

# DECORATIVE BARK PRODUCTS

Background Information concerning  
DEQ and Employee Misconduct

2000-2011

**BETTS Lesley**

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**From:** WEICK Rodney J  
**Sent:** Wednesday, October 15, 2008 3:54 PM  
**To:** DECONCINI Nina  
**Subject:** FW: Vanport/Decorative Bark

FYI- Dennis' response to Dan Murphy.

*Rodney Weick  
Stormwater and UIC Manager  
DEQ-NWR  
503-229-5886  
[weick.rodnev.j@deq.state.or.us](mailto:weick.rodnev.j@deq.state.or.us)*

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**From:** JURRIES Dennis  
**Sent:** Wednesday, October 15, 2008 1:14 PM  
**To:** MURPHY Daniel E  
**Cc:** WEICK Rodney J  
**Subject:** Vanport/Decorative Bark

The site received a NON for failure to submit sampling results for some sampling events from the period July 1, 2003 through June 30, 2004.

A compliance stormwater inspection was performed for the above site on 4/14/06 for which they were given a Warning Letter with opportunity to correct for failing to update their SWPCP to show the change in site controls, using the wrong BMPs, evidence of significant sediment leaving the site from the sediment on the ground, and for failure to apply for coverage under the NPDES 1200-C permit and not for any actual discharge or any Decorative Bark direct issues. They responded quickly and well in meeting all of the issues.

A compliance stormwater inspection was performed for the above site on 4/19/07 and the site was found to be in compliance. This investigation of the complaint was made by myself, Ann Cox, and Susan Patterson.

In general, we have never found a major issue or plume to my knowledge in any complaint response even in those were we arrived at the site within hours of the complaint. Susan Patterson and you have conducted inspections prior to these and as I recall, could not confirm the complaint issues. You should close out those complaints in the data base as investigate and unable to confirm any issues as far as water quality goes.

Black Liquor occasionally discharges for the site and is anaerobic bacteria etc. from the old saw mill debris that is all over the area and many feet thick in places but it is not frequently released as I have only seen it once in the many times that I have been out there and that was due to the installation of a new settling pond seeping stormwater in an area that previously had no water at that elevation.

*Dennis Jurries, PE*  
DEQ NWR Storm Water Engineer  
2020 SW 4th Ave.  
Suite 400  
Portland, OR 97201  
(503) 229-5937

**Denece Messenger**

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**From:** "Jim Everett" <jim.everett@vanport-intl.com>  
**To:** <klafky@lafky.com>; <denecemessenger@comcast.net>  
**Sent:** Tuesday, September 02, 2008 4:16 PM  
**Attach:** DOC080902-004.pdf  
**Subject:** RE: DEQ  
 Kevin & Denece,

I want to be factual about Dan Murphy's visit to Vanport on Thursday. In relaying information to Denece by phone I may have over spoke a bit. Adolf and I discussed again today.

Dan Murphy, from DEQ, parked near the Vanport office about 12:30 on Thursday, 8/28/08. He walked towards the Vanport kiln area with his camera to view the DBP yard. Adolf went to ask Dan what he was doing. I joined them soon after.

Dan said he was back working in the Gresham DEQ office and had taken over from Susan Patterson who had been assigned the Vanport site while he was on a special project. He said he had worked on the Vanport storm water management plan years ago.

He said he was documenting the air quality of the bark operation. He was looking for clouds of dust arising from loading, truck movements, or the screening machinery. He said a letter had been sent to DBP and a copy to Vanport. Neither of us have received anything recently. Perhaps he was referring to the 2006 letters DEQ sent. (see attached)

Dan indicated that he was not looking at water quality today, only air quality.

Dan commented that the current sweeper is inadequate. He said the sweeper needs to pick up dirt not just move it around. He said the sprinklers are inadequate. He commented that the bark piles seemed too high (over 2 stories).

Dan said he does not enter the property because he believes DBP shuts down when he arrives. He tries to observe from Spring St. and Burt Lane. Adolf says I was incorrect to say that Dan saw bark dust on Spring St. or Burt Lane. Instead Adolf feels Dan was only saying he watched from there.

Dan said because of a lack of response from DBP, DEQ has decided to only communicate with DBP only in writing. He said they are finished with any kind of outreach or advice. Later that day, by phone, Dan told me that because of her aggressive actions Denece was not welcome at their office.

While Dan seemed to be dissatisfied with DBP's operation in regards to air quality, the term "dogging" DBP may be an overstatement. (Although I am sure that's what Denece feels.) To me, Dan seemed to be relating that DEQ felt that, in regards to air quality, they had not seen any real changes at DBP over the years.

Regards,  
 Jim Everett  
 503-489-1181

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**From:** klafky@lafky.com [mailto:klafky@lafky.com]  
**Sent:** Saturday, August 30, 2008 9:33 AM  
**To:** Denece Messenger  
**Cc:** Jim Everett  
**Subject:** RE: DEQ

I will call Patterson/Juries Tuesday morning. Thanks.

## MURPHY Daniel E

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**From:** Derek deLandro [derekd@duckdelivery.com]  
**Sent:** Monday, June 23, 2008 12:40 PM  
**To:** MURPHY Daniel E  
**Cc:** Stephanie de Landro  
**Subject:** RE: DBP call and concern

Sounds good, just let me know if you need it and I will talk the Jim Tait our attorney. I don't believe that there will be any issue with giving you what is needed. Maybe after all these years DBP and the owner will finally comply and not feel that they are above the law. One year will be up in about 2 months, but they did appeal the judgment. This really should not affect what you are doing because there is still a judgment against DBP and the owner.

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**From:** MURPHY Daniel E [mailto:MURPHY.Daniel@deq.state.or.us]  
**Sent:** Monday, June 23, 2008 12:25 PM  
**To:** Derek deLandro  
**Subject:** RE: DBP call and concern

Thanks that may be our best evidence of a Nuisance Condition. Our Enforcement Department has a hard time getting judgments on nuisance conditions so every bit of evidence to support the claim helps and an actual judgment against them within the past year should be enough and possibly triggering a AQ permit and set standards that must be met for them to operate.

-----Original Message-----

**From:** Derek deLandro [mailto:derekd@duckdelivery.com]  
**Sent:** Monday, June 23, 2008 12:16 PM  
**To:** MURPHY Daniel E  
**Cc:** Stephanie de Landro  
**Subject:** RE: DBP call and concern

Hi Dan

As I mentioned in our phone call. A sizeable verdict was handed down against DBP and the owner for trespassing on our property with regard to the particulate matter. I am sure that you can have a copy of the verdict is needed.

Thanks Derek

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**From:** MURPHY Daniel E [mailto:MURPHY.Daniel@deq.state.or.us]  
**Sent:** Monday, June 23, 2008 12:06 PM  
**To:** Derek deLandro  
**Subject:** RE: DBP call and concern

Thank you and I will let her know when I am in the area and plan on coming by. Was planning on going out this week, like today but things are getting really crazy after this past weekend. Hopefully I'll be able to at least by tomorrow during the morning hours or just prior to noon. I'll call her and if you have a out door table or area showing the impacts that is even better. Thanks again Derick. I really hope we can get this issue better addressed this time around.

I plan on doing this strictly as a DEQ issue and any information requests from a regulatory aspect. I may need to address the suit brought against them to show "Nuisance" conditions that persist and are ongoing. If this doesn't show clearly a "Nuisance" Condition I don't know what would.

-----Original Message-----

**From:** Derek deLandro [mailto:derekd@duckdelivery.com]



## MURPHY Daniel E

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**From:** Derek deLandro [derekd@duckdelivery.com]  
**Sent:** Thursday, August 21, 2008 9:15 AM  
**To:** MURPHY Daniel E; GRUNOW Greg  
**Cc:** DECONCINI Nina; DRUBACK Ed; PATTERSON Susan  
**Subject:** RE: de Landro Attorney: James C. Tait & pictures

Hi Dan

As I mentioned before, we are willing to help with this, but please DO NOT name my family in any documents. We have had enough with being sued and taken to court and I will not subject my family to this. I am only helping because you came to me first several weeks ago. We are trying to put this horrible ordeal behind us

Thanks

Derek & Steph

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**From:** MURPHY Daniel E [mailto:MURPHY.Daniel@deq.state.or.us]  
**Sent:** Thursday, August 21, 2008 9:05 AM  
**To:** Derek deLandro; GRUNOW Greg  
**Cc:** DECONCINI Nina; DRUBACK Ed; PATTERSON Susan  
**Subject:** RE: de Landro Attorney: James C. Tait & pictures

Thank you for sending the photos Derek. Am currently drafting the PEN and Enforcement action at the direction of the AQ manager Greg Grunow and we should have that out by the end of the week and the Enforcement action should be drafted and sent next week. Thanks for all the help.

-----Original Message-----

**From:** Derek deLandro [mailto:derekd@duckdelivery.com]  
**Sent:** Thursday, August 21, 2008 8:30 AM  
**To:** GRUNOW Greg  
**Cc:** MURPHY Daniel E; DECONCINI Nina; DRUBACK Ed; PATTERSON Susan  
**Subject:** de Landro Attorney: James C. Tait & pictures

Good Morning Greg

This is the contact information for our attorney Jim Tait.

As I mentioned Friday, that I was going to clean our upper deck off. I did this and 3-4 days later it has several areas that clearly show the Bark Particulate Matter from DBP. These pictures were taken on 08-20-08. This is a weekly cleaning process or every few day's depending on days of sun and rain. As you mentioned, we should not have to endure this but we do.

Thanks for your help!

The de Landro family



# Oregon

Theodore R. Kulongoski, Governor

## Department of Environmental Quality

Northwest Region Portland Office

2020 SW 4th Avenue, Suite 400

Portland, OR 97201-4987

(503) 229-5263

Fax: (503) 229-6945

TTY: (503) 229-5471

April 30, 2010

CERTIFIED MAIL NO. 7007 0710 0000 1655 4568

Decorative Bark Products, Inc.

Attn: Denece Messenger

P.O. Box 556

Scio, OR 97374

RE: **Withdrawal of Pre-Enforcement Notices**

PEN-NWR-AQ-06-088

PEN-NWR-AQ-08-033

On September 20, 2006 and on September 5, 2008, the Department of Environmental Quality (DEQ) issued Decorative Bark Products, Inc. (Decorative Bark) Pre-Enforcement Notice Nos. PEN-NWR-AQ-06-088 and PEN-NWR-AQ-08-033 (PENs). Both of the PENs were issued for failing to take reasonable precautions to prevent fugitive dust emissions from the bark piles at the Decorative Bark facility in violation of OAR 340-208-0210(2). The PENs notified you that the matters were being referred to DEQ's Office of Compliance and Enforcement for formal enforcement action, which could result in assessment of civil penalties.

This letter is to inform you that DEQ will not be proceeding with a formal enforcement action at this time and that both PENs are hereby withdrawn. Please note that if violations of Oregon law occur in the future, you may be subject to formal enforcement, which may include civil penalties.

If you have any questions, please contact me at (503) 229-6271.

Sincerely,

Nina DeConcini

DEQ NW Region Administrator

cc: Rebecca Hillwig, DEQ

Peter Mohr, Tonkon Torp LLP



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[PROFILE](#)

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[PRICING AND SERVICES](#)

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[PHOTOMICROGRAPHY](#)

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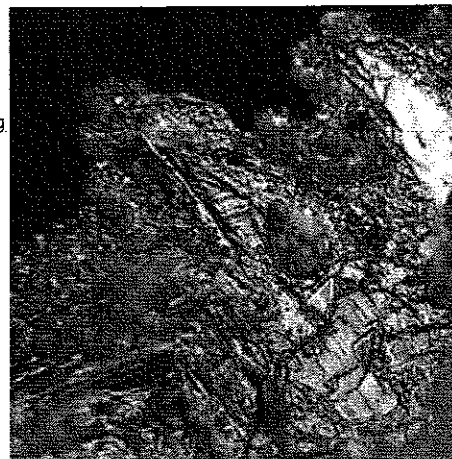
[CONTACT](#)

Chemoptix Microanalysis LLC  
2767 Robinwood Way  
Suite G  
West Linn, OR 97068  
503.636.9251

## Chemoptix Microanalysis

Chemoptix performs analysis of particle contaminants, their sources and mechanisms of generation for industrial, environmental and consultant clients. Working closely with clients to establish the time frame and environment where contaminants or process irregularities are being introduced. The work involves such parameters as material incompatibility, soot, biofouling, wear, temperature anomalies, corrosion/erosion, chemistry, materials in contact, explosions, transport mechanisms, precipitation and recrystallization. Also provided are asbestos analysis, quantitative microscopy, photomicrography, technical reviews and consultation.

Clients currently include: Boeing, Intel, Tektronics, Mobil/Exxon, Xerox, Fei/Philips, Freightliner, General Electric, Epson, Union 76, Hewlett Packard, Texaco, Boise Cascade, Westinghouse, Portland General Electric, Micropump, Sun Microsystems, U. S. Army Corps of Engineers and Oregon Department of Environmental Quality.



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July 25, 2007

Denise Messenger, *et al.*,  
Decorative Bark Products,  
Boring, OR

**Re: Comparisons of material from Bark Yard to water meter and window sill samples: Chemoptix #G-MIC-1880 through -1884.**

Denise,

The material cited herein, received at this laboratory on July 23 of this year, has been analyzed and compared microscopically. The results and accompanying photomicrographs should be of interest:

Summarily, although cork (bark) particles were found in all the samples, the window sill and water meter tape lift samples compared to each other more favorably than to the material sampled in the Bark Yard itself.

The samples cited are:

<i>Sample Identification/location</i>	<i>Sample Type</i>	<i>Chemoptix ID</i>
1- Bark Yard/Decorative Bark	Hand (grab)	G-MIC-1880
2- Road Side Debris Burt Lane	Hand (grab)	G-MIC-1881
3- Window Sill Debris Saginaw [Salem, OR]	Tape lift	G-MIC-1882
4- Water Meter Boring, Burt Lane	Tape Lift	G-MIC-1883
5- Window Sill Debris Norm Smith Residence	Tape Lift	G-MIC-1884

**Methods:**

Fine material from the hand (grab) samples were tape lifted from inside the bag and, like the tape lift samples, were mounted on glass microscope slides. These were immersed in a clean acetone rinse tank for one hour to dissolve the tape backing. All samples, including a rinse tank blank, were then mounted in refractive index oil with cover slips and examined with transmitted light using a research grade polarizing light microscope. They were also photographed using identical exposures and lighting. Amounts of bark-like (cork-like) tissue particles were estimated (volume/volume) using AGI visual estimation graphics.

**Results:**

- 1- *Bark Yard/Decorative Bark, G-MIC-1880*: This sample appeared to be comprised almost entirely of plant tissue including cork (bark) as well as remnants of woody tissues. The material was a rich brown color.
- 2- *Road Side Debris Burt Lane, G-MIC-1881*: This sample also was predominantly (>95%) plant tissues, including cork (bark) although the species range and tissue type appeared to be for the most part different. It was also a rich brown color. The sample also contained mineral grains from igneous rocks, tire wear, debris from fungi, and chemically separated cellulose of a type derived from fabrics.
- 3- *Window Sill Debris Saginaw, G-MIC-1882*: This particle array also contained bark-like particles (~3%). The sample also contained dead and dying algae (also a rich brown color), pollen, spores, fungal artifacts, combustion products, tire wear, plant phytoliths, mineral grains from a variety of sources, fiberglass, coating over sprays, plant trichomes and chemically separated cellulose of a type used in fabrics.
- 4- *Water Meter Boring, Burt Lane G-MIC-1883*: This particle suite also contained bark-like particles (~5%) including species not seen in Samples 1 and 2, as well as dead and dying algae, spores, fungal artifacts (including dark brown ones), combustion products, tire wear, plant phytoliths, mineral grains and plant trichomes.
- 5- *Window Sill Debris, Norm Smith Residence, G-MIC-1884*: This particle array contained bark-like particles as well (~5%). The sample also contained dead and dying algae, pollen, fern spores, fungal artifacts (including brown), combustion products, tire wear, plant phytoliths, fiberglass/glass wool, mineral grains, starch, coating over sprays, plant trichomes and fibers from fabrics.

Thank you for your patience during our investigation into this interesting material. If you have questions require hard data or elaboration on any aspect of this project, feel free to call (503) 636-9251, or email me at [stancassell@chemoptix.com](mailto:stancassell@chemoptix.com).

Respectfully Submitted,

Stan Cassell,  
Microanalyst

Attachments

**Denece Messenger**

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**From:** "Stan Cassell" <stancassell@chemoptix.com>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>  
**Sent:** Monday, September 15, 2008 8:44 AM  
**Subject:** Re: Decorative Bark Products  
Hello Denece:

It is regrettable that you are still struggling with this.

The salient piece here is that a lot of neighborhoods' landscaping has bark --and unless you are producing and installing *all* of it, finding bark within a dust sample provides no stronger a corollary to you than any carbon soot similarly recovered necessarily being from *your* car. We established that your neighborhood had no more dust from bark than areas well away from your place of business --a Salem neighborhood, if I recall, was used as a control. It would seem DEQ would have to establish a plume with you as a point source to make any valid point.

Wednesday is good pretty much anytime; so is Thursday during the day. A little lead time is preferable, but it need not be more than a few hours if indeed you catch me here in the lab.

Regards,

Stan  
503.636.9251

On Sun, Sep 14, 2008 at 7:18 PM, Denece Messenger <denecemessenger@comcast.net> wrote:  
Stan:

You may remember me from two years ago (Decorative Bark Products vs DEQ and the one neighbor on Burt Lane). DEQ is making a number of unfounded claims: that they are looking at window sills and know definitively that it is bark particulate from Decorative Bark. The eye ball test is the science being used. We may be asking you to help get some science in front of the higher ups so they understand we did the science on this and found that the bark on Burt did not match Decorative Bark Products. I am asking for a meeting today. Would you be good enough to let me know your availability this week....Wednesday, Thursday?

Regards,  
Denece



# ALBERT G. DUBBLE, P.E., INC.

## ACOUSTICAL CONSULTANT

16905 NE KINGS GRADE, NEWBERG, OREGON 97132 agd931@hevanet.com 503-538-8044 FAX 503-537-8044

MEMBER - INSTITUTE OF NOISE CONTROL ENGINEERING

July 23, 2007

Mr. Kevin Lafky, Attorney-at-Law  
429 Court St. NE  
Salem, OR. 97301

### Re: Decorative Bark Mill – Boring, OR. – Noise Study

Dear Mr. Lafky:

On July 20 and today, I took environmental noise measurements at the subject mill to determine operating noise exposure in the adjacent residential neighborhood on Burt and Parker Lanes. I have two sets of data to present. The first noise measurements were taken at 1030 in the morning on July 20 using my Larson-Davis Labs Model LxT, Type I, precision sound level meter, a hand held device. The measurements are as follows;

Delandro residence at 12799 Burt Lane; front driveway by the road – average noise level = 49 dBA;

Delandro residence rear fence line about 10 feet from a pool pump which was fairly quiet = 46 dBA average level. These two sites do not border the bark mill property line but were taken to determine compliance with the State DEQ noise standard.

Jones residence behind Delandro towards the mill property line, on Parker Lane – 47 dBA average noise.

The second set of measurements were taken using both the hand-held instrument mentioned above and an automatic noise analyzer by Larson-Davis Labs, the Model 700. The noise analyzer was placed about 10 feet inside the bark mill property line near the row of trees, and the mobile home at 28784 SE Parker Lane. The analyzer ran for approximately one-half hour and the attached printout shows the noise data. Both automatic and manual measurements were recorded at this location. The L50 and L10 statistical noise levels are what our State DEQ uses in their noise standard. The descriptors and levels are shown below;

	DEQ Standard Levels	
	Daytime	Nighttime
L10	60	55 dBA
L50	55	50 dBA

For your information, the L50 is the fiftieth percentile and corresponds to 30 minutes out of any test hour. Likewise, the L10 is the tenth percentile and corresponds to 6 minutes out of the test hour. Thirty and six minute periods however are not required to determine the statistical quantities. They can be determined accurately in 10 to 15 minutes if there are no drastic changes to the noise climate.

Nighttime hours are 10 pm to 7 am and daytime hours are then 7 am to 10 pm. Since the bark mill does not start its machinery until 7 am the daytime hours apply to this case. The data sheet shows that the L50 level was 50 to 51 dBA, and fully meets the DEQ daytime standard. The 4th sample on the data sheet is with the bark mill down, and the level dropped by only 4 to 5 dBA. This shows a very low contribution by this mill to the local environment. The L10 descriptor also shows complete compliance with noise between 52 and 54 dBA compared to the standard DEQ level of 60 dBA daytime.

The hand-held noise measurements show that this bark mill is also in complete compliance with the Clackamas County property line noise standard of 60 dBA maximum, with noise running between 48 and 53 dBA. Bird calls and aircraft noise causes increases at this site to 62 dBA.

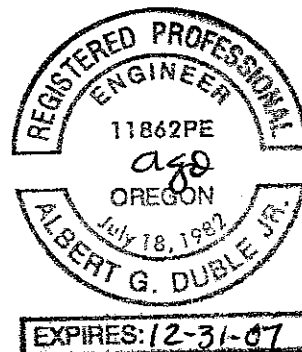
Call if you have any questions.

Very truly yours,

*Albert G. Duble*

Albert G. Duble, P.E.  
Acoustical Engineer  
Emeritus Mem. INCE

cc. Denece Messenger, Mill Manager





DATA REPORT

07/23/07 13:24:33 LARSON-DAVIS LABS -- MODEL 700 SN 700B1213 PAGE 1

Dose 38016.0  
Proj 65535.0  
SEL 102.6  
LVL 69.9  
Time 0000.31.04  
Lmin 42.5  
Lmax 106.0  
Lpk 132.5  
QVLD 01  
RMS Ex 0001  
Pk Ex 0001  
R/S 04  
Memory 5870.0  
L01 58.5  
L10 53.5  
L50 50.5  
L90 48.0

Overall Percentiles

SETUP DATA

\*\*\*\*\*

Detc FAST  
Wght A  
Pk Unwgt =0

Crit 32.0  
Thld 32.0  
Exch 3  
LDL =0

RMS Thld 32.0  
Pk Thld 32.0  
Hyst 4

Run date 00/00  
Stop date 00/00  
Run time 1 99:00  
Stop time 1 99:00  
Run time 2 99:00  
Stop time 2 99:00

Excd =0

Intv =1  
Time 00:30  
Auto-Stop =0  
Ln =1

Hist =0  
Save Pk =0  
Per 60.0

Cal 15.0  
Ver 1.410

2

# INTV REPORT

LARSON-DAVIS LABS -- MODEL 700  
07/23/07 13:24:43 SN 700B1213

PAGE 2

Cnt	LVL	SEL	Lmax	Lpk	Lmin	Date	Time	Dur	h:m	Ex	Pk	Ov
1	94.5	96.5	94.5	96.5	94.5	22 JUL	20:12:40	0:00	h:m	1	1	0
			L01 = 94.5		L10 = 94.5		L50 = 94.5			L90 = 94.5		-CAL
2	70.5	101.0	106.0	132.5	47.0	23 JUL	10:16:00	0:19	h:m	0	0	1
			L01 = 60.0		L10 = 54.0		L50 = 51.5			L90 = 49.5		ON
3	50.5	77.5	66.0	75.0	47.0	23 JUL	10:36:05	0:07	h:m	0	0	0
			L01 = 56.5		L10 = 52.0		L50 = 50.0			L90 = 49.0		ON
4	47.0	70.5	59.5	75.5	42.5	23 JUL	11:00:42	0:03	h:m	0	0	0
			L01 = 53.0		L10 = 49.0		L50 = 46.5			L90 = 45.0		

99999

↑ MILL OFF

# DELANDRO REAR FENCE 2

User:

Location:

Job Description:

20 July 2007 01:57:39

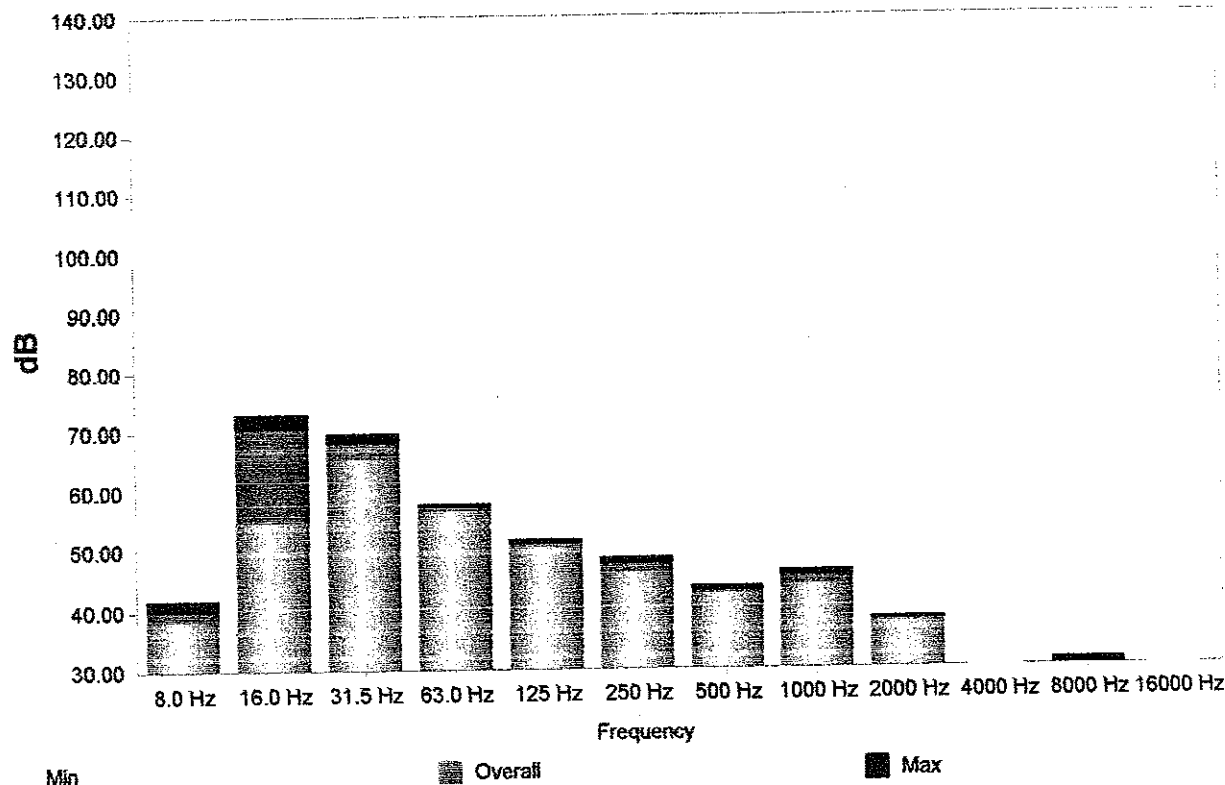
Serial Number:	01135	Start:	2007 Jul 19 13:39:39
Model Number:	LxT1	Stop:	2007 Jul 19 13:39:39
RMS Weighting:	A Weighting	Run Time:	00:00:00
Peak Weighting:	A Weighting	Pre Calibration:	2007 Jul 09 13:00:42
Detector:	Fast	Post Calibration:	None
Preamp:	PRMLXT1	Deviation:	—
Integration Method:	Linear	OBA Range:	Low

Leq:	47.6 dBA	L1f:	200.0 dBA
Lmax:	@ 13:39:39 47.6 dBA ✓	L1f:	50.4 dBA
Lpeak (max):	—	L1f:	50.4 dBA
Min:	@ 13:39:39 47.1 dBA	L1f:	47.5 dBA
Event Counts (SPL Trigger 0.0 dB):	1	L1f:	47.3 dBA
Event Counts (SPL Trigger 20.0 dB):	1	L1f:	46.8 dBA
Event Counts (Lpeak Trigger 140.0 dB):	0		

Dose:	0.0	0.0 dBA	Lep (8):	-3.0 dBA
Projected Dose:	0.0	0.0	LE:	41.6 dBA
TVWA (Projected):	47.6	— dBA	SE:	0.0 µPa²hr
TVWA (8):	-3.0	-85.1 dBA	SE(8):	183.9 µPa²hr
Name:	OSHA-1	OSHA-2	SE(40):	919.4 µPa²hr
Exchange Rate:	3	5		
Threshold:	20	80 dBA		
Criterion Level:	90	90 dBA		
Criterion Duration:	8	8 hours		

Note:

## 1/1 Octave



ALBERT G. DUBLE, P.E. INC.  
ACOUSTICAL ENGINEER

COMPANY QUALIFICATION INFORMATION

The firm is a small corporation providing acoustical engineering services in the sub-fields of architecture, mechanical and HVAC noise control, environmental noise, legal consulting, industrial noise control, and sound reinforcement design. The President and principal consultant, Albert G. Duble, P.E., has over 30 years experience in the fields of acoustics, vibration and general noise control. The firm has been a private engineering practice for 20 years, with previous experience working with other consulting firms, aerospace, and the Oregon Highway Division since 1971. Mr. Duble writes and grades papers for the State Board of Engineering acoustical examination.

Major work efforts have been with local government agencies, pulp and paper and wood processing industries, food processing, power and light, and electronics plants. Specific clients have been the Oregon and Washington State Highway Agencies, their individual Occupational Health Agencies, Washington State Attorney Generals Office, U.S.D.O.L.-OSHA Training Institute, the Hewlett Packard Company, Intel and Tektronix, ARCO and Union 76 Oil Companies, Boise Cascade, Weyerhaeuser, Georgia Pacific, City of Boise, and other major consultants such as SJO Consulting Engineers, B.E. & K Engineering (Birmingham, AL), and Brown & Root of Houston, Texas, Arizona Electric Cooperative, City of Tacoma Power & Light, Portland General Electric and Calpine Energy Co.

Mr. Duble was the original acoustical engineer for the State of Oregon Highway Division in Salem, OR., and helped to establish their noise environmental impact analysis capability in the early 70's. Mr. Duble presents technical seminars on industrial and environmental noise control and has served as an expert witness many times. He holds a B.S. Degree in Industrial Engineering/Electronics, and has attended many advanced training seminars in different fields of acoustics. He taught seminars for six years for OSHA.

The firm makes extensive use of computer modeling programs to help solve problems in highway, industrial and HVAC mechanical noise control.

Modern digital acoustic and vibration instruments and analyzers are available for field noise investigations.

16905 NE Kings Grade

Newberg, Oregon 97132

Tel: 503-538-8044

agd@hevanet.com

FAX: 503-537-8044

**PARTIAL CLIENT LIST**

**ALBERT G. DUBLE, P.E. INC. - ACOUSTICAL ENGINEER**

Boise Corporation	Weyerhaeuser	Georgia Pacific
International Paper	Louisiana Pacific	Medford Corp.
Ore-Ida Foods	Lamb Weston	Carnation Co.
Nabisco Bakery	S.P. Newsprint	Blue Heron Paper
West Linn Paper	State of Washington	State of Oregon
Hewlett-Packard	Tektronix Inc.	Intel Corp.
McDonalds Inc.	Foodmaker Inc.	Cascade Steel
Esco Corp.	PGE Inc.	Calpine Energy Sys
Conagra Malts	Durametal Inc.	Potlatch Corp.
Lowes Stores	Wal-Mart Inc.	Winco Foods
Albertsons	Oregonian News	Shindaiwa Tools
Clark College	Oregon State Univ.	U of Oregon
SBA Antennas Inc.	Jackson County Or.	Plum Creek Corp.
Wah Chang Albany	Precision Castparts	Tillamook Creamery
Columbia Corrugated Box	CSCB Architects, Kuni Auto Group	
USDOL-OSHA	Shilo Inns	City of West Linn

16905 NE Kings Grade, Newberg, OR 97132  
Tel: 503-538-8044 FAX: 503-537-8044  
E-Mail: agd931@hevanet.com



**Denece Messenger**

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**From:** "Leavengood, Scott" <scott.leavengood@oregonstate.edu>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>; "Knowles, Chris" <Chris.Knowles@oregonstate.edu>  
**Sent:** Tuesday, August 04, 2009 9:51 AM  
**Subject:** RE: Follow up

Good morning Denece:

And thanks very much for the flashlight. What a great tool! I'm glad Chris was here to show me the features since I'm not sure I could have figured out what the 'other end' was for.

I address each of your questions below.

Scott

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**From:** Denece Messenger [mailto:denecemessenger@comcast.net]  
**Sent:** Tuesday, August 04, 2009 8:19 AM  
**To:** Knowles, Chris; Leavengood, Scott  
**Subject:** Follow up

Gentlemen:

As I mentioned, we were hoping we could get your perspective on our site visit. I understand you are both busy and I respect that. If you could make some quick observations. An email response is perfect.

1) What was your general impression of Decorative Bark Products operation? Were we performing within the industry standard, above the industry standard, below the industry standard? How do we compare to other bark yards as far as cleanliness and dust?

*Answer*  
 I'd say above the industry standard. The operations I've seen (including a new business in Corvallis from whom I purchased bark for my home a couple weekends ago) are quite simple - the bark is typically stored on some sort of a solid surface such as concrete or asphalt. Generally the rest of the facility isn't paved; of course, this leads to extra dust being produced from the unpaved surfaces during dry weather. If I recall correctly, your entire facility was paved. Further, I've never seen water used nor can I recall seeing a berm to keep down dust and noise. While we did see some dust blowing around at your facility, I do believe you are making great efforts to control dust.

2) Did you see "reasonable precautions" in place?

*Answer*  
 Yes.

3) Were the 20 foot sprinklers doing the job intended of keeping the working floor wet? What do you think would be more effective the sprinklers with the 180 degree osilating sprinkler head at full pressure or using misters or foggers?

*Answer*  
 From what I recall, the sprinklers were doing a pretty good job of keeping the area around them wet as well as areas more distant wet via runoff. To get more of the area wet, it seemed the water truck you had might be needed. In fact, might periodic passes with the water truck alone meet the objectives of keeping the asphalt wet?

4) The wind sock which was implemented by Decorative Bark Products which captured the bark fines on the end of the screen plants....was it doing its job? The implementation of misters and foggers at the end of the conveyor...would that be standard operating procedure in the industry. Would it be necessary given that the wind sock was already in place?

*Answer*  
I need some clarification on 'wind sock.' I think of that as the devices used at airports to monitor wind direction and to some extent wind speed. Are you talking about a wind sock in that regard so you can determine when it might be too windy to be operating (and the wind is blowing towards the nearby residences) or the cloth you had on the screen machine? Reading the question, I assume it's the latter. And yes, that device did seem to me to be limiting the distribution of the fines. I cannot recall having seen such a device anywhere I've visited; and given the apparent effectiveness, I can't see that misters and foggers would be helpful.

5) Any other observations that would be helpful in assessing how Decorative Bark Products compares with others in the industry?

*Answer*  
Dust is inevitable in any wood products operation that does some form of processing (sawing, grinding, etc.). From what I saw at your facility, it seemed to me that you have made significant efforts to minimize dust.

Thank you for your time and consideration.

Denece Messenger  
President - Decorative Bark Products, Inc.  
503-510-4029  
[denecemessenger@comcast.net](mailto:denecemessenger@comcast.net)



To: Dan Murphy, Eastside Complaints Coordinator  
Northwest Region  
From: Ed Druback, Air Quality Program Manager  
Northwest Region  
Date: 10/31/2008  
Re: Work Improvement Plan

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Dan:

As you and I have discussed over the last few months in our meetings, the Complaints Coordinator position for NWR is the most visible "face" of DEQ in the communities that make up NWR (outside of the Vehicle Inspection Program in the Portland metro area). As a Complaints Coordinator you are routinely required to communicate with a wide range of internal and external customers. In effect, you have to not only master the art of communication to be effective in your position, but have to be able to communicate effectively with a wide range of audiences. No matter which of these diverse audiences you are addressing; there is a need to constantly communicate in a clear, concise and accurate manner.

Recently, I have noticed some internal and external documents you have written contained avoidable errors. The documents contained both factual errors and grammatical errors that clearly should have been caught and corrected before being distributed. This is important for all of us, even when the first person the document is being distributed to is internal and the document is marked draft, to present a well thought out and accurate document.

Another essential component of being the public face of DEQ in the Complaints Coordinator position is there must be a continuous commitment to providing a high level of customer service. As I said in your last annual performance review:

(After returning to the Complaints Coordinator from his rotational assignment in HOT...)  
Initially Dan was quite positive and desired to make the best of this return to the Complaints Coordinator position. He most definitely returned with a renewed enthusiasm. Now that he has been back for a year his enthusiasm appears to be waning to a degree.

The recent meeting you and I attended with three officials from Altec was the type of effective engagement and communication style I expect from you. I observed that you were very engaged and thoughtful and demonstrated commitment and enthusiasm for your position with DEQ. However, some recent internal communications with other staff is indicative of the fact that your enthusiasm and commitment for the job has indeed waned again.

Objectives of this work improvement plan are:

- Improving your written communication skills and improving all of your communications internally and externally
- Demonstrating your commitment to your current position as Complaints Coordinator by improving communication when you are going to be absent from work.

## MURPHY Daniel E

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**From:** Derek deLandro [derekd@duckdelivery.com]  
**Sent:** Monday, June 23, 2008 12:40 PM  
**To:** MURPHY Daniel E  
**Cc:** Stephanie de Landro  
**Subject:** RE: DBP call and concern

Sounds good, just let me know if you need it and I will talk the Jim Tait our attorney. I don't believe that there will be any issue with giving you what is needed. Maybe after all these years DBP and the owner will finally comply and not feel that they are above the law. One year will be up in about 2 months, but they did appeal the judgment. This really should not affect what you are doing because there is still a judgment against DBP and the owner.

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**From:** MURPHY Daniel E [mailto:MURPHY.Daniel@deq.state.or.us]  
**Sent:** Monday, June 23, 2008 12:25 PM  
**To:** Derek deLandro  
**Subject:** RE: DBP call and concern

Thanks that may be our best evidence of a Nuisance Condition. Our Enforcement Department has a hard time getting judgments on nuisance conditions so every bit of evidence to support the claim helps and an actual judgment against them within the past year should be enough and possibly triggering a AQ permit and set standards that must be met for them to operate.

-----Original Message-----

**From:** Derek deLandro [mailto:derekd@duckdelivery.com]  
**Sent:** Monday, June 23, 2008 12:16 PM  
**To:** MURPHY Daniel E  
**Cc:** Stephanie de Landro  
**Subject:** RE: DBP call and concern

Hi Dan

As I mentioned in our phone call. A sizeable verdict was handed down against DBP and the owner for trespassing on our property with regard to the particulate matter. I am sure that you can have a copy of the verdict is needed.

Thanks Derek

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**From:** MURPHY Daniel E [mailto:MURPHY.Daniel@deq.state.or.us]  
**Sent:** Monday, June 23, 2008 12:06 PM  
**To:** Derek deLandro  
**Subject:** RE: DBP call and concern

Thank you and I will let her know when I am in the area and plan on coming by. Was planning on going out this week, like today but things are getting really crazy after this past weekend. Hopefully I'll be able to at least by tomorrow during the morning hours or just prior to noon. I'll call her and if you have a out door table or area showing the impacts that is even better. Thanks again Derick. I really hope we can get this issue better addressed this time around.

I plan on doing this strictly as a DEQ issue and any information requests from a regulatory aspect. I may need to address the suit brought against them to show "Nuisance" conditions that persist and are ongoing. If this doesn't show clearly a "Nuisance" Condition I don't know what would.

-----Original Message-----

**From:** Derek deLandro [mailto:derekd@duckdelivery.com]

**Sent:** Monday, June 23, 2008 12:01 PM  
**To:** MURPHY Daniel E  
**Cc:** Stephanie de Landro  
**Subject:** RE: DBP call and concern

Hi Dan

I have no issue with you personally being on our property. I only ask that you call Steph 503-936-6176 or I before hand. When on our property if you go toward the back right of our driveway in the corner by the fence you can clearly see DBP. As I observed an hour ago the front loader moving and kicking up particulate matter. I also have pictures from this point showing particulate matter blowing in the air from just the wind and from machinery moving around. Their busy time of day is from about 6:30 to noon then early afternoon. It is interesting to see what they will do at times when being observed. It is like a cat & mouse game with her.

Steph can show you several areas around our home that are being impacted.

Thanks for your help!

Derek & Steph

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**From:** MURPHY Daniel E [mailto:MURPHY.Daniel@deq.state.or.us]  
**Sent:** Monday, June 23, 2008 8:28 AM  
**To:** Derek deLandro  
**Subject:** RE: DBP call and concern

Ed has instructed me to go ahead and look into the situation once again and run with Enforcement Actions against DBP for any observed site violations. I'll hopefully be in the area several times this week and will take a look at what is out there and go with that.

As before, would you allow me access to you property to observe the operation from your side of the line? It will make things a bit easier when I can show a deposition once again on your property. Thanks Derrick, hope you all had a great weekend.

-----Original Message-----

**From:** Derek deLandro [mailto:derekd@duckdelivery.com]  
**Sent:** Friday, June 20, 2008 8:36 AM  
**To:** MURPHY Daniel E  
**Subject:** DBP call and concern

Good Morning Dan

Following up from your phone call on Tuesday afternoon. How did your meeting with Ed go on Wednesday morning and what was the outcome? Say hi to Ed and Susan for me. As always we appreciate any help regarding the DBP issue and concern. I did look out the back yard this morning and I see what you were talking about. This week the piles are larger and grow larger as each week goes by. With summer starting tomorrow it will be interesting how they set up sprinkler to control such a large area.

Thanks

Derek & Steph

## MURPHY Daniel E

**From:** Derek deLandro [derekd@duckdelivery.com]  
**Sent:** Thursday, August 21, 2008 9:15 AM  
**To:** MURPHY Daniel E; GRUNOW Greg  
**CC:** DECONCINI Nina; DRUBACK Ed; PATTERSON Susan  
**Subject:** RE: de Landro Attorney: James C. Tait & pictures

Hi Dan

As I mentioned before, we are willing to help with this, but please DO NOT name my family in any documents. We have had enough with being sued and taken to court and I will not subject my family to this. I am only helping because you came to me first several weeks ago. We are trying to put this horrible ordeal behind us

Thanks

Derek & Steph

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**From:** MURPHY Daniel E [mailto:MURPHY.Daniel@deq.state.or.us]  
**Sent:** Thursday, August 21, 2008 9:05 AM  
**To:** Derek deLandro; GRUNOW Greg  
**Cc:** DECONCINI Nina; DRUBACK Ed; PATTERSON Susan  
**Subject:** RE: de Landro Attorney: James C. Tait & pictures

Thank you for sending the photos Derek. Am currently drafting the PEN and Enforcement action at the direction of the AQ manager Greg Grunow and we should have that out by the end of the week and the Enforcement action should be drafted and sent next week. Thanks for all the help.

-----Original Message-----

**From:** Derek deLandro [mailto:derekd@duckdelivery.com]  
**Sent:** Thursday, August 21, 2008 8:30 AM  
**To:** GRUNOW Greg  
**Cc:** MURPHY Daniel E; DECONCINI Nina; DRUBACK Ed; PATTERSON Susan  
**Subject:** de Landro Attorney: James C. Tait & pictures

Good Morning Greg

This is the contact information for our attorney Jim Tait.

As I mentioned Friday, that I was going to clean our upper deck off. I did this and 3-4 days later it has several areas that clearly show the Bark Particulate Matter from DBP. These pictures were taken on 08-20-08. This is a weekly cleaning process or every few day's depending on days of sun and rain. As you mentioned, we should not have to endure this but we do.

Thanks for your help!

The de Landro family

*now I Derek  
gets all the  
inside info*

*even before  
me*

*Are they using Derek's photos - objection?*

September 26, 2008

*Via Certified Mail*

Dan Murphy  
Department of Environmental Quality  
Northwest Region - East Side Office  
1550 NW Eastman Parkway, Suite 290  
Gresham, OR 97030

**Re: AQ-Clackamas County  
Decorative Bark Productions Inc.  
Pre-Enforcement Notice  
PEN-NWR-AQ-08-033**

Dear Mr. Murphy:

I am writing this letter on behalf of my client, Decorative Bark, in response to your letter of September 5, 2008. In your letter, you stated, on page 6, that if Decorative Bark believed any of the facts in your letter were in error, we should provide written information to you in that regard. You did not provide a deadline for that submission. Please note that Decorative Bark's correct address is PO Box 1198, Tualatin, 97062. In the cc of your letter, you mention Ron Basque, who has not been involved with Decorative Bark for several years. Please remove him from your records in reference to this company.

On page 1 of your letter, and in the so called site observations listed on pages 2-4, there is a notable lack of specificity regarding the observations. Please provide us with any notes or direct work product supporting the site observation claims. Specifically, we need to know exactly what happened when, and whether there exists any objective evidence in support of the claims, such as photographs, video tape, scientific testing, or otherwise. I would appreciate receiving any of the inspector notes from these site observations, or in any other way, related to Decorative Bark. Clearly, the four bullet points on page 1 of your letter are not correct, and are not even consistent with the site observations contained later in the letter.

On page 2 of your letter, in reference to "reasonable precautions" under the administrative rule, Decorative Bark is making all reasonable precautions. Please let me know whether the agency has defined "reasonable precautions" any further. I know that this notice that have you sent asks that Decorative Bark do certain remediation work that other bark processors are not

being required to do. Why is that reasonable for Decorative Bark, but not other bark processors? It is not appropriate to subject Decorative Bark to different standards than other bark processors.

Please recall that Decorative Bark is being operated on a site that has been in industrial use for a century. To the extent that there are residential users near Decorative Bark at this time, those residential users have moved in after the industrial site was long established. No residential user could reasonably claim, at this point, that they were unaware of the industrial use nearby. This industrial site used to be much more significant in terms of time, noise, and environmental impact, when it was a lumber mill. The uses that now exist on site are much less environmentally significant than in the past.

Under the administrative rule, it is not reasonable to use excessive water or chemicals to control bark dust. The use of water will effect the storm water management plan that DEQ has established for the site. Bark cannot be enclosed in the way that the rule suggests. Therefore, these are not reasonable. There is no evidence that Decorative Bark has created particulate matter larger than 520 microns in size. If you have such evidence, please provide it.

Under the June 3 site observation, the statement that there was "high potential for fugitive dust to be blown off site" shows that no dust was being off site. Therefore, such a statement is irrelevant. The same statement exists under the June 17 observation. On June 24, there is no dust migration, and simply no violation. On July 1 there is a claim that fugitive dust migrated off the site. Please specify where this occurred. Without more information, it is impossible to respond. On July 22, there is an inference that Decorative Bark somehow regulates its operations based on DEQ inspector site visits. Nothing could be further from the truth. Decorative Bark operates on a normal daily schedule, beginning early in the morning and operating until and through the afternoon. Because DEQ inspectors have failed to identify themselves to any Decorative Bark employee, it would be impossible for Decorative Bark to moderate its operations anyway. On the same date, there is a statement that bark dust impacted residents on Burt Lane. Please identify what residents, and in what way. Please provide any scientific evidence that this impact came from Decorative Bark.

On July 30, you state that you took a dust sample from a private residence on Burt Lane. What procedures were followed to ensure the integrity of that sample? Was there any scientific testing of the sample? What are the results? Please provide. I ask similar questions in reference to the site inspection of August 28. What properties were visited, and where they inhabited at the time? Is there any photographic or video evidence to support any of these claims in the site observations?

Under classification of violations, page 4, there is statement about bark dust deposition greater than 250 microns. On which visit was that noted? Where is the proof?

On page 5, you state that outreach and technical assistance were provided to Decorative

Letter to DEQ

Page 3

Bark in the past. As you know, Decorative Bark disagrees with that assertion. Denece Messenger spoke with Susan Patterson in the past, and Patterson simply refused to provide any assistance, or any guidance. If DEQ is willing to provide outreach and technical assistance, why is DEQ conducting surreptitious visits to the site without identifying itself? If DEQ is truly interested in operating in good faith, why does it not contact Decorative Bark's owner and make arrangements to address these issues?

On page 5, you refer to an enforcement action dated September 20, 2006, although I do not believe there was any enforcement action on that date, or otherwise. I believe it was a "pre-enforcement notice." In response to that pre-enforcement notice two years ago, my client and I met with Ed Druback and explained to him that we have done all reasonable actions to respond to any issues raised by DEQ. We have heard nothing for two years, until this letter.

On page 5, you refer to "the unabated operating activities conducted at Decorative Bark." Again, these operating activities are identical to that of all other bark processors in Oregon.

On page 5-6, you request that corrective actions be employed. Decorative Bark is already doing number 2, 3, 4, 5, 8 and 9. Decorative Bark does have a regular schedule of sweeping and watering the property. Typically, the sweeping and watering occurs early in the morning, when the dew point is appropriate. There is a potential conflict between certain actions that you request and corrective action number 9, compliance with the storm water control plan. Most of the suggestions you make simply involve dumping water on the bark at every stage. Obviously, that creates run off, which may violate the storm water control plan. You do not suggest any way in which those conflicting goals can be reconciled.

Decorative Bark remains willing to work with DEQ in a constructive manner, but the method of surreptitiously visiting Decorative Bark, failing to interact with its owner, and then sending this pre-enforcement notice without any attempt at outreach or resolution, suggests that DEQ does not share that goal. If the agency is truly interested in a constructive resolution of these concerns, DEQ will make sure that Decorative Bark is treated consistently with other bark producers in Oregon, and DEQ will attempt to meet constructively with Decorative Bark to determine whether there exists a factual basis for these claims and, if so, what the most constructive way would be to resolve them. Thank you for your attention to this matter.

Sincerely,

LAFKY & LAFKY

*Dictated but not read to avoid delay*

Kevin T. Lafky

emd

Letter to DEQ

Page 4

cc: Denece Messenger, Decorative Bark Products Inc.  
Paul Owens and Todd Siler, Vamport Mills  
Oregon Division of State Lands  
Clackamas County Zoning and Planning Division  
Clackamas County Community Environment  
Department of Land Conservation & Development  
Office of Compliance and Enforcement, DEQ Headquarters  
Office Craig Ball, Oregon State Police  
DEQ Western Region Air Quality Office  
Oregon OSHA





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1 MR. LAFKY: Nothing further.

2 MR. TAIT: I do have another question.

3 THE COURT: All right.

4 **REDIRECT EXAMINATION**

5 BY MR. TAIT:

6 Q. Does it matter to DEQ if the illegal particles from

7 this mulch operation go on neighbor A or neighbor B or --

8 A. No.

9 Q. -- neighbor C?

10 MR. LAFKY: Object to the form of the question.

11 A. **It doesn't matter which way the wind's blowing.**

12 THE COURT: Overruled.

13 MR. TAIT: Thank you. That's all.

14 THE COURT: You may step down.

15 THE WITNESS: Thank you.

16 THE COURT: Is this witness free to go?

17 MR. TAIT: Yes.

18 THE COURT: Can she be released?

19 MR. LAFKY: I have not subpoenaed her, so I have no

20 objection.

21 THE COURT: All right. You're free to go.

22 THE WITNESS: Thank you.

23 MR. TAIT: Call Dan Murphy.

24 THE COURT: Would you please stand here, face my

25 clerk and raise your right hand to be sworn.

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1 **DANIEL MURPHY**

2 called as a witness on behalf of the Defendant,

3 after having been first duly sworn under oath,

4 was examined and testified as follows:

5 THE CLERK: Please take a seat. State your name

6 and spell your last name for the record.

7 THE WITNESS: My name's Daniel Murphy, M-U-R-P-H-Y.

8 THE COURT: You may inquire.

9 **DIRECT EXAMINATION**

10 BY MR. TAIT:

11 Q. Mr. Murphy, what do you do for a living?

12 A. **I am currently working for the Department of**

13 **Environmental Quality as a complaints coordinator.**

14 Q. I'm moving over here so that it'll be easier for

15 you to talk to the jury instead of (indiscernible).

16 A. Thank you.

17 Q. What's your educational background?

18 A. **High school graduate. I have a two-year**

19 **associate's degree in general arts. I have a medical**

20 **technologist certification and nine years experience in**

21 **complaints for DEQ.**

22 Q. And when you say experience with complaints, what

23 does that mean?

24 A. **That means I've been working in environmental**

25 **complaint handling for the last nine years, in other words,**

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1 from the private industry, from private citizens, from the

2 State, from the federal government. I handle that type of

3 complaint issue.

4 Q. Are you familiar with the Oregon administrative

5 regulations on the kinds of particles that can be or not be

6 deposited in the air?

7 A. Yes, I am.

8 Q. Are you familiar with DEQ regulations?

9 A. Yes, I am.

10 Q. All right. Now, can you -- you've been dealing

11 with this Decorative Bark issue for a very long time, haven't

12 you?

13 A. Correct.

14 Q. When did you first become aware of a problem with

15 Decorative Bark (indiscernible)?

16 A. **Approximately 2001.**

17 Q. And what was the problem?

18 A. **Initially it was a complaint concerning vehicles**

19 **being -- that used motor oil from the trucking part of their**

20 **business was being allowed to enter the -- or drain on the**

21 **ground and they had a wash water discharge from their washing**

22 **machine for their rags, and that was the initial complaint.**

23 **I'd also observed a pall of dust coming from the bark piles**

24 **from Highway 26.**

25 Q. Okay. Let me -- I should ask you a question before

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1 I ask that more fully. Is the first time that you became

2 aware of Decorative Bark from a complaint from a -- from

3 somebody or was it from your own personal observation?

4 A. **The first time was from my personal observation,**

5 **the second time was from a complaint.**

6 Q. When was this personal information, 2001?

7 A. Correct.

8 Q. What was it?

9 A. **It was a plume of dust, red dust coming up from the**

10 **middle of Boring. And I drove down there and discovered it**

11 **was from Decorative Bark.**

12 Q. Was there anything distinctive about this plume,

13 something that made it look different than other dust in the

14 road?

