013  
**NOTICE OF NONCOMPLIANCE**

Dear Mr. Bechtolt:

As discussed, this notice is the result of confirmed violations of the underground storage tank (UST) regulations documented during Department inspections of your facilities on February 11, 1999. Inspections were conducted at your facilities to determine UST technical upgrade status prior to the issuance of Certificates to Operate from the Department.

In addition to documenting the current violations, under Corrective Measures, this notice identifies actions and document submittals which assure ongoing compliance with Department leak detection, cathodic protection and cleanup requirements.

### Violations

Failure to notify the Department at least 3 working days before beginning to upgrade sub-standard USTs.

Based on information provided from Kevin Loomis-Licensed Supervisor from Corpro, no 3-working day verbal notice was provided to the Department before conducting cathodic protection system installation at the following UST facilities:

Hiway Service, 3108 Marine Dr., Astoria, OR. #6897  
Burns-Johanson Oil Bulk Plant, 455 Industrial, Astoria, OR. #7375  
Landwehr's, 505 Old Highway 101, Astoria, OR. #7471  
Warrenton BP, 238 South Main, Warrenton, OR. #7476

Each occurrence is considered a separate violation.

Title 40 of the federal code of regulations (CFR) 280.21(e) as amended by Oregon Administrative Rule (OAR) 340-150-0001 through 340-150-0166, specifies that at least 3 working days before beginning the upgrade of sub-standard UST systems, owners and operators or the licensed service provider performing the work must notify the Department of the confirmed date and time the upgrade will begin to allow observation by the Department.

# EXHIBIT

5

Item D 000207

Cary Bechtolt  
March 10, 1999

These are Class III violations and considered to be significant violation of Oregon environmental law. Should you fail to correct the violation in accordance with the schedule set forth below, we may refer your file to the Department's Enforcement Section with a recommendation to proceed with a formal enforcement action which may result in a civil penalty assessment. Civil penalties can be assessed for each day of violation.

#### Corrective Measures

- I. By **March 26, 1999**, the Department requests you provide your written intentions regarding the fate of USTs that currently do not meet the technical upgrade requirements.

Department records identify the following USTs as not conforming to upgrade standards:

Hiway Service, 3108 Marine Dr., Astoria,  
Tank #AJAAB (used oil), *Deficiency-cathodic protection & spill/overflow, financial responsibility.*

Burns-Johanson Bulk Plant, 455 Industrial, Astoria,  
Tanks #BKKAC & BKKAD (550 gallon gasoline), *Deficiency-spill/overflow, cathodic protection, financial responsibility (no upgrade checklist/report provided concerning Corpro work on these tanks)*

- II. As authorized in title 40 CFR 280.34, the Department requests that as the owner & operator of dated UST systems, beginning **April 6, 1999**, you submit the monthly Statistical Inventory Reconciliation records for each UST at your facilities until which time the product delivery system is replaced.

Based on the results of the inspection and reports submitted concerning the UST upgrades at your facilities, you have opted to cathodically protect the over 30 year existing steel product piping and that Statistical Inventory Reconciliation is the chosen method of upgraded monthly leak detection. Nationally, failed product delivery pipes are usually the culprits in confirmed releases. The Department considers this a reasonable request considering the potential cleanup risk and liability associated with ongoing product dispensed from aged UST systems.

- III. By **March 26, 1999**, initiate free product recovery, initial abatement measures and a site check at Warrenton BP.

During the February 11, 1999, inspection at Warrenton BP, the Department confirmed the presence of free product in the water and soils outside the confines of the UST systems. The tank was being accessed for tank lining purposes. This is required as stated in title 40 CFR 280.64 as amended by OAR 340-150-0001 through 340-150-0166, at sites where the presence of free product exists, owners and operators must remove the free product to maximum extent practicable and initiate abatement measures and site check.

Cary Bechtolt  
March 10, 1999

- IV. By **August 11, 1999**, perform tank and piping integrity tests on all your UST systems that have been upgraded, or are influenced by, the newly installed cathodic protection and provide the Department with copies of the completed integrity tests.

As specified in the February 1998, approved Specification for Mean Time to Corrosion Failure (MTCF) non-invasive procedure (copy enclosed), item 7.2.2.3, requires item 5.1 to be repeated within six (6) months after the ten year old or older tank is cathodically protected to assure its continued leak free condition.

The Department appreciates your efforts to comply with regulations to ensure your UST do not become an environmental liability to you and the citizens of Oregon. If you have any questions regarding this information, please call me at (503) 229-5472.

Sincerely,



Richard Rose  
UST Compliance/Cleanup Specialist  
Northwest Region

Enclosure

Cc: Statewide Enforcement Section-DEQ/NWR  
Stephanie Holmes-DEQ/HQ/UST  
File #04-99-0134  
Corpro Companies  
11524 Mukilteo Speedway Suite #101  
Mukilteo, WA 98275  
John Jensen, Permittee  
Warrenton BP  
238 South Main  
Warrenton, OR 97103

# EPA UST Program Field Notice of Non-compliance

No. 748

The Environmental Protection Agency (EPA) is responsible for the enforcement of underground storage tank (UST) laws that protect human health and the environment. Pursuant to federal regulation at 40 CFR Part 280, during an inspection on

7/11/02 the following items of UST non-compliance were observed at your facility:

	Description:	Correction Required:	Deadline:
1	Failure to provide copy of current "Certificate of Insurance" for covered facilities (40 CFR 280.11(a))	Submit current "Certificate of Insurance" and attachment showing facilities/tanks covered.	8/11/02
2			
3			
4			

## WARNING

The EPA wishes to work cooperatively with you as the owner and/or operator of this facility to resolve the violations(s) listed above at this time. Therefore, no penalty will currently be assessed. However, if you fail to complete the above noted compliance task(s) before the listed deadline(s), you will become subject to citation and/or formal enforcement action. Such enforcement actions mandate compliance and carry monetary penalties as high as \$10,000 for every day of continued violation on each underground tank.

Notify your EPA contact person (listed below) immediately if you are unable to perform the required actions within the specified dates.

EPA Inspector	Facility Information
Name: Robert B. Cutler	Name of Facility: Hwy Sec. / B-T Bulk Plant / Landwehr's
Office Address: USEPA Washington Operations Office, 300 Desmond Dr SE, Ste. 102, Lacey, WA 98503	Facility ID #: ORG89773757471
Phone: 360-753-9543	Address: 3108 Marine Dr., Astoria, OR 97103 455 Industrial St. 34908 Hwy 105
Signature: Robert B. Cutler / Robert B. Cutler	Contact: Cary Bechtolt
	Phone: 1972 503-325-1792
	Signature: Cary Bechtolt
	2341

# EXHIBIT

Item 6 00210

## EPA REGION 10

## UNDERGROUND STORAGE TANK

## INSPECTION FORM (SHORT)

Significant Compliance:

RD

Upgrade

5/7/02

Facility# OR 7375

Y

N

Y

N

Inspection Date 7/11/02 Time 1:05 pm GPS reading 071120ALead Inspector Robert Cutler Others \_\_\_\_\_Facility Reps \* Cary Bechtolt

(\* Credentials Presented)

Visual Documentation of Inspection: ☐ 35mm pictures ☒ Video Footage ☐ OtherFacility Drainage (FD) questionnaire: ☒ Completed ☐ Not Completed ☐ Not ApplicableEnforcement Actions Taken On Site: FNONC # 748 FC # \_\_\_\_\_ For \$ \_\_\_\_\_ *Previously*Verbal Warning for 40 CFR 280. \_\_\_\_\_ SBA Info Sheet Given? Y N *5/02*

Enforcement Action Delayed for (Reason): \_\_\_\_\_

## Facility Information

Location Name Burns - Johanson Bulk Plant

Owner \_\_\_\_\_ Operator \_\_\_\_\_

Address (Loc/Owner/Op) \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

Address (Loc/Owner/Op) \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

Tank #	(3)	(1)	(2)	4	5	6
<input type="checkbox"/> MEETS FINANCIAL RESPONSIBILITY REQUIREMENTS						
<input type="checkbox"/> All (tanks covered) or (check which tanks are covered)						
Type: <input checked="" type="checkbox"/> Ins. <input type="checkbox"/> Self <input type="checkbox"/> Other _____ Dates Coverage: _____ In EPA Format? Y N						
Issuing Entity: _____ <input type="checkbox"/> PSTF						
TANK STATUS						
Status (circle):	(CIU)	TOS	POS	<input checked="" type="checkbox"/> All or		
Manifolded (M) or Compartmented (C) Tank?		M	M			
Date installed:	<input checked="" type="checkbox"/> All or	1977				
Tank cap (gal):	<input type="checkbox"/> All or	20,000	10,000	10,000		
Tank Material:	BS CPS	C	FRP	DW	ExL	Lin
Piping Material:	GS CPS	FRP	FlexP	DW	SecC	
Piping Type:	Grav	Pres	(SafeS)	U.S.S.		
Product in tank:	<input type="checkbox"/> All or	Ux1	D	D		
Date last used:	<input type="checkbox"/> All or					
Closure Status:	Removed	In-Place	Chg-in-Svc	<input type="checkbox"/> All or		
Site Assessment?	Y	N	<input type="checkbox"/> All or			

Pipes: Confirmed check valves

Tank #	1	2	3	4	5	6
<b>LEAK DETECTION</b>						
<input type="checkbox"/> <b>Manual Tank Gauging</b>						
MTG method correctly done?	Y	N	<input type="checkbox"/> All or			
<input type="checkbox"/> <b>Tank Tightness Testing</b>						
Last TTT date?		Passed?	Y	N	<input type="checkbox"/> All or	
<input type="checkbox"/> <b>Inventory Control</b>						
IC method correctly done?	Y	N	<input type="checkbox"/> All or			
<input type="checkbox"/> <b>Automatic Tank Gauging</b>						
ATG method correctly done?	Y	N	<input type="checkbox"/> All or			
<input type="checkbox"/> <b>Vapor Monitoring</b>						
Site assessment?	Y	N	<input type="checkbox"/> All or			
VM method correctly done?	Y	N	<input type="checkbox"/> All or			
<input type="checkbox"/> <b>Ground Water Monitoring</b>						
Site assessment? (ie: 3' < gw < 20')	Y	N	<input type="checkbox"/> All or			
GWM method correctly done?	Y	N	<input type="checkbox"/> All or			
<input checked="" type="checkbox"/> <b>SIR</b>						
SIR method correctly done?	<input checked="" type="radio"/> N		<input checked="" type="checkbox"/> All or			
<input type="checkbox"/> <b>Interstitial Double-Wall Monitoring</b>						
Interstitial DW method correctly done?	Y	N	<input type="checkbox"/> All or			
<input type="checkbox"/> <b>Interstitial Sec. Con. Monitoring</b>						
Interstitial SC method correctly done?	Y	N	<input type="checkbox"/> All or			
<b>PIPING</b>						
<input type="checkbox"/> ALLD(s); Last annual test date:		<input type="checkbox"/> All or				
<input type="checkbox"/> LTT(s); Date last LTT		Passed?	Y	N	<input type="checkbox"/> All or	
Monthly Monitoring Method (circle): ATG VM GWM IM SIR						
IMSump Other		<input type="checkbox"/> All or				
<b>RECORDS</b>						
RD records verify compliance?	<input checked="" type="radio"/> N		<input checked="" type="checkbox"/> All or			
Equipment operated correctly and/or functioning? Y N Method(s)/Equipment name(s): ATG <input checked="" type="radio"/> SIR IM Other						
Model/Name:						
Third Party Evaluation(s) available for: ATG <input checked="" type="radio"/> SIR IM Sensors ALLD Other In Compliance with Evaluation? <input checked="" type="radio"/> N						
Comments: <u>Simmons SIR: Had only May on-site. Office had all other months - checked 3 - all Passes.</u>						

Tank #	1	2	3	4	5	6
<b>UPGRADE INFORMATION</b>						
<input checked="" type="checkbox"/> CP Met on Tank(s) and Piping	<input type="checkbox"/> All or					
<input type="checkbox"/> Tank Lining						
Lining documentation provided? Y N	<input type="checkbox"/> All or					
Date of Lining: _____						
Date of last inspection, if required: _____	<input type="checkbox"/> All or					
<input checked="" type="checkbox"/> Cathodic Protection System						
Date of Passing Integrity Inspection: _____	<input type="checkbox"/> All or					
CP covers: <input checked="" type="checkbox"/> Tanks <input checked="" type="checkbox"/> Piping	<input checked="" type="checkbox"/> All or					
<input checked="" type="checkbox"/> Impressed Current System	<input checked="" type="checkbox"/> All or					
Installation Date: 8/11/99 Set at 8.00 amps						
<input type="checkbox"/> Sacrificial Anode System	<input type="checkbox"/> All or					
<input type="checkbox"/> Combination of both systems (describe in notes)	<input type="checkbox"/> All or					
Installation Date: _____						
<b>All Cathodic Protection Systems: Testing Requirements</b>						
<input type="checkbox"/> 6 mo. CP test after installation (if applicable)?	<input type="checkbox"/> All or					
Covers: <input type="checkbox"/> Tanks/Piping <input type="checkbox"/> Tanks <input type="checkbox"/> Piping						
<input checked="" type="checkbox"/> Date of last test: 8/11/99 Passed? <input checked="" type="checkbox"/> N	<input type="checkbox"/> All or					
Covers: <input checked="" type="checkbox"/> Tanks/Piping <input type="checkbox"/> Tanks <input type="checkbox"/> Piping						
<input type="checkbox"/> Date previous test: _____ Passed? Y N	<input type="checkbox"/> All or					
Covers: <input type="checkbox"/> Tanks/Piping <input type="checkbox"/> Tanks <input type="checkbox"/> Piping						
<b>Impressed Current</b>						
<input checked="" type="checkbox"/> Last 3 (60 day) rectifier inspections documented?	<input checked="" type="checkbox"/> All or					
System On? <input checked="" type="checkbox"/> N Observed amperage of 7.2 amps						
<input checked="" type="checkbox"/> Spill/Overfill Met (transfer > 25 gals.)						
<input checked="" type="checkbox"/> Spill Bucket	<input checked="" type="checkbox"/> All or					
<input type="checkbox"/> Ball Float Valve	<input type="checkbox"/> All or					
<input checked="" type="checkbox"/> Flow Restrictor (Observed all)	<input checked="" type="checkbox"/> All or					
<input type="checkbox"/> Automatic Alarm	<input type="checkbox"/> All or					
<input type="checkbox"/> Spill/Overfill NOT Req'd (transfer ≤ 25 gals.) <input type="checkbox"/> All or						
Inspector's Signature <u>Robert M. Lenth</u> Date: <u>7/11/02</u>						



FR - Had no current "Certificate of Insurance". Had applied for renewal, but had not received paperwork yet.



# Facility Summary for R10 Facility ID # 0R7375

Owner Name and Address: BURNS-JOHANSON OIL CO. P.O. BOX 989, Astoria, OR 97103

Location Name 0R7375 BURNS-JOHANSON BULK PLANT		Location Street Address 455 INDUSTRY ST		Location City Astoria		Zip 97103	
Tank ID	Installed Age (Yr)	Product Capacity	Tank Mat'l of Construction	Piping Material	Piping Type	Tank Release Detection	FR Met
001	1/1/1977 28	Diesel 10,000	CP-field Installed Impressed None	Galvanized Steel Cathodically Protected	Safe Suction	A B C D E F G H I J K L B D E F G H I J K L	Yes Yes Yes Yes
002	1/1/1977 28	Diesel 10,000	CP-field Installed Impressed None	Galvanized Steel Cathodically Protected	Safe Suction	A B C D E F G H I J K L B D E F G H I J K L	Yes Yes Yes Yes
003	1/1/1977 28	Gasoline 20,000	CP-field Installed Impressed None	Galvanized Steel Cathodically Protected	Safe Suction	A B C D E F G H I J K L B D E F G H I J K L	Yes Yes Yes Yes

EXHIBIT 7

## Tank/Piping Release Detection Codes

A Manual Tank Gauging	C Inventory Control	E Vapor Monitoring	G Interstit. Dbl-Wall Monitor	I SIR	K Deferred
B Tank/Line Tightness Testing	D ATG/Auto Line LD	F GW Monitoring	H Interstit. Sec. Con. Monitor	J Other Methods	L Not Listed

Report Generation Date: 7/11/2005



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 10**  
**WASHINGTON OPERATIONS OFFICE**  
300 Desmond Drive SE, Suite 102  
Lacey, Washington 98503

February 25, 2005

CERTIFIED with RETURN RECEIPT

Cary Bechtolt  
Burns-Johanson Oil Co.  
455 Industry St.  
P.O. Box 989  
Astoria, OR 97103

Re: "UST Program Field Notice of Non-compliance" No. 748, from  
the 7/11/02 Underground Storage Tank (UST) facility  
inspection of the Burns-Johanson Bulk Plant, Hiway Service,  
and Landwehr's (ODEQ Facility #7375, #6897, and #7471)

Dear Mr. Bechtolt:

On July 11, 2002, EPA conducted an inspection of your facility, in Astoria, OR. At the conclusion of the inspection, we identified that you did not have a current copy of your financial responsibility mechanism for your UST systems. Consequently, an enforcement action was issued to your company "UST Program Field Notice of Non-compliance" No. 748.

To date, we **have not received the specified compliance data** confirming your completion of the required compliance action (i.e., submittal of a current financial responsibility mechanism that covers your facility(ies)).

Enclosed you will find copies of the enforcement action issued during the inspection. Please provide the required compliance data, for "UST Program Field Notice of Non-compliance" No. 748. What is needed is the following:

1. A current "Certificate of Insurance", in the required EPA legal language.
2. A current attachment to the "Certificate of Insurance" that lists the facilities covered and the number of tanks at each.

**EXHIBIT**

**8**



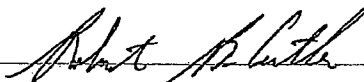
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Item D 000218

2

I look forward to completing these actions within the next several weeks. If you have any questions, please feel free to contact me at (360) 753-9543.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert B. Cutler", is written over a horizontal line.

Robert B. Cutler  
EPA Settlement Lead

Enclosures

# EPA UST Program Field Notice of Non-compliance

No.

748

The Environmental Protection Agency (EPA) is responsible for the enforcement of underground storage tank (UST) laws that protect human health and the environment. Pursuant to federal regulation at 40 CFR Part 280, during an inspection on

7/11/02 the following items of UST non-compliance were observed at your facility:

1	Description: Failure to provide copy of current "Certificate of Insurance" for covered facilities (40 CFR 280.11(a))	Correction Required: Submit current "Certificate of Insurance" and attachment showing facilities/tanks covered.	Deadline: 8/11/02
2	Description:	Correction Required:	Deadline:
3	Description:	Correction Required:	Deadline:
4	Description:	Correction Required:	Deadline:

## WARNING

The EPA wishes to work cooperatively with you as the owner and/or operator of this facility to resolve the violations(s) listed above at this time. Therefore, no penalty will currently be assessed. However, if you fail to complete the above noted compliance task(s) before the listed deadline(s), you will become subject to citation and/or formal enforcement action. Such enforcement actions mandate compliance and carry monetary penalties as high as \$10,000 for every day of continued violation on each underground tank.

Notify your EPA contact person (listed below) immediately if you are unable to perform the required actions within the specified dates.

EPA Inspector	
Name:	Robert B. Cutler
Office Address:	USEPA Washington Operations Office; 300 Desmond Dr SE, Ste. 102; Lacey, WA 98503
Phone:	360-753-9543
Signature:	Robert B. Cutler / Robert B. Cutler

Facility Information	
Name of Facility:	Huy Soc. / B-T Bulk Plant / Landwehr's
Address:	3108 Marino Dr. Astoria, OR 97103 455 Industrial St. 34908 Hwy 105
Facility ID #	ORG897/7375/7471
Contact:	Cory Beckwith
Phone:	503-325-1772
Signature:	Cory Beckwith



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
WASHINGTON OPERATIONS OFFICE  
300 Desmond Drive SE, Suite 102  
Lacey, Washington 98503

July 11, 2005

Cary Bechtolt  
Burns-Johanson Oil Co.  
455 Industry St.  
P.O. Box 989  
Astoria, OR 97103

Re: "UST Program Field Notice of Non-compliance" #748, from the  
7/11/02 Underground Storage Tank (UST) facility inspection  
of the Burns Johanson Bulk Plant (ODEQ Facility #7375)

Dear Mr. Bechtolt:

Final review of the information that you supplied satisfies the requirements of the enforcement actions. This brings your facility into compliance with "UST Program Field Notice of Non-compliance" #748, issued on July 11, 2002, from the inspection of the Burns Johanson Bulk Plant.

You may have technical or regulatory questions in the future, in which case, please feel free to contact Greg Toran, ODEQ, at 503-229-5496, in their Portland, OR, office or myself, if the question should pertain to EPA's regulations. EPA and ODEQ prefer to help people through compliance assistance, and not have to use the enforcement process. So, please call if you have any questions.

If you have anything further, in reference to this action, please feel free to contact me at 360-753-9543.

Sincerely,

Robert B. Cutler  
EPA Settlement Lead



# Oregon

Theodore R. Kulongoski, Governor

## Department of Environmental Quality

811 SW Sixth Avenue  
Portland, OR 97204-1390  
503-229-5696  
TTY 503-229-6993

November 15, 2005

Burns-Johanson Oil Co.  
PO Box 989  
Astoria, OR 97103-0989

RE: Warning Letter with Opportunity to Correct – Failure to have Financial Responsibility  
BURNS-JOHANSON BULK PLANT  
Facility ID # 7375  
WL-HQ-LQ/T-2005-0014  
**By Certified Mail**

Dear Permittee and Tank Owner:

### **Background**

Underground storage tank (UST) owners and/or permittees must demonstrate that they have the financial resources (through insurance or other means) to pay the costs of cleaning up leaks and compensating third-parties for bodily injury and property damage caused by leaking USTs. In September 2002, the Department of Environmental Quality (Department) began verifying compliance with the requirements for Financial Responsibility (FR) for all regulated UST facilities in Oregon. Since that time, the Department has requested verification of FR for the above referenced facility on several occasions through both written requests and actual or attempted telephone contact. To date, the Department has not received the required verification of FR. As the registered owner and/or permittee for the UST facility referenced above, you are responsible for the following violation of Oregon environmental law:

### **VIOLATION:**

Oregon Administrative Rule (OAR) 340-150-0135(3), CLASS I,  
Failure to establish or maintain a Financial Responsibility mechanism.

### **Corrective Action Requested**

Provide the Department with appropriate verification of Financial Responsibility by **December 15, 2005**. The enclosed "*Documenting Compliance with Financial Responsibility*" fact sheet and the "*Dollars and Sense – Financial Responsibility Requirements for Underground Storage Tanks*" publication, page 11, explains the most common form of documentation that must be provided to the Department.

Over

# EXHIBIT

9  
DEC-1  
Item D 000222

Mail documentation to:

Department of Environmental Quality (DEQ)  
Mitch Scheel  
811 SW 6<sup>th</sup> Ave.  
Portland, Oregon 97204

If you correct the violation cited above by providing the requested verification within the time frame outlined above, the Department will not take formal enforcement action on the violation. However, should this violation remain uncorrected, it will be referred to the Department's Office of Compliance and Enforcement for formal enforcement action, including assessment of a civil penalty, a Department order or the revocation of the permit to operate your UST system. Civil penalties can be assessed for each day of violation.

If you feel the Department has issued this Warning Letter in error, you may provide information to my attention at the address shown above to clarify the facts surrounding the alleged violation. If the Department determines that the violation was cited in error, the Department will amend or withdraw this Warning Letter. The Department endeavors to assist you in your compliance efforts. Should you have any questions about the content of this letter or desire any follow-up technical assistance, please contact me at 503-229-6704 or 1-800-452-4011 (in Oregon).

Sincerely,



Mitch Scheel  
UST Policy Coordinator  
Underground Storage Tank Program

Cc: Alice N. Codd  
P.O. Box 989  
Astoria, OR 97103

NWR Tanks Program

Office of Compliance and Enforcement, DEQ Headquarters

UNIVERSAL APPLICATORS, INC.

FACSIMILE TRANSMITTAL SHEET

FROM:	
Alan Bakalian	Laurie for Greg Brennan
DATE:	
PLIA	12/21/2010
TOTAL NO. OF PAGES INCLUDING COVER:	
FAX NUMBER:	10
(425) 822-1411	
SENDER'S REFERENCE NUMBER:	
PHONE NUMBER:	
YOUR REFERENCE NUMBER:	

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

RE: Additional Niemi reports

Please feel free to call with questions.

