

**Date:** June 2, 2011

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director

**Subject:** Agenda item E, Action item: Contested case nos. WQ/OI-WR-09-144 and WQ/OI-WR-09-203 regarding AAA American Eagle Services, LLC, dba Hank's Septic Service and Lebanon/Sweet Home Septic Tank Service  
June 15-17, 2011, EQC meeting

**Introduction** The Oregon Department of Environmental Quality implements environmental protection laws. Most people voluntarily comply with the laws; however, DEQ may assess civil penalties and orders to compel compliance or create deterrence. When persons or businesses do not agree with DEQ's enforcement action, they have the right to an appeal and a contested case hearing before an administrative law judge.

On Dec. 11, 2009, DEQ issued the respondent a Notice of Revocation of Onsite Sewage Disposal Service Provider's License. This was case number WQ/OI-WR-09-203. On Dec. 16, 2009, DEQ issued the respondent a Notice of Civil Penalty Assessment and Order to Comply, case number WQ/OI-WR-09-144, alleging five violations and assessing civil penalties for all violations.

The violations included (1) installing an onsite sewage disposal system or part thereof without first obtaining the required permit; (2) installing an onsite sewage disposal system or part thereof (on a different property) without first obtaining the required permit; (3) failure to provide required origin-destination documents (showing septage pumped and disposed of) within 14 days of DEQ's request; (4) performing sewage disposal services without first obtaining the required license; and (5) allowing an uncertified installer to supervise or be responsible for the construction or installation of an onsite system or part thereof,

The respondent appealed the notice, and on July 6, 2010, a contested case hearing was held. Administrative Law Judge A. Bernadette House issued a Proposed and Final Order on Nov. 22, 2010, and on Dec. 21, 2010, the respondent petitioned EQC for review of that order.

In its exceptions and brief, the respondent requests that the commission adopt

alternate findings of fact and alternate conclusions of law, and reverse Judge House's conclusions. In its answering brief, DEQ requests that the commission uphold the order.

**DEQ  
recommendation  
and EQC motion**

DEQ recommends that the commission issue a final order adopting Judge House's order.

**Background and  
Findings of Fact**

In the order, Judge House found that during Dec. 2008 through Jan. 2009, the respondent, through Michael Cross, managing partner, purchased two existing wastewater disposal businesses.<sup>1</sup> Lisa Fincher is a licensing specialist for DEQ, licensing septic pumpers and installers, and on Dec. 8, 2008, Cross contacted Fincher regarding the process for transferring previously purchased DEQ licenses for sewage disposal services from another company to itself.

On Dec. 9, 2008, and again on Dec. 29, 2008, Fincher sent the respondent the required forms and other information, including links, for the requirements for transferring permits or getting new permits.<sup>2</sup> On Dec. 29, 2008, DEQ emphasized to Cross that the business was not licensed and should not be doing any business in Oregon.<sup>3</sup>

On Jan. 6 and 7, 2009, the respondent performed septage pumping services for addresses in Lebanon and disposed the septage at the City of Lebanon and the North Albany Site treatment plants. The respondent was not licensed by DEQ during that time.<sup>4</sup> DEQ issued the respondent a license Jan. 12, 2009, and notified Cross at that time that the transferred licenses would expire June 30, 2009.<sup>5</sup>

On June 30, 2009, the respondent's license expired.<sup>6</sup> DEQ received the respondent's application for renewal on July 2, 2009, but did not issue the license because the application was incomplete and not paid in full.<sup>7</sup>

From July 6, 2009, through July 13, 2009, while the respondent was not licensed, it brought two trucks with septic waste for disposal at the City of Salem septic waste disposal station.<sup>8</sup> The city received three additional loads from the respondent before it told the respondent that it could no longer use

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<sup>1</sup> Proposed and Final Order, page 3, finding of fact number 1.

<sup>2</sup> Proposed and Final Order, page 4, finding of fact number 4-5.

<sup>3</sup> Proposed and Final Order, page 4, finding of fact number 7.

<sup>4</sup> Proposed and Final Order, page 5, finding of fact number 11.

<sup>5</sup> Proposed and Final Order, page 6, finding of fact number 16.

<sup>6</sup> Proposed and Final Order, page 6, finding of fact number 17.

<sup>7</sup> Proposed and Final Order, page 6, finding of fact number 17.