15 A. **It was red and it was hanging over Boring and I'd**

16 **never seen it before. I had lived in that area for ten years.**

17 Q. And so what did you do when you saw this plume of

18 red dust?

19 A. **I drove onto the parking lot after following -- I**

20 **exited Highway 26 at the Boring exit, drove around into the**

21 **town of Boring and observed where the plume of dust was coming**

22 **from at that time.**

23 Q. And then what did you do?

24 A. **I approached the maintenance person, I believe his**

25 **name is Jim, and I told him what I observed and asked him to**

*NO DEQ proof  
Dence*

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1 either get some water out on the bark piles or to allow the  
2 pall to settle and to see what they could do as far as the  
3 dust went.  
4 Q. Did you talk to anybody else there?  
5 A. Not at that time. He said he would talk to the  
6 manager. I didn't know who that was at that time.  
7 Q. Now, in terms of DEQ records, there's a file?  
8 A. Correct.  
9 Q. Are there any other records DEQ keeps of  
10 complaints?  
11 A. There's the old Sequin database, but we don't use  
12 that. It hasn't been used since '97, if that's what you're  
13 asking.  
14 Q. Well, do you have -- do you have a -- do you have  
15 anything that you can pull up that would show all the  
16 different complaints and who -- who made them?  
17 A. Yes, we do. For -- we have a complaints database,  
18 and it's broken into two databases at this point, one for  
19 Northwest Region and one for our Gresham office. And I have  
20 the ability to go into both those databases to check on all  
21 received complaints for the address, for the site name or  
22 for -- in this instance it would be under Vanport Mill.  
23 Q. And have you done that?  
24 A. Yes, I have.  
25 Q. Okay. And when was your next contact with anyone

1 he would construct the holding ponds. I also advised him to  
2 clean out the sediment pond that was located down slope from  
3 where the bark piles were kept.  
4 Q. Did you talk to anyone else from Decorative Bark at  
5 that time?  
6 A. I don't believe so, not at that time. It was just  
7 me and one other gentleman. It wasn't Jim from the machine  
8 shop, either, at that time.  
9 Q. And it was not Denece Messenger?  
10 A. No, it wasn't.  
11 Q. When was the next time you had any contact with  
12 Decorative Bark?  
13 A. I believe again approximately late May, early June  
14 2001.  
15 Q. All right.  
16 A. And it was another black liquor issue concerning  
17 children being in the river or the stream at the same time  
18 that this black liquor was going into it. And again I went  
19 over there, took another observation. The black liquor was  
20 getting into the stream. I tried to do a turbidity test at  
21 that time. It didn't indicate a significant increase. I  
22 could only take one sample, though, at one point.  
23 When you're taking water quality samples for  
24 turbidity, you have to be able to take from 30 feet upstream  
25 from the ingress, you have to take a sample there, then you

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1 from Decorative Bark?  
2 A. I believe it was, again, in May 2001. That might  
3 be incorrect. That's going off memory at this point.  
4 Q. Okay. Whenever you're giving dates, if they're  
5 approximate, tell the jury so they know that.  
6 A. All right.  
7 Q. All right. What happened?  
8 A. I believe it was another water quality complaint  
9 concerning the black liquor entering Deep Creek. It's a  
10 stream that runs through the middle of Boring.  
11 Q. And is that -- does Deep Creek go over the aquifer  
12 in Boring?  
13 A. Yes, it does.  
14 MR. LAFKY: Objection; relevance.  
15 THE COURT: Sustained.  
16 Q. Okay. So what did you do about this complaint?  
17 A. I approached the lot person at the time. I walked  
18 the site with them at this point. I don't remember who the  
19 gentleman was that I was walking the site with. I advised  
20 that he move the bark piles away from the edge of the  
21 embankment. It was less than ten feet at that time. They  
22 could just barely get a tractor around the side of it. I  
23 advised him to move it back.  
24 I also advised them to construct some holding ponds  
25 for any possible runoff. He indicated to me at that time that

1 have to take a sample from the mixing zone and you have to  
2 take another sample from 30 feet downstream from the ingress.  
3 I couldn't do that, because the nature of the sediment in the  
4 bottom of Deep Creek is too deep and it's also inaccessible  
5 because of the slope and the blackberries at that time.  
6 Q. Okay. You've now mentioned three times that you've  
7 been to Decorative Bark, I think.  
8 A. Correct.  
9 Q. The last two, did you make any observations about  
10 any dust problem at the site?  
11 A. I believe in their -- in late May is when things  
12 began drying out and I started to notice the dust problem.  
13 And it was mentioned at that time that a sprinkler system such  
14 as the other bark industries near them, they might want to  
15 start using them before we started getting dust complaints.  
16 Q. What kind of sprinkler system are you talking  
17 about?  
18 A. Well, normally for a bark industry, we ask them to  
19 put a sprinkler system, generally PVC, though it's up to them  
20 how they do it. We can't advise exactly how they're supposed  
21 to take care of their dust problem. Most of them take the PVC  
22 pipe with sprinkler heads attached to them, drape it across  
23 the top of their largest piles that aren't being used, and  
24 they ensure that the one that's being turned at the time is  
25 well wetted during the hot weather. During the wintertime and

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1 the springtime, late fall, you usually don't have to worry  
2 about it as much.  
3 Q. Okay. When's the next time you had any contact  
4 with Decorative Bark?  
5 A. Ooh. That one's a little bit harder. I believe  
6 it's July or August of 2001. This is going on -- again, off  
7 my memory. And it was another dust complaint. We had started  
8 to observe Decorative Bark continuing complaints, including  
9 dust, but mostly water complaints at that time. Dust  
10 complaints began getting a little bit heavier later.  
11 Q. Can you tell the jury approximately how many  
12 (indiscernible) complaints about Decorative Bark you have --  
13 the DEQ has received from 2001 to the present?  
14 A. 19 on the Northwest Region database and nine on the  
15 Gresham database. Now, those are only the ones that we  
16 entered, because we had other ones that were coming in that we  
17 were adding to the current complaints that we were  
18 investigating at the time.  
19 Q. Okay. When was the first time that you met Denece  
20 Messenger?  
21 A. I believe 2002, somewhere in there.  
22 Q. What was -- what was her concern?  
23 A. It was another dust complaint, and I went out there  
24 to give technical assistance at that point. We were trying to  
25 do an outreach so we could abate the problem and avoid any

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1 possible civil litigation with DEQ at that point.  
2 Q. And how did you come to meet Denece Messenger?  
3 A. I spoke to one of the people in the shop and they  
4 had introduced me to Denece at that time. She'd come down  
5 from the office when I showed up, and she seemed rather  
6 positive at the time to take care of the dust problem and had  
7 assured me that they would make sure to clean out the holding  
8 pond and assure that they will use a sprinkler system. And  
9 that would have taken care of the problems at that time.  
10 Q. Okay. And did she tell you what her capacity was?  
11 Does she claim she was just a salesperson for --  
12 A. No. She always explained to me that she was the  
13 owner at that time.  
14 Q. And this was in 2002?  
15 A. Correct.  
16 Q. Not 2004, but 2002?  
17 A. Correct.  
18 Q. Explain that -- did she explain to you she was the  
19 owner in 2002?  
20 A. No. I was told by the person that introduced me.  
21 MR. LAFKY: Object to the hearsay, then.  
22 THE COURT: Sustained.  
23 Q. Did this fellow ever say that she was the owner in  
24 the presence of Miss Messenger?  
25 A. No. Not that I recall at that time.

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1 Q. Do you recall any conversations with her about  
2 whether or not she was the owner?  
3 A. She said she was the manager when she came down. I  
4 assumed that that was the owner. Management is -- I wasn't  
5 making that distinction at that point. We were just trying to  
6 do outreach.  
7 Q. Okay. From that time in 2002 and from then on, was  
8 there ever anybody else that DEQ dealt with at Decorative Bark  
9 other than Denece Messenger?  
10 A. Every time we showed up, Denece would show up  
11 shortly thereafter usually, so I assumed that somebody was  
12 calling her. That's an assumption on my part, though.  
13 Q. Okay. So let's -- can you just generally for the  
14 jury describe the history of complaints and your personal  
15 involvement when you would go to the property, what you would  
16 see or be told by Denece Messenger (indiscernible)?  
17 A. All right.  
18 MR. LAFKY: Object to the vagueness of the question  
19 and characterization.  
20 THE COURT: Overruled. You may answer.  
21 A. I started going out to Decorative Bark on a regular  
22 basis because of the amount of complaints we were receiving.  
23 Any time we were in the area, we would drive by and we would  
24 approach Denece and advise her, myself going all to George  
25 Druback, all -- these are all complaints coordinators that

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1 have dealt with Denece. We've all explained to her that she  
2 needed to have a water system, some type of water system. You  
3 need to ensure that the holding pond was cleaned out on a  
4 regular basis; if it wasn't, that they could be held  
5 responsible.  
6 Eventually a warning letter and a (indiscernible)  
7 were generated. It seemed like we would go out there and we  
8 would get positive talk and we'd talk about some things. We'd  
9 go back out there at a later time, and the same thing was  
10 going on. We advised to get a sprinkler system. Denece got a  
11 sprinkler system, but it's an agricultural sprinkler head  
12 instead of a mister. This generally is only going to get a  
13 small area and it's not going to knock down the dust the way  
14 it needs to be in order to keep it on site.  
15 Q. Now, eventually were letters you were talking about  
16 (indiscernible)?  
17 A. Correct.  
18 Q. And those are already in evidence and I'm not going  
19 to have you go through all of those again.  
20 A. Okay.  
21 Q. But what I want you to do is have you look at a few  
22 of these letters. Let's see. Let's just take, for example,  
23 Exhibit Number 104, and would you look at that generally and  
24 tell the jury whether or not anything that was in that  
25 memorandum about what was wrong at Decorative Bark, is there

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1 anything in there that was not explained personally face to  
2 face to Denece Messenger things that needed to be done?  
3 A. As I look at sub area one, the hay bales, that was  
4 mentioned to Denece several times that they needed to be  
5 changed on a regular basis. It was discovered that at that  
6 time that Denece was taking care of the hay bales on site for  
7 the runoff from Decorative Bark, but this actually falls under  
8 the permit for Vanport Mills. And Dennis Juris, their storm  
9 water manager and I, had gone out to Vanport Mills to  
10 readdress the storm water permit, discharge permit from  
11 Vanport Mills. Vanport Mills leases many of the property --  
12 many of the sites on the property, Decorative Bark being one  
13 of them. Ultimately speaking, they're responsible for all the  
14 runoff that comes from the site, so the hay bales actually  
15 come under their heading. As I understood it via Vanport  
16 Manufacturing, or Vanport Mills, was that Denece Messenger  
17 would be taking care of that.

18 We did speak about the sub area two, where the  
19 (indiscernible) sediment settling areas need to be cleaned out  
20 frequently. We'd gone out there several times, and the  
21 sediment inside the holding ponds were more than a foot deep.

22 Let's see. And we had spoken about the ponding of  
23 the water, what type of a filtration system that they were  
24 going to use for sub area four. They had talked about  
25 possibly growing some poplars, as another bark industry had

1 meetings with Denece Messenger where she's told what she's  
2 supposed to be doing with all those things.

3 A. All right. Sub area nine has nothing to do with  
4 Denece.

5 Sub area 12, bark storage area, there's a -- again,  
6 the black liquor runoff issue had been brought up to Denece  
7 and that they need to take care of the problem, and nothing  
8 had been done at that point.

9 And we did not observe sub area 13, so that had  
10 nothing to do with Denece also. I think that covers it.

11 Q. Okay. In terms of your visits to the site, did  
12 Denece Messenger and Decorative Bark ever comply with your  
13 requests and the letters and so forth having to do with this  
14 dust problem?

15 A. Partially they addressed the problem. They tried  
16 to bring on a sprinkler system. She was informed that the  
17 sprinkler system was inadequate. Another sprinkler of the  
18 same type was brought on. Two sprinklers for that site was  
19 explained to Denece that that is not enough in order to keep  
20 down the dust, especially the type of sprinkler heads that she  
21 was using. We advised that mister heads be used, either that  
22 or more sprinkler heads over the whole site, as we were still  
23 getting complaints at that point. We still get complaints.  
24 We haven't had any in the last month.

25 Q. Okay. Did she ever -- there's no -- this isn't the

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1 done near them, with a pump. Apparently that wasn't followed  
2 up on. They had not installed any type of sediment ponds for  
3 the back area to ensure that there was no black slurry  
4 entering Deep Creek.

5 And again we mentioned the watering devices being  
6 inadequate at the time. This was all sent over to Vanport  
7 Mills for their review for their storm water permit and to see  
8 what they could do as far as their leasing and to have  
9 Decorative Bark follow that lease.

10 The solid waste material on sub area five had  
11 nothing to do with Denece at that time, and sub area six was  
12 nothing to do with her either.

13 There were several issues on site that Vanport Mill  
14 had to address: one being in sub area eight there were  
15 several hundred tires, and you're not supposed to have more  
16 than 99 tires on site without having a permit.

17 Q. We don't claim that she's going to remove the  
18 tires.

19 A. That's correct.

20 Q. And that's -- what I'm trying to talk to you about  
21 are things to do with Decorative Bark. I want to make sure  
22 that -- and you're right. The tires have nothing to do with  
23 them. I want you to verify everything on there that doesn't  
24 have anything to do with Decorative Bark and I want to know if  
25 the things that are on there, if there have been face-to-face

1 whole file that we actually have the DEQ file. I'll point out  
2 specific warning letters. And again, you know, the jury's  
3 going to have this, so I don't -- I don't want to spend the  
4 whole afternoon reading the file.

5 What I do want to do is take, for example, the  
6 latest -- the latest letter talking about various problems at  
7 the mill, and I want to know whether or not in your experience  
8 these years with Decorative Bark whether they've taken care of  
9 these problems.

10 By the way, have all of the complaints regarding  
11 the operation of Decorative Bark come from Derek de Landro?

12 A. No, they have not.

13 Q. Do you have some estimate how many have been from  
14 other people?

15 A. Maybe half.

16 Q. And have these all been people who live in the  
17 general area and are affected by the bark dust?

18 A. Yes, it has been.

19 Q. I apologize for just standing here. I feel like I  
20 put my hands on this stuff (indiscernible).

21 There's a letter that I believe you sent that  
22 specifically listed the Oregon Administrative Rule that dealt  
23 with environmental quality in 2006 that says, what have you  
24 done? And (indiscernible) it doesn't seem to be any  
25 particular order (indiscernible) if that was --

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1 A. 2006.

2 Q. Here we go. September.

3 A. 2006. That might have been (indiscernible).

4 Q. It is (indiscernible). My concern is if you look

5 at this letter and you look at all the things they say that

6 she's supposed to be doing, can you tell the jury -- and

7 again, just in general terms this cites the statute that says

8 you have to -- you can't let dust particles escape and so

9 forth, but there are a list of things that are observed there

10 in 2006. I want you to just read this letter and tell the

11 jury whether or not these are the same things that you

12 observed beginning in 2001 all the way through 2006.

13 A. In 2006, it's the same issues are present. Once

14 again, the sprinklers are not knocking down the emissions as

15 they should be, the dust is still leaving the site, and the

16 dry and fine dust throughout the area, including the trees,

17 had been observed by myself from 2001 forward to present. I

18 have -- excuse me. I should say until last month. I have not

19 been out there this month to check to see if the issue is

20 still going on. And we still have to address the holding

21 ponds, especially the one downhill from them, and the dust

22 issues are still all present to -- in this letter as they were

23 back in 2001.

24 Q. And is there any doubt in your mind that there have

25 been face-to-face meetings with people from --

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1 MR. TAIT: Excuse me, Your Honor, but, you know,

2 the facial expressions from Miss Messenger and, for that

3 matter, Mr. Lafky are inappropriate and I think that

4 (pause) --

5 MR. LAFKY: That's inappropriate, Judge. There was

6 no facial expression.

7 THE COURT: Well, I --

8 MR. TAIT: I can put my client on to testify about

9 what she's been doing.

10 THE COURT: I've been taking peeks, and there's

11 nothing yet that merits a court intervention, and I --

12 MR. TAIT: Okay.

13 THE COURT: -- direct you not to ask in front of

14 the jury again.

15 MR. TAIT: Okay. I'll do that. And I apologize,

16 Judge. You're absolutely right. That was inappropriate of

17 me. I apologize to Kevin, too. That's not appropriate.

18 BY MR. TAIT:

19 Q. Okay. So in terms of your own personal

20 observations, there's a claim being made in this case that

21 this red dust at times was all over the de Landro property

22 isn't from Decorative Bark, it's from somewhere else. Can you

23 tell the jury from your personal observations whether dust,

24 these red particles are going from the Decorative Bark

25 property to the de Landro property?

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1 MR. LAFKY: Object to the form of the question

2 about it being all over the de Landro property.

3 THE COURT: Overruled.

4 Q. Go ahead. You can answer.

5 A. Thank you. I would assume, and from my personal

6 observation, that the dust is coming from Decorative Bark.

7 MR. LAFKY: Object to the assumption.

8 MR. TAIT: He said assumed and personal

9 observation. I agree, Judge, that we should not be making

10 personal assumptions, and maybe I ought to just change that.

11 THE COURT: Well --

12 Q. Just talk about --

13 THE COURT: (Indiscernible) the question, then.

14 Yes, you're not allowed to speculate.

15 THE WITNESS: Thank you.

16 A. From what I've seen, the dust that's impacting

17 Mr. de Landro's property is from Decorative Bark. I have been

18 to the other bark site, and they don't have the same dust

19 problem and they have twice the amount of bark on site.

20 Q. Which other -- which other place are you talking

21 about?

22 A. (Indiscernible).

23 Q. Go ahead.

24 A. And from the general wind patterns and the

25 observations that I've seen over the years, the dust comes

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1 from Decorative Bark.

2 Q. Is this -- I may have asked Miss Patterson this

3 question. I may have asked you already. If I have, I

4 apologize. Is this dust particle that you're talking about,

5 is it distinctive?

6 A. Yes, it is. It's red in nature. You can tell it's

7 bark. It's very easy to tell the difference between

8 sandblasting, bark, dust from the road, especially if the

9 color is -- is bright red as the bark is, especially during

10 the summertime.

11 Q. How about things that come down from the -- from

12 trees?

13 A. That's not going to be the same color as bark.

14 It's usually a brown color.

15 Q. Did I ask you to review the video that I'm told

16 that by Mr. Lafky is going to be employed as part of

17 Decorative Bark's response? Did I ask you to review that

18 video?

19 A. Yes, you did.

20 Q. Did you do that?

21 A. Yes, I did.

22 Q. And is that -- does that video show typical

23 operation on Decorative Bark property according to what you've

24 seen?

25 A. During the wintertime, not during the summer

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1 months.

2 Q. What's different?

3 A. There's standing water throughout the site. You

4 can see rain coming down during the video. There -- on one of

5 the loaders, there's a piece on it, it looks like it's a dust

6 suppression piece that I've never seen before. I don't know

7 if it's on there today or not. I'd have to go out there and

8 take a look, now that I've seen it on the video, actually

9 really take a closer look next time I'm out there.

10 There's water on the ground. It doesn't give a

11 good view of what the activities are during the summertime.

12 And even when you do see them loading onto the conveyor belt,

13 there's a huge pall of dust that comes off, and that's

14 indicative of the type of material coming from the site during

15 the summer, except for in a lot larger quantity.

16 Q. These photographs may be part of the DEQ file. I'm

17 not sure. Would you look at Exhibit Number 216.

18 A. That's much more indicative of what you see.

19 Q. Showing (indiscernible). Almost done here.

20 MR. TAIT: Okay. I'm done. Thank you.

21 THE COURT: Cross-exam.

22 MR. LAFKY: Thank you.

23 ////

24 ////

25 **CROSS-EXAMINATION**

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1 BY MR. LAFKY:

2 Q. Mr. Murphy, you mentioned being out at Decorative

3 Bark last month; is that correct?

4 A. I had driven by there, yes.

5 Q. You had driven by there. What does that mean?

6 Were you on the property?

7 A. No. I'm driving either around the property

8 perimeter itself to see if I can see any dust coming from the

9 site.

10 Q. So around the property perimeter. Does that mean

11 like down Spring Street, down Wally Road? Which one?

12 A. Both. And right down 224.

13 Q. Okay. When's the last time --

14 A. (Indiscernible).

15 Q. -- you've actually -- I'm sorry?

16 A. And down 26, also.

17 Q. When was the last time you've actually been to the

18 Decorative Bark production site?

19 A. On site itself?

20 Q. Yes.

21 A. I believe it was two and a half months ago.

22 Q. Okay. And how many times have you been there in

23 the last five years?

24 A. The last five years? I'm not sure. I go by -- any

25 time I'm in the area, I drive by.

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1 Q. I mean on site.

2 A. On site. Any time I'm in the area, I drive by.

3 Q. Okay. Now, in terms of your visit to Decorative

4 Bark in 2002, did you create a memo to the complaint filed to

5 somebody named David Koonz or Koontz?

6 A. Koontz.

7 Q. Koontz?

8 A. That's correct. That's our solid waste manager.

9 Q. Okay. And in that memo you had a conclusion, I

10 think it's part of your file there, about speaking with Ron

11 concerning the site?

12 A. That could be the second gentleman I spoke to.

13 Q. Okay. Do you remember Ron was described as an

14 owner to you?

15 A. Not offhand.

16 Q. Okay. You don't recall that?

17 A. No.

18 Q. Did you write, "After speaking with Ron concerning

19 the site, I believe that he'll be taking any necessary steps

20 needed to abate any runoff from the site in the future"?

21 A. Yes, I did. I remember writing that. As a matter

22 of fact, I believe I remember the gentleman.

23 Q. Does that refresh you?

24 A. Yes. As a matter of fact, this is the gentleman

25 that I spoke with that said he would look into constructing

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1 the holding ponds and look into possibly using the back

2 portion of the lot for poplar trees. That would take care of

3 the black liquor problem.

4 Q. And then you said that the whole storm water plan

5 for the Vanport site is out of date, a new plan needs to be

6 submitted, correct?

7 A. Correct.

8 Q. And that's what you were talking about earlier, was

9 that letter to -- to Adolph Hertrich? Is that what you were

10 referring to earlier?

11 A. Correct.

12 Q. Mr. Hertrich is one of the owners or the owner of

13 Vanport?

14 A. One of the owners, yes.

15 Q. Now, Mr. Murphy, I've heard that both you and

16 Miss Patterson have reviewed a videotape that was provided to

17 defense counsel in this case. How did you happen to have a

18 chance to review that?

19 A. It was sent to the -- our office and we were asked

20 to review it.

21 Q. Asked by whom?

22 A. Myself, by Mr. Tait. I'm not sure who Susan was

23 asked by. I would --

24 Q. So in a -- is it common in a private lawsuit of

25 this type that you'd be asked to review evidence as a tax paid

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1 employee?  
 2 A. We're asked to review evidence quite often, yes.  
 3 Just please be aware that this is the third time I've made it  
 4 to a civil hearing in nine years that I've been here. So,  
 5 yes, we do review our evidence, and they -- if you or the  
 6 other party would send us information, I would go ahead and  
 7 review that in preparation for the --  
 8 Q. And your testimony is from looking at that  
 9 videotape, that you think it was taken in the wintertime?  
 10 A. Correct. I think we're getting confused here.  
 11 One's a videotape and one's a CD. I watched the CD that I was  
 12 talking about today on the computer, and that's what I was  
 13 referring to.  
 14 Q. Was that a CD that involved Miss Messenger  
 15 directing --  
 16 A. Correct.  
 17 Q. -- the camera around the site of Decorative Bark?  
 18 A. Correct.  
 19 Q. And based on your review of that CD, it would  
 20 surprise you if that videotape was made in July?  
 21 A. Very much so. Very much so.  
 22 Q. Ms. Patterson testified earlier this afternoon, and  
 23 we went through what she says is a certified copy of the  
 24 entire DEQ file involving Decorative Bark, right here, Exhibit  
 25 220.

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1 A. All right.  
 2 Q. And we went through that earlier, and there's not  
 3 one complaint form that's attributed to anyone besides  
 4 Mr. de Landro or anonymous.  
 5 Now, you've told us today that maybe half of some  
 6 complaints were made by someone else other than Mr. de Landro;  
 7 is that correct?  
 8 A. That's -- that's correct.  
 9 Q. So you're -- you're an expert in the complaint  
 10 process. How is it that there's not one complaint form in the  
 11 entire DEQ file that refers to what you're claiming?  
 12 A. I'm checking right now to see if my numbers that I  
 13 came up with are the same amount of complaints that I have in  
 14 this file.  
 15 Q. Okay.  
 16 A. And (pause) -- I'm not sure if we have all the  
 17 complaints that we've received at this point on Decorative  
 18 Bark in this file.  
 19 Q. Is there --  
 20 A. I count seven, I believe, but I counted 19 from the  
 21 Northwest Region database alone.  
 22 Q. Is there a reason why Ms. Patterson would certify  
 23 that that's the entire file if in fact is not?  
 24 A. Miss Patterson was in a training position for the  
 25 last year in the complaints department. She was concentrating

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1 on air quality issues, and she may not have checked the  
 2 Northwest Region -- we've got Northwest Region complaints  
 3 right here. She may not have looked it up as Decorative  
 4 Bark -- or if you only look it up as Decorative Bark Products,  
 5 that's all you're going to get in the database when you do the  
 6 database search. If you do it on the site address, you might  
 7 pull up some more, because it's not listed under the same  
 8 thing. If you pull it up under Vanport Mill site, because  
 9 some of the complaints came in as a Vanport Mill complaint,  
 10 that's what it would be, but if the -- if it was found that it  
 11 was Decorative Bark, that would be mentioned in there, but the  
 12 name on the complaint would not change at that point, so she  
 13 may have missed that at that point.  
 14 Q. What was the --  
 15 A. If you don't do --  
 16 Q. When you said that maybe half of them were not  
 17 Mr. de Landro, did that include anonymous as part of that  
 18 half?  
 19 A. Yes, it does.  
 20 Q. Okay. So have there been other neighbors around  
 21 there that have complained about air quality issues, to your  
 22 knowledge --  
 23 A. Yes, there have.  
 24 Q. -- to DEQ? Who's that?  
 25 A. I can't remember off the top of my head. I'm

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1 sorry. I'm not real familiar with names. They don't stick in  
 2 my head unless I actually write them down several times.  
 3 Q. So you don't know?  
 4 A. That's why I had a hard time remembering Ron's  
 5 name.  
 6 Q. And this complaint about children in the stream,  
 7 that was Mr. de Landro, wasn't it?  
 8 A. That was his concern, yes.  
 9 MR. LAFKY: Okay. Nothing further.  
 10 THE COURT: Redirect.  
 11 **REDIRECT EXAMINATION**  
 12 BY MR. TAIT:  
 13 Q. You identified a videotape, and that's Defendant's  
 14 Exhibit 204. Did you look at that videotape?  
 15 A. Yes, I did.  
 16 Q. The particles that Mr. de Landro was pointing out  
 17 all over his property in this videotape, whoever is --  
 18 whoever's causing those particles to be on his property, does  
 19 that comply with DEQ regulations?  
 20 A. No, it doesn't.  
 21 Q. And in particular, what regulation?  
 22 A. I'm sorry?  
 23 Q. Which regulation?  
 24 A. It would be the 340.208, dust rules.  
 25 Q. Okay.



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1 A. For A – ORS's, Oregon Revised Statutes.  
 2 Q. The jury's already heard that if you can see the  
 3 particle, it violates -- in the air, it violates DEQ  
 4 regulations. Is that right?  
 5 A. Correct.  
 6 Q. And in Defense Exhibit 202, this is a bunch of pine  
 7 needles that actually show up in the photograph that  
 8 Mr. Lafky's been showing the jury. Does this look at all  
 9 like -- like the dust that you observed from Decorative Bark  
 10 on the de Landro property?  
 11 A. From this vantage point, I -- I'm sorry.  
 12 Q. I'm sorry. I didn't mean that to be a vision test.  
 13 A. Oh, from here, yeah, this does -- no. This is  
 14 nothing like the dark -- bark dust.  
 15 Q. Okay. That would be -- so there's no doubt in your  
 16 mind from looking at this -- from the database that you had  
 17 access to that this are -- that there are 19 -- did you say 19  
 18 complaints?  
 19 A. 19 complaints I believe I counted on the Northwest  
 20 Region database and either eight or nine on the Gresham  
 21 database.  
 22 Q. And of those 19 complaints, how many dealt with  
 23 Decorative Bark as oppose -- in part or in whole -- let me ask  
 24 it a different way.  
 25 Were any of those complaints that dealt solely with

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1 Vanport issues not things that were going on at Decorative  
 2 Bark?  
 3 A. Not -- I tried to separate those ones out when I  
 4 was doing the database search and I would read into the  
 5 information to ensure that it was a Decorative Bark issue or a  
 6 dust issue or black liquor issue. When we were doing the  
 7 storm water pollution control plan review with Vanport Mill,  
 8 that was one of the issues that needed to be addressed, and  
 9 the black liquor entering the Deep Creek was a concern, so  
 10 that was actually a Decorative Bark issue, but because it's a  
 11 storm water pollution control plan, it's ultimately Vanport  
 12 Mill's responsibility to ensure that the black liquor's not  
 13 entering the stream however they do it, and they can put the  
 14 onus on Decorative Bark.  
 15 Q. Now, do you have an opinion as to whether or not  
 16 the bark dust that you're talking about, those particles in  
 17 the air and the water pollution that you personally observed,  
 18 whether those are matters of public health?  
 19 MR. LAFKY: Objection; relevancy.  
 20 THE COURT: Overruled. You can answer the  
 21 question.  
 22 A. Could you ask that question again? I'm sorry.  
 23 Q. Yeah. The -- the brown -- the black liquor --  
 24 A. Correct.  
 25 Q. -- the water quality pollution issue and the bark

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1 dust, the particles in the air that you can see, do you have  
 2 an opinion as to whether those are -- are health issues, in  
 3 other words, issues that the DEQ is concerned about because  
 4 they possess -- they present a serious risk -- a risk of  
 5 injury to a person's health?  
 6 A. What --  
 7 MR. LAFKY: Same objection, and to the form of the  
 8 question.  
 9 THE COURT: Overruled.  
 10 A. The dust particles we're more concerned with than  
 11 the black liquor, because it can impact people's breathing  
 12 difficulties, especially asthmatics or people that have -- are  
 13 on a breathe machine or need oxygen for whatever reason. The  
 14 black liquor we're concerned with because it's considered a  
 15 waste, and any waste to the waters of the state is considered  
 16 a Class I violation of 468B.025.  
 17 Q. That's not a microphone you're speaking into, so if  
 18 you think it's --  
 19 A. I'm sorry.  
 20 Q. I'm having a little bit of trouble hearing you.  
 21 A. The water quality violation is a -- considered a  
 22 Class I violation because it's waste to waters of the state.  
 23 We do not have a bacteria standard for black liquor at this  
 24 time. They're working on it. And that's where it falls into  
 25 a gray area and that's why we tried to work with them to get

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1 the issue taken care of. The dust particles is much more of a  
 2 concern because of the impact to people's breathing and the  
 3 impact to their homes and property.  
 4 Q. Do you have that -- let me just show one part of  
 5 the file just (indiscernible) introduced into evidence, the  
 6 DEQ file. This contains some names re: Decorative Bark,  
 7 Derek de Landro, correct?  
 8 A. Correct.  
 9 Q. Brandon Ross?  
 10 A. Correct.  
 11 Q. Matt Hampton?  
 12 A. Correct.  
 13 Q. Rex and Delores Case?  
 14 A. That's correct.  
 15 Q. Linda Morgan?  
 16 A. Yes.  
 17 Q. It also has a card that says Decorative Bark  
 18 Products, Inc., Denece Messenger?  
 19 A. Yes.  
 20 Q. How was that card given to you?  
 21 A. This card -- was this one given to me or to Susan?  
 22 (Indiscernible).  
 23 Q. (Indiscernible) your file. You don't  
 24 (indiscernible)?  
 25 A. That would be for contact purposes. That's why we

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1 write down this information, so we have a way to contact  
2 people that we need to speak to. We try to take a proactive  
3 approach and we'll give people a call and say, "Hey, we're  
4 getting -- we're getting dust issues. Can you go out and make  
5 sure you're knocking down your dust?"  
6 It wasn't easy to get ahold of Denece, so we wound  
7 up having to go out there quite a few times, and it got to a  
8 point where we'd go out there all the time.  
9 MR. TAIT: Thank you very much.  
10 THE WITNESS: You're welcome.  
11 MR. LAFKY: I have just one follow-up, Your Honor.  
12 THE COURT: All right.  
13 **RECROSS-EXAMINATION**  
14 BY MR. LAFKY:  
15 Q. Mr. Murphy, those names that were just read off,  
16 were those names given to DEQ by Mr. de Landro?  
17 A. I'm not sure. They may have been. Some of those I  
18 don't recognize. Those were in the file that Susan had put  
19 together.  
20 MR. LAFKY: Nothing further.  
21 THE COURT: All right. Did I hear a notebook  
22 tearing? All right. We'll give you a few moments, it looks  
23 like, to finish up the question.  
24 THE CLERK: Are there any others?  
25 THE COURT: Okay. What we're going to do then is

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1 take the afternoon break, and when you come back, we'll know  
2 what questions we can and can't ask. So it'll be about 15  
3 minutes from now.  
4 Please rise for the jury.  
5 (Jury leaving courtroom: 3:05)  
6 THE COURT: You may be seated.  
7 MR. TAIT: I might note that I now have a medical  
8 doctor here waiting in the hall.  
9 THE COURT: You -- I'm sorry?  
10 MR. TAIT: I now have a medical doctor waiting in  
11 the hall that I'd like to call next before we put  
12 (indiscernible).  
13 MR. LAFKY: Well, he's got a doctor here, then we  
14 need to do that next.  
15 THE COURT: Sorry.  
16 MR. TAIT: I'm trying to --  
17 MR. LAFKY: It's fine. I understand how that goes.  
18 THE COURT: The first question, was the water from  
19 Deep Creek tested? Plaintiffs' position on whether it should  
20 be asked?  
21 MR. LAFKY: No problem. First -- well, when I say  
22 "no problem," of course I'm not withdrawing --  
23 THE COURT: With your continuing objection, right.  
24 MR. LAFKY: -- longstanding and probably boring the  
25 Court issues about the water quality.

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1 THE COURT: Never boring to me. Mr. Tait?  
2 MR. TAIT: Well, why don't we just ask him if it  
3 was, and if it wasn't, you can just tell the jury yourself  
4 rather than (pause) --  
5 MR. LAFKY: Well, I don't have a problem with him  
6 being asked that, whatever the answer is.  
7 THE COURT: Was the water from Deep Creek tested?  
8 THE WITNESS: Only for turbidity, and that was  
9 only --  
10 THE COURT: Only for?  
11 THE WITNESS: For turbidity. And turbidity is the  
12 amount of light that will pass through a column of light. And  
13 it was not a legal sample, so I don't know if you want me to  
14 bring it up or not. I don't have --  
15 MR. TAIT: Well, I think what he's saying is that  
16 it was not tested for --  
17 THE COURT: Black liquor?  
18 MR. TAIT: For what?  
19 THE COURT: What?  
20 THE WITNESS: Bacteria.  
21 THE COURT: Bacteria?  
22 THE WITNESS: Yeah. It doesn't get the bacteria  
23 standard, so (pause) --  
24 THE COURT: Okay. So I'll say the water from Deep  
25 Creek was not tested --

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1 MR. TAIT: By DEQ.  
2 THE COURT: By DEQ for bacteria.  
3 The next question, were there any negative results?  
4 That's a given. Since it wasn't tested, there were none.  
5 The third question, what is black liquor exactly?  
6 THE WITNESS: Black liquor is --  
7 THE COURT: I'm not asking yet.  
8 THE WITNESS: I'm sorry.  
9 THE COURT: (Indiscernible).  
10 MR. TAIT: No objection, Judge.  
11 MR. LAFKY: No objection.  
12 THE COURT: All right. Next question, Mr. Murphy  
13 stated it was difficult to get ahold of Mrs. Messenger. Did  
14 he have to leave a message and is his number knowingly  
15 blocked? Did he identify himself when he called?  
16 That's a bunch all in one, so I'd probably start  
17 (indiscernible) and I'll ask you whether you have objections  
18 to each section.  
19 MR. TAIT: I don't have any objections to any of  
20 it.  
21 THE COURT: Any of it? Do you?  
22 MR. LAFKY: No.  
23 THE COURT: Would you like to hear it?  
24 MR. LAFKY: I don't know if he ever called her, but  
25 I don't have an objection.

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1 THE COURT: Did you ever call Miss Messenger?

2 THE WITNESS: I attempted to, yes.

3 THE COURT: Did you have to leave a message?

4 THE WITNESS: Yes, I did.

5 THE COURT: Was -- is your number blocked?

6 THE WITNESS: No.

7 THE COURT: Did you identify yourself when you

8 called?

9 THE WITNESS: Yes, I did.

10 THE COURT: The next question, or questions, is --

11 are as to, quote, adequately wet, end quote. Is there a

12 suggested depth each fill should have water?

13 MR. LAFKY: Pile, probably.

14 THE COURT: Pile. Is there a suggested depth each

15 pile should have water through, i.e., quarter inch deep, four

16 feet deep, center of the pile, either from the DEQ or the EPA?

17 Would you like to hear the answer before you

18 determine whether you have an objection?

19 MR. LAFKY: No. I have no objection to that.

20 THE COURT: No objection.

21 MR. TAIT: I don't have any objection to that.

22 THE COURT: And a new question, why does the

23 witness think Mt. Scott Fuel is not an issue? Do they have a

24 different system?

25 MR. TAIT: No objection.

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1 MR. LAFKY: No problem.

2 THE COURT: Okay. We will now take a ten-minute

3 break and be back with this witness.

4 (Recess: 3:09 - 3:20)

5 THE COURT: Please come on back. Dan.

6 THE WITNESS: Yes, ma'am.

7 THE COURT: I was just trying to remember your

8 name.

9 THE WITNESS: Okay.

10 THE COURT: Please bring in the jury.

11 (Jury entering courtroom: 3:22)

12 THE COURT: You may be seated. In response to two

13 of the juror questions, I am simply going to tell you all that

14 the water from Deep Creek was not tested by DEQ for bacteria.

15 The next question is, what is black liquor exactly?

16 THE WITNESS: Black liquor is the breakdown of

17 deciduous matter generally from large bark piles. Happens at

18 almost every bark industry. Black liquor will leak out either

19 the sides or the bottom of the bark pile, and you can abate it

20 or take care of it however you want. Some companies use it as

21 an additive to their poplar fields and it helps the poplars

22 grow quicker, and you can also use the poplar as a matter in

23 your bark process. And that's where the black liquor comes

24 from.

25 THE COURT: Was the word you were just using

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1 popper?

2 THE WITNESS: Poplar.

3 THE COURT: Poplar.

4 THE WITNESS: Poplar trees. It's a type of tree.

5 THE COURT: You stated that it was difficult to get

6 ahold of Miss Messenger. Did you have to leave a message?

7 THE WITNESS: At one time it was, but thereafter it

8 got pretty easy, because we'd show up and she would be there

9 or she would show up shortly after we would be there.

10 THE COURT: Did you have to leave a message?

11 THE WITNESS: Yes, we did. Or I did.

12 THE COURT: Is your number knowingly blocked?

13 THE WITNESS: No, it is not.

14 THE COURT: Did you identify yourself when you

15 called?

16 THE WITNESS: Yes, I did.

17 THE COURT: As to the phrase "adequately wet," is

18 there a suggested depth each pile should have water through,

19 such as one quarter deep, four feet deep or center of the

20 pile, either set by DEQ or the EPA?

21 THE WITNESS: No, there isn't. All it needs to be

22 is enough water to take care of the dust problem. Generally

23 speaking, if you have a large turnover, such as Decorative

24 Bark has, it's very hard to get what's called a crust over the

25 top, which is the first inch to an inch and a half of bark

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1 material. When it becomes wet and been wet over time and

2 dried out, it gets a crust over the top, and until you break

3 open that pile, you generally won't get any dust off it. Once

4 that's busted open, of course you're going to have your dust

5 problem thereafter.

6 THE COURT: Why do you think Mt. Scott Fuel is not

7 an issue? Do they have a different system?

8 THE WITNESS: They have a different system. They

9 have a system to take care of the black slurry. There's a

10 runoff. The land's been graded to slope towards the south.

11 There's a runoff trough for all the black liquor and all the

12 runoff from the site to enter. It goes into a holding pit.

13 The holding pit goes into a holding pond. The pond has two

14 pumps on it. They take the pumped water and put it into their

15 poplar field. That takes care of the black liquor.

16 They have a sprinkler system, generally speaking,

17 where the sprinklers are on top of the bark piles and spray in

18 a misted area completely around continuously until the dust

19 problem is taken care of. At one time we did have one

20 complaint about Mt. Scott, and that's why I know about their

21 system as well as I do.

22 THE COURT: Okay. Any follow-up for the plaintiff?

23 MR. LAFKY: Yes, please.

24 ////

25 **RECROSS-EXAMINATION**



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1 MR. LAFKY: Okay. Then we're fine.  
 2 THE COURT: If you still have those documents,  
 3 Mr. Tait, when he's done testifying, if you could just hand  
 4 them back to him.  
 5 MR. TAIT: I did. I gave them to him.  
 6 THE COURT: Okay.  
 7 MR. TAIT: Well, is there an issue about whether or  
 8 not I told Mr. Lafky, gave him permission to go on the  
 9 property and take samples as needed? I'm serious. I'm  
 10 entitled to call him as a witness to testify about that if he  
 11 denies that. And I did in fact make that statement to him.  
 12 MR. LAFKY: I don't think it's relevant, Judge.  
 13 They've got the burden of proof, you know. I mean, they can  
 14 spend their \$500 just like we did and have this analyzed.  
 15 THE COURT: I'll have to respond to that later.  
 16 (Jury entering courtroom: 12:21)  
 17 THE COURT: You may be seated. You may continue  
 18 with your cross.  
 19 MR. TAIT: Thank you. No more questions, Your  
 20 Honor.  
 21 MR. LAFKY: Nothing further.  
 22 THE COURT: You may step down.  
 23 THE WITNESS: Thank you.  
 24 MR. TAIT: Well, that was fun, wasn't it?  
 25 MR. LAFKY: Call Dan Murphy, Your Honor.

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1 THE COURT: Please come -- oh, have you testified  
 2 in this case?  
 3 THE WITNESS: Yes, I have.  
 4 THE COURT: You're still under oath.  
 5 **DAN MURPHY**  
 6 called as a witness on behalf of the Plaintiffs,  
 7 after having been previously duly sworn under oath,  
 8 was examined and testified as follows:  
 9 **DIRECT EXAMINATION**  
 10 BY MR. LAFKY:  
 11 Q. Mr. Murphy, when you were here last week, you went  
 12 through this certified copy of the DEQ file. Do you recall  
 13 that?  
 14 A. Yes, I do.  
 15 Q. And the document that I flagged there with the  
 16 purple Post-It, is that a follow-up document that you created?  
 17 A. This is my handwriting and this is the time. Yes,  
 18 it is.  
 19 Q. And under the follow-up action, there's actually  
 20 two entries, correct, both in the summer of 2005?  
 21 A. Correct.  
 22 Q. On June 14th of 2005, did you note that you visited  
 23 the site, there was no noted dust leaving the site?  
 24 A. Yes. That was under light raining conditions with  
 25 broken overcast. Several piles of bark had been processed

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1 from the last time that I was out at the site.  
 2 Q. Keep going. Next sentence.  
 3 A. Yes. I noticed that the piles weren't as large as  
 4 they were the preceding years. They've knocked -- they've  
 5 taken down some of the size of the piles themselves.  
 6 Q. Right. And you noted there was a light breeze but  
 7 no noted dust leaving the site, correct?  
 8 A. Correct.  
 9 Q. And then July 26th, about six weeks later, you made  
 10 another note, correct?  
 11 A. Correct.  
 12 Q. And what was that note?  
 13 A. It appears that they at that time had put up one of  
 14 the berms that they had talked about to help abate the dust  
 15 and see how that worked as far as one of the steps to help  
 16 address the dust situation at that time.  
 17 Q. So it says, bought new water sweep, will start up  
 18 sprinkler system, created new berm to help abate dust,  
 19 correct?  
 20 A. Correct. We did mention -- at that time I was  
 21 speaking with Denece, and I mentioned to her, because of the  
 22 nature of that specific water sweep, it would allow the water  
 23 to go onto the ground, and the sweep itself was not picking up  
 24 the bark, it was just moving it from underneath. So I had  
 25 suggested that she might possibly look into another

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1 watering-type truck if that one was not adequate.  
 2 Q. Is that in your report?  
 3 A. That was verbal between myself and Denece.  
 4 Q. Okay. So why isn't that in your report?  
 5 A. Probably didn't think to put it into it at that  
 6 point.  
 7 Q. Does DEQ typically tell a business what to do, or  
 8 do you wait until they've went out and bought equipment and  
 9 then say, "Well, I'm not sure that's the right equipment. You  
 10 might want to think about doing something different"?  
 11 A. We cannot specifically tell you how to address a  
 12 specific problem. That is your decision as a business owner  
 13 on how you want to address that type of situation. And it's  
 14 all individual, so what may work at site B may not work at  
 15 site C.  
 16 Q. Did you create a memorandum to the complaint file  
 17 as a result of that July 26th visit?  
 18 A. I can't say off memory. I would have to  
 19 specifically go through and try to find that memorandum for  
 20 this one.  
 21 Q. Let me show you this document, Mr. Murphy, and see  
 22 if that refreshes your recollection.  
 23 A. This one was for a May 9th site visit.  
 24 Q. Look down below there.  
 25 A. Oh, there we go. Thank you.

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1 Q. Does that refer to the July 26th visit?  
 2 A. **Yes, it does.**  
 3 Q. And is it dated July 27th?  
 4 A. **Yes, it is.**  
 5 Q. Can you tell us, Mr. Murphy, why that memorandum is  
 6 not anywhere in this certified true copy of the DEQ complaint  
 7 file regarding Decorative Bark when it says it's regards to a  
 8 complaint and it's addressed to the complaint file?  
 9 A. **I couldn't address that at this point.**  
 10 MR. TAIT: Does that have an exhibit sticker number  
 11 on it?  
 12 THE WITNESS: Pardon me?  
 13 A. **It may have been that when this was pulled**  
 14 **originally by Susan --**  
 15 Q. "This" being the file?  
 16 A. **The file, correct. That this was not included in**  
 17 **this form itself --**  
 18 Q. "This" --  
 19 A. **-- which is completely --**  
 20 Q. -- meaning your memo?  
 21 A. **Correct. The memo may not have been included.**  
 22 **There may be a hard copy with the hard copy file down at the**  
 23 **Northwest Region office, which is in Portland.**  
 24 Q. And, in fact, the memo also states that there was  
 25 no visible dust cloud coming from the site, correct?

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1 A. **At the time, correct.**  
 2 Q. Now, Mr. Murphy, when you were here last week, you  
 3 said that there'd been some --  
 4 MR. TAIT: I'm sorry, Judge. Can we have that  
 5 marked, please, as an exhibit, so I'll be able to tell what  
 6 they're talking about?  
 7 MR. LAFKY: I can show it to counsel, Your Honor.  
 8 MR. TAIT: I'm sorry to interrupt, but I don't want  
 9 to lose --  
 10 THE COURT: What's the next defense number?  
 11 THE CLERK: Do you mean plaintiff?  
 12 THE COURT: No. I mean defense. He's the one  
 13 asking to mark it.  
 14 MR. TAIT: This is -- this letter is in evidence,  
 15 Counsel.  
 16 MR. LAFKY: If I may continue.  
 17 THE COURT: Is the letter in evidence? It should  
 18 be identified.  
 19 MR. TAIT: It is -- it is.  
 20 MR. LAFKY: No. It's not in the DEQ file. If it's  
 21 in evidence, then it is. I'm asking him why it's not in the  
 22 file.  
 23 THE COURT: Well, whether it is or isn't, we're  
 24 going to mark it with the next defense number, which would  
 25 be --

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1 MR. TAIT: It's Exhibit Number 105, Your Honor.  
 2 It's in evidence already.  
 3 THE COURT: Can I see Defendant's Exhibit Number  
 4 105, please?  
 5 BY MR. LAFKY:  
 6 Q. Mr. Murphy --  
 7 THE COURT: Just a minute.  
 8 MR. LAFKY: Oh, I'm sorry, Judge. I thought we  
 9 were done with that.  
 10 THE COURT: It's not the same.  
 11 MR. TAIT: Oh, I'm sorry. I thought it was.  
 12 THE CLERK: It would be a defense --  
 13 THE COURT: Okay. It is the same, except the one  
 14 that was just shown to the witness is missing a page, and 105  
 15 is complete. So for the record, the witness has just been  
 16 referring to what is marked as Defendant's Exhibit 105, but  
 17 page 2 is missing. Okay. Now you may continue.  
 18 BY MR. LAFKY:  
 19 Q. And I think, Mr. Murphy, on 105, this is a front  
 20 and back copy, is that right, your memo?  
 21 A. **Yes, it is.**  
 22 Q. Now, going back to your testimony last week where  
 23 you said you'd had these complaints about Decorative Bark, you  
 24 said we had about 19 complaints. Do you recall that?  
 25 A. **Yes, I do.**

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1 Q. And then did you go back and look at the complaint  
 2 files again?  
 3 A. **No, I haven't physically gone back and relooked at**  
 4 **all the complaint files again. I did grab the file and bring**  
 5 **it with me that Susan had put together, as requested.**  
 6 Q. And in that file, there's some Post-It notes in the  
 7 front of the file, correct?  
 8 A. **I believe there are, yes.**  
 9 Q. And those Post-It notes contain the name of some of  
 10 the -- the names of some of the de Landro neighbors, correct?  
 11 A. **Correct.**  
 12 Q. The file doesn't reflect whether these people ever  
 13 complained, correct?  
 14 A. **I believe -- I don't believe it does.**  
 15 Q. And the file doesn't reflect whether those names  
 16 were given to Ms. Patterson or DEQ generally by one or both of  
 17 the de Landros, correct?  
 18 A. **That wouldn't generally have come from the**  
 19 **de Landros in sticky notes. That type of information we**  
 20 **generate via our own phone calls and our own investigations,**  
 21 **generally speaking. You'd have to ask Susan about that**  
 22 **specific setup, because I'm not the one that put that together**  
 23 **or got those names.**  
 24 MR. LAFKY: Okay. Nothing further.  
 25 THE COURT: Cross-exam.

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1 MR. TAIT: Thank you.  
2 CROSS-EXAMINATION  
3 BY MR. TAIT:  
4 Q. How many times -- I'm sorry. I've just forgotten  
5 this. When is roughly the first time you actually went out  
6 and -- you described it (indiscernible) so I don't want to go  
7 over it all again. You saw the plume of dust?  
8 A. Correct.  
9 Q. When was that?  
10 A. Approximately 2001.  
11 Q. And from 2001 until the present, can you tell the  
12 jury approximately how many times you've been out to that  
13 property?  
14 A. 30 to 40 times, maybe. Maybe more.  
15 Q. And during those visits, can you tell the jury  
16 whether or not you have explained in person to Denece  
17 Messenger what the Oregon regulations require that she do  
18 starting back in 2002?  
19 A. Yes, I have.  
20 Q. Do you still have Exhibit 105?  
21 A. Yes, I do.  
22 Q. And this -- when you say it looks like she's taken  
23 steps in this letter, they actually -- the steps that you saw  
24 her taking were actually told to do it. Is that true?  
25 A. That's correct.