Regards, Laurie Universal Applicators, Inc

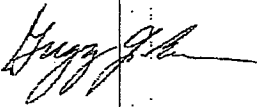
(503) 236-6359, Fax: (503) 233-9804

1.800.200.1377 [laurie@univetsalap.com](mailto:laurie@univetsalap.com)

EXHIBIT

10

## Oregon Department of Environmental Quality Cathodic Protection Test Form

UST Owner			UST Facility				
NAME:			NAME: NEIMI OIL BULK		ID#: 7375		
ADDRESS:			ADDRESS 455 INDUSTRIAL ST				
CITY:		STATE:	CITY: ASTORIA		STATE: OR		
<b>Cathodic Protection Tester</b>							
TESTER'S NAME: GREG BRENNAN			CP TESTER'S LICENSE #: 10438				
COMPANY NAME:			EXPIRATION DATE: 9/09				
ADDRESS: 2357 se 50 <sup>th</sup> AVE			PHONE NUMBER: 503-236-6359				
CITY: PORTLAND		STATE: OR	NACE CERTIFICATION #:				
Cathodic protection system is: <input type="checkbox"/> Galvanic <input checked="" type="checkbox"/> Impressed current      Date Last Tested: 05							
Weather Conditions at Time of Testing/Inspection: COOL AND DAMP							
Temperature: 54      Soil/Backfill Conditions (circle): moist dry sand gravel soil Describe:							
<b>Cathodic Protection System Certification</b>							
Identify which of the following testing situations is being recorded:							
<input type="checkbox"/> Test required within 6 months of installation of CP system (installation date was ___/___/___)							
<input checked="" type="checkbox"/> Test required at least every 3 years after installation/test noted above							
<input type="checkbox"/> Test required within 6 months of any repair activity							
The cathodic protection system is effective, testing was performed according to NACE Standard RP-0285-2002, and is providing cathodic protection to all tanks and product lines: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No							
Signature of Tester			 Date 5/1/09				
<b>UST SYSTEM INFORMATION</b>							
TANK #	YR TANK INSTALLED	CAPACITY	TANK MATERIAL	LINED? Y/N Date	YR CP INSTALLED	PIPING MATERIAL	YR CP INSTALLED
1	1975	10	STEEL			STEEL	NA
2	75	20					
3	1975	10					

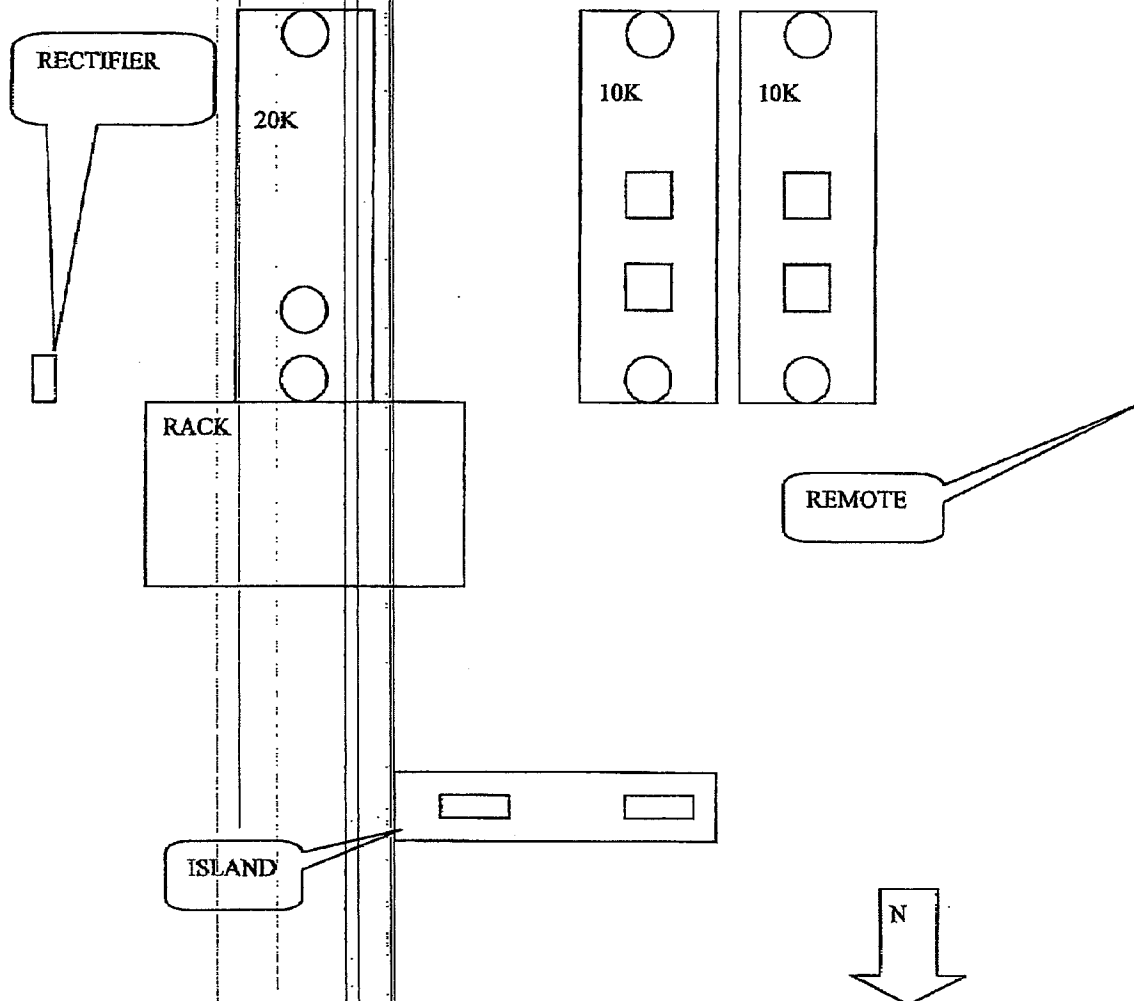
**UST SITE PLAN** - On the back draw a diagram showing the important parts of the facility (tanks, lines, manway locations, turbines, vents, rectifier, pump islands, buildings). Indicate reference cell locations where structure-to-soil potential or continuity measurements have been made and label (R-1, R-2, R-3); location of all anodes and wires; location of CP test stations.

CP Test Report Form Page 1 (1/31/06)

<b>IMPRESSED CURRENT CP TEST REPORT PAGE</b>							
<b>RECTIFIER DATA</b>							
RECTIFIER MANUFACTURER: CORPRO				RATED DC OUTPUT: 60 VOLTS 8 AMPS			
RECTIFIER MODEL: CSAYSA60-8Z				RECTIFIER SERIAL NUMBER: 983239			
RECTIFIER OUTPUT AS INITIALLY DESIGNED OR LAST RECOMMENDED (if available): VOLTS 60 AMPS 8							
	DATE	TAP SETTINGS		DC OUTPUT		HOUR METER	COMMENTS
		Course	Fine	Volts	AMPS		
"As Found"	05/01/09	D	5	59	1.2		SET HIGH BUT OK
"As Left"	05/01/09	D	5	59	1.2		
<b>STRUCTURE TO SOIL POTENTIAL MEASUREMENTS</b>							
ID	STRUCTURE	CONTACT POINT	REFERENCE CELL ID	ON	INSTANT OFF	100MV	
						NATIVE	CHANGE
1	TANK	VENT	CUCUSO4 AT BERM IN ASPHALT	1126	906		
2	TANK	VENT	CUCUSO4 AT BERM IN ASPHALT	1129	908		
3	TANK	VENT	CUCUSO4 AT BERM IN ASPHALT	1125	916		
1	PIPE	PIPE	SAME	1067			
2	PIPE	PIPE	SAME	1079			
3	DISP	PIPE	SAME	1067			
<b>CP TEST STATION REQUIREMENTS</b>							
Have previous CP system test records been reviewed? Y				Has this CP test been performed consistent with previous CP system tests? Y			
If test procedures have changed since last test please explain:							
Have potential measurements been made at all tanks and piping including any buried flex-connectors?							
<b>COMPLETE IF ANY REPAIRS OR MODIFICATIONS TO THE CP SYSTEM ARE MADE OR ARE NECESSARY</b>							
Complete if any repairs or modifications to the cathodic protection system are made or are necessary.							
Additional anodes for an impressed current system (attach corrosion experts design)							
<input type="checkbox"/> Repairs or replacement of rectifier (explain below)							
Anode header cables repaired and/or replaced (explain below)							
<input type="checkbox"/> Impressed current protected tanks/piping not electrically continuous (explain)							
Remarks/Other:							

**CONTINUITY**

STRUCTURE TO REMOTE	FILL	TLS	TUR	VENT
TANK 1	1679	1679	1679	1679
TANK 2	1679	1678	1678	1679
TANK 3	1679	1679	SUCTION PUMP	1679
	TO PIPING			
PIPE 1	1679			
PIPE 2	1679			
PIPE 3	1679			





OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY  
Underground Storage Tank Program

**UNDERGROUND STORAGE TANK SYSTEM  
MODIFICATION REPORT AND CHECKLIST**

Modification work conducted at one UST facility may be reported together by completing pages 3, 4, 5, 6, and 7 once for the entire facility. Make additional copies of page 4, as needed.

**1. UST SYSTEM PERMITTEE AND LOCATION (PLEASE PRINT):**

DEQ Facility ID Number: 7375  
DEQ UST Facility Name: Neimi Bulk Plant  
Facility (location) Address: 455 Industrial St  
Astoria, OR  
  
UST permittee name: Neimi Oil  
Permittee mailing address: \_\_\_\_\_  
\_\_\_\_\_  
Permittee Telephone: \_\_\_\_\_  
\_\_\_\_\_

**2. TANK MODIFICATION OR ADDITION PERFORMED BY:**

Service Provider: UAI DEQ License Number 12360  
(Please Print)  
Address: 2357 SE 50TH AVE Lic. Expiration Date: 5/10/11  
PORTLAND, OR 97115  
Telephone: 503-236-6359  
  
Licensed Supervisor: GREG BRENNAN DEQ License Number 10438  
(Please Print) Lic. Expiration Date: 9/11/11

### IMPORTANT NOTE REGARDING USE OF THIS PAGE (Page 4 of 7)

If the same work is completed on each tank and associated piping system, fill out this page just once. If different work is completed on each tank and associated piping system, make copies of this page and fill one out for each tank and associated piping system that has been modified, added to, or that has had metal underground piping and fittings repaired or replaced.

#### 3. TANK AND ASSOCIATED PIPING SYSTEM INFORMATION

TANK #	DEQ-UST PERMIT #	TANK SIZE IN GALLONS	PRODUCT STORED		TYPE OF ASSOCIATED PIPING (i. e. metal, fiberglass, flexible, single-walled, double-walled, etc.)	
			CURRENT	FUTURE	CURRENT	FUTURE
		20,000	#2	#2	STEEL	STEEL

#### 4. MODIFICATION AND METAL PIPING, REPAIR OR REPLACEMENT INFORMATION (Please write a narrative description of the work that was completed).

We added a line leak detector and valves so that the line could be leak tested and isolated.

**5. CHECKLIST:** (Check YES or NO. Where a specific item is "not applicable" to the situation, please check the N/A box)

	YES	NO	N/A
Was the DEQ Regional Office notified at least 30 days in advance of the planned modification or addition start date?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Was the DEQ Regional Office notified 72 hours in advance prior to beginning the modification or addition? If yes, indicate 3-day number issued: _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Was external cathodic protection (CP) installed, modified or added to?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Was a separate CP report submitted or attached?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Was a CP test station installed?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Is a 6-month CP follow-up inspection/test scheduled? Projected inspection date: _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Was a site assessment conducted?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Was contamination, including simple overflow, encountered and was it reported to DEQ? If so, indicate DEQ LUST number issued: _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Were internal inspections of all USTs completed before lining began on any UST?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Have the results of the internal tank inspections been submitted to and/or discussed with DEQ?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
If there were holes in any of the USTs, has a SUSPECTED release been reported to DEQ? If yes, indicate date reported: _____	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Was the system tight-tested before placing back into service?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Do all tank and piping materials comply with OAR 340-150-0300?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Have all items checked above been modified or added to in accordance with all codes, manufacturer's requirements and federal and state regulations?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Has the UST system permittee been provided with written documentation of the item(s) modified or added to and has the permittee been instructed to preserve these records?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## 6. AS-BUILT DRAWING OF TANK SYSTEM MODIFICATION

**Attach documentation, including equipment receipts, for any equipment that was modified, including the repair or replacement of metal piping and fittings.**

June 2009

Page 6 of 7

09-LQ-078

p.8

(503) 233-9804

Dec 21 10:09:37a  
Item D 000232  
Laure

**7. SUPERVISOR'S OATH:** I certify that I have been the Oregon DEQ licensed supervisor present on site during the above listed modification work and to the best of my knowledge the work has been conducted in compliance with all local, state and federal laws, regulations and industry standards and procedures pertaining to underground storage tank systems. I further certify that the information contained in this report and checklist is true to the best of my belief and knowledge.

Supervisor: GREG BRENNAN

(Print Name)

(Signature)

Service Provider: UAI

Date: 12/16/10

UST Service Provider Firm, Executive Officer:

GREG BRENNAN

(Print Name)

(Signature)

12/16/10

(Date)

**8. UST PERMITTEE MODIFICATION CERTIFICATION STATEMENT:**

I hereby certify that the information provided on this report and checklist concerning the modification work on my tank and associated piping system is accurate.

(Print Permittee Name)

(Signature)

(Date)

For information, call the appropriate DEQ Regional Office (see Page 2) or the toll free number, 1-800-742-7878. Two copies of this form must be mailed within 30 days after the modification or addition work is completed to:

1. One copy to the appropriate DEQ Regional Office (see page 2)

Check ☐ here that this copy has been mailed

2. One copy to the UST Program Office at:

Department of Environmental Quality

UST Program

811 SW 6<sup>th</sup> Avenue

Portland, OR 97204

Check ☐ here that this copy has been mailed

**DEQ INSPECTIONS:** This form may be used by DEQ Inspectors for oversight purposes. A DEQ inspector is not required to inspect the modification.

DEQ Inspector's Signature: \_\_\_\_\_

Inspection Date(s): \_\_\_\_\_

## ZENO DRAKE BAKALIAN P.S.

G. Michael Zeno, Jr.  
Leslie A. Drake  
Allan B. Bakalian \*

\*also admitted in Oregon

### LEGAL AND ESCROW SERVICES

4020 LAKE WASHINGTON BLVD. NE, SUITE 100  
KIRKLAND, WASHINGTON 98033-7862

(425) 822-1511  
FAX (425) 822-1411  
[abakalian@zdblawn.com](mailto:abakalian@zdblawn.com)

December 3, 2010

Via Email and U.S. Mail

Bob McCoy  
Greg Toran  
Department of Environmental Quality  
Northwest Region  
2020 SW 4<sup>th</sup> Ave., Suite 400  
Portland, OR 97201

**Re: Pre-Enforcement Notice, Burns-Johanson Bulk Plant  
PEN-NWR-UST – 10-0006**

Dear Mr. McCoy and Mr. Toran:

As noted in my October 22, 2010 letter (attached), I am enclosing copies of the UST system repair and testing documentation for the Niemi Oil Cardlock facility located at 455 Industry Street, Astoria, OR (e.g., the Burns-Johanson Bulk Plant).

On October 27-28, 2010, Greg Brennan of Universal Applicators installed a new pipeline leak detector, brass valve and pressure test fitting for the diesel UST pipeline to the loading rack at the Niemi Cardlock facility. On December 2, 2010, Don Reeves of Mascot Equipment performed a successful pipeline pressure test of that UST system. The UST repair and replacement report, along with the attached photos taken by Greg Brennan, is attached for your records. A copy of Mascot Equipment's pressure test report is also attached.

Niemi Oil has now successfully completed the required UST system upgrades and compliance testing identified in the Department of Environmental Quality's (DEQ) above-referenced DEQ Pre-Enforcement Notice. As you are also aware, at the time of the inspection in August, Niemi Oil was making arrangements with its UST service providers to inspect and repair the Cardlock UST system. Unfortunately, and contrary to our understanding that DEQ would delay the inspection until after the work was completed, the inspection proceeded before the work could be completed.

Nevertheless, the work was successfully completed and pending your approval, Niemi would like to get closure of this matter. I do not believe it will be productive for DEQ to initiate formal enforcement action for this matter as indicted in the Pre-Enforcement Notice. Niemi Oil has incurred thousands of dollars in new upgrades and is also engaged in an extensive and costly investigation of historical contamination at or in the vicinity of the Cardlock facility pursuant to DEQ's Astoria Area-Wide Petroleum ongoing investigation in Area of Contamination 1.

**EXHIBIT**

Item D 000234

December 3, 2009  
Page 2

Further, based on DEQ's correspondence and agreement to defer the UST inspection at the Cardlock, among other defenses, Niemi will contest formal enforcement action associated with the UST inspection. As indicated in my October 22 letter, to the extent DEQ believes a violation occurred, it can and should be resolved by a UST field citation, as the Niemi Oil Warrenton UST system inspection was handled by DEQ in 2008.

Please do not hesitate to contact me or Niemi Oil's UST service providers at Universal Applicators or Mascot Equipment if you have any questions or need more documentation or information about the UST repairs and tests. Finally, to the extent DEQ does not agree to resolve this matter short of formal enforcement action, please consider this letter as my request to meet with you and the UST program director to review and discuss this matter before any further action is initiated.

Very truly yours,



Allan Bakalian

Enclosures

cc: Niemi Oil  
Susan Greco, DEQ  
Greg Brennan, Universal Applicators  
Don Reeves, Mascott Equipment



OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY  
Underground Storage Tank Program

## UNDERGROUND STORAGE TANK SYSTEM REPAIR AND REPLACEMENT REPORT AND CHECKLIST

This report and checklist may be filled out by a DEQ licensed supervisor or repair service technician to satisfy the repair and replacement record keeping requirements described in OAR 340-150-0350 (9) and 340-150-0354 (3). The purpose of this report and checklist is to document that the repair or replacement of underground storage tank (UST) system components complied with OAR 340-150-0350 or 340-150-0354. While use of this repair and replacement report and checklist form is optional, permittee and tank owner compliance with the record keeping requirements of OAR 340-150-0350 (9) and 340-150-0354 (3) is mandatory.

A copy of this repair or replacement report and checklist should be provided to the UST permittee along with instructions to the permittee that this repair or replacement report and checklist, and any attachments, must be retained for the operating life of the UST systems. DEQ UST inspectors may request to review repair or replacement records at any time during the operating life of the UST system.

### DEFINITION CHECKLIST ✓

- ☒ A repair was completed. To repair means to restore any portion of an UST system that has failed. However, metal piping and fittings that have released a regulated substance must be replaced.
- ☒ A replacement was completed. To replace means to change any part of an UST system by exchanging one unit for a like or similar unit.

### REMINDER CHECKLIST ✓

- ☒ Before beginning the repair or replacement work, obtained any local planning, building or fire department approvals or permits that were needed to complete the work. Copies are attached.
- ☒ Documentation is attached, including equipment receipts, for any equipment that was repaired or replaced. Documentation such as tank manufacturer's certifications, third party certifications, tank or piping tightness tests results, cathodic protection testing results, structural integrity assessments, is also attached, if applicable.
- ☒ Petroleum-contaminated soil or groundwater encountered during repairs or replacements was reported to DEQ, if applicable.
- ☒ A site assessment was performed to characterize the level of soil or groundwater contamination. A copy of the site assessment is attached and has been sent to DEQ.
- ☒ A copy of the completed form, including all applicable attachments (examples listed above), has been provided to the UST permittee. Please note that a copy does not need to be provided to DEQ.
- ☒ The permittee has been informed of the requirements to keep a copy of this repair or replacement report and checklist, including attachments, for the operating life of the UST system.

**1. UST SYSTEM PERMITTEE AND LOCATION (PLEASE PRINT):**

DEQ UST Facility Name: Neimi Oil Bulk Plant - Cardstock  
Facility (location) Address: 455 490 Industry St  
Astoria, OR 97103  
  
UST permittee or customer name: Neimi Oil  
Permittee or customer Telephone: \_\_\_\_\_

**2. REPAIR OR REPLACEMENT WORK PERFORMED BY:**

**IF APPLICABLE:**

Company: UAI DEQ License Number 12630  
(Please Print Company Name)  
Address: 2357 SE 50th Ave Lic. Expiration Date: 05/10/11  
Portland, OR 97215  
Telephone: 503-236-6359  
  
Supervisor or technician: Greg Brennan DEQ License Number 10436  
(Please Print Name) Lic. Expiration Date: 09/21/11

**3. TANK AND ASSOCIATED PIPING SYSTEM INFORMATION**

TANK SIZE (GALLONS)	TYPE OF TANK (steel, fiberglass, double-walled, steel with internal lining, etc.)	PRODUCT STORED	TYPE OF ASSOCIATED PIPING (i. e. metal, fiberglass, flexible, single-walled, double-walled, etc.)
20000	Steel	# 2	Steel all with C/P

**4. BRIEF DESCRIPTION OF REPAIR OR REPLACEMENT WORK COMPLETED**

By request of DEQ we installed line leak detector and valves to allow testing of the line from tank to the riser from the loading rack.



☒ PORTLAND  
435 N.E. HANCOCK  
PORTLAND, OR 97212  
503-282-2587

☐ TRICITIES  
200 S. 20TH AVE.  
PASCO, WA 99301  
509-543-2018

☐ SEATTLE  
6530 5TH PLACE SOUTH  
SEATTLE, WA 98106  
206-763-7867

Site Name: Niemi Oil Co.  
Address: \_\_\_\_\_  
City, State, Zip: Astoria, OR 97103

Test Date: 12/2/10  
Technician Name: D. Reeves  
Tech Signature: Don Reeves 2010.12.02 10:12:40 -08'00'

Product: Diesel  
Type of Leak Detector: VMI LD3000  
Type of Product Line: Single wall steel

3 GPH Test: Pass: ☒ Fail: ☐ Type of New Leak Detector: \_\_\_\_\_  
Replaced Leak Detector?: Yes: ☐ No: ☐ S/N: \_\_\_\_\_  
New Leak Detector: Pass: ☐ Fail: ☐

Product: \_\_\_\_\_  
Type of Leak Detector: \_\_\_\_\_  
Type of Product Line: \_\_\_\_\_

3 GPH Test: Pass: ☐ Fail: ☐ Type of New Leak Detector: \_\_\_\_\_  
Replaced Leak Detector?: Yes: ☐ No: ☐ S/N: \_\_\_\_\_  
New Leak Detector: Pass: ☐ Fail: ☐

Product: \_\_\_\_\_  
Type of Leak Detector: \_\_\_\_\_  
Type of Product Line: \_\_\_\_\_

3 GPH Test: Pass: ☐ Fail: ☐ Type of New Leak Detector: \_\_\_\_\_  
Replaced Leak Detector?: Yes: ☐ No: ☐ S/N: \_\_\_\_\_  
New Leak Detector: Pass: ☐ Fail: ☐

Product: \_\_\_\_\_  
Type of Leak Detector: \_\_\_\_\_  
Type of Product Line: \_\_\_\_\_

3 GPH Test: Pass: ☐ Fail: ☐ Type of New Leak Detector: \_\_\_\_\_  
Replaced Leak Detector?: Yes: ☐ No: ☐ S/N: \_\_\_\_\_  
New Leak Detector: Pass: ☐ Fail: ☐

p. 1

WO# : \_\_\_\_\_

[illegible]

## DATA CHART FOR USE WITH PETROTITE LINE TESTER

WO#: \_\_\_\_\_

STATION NUMBER: \_\_\_\_\_

DATE: 12/2/10

1 LOCATION: Niemi Oil Co. —Bulk plant on Industry— Astoria, OR 97103

2 OWNER: Niemi Oil Co.

3 OPERATOR: Niemi Oil Co.

4 REASON FOR TEST: ANNUAL COMPLIANCE TESTING

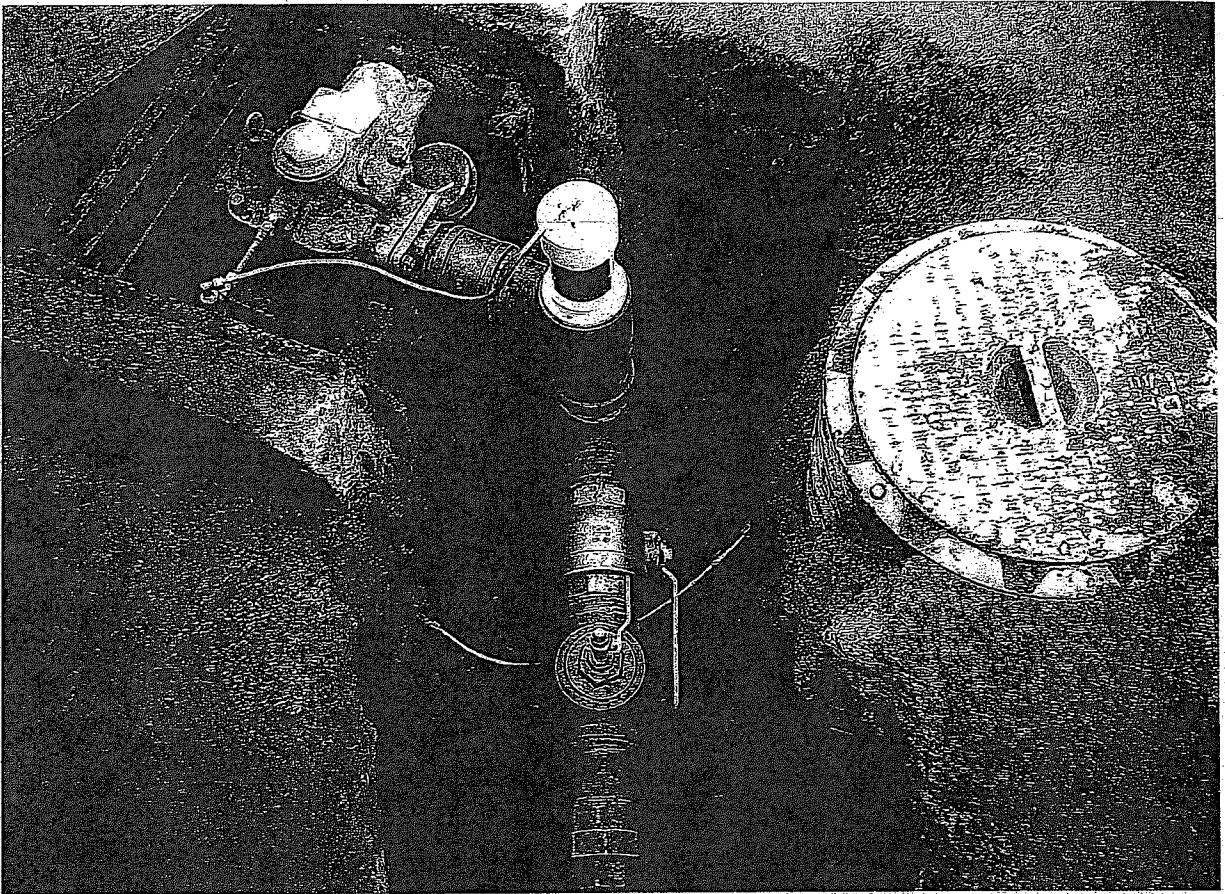
5 TEST REQUESTED BY: Niemi Oil Co.

6 SPECIAL INSTRUCTIONS: \_\_\_\_\_

7 CONTRACTOR OR COMPANY MAKING TEST MASCOTT EQUIPMENT CO. D. REEVES  
MECHANIC(S) NAME: \_\_\_\_\_8 IS A TANK TEST TO BE ☐ YES 9 MAKE AND TYPE OF Tohheim 5 HP submersible  
MADE WITH THIS LINE TEST? ☒ NO PUMP OR DISPENSER (SUCTION OR SUBMERSIBLE)

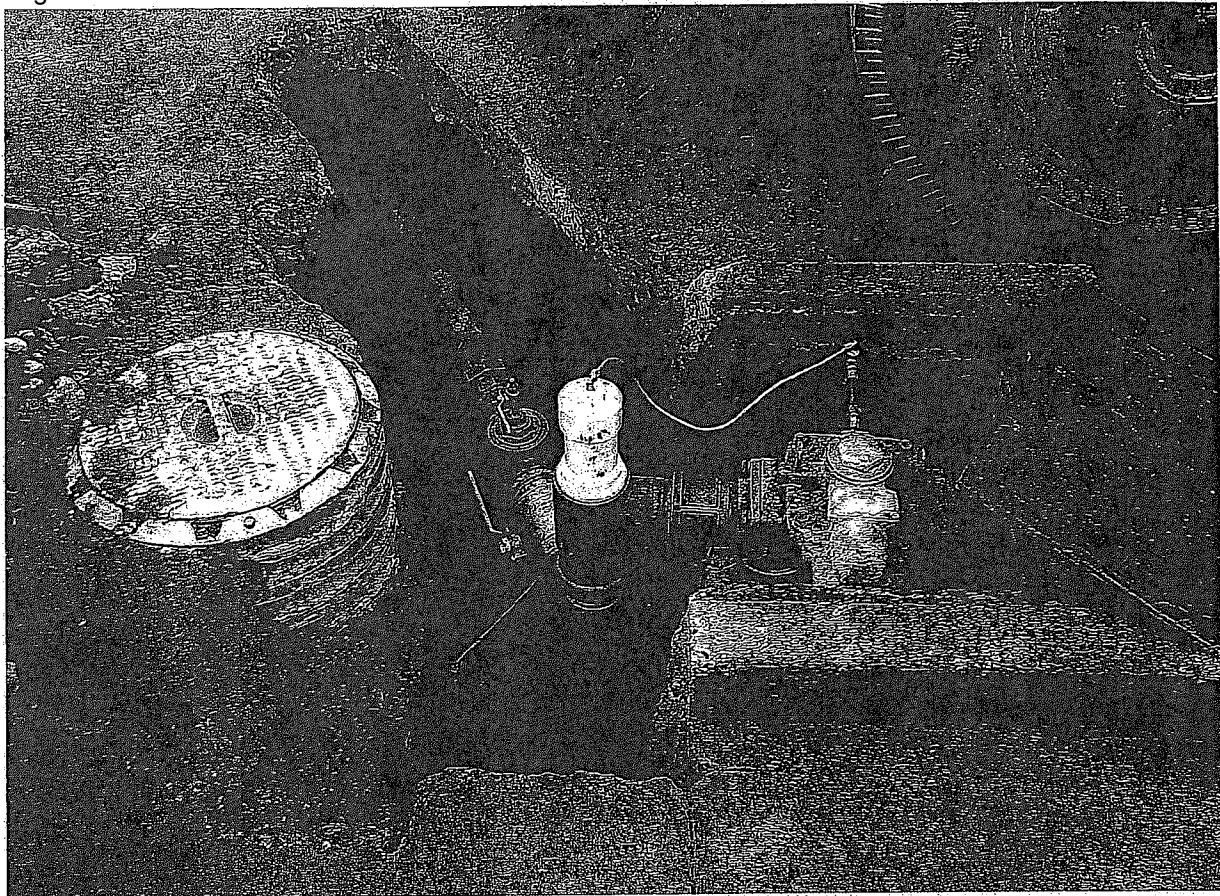
10 WEATHER Cold TEMPERATURE IN TANKS 56 -F -C COVER Mixed BURIAL DEPTH 12"

11 IDENTIFY EACH LINE AS TESTED	12 TIME (MILITARY)	13 LOG OF TEST PROCEDURES, AMBIENT TEMPARATURE, WEATHER, ETC	14 PRESSURE		15 VOLUME			16 REMARKS SIZE, LENGTH & TYPE OF LINE, # FLEX CONNECTORS CONCLUSION, REPAIRS AND COMMENTS
			Psi OR kPa		READING		NET CHANGE	
			BEFORE	AFTER	BEFORE	AFTER		
	Pre-test @ 0815	Set up for line test. Pressurize line and observe.	80					APPROX. 27'- 3" Single wall steel
	0845	Drop pressure to test level. Wait and observe. 30 min.		70				Method of isolation: BALL VALVE
	0900	Begin testing		70		.0720		
	0915	First reading	66	70	.0720	.0715	-.0005	
	0930	Second reading	70	70	.0715	.0715	+.0000	
	0945	Third reading	70	70	.0715	.0715	+.0000	
	1000	End of test	70	70	.0715	.0715	+.0000	LINE BLEEDBACK = 8 ml



Niemi Oil Cardlock UST  
455 Industry Street, Astoria

1. Turbine
2. Line Leak Detector (with brass valve and pressure test fitting)
3. UST Fill Port Lid



Niemi Oil Cardlock UST

455 Industry Street, Astoria

1. UST fill port lid

2. ~~Line Leak Detection (with new brass valve and pressure test fitting)~~

3. Turbine



Niemi Oil Cardlock UST  
455 Industry Street, Astoria

1. Turbine
2. Line Leak Detector (with brass valve and pressure test fitting)
3. UST Fill Port Lid

### **ENFORCEMENT REFERRAL – UST Compliance**

Inspector: Bob McCoy	Manager: Mike Kortenhof
What Q-Time number do you want the ELS to use? 40572	
Referring Region & Office: Northwest Region Tanks	
UST Facility ID#: 7375	

1. Who is the permittee, tank owner and property owner? Provide printout from UST database.  
**Burns-Johanson Oil-see printout**
2. Where did the violation(s) occur?  
Address: **455 Industry Street, Astoria, Oregon**  
County: **Clatsop**
3. How did the Department discover the violation(s)? (e.g. complaint, inspection, etc.) Attach this documentation.  
**Compliance inspection**
4. Did you have conversations or correspondence with anyone other than the respondent about the violations (i.e. service provider, EPA)?  
☐ Yes or ☒ No  
If so, provide name/contact information and attach any correspondence.
5. If the violations fit within the UST field citation program, why are the violations being referred?  
**They do not fit within the field citation program.**

For every violation, please provide the following information with as much detail as possible. Copy and paste the table for Violation 2, 3, etc. To do this you will need to unprotect the document. If the information is already provided somewhere else in the referral, you don't need to rewrite it on this form, but please reference in what attachment it can be found (e.g. page 3 of inspection report which is attachment 1). Please note that referencing the PEN cannot suffice as evidence but can suffice for citations.

<b>Violation 1</b>	
<b>Narrative description of violation</b>	Failure to install a method or combination of methods for release detection such that the method can detect a release from any portion of the UST system. During the inspection it was noted that there is a pressure line on the diesel portion of the loading rack which does not have a line leak detector on it.
<b>Citations (specific rule in OAR Chapter 150 or 151)</b>	OAR 340-150-0400(1)(a)
<b>Evidence in support of the violation Attach photographs, inspection report, samples, release detection records, etc.</b>	Photos, inspection report

What communication have you had with Respondent regarding this violation? Attach phone notes, WL/PEN, FC	PEN
Are there uncorrected violations? If Yes: Provide what is required for compliance and when. If No: Attach documentation of correction i.e. PEN response, invoices, reports.	Yes. The diesel portion of the loading rack still does not have leak detection. The facility will have to break concrete and install a hi-flow leak detector. See email from Alex Hajhashemi regarding the leak detector.
How many days did the violation occur/exist? (from when to when)	1975 to present
Is this a repeat violation? If so, reference any communications with Respondent regarding prior occurrence	No.
Cost of achieving compliance See attached standardized values and state whether those fit for this specific case or not. If not, please provide specific amounts.	According to Mr. Hajhashemi it will cost in excess of \$5,000 to install the leak detector.
Were there any impacts of the violation on human health and the environment? a spill/release has been reported; the facility is located adjacent to surface waters, residences, etc.; samples were collected and a release was/wasn't found	Unknown. No leak detection has been performed so it is unknown whether the line is leaking.
What other evidence do you have regarding whether the respondent knew or should have known that this would be a violation (e.g. interactions with others including EPA, service providers; training on requirements; multiple UST facilities)?	The owner, Cary Bechtolt, has been in this business for at least 20 years and has had extensive interaction with DEQ. He is a trained operator and delivers bulk and sells retail. He runs three gasoline dispensing facilities and a bulk plant.
<b>Violation 2</b>	
Narrative description of violation	Failure to perform line tightness test at least once every 3 years.
Citations (specific rule in OAR Chapter 150 or 151)	340-150-0410(5)
Evidence in support of the violation Attach photographs, inspection report, samples, release detection records, etc.	inspection report

What communication have you had with Respondent regarding this violation? Attach phone notes, WL/PEN, FC	PEN
Are there uncorrected violations? If Yes: Provide what is required for compliance and when. If No: Attach documentation of correction i.e. PEN response, invoices, reports.	Yes. The RP claims that the suction line at the rack is safe suction, but has not produced any documentation to bolster that claim. Since safe suction is not proven, the line must be tightness tested every three years, and no tightness test documentation has been forthcoming.
How many days did the violation occur/exist? (from when to when)	1975 to present
Is this a repeat violation? If so, reference any communications with Respondent regarding prior occurrence	No.
Cost of achieving compliance See attached standardized values and state whether those fit for this specific case or not. If not, please provide specific amounts.	\$155.00
Were there any impacts of the violation on human health and the environment? a spill/release has been reported; the facility is located adjacent to surface waters, residences, etc.; samples were collected and a release was/wasn't found	Unknown. No leak detection has been performed so it is unknown whether the line is leaking.
What other evidence do you have regarding whether the respondent knew or should have known that this would be a violation (e.g. interactions with others including EPA, service providers; training on requirements; multiple UST facilities)?	The owner, Cary Bechtolt, has been in this business for at least 20 years and has had extensive interaction with DEQ. He is a trained operator and delivers bulk and sells retail. He runs three gasoline dispensing facilities and a bulk plant.

Violation 3	
Narrative description of violation	Failure to maintain a required financial responsibility mechanism
Citations (specific rule in OAR Chapter 150 or 151)	340-150-010

Evidence in support of the violation Attach photographs, inspection report, samples, release detection records, etc.	inspection report
What communication have you had with Respondent regarding this violation? Attach phone notes, WL/PEN, FC	PEN
Are there uncorrected violations? If Yes: Provide what is required for compliance and when. If No: Attach documentation of correction i.e. PEN response, invoices, reports.	No.
How many days did the violation occur/exist? (from when to when)	A little less than two months (see inspection report)
Is this a repeat violation? If so, reference any communications with Respondent regarding prior occurrence	No.
Cost of achieving compliance See attached standardized values and state whether those fit for this specific case or not. If not, please provide specific amounts.	Around \$500
Were there any impacts of the violation on human health and the environment? a spill/release has been reported; the facility is located adjacent to surface waters, residences, etc.; samples were collected and a release was/wasn't found	No.
What other evidence do you have regarding whether the respondent knew or should have known that this would be a violation (e.g. interactions with others including EPA, service providers; training on requirements; multiple UST facilities)?	The owner, Cary Bechtolt, has been in this business for at least 20 years and has had extensive interaction with DEQ. He is a trained operator and delivers bulk and sells retail. He runs three gasoline dispensing facilities and a bulk plant.

Violation 4	
Narrative description of violation	Failure to conduct one of the two three-year corrosion protection tests within the last six years.
Citations (specific rule in OAR Chapter 150 or 151)	340-150-325(2)(b)
Evidence in support of the violation Attach photographs, inspection report, samples, release detection records, etc.	Inspection report

What communication have you had with Respondent regarding this violation? Attach phone notes, WL/PEN, FC	PEN
Are there uncorrected violations? If Yes: Provide what is required for compliance and when. If No: Attach documentation of correction i.e. PEN response, invoices, reports.	No.
How many days did the violation occur/exist? (from when to when)	2009-2010
Is this a repeat violation? If so, reference any communications with Respondent regarding prior occurrence	No.
Cost of achieving compliance See attached standardized values and state whether those fit for this specific case or not. If not, please provide specific amounts.	Nothing
Were there any impacts of the violation on human health and the environment? a spill/release has been reported; the facility is located adjacent to surface waters, residences, etc.; samples were collected and a release was/wasn't found	No.

What other evidence do you have regarding whether the respondent knew or should have known that this would be a violation (e.g. interactions with others including EPA, service providers; training on requirements; multiple UST facilities)?	The owner, Cary Bechtolt, has been in this business for at least 20 years and has had extensive interaction with DEQ. He is a trained operator and delivers bulk and sells retail. He runs three gasoline dispensing facilities and a bulk plant.
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Violation 5	
Narrative description of violation	Failure to post operating certificate in a conspicuous location so that it can be readily viewed by a fuel distributor.
Citations (specific rule in OAR Chapter 150 or 151)	340-150-0150(1)
Evidence in support of the violation Attach photographs, inspection report, samples, release detection records, etc.	Inspection report

What communication have you had with Respondent regarding this violation? Attach phone notes, WL/PEN, FC	PEN
Are there uncorrected violations? If Yes: Provide what is required for compliance and when. If No: Attach documentation of correction i.e. PEN response, invoices, reports.	No.
How many days did the violation occur/exist? (from when to when)	30 days.
Is this a repeat violation? If so, reference any communications with Respondent regarding prior occurrence	No.
Cost of achieving compliance See attached standardized values and state whether those fit for this specific case or not. If not, please provide specific amounts.	Nothing

<b>Were there any impacts of the violation on human health and the environment? a spill/release has been reported; the facility is located adjacent to surface waters, residences, etc.; samples were collected and a release was/wasn't found</b>	<b>No.</b>
<b>What other evidence do you have regarding whether the respondent knew or should have known that this would be a violation (e.g. interactions with others including EPA, service providers; training on requirements; multiple UST facilities)?</b>	<b>The owner, Cary Bechtolt, has been in this business for at least 20 years and has had extensive interaction with DEQ. He is a trained operator and delivers bulk and sells retail. He runs three gasoline dispensing facilities and a bulk plant.</b>

**ADDITIONAL INFORMATION:**

Use separate "Confidential Intra-Office Advisory" form (the last page of this document) for confidential information.

State of Oregon

Department of Environmental Quality

Memorandum

To: File #7375  
UST/Land Quality

Date: 08/05/2010

From: UST/Land Quality

Subject: Burn's-Johanson Bulk Plant Compliance Inspection August 3<sup>rd</sup>, 2010

On August 3<sup>rd</sup>, 2010, the DEQ conducted a compliance inspection of facility #7375, Burns-Johanson Bulk Plant at 455 Industry Street in Astoria, Oregon.

People present at the inspection were myself (Bob McCoy), DEQ inspector, Greg Toran, DEQ Inspector, and Cary Bechtolt, facility owner.

Equipment on the site included three single-wall steel tanks including two manifolded diesel tanks, a bulk loading rack, two dispensers which were wrapped in plastic, and an impressed current rectifier. The northernmost tank is a diesel slave to the center tank, which has a turbine. Piping is composed of single-wall steel pipe. The diesel portion of the loading rack has a pressure system which is manually turned on for loading, and is only under pressure during loading. The loading rack pressure system does not have a line leak detector. The gasoline portion of the loading rack is suction, but it is unknown whether it is safe suction. All steel equipment is cathodically protected. Overfill is accomplished by a flapper valve in each fill pipe. Mr. Bechtolt will need to document that the tanks are filled with tight-fill gravity drops to show that this method of overfill protection is effective. If he reopens the two dispensers he will also need to provide proof that dispenser suction systems are safe suction. There are 5 vent pipes at the site. Owner claims that two of the tanks are "double vented". He will need to produce proof that two tanks are double vented, and that the extra two vents don't belong to two regulated but unregistered tanks.

Mr. Bechtolt was able to produce 12 months of passing SIR tests for the tanks on site, the last two cathodic protection tests, and the 60-day logs for the impressed current system. He did not have insurance papers on site, but did email them to me after the inspection. The insurance he provided had a starting date of 8/2/2010. His old insurance lapsed on 6/8/2010. He was effectively without insurance for a little less than two months. The cathodic protection tests were done 4 years apart instead of three years apart, but since they showed no failing tests we can safely assume that the system was functioning during the extra year.

The operating certificate was not on display at this facility. The operating certificate at the Niemi office is incorrect, claiming heating oil in the gasoline tank.

Emergency response signage was not in evidence.



**Equipment found:**

- Three cathodically protected single-walled steel tanks.
- One bulk loading rack with a suction component and a pressure component.
- Two dispensers which were disabled and wrapped in plastic.
- Impressed current rectifier for cathodic protection of metal tanks and metal piping.
- Drop tubes with flappers for overfill prevention.
- Five vents. (two extras)

**Records provided:**

- 12 months of passing SIR testing
- The last two cathodic protection tests-4 years apart
- 60 day rectifier log
- Proof of insurance beginning 8/2/2010. Previous insurance lapsed on 6/8/2010
- Operating certificate with incorrect tanks listed.

**Confirmed violations:**

- Insurance lapse of two months.
- No three-year pressure tests or proof of safe suction.
- No emergency response signage.
- Certificate not posted in a conspicuous place.
- No line leak detector on the pressure line.

**Required actions:**

- Obtain proof of safe suction for rack suction line.
- Install line leak detector on rack pressure line.
- Post operating certificate in a conspicuous place.
- Document class "C" operator training for all employees who dispense fuel.
- Maintain insurance.
- Document that the tanks are filled with tight-fill gravity drops.
- Repeat operator training.
- Prove that tanks are double-vented.

**Previous 3 year SOC inspection was performed by EPA on July 11, 2002.**



12/2/2010  
t/c with  
Bob

- ~~initial books~~
- Was not in view - inside of ~~binders~~ book.
  - Copy of Certificate was inside a book.
  - presented Insurance policy during inspection. Database shows that we received policy on 11/1/10.

original  
~~copy~~ of certificate was inside his  
office.

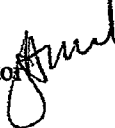
EXHIBIT 14

State of Oregon  
Department of Environmental Quality

Memorandum

**To:** Regional and Division Administrators, Managers  
and Staff

**Date:** March 10, 2008

**From:** Joni Hammond, Interim Deputy Director 

**Subject:** Enforcement Guidance

Please replace pages UST-1 through UST-5 (Appendix L) of the Department's Internal Management Directive entitled "Enforcement Guidance for Field Staff, Effective March 31, 2006" with the attached pages, reflecting a change in the enforcement guidance for compliance with the Department's underground storage tank regulations.

Please also replace the following documents: Guidance for Expedited Enforcement of UST Compliance Violations and UST Facility Inspection and Compliance Enforcement Tables.

The attached documents will be effective for inspections commenced on or after March 10, 2008. I direct all DEQ personnel to follow this Guidance. Thank you.

EXHIBIT



# UST FIELD CITATIONS

Guidance for Expedited Enforcement of  
UST Compliance Violations



State of Oregon  
Department of  
Environmental  
Quality



Land Quality Division

Underground Storage  
Tank Program

811 SW Sixth Ave.  
Portland, OR 97204  
Phone: (800) 742-7878  
Fax: (503) 229-6977  
[www.deq.state.or.us](http://www.deq.state.or.us)

March 2008  
Mitch Scheel  
08-lq-026

## UST Compliance Field Citation Guidance

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### TABLE OF CONTENTS

1	Introduction.....	2
1.1	UST Field Citation Enforcement Process.....	2
1.2	Goals of UST Field Citation Program.....	2
1.3	Purpose of UST Field Citation Guidance.....	2
1.4	Use of the Term "Permittee".....	3
2	UST Field Citation Process.....	3
2.1	When the Field Citation Process is Not Appropriate.....	3
2.2	The UST Field Citation Form.....	4
2.2.1	Completing the Field Citation Form.....	4
2.3	Using the UST Facility Inspection and Compliance Guidance.....	6
2.4	Distributing Copies of the Field Citation Form.....	7
2.5	Follow-up for Compliance Achievement.....	8
2.5.1	Centralized Compliance Database.....	8
2.5.2	Compliance Documentation.....	8
2.5.3	Compliance Follow-Up.....	8
2.5.3.1	Extension of Compliance Due Dates.....	8
2.5.3.2	Final Compliance Achievement.....	8
2.5.4	Actions Necessary If Violations Are Not Corrected.....	8
2.5.5	Field Penalty Payments.....	9
3	Accounting Procedures.....	10
3.1	Prenumbered Field Citation Forms.....	10
3.2	Receipt of Field Penalties.....	10
3.3	Canceling a Field Citation.....	10
4	Formal Enforcement Referrals.....	11
5	Summary of Actions.....	11
5.1	UST Program Managers.....	11
5.2	Inspectors.....	11
5.3	UST HQ.....	12
5.4	Office of Compliance & Enforcement.....	12
5.5	Business Office.....	12
6	Approval of Guidance Document.....	12
7	Appendices.....	12
7.1	Field Citation for UST Violations Form.....	12
7.2	UST Facility Inspection and Compliance Guidance.....	12

## UST Compliance Field Citation Guidance

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### 1 Introduction

#### 1.1 UST Field Citation Enforcement Process

The 2001 Legislature (House Bill 2264) established the basic framework for a pilot program to expedite the enforcement of UST violations. On January 30, 2003, the Environmental Quality Commission (EQC) adopted the rules that define this process (OAR 340-150-0250). The pilot program was extended by the 2005 Legislature. The 2007 Legislature (SB 104) made the program permanent and increased the maximum penalty amount from \$100 to \$500 and increased the total penalty amount from \$300 to \$1,500. On February 21, 2008, the EQC modified OAR 340-150-0250 to incorporate the recent legislative changes.

This document replaces DEQ's January 29, 2004 *UST Field Citations – Interim Guidance Document for Expedited Enforcement of UST Compliance Violations*. In addition, the April 2006 *UST Facility Inspection and Compliance Enforcement* manual used by UST inspectors has also been updated as of March 2008. It is the intent of the UST Program managers to implement these new UST field citation guidance policies in the following manner:

1. Violations documented during UST compliance inspections conducted on or before March 9, 2008 will be handled pursuant to the January 29, 2004 interim expedited enforcement guidance document and the April 2006 UST inspector's field manual.
2. Violations documented during UST compliance inspections conducted on or after March 10, 2008 will be handled pursuant to the March 2008 *UST Field Citations – Guidance for Expedited Enforcement of UST Compliance Violations* and the *UST Facility Inspection and Compliance Enforcement* manuals.

#### 1.2 Goals of UST Field Citation Program

The two-pronged goal of the field citation program is to expedite the enforcement process for both permittees and the Department of Environmental Quality (DEQ) and to make more efficient use of DEQ staff resources by including all clear-cut violations in the expedited enforcement program. The use of field citations will promptly notify permittees of violations, corrective measures required, and applicable penalties. By removing the incentive to expend their time and resources contesting larger penalties in the formal enforcement process, permittees who receive field citations should see a clear advantage in focusing their energy and economic resources on achieving compliance.

#### 1.3 Purpose of UST Field Citation Guidance

This guidance has been developed to aid inspectors when documenting violations during an UST operation and maintenance (O & M) inspection and other related compliance activities. In addition, this guidance includes procedures necessary to ensure that sound accounting principles are followed for revenue collection and audit purposes. Section 7.2 of this guidance document contains the *UST Facility Inspection and Compliance Guidance* document which includes a table of UST compliance violations, describes inspection procedures, and lists UST violations, rule citations, field penalty amounts and actions necessary for permittees to correct violations. It also identifies the UST violations that must be referred to the Office of Compliance and Enforcement (OCE) for formal enforcement.

## **UST Compliance Field Citation Guidance**

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### **1.4 Use of the Term "Permittee"**

As a convenience to the reader, the term "permittee" as used in this guidance means the combined term "permittee and tank owner". It is understood that both the permittee and tank owner are responsible for compliance with the UST regulations; if one complies, both are deemed to be in compliance. When the permittee and tank owner are different individuals, it is up to the two parties to make the determination of who will correct the violations and comply. The inspector will issue the field citation jointly to both the permittee and the tank owner.

## **2 UST Field Citation Process**

### **2.1 Violations not Eligible for a Field Citation**

The statutes and rules set forth some situations when issuance of a field citation is not permitted. These are:

- The total field penalty amount for all violations identified during a single inspection or file review would exceed \$1,500;
- The DEQ has issued a field penalty or civil penalty to a permittee for the same violation at the same UST facility within the previous three years; or
- At its discretion, the DEQ determines that a permittee is not eligible for the expedited process.

Based on DEQ's discretion, DEQ has determined that in the following circumstances, a permittee must be referred for formal enforcement:

- More than three Class I violations documented at a single facility during a single inspection.
- More than two Class I violations in addition to more than four Class II violations documented at a single facility during a single inspection.
- Permittee and/or tank owner fails to decommission a tank that is not structurally sound (OAR 340-150-0350 (4) and 340-150-0360 (3)) or fails to decommission any UST system that does not meet the requirements of OAR 340 – Division 150 (OAR 340-150-0135 (8) and 340-150-0555 (4)).
- Permittee and/or tank owner has gained a substantial economic benefit by their non-compliance. A referral must be made for the following violations: no overfill prevention devices, no spill prevention devices, no release detection equipment (including line leak detectors) or no corrosion protection for UST systems installed on or before December 22, 1998 (please refer to the *UST Facility Inspection and Compliance Enforcement Table* for the specific violations which require referral). Other violations may be appropriate for referral based on the specific economic benefit gained by the permittee and/or tank owner based on their non-compliance.

If any of the above conditions exist, inspectors may not issue a field citation. The inspector must refer the file to OCE for formal enforcement (refer to section 4) after providing or sending a Pre Enforcement Notice (PEN) notifying the permittee of the violations and that the file is being referred.

## **UST Compliance Field Citation Guidance**

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Additionally, the DEQ may determine, on a case-by-case basis, whether to refer a specific permittee and/or tank owner. Some factors to look for in determining if an enforcement referral is more appropriate than issuance of a field citation are listed below.

- Any circumstances showing a pattern of or systematic non-compliance such as repeat violations at the same UST facility location, violations at other UST facility locations owned and/or operated by the same permittee and/or tank owner, or violations in other DEQ regulatory programs by the permittee and/or tank owner. For example: the permittee has repeated the same violations since the last inspection but it has been longer than 3 years since the previous violations occurred; or the permittee has multiple facilities and has the same violations at most of these facilities.
- Permittee and/or tank owner shows an unwillingness or refusal to achieve compliance such as a failure to implement corrective actions within the timeframe specified by the department.
- Permittee and/or tank owner exhibits a willful or flagrant disregard of the UST laws and rules by acting deliberately, deceitfully or dishonestly to avoid complying with recognized UST standards and practices. NOTE: the deliberately, deceitfully and dishonestly factors are the same factors used in deciding whether to refer a violation for criminal investigation or prosecution.
- The violations by permittee and/or tank owner lead to direct environmental harm such as contamination of a public or private drinking water well, explosive vapors in a home, office or commercial building or significant damage to sensitive natural resources such as designated wild rivers, wildlife refuges or irreplaceable wildlife habitat.