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1 Q. They weren't dusting, they weren't doing those  
2 things when you came out to the site?  
3 A. Yes.  
4 Q. And when you say it looks like she's taking steps,  
5 it's because she's told you she's going to take steps; isn't  
6 that right?  
7 A. Partially. Sometimes there would be -- like at one  
8 time they had set the bark piles back away from the stream, as  
9 we requested. They had put up a berm to see if that would  
10 help abate the dust. Dust problem wasn't abated. Some more  
11 measures needed to be taken.  
12 Q. Have you been out to the property since 2006?  
13 A. Yes, I have.  
14 Q. When was the last time you were out there?  
15 A. Last Thursday. Last Wednesday.  
16 Q. Were they in operation?  
17 A. No, they were not. The last three times I've been  
18 by the site, they have not been in operation. I go by on the  
19 weekends and sometimes during the late part of the week and in  
20 the afternoons.  
21 Q. So they haven't been operating full bore on every  
22 day but weekends?  
23 A. I would assume that they're operating, but that --  
24 I don't know from personal knowledge when their operating  
25 hours are. I try to get out there when something's going on

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1 and then see if anything is leaving the site at that time.  
2 Sometimes there's nothing going on on the weekends. I've not  
3 really seen anything, especially early morning weekends.  
4 Q. And do you remember whether you were -- whether you  
5 were out on the 22nd or 23rd?  
6 A. Of this month?  
7 Q. Of July.  
8 A. I believe, yes. That was last week, I think. Yes.  
9 Q. Is it -- I mean, we're -- now I'm talking about a  
10 period of time from Sunday the 20 -- Sunday the 22nd, Monday  
11 the 23rd, Tuesday the 24th. Do you recall being out there any  
12 of those days?  
13 A. Not -- I went by on Saturday and -- on my way down  
14 to Stayton. I didn't observe anything coming off site at that  
15 time, but I came by early in the morning. And then Sunday  
16 afternoon I came back the same way. It was late afternoon.  
17 Nothing was going on at the site at the time.  
18 Q. Could you tell whether any of the machinery was  
19 operating?  
20 A. I couldn't tell at that point.  
21 MR. TAIT: All right. Thank you. That's all I  
22 have.  
23 THE COURT: Redirect.  
24 MR. LAFKY: Thanks.  
25 ////

1141

1 REDIRECT EXAMINATION  
2 BY MR. LAFKY:  
3 Q. Mr. Murphy, when you said -- when you say you went  
4 by there last Wednesday, that would be what, the 25th?  
5 A. Yes.  
6 Q. And what time were you there?  
7 A. 4:30.  
8 Q. And then you said you were there Sunday?  
9 A. Correct.  
10 Q. Sunday afternoon?  
11 A. That was approximately 8:00 in the morning.  
12 Q. Not operating Sunday morning?  
13 A. I didn't see anybody operating at the time when I  
14 came by.  
15 Q. And not operating Wednesday at 4:30 in the  
16 afternoon?  
17 A. Correct.  
18 MR. LAFKY: Nothing further.  
19 MR. TAIT: Judge, I forgot to ask one question I  
20 want to ask him.  
21 THE COURT: One question.  
22 MR. TAIT: All right.  
23 RECROSS-EXAMINATION  
24 BY MR. TAIT:  
25 Q. The times that you've been there recently, how do

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1 these compare with the years when you would go out there and  
 2 see what was -- years 2002 to 2005 that you'd go out there and  
 3 see what was going on?  
 4 A. It appears that there have been measures taken, but  
 5 they haven't been adequate. We're still getting the dust off  
 6 site, and which is the ultimate measure, if the dust is  
 7 getting off site, on whether the VMP's are adequate.  
 8 MR. TAIT: Thank you. That's all.  
 9 MR. LAFKY: Nothing further.  
 10 THE COURT: You may step down.  
 11 THE WITNESS: Thank you.  
 12 THE COURT: And may he be released?  
 13 MR. LAFKY: Yes.  
 14 MR. TAIT: Yes.  
 15 THE COURT: All right. You're free to go.  
 16 Is there another witness before you re-call your  
 17 client?  
 18 MR. LAFKY: No.  
 19 THE COURT: Okay. I'm going to release you for  
 20 lunch, then. And as I said, you're going to get a long one so  
 21 that we can get some work done and try to make it smoother  
 22 when you return. So it's about 12:30. I'm going to be  
 23 optimistic and say 2:30. So please be back from lunch and in  
 24 the jury room by 2:30.  
 25 Please rise.

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1 (Jury leaving courtroom: 12:36)  
 2 THE COURT: You may be seated. We're only going to  
 3 take about a half-hour for lunch. We can do it at the  
 4 beginning or at the end. Would you like to have a vote?  
 5 MR. TAIT: Let's do it -- I'd like to do it at the  
 6 beginning. I'm going to go over to Subway sandwiches, grab a  
 7 sandwich and eat it and come back as soon as I can possibly  
 8 get here. That's what I plan to do.  
 9 THE COURT: Do you have an opinion about whether we  
 10 keep working right now or grab lunch right now and come back  
 11 and lunch?  
 12 MR. LAFKY: Lunch now is fine.  
 13 THE COURT: Okay.  
 14 MR. LAFKY: I haven't seen McMenamin's be able to  
 15 do the 30 minute thing.  
 16 THE COURT: Don't go to McMenamin's.  
 17 MR. LAFKY: Even if you walk in and order --  
 18 THE COURT: Don't go to McMenamin's.  
 19 MR. LAFKY: What are the other options? I haven't  
 20 found the other options.  
 21 THE COURT: I was there Sunday night and I was  
 22 there by myself, so it wasn't like it was a big hour. An hour  
 23 and 15 minutes from order to receiving.  
 24 MR. LAFKY: Yeah. We were on the road just --  
 25 THE COURT: Sunday night. What's going on on

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1 Sunday night? That was probably all on the record.  
 2 MR. TAIT: Judge, I just want to just give you a  
 3 heads-up. I suppose we can talk about this at some later  
 4 time, but I want to give you a heads-up on two evidentiary  
 5 things.  
 6 I intend to put a de Landro back on to testify that  
 7 from this witness who testified as to noise levels, as the  
 8 jury was leaving, he got up and started getting off the  
 9 witness stand and he went like this right at Denece Messenger,  
 10 big smile on his face and went like this. I think that he  
 11 said that he didn't have any memory of doing that.  
 12 And I also -- they were present as the depositions  
 13 were taken on July 3rd, 2007, and they heard Mr. Lafky ask me  
 14 if -- if I had permission to go on the property and take  
 15 tests. Our response was yes.  
 16 THE COURT: I will consider whether to allow it  
 17 when you ask when the time comes.  
 18 MR. TAIT: Okay.  
 19 MR. LAFKY: And, Judge, the problem of course with  
 20 that whole issue is, you know, you'd have to live on the  
 21 property for a week to be sure that the testing is reliable.  
 22 We have no reason to believe that samples we've taken from  
 23 other sites are in any way tainted or compromised. So that's  
 24 the problem. They've got the burden of proof. They can  
 25 present this evidence themselves.

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1 THE COURT: I see the problem differently, but it  
 2 doesn't really matter right now. Let's all get something to  
 3 eat and come back as soon as we can. Thank you.  
 4 (Recess: 12:39 - 1:24)  
 5 THE COURT: Okay. Where we left off -- well, I --  
 6 did you pass them the (pause) --  
 7 THE CLERK: Sorry.  
 8 THE COURT: We fixed the ones we had already  
 9 discussed, or at least to me we fixed them, so I had copies  
 10 made for you, but that's just stuff from this morning. Let's  
 11 go on.  
 12 We left off with defendant's special instruction  
 13 number ten, particle fallout limitation. And this is another  
 14 ordinance reference. And Mr. Lafky, you object?  
 15 MR. LAFKY: I do. My objection would be to what I  
 16 articulated earlier regarding special number nine as well as  
 17 the fact that there's no evidence on this particular issue in  
 18 the case.  
 19 MR. TAIT: I don't know which one we're talking  
 20 about.  
 21 THE COURT: Defendant's special instruction number  
 22 ten, particle fallout limitation. It was the next one in the  
 23 packet I gave you this morning.  
 24 MR. TAIT: The packet that I have, it's -- it is --  
 25 it's labeled with -- okay.



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1 THE COURT: The last one previous to that was  
 2 (pause) --  
 3 MR. LAFKY: Number nine.  
 4 THE COURT: Yes. Defendant's special instruction  
 5 number nine, which was the one with the regulation that we  
 6 were discussing.  
 7 MR. TAIT: Okay. Well (pause) --  
 8 THE COURT: And I had these in the order that I  
 9 planned to give them, so that's why they were a little mixed  
 10 up in terms of numbers.  
 11 MR. TAIT: Oh, okay. Now I have it. Well, this  
 12 doesn't say that it violates the law, which is the whole  
 13 purpose of the instruction.  
 14 THE COURT: What was that?  
 15 MR. TAIT: It doesn't say that you --  
 16 THE COURT: You don't have to stand for this part.  
 17 I just want to make sure I hear you.  
 18 MR. TAIT: Okay. I'm standing in part because I  
 19 can't sit that way.  
 20 THE COURT: Okay.  
 21 MR. TAIT: The whole purpose of this instruction is  
 22 to tell them what this says and for you to tell them that this  
 23 is the law. It's just like saying here's the law on violation  
 24 of the basic rule. Do whatever you want to with it.  
 25 THE COURT: Which is what we did with number nine.

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1 MR. TAIT: Number nine's a whole different animal.  
 2 It's something -- it is something that you can consider as  
 3 evidence because it talks about a specific number of microns  
 4 and those kind of things. It doesn't -- it doesn't describe  
 5 any conduct, it just is a description of what these things  
 6 are.  
 7 THE COURT: I am not going --  
 8 MR. TAIT: Well, if you --  
 9 THE COURT: I am not going to give that  
 10 instruction.  
 11 MR. TAIT: Pardon?  
 12 THE COURT: I'm not going to give that instruction.  
 13 MR. TAIT: What instruction?  
 14 THE COURT: The one we're discussing right now.  
 15 MR. TAIT: This one at all?  
 16 THE COURT: Defendant's special instruction number  
 17 ten. They did hear evidence to that effect and they're going  
 18 to be told they can consider all the evidence they heard, but  
 19 I'm not going to give it to them again as a specific  
 20 instruction.  
 21 The next one is uniform instruction number 70.01,  
 22 damages preliminary instruction.  
 23 MR. LAFKY: And I suggest taking out the phrase "or  
 24 negligence" on the third paragraph from the end.  
 25 MR. TAIT: Have we -- I'm sorry. Did we already go

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1 by particle fallout limitation? You may --  
 2 THE COURT: That was what I just said I'm not  
 3 giving. I just said that, and then we moved on to number  
 4 70.01.  
 5 MR. TAIT: Okay. Now I'm really confused. Are you  
 6 giving the instruction on the violation on number nine?  
 7 THE COURT: Yes.  
 8 MR. TAIT: Oh, okay. My confusion.  
 9 THE COURT: It's all right.  
 10 MR. TAIT: I'd ask the Court take judicial notice,  
 11 then.  
 12 THE COURT: I will delete the words "or negligence"  
 13 from the third from the last paragraph.  
 14 Take judicial notice?  
 15 MR. TAIT: Yes, I agree. I was going to ask you to  
 16 take judicial notice that under Oregon Administrative  
 17 regulations no person may cause or permit the emission of  
 18 particulate matter larger than 250 microns, exactly what this  
 19 thing says the definition of. I mean, saying someone talked  
 20 about this is not the same thing as the judge saying this is  
 21 the law of Oregon.  
 22 THE COURT: I've already ruled on that one.  
 23 MR. TAIT: I'm asking you to take judicial notice  
 24 of this, Judge, I -- I guess.  
 25 THE COURT: If you're asking me to take judicial

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1 notice so that I will make an announcement during instructions  
 2 that I've taken judicial notice, then, no. If you're --  
 3 MR. TAIT: That's exactly what --  
 4 THE COURT: -- asking me to acknowledge that that's  
 5 the law, then, yes, that that's a regulation in the Oregon  
 6 Administrative Rule, I acknowledge that it is a regulation in  
 7 the Oregon Administrative Rule, but it's not one that I'm  
 8 going to talk to the jury about.  
 9 MR. TAIT: Okay. I understand.  
 10 THE COURT: With regard to the damages preliminary  
 11 instruction, having deleted the words "or negligence," is  
 12 there anything else that you have on that one, Mr. Tait?  
 13 MR. TAIT: No.  
 14 THE COURT: Okay. Next one is noneconomic damages  
 15 when economic damages are awarded, which was requested by  
 16 Mr. Tait. Mr. Lafky, do you have an objection to that one?  
 17 MR. LAFKY: No.  
 18 THE COURT: It's uniform 70.05.  
 19 Special instruction number 14, damages noneconomic.  
 20 That (pause) -- whose special was that?  
 21 MR. TAIT: Mine.  
 22 THE COURT: Okay. Then, Mr. Lafky, what is your  
 23 position on this special instruction?  
 24 MR. LAFKY: That we ought to just give the uniform  
 25 instruction on noneconomic damages.

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1 THE COURT: Which, if I remember correctly from  
2 when I was putting these together last week, I was choosing  
3 between this one or that one, and they were somewhat similar.  
4 Did I include the uniform one?

5 MR. TAIT: Well, just including uniform does not  
6 include all the elements of damages we've alleged and put on  
7 evidence about. That's why we have that one. It's tailored  
8 to these facts.

9 THE COURT: Well, if I did have the uniform one, it  
10 would be right here, and it isn't, so -- so that was my  
11 thought, too.

12 MR. LAFKY: It's 70.02 is the noneconomic.

13 THE COURT: Do you believe there's a misstatement  
14 of the law here or are you simply preferring, Mr. Lafky?

15 MR. LAFKY: Well, looking at the instruction  
16 (pause) --

17 THE COURT: It's exactly the same until you get to  
18 the numbers, and then when you get to the numbers, emotional  
19 distress is included, humiliation is included, but discomfort,  
20 annoyance and convenience and mental anguish are additions.  
21 And then number two is different from uniform (pause) -- it  
22 doesn't appear to me that it varies substantially.

23 Would you like to argue that it does, Mr. Lafky?  
24 It does appear to me that it's simply the uniform instruction  
25 tailored for this case.

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1 MR. LAFKY: Well, there -- first of all, item four  
2 is wrong where it says the amount of punitive damages you  
3 award to Denece Messenger. I think that's supposed to say  
4 noneconomic damages.

5 THE COURT: Okay. I know she wasn't seeking  
6 punitives, so that makes sense to me. What was the thought,  
7 Mr. Tait, or is that just a typo?

8 MR. TAIT: I don't know where the word Denece  
9 Messenger came from. I do -- I have never intentionally  
10 submitted anything that talked about any kind -- any kind of  
11 damages to Denece Messenger.

12 THE COURT: Oh. So they were -- it was supposed to  
13 be punitive but it was not supposed to be to her. It was  
14 supposed to be punitive to --

15 MR. TAIT: Well, this is noneconomic damages. I  
16 don't know why we would ever -- punitive damages, it shouldn't  
17 be in here at all.

18 MR. LAFKY: Well, if we're going to give an  
19 instruction, of course, it would have to be referring to the  
20 claims for noneconomic damages by both sides. I think that  
21 was probably the intent here, because her claim for  
22 noneconomics is in the amount of 125,000.

23 THE COURT: Okay. And it -- as -- as I'm listening  
24 to you both, I'm thinking I did probably assemble this from a  
25 couple of requested instructions, and that was -- and my

1 thought was to make it apply to all of the claims that related  
2 to noneconomic damages, so that would have been my addition.

3 MR. TAIT: How do you get --

4 THE COURT: But it should have been noneconomic and  
5 not punitive.

6 MR. TAIT: Well, okay.

7 THE COURT: Which is why it's in the noneconomic  
8 instruction. So am I hearing objections on this one as --

9 MR. TAIT: Well, there should be no instruction  
10 anywhere in this case that talks about punitive damages to  
11 Denece Messenger. There should be no --

12 THE COURT: Well, it doesn't now. It's  
13 noneconomic, and it was my typo. I'm sorry.

14 MR. TAIT: Okay. There also cannot be any  
15 instruction that applies to Denece Messenger that allows her  
16 to get inconvenience and interference with a party's right to  
17 possession and the use of their property. That's not even a  
18 claim that she has.

19 THE COURT: Okay. So what you're I think asking me  
20 to do, if you were to convert that from just being a general  
21 objection to being a suggestion, would be in determining the  
22 amount of noneconomic damages for Decorative Bark and Denece  
23 Messenger, and then have one or two and then do a separate  
24 additional paragraph, in determining the noneconomic damages  
25 for the de Landros, and it's separate.

1 MR. TAIT: There is -- there is no for Decorative  
2 Bark and Denece Messenger. There's a claim by Decorative  
3 Bark --

4 THE COURT: Okay. For Denece Messenger, right.  
5 That's the one that's already there. What I'm trying to do is  
6 construct something here that will work. Can you help me with  
7 that?

8 MR. TAIT: Well, Judge, I don't like the concept of  
9 trying to get an instruction that the jury's supposed to try  
10 to figure out whether this applies to all claims or one person  
11 or another. I think we should tell them that it applies to  
12 this claim.

13 THE COURT: Well, that's what I was just  
14 suggesting.

15 MR. TAIT: Oh, okay.

16 THE COURT: Did that not make sense?

17 MR. TAIT: Yeah, it does.

18 THE COURT: Well, then help me do that. In  
19 determining the amount -- and this is both of you, please,  
20 Mr. Lafky. In determining the amount of noneconomic damages,  
21 if any, for, we'll start with the plaintiff.

22 MR. LAFKY: For Plaintiff Denece Messenger,  
23 consider each of the following, item one and item four.

24 THE COURT: Okay.

25 MR. LAFKY: And for counterclaimants, Derek and

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1 Stephanie de Landro, consider the following, items, one, two  
2 and three.  
3 THE COURT: Yes. That's -- that's what I was  
4 seeking. Mr. Tait, how do you --  
5 MR. TAIT: Well, I don't agree that you can say  
6 that she would get emotional distress for that claimed  
7 misconduct. How is a jury supposed to know what damage she is  
8 seeking emotional distress for? Is it for the trespass? She  
9 can't get emotional distress damages for the trespass. Is it  
10 for the nuisance? She can't get any damages for that. Is it  
11 for any of the claims that the Court has withdrawn? I don't  
12 believe that's taken care of somewhere else.  
13 MR. LAFKY: She only has one claim, but if you want  
14 to say --  
15 MR. TAIT: Intentional --  
16 MR. LAFKY: -- because of intentional --  
17 THE COURT: She has trespass --  
18 MR. LAFKY: -- because of Denece Messenger's claim  
19 of intentional --  
20 THE COURT: She has trespass and (pause) --  
21 MR. LAFKY: Decorative Bark has the trespass.  
22 THE COURT: Oh, that's right.  
23 MR. LAFKY: And the --  
24 THE COURT: That's right.  
25 MR. LAFKY: -- interference claim and Messenger has

1 Giusto.  
2 THE COURT: Yes. And we're not discussing that  
3 right now. We're going to try to get through the  
4 instructions, but you were asking what were the claims of  
5 damages on, and just speaking from having read the complaints,  
6 that's what they were on.  
7 MR. TAIT: But, Judge, I don't know how -- I don't  
8 know whether those claims are in or out of this case now the  
9 way these instructions are being given. Neither does the  
10 jury. I haven't seen anything on withdrawal of issues. I  
11 don't -- I don't know -- I mean, if the jury's somewhere being  
12 told the only thing that she is entitled to --  
13 THE COURT: Well, there was something in the  
14 (indiscernible) issues that we did this morning. It was  
15 limited because the only one I had withdrawn was the nuisance  
16 claim and we were going to address them. And if you want, we  
17 can just butt in now and address the rest of the directed  
18 verdict claims, but I thought we might get through this one  
19 stack --  
20 MR. TAIT: Well, I'm sorry, Judge.  
21 THE COURT: -- without getting to the special  
22 instructions without digressing to something else, but we'll  
23 go back and find the one on withdrawal.  
24 MR. TAIT: These things are sort of tied together,  
25 because I don't know if you're allowing her to claim emotional

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1 the IIED claim.  
2 THE COURT: That's right. So if you want to say  
3 because of intentional infliction of emotional distress or if  
4 you want to say because of Denece Messenger's claim of  
5 intentional infliction of emotional distress, that's fine with  
6 me. And then I guess you'd say on the de Landros, then you'd  
7 say, because of trespass and/or nuisance? I mean, I don't  
8 know how you want to present that, but that would be the kind  
9 of (indiscernible).  
10 MR. TAIT: And/or nuisance is fine. That -- this  
11 (pause) -- okay. What -- what --  
12 THE COURT: Okay.  
13 MR. TAIT: What conduct -- what conduct is the  
14 plaintiff entitled -- Denece Messenger entitled to get  
15 compensation for? Nowhere in this case that I've seen so far  
16 has anybody told you. Under the summary of issues,  
17 specifically --  
18 THE COURT: She requested compensation in a nominal  
19 amount for the trespass and in noneconomic damages for the  
20 intentional infliction of emotional distress and then damages  
21 to be proven at trial for the contract claim.  
22 MR. TAIT: For what? Intentional interference with  
23 contractual relations?  
24 THE COURT: Yes.  
25 MR. TAIT: Yes. And that's with the letter with

1 distress damages for the letter to Giusto, the letter to DEQ,  
2 the comment to DEQ. He says he's withdrawn all those things,  
3 and this doesn't make any distinction between any of them.  
4 THE COURT: Because they're addressed by other  
5 instructions.  
6 MR. TAIT: Well, I don't -- I'm sorry. I don't see  
7 that instruction. Maybe I just (pause) --  
8 MR. LAFKY: There's no claim by Decorative Bark for  
9 noneconomic damages.  
10 MR. TAIT: And --  
11 MR. LAFKY: Decorative Bark claims are trespass and  
12 intentional interference with economic relation.  
13 THE COURT: I also drafted a summary of pleadings  
14 earlier that's with your -- the stacks that she passed to you.  
15 MR. TAIT: Okay. I've --  
16 THE COURT: So let's get that back. That might be  
17 helpful.  
18 MR. TAIT: Maliciously attempt to interfere with --  
19 there's no such thing as a malicious attempt to interfere.  
20 You either interfere or you don't.  
21 THE COURT: I'm summarizing the pleadings.  
22 MR. TAIT: I don't -- it doesn't matter. The  
23 pleadings don't say attempted interference. They --  
24 THE COURT: Yes, they do.  
25 MR. TAIT: They don't state --

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1 THE COURT: I took it directly out --  
 2 MR. TAIT: They don't state a claim for attempted  
 3 interference.  
 4 THE COURT: Okay.  
 5 MR. TAIT: So that summary shouldn't be stated that  
 6 way.  
 7 MR. LAFKY: That's fine with me if you take out  
 8 intentionally and maliciously attempted to and put a D on the  
 9 end of interfere.  
 10 MR. TAIT: Well, then you don't state a claim at  
 11 all. If it's not intentional, it's no -- it can't be  
 12 intentional interference with contractual relations. If it  
 13 says intentional, it's --  
 14 THE COURT: Okay. Let's put aside all the jury  
 15 instructions and finish argument on that.  
 16 MR. TAIT: On what?  
 17 THE COURT: On the arguments on the claim about  
 18 intentional interference with economic relations. We had left  
 19 that at the end of the day on Friday, so --  
 20 MR. TAIT: Okay.  
 21 THE COURT: -- let's go back.  
 22 MR. TAIT: The claim fails as a matter of law  
 23 because the claim's proof of any damages are insufficient for  
 24 the same reasons I said last week. The witness said, and I  
 25 didn't have any need for bark dust for two weeks, or during

1 Allstate. I'd like to hear your position on that and the  
 2 damages issues also.  
 3 MR. LAFKY: My recollection of Mr. Giusto's  
 4 testimony differs from counsel. I don't recall Mr. Giusto  
 5 saying that he didn't need bark for a couple days. I recall  
 6 him testifying that he didn't buy bark from Decorative Bark  
 7 for a couple of days, as he had been doing, and while he made  
 8 some phone calls and investigated this issue that was raised  
 9 by Mr. de Landro in the e-mail, he testified as to --  
 10 THE COURT: That's more my memory also.  
 11 MR. LAFKY: He testified as to how much that would  
 12 have been had he have made those purchases. And if you look  
 13 at the uniform instruction on --  
 14 THE COURT: But didn't testify that he made them  
 15 anywhere else or that he bought bark during that  
 16 two-day period at all, is my memory.  
 17 MR. LAFKY: Correct. So I think it's just a  
 18 question of fact. And the -- the uniform instruction on the  
 19 intentional interference, if I can find that one, the 40.04  
 20 uniform instruction, I think if you look at the uniform  
 21 instruction, we've made out a prima facie case, and it's just  
 22 a question of what the jury determines. I think Mr. Tait's  
 23 argument is, is that if he's motivated by some type of  
 24 environmental concern, then in no way can this ever be  
 25 improper means or an improper purpose, and of course that's

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1 that period of time I called around and then I determined not  
 2 to go ahead and buy from Denece Messenger. So he did not  
 3 prove any damages. The net damages have to be proven, not  
 4 just your gross sum. And they've said -- he mentioned some  
 5 amount of money he would pay if he bought a certain amount of  
 6 bark dust. They have -- I submitted a case against it said  
 7 you can't do that. I submitted a case that requests the  
 8 instruction to withdraw this claim that says if you have a  
 9 mixed motive, and environmental concerns is one of those  
 10 motives --  
 11 THE COURT: Conklin.  
 12 MR. TAIT: Yeah. That that is not -- that's a  
 13 pleading claim. So we're past that. We're into the evidence  
 14 now, but the evidence tells at best for the plaintiff, a mixed  
 15 motive. Even the things that the de Landros are specifically  
 16 talking about, talks about environmental concerns and concerns  
 17 for his children. There's a mixed motive. They have not  
 18 proven a claim for intentional interference with contractual  
 19 relations.  
 20 THE COURT: Okay. Mr. Lafky, I told you late  
 21 Friday what I had been reading up on with that, in particular  
 22 my thought that it's -- that there were similarities to the  
 23 Top (pause) --  
 24 MR. LAFKY: Top Service.  
 25 THE COURT: Yes. Top Service Body Shop vs.

1 just not true. I mean, we can envision all types of --  
 2 THE COURT: Well, how --  
 3 MR. LAFKY: -- environmental sensibilities --  
 4 THE COURT: Address for how it is an improper means  
 5 and an improper -- where the evidence is that it was improper  
 6 means and improper purpose.  
 7 MR. LAFKY: He sends an e-mail to a customer of  
 8 Decorative Bark as part of this effort that he's making, as  
 9 testified to by Denece Messenger, that he wants to get them  
 10 evicted or shut them down. And that goal is an improper means  
 11 or an improper purpose. He's trying to deprive them of income  
 12 for an improper purpose. And that's just a question of fact  
 13 for the jury to decide, you know, is this a fair commentary by  
 14 a concerned citizen or is this improper means or an improper  
 15 purpose. And it's just a question of fact for the jury to  
 16 decide.  
 17 MR. TAIT: He is not responding at all to the mixed  
 18 motive that the Supreme Court in Conklin specifically says  
 19 isn't enough. One of the motives might be bad, but if the  
 20 other one is not bad, they can't make that a claim. He's not  
 21 addressed that.  
 22 THE COURT: Well, and -- and I'll repeat what I was  
 23 saying on Friday, because I'm thinking it may not be fresh in  
 24 your mind, but after reading Top Soil and thinking about the  
 25 fact that Mr. de Landro had a professional business

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1 relationship with Steve Giusto, Steve Giusto had a  
 2 professional business relationship with your client, and it  
 3 was one letter, it wasn't letters written blanket to all of  
 4 their clients, it was just one that he had a professional  
 5 business relationship with, and it didn't threaten to take his  
 6 business away from him, it didn't say, if you continue doing  
 7 business with her, you know, I'm going to do a campaign  
 8 against you. It didn't really say anything other than please  
 9 re-evaluate in light of some facts I'm bringing to your  
 10 attention. How is that sufficient to bring that to the jury?  
 11 MR. LAFKY: The evidence, of course, is that he did  
 12 quit doing business with Mr. Giusto and Boring Bark. That's  
 13 what Mr. de Landro testified to. So --  
 14 THE COURT: But the letter didn't say that. That  
 15 may be what happened, but that's not what the letter said.  
 16 MR. LAFKY: I think the letter speaks for itself,  
 17 and the question is whether the letter can be an improper  
 18 means or an improper purpose in the context of Mr. de Landro  
 19 saying that he wants to get Decorative Bark evicted and shut  
 20 them down. And so looking at the letter in that context, it  
 21 certainly creates a question of fact about improper means or  
 22 improper purpose. You'll note that the jury instruction, the  
 23 uniform instruction doesn't define improper means or improper  
 24 purpose. So, again, this is something that's turned over to  
 25 the jury to determine in their own best view as to the facts

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1 of a particular case. The only question --  
 2 THE COURT: If there's sufficient evidence.  
 3 MR. LAFKY: Right. So the only question at this  
 4 point would then be is there any evidence from which a  
 5 reasonable juror could conclude that this constituted an  
 6 improper means or an improper purpose, and certainly in the  
 7 context of this evidence, including his statement that he  
 8 wanted to evict Decorative Bark, that it is.  
 9 MR. TAIT: The uniform jury instruction  
 10 specifically says you may have to instruct further on what is  
 11 an improper means or an improper motive. In this case, you  
 12 have to. And again for the third time, what is -- what is his  
 13 response to the holding in *Conklin* that if it's a mixed  
 14 motive, they don't make that a claim? One good, one bad.  
 15 MR. LAFKY: I think that's a pleading issue, Judge,  
 16 as to whether -- if I remember *Conklin vs. Carbon Rock*, I  
 17 think it was in the context of, you know, whether you pled  
 18 something adequately. And again, the pleading, I don't think,  
 19 mirrored the claims of tort.  
 20 THE COURT: That was the pleading (indiscernible).  
 21 And it refers to *Top Service Body Shop*, which is the one I  
 22 think raised the most (indiscernible), because defendant had  
 23 shown a legitimate business objective.  
 24 MR. LAFKY: And certainly Mr. de Landro had no  
 25 business objective. He isn't in the bark business.

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1 THE COURT: He was in the business of buying bark  
 2 from Steve Giusto.  
 3 MR. LAFKY: He's not in the bark business, Judge.  
 4 He's not saying to Boring Bark, well, I'd like your business  
 5 to come to me instead of Decorative Bark. That's what that  
 6 comment refers to, is --  
 7 THE COURT: No, it's --  
 8 MR. LAFKY: -- competitor potential.  
 9 THE COURT: Yeah. It's not exactly the same, but  
 10 it does seem to be saying, which is consistent with everything  
 11 else, I don't want to support her through you. So in my  
 12 evaluation of whether I'm going to continue supporting your  
 13 business knowing that you buy from her, I need to know if  
 14 you'll consider these things. That's how -- that's how it  
 15 read to me.  
 16 MR. LAFKY: Well, again, it speaks for itself. It  
 17 is what it is. And the question is, can that be a fact that  
 18 supports any reasonable juror ruling in favor of the plaintiff  
 19 on this claim, and I think it can. I don't know how else to  
 20 state it other than I don't want to keep flogging it.  
 21 THE COURT: Right.  
 22 MR. LAFKY: But I just think if you give --  
 23 THE COURT: I've invited you to flog. It's okay.  
 24 MR. LAFKY: If you look at the uniform instruction,  
 25 it's just a question of whether a reasonable juror could find

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1 on these facts that we've heard so far that he wanted to evict  
 2 them, he wanted one of their customers to stop buying from  
 3 them, whether that was improper in any way, regardless of his  
 4 relationship. In other words, I think another way to think  
 5 about it is, well, is he somehow privileged to do this because  
 6 he's a customer of Boring Bark? And the answer to that would  
 7 be no. Again, it just goes to the weight.  
 8 MR. TAIT: Why -- why do -- why does -- he seems to  
 9 be ignoring a case that is factually close to the point where  
 10 they say this guy -- you know, that his pleadings show that he  
 11 was acting on behalf of an environmental group. That's a  
 12 legitimate purpose. That's not an improper purpose. When he  
 13 had a mixed -- you had a mixed motive, you don't state a  
 14 claim. You can't prove a claim under a mixed motive. And  
 15 that's what we should be talking about here. I mean, the --  
 16 jeez, Judge, he said he told us --  
 17 THE COURT: It refers to a duty of  
 18 non-interference. It says not only does the plaintiff have to  
 19 prove that he intentionally interfered, but also that he had a  
 20 duty of non-interference.  
 21 MR. TAIT: Exactly. Now we're getting there.  
 22 THE COURT: Did he have a duty of non-interference,  
 23 Mr. Lafky?  
 24 MR. LAFKY: Yes. He has a duty not to interfere  
 25 with the existing financial relationship between Boring Bark

<p style="text-align: right;">1166</p> <p>1 and Decorative Bark. That's what the whole tort is based on.</p> <p>2 THE COURT: Where does that -- his duty come from?</p> <p>3 MR. LAFKY: From the tort law. Simply from this</p> <p>4 situation, from the relationship with --</p> <p>5 THE COURT: That seems a little circular.</p> <p>6 MR. LAFKY: It is. It's completely circular.</p> <p>7 That's -- that's why --</p> <p>8 THE COURT: Well, you --</p> <p>9 MR. LAFKY: -- talking about a duty to --</p> <p>10 THE COURT: You can't say in order to commit a</p> <p>11 tort, you have to have a duty to not interfere, and the reason</p> <p>12 you have a duty to not interfere is so you don't commit the</p> <p>13 tort. That's (pause) --</p> <p>14 MR. LAFKY: That's exactly what the case says.</p> <p>15 MR. TAIT: That's --</p> <p>16 MR. LAFKY: It is circular.</p> <p>17 MR. TAIT: It says, no, you can't do that.</p> <p>18 THE COURT: I think it is -- I thought that's what</p> <p>19 you were saying. I didn't think that's what the case said.</p> <p>20 MR. LAFKY: Well, I think what the case says is</p> <p>21 you've got -- you can't interfere, period. And so then the</p> <p>22 question is, well, under what circumstances can you interfere?</p> <p>23 And the circumstances are when you're not violating the</p> <p>24 elements of the claim. To say that you have a duty to not</p> <p>25 interfere is the same thing as the defendant saying, I've got</p>	<p style="text-align: right;">1168</p> <p>1 And the court says when you have a mixed motive like that,</p> <p>2 they cannot make a claim by showing that mixed motive. And in</p> <p>3 this case, the letter is the sole basis for this, and it says,</p> <p>4 I've got environmental concerns.</p> <p>5 THE COURT: I've put a lot of thought into this</p> <p>6 over the past few days and I am going to direct a verdict for</p> <p>7 the defense on that claim.</p> <p>8 The other of -- the other request for a directed</p> <p>9 verdict, which were defense ones, I've also done a lot of</p> <p>10 reading about. They started with a directed verdict on</p> <p>11 trespass, which I -- I can't remember if I've already denied</p> <p>12 that and I was revisiting it by reading all these cases or if</p> <p>13 I had deferred it, but either way after reading the cases, I'm</p> <p>14 denying the request for directed verdict on that.</p> <p>15 MR. TAIT: I do think I moved for a directed</p> <p>16 verdict on the grounds of --</p> <p>17 THE COURT: No. Their --</p> <p>18 MR. TAIT: Theirs.</p> <p>19 THE COURT: -- request.</p> <p>20 MR. TAIT: Okay.</p> <p>21 THE COURT: We were mostly with their request and</p> <p>22 then yours came back up at the end.</p> <p>23 MR. TAIT: Okay.</p> <p>24 MR. LAFKY: I'd asked for directed verdict in favor</p> <p>25 of plaintiff on the trespass --</p>
<p style="text-align: right;">1167</p> <p>1 a privilege to interfere. And there's no such privilege in</p> <p>2 this case. Again, if you look at the uniform instruction on</p> <p>3 the second page, it says, improper --</p> <p>4 THE COURT: What's the number?</p> <p>5 MR. LAFKY: 40.04.</p> <p>6 THE COURT: Thank you.</p> <p>7 MR. LAFKY: What the uniform instruction says in</p> <p>8 the footnote on the second page is that improper circumstances</p> <p>9 the defendant may claim a privilege to interfere. That's the</p> <p>10 same sort of thing that we're talking about here. In other</p> <p>11 words, duty of non-interference is the same thing as saying</p> <p>12 that the person's committed the tort. And I agree. I think</p> <p>13 it is just circular.</p> <p>14 MR. TAIT: I could not agree more, Judge. What</p> <p>15 he's saying is circular, but the case doesn't support that</p> <p>16 reasoning. The <i>Conklin</i> case specifically says, okay, we left</p> <p>17 for a further case, the issue left off in <i>Top</i> -- whatever that</p> <p>18 thing is, where we did not decide the issue of what happens</p> <p>19 when somebody has a mixed motive. Now we have a case where</p> <p>20 there is a mixed motive. The defendant in that case pleaded</p> <p>21 they were acting on behalf of an environmental agency. And</p> <p>22 there is scant reference in the plaintiffs' claim to anything</p> <p>23 other than an environmental reference. The only letter</p> <p>24 they're talking about in this whole case return -- refers to</p> <p>25 an environmental issue that's exactly what he's talking about.</p>	<p style="text-align: right;">1169</p> <p>1 THE COURT: Right. Exactly.</p> <p>2 MR. LAFKY: -- for liability.</p> <p>3 THE COURT: And then the next one I was to think</p> <p>4 about was the -- that the suit was brought against both Denece</p> <p>5 Messenger in her individual capacity and Decorative Bark,</p> <p>6 which is her corporate counterpart, and you asked me to direct</p> <p>7 a verdict for one or the other.</p> <p>8 MR. LAFKY: On behalf of the individual as being no</p> <p>9 evidence that she'd ever acted outside the course and scope of</p> <p>10 her employment and also no evidence that she was not acting</p> <p>11 with the intent to (indiscernible) the corporation. I've got</p> <p>12 some more case law on that. I don't know if you're still</p> <p>13 thinking about it or not, but (pause) --</p> <p>14 THE COURT: No, but I'm interested. I'm not still</p> <p>15 thinking about it, because I am not going to permit that</p> <p>16 directed verdict, because I think there is some evidence that</p> <p>17 it was either simply her being bullheaded as a person, not</p> <p>18 necessarily in her capacity with the corporation, or it could</p> <p>19 have been because she wants to make money with the</p> <p>20 corporation, which was other testimony that we heard.</p> <p>21 MR. LAFKY: And, again, the basis of a sole owner</p> <p>22 of a corporation wanting the corporation to make money absent</p> <p>23 any evidence that the owner has acted outside of the course</p> <p>24 and scope of their official capacity for the corporation</p> <p>25 would, I believe, not be appropriate to deny a directed</p>

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1 verdict on. In other words, there's no evidence, for  
2 instance, that you -- you referred a moment ago to it being  
3 her corporate counterpart, so if we analogize to like an alter  
4 ego type of situation, which is typically meant to pierce the  
5 corporate veil, there's just no evidence of that in this case,  
6 that Ms. Messenger's acted in any way outside of her corporate  
7 capacity or in any way that would subject her to personal  
8 liability.

9 Another way to look at it would be, let's assume  
10 they never sued Denece Messenger and let's assume that you got  
11 a verdict against direct -- Decorative Bark on behalf of  
12 defendants on some counterclaim. There's no evidence in this  
13 case that there's been any kind of -- any conduct that would  
14 allow the judgment creditor to pierce the corporate veil; in  
15 other words, no evidence of lack of corporate formalities, no  
16 evidence of acting --

17 THE COURT: I'll tell you what -- what makes me  
18 unsure, and this one I'm -- I'm ruling from my own perception  
19 of all the evidence that I've heard, and it -- it's -- it has  
20 seemed to me -- I haven't been able to tell from  
21 Miss Messenger's own testimony when she feels like she's  
22 acting as an individual or when she feels like she's acting on  
23 behalf of the corporation, and I found her testimony to be  
24 confusing on that point.

25 It seemed as if there were things that happened to

1 offered any evidence that Ms. Messenger was acting with any  
2 intent other than to benefit the corporation. In fact, you  
3 just said that.

4 THE COURT: Well, there's also a question of once  
5 you -- once -- if the jury should find misconduct, then the  
6 level of misconduct would ultimately wind up dictating whether  
7 it was personal or corporate, because there are levels of  
8 misconduct that are always considered, like -- like with Enron  
9 or something that are always -- that's a, you know,  
10 tremendously huge example and this is not that case at all,  
11 but there are times when someone's acting in the corporate  
12 capacity when they are also involved in personal misconduct.

13 MR. LAFKY: If they're being charged personally  
14 with some type of racketeering charge, which is what that case  
15 was about, you know, that's -- you can have personal liability  
16 in a racketeering context because you've acted with an intent  
17 to get others like a corporation to violate the law,  
18 securities law, for instance, but here there's no claim that  
19 Denece Messenger acted with any intent to get Decorative Bark  
20 to violate the law. The claim is that Denece Messenger --

21 THE COURT: But she and Decorative Bark are -- are  
22 at times the same.

23 MR. LAFKY: They're not the same.

24 THE COURT: And at times not.

25 MR. LAFKY: There's no evidence that the defense

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1 her in her corporate capacity that she was taking very  
2 personally, and therefore it also seemed that there were  
3 things that she was doing that arguably she was doing  
4 personally even though she was doing them while she was at the  
5 property of Decorative Bark.

6 So because I found that confusing myself, I think  
7 there is a question for the jury to decide about which times  
8 she had which hat on and what her motives were depending on  
9 which hat she was wearing, but that -- that was the ultimate  
10 reason for denying that.

11 MR. LAFKY: Well, the only other thing I'd add for  
12 the record, Judge, is just to cite this *Welch v. Bancorp*  
13 *Management* case, which is --

14 THE COURT: May I have it?

15 MR. LAFKY: Sure. 296 Oregon 208, and I've  
16 highlighted some portions here. And essentially what it says  
17 is to enjoy immunity, meaning immunity from tortious claims by  
18 third parties, a corporate officer or employee must be acting  
19 within the scope of his employment and acting with the intent  
20 to benefit the corporation.

21 And so, again, I don't believe that defendants have  
22 presented any evidence that Ms. Messenger was not acting  
23 within the course and scope of her employment for the  
24 corporation as it relates to any claim of trespass or nuisance  
25 the defendants have made, nor do I believe that defense has

1 has presented that they're the same. The evidence is in fact  
2 their own tax returns that they've sought to introduce show  
3 that there's a division of corporate and individual. As their  
4 own evidence has shown, there's a personal salary being paid  
5 by the corporation to Ms. Messenger, the individual, separate  
6 tax returns, corporate formalities. There's no evidence  
7 otherwise. And Denece Messenger is being sued for trespass  
8 and nuisance, not for an Oregon RICO claim or some other type  
9 of theory that might implicate personal responsibility. In  
10 this case, it's two tort claims based on air particulate,  
11 smell and noise, and so there's no evidence --

12 THE COURT: But taking -- taking evidence in the  
13 light most favorable to the non-moving party, if the actions  
14 that were taken by her resulted in a trespass and a nuisance,  
15 then I have to decide is there a question about whether it was  
16 her personal misconduct or whether it was the general  
17 misconduct of the corporation.

18 MR. LAFKY: That's true. And so --

19 THE COURT: And that's what I can't figure out.

20 MR. LAFKY: So analogize to Mr. Fussell, the loader  
21 operator. If Mr. Fussell had been sued in his individual  
22 capacity and it turned out that he was running the loader  
23 operator that created some dust that got on the de Landros'  
24 property, would he be personally liable for trespass or  
25 nuisance? And the answer to that's a resounding no absent any

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1 indication that he's acting outside of the course and scope of  
 2 his employment. It doesn't --  
 3 THE COURT: Right.  
 4 MR. LAFKY: -- matter whether you're the owner --  
 5 THE COURT: The issue is course and scope of  
 6 employment, and then the question is, is that an issue for the  
 7 jury --  
 8 MR. LAFKY: Right.  
 9 THE COURT: -- or for me, and I'm deciding that  
 10 it's an issue for the jury.  
 11 MR. LAFKY: Okay.  
 12 THE COURT: Did you want to say any more on that?  
 13 MR. TAIT: Well, I do, Judge. This case that he  
 14 cited, all this says as a -- as a matter of contract rule, and  
 15 that's actually the rule he's been urging all along here, as a  
 16 matter of contract law, an employee of a contract who -- in  
 17 performing or breaching that contract who's acting within the  
 18 scope of their employment is not liable, not personally  
 19 liable. That's contract law.  
 20 And this case talks about can be liable for  
 21 intentionally interfering with contractual relations. And  
 22 that says nothing, absolutely nothing about general tort law.  
 23 And this idea in her personal capacity or any other capacity,  
 24 the fact of the matter is, there are work (indiscernible) out  
 25 there, and he knows it's a violation of Oregon law to put huge

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1 plumes of smoke in the air and have them go on someone's  
 2 property. And he does that with that knowledge, it doesn't  
 3 matter who he's working for. If he's working for the  
 4 corporation, the corporation is liable on a theory of  
 5 respondeat superior, but he is still personally liable.  
 6 There's no law anywhere that relieves somebody from their  
 7 obligation not to commit torts and injure somebody else,  
 8 regardless of who they're working for. So it's really a lot  
 9 more simple than -- than what -- I mean, the result is the  
 10 same than just saying that I -- I suspect the analysis --  
 11 THE COURT: You've made your record, so the  
 12 appellate court will be fully informed.  
 13 MR. TAIT: Yeah, well --  
 14 MR. LAFKY: And, Judge, on the issue --  
 15 THE COURT: And the last --  
 16 MR. LAFKY: While we're talking about that -- I'm  
 17 sorry.  
 18 THE COURT: No.  
 19 MR. LAFKY: If you want to finish that. My only  
 20 thought was --  
 21 THE COURT: I was -- I was going to go on to say  
 22 the only other question was whether I would strike reckless  
 23 and negligent from the trespass claim, and there was a case  
 24 that was directly on point that said it could be reckless  
 25 negligence, so I'm also denying that, but if you want to

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1 complete the record on this other issue, please do.  
 2 MR. LAFKY: No. The only other thing I was going  
 3 to say is if you're allowing the personal claim to go to the  
 4 jury, then of course we need some type of verdict form that  
 5 reflects that, and I haven't seen that as part of any verdict  
 6 form that I've reviewed so far. So in order to preserve any  
 7 potential error on that --  
 8 THE COURT: To separate.  
 9 MR. LAFKY: -- I would certainly ask that any  
 10 verdict form reflect whether the jury is giving a verdict  
 11 against Decorative Bark or Denece Messenger as opposed to  
 12 lumping it together.  
 13 THE COURT: That makes sense.  
 14 MR. TAIT: Well, I submitted an instruction that  
 15 does exactly that. I --  
 16 THE COURT: For the verdict form? He was talking  
 17 about a verdict form.  
 18 MR. TAIT: I have it in a verdict form.  
 19 THE COURT: Okay.  
 20 MR. TAIT: It has a spot for damages against the  
 21 corporation and against her.  
 22 THE COURT: Okay.  
 23 MR. TAIT: And let me just -- I've looked all over  
 24 the case trying to find a case I knew I had, but it's *Wheeler*  
 25 *vs. Albertson's, Inc.*, 129 Or App 501, where a store owner --

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1 where they found that a store was liable for the conduct of  
 2 its manager under the theory of respondeat superior, and the  
 3 manager was liable for his own conduct. That's exactly what  
 4 he's talking about here. And that's -- this is just an  
 5 example of what the law's been in Oregon forever. This  
 6 business about what his capacity is doesn't have anything to  
 7 do with tort law.  
 8 THE COURT: Can I keep this?  
 9 MR. TAIT: Yes.  
 10 THE COURT: Because I don't want to read it now.  
 11 MR. TAIT: I don't blame you.  
 12 THE COURT: Okay. And we will go back now to the  
 13 summary of pleadings, because that does just change it  
 14 slightly.  
 15 The second claim for relief paragraph is stricken,  
 16 the plaintiffs' second claim for relief. So we have the first  
 17 claim for relief alleges that Defendant Derek de Landro  
 18 intentionally entered onto the lands leased by Decorative  
 19 Bark, Inc., and in the exclusive possession of Decorative  
 20 Bark, Inc., without a right to do so or a reasonable belief  
 21 that he had such a right. Any concerns about that?  
 22 MR. LAFKY: No.  
 23 THE COURT: Okay. The next paragraph, having  
 24 stricken that, is now Plaintiff Denece Messenger's claim for  
 25 relief alleges that -- we'll make that second (indiscernible).



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1 Oh, no. That's her only claim for relief. There was one  
2 in -- okay. Plaintiff Denece Messenger's claim for relief --  
3 I'll delete the word "first" from that first paragraph.  
4 Plaintiff Denece Messenger's claim for relief alleges that  
5 Defendant Derek de Landro acted in a way that is an  
6 extraordinary transgression of the bounds of socially  
7 tolerable conduct, and thereby intentionally caused her severe  
8 mental or emotional distress, including embarrassment,  
9 humiliation, damage to reputation, stress, anxiety, loss of  
10 sleep and pain and suffering. Any --  
11 MR. TAIT: There's no evidence of any damage to her  
12 reputation.  
13 THE COURT: (Indiscernible).  
14 MR. TAIT: We're talking about just about this  
15 letter to Giusto now. What else is there?  
16 THE COURT: The newspaper article.  
17 MR. TAIT: He withdrew that.  
18 THE COURT: He did withdraw that?  
19 MR. TAIT: He specifically withdrew that.  
20 THE COURT: It's hard to remember.  
21 MR. TAIT: I know, Judge. And my saying it very  
22 passionately, that is the problem.  
23 MR. LAFKY: I think we just threw this on directed  
24 verdict, Judge, and we struck a few of these phrases.  
25 THE COURT: Okay. So which one should I --

1 and say, okay, these are out, so we're not talking about  
2 these, so we know exactly what's left so I then can make my  
3 motion for a directed verdict knowing what's actually left.  
4 And when he says, oh, we've got all these things put together,  
5 well, if we strike a whole bunch of those, he doesn't have all  
6 of those things put together.  
7 THE COURT: So what you want to do is not go over  
8 any summary of the pleadings, you want to go over line by line  
9 the pleading itself and decide what's stricken and what  
10 remains? Is that what you want?  
11 MR. TAIT: Well, it's -- now we're talking about in  
12 your summary of the pleadings what the jury can consider --  
13 THE COURT: Yes.  
14 MR. TAIT: -- in the emotional instruction --  
15 intentional infliction of emotional distress claim. Unless we  
16 know what is left in this case, you can't give a proper  
17 summary of that pleading.  
18 MR. LAFKY: You're just telling them what the  
19 claims are. That's all this is.  
20 MR. TAIT: Well, a summary of the pleadings means  
21 only those things that are properly in the pleadings. And if  
22 they're not in the pleadings, then the -- I think paragraphs  
23 11 and 12 are out. You've just ruled that.  
24 MR. LAFKY: There -- there's no reference to the  
25 facts in this pleading summary, so the question is, does the

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1 MR. LAFKY: So whichever ones your notes reflect  
2 based on when we discussed this a couple days ago would be  
3 what I would be fine with going with.  
4 THE COURT: And what happened was we would strike  
5 in the allegations and I wouldn't necessarily follow through  
6 and strike it in the prayer.  
7 MR. LAFKY: Right.  
8 THE COURT: Or in the claim portion of (pause) --  
9 MR. TAIT: Okay. So just --  
10 THE COURT: All right.  
11 MR. TAIT: What you just --  
12 THE COURT: So damage to reputation is deleted. I  
13 think there was testimony about embarrassment, humiliation,  
14 stress, anxiety and loss of sleep.  
15 MR. LAFKY: I think we agreed there --  
16 THE COURT: Pain and suffering --  
17 MR. LAFKY: Pain and suffering we talked about in  
18 the context of going to the hospital, that sort of thing.  
19 THE COURT: Right. So I will delete the "damage to  
20 reputation" words.  
21 MR. TAIT: Well, Judge, can we -- here's my  
22 problem. We need to know exactly what -- what claims left in  
23 the pleadings are in there now, because he's incorporated  
24 every one of them in his IUD -- in intentional infliction of  
25 emotional distress claim. And I think we need to go through

1 pleading summary need to have all the facts alleged or not?  
2 And I don't think it does.  
3 THE COURT: I'm not going to leave them all in the  
4 summary.  
5 MR. TAIT: Well, okay. Judge, the function of the  
6 pleading is to not only give the jury notice of what it's  
7 talking about, people are talking about, but it limits their  
8 amount to consider various items in determining their amount  
9 of damages. And if you don't tell them that, you're not --  
10 you're letting them award damages on anything they've heard  
11 any testimony about. You're just -- you don't have a choice  
12 here.  
13 THE COURT: As has been my problem throughout the  
14 trial, I understand your words but I never understand what  
15 you're asking me for. You -- you sound like -- well, to be  
16 frank, you sound like you're just criticizing everything and  
17 not making any suggestions. I don't know what you're asking  
18 me to do. What are you asking me to do?  
19 MR. TAIT: I'm asking you to tell the jury what --  
20 what --  
21 THE COURT: Specifically what?  
22 MR. TAIT: Specifically --  
23 THE COURT: Tell the jury --  
24 MR. TAIT: They're his claims. They're not mine,  
25 Judge. How do I tell you what he -- every time I say what his

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1 claims are, he says, no, I don't really mean that.

2 THE COURT: Well, I made a summary, and apparently

3 you don't want that one. Do you have an alternative

4 suggestion, or do you want him to just make an alternative

5 suggestion?

6 MR. TAIT: I don't want either one of those, Judge.

7 You know, we still don't know what he's claiming are the acts

8 that the jury should be able to consider in the intentional

9 infliction of emotional distress claim. I know which ones I

10 think he can't consider, but unless we have some agreement on

11 those, how do I know what we should be telling the jury?

12 THE COURT: Well, just tell us.

13 MR. LAFKY: We don't have to --

14 MR. TAIT: Okay. Paragraphs 11 and 12 are out of

15 this case, so that cannot be part of -- the letter to Giusto

16 cannot be part of an intentional infliction of emotional

17 distress claim. They withdrew all of the -- of the -- well,

18 the intentional trespass can't be, because that's a matter of

19 Decorative Bark's claim. The report -- the taking pictures

20 and reporting complaints to DEQ has been specifically

21 withdrawn by the plaintiff, so paragraphs 13 and 14, I think

22 you've already thrown paragraph 13 -- or 14 -- the nuisance

23 claim out as to Decorative Bark. It cannot be a basis for

24 damages against Denece Messenger. So now we're talking

25 about -- what's left?

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1 THE COURT: 15 was part of the nuisance claim, too,

2 so that's out.

3 MR. TAIT: Yeah. Four is out. Paragraph 4 is out.

4 That's Giusto.

5 THE COURT: Well --

6 MR. TAIT: Date's out, date's out, because that's

7 claims to DEQ.

8 THE COURT: I don't know that paragraph 4 is

9 automatically out, because I struck that claim.

10 MR. LAFKY: That's correct.

11 THE COURT: Because they're using paragraph 4 as

12 part of the other claim.

13 MR. LAFKY: That's correct.

14 MR. TAIT: So --

15 THE COURT: The fact that it doesn't -- or the fact

16 that --

17 MR. TAIT: Okay. To start with, it's now corrected

18 to -- it has nothing to do with Denece Messenger. It has to

19 do with letter -- having to do with Boring Bark. That's a

20 corporation. It cannot be used for intentional infliction of

21 emotional distress. It wasn't used ever in this -- for that

22 purpose, it was only used for intentional interference with

23 contractual relations.

24 MR. LAFKY: I think it was incorporated into the

25 claim.

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1 THE COURT: It was. Messenger re-alleges

2 paragraphs 1 through 15.

3 MR. TAIT: So they still say the same thing. They

4 wrote a letter about Boring Bark's business with Giusto.

5 THE COURT: We tried to communicate with the owner,

6 Denece Messenger, to no avail.

7 MR. TAIT: And that -- that's going to cause

8 intentional infliction of emotional distress? I mean, that --

9 that or -- that in combination with nothing could ever

10 constitute intentional infliction of emotional distress.

11 THE COURT: Well, not by itself, but they're not

12 claiming that any single thing by itself constituted

13 intentional --

14 MR. TAIT: How can this --

15 THE COURT: -- infliction of emotional distress.

16 MR. TAIT: -- in contrast with anything? "I've

17 tried to communicate with Denece Messenger, to no avail."

18 That's not an actual statement, no matter how many other

19 theories we tie it to.

20 MR. LAFKY: Judge, the summary of the pleadings

21 doesn't say that it is. The problem is we just need to tell

22 the jury who's got -- what claims are remaining. The jury's

23 presumed to agree that if you've stricken evidence or you

24 sustain an objection, they're not to consider that. They're

25 told that.

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1 If defense counsel wants to get some kind of

2 specific instruction regarding some kind of specific evidence,

3 like we've done with the water quality special instruction,

4 then he's entitled to ask for that.

5 MR. TAIT: Right, Judge. You've asked me what

6 things I think ought to be out of this case. I'm trying to

7 tell you that.

8 MR. LAFKY: But those things aren't in the summary.

9 MR. TAIT: It doesn't matter whether they're in the

10 summary or not. I'm trying to figure out if they're in the

11 case or not in the case, so the jury can be told they either

12 are or are not in the summary.

13 THE COURT: Okay. What I'm going to do is tell you

14 from the complaint what's still in the case. Paragraph 1 is

15 still in, paragraph 2 is still in, paragraph 3 is still in,

16 paragraph 4 is still in.

17 MR. TAIT: Is still in the case?

18 THE COURT: Yes. Paragraph 7 is still in,

19 paragraph 9, paragraph 10, paragraph 16 through 19, except for

20 that in 19 we deleted Messenger has suffered economic damages

21 in an amount to be determined at trial and we deleted loss of

22 sleep, so we should also delete that from the third paragraph.

23 MR. TAIT: Okay. So if you're leaving 9 in, then

24 you're letting -- you're leaving in a claim of trespass

25 against Decorative Bark -- oh, I see. You don't mean that's

<p style="text-align: right;">1186</p> <p>1 in there for the intentional infliction of emotional distress</p> <p>2 claim, you mean that's in there as a claim for Decorative</p> <p>3 Bark.</p> <p>4 THE COURT: Yes.</p> <p>5 MR. TAIT: Okay.</p> <p>6 THE COURT: Paragraph 20 is still in. Obviously</p> <p>7 that's not for the jury. That's for me. Paragraph, well, 21,</p> <p>8 and then the prayer. That's what's in.</p> <p>9 I had forgotten, Mr. Lafky, that we struck loss of</p> <p>10 sleep. And I think that if we did strike it in the pleadings,</p> <p>11 we need to strike it in the summary.</p> <p>12 MR. LAFKY: Okay.</p> <p>13 THE COURT: So I'm doing that.</p> <p>14 Moving on to the counterclaimants' portion of the</p> <p>15 summary of pleadings. Counterclaimants --</p> <p>16 MR. TAIT: Wait, Judge, now that we know what's in</p> <p>17 and what's not in, we can talk about what's in and the</p> <p>18 objections I have about it.</p> <p>19 THE COURT: Okay.</p> <p>20 MR. TAIT: Now you have somebody in the pleadings</p> <p>21 acting in a way that is outside the extraordinary bounds of</p> <p>22 intentional conduct without telling the jury either that these</p> <p>23 other claims have been taken out or what conduct you're</p> <p>24 specifically talking about. And a summary of the pleading</p> <p>25 should not --</p>	<p style="text-align: right;">1188</p> <p>1 home and causes them emotional distress.</p> <p>2 The de Landros further allege that the actions of</p> <p>3 Decorative Bark, Inc., and Denece Messenger constitute a</p> <p>4 reckless and outrageous indifference to a highly unusual risk</p> <p>5 of harm to them and their property.</p> <p>6 MR. TAIT: Well, you say noise and airborne</p> <p>7 particulates, but it's actually noise, smell and airborne</p> <p>8 particulates.</p> <p>9 THE COURT: Okay. I'll add smell.</p> <p>10 MR. LAFKY: That's fine either way.</p> <p>11 THE COURT: And then the second paragraph says,</p> <p>12 Counterclaimants Derek and Stephanie de Landro second claim</p> <p>13 for relief is that the actions of Decorative Bark, Inc., and</p> <p>14 Denece Messenger also constitute private nuisance.</p> <p>15 MR. LAFKY: That's certainly what they claim, so I</p> <p>16 think that's a fair summary.</p> <p>17 THE COURT: Mr. Tait?</p> <p>18 MR. TAIT: Yes, I agree, Judge.</p> <p>19 THE COURT: Oh, good.</p> <p>20 MR. TAIT: Wow.</p> <p>21 THE COURT: Wow. See how fast that was.</p> <p>22 Again, we're back to damages.</p> <p>23 MR. TAIT: Back to damages.</p> <p>24 THE COURT: And that was special instruction number</p> <p>25 14, where we were divvying up the last part. And what I have</p>
<p style="text-align: right;">1187</p> <p>1 THE COURT: There's going to be a separate</p> <p>2 instruction on withdrawal of issues. There's never -- there's</p> <p>3 not going to be a single instruction that covers absolutely</p> <p>4 everything. That doesn't happen.</p> <p>5 MR. TAIT: Okay.</p> <p>6 THE COURT: So I'm not going to address in the</p> <p>7 summary of the pleadings both what's in and what's out. I'm</p> <p>8 simply going to summarize what's in and then we'll have a</p> <p>9 separate instruction on what's withdrawn.</p> <p>10 MR. LAFKY: And you're giving the uniform about</p> <p>11 pleadings are not evidence.</p> <p>12 THE COURT: Right.</p> <p>13 MR. LAFKY: This -- so --</p> <p>14 MR. TAIT: So object to this summary of pleadings</p> <p>15 in the sense that you are saying -- you are talking about some</p> <p>16 unspecified conduct without telling the jury what it is.</p> <p>17 That's a function of the summary of the pleadings. So now</p> <p>18 we're on what?</p> <p>19 THE COURT: Counterclaims. Counterclaimants Derek</p> <p>20 and Stephanie de Landro first claim for relief alleges that</p> <p>21 the actions of Decorative Bark, Inc., and Denece Messenger</p> <p>22 resulted in the frequent transference of noise and airborne</p> <p>23 particles to their property, which they allege constitutes an</p> <p>24 ongoing trespass that diminishes the fair market value of</p> <p>25 their home, interferes with their use and enjoyment of their</p>	<p style="text-align: right;">1189</p> <p>1 now is, in determining the amount of noneconomic damages, if</p> <p>2 any, for Denece Messenger and her claim of intentional</p> <p>3 infliction of emotional distress, consider each of the</p> <p>4 following: one, and four. Then in determining the amount of</p> <p>5 noneconomic damages, if any, for the de Landros on their claim</p> <p>6 of trespass, and then I trailed off and we got diverted --</p> <p>7 MR. TAIT: So that's --</p> <p>8 THE COURT: -- on their claims of trespass and</p> <p>9 nuisance.</p> <p>10 MR. LAFKY: Consider each of the following.</p> <p>11 THE COURT: If any.</p> <p>12 MR. TAIT: Okay. Noneconomic as far as Messenger</p> <p>13 is what is listed there now as the one starting with the</p> <p>14 emotional distress, and four, the amount of noneconomic</p> <p>15 damages --</p> <p>16 THE COURT: Oh.</p> <p>17 MR. TAIT: -- may not exceed? Okay.</p> <p>18 THE COURT: And then for your clients, in</p> <p>19 determining the noneconomic damages, if any, for the</p> <p>20 de Landros on their claims of trespass and nuisance, consider</p> <p>21 each of the following.</p> <p>22 MR. TAIT: And one through four.</p> <p>23 THE COURT: Say again?</p> <p>24 MR. TAIT: One through four, then, as to them.</p> <p>25 MR. LAFKY: One through three, I think.</p>

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1 THE COURT: One through three.

2 MR. TAIT: Oh, yes. Sorry.

3 THE COURT: That's okay.

4 MR. TAIT: Okay.

5 THE COURT: Okay. That will be that one.

6 Punitive damages general, UCJI Number 75.02.

7 MR. TAIT: Wait. What -- counter-defendants. That

8 should be plaintiffs rather -- I mean, because

9 counter-defendants, nobody's used that word the whole trial.

10 It's been plaintiff and -- defendant or counterclaimants.

11 THE COURT: But they're plain --

12 MR. LAFKY: They have been called different things.

13 THE COURT: I think it's very confusing for juries

14 when you call a counterclaimant a plaintiff, because they're

15 still thinking of the plaintiff that they referred to.

16 MR. TAIT: Well, put their name in.

17 THE COURT: Okay.

18 MR. LAFKY: (Indiscernible).

19 MR. TAIT: Put Messenger and Decorative Bark.

20 THE COURT: Okay. If --

21 MR. LAFKY: That's always better.

22 THE COURT: If the de Landros prevail on the

23 nuisance claim, then you must consider whether to award

24 punitive damages. If you decide that Decorative Bark, Inc.,

25 and Denece Messenger have acted as claimed by counterclaimant,

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1 and then in the numbers below I'll have to substitute in both

2 of those long names, which I won't keep repeating, but they'll

3 be able to cut and paste for counter-defendant.

4 MR. TAIT: That will just say Messenger or -- or

5 and Decorative -- and/or Decorative Bark.

6 THE COURT: Decorative Bark, Inc.

7 MR. TAIT: And it could be their motive, then, but

8 anyway, we're going to not use the counterclaimant.

9 THE COURT: Okay.

10 MR. TAIT: Punitive damage may not exceed the sum

11 of -- actually, the claim is for \$250,000 total, not for each.

12 THE COURT: Punitive damages may not exceed -- boy,

13 I don't know what I was reading there.

14 MR. TAIT: The sum of \$250,000 total.

15 THE COURT: So I'll just cross out the last two

16 lines and write --

17 MR. TAIT: Yes.

18 THE COURT: -- the amount of punitive damages you

19 award counterclaimants may not exceed \$250,000.

20 Okay. Next one, 73.01, avoidable consequences.

21 MR. LAFKY: I just couldn't find the last pleading,

22 Judge, by the --

23 THE COURT: Sorry?

24 MR. LAFKY: -- defendants, but you've reviewed it,

25 I take it. I couldn't find the last pleading related to this

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1 punitives issue --

2 THE COURT: Yes.

3 MR. LAFKY: -- of what was alleged, so (pause) --

4 THE COURT: I could have sworn I'd been looking at

5 the last pleading, but I must not have been, because it's

6 plain. Number five in the prayer says for punitive damages in

7 a reasonable amount to be set by the jury not to exceed

8 \$250,000.

9 MR. LAFKY: Total.

10 THE COURT: That's what it says.

11 MR. LAFKY: Okay.

12 THE COURT: It says that.

13 MR. TAIT: Total. Not each, both.

14 THE COURT: Not each.

15 MR. TAIT: Not each, just total.

16 MR. LAFKY: Okay.

17 THE COURT: Avoidable consequences.

18 MR. LAFKY: So how are you changing the

19 instruction? I'm sorry. I --

20 THE COURT: Oh. It's all right. I simply -- on

21 the second page of the instruction, I deleted the second two

22 lines. And the first line now reads, the amount of punitive

23 damages you award to counterclaimants may not exceed \$250,000.

24 And actually I'll change counterclaimants to the de Landros.

25 MR. LAFKY: Okay.

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1 THE COURT: And there's a period.

2 MR. LAFKY: All right. Thanks.

3 THE COURT: Avoidable consequences, 73.01. Any

4 objection?

5 MR. TAIT: Yes.

6 THE COURT: Okay. Do you want to put on the record

7 other than just saying there is one or --

8 MR. TAIT: No, I don't have to say -- I mean, there

9 are two objections. First I submit that this is intentional

10 tort and that the document of avoidable consequences does not

11 apply. The analogy has always been similar to comparative

12 negligence, and negligence is not a defense to an intentional

13 tort, so it shouldn't be submitted at all. That's -- that's

14 one --

15 THE COURT: Okay.

16 MR. TAIT: That's one thing. I submitted a

17 specific instruction on the issue of -- which one is it?

18 THE COURT: Are you talking about the new ones you

19 just brought this morning?

20 MR. TAIT: No. It's just -- I'm sorry. I didn't

21 hear you, Judge.

22 THE COURT: Are you talking about the supplements

23 you brought this morning?

24 MR. TAIT: Yes, I am, Judge.

25 THE COURT: I haven't gone through those very

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1 carefully yet.

2 MR. TAIT: It's not here.

3 THE COURT: 73.01 modified.

4 MR. TAIT: Did you get something that says 73.01

5 modified?

6 THE COURT: Well, your index at the beginning of

7 the supplements says that.

8 MR. TAIT: Oh. It's number seven.

9 THE COURT: Yes.

10 MR. TAIT: The first part is UCJI 73.01. Second

11 part says, the plaintiffs in this case have the burden of

12 proving that the de Landros, after suffering some damage,

13 failed to exercise reasonable care to avoid incurring further

14 damages. Reasonable care means that care that would be taken

15 by a reasonably prudent person in a same or similar

16 circumstances.

17 The concept here is different from the uniform jury

18 instruction. It is the concept that the person claiming that

19 someone else did not mitigate their damages or actually do

20 something to avoid consequences has the burden of proving that

21 such conduct would be reasonable under the circumstances.

22 THE COURT: Mr. Lafky, how do you feel about the

23 second paragraph?

24 MR. LAFKY: Well (pause) --

25 THE COURT: Or I should say, what is your position

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1 on the second paragraph?

2 MR. LAFKY: I think the uniform instruction says

3 what we need it to say. You know, what this says is that the

4 plaintiffs have the burden of proving by some unspecified

5 quantum of proof that the de Landros did something, and I

6 think that the uniform instruction is worded the way it is

7 because it reflects the law in this area --

8 MR. TAIT: Well, it --

9 MR. LAFKY: -- that they have to avoid increasing

10 their damages, which is what it says.

11 MR. TAIT: You have to prove that we can avoid that

12 by taking reasonable precaution. That's their burden. That's

13 what the -- Zimmerman says and that's what every case that

14 cites Zimmerman for that proposition says. It's the

15 defendant's burden to prove that there are reasonable means

16 available under all the circumstances that if we take would

17 avoid causing the damages.

18 THE COURT: I am going to give the uniform

19 instruction only. I think that the language about exercising

20 reasonable care and failure to exercise such care covers it.

21 MR. TAIT: It doesn't cover burden of proof at all,

22 Judge, and that's just a huge difference. I mean, the burden

23 of proof on any claim is huge. You've got a case right here

24 that says it's their burden, and they're not saying that means

25 it's our responsibility. It's just a mistake in law.

1196

1 THE COURT: That's surprising that the people that

2 wrote the uniform instructions didn't feel the same way, then.

3 MR. TAIT: The issue wasn't before the people who

4 wrote the uniform jury instruction, Judge. I don't know why

5 you say they considered this and decided not to do it.

6 THE COURT: The next one is the one that we took

7 out from earlier in the set of instructions and said might

8 be -- go along with the damages instructions, which used to be

9 called common law negligence, but I have re-entitled it

10 damages reasonable care. It was UCJI Number 20.02, but

11 modified. And what we had done was changed, a person is

12 negligent if the person fails to exercise reasonable care,

13 therefore, when that person does some act that a reasonably

14 careful person would not do or fails to do something that a

15 reasonably careful person would do under similar

16 circumstances.

17 MR. LAFKY: It's not in my packet.

18 THE COURT: We had talked about it this morning and

19 we all took it out. It was earlier in your packet and it was

20 called common law negligence. And then this morning we

21 started to argue about it and ultimately said this might go

22 along with the damages stuff, so I repositioned. We can make

23 a copy. Do you have that one?

24 MR. TAIT: I'm sorry? A copy of which?

25 THE COURT: Make two copies of this.

1197

1 MR. TAIT: Which one is it? Oh, the reasonable

2 care? Yeah, I have that.

3 MR. LAFKY: I just threw out the two about

4 promises, so I'm just not sure I --

5 THE COURT: She'll bring you one about it.

6 MR. LAFKY: (Indiscernible) or what? What's your

7 plan in terms of the schedule later today? I mean, do you --

8 is it 5:30 and everybody goes home or --

9 THE COURT: I have to be teaching a class at 5:30

10 at Lewis & Clark --

11 MR. LAFKY: So --

12 THE COURT: -- so people will be going home at five

13 o'clock.

14 MR. LAFKY: So we'll (pause) --

15 THE COURT: I'm hoping that we'll have this

16 submitted to them before that, but they may not be

17 deliberating very long today.

18 MR. TAIT: Well --

19 MR. LAFKY: And then just have them come back at

20 9:00 tomorrow?

21 THE COURT: They get to decide when they want to

22 come back, so 8:30, 9:00, 9:30.

23 MR. LAFKY: Tomorrow morning.

24 THE COURT: Okay. So the question is, now that the

25 common law negligence uniform instruction has been converted

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1 into a damages reasonable care instruction with the miraculous  
 2 only changing of two words in the last paragraph, is there  
 3 objection from either or both sides?  
 4 MR. TAIT: No.  
 5 THE COURT: None from you?  
 6 MR. TAIT: I would hope, Judge, that you would,  
 7 when you give the economic -- the intention -- the (pause) --  
 8 THE COURT: The withdrawal?  
 9 MR. TAIT: Avoidable consequences instruction.  
 10 THE COURT: Yes.  
 11 MR. TAIT: That you say in connection with this  
 12 instruction, and then give them that instruction, because  
 13 that's where we both believe in a --  
 14 THE COURT: Well, it's coming right after it.  
 15 MR. TAIT: Okay.  
 16 THE COURT: So I could just add language at the  
 17 end.  
 18 MR. TAIT: Yeah.  
 19 THE COURT: Okay.  
 20 MR. TAIT: In connection with this instruction and  
 21 then give it.  
 22 MR. LAFKY: And again, Judge, I would except to  
 23 that instruction being given, because I -- I believe that it's  
 24 potentially misleading in terms of the proof required for  
 25 defendants on their counterclaim of nuisance, and I think

1199

1 that's what this is potentially --  
 2 THE COURT: Here's the thing --  
 3 MR. LAFKY: -- related to, if I'm understanding  
 4 this right.  
 5 THE COURT: Here's the thing, when these are read,  
 6 as you know, I don't read the titles and I don't really  
 7 deliberately separate them, so the way they are currently set  
 8 to be read is, this is how it'll sound: A person who suffers  
 9 damage has a duty to exercise reasonable care to avoid  
 10 increasing that damage. There can be no recovery for  
 11 increased damage caused by the failure to exercise such care.  
 12 The law requires every person to use reasonable care to avoid  
 13 harming others. Reasonable care is the degree of care and  
 14 judgment used by reasonably careful people in the management  
 15 of their own affairs.  
 16 You know, it's -- it's not separated, so is there a  
 17 need to connect it further?  
 18 MR. TAIT: Well, Judge, he's the one who's  
 19 objecting. Don't look at me. I'm not objecting to it at all.  
 20 THE COURT: Well, you were requesting the  
 21 additional language and I was trying to figure out what to put  
 22 in that would actually sound (pause) --  
 23 MR. TAIT: I would put at the end of the avoidable  
 24 consequence instruction, "in connection with this instruction,  
 25 I further instruct you" and then just go to the next one. It

1200

1 should be "themselves," not "others."  
 2 THE COURT: I think that because they're being read  
 3 one right after the other and there's not going to be a break  
 4 or a pause, that they don't need the additional language to  
 5 connect them, so I'm not --  
 6 MR. TAIT: Judge, you know, I -- he has an  
 7 objection to this, and I don't mind if they are somehow  
 8 connected to make sure there's no reversible error. I don't  
 9 know why you would just not do that. He wants it, I want it,  
 10 so why wouldn't we do that?  
 11 THE COURT: He doesn't want it.  
 12 MR. TAIT: You don't want -- you don't -- I thought  
 13 he said he wanted something connecting that.  
 14 THE COURT: No. He was arguing the opposite.  
 15 MR. TAIT: He doesn't want --  
 16 THE COURT: Am I right, Mr. Lafky?  
 17 MR. TAIT: He doesn't want it at all. He doesn't  
 18 want it at all. He then says it's not connected to anything.  
 19 MR. LAFKY: Let me give it the Duple.  
 20 THE COURT: What? Which? What are you --  
 21 MR. LAFKY: That's right. I don't want it at all.  
 22 THE COURT: Okay.  
 23 MR. TAIT: Well, I -- I assume that he's waiving  
 24 any instruction that these are not somehow connected. I'm  
 25 willing to do that. I think you are, too. Now he says, I

1201

1 just don't want it at all.  
 2 I don't want to hear more talk about this should  
 3 have been somehow connected some time in the future when he  
 4 will not take this opportunity when I'm willing to work with  
 5 him, and I'm sure you are, too, in this matter. So (pause) --  
 6 THE COURT: Well, again, I've just read them the  
 7 way they will be read to the jury. It's -- I think it already  
 8 sounds like they're connected. I'm not going to add another  
 9 sentence connecting them, and that's what I said a minute ago,  
 10 so --  
 11 MR. LAFKY: And I said when I --  
 12 THE COURT: -- I'm not doing that because I'm  
 13 letting Mr. Lafky made the decision. I made that decision and  
 14 that's the decision.  
 15 MR. TAIT: Well --  
 16 THE COURT: So --  
 17 MR. TAIT: -- Judge, you know, with -- I mean, with  
 18 immeasurable respect, you shouldn't do what you're doing here,  
 19 Judge: I think these things should do this or shouldn't do  
 20 that, therefore, I'm going to do it this way. This case is  
 21 not about how you feel about these things.  
 22 THE COURT: Okay. So I shouldn't explain myself to  
 23 you.  
 24 MR. TAIT: No, Judge.  
 25 THE COURT: Got it. I won't. I won't do that.

1202

1 MR. TAIT: No, listen. I'm sorry. You're  
 2 misunderstanding what I'm saying. And now I'm -- now I can't  
 3 tell what Mr. Lafky's saying, because he simply won't say it.  
 4 I heard him say before, I don't like this instruction because  
 5 I don't think it's really tied to anything. So I said, fine,  
 6 let's tie it to the next one. And now he thinks he's still  
 7 got that objection even though I've agreed we'll fix that.  
 8 That's an easy thing to do. And you're saying, well, I've  
 9 already decided --

10 THE COURT: Well, we've repositioned it and that is  
 11 a fix. And now you're saying that's not enough of a fix, you  
 12 want additional language, and I just said no, and you don't  
 13 like --

14 MR. TAIT: I don't have any exception to any  
 15 instruction the way it's been written. What I don't like is  
 16 for you to allow him to make an exception to the fact that  
 17 these are not connected and -- and me say, if that's what his  
 18 objection is, I'm fine, let's change it, and for you to say,  
 19 well, I don't care what you want. I'm not going to do it.

20 THE COURT: Okay. You've made a record about what  
 21 you don't like about my ruling.

22 MR. TAIT: Well, I thought maybe it might make some  
 23 difference, Judge. I don't really care about the instruction.

24 MR. LAFKY: And let me enunciate -- based on this  
 25 statement, let me enunciate why I made the objection and what

1203

1 I thought I said, but it was that -- not that this instruction  
 2 entitled "Reasonable Care" now should be read in connection  
 3 with anything, but that it's not connected to any issue in the  
 4 case and therefore should not be given, because it's a  
 5 negligence type of instruction and it's not relevant to the  
 6 issues that are being submitted to the jury. That's the  
 7 exception or the objection that I was trying to enunciate.  
 8 And if I suggested that somehow if it were connected --

9 THE COURT: That's what I heard you say earlier,  
 10 and it was -- it was me who believed that it is relevant and  
 11 should be given.

12 MR. LAFKY: Right.

13 THE COURT: And then we repositioned it and now  
 14 we're moving on to the verdict instruction. And it looks like  
 15 it was requested by both of you, so it will be given.

16 That takes us to this morning's requested  
 17 additional instructions. Starting with the plaintiffs'  
 18 because it's shorter, I rewrote special instruction number  
 19 three, and I will give you both a copy.

20 MR. LAFKY: Let me ask you, Judge, back with the  
 21 verdict instruction.

22 THE COURT: I was going to -- oh, yes.

23 MR. LAFKY: You say, at least the same nine jurors  
 24 must agree on each answer unless the verdict form instructs  
 25 you otherwise as to a particular question, and I don't think

1204

1 we have that.

2 THE COURT: We don't.

3 MR. LAFKY: So I would just suggest that it say, at  
 4 least the same nine jurors must agree on each answer, period.

5 THE COURT: All right.

6 MR. TAIT: That's not --

7 THE COURT: No?

8 MR. TAIT: You're talking -- we have two separate  
 9 forms, and they -- at least the same nine have to agree to  
 10 each answer on plaintiffs' form. And on our form, they do not  
 11 have to be the same nine that agree to all those answers.

12 MR. LAFKY: That's true. You have to have the same  
 13 nine as to liability and damages as to each particular claim,  
 14 so he's right.

15 THE COURT: Okay. At least the same nine jurors  
 16 must agree on -- how shall I say that? On all answers within  
 17 a single verdict form?

18 MR. TAIT: Yes. That's good.

19 MR. LAFKY: That's fine.

20 THE COURT: That is done. Did she just hand you  
 21 the rewrite I did of plaintiffs' special number three?

22 MR. TAIT: Yeah. I object to this, because in fact  
 23 there is an issue in this case. It's the letter to Steve  
 24 Giusto, talks about pollution, that is about water quality.  
 25 We're entitled to prove to the hilt that -- that what we said

1205

1 in the letter about -- that that is -- that is true. And --  
 2 and we are entitled to (pause) -- that's the same argument we  
 3 had all along. You say, well, I'm not talking about that, but  
 4 the fact is the letter refers to pollution. Letter -- the  
 5 letter refers to environmental concerns. He doesn't get to  
 6 rewrite history about what this letter's about. There are  
 7 letters, there are pictures that are attached to that that  
 8 show pollution, that show water quality issues. So if he  
 9 really wants this out of the case, he can take it out, but he  
 10 can't with this instruction.

11 THE COURT: Well, now is the time to try to make  
 12 some sense of what you both agreed I could tell the jury  
 13 before, which was, the defendant counterclaimants have  
 14 withdrawn any claims relating to water quality impairment.  
 15 Also the plaintiffs have withdrawn their allegations that  
 16 defendant's complaints to DEQ about water quality impairment  
 17 were false. We will hear no further evidence on water quality  
 18 impairment and that issue will not be before you when you go  
 19 to deliberate.

20 You both agreed that I could say that to them and I  
 21 already did. So the purpose of my rewrite was that in the  
 22 form that he submitted it this morning, it wasn't exactly  
 23 that, and I rewrote it to try to be true to the spirit of what  
 24 we've already told them, but to try to explain that.

25 MR. TAIT: Judge, when we were talking about that,

1206

1 I thought they were taking all claims of water quality out of  
 2 the case. They're not. They're -- they're asking that the  
 3 jury award emotional distress damages because he wrote a  
 4 letter to Giusto that said, everybody's seen the letter a  
 5 bunch of times, it talks about his concerns about the  
 6 environment.

7 THE COURT: But he's also admitted that the ones  
 8 pertaining to water quality were -- that he's no longer  
 9 claiming those were false.

10 MR. TAIT: They never were false, Judge. Just  
 11 saying he doesn't claim they're false doesn't mean that the  
 12 jury can't -- can't consider (pause) --

13 MR. LAFKY: How can they consider it if there's no  
 14 claim for trespass or nuisance related to water quality? How  
 15 can they consider it if the only claims remaining by either  
 16 plaintiff are trespass and IIED? And I don't know how you get  
 17 to anything about water quality. And we have the same problem  
 18 of the jury being prejudiced.

19 I'd moved for mistrial before; that was denied.  
 20 This is my attempt to try to limit the damage from the first  
 21 two days of a lot of testimony related to water quality.

22 MR. TAIT: Your Honor, we've already had that  
 23 motion. Judge, the legal principle here is he is claiming  
 24 that if he can get damages for intentional interference -- or  
 25 excuse me, for intentional infliction of emotional distress by

1207

1 writing a letter to a customer of Decorative Bark and -- and  
 2 that letter talks about environmental issues and pictures --

3 THE COURT: It's just saying, in determining  
 4 damages, if any, you should not consider any evidence you  
 5 heard about water quality.

6 MR. TAIT: What, they could -- that they can't  
 7 consider that -- that letter to Mr. Giusto?

8 THE COURT: Well, the letter to Mr. Giusto didn't  
 9 say anything specific about water quality. It said  
 10 environmental concerns generally.

11 MR. TAIT: No, Judge. That's not for you or me or  
 12 Mr. Lafky to decide. It's for the jury to decide what they're  
 13 talking about there. Just because he says we're not making a  
 14 claim for that, you are allowing the language of that letter  
 15 to go to the jury with Mr. Lafky now saying, well, that's not  
 16 what we mean it to be. That just doesn't work. It's one of  
 17 the problems with allowing that whole claim about the letter  
 18 to Giusto to go into evidence. It is clearly an environmental  
 19 concern, including --

20 THE COURT: That had not been stricken at the time  
 21 we constructed the statement that I previously made to the  
 22 jury that you agreed to. And I'm not going to accept that you  
 23 can just reverse your position after you've agreed to allow me  
 24 to tell the jury something. So either I'll tell them again  
 25 what I told them before that you agreed to or I'll explain it

1208

1 differently in this instruction, but I'm not going to switch  
 2 it up on them. I told it to them with your agreement.

3 MR. TAIT: So you're holding as a matter of law  
 4 that that letter that Mr. --

5 THE COURT: I'm holding as a matter of stipulation  
 6 that this is something you both agreed the jury should hear.  
 7 And if they need to hear it a second time exactly as I said it  
 8 the first time, I'll do it that way, but you stipulated, and  
 9 you can't unstipulate. So either a new special instruction,  
 10 which you can help me try to work with, or I'll reread what I  
 11 read before.

12 MR. TAIT: So he can -- he can -- I just want to  
 13 make sure the parameters of your ruling, Judge. He can stand  
 14 up in front of the jury and look at that letter and he can say  
 15 that we ought to get emotional distress because of these  
 16 claims about the environment written in this letter and he  
 17 got -- that she ought to be able to get emotional distress  
 18 because he sent letters that include photographs of pollution  
 19 that's clear the pollution -- the witness has talked about it  
 20 as pollution, but we can't talk about whether that's false or  
 21 true, we can't talk about anything about that letter, because  
 22 he's decided that regardless of what the letter says, that he  
 23 can say we're not making any claims about water quality  
 24 pollution, so you can't talk about it?

25 THE COURT: No. No. You can say that the elements

1209

1 about water quality were true and it was stipulated that they  
 2 were true and it was removed. Why could you not say that?  
 3 That's -- it's just not a claim.

4 MR. TAIT: So what is the -- what's left?

5 THE COURT: What do you mean, "What's left?"

6 MR. TAIT: What is left that she can get emotional  
 7 distress from in that letter? None -- none of the pictures  
 8 that show problems with water quality --

9 THE COURT: The emotional distress claim is based  
 10 on potentially or allegedly a number of things, and that could  
 11 be one.

12 MR. TAIT: "That" is what?

13 THE COURT: Among others.

14 MR. TAIT: "That" meaning? I'm sorry. I'm trying  
 15 to --

16 THE COURT: Trying to influence someone that you  
 17 have a professional business relationship with to (pause) --

18 MR. TAIT: Not buy from a corporation?

19 THE COURT: -- look at these things.  
 20 What are you asking me to do now? You're asking me  
 21 to not give this instruction. Apparently you're also asking  
 22 me not to repeat the instruction we gave them before with your  
 23 agreement. So are you just saying we forget the fact that we  
 24 told them that before and don't remind them of it and hope  
 25 that they forget?



1210

1 MR. TAIT: No, Judge. I have not said any of those  
 2 things. I'm saying that -- that counsel has a pleading in  
 3 this case that fairly comments upon -- upon the air quality.  
 4 All you have to do is read that letter. And you can't simply  
 5 take it out. And you've allowed them to try to get money  
 6 damages for that but we can't comment on that. We can't  
 7 comment on the --  
 8 THE COURT: I didn't say you couldn't comment on  
 9 it. I don't understand why you keep saying that.  
 10 MR. TAIT: I don't understand (pause) -- what  
 11 you're saying is (pause) --  
 12 THE COURT: It's in evidence and it has some  
 13 relevance, but it's no longer the essence of a claim.  
 14 MR. TAIT: I'm sorry, Judge. That -- that language  
 15 just doesn't -- I don't know what that means. I don't know  
 16 what not the essence of a claim means.  
 17 THE COURT: Well, I'm trying to split the hairs  
 18 that you were splitting earlier, and it wasn't easy to  
 19 understand then, either.  
 20 Our jurors are all back and have been waiting. I  
 21 think what -- what we maybe should do is let's -- let's take  
 22 that one aside and come back to it and see if we can get  
 23 through any of the other ones that came in today.  
 24 MR. TAIT: Okay.  
 25 THE COURT: Special instruction number two is

1211

1 existence of a nuisance. We've already been through that.  
 2 So --  
 3 MR. TAIT: Express (pause) --  
 4 THE COURT: That was the one that we changed on  
 5 earlier instruction.  
 6 MR. TAIT: These are my subsequent requested  
 7 instructions?  
 8 THE COURT: No. These are his, because it was  
 9 shorter. We were starting with the shorter one.  
 10 MR. TAIT: Oh, okay.  
 11 MR. LAFKY: Yeah, we dealt with that.  
 12 THE COURT: Special instruction number two's been  
 13 dealt with. Special instruction number four, nominal damages.  
 14 MR. LAFKY: Correct.  
 15 THE COURT: Nominal damages are to be awarded when  
 16 trespass is proved. The proper measure of nominal damages is  
 17 the amount necessary to vindicate Decorative Bark's right to  
 18 their private and exclusive possession of their land.  
 19 Mr. Tait.  
 20 MR. TAIT: That -- that says they have to award  
 21 damages, and they don't. There's no case that says you have  
 22 to award nominal damages.  
 23 MR. LAFKY: I think that case does say that. That  
 24 if a trespass --  
 25 THE COURT: What case?

1212

1 MR. LAFKY: -- is proved -- the *Sleet* case, or  
 2 however it's pronounced there.  
 3 THE COURT: I can't remember. I read it this  
 4 morning. And I can't remember, so that one will get put  
 5 aside, too.  
 6 So going to defendant's supplemental requested,  
 7 page 3, number two, withdrawal of issues. Mr. Lafky.  
 8 MR. LAFKY: I just think if you're going to have a  
 9 withdrawal claim, and I thought you'd given us one that we'd  
 10 looked at earlier.  
 11 THE COURT: We did look at one earlier on nuisance.  
 12 MR. LAFKY: That it ought to just say what the  
 13 claim is. If you're withdrawing a claim, you're withdrawing a  
 14 claim of nuisance by Decorative Bark against Mr. de Landro.  
 15 If you're withdrawing a claim of intentional interference with  
 16 an economic relationship by Decorative Bark against  
 17 Mr. de Landro, or whatever it is --  
 18 THE COURT: 13.04.  
 19 MR. LAFKY: -- without saying based upon an e-mail  
 20 or claim for unspecified damages or a lot of surplus language,  
 21 it should just say what the claims are that have been  
 22 withdrawn.  
 23 MR. TAIT: How do they know what that is, Judge?  
 24 You didn't tell --  
 25 THE COURT: Well, the earlier one we looked at

1213

1 said, the Court hereby withdraws from your consideration the  
 2 following claim made by the plaintiff against the defendant in  
 3 the complaint: one, nuisance created by de Landro claimed by  
 4 Decorative Bark, Inc. And then what would seem natural to me  
 5 would be to add two, intentional inflict -- intentional  
 6 interference with economic relations claimed by de Landro --  
 7 sorry -- created by de Landro, claimed by Decorative Bark.  
 8 MR. LAFKY: Just Decorative Bark's claim of  
 9 intentional interference with economic relations against  
 10 Mr. de Landro.  
 11 THE COURT: Yes. And the nuisance one, which you  
 12 cover in two, is covered in number one. And then number  
 13 three, all claims for damages based upon defendant's calls.  
 14 There weren't separate claims for damages based on calls  
 15 alone.  
 16 MR. TAIT: Yes, there were, Judge. There were --  
 17 well, there were not separate claims, but a series of calls.  
 18 Again, these claims are all part of the intentional  
 19 interference with contractual relations, so we lumped them all  
 20 together.  
 21 THE COURT: Say that last part again.  
 22 MR. TAIT: Well, they're -- I mean, they're not  
 23 separate claims in the sense of a claim for nuisance, a claim  
 24 for trespass, they're not separate claims in that way, but the  
 25 plaintiff has alleged a series of telephone calls over time

1214

1216

1 to -- to DEQ and has -- and has claimed damages because of  
2 those, and there are no claims for intentional interference  
3 with contractual relations, there are -- there are no claims  
4 for nuisance and there can be no -- we don't -- are you  
5 claiming that these can be used in intentional infliction of  
6 emotional distress claim? I thought he withdrew all telephone  
7 call claims.

8 THE COURT: Are you talking to me or to him?

9 MR. LAFKY: I don't believe there's a claim in this  
10 case related to de Landro's calls to the DEQ.

11 MR. TAIT: Now? After you've withdrawn them?

12 MR. LAFKY: I don't think that there was a claim on  
13 day one.

14 MR. TAIT: I don't know how you can make that  
15 statement, but just look at the pleadings.

16 THE COURT: Every -- every factual allegation is  
17 not a claim in and of itself, and it seems like --

18 MR. TAIT: I know.

19 THE COURT: -- you're saying that it is. It seems  
20 like you're saying that any time we strike any factual  
21 allegation, that we've removed a claim.

22 MR. TAIT: I've never said that, not every time,  
23 but when he takes the position intentional interference of --  
24 with -- excuse me. Intentional infliction of emotional  
25 distress is based upon not one act, but a series of acts,

1 withdrawn?

2 MR. LAFKY: We've never told them there were such  
3 claims.

4 MR. TAIT: So now she's going to get on the witness  
5 stand and say how horrible DEQ is, has treated her awful this  
6 and awful that. The jury's never been told she can't make any  
7 claim for that. Is that what we're doing here?

8 THE COURT: Well, they're being told in other jury  
9 instructions exactly what the claims are and what the elements  
10 of those claims are.

11 MR. TAIT: They are never being told exactly what  
12 any claims are, Judge. They're never being told what --

13 THE COURT: They're being advised what the elements  
14 of intentional infliction of emotional distress are --

15 MR. TAIT: I agree.

16 THE COURT: -- they're being advised of what a  
17 nuisance claim is --

18 MR. TAIT: Agree.

19 THE COURT: -- they're being advised about what  
20 trespass is --

21 MR. TAIT: Agreed. Judge, I agree with all that.

22 THE COURT: -- they're being advised that trespass  
23 can include airborne particles.

24 MR. TAIT: Yeah. And I don't have any -- I don't  
25 have any -- I don't want to -- I don't -- I've agreed to all

1215

1217

1 every time you take one of those acts away, it's fair game for  
2 me to say, okay, if you're considering all the rest of them,  
3 they don't have a claim. That's what I've done. And -- and  
4 that's a different issue than what we're talking about here.  
5 Now we're talking about he withdrew, voluntarily withdrew all  
6 of the factual claims that he was -- of any kind. You know,  
7 remember, Judge, he is the one who has reincorporated each one  
8 of these things into every claim for relief, so this cuts  
9 across all claims for relief. And you -- and you -- you know,  
10 this is the way you need to resolve it, by taking all the  
11 claims of damages --

12 THE COURT: Well --

13 MR. TAIT: -- based upon calls to DEQ about these  
14 things.

15 MR. LAFKY: Judge, I guess the way I --

16 THE COURT: I -- I disagree, because the jury never  
17 to this point has seen the complaint or heard every individual  
18 allegation in the complaint. And trying to advise them what  
19 the individual allegations were after they're stricken isn't  
20 the same thing as advising them of what claims have been  
21 withdrawn. It doesn't even make sense to include it in the  
22 same category.

23 MR. TAIT: Well, he specifically said, Judge, I'm  
24 withdrawing all claims relating to calls by de Landro to DEQ.  
25 How else do you tell these claims have been -- have been

1 those things. The problem I have is that there have been  
2 claims all along about complaints to DEQ and those kind of  
3 things in this case. And if they're taking them out, they  
4 need to be told those things are out, you can't consider those  
5 as proof of any those elements. That's all.

6 THE COURT: Okay.

7 MR. TAIT: That's (pause) --

8 THE COURT: I am going to give the instruction I  
9 had already advised you of this morning with the second line  
10 of Decorative Bark's claim of intentional interference with  
11 economic relations against Derek de Landro, and then the  
12 language, the uniform language, these claims are out of the  
13 case for all purposes and you are not to concern yourselves  
14 with why the Court has withdrawn them.

15 The next defendant special supplemental requested,  
16 in order to prevail, is no longer -- we don't have to go over  
17 that. Number four --

18 MR. LAFKY: Actually, that's eight.

19 THE COURT: -- we don't have to go over, number  
20 five we don't have to go over, number six we don't have to go  
21 over.

22 MR. TAIT: Yeah. Three is already out of the case,  
23 four is already out of the case.

24 THE COURT: I'm up to seven.

25 MR. TAIT: Five is --

1218

1 MR. LAFKY: We already talked about that.

2 THE COURT: Yes, we did.

3 MR. TAIT: Five is already out of the case, six is

4 already out of the case, seven is --

5 THE COURT: Seven is the one just --

6 MR. TAIT: Is the one we already talked about.

7 That's the one that --

8 THE COURT: Right.

9 MR. TAIT: -- talks about the (indiscernible) the

10 burden of proof.

11 THE COURT: Number eight, I instruct you it is not

12 a defense to any of the claims made by the de Landros in this

13 case that there had been commercial uses on the Vanport Mill

14 site for a substantial period of time prior to the de Landros

15 purchasing the property.

16 MR. TAIT: I think you already take care of that in

17 one of the instructions, Judge.

18 THE COURT: Okay. Number nine, it is also not a

19 defense to either of the de Landro's claims --

20 MR. TAIT: Same, same.

21 THE COURT: Okay.

22 MR. TAIT: I think you've already taken care of

23 that.

24 THE COURT: And number ten, uses of the Vanport

25 property prior to the purchase.

1219

1 MR. TAIT: Ten. You've already taken care of that

2 instruction.

3 THE COURT: Okay. So the only two that I have to

4 rule on after the last witness will be plaintiffs' special

5 instruction number three and four from this morning.

6 Let's also look at the verdict forms to make sure

7 we have something that we can use.

8 MR. LAFKY: Starting with plaintiffs'?

9 THE COURT: You know, I don't know that I ever

10 received the one that you submitted. I was told you submitted

11 one.

12 MR. LAFKY: I'm sure this is --

13 THE COURT: Oh, here. You submitted one that had

14 both in the same group.

15 MR. LAFKY: I did.

16 THE COURT: And I'm not going to give them. I'm

17 going to give them two separate verdict forms. Is the one

18 that you're looking at now the one that tried to incorporate

19 both? I don't have that one.

20 MR. TAIT: This one says intentional interference

21 with economic relations.

22 MR. LAFKY: Well, obviously that would be out.

23 MR. TAIT: Okay.

24 THE COURT: Did you get one that I had drafted?

25 MR. LAFKY: Apparently.

1220

1 THE COURT: Okay. The first line I had corrected,

2 but it had not yet been corrected when you got your copies

3 too. Did the defendant trespass onto Decorative Bark, Inc.'s,

4 property, question mark. Answer, yes or no.

5 MR. LAFKY: That's fine.

6 MR. TAIT: Well, I mean, he asked "and thereby

7 caused damage to plaintiff" in his requested verdict form.

8 THE COURT: And I -- as I told you, I just read a

9 case this morning that you referred me to that said damage is

10 not an element --

11 MR. TAIT: Oh, okay.

12 THE COURT: -- of trespass --

13 MR. TAIT: You're right.

14 THE COURT: -- so I took that out.

15 MR. TAIT: Yes, that's right. I agree.

16 THE COURT: Did defendant intentionally interfere

17 with Decorative Bark, Inc.'s, economic relations, thereby

18 causing damage to Decorative Bark, Inc.? Yes or no.

19 MR. LAFKY: That's out.

20 THE COURT: Right. Did the defendant intentionally

21 inflict emotional distress on Plaintiff Messenger? Answer yes

22 or no. That would now be number two.

23 And then if your answers to questions one and two

24 are no, your verdict on the plaintiffs' claims is for

25 defendant. If your answer to question one is yes, proceed to

1221

1 question three. Four will become three. And if your answer

2 to question two is yes, proceed to question -- does that work?

3 MR. TAIT: No, because there are no -- there are no

4 economic damages.

5 THE COURT: Right, for trespass.

6 MR. LAFKY: Right.

7 THE COURT: It would be noneconomic only. So if I

8 delete the economic damages and then delete the letter so that

9 it looks more like the bottom one.

10 MR. TAIT: Yes.

11 THE COURT: That works? Mr. Lafky?

12 MR. LAFKY: That's fine.

13 MR. TAIT: (Indiscernible).

14 THE COURT: And I was also told, I think by you,

15 Mr. Tait, that you submitted another verdict form, but I don't

16 think I have it.

17 MR. TAIT: (Indiscernible). I had it in my hand,

18 Judge. I guess we ought to take out "cause damage to

19 counterclaimant".

20 THE COURT: Right. So (pause) --

21 MR. TAIT: I suppose we should take that same thing

22 out of question two?

23 THE COURT: I'm thinking of also using the names

24 again. I like that.

25 MR. TAIT: Yes. I agree, Judge.

1222

1 THE COURT: Okay. Did (pause) --

2 MR. LAFKY: Well, again, I'd ask it be separated

3 out so it doesn't say the plaintiffs, but it would have to be

4 separated out by either Messenger or Decorative Bark.

5 THE COURT: We'll do a double. The first one will

6 be did Decorative Bark's -- Bark, Inc.'s, conduct cause a

7 trespass that caused damage to the de Landros.

8 MR. TAIT: No, don't "cause damage", Judge --

9 THE COURT: Right. Right. Sorry. Cause a

10 trespass on the de Landros' property?

11 MR. TAIT: Why don't we use the same questions that

12 we're using.

13 MR. LAFKY: Yeah. I'd just mirror what we just did

14 on the plaintiffs' form.

15 THE COURT: Cause a trespass onto --

16 MR. LAFKY: Did Decorative Bark trespass onto the

17 de Landros' property? Did Denece Messenger trespass onto the

18 de Landros' property?

19 MR. TAIT: No.

20 THE COURT: That doesn't seem to fit --

21 MR. TAIT: It doesn't fit.

22 THE COURT: -- that theory.

23 MR. TAIT: Yeah.

24 THE COURT: Even though it's explained in other

25 instructions.

1223

1 MR. TAIT: Conduct cause a trespass.

2 THE COURT: I think did Decorative Bark, Inc.'s,

3 conduct cause a trespass on the de Landros' property.

4 MR. TAIT: Yes.

5 THE COURT: And then did plain -- did Decorative

6 Bark's conduct cause a nuisance --

7 MR. TAIT: In the first place, Messenger? Is the

8 first question Messenger?

9 THE COURT: No. The -- we're going to basically do

10 it all once with Decorative Bark and then do it all a second

11 time with Messenger.

12 MR. TAIT: I'm -- I'm (pause) --

13 THE COURT: Or do you want to do, did -- did

14 Decorative Bark, Inc.'s, conduct cause a trespass on the

15 de Landros' property? Answer, yes, no. Then did --

16 MR. TAIT: Messenger --

17 THE COURT: -- Denece Messenger's --

18 MR. TAIT: Yes. That's what I would prefer.

19 THE COURT: Okay.

20 MR. TAIT: Those instructions are wrong, too, then.

21 THE COURT: And then two would be, did Decorative

22 Bark, Inc.'s, conduct cause a nuisance to the de Landros?

23 MR. LAFKY: That would include the damage, because

24 it is an element on the nuisance.

25 THE COURT: Yes, it is.

1224

1 MR. TAIT: That should be "create a nuisance," I

2 guess. No. "Cause a nuisance," that's right. That caused

3 damage to the de Landros.

4 THE COURT: And then number four would be the same

5 question but with Messenger.

6 MR. TAIT: If the answers to questions -- yeah.

7 Okay. I got you. Then if your answers to questions one and

8 two of your verdict on the counterclaims is for (pause) --

9 THE COURT: Answer to questions one through four

10 are no, your verdict on the counterclaims is for plaintiffs,

11 period.

12 MR. TAIT: I don't know where you've gone, Judge.

13 I've just got the first two, and then the instruction is, if

14 your answer to questions one and two are --

15 THE COURT: Well, we just turned one and two into

16 four. We now have one, two, three and four, because we've

17 broken out Decorative Bark, Denece Messenger, Decorative Bark,

18 Denece Messenger.

19 MR. LAFKY: And then it's got to mirror that --

20 THE COURT: Question number --

21 MR. TAIT: Oh, trespass and nuisance. I see. I --

22 THE COURT: Right.

23 MR. TAIT: Yeah, I got you. I got you.

24 THE COURT: So now it's, if your answers to

25 questions one through four (indiscernible) verdict on

1225

1 counterclaims is for plaintiffs. If your answer to question

2 (pause) --

3 MR. LAFKY: It really makes more sense to --

4 THE COURT: One and three is yes.

5 MR. LAFKY: -- you know, to have your -- you've got

6 de Landro trespass Decorative Bark, yes or no, damages any;

7 de Landro nuisance Decorative Bark, yes or no --

8 THE COURT: Right.

9 MR. LAFKY: -- damages, any; de Landro --

10 THE COURT: Okay.

11 MR. LAFKY: -- trespass, Messenger, damages any.

12 THE COURT: What I'm going to do, then, on that is

13 I'm going to talk to Karen and explain what we're going for

14 and have her redraft one, because it's too confusing. We're

15 reorganizing too much. So when we can look at it --

16 MR. TAIT: Agree.

17 THE COURT: -- with that reorganization, we'll talk

18 about those two instructions, that reorganization, and then

19 we'll --

20 MR. TAIT: I would like to express a concern,

21 Judge. I do not want to split arguments in this case, meaning

22 have -- be able to allow Mr. Lafky to do a closing argument in

23 the morning --

24 THE COURT: Oh.

25 MR. TAIT: -- a final -- a rebuttal argument --

*Farland-Patterson* ✓

Annual Review  
Susan Patterson  
2008

NOV 03 2008  
DEPARTMENT RESOURCE

**1. Highlight the most noteworthy achievements related to the goals for the year.**

Susan returned to her position in the Asbestos Control Program more than a year ago after completing a special assignment as the complaints coordinator for the eastside of NWR. That position was a developmental position to enable Susan to gain the experience necessary to qualify for an NRS 1. Since returning Susan has had one goal that she wants to achieve: to find an NRS position where she can use the knowledge and skills that she learned while in her developmental assignment. This year Susan had two opportunities to interview for an NRS1 position. Although she was not the successful candidate for either of these positions I can say from being the interviewer in one of them that she did very well in the interview for most of the interview. Susan and I discussed the questions asked together with her responses – where she excelled and where she fell short. I will not repeat all of that but suffice it to say that Susan in reflecting on the last year mentioned that getting the two interviews and receiving very useful feedback, thus being better prepared for future interviews was in and of itself a noteworthy achievement.

In her position in the Asbestos Control Program Susan continues to provide excellent customer service. She has maintained and enhanced her knowledge of the workings of the program and uses that knowledge to take a significant amount of the load off of Kevin McCrann so that he can focus on his inspector duties.

Outside of the regular duties of the position Susan has been involved in a number of activities that are very important. This past year for example she headed up the Charitable Fund Drive, the Governor's Food Drive and the 2007 Christmas Toy Drive. Thank you Susan!

**2. Identify lessons learned/areas of improvement.**

Susan states: "I will be better prepared for my next interview after learning I completely forgot all of the great training I have had!" As Susan is quite aware openings at the NRS 1 level do not come along all that often in the Portland area. As well, when one does there is usually pretty intense competition for it. Due to that Susan has to be prepared and most importantly, since she will probably know the manager doing the interview, she has to fully answer the questions and communicate exactly why she is the right person for the position.

One additional area that I believe that Susan should work on improving in this upcoming year is not allowing her personal feelings to interfere with the balance that is necessary to maintain objectivity. I have noticed that on some occasions Susan's personal investment in a project she is working on becomes so intense that she appears to lose that objectivity.



285

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1 Q. And when you say you would call him by his name,  
2 what do you mean?  
3 A. Well, when we would -- when we would confer, you  
4 know, when we were talking, I would respond back to him,  
5 "Well, Derek" or, you know, use his name.  
6 Q. And did he ever say, "Well, that's not me," or,  
7 "I'm not Derek"?  
8 A. No.  
9 Q. Has his voice on the telephone calls been  
10 consistent with the voice you've heard in depositions and  
11 today in testimony?  
12 A. Yes.  
13 MR. LAFKY: I don't have any other questions, Your  
14 Honor.  
15 MR. TAIT: No questions.  
16 THE COURT: No follow-up? All right. You may step  
17 down.  
18 THE WITNESS: Should I take this?  
19 MR. LAFKY: Yeah. Just leave it.  
20 THE COURT: Further witnesses for the plaintiff?  
21 MR. LAFKY: We have one more scheduled for 1:30,  
22 Your Honor.  
23 THE COURT: All right. Then we will continue with  
24 the first defense witness.  
25 MR. TAIT: I call Mr. Dan Murphy.