If any of the above conditions exist, inspectors should draft a memorandum to their manager stating the reasons why a field citation should not be issued. If the manager agrees that a field citation should not be issued, the inspector must refer the file to OCE for formal enforcement (refer to section 4) after providing or sending a Pre Enforcement Notice (PEN) notifying the permittee of the violations and that the file is being referred.

### **2.2 The UST Field Citation Form**

A three-page form *Field Citation for UST Violations* (FC form) has been developed to make it easier and more efficient for inspectors to issue field citations during an inspection. The FC form also includes necessary legal language for a formal notice of a field penalty assessment. Each FC form is prenumbered and printed on self-copying NCR paper bound in tablets. An example of the FC form is included in section 7.1.

#### **2.2.1 Completing the Field Citation Form**

Completing the FC form is self-explanatory, as each information block is clearly labeled. Each FC form issued will consist of two separate sheets; page 1 and page 3 (page 2 is preprinted on the back of page 1).

- Page 1 contains general information about the UST inspector, the facility inspected, the facility representative, total field penalty amount assessed (totaled from amounts on page 3) and two signature blocks. The first signature block is for the facility representative. The facility representative is the person present during the inspection (usually the permittee or UST system operator). Their signature only denotes that they received a copy of the FC form in person and does not constitute an admission of any violation. If the facility representative

### **UST Compliance Field Citation Guidance**

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does not sign the FC form for any reason, the inspector should note that in the signature block. If the FC form is issued by mail only, write in "not applicable - notice mailed" in the signature block area for the facility representative.

The second signature block is for the permittee when they return a copy of page 1 to the DEQ business office. During the inspection, the signature block should be left blank even if the permittee or owner is the facility representative during the inspection. By signing and returning the FC form, the permittee either acknowledges that the listed violations have occurred and that they are remitting the listed field citation penalty or they are acknowledging that they do not wish to participate in the expedited enforcement process and understand that they will be referred to the DEQ's OCE for formal enforcement. The appropriate choice is noted by checking one of two boxes (Option 1 and Option 2) on this page of the FC form. DEQ expects page 1 to be signed, dated and returned to the Business Office within 30-days of the issued date.

- Page 2 is preprinted with information required for a formal notice of the assessment of the field penalty. It also informs the permittee of the process for participating in the expedited enforcement program and the consequences of a failure to correct the violations and/or pay the field penalty.
- Page 3 is for listing the violations documented during the inspection, applicable rule citations, field penalty amount for each violation and the actions the permittee must take to correct each violation. **It is very important for the inspector to remember to fill out the top of the form with the Date Issued, Field Citation Number, and the Facility ID so that this page can be tracked with page 1 and 2 of the FC form.** The inspector must fill in the date compliance must be achieved for each violation and total the amount of the field citation. This total then needs to be transcribed onto page 1 of the FC form. (If an inspector needs more than one page to list the violations, utilize additional Page 3 sheets and add up the total penalties and fill it in on the first page 3). A copy of page 3 is left with the facility representative and will serve as a certification of compliance by allowing the permittee to enter the date they completed each corrective action. Once all the violations are corrected, the permittee signs the certification of compliance at the bottom of Page 3 and mails the original to the regional inspector.
- When writing the description of the violation(s) on page 3 of the FC form, the inspector should reference the *UST Facility Inspection and Compliance Guidance* for the specific violation noted. Utilize the reference number in the *UST O & M Inspection Form* and look that number up in the table of violations. Describe the violation by combining the wording in the "violation description" column with the "compliance requirement" column. Many of the descriptions of violations are written generically. The inspector should make sure that the description of the violation clearly states what specific violation occurred at the site. In all cases, the description must include the violation and a brief summary of what action or inaction caused the violation to occur. The permittee should be able to clearly understand what acts or omissions caused the violation.
- The inspector should leave a postage paid self addressed envelope (provided by HQ) with the facility representative if that representative is the permittee or the tank owner. If the

## **UST Compliance Field Citation Guidance**

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representative is not the permittee or tank owner, mail the postage paid self addressed envelope to the permittee with their copy of the field citation.

- The permittee is responsible for keeping adequate documentation of the corrective action work on file and providing access to this documentation to an inspector upon request.

### **2.3 Using the UST Facility Inspection and Compliance Guidance**

Inspectors must reference the *UST Facility Inspection and Compliance Guidance* when completing an inspection and filling out page 3 of the FC form. This guidance provides information to the inspector on what to look for during the inspection (to maintain consistency) and how to document violations. Significant deviations from this guidance should not occur, except as noted below, to ensure consistent enforcement response and field penalty calculations. The description of violations, citations, and violation classes must be based on the information in the table of violations within the guidance document. All inspectors should keep a copy of this document on hand when completing the FC form.

**Reference number.** This number corresponds to the section of the *UST O & M Inspection Form*, as appropriate. Not all entries will have a reference number, as there are some violations not specifically listed in the inspection form.

**Compliance Issue Description.** This is a description of the rule requirement from Division 150 or 151.

**Violation Language.** This is a description of the violation from 340-012-0053 and 340-012-0067.

**Rule citation.** The first citation is to the rule violated (Divisions 150 and 151). The next citation is to the enforcement rules in OAR 340-012-0053 or 340-012-0067, plus the applicable statute.

**Class.** This includes the classification of the violation in accordance with 340-012-0053 or 340-012-0067. Class II violations have a field penalty range of \$50 to \$150, and Class I violations have a field penalty range of \$150 to \$500.

- Permittees will not receive a field penalty for Class III violations unless the permittee does not correct the violation by the required compliance date. A \$50 field penalty is assigned to each class III violation that is not corrected (refer to section 2.5.3).
- Permittees will receive a PEN for some UST violations and will be referred for formal enforcement (refer to section 4).

**Recommended compliance action and date compliance must be achieved.** This section includes the actions that the permittee must complete to correct the violation and the date by which the violations must be corrected.

- Inspectors may determine, on a case-by-case basis, that a different corrective action measure or time period to correct the violation is necessary or appropriate as compared to what is recommended in the guidance. If there are multiple violations with different compliance due dates, use the latest date to establish a single due date for returning the certification of compliance (approximately one week from the last compliance date).

## UST Compliance Field Citation Guidance

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- To ensure overall consistency, if the change in corrective action is significant (e.g., guidance states that tank should be decommissioned, but inspector does not believe that decommissioning is warranted), the inspector must first consult with their regional manager. The regional manager will consult with other UST managers, if needed. In this case, the FC form will not be issued until resolution of the appropriate corrective action is achieved so the FC form will be mailed to the permittee and owner.

**Penalty amount.** This section includes the FC penalty amount for the violation. Some violations have more than one FC penalty amount if the inspector determines that the underlying violation caused a spill or release to occur (for example failure to have installed spill prevention (C1a) or spill overfill (C1b) equipment). In many of these situations, UST inspectors may have reason to believe a suspected release has occurred and will require an investigation into the suspected release. In these cases, the UST inspector should delay issuing the field citation until the results of the suspected release investigation are available (typically seven days). This insures that the appropriate field citation penalty amount is assessed for the violation documented.

### 2.4 Distributing Copies of the Field Citation Form

The FC form is comprised of a four part NCR form. The inspector should keep the original (top white copy) of the FC form to use to make additional copies and then file it in the region's UST facility file. The rest of the NCR copies should be utilized in the following manner:

NCR Forms:

Pink: Left with the facility representative during the inspection

Yellow: Sent to Business Office

Green: Remains as permanent copy in the book

The inspector will need to make copies of the FC form when the inspector gets back to the office for:

1. Permittee and/or tank owner (A copy of the FC must be provided to both the permittee and the tank owner, if they are different people, to be sure that they received service of the FC. Always confirm who the permittee and tank owner are and their appropriate mailing address either prior to or at inspection to ensure that it will be mailed to the proper person at the proper address. FC's do not need to be mailed by certified mail.) Include in the permittee's copy, the self addressed postage paid envelope for returning both the Page 1 of the FC form and the penalty amount.
2. Office of Compliance and Enforcement
3. HQ-UST
4. Regional Manager (or route file copy to them)

When a copy of the completed FC form is provided to the facility representative while the inspector is at the facility, the inspector may not accept payment for the field penalty in person under any circumstances. The permittee must mail the payment directly to the Business Office, along with a signed copy of the first page of the FC form noting that they are choosing Option 1 (refer to section 2.5.4).

## **UST Compliance Field Citation Guidance**

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### **2.5 Follow-up for Compliance Achievement**

#### **2.5.1 Centralized Compliance Database**

Until such time as there is implemented a centralized compliance data base (CCD), UST inspectors must track compliance actions pursuant to regional office policies for enforcement tracking, including obtaining a regional enforcement tracking number (ETN). The ETN number needs to be entered into the top right hand side of Page 1 of the FC. This ETN number is for internal enforcement tracking purposes only. Any follow-up on the compliance issues noted in the FC should also be entered into the regional enforcement tracking system including the return to compliance date.

#### **2.5.2 Compliance Documentation**

Inspectors need to enter all inspection data from both the inspection form and the FC form in the "UST Compliance Database" as soon as possible after the inspection is complete. At a minimum, all database updates are to be completed by the 10<sup>th</sup> of each month for inspections made during the prior month. As information comes in on compliance certification, that data should also be entered into the database by the 10<sup>th</sup> of each month.

#### **2.5.3 Compliance Follow-Up**

Inspectors will provide technical assistance as necessary to help permittees correct violations, however, inspectors should also refer permittees to licensed service providers for assistance where appropriate.

Inspectors should track whether the certificate of compliance (Page 3) is submitted by a permittee in a timely manner. If the certificate has been signed and provided, all of the violations will be assumed to have been corrected. At periodic intervals, some follow-up inspections will be scheduled to determine if the violations have been corrected. HQ staff will provide a monthly report for inspectors and managers that displays the payment status for all FCs.

##### **2.5.3.1 Extension of Compliance Due Dates**

- Inspectors may grant one extension of the compliance due date (corrective action period) for good cause (i.e., equipment on order, but will not arrive within time period). A request for a second extension should generally be denied, but if appropriate, the extension must be approved by the regional manager.
- Inspectors will record any compliance date extensions in the UST Inspection database, note the change on a copy of the FC form issued and send a copy to HQ, OCE and the permittee and owner.

##### **2.5.3.2 Final Compliance Achievement**

- Once a permittee has provided the certificate of compliance and the field penalty has been paid, regional staff will send a brief letter to the permittee noting that compliance has been achieved. This information should then be entered into the UST compliance database

#### **2.5.4 Actions Necessary If Violations Are Not Corrected**

At periodic intervals, follow-up inspections will be scheduled for a statistically significant number of facilities that previously received field citations and who indicated they had returned to compliance to determine their compliance status. If, during the follow-up inspection, it is determined that a permittee failed to correct all violations, the following actions must be taken:

## **UST Compliance Field Citation Guidance**

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- **Class III violations:** Regional staff will issue a second field citation with a \$50 field penalty to the permittee for each class III violation that is not corrected by the scheduled date.
- **Class I & II violations:** If a follow-up inspection indicates that any of the Class I & II violations have not been corrected and the permittee had paid the field penalty, the inspector will refer the file to OCE (refer to section 4) for the violation of *Failure to comply with a Final Order*. (OAR 340-012-0053(1)(a)) The inspector should issue a PEN to the permittee for the new violation which notifies the permittee that the violation is being referred for formal enforcement. If the permittee had submitted a signed certificate of compliance but had not paid the penalty, the inspector will cite the violation as: *Submitting false, inaccurate or incomplete information where the submittal either masked a violation or caused the Department to misinterpret a substantive fact.* (OAR 340-012-0053(1)(b)).

### **2.5.5 Field Penalty Payments**

Each permittee has 30 days from the date the FC form was issued (date on the FC form itself) to submit page 1 of the FC form to the Business Office indicating whether they are opting in (Option 1) or out (Option 2) of the expedited enforcement program (see 2.2.1). When the Business Office receives a FC form which includes payment, the payment is recorded in the Business Office database, the FC form is marked "paid" and the date the payment received is entered on the form. The Business Office will send a copy of all FC forms received to UST HQ. The Business Office will run a monthly report off their database after the 10<sup>th</sup> day of the month that lists the facilities issued field citations, the date issued and amount due and the date and amount paid. This Business Office report will be emailed to UST HQ and forwarded by HQ to UST inspectors. This information will be used by UST HQ and the inspectors to follow-up on the status of their inspections.

If the permittee fails to pay the FC within 30 days of issuance, UST HQ will call the permittee and inform the permittee that if payment is not received within 5 working days, the file will be referred to OCE. If the permittee fails to pay the penalty within 5 days after the telephone call, UST HQ will inform the region of that fact. The region will send a PEN informing the permittee that the file is now being referred for formal enforcement. The region will then refer the violations to OCE for formal enforcement (refer to section 4). The region will send a copy of the PEN to the Business Office with the FC number clearly marked on the first page for cross-reference purposes.

If the permittee requests a payment plan, the UST inspector, the Business Office and the permittee must work out the payment terms. The written payment plan must include a statement that failure to make the payments will result in the UST inspector rescinding the field citation and sending an enforcement referral to the Office of Compliance and Enforcement. The payment plan must be signed and dated by the permittee and returned to the UST inspector. Upon receipt by the UST inspector, copies will be sent to the Business Office and UST headquarters. UST headquarters and the UST inspector will monitor compliance with the payment plan and take follow-up compliance actions, as necessary.

HQ will notify the inspector by email if the permittee selected Option 2 opting out of the expedited enforcement program. The region will send a PEN informing the permittee that the file

## **UST Compliance Field Citation Guidance**

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is now being referred for formal enforcement. The region will then refer the violations to OCE for formal enforcement (refer to section 4). The region will send a copy of the PEN to the Business Office with the FC number clearly marked on the first page for cross-reference purposes.

### **3 Accounting Procedures**

#### **3.1 Prenumbered Field Citation Forms**

Each Page 1 and 2 of the FC form is numbered for security purposes and so that no misuse can occur. Page 3 will not be preprinted so the inspector **must** write the FC number onto Page 3 of the FC form. Additional Page 3's can be utilized for a single facility if need be (the inspector must total all penalties and place them on the first page 3 where it indicates *Total Penalty Amount All Pages*). The Business Office will track every numbered form including: an inventory of blank FC forms, FC forms that have been sent to a regional office, FC forms issued and subsequently paid or not paid, and FC forms that have been voided. The Business Office will file a copy of each FC form returned to the Business Office (not all issued forms will be returned) in numeric order. If for any reason a FC form is voided, the inspector must clearly write "VOID" on all the copies of the form and return the white, pink and yellow copies to the Business Office - **do not destroy the voided copy**. Voided FC forms will be filed with the returned FC forms. Periodically, the Business Office will verify that all FC forms can be accounted for. If a referral for formal enforcement is completed for a facility which received a FC, a copy of the referral must be sent to the Business Office to ensure that they know the FC form with payment will not be submitted for the FC.

The FC forms will be kept by the Business Office in a secured file and distributed to each inspector as needed. The FC forms must be kept in a secure location in each regional office (i.e., locking file or storage cabinet). Inspectors should contact the Business Office (Kelly Scharbrough, 503-229-6719) to request FC forms.

#### **3.2 Receipt of Field Penalties**

The funds received for field penalties and civil penalties must be tracked separately within the UST Compliance and Corrective Action Fund (ORS 466.791). Appropriate account project codes will be established to identify the two sub-accounts. The details of each account will be needed for periodic management reports.

The citation number located at the top of each FC form is the reference number for recording revenue receipts. Daily transmittal forms should be forwarded to UST HQ. UST HQ will follow up with the permittee and Business Office as necessary in the event no payment or a partial payment is received for any field citation.

#### **3.3 Canceling a Field Citation**

As noted in Section 2.5.5, a permittee may chose Option 2 and opt out of the expedited enforcement program. In this case, the Business Office will cancel the field citation based on the permittee's decision not to participate in the field citation program. The UST inspector will follow-up by preparing a formal enforcement referral for the documented violations.

## **UST Compliance Field Citation Guidance**

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Occasionally an UST Inspector may decide to cancel or a field citation that has already been issued. Example circumstances may include, but are not limited to:

- Failure of the permittee to pay the field citation penalty in a timely fashion (30-days plus collection follow-up actions by UST headquarters and/or UST inspector). Failure to pay a field citation results in a formal enforcement referral by the UST inspector.
- New information comes to the UST inspector's attention in a timely fashion (i.e. before the field citation is paid) that documents the UST compliance violations were more serious and/or extensive than originally thought. Had that information been available at the time of inspection, the appropriate enforcement response to the UST compliance violations was a formal enforcement referral rather than issuance of a field citation.
- New information comes to the UST inspector in a timely fashion (i.e. before the field citation is paid) that if available at the time of the inspection would have showed the facility in compliance at the time of the inspection.

The UST inspector will prepare a written memo of justification to cancel an issued field citation and submit it to the UST Regional Manager for review and approval. If the UST Regional Manager concurs, the UST Regional Manager will sign and date the justification memo. A copy of the signed and dated justification memo will be sent to the Business Office for filing with the yellow copy of the field citation and a note will be placed in the accounting database that the field citation was cancelled or rescinded.

### **4 Formal Enforcement Referrals**

Referrals to OCE will be completed on the UST compliance referral format based on agency-wide enforcement guidance. Referrals must occur in the appropriate situation to ensure that permittees are treated consistently across the state.

### **5 Summary of Actions**

Each person/section is responsible for performing the following actions:

#### **5.1 UST Program Managers**

Review and approve all formal enforcement actions within their region, approve or deny all requests for second extensions to compliance due-dates and resolve statewide enforcement issues as needed.

#### **5.2 Inspectors**

Conduct O & M inspections in accordance with all internal procedures, issue field citations consistent with this guidance and the *UST Facility Inspection and Compliance Guidance document*, track the receipt of the certificate of compliance and penalty payments, update UST database, send letters to permittees noting that compliance has been achieved, prepare formal enforcement referrals in accordance with all internal guidance and provide technical assistance as needed to help permittees correct violations.

## **UST Compliance Field Citation Guidance**

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### **5.3 UST HQ**

Follow-up on FC not paid within 30 days of issue date, make copies of submitted FC forms which indicate that they wish to choose Option 2 and send to the appropriate regional office for formal enforcement referral, communicate with regional staff and the Business Office.

### **5.4 Office of Compliance & Enforcement**

Prepare civil penalties and orders based on formal enforcement referrals made by UST program and notify UST HQ if any referral by regions does not result in a civil penalty. Perform permit revocations.

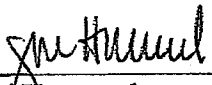
### **5.5 Business Office**

Maintain sufficient quantities of prenumbered tablets of FC forms in secure location, distribute additional tablets to inspectors upon request, track all prenumbered FC forms, provide monthly report to regions on FC forms issued and sites that have submitted Page 1 of the FC form and the associated penalty to the business office, and record revenue received from payment of field penalties.

## **6 Approval of Guidance Document**

This document may be revised on a periodic basis as needed to incorporate new information, rule revisions or to change the list of violations covered by this guidance. This guidance will be incorporated into the agency-wide Division 12 guidance document.

This guidance document is not a final agency action and is intended for use as internal guidance only. It does not create any rights, duties, obligations, or defenses, implied or otherwise. The DEQ may take action at variance with this guidance, but within the requirements of Division 12.

  
\_\_\_\_\_  
Jon Hammond  
Interim Deputy Director

3-10-08  
\_\_\_\_\_  
Date

## **7 Appendices**

### **7.1 Field Citation for UST Violations Form**

### **7.2 UST Facility Inspection and Compliance Guidance**

**Appendix L -  
Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

<b>Div. 12 Cite</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b>CLASS I VIOLATIONS</b>		
UST 0067(1)(a)	Failing to investigate or confirm a suspected release;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
UST 0067(1)(b)	Failing to establish or maintain the required financial responsibility mechanism;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
UST 0067(1)(c)	Failing to obtain the appropriate general permit registration certificate before installing or operating an UST;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
UST 0067(1)(d)	Failing to install spill and overfill protection equipment that will prevent a release or failing to demonstrate to the department that the equipment is properly functioning;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
UST 0067(1)(e)	Failing to install, operate or maintain a method or combination of methods for release detection such that the method can detect a release from any portion of the UST system;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
UST 0067(1)(f)	Failing to protect from corrosion any part of an UST system that routinely contains a regulated substance;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
UST 0067(1)(g)	Failing to permanently decommission an UST system;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
UST 0067(1)(h)	Failing to obtain approval from the department before installing or operating vapor or groundwater monitoring wells as part of a release detection method;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
UST 0067(1)(i)	Installing, repairing, replacing or modifying an UST system in violation of any rule adopted by the department;	"A" - send PEN and refer or follow "UST Field Citation" program guidance. Note: Because of the nearly endless number of scenarios that this rule could encompass, there are many potential violations that could be cited as a field citation. Criteria/scenarios field citation will be described in "UST Field Citation" program guidance.
UST 067(1)(j)	Failing to conduct testing or monitoring, or to keep records where the failure constitutes a significant operational compliance violation;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.

**Appendix L -  
Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

<b>Div. 12</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b>Cite</b>		
UST	Providing, offering or supervising tank services without the appropriate license;	"A" - send PEN and refer.
0067(1)(k)	Demonstrating negligence or incompetence in performing tank services, or	"A" - send PEN and refer.
UST	Failing to assess the excavation zone of a decommissioned or abandoned UST when directed to do so by the department;	"A" - send PEN and refer or follow "UST Field Citation" program guidance.
0067(1)(l)		
UST		
0067(1)(m)		
<b>CLASS 2 VIOLATIONS</b>		
UST	Continuing to use a method or methods of release detection after period allowed by rule has expired;	Follow the "UST Field Citations" program guidance.
0067(2)(a)	Failing to have a trained UST system operator for an UST facility after March 1, 2004;	Follow the "UST Field Citations" program guidance.
UST	Failing to apply for a modified general permit registration certificate;	Follow the "UST Field Citations" program guidance.
0067(2)(b)	Failing to have an operation certificate for each compartment of a multi-chambered or multi-compartment UST when at least one compartment or chamber has an operation certificate.	Follow the "UST Field Citations" program guidance.
UST	Installing, repairing, replacing or modifying an UST or UST equipment without providing the required notifications;	Follow the "UST Field Citations" program guidance.
0067(2)(c)	Failing to decommission an UST in compliance with the statutes and rules adopted by the department, including, but not limited to, performance standards, procedures, notification, general permit registration and site assessment requirements;	Follow the "UST Field Citations" program guidance.
UST	Providing tank services at an UST facility that does not have the appropriate general permit registration certificate;	"B" - send WL.
0067(2)(d)	Failing to obtain the identification number and operation certificate number before depositing a regulated substance	"B" - send WL.
UST		
0067(2)(e)		
UST		
0067(2)(f)		
UST		
0067(2)(g)		
UST		
0067(2)(h)		

UST - 2

3/6/2008

**Appendix L -  
Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

<b>Div. 12 Cite</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
	into an UST, by a distributor;	
UST	Failing, by a distributor, to maintain a record of all USTs into which it deposited a regulated substance;	"B" - send WL.
0067(2)(i)	Allowing tank services to be performed by a person not licensed by the department;	Follow the "UST Field Citations" program guidance.
UST	Failing to submit checklists or reports for UST installation, modification or suspected release confirmation activities;	Follow the "UST Field Citations" program guidance.
0067(2)(k)	Failing to complete an integrity assessment before adding corrosion protection;	Follow the "UST Field Citations" program guidance.
UST	Failing by an owner or permittee to pass the appropriate national examination before performing tank services;	Follow the "UST Field Citations" program guidance.
0067(2)(l)	Failing to provide the identification number or operation certificate number to persons depositing a regulated substance into an UST;	Follow the "UST Field Citations" program guidance.
UST	<b>CLASS 3 VIOLATIONS</b>	
0067(3)(a)	Failing by a person who sells an UST to notify the new owner or permittee of the department's general permit registration requirements.	Follow the "UST Field Citations" program guidance.

Appendix L -  
Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)

**UMBRELLA VIOLATIONS GUIDANCE FOR USTs**

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
<b>CLASS 1 VIOLATIONS</b>		
0053(1)(a)	Violating a requirement or condition of a commission or department order, consent order, agreement, consent judgment (formerly called judicial consent decree) or compliance schedule contained in a permit;	"A" - send PEN and refer. Notes on violation of MAO requirements: The MAO may allow delay or deviation if outside the reasonable control of the person and the Department is notified in a timely manner. For enforcement of MAOs, see guidance for Penalty Demand Notices.
0053(1)(b)	Submitting false, inaccurate or incomplete information to the department where the submittal masked a violation, caused environmental harm, or caused the department to misinterpret any substantive fact;	"A" - send PEN and refer if any of the following apply: (i) the violator knew or should have known that the information submitted was false, incomplete or inaccurate and the violator signed a certification that the information being submitted was true or accurate; (ii) the falsification masked a violation; (iii) the violation caused environmental harm; (iv) the violation caused the Department to issue a permit or license it would not have otherwise issued. Otherwise "B" - send WL if the violator was otherwise in compliance and did not know and would not reasonably have known the information submitted was false, inaccurate or incomplete.
0053(1)(c)	Failing to provide access to premises or records as required by statute, permit, order, consent order, agreement or consent judgment (formerly called judicial consent decree), or	"A" - send PEN and refer if the person denying access was informed by a Department representative that permitting access to the Department was required by statute, permit, or order. Otherwise, "B" - send WL.
0053(1)(d)	Using fraud or deceit to obtain department approval, permit or license.	"A" - send PEN and refer.
<b>CLASS 2 VIOLATIONS</b>		
0053(2)(a)	Violating any otherwise unclassified requirement.	Follow the "UST Field Citations" program guidance.

## Certificate of Insurance Storage Tank Systems

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.	Producer
USC 5892654-04	06/08/2009	06/08/2010	06/08/2009	65478000

**Named Insured and Mailing Address:**

NIEMI OIL CO  
PO BOX 989  
ASTORIA OR 97103

**Producer:**

USASSURE INSURANCE SERVICES, INC.  
PO BOX 10630  
JACKSONVILLE FL 32247-0630

### CERTIFICATE:

1. Zurich American Insurance Company, the Insurer, as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

Per Attached Scheduled Locations and

Scheduled Storage Tank(s) Systems

for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; arising from operating the underground storage tank(s) identified above.