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1 THE COURT: All right.  
2 MR. TAIT: Mr. Murphy isn't here, so we'll start  
3 with Susan Patterson.  
4 THE COURT: All right. Please come forward, stand  
5 by the witness chair. Face my clerk and raise your right hand  
6 to be sworn.  
7 **SUSAN PATTERSON**  
8 called as a witness on behalf of the Defendant,  
9 after having been first duly sworn under oath,  
10 was examined and testified as follows:  
11 THE CLERK: Please take a seat. State your name  
12 and spell your last name for the record.  
13 THE WITNESS: Susan Patterson, P-A-T-T-E-R-S-O-N.  
14 THE COURT: You may inquire.  
15 **DIRECT EXAMINATION**  
16 BY MR. TAIT:  
17 Q. When I ask you questions, it's kind of common  
18 courtesy for you to look at me and answer those questions to  
19 me, but these people -- if you do that, these people will see  
20 your right ear, and so I'd like you when you answer questions  
21 to try to talk to the jury. Will you do that for me?  
22 A. Yes.  
23 Q. What do you do for a living?  
24 A. I work for the State of Oregon, Department of  
25 Environmental Quality.

1 Q. And in what capacity?  
2 A. Presently I am -- work in the asbestos program.  
3 Q. So at some point in time did you work in the  
4 complaint department?  
5 A. Yes, I did.  
6 Q. And in what capacity did you work there?  
7 A. I was the complaints coordinator.  
8 Q. I'm going to walk over there, because you don't  
9 seem to be able to break yourself of looking at me.  
10 A. Sorry.  
11 Q. What did the complaints coordinator do?  
12 A. We received complaints from whether it be citizens,  
13 other businesses, just about anybody regarding anything from a  
14 dust issue on a non-permitted source, open burning complaints  
15 from citizens regarding other neighbors. We received just  
16 about anything that doesn't get covered under a permit with  
17 our agency.  
18 Q. Now, is Decorative Bark a permitted business?  
19 A. No, it is not.  
20 Q. And by permitted I mean -- it has two meanings.  
21 (Indiscernible) to make sense to the jury. Some businesses  
22 have to have a permit?  
23 A. Correct. And when I'm saying they do not, they do  
24 have a water quality permit which covers for their water  
25 quality stuff, I believe, that -- Dan will be able to answer

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1 that question better. I dealt with more of the air quality  
2 issues.  
3 Q. So are they permitted for air quality?  
4 A. No, they are not.  
5 Q. And when did you first --  
6 MR. TAIT: Maybe I could have these exhibits  
7 introduced into evidence, they're Exhibits 121 and 120.  
8 They're copies of the DEQ file.  
9 (Defendant's Exhibits 120 and 121 offered)  
10 THE COURT: Have you had an opportunity to look  
11 through those yet?  
12 MR. LAFKY: I looked at them and I have an issue  
13 with a couple of them, so I guess I can pull those out and we  
14 can talk about them later.  
15 MR. TAIT: Why don't you tell the judge what the  
16 issue is. It's the same objection you already overruled.  
17 MR. LAFKY: Well --  
18 THE COURT: Well, we're going to try to get through  
19 this witness before we take a lunch, but I have to ask you to  
20 go back to the jury room.  
21 (Jury leaving courtroom: 11:53)  
22 THE COURT: You may be seated. Is this the same  
23 objection?  
24 MR. LAFKY: Yes, and more. If I can just have a  
25 minute to try to narrow it.

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1 MR. TAIT: Your Honor, it's my belief these  
2 exhibits have already been admitted into evidence. That's  
3 certainly a proper objection if they haven't. If he's talking  
4 about objection (indiscernible), it's a little late now  
5 (indiscernible).

6 THE COURT: I'm confused, too, but he gets a chance  
7 to make his record.

8 MR. TAIT: Okay.

9 MR. LAFKY: So, again, Judge, as I mentioned  
10 before, my objection generally is to water quality, hearsay,  
11 relevancy as to issues that are no part of this case. Then in  
12 this pile, we've got -- and these are just things, I guess,  
13 that differ from the copy I have, but on Defendant's 115,  
14 there's some handwriting and some notations and some pen on  
15 some photographs, and I don't -- this isn't something that  
16 I've seen before in reference to the -- the DEQ file.

17 MR. TAIT: When he says that, Judge, it's right  
18 here.

19 THE COURT: What I need to know is do they look any  
20 different than the ones in the file or are they cumulative of  
21 ones in the file?

22 MR. LAFKY: All I can refer to is the file that I  
23 keep working from, and as we talked yesterday, there might be  
24 some differences, but I'm working with the file that Mr. Tait  
25 says is the exact same thing we filed with Mr. de Landro's

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1 affidavit in response to the motion to strike, and that's the  
2 document I've -- I've been working with.

3 THE COURT: Okay. This one is different. 115  
4 doesn't look like the one in the certified file. It does have  
5 writing on it.

6 MR. LAFKY: So, again, I don't know whose  
7 handwriting that is and what it refers to.

8 MR. TAIT: Okay.

9 MR. LAFKY: Then 106 is Dennis Juris to Adolph  
10 Hertrich.

11 THE WITNESS: That's my handwriting.

12 MR. LAFKY: The owner of Vanport. And 103 is  
13 Dennis Juris to Adolph Hertrich --

14 MR. TAIT: They're both in the file --

15 MR. LAFKY: -- the owner of Vanport. And again my  
16 objection to those is relevancy, hearsay.

17 THE COURT: The relevance objection has already  
18 been overruled. The hearsay objection is overcome by the fact  
19 that it's a certified copy and self-authenticating.

20 MR. LAFKY: And I should mention the 403 objection  
21 as well, because the danger now in admitting these things to  
22 the jury is that the jury would punish Decorative Bark for  
23 something related to Vanport and not to Decorative Bark, and  
24 again, that's inappropriate as well.

25 THE COURT: The pages that look just like the pages

1 that have already been admitted, of course, can be used. The  
2 one page that wasn't -- I'm not going to admit in advance, but  
3 if I've been hearing asides correctly, she's going to testify  
4 that she added that writing and she's going to lay the  
5 foundation for the additional information on it, so --

6 MR. LAFKY: If that's what she'll testify to, then  
7 I don't have any objection on that basis.

8 THE COURT: Okay.

9 MR. TAIT: So --

10 MR. LAFKY: That it differs from the other exhibit.

11 THE COURT: Okay. So your objections are noted for  
12 the record, and we'll proceed using those exhibits.

13 Please bring the jury back in. Please rise.

14 (Jury entering courtroom: 11:59)

15 THE COURT: You may be seated.

16 I apologize. The court is not as glamorous as it  
17 appears on TV.

18 You may continue your questioning.

19 BY MR. TAIT:

20 Q. What training have you had in determining whether  
21 somebody is involved in violation of the DEQ regulations,  
22 whether or not knowing whether things of that nature should be  
23 (indiscernible)?

24 A. Besides the on-the-job training, we have trainings  
25 through a few different sources. We've -- I've taken

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1 California Air Resources Board training, which to you is not  
2 going to mean that much, but it's a pretty intensive five-day  
3 training. With that agency, I've taken many hazardous  
4 determination courses. I've taken -- oh, goodness. On the  
5 spot here, I can't think of every single certification or  
6 class I've taken, but we've had quite a -- quite a few  
7 trainings in -- in air quality issues.

8 Q. (Indiscernible) on-the-job training  
9 (indiscernible)?

10 A. Generally we go out with senior inspectors time  
11 after time to hone our skills. That's -- you know, once you  
12 have training, you have the pretty much basics for what you're  
13 looking for. Criminal investigation training teaches you what  
14 to look for and then you go out with other inspectors, or  
15 senior inspectors and -- or, you know, they verify that  
16 you're, you know, doing everything with -- with the way the  
17 DEQ teaches us.

18 Q. When did you first get involved with Denece  
19 Messenger and Decorative Bark?

20 A. Well, I first became a complaints coordinator, I  
21 want to say it was around October of '06, right around there,  
22 and that was an ongoing case that the point for us, an ongoing  
23 case meaning it was something that we had had complaints on  
24 previously. It was something that was well known in our  
25 complaints department, known to be an issue.



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1 Q. I have some separate exhibits. We have the whole  
2 file marked so we can use that if we need to. (Indiscernible)  
3 separate exhibits. Some of these seem to predate your --

4 A. Yes.

5 Q. -- (indiscernible) as complaints coordinator. So  
6 use these to the extent you knew he had to refresh your  
7 recollection. What I'd like to do is to tell you what  
8 complaints you were responding to, what you did, what did you  
9 find?

10 A. I received a lot of air quality complaints,  
11 complaints as far as the -- the particulate matter coming on  
12 to neighboring properties. I've also received some water  
13 quality complaints. The complaints are very seasonal. And  
14 what you need to understand is in, you know, November,  
15 December, January, you know, February, during the rainy  
16 months, we're not going to get air quality dust complaints.  
17 Likewise, you know, in the summer months -- or, you know,  
18 you're not going to see as many of the water quality  
19 complaints, just to kind of give you -- so, yes, we do receive  
20 a lot of -- we've received a lot of air quality, probably more  
21 so than the water quality complaints.

22 Q. Thank you. Let's go specifically to some of these  
23 documents that show when you first got involved.

24 A. Okay.

25 Q. The fellow who was doing this before you was

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1 Mr. Murphy; is that correct?

2 A. Correct. There's been a couple of complaints  
3 coordinators that have dealt with the complaints stemming from  
4 that property.

5 Q. Okay. Let's start with Defense Exhibit 106. This  
6 is a letter dated April 27th, 2006 --

7 A. Uh-huh.

8 Q. -- to (indiscernible)?

9 A. Yes.

10 Q. You were investigating that complaint at that time?

11 A. Yes. There was -- Dennis Juris and Anne Cox who  
12 are water quality folks in our water quality department and  
13 myself were responding to complaints of black liquor runoff  
14 into the Deep Creek body of water that runs adjacent to the  
15 property or through the property.

16 Q. (Indiscernible) Decorative Bark's pro --  
17 Decorative Bark's plant?

18 A. I'm sorry. Say that again.

19 Q. Did you go out to the Decorative Bark plant?

20 A. Yes, we did.

21 Q. Tell the jury what you did, what you did and what  
22 you saw.

23 A. When --

24 MR. LAFKY: Object to relevance and 403.

25 THE COURT: Overruled.

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1 A. When we arrived on the property, we noticed heavy,  
2 heavy black, what we call black liquor, which is the runoff.  
3 Once it goes through the bark pile, it takes a lot of the  
4 stuff with it and it just keeps on going and down the hill  
5 into the creek off the property.

6 Q. Are there pictures here that Dennis took of that?

7 A. Yeah. I believe Dennis did take quite a few  
8 pictures.

9 Q. Do you have some of the pictures here? You can  
10 look at these and see if these show the black liquor that  
11 you're talking about.

12 A. This probably would show right here as one --

13 Q. Let me stop you --

14 A. Okay.

15 Q. -- and have you describe this.

16 A. That one.

17 Q. (Indiscernible) conversation doing this for the  
18 jury and tell me what you're talking about.

19 A. Okay.

20 Q. You're referring to Defense Exhibit --

21 A. Well, I should look at all the pictures first, but  
22 I was just trying to put that aside, because that shows from a  
23 ways up. That's a good one and that's a good one. Yeah.  
24 Yep. Some of these I took, too, after -- after that. Okay.

25 These probably have the best (pause) --

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1 Q. Let's identify it for the jury. And what I'm going  
2 to ask you to do is you step out here and show the jury what  
3 you -- show the jury what you're talking about here.

4 A. Okay.

5 Q. No. I'll hold it for you.

6 A. Okay.

7 Q. If you point out which one you want to use. Start  
8 with the exhibit number, please.

9 A. Number 114, as you can see, the water that's being  
10 brought down is carrying a black liquor like substance is what  
11 basically, and that, as you can see, is not being held off by  
12 any means by these hay bales. As you can see, the hay bales  
13 are not only absorbing some, but there's quite a bit of  
14 product getting through, as you can tell.

15 Q. (Indiscernible) you know there were complaints  
16 about this problem going clear back to 2002.

17 A. Yes.

18 Q. And you saw these things on the ground?

19 A. This -- this is once you get passed this area over  
20 here and you can see closer --

21 Q. Stop, please.

22 A. Okay.

23 Q. We're trying to make a record --

24 A. Okay.

25 Q. -- as you're talking to the jury.

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1 A. Okay.  
2 Q. So when you say "this," you're talking about  
3 Defense Exhibit 117?  
4 A. 117.  
5 Q. And describe what you mean.  
6 A. Well, 117 is actually just a close-up of the actual  
7 product going into the water.  
8 Q. In terms of DEQ regulations, is there anything  
9 wrong with this black liquor going into Deep Creek?  
10 A. You can't pollute any body of water in the state.  
11 MR. LAFKY: Objection, Your Honor. Relevance, 403.  
12 THE COURT: Overruled.  
13 Q. And -- okay. When did you see these things?  
14 A. That was -- this was taken in June '06.  
15 Q. And in June of 2006, did you have any conversation  
16 with Denece Messenger about this issue?  
17 A. Yes. She was there the day that we came out.  
18 Well, she was there the day that we came out on April 1st,  
19 also.  
20 Q. And the same conditions on April 1st?  
21 A. Yes.  
22 Q. So did you talk with Denece Messenger, I'm going to  
23 limit my -- these questions to the issue of this black liquor  
24 going into Deep Creek. Did you talk to Denece Messenger about  
25 that?

1 Q. What was her response when you told her that  
2 allowing this -- this black liquor to go into this creek was  
3 violating the DEQ regulations?  
4 MR. LAFKY: Same objection.  
5 THE COURT: Overruled.  
6 A. We never got much of a response. We were told that  
7 things were going to be fixed, but every time we've been out  
8 there, we were seeing the same thing over and over again, the  
9 same problems. We were told that they were going to work on  
10 it, and that's basically all we were ever told: Yeah, we're  
11 going to work on that. Yeah, we're going to work on that.  
12 Yeah, we'll do something to fix that.  
13 Q. Did they actually do anything to fix it that you  
14 can tell?  
15 A. Once Vanport Mill got involved, then we started  
16 seeing some improvement.  
17 Q. Okay. That's the --  
18 A. But that wasn't until the owner of the property had  
19 to get involved in order for us to see that.  
20 Q. It was not Denece Messenger, it was not Decorative  
21 Bark that made the changes, it was other people?  
22 A. It was the -- yeah.  
23 Q. What do these other pictures show? Just tell us --  
24 A. 113.  
25 Q. 113.

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1 MR. LAFKY: Same objection, Your Honor.  
2 THE COURT: Overruled.  
3 A. Yes, we did.  
4 Q. What was the conversation?  
5 A. Basically what -- you know, what is going to be  
6 done to stop this. Also pointed out the fact that hay bales  
7 are not a source of control for -- for runoff. States  
8 (indiscernible) are rules that it's just not something that's  
9 used in this part of the state. It's too wet over here. It's  
10 predominantly on the east side of the mountains, where it's a  
11 lot dryer, you can get away with using those a little bit.  
12 Q. Did you talk to her about whether or not this --  
13 allowing this black liquor to go into the creek was prohibited  
14 by DEQ regulations?  
15 A. Oh, yes. Every time we were out there.  
16 Q. How many times did you tell her about that?  
17 A. I couldn't even count how many times. They had the  
18 stuff sit -- not only myself, but other agents as well.  
19 Q. You have a better idea, even if it's an estimate,  
20 than any of us here, any of the members of the jury.  
21 A. More than a dozen times.  
22 Q. Over what period of time?  
23 A. Over -- over my period of -- of working in the  
24 complaints program, which would have been 18 months, from  
25 October of '06 until April of '07.

1 A. 113 is a close-up, and basically it's just another  
2 angle to kind of look at just to again show the pool of this  
3 black liquor and the -- right before the (indiscernible) that  
4 you can see basically this picture showed that what's being  
5 used there is not working. Basically that's what you see in  
6 that picture.  
7 Q. Does DEQ have any kind of enforcement proceeding  
8 against Decorative Bark?  
9 A. Yes. Water and air quality both have.  
10 Q. Did any of these result in any kind of a hearing?  
11 A. You know, that takes a long, long time to get to  
12 that point. It's -- it's very difficult for an agency to get  
13 to that point. It takes almost a year just because we've got,  
14 you know, very few staff members able to go to that point. It  
15 all goes back to, you know, budget. We just don't have the  
16 staff members at the time, but yeah, we are -- yes, to that  
17 point eventually.  
18 MR. LAFKY: Objection as nonresponsive. Move to  
19 strike.  
20 (MOTION-BY-COUNSEL)  
21 THE COURT: The objection is sustained.  
22 Q. Let me ask you a question. I mean, the de Landros  
23 wonder why DEQ hasn't stopped this kind of stuff, why DEQ  
24 hasn't taken action to prevent Miss Messenger from doing the  
25 kind of things that you can see in the (indiscernible) here.

says -  
time  
down

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1 Can you tell the jury why they haven't stopped them?  
 2 MR. LAFKY: Object to the form; argumentative.  
 3 THE COURT: Overruled.  
 4 A. Well, I -- I hate to say -- I mean, I hate to use  
 5 the term it's not as easy as it sounds, if that makes any  
 6 sense to you. It's -- while we can go out and we document and  
 7 we have documented, you know, violations, it isn't as easy as  
 8 just walking over to our attorney and -- and dealing with it.  
 9 I mean, there's -- we cover the whole state, and so there's  
 10 lots of cases in the state that -- that are -- that we are --  
 11 you know, that -- that our attorneys are working on. And  
 12 it -- and it comes -- it's over a long period of time. It's a  
 13 very frustrating process. It takes a long time. It takes a  
 14 long time for us to gather our evidence and get our  
 15 information, and we have to be sure that we are being fair to  
 16 both sides and to both parties. And it makes it -- you know,  
 17 you don't want to do -- you know, make any moves or do  
 18 anything that's going to, you know, jeopardize, you know, the  
 19 information collected by your previous coworkers or (pause) --  
 20 Q. Okay. Mr. -- Mr. Lafky was pointing out to the  
 21 jury that his client's never been fined. Does that mean these  
 22 violations are not going on?  
 23 A. No, it would not mean that.  
 24 Q. He's pointing out to his client -- to the jury that  
 25 there's never been any formal proceeding that lawyers

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1 initiated. Does that mean that these practices that you're  
 2 describing to the jury haven't been going on?  
 3 A. No.  
 4 Q. Let's look at -- there's some other photographs  
 5 here. Were you involved in these, in any of these, 118, 116?  
 6 A. I believe that -- that these were sent in with  
 7 their storm water plan by an engineer.  
 8 Q. This is Vanport's, Vanport's response?  
 9 A. That's Vanport's engineer that took those.  
 10 Q. Tell the jury what Vanport did once they got  
 11 involved. What we're showing now is Exhibit 1 -- 118.  
 12 A. You know, I don't -- I can't say word for word  
 13 exactly what they did. I do know that they have -- there's  
 14 now a holding pond. And it looks like, you know, as far as  
 15 the water quality stuff goes, it looks like they've done a lot  
 16 of work out there to try to mitigate that going into the  
 17 creek.  
 18 Q. That started in 2006?  
 19 A. I believe so, if not before, yeah.  
 20 Q. Again, that wasn't Denece Messenger, it wasn't  
 21 Decorative Bark?  
 22 A. No. It was Vanport.  
 23 Q. What does Exhibit 116 show?  
 24 A. Again, just -- just more pictures of looks like a  
 25 holding pond. I believe that's what those pictures are of.

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1 Q. What's this -- what's the liquid that we're looking  
 2 at?  
 3 A. That is black liquor.  
 4 Q. Now, let's turn to the question of other practices.  
 5 For example, in Exhibit 106, it discusses (indiscernible), so  
 6 I'm not going to have you read the whole thing, but we're  
 7 talking about the straw bales, that's in this warning letter.  
 8 It cites the Oregon Revised Statutes that says they can't do  
 9 what they're doing, says there's a violation, requires that  
 10 they review and revise their storm water pollution plan,  
 11 correct?  
 12 A. Uh-huh.  
 13 Q. Dennis says that the DEQ will be frequently  
 14 inspecting the site for evidence of water quality violations.  
 15 Have you actually been frequently?  
 16 A. That would have come from Dennis Juris, and you  
 17 would have to ask him if he's done (indiscernible) on that.  
 18 Q. (Indiscernible). The next series of things I want  
 19 to ask you about are the -- not the black liquor  
 20 (indiscernible). There's the 2006 -- two 2006 letters that  
 21 relate to bark dust on the property, aren't there? Let's look  
 22 at this one. You can get that one out.  
 23 Well, what did you see in terms of the practices of  
 24 Decorative Bark related to controlling air particles?  
 25 A. Not -- not much. What are you -- I mean, we're

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1 looking for -- what we're looking for when we go onto a site  
 2 such as this one for dust control, we are looking for  
 3 sprinklers, any type of misters, like a fine mist that would  
 4 spray and create almost like a curtain that would collect that  
 5 material, and it would collect it when it's wet and it knocks  
 6 it down right in its tracks.  
 7 Q. So when you say "not much," what were you talking  
 8 about? Here's a letter. This is a letter that you sent --  
 9 A. Meaning -- well, meaning that several times that  
 10 we've been out there, we've had to ask them to turn on  
 11 sprinklers. We've asked, "Where are your -- your dust  
 12 controls?" It seems to be the topic of conversation when we  
 13 come out there. *documentation Spda to me*  
 14 Q. Right. For example, this September 26 -- September  
 15 -- 20, 2006, letter from you specifically to Denece Messenger at  
 16 Decorative Bark. Now, does this letter set forth the things  
 17 that you actually saw with your own eyes out there?  
 18 A. Yes.  
 19 Q. So would you tell the jury, you can use this to  
 20 refresh your recollection, when you went out there, what did  
 21 you see about their operations that did not comply with DEQ  
 22 regulations?  
 23 A. Well, for their whole site, they only had two  
 24 sprinklers on, which is absolutely not adequate to -- to cover  
 25 what we were -- what we were seeing. I mean, it was -- it was

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1 very dry. I don't remember -- I don't remember what the  
2 temperature was. I don't remember what the wind was blowing  
3 that day. I don't remember, you know, as far as that. I do  
4 remember that it was -- it was a dry day, and at one point at  
5 the -- on this visit at one point, we had to take refuge in  
6 our vehicle, it was blowing the dust off of their piles so  
7 bad. We actually had to -- when we got back to the office, we  
8 had to take sponge baths and use Visine and try to wash our  
9 eyes out because the bark was blowing so badly. And, again,  
10 with only two sprinklers on, it wasn't -- it wasn't enough.  
11 It wasn't adequately wetting the material to keep it from  
12 blowing offsite. And we were not standing directly --  
13 directly on Decorative Bark. We were standing over by the  
14 McGriff Lumber Mill, which is on the same Vanport property.  
15 And you could -- I mean, it doesn't -- it wouldn't take  
16 anybody with any degree at all to look and see. You could see  
17 them just grabbing into the piles with the machinery, driving  
18 through the complex, the product going up the conveyor,  
19 dropping off onto another pile. Any of these points you can  
20 look and see just with the naked eye, you could see this drift  
21 of reddish dust. And -- ? Did it drift.  
22 Q. The jury -- wind direction  
23 A. -- that day it was -- it was extremely bad on that  
24 day. It got in our eyes, our throats. It was in our clothes.  
25 Q. Was Denece Messenger there that day?

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1 A. You know, I've been out there so many times, I  
2 can't remember if she was there on that specific day or not.  
3 Q. On days that you were out there, have you seen the  
4 same kind of phenomenon with the dust blowing?  
5 A. Yeah. It was pretty bad that day, but, yeah, you  
6 know, the same typical that we see when we go out there, dust  
7 blowing off the tops of piles again where -- where the  
8 equipment is driving into the pile. When it grabs into the  
9 pile, it's not only taking what's on the top, it's taking  
10 quite a chunk out of it, the vehicles that have to drive  
11 through there. Yeah, that's pretty much what we see every  
12 time we go out there, and it's pretty typical of what we see.  
13 Q. Have you talked to Denece Messenger about --  
14 A. Every time we go out there.  
15 Q. Any doubt in your mind that she knows that she's  
16 not supposed to be allowing dust to go off those piles?  
17 A. No doubt in my mind at all that she knows that  
18 that's not --  
19 Q. What's been her response when you point out to her  
20 that she's violating the DEQ regulations, you have to do  
21 something about this?  
22 A. She says they're working on it.  
23 Q. And when you come back, have you seen any evidence  
24 that they've been working on it?  
25 A. No.

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1 Q. She says -- I mean, she claims from the witness  
2 stand under oath that she's complying with all the DEQ  
3 regulations. Is that accurate or inaccurate?  
4 A. It's inaccurate.  
5 Q. Now, there's -- the jury will see as part of the  
6 exhibit there's some Oregon administrative regulations that  
7 talk about what should be put into the air, things that are  
8 prohibited. And you describe those in that letter, don't you,  
9 for her?  
10 A. Yes.  
11 Q. I don't want you to read it word for word, but can  
12 you summarize for the jury, using that?  
13 A. Here's a perfect summary right here. This says it  
14 all.  
15 Q. Okay.  
16 A. No person may cause or permit any materials to be  
17 handled, transported or stored in a building or its  
18 apparatuses or a road to be used, constructed, altered,  
19 repaired or demolished, or any equipment to be operated,  
20 without taking reasonable precautions to prevent particulate  
21 matter from becoming airborne.  
22 Q. Are there definitions about how -- how large  
23 particulate matter can be without being a violation?  
24 A. Yes. There -- it gets -- it gets in the -- I do  
25 not believe that we have that information in this letter.

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1 Q. The administrative regulations says 250 microbes?  
2 A. Correct.  
3 Q. Do you remember that?  
4 A. Yes.  
5 Q. That's probably helpful to most members of the  
6 jury.  
7 A. Yes.  
8 Q. What's --  
9 A. Visible with your eye. Big enough that you can see  
10 with your naked eye. That's --  
11 Q. Anything you can see with your naked eye is more  
12 than 250 microbes?  
13 A. Yes.  
14 Q. And it's (indiscernible)? Yes?  
15 A. Yes.  
16 Q. So I'm not going to show you everything, but all  
17 these exhibits, 205, 215, these are -- I'll represent to you  
18 that these are particles that the de Landros have wiped off of  
19 their property.  
20 A. Uh-huh.  
21 Q. This stuff is on their property from the -- from  
22 Decorative Bark violation of those regulations?  
23 A. Yes.  
24 MR. LAFKY: May I ask a question in aid of  
25 potential objection, Your Honor?

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1 THE COURT: You may.  
 2 **QUESTIONS IN AID OF OBJECTION**  
 3 BY MR. LAFKY:  
 4 Q. Miss Patterson, this material that you've just been  
 5 shown, is that material that you've analyzed in any fashion?  
 6 A. I have not analyzed that material, no.  
 7 Q. So when you're being shown this material in a  
 8 plastic bag, you don't know where it came from?  
 9 MR. TAIT: Your Honor, this is not proper voir  
 10 dire, Judge. That -- it doesn't matter whether or not this  
 11 material is from (indiscernible) it is (indiscernible)  
 12 violated or not violated. I'm not asking whether she can tell  
 13 that this is from the property. I haven't asked her that  
 14 question.  
 15 MR. LAFKY: Well, that appeared to be the  
 16 implication that was being sought, and so I'm trying to  
 17 explore foundation for that in terms of her qualifications and  
 18 her analysis.  
 19 THE COURT: Well, you asked two questions along  
 20 those lines, and that's enough. So we'll continue with the  
 21 testimony.  
 22 BY MR. TAIT:  
 23 Q. Okay. So have you been to the de Landro property?  
 24 A. Yes, I have.  
 25 Q. And have you seen the dust that covers things at

1 "You can't tell."  
 2 THE COURT: Objection --  
 3 THE WITNESS: Nobody would be able to tell.  
 4 THE COURT: You --  
 5 MR. LAFKY: Okay. I'll accept that.  
 6 THE WITNESS: I mean (pause) --  
 7 THE COURT: The objection is overruled and that  
 8 testimony will be not stricken.  
 9 BY MR. TAIT:  
 10 Q. Now, have you -- have you stood at an area between  
 11 the de Landro property and the Decorative Bark property where  
 12 you could see these piles?  
 13 A. Uh-huh.  
 14 Q. Yes?  
 15 A. Yes. Many times.  
 16 Q. And have you seen the dust coming off these piles?  
 17 A. Yes.  
 18 Q. And have you seen the dust come right at you and go  
 19 over your head toward the de Landro property?  
 20 A. Yes.  
 21 Q. How many times have you seen that happen?  
 22 A. Again, I've probably been at the de Landros -- I've  
 23 probably been there maybe four times investigating. And part  
 24 of our investigation would be to go and survey the area.  
 25 Q. Okay. And what have you seen on those times that

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1 their property?  
 2 A. Yes, I have.  
 3 Q. And can you look at that dust and tell the jury  
 4 whether or not, in your opinion, that dust is from Decorative  
 5 Bark?  
 6 A. Well, you -- you can't tell by looking at it, but  
 7 when the wind is blowing and you're not seeing any sprinklers  
 8 over there, you can watch it coming through the trees. And  
 9 you see how clean the -- you know, their -- their property,  
 10 whether it be their patio furniture, the wedges -- the ledges  
 11 on their window sill on the opposite side, it's redness. You  
 12 can't mistake this stuff. I mean, I -- I would be happy to go  
 13 get a sample and test it if that's what somebody needs, but  
 14 it's not necessary.  
 15 Q. (Indiscernible)?  
 16 A. It's really not necessary from what we've seen out  
 17 there.  
 18 MR. TAIT: I'm sorry, Judge. That's my attempt to  
 19 be humor (indiscernible).  
 20 MR. LAFKY: Your Honor, I'd object and move to  
 21 strike the response after "you can't tell." She said, "You  
 22 can't tell" --  
 23 (MOTION-BY-COUNSEL)  
 24 MR. TAIT: Just by looking at it.  
 25 MR. LAFKY: That was the question, and she said,

1 you were there?  
 2 A. Reddish bark dust covering just about everything.  
 3 Q. There's a -- that doesn't -- there are no pine  
 4 needles, there are no pine needles any time. You wouldn't  
 5 mistake pine needles for this reddish bark dust, would you?  
 6 A. No.  
 7 Q. Or anything that comes off a tree?  
 8 A. No.  
 9 Q. You can go ahead and sit down. I'm sorry.  
 10 A. Oh, no. That's fine.  
 11 Q. I didn't mean to have you standing up all the time.  
 12 A. That's fine.  
 13 Q. Now, so you said that this sets out the -- the law,  
 14 and this says, corrective actions requested. It says this is  
 15 a Class II violation. What does that mean?  
 16 A. We have three classes of violations, Class I being  
 17 the most stringent and Class III being the least of the three  
 18 stringent.  
 19 Q. Okay. And the letter also says, given the fact  
 20 that you have failed to take necessary actions to remedy this  
 21 situation when you were notified of the previous violation, it  
 22 gives the department cause for concern that additional  
 23 violations may have occurred or will occur. Unabated  
 24 emissions of particulate matter may cause aggravated  
 25 respiratory disease in individuals prone to respiratory

no need to  
re-7

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1 disease or ailments. The violations cited above pose the risk  
2 of significant environmental harm and adverse health effects.  
3 Since you were previously warned of similar violations, the  
4 matter is being referred to the department's office of  
5 compliance in Portland -- and enforcement with a  
6 recommendation to proceed with formal enforcement action.

7 Let's start with the first part of this where it  
8 talks about on the things that you've -- you've been warned  
9 about this before is pretty self-evident. The part about this  
10 causing aggravated -- aggravating respiratory distress or  
11 causing significant environmental harm and adverse health  
12 effects, tell the jury what your -- you know, what DEQ's view  
13 on -- on this particular issue is.

14 A. Well --

15 MR. LAFKY: Objection; relevance. There's no such  
16 claim in this case.

17 THE COURT: I'm going to sustain that objection.

18 MR. TAIT: Your Honor, this is relevant on the --  
19 on the issue of their concerns about their health, their  
20 concerns about their -- their son's health. The department  
21 says that this does pose a risk. We're entitled to prove that  
22 those concerns are -- are founded and they're reasonably  
23 founded. We're not saying that they -- they're not claiming,  
24 for example, that the de Landros, either of the adults, has  
25 some ailment and are seeking compensation for that. If we

1 A. I wasn't in that building.

2 Q. You were not?

3 A. No.

4 Q. Were you ever -- were you ever in the building when  
5 there was a meeting between Miss Messenger and Mr. Druback and  
6 you could hear what was going on?

7 A. I don't believe so.

8 Q. Okay.

9 A. I believe those meetings took place at our  
10 Northwest Region office, and I was in Gresham.

11 MR. TAIT: Thank you. That's all I have of this  
12 witness.

13 THE COURT: All right. We're going to break for  
14 lunch. I will ask you to be back here -- back here at the  
15 jury room at 1:30, please. Please rise for the jury.

16 (Jury leaving courtroom: 12:30)

17 THE COURT: You may be seated. Any reason the  
18 witness can't go until 1:30 now? Do we need her to stick  
19 around for whatever?

20 MR. TAIT: No.

21 THE COURT: Okay. You may go to lunch.

22 THE WITNESS: Thank you.

23 MR. LAFKY: Judge, I had a motion for mistrial,  
24 again based on this whole water quality issue. As you know,  
25 it's been my repeated argument that there is no water quality

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1 could have claimed that, we would, but we can claim that --  
2 that they have reasonable -- they have reasons to be un- --  
3 they have reasons to have emotional distress about this issue.  
4 And the fact that the DEQ's policy, in this letter, for that  
5 matter, says that this does pose a significant risk is  
6 evidence on that issue only.

7 THE COURT: That letter is in evidence. I'm  
8 sustaining the objection as to further testimony beyond the  
9 letter.

10 BY MR. TAIT:

11 Q. Now, were you present in DEQ when Miss Messenger  
12 showed up there to talk to your boss, Mr. Druback?

13 A. Which time? Which date?

14 Q. Was there a particular visit to Mr. Druback that  
15 drew the attention of all the people who were there?

16 A. Oh, yeah. That was the one with her attorney. I  
17 don't remember the specific date that --

18 Q. This attorney right here? Mr. Lafky?

19 A. I don't know. It was at a different office.

20 You -- we just heard from other staff members --

21 MR. LAFKY: Object to the hearsay.

22 A. -- that there was a lot of commotion.

23 MR. LAFKY: Object to the hearsay.

24 THE COURT: Sustained.

25 Q. Well, I'm talking about your personal observation.

1 claim in this case, that the de Landros by virtue of a lack of  
2 any bordering on the water body at issue here can't have a  
3 trespass -- private trespass or private nuisance tort claim in  
4 this case. And we've just been treated to the DEQ  
5 representative testifying 70 percent about water quality  
6 issues. Obviously it's intended to inflame the jury against  
7 Decorative Bark and Miss Messenger, and I believe it's going  
8 to be impossible, certainly we'll ask for a limiting  
9 instruction at the time of jury instructions, I don't know if  
10 we'll get that or not, but I'd move for mistrial at this time,  
11 because I think the jury's going to be so severely prejudiced  
12 by this testimony that in our opinion is not relevant and  
13 germane to these tort claims.

14 (MOTION-BY-COUNSEL)

15 THE COURT: Denied.

16 Mr. Tait?

17 MR. TAIT: I'm listening.

18 THE COURT: Well, we -- you wanted to talk about  
19 the Giusto testimony, or did you not?

20 MR. TAIT: Well, I just want to -- I want to make  
21 sure that there's not a bunch of spec- -- I mean, I have no  
22 idea what he's going to be talking about.

23 MR. LAFKY: He's going to talk about he got the  
24 e-mail and what he did as a result.

25 MR. TAIT: What did he do as a result? Did he do

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1 something? Did he -- did he stop doing business with her?  
 2 Did he change his business habits with her?  
 3 MR. LAFKY: My understanding is he's going to say  
 4 for a short time he did not purchase bark from her.  
 5 MR. TAIT: Okay.  
 6 MR. LAFKY: So that's --  
 7 THE COURT: Okay.  
 8 MR. LAFKY: I mean --  
 9 THE COURT: So we don't need to have a hearing on  
 10 that?  
 11 MR. LAFKY: I think not.  
 12 MR. TAIT: No.  
 13 THE COURT: It doesn't sound like we would.  
 14 MR. TAIT: No.  
 15 THE COURT: I just wanted to confirm. Okay. I'll  
 16 see everybody back at 1:30.  
 17 (Recess: 12:33 - 1:37)  
 18 THE COURT: Okay. We're on the record. My plan is  
 19 to finish up with this witness before we take up with  
 20 Mr. Giusto.  
 21 MR. LAFKY: Judge, Mr. Tait had asked to get the  
 22 other DEQ person on. I don't have any objection to that.  
 23 THE COURT: Okay.  
 24 MR. TAIT: And I have one more question of her, I  
 25 think, of this witness.

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1 THE COURT: Okay.  
 2 MR. TAIT: Exactly two. It's the same subject.  
 3 MR. LAFKY: I don't object to reopening.  
 4 THE COURT: Okay. Whenever you both agree, I will  
 5 not interfere.  
 6 THE CLERK: Should we wait for the witness to take  
 7 the stand before the jury comes in?  
 8 THE COURT: Yeah. Does the witness know that  
 9 they're needed here, Mr. --  
 10 MR. TAIT: Yes.  
 11 THE COURT: Okay. So (pause) --  
 12 MR. TAIT: I can go out and have her come sit in  
 13 here.  
 14 THE COURT: So should Kristi go call the name or  
 15 not?  
 16 MR. TAIT: Yeah. She's -- yeah. She's right on  
 17 this bench over here.  
 18 THE COURT: Okay. Go ahead and take a seat back on  
 19 the witness chair.  
 20 Please rise.  
 21 (Jury entering courtroom: 1:40)  
 22 THE COURT: You may be seated. Mr. Tait.  
 23 MR. TAIT: Thank you.  
 24 BY MR. TAIT:  
 25 Q. Miss Patterson, did you have a chance to review a

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1 video that purports to be what the operations are like at  
 2 Decorative Bark with -- that features Denece Messenger as a  
 3 person in the video?  
 4 A. Yes. I viewed that videotape.  
 5 Q. That's what I understand that they're going to  
 6 offer to show the conditions out there. I'd like you to tell  
 7 me how what you saw on that video compares with what you saw  
 8 every time you went out and inspected Decorative Bark.  
 9 A. Well, it didn't really compare, because it was  
 10 pouring down rain, number one, or it looked like it was  
 11 raining quite heavily, number one, and that's not typically  
 12 what we see when we go out there. It was raining and there  
 13 was a sprinkler on, so it was not typical.  
 14 Q. Did the bark piles look like -- was there dust  
 15 coming off the bark piles?  
 16 A. Actually, as much as it was raining and with the  
 17 sprinkler on, you could see when they grabbed into the pile,  
 18 you could still see dust coming, wafting out of -- out of the  
 19 pile.  
 20 Q. Okay. Which is closer to being typical, that video  
 21 or the photographs that the jury has in evidence?  
 22 MR. LAFKY: Object to the form of the question as  
 23 to which is closer to typical.  
 24 MR. TAIT: I'm talking specifically about Exhibit  
 25 216.

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1 THE COURT: Overruled. You can --  
 2 A. The -- actually the photographs are more typical of  
 3 what we see --  
 4 Q. All right. That's all --  
 5 A. -- when we go out there.  
 6 CROSS-EXAMINATION  
 7 BY MR. LAFKY:  
 8 Q. Miss Patterson, how often does it rain in Boring,  
 9 Oregon?  
 10 A. Quite a bit.  
 11 Q. So why would you say that it wouldn't be typical  
 12 that it would be raining --  
 13 A. I didn't say it was typical that it wouldn't be  
 14 raining. I said it's not typical of what we see -- he asked  
 15 if it was typical of what we see when we go out there.  
 16 Q. So did you never go out there when it was raining?  
 17 A. We haven't really had to too often when it was  
 18 raining.  
 19 Q. Okay. So why would you have to go out there?  
 20 Would you have to go to the property in response to a  
 21 complaint?  
 22 A. That is the reason why we would go out, yes, is to  
 23 respond to a complaint.  
 24 Q. Is that some sort of department rule or regulation  
 25 either formal or informal, if someone makes a complaint, you

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1 do need to make a response?  
 2 A. **We do try to make a site visit as often as**  
 3 **possible, especially in a case where it's -- we've had**  
 4 **multiple complaints.**  
 5 Q. And you talked about that earlier. You've had a  
 6 lot of complaints about Decorative Bark, right?  
 7 A. **Correct.**  
 8 Q. Multiple complaints, right?  
 9 A. **Correct.**  
 10 Q. And through the defense, there's a certified copy  
 11 of the entire DEQ file that's been admitted in this case,  
 12 correct?  
 13 A. **Correct.**  
 14 Q. And in fact, you went through that file and signed  
 15 every page saying this is a certified true copy of everything  
 16 that exists in our office about Decorative Bark, correct?  
 17 A. **It was everything that was in the file, yes,**  
 18 **correct.**  
 19 Q. Everything in the file? Okay. Now, you also have  
 20 a form that gets filled out in response to a complaint,  
 21 correct?  
 22 A. **Correct.**  
 23 Q. So let's go through every one of these complaint  
 24 forms in this entire file. Here's May 9th, 2005, and there's  
 25 a box for complaint, correct?

1 complainant?  
 2 A. **Derek de Landro.**  
 3 Q. There's a form on the back of that one with  
 4 another. July 25th, '01, who's the complainant?  
 5 A. **That would be confidential anonymous complaints.**  
 6 Q. So that's our second anonymous, and so far it's --  
 7 everything else, de Landro. Now, here's the last complaint  
 8 form in the file, May 9th of '05.  
 9 A. **Derek de Landro.**  
 10 Q. Can you show me any one of these complaint forms in  
 11 this entire certified copy that you went through and certified  
 12 every page that contains any complaint made by anyone other  
 13 than Derek de Landro or anonymous?  
 14 A. **Okay. I'm sorry. It's been awhile since you asked**  
 15 **the question, but I don't see any others, no.**  
 16 Q. Is there any piece of paper anywhere in that file  
 17 that documents any one spec of dust specifically going onto  
 18 the de Landro property?  
 19 A. **Okay. I'm not sure I understand what your question**  
 20 **is.**  
 21 Q. Sure. Is there any piece of paper in that file  
 22 that identifies in any way any one spec of dust, whatever the  
 23 size, whatever the date, whatever, going from Decorative Bark  
 24 onto the de Landro property specifically?  
 25 A. **To answer for sure, I would have to read through**

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1 A. **Correct.**  
 2 Q. And who's the complainant on this one?  
 3 A. **Derek de Landro.**  
 4 Q. Okay. Then here's the next complaint form, same  
 5 date, May 9th, '05. Who's the complainant?  
 6 A. **Derek de Landro.**  
 7 Q. And the next complaint, this is December 19th, '02.  
 8 Who's the complainant?  
 9 A. **This is not -- the complainant is not listed,**  
 10 **because it was an anonymous confidential complaint.**  
 11 Q. Okay. So this one anonymous, no name listed,  
 12 correct?  
 13 A. **Correct. Meaning somebody could have called in.**  
 14 **We wouldn't have known who it was or (pause) --**  
 15 ~~Q. Okay.~~  
 16 A. **-- chose not to leave that information.**  
 17 Q. All right. So so far we've got two de Landro, one  
 18 anonymous, right?  
 19 A. **Correct.**  
 20 Q. Okay. Then this is front and back. So now the  
 21 back page of that one, that's May 6th, '02. When would that  
 22 have been? That's seven months before the anonymous one in  
 23 December. May 6th, '02, who's the complainant?  
 24 A. **Derek de Landro.**  
 25 Q. Then we've got March 21st, '02. Who's the

1 **all the documentation.**  
 2 Q. In your work in -- you said you visited  
 3 Mr. de Landro four times?  
 4 A. **I -- his property.**  
 5 Q. Okay. And did you have other conversations with  
 6 him besides visiting his property?  
 7 A. **He was there, I think, once or twice when I was**  
 8 **there.**  
 9 Q. And what I'm asking, then, from your recollection,  
 10 without having to wait for you to go through the entire file,  
 11 is if you recollect any documentation being created by you  
 12 that documents a specific spec of dust ever going from  
 13 Decorative Bark onto the de Landro property?  
 14 A. **I would think that, yeah, the warning letter**  
 15 **probably outlines.**  
 16 Q. Okay.  
 17 A. **Dust going onto the property.**  
 18 Q. And the warning letter says on August 2nd, '06,  
 19 this dust migrated from your facility off site and onto  
 20 neighboring properties to the north. Do you recall that?  
 21 A. **Yes.**  
 22 Q. And is it your testimony that when Mr. Druback  
 23 signed that letter, that that meant the de Landro property  
 24 even though it's not specified?  
 25 A. **Correct.**



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1 Q. Anything else other than that one reference?

2 A. Probably in the pre-enforcement notice in  
3 subsequent, you know, follow-up from the warning letter.

4 Q. You sent a specific letter to Decorative Bark about  
5 the time that you testified to this morning when the dust got  
6 on the McGriff property, correct?

7 A. Yes.

8 Q. And you specifically identified the McGriff  
9 property in that letter, correct?

10 A. Uh-huh.

11 Q. Is that a yes?

12 A. Yes. I'm --

13 Q. Just for our record.

14 A. Yes. From my understanding, I was standing there,  
15 yes.

16 Q. And how close to the Decorative Bark property were  
17 you standing when this dust got on you?

18 A. From where we parked the car and then walked, we  
19 were within -- I don't know. I guess if -- I don't know  
20 exactly where their property line is right there, but I mean,  
21 it's pretty much from -- you know, from here you're on McGriff  
22 and if you stand right there, you're on Decorative Bark, but  
23 from the time we got out of the car, we were probably 50 feet  
24 from the property line maybe.

25 Q. You don't know what the boundary is between what

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1 Decorative Bark leases and what McGriff leases?

2 A. Well, I don't know the exact coordinates, is what I  
3 meant to say. And you can tell that this is -- you know,  
4 here's the lumber yard here and here's the bark operation  
5 here. If you saw one of the aerial pictures, you can --

6 Q. Okay.

7 A. It's pretty easy to tell.

8 Q. And you think you were maybe within 50 feet or so,  
9 best guess, of the Decorative Bark property when that dust  
10 blew on you?

11 A. I'm thinking from the time that, yeah, where we  
12 parked the car and then walking out towards the property line  
13 and saw that it's just coming at us and heading back towards  
14 the car, yeah, we were within 50 feet.

15 Q. When you went to the de Landro property and you met  
16 with Mr. de Landro, did you ever go out with Mr. de Landro and  
17 take photographs?

18 A. Yes. I was taking photographs. I was on a site  
19 inspection -- or on a, excuse me, a follow-up to a complaint.

20 Q. From Mr. de Landro?

21 A. Yes.

22 Q. And when you visited Mr. de Landro and you went  
23 with him to take photographs, were you doing that from  
24 Mr. de Landro's property or from a different property?

25 A. We had taken pictures from all sorts of angles.

1 We -- I probably did start off taking some on his property,  
2 and as we moved to the next small little -- little road taking  
3 more pictures and then onto the neighbor's property and took  
4 pictures.

5 Q. And do you remember which neighbor's property you  
6 went on to take those photographs with Mr. de Landro?

7 A. I could -- I could point it out to you. I can't  
8 remember her name. I'm sorry.

9 Q. Okay. Would that be Hannah Jones? Does that  
10 refresh your --

11 A. That sounds -- that sounds familiar. That was --

12 Q. Does her property actually border the Vanport  
13 facility?

14 A. Yes.

15 Q. Mr. de Landro's property, however, does not,  
16 correct?

17 A. No.

18 Q. Does Mr. de Landro's property border Deep Creek at  
19 any location?

20 A. I don't -- I don't think it does, no.

21 Q. You testified earlier that it's very difficult to  
22 move forward with regulatory action generally in your  
23 experience. Is that accurate?

24 A. Well, it's just very time-consuming, it takes a lot  
25 of time. We have very short staff.

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1 Q. Sure.

2 A. And --

3 Q. So how long have you worked for the Oregon DEQ?

4 A. I've worked for the DEQ for just over six and a  
5 half years.

6 Q. And during what part of that time were you in some  
7 function that might have related to Decorative Bark?

8 A. 18 months.

9 Q. 18 months. So what 18-month period was that?

10 A. From the -- let's see. It would have been right  
11 around October of '06 to April of '07.

12 Q. Okay. That -- that sounds like six months, so --

13 A. Excuse me. October of '05, I'm sorry.

14 Q. Sure.

15 A. Sorry.

16 Q. October of '05 until April of this year?

17 A. Correct.

18 Q. And that's when you went into asbestos?

19 A. Actually, I started out in the asbestos program. I  
20 was in a one-year -- or to be a one-year developmental  
21 position, and that's why I -- I was -- stepped into this, the  
22 role of the complaints role. Once my training was over, it  
23 actually has went over six months, so then I was in the 18  
24 months, so that's when my dealing with Decorative Bark. And  
25 then I went back to asbestos, which was my previous job. Does

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1 that make sense?  
 2 Q. I think so.  
 3 A. Yeah. Okay.  
 4 Q. But at any rate, it was only in the October '05 to  
 5 April '07 time period during which you had any dealings with  
 6 Decorative Bark?  
 7 A. No. I started going out with the complaints  
 8 coordinator the summer prior just to start -- start as my  
 9 training to see how they do it, how complaints are conducted  
 10 or inspections are conducted.  
 11 Q. When you say "summer prior," does that mean '05 or  
 12 '04?  
 13 A. Correct. I'm sorry. '05.  
 14 Q. '05.  
 15 A. Yeah.  
 16 Q. So summer of '05 to April '07, that's when you've  
 17 been testifying today and talking about --  
 18 A. Yes.  
 19 Q. -- anything you've ever observed, it would have had  
 20 to have been within that time frame?  
 21 A. Yes.  
 22 Q. In regard to the air quality issue, you talk about  
 23 permit or not a permit. Is Decorative Bark required to have  
 24 any type of permit for air quality?  
 25 A. The Department of Environmental Quality does not

1 at any time try to fine Decorative Bark?  
 2 A. Not to my knowledge.  
 3 Q. Did DEQ initiate any type of notice of violation or  
 4 any type of citation or anything that would require Decorative  
 5 Bark to respond, go to a hearing, any type of formal  
 6 enforcement action?  
 7 A. No.  
 8 Q. So in the seven years that you've worked for DEQ, a  
 9 warning letter is as bad as it's ever gotten in your career?  
 10 A. They've -- we have sent pre-enforcement notice to  
 11 Decorative Bark, which is a step above a warning letter.  
 12 Q. Okay. A pre-enforcement notice?  
 13 A. That -- that means that you could be responsible  
 14 for fines incurred for -- regarding the violation.  
 15 Q. And were any of those warning letters or  
 16 pre-enforcement notices followed up on in any way?  
 17 A. Yeah. We do -- once -- once we're -- you know, we  
 18 receive the complaints, we follow up on them. Once it gets to  
 19 the point if we have to send a warning letter, as part of your  
 20 follow-up to your warning letter, you want to follow up to  
 21 verify that the things that you've put in the letter for them  
 22 to correct are being done.  
 23 Q. So other than seeing if the things were done, do  
 24 you know if anything else has occurred on the DEQ side?  
 25 A. No. Just as far as when we -- when it goes

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1 permit bark dust operations at this time.  
 2 Q. And when you say "does not permit" it, you mean it  
 3 does not issue permits to bark dust processors?  
 4 A. Correct.  
 5 Q. So anyone in Oregon that makes bark dust does not  
 6 have an air permit?  
 7 A. Correct.  
 8 Q. Then the water quality permit for the Vanport area,  
 9 is that held by the property owner, Vanport?  
 10 A. Yes, I believe so.  
 11 Q. So ultimately any responsibility for water quality  
 12 issues would be the property owner, in this case Vanport,  
 13 correct?  
 14 A. Yes.  
 15 Q. During the six or seven years that you've worked  
 16 for DEQ, how many cases have you worked on in which DEQ has  
 17 sought to fine or take some kind of formal enforcement action  
 18 against an individual, business, anyone?  
 19 A. This is the first one I've been involved with.  
 20 Q. Are you saying that that happened here? I mean,  
 21 you're saying that DEQ sought to fine Decorative Bark or take  
 22 some formal enforcement action here?  
 23 A. I -- I'm -- I don't know if I'm understanding your  
 24 question correctly.  
 25 Q. Well, I'm just trying to understand, did -- did DEQ

1 pre-enforcement, you hand some of that off to the enforcement  
 2 program, and I'm not sure exactly what they're doing with  
 3 their portion of it.  
 4 Q. Now, you testified earlier in response to a  
 5 question that asked you whether DEQ -- whether Decorative Bark  
 6 had violated any DEQ regulations, and you said they have --  
 7 they only have two sprinklers. Do you recall that?  
 8 A. Not specifically that I said they only have two  
 9 sprinklers.  
 10 Q. Okay. Well, I guess just point me towards any  
 11 regulation that says how many sprinklers they're supposed to  
 12 have or --  
 13 A. Adequately wet. That's what it says.  
 14 Q. Adequately wet?  
 15 A. Adequately wet.  
 16 Q. And that's as defined as it gets?  
 17 A. Well, we go out onto a site and it's July, a hot  
 18 90-degree day and the wind is blowing and there are no  
 19 sprinklers on, that's not adequately wet. If there's one  
 20 sprinkler on, chances are that's not adequately wet.  
 21 Q. And that would be up to you to determine what's  
 22 adequate?  
 23 A. That would be up to the proper -- who was running  
 24 the property. In that case it would have been up to  
 25 Miss Messenger to, you know, decide how many sprinklers she

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1 needed. If we still were receiving complaints, you know,  
2 after that, we may look at, okay, what are they doing to, you  
3 know, mitigate the dust issue.