The limits of liability are \$1,000,000 each occurrence and \$1,000,000 annual aggregate, exclusive of legal defense costs which are subject to a separate limit under the policy. This coverage is provided under policy # USC 5892654-04. The effective date of said policy is 06/08/2009.

2. The Insurer further certifies the following with respect to the insurance described in Paragraph 1:
  - a. Bankruptcy or insolvency of the insured shall not relieve the Insurer of its obligations under the policy to which this certificate applies.
  - b. The Insurer is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third party, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in 40 CFR 280.95-280.102.
  - c. Whenever requested by a Director of an implementing agency, the Insurer agrees to furnish to the Director a signed duplicate original of the Policy and all endorsements.
  - d. Cancellation or any other termination of the insurance by the Insurer, except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the Insured. Cancellation for non-payment of premium or misrepresentation by the Insured will be effective only upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured.

# EXHIBIT

# 16

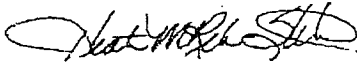


Dec. 6-7, 2012, EQC meeting

Page 152 of 237

- e. The insurance covers claims otherwise covered by the Policy that are reported to the Insurer within six (6) months of the effective date of cancellation or non-renewal of the Policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.

I hereby certify that the wording of this instrument is identical to the wording in 40 CFR 280.97 (b) (2) and that the insurer is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.



Heather M. Rehm-Stelter  
Product Line Manager  
Authorized Representative of  
Zurich American Insurance Company  
One Liberty Plaza  
New York, New York 10006

## Scheduled Storage Tank Systems Attachment



Policy No. USC 5892654-04

Named Insured: NIEMI OIL CO

Location Number: 1  
Location Name: WARRENTON 76  
Location Address: 238 SE MAIN  
WARRENTON OR 97146  
Total Number of Tanks 3

Fac # 7476

Tank #	Type	Installation Date	Capacity	Contents
1	UST	01/01/1978	1,000	Gasoline

Cleanup Costs Retroactive Date 06/08/2005  
Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date 06/08/2005

Tank #	Type	Installation Date	Capacity	Contents
2	UST	01/01/1978	1,000	Gasoline

Cleanup Costs Retroactive Date 06/08/2005  
Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date 06/08/2005

Tank #	Type	Installation Date	Capacity	Contents
3	UST	01/01/1978	1,500	Gasoline

Cleanup Costs Retroactive Date 06/08/2005  
Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date 06/08/2005

Location Number: 2  
Location Name: LANDWEIERS 76  
Location Address: 34908 HWY 101 BUS  
ASTORIA OR 97103  
Total Number of Tanks 3

Fac # 7471

Tank #	Type	Installation Date	Capacity	Contents
1	UST	01/01/1989	1,500	Gasoline

Cleanup Costs Retroactive Date 06/08/2005  
Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date 06/08/2005

U-ENVL-UF-108-C CW (03/08)

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
2	UST	01/01/1989	5,000	Gasoline	06/08/2005	06/08/2005

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
3	UST	01/01/1989	5,000	Gasoline	06/08/2005	06/08/2005

Location Number: 3  
Location Name: 76 HIWAY STATION  
Location Address: 3108 MARINE DR  
ASTORIA OR 97103  
Total Number of Tanks 3

#6897

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
1	UST	01/01/1977	1,500	Gasoline	06/08/2005	06/08/2005

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
2	UST	01/01/1977	4,000	Gasoline	06/08/2005	06/08/2005

U-ENVL-UF-108-C CW (03/08)

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
3	UST	01/01/1977	4,000	Gasoline	06/08/2005	06/08/2005

Location Number: 4  
Location Name: 76 CARDLOCK  
Location Address: 455 INDUSTRY  
ASTORIA OR 97103  
Total Number of Tanks 3

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
1	UST	01/01/1978	10,000	Diesel	06/08/2005	06/08/2005

#7375

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
2	UST	01/01/1978	10,000	Diesel	06/08/2005	06/08/2005

Tank #	Type	Installation Date	Capacity	Contents	Cleanup Costs Retroactive Date	Bodily Injury and Property Damage excluding Cleanup Costs Retroactive Date
3	UST	01/01/1978	20,000	Gasoline	06/08/2005	06/08/2005

**Allan Bakalian**

---

**From:** ELWORTH Susan [elworth.susan@deq.state.or.us]  
**Sent:** Tuesday, May 31, 2011 12:11 PM  
**To:** Allan Bakalian  
**Cc:** SMITH Bryan  
**Subject:** RE: Burns Johanson Oil Co  
**Attachments:** 20110531105740127.pdf

Allan – Attached is the more detailed version of the economic benefit calculation from the BEN computer model. You can contact Bryan Smith, who inputted the data into the model and he can verify for you that the calculation was completed as a delayed cost. If you have further questions on how, specifically, the BEN computer model works, I would suggest that you contact EPA directly as they are the developers of the program. Bryan should be able to provide you with a direct contact there.

DEQ is not involved in determining how the model works or setting any of the rates used to determine the calculation but is only authorized, through rule, to use the model to determine economic benefit calculations. Bryan's phone number is 5032295395. Susan

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**From:** Allan Bakalian [mailto:abakalian@zdblawn.com]  
**Sent:** Thursday, May 26, 2011 4:36 PM  
**To:** ELWORTH Susan  
**Subject:** RE: Burns Johanson Oil Co

Thanks, Susan.

I would like to participate in a call with Sean or review a detailed breakdown of the EB calculation.

My primary concern is that the EB for delaying installation of a \$2300 leak detector in 1993 to 2002 is calculated as an \$7197 EB penalty

That cannot be right as the economic benefit for delaying installation equipment cannot be 3 times the actual cost of the equipment.

Let me know when Sean is available to discuss this or have him call me.

Regards,

Allan

Allan Bakalian

ZENO DRAKE BAKALIAN P.S.  
4020 Lake Washington Blvd. N.E., Suite 100  
Kirkland, WA 98033  
(425) 822-1511, ext. 224 - tel  
(425) 985-6527 - mobile  
(425) 822-1411 - fax

[abakalian@zdblawn.com](mailto:abakalian@zdblawn.com)

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Run Name =	leak detector
Present Values as of Noncompliance Date (NCD),	01-Jan-1993
A) On-Time Capital & One-Time Costs	\$2,200
B) Delay Capital & One-Time Costs	\$793
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$1,407
E) Final Econ. Ben. at Penalty Payment Date,	
05-Jul-2011	\$7,179
C-Corporation w/ OR tax rates	
Discount/Compound Rate	9.2%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	01-Oct-2002
Capital Investment:	
Cost Estimate	\$3,900
Cost Estimate Date	02-Nov-2010
Cost Index for Inflation	PCI
Consider Future Replacement (Useful Life)	y (15)
One-Time, Nondepreciable Expenditure:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Tax Deductible?	N/A
Annually Recurring Costs:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	N/A
On-Time Capital Investment	
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

Run Name = leak detector	
<u>Present Values as of Noncompliance Date (NCD),</u>	<u>01-Jan-1993</u>
A) On-Time Capital & One-Time Costs	\$2,200
B) Delay Capital & One-Time Costs	\$793
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$1,407
E) Final Econ. Ben. at Penalty Payment Date,	
<u>06-Jul-2011</u>	<u>\$7,179</u>
 <i>C-Corporation w/ OR tax rates</i>	
Discount/Compound Rate	9.2%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	01-Oct-2002
<u>Capital Investment:</u>	
Cost Estimate	\$3,900
Cost Estimate Date	02-Nov-2010
Cost Index for Inflation	PCI
Consider Future Replacement (Useful Life)	y (15)
<u>One-Time, Nondepreciable Expenditure:</u>	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Tax Deductible?	N/A
<u>Annually Recurring Costs:</u>	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
<u>User-Customized Specific Cost Estimates:</u>	
On-Time Capital Investment	N/A
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

Notes: (1) Corporate bond rates averaged across all industries (average of Aaa & Baa); Federal Reserve Statistical Release H.15.  
(2) Combined state/federal marginal tax rates:  $\text{federal} + (\text{state} * (1 - \text{federal}))$ ; Federation of Tax Administrators.  
(3) Calculated as:  $(1) * (100\% - (2))$ . [Adjusts for tax-deductibility of interest payments.]  
(4) Average corporate debt weight; Standard & Poor's Analysts' Handbook, S&P Industrials Sample Balance Sheet.  
(5) Federal Reserve Bulletin Table 1.35. [Used as a proxy for the risk-free rate in the Capital Asset Pricing Model (CAPM)].  
(6) Beta measures risk relative to overall stock market, with a value of 1.00 therefore assuming risk is same as market.  
(7) Differences of average returns between stock market and 5-yr T-notes, 1926 - prior yr; Ibbotson Associates Handbook.  
(8) Calculated as  $(6) * (7)$ . [Also equal to (7), since (6) is equal to 1.00 for a company of average risk.]  
(9) Calculated as  $(5) + (8)$ . [Reflects risk-free rate of return plus the company risk premium.]  
(10) Calculated as  $100\% - (4)$ . [Reflects: total financing - debt = equity financing.]  
(11) Calculated as  $(3) * (4) + (9) * (10)$ . [Reflects: (debt cost x debt weight) + (equity cost x equity weight).]

Average of 1993 to 2010											Final rate:
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
YEAR	Cost of Debt	Tax Rate	After-Tax Debt Cost	Debt Weight	5-Year Treasury Notes	Beta	Intermed. Horizon Risk Prem	Company Risk Premium	Equity Cost	Equity Weight	Rate
1987	9.98%	38.4%	6.15%	46%	7.94%	1.00	7.7%	7.7%	15.6%	54%	
1988	10.27%	38.4%	6.33%	50%	8.48%	1.00	7.6%	7.6%	16.1%	50%	
1989	9.72%	38.4%	5.99%	46%	8.50%	1.00	7.6%	7.6%	16.1%	54%	
1990	9.84%	38.4%	6.06%	50%	8.37%	1.00	7.8%	7.8%	16.2%	50%	
1991	9.29%	38.4%	5.72%	45%	7.37%	1.00	7.5%	7.5%	14.9%	55%	
1992	8.56%	38.4%	5.27%	51%	6.19%	1.00	7.8%	7.8%	14.0%	49%	
1993	7.58%	39.3%	4.60%	51%	5.14%	1.00	7.7%	7.7%	12.8%	49%	8.6%
1994	8.30%	39.3%	5.04%	51%	6.69%	1.00	7.6%	7.6%	14.3%	49%	9.6%
1995	7.90%	39.3%	4.80%	45%	6.38%	1.00	7.4%	7.4%	13.8%	55%	9.8%
1996	7.71%	39.3%	4.68%	41%	6.18%	1.00	7.8%	7.8%	14.0%	59%	10.2%
1997	7.57%	39.3%	4.59%	36%	6.22%	1.00	7.9%	7.9%	14.1%	64%	10.7%
1998	6.88%	39.3%	4.18%	33%	5.15%	1.00	8.2%	8.2%	13.4%	67%	10.4%
1999	7.47%	39.3%	4.53%	31%	5.55%	1.00	8.4%	8.4%	14.0%	69%	11.1%
2000	8.00%	39.3%	4.86%	33%	6.16%	1.00	8.5%	8.5%	14.7%	67%	11.5%
2001	7.52%	39.3%	4.56%	38%	4.56%	1.00	8.2%	8.2%	12.8%	62%	9.7%
2002	7.15%	39.3%	4.34%	42%	3.82%	1.00	7.8%	7.8%	11.6%	58%	8.6%
2003	6.21%	39.3%	3.77%	37%	2.97%	1.00	7.4%	7.4%	10.4%	63%	7.9%
2004	6.01%	39.3%	3.65%	39%	3.43%	1.00	7.6%	7.6%	11.0%	61%	8.1%
2005	5.65%	39.3%	3.43%	32%	4.05%	1.00	7.6%	7.6%	11.7%	68%	9.1%
2006	6.04%	39.3%	3.67%	33%	4.75%	1.00	7.6%	7.6%	12.4%	67%	9.5%
2007	6.02%	39.3%	3.65%	34%	4.43%	1.00	7.6%	7.6%	12.0%	66%	9.2%
2008	6.54%	39.3%	3.97%	45%	2.80%	1.00	7.5%	7.5%	10.3%	55%	7.5%

Calculations for Specific Cost Estimates

	<u>On-Time</u>	<u>Delay</u>
Date:	01-Jan-1993	01-Oct-2002
<u>Capital Investment:</u>		
Original Cost Estimate	\$3,900	\$3,900
	÷	÷
PCI Value as of Cost Estimate Date, 02-Nov-2010	562.293	562.293
	x	x
PCI Value as of Specific Estimate Date	357.200	400.000
	=	=
<b>Specific Cost Estimate,</b>	<b>\$2,477</b>	<b>\$2,774</b>
reflecting implicit annualized inflation rate of:	2.6%	4.3%
<u>One-Time, Nondepreciable Expenditure:</u>		
Original Cost Estimate	\$0	\$0
	÷	÷
PCI Value as of Cost Estimate Date, 01-Jan-2000	N/A	N/A
	x	x
PCI Value as of Specific Estimate Date	N/A	N/A
	=	=
<b>Specific Cost Estimate,</b>	<b>\$0</b>	<b>N/A</b>
reflecting implicit annualized inflation rate of:	N/A	N/A

<b>A) On-Time Capital &amp; One-Time Costs</b>	01-Jan-1993	01-Jul-1993	01-Jul-1994	01-Jul-1995	01-Jul-1996	01-Jul-1997	01-Jul-1998	01-Jul-1999	01-Jul-2000
One-Time, Nondepreciable Expenditure	0								
Capital Investment- Initial Installation	(2,477)								
Depreciation- Federal	0	(354)	(607)	(433)	(309)	(221)	(221)	(221)	(110)
Marginal Tax Rate (MTR)- Federal	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%
Tax Liability Offset- Federal	0	124	212	152	108	77	77	77	39
Depreciation- State (OR)	0	(354)	(607)	(433)	(309)	(221)	(221)	(221)	(110)
MTR- State (OR), adj. for fed. deductibility	4.3%	4.3%	4.3%	4.3%	4.3%	4.3%	4.3%	4.3%	4.3%
Tax Liability Offset- State (OR)	0	15	26	19	13	9	9	9	5
Net After-Tax Cash Flow	(2,477)	139	238	170	122	87	87	87	43
PV Factor: Adjusts Cash Flow to NCD	1.0000	0.9573	0.8766	0.8028	0.7350	0.6731	0.6164	0.5644	0.5167
PV Cash Flow as of NCD	(2,477)	133	209	137	89	58	54	49	22
Federal Utilized Depreciation Schedule:		14.29%	24.49%	17.49%	12.49%	8.93%	8.92%	8.93%	4.46%
State Utilized Depreciation Schedule:		14.29%	24.49%	17.49%	12.49%	8.93%	8.92%	8.93%	4.46%
Bonus schedules & cut-off dates:									
MACRS:		14.29%	24.49%	17.49%	12.49%	8.93%	8.92%	8.93%	4.46%
10-Sep-01 6-May-03		40.00%	17.14%	12.24%	8.74%	6.25%	6.24%	6.25%	3.12%
5-May-03 1-Jan-05		57.15%	12.25%	8.75%	6.25%	4.47%	4.46%	4.47%	2.23%
Imputed Lease Cost for Interim Period When On-Time (But Not Delay) Equipment Would Need Replacement									
Applicable Only w/ Default Values of Delayed (Not Avoided) Capital and Considered Future Replacement									
Total Imputed Lease Cost:	(4,528)	x	MTR- Federal/State Combined:		39.7%	=	Net After-Tax Cash Flow:		(2,730)
PV Factor: Adjusts Cash Flow to NCD:	0.1737								
PV Cash Flow as of NCD: (474)		+	Initial Install. NPV (see above): (1,725)			=	On-Time Total NPV, Install+Lease: (2,200)		
<b>B) Delay Capital &amp; One-Time Costs</b>	01-Oct-2002	01-Apr-2003	01-Apr-2004	01-Apr-2005	01-Apr-2006	01-Apr-2007	01-Apr-2008	01-Apr-2009	01-Apr-2010
One-Time, Nondepreciable Expenditure	0								
Capital Investment	(2,774)								
Depreciation- Federal	0	(1,110)	(476)	(340)	(243)	(173)	(173)	(173)	(87)
Marginal Tax Rate (MTR)- Federal	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%
Tax Liability Offset- Federal	0	388	166	119	85	61	61	61	30
Depreciation- State (OR)	0	(1,110)	(476)	(340)	(243)	(173)	(173)	(173)	(87)
MTR- State (OR), adj. for fed. deductibility	4.3%	4.3%	4.3%	4.3%	4.3%	4.3%	4.3%	5.1%	5.1%
Tax Liability Offset- State (OR)	0	48	20	15	10	7	7	9	4
Net After-Tax Cash Flow	(2,774)	436	187	133	95	68	68	70	35
PV Factor: Adjusts Cash Flow to NCD	0.4238	0.4056	0.3714	0.3401	0.3114	0.2852	0.2611	0.2391	0.2190
PV Cash Flow as of NCD	(1,176)	177	69	45	30	19	18	17	8
PV Cash Flow as of NCD: (793)									
Federal Utilized Depreciation Schedule:		40.00%	17.14%	12.24%	8.74%	6.25%	6.24%	6.25%	3.12%
State Utilized Depreciation Schedule:		40.00%	17.14%	12.24%	8.74%	6.25%	6.24%	6.25%	3.12%

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**From:** Allan Bakalian [<mailto:abakalian@zdblawn.com>]  
**Sent:** Friday, July 22, 2011 2:49 PM  
**To:** ELWORTH Susan; SMITH Bryan  
**Subject:** Burns Johanson

Susan,

Please see the attached revised settlement calculations and offer. I would be happy to answer any questions you or Bryan have regarding the BEN model run that is attached.

Thanks,

Allan

Allan Bakalian

ZENO DRAKE BAKALIAN P.S.  
4020 Lake Washington Blvd. N.E., Suite 100  
Kirkland, WA 98033  
(425) 822-1511, ext. 224 - tel  
(425) 985-6527 - mobile  
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[abakalian@zdblawn.com](mailto:abakalian@zdblawn.com)

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Run Name =	Revised
Present Values as of Noncompliance Date (NCD),	06-Jun-2003
A) On-Time Capital & One-Time Costs	\$2,090
B) Delay Capital & One-Time Costs	\$1,569
C) Avoided Annually Recurring Costs	\$0
D) Initial Economic Benefit (A-B+C)	\$521
E) Final Econ. Ben. at Penalty Payment Date,	
01-Aug-2011	\$918
C-Corporation w/ OR tax rates	
Discount/Compound Rate	7.2%
Discount/Compound Rate Calculated By:	User
Compliance Date	01-Nov-2010
Capital Investment:	
Cost Estimate	\$3,900
Cost Estimate Date	01-Nov-2010
Cost Index for Inflation	PCI
Consider Future Replacement (Useful Life)	y (25)
One-Time, Nondepreciable Expenditure:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Tax Deductible?	N/A
Annually Recurring Costs:	
Cost Estimate	\$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	N/A
On-Time Capital Investment	
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

**Calculations for Specific Cost Estimates**

Date:	<u>On-Time</u> 06-Jun-2003	<u>Delay</u> 01-Nov-2010
<b><u>Capital Investment:</u></b>		
Original Cost Estimate	\$3,900	\$3,900
	÷	÷
PCI Value as of Cost Estimate Date, 01-Nov-2010	562.293	562.293
	x	x
PCI Value as of Specific Estimate Date	400.000	562.293
	=	=
<b>Specific Cost Estimate,</b>	<b>\$2,774</b>	<b>\$3,900</b>
reflecting implicit annualized inflation rate of:	4.7%	N/A
<b><u>One-Time, Nondepreciable Expenditure:</u></b>		
Original Cost Estimate	\$0	\$0
	÷	÷
PCI Value as of Cost Estimate Date, 01-Jan-2000	N/A	N/A
	x	x
PCI Value as of Specific Estimate Date	N/A	N/A
	=	=
<b>Specific Cost Estimate,</b>	<b>\$0</b>	<b>N/A</b>
reflecting implicit annualized inflation rate of:	N/A	N/A

A) On-Time Capital & One-Time Costs	06-Jun-2003	06-Dec-2003	06-Dec-2004	06-Dec-2005	06-Dec-2006	06-Dec-2007	06-Dec-2008	06-Dec-2009	06-Dec-2010
One-Time, Nondepreciable Expenditure	0								
Capital Investment- Initial Installation	(2,774)								
Depreciation- Federal	0	(1,585)	(340)	(243)	(173)	(124)	(124)	(124)	(82)
Marginal Tax Rate (MTR)- Federal	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%
Tax Liability Offset- Federal	0	555	119	85	61	43	43	43	22
Depreciation- State (OR)	0	(1,585)	(340)	(243)	(173)	(124)	(124)	(124)	(52)
MTR- State (OR), adj. for fed. deductibility	4.3%	4.3%	4.3%	4.3%	4.3%	4.3%	4.3%	5.1%	5.1%
Tax Liability Offset- State (OR)	0	69	15	10	7	5	5	6	3
Net After-Tax Cash Flow	(2,774)	623	133	95	68	49	49	50	25
PV Factor: Adjusts Cash Flow to NCD	1.0000	0.9857	0.9007	0.8402	0.7838	0.7311	0.6819	0.6361	0.5934
PV Cash Flow as of NCD	(2,774)	601	120	80	53	35	33	32	15
Federal Utilized Depreciation Schedule:		57.15%	12.25%	8.75%	6.25%	4.47%	4.46%	4.47%	2.23%
State Utilized Depreciation Schedule:		57.15%	12.25%	8.75%	6.25%	4.47%	4.46%	4.47%	2.23%
Bonus schedules & cut-off dates:	MACRS:	14.29%	24.49%	17.49%	12.49%	8.93%	8.92%	8.93%	4.46%
10-Sep-01 6-May-03		40.00%	17.14%	12.24%	8.74%	6.25%	6.24%	6.25%	3.12%
5-May-03 1-Jan-05		57.15%	12.25%	8.75%	6.25%	4.47%	4.46%	4.47%	2.23%
Imputed Lease Cost for Interim Period When On-Time (But Not Delay) Equipment Would Need Replacement					Start Date:	End Date:	Years:	Capital Cost:	Annual Lease:
Applicable Only w/ Default Values of Delayed (Not Avoided) Capital and Considered Future Replacement					06-Jun-2028	01-Nov-2035	7.4	(5,443)	(475)
Total Imputed Lease Cost:	(3,519)	x	MTR- Federal/State Combined:		40.1%	=	Net After-Tax Cash Flow:		(2,108)
PV Factor: Adjusts Cash Flow to NCD:	0.1357								
PV Cash Flow as of NCD: (286)		+	Initial Install. NPV (see above): (1,804)			=	In-Time Total NPV, Install+Lease: (2,090)		
B) Delay Capital & One-Time Costs	01-Nov-2010	01-May-2011	01-May-2012	01-May-2013	01-May-2014	01-May-2015	01-May-2016	01-May-2017	01-May-2018
One-Time, Nondepreciable Expenditure	0								
Capital Investment	(3,900)								
Depreciation- Federal	0	(557)	(955)	(682)	(487)	(348)	(348)	(348)	(174)
Marginal Tax Rate (MTR)- Federal	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%
Tax Liability Offset- Federal	0	195	334	239	170	122	122	122	61
Depreciation- State (OR)	0	(557)	(955)	(682)	(487)	(348)	(348)	(348)	(174)
MTR- State (OR), adj. for fed. deductibility	5.1%	5.1%	5.1%	5.1%	5.1%	5.1%	5.1%	5.1%	5.1%
Tax Liability Offset- State (OR)	0	29	49	35	25	18	18	18	9
Net After-Tax Cash Flow	(3,900)	224	383	274	186	140	140	140	70
PV Factor: Adjusts Cash Flow to NCD	0.5973	0.5771	0.5382	0.5021	0.4684	0.4369	0.4075	0.3801	0.3546
PV Cash Flow as of NCD	(2,330)	129	206	137	92	61	57	53	25
PV Cash Flow as of NCD: (1,569)									
Federal Utilized Depreciation Schedule:		14.29%	24.49%	17.49%	12.49%	8.93%	8.92%	8.93%	4.46%
State Utilized Depreciation Schedule:		14.29%	24.49%	17.49%	12.49%	8.93%	8.92%	8.93%	4.46%

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JUL 08 2011

Allan---

ZENO DRAKE BAKALIAN P.S.

As far as the Corp tax rate for the DEQ information I am sending a copy of the Adjusted Trial Balance that Yergen & Meyer prepared that shows net losses for 1996 and 1997. Also a copy of 1997 tax return showing taxable income of \$1,700.00. This is just to give you an idea that the 15% figure given by our current accountant was probably relevant.