4 Q. I'm trying to understand the -- these air quality  
5 rules, and I -- it sounds like you've got some experience in  
6 enforcing them, correct?

7 A. Correct.

8 Q. Okay. And so if you're in a non-permitted area or  
9 you're outside a special control area, is that -- what does  
10 that mean, a special control area?

11 A. I think the special control area is in reference to  
12 open burning. Are you taking that out of a letter that we  
13 sent Ms. Messenger --

14 Q. I'm just --

15 A. -- or are you taking that out of the air quality  
16 rules as a whole?

17 Q. I'm just looking at these air quality rules --

18 A. Okay.

19 Q. -- that I believe you attached to your warning  
20 letter.

21 A. We do attach a copy because we want to see where  
22 people -- show folks where we took the excerpt from.

23 Q. So at any rate, Decorative Bark's outside a special  
24 control area, correct?

25 A. That is -- again, that is in regards to open

1 the violations are listed right here, the Oregon

2 Administrative Rule violation.

3 Q. So it says, you can't operate equipment without  
4 taking reasonable precautions to prevent particulate matter  
5 from becoming airborne.

6 A. Yeah. Just a similar letter, basically.

7 Q. So is that the only rule that you believed  
8 Decorative Bark violated?

9 A. Well, here that's the only one that we were able to  
10 cite, yes, but it -- the rule kind of goes on.

11 Q. Is there any definition of what constitutes  
12 reasonable precautions?

13 A. I'm sorry. What's that?

14 Q. Is there any definition as to what constitutes  
15 reasonable precautions?

16 A. Well, we've spelled out here in seven different  
17 things that we'd like to do to explain which precautions that  
18 we're talking about. Would you like me to read those?

19 Q. You put seven things in this letter that you  
20 wanted -- at least Mr. Druback did, that you wanted Decorative  
21 Bark to do, correct?

22 A. Yeah. We're giving them -- so take -- to take  
23 reasonable precautions to prevent bark from becoming airborne.

24 Q. And what --

25 A. Such precautions should include but are not limited

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1 burning issue. And Miss Messenger is a commercial operation,  
2 and therefore no open burning should be taking place. That --  
3 it's -- it's kind of like apples and oranges. It doesn't  
4 really refer to this -- this case. It's in the air quality  
5 rules for other things.

6 Q. Okay. Well, does it require any person to not emit  
7 or allow into the air for a period -- any kind of contaminants  
8 for a period or periods aggregating more than three minutes in  
9 any hour, which is equal to or greater to 40 percent opacity?

10 A. This again does not refer to anything that has to  
11 do with Decorative Bark operation.

12 Q. Okay. So --

13 A. That would be an opacity reading. I -- for an  
14 example, when you drive by a business or, you know, even  
15 Burger King has them, anybody that has a stack on it where you  
16 see a plume coming out of it, we have -- we are also certified  
17 to read plume opacity and what he was referencing, but that is  
18 not the case in Decorative Bark.

19 Q. So what is the rule that she allegedly violated?

20 A. Okay. If you reference the -- I don't -- I don't  
21 know. Let's see. Can you grab this? Let's see.

22 Q. Let me help you there.

23 A. Yeah. The warning letter here --

24 Q. I'll get this here.

25 A. Yeah. There's a warning letter. And you can --

1 to.

2 Q. Okay. So --

3 A. And then we listed what we wanted them to do.

4 Q. So what I want to ask you, Miss Patterson, is  
5 before Decorative Bark gets this letter, is there some rule  
6 that someone turns to, a lawyer, a business owner, anyone,  
7 that lists these things that they ought to be doing, that  
8 specific type of business?

9 A. Well, I would think that would be something you  
10 would know before you got into that kind of business --

11 Q. So --

12 A. -- as to what is necessary. I mean, if I was going  
13 to open up a business, I would want to know what are the types  
14 of equipment I would need, and certainly that would be a  
15 forethought before I maybe even got my business license.

16 Q. Do you know whether Decorative Bark is required to  
17 have a business license?

18 A. I would imagine they were. I don't -- that's not  
19 something that DEQ regulates, is business license. I would  
20 imagine -- isn't any business required to have a business  
21 license? No?

22 Q. So from your perspective, the average person in  
23 whatever business they might be in should know what DEQ means  
24 by "reasonable precautions" just by virtue of being in that  
25 business?

*Susan Patterson*

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A. I think you should know what it takes to run your own business. When DEQ comes to you and points out some things that you need to do to improve upon, I -- I would think that that (pause) --

Q. And when the rule says --

A. -- would --

Q. -- to prevent particulate matter from becoming airborne, does that mean at all?

A. You can't let it leave your property.

Q. Does the rule say that?

A. I believe it does.

Q. Okay. That's not in your letter. That's why I'm asking, is that what the rule says, because I don't know.

I --

A. Yeah. I'd have to go back and read through. We have -- we have so many rules to follow, that literally every time you're dealing with -- with one business or another to verify that you're doing everything, you know, the way it's supposed to, we go back through and read our rules. So I don't come onto your property and think that you're doing something wrong if we don't know, and so we grab our rules and we read through them to make sure that we're -- excuse me -- to verify them.

Q. Does this look like the rule that you attached?

And let me see if it's also here in the back of this exhibit.

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So which one is that?

A. This is requirements.

Q. (Indiscernible)?

A. Yes.

Q. Okay. So it looks like it's here in the exhibit as well. Here you go. And I don't see where it says that it has to leave the property in order to be an issue.

A. Well, I think that -- I think that it probably doesn't say that exactly.

Q. So in other words, what this rule requires is an operation like Decorative Bark using precautions to prevent something from just going a foot into the air theoretically, right?

A. Are you -- are you asking me a question? What's --

Q. Well, yeah. Is that -- Is that what it says? It just says "from becoming airborne", correct?

A. Well, a bark dust operation generally is outdoors, and so reasonable precautions for it becoming airborne, I mean, obviously it may kick up a little on your property, but you cannot let that wander over two blocks away to neighboring properties.

Q. But that's not what the rule says, does it, Miss Patterson? In fact, it even refers to material in a building, correct?

MR. TAIT: Excuse me, Your Honor. I've been kind

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of patient. This is an Oregon administrative regulation. It's law, and the Court's job is to decide what that means. And this witness -- I mean, he's been asking her what she thinks this means, so forth and so on. Miss Messenger is presumed to know the law, just like everyone is presumed to know the law, and you're going to have to tell the jury about this, and it's simply not proper to ask her what the law is.

THE COURT: Do you want to be heard?

MR. LAFKY: Sure. They opened the door when he asked her if she'd violated any rules, and so I'm going through the rules.

MR. TAIT: Well, he's -- he's not simply doing that.

THE COURT: I'm sustaining the objection.

BY MR. LAFKY:

Q. Now, Ms. Patterson, do you recall that Miss Messenger specifically had a conversation with you in which she asked you for some services and some assistance, and you told her that she was not the permit holder, referring to water quality issues, and therefore was not entitled to assistance?

A. No, I did not say that.

Q. Is someone who is not the permit holder entitled to assistance from DEQ in water quality areas?

A. Yes.

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Q. So you offered Ms. Messenger whatever assistance she needed?

A. I directed her to the person who could answer her questions.

Q. That wasn't you?

A. Correct.

Q. And who was that?

A. I believe it was Dennis Juris with our water quality program. He's a senior water quality engineer.

Q. Is there some sort of chemical testing that DEQ could do to determine whether a specific substance matches up with some other type of substance?

A. Yeah. I don't know if the word chemical testing is correct, but, yeah, they could tell.

Q. Okay. What would be the correct terminology for that?

A. We'd have to get somebody from the lab in here to give you correct terminology on what it's actually called, but they can do testing.

Q. At any rate, DEQ has such a lab or subcontracts out to such a lab --

A. We have our own lab, yes.

Q. Okay. And then do you recall an occasion where you were taking photographs of Decorative Bark and Ms. Messenger approached you and offered to speak with you? Do you recall

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1 that?

2 A. That happened a couple of times.

3 Q. What was your typical approach there? Did you go  
4 onto the property and start taking photographs or did you come  
5 in, introduce yourself, talk to Ms. Messenger or other  
6 employees? What did you do there?

7 A. From -- basically from the time I started, this had  
8 already been something that DEQ had been dealing with for a  
9 long time, and so what was becoming practice was just to  
10 observe, because they had already been told what was -- what  
11 was requested of them to keep the dust down. And so at this  
12 point we were basically just observing from Vanport's  
13 property, from the McGriff Lumber Mill yard.

14 Q. What was the date of that letter that said you  
15 ought to do the following things, the so-called warning  
16 letter?

17 A. Let's see. August 2nd, 2006.

18 Q. Do you know as we sit here today whether those  
19 things have been done?

20 A. From subsequent follow-up site inspections, we were  
21 not seeing that that -- that most of the stuff was being done,  
22 no.

23 Q. Well, you were out of there in April. So when did  
24 you follow up on this August 2nd letter to see whether these  
25 things had been done?

1 and things like that and convenience.

2 Q. And so if Mr. Lafky has been given permission from  
3 us to go on the property so he can do any inspection that he  
4 wants, including taking samples, and hasn't done that, that  
5 would have been available to him?

6 MR. LAFKY: Object to the form.

7 THE COURT: Overruled.

8 A. I'm sorry. Can you ask that --

9 Q. Yes. So if -- if necessary, we'll call Mr. Lafky  
10 to -- to establish what he's been given permission to do, but  
11 assuming that he's been -- been given permission to go onto  
12 our property to do whatever tests he wants, he could go on the  
13 property and take this material that's on -- that you see  
14 every time you go out there and go compare it to the things  
15 going on at Decorative Bark and come in here with an expert  
16 and explain to the jury whether they're the same or different?

17 MR. LAFKY: Objection, Your Honor. It's not our  
18 burden to prove.

19 MR. TAIT: That doesn't mean --

20 THE COURT: Overruled.

21 MR. TAIT: -- they can't do it.

22 THE COURT: Overruled.

23 A. Yeah. Anybody could take a sample.

24 Q. Sure. Of the complaints that you've listed by  
25 Mr. de Landro, did you ever go out and follow up on those

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1 A. I had been out there a couple of times from August  
2 on. I mean, after -- like, probably within a week or two  
3 after this letter was written, we went out there to follow up  
4 to see if anything was being done.

5 Q. And from your perspective, nothing was going on?

6 A. No. It didn't look like anything was being done.

7 Q. One more thing. When you showed up on the  
8 Decorative Bark property and you were taking pictures and  
9 making observations, did they shut down the mill?

10 A. I don't think so, no.

11 Q. They just kept running like they normally run?

12 A. At McGriff's Lumber Mill or at --

13 Q. At Decorative Bark with the bark processing.

14 A. I mean, it looked like they kept running. They  
15 didn't stop.

16 MR. LAFKY: Okay. I don't have any other  
17 questions.

18 THE COURT: Redirect.

19 REDIRECT EXAMINATION

20 BY MR. TAIT:

21 Q. There are other laboratories, aren't there, that  
22 can do the tests that Mr. Lafky's talking about? They can  
23 take the sample and compare it with their own bark dust and  
24 determine whether it's the same?

25 A. Oh, yes. DEQ, we use our own lab because of costs

1 complaints and find that they were not -- that they were not  
2 based in fact, that there wasn't something -- find that these  
3 complaints were well founded?

4 A. Well, we went out there, and you could definitely  
5 tell that the dust had been blowing around and things, but  
6 there were times that, yes, that we could go out there. And,  
7 you know, that stuff is very hard to capture on film. It's  
8 really hard to get accurate documentation sometimes, as you  
9 can see. That's why we weren't able to follow through with on  
10 other warning letters.

11 Q. I'm talking about what you see, not -- has there  
12 ever been a time that he complained there's dust in the air,  
13 there's stuff going on here where you went out and found out  
14 there was no dust in the air, there was nothing going on?

15 A. There was probably a couple times, yes, that we  
16 went out and just weren't able to -- but -- but the thing is  
17 is, I mean, my office is at least 20 minutes from there.  
18 We're not always able to get up and go right out when the  
19 complainant calls. It's very reasonable to not find, you  
20 know, necessarily the same conditions as what the complainant  
21 saw every time. Wind changes, mother nature does all sorts of  
22 things.

23 Q. Did you ever talk to Miss -- Miss Messenger about  
24 the contract between Decorative Bark and Vanport that makes  
25 Decorative Bark responsible for all storm water pollution

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1 cleanup? Did you ever talk to her about that?

2 A. I'm not sure I'm understanding.

3 Q. There's a contract between Decorative Bark --

4 MR. LAFKY: Object to the characterization.

5 Q. Assume, assume. Mr. Murphy --

6 THE COURT: I'm going to ask you to rephrase the

7 question.

8 MR. TAIT: Yeah.

9 Q. Assuming there's a contract between Decorative Bark

10 and Vanport that requires Decorative Bark to do the things to

11 make the water quality better, you just don't know about that?

12 A. I believe it says something like that about that in

13 the water -- or the storm water permit.

14 Q. Okay. So it would not be the responsibility of the

15 mill, it would be the responsibility of Messenger to clean up

16 those problems?

17 A. Well, it's not going to -- it -- yeah. I guess it

18 would depend on who's creating the problem. I --

19 Q. Okay. All right. Thank you.

20 A. I would -- oh, sorry.

21 Q. Go ahead. I didn't mean to cut you off.

22 A. No. You didn't. I'm sorry. I just thought, you

23 know, if -- if there's a -- if there's a violation going on

24 and if it's any one of the businesses on Vanport's property,

25 of course we're going to go to the business first and then

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1 ultimately we are going to go to the property owner.

2 Q. Okay. Have you ever had -- during the period of

3 time that you're there, have you had complaints about any

4 other business on the Vanport property causing these kind of

5 problems?

6 A. There was a report of ASAP Sandblasting, a

7 sandblasting operation, who's also not a permitted source.

8 There was talk of them contributing to some of the water

9 quality violations, but we found that that -- not to be true.

10 Q. This is -- when you talk about the sandblasting

11 operation, isn't that the operation that was denied a permit

12 because they wouldn't enclose their operation?

13 A. Correct. I believe that's the reason why.

14 Q. So they're -- they were shut down because they were

15 emitting so much stuff and they wouldn't enclose their

16 building?

17 MR. LAFKY: Object to the characterization.

18 Q. Isn't that true? That's what happened?

19 MR. LAFKY: Object. It would have to be based on

20 hearsay.

21 THE COURT: Sustained.

22 MR. TAIT: Well, I think you actually already

23 answered that question anyway. Thank you. That's all I have.

24 MR. LAFKY: I have just a couple follow-up, if I

25 could, Your Honor.

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1 THE COURT: You may.

2 **RE CROSS-EXAMINATION**

3 BY MR. LAFKY:

4 Q. Miss Patterson, you talked about whose

5 responsibility -- I thought you testified earlier that Vanport

6 did the work to fix this water quality issue. Isn't that what

7 you said?

8 A. I believe so.

9 Q. So is it possible that Decorative Bark paid for

10 that work, then?

11 A. This has been going on for a long time. We've

12 waited for Decorative Bark to take care of the problem, and it

13 hadn't been happening, and so then ultimately Vanport did need

14 to step in.

15 Q. So you don't know? Is that the short answer?

16 A. Well, that's what -- that's what we're -- that's

17 from what we can see, is that -- that it was Vanport that

18 needed to step in.

19 Q. So the work was done, correct?

20 A. The work was finally done, yes.

21 Q. Do you know who paid for that?

22 A. I'm not privy to Vanport's -- I'm not privy to

23 their bookkeeping records.

24 Q. In other words, you don't know if Decorative Bark

25 paid for that?

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1 A. I would imagine that any of the businesses on the

2 property who were contributing to the problem ultimately paid

3 for it in some way or another with their rent or however that

4 works out.

5 Q. And you mentioned wind patterns. What -- what's

6 the prevailing --

7 MR. TAIT: Excuse me, Your Honor. You know, we've

8 had direct, we've had cross-examination and I had redirect.

9 THE COURT: This does seem to be --

10 MR. TAIT: He's going back into all these things

11 again.

12 THE COURT: -- outside the scope.

13 MR. LAFKY: She testified about wind patterns on

14 redirect. It was not something that was brought up earlier.

15 MR. TAIT: I didn't ask a single question about

16 that.

17 THE COURT: I'll allow you two more questions.

18 BY MR. LAFKY:

19 Q. What are the prevailing wind directions in that

20 area during the summer months?

21 A. I don't -- I don't know.

22 Q. As an air quality expert, do you think that would

23 be something that would be a good idea for you to know?

24 A. I'm not a meteorologist. That would be a question

25 for a meteorologist on prevailing winds.

**Denece Messenger**

**From:** "Sen Devlin" <Devlin.Sen@state.or.us>  
**To:** "PEDERSEN Dick" <Dick.Pedersen@state.or.us>  
**Cc:** <Denecemessenger@comcast.net>  
**Sent:** Friday, September 26, 2008 12:59 PM  
**Subject:** DEQ complaint  
 Director Pedersen,

My office has been working with my constituent Denese Messenger of Decorative Bark Products based out of Boring, OR trying to resolve a complaint she has with the DEQ. See below correspondence between DEQ, Ms. Messenger, and my staff. There appears to be an impasse between DEQ and Ms. Messenger and I believe it would be a benefit to both DEQ and Decorative Bark to resolve this problem. I am requesting that DEQ provide some sort of mediation between the two parties. While the Gresham DEQ office has the most interaction and knowledge about the case because of the delicate relationship between the Gresham office and Ms. Messenger I believe it would be better to bring in someone from the Portland office to try and resolve the impasse. Below is my understanding of some of the serious problems that Ms. Messenger has with how DEQ has treated herself and her business.

- Being specifically target by DEQ on environmental problems while other similar businesses are not being held to the same standard
- Lack of scientific evidence done by the DEQ proving that Decorative Bark is causing environmental problems
- No evidence including pictures that show reddish-brown plume that DEQ said Decorative Bark produced even though there was no other reports from residents around the city of seeing this plume
- Only minimal technical assistance being provided by DEQ but when Ms. Messenger does try to comply and spends the money DEQ comes back and says what she has done is not sufficient. While technical assistance works there seems to be a time when it is more responsible to tell the person exactly what is needed to comply instead of giving multiple options and therefore have a possibility of non-compliance.

Please let me know if and how I can be of assistance.

Sincerely,  
 Senator Richard Devlin

Senate Majority Leader  
 900 Court St S-323  
 Salem, OR 97301  
 503-986-1700  
 503-986-1719

----- Original Message -----

**From:** Sen Devlin  
**To:** Denecemessenger@comcast.net  
**Sent:** Thursday, September 25, 2008 11:27 AM  
**Subject:** FW: Response to your inquiry to DEQ

Denece,

I spoke with Nina DeConcini who is the NW Region Division Administrator for DEQ. While I felt I was given a complete explanation I was not happy that they did not address some of the concerns that were raised by you in our original conversation so I pressed DEQ for more information. Below is their original response and also my second correspondence with them where I pushed for specific answers. I do not think this will resolve your complaint that you believe you are being treated unfairly compared to similar business and I would be happy to continue to work with you to try and resolve your problem with DEQ. I think there could be a window of opportunity to go back in to discussions with DEQ to present your scientific findings about the dust/bark in the air. In my correspondence with them they seemed interested in seeing the data.

Please let me know if there is anything else I can do for you.

Sincerely,  
 Anna Haley

Senior Legislative Assistant  
 Senator Richard Devlin  
 900 Court Street  
 Salem, OR 97301  
 503-986-1719

1st Email

DEQ has had concerns over bark dust from Decorative Bark Products operations migrating off-site and landing on adjacent properties for a number of years.

DEQ 's approach to complaints includes visiting the site and assessing how we can achieve compliance, instead of using our enforcement authority as a first response. DEQ staff works with the facility owner and attempts to find a set of actions that can be taken to resolve the concern. If those actions do not resolve the concern, then DEQ requests that the facility owner take additional actions. At each of these stages, our goal is to work with the facility to evaluate what actions make the most sense so they can continue to

operate and not cause problems in their community. There are many ways to correct a violation and we try to be as flexible as possible in exploring options and sharing our expertise with a source that is having trouble staying in compliance. We typically do not give specific directives, but rather advice on what might help alleviate the concern. For example, DEQ staff would not say to the facility owner: "You need to have 12 water sprinklers in the following locations to keep dust from the piles minimized." Rather DEQ staff would say: "One way to keep dust minimized is by keeping the piles small and covering them."

In the case of Decorative Bark Products, DEQ staff started receiving complaints about seven years ago. DEQ staff advised Ms. Messenger of the various methods that could be employed to minimize bark dust from leaving the facility. After most visits to the facility by DEQ staff, the complaints by neighbors subsided, only to return at a later date. That cyclic nature has been going on for the last six to seven years. As indicated above, we have attempted to use the "technical assistance" approach with Decorative Bark all this time. It has been frustrating for DEQ staff because our attempts to remedy the issues for neighbors being impacted have not been successful. We have reached a point with Decorative Bark where we had to use our enforcement authority due to Ms. Messenger's failure to comply with our requests.

With respect to the operations at Decorative Bark Products this summer, DEQ documented numerous times where Decorative Bark was in violation of our air quality rules. Due to the ongoing violations at Decorative Bark Products, DEQ issued a Pre-Enforcement Notice and requested once again that Decorative Bark Products take reasonable precautions to keep bark dust from becoming airborne and impacting the property of others. The violations have been referred to the Office of Compliance and Enforcement.

Additionally, in response to a lawsuit filed by one of Decorative Bark Products neighbors in Clackamas County Court, a judge determined that Decorative Bark Products was a nuisance and trespassed on the property of that neighbor. This judgment was made because the court determined that Decorative Bark Products had failed to control bark dust from becoming airborne, thereby depositing bark dust on the property of that neighbor. Decorative Bark Products was ordered to pay in excess of \$100,000 to that neighbor. That lawsuit is currently being appealed by Decorative Bark Products.

We are sensitive to the needs of businesses and communities and feel we have worked exhaustively with Ms. Messenger to bring her into compliance. Should you need further clarification or more detailed information, please feel free to contact Ed Druback at: [druback.ed@deq.state.or.us](mailto:druback.ed@deq.state.or.us) or 503.667.8414, extension 55014.

Second Email

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-Has DEQ restricted Ms. Messenger's access into government building?

No, DEQ has not restricted Ms. Messenger's access into any DEQ or other government building.

However, Ed Druback, NWR Air Quality manager, did send an e-mail to the NWR Gresham office staff to alert them that the facility owner of Decorative Bark had received a Pre Enforcement Notice and that in the past, the facility owner became verbally abusive in our offices while people were trying to work. This occurred in a previous meeting that Ms. Messenger had with Mr. Druback. We have instructed our staff not to tolerate that kind of behavior and to alert a manager present if such a situation arises.

-Has there been specific scientific testing done by DEQ that it is Decorative Bark's material that is landing in on the neighbor's property? Ms. Messenger seemed to indicated that her scientists have concluded that the molecular make up of the bark that she sells does not match with what is on the neighbor's property.

No specific scientific testing has been done by DEQ on the fallout observed on surrounding properties and the material at Decorative Bark Products. If Ms. Messenger has had such testing done she has not shared it with DEQ. DEQ would be more than willing to review any such information Ms. Messenger may have.

-As when I spoke with her she seemed more than willing to sit down with DEQ and discuss what technical fixes need to occur for her to be compliant? While I agree there can be many ways to alleviate a problem and DEQ should not decided which avenue to take I find that there is a big difference between putting in a sprinkler system and keeping piles small. It seems to me that after 8 years of "technical advice" and with Decorative Bark trying to implement changes that this type of advice is not working and maybe more a more specific plan should be discussed.

I agree that there is a difference between sprinkler systems and size of piles. The point I was trying to make was that DEQ tries not to dictate specifics such as the size of a pile or the number and exact placement of sprinklers because we believe the business is in the best position to determine how to implement a particular suggestion we feel will yield the desired results. For example, if the piles are smaller, a single sprinkler per pile operated for a couple of hours a day, may be sufficient. If the piles are extremely large, then multiple sprinklers operating most of the day might be required on a constant basis on the working face of the pile when moving or processing materials to get the job done. The operator is in the best position to make a determination of which combination would best suit their operations.

-My last question is regarding DEQ policy regarding monitoring. It seemed strange the Ms. Messenger and her employees would find DEQ staff hiding behind trailers and would rarely approach her.

I believe that Ms. Messenger may have misinterpreted what was being done by the DEQ inspectors. DEQ staff did note that operations at Decorative Bark Products ceased upon their entering the facility. DEQ also received a report from a former Decorative Bark employee that it was their policy to cease operations when a state vehicle was spotted. However, neither of these were the reasons for DEQ staff to select the specific location we believe that Ms. Messenger is referring to. The location was elevated and allowed a complete view of the working area of the facility without having to physically be on the property and potentially disrupt operations.

DEQ performs varying levels of site inspections. This type of inspection is what EPA calls a "level one inspection" which includes anything from a simple "drive by" of the facility to viewing the operation from a distance without entering or making contact with personnel at the facility. In simpler cases, a quick observation of the facility in operation is all that is needed to verify compliance or non-compliance.

As mentioned in my previous reply, on numerous occasions DEQ staff did enter the site and provide feedback and technical assistance to Ms. Messenger.

-----Original Message-----

From: SEN Devlin  
Sent: Friday, September 19, 2008 9:47 AM  
To: ALDRICH Greg

2/14/2011



Cc: HILLWIG Rebecca; PEDERSEN Dick  
Subject: Constituent complaint

Dear Greg,

I was contacted by Denise Messenger yesterday regarding what she claimed as DEQ railroading her and the business she runs. She seemed to have legitimate complaints and I am hoping the someone in the Director's Office can look into it and get to the bottom of her claims. I am ccing this email to Rebecca Hillwig because Ms. Messenger informed me she had been working with Rebecca to resolve these problems and Director Pedersen so he is aware of Ms. Messenger's complaints against his agency.

Ms. Messenger's explanation:

She owns a whole sale bark company and leases 9 acres inside a zoned industrial site in Boring Oregon. In 2000 a new neighbor moved in behind the property and has harassed her about her business practices and was making unsubstantiated claims about Ms. Messenger's business. At that time Ms. Messenger acknowledged that there could be an environmental problem and started to look for ways to insure that her business was not effecting the creek that runs close to her property. She started out with hay bales, went to cement blocks, no has holding ponds and continues to reevaluate the environmental impact when the rainy season comes. DEQ comes out in 2005 recommends putting in sprinklers to deal with dust migration and also a street sweeper. DEQ did not tell her where to put the sprinkler system. She put in a sprinkler system and also got a street sweeper. The day after Memorial Day 2006 she is approached by her landlord, police officer and Susan Patterson from DEQ. Susan Patterson told Ms. Messenger that she has full authority to arrest her for a felony for dumping into the creek and once we are done with that we will move onto air quality concerns. Ms. Messenger unaware of any air laws she might be breaking attempted to contact Susan Patterson a number of times to ask what she should do to resolved DEQ's concerns. In June she finally got a hold of her and Susan's response was " you know what you need to do. I can't give technical support because you are not the permit holder". Later that summer employees for Ms. Messenger found Susan Patterson hiding behind trailers taking pictures. Ms. Messenger called Susan Patterson's supervisor to complain and his response was Susan was a trainee and doesn't have authority to give advice. Ms. Messenger noted that Susan was on her property around once a day but never approached her. In the meantime a lawsuit was filed by Ms. Messenger against the neighbor for harassment. This September 5th she gets a letter from Dan Murphy from DEQ that he has seen a huge red plume over Boring. She asked a number of people if they had seen a plume and no one had. Someone at DEQ told Ms. Messenger's landlord that she is no longer allowed in government buildings because she poses a threat to their employees.

Ms. Messenger seems more that cooperative with DEQ. She said she has invited them out numerous time to discuss DEQ's concerns. She has invested over \$100,000 already in doing what she has been told and to try to mitigate any environmental problem she might be causing.

She just received a letter saying that she has until September 30 to retrofit all of her machines to comply with DEQ standards. She has never received any fines and has hired a scientist to do sample testing.

I would be very grateful if someone at DEQ would look into her complaint and get back to me.

Sincerely,  
Anna Haley

Senior Legislative Assistant  
Senator Richard Devlin  
900 Court Street  
Salem, OR 97301  
503-986-1719

Senator Richard Devlin  
Senate Majority Leader  
900 Court St S-323  
Salem, OR 97301  
503-986-1700  
503-986-1719

2/14/2011



**100% Respect   100% Responsibility   100% Results**

**September 28, 2010**

**Anna:**

**I am faxing you the documents that show DEQ walked away from negotiations. They include; an email exchange, on November 16, 2009, between DOJ and my attorney, Peter Mohr. In that email, DOJ says that, "Our clients (DEQ) are unable to come to agreement." Peter Mohr confirms in his email that negotiations are now officially off from DEQ's perspective.**

**On April 15, 2010, the Department of Justice reiterates that in the second paragraph of its letter; "You may recall that when DEQ ended negotiations...."**

**If I recall correctly, Dick Petterson stated to you and Senator Devlin that it was DBP that walked away. We clearly did not.**

**Thank you for your consideration.**

**Denece Messenger**



**100% Respect   100% Responsibility   100% Results**

**September 28, 2010**

**Anna:**

**I am faxing you the documents that show DEQ walked away from negotiations. They include; an email exchange, on November 16, 2009, between DOJ and my attorney, Peter Mohr. In that email, DOJ says that, "Our clients (DEQ) are unable to come to agreement." Peter Mohr confirms in his email that negotiations are now officially off from DEQ's perspective.**

**On April 15, 2010, the Department of Justice reiterates that in the second paragraph of its letter; "You may recall that when DEQ ended negotiations...."**

**If I recall correctly, Dick Petterson stated to you and Senator Devlin that it was DBP that walked away. We clearly did not.**

**Thank you for your consideration.**

**Denece Messenger**

**To:** Peter Mohr  
**Subject:** Decorative Bark

**Compromise Settlement Communication / Inadmissible as Evidence**

Peter,

Following up on our phone call this morning, this email confirms DEQ's belief that we have reached an impasse on settlement negotiations, and that despite our efforts to reach a mutually acceptable compromise, our clients are unable to come to agreement. DEQ recognizes that both sides have incurred costs to negotiate for over a year, and because it seems clear that we will not be able to overcome this impasse, DEQ does not want to continue negotiations that will continue to increase both parties' costs when it appears highly unlikely that the parties will agree on settlement. Therefore, DEQ is going to cease negotiations in this matter.

If in the future Decorative Bark would like to propose an alternative to the streamlined settlement that we'd been discussing - in which DEQ would withdraw its PENs in exchange for Decorative Bark releasing its threatened tort claims - DEQ would be willing to listen.

On a related note, this email confirms DEQ's understanding that there are no settlement offers that remain open in this matter. Additionally, out of an abundance of caution, DEQ withdraws any settlement offers that it previously made.

Please contact me if you have any questions.

Paul

**Paul Logan**, Assistant Attorney General  
Oregon Department of Justice | Natural Resources Section  
1515 SW Fifth Avenue, Suite 410 | Portland, OR 97201  
971.673.1943 phone | [paul.s.logan@doj.state.or.us](mailto:paul.s.logan@doj.state.or.us)

**\*\*\*\*\*CONFIDENTIALITY NOTICE\*\*\*\*\***

This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

\*\*\*\*\*

9/28/2010

## **Denece Messenger**

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**From:** "Peter Mohr" <peter.mohr@tonkon.com>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>  
**Sent:** Monday, November 16, 2009 12:57 PM  
**Subject:** FW: Decorative Bark  
FYI.

---

**From:** Peter Mohr  
**Sent:** Monday, November 16, 2009 11:33 AM  
**To:** 'Logan Paul S'  
**Subject:** RE: Decorative Bark

Paul,

Thank you for your e-mail confirming DEQ's position in these matters. In response, this e-mail shall confirm DBP's understanding that:

(a) these settlement negotiations are now closed thereby releasing the parties from any and all offers previously made in the course of attempting to reach a resolution; and

(b) as a result of the parties' inability to reach a resolution, DEQ's 2006 and 2008 PENs remain outstanding against DBP and that DBP's noticed tort claims remain outstanding against DEQ.

Please feel free to contact me with any comments or questions.

Peter



### **Peter D. Mohr | Tonkon Torp LLP**

**1600 Pioneer Tower | 888 S.W. Fifth Avenue**

**Portland, Oregon 97204**

**503.802.5759 | FAX 503.972.7459**

**[peter.mohr@tonkon.com](mailto:peter.mohr@tonkon.com) | [www.tonkon.com](http://www.tonkon.com)**

**This message may contain confidential communications and privileged information. If you received this message in error, please delete it and notify me promptly.**

**Circular 230 Disclaimer:** If any part of this communication is interpreted as providing federal tax advice, U.S. Treasury Regulations require that we inform you that we neither intended nor wrote this communication for you to use in avoiding federal tax penalties that the IRS may attempt to impose and you may not use it for that purpose.

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**From:** Logan Paul S [mailto:Paul.S.Logan@doj.state.or.us]  
**Sent:** Monday, November 16, 2009 10:11 AM

9/28/2010

JOHN R. KROGER  
Attorney General



MARY H. WILLIAMS  
Deputy Attorney General

**DEPARTMENT OF JUSTICE**  
GENERAL COUNSEL DIVISION

April 15, 2010

Peter D Mohr  
Tonkon Torp LLP  
888 SW 5th Ave Ste 1600  
Portland OR 97204

RE: Decorative Bark Products

Dear Mr. Mohr,

Thank you for your letter dated March 30, 2010. As you know, and as described in my letter to you dated March 9, 2010, the Department of Environmental Quality (DEQ) and your client Decorative Bark Products, Inc. (Decorative Bark) spent over a year in an attempt to negotiate a resolution to DEQ's 2006 and 2008 pre-enforcement notices to Decorative Bark and to Decorative Bark's threatened tort claims against DEQ. During that time, DEQ did not restrict DEQ employee Rebecca Hillwig's investigation of this matter, which she was performing in the scope of her duties as DEQ's Clean Air Act Ombudsman. In November 2009, DEQ ended negotiations when it became clear that the parties would not be able to agree to a resolution. Additionally, DEQ informed Decorative Bark that it did not intend to pursue its pre-enforcement notices further, directed DEQ employee Rebecca Hillwig to end her investigation (since DEQ was no longer pursuing enforcement), and offered Ms. Hillwig the opportunity to prepare a report summarizing her investigation to date.

You may recall that when DEQ ended negotiations, it offered to fully relinquish its pre-enforcement notices in exchange for Decorative Bark releasing its threatened tort claim litigation against DEQ. Decorative Bark declined. As a result, even though DEQ is no longer pursuing its pre-enforcement notices, Decorative Bark's threatened tort claim litigation is still pending against DEQ. Due to pending litigation against it, DEQ instructed Ms. Hillwig in November 2009 to conduct all communications with third parties concerning this matter through DEQ management.

In response to your request for legal analysis of DEQ's authority to manage its employees, DEQ reiterates that its authority is clear and is a necessary part of its role as an employer. Decorative Bark's pending litigation against DEQ constrains DEQ's willingness to share additional legal analysis. However, DEQ reminds you that Ms. Hillwig's role as DEQ's Clean Air Act Ombudsman is only one of her many job duties, and since DEQ is no longer pursuing the pre-enforcement notices that Ms. Hillwig was investigating as DEQ's Ombudsman, it is appropriate for DEQ to ensure that its limited state resources are spent efficiently by

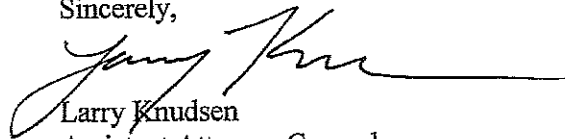
April 15, 2010

Page 2

directing Ms. Hillwig to wrap up work on the inactive Decorative Bark matter and to work on the many other active matters before her.

Please note that as stated in my letter dated March 9, 2010, DEQ has given Ms. Hillwig the opportunity to prepare a report on this matter. If she does so, the report will be available to the public upon request. As also stated in that letter, DEQ has instructed Ms. Hillwig to conduct all communications with third parties concerning this matter through DEQ management.

Sincerely,



Larry Knudsen  
Assistant Attorney General  
Natural Resources Section

LJK:smn/JUSTICE-#1992304-v1

cc: Ms. Joni Hammond, DEQ Deputy Director  
Ms. Nina DeConcini, DEQ Northwest Region Administrator  
Ms. Rebecca Hillwig, DEQ Clean Air Act Ombudsman

bcc: Jas Adams  
Paul Logan  
Tessa Sugahara  
Donna Bennett

## **Denece Messenger**

---

**From:** "HILLWIG Rebecca" <Hillwig.Rebecca@deq.state.or.us>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>; "Peter Mohr" <peter.mohr@tonkon.com>  
**Sent:** Friday, November 20, 2009 2:54 PM  
**Attach:** Final call from LKnudsen.docx  
**Subject:** This e-mail message is to inform you

This e-mail message is to inform you of the current status of my future interactions with DBP, it's owner and her representative as per Larry Knudsen, DOJ, Salem.

This is regarding the settlement negotiations between DEQ and DBP. I have been instructed to cease all communications with you, your lawyer and any other third party in this case.

As for the report. I have not been able to complete it at this time and will need additional time to thoroughly address the issues in this case. I will endeavor to complete the report as quickly as possible but want to ensure that all necessary elements are addressed, and that my recommendations for future improvements in the process and in staff conduct are appropriate, and of value to both the organization and the small business community.

Thank you for your patience in this matter.

*Rebecca Hillwig*  
*Small Business Assistance/Small Business Ombudsman*  
*DEQ Air Quality*  
*811 SW Sixth Ave*  
*Portland, OR 97204*  
*503-229-5376*



Director Dick Pedersen  
Dept. of Environmental Quality  
811 SW Sixth Avenue  
Portland, OR 97204

November 22, 2010

Director Pedersen,

I would first like to thank you for coming to my office to speak about the Ombudsman Report on Decorative Bark. To close this case from our end, respectfully request that the Department of Environmental Quality (DEQ) answer some final questions.

1. What is the disposition of the case right now? Both parties have stated that the other party walked away from negotiations, is there an opportunity for the parties to re-engage in negotiations? ,
2. I remain concerned about the evidence in the he Ombudsman Report that demonstrates that DEQ did not act with the highest quality of professional standards as expected by the public and the legislature. What specifically has been done at a departmental level in response to this report to ensure that better policies and procedures are in place and being followed?
3. The Ombudsman serves an important role for small businesses, and this first report by the Ombudsman provides an opportunity for the department to evaluate the process and procedures and role of the ombudsman in the agency. What steps is the department taking to put in process, procedures and check in points for the Ombudsman for future cases

In a case like this where the individual or businesses is challenging the findings/ruling of the department what is the role of scientific analysis in determining that the violation has *actually* occurred. For instance, in this case, were steps taken to match the molecular make-up of the tape sample with the samples taken from the yard?

Thank you again for your time in addressing these answers.

Sincerely,

Senator Richard Devlin



# Oregon

Theodore R. Kulongoski, Governor

## Department of Environmental Quality

Headquarters

811 SW Sixth Avenue

Portland, OR 97204-1390

(503) 229-5696

FAX (503) 229-6124

OTRS 1-800-735-2900

December 8, 2010

Senator Richard Devlin  
900 Court Street NE, S-223  
Salem, Oregon 97301

Dear Senator Devlin,

I am replying to your November 22, 2010 letter.

In response to question # 1: DEQ negotiated with Ms. Messenger and her legal counsel in an attempt to settle this matter for approximately one year, starting in December 2008. Because of the importance of the case, I asked DEQ's Deputy Director and an Oregon Department of Justice attorney to participate in the negotiations. In good faith, DEQ offered significant concessions in an attempt to settle the matter including an agreement to withdraw both of the enforcement violations against Decorative Bark, a cash offer and an agreement to apologize to Ms. Messenger, among others. In exchange, DEQ asked Decorative Bark to implement a list of what are called "Best Work Practices" (BWPs) to control the bark dust emissions impacting Decorative Bark's residential neighbors. BWPs are commonly suggested when DEQ offers technical assistance to businesses. However, Decorative Bark refused to implement the BWPs or take any additional measures to control its bark dust emissions. The negotiations ceased when it became clear that the parties could not reach agreement. While DEQ remains open to a dialogue, we do not believe that the parties will be able to reach a settlement. The parties spent almost a year exploring the possibility of settlement, at the end of which it was clear that the parties would not be able to settle.

In response to question # 2: Throughout the negotiations with Decorative Bark, DEQ acknowledged that agency personnel did not always conduct themselves in a professional manner. As a general matter, DEQ's performance management system has numerous "check points" whereby staff and management at all levels are evaluated, both for performance on the job and the work products produced. These include monthly one on one meetings, quarterly check-ins, annual reviews and progressive discipline, when warranted. In addition, over the past several years DEQ has made efforts regarding how inspections and enforcement are carried out by implementing a process improvement technique called "Lean Kaizen," throughout the agency. We intend to continue to set and measure expectations for staff and management performance and examine other opportunities for improvements through Lean Kaizen. These include evaluating the recommendations in the Ombudsman report.

Specific to this matter, during settlement negotiations with Decorative Bark, DEQ committed to a "fresh start" with respect to future interactions with the facility including the assignment of a new inspector with air quality experience. We were clear that we would honor this commitment regardless of the outcome of settlement negotiations. Recently we implemented the fresh start when we received a new complaint about Decorative Bark in September 2010 from a nearby homeowner. As with previous complaints from different residential neighbors, this neighbor complained that Decorative Bark was emitting bark dust that was blown off site and impacted the neighborhood. One of my senior managers for the region where Decorative Bark is located has been closely monitoring the correspondence, procedures and interactions the newly-assigned DEQ inspector has been having with Ms. Messenger and Decorative Bark personnel. The reports I've received indicate that DEQ is conducting the investigation in an objective manner with frequent communication in the form of email, phone calls and on site visits to ensure an open and transparent process for everyone involved.

In response to question # 3:

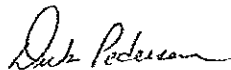
DEQ values the role of the small business Ombudsman. As this is the first time any business has ever taken advantage of the service provided by DEQ, there were not any protocols or procedures in place within the agency as a model for guidance. We expect moving forward that more precise standards and check-in points will be established and we plan to confer with the Department of Justice regarding next steps.

In response to your final question:

DEQ endeavors to base all decisions on the most objective, scientifically defensible information possible, including a thorough analysis of the facts and data. DEQ relies on a variety of types of reliable evidence to enforce air quality violations. One of these is laboratory testing, which DEQ did not perform in response to past complaints about Decorative Bark, but did perform in response to the most recent complaint from a neighbor. The results of the laboratory testing are still preliminary and we are communicating the results in real time to Ms. Messenger of Decorative Bark. DEQ also frequently relies upon eye witness accounts. In the past, several different DEQ employees observed bark dust blowing from the Decorative Bark facility onto neighboring homes. Heavy volumes of bark dust in the air, as have been emitted by Decorative Bark, are easily visible to the eye and were documented when DEQ personnel investigated complaints in the past.

If you have any additional questions, please feel free to contact me. I appreciate your involvement in this matter. Thank you for your time.

Sincerely,



Dick Pedersen  
Director

**From:** HILLWIG Rebecca  
**Sent:** Thursday, December 16, 2010 11:26 AM  
**To:** SEN Devlin  
**Cc:** HILLWIG Rebecca  
**Subject:** Status of the Ombudsman within DEQ and the Decorative Bark case

**Importance:** High

Senator Devlin,

First of all, thank you and your staff for taking the time to listen to my concerns and to strongly consider my call to action.

I am extremely concerned about the state of the Agency and its actions, not only in the case of Decorative Bark but for future interactions with Oregon's small business community. I am also seriously concerned about the future of the Ombudsman and my role within the Agency. DEQ management all the way to the director's office did not know that DEQ even had an Ombudsman before this case, and was shocked to find out what the role of the Agency Ombudsman entailed.

From the beginning of this appeal from Decorative Bark and Ms. Messenger, my role as the Agency Ombudsman has been repeatedly attacked, and a campaign to diminish my role has been ongoing. As you and your staff have seen, in the numerous e-mail correspondence that occurred between DEQ management and myself in this role, there was no mistaking the intimidation DEQ management tried to exert upon me in this position to try and diminish my capacity for autonomy. This intimidation was heavy handed until I countered in one e-mail response, ccd to our union representative, that if need be a grievance against the Agency would be filed.

To date, since the issuance of my Ombudsman report in the Decorative Bark case, I have had no interaction or correspondence from DEQ management either through Nina Deconcini, Joni Hammond or Dick Pedersen as to what DEQ has done with any of the recommendations made in my report. I have also recently been informed by DEQ staff who are now working on Decorative Bark, that they were instructed not to talk to me about any current or future issues with the company and its owner Ms. Messenger. This edict has placed certain DEQ staff in a position where they have "nervously" relayed information to me about their interaction with Ms. Messenger and Decorative Bark, because they did not want management to know they were talking to me. It was not until Ms. Messenger sent an e-mail to this staff person and management expressly asking for my involvement that the staff person felt comfortable with doing so.

Even as we sit here today, the role of the Ombudsman is being diminished within this Agency. Management from the top down is incapable of self reflection, because the reflection in the mirror is imperfect, and as a result, it is as if management is hoping to keep this reflection from the public eye. DEQ believes they have dodged a bullet in this case because they have the power to keep information close to their chest. They are keeping me at bay and seem to work behind the scenes to attempt to bemuse your office,

Ms. Messenger and yes, the public. This kind of action on the part of the Agency not only makes it difficult for me as the Ombudsman to do my job for fear of intimidation, but undermines the very role set in statute through the Clean Air Act. A role which was created to protect small businesses from the very actions and decisions that have been, and are currently being performed and made by DEQ management.

I have been informed by Ms. Messenger that she is now being instructed by the Clackamas County Court to pay Mr. deLandro (the past complainant) the sum of \$108,000 dollars as the settlement from the court case DEQ staff and management testified in as expert witnesses. Testimony based, not on scientific fact, but on the word of the complainant, with which DEQ staff had become friendly with during the course of their inspections at Decorative Bark. As per my Ombudsman report, I stated that the testimony of DEQ staff during the Clackamas County case weighed heavily in the decision made to award Mr. deLandro with a settlement. If these kinds of actions on the part of DEQ are allowed to happen, then all of us are doing a disservice to the small business community, and ultimately the people of the State of Oregon. We as Agency management and staff are regarded as "environmental" experts, so our words can be very powerful. The Agency needs to understand and be keenly aware that without scientific evidence to support, not the presence of fugitive dust but proof of offsite migration, that we must be very careful with our deeds and our words, as they can and in this case did, cause irreparable harm. That \$108,000 settlement cannot at this point be overturned. That \$108,000 settlement can be a grave hardship on a small business. That settlement made based heavily upon DEQ testimony could be the difference between staying in business and nurturing jobs or closing doors and putting Oregonians out of work.

The environment and its protection are extremely important to me. I would be the first person to ensure that a company, big or small do what is necessary to protect it. However, with a limited budget, "bigger fish to fry" and more serious, "actual" violations occurring in Oregon, businesses like this do not warrant the kind of attention or time the Agency and its management and staff are throwing at it.

I respectfully ask you Senator Devlin, to assist me in scheduling a meeting with the new Governor, and to attend that meeting with me as a politician concerned with government doing what is right and what is necessary. I believe you to be a person and a Senator of great integrity and purpose and with you I can help to affect a change.

I believe this meeting should take place and these issues of concern be taken care of as soon as possible.

Until then, I respectfully await your insight and answer to this very important problem.

Sincerely,

*Rebecca Hillwig*

*Small Business Assistance/Small Business Ombudsman*

*DEQ Air Quality*  
*811 SW Sixth Ave*  
*Portland, OR 97204*  
*phone: 503-229-5376*  
*fax: 503-229-5675*

---

**From:** HILLWIG Rebecca  
**Sent:** Monday, May 10, 2010 2:34 PM  
**To:** 'DECONCINI Nina'  
**Cc:** PAPISH Uri; KNUDSEN Larry; HAMMOND Joni; PEDERSEN Dick; 'Denece Messenger'; 'Peter Mohr'; SEN Devlin; 'harry.dewolf@sba.gov'; 'robert.ducote@sba.gov'; 'suzanne.pickgrobe@sba.gov'; 'esther.vassar@sba.gov'; 'yolanda.swift@sba.gov'; 'Suber.Angela@epamail.epa.gov'; 'Rogers.JoanB@epamail.epa.gov'; 'issa@oregonafscme.com'; LOWE Lesley  
**Subject:** Directive to Submit Incomplete Ombudsman Report

Nina,

I was instructed this morning that by close of business today (5:00 pm) that I will be required by you as one of Oregon DEQ's Regional Administrators, to submit to Uri, my section manager, the Ombudsman report for Decorative Bark Products, Inc. in whatever form of completion it is in, along with all hard and electronic copies of documents used within the report.

As I have communicated to you and to other DEQ managers on several occasions, my role as the Department Ombudsman is to investigate complaints arising from individuals and businesses who feel they have been unfairly treated, and have experienced bias and excessive inspections on the part of the Department and its staff. The role and position of the Ombudsman must be independent of managerial control and direction from the Department, so that an "objective" investigation of the details of the complaint can be performed to determine its validity. If valid, one of the most important roles of the Ombudsman is to propose recommendations intended to move the Department in a positive direction, so that changes in the activities which are counter to the Department's mission, vision and values can be made.

As I have stated before, the submission of an incomplete Ombudsman report is of no worth to anyone, and is disconcerting to me, since the report will not contain the recommendations I believe need to be made to move forward in making the Department better and stronger in its mission.

This is to document my objection to the use of the authority of your position as the Northwest Region Division Administrator, to require the Ombudsman, to make a decision or to perform an action counter to the responsibilities of the position. If I am forced to submit my report, and the documents I have in my possession before the report is complete, I will be doing so under duress, for fear of losing my position within the Department, or for fear of receiving a reprimand which could diminish my worth within the Department, or with any future employers.

I submit this as evidence of my disagreement with your directions and my objection to the submittal request of an incomplete report.

---



*Rebecca Hillwig*

*Small Business Assistance/Small Business Ombudsman*

*DEQ Air Quality*

*811 SW Sixth Ave*

*Portland, OR 97204*

*phone: 503-229-5376*

*fax: 503-229-5675*

---

**From:** HILLWIG Rebecca  
**Sent:** Wednesday, May 12, 2010 2:58 PM  
**To:** 'DECONCINI Nina'; HILLWIG Rebecca  
**Cc:** denecemessenger@comcast.net; SEN Devlin; dick.pedersen@state.or.us;  
esther.vassar@sba.gov; issa@oregonafscme.com;  
joni.hammond@state.or.us; KNUDSEN Larry; peter.mohr@tonkon.com;  
rogers.joanb@epamail.epa.gov; suber.angela@epamail.epa.gov;  
uri.papish@state.or.us  
**Subject:** RE: Directive to Submit Incomplete Ombudsman Report

To further clarify, this is not about me as a DEQ employee or the Ombudsman position I am responsible for. This is about a grievance communicated to me as the Ombudsman via a small business, who believes they have been burdened by bias, unfair treatment and excessive inspections on the part of DEQ staff and management.

DEQ's mission is to protect the environment and public health in a manner that is above reprisal. One of the duties of the Ombudsman is to recommend positive steps the Department can take in a forward direction, to ensure that the job we do as educators and protectors is legally and ethically above reprisal from any party. If, during the course of this or any other complaint investigation as the Ombudsman, my findings document or call into question the integrity of the Department, then it is the duty of the Ombudsman, as I have stated so many times in the past, to declare it an issue and to recommend changes. This small business like all businesses, as well as the citizens of Oregon expect nothing less from their civil servants.

To date in the e-mails you are referring to from your office, you have not once stated a concern for the issues raised by the small business who has requested the help of the Ombudsman, because they feel they have been mistreated by the Department. The only issue that appears to be of importance, is the establishment of control over the person in this Ombudsman position who must, no requires, freedom from the managerial and political influences of the Department in order to ensure credibility and objectivity.

You have stated that you have made numerous efforts to facilitate the completion of the report within a reasonable time. In an excerpt from your April 27, 2010 e-mail message at 5:00 pm you stated *"I have taken steps to facilitate your completion of the project, within the timeline previously established, by removing what you have identified as impediments to timely completion of the report...By April 30th, 2010, DEQ will send a letter...withdrawing the 2006 and the 2008 PENs at issue, and neither of these PENs will be used in any future potential enforcement action the Department may take. I have also discussed this matter with your supervisor. He has agreed to allow you to devote your work time this week exclusively to completing the report... As I directed in my previous emails, please deliver your report, in whatever state of completion you have achieved, to Uri no later than April 30, 2010..."* (phrases underlined for emphasis).

You have also stated that *"I have been working on this matter for over 18 months and that it has been six months since DEQ ceased negotiations with Decorative Bark."*

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Again to clarify. If DEQ and Decorative Bark had concluded their negotiations in a positive way, and the items Ms. Messenger, DEQ and DOJ had been negotiating during the 18 month period had been agreed upon at the time, DEQ, Ms. Messenger and myself as the Ombudsman would not be where we are today, debating the merits of this position, or the level of control your office wishes to exert over it.