EXHIBIT 24  
Item ID: 000296

Yergen and Meyer, LLP  
22294  
6/12/97 8:48AM

ED NIEMI OIL CO., INC.  
ADJUSTED TRIAL BALANCE REPORT  
March 31, 1997

Page: .  
Prepared by: Kai  
Reviewed by:

Account	Description	Adjusted 3/31/96.	Unadjusted 3/31/97	AJE 3/31/97	Adjusted 3/31/97
40050	Gasoline sales	-3,124,941.62	-2,813,868.98		-2,813,868.98
42000	Fuel sales	-542,061.23	-629,599.28		-629,599.28
43000	TBAS & lube sales	-37,872.98	-30,270.54		-30,270.54
44000	Tank Insurance sales	-1,290.25	-444.00		-444.00
45000	Burner parts sales	-21,100.00	-14,672.59		-14,672.59
45100	Burner, labor	-10,142.75	-7,853.40		-7,853.40
	Sales Revenue	-3,737,408.83	-3,496,708.79	0.00	-3,496,708.79
	Total Revenues	-3,737,408.83	-3,496,708.79	0.00	-3,496,708.79
61015	Auto & Truck Commissions		20,000.00		20,000.00
	Operating Expenses	0.00	20,000.00	0.00	20,000.00
46000	Miscellaneous Income	641.22	-4,601.00	3 423.00	-4,178.00
81200	Rental income	-1,500.00	-500.00		-500.00
81300	Life insurance income	-1,937.48			
	Other Income	-2,796.26	-5,101.00	423.00	-4,678.00
51000	Gasoline purchases	2,841,471.69	2,535,779.41		2,535,779.41
52000	Fuel purchases	444,507.44	496,374.42		496,374.42
53000	TBAS & lube purchases	31,093.22	30,795.96		30,795.96
53010	Burner purchases	14,531.41	10,518.29		10,518.29
53020	Tank insurance purchases	820.50			
61000	Advertising	3,394.50	2,949.58		2,949.58
61010	Truck and auto	9,820.34	18,290.30		18,290.30
61025	PUC	3,064.24			
61030	Depreciation expense	13,407.00	16,800.00	1 -6,796.00	10,004.00
61035	Burner Dept Exp	842.82			
61040	Freight & cartage	404.61			
61054	Employee welfare	31,093.43			
61060	Insurance	12,518.58	30,603.19		30,603.19
61062	Life Insurance Expense	2,617.13	1,520.00		1,520.00
61065	Cash over & short	132.84	91.67		91.67
61070	Office expense	15,696.74	14,304.48		14,304.48
61075	Oil heat comm	3,586.94	4,527.45		4,527.45
61080	S & H Green Stamps	250.00			
61085	Plant rent & repairs	9,496.78	38,620.60		38,620.60
61090	Professional Fees	7,764.65	3,418.75		3,418.75
61095	Supplies	6,611.54	8,896.10		8,896.10
61105	Taxes & licenses	13,200.00	8,603.80	2 -1,531.00	7,072.80
61110	Service station rents	10,102.14	6,836.45		6,836.45
61115	Station repairs-Landwehr	134,371.93	125,093.98		125,093.98
61122	Salaries & wages	66,000.00	65,148.00		65,148.00
61124	Officers salaries	20,152.75	20,101.13		20,101.13
61126	Payroll taxes	7,362.23	8,003.15		8,003.15
61130	Telephone	402.47	232.65		232.65
61140	Travel & entertainment	5,663.42	4,825.43		4,825.43
61150	Utilities	1,094.14			
61160	Bad debts	2,161.25	1,889.37		1,889.37
61170	Oregon Load Fee	10,625.83	7,698.59		7,698.59
61180	BP Credit Card Fees	-274.26	-2.91		-2.91
81000	Interest earned	-2,070.26	-5,281.97		-5,281.97
81100	Late Charges	-18,974.62	416.89		416.89
81400	Discounts	13,846.27	12,263.34		12,263.34
91000	Interest	5,893.45			
91020	Property taxes	2,251.00			
91030	Federal taxes			2 1,531.00	
91031	State taxes	497.00		5 1,588.00	3,119.00
91040	Miscellaneous Expense	2,784.33		4 1,239.00	1,239.00
91050	Contributions	150.00			
	Income Tax Expense	3,728,365.47	3,469,318.10	-3,969.00	3,465,349.10
	Total Expenses	3,725,569.21	3,484,217.10	-3,546.00	3,480,671.10
	Net (Income) Loss	-11,839.62	-12,491.69		-16,037.69

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:  
BURNS-JOHANSON OIL COMPANY,  
an Oregon corporation,  
  
Respondents.

Declaration of Steve Allen  
  
No. LQ/UST-NWR-10-248

I, Steve Allen, under penalty of perjury of the laws of the State of Oregon and of the United States of America, declare as follows:

1. I am over the age of eighteen years, and have personal knowledge of the matters described below.

2. I am a Certified Public Accountant in Astoria, Oregon. I have served as the accountant for Burns Johanson Oil Company, Niemi Oil Company, ETU Inc., Alice Codd and previously Warren Bechtolt and Alice Codd and John Codd and Alice Codd since the 1980s.

3. In the late 1970s, Warren and Alice Bechtolt acquired Burns Johanson Oil Company and the oil storage facility located at 455 Industry Street, Astoria, Oregon. Warren Bechtolt passed away in 1989.

1           4. Burns Johanson is an S Corporation and its revenue was passed through and  
2 included on the individual tax returns of the Bechtolts and Codds. The company did not pay  
3 dividends or distribute profits to its owners.  
4

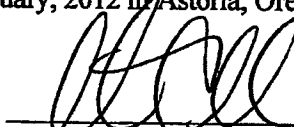
5           5. In December 2010, most of my client files were destroyed in a fire that  
6 completely burned out the Cannery office complex in downtown Astoria. Only a few files were  
7 saved from a concrete vault in the building.  
8

9           6. Notwithstanding the fire and loss of many of my clients' tax records I was able to  
10 locate many of the tax returns for Alice Bechtolt/Codd for which the Burns Johanson revenues  
11 were reported on Line 17 for S Corporations.  
12

13           7. As evident from the 1997 through 2003 tax returns (when Burns Johanson ceased  
14 operating), Burns Johanson lost money nearly every year (upwards of \$50,000 annually) and was  
15 taxed between zero and fifteen percent (15%) as shown on the attached spreadsheet.  
16 Accordingly, based on the Codd's taxable income, the highest rate the highest tax rate that Burns  
17 Johanson would have paid is 15%, not 39% as used by DEQ on their economic benefit  
18 calculations. The Oregon tax rate applicable to the individual taxpayers during this period was  
19 between zero and nine (9%), as shown on the spreadsheet.  
20

21           8. I have also done the tax returns for Niemi Oil, which has operated the heating oil  
22 and gasoline/diesel business at the Burns Johanson property. Niemi Oil has not paid any taxes in  
23 years, as it has not reported any operating income for at least ten years.  
24

25 EXECUTED this 24 day of January, 2012 in Astoria, Oregon.

26   
27 \_\_\_\_\_  
28 Steve Allen

**Federal and Oregon Tax Rate for Burns Johanson Oil Company as Reported on Line 17 of the Individual  
Taxpayer Returns (Warren and Alice Becholt, John and Alice Codd, Alice Codd)**

YEAR	FEDERAL TAX RATE	OREGON TAX RATE
1991	20%	8%
1992	15%	8%
1993	19%	8%
1994	21%	8%
1995	19%	8%
1996	18%	6%
1997	12%	1%
1998	15%	0%
1999	15%	0%
2000	10%	0%
2001	0%	0%
2002	0%	0%
2003	0%	0%
2004		
2005		
2006		
2007		
2008		
2009		
2010		

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## Changes To The Fed Funds And Discount Rates

January 1, 1990 - December 13, 2011

Latest FOMC: December 13, 2011 - Rates left unchanged at 0.00 - 0.25 percent.

DATE	FED FUNDS RATE	DISCOUNT RATE
January 1, 1990	8.25%	7.00%
July 13, 1990	▼ 0.25% 8.00%	
October 29, 1990	▼ 0.25% 7.75%	
November 14, 1990	▼ 0.25% 7.50%	
December 7, 1990	▼ 0.25% 7.25%	
December 19, 1990	▼ 0.25% 7.00%	▼ 0.50% 6.50%
January 8, 1991	▼ 0.25% 6.75%	
February 1, 1991	▼ 0.50% 6.25%	▼ 0.50% 6.00%
March 8, 1991	▼ 0.25% 6.00%	
April 30, 1991	▼ 0.25% 5.75%	▼ 0.50% 5.50%
August 6, 1991	▼ 0.25% 5.50%	
September 13, 1991	▼ 0.25% 5.25%	▼ 0.50% 5.00%
October 10, 1991	▼ 0.25% 5.00%	
November 6, 1991	▼ 0.25% 4.75%	▼ 0.50% 4.50%
December 11, 1991	▼ 0.25% 4.50%	
December 20, 1991	▼ 0.50% 4.00%	▼ 1.00% 3.50%
April 9, 1992	▼ 0.25% 3.75%	
July 2, 1992	▼ 0.50% 3.25%	▼ 0.50% 3.00%
September 4, 1992	▼ 0.25% 3.00%	
February 4, 1994	▲ 0.25% 3.25%	
March 22, 1994	▲ 0.25% 3.50%	
April 18, 1994	▲ 0.25% 3.75%	
May 17, 1994	▲ 0.50% 4.25%	▲ 0.50% 3.50%
August 16, 1994	▲ 0.50% 4.75%	▲ 0.50% 4.00%
November 15, 1994	▲ 0.75% 5.50%	▲ 0.75% 4.75%
February 1, 1995	▲ 0.50% 6.00%	▲ 0.50% 5.25%
July 6, 1995	▼ 0.25% 5.75%	
December 19, 1995	▼ 0.25% 5.50%	
January 31, 1996	▼ 0.25% 5.25%	▼ 0.25% 5.00%
March 25, 1997	▲ 0.25% 5.50%	
September 29, 1998	▼ 0.25% 5.25%	
October 15, 1998	▼ 0.25% 5.00%	▼ 0.25% 4.75%
November 17, 1998	▼ 0.25% 4.75%	▼ 0.25% 4.50%
June 30, 1999	▲ 0.25% 5.00%	
August 24, 1999	▲ 0.25% 5.25%	▲ 0.25% 4.75%
November 16, 1999	▲ 0.25% 5.50%	▲ 0.25% 5.00%
February 2, 2000	▲ 0.25% 5.75%	▲ 0.25% 5.25%
March 21, 2000	▲ 0.25% 6.00%	▲ 0.25% 5.50%
May 16, 2000	▲ 0.50% 6.50%	▲ 0.50% 6.00%

**EXHIBIT 26**

January 3, 2001	▼ 0.50%	6.00%	▼ 0.25%	5.75%
January 4, 2001			▼ 0.25%	5.50%
January 31, 2001	▼ 0.50%	5.50%	▼ 0.50%	5.00%
March 20, 2001	▼ 0.50%	5.00%	▼ 0.50%	4.50%
April 18, 2001	▼ 0.50%	4.50%	▼ 0.50%	4.00%
May 15, 2001	▼ 0.50%	4.00%	▼ 0.50%	3.50%
June 27, 2001	▼ 0.25%	3.75%	▼ 0.25%	3.25%
August 21, 2001	▼ 0.25%	3.50%	▼ 0.25%	3.00%
September 17, 2001	▼ 0.50%	3.00%	▼ 0.50%	2.50%
October 2, 2001	▼ 0.50%	2.50%	▼ 0.50%	2.00%
November 6, 2001	▼ 0.50%	2.00%	▼ 0.50%	1.50%
December 11, 2001	▼ 0.25%	1.75%	▼ 0.25%	1.25%
November 6, 2002	▼ 0.50%	1.25%	▼ 0.50%	0.75%

January 2003 -- Change to "primary - secondary" discount rates.

June 25, 2003	▼ 0.25%	1.00%	▼ 0.25%	2.00%
June 30, 2004	▲ 0.25%	1.25%	▲ 0.25%	2.25%
August 10, 2004	▲ 0.25%	1.50%	▲ 0.25%	2.50%
September 21, 2004	▲ 0.25%	1.75%	▲ 0.25%	2.75%
November 10, 2004	▲ 0.25%	2.00%	▲ 0.25%	3.00%
December 14, 2004	▲ 0.25%	2.25%	▲ 0.25%	3.25%
February 2, 2005	▲ 0.25%	2.50%	▲ 0.25%	3.50%
March 22, 2005	▲ 0.25%	2.75%	▲ 0.25%	3.75%
May 3, 2005	▲ 0.25%	3.00%	▲ 0.25%	4.00%
June 30, 2005	▲ 0.25%	3.25%	▲ 0.25%	4.25%
August 9, 2005	▲ 0.25%	3.50%	▲ 0.25%	4.50%
September 20, 2005	▲ 0.25%	3.75%	▲ 0.25%	4.75%
November 1, 2005	▲ 0.25%	4.00%	▲ 0.25%	5.00%
December 13, 2005	▲ 0.25%	4.25%	▲ 0.25%	5.25%
January 31, 2006	▲ 0.25%	4.50%	▲ 0.25%	5.50%
March 28, 2006	▲ 0.25%	4.75%	▲ 0.25%	5.75%
May 10, 2006	▲ 0.25%	5.00%	▲ 0.25%	6.00%
June 29, 2006	▲ 0.25%	5.25%	▲ 0.25%	6.25%
August 17, 2007		5.25%	▼ 0.50%	5.75%
September 18, 2007	▼ 0.50%	4.75%	▼ 0.50%	5.25%
October 31, 2007	▼ 0.25%	4.50%	▼ 0.25%	5.00%
December 11, 2007	▼ 0.25%	4.25%	▼ 0.25%	4.75%
January 22, 2008	▼ 0.75%	3.50%	▼ 0.75%	4.00%
January 30, 2008	▼ 0.50%	3.00%	▼ 0.50%	3.50%
March 16, 2008		3.00%	▼ 0.25%	3.25%
March 18, 2008	▼ 0.75%	2.25%	▼ 0.75%	2.50%
April 30, 2008	▼ 0.25%	2.00%	▼ 0.25%	2.25%
October 8, 2008	▼ 0.50%	1.50%	▼ 0.50%	1.75%
October 29, 2008	▼ 0.50%	1.00%	▼ 0.50%	1.25%

December 16, 2008	▼ 1.00%	<b>0.00%</b>	▼ 0.75%	0.50%
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FOMC Meeting calendar for 2012.

January 24-25	March 13	April 24-25	June 19-20
July 31	September 12	October 23-24	December 11

FOMC meeting calendars and interest rate decisions for 2001 - 2011

## Latest Fed Press Release

Latest FOMC Press Release - December 13, 2011 meeting

[↑ Back To Top](#)

[Back To Previous Page](#)

## Past FOMC Meetings

### 2011

January 25-26 NO CHANGE	March 15 NO CHANGE	April 26-27 NO CHANGE	June 21-22 NO CHANGE
August 9 NO CHANGE	September 20-21 NO CHANGE	November 1-2 NO CHANGE	December 13 NO CHANGE

2011 was the third year in a row when the Fed Funds rate - the official Fed US interest rate - remained at ZERO throughout the year. In the middle of the year, the Fed stated officially that their present ZIRP (Zero Interest Rate Policy) would extend until "at least" the middle of 2013.

### 2010

January 26-27 NO CHANGE	March 16 NO CHANGE	April 27-28 NO CHANGE	June 22-23 NO CHANGE
August 10 NO CHANGE	September 21 NO CHANGE	November 2-3 NO CHANGE	December 14 NO CHANGE

2010 was the second year in a row when the Fed Funds rate - the official Fed US interest rate - remained at ZERO throughout the year. As had been the case since the beginning of 2009, the last FOMC press release of 2010 kept the statement that rates would be kept at current levels for "an extended period". That period had now extended for two years - and counting. Also in 2010, the Fed abandoned all pretense of having any type of "exit strategy" from their stimulus program. Finally, there was the second tranche of direct Treasury debt monetisation begun on November 3.

### 2009

January 27-28 Rates at ZERO	March 17-18 NO CHANGE	April 28-29 NO CHANGE	June 23-24 NO CHANGE
August 11-12 NO CHANGE	September 22-23 NO CHANGE	November 3-4 NO CHANGE	December 15-16 NO CHANGE

In 2009, for the first time in the history of the Fed, official US interest rates (the Fed Funds Rate) remained at ZERO for the entire year. The Fed cut their official rates to a range of ZERO to 0.25 percent on December 16, 2008 and left them there for the entire year of 2009. At the last FOMC meeting of the year on December 15-16, the Fed stated

again that rates would be kept at current levels for "an extended period".

## 2008

January 29-30 Rate Cut: 0.50%	March 18 Rate Cut: 0.75%	April 29-30 Rate Cut: 0.25%	June 24-25 NO CHANGE
August 5 NO CHANGE	September 16 NO CHANGE	October 28-29 Rate Cut: 0.50%	December 16 Rate Cut: 1.00%

Two rate cuts outside FOMC meetings in 2008:

January 22 Rate cut: -0.75%	October 8 Rate cut: -0.50%
--------------------------------	-------------------------------

2008 was the year of the global financial "logjam" as commercial lending dried up. As the Fed led global central banks into an orgy of money creation, commodity prices soared in the first half of the year only to dive even faster in the second half as deleveraging overwhelmed money creation. On December 16, the Fed reached central bank "nirvana" by cutting its controlling "funds rate" to a target of between **0.00** and 0.25 percent. It remains to be seen what the Fed will do in 2009. The only thing which is certain is that they WON'T be cutting official interest rates.

## 2007

January 30-31 NO CHANGE	March 20-21 NO CHANGE	May 9 NO CHANGE	June 27-28 NO CHANGE
August 7 NO CHANGE	September 18 Rate Cut: - 0.50%	October 30-31 Rate Cut: - 0.25%	December 11 Rate Cut: - 0.25%

Ben Bernanke's first full year as Fed Chairman. 2007 was the year when the LAST great market bubble - the US real estate bubble - burst spectacularly. That was made plain by the "subprime" crisis of August 2007 and sealed when the Fed sprung a "surprise" 0.50% Discount Rate cut on August 17, 2007. By the end of the year, the Fed Funds rate had fallen from 5.25 percent to 4.25 percent.

## 2006

January 31 Rate rise: +0.25%	March 28 Rate rise: +0.25%	May 10 Rate rise: +0.25%	June 28-29 Rate rise: +0.25%
------------------------------------	----------------------------------	--------------------------------	------------------------------------

August 8 NO CHANGE	September 20 NO CHANGE	October 24-25 NO CHANGE	December 12 NO CHANGE
-----------------------	---------------------------	----------------------------	--------------------------

Alan Greenspan came to the end of a 19 year tenure at the Fed in January 2006. The 0.25% rate rises continued until the June FOMC meeting and rates have been held steady since. Hence, in the two years between June 2004 and June 2006, the Fed Funds rate was raised from 1.00% to 5.25% in seventeen equal 0.25% steps.

## 2005

February 1-2 Rate rise: +0.25%	March 22 Rate rise: +0.25%	May 3 Rate rise: +0.25	June 29-30 Rate rise: +0.25%
August 9 Rate rise: +0.25%	September 20 Rate rise: +0.25%	November 1 Rate rise: +0.25%	December 13 Rate rise: +0.25%

Eight meetings in 2005 and eight 0.25% rate rises, making thirteen in all since the Fed Funds rate lifted off its 1.0% lows on June 30, 2004.

## 2004

January 27-28 NO CHANGE	March 16 NO CHANGE	May 4 NO CHANGE	June 29-30 Rate rise: +0.25%
August 10 Rate rise: +0.25%	September 21 Rate rise: +0.25%	November 10 Rate rise: +0.25%	December 14 Rate rise: +0.25%

Fed Funds rate raised 125% in six months in 2004 - from 1.00% in June to 2.25% in December.

## 2003

January 28-29 NO CHANGE	March 18 NO CHANGE	May 6 NO CHANGE	June 24-25 Rate cut: -0.25%
August 12 NO CHANGE	September 16 NO CHANGE	October 28 NO CHANGE	December 9 NO CHANGE

One rate cut in 2003. Fed Funds rate ends the year at 1.00%.

## 2002

January 29-30 NO CHANGE	March 19 NO CHANGE	May 7 NO CHANGE	June 25-26 NO CHANGE
August 13 NO CHANGE	September 24 NO CHANGE	November 6 Rate cut: -0.50%	December 10 NO CHANGE

One rate cut in 2002. Fed Funds rate ends the year at 1.25%.

## 2001

January 30-31 Rate cut: - 0.50%	March 20 Rate cut: - 0.50%	May 15 Rate cut: - 0.50%	June 26-27 Rate cut: - 0.25%
August 21 Rate cut: - 0.25%	October 2 Rate cut: - 0.50%	November 6 Rate cut: - 0.50%	December 11 Rate cut: - 0.25%

Three rate cuts outside FOMC meetings in 2001:

January 3 Rate cut: -0.50%	April 18 Rate cut: -0.50%	September 17 Rate cut: -0.50%
-------------------------------	------------------------------	----------------------------------

ELEVEN rate cuts in 2001. Fed Funds rate cut from 6.50% to 1.75%.  
 That's 475 basis points (4.75%) - or - 73.1% of the way to ZERO.

[Back To Previous Page](#)

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
DEPT. OF ENVIRONMENTAL QUALITY**

IN THE MATTER OF: ) **NOTICE OF RESCHEDULED**  
 ) **IN-PERSON HEARING**  
 )  
**BURNS-JOHANSON OIL COMPANY** ) OAH Case No.: 1102419  
 ) Agency Case No.: LQ/UST-NWR-10-248

**PLEASE TAKE NOTICE** that a contested case hearing has been scheduled in the above matter before the Office of Administrative Hearings.

**Hearing Date: January 25, 2012**

**Hearing Time: 9:00 am**

**Location: DEQ-Portland Office  
811 SW 6th Ave  
Check in with receptionist  
Portland OR 97204**

Your case has been assigned to **Administrative Law Judge Monica Whitaker** an employee of the Office of Administrative Hearings. The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency proposing the action.

Unless otherwise notified, all correspondence, inquiries, exhibits and filings should be sent to:

Monica Whitaker  
Office of Administrative Hearings  
7995 SW Mohawk St.  
Tualatin, OR 97062  
Fax: (503) 612-4340

OAR 137-003-0520 requires a copy of any correspondence, exhibits or other filings to be provided to all parties and the agency at the same time they are provided to the ALJ. **Please use the OAH case number above on all correspondence and filings.**

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

**If you are hearing impaired, need a language interpreter or require another type of accommodation to participate in or attend the hearing, immediately notify the Office of Administrative Hearings at (503) 947-1581 or TDD at 1-800-735-1232 to make the appropriate arrangements. The Office of Administrative Hearings can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.**

You are required to notify the Office of Administrative Hearings at (503) 947-1581 immediately if you change your address or telephone number prior to a decision in this matter.

**CERTIFICATE OF MAILING**

On October 5, 2011, I mailed the foregoing NOTICE OF RESCHEDULED IN-PERSON HEARING in OAH Case No. 1102419.

By: First Class and Certified Mail

Certified Mail Receipt # 7011 0470 0002 8827 5374

Allan Bakalian  
Zeno Drake Bakalian PS  
4020 Lake Washington Blvd NE Ste 100  
Kirkland WA 98033

By: First Class Mail

Susan Elworth  
Dept. of Environmental Quality  
811 SW 6th Ave  
Portland OR 97204

Carol Buntjer  
Administrative Specialist  
Hearing Coordinator

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Under ORS 183.413(2), you must be informed of the following:

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.
2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.
3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.
4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.
5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.
6. Interpreters. If you have a disability or do not speak English, the administrative law judge will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the administrative law judge a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.
7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the administrative law judge will have the opportunity to ask questions of all witnesses. DEQ or the administrative law judge will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

12. Continuances. There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. Please make sure you have all your evidence ready for the hearing. However, if you can show that the record should remain open for additional evidence, the administrative law judge may grant you additional time to submit such evidence.

13. Record. A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This will be done by tape recorder. This tape and any exhibits received in the record will be the whole record of the hearing and the only evidence considered by the administrative law judge. A copy of the tape is available upon payment of a minimal amount, as established by DEQ. A transcript of the record will not normally be prepared, unless there is an appeal to the Court of Appeals.

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

**PLEASE PLACE IN ORIGINAL FILE**

**DATE:** 10/05/11

**CASE NAME:** Burns-Johanson Oil Co

**CASE NUMBER:** 1102419

**AGENCY:** DEQ

**ALJ:** Whitaker

**HEARING NOTICE**

Thanks, Carol

*ABC*

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"><li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li><li>Print your name and address on the reverse so that we can return the card to you.</li><li>Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul>	<p>A. Signature <i>J. Hays</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>J. Hays</i> C. Date of Delivery <i>10-7-11</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
1. Article Addressed to: <i>CB 1102419</i>	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.
Allan Bakalian Zeno Drake Bakalian PS 4020 Lake Washington Blvd NE Ste 100 Kirkland WA 98033	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes
2. Article Number (Transfer from service) <i>7011 0470 0002 8827 5374</i>	

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Sent To Allan Bakalian Zeno Drake Bakalian PS 4020 Lake Washington Blvd NE Ste 100 Kirkland WA 98033	
PS Form 3800, August 2008 See Reverse for Instructions	

Item D 000365

Attachment E

Dec. 6-7, 2012, EQC meeting

Page 8 of 18

**From:** Allan Bakalian <abakalian@zdblaw.com>  
**To:** Monica A WHITAKER <monica.a.whitaker@state.or.us>, ELWORTH Susan <susan....>  
**CC:** OAHREFERRAL EMP <emp.oahreferral@state.or.us>  
**Date:** 10/4/2011 12:29 PM  
**Subject:** RE: Burns-Johanson Oil Company, OAH case no. 1102419

Yes, January 25 will work for me.

Allan

Allan Bakalian  
ZENO DRAKE BAKALIAN P.S.  
4020 Lake Washington Blvd. N.E., Suite 100  
Kirkland, WA 98033  
(425) 822-1511, ext. 224 - tel  
(425) 985-6527 - mobile  
(425) 822-1411 - fax

abakalian@zdblaw.com

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Please consider the environment before printing this message.

-----Original Message-----

From: Monica A WHITAKER [mailto:monica.a.whitaker@state.or.us]  
Sent: Tuesday, October 04, 2011 11:53 AM  
To: Allan Bakalian; ELWORTH Susan  
Cc: OAHREFERRAL EMP; Monica A WHITAKER  
Subject: RE: Burns-Johanson Oil Company, OAH case no. 1102419

Dear Mr. Bakalian:

DEQ is available January 25 or 26. Does either date work for you?

Sincerely,

Monica A. Whitaker  
Senior Administrative Law Judge  
Office of Administrative Hearings

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\*\*\*\*\*

>>> ELWORTH Susan <elworth.susan@deq.state.or.us> 10/4/2011 11:09 AM >>>  
Judge Whitaker - January 25th and 26th would work for the Department.

Attachment E

Dec. 6-7, 2012, EQC meeting

Page 9 of 18

-----Original Message-----

From: Monica A WHITAKER [mailto:monica.a.whitaker@state.or.us]

Sent: Monday, October 03, 2011 2:46 PM

To: Allan Bakalian; WHITAKER Monica.A; ELWORTH Susan

Cc: OAHREFERRAL EMP

Subject: RE: Burns-Johanson Oil Company, OAH case no. 1102419

Ms. Elworth and Mr. Bakalian,

Would January 18 or 19 work for either of you to reschedule the hearing? Additionally, I am available January 23-26 to conduct the hearing.