As for the six months that DEQ has ceased negotiations with DEQ. I requested in writing from DEQ management the instructions they asked the Department of Justice to relay to me by phone. These instructions covered the cessation of all work on this matter, the cessation of any communications with third parties, and that I was to complete my report and send it to the DOJ for review. That e-mail from your office was dated December 11, 2009. Since that date I have had to put aside my work on the report each time an e-mail message has been sent, to attempt to educate the Department on the role of the Ombudsman, and the procedure I will be using in issuing my report. Having to do this has taken valuable time away from the task at hand...the completion of the report itself.

As I stated in my e-mail response of April 28, 2010, *"The public's desire for transparency should not be balanced by the Department's need or desire for obscurity or control in these matters. The more the Department's information and communication appears to be concealed, the more the public distrusts the Department and its staff, regardless of the apparent message."* And regardless of the name bestowed on this position. For this reason I am again setting forth how the report will be disseminated. This is the same procedure as outlined in my e-mail messages dated; April 28, April 29, May 7, 2010 and again today. A copy of the report will be given to the Director of the Department and to the complainant at the same time. Any other copies disseminated can either go through the public records request process or be distributed through the complainant at their discretion.

Once the report is completed and a copy distributed to both parties involved, I will continue to work on this issue to the extent the position of the Ombudsman requires me to do so. The issuance of the report is not the switch that ceases to make the duties of the Ombudsman necessary. It is only the closing of a chapter.

For the record, since I made the commitment to the complainant that I would have the report done by May 19<sup>th</sup>, regardless of any extensions your office feels compelled to approve or deny, I will no longer have time to reply to any further e-mails regarding this issue until after that date.

Respectfully,

Rebecca

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**From:** DECONCINI Nina [mailto:nina.deconcini@state.or.us]

**Sent:** Wednesday, May 12, 2010 8:55 AM

**To:** HILLWIG Rebecca

**Cc:** denecemessenger@comcast.net; SEN Devlin; dick.pedersen@state.or.us; esther.vassar@sba.gov; issa@oregonafscme.com; joni.hammond@state.or.us; KNUDSEN Larry; peter.mohr@tonkon.com; rogers.joanb@epamail.epa.gov; suber.angela@epamail.epa.gov; uri.papish@state.or.us

**Subject:** RE: Directive to Submit Incomplete Ombudsman Report

Rebecca,

As I have stated before, you have articulated an individual perspective on this matter, but I remind you that there is also an organizational perspective that involves the reasonable allocation and management of staff time. I will grant your request to complete the report until 5pm on Wednesday, May 19th. There will be no further extensions, regardless of whether or not you complete your work on the report.

The May 19th deadline is the culmination of numerous efforts I have made to facilitate your completion of the report within a reasonable time. You have been working on this matter for over 18 months now, and it has been six months since DEQ ceased negotiations with Decorative Bark. You have had all relevant documents since the end of negotiations. I have instructed your manager, Uri Papish, to reassign any work that could be impeding your progress on the report. On March 9th I first gave you a deadline to finish the report. I have since given you three extensions. It has been over two months since you were first told that there would be a deadline to complete the report.

I will also reiterate some of my previous directives so that I am clear. By no later than the deadline - 5pm on Wednesday, May 19th - you are to provide the final report, and copies of all your documents concerning this matter, to your manager Uri Papish (you may also keep your own records). After the deadline, you are to cease all work on this matter.

Finally, because Decorative Bark has threatened litigation in this matter and has filed a notice of a claim, all communications with third parties regarding Decorative Bark will go through the DEQ Director's office, me, or the Department of Justice. The report will promptly be made available to anyone who wishes a copy upon request. You are not to distribute it independently or prior to delivering it to Uri Papish.

Thank you.

Nina

**From:** HILLWIG Rebecca [mailto:rebecca.hillwig@state.or.us]

**Sent:** Tuesday, May 11, 2010 11:44 AM

**To:** DECONCINI Nina; rebecca.hillwig@state.or.us

**Cc:** denecemessenger@comcast.net; SEN Devlin; dick.pedersen@state.or.us; esther.vassar@sba.gov; issa@oregonafscme.com; joni.hammond@state.or.us; KNUDSEN Larry; peter.mohr@tonkon.com; rogers.joanb@epamail.epa.gov; suber.angela@epamail.epa.gov; uri.papish@state.or.us

**Subject:** RE: Directive to Submit Incomplete Ombudsman Report

Although it may appear that the issue being discussed here is merely an internal reporting issue, I can assure you it is not. This report is not about me as the DEQ Ombudsman, this is about the small business owner who complained to the DEQ Ombudsman regarding her belief that DEQ staff and management were showing bias in their treatment of her business, were excessively inspecting her business, and were not treating her or her business fairly in relation to others in her industry.

This small business owner felt it necessary to personally contact the SBA Ombudsman, Esther Vassar, regarding her opinion on the control an agency may have over their own Ombudsman. I want to thank Ms. Vassar for giving the owner enough information to help assuage her anxiety over the matter.

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Nina,

In answer to your e-mail...

Below is what I stated in my e-mail response to you dated April 13, 2010, regarding a completion date for the Ombudsman report:

*"So as not to give anyone an additional completion date that may again need to be pushed due to concurrent responsibilities that are beyond anyone's control, I can only say that it is my intention to complete the report at the earliest possible date for all concerned."*

On April 14, 2010, you responded via e-mail by giving me April 30, 2010, as a deadline for completion. On April 20, 2010 you followed this e-mail with a phone call communicating the same information.

Below is a portion of my April 26, 2010 e-mail response regarding your communications:

*"As I mentioned in my last e-mail, I am working on the report as much as possible and fully expect to have it completed soon. It is as important for me to close this loop as expeditiously as possible as it is for all parties involved. However, I do not wish to compromise my work ethic, my responsibilities, my reputation or myself, by issuing a report that is incomplete, and therefore of no worth or consequence to the DEQ or the small business community this position represents."*

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In an additional e-mail response to you dated April 28, 2010, I stated the following:

*"Since no one within the Department knows the current level of completion of this report, it seems arbitrary for the Department to have set a capricious deadline, without an understanding of the time it would take to complete the report as required. I was also unable to forgo some of the responsibilities of the SBAP Coordinator over the past several days, and it was not until Tuesday, April 27, 2010, that your e-mail and voice-mail allowed me to truly focus 95% of my time on completing the report."*

And, after feeling pressured to provide you with an alternative date stated:

*"Given the added time to work on this to completion, I believe I will be able to finish the report by May 10, 2010."*

(I believe has been underlined here for added emphasis)

In my e-mail response dated May 7, 2010, I again made the following statement:

*"It is an irresponsible act to issue a report that is not complete, and as I have noted before is of no worth to either party in resolving this long standing issue. I have made an attempt in the past to express my concerns about deciding on an arbitrary deadline for this very reason, but it appears that no one is listening. Management cannot, nor should they, dictate the deadline of this report or whether additional extensions will be granted. I am not required by law or by any DEQ mandate, policy or procedure to work on weekends, and in fact, DEQ policy makes it nearly impossible to do so."*

I have mentioned several times in the past that I had additional duties that could not be covered by other DEQ staff due to the complexities and resources needed to accomplish them. The arbitrary deadlines you are speaking of in your e-mail were chosen after months of DEQ management not communicating with me about any resources that may be needed to complete my Ombudsman report, and with no knowledge of what stage my report was in, how long it would take to complete it, or whether work in my dual position could be shifted.

You agreed to the May 10, 2010 date from my e-mail of April 28<sup>th</sup>, for the reasons I have stated in the numerous e-mails that have been written, and not simply because of any request made by me to extend these arbitrary deadlines. The phrase; *"As you have requested, we have granted several extensions to complete the report"* is simply not a true statement of the facts as we both know them. Again, the deadlines that created the extensions you speak of in your e-mail were capriciously set by your office originally, without the information necessary to make a fair assessment of the time needed to complete the project.

I have given the small business my assurance that the report will be completed by close of business on Wednesday May 19<sup>th</sup>. However, I will be working this week to accomplish this task even earlier if at all possible.

---

Respectfully,

Rebecca

**From:** DECONCINI Nina [mailto:nina.deconcini@state.or.us]  
**Sent:** Monday, May 10, 2010 3:04 PM  
**To:** nina.deconcini@state.or.us; rebecca.hillwig@state.or.us  
**Cc:** denecemessenger@comcast.net; SEN Devlin; dick.pedersen@state.or.us; esther.vassar@sba.gov; harry.dewolf@sba.gov; issa@oregonafscme.com; joni.hammond@state.or.us; KNUDSEN Larry; lesley.lowe@state.or.us; peter.mohr@tonkon.com; robert.ducote@sba.gov; rogers.joanb@epamail.epa.gov; suber.angela@epamail.epa.gov; suzanne.pickgrobe@sba.gov; uri.papish@state.or.us; yolanda.swift@sba.gov  
**Subject:** Re: Directive to Submit Incomplete Ombudsman Report

Rebecca,

Thanks for your email. I am surprised to hear that you will not be able to complete the report as you indicated would be done by today. As you have requested, we granted several extensions to complete the report.

If this will not be possible today, could you please indicate when you will be able to submit the report?

I look forward to your reply.

Nina

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**From:** HILLWIG Rebecca  
**To:** DECONCINI Nina  
**Cc:** Denece Messenger ; SEN Devlin; PEDERSEN Dick ; esther.vassar@sba.gov ; harry.dewolf@sba.gov ; issa@oregonafscme.com ; HAMMOND Joni ; KNUDSEN Larry; LOWE Lesley ; Peter Mohr ; robert.ducote@sba.gov ; rogers.joanb@epamail.epa.gov ; suber.angela@epamail.epa.gov ; suzanne.pickgrobe@sba.gov ; PAPISH Uri ; yolanda.swift@sba.gov  
**Sent:** Mon May 10 14:33:49 2010  
**Subject:** Directive to Submit Incomplete Ombudsman Report  
Nina,

I was instructed this morning that by close of business today (5:00 pm) that I will be required by you as one of Oregon DEQ's Regional Administrators, to submit to Uri, my section manager, the Ombudsman report for Decorative Bark Products, Inc. in whatever form of completion it is in, along with all hard and electronic copies of documents used within the report.

As I have communicated to you and to other DEQ managers on several occasions, my role as the Department Ombudsman is to investigate complaints arising from individuals and businesses who feel they have been unfairly treated, and have experienced bias and excessive inspections on the part of the Department and its staff. The role and position of the Ombudsman must be independent of managerial control and direction from the Department, so that an "objective" investigation of the details of the complaint can be performed to determine its validity. If valid, one of the most

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important roles of the Ombudsman is to propose recommendations intended to move the Department in a positive direction, so that changes in the activities which are counter to the Department's mission, vision and values can be made.

As I have stated before, the submission of an incomplete Ombudsman report is of no worth to anyone, and is disconcerting to me, since the report will not contain the recommendations I believe need to be made to move forward in making the Department better and stronger in its mission.

This is to document my objection to the use of the authority of your position as the Northwest Region Division Administrator, to require the Ombudsman, to make a decision or to perform an action counter to the responsibilities of the position. If I am forced to submit my report, and the documents I have in my possession before the report is complete, I will be doing so under duress, for fear of losing my position within the Department, or for fear of receiving a reprimand which could diminish my worth within the Department, or with any future employers.

I submit this as evidence of my disagreement with your directions and my objection to the submittal request of an incomplete report.

*Rebecca Hillwig*

*Small Business Assistance/Small Business Ombudsman*

*DEQ Air Quality*

*811 SW Sixth Ave*

*Portland, OR 97204*

*phone: 503-229-5376*

*fax: 503-229-5675*

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----- Original Message -----

**From:** CARDWELL Nancy

**To:** Denece Messenger

**Cc:** SMITH Jeffrey M ; DECONCINI Nina ; JOHNSON Keith

**Sent:** Monday, January 10, 2011 2:40 PM

**Subject:** RE: Recap final

Hi Denece,

Thank you for your email. I appreciate that we've had open communication and numerous conversations about the dust complaint from your neighbor (Mr. Dean Rupae) and follow-up sampling event.

While DEQ respectfully disagrees with many of the conclusions in your email below, DEQ has wrapped up the investigation of this complaint, and from our perspective, the matter is closed.

Nancy

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# Oregon

Theodore R. Kulongoski, Governor

## Department of Environmental Quality

Northwest Region Portland Office

2020 SW 4th Avenue, Suite 400

Portland, OR 97201-4987

(503) 229-5263

Fax: (503) 229-6945

TTY: (503) 229-5471

April 30, 2010

CERTIFIED MAIL NO. 7007 0710 0000 1655 4568

Decorative Bark Products, Inc.

Attn: Denece Messenger

P.O. Box 556

Scio, OR 97374

RE: **Withdrawal of Pre-Enforcement Notices**

PEN-NWR-AQ-06-088

PEN-NWR-AQ-08-033

On September 20, 2006 and on September 5, 2008, the Department of Environmental Quality (DEQ) issued Decorative Bark Products, Inc. (Decorative Bark) Pre-Enforcement Notice Nos. PEN-NWR-AQ-06-088 and PEN-NWR-AQ-08-033 (PENs). Both of the PENs were issued for failing to take reasonable precautions to prevent fugitive dust emissions from the bark piles at the Decorative Bark facility in violation of OAR 340-208-0210(2). The PENs notified you that the matters were being referred to DEQ's Office of Compliance and Enforcement for formal enforcement action, which could result in assessment of civil penalties.

This letter is to inform you that DEQ will not be proceeding with a formal enforcement action at this time and that both PENs are hereby withdrawn. Please note that if violations of Oregon law occur in the future, you may be subject to formal enforcement, which may include civil penalties.

If you have any questions, please contact me at (503) 229-6271.

Sincerely,

Nina DeConcini

DEQ NW Region Administrator

cc: Rebecca Hillwig, DEQ  
Peter Mohr, Tonkon Torp LLP

Rebecca,

Thanks for your email. Just to clarify, my expectation is that you will be delivering your report and all documentation associated with the Decorative Bark matter to Uri on or before May 10, 2010. This should include the hard copy and electronic files in your possession. Among the reasons I request all information, without qualification, concerns public records law requirements and, to the extent such requests are made, having the complete record available for assessment.

Please reply to acknowledge receipt and understanding of this email.

Nina

-----Original Message-----

From: HILLWIG Rebecca [mailto:rebecca.hillwig@state.or.us]

Sent: Thursday, April 29, 2010 4:46 PM

To: DECONCINI Nina; HILLWIG Rebecca

Cc: PAPISH Uri

Subject: RE: Response to e-mail dated April 20, 2010 regarding Ombudsman report

I am acknowledging receipt of your e-mail.

My submittal will include all relevant documentation used to substantiate the information collected, reviewed and provided in the Ombudsman report. My e-mail of yesterday, April 28, 2010, outlines the appropriate and professional manner in which an Ombudsman report is issued. As you have agreed below, it is a public record. Ms. Messenger as the complainant and owner of Decorative Bark has already requested a copy upon its completion.

Rebecca

-----Original Message-----

From: DECONCINI Nina [mailto:nina.deconcini@state.or.us]

Sent: Thursday, April 29, 2010 3:37 PM

To: HILLWIG Rebecca

Cc: PAPISH Uri

Subject: RE: Response to e-mail dated April 20, 2010 regarding Ombudsman report

Rebecca,

Thanks for your response. As noted in my previous email, you have an individual perspective on this matter, and there is also an organizational perspective that involves the reasonable allocation and management of staff time. You may have until May 10, 2010 to complete the report and all other work pertaining to the Decorative Bark matter. There will be no additional extensions granted.

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Whether or not you are able to complete the report, please provide all of your documentation, both hard copy and electronic, to Uri by close of business on 5/10/10.

The report will be a public record, available to anyone who requests a copy.

Please reply to acknowledge receipt and understanding of this email.

Nina

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From: HILLWIG Rebecca [mailto:rebecca.hillwig@state.or.us]  
Sent: Wed 4/28/2010 3:30 PM  
To: DECONCINI Nina; HILLWIG Rebecca  
Cc: PAPISH Uri  
Subject: RE: Response to e-mail dated April 20, 2010 regarding Ombudsman report

Nina,

I have received your e-mail and your phone message and fully understand your interpretation of the situation. I am also aware that the organization has its own perspective as it relates to the reasonable allocation and management of staff time. It was the Department's decision to make the Small Business Assistance Program Coordinator (SBAP) and the Small Business Ombudsman one and the same, with all of the duties and activities required of both positions. It is therefore the Department's responsibility to understand the complexities of these positions, and to respect the level of time and resources devoted to completing the duties of both. Although I appreciate attempts to lighten my workload so as to complete this report, DEQ staff working on other projects are limited in their availability to assist with the responsibilities of the SBAP Coordinator, because they themselves do not have the time or the knowledge to perform these additional duties.

You mention that you have taken steps to facilitate the completion of my report within the timeline previously established, by removing what you believe were identified as impediments in my e-mail response of April 26, 2010. Although I appreciate the attempt at reducing the time spent on my other duties, I am neither required nor compelled to submit an incomplete report by April 30, 2010, for the following reasons:

1. The duties of an Ombudsman are not focused solely on an impending enforcement action. In fact, one of the primary duties of the Ombudsman is to investigate complaints regarding staff conduct, unfair treatment and unfair audit or inspection practices and protocols from which an enforcement action or formal enforcement may have derived. A citizen or business may solicit the assistance of the Ombudsman at any time, regardless of whether enforcement action has been taken or a pre-enforcement notice has been issued or is pending. A business or citizen can believe they are being treated unfairly, have been excessively audited or that staff conduct is

biased or unduly influenced, even if no enforcement action is forthcoming. Therefore, the Department's decision to send a letter to Decorative Bark on April 30, 2010, informing the owner, Denece Messenger that DEQ will be withdrawing the 2006 and the 2008 PENs, and that neither of these PENs will be used in any future potential enforcement action the Department may take, is of no relevance to the investigation of the complaint or the completion of the Ombudsman report.

2. The autonomy afforded the Ombudsman to complete a complaint investigation and to develop, release and even publish a report is necessary as the Department continues to strive for fairness, impartiality and transparency. The public's desire for transparency should not be balanced by the Department's need or desire for obscurity or control in these matters. The more the Department's information and communication appears to be concealed, the more the public distrusts the Department and its staff, regardless of the apparent message. In short, the Ombudsman must be free of managerial and political influences so as to ensure the credibility and objectivity of the position AND the Department.

3. As of your April 20, 2010 voice-mail you told me you had spoken to Uri, my manager about freeing me up to focus solely on the completion of the Ombudsman report. Since no one within the Department knows the current level of completion of this report, it seems arbitrary for the Department to have set a capricious deadline, without an understanding of the time it would take to complete the report as required. I was also unable to forgo some of the responsibilities of the SBAP Coordinator over the past several days, and it was not until Tuesday, April 27, 2010, that your e-mail and voice-mail allowed me to truly focus 95% of my time on completing the report.

In my e-mail response on April 26th, I explained that Uri, as my supervisor overseeing the duties of the SBAP Coordinator, has a right to know the time constraints on me, because time spent on duties above and beyond my Coordinator duties needs to be accounted for. I believe it is neither appropriate nor beneficial in this case, to put him in a situation which could directly affect the manager/employee relationship we share in my role as the SBAP Coordinator. To Uri's credit, he has allowed me to perform my Ombudsman duties free from influence, and has judiciously limited his managerial responsibilities to; evaluating the time spent on this investigation and report only as it affects the deliverables of my "other" role.

If you sincerely appreciate the role of the Ombudsman, the pride I take in my work, and my ethics, you will understand why I cannot issue this report in its present form. Doing so would again, be of little worth or consequence to the Department or the small business community this position represents. I also believe that once the report is complete, it should be issued to the head of the Department, you if you so choose and to the individual who entrusted me with the completion of a full, impartial and measured report. Since this report includes only those documents found in the DBP file, those presented to Ms. Messenger and her attorney as part of a records request, and those documents provided by Ms. Messenger herself, this report is considered a public document and can be released to anyone who requests a copy.

Given the added time to work on this to completion, I believe I will be able to finish the report by May 10, 2010.

Rebecca

From: DECONCINI Nina [mailto:nina.deconcini@state.or.us]  
Sent: Tuesday, April 27, 2010 5:00 PM  
To: HILLWIG Rebecca  
Cc: PAPISH Uri  
Subject: RE: Response to e-mail dated April 20, 2010 regarding Ombudsman report

Rebecca,

I sincerely appreciate the role you play as both the Small Business Assistance Program Coordinator and the Small Business Ombudsman for DEQ.

I also acknowledge that you take pride in your work and feel compelled to see this project to completion. Just as you have articulated an individual perspective on this project, I remind you that there is also an organizational perspective that involves the reasonable allocation and management of staff time. I have taken steps to facilitate your completion of the project, within the timeline previously established, by removing what you have identified as impediments to timely completion of the report.

**Briefly, I have conferred with the Department of Justice and DEQ's Office of Compliance and Enforcement on this matter. DEQ does not intend to pursue enforcement actions for either the 2006 or the 2008 PENs. By April 30th, 2010, DEQ will send a letter to Decorative Bark withdrawing the 2006 and the 2008 PENs at issue, and neither of these PENs will be used in any future potential enforcement action the Department may take.** I have also discussed this matter with your supervisor, Uri Papish. He has agreed to allow you to devote your work time this week exclusively to completing the report. If you do receive a call from the public or other source that you feel would require substantial time, please let Uri know so he can have another staff person handle the matter. As I directed in my previous emails, please deliver your report, in whatever state of completion you have achieved, to Uri no later than April 30, 2010. Please also provide all documentation you have, both hard copy and electronically, to Uri at that time.

Thank you.

Nina

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From: HILLWIG Rebecca [mailto:rebecca.hillwig@state.or.us]  
Sent: Monday, April 26, 2010 11:20 AM  
To: DECONCINI Nina  
Cc: PAPISH Uri  
Subject: Response to e-mail dated April 20, 2010 regarding Ombudsman report

Nina,

In response to your April 14th e-mail and your e-mail and phone call dated April 20th I am sending this response regarding the Ombudsman report:

I have read your e-mail message from April 14, 2010 and understand its content. I also understand your position and the reasons behind your directives. However, I believe your request that I complete the Ombudsman report no later than April 30, 2010 in whatever state of completion it may be in and that I am to cease all work on this matter is not reasonable or dispassionate.

Although the settlement negotiations between DEQ and Decorative Bark have ceased, and DEQ is not at this time pursuing enforcement against Decorative Bark, both the 2006 and 2008 PENs are still outstanding. This means DEQ may at any time take action on these outstanding PENs and at the very least may choose to use them as evidence of what DEQ staff believes are ongoing violations at the DBP site.

The position I currently hold as both the Small Business Assistance Program Coordinator and the Small Business Ombudsman became effective as part of the Clean Air Act reissued in 1990. Although currently this is a dual position due mainly to past budget cuts, the Ombudsman position, known in the past as the Small Business Technical Assistance Liaison was, as late as 2001, jointly housed between the DEQ and the Oregon Economic and Community Development Department. Many states have Ombudsmen who are independent of the regulatory process and although receive funding through the 105 program and Title V fees, are located in non-regulatory agencies or institutions such as colleges and community development organizations.

Based upon my knowledge of the roles and responsibilities of an agency Ombudsman at both the state and national level, the duties of an Ombudsman are not focused solely on an impending enforcement action. In fact, one of the primary duties of the Ombudsman is to investigate complaints regarding staff conduct, unfair treatment and unfair audit or inspection practices and protocols from which an enforcement action or formal enforcement may have derived. It is this responsibility that allows the Ombudsman to continue to investigate as needed, and to develop a report to complete the cycle in an impartial, respectful and responsible manner, free from political influences.

It is appropriate for Uri as my manager overseeing my duties as the Small Business Assistance Program Coordinator to be updated on the time spent fulfilling the responsibilities of the Ombudsman. This is because those duties take time away from the required work and projects of the Small Business Program he is charged with

managing. However, it is the responsibility and duty of the Department to provide the autonomy necessary for the Ombudsman to perform this specific obligation, free of managerial control and without fear of unfavorable consequences or discipline.

As I mentioned in my last e-mail, I am working on the report as much as possible and fully expect to have it completed soon. It is as important for me to close this loop as expeditiously as possible as it is for all parties involved. However, I do not wish to compromise my work ethic, my responsibilities, my reputation or myself, by issuing a report that is incomplete, and therefore of no worth or consequence to the DEQ or the small business community this position represents.

Rebecca Hillwig  
Small Business Assistance/Small Business Ombudsman  
DEQ Air Quality  
811 SW Sixth Ave  
Portland, OR 97204  
phone: 503-229-5376  
fax: 503-229-5675

Previous e-mail messages

Wed 4/14/2010 9:26 AM  
HILLWIG Rebecca  
PAPISH Uri

Rebecca,

While I appreciate and am sensitive to staff workloads, by this email, I am requesting that you deliver to me your report, in whatever state of completion you have achieved, no later than by April 30, 2010. You may send it electronically or as a hard copy. After April 30th, I expect that you will not work on this matter any further, since the settlement negotiations between DEQ and Decorative Bark have ceased, DEQ is not pursuing enforcement against Decorative Bark at this time, and there is no further action needed on your part.

Please reply to my email to acknowledge receipt and understanding of this message.

Thanks.

Nina

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From: HILLWIG Rebecca [mailto:rebecca.hillwig@state.or.us]  
Sent: Tuesday, April 13, 2010 2:31 PM  
To: DECONCINI Nina  
Subject: Ombudsman report: DBP and DEQ

Nina,

I wanted to inform you that I have not yet been able to complete the Ombudsman report regarding Decorative Bark and DEQ.

So as not to give anyone an additional completion date that may again need to be pushed due to concurrent responsibilities that are beyond anyone's control, I can only say that it is my intention to complete the report at the earliest possible date for all concerned.

I have relayed this information to Denece Messenger and Peter Mohr so that they are also aware of the situation.

Thank you for your understanding. I will be in contact when the report is completed.

Rebecca

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**Denece Messenger**

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**From:** "Rep Flores" <Flores.Rep@state.or.us>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>  
**Sent:** Wednesday, October 22, 2008 7:08 PM  
**Subject:** RE: Follow up to Meeting  
 Denece,

Sounds like you had a productive meeting. It doesn't sound like the agency is going to drop the case against you and stop the "enforcement" action. In other words I would still expect a letter outlining violations and asking you to pay penalties in the next couple of weeks. I'm glad to see Senator Metsger was as discouraged as Rep Flores' has been about your situation.

Keep us posted and let us know if there is anything more we can do on our end.

Thanks,

Dawn Phillips

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**From:** Denece Messenger [mailto:denecemessenger@comcast.net]  
**Sent:** Wednesday, October 22, 2008 2:56 PM  
**To:** Rep Flores; Sen Devlin  
**Subject:** Follow up to Meeting

Senator Devline and Rep. Flores:

I wanted to thank you both again for your help in our DEQ issue. I have a follow up to this morning's meeting.

I wanted to let you both know that Rick Metsger, my attorney and I met with Dick Pederson, Nina Deconcini and Rebecca Hillwig (DEQ Ombudsman and our invite). Basically, Sen. Metsger called DEQ practices "harrasment" he went on to say that he checked with other companies and no one has been asked to do what we have. He said that none of the businesses in the area registered any concern with our practices and He acknowledged that there was one complainant and he has since moved. According to the real estate agent, "there were no issues mentioned or noticed." Metsger went on to say that he does not want any more inspections from The Gresham office unless he too is invited. He said, "If he were Decorative Bark he would find himself very frustrated with the lack of consistency or science."

Nina Deconcini contradicted herself in the meeting saying that they were willing to come out-we pointed out the email to our attorney saying that they weren't. She also had mentioned to one of the lawmakers that today's meeting would not impact their decision and then when asked she said her email only said we were having a meeting. So we clarified for her that she had actually said today's meeting would have no impact. I also asked her about the accusations that we shut down when they come out. She said that she had heard that from one of her agents who heard it was part of the court testimony. I asked if she had checked into the background on this employee....she said no. I explained he had been laid off...not fired...because we had become aware that he was a three-time felon and charged with illegal use of firearms. We told her he was a disgruntled employee and we wanted him to go away without incident. She said she would check her peoples work more closely.

Dick Pederson was genuinly surprised when we explained that we had been inspected 150 times in the last five years and even today we were getting an inspection for water. I sense, he was also concerned that there were no water or air tests performed by DEQ and that all their claims were "look sees."

We have asked that the harrasement stop and for a letter that I can give to my customers, landlord and employees explaining that there has been no scientific proof behind any of the accusations and that our record is clear.

They said they would get back to us. I will keep you posted. Maybe some internal changes will take place to protect other small businesses from this in the future.

Thank you again for your help in this matter.

Regards,

Denece

Suite 400

Portland, OR 97201

Office: 503.229.6271

Mobile: 503.804.0840

Fax: 503.229.6924

[www.deq.state.or.us](http://www.deq.state.or.us)

-----Original Message-----

**From:** REP Flores

**Sent:** Thursday, September 25, 2008 4:33 PM

**To:** DECONCINI Nina

**Subject:** Decorative Bark

Nina,

The owners of Decorative Bark -- our constituents -- have been in touch with Rep Flores and feel they are not being treated fairly by DEQ. I am not familiar with all the background on this case, but I understand it has to do with air or water pollution concerns.

Apparently the company was served notice of some potential fines or violation penalties. Unfortunately the agency sent the notice to the wrong address and so the company has not had time to respond to the letter in a timely manner.

What is the deadline for the company to respond to DEQ in order to avoid penalties? Are there other options that can be explored such as granting them more time to fix whatever problems are occurring? Can they appeal the penalties? Can the agency work with the company on some kind of plan to improve conditions?

Any feedback you can provide would be greatly appreciated.

Sincerely,



**Dawn Phillips**

**Chief of Staff**

**State Representative Linda Flores**

**503.986.1451**

**900 Court St. NE H-287**

**Salem, OR 97301**

**[rep.lindaflores@state.or.us](mailto:rep.lindaflores@state.or.us)**

**[www.leg.state.or.us/flores](http://www.leg.state.or.us/flores)**

**Denece Messenger**

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**From:** "Rep Flores" <Flores.Rep@state.or.us>  
**To:** <denecemessenger@comcast.net>  
**Sent:** Thursday, October 09, 2008 4:57 PM  
**Subject:** RE: Decorative Bark  
Denece,

Had a long talk with Deconcini yesterday. She basically told me their guidelines are subjective, it is based on observation and migrating dust is against the law.

She said the PEN is the letter telling you they are going to fine/penalize you for violations. It should be done in a couple weeks. She said a warning letter was sent a couple months ago and corrective action wasn't taken.

she said once the penalty letter assessing fines is issued, then you have 20 days to contest/dispute the fine and findings and they would then schedule an INFORMAL meeting -- that's what she called it -- and they might reach a settlement with you to do certain things, pay some penalty etc.

I said -- so you are willing to meet w/ them AFTER the penalties/fines come out but not before? she said they had been willing to meet with you anytime. I said that is not what you TOLD me.. I didn't tell her I have the emails. She wanted proof that the agency refused to meet with you.. so if it's okay with you I'm going to tell her that you explained to me that deconcini sent your lawyer an email on Sept 19th in which she said they didn't want to meet with you. I would rather not share your private legal correspondences with the agency.

The only documents she knows I have is the PEN which she gave me.

I asked about where in the law was it spelled out that you had to have certain types of equipment -- watering systems etc.. she said it's not, every case is different. You are required to do everything "practicable" to stop the dust migration.

I said.. what happens if you install all the equipment the state requires.. do everything the state asks.. and the dust still blows off site??? do you get fined again? she said maybe -- if you've done everything "practicable".

I asked her if the meeting with Sen Metsger was going to change anything or stop the penalties. She said No.

I told her you said her staff has not been "on site" but only in the neighborhood. She said .. not true, they have been on the grounds. She said they have physical evidence, samples, pictures and just their "observations" of dust on other people's property was enough to fine you. I told her the one guy had moved and the realtor told prospective buyers that there was no problems with your business. She said the realtor was not an "epidemiologist" and that the agency had other emails from other neighbors complaining. I said what if there are no more complaints? she said doesn't matter, they will still go out there and enforce the law as they see fit.

She said they had offered and provided technical assistance and you guys either refused or it just hadn't worked very well.

I tried to pin her down on what we could do to change the system so the standards were easier to understand. For example, if your dust particles are size X and they drift into adjacent property X number of days or whatever then the company must do Y to correct that. I told her we would do legislation for 2009. She said that would not work.

We'll see. I would rather not be at the Metzger meeting. He has not invited us to be there and I don't want to appear like we're barging in on his meeting. I think I am already committed that day anyway. But I am dying to hear how it goes.

Stick to the facts. Hold them accountable for measurable standards and timelines/deadlines for correction. You should be able to stand your ground. Sorry we can't do much more to help at this point but please keep us posted.

Thanks,



**Dawn Phillips**  
**Chief of Staff**  
**State Representative Linda Flores**  
**503.986.1451**  
**900 Court St. NE H-287**  
**Salem, OR 97301**  
**[rep.lindaflores@state.or.us](mailto:rep.lindaflores@state.or.us)**  
**[www.leg.state.or.us/flores](http://www.leg.state.or.us/flores)**

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**From:** denecemessenger@comcast.net [mailto:denecemessenger@comcast.net]  
**Sent:** Wednesday, October 08, 2008 4:34 AM  
**To:** Rep Flores  
**Subject:** RE: Decorative Bark

Thank you for all that you have done. I have a meeting with Metsger and Dick Pederson on Oct. 22 at 8:00. You have done so much already, but I would love to have you there. We are meeting at Metsger's Ho-fice (home office in Salem) 1317 Court street. Please know that I understand if you cannot attend. At the meeting I plan to challenge the rules that have been broken, but also show my documentation and science and point out the lack of theirs.

The never answered your question about any technical advice. The fact is, they didn't give any. Thank you again for all you have done.

Denece

----- Original message -----

From: "Rep Flores" <Flores.Rep@state.or.us>  
Denece,

I'm not sure what more to do -- I can argue with them all day and they will still say they are right and you are wrong. There are a couple of ways to resolve this.

1) keep fighting to make them clarify what the law requires through your lawyer and appeal their findings.  
2) we can arrange a meeting with them -- but they probably won't budge. Besides, I understand you're already having a meeting with Senator Metzger in a couple weeks. Perhaps he can help you get to the bottom of some of this stuff. You need to outline to him some of the same areas we have already covered with the agency (without giving him our emails) .. like where does it say particles hurt humans? And if the smaller the particle the more harmful, then how come your rules say anything over 250 microns is a violation? seems like the rules say bigger is worse, not smaller.

Let us know how it goes with Senator Metsger and you can tell him you've been in contact with Rep Flores and she is very interested in any legislative changes he might want to work on to help resolve some of these "grey areas" in the law. Such as what is the standard industry method for a "watering system"? etc.

3) see next email for our latest exchange with DEQ.

Keep in touch and let us know how you're doing and how things are progressing.

Thanks,

Dawn Phillips

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**From:** denecemessenger@comcast.net [mailto:denecemessenger@comcast.net]  
**Sent:** Tuesday, October 07, 2008 6:49 PM  
**To:** Rep Flores  
**Subject:** RE: Decorative Bark

Dawn:

Have they yet provided any science, documentation or proof? Also, they did not give you the documents you asked for that shows this so called technical advice that alledgedly took place before any pre-enforcement or warning letters.. The truth of the matter is, the only thing they have sent me are warnings and pre-enforcements. Where is the technical advice they gave me?

By the way, the judge didn't rule, a jury did.

They also didn't explain why I'm being held to a different standard than all other bark producers.  
Denece

----- Original message -----

**From:** "Rep Flores" <Flores.Rep@state.or.us>  
Nina -- just a couple of items in blue below.

thanks for helping me understand,

Dawn Phillips

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**From:** DECONCINI Nina [mailto:Nina.Deconcini@state.or.us]  
**Sent:** Friday, October 03, 2008 9:54 AM  
**To:** REP Flores  
**Subject:** RE: Decorative Bark

Hi Dawn,

Sorry for any confusion and my delay in getting back to you. Sometimes you're immune to your own bureaucracy!

Let's see if I can't simplify things.

# 1) The recent Pre-Enforcement Notice (PEN) we issued to Decorative Bark is attached. The specific regulations we cited in the PEN are:

OAR 430-0208-0210(2)

(2) No person may cause or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished; or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions may include, but not be limited to the following:

- (a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;
- (b) Application of asphalt, oil, water, or other suitable chemicals on unpaved roads, materials stockpiles, and other surfaces which can create airborne dusts;
- (c) Full or partial enclosure of materials stockpiles in cases where application of oil, water, or chemicals are not sufficient to prevent particulate matter from becoming airborne;
- (d) Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials;
- (e) Adequate containment during sandblasting or other similar operations;
- (f) Covering, at all times when in motion, open bodied trucks transporting materials likely to become airborne;
- (g) The prompt removal from paved streets of earth or other material that does or may become airborne.

And

OAR 340-208-0450

No person may cause or permit the emission of particulate matter larger than 250 microns in size at sufficient duration or quantity as to create an observable deposition upon the real property of another person when notified by the department that the deposition exists and must be controlled.

I didn't see in your findings in the PEN any mention of scientific studies or samples showing there was particulate matter discovered larger than 250 microns in size?

there are also notes that say "observations" or "high potential for fugitive dust" and "dust plumes" -- seems kind of subjective. I am not a scientist but I am wondering what is the environmental harm here? is there some law or rule that says dust that migrates causes harm to humans or wildlife? I think of lot cases where there are natural dust storms. I'm just trying to figure out what problems we're trying to avoid/fix here? I was looking at the corrective steps and asked the company about those items and they said they already have watering systems, a watering truck and sweeping procedures in place. The OAR above talks about "reasonable precautions" -- but it sounds like you're asking for specific types of equipment. Is there some standard that all businesses like this are supposed to follow? In other words, do other barkdus t wholesale outlets have to have the same kinds of equipment?

# 2) The deadline for the company to make improvements in order to avoid potential enforcement has passed. As I indicated in my previous email, Decorative Bark had many technical assistance visits by DEQ to help provide guidance about what improvements needed to be made. Because that didn't happen, we sent Decorative Bark the Pre-Enforcement Notice. This means our Office of Compliance and Enforcement will review what the company has done and, if in their determination a violation has occurred, a Notice of Civil Penalty and Department Order will be drafted and sent to our Deputy Director for approval and issuance. Once the penalty is issued, Decorative Bark will have 20 days to either appeal or pay the penalty. Prior to the formal appeal, a chance for an informal meeting with DEQ is offered. If the results of this in formal meeting are not satisfactory to both Decorative Bark Products and DEQ, the appeal will go before an administrative law judge. Further appeals are allowed beyond the administrative law judge to the EQC and ultimately the courts.

The Corrective actions requested at the bottom of the letter don't seem to indicate when this corrective action is supposed to be completed?



So.. what is the timeline between the PEN and when a determination is made of a violation and a notice of civil penalty is issued? Shouldn't the company have some time frame to address the concerns in the PEN so the OCE can review those actions before moving to a penalty... I understand there are a lot of steps here.. just trying to get a feel for how this works.

# 3) I didn't mean to confuse you regarding the separate court case. It does not have any bearing on our enforcement proceedings. I merely wanted to share information about an independent, third party that essentially came to the same conclusions as we have regarding Decorative Bark's failure to remedy the air quality problems at their site, and how those problems have affected the neighboring community.

# 4) We will absolutely make sure we have the correct address for future mailings. DEQ uses the address that the company provides to the Secretary of State Corporation Division. Because Decorative Bark listed their lawyer as the registered agent, we sent it to him as well, and are certain it was received.

I think that covers it, but please let me know if you require more information.

Thanks!

Nina

-----Original Message-----

**From:** REP Flores

**Sent:** Tuesday, September 30, 2008 1:47 PM

**To:** DECONCINI Nina

**Subject:** RE: Decorative Bark

Nina -- thanks for the information on Decorative Bark. I am curious about a couple of things. 1) can you send us whatever notice you have sent the company about what kinds of improvements you are asking them to make prior to any penalties/enforcement action and the ORS or OAR that spells out the laws which govern the standards you are asking the company to follow. 2) We would still like a better understanding of how this works. What is the deadline for the company to make the improvements required by law before penalties will be assessed and what is the appeal process? timeline etc.? 3) I'm just a little confused as to how a separate court case which doesn't appear to involve DEQ is applicable to the enforcement action. I assume this matter is between the state and the company and not a third party. Not sure how the agency is able to use one judge's opinion against a company -- especially when the case is on appeal. 4) it is also my understanding that the scio address is an old address and the notice should have been sent to the company's address in Boring. Not sure how the agency records are supposed to be updated but perhaps that needs to happen for future mailers.

We really appreciate you helping Rep Flores understand the situation and so we can help our constituent work through the process.

Sincere thanks,

**Dawn Phillips**

**Chief of Staff**

**State Representative Linda Flores**

**503.986.1451**

**900 Court St. NE H-287**

Salem, OR 97301  
[rep.lindaflores@state.or.us](mailto:rep.lindaflores@state.or.us)  
[www.leg.state.or.us/flores](http://www.leg.state.or.us/flores)

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**From:** DECONCINI Nina [mailto:Nina.Deconcini@state.or.us]  
**Sent:** Monday, September 29, 2008 4:07 PM  
**To:** REP Flores  
**Cc:** PEDERSEN Dick; ALDRICH Greg; AERNE Melissa  
**Subject:** RE: Decorative Bark

Dawn,

Thanks for your email and sorry for my delay in getting back to you. DEQ has had concerns over bark dust from Decorative Bark Products operations migrating off-site and landing on adjacent properties for a number of years. We have met with Ms. Messenger and her staff many times to suggest best management practices to keep the bark dust from blowing off-site. Despite our best efforts to work with her in a technical assistance mode, she has not made the progress we need to see to be in compliance with air quality rules. See the next paragraph for an explanation of our philosophy regarding compliance versus enforcement. We have sent Ms. Messenger what's called a "Pre-enforcement notice" and it was sent to her at her Scio, OR location, which is the legal address we have on file. Another copy was sent to her lawyer, who is listed as the registered agent. We have confirmed receipts so we're sure the letter was received. A Pre-enforcement notice lets a facility know we will be referring their case to our enforcement office, where the violations will be reviewed to determine what type of penalty will be assessed. We provide everyone who receives a Pre-enforcement notice an opportunity to give us more information if they believe there are factual errors.

DEQ's approach to complaints includes visiting the site and assessing how we can achieve compliance, instead of using our enforcement authority as a first response. DEQ staff works with the facility owner and attempts to find a set of actions that can be taken to resolve the concern. If those actions do not resolve the concern, then DEQ requests that the facility owner take additional actions. At each of these stages, our goal is to work with the facility to evaluate what actions make the most sense so they can continue to operate and not cause problems in their community. There are many ways to correct a violation and we try to be as flexible as possible in exploring options and sharing our expertise with a source that is having trouble staying in compliance.

In the case of Decorative Bark Products, DEQ staff started receiving complaints about seven years ago. DEQ staff advised Ms. Messenger of the various methods that could be employed to minimize bark dust from leaving the facility. After most visits to the facility by DEQ staff, the complaints by neighbors subsided, only to return at a later date. That cyclic nature has been going on for the last six to seven years. As indicated above, we have attempted to use the "technical assistance" approach with Decorative Bark all this time. It has been frustrating for DEQ staff

because our attempts to remedy the issues for neighbors being impacted have not been successful. We have reached a point with Decorative Bark where we had to use our enforcement authority due to Ms. Messenger's failure to comply with our requests.

Additionally, in response to a lawsuit filed by one of Decorative Bark Products neighbors in Clackamas County Court, a judge determined that Decorative Bark Products was a nuisance and trespassed on the property of that neighbor. This judgment was made because the court determined that Decorative Bark Products had failed to control bark dust from becoming airborne, thereby depositing bark dust on the property of that neighbor. Decorative Bark Products was ordered to pay in excess of \$100,000 to that neighbor. That lawsuit is currently being appealed by Decorative Bark Products.

We are sensitive to the needs of businesses and communities and feel we have worked exhaustively with Ms. Messenger to bring her into compliance. Should you need further clarification or more detailed information, please feel free to contact me or my air quality manager, Ed Druback at: [druback.ed@deq.state.or.us](mailto:druback.ed@deq.state.or.us) or 503.667.8414, extension 55014.

Nina DeConcini

Oregon Department of Environmental Quality

NW Region Interim Division Administrator

2020 SW 4th Avenue

Suite 400

Portland, OR 97201

Office: 503.229.6271

Mobile: 503.804.0840

Fax: 503.229.6924

[www.deq.state.or.us](http://www.deq.state.or.us)

-----Original Message-----

**From:** REP Flores

**Sent:** Thursday, September 25, 2008 4:33 PM

**To:** DECONCINI Nina

**Subject:** Decorative Bark

Nina,

The owners of Decorative Bark -- our constituents -- have been in touch with Rep Flores and feel they are not being treated fairly by DEQ. I am not familiar with all the background on this case, but I understand it has to do with air or water pollution

concerns.

Apparently the company was served notice of some potential fines or violation penalties. Unfortunately the agency sent the notice to the wrong address and so the company has not had time to respond to the letter in a timely manner.

What is the deadline for the company to respond to DEQ in order to avoid penalties? Are there other options that can be explored such as granting them more time to fix whatever problems are occurring? Can they appeal the penalties? Can the agency work with the company on some kind of plan to improve conditions?

Any feedback you can provide would be greatly appreciated.

Sincerely,

A handwritten signature in cursive script that reads "Dawn Phillips".

Dawn Phillips  
Chief of Staff  
State Representative Linda Flores  
503.986.1451  
900 Court St. NE H-287  
Salem, OR 97301  
[rep.lindaflores@state.or.us](mailto:rep.lindaflores@state.or.us)  
[www.leg.state.or.us/flores](http://www.leg.state.or.us/flores)

## **Denece Messenger**

---

**From:** "Rep Flores" <Flores.Rep@state.or.us>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>  
**Sent:** Wednesday, October 15, 2008 3:43 PM  
**Subject:** JUST FYI.. FROM DP

-----Original Message-----

From: DECONCINI Nina [mailto:Nina.Deconcini@state.or.us]  
Sent: Wednesday, October 15, 2008 4:40 PM  
To: REP Flores  
Subject: RE: Oct. 22 meeting

Hi Dawn.

The 10/22 meeting date was set based on when Senator Metsger was available. You are correct about the correspondence with Decorative Bark. I've pasted the text of my email exchange with Mr. Lafky (Decorative Bark's lawyer) below. Since we feel we have been clear about what needs to be done, I indicated that we would be willing to meet with Decorative Bark after the company has implemented our recommended solutions. In our experience with the company, we've found a distinct difference in what we observe at the facility when visits are unannounced vs. planned. This is why, given our extremely limited resources, we suggested a meeting after the company has made the modifications to prevent the emissions from migrating offsite.

I hope that explains our logic. Let me know if not.

Nina

Mr. Lafky:

Thank you for expressing your concern's about DEQ's observations of Decorative Bark Products operations and the violations DEQ has documented at the facility.

As you are aware, numerous DEQ employees have visited Decorative Bark Products over the last five years. These staff have performed both technical assistance visits and standard inspections (both announced and unannounced). I appreciate your offer for additional individuals, including myself, to view the operations at Decorative Bark Products. However, since the record of ongoing violations at Decorative Bark Products has been well documented; I am unsure of what is gained by such a visit at this time. I do believe, however, that once Decorative Bark Products implements the requests made in the most recent Pre-Enforcement Notice it would be very timely to visit Decorative Bark Products and

observe the facility in operation. Hopefully we will be able to find a mutually convenient time once that has transpired.

Regards-

Nina DeConcini

Oregon Department of Environmental Quality NW Region Division

Administrator 2020 SW 4th Avenue Suite 400 Portland, OR 97201

Office: 503.229.6271

Mobile: 503.804.0840

Fax: 503.229.6924

[www.deq.state.or.us](http://www.deq.state.or.us)

-----Original Message-----

From: [klafky@lafky.com](mailto:klafky@lafky.com) [mailto:[klafky@lafky.com](mailto:klafky@lafky.com)]

Sent: Monday, September 15, 2008 12:04 PM

To: [rebecca.hillwig@deq.state.or.us](mailto:rebecca.hillwig@deq.state.or.us); DECONCINI Nina; JURRIES Dennis

Subject: Decorative Bark

Greetings, I represent Decorative Bark and have corresponded with some of you previously regarding issues that have been raised by DEQ involving air/water quality at Decorative Bark's processing plant in Boring. DB believes that many of the claims that have been made by DEQ workers regarding DB's operations are inaccurate. We would like to put to rest any of the factual disputes involving DB's operations. I suggest that we schedule a mutually convenient time for DEQ administrators to visit DB and observe its processing facility. I suggest that this visit occur as soon as possible, given the current hot sunny weather, which would presumably lead to the most challenging air quality issues. It is important that you be able to view the plant in full operation in hot weather so that you can see for yourself whether there are air quality issues impacting the vicinity. Thanks.

---

Kevin Lafky, Attorney

Lafky & Lafky

Attorneys at Law

[www.lafky.com](http://www.lafky.com)

503-585-2450

503-585-0205 fax

[klafky@lafky.com](mailto:klafky@lafky.com)

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-----Original Message-----

From: REP Flores  
Sent: Wednesday, October 15, 2008 1:55 PM  
To: DECONCINI Nina  
Subject: FW: Oct. 22 meeting

Nina --

This coincidental visit seems a bit odd. Considering the tense relationship between Decorative Bark and DEQ right now, wouldn't it be better to try to work with the company than give them another reason to complain?



Also, I am told that there is an email exchange in September between you and their attorney in which you declined to meet with them. You said the agency has never refused to meet with them and you wanted written proof if they had something to the contrary. I can try to get a copy of that email if you'd like.

Looking forward to your response.

Thanks,

Dawn Phillips

-----Original Message-----

From: Denece Messenger [mailto:denecemessenger@comcast.net]  
Sent: Wednesday, October 15, 2008 6:02 AM  
To: JURRIES Dennis; HILLWIG Rebecca; William Jesse; Rep Flores  
Subject: Re: Oct. 22 meeting

I could be in the Boring yard by noon that same day. I really think it is appropriate that I am present. I am available all next week except for the 22 in the morning...as you know, I have a meeting with Dick Peterson with DEQ.

Also, could you tell me the nature of this meeting?

Denece

----- Original Message -----

From: "JURRIES Dennis" <JURRIES.Dennis@deq.state.or.us>  
To: "Denece Messenger" <denecemessenger@comcast.net>  
Sent: Wednesday, October 15, 2008 5:42 AM  
Subject: RE: Oct. 22 meeting

I am sorry but we are booked pretty solid this month and we have to complete the inspections this month or fall behind EPA mandated inspection quotas.

Dennis Jurries, PE  
DEQ NWR Storm Water Engineer

2020 SW 4th Ave.  
Suite 400  
Portland, OR 97201  
(503) 229-5937

Check out the Stormwater BMP Guidance at:  
<http://www.deq.state.or.us/wq/stormwater/nwrinfo.htm>

-----Original Message-----

From: Denece Messenger [mailto:[denece messenger@comcast.net](mailto:denece messenger@comcast.net)]  
Sent: Tuesday, October 14, 2008 7:42 PM  
To: JURRIES Dennis; Paul Owen; William Jesse; HILL WIG Rebecca  
Subject: Oct. 22 meeting

Dennis:

I have been informed that you are planning a visit to Vanport and Decorative Bark. I have a meeting scheduled with Dick Pederson of DEQ that same morning at 8:00 in Salem with Senator Rick Metsger and my attorney. I would like to be on site when you come for your visit. Would you be willing to reschedule for the afternoon on the 22 or even on the 23rd?

Regards,  
Denece Messenger  
Decorative Bark Products, Inc.



**Denece Messenger**

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**From:** "Rep Flores" <Flores.Rep@state.or.us>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>  
**Sent:** Wednesday, October 15, 2008 9:40 PM  
**Subject:** RE: JUST FYI.. FROM DP

I didn't ask for the technical advice because I think she referred to that as that program where you have to enter into an agreement with them etc.

I don't know what else to do at this point. We've asked them to be fair. They've agreed that the court case should not be used against you in the state action -- at least I said that and she agreed.

It's really difficult for us to jump into the middle of a case that has been going on for quite a while and we are not a party -- Rep Flores wants to help but we don't know where to go from here. There is really no jurisdiction for a legislator to interfere or stop an agency from carrying out whatever they believe the law to require. That is probably left for lawyers to decide in a new court case or if you appeal any kind of penalties they lay on you.

We'll keep an eye on this and hope you'll keep sending us updates. I am very curious to see if the agency agrees to do anything different or if anything changes after your meeting with the Senator.

Hang in there.

Dawn Phillips

-----Original Message-----

**From:** Denece Messenger [mailto:denecemessenger@comcast.net]  
**Sent:** Wednesday, October 15, 2008 6:39 PM  
**To:** Rep Flores  
**Subject:** Re: JUST FYI.. FROM DP

Dawn:

Do you find her answer acceptable? Knowing that we caught her lying. She keeps saying the same thing. The question is, where are the documents you asked for that shows all this so called techical advice they gave me.

Wouldn't they write that out. Dennis Jurries gave me some info on bioswales after I asked him to come out April of 07...that's the only DEQ person who came out on my invitation and the only one that came out announced.

Under oath, Dan murphy deq gresham, said he had been out to the company more than 40 times. One week he came out on Wed. Thursday, early Saturday morning and then again on sunday. Susuan Patterson also deq gresham says she came out "so many times she can't count." Not one of those visits was announced.

Nina said herself that they stood on the property line and observed because they felt I shut down when they came. How can she have it both ways?

Why am I being treated like this. Nina has not presented you with any proof. Have her send you the documented technical advice they sent BEFORE any warning or preenforcement...There isn't any. That's why. They have no science, no proof, no documentation.

Thank you for hanging in there. Dennis Jurries says he can't change the time. So he is coming out on the 22nd and I won't be there.

Denece

----- Original Message -----

From: "Rep Flores" <[Flores.Rep@state.or.us](mailto:Flores.Rep@state.or.us)>  
To: "Denece Messenger" <[denecemessenger@comcast.net](mailto:denecemessenger@comcast.net)>  
Sent: Wednesday, October 15, 2008 4:43 PM  
Subject: JUST FYI.. FROM DP

-----Original Message-----

From: DECONCINI Nina [<mailto:Nina.Deconcini@state.or.us>]  
Sent: Wednesday, October 15, 2008 4:40 PM  
To: REP Flores  
Subject: RE: Oct. 22 meeting

Hi Dawn.

The 10/22 meeting date was set based on when Senator Metsger was available. You are correct about the correspondence with Decorative Bark. I've pasted the text of my email exchange with Mr. Lafky (Decorative Bark's lawyer) below. Since we feel we have been clear about what needs to be done, I indicated that we would be willing to meet with Decorative Bark after the company has implemented our recommended solutions. In our experience with the company, we've found a distinct difference in what we observe at the facility when visits are unannounced vs. planned. This is why, given our extremely limited resources, we suggested a meeting after the company has made the modifications to prevent the emissions from migrating offsite.

I hope that explains our logic. Let me know if not.

Nina

**THEODORE R. KULONGOSKI**  
GOVERNOR



January 26, 2010

Denece Messenger  
171 18<sup>th</sup> Street  
Lyons, OR 97358

Dear Ms. Messenger:

Thank you for contacting the Governor's office regarding your complaint against the Department of Environmental Quality. Governor Kulongoski has asked that I respond on his behalf.

I am in receipt of your email requesting a meeting to discuss matters regarding the Oregon Department of Environmental Quality (DEQ). Our office has spoken with you on various occasions about your concerns regarding DEQ and your business, and we responded in writing on September 24, 2008. DEQ is the regulatory agency responsible for protecting Oregon's environment and ensuring compliance with environmental laws and rules as delegated by the U.S. Environmental Protection Agency and the Oregon Legislature. As with all state agencies and commissions, it is legally obligated to enforce statutes and issue sanctions as mandated by law. DEQ uses a combination of tools to ensure compliance and takes enforcement action and issues civil penalties in accordance with Oregon law. As I indicated in my previous correspondence, I am aware that after documenting numerous air quality rules violations over the course of several years, DEQ issued a pre-enforcement notice against your business, Decorative Bark Products. Since that time, I understand DEQ has been involved in negotiations with you in a good faith effort to resolve issues involving the pre-enforcement notice issued to your company and the tort claim filed by your attorney. However, I am aware the negotiations have ceased and your tort claim was denied.

While one of the roles of the Governor's office is to ensure communication between state agencies and the public, the Governor and his staff cannot relieve businesses or individuals from enforcement actions or interfere in legal processes. Therefore, we are unable to accommodate your request for a meeting. I am aware Dick Pedersen, the Director for the Department of Environmental Quality has offered to meet with you as you requested and we encourage you to continue to work with the staff at DEQ.

Again, we appreciate you contacting the Governor's office, and I regret we cannot assist you further in this matter.

Sincerely,

Katherine Wentzel  
Citizens' Contact Analyst

cc: Department of Environmental Quality

**Denece Messenger**

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**From:** "GOV Citizen Representative" <representative.citizen@state.or.us>  
**To:** <denecemessenger@comcast.net>  
**Sent:** Wednesday, December 23, 2009 9:50 AM  
**Subject:** RE: Improper DEQ conduct

December 23, 2009

Dear Denece:

Thank you for contacting the Office of the Governor. To invite the Governor to an event or to request a meeting with the Governor please access his website at [www.governor.oregon.gov](http://www.governor.oregon.gov) and click on "Contact Us" and then click on the PDF link at the top "How to Invite the Governor to Your Event." This will take you to the instructions on formatting your request. Once your request has been formatted according to these guidelines please email it to [schedoffice@das.state.or.us](mailto:schedoffice@das.state.or.us) or fax it to 503-378-8970.

Amy Powell

Citizens' Representative Assistant

-----Original Message-----

From: [denecemessenger@comcast.net](mailto:denecemessenger@comcast.net) [mailto:[denecemessenger@comcast.net](mailto:denecemessenger@comcast.net)]  
Sent: Tuesday, December 22, 2009 11:54 AM  
To: [representative.citizen@state.or.us](mailto:representative.citizen@state.or.us)  
Subject: Improper DEQ conduct

Below is the result of your feedback form. It was submitted by  
<[denecemessenger@comcast.net](mailto:denecemessenger@comcast.net)> on Tuesday, December 22, 2009 at 11:54:12

-----  
first\_name: DENECE

last\_name: MESSENGER

guest\_street: 17590 SW FULTON DR.

guest\_city: TUALATIN

guest\_state: OR

guest\_zip: 97062

guest\_phone: 503-510-4029

message: I would like to have a face-to-face meeting with the Governor concerning improper regulatory actions taken against me and my property for over four years.

DEQs conduct is currently the topic of a DEQ Ombudsman investigation. The official Ombudsman report that will be issued in advance of the meeting. I would like to personally meet with the Governor in mid-January.

## **Denece Messenger**

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**From:** <governor@state.or.us>  
**To:** <denecemessenger@comcast.net>  
**Sent:** Tuesday, December 22, 2009 11:54 AM  
**Subject:** confirmation of Improper DEQ conduct

Thank you for sharing your ideas and concerns. I believe citizen input is vital to a strong and healthy society and I urge your continued involvement. Should your comments require an additional response, appropriate staff will contact you. I look forward to hearing from you in the future.

Sincerely,  
Theodore R. Kulongoski  
Governor

**Denece Messenger**

**From:** "HILLWIG Rebecca" <Hillwig.Rebecca@deq.state.or.us>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>; <peter.mohr@tonkon.com>  
**Sent:** Wednesday, February 16, 2011 11:15 AM  
**Subject:** FW: DEQ OMBUDSMAN REQUEST FOR A MEETING WITH THE GOVERNOR AT HIS EARLIEST CONVENIENCE!

FYI

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**From:** HILLWIG Rebecca  
**Sent:** Friday, February 11, 2011 3:53 PM  
**To:** OLEARY Joe \* GOV; 'curtis.robinhold@state.or.us'  
**Subject:** FW: DEQ OMBUDSMAN REQUEST FOR A MEETING WITH THE GOVERNOR AT HIS EARLIEST CONVENIENCE!  
**Importance:** High

Mr. O'Leary and Mr. Robinhold,

I would first like to say that Unoda Moyo, Senior State HR Management Consultant from the Dept of Administrative Services - Human Resource Services Division (DAS-HR) was extremely thorough and very pleasant to work with during his investigation on January 27, 2011. However, Mr. Moyo's responsibilities lie with the "position" of the Ombudsman within the Dept of Environmental Quality (DEQ), and not with the merits of the Ombudsman case and investigation, or the subsequent report I issued in May of 2010 covering Ms. Messenger's complaint regarding DEQ's misconduct.

The Ombudsman case and final report had little to do with the investigation by DAS-HR. Mr. Moyo was concerned specifically with the placement of the Ombudsman within the hierarchy of the DEQ, and how the Ombudsman and the autonomy of the position could potentially be compromise due to its nature and location within the Agency. Mr. Moyo, in his capacity as an HR Consultant, could not, nor does he have the ability in his position, to address the concerns regarding DEQ's conduct uncovered during my Ombudsman investigation, and documented within my May 2010 report. Although the harassment I felt in the position of the Ombudsman may be within the DAS-HR purview, the review of the complaint investigation regarding DEQ's conduct towards Decorative Bark Products and Ms. Messenger, and how DEQ management has chosen to deal with the outcome of my investigation and report, cannot be resolved within the confines of DAS-HR.

As I mentioned in my earlier e-mails, although the future of the Ombudsman within DEQ is an important discussion to be had by many interested and affected parties, this particular dilemma is only a part of the issue I am asking the Governor's office to address, and assist in resolving. It is of extreme importance that DEQ management be held accountable for their actions in this small business case, for the documented staff and management biases they demonstrated towards Decorative Bark Products and its owner Ms. Messenger, and that my investigation and subsequent report be taken seriously. If DEQ is not held accountable and therefore does not take responsibility for its actions as an agency, then DEQ management will continue to believe itself to be above reproach by anyone, including the Ombudsman, at which time this position and its autonomy will have been compromised, and the small business community ignored.

2/16/2011

I understand why you felt the Department of Administrative Services (DAS) should be consulted about this case as it is after all the umbrella agency under which DEQ resides. However, I feel it is necessary to inquire as to how the Governor's office intends to proceed with this case, or to monitor the outcome of this case, if it is passed along to DAS without a set of checks and balances to keep the issues from dying.

As DEQ management continues to balance their need for concealment with the State's desire for transparency, the issues brought forward in the Ombudsman report, the strength of this Agency's credibility with the Governor and with the community, and its commitment to human health and the environment, continue to be in question. DEQ will persist in protecting their decisions, unless pressed, because they make many decisions for the wrong reasons. This Ombudsman case is a perfect example of focusing time and resources on something that provides little to no environmental benefit, because Agency management and staff lost their professional objectivity.

I am also concerned about the lengthened timeframe this referral could result in, since this case, and its inherent problems have been ongoing now for more than 2 years with no resolution. Additional weeks and or months of investigation through DAS is disconcerting to me and others, and appears less than suitable in this case, since DEQ management has been able to dodge this bullet in the past within the confines of the Agency umbrella.

With that said, I am wondering if you can shed some light on how the Governor's office intends to proceed with this case through DAS, and if you have any idea how long it might take DAS staff to address this issue? Although you may have referred the case and it's resolution to DAS, I believe it is extremely important that the Governor's office remain involved in this case, since the outcome for the State, this agency, and the community, will either benefit or impair future relations with their constituency.

I again wish to thank you for your time, and hope that you understand the validity of my statements in this matter.

Respectfully,  
Rebecca

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**From:** OLEARY Joe \* GOV [mailto:joe.oleary@state.or.us]  
**Sent:** Saturday, January 15, 2011 10:00 AM  
**To:** HILLWIG Rebecca  
**Subject:** RE: DEQ OMBUDSMAN REQUEST FOR A MEETING WITH THE GOVERNOR AT HIS EARLIEST CONVENIENCE!

Ms. Hillwig:

I have asked staff at the Department of Administrative Services to contact you in order to ensure that we understand the nature of the issues you are raising and can take appropriate action if needed.

Regards,  
Joe

**Joseph O'Leary**  
**General Counsel**  
**Office of the Governor**

2/16/2011

I understand why you felt the Department of Administrative Services (DAS) should be consulted about this case as it is after all the umbrella agency under which DEQ resides. However, I feel it is necessary to inquire as to how the Governor's office intends to proceed with this case, or to monitor the outcome of this case, if it is passed along to DAS without a set of checks and balances to keep the issues from dying.

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I am also concerned about the lengthened timeframe this referral could result in, since this case, and its inherent problems have been ongoing now for more than 2 years with no resolution. Additional weeks and or months of investigation through DAS is disconcerting to me and others, and appears less than suitable in this case, since DEQ management has been able to dodge this bullet in the past within the confines of the Agency umbrella.

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I again wish to thank you for your time, and hope that you understand the validity of my statements in this matter.

Respectfully,  
Rebecca

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**From:** OLEARY Joe \* GOV [mailto:joe.oleary@state.or.us]  
**Sent:** Saturday, January 15, 2011 10:00 AM  
**To:** HILLWIG Rebecca  
**Subject:** RE: DEQ OMBUDSMAN REQUEST FOR A MEETING WITH THE GOVERNOR AT HIS EARLIEST CONVENIENCE!

Ms. Hillwig:

I have asked staff at the Department of Administrative Services to contact you in order to ensure that we understand the nature of the issues you are raising and can take appropriate action if needed.

Regards,  
Joe

**Joseph O'Leary**  
**General Counsel**  
**Office of the Governor**

2/16/2011



**Denece Messenger**

**From:** "HILLWIG Rebecca" <Hillwig.Rebecca@deq.state.or.us>  
**To:** <denecemessenger@comcast.net>; <peter.mohr@tonkon.com>  
**Sent:** Wednesday, January 19, 2011 2:50 PM  
**Attach:** Ombudsman and case e-mail string-RH&ND.docx; Decorative Bark PEN Withdrawal 4-30-10.pdf; Closure of current issue-Cardwell.docx; Directive to Submit Incomplete Ombudsman Report-for Gov.pdf; Directive to Submit Incomplete Ombudsman Report-Grievance-toGov.pdf; Status of the Ombudsman within DEQ and the Decorative Bark case-for Gov.pdf  
**Subject:** FW: DEQ OMBUDSMAN REQUEST FOR A MEETING WITH THE GOVERNOR AT HIS EARLIEST CONVENIENCE!

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**From:** HILLWIG Rebecca  
**Sent:** Friday, January 14, 2011 12:37 PM  
**To:** OLEARY Joe \* GOV  
**Subject:** RE: DEQ OMBUDSMAN REQUEST FOR A MEETING WITH THE GOVERNOR AT HIS EARLIEST CONVENIENCE!  
**Importance:** High

Mr. O'Leary (Joe),

Thank you so much for your prompt reply to my e-mail to Mr. Robinhold. I would like to clarify some of the issues for you with regards to Decorative Bark, the Ombudsman report and the position of the Ombudsman within DEQ. I am also sending new "unblocked" documents for your review, as I believe they and a few others will convey my concerns regarding DOJ's legal review of the issues surrounding the Decorative Bark Products (DBP) facility, and the DEQ Ombudsman as mentioned.

It has been my understanding, and that of Ms. Messenger (owner of the DBP facility) and her attorney, that the issues surrounding DBP and the DEQ Ombudsman position have not been under legal consideration by DEQ or DOJ since April of 2010. I am attaching an e-mail string between Nina Deconcini, NW Region Administrator and myself, describing the withdrawal of both the 2006 and 2008 Pre-Enforcement Notices. In addition, I have attached the letter from DEQ management to Ms. Messenger dated April 30, 2010, officially confirming the withdrawal, and that no future enforcement would be considered with regards to these actions.

The third document is a recent e-mail sent to Ms. Messenger via DEQ staff on January 10th, informing Ms. Messenger that DEQ had wrapped up their investigation regarding dust, and that DEQ considered the case closed.

I would also like to clarify that the Tort Claim filed against DEQ regarding their conduct in this case has long since expired.

Given this information, I am a bit confused by your understanding, as expressed, and by what is meant by "issues regarding this facility and the role of the Ombudsman position within DEQ are under legal consideration by the Oregon Department of Justice." Although I believe that DEQ needs to work with myself and others to further outline the role of the DEQ Ombudsman, this position is federally mandated by congress through the 1990 Clean Air Act.

Although I respect your position and that of the Governor and his Chief of Staff, there have been no checks on DEQ's authority since day one with this facility and its owner. Nor is there any way to confirm or be assured of appropriate DEQ conduct in this or any other case, since management chooses to see this position and the details of the case as adversarial, instead of as a way to except some measure of failure and make improvements. I have also felt and continue to feel, that the autonomy of the DEQ Ombudsman is extremely important and necessary in order for it to continue to be one of the checks for this agency.

I am asking again, respectfully, that based upon "your" judgment, and that of the Governor and his Chief of Staff, that you not rely solely on the information being delivered through the DOJ's office or potentially DEQ, but instead use this opportunity to deal with this issue of your own accord. The DOJ has made it clear on more than one occasion, that they intend to protect DEQ. DEQ management will also be protecting themselves and their decisions from refute. It is for this reason, and the fact that there seems to be no external recourse for me outside this Agency, that I am afraid my position may in some way be sabotaged.

If I could speak to you briefly about this I would very much appreciate it. I also have much more documentation regarding this case and my treatment within DEQ, as does Ms. Messenger and her attorney. I would also again like to emphasize that the treatment of this facility and its owner have not been, nor will it be exclusive to her, and that many fellow business owners and neighbors will be looking to see what happens with regards to this matter.

With all due respect to your office and the Governor, I thank you for your time and attention to this matter and am available for any conversation.

Thank you,

Respectfully,

Rebecca Hillwig

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**From:** OLEARY Joe \* GOV [mailto:joe.oleary@state.or.us]

**Sent:** Thursday, January 13, 2011 3:48 PM

**To:** rebecca.hillwig@state.or.us

**Subject:** FW: DEQ OMBUDSMAN REQUEST FOR A MEETING WITH THE GOVERNOR AT HIS EARLIEST CONVENIENCE!

**Importance:** High

Ms. Hillwig:

Curtis Robinhold, Governor Kitzhaber's Chief of Staff, asked me to respond to your email (below) from yesterday regarding the Department of Environmental Quality. Thank you for forwarding the information about the issues concerning Decorative Bark Products. Our understanding is that issues regarding this facility and the role of the Ombudsman position within DEQ are under legal consideration by the Oregon Department of Justice. Though I cannot arrange a meeting with you at this time, please know that your concerns with respect to Director Peterson will be taken into consideration by the appropriate staff.

Regards,  
Joe

Joseph O'Leary  
General Counsel  
Office of the Governor  
o: 503-378-8636  
c: 503-559-1277

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**From:** HILLWIG Rebecca [mailto:]  
**Sent:** Wednesday, January 12, 2011 11:39 AM  
**To:** curtis.robinhold@state.or.us  
**Subject:** DEQ OMBUDSMAN REQUEST FOR A MEETING WITH THE GOVERNOR AT HIS EARLIEST CONVENIENCE!  
**Importance:** High

Chief of Staff Robinhold,

I am contacting you via e-mail because I cannot yet find a phone contact for you.

My name is Rebecca Hillwig and I am the Small Business Assistance Program Coord and the **Small Business Ombudsman** for the Dept of Environmental Quality (DEQ). This position is within the Air Quality Division and is mandated by federal statute in the 1990 Clean Air Act. I have been working in this capacity since June of 2006.

In September of 2008 a small business contacted me regarding the conduct of DEQ management and staff, the exercise of their enforcement authority, and the abuse of this authority leading ultimately to a complaint of harrassment on the part of DEQ towards this small business and its operations.

I conducted an investigation of the alegations and have been working on this issue over the last two years. My Ombudsman report was issued to the current DEQ Director, Dick Pedersen and to the small business owner in May of 2010. The matter was also discussed back in 2008 and 2009 with then Senator Metsger, who agreed with the complainant and her lawyer that the business was being harrassed, and instructed DEQ management to work with the business to negotiate a settlement. In 2009 and 2010 the case and the report were discussed several times with Senator Devlin as the small business owner resides within his District. A copy of the report was given to the Senator via Ms. Messenger, the small business owner.

For the past several months, DEQ management has instructed staff not to discuss with me, issues surrounding Ms. Messenger, and as a result DEQ has managed to keep me outside the loop of correspondence regarding this business. In November of 2010, Senator Devlin asked DEQ management to respond to several questions of concern. Although I did not receive Director Pedersen's response via DEQ, I was able to review the letter, thanks to Senator Devlin's office and Ms. Messenger. Based on my experience and my investigation of this case, I must truthfully say that the Director's letter contains several non-factual statements made regarding this case, and the steps DEQ has taken to remedy this issue to the satisfaction of all parties.

In light of this e-mail and the documents provided, I have a twofold message. To alert you and the new Governor about my role as the DEQ Ombudsman and the diminished value of this position within the DEQ, and to allow you an opportunity to review and possibly address this issue early on in this Governor's administration.

As you will see from several of the documents attached, Director Pedersen had full knowledge of what was going on throughout this process and chose to allow others to try and deal with the issue. I am writing this today, hopefully before decisions and announcements are made by the Governor regarding agency heads. However, I can tell you through experience with this case, DEQ current management and my interactions with Ms. Messenger and her attorney, that regardless of what course of action is taken over the next few weeks regarding the appointment of the DEQ Director, this issue and the story will not go away, and will likely, if all other avenues fail, be given to the media.

With regard to the attached documents. They are not long and will provide you and the Governor with the necessary background information to understand my concerns regarding; management of DEQ, the manner in which the Agency is using its enforcement authority, the excessive amount of resources DEQ is bringing to bear on this small business in relation to significant violators within the state, and the future of the Ombudsman's role within the Agency.

The first four documents are directly from my Ombudsman report and are attached as background. The fifth document is a letter I sent to Senator Devlin in December because of additional issues occurring between DEQ, my position and the small business. The sixth and seventh documents cover the following:

As a result of my work on this case, and my interactions with DEQ management, I was compelled to write a response to an e-mail from DEQ upper management outlining reasons for a grievance to be filed by me in the event the situation became worse. That e-mail was copied to several people including Senator Devlin, my union representative, the Ombudsman for the National Small Business Administration, the EPA Small Business Ombudsman and staff, DEQ Director Pedersen, Deputy Director Joni Hammond, NW Region Administrator Nina Deconcini, Larry Knudsen from the Attorney General's Office, my manager, the small business owner Ms. Messenger, and her attorney Peter Mohr of TonkonTorp. This e-mail is document six.

Document seven is DEQ management's response to my grievance e-mail and my rebutal to Ms. Deconcini.

I sincerely hope as you and the Governor review these documents that you will understand my motives, and that you will find it important for you and the new Governor to take action. I, like the governor, am passionate about the environment and human health, and the protection of both. I would be the first to be critical of any entity who chose to turn a blind eye to their impact on Oregon's natural beauty. These actions on the part of DEQ, are not what it will take to make Oregon an environmental leader in the nation. They are not what will build trust and commitment within our communities. They are not what will make Oregon's small businesses strong and accountable for their actions, and they are not what is needed to protect the least of our citizens.

I want to thank you and the Governor for your time. I would also like to ask for a meeting with you and the Governor at your earliest convenience to discuss this issue further, as it is ongoing. As a matter of respect for his time, I would also like to extend the invitation to Senator Devlin as the Co-Chair of the Ways and Means Committee to be present at the meeting if he is so inclined. Please feel free to call me at 503-229-5376 if that is easier for you.

Thank you again.

Respectfully,

**Rebecca Hillwig**

DEQ Air Quality

Small Business Tech Asst Program Coord/Small Business Ombudsman

811 SW Sixth Ave

Portland, OR 97204

phone: 503-229-5376

fax: 503-229-5675

**Denece Messenger**

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**From:** "Denece Messenger" <denecemessenger@comcast.net>  
**To:** "HILLWIG Rebecca" <Rebecca.Hillwig@state.or.us>; "Peter Mohr" <peter.mohr@tonkon.com>;  
"Denece Messenger" <denecemessenger@comcast.net>  
**Sent:** Tuesday, September 21, 2010 5:56 AM  
**Subject:** DEQ Visit

Rebecca and Peter:

I received a call yesterday from Nancy Caldwell who says the day she was operating the complaint phone, a call came in from Boring about dust. She said that DEQ decided she should stick with the complaint and not assign it elsewhere. She said at the very beginning of the conversation that she "has purposely been told nothing about DBP as to not color her opinion and she can remain objective." However, later in the conversation she said that Nina Deconcini had told her that there had been "Issues with DBP in the past and a number of other agents have been out there."

She told me that she and the lab are coming out and wanted to put a sticky on site to see if they collect dust. I told her she was very welcomed to come on site and that I would enjoy showing her around. We are meeting at 10 am on Tuesday, Sept. 21. She says that they are going to collect dust from the area and have it analyzed at the lab.

I plan to tell her that she can put up stickies wherever she wants on the perimeter of the property. If this is a test about migrating dust, we should have them on the outside of the property to see if it is truly migrating....don't you agree.

Two things that were of concern: They did not include the Ombudsman. I will follow up with that. Also, she said the complaintant wants to remain anonymous. The complaintant did not name DBP according to the initial report. I will be curious to see if they actually named me according to Nancy. If there is a contradiction.....

Also, the two other mills that are on site, were not contacted as potentials.

Denece Messenger  
President - Decorative Bark Products, Inc.  
503-510-4029  
[denecemessenger@comcast.net](mailto:denecemessenger@comcast.net)

**Denece Messenger**

---

**From:** "CARDWELL Nancy" <CARDWELL.Nancy@deq.state.or.us>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>  
**Cc:** "CARDWELL Nancy" <CARDWELL.Nancy@deq.state.or.us>  
**Sent:** Tuesday, December 28, 2010 3:27 PM  
**Attach:** Boring Wind Rose - entire sampling period.jpg; Boring Dust Study 2010.xlsx; Boring Wind Rose - 1st sampling period.jpg; Boring Wind Rose - 4th sampling period.jpg; 20101019AR.pdf; 20100939AR.pdf  
**Subject:** Sampling Reports  
Hello Denece,

Attached are the final reports of the Boring Dust study done in October 2010, plus some other supporting information and data summaries. The purpose of the sampling was to help identify particulate fallout reported by a local resident near your operations. There were five sampling locations (plus a duplicate). Included are reports for two of the four sampling events; Sept 29 -- Oct 3, and October 15 -- October 21, 2010. The other two events have not been analyzed as they were determined to be of limited value due their short length of exposure and the foggy and damp weather conditions at the time.

DEQ sampled for particles greater than 250 microns in size, pursuant to DEQ's Particulate Fallout Limitation rule OAR 340-208-0450 which states: "No person may cause or permit the emission of particulate matter larger than 250 microns in size at sufficient duration or quantity as to create an observable deposition upon the real property of another person when notified by the department that the deposition exists and must be controlled." DEQ did not find a significant number of particles greater than 250 microns. However, sampling sites 2 and 3 had the highest deposition of particulate matter and points more to the bark yard as the source. Additionally, the samples were taken in wetter weather (October).

The "wind rose" plots information about wind speed and direction. Wind speeds during the sampling period were generally low. In the wind rose plots the longer and darker the cones, the more wind came from that direction, and the stronger it was. Most of the time the wind was light and from the North or South, which could account for the higher impacts at sites 2 and 3.

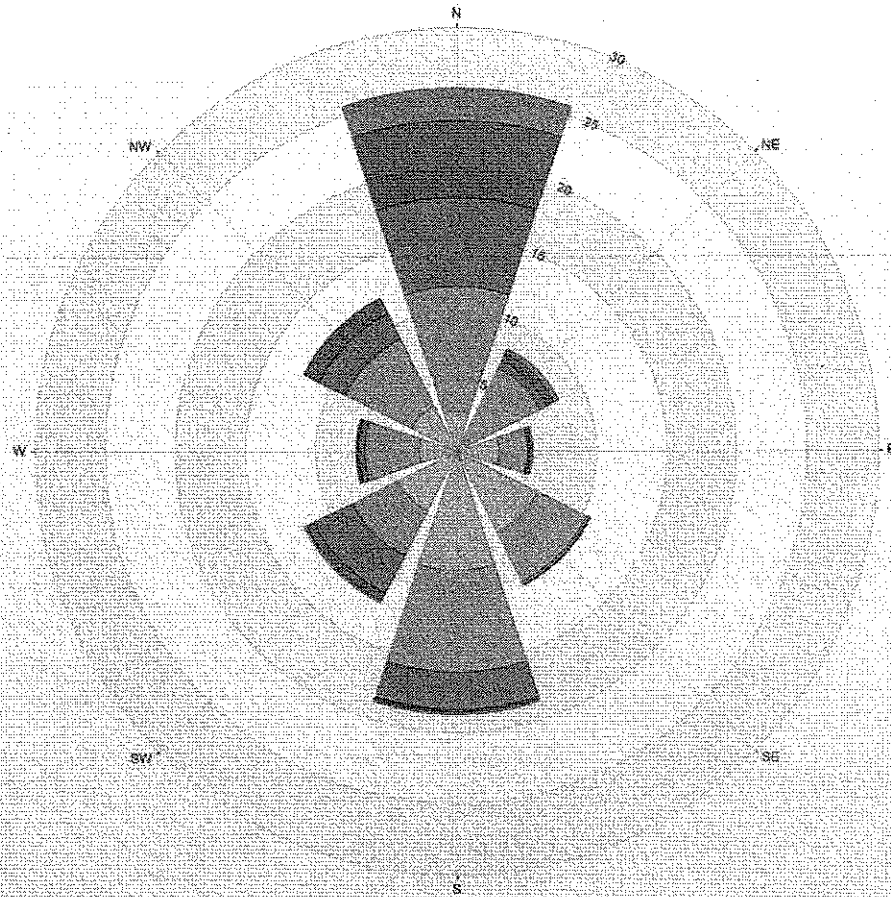
The sampling is one tool to help gather information to better understand the nature of the particles in the air. We do not intend to pursue further action at this time, but maintain the responsibility of complaint response. We are encouraged to know you have been in communication with the complainant and have come to an agreement to work together when there is an issue. We thank you for your effort and cooperation.

If you have questions about these reports please give me a call. Thank you.

Nancy Cardwell  
Oregon DEQ, Air Quality, Northwest Region  
(503) 229-6610

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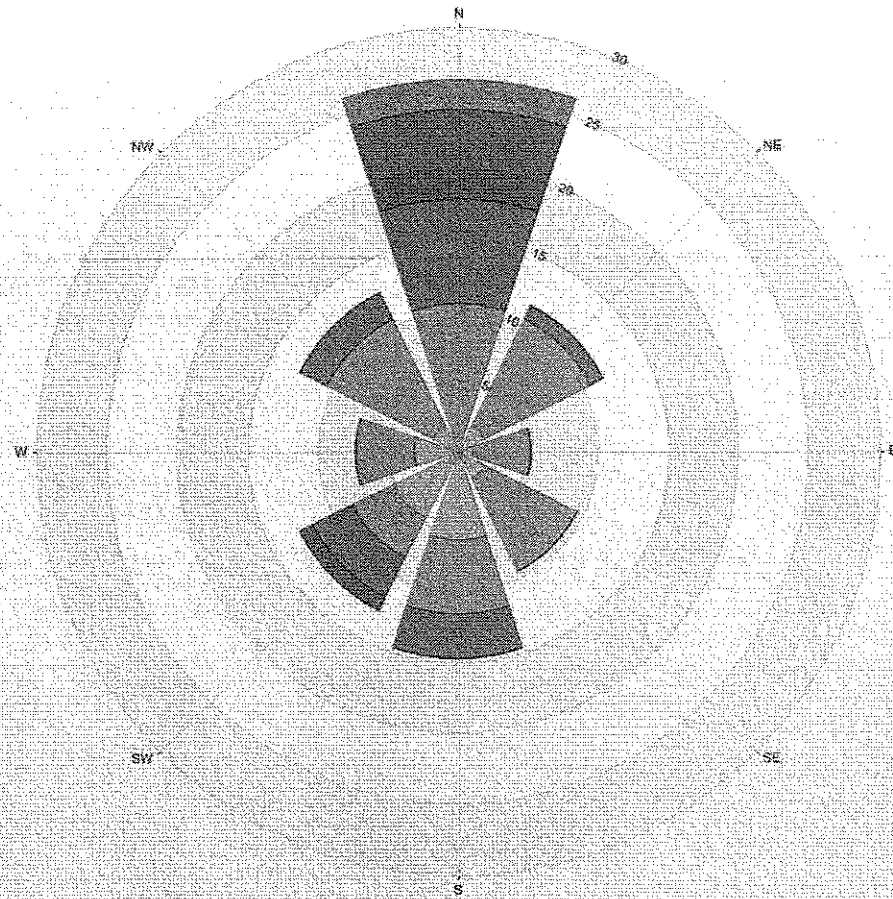
Boring Garden Center 9/29/2010 1:00 PM - 10/21/2010 1:00 PM Calm: 0.0%



% from Sectors	33	41	15	8	3
0.500-1.500					
1.500-3.000					
3.000-4.500					
4.500-6.000					
>6.000					

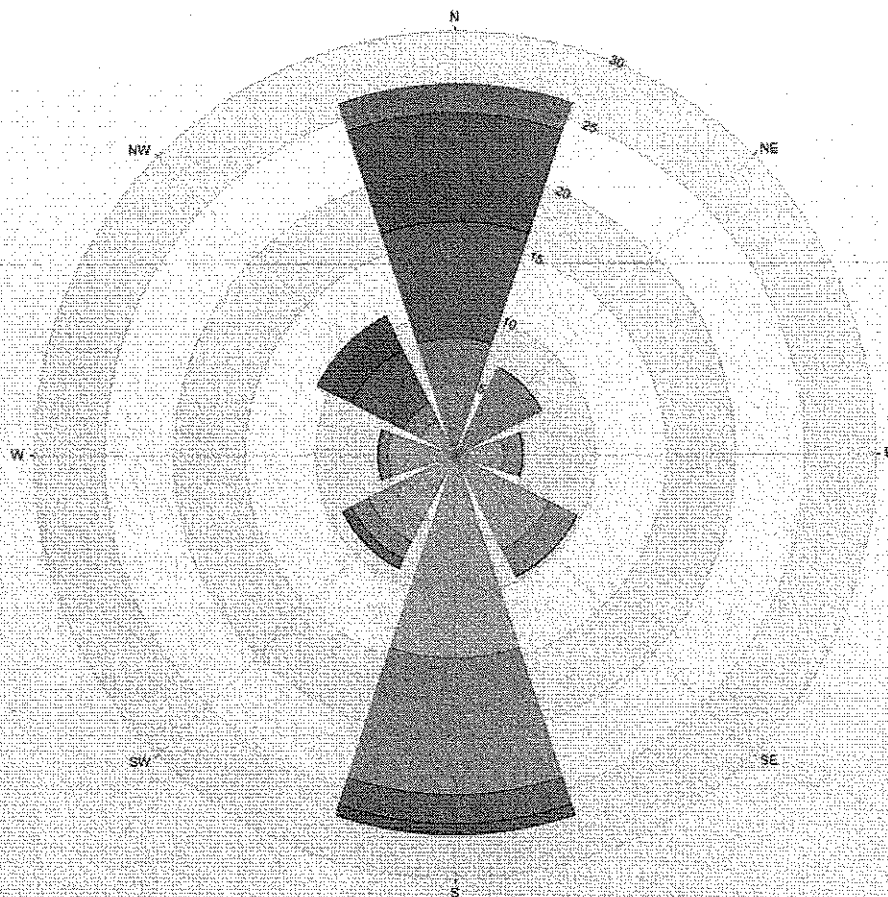


Boring Garden Center 9/29/2010 1:00 PM - 10/3/2010 11:00 AM Calm: 0.0%



% from Sectors	23	34	17	7	2
0.500-1.500					
1.500-3.000					
3.000-4.500					
4.500-6.000					
>6.000					

Boring Garden Center 10/15/2010 1:00 PM - 10/21/2010 1:00 PM Calm: 0.0%



% from Sectors	41	31	15	11	2
0.500-1.500					
1.500-3.000					
3.000-4.500					
4.500-6.000					
>6.000					

**Denece Messenger**

---

**From:** "Denece Messenger" <denecemessenger@comcast.net>  
**To:** "CARDWELL Nancy" <CARDWELL.Nancy@deq.state.or.us>; "HILLWIG Rebecca" <Hillwig.Rebecca@deq.state.or.us>; "Peter Mohr" <peter.mohr@tonkon.com>; "Denece Messenger" <denecemessenger@comcast.net>  
**Sent:** Wednesday, January 05, 2011 3:37 PM  
**Subject:** Recap final

Nancy:

I sent you an earlier email in haste. I appologize this is my busy season in meeting with customers and providing prices and I was flying out the door in a hurry. So, I now have had a chance to catch my breath, collect my thoughts and regroup. I concur with everything I said earlier, however, this format is easier to read.

I feel it is necessary to recap our conversation so there is clarity on both of our parts. Unfortunately, the past is very much a part of why we are here. I know that frustrates you but the reality is that DEQ has spent many years, thousands of dollars and countless man hours monitoring and ultimately attempting to find violations at my facility. After atleast 150 visits, by more than a dozen different DEQ field agents, our facility remains compliant. DEQ continues to speak contradictions and point fingers without science to back it up. This has not changed since they began this charade some five years ago. With the issuance of this latest report and DEQ's conclusion that somehow our facility is responsible for bark dust on the Boring Garden Center only says DBP is in for more harassment and therefore more of the same. This is why I feel the issuance of this latest report not only solves nothing but actually makes matters even worse, something which I did not think was possible.

As for the new round of tests, I am confirming that there was nothing found at Delondro's, nothing found at Dean Rupau's and the only particulate found was upwind from my facility at Boring Garden Center. It was not a notable amount, but there was something. The report stated that dust at BGC "points to the DBP barkyard." In our conversation yesterday, I informed you that **upwind** and, within view of BGC, are two bark production yards. You acknowledged, to your credit, that such operations and therefore their potential to be the source of any bark dust located downwind at the BCG, were not even factored into the report. Also, I informed you that no less than 40 semi-trucks or trucks of that size travel in front of BGC every day. They are in route to one of the five bark companies in Boring and take HWY 212 to get there to either deliver or pick up barkdust products. Since none of these circumstances were factored in to DEQ's analysis, you asked for the names of the other bark companies.

I also expressed concern that there was no "control" and no factoring in for road dust along such a busy highway. DBP is located no less than three blocks away, downwind by even DEQ's own analysis of BGC. It is also worth noting that between DBP and BGC there are about 5 businesses that would also be impacted before any material from DBP reached BGC.

I also expressed concern that DEQ says that they will not bring any enforcement action. I find that absurd since where there is no evidence of a violation, there is nothing to enforce. What it also says is that DEQ has taken the position that our Boring facility is in violation. Nothing has changed. This is just more of the same conduct against DBP that Senator Metsger himself characterized as harassment more than two years ago.

When we discussed that nothing was found at the towers of the complainant, Dean Rupau's home, you mentioned that it was not a good time of year to perform the tests as the weather was changing and that the only reason you moved forward was to get a "baseline" level of information. The only thing that was shown by the study was the direction of prevailing winds during the periods in question and the fact that such winds did not speak to DBP as a source of barkdust on BGC and that there is no basis to believe any migration occurred of site from the DBP facility.

As I told you, DEQ director Dick Pedersen told Senator Devlin that the new complainant called in about Decorative Bark. When I told you Pedersen was wrong you still mentioned that the complainant named Decorative Bark. I gave you a recounting of the facts that came down. On July 30 at 9:32 am I got a call from Doug McGriff of McGriff Lumber who said he got a call from DEQ which wanted to check into a complaint about dust. I called the DEQ Ombudsman, Rebecca Hillwig and I called Jeff Bowers of Bowers

Forest Products and said that there was a complaint about sawdust migration. Bowers told me he has worked out a deal with his neighbors. I told McGriff to invite DEQ out. Then as told to me later by the complainant, Dean Rupau, DEQ asked him if the dust was red and he said yes which DEQ responded, "It's Decorative Bark and we have had issues out there." Rupau admitted that he did not even know who was in his backyard and yet DEQ still felt it appropriate to point the finger at DBP, with no evidence.

I also read you part of a letter that Dick Pedersen wrote last week to Senator Devlin stating that DBP will not engage in Best Work Practices. I explained to you that as of 2004, I have implemented several Best Work Practices along with other reasonable precautions. DEQ refuses to acknowledge what I've done and Pedersen and Nina Deconcini continue to tell lawmakers and the Governor that I've done nothing. The DEQ Ombudsman, however, disagrees. Pedersen also told the Senator that "Heavy amounts of barkdust have been observed on the neighboring property." I explained that the observers were Susan Patterson and Dan Murphy. Neither was able to enter ONE PICTURE of such evidence into the courts nor did they ever complete samples to confirm whether the alledged material was even barkdust.

So, Nancy, you have been brought into a situation with a lot of history. I truley believe you want to be objective and want to fix this. Unfortunately, this newest round only heightens my concerns that nothing has changed even after all that DEQ has dragged my company through and the adverse opinions of the agency's conduct as stated by its own Ombudsman. My little tiny bark yard has hundreds of thousands of dollars in scrutinty and man hours and money and I am still baffled as to why. DEQ treats it like it's Chernoble. I can't figure out why. One-Hundred-and -fifty-plus visits , more than a dozen different DEQ field agents, hundreds of man hours and thousands of dollars and nothing. So, while I don't think you can fix the bigger problem that is DEQ management. I do think you can address the lack of legitimacy of this report.

Denece Messenger  
President - Decorative Bark Products, Inc.  
503-510-4029  
[denecemessenger@comcast.net](mailto:denecemessenger@comcast.net)

**Denece Messenger**

---

**From:** "CARDWELL Nancy" <CARDWELL.Nancy@deq.state.or.us>  
**To:** "Denece Messenger" <denecemessenger@comcast.net>  
**Cc:** "SMITH Jeffrey M" <SMITH.Jeff@deq.state.or.us>; "DECONCINI Nina" <Nina.Deconcini@state.or.us>; "JOHNSON Keith" <JOHNSON.Keith@deq.state.or.us>  
**Sent:** Monday, January 10, 2011 2:40 PM  
**Subject:** RE: Recap final  
 Hi Denece,

Thank you for your email. I appreciate that we've had open communication and numerous conversations about the dust complaint from your neighbor (Mr. Dean Rupae) and follow-up sampling event.

While DEQ respectfully disagrees with many of the conclusions in your email below, DEQ has wrapped up the investigation of this complaint, and from our perspective, the matter is closed.

Nancy

---

**From:** Denece Messenger [mailto:denecemessenger@comcast.net]  
**Sent:** Wednesday, January 05, 2011 3:37 PM  
**To:** CARDWELL Nancy; HILLWIG Rebecca; Peter Mohr; Denece Messenger  
**Subject:** Recap final

Nancy:

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Denece Messenger  
President - Decorative Bark Products, Inc.  
503-510-4029  
[denecemessenger@comcast.net](mailto:denecemessenger@comcast.net)

## BETTS Lesley

---

**From:** GRUNOW Greg  
**Sent:** Thursday, August 28, 2008 10:09 AM  
**To:** 'Derek deLandro'  
**Cc:** MURPHY Daniel E; DRUBACK Ed; DECONCINI Nina; PATTERSON Susan; 'Kenn McManus'; 'jimtait3@excite.com'; 'jimtait@taitlaw.com'  
**Subject:** RE: de Landro home 08-27-08 trespass

Good Morning Derek and Family,

I am so sorry that you folks have had to regularly experience and clean up messes like this. At the moment I can only tell you that we are actively pursuing this case. If you have not cleaned up after this latest mess yet, I'd like to ask you to hold off until Dan can come by and document it. He will be leaving our office shortly. I hope to be able to share more information on our progress with this case soon.

Respectfully,  
Greg Grunow  
ODEQ Northwest Region  
Eastside Office  
503-667-8414 x55015  
[grunow.greg@deq.state.or.us](mailto:grunow.greg@deq.state.or.us)

-----Original Message-----

**From:** Derek deLandro [<mailto:derekd@duckdelivery.com>]  
**Sent:** Thursday, August 28, 2008 9:17 AM  
**To:** GRUNOW Greg  
**Cc:** MURPHY Daniel E; DRUBACK Ed; DECONCINI Nina; PATTERSON Susan; Kenn McManus; jimtait3@excite.com; jimtait@taitlaw.com  
**Subject:** de Landro home 08-27-08 trespass

Good Morning Greg & Dan

After leaving town for a brief 4 day vacation this is what we came home to last Tuesday afternoon 08-26-08. Our upper deck, several areas around our driveway and basketball hoop were our 4 year old son plays are covered with Bark Dust Particulate matter from Decorative Bark Products. This is very typical when we have weather that is mixed with sun and rain. Yesterday when I came home my wife mentioned that the smell was so bad at around 3:30 pm that she and our son came in the house to get away from it. The wind was blowing right toward our home.

Now I ask, what is being done about this. We are trying to sell our home to move away from this trespass and abuse. But as my attorney once said "I would not buy your home for any price with that bark company and the dust on your home and property" now that's encouraging!

I know that DEQ is trying to do something, why is the land owner Vanport not being held responsible? Is there another government agency that can get involved, EPA?

Please advice, our family should not have to endure this!

823

825

1 things clean so that he doesn't have to be touching in his  
2 pool and, you know, worried about him getting it in his mouth  
3 or his face, or the anxiety of just cleaning things up on a  
4 constant basis when I should be doing other things with my  
5 family, anxieties of trying to -- wanting to move. Like I --  
6 my husband had stated before, after we built the house and the  
7 first summer, we had already knew that the house was going to  
8 go on the market this last January, and that January had come  
9 and past now.

10 Q. Are you concerned about what's going to happen when  
11 you try to sell your house?

12 A. Yeah. Yeah. I've learned now that now we have to  
13 disclose all the matters and the issues of the out -- what's  
14 happening on the outside.

15 Q. Why is that?

16 A. Why is that? Because you have to disclose what's  
17 happening so that somebody else that comes in and sees that  
18 there's a problem can't turn around and sue me because I  
19 didn't tell them that this was happening on the house.

20 Q. Now, Mr. Lafky in a question to your husband  
21 suggested that you and your husband care more about staying at  
22 the property than you do about the welfare of your  
23 three-year-old child. And I want to ask you, is that a fair  
24 characterization by Mr. Lafky --

25 MR. LAFKY: Objection --

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1 Q. -- of how you --

2 MR. LAFKY: -- to the form of the question, Your  
3 Honor.

4 MR. TAIT: I have to finish the question, Judge.

5 Q. Is that a fair characterization of the process you  
6 went through and the feelings you feel about your  
7 three-year-old child?

8 MR. LAFKY: Same objection.

9 THE COURT: Overruled.

10 A. Say that again. That was really long.

11 Q. It was interrupted, too.

12 A. Sorry.

13 Q. Mr. Lafky has suggested through his questioning of  
14 your husband that you care more about the house and staying  
15 there than you do for the welfare of your three-year-old  
16 child, and I want you to tell this jury whether or not that's  
17 a fair characterization about how you and your husband feel  
18 about your child and the problems you -- he's having.

19 A. No, that's not --

20 MR. LAFKY: Same objection, Your Honor. I haven't  
21 suggested anything. I've asked questions.

22 THE COURT: It's still overruled.

23 A. That is not true. As I just stated, we had  
24 already, after realizing what was happening with the property  
25 and knowing -- and having my doctor tell me about the -- the

1 particulate matter intake of our young son, we had already  
2 decided to put the house on the market and move.

3 MR. TAIT: Thank you. That's all I have of this  
4 witness, Your Honor.

5 THE COURT: Cross-exam.

6 MR. LAFKY: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. LAFKY:

9 Q. Miss de Landro, let's start with the last things  
10 first. Before speaking with your doctor, you did not  
11 understand that if your child breathed any form of dust, that  
12 that would be bad for him?

13 A. We're not talking about dust. You were asking  
14 me -- we're -- my doctor had talked about bark particles.

15 Q. Did you think your child breathing any form of dust  
16 would be potentially bad?

17 A. On a huge factor.

18 Q. I'm sorry. What?

19 A. If it's a massive amount of dust, it could be  
20 harmful to anybody

21 Q. The emotional distress that you claim in this case  
22 from Decorative Bark, your doctor testified a couple of days  
23 ago that you'd had some other issues. Is that correct?

24 A. That's true.

25 Q. She diagnosed you with postpartum depression after

826

1 the birth of your son; is that correct?

2 A. That's what she stated.

3 Q. Well, is it correct that you agree with that?

4 A. I'm not sure that I personally would have called it  
5 postpartum depression, but she did, yes.

6 Q. She noted that you had some issues that you brought  
7 up with her regarding your step-children?

8 A. Yes. There's always issues with step-children.

9 Q. And then you had a potentially tragic situation  
10 where your father was missing?

11 A. Quite a few years ago, yes. My dad went what I  
12 would say MIA for a period of time.

13 Q. And that's right about the time your doctor first  
14 prescribed these medications that you continue to take,  
15 correct?

16 A. The -- yes.

17 Q. Now, when you were building your home in Boring,  
18 you and your family lived in Troutdale, correct?

19 A. Yes, we did.

20 Q. How long did you live in Troutdale?

21 A. Roughly six months.

22 Q. During the entire time you lived in Troutdale, did  
23 you continue to take the Ambien and the Xanax?

24 A. Periodically, yes.

25 Q. You weren't exposed to Decorative Bark while you



## MURPHY Daniel E

**From:** DRUBACK Ed  
**Sent:** Wednesday, June 18, 2008 9:33 AM  
**To:** MURPHY Daniel E  
**Subject:** RE:

I would say a site visit would be in order and if necessary follow up enforcement

---

**From:** MURPHY Daniel E  
**Sent:** Wednesday, June 18, 2008 8:49 AM  
**To:** DRUBACK Ed  
**Subject:** FW:

*June 18-2008  
Dan called Delandro  
Are you being impacted?*

Hey Ed,

Sandi has CC'd you on this email and another from the sixth of June about these bark piles on Decorative Bark Property. I called the Delandro's and asked if they are being impacted again and they stated that it can be worse than it was prior to the litigation. Due to the continuing practices of Decorative Bark Products they are moving and are having a very hard time selling the home due to this impact. They are currently only showing the home on the weekends when operations are at a minimum. They are still having problems selling the house though and the biggest concern Derick stated was the impact from the bark business.

How do we handle this one?

-----Original Message-----

**From:** SMITH Sandi  
**Sent:** Tuesday, June 17, 2008 4:26 PM  
**To:** MURPHY Daniel E  
**Cc:** 'DRUBACK Ed'; PATTERSON Susan  
**Subject:**

<< File: P1010027.JPG >> << File: P1010022.JPG >> << File: P1010024.JPG >>

**Sandi Smith**

Oregon Department of Environmental Quality

Air Quality Permits & Compliance

1550 NW Eastman Pkwy #290

Gresham, Oregon 97030

503/667-8414 x55017

Please consider the Environment before printing this e-mail

**Claim: Decorative Bark has migrating dust.**

312 Susan Patterson says under oath: "Reddish bark dust is covering just about everything."

Truth: DEQ has no pictures or scientific evidence that bark has migrated off-site. Not one picture of migrating dust or a plume was entered in court.

Proof:

755

Lafkey Q)..."we've seen hundreds of photographs, we've seen a videotape, we've seen a CD. Is there any picture that you brought to trial that shows, in your mind, this bark dust on or near your home in the air?"

DeLondro A)" Not from our property, I haven't taken a picture of that."

Lafkey Q) "Why not?"

DeLondro A)" I couldn't....to be honest.....sir, I wouldn't know what.....I haven't. I've taken pictures from Wally Road showing the dust in the air, DEQ's been over and taken pictures."

756

Lafkey Q) "How many times have you gone out to take photographs of something that in your mind relates to Decorative Bark?"

Delondro A)" Could be 15-20 times. I've taken pictures from our property, from Hannah's property, Wally Road, Lori and Stacey that live over off of Spring Street, the gentleman that lives off 286....."

344

Patterson     **"You know, that stuff is very hard to capture on film. It's really hard to get accurate documentation sometimes, as you can see. That's why we weren't able to follow through with our other warning letters." (Patterson)**

326

Patterson     **A)"We had pictures from all sorts of angles. We...probably did start off taking some on his property (DeLondro), and as we moved to the next small little....little road taking more pictures and then onto the neighbor's property and took pictures."**

**Proof:           Not one picture showing migrating dust was entered as evidence.**

**Manager, Boring Water District-Larry Alexander checks water meters in Delondros neighborhood monthly. Water District supply depot located Vanport campus.**

546

Lafkey         Q)" Is your office or are your vehicles regularly coated with any kind of bark dust from Decorative Bark's operations that you can see?"

**Alexander     A) None that's ever happened. It's never, ever happened.**

Lafkey         Q) "When you go through the Decorative Bark site three to four times a day, do you see big clouds of bark dust in the air, red dust, anything of that nature?"

**Alexander     A) "I've never observed that, no. Usually, they've got sprinklers running and it keeps it pretty well wet, but I've never seen clouds of dust ever."**

### Declaration of Vicki Bidema

I, Vicki Bidema, declare:

1. The followings statements are true and correct, and, if called upon, I could competently testify to the facts averred herein.
2. My husband, Clifford Bidema and I reside on and are owners of real property located at 12799 SE Burt Lane, Boring, Oregon, 97009, and which is identified in the records of the Clackamas County Assessor's office as Tax Lot number 900/Parcel No. 00649150, Clackamas County, Oregon (hereinafter "the Property") The Property contains numerous improvements including a house with a deck facing west.
3. We purchased the Property and all appurtenant improvements on September 22, 2008 from the former owners, Derek and Stephanie de Landro (hereinafter "the Sellers").
4. Prior to purchasing the Property, on September 11, 2008, we had an inspection completed for the house and adjoining garage which revealed no health or safety issues. Also prior to purchase, we visited the Property twice, on September 6 and 7<sup>th</sup>, 2008. At no time during these visits to the property did I or my husband ever witness any deposit of bark dust, or what would appear to be bark dust, covering any portion of the Property. At no time during this period that we investigated the Property in advance of the purchase, did the Sellers ever disclose, either verbally or in writing, to me or my husband that the Sellers themselves, or the Sellers' use and enjoyment of the Property, ever suffered from the migration of dust or other air emissions of any kind from any source.
5. At no time since the purchase of the Property have I or my husband ever witnessed any deposit or accumulation of bark dust, or what would appear to be bark dust, covering any portion of the Property. In addition, since our purchase of the Property, neither I nor my husband possess any personal knowledge of any events which consisted of the migration of bark dust, or what would appear to be bark dust, from any direction onto our Property or onto any other area within our neighborhood.
6. Prior to our purchase of the Property, the title company identified a lien against the Property for the benefit of Decorative Bark Products, Inc. in the amount of \$2,500.00 which was removed at closing. No information was disclosed by Sellers as to the reason for the lien. Furthermore, nor did I possess any reason to believe the lien affected the Property in consideration of Sellers' affirmative written statement that there were no conditions that adversely affected the value of the Property.

Dated this 23<sup>rd</sup> day of February, 2009.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it may be made for use as evidence in court and is subject to penalty for perjury.

Vicki L Bidema