Sincerely,

Monica A. Whitaker

Senior Administrative Law Judge

Office of Administrative Hearings

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\*\*\*\*\*

>>> ELWORTH Susan <elworth.susan@deq.state.or.us> 10/3/2011 2:42 PM >>>

Judge Whitaker - Unfortunately I will be out of the office during the second week of January. Additionally at least one of my witnesses is unavailable on both October 25th and November 3rd. November 14th or January 11th or 12th would work although it doesn't appear that Mr. Bakalian is available on those dates. Thank you.

-----Original Message-----

From: Monica A WHITAKER [mailto:monica.a.whitaker@state.or.us]

Sent: Wednesday, September 28, 2011 11:09 AM

To: Allan Bakalian; ELWORTH Susan

Cc: OAHREFERRAL EMP; WHITAKER Monica.A

Subject: RE: Burns-Johanson Oil Company, OAH case no. 1102419

Ms. Elworth,

In light of Mr. Bakalian's availability, please advise me as to your dates of availability. The matter can remained as scheduled, or can be rescheduled into mid-January.

Sincerely,

Monica A. Whitaker

Senior Administrative Law Judge

Office of Administrative Hearings

Attachment E

Dec. 6-7, 2012, EQC meeting

Page 10 of 18

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\*\*\*\*\*

>>> Allan Bakalian <abakalian@zdblawn.com> 9/26/2011 4:15 PM >>>

Thank you.

I am not available until January 17 or 18.

Allan

Allan Bakalian  
ZENO DRAKE BAKALIAN P.S.  
4020 Lake Washington Blvd. N.E., Suite 100  
Kirkland, WA 98033  
(425) 822-1511, ext. 224 - tel  
(425) 985-6527 - mobile  
(425) 822-1411 - fax

abakalian@zdblawn.com

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Please consider the environment before printing this message.

-----Original Message-----

From: Monica A WHITAKER [mailto:monica.a.whitaker@state.or.us]

Sent: Monday, September 26, 2011 3:26 PM

To: Allan Bakalian; ELWORTH Susan

Cc: OAHREFERRAL EMP; WHITAKER Monica.A

Subject: RE: Burns-Johanson Oil Company, OAH case no. 1102419

Mr. Bakalian and Ms. Elworth:

The next possible dates available on my calendar are November 14, or January 11, 12, 17, 18, or 19.

Please let me know if any of these dates work for you.

Sincerely,

Monica A. Whitaker  
Senior Administrative Law Judge  
Office of Administrative Hearings

\*\*\*\*\*CONFIDENTIALITY NOTICE\*\*\*\*\*

Attachment E

Dec. 6-7, 2012, EQC meeting

Page 11 of 18

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\*\*\*\*\*

>>> ELWORTH Susan <elworth.susan@deq.state.or.us> 9/26/2011 2:45 PM >>>

Unfortunately one of the Department's witnesses is unavailable on November 3rd. If October 31st does not work, then I would propose that Judge Whitaker propose other dates that will work for her and both myself and Mr. Bakalian can see if our witnesses are available on those dates. Thank you.

-----Original Message-----

From: Allan Bakalian [mailto:abakalian@zdblawn.com]

Sent: Monday, September 26, 2011 1:36 PM

To: ELWORTH Susan; WHITAKER Monica.A

Cc: OAHREFERRAL EMP; WHITAKER Monica.A

Subject: RE: Burns-Johanson Oil Company, OAH case no. 1102419

Judge Whitaker and Ms. Elworth,

I am not available Oct. 31, but will be on Nov. 3.

Sincerely,

Allan

Allan Bakalian  
ZENO DRAKE BAKALIAN P.S.  
4020 Lake Washington Blvd. N.E., Suite 100  
Kirkland, WA 98033  
(425) 822-1511, ext. 224 - tel  
(425) 985-6527 - mobile  
(425) 822-1411 - fax

abakalian@zdblawn.com

Please visit our new website at ZDBLAW.COM

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Please consider the environment before printing this message.

-----Original Message-----

From: ELWORTH Susan [mailto:elworth.susan@deq.state.or.us]

Sent: Monday, September 26, 2011 1:28 PM

To: WHITAKER Monica.A; Allan Bakalian

Cc: OAHREFERRAL EMP; WHITAKER Monica.A

Subject: RE: Burns-Johanson Oil Company, OAH case no. 1102419

Judge Whitaker - October 31st will work for both myself and my two witnesses. Thank you.

-----Original Message-----

From: Monica A WHITAKER [mailto:monica.a.whitaker@state.or.us]

Sent: Monday, September 26, 2011 1:22 PM

Attachment E

Dec. 6-7, 2012, EQC meeting

Page 12 of 18

To: 'Allan Bakalian'; ELWORTH Susan  
Cc: OAHREFERRAL EMP; WHITAKER Monica.A  
Subject: Re: Burns-Johanson Oil Company, OAH case no. 1102419

Ms. Elworth and Mr. Bakalian:

I am granting Ms. Elworth's request to reschedule this hearing. I am booked with hearings for most of November and December, but could accommodate a hearing on October 31 or November 3, 2011. Please let me know as soon as possible if either date works for you.

Sincerely,

Monica A. Whitaker  
Senior Administrative Law Judge  
Office of Administrative Hearings

\*\*\*\*\*CONFIDENTIALITY NOTICE\*\*\*\*\*

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\*\*\*\*\*

>>> ELWORTH Susan <elworth.susan@deq.state.or.us> 9/26/2011 1:16 PM >>>

Mr. Bakalian and Judge Whitaker - As each of you know, this case has been scheduled for a hearing on October 25, 2011. Unfortunately one of the Department's witnesses must attend a training for his job which is being offered on that date. The Department is requesting that the hearing be rescheduled to either the first or second week of November if there is a day during those weeks that works for each of you. Thank you.

Susan M. Elworth  
Department of Environmental Quality  
Environmental Law Specialist  
(503) 229-5152

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
DEPT. OF ENVIRONMENTAL QUALITY**

IN THE MATTER OF: ) **NOTICE OF IN-PERSON HEARING**  
 )  
**BURNS-JOHANSON OIL COMPANY** ) OAH Case No.: 1102419  
 ) Agency Case No.: LQ/UST-NWR-10-248

**PLEASE TAKE NOTICE** that a contested case hearing has been scheduled in the above matter before the Office of Administrative Hearings.

**Hearing Date: October 25, 2011**

**Hearing Time: 9:00 am**

**Location: DEQ-Portland Office  
811 SW 6th Ave  
Check in with receptionist  
Portland OR 97204**

Your case has been assigned to **Administrative Law Judge Monica Whitaker** an employee of the Office of Administrative Hearings. The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency proposing the action.

Unless otherwise notified, all correspondence, inquiries, exhibits and filings should be sent to:

Monica Whitaker  
Office of Administrative Hearings  
7995 SW Mohawk St.  
Tualatin, OR 97062  
Fax: (503) 612-4340

OAR 137-003-0520 requires a copy of any correspondence, exhibits or other filings to be provided to all parties and the agency at the same time they are provided to the ALJ. **Please use the OAH case number above on all correspondence and filings.**

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

**If you are hearing impaired, need a language interpreter or require another type of accommodation to participate in or attend the hearing, immediately notify the Office of Administrative Hearings at (503) 947-1581 or TDD at 1-800-735-1232 to make the appropriate arrangements. The Office of Administrative Hearings can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.**

**CERTIFICATE OF MAILING**

On August 5, 2011, I mailed the foregoing NOTICE OF IN-PERSON HEARING in OAH Case No. 1102419.

By: First Class and Certified Mail

Certified Mail Receipt # 7011 0470 0002 8820 0710

Allan Bakalian  
Attorney at Law  
Zeno Drake Bakalian PS  
4020 Lake Washington Blvd NE Ste 100  
Kirkland WA 98033

By: First Class Mail

Susan Elworth  
Dept. of Environmental Quality  
811 SW 6th Ave  
Portland OR 97204

Carol Buntjer  
Administrative Specialist  
Hearing Coordinator

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Under ORS 183.413(2), you must be informed of the following:

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.
2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.
3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.
4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.
5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.
6. Interpreters. If you have a disability or do not speak English, the administrative law judge will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the administrative law judge a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.
7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the administrative law judge will have the opportunity to ask questions of all witnesses. DEQ or the administrative law judge will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.
- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

12. Continuances. There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. Please make sure you have all your evidence ready for the hearing. However, if you can show that the record should remain open for additional evidence, the administrative law judge may grant you additional time to submit such evidence.

13. Record. A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This will be done by tape recorder. This tape and any exhibits received in the record will be the whole record of the hearing and the only evidence considered by the administrative law judge. A copy of the tape is available upon payment of a minimal amount, as established by DEQ. A transcript of the record will not normally be prepared, unless there is an appeal to the Court of Appeals.

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

**PLEASE PLACE IN ORIGINAL FILE**

**DATE:** 08/05/11

**CASE NAME:** BURNS-JOHANSON OIL CO.

**CASE NUMBER:** 1102419

**AGENCY:** DEQ

**ALJ:** WHITAKER

HEARING NOTICE

Thanks, Carol

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"><li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li><li>Print your name and address on the reverse so that we can return the card to you.</li><li>Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul>		<p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	
1. Article Addressed to: CB 1102419		J. Hays 8-9-11	
Allan Bakalian Zeno Drake Bakalian PS 4020 Lake Washington Blvd NE Ste 100 Kirkland WA 98033		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
2. Article Number (Transfer from service label)		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, February 2004		Domestic Return Receipt 102595-02-M-1540	

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Zeno Drake Bakalian PS	
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Kirkland WA 98033	
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See Reverse for Instructions	

Item D 000376



# Oregon

John A. Kitzhaber, MD, Governor

August 23, 2011

CERTIFIED MAIL 7009 2820 0001 4367 1129

Burns-Johanson Oil Company  
c/o Allan Bakalian  
Zeno Drake Bakalian P.S.  
4020 Lake Washington Boulevard NE, Suite 100  
Kirkland, WA 98033-7862

Re: Amended Notice of Civil Penalty Assessment and Order  
Case No. LQ/UST-NWR-10-248  
UST Facility #7375

Dear Mr. Bakalian:

On December 30, 2010, DEQ issued to your client a Notice of Civil Penalty Assessment and Order to Comply (Notice) for violations at their underground storage tank facility located at 455 Industry Street in Astoria, Oregon. The Notice assessed a civil penalty in the amount of \$19,032.

DEQ's subsequent review of the evidence indicates that the value of certain aggravating and mitigating factors used in the earlier civil penalty calculations should be recalculated. As such, DEQ has issued the attached Amended Notice of Civil Penalty Assessment and Order (Amended Notice). The Amended Notice supersedes the Notice. The Amended Notice assesses a total civil penalty of \$12,083.

Because you have already submitted a written request for hearing and because we have already discussed the facts and mitigating information, your client need not submit a new request for hearing in order to preserve its right to a hearing. However, you may amend your answer within twenty (20) days of the date of service of the Amended Notice. Also pursuant to your request, a contested case hearing has already been scheduled in this matter.

If you have any questions about this action, please contact Susan Elworth with the Department's Office of Compliance and Enforcement in Portland at 503-229-5152, or toll-free at 1-800-452-4011, extension 5152.

Sincerely,

  
Leah E. Koss, Manager

Office of Compliance and Enforcement

Enclosures

cc: Bob McCoy, NWR office, DEQ  
Burns-Johanson Oil Company, c/o Alice N. Codd, PO Box 989, Astoria OR 97103  
✓ Judge Monica Whitaker, OAH, 7995 SW Mohawk Street, Tualatin OR 97062.

Department of Environmental Quality

Headquarters

811 SW Sixth Avenue

Portland, OR 97204-1390

(503) 229-5696

FAX (503) 229-6124

TTY: 711

RECEIVED

AUG 24 2011

Office of Administrative Hearings

Tualatin

Item D 000377

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF:	)	AMENDED NOTICE OF CIVIL
BURNS-JOHANSON OIL COMPANY,	)	PENALTY ASSESSMENT AND ORDER
an Oregon corporation,	)	
Respondent.	)	NO. LQ/UST-NWR-10-248

I. AUTHORITY

This Amended Notice of Civil Penalty Assessment and Order is issued pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through 468.140, ORS 466.706 through 466.835, ORS 466.994, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012 and 150.

II. FINDINGS OF FACT

1. In 1986, Respondent submitted a Notification of Underground Storage Tanks to DEQ for five underground storage tanks (USTs) located at 455 Industry Street in Astoria, Oregon (the Facility). The Notification stated that the estimated age of the tanks was 11 years.

2. In 1989, DEQ issued Respondent an UST Program Temporary Permit for the five USTs at the Facility.

3. In 1999, Respondent decommissioned two of the USTs.

4. Since February 17, 1999, Respondent has been the permittee for the remaining three USTs under General Permit Operating Certificate for facility no. 7375.

5. On August 3, 2010, DEQ inspected the Facility.

6. During the inspection, Respondent provided DEQ with the results of two corrosion protection tests, conducted on February 23, 2005 and May 1, 2009.

7. During the inspection, Respondent provided to DEQ a financial responsibility mechanism with an effective date of the policy of August 2, 2010. Respondent's prior financial responsibility mechanism expired on June 8, 2010.

8. During the inspection, DEQ was unable to readily determine if the suction piping which runs from the gasoline portion of the loading rack to the USTs was designed and

constructed to meet the requirements of OAR 340-150-0410(6).

9. During the inspection, DEQ discovered that the pressurized piping which runs from the diesel portion of the loading rack to the USTs was not equipped with an automatic line leak detector. Respondent was unable to provide DEQ with the results of line tightness testing for this pressurized piping.

10. During the inspection, Respondent's operating certificate was not posted at the Facility.

11. On or about October 27, 2010, Respondent installed a line leak detector on the pressurized piping which runs from the diesel portion of the loading rack to the USTs.

12. On or about December 2, 2010, Respondent had the pressurized piping which runs from the diesel portion of the loading rack to the USTs tightness tested.

13. On or about February 1, 2011, DEQ received documentation showing that the suction piping which runs from the gasoline portion of the loading rack to the USTs was designed and constructed to meet the requirements of OAR 340-150-0410(6).

### III. CONCLUSIONS

1. Respondent violated 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 including 40 CFR 280.40 and 280.41) by failing to install and operate a method of release detection for piping and by failing to conduct annual line leak detector operational testing and line tightness testing as described in Section II, Paragraph 9. These are Class I violations pursuant to OAR 340-012-0067(1)(e) and OAR 340-012-0067(1)(j). DEQ hereby assesses a \$11,294 civil penalty for this violation.

2. Respondent violated OAR 340-150-0163 by failing to continuously maintain a required financial responsibility mechanism as described in Section II, Paragraph 7. This is a Class I violation pursuant to OAR 340-012-0067(1)(b). DEQ hereby assesses a \$450 civil penalty for this violation.

3. Respondent violated OAR 340-150-0325(2) by failing to have the corrosion protection system inspected and tested for proper operation by a qualified cathodic protection tester at least every three years. As described in Section II, Paragraph 6, Respondent did not have the corrosion protection system inspected and tested for over 4 years. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ hereby assesses a \$189 civil penalty for this violation.

4. Respondent violated OAR 340-150-0163(1)(a) by failing to post Respondent's annual operating certificate in a conspicuous location which is clearly visible at the Facility as described in Section II, Paragraph 10. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ hereby assesses a \$150 civil penalty for this violation.

5. Respondent violated OAR 340-012-0410(6) by failing to provide a method for DEQ to readily determine compliance with the requirements in that rule section, as described in Section 11, Paragraph 8. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ did not assess a civil penalty for this violation.

#### IV. ORDER TO PAY CIVIL PENALTY

Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is hereby ORDERED TO pay a total civil penalty of \$12,083. The determination of the civil penalty is attached as Exhibit Numbers 1 through 4, which are incorporated as part of this Notice.

If you do not file a request for hearing as set forth in Section V below, your check or money order must be made payable to "State Treasurer, State of Oregon" and sent to the DEQ, Business Office, 811 S.W. Sixth Avenue, Portland, Oregon 97204. Once you pay the penalty, the Findings of Fact, Conclusions and Order become final.

#### V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ must receive the request for hearing **within 20 calendar days** from the date you receive this Notice. The request should include any affirmative defenses and either admit or deny each allegation of fact in this Notice. (See OAR 340-011-0530.) You must mail the request for hearing to: **DEQ, Office of Compliance and Enforcement - Appeals, 811 SW Sixth Avenue,**

1 **Portland, Oregon 97204**, or fax to **(503) 229-5100**. An administrative law judge employed by  
2 the Office of Administrative Hearings will conduct the hearing, according to ORS Chapter 183,  
3 OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be  
4 represented by an attorney at the hearing, or you may represent yourself unless you are a  
5 corporation, agency or association.

6 If you fail to file a request for hearing in writing within 20 calendar days of receipt of the  
7 Notice, the Notice will become a final order by default without further action by DEQ, as per  
8 OAR 340-011-0535(5). If you do request a hearing but later withdraw your request, fail to attend  
9 the hearing, or notify DEQ that you will not be attending the hearing, DEQ will issue a final  
10 order by default pursuant to OAR 137-003-0670. DEQ designates the relevant portions of its  
11 files, including information submitted by you, as the record for purposes of proving a prima facie  
12 case.

13  
14 Date

8/23/11

Leah E. Koss

Leah E. Koss, Manager  
Office of Compliance and Enforcement

AMENDED EXHIBIT NO. 1  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Failing to install and operate a method of release detection for piping and failing to conduct line leak detector operational testing and line tightness testing, in violation of OAR 340-150-0410(2) and OAR 340-150-0555(1)(d).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0067(1)(e) and (1)(j).

MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as the information reasonably available to the Department indicates that the violation posed no more than a de minimis threat to human health or the environment. Respondent had line tightness testing conducted on the piping which showed that the piping was not leaking at a rate higher than 0.1 gallon per hour rate.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$250 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent was required to comply with all the release detection requirements by December 22, 1990. Respondent installed the equipment in October 2010 and had the testing completed in December 2010.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the

permittee. Respondent has had a permit for its facility and as such, has at least constructive knowledge that it must install a line leak detector on pressurized piping.

"C" is Respondent's efforts to correct the violation and receives a value of -2 according to OAR 340-012-0145(6)(a)(D), because Respondent made reasonable efforts to correct the violation by installing a line leak detector in October 2010 and conducting testing in December 2010.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of \$10,944. This is the amount Respondent gained by delaying spending approximately \$3,900 to install a line leak detector from December 1990 until October 2010 (\$6,699) and by avoiding spending \$225 every year, starting in December 1991 through December 2010, for line tightness testing and line leak detector operational testing (\$4,245). This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$250 + [(0.1 \times \$500) \times (0 + 0 + 4 + 2 - 2)] + \$10,944$   
 $= \$250 + (\$25 \times 4) + \$10,944$   
 $= \$250 + \$100 + \$10,944$   
 $= \$11,294$

Per OAR 340-012-0150(5), DEQ is treating the violation as extending over as many days as necessary to recover the economic benefit of the violation. The violation was on-going from December 1990 until December 2010.

AMENDED EXHIBIT NO. 2  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

- VIOLATION 2: Failing to continuously maintain a financial responsibility mechanism, in violation of OAR 340-150-0163.
- CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0067(1)(b).
- MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Respondent allowed its financial responsibility mechanism to lapse for less than two months, during which time, the information reasonably available to DEQ does not indicate that Respondent needed to use its financial responsibility mechanism.
- CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$
- "BP" is the base penalty, which is \$250 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.
- "P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.
- "H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.
- "O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent did not have a current valid financial responsibility mechanism from June 8 to August 2, 2010.
- "M" is the mental state of the Respondent and receives a value of 6 according to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. Reckless means the Respondent consciously disregarded a substantial and unjustifiable risk that the result of its conducts would occur. Respondent has had a permit for its facility. Each year, DEQ requires permittees to submit proof of a valid financial responsibility mechanism. In 2002, EPA issued Respondent a Notice of Noncompliance for failing to provide evidence of a current financial responsibility mechanism for this facility. Respondent knew that it

needed to continuously maintain a financial responsibility mechanism and by failing to renew its policy in a timely manner, Respondent disregarded a substantial and unjustifiable risk that its conduct would be a violation.

"C" is Respondent's efforts to correct the violation and receives a value of -2 according to OAR 340-012-0145(6)(a)(B), because Respondent made reasonable efforts to correct the violation by obtaining a financial responsibility mechanism in August 2010.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$0 because DEQ finds that economic benefit gained by delaying obtaining a financial responsibility mechanism from June 2010 to August 2010 would be de minimis.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
=  $\$250 + [(0.1 \times \$250) \times (0 + 0 + 4 + 6 - 2)] + \$0$   
=  $\$250 + (\$25 \times 8) + \$0$   
=  $\$250 + \$200 + \$0$   
=  $\$450$

AMENDED EXHIBIT NO. 3  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 3: Failing to have a corrosion protection system inspected and tested for proper operation at least every three years, in violation of OAR 340-150-0325(2).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0053(2).

MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Although Respondent failed to conduct the inspection and test conducted in 2008, a test conducted in 2009 shows that the corrosion protection system was operating properly and was likely operating properly prior to the inspection and test in 2009.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$125 for a Class II, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(B)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent was required to conduct an inspection and test within three years of the test it conducted in February 2005 (February 2008), but did not conduct an inspection and test until May 2009.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the permittee. Respondent has had a permit for its facility and as such, has at least

constructive knowledge that it must conduct a corrosion protection inspection and test every three years.

"C" is Respondent's efforts to correct the violation and receives a value of -2 according to OAR 340-012-0145(6)(a)(B), because Respondent made reasonable efforts to correct the violation by conducting the inspection and test.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$14. This is the amount Respondent gained by delaying, from February 2008 until May 2009, spending approximately \$125 to conduct a corrosion protection inspection and test. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
= \$125 +  $[(0.1 \times \$125) \times (0 + 0 + 4 + 2 - 2)] + \$14$   
= \$125 +  $(\$12.50 \times 4) + \$14$   
= \$125 + \$50 + \$14  
= \$189

AMENDED EXHIBIT NO. 4  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 4: Failing to post the annual operating certificate in a conspicuous location which is clearly visible, in violation of OAR 340-150-0163(1)(a).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0053(2).

MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Although the operating certificate was not posted properly during DEQ's inspection, Respondent is the only distributor who delivers fuel at this facility so that there was minimal risk that a distributor would deliver fuel without the operating certificate being valid.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$125 for a Class II, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(B)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(a)(A), because DEQ does not have sufficient information to allege that the violation existed on any date besides the date of the inspection.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the permittee. Respondent has had a permit for its facility and as such, has at least constructive knowledge that it must post the operating certificate in a conspicuous place.

- "C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because DEQ has insufficient information to make a finding under OAR 340-012-0145(6)(a)(A) through (6)(a)(C) or OAR 340-012-0145(6)(a)(E).
- "EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$0 because DEQ finds that economic benefit gained would be de minimis.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$

$$\begin{aligned} &= \$125 + [(0.1 \times \$125) \times (0 + 0 + 0 + 2 + 0)] + \$0 \\ &= \$125 + (\$12.50 \times 2) + \$0 \\ &= \$125 + \$25 + \$0 \\ &= \$150 \end{aligned}$$

## ZENO DRAKE BAKALIAN P.S.

### LEGAL AND ESCROW SERVICES

G. Michael Zeno, Jr.  
Leslie A. Drake  
Allan B. Bakalian \*

4020 LAKE WASHINGTON BLVD. NE, SUITE 100  
KIRKLAND, WASHINGTON 98033-7862

(425) 822-1511  
FAX (425) 822-1411  
[abakalian@zdblawn.com](mailto:abakalian@zdblawn.com)

\*also admitted in Oregon

January 18, 2011

Via Facsimile 503 229-5100 and FedEx

Office of Compliance and Enforcement - Appeals  
Department of Environmental Quality  
811 SW 6<sup>th</sup> Avenue  
Portland, OR 97204

**Re: Notice of Appeal**  
***In the Matter of Burns-Johanson Oil Company***  
**Case No. LQ/UST-NWR-10-048**

On behalf of Burns-Johanson Oil Company, enclosed for filing is an answer and request for a hearing in the above-referenced matter. Please let me know if you have any questions.

Very truly yours,



Allan Bakalian

Enclosure

cc: Susan Greco (via email)

RECEIVED  
JAN 19 2011  
OFFICE OF COMPLIANCE  
AND ENFORCEMENT  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
Item D 000390

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF:  
BURNS-JOHANSON OIL COMPANY,  
an Oregon corporation,

Respondents.

RESPONDENTS REQUEST FOR  
HEARING AND ANSWER TO  
NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER TO  
COMPLY

**No. LQ/UST-NWR-10-248**

COMES NOW BURNS-JOHANSON OIL COMPANY (Respondent), by and through its attorneys Zeno Drake Bakalian P.S. and Allan B. Bakalian, and submits this Request for Hearing and Answer to the Notice of Civil Penalty Assessment and Order to Comply issued by the Oregon Department of Environmental Quality regarding the underground storage tanks (USTs) at Respondent's facility located at 455 Industry Street, Astoria, Oregon (the Facility).

**I. AUTHORITY**

Respondent submits this Request for Hearing and Answer in response to the Notice of Civil Penalty Assessment and Order to Comply (Notice), issued on December 30, 2010, by the Oregon Department of Environmental Quality (DEQ) pursuant to Oregon Revised Statutes

RESPONDENTS REQUEST FOR HEARING AND  
ANSWER TO NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 1

ZENO DRAKE BAKALIAN P.S.  
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Kirkland, WA 98033  
(425) 822-1511

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AND ENFORCEMENT  
DEPARTMENT OF ENVIRONMENTAL QUALITY

Item D 000391

(ORS) 468.100 and 468.126 through 468.140, ORS 466.706-835, ORS 466.994, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011 and 012 and 150. Respondent received DEQ's Notice on January 3, 2011.

## II. ANSWER

### ***RESPONSE TO DEQ'S ALLEGED FINDINGS***

1. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1, and therefore deny the same.

2. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2, and therefore deny the same.

3. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3, and therefore deny the same.

4. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4, and therefore deny the same.

5. Respondent admits the allegations in paragraph 5.

6. Respondent admits the allegations in paragraph 6.

7. Respondent admits that during the inspection it provided DEQ its financial responsibility documentation. Respondent denies the remainder of the allegations in paragraph 7.

8. Respondent denies the allegations in paragraph 8.

9. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9, and therefore denies the same.

10. Respondent denies allegations in paragraph 10.

11. Respondent admits the allegations in paragraph 11.

12. Respondent admits the allegations in paragraph 12.

RESPONDENTS REQUEST FOR HEARING AND  
ANSWER TO NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

ZENO DRAKE BAKALIAN P.S.  
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Kirkland, WA 98033  
(425) 822-1511

PAGE - 2

***RESPONSE TO DEQ'S CONCLUSIONS AND ALLEGED VIOLATIONS SET FORTH IN  
SECTION III OF THE NOTICE***

1. Respondent denies and disputes the alleged violations contained in paragraph 1.
2. Respondent denies and disputes the alleged violations contained in paragraph 2.
3. Respondent denies and disputes the alleged violations contained in paragraph 3.
4. Respondent denies and disputes the alleged violations contained in paragraph 4.
5. Respondent denies and disputes the alleged violations contained in paragraph 5.

***RESPONSE TO DEQ'S ORDER TO PAY CIVIL PENALTY AND TO COMPLY SET  
FORTH IN SECTION IV OF THE NOTICE***

1. For the reasons set forth in Respondent's Answer and Affirmative Defenses, Respondent denies and disputes Paragraph 1 of Section IV, regarding DEQ's order to pay a total civil penalty of \$19,032.
2. For the reasons set forth in Respondent's Answer and Affirmative Defenses, Respondent denies and disputes Paragraph 2 of Section IV, regarding DEQ's order to take certain actions it alleges are necessary to bring the Facility's UST system into compliance with OAR Chapter 340, Division 150, within 30 calendar days of the Notice.

**III. AFFIRMATIVE DEFENSES**

Respondents assert the following affirmative defenses to DEQ's Notice of Civil Penalty Assessment and Order to Comply as follows:

1. First Affirmative Defense – Estoppel, Waiver and Laches.

DEQ is estopped and barred by the doctrine of laches from asserting or issuing any violations, civil penalties or orders with regard to Respondent's Facility occurring prior to July 2005, when the U.S. Environmental Protection Agency's (EPA) issued Respondent a letter of

RESPONDENTS REQUEST FOR HEARING AND  
ANSWER TO NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

ZENO DRAKE BAKALIAN P.S.  
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Kirkland, WA 98033  
(425) 822-1511

1 compliance stating that the Facility was in compliance with the applicable UST regulations.  
2 EPA, not DEQ, had jurisdiction over Respondent's facility until 2005. The first inspection by  
3 DEQ at the Facility was in August 2010. Accordingly, DEQ has no authority or jurisdiction to  
4 issue any civil penalties or order for alleged violations prior to July 2005.  
5

6 DEQ further waived its right to assert any alleged violations at the Facility prior to the  
7 August 3, 2010 inspection, because DEQ did not abide by its agreement with Respondent to  
8 defer its inspection at the Facility until after Respondent's UST service provider conducted an  
9 evaluation of the UST system and performed any necessary upgrades in compliance with DEQ's  
10 current UST regulations. Respondent relied upon DEQ's agreement and scheduled the UST  
11 service provider evaluation for July 29, 2010. However, DEQ independently contacted  
12 Respondent's service provider and notified Respondent it would accompany the UST service  
13 provider and conduct its inspection at the same time, contrary to its prior agreement. By  
14 breaching its prior agreement, DEQ waived its right to issue any civil penalties or orders for the  
15 alleged violations in this matter because it improperly interfered with and prevented  
16 Respondent's UST service provider from completing the Facility evaluation, and conducted its  
17 August 3, 2010 inspection before Respondent's UST service provider had evaluated the Facility.  
18  
19

20 2. Second Affirmative Defense.

21 Respondent's gasoline UST system is in compliance with the OAR 340-150-0410(6).  
22 Contrary to DEQ's allegations in Finding of Fact 8, DEQ did not request Respondent to verify or  
23 demonstrate that the suction piping which runs from the gasoline portion of the loading rack to  
24 the UST met the "safe suction" requirements of OAR 340-150-0410(6). Had DEQ requested,  
25 Respondent would have been able to demonstrate compliance with this section as set forth in  
26 OAR 340-150-0410(6)(c).  
27  
28

RESPONDENTS REQUEST FOR HEARING AND  
ANSWER TO NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 4

ZENO DRAKE BAKALIAN P.S.  
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Kirkland, WA 98033  
(425) 822-1511

3. Third Affirmative Defense – Alternative Line Leak Detection

A. Respondent is not required to conduct line leak detector operation testing and line tightness testing for the diesel or gasoline UST piping, as alleged in Paragraph 1 of Section III (referencing Finding of Fact 9), based upon OAR 340-150-0410(7), which authorizes alternative methods designed to detect releases from underground piping, set forth in OAR 340-150-0450 through OAR 340-150-0470, utilized by Respondent.

B. In lieu of line leak/release detection, Respondent is allowed to use Statistical Inventory Reconciliation (SIR) as a release detection method for both the gasoline and diesel USTs. OAR 340-150-0435. Respondent provided DEQ copies of its monthly SIR records for the gasoline and diesel UST systems during the August 3, 2010, inspection.

C. Respondent is not required to conduct line leak detector operation testing and line tightness testing for the gasoline UST piping, as alleged in Paragraph 2 of Section III (referencing Finding of Fact #8), because it meets the requirements of OAR 340-150-0410(6) regarding safe suction systems.

D. Pursuant to subsections A and B above, the alleged Class I violation for the diesel UST system, based upon DEQ's Finding of Fact 9, must therefore be dismissed and/or removed from the \$11,987 civil penalty calculations for this alleged violation.

E. Pursuant to subsections B and C above, the alleged Class I violation for the gasoline and diesel UST systems, based upon DEQ's Findings of Facts 8 and 9, must therefore be dismissed and/or removed from the \$6,255 civil penalty calculations for this alleged violation(s).

F. Pursuant to subsections B and C above, Respondent's gasoline UST system is in compliance with Chapter 340, Division 150, and there is no basis for DEQ's Order set forth in

RESPONDENTS REQUEST FOR HEARING AND  
ANSWER TO NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 5

ZENO DRAKE BAKALIAN P.S.  
4020 Lake Washington Blvd. NE, Suite 100  
Kirkland, WA 98033  
(425) 822-1511

1 Section IV, Paragraph 2, that Respondent take certain additional actions that DEQ alleges are  
2 necessary to bring the UST system into compliance with such regulations.

3 4. Fourth Affirmative Defense – Abuse of Discretion; Improper Penalty Calculations  
4 in Violation of DEQ’s Guidelines and Policy

5 DEQ’s civil penalty formula and assessment for Violations 1 and 2 in Section III is based  
6 on inaccurate facts and information. DEQ abused its discretion by improperly increasing the civil  
7 penalties for the alleged line leak detection, line testing and safe suction violations, as follows:

8  
9 A. DEQ improperly classified the alleged Violations 1 and 2 as “moderate,” rather than  
10 “minor” in accordance with the factors at OAR 340-012-0130(1).

11 B. DEQ improperly treated the alleged Violations 1 and 2 as ongoing from 1990 until  
12 October 2010. At most, Violations 1 and 2 originated after EPA’s July 2005  
13 determination that the Facility was in compliance with the UST regulations. The  
14 additional 15 years of alleged noncompliance significantly and adversely affects the  
15 “O” and “EB” components of the civil penalty formula. DEQ further improperly  
16 determined the “H”, “M” and “C” components of its penalty calculations for alleged  
17 Violations 1 and 2.

18 C. Based on A and B above, DEQ improperly determined the alleged “Economic  
19 Benefit” component of the penalty calculations for alleged Violations 1 and 2.

20 21 5. Fifth Affirmative Defense – Financial Responsibility

22 Respondent affirmatively alleges that it continuously maintained the required financial  
23 responsibility mechanism effective between June 9, 2010 and August 3, 2010. During this time,  
24 Respondent was transitioning from Zurich to a new insurance provider, but was still covered by  
25 Zurich and/or its new insurer.  
26  
27  
28

RESPONDENTS REQUEST FOR HEARING AND  
ANSWER TO NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 6

ZENO DRAKE BAKALIAN P.S.  
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Kirkland, WA 98033  
(425) 822-1511

6. Sixth Affirmative Defense – No Harm to the Environment

Notwithstanding the alleged Violations, and as documented by DEQ's inspection at the Facility, there is no evidence of any harm to the environment in this matter. DEQ failed to consider this and the other discretionary factors set forth in OAR in determining and calculating the civil penalties for the alleged violation in this matter.

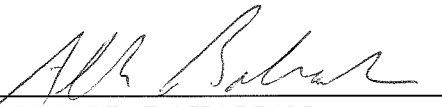
**PRAYER FOR RELIEF**

Wherefore, having answered the Notice of Civil Penalty Assessment and Order to Comply issued by DEQ, and having asserted affirmative defenses, Respondent prays:

1. For a hearing before an administrative law judge.
2. That the Department's Notice of Civil Penalty Assessment and Order to Comply be dismissed with prejudice;
3. For further relief as may be deemed just.

DATED this 18<sup>th</sup> day of January, 2011.

ZENO DRAKE BAKALIAN P.S.

By:   
ALLAN B. BAKALIAN  
Attorney for Respondent  
OSB # 85134  
abakalian@zdblawn.com

RESPONDENTS REQUEST FOR HEARING AND  
ANSWER TO NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER TO COMPLY

PAGE - 7

ZENO DRAKE BAKALIAN P.S.  
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Kirkland, WA 98033  
(425) 822-1511



## Department of Environmental Quality

Headquarters  
811 SW Sixth Avenue  
Portland, OR 97204-1390  
(503) 229-5696  
FAX (503) 229-6124  
TTY (503) 229-6993

December 30, 2010

CERTIFIED MAIL No. 7009 2820 0001 4367 1013

Burns-Johanson Oil Company  
c/o Allan Bakalian  
Zeno Drake Bakalian P.S.  
4020 Lake Washington Boulevard NE, Suite 100  
Kirkland, WA 98033-7862

Re: Notice of Civil Penalty Assessment and Order to Comply  
Case No. LQ/UST-NWR-10-248  
UST Facility #7375

This letter is to inform you that DEQ has issued you a civil penalty of \$19,032 for violations related to your underground storage tank (UST) system located at 455 Industry Street in Astoria, Oregon. DEQ issued this penalty because failing to comply with UST regulations could lead to releases of hazardous substances into the environment. Leaking USTs can contaminate groundwater and place human health and the environment at risk.

On August 3, 2010, DEQ conducted an inspection of your UST system. During the inspection, it was discovered that no line leak detector was installed on the diesel portion of the piping associated with the USTs. Additionally, you had not conducted annual line tightness tests on the piping and you had not conducted a corrosion protection test every three years. You were also unable to provide DEQ with evidence that the gasoline portion of the piping complied with the "safe suction" regulations. Properly functioning release detection equipment and completed testing ensures that releases are discovered quickly before contamination spreads beyond the immediate area of the UST. Corrosion protection is necessary because unprotected USTs can corrode and release petroleum into the environment.

Section IV of the Notice requires you to provide DEQ with either (1) documentation that the gasoline piping complies with the "safe suction" regulations or (2) the results of a line tightness test. DEQ appreciates the fact that you have now installed a line leak detector and this fact was used in determining the amount of the civil penalty.

If you wish to appeal this matter, you have 20 calendar days from receipt of this letter to request a contested case hearing. This hearing request must be in writing. Send your hearing request to DEQ Office of Compliance and Enforcement – Appeals:

Via mail - 811 S.W. 6<sup>th</sup> Ave., Portland, OR 97204

Via fax - 503-229-5100

Once DEQ receives your request, we will arrange to meet with you to discuss this matter. If DEQ does not receive a written hearing request from you within 20 days, the penalty will become due.



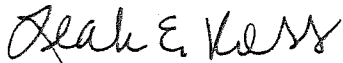
The attached Notice further provides DEQ's reasons for issuing the penalty and further instructions for appealing the penalty. Please review and refer to it when discussing this case with DEQ.

DEQ may allow you to resolve part of your penalty through the completion of a Supplemental Environmental Project (SEP). SEPs are environmental improvement projects that you sponsor in lieu of paying part of your penalty. Enclosed are more details on how to pursue a SEP.

DEQ's rules are available on the internet at <http://www.deq.state.or.us/regulations/rules.htm> or by calling the number below to request a paper copy.

If you have any questions, please contact DEQ Environmental Law Specialist Susan Greco at (503) 229-5152. You may call toll-free within Oregon at 1-800-452-4011, extension 5152.

Sincerely,



Leah E. Koss, Manager  
Office of Compliance and Enforcement

Enclosures

cc: Bob McCoy, NWR office, DEQ  
Clatsop County District Attorney  
Burns-Johanson Oil Company, c/o Alice N. Codd, Registered Agent, 490 Industry, P.O. Box 989, Astoria, OR 97103

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF: ) NOTICE OF CIVIL PENALTY  
BURNS-JOHANSON OIL COMPANY, ) ASSESSMENT AND ORDER TO  
an Oregon corporation, ) COMPLY  
Respondent. ) NO. LQ/UST-NWR-10-248

I. AUTHORITY

This Notice of Civil Penalty Assessment and Order to Comply is issued pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through 468.140, ORS 466.706 through 466.835, ORS 466.994, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012 and 150.

II. FINDINGS OF FACT

1. In 1986, Respondent submitted a Notification of Underground Storage Tanks to DEQ for five underground storage tanks (USTs) located at 455 Industry Street in Astoria, Oregon (the Facility). The Notification stated that the estimated age of the tanks was 11 years.

2. In 1989, DEQ issued Respondent an UST Program Temporary Permit for the five USTs at the Facility.

3. In 1999, Respondent decommissioned two of the USTs.

4. Since February 17, 1999, Respondent has been the permittee for the remaining three USTs under General Permit Operating Certificate for facility no. 7375.

5. On August 3, 2010, DEQ inspected the Facility.

6. During the inspection, Respondent provided DEQ with the results of two corrosion protection tests, conducted on February 23, 2005 and May 1, 2009.

7. During the inspection, Respondent provided to DEQ a financial responsibility mechanism with an effective date of the policy of August 2, 2010. Respondent's prior financial responsibility mechanism expired on June 8, 2010.

8. During the inspection, DEQ was unable to readily determine if the suction piping which runs from the gasoline portion of the loading rack to the USTs was designed and

constructed to meet the requirements of OAR 340-150-0410(6). Respondent was unable to provide DEQ with the results of line tightness testing for this suction piping.

9. During the inspection, DEQ discovered that the pressurized piping which runs from the diesel portion of the loading rack to the USTs was not equipped with an automatic line leak detector. Respondent was unable to provide DEQ with the results of line tightness testing for this pressurized piping.

10. During the inspection, Respondent's operating certificate was not posted at the Facility.

11. On or about October 27, 2010, Respondent installed a line leak detector on the pressurized piping which runs from the diesel portion of the loading rack to the USTs.

12. On or about December 2, 2010, DEQ received the passing results of a line tightness test on the pressurized piping which runs from the diesel portion of the loading rack to the USTs.

### III. CONCLUSIONS

1. Respondent violated OAR 340-150-0410(2) and OAR 340-150-0555(1)(d) by failing to install and operate a method of release detection for piping as described in Section II, Paragraph 9. This is a Class I violation pursuant to OAR 340-012-0067(1)(e). DEQ hereby assesses a \$11,987 civil penalty for this violation.

2. Respondent violated OAR 340-150-0410(2)(c), 340-150-0410(3) and 340-150-0410(4) by failing to conduct line leak detector operational testing and line tightness testing as described in Section II, Paragraphs 8 and 9. This is a Class I violation pursuant to OAR 340-012-0067(1)(j). DEQ hereby assesses a \$6,255 civil penalty for this violation.

3. Respondent violated OAR 340-150-0163 by failing to continuously maintain a required financial responsibility mechanism as described in Section II, Paragraph 7. This is a Class I violation pursuant to OAR 340-012-0067(1)(b). DEQ hereby assesses a \$450 civil penalty for this violation.

////

4. Respondent violated OAR 340-150-0325(2) by failing to have the corrosion protection system inspected and tested for proper operation by a qualified cathodic protection tester at least every three years. As described in Section II, Paragraph 6, Respondent did not have the corrosion protection system inspected and tested for over 4 years. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ hereby assesses a \$190 civil penalty for this violation.

5. Respondent violated OAR 340-150-0163(1)(a) by failing to post Respondent's annual operating certificate in a conspicuous location which is clearly visible at the Facility as described in Section II, Paragraph 10. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ hereby assesses a \$150 civil penalty for this violation.

#### IV. ORDER TO PAY CIVIL PENALTY AND TO COMPLY

Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is hereby ORDERED TO:

1. Pay a total civil penalty of \$19,032. The determination of the civil penalty is attached as Exhibit Numbers 1 through 5, which are incorporated as part of this Notice.

2. Respondent must take all actions necessary to bring the UST system into compliance with OAR Chapter 340, Division 150, within 30 calendar days of the date of this Notice, by:

(a) providing DEQ with either

(i) documentation, from a licensed service provider, that the suction piping which runs from the gasoline portion of the loading rack to the USTs is designed and constructed to meet the requirements of OAR 340-150-0410(6); or

(ii) the results of a line tightness test on this portion of the piping of the UST system as required by OAR 340-150-0410; **or**

(b) submitting a 30-day notice of permanent closure to DEQ and begin managing the USTs as set forth in OAR 340-150-0168 by emptying the USTs of all regulated substances as required by OAR 340-150-0163(3).

////

1 All submittals required under Section IV, paragraph 2 must be submitted to: Bob McCoy,  
2 Department of Environmental Quality, 2020 SW 4<sup>th</sup> Avenue, Suite 400, Portland OR 97201.

3 If you do not file a request for hearing as set forth in Section V below, your check or money  
4 order must be made payable to "State Treasurer, State of Oregon" and sent to the DEQ,  
5 Business Office, 811 S.W. Sixth Avenue, Portland, Oregon 97204. Once you pay the penalty,  
6 the Findings of Fact, Conclusions and Order become final.

7 V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

8 You have a right to a contested case hearing on this Notice, if you request one in writing.  
9 DEQ must receive the request for hearing **within 20 calendar days** from the date you receive  
10 this Notice. The request should include any affirmative defenses and either admit or deny each  
11 allegation of fact in this Notice. (See OAR 340-011-0530.) You must mail the request for  
12 hearing to: **DEQ, Office of Compliance and Enforcement - Appeals, 811 SW Sixth Avenue,**  
13 **Portland, Oregon 97204**, or fax to **(503) 229-5100**. An administrative law judge employed by  
14 the Office of Administrative Hearings will conduct the hearing, according to ORS Chapter 183,  
15 OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be  
16 represented by an attorney at the hearing, or you may represent yourself unless you are a  
17 corporation, agency or association.

18 If you fail to file a request for hearing in writing within 20 calendar days of receipt of the  
19 Notice, the Notice will become a final order by default without further action by DEQ, as per  
20 OAR 340-011-0535(5). If you do request a hearing but later withdraw your request, fail to attend  
21 the hearing, or notify DEQ that you will not be attending the hearing, DEQ will issue a final  
22 order by default pursuant to OAR 137-003-0670. DEQ designates the relevant portions of its  
23 files, including information submitted by you, as the record for purposes of proving a prima facie  
24 case.

25  
26 Date

12/30/10

27  
Leah E. Koss, Manager  
Office of Compliance and Enforcement

EXHIBIT NO. 1  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Failing to install and operate a method of release detection for piping, in violation of OAR 340-150-0410(2) and OAR 340-150-0555(1)(d).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0067(1)(e).

MAGNITUDE: The magnitude of the violation is moderate, pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the Department does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$500 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent was required to comply with all the release detection requirements by December 22, 1990. Respondent installed the equipment in October 2010.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the permittee. Respondent has had a permit for its facility and as such, has at least constructive knowledge that it must install line leak detectors on all pressurized piping.

"C" is Respondent's efforts to correct the violation and receives a value of -1 according to OAR 340-012-0145(6)(a)(C), because Respondent eventually made efforts to correct the violation by installing a line leak detector in October 2010.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of \$11,237. This is the amount Respondent gained by delaying spending approximately \$5,000 to install a line leak detector from December 1990 until October 2010. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$500 + [(0.1 \times \$500) \times (0 + 0 + 4 + 2 - 1)] + \$11,237$   
 $= \$500 + (\$50 \times 5) + \$11,237$   
 $= \$500 + \$250 + \$11,237$   
 $= \$11,987$

Per OAR 340-012-0150(5), DEQ is treating the violation as extending over as many days as necessary to recover the economic benefit of the violation. The violation was on-going from December 1990 until October 2010.

EXHIBIT NO. 2  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 2: Failing to conduct line leak detector operational testing and line tightness testing, in violation of OAR 340-150-0410(2)(c), 340-150-0410(3) and 340-150-0410(4).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0067(1)(j).

MAGNITUDE: The magnitude of the violation is moderate, pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the Department does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$500 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent was required to comply with all the release detection requirements by December 22, 1990 including line tightness testing.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the permittee. Respondent has had a permit for its facility and as such, has at least constructive knowledge that it must conduct line tightness testing.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because the violation or the effects of the violation could not be corrected or minimized.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$5,455. This is the amount Respondent gained by avoiding spending \$155 every three years, starting in December 1993 for line tightness testing on its suction piping (\$1,021) and by avoiding spending \$225 every year, starting in December 1991 for line tightness testing and line leak detector operational testing (\$4,434). This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$

$$\begin{aligned} &= \$500 + [(0.1 \times \$500) \times (0 + 0 + 4 + 2 + 0)] + \$5,455 \\ &= \$500 + (\$50 \times 6) + \$5,455 \\ &= \$500 + \$300 + \$5,455 \\ &= \$6,255 \end{aligned}$$

EXHIBIT NO. 3  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

- VIOLATION 3: Failing to continuously maintain a financial responsibility mechanism, in violation of OAR 340-150-0163.
- CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0067(1)(b).
- MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Respondent allowed its financial responsibility mechanism to lapse for less than two months, during which time, the information reasonably available to DEQ does not indicate that Respondent needed to use its financial responsibility mechanism.
- CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$
- "BP" is the base penalty, which is \$250 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.
- "P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.
- "H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.
- "O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent did not have a current valid financial responsibility mechanism from June 8 to August 2, 2010.
- "M" is the mental state of the Respondent and receives a value of 6 according to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. Reckless means the Respondent consciously disregarded a substantial and unjustifiable risk that the result of its conducts would occur. Respondent has had a permit for its facility. Each year, DEQ requires permittees to submit proof of a valid financial responsibility mechanism. In 2002, EPA issued Respondent a Notice of Noncompliance for failing to provide evidence of a current financial responsibility mechanism for this facility. Respondent knew that it

needed to continuously maintain a financial responsibility mechanism and by failing to renew its policy in a timely manner, Respondent disregarded a substantial and unjustifiable risk that its conduct would be a violation.

"C" is Respondent's efforts to correct the violation and receives a value of -2 according to OAR 340-012-0145(6)(a)(B), because Respondent made reasonable efforts to correct the violation by obtaining a financial responsibility mechanism in August.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$0 because DEQ finds that economic benefit gained by delaying obtaining a financial responsibility mechanism from June 2010 to August 2010 would be de minimis.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
=  $\$250 + [(0.1 \times \$250) \times (0 + 0 + 4 + 6 - 2)] + \$0$   
=  $\$250 + (\$25 \times 8) + \$0$   
=  $\$250 + \$200 + \$0$   
=  $\$450$

EXHIBIT NO. 4  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 4: Failing to have a corrosion protection system inspected and tested for proper operation at least every three years, in violation of OAR 340-150-0325(2).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0053(2).

MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Although Respondent failed to conduct the inspection and test conducted in 2008, a test conducted in 2009 shows that the corrosion protection system was operating properly and was likely operating properly prior to the inspection and test in 2009.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$125 for a Class II, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(B)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation occurred for more than 28 days. Respondent was required to conduct an inspection and test within three years of the test it conducted in February 2005, but did not conduct an inspection and test until May 2009.

"M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the permittee. Respondent has had a permit for its facility and as such, has at least

constructive knowledge that it must conduct a corrosion protection inspection and test every three years.

"C" is Respondent's efforts to correct the violation and receives a value of -2 according to OAR 340-012-0145(6)(a)(B), because Respondent made reasonable efforts to correct the violation by conducting the inspection and test.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$15. This is the amount Respondent gained by delaying, from February 2008 until May 2009, spending approximately \$125 to conduct a corrosion protection inspection and test. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$125 + [(0.1 \times \$125) \times (0 + 0 + 4 + 2 - 2)] + \$15$   
 $= \$125 + (\$12.50 \times 4) + \$15$   
 $= \$125 + \$50 + \$15$   
 $= \$190$

EXHIBIT NO. 5  
FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

- VIOLATION 5: Failing to post the annual operating certificate in a conspicuous location which is clearly visible, in violation of OAR 340-150-0163(1)(a).
- CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0053(2).
- MAGNITUDE: The magnitude of the violation is minor, pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health or the environment. Although the operating certificate was not posted properly during DEQ's inspection, Respondent is the only distributor who delivers fuel at this facility so that there was minimal risk that a distributor would deliver fuel without the operating certificate being valid.
- CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$
- "BP" is the base penalty, which is \$125 for a Class II, minor magnitude violation in the matrix listed in OAR 340-012-0140(5)(b)(B)(iii) and applicable pursuant to OAR 340-012-0140(5)(a)(E) because Respondent is the permittee of one UST facility.
- "P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.
- "H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.
- "O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(a)(A), because DEQ does not have sufficient information to allege that the violation existed on any date besides the date of the inspection.
- "M" is the mental state of the Respondent and receives a value of 2 according to OAR 340-012-0145(5)(a)(B), because Respondent had constructive knowledge (reasonably should have known) that its conduct would be a violation. Holding a permit that requires certain conduct is presumed to constitute at least constructive knowledge on behalf of the permittee. Respondent has had a permit for its facility and as such, has at least constructive knowledge that it must post the operating certificate in a conspicuous place.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because DEQ has insufficient information to make a finding under OAR 340-012-0145(6)(a)(A) through (6)(a)(C) or OAR 340-012-0145(6)(a)(E).

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a total value of \$0 because DEQ finds that economic benefit gained would be de minimis.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$125 + [(0.1 \times \$125) \times (0 + 0 + 0 + 2 + 0)] + \$0$   
 $= \$125 + (\$12.50 \times 2) + \$0$   
 $= \$125 + \$25 + \$0$   
 $= \$150$