<sup>8</sup> Proposed and Final Order, page 6, finding of fact number 20.

the Salem station because it did not have a valid DEQ license.<sup>9</sup>

On July 2, 2009, DEQ sent the respondent a letter requesting copies of its origin-destination records for March 1, 2009, through May 31, 2009. Per OAR 340-071-0600(13)(d), the respondent must submit the records to DEQ within 14 days from the date of the letter.<sup>10</sup> Despite additional requests from DEQ, the respondent did not submit the requested records until May 2010. The respondent offered no explanation for the delay in producing the records.<sup>11</sup>

On or about June 1, 2009, June McCready, owner of property located at 38355 Weirich Drive Lebanon, Oregon, contacted Cross, who visited the property that day and pumped the septic tank.<sup>12</sup> Michael Hamer is a licensed provider of onsite services in Linn County. On or about July 15 or 16, 2009, Hamer saw the respondent's truck being driven through Lebanon with materials for septic system installation. Hamer called Linn County and found that the respondent had not pulled any installation permits.<sup>13</sup>

The next day, Hamer followed the respondent's truck to the Lebanon property. Hamer's employee took pictures of the work and talked to the individual operating the respondent's track hoe and digging drainfield equipment. When Hamer's employee asked, the operator said that he worked for the respondent. Hamer could see that new infiltrator units had been installed in addition to approximately 200 feet of drainfield.<sup>14</sup> DEQ subsequently learned that this employee was not certified to install onsite sewage disposal systems.<sup>15</sup>

Jan Heron, environmental wastewater specialist for Linn County, researched the county database and found that there had been no permits issued for the Lebanon property work. Heron then forwarded Hamer's statement and the photographs to DEQ.<sup>16</sup>

On July 6, 2009, David McCready, the Lebanon property owner's son, told Linn County staff said that he had asked the respondent's employee on the site if the respondent had a permit for the work. In response, the respondent's employee had told McCready that it was a repair and that no permit was

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<sup>9</sup> Proposed and Final Order, page 7, finding of fact number 21.

<sup>10</sup> Proposed and Final Order, page 6, finding of fact number 18.

<sup>11</sup> Proposed and Final Order, page 6, finding of fact number 19.

<sup>12</sup> Proposed and Final Order, page 7, finding of fact number 22.

<sup>13</sup> Proposed and Final Order, page 7, finding of fact number 23.

<sup>14</sup> Proposed and Final Order, page 7, finding of fact number 24.

<sup>15</sup> Proposed and Final Order, page 13, finding of fact number 68.

<sup>16</sup> Proposed and Final Order, page 7, finding of fact number 26-27.

needed.<sup>17</sup>

On or about July 23, 2009, Cross came to Linn County to pick up the application for an “emergency repair” permit. Heron informed Cross that work performed as an emergency repair required that the person performing the work had to submit an application within three days of performing the work. Heron also told Cross that the work permitted under such a permit had to be minor repair. During the conversation, Cross denied installing any disposal field.<sup>18</sup>

The June 19, 2009, invoice from the respondent to Ms. McCready included excavator work, parts, jetting, and drainfield work for a total balance of \$5,162.00.<sup>19</sup>

Rick Partipilo is the supervisor of Linn County’s onsite permitting program, and in his opinion, the June 19, 2009, invoice appears to be for installation of a drainfield. The work detailed in the invoice falls under a major repair, requiring more than a minor repair permit. Photographs of the work performed show a drainfield installation in progress. As of June 22, 2009, no permit had been issued for the installation work.<sup>20</sup>

On Oct. 15, 2009, Heron met with Cross and others at the Lebanon site. Heron noted corrections that were needed.<sup>21</sup> Heron documented that the respondent’s work was not approvable for permitting as the installation was too deep. Installation at too deep a level does not adequately protect the groundwater and can cause a danger to human health.<sup>22</sup> In addition, a portion of the drainfield was located under the driveway, making it vulnerable to damage by vehicles, which could cause direct sewage discharge to the ground and back up into the system. Driveway usage also causes soil compaction issues and limits the system’s ability to exchange gas efficiently enough for permit approval.<sup>23</sup>

On or about June 12, 2009, Jessica Joye, onsite wastewater specialist for the City of Salem, was notified of a complaint regarding the respondent from Janice Endicott, the owner of property located at 11085 State Street, Salem, Oregon.<sup>24</sup>

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<sup>17</sup> Proposed and Final Order, page 8, finding of fact number 29.

<sup>18</sup> Proposed and Final Order, page 8, finding of fact number 30.

<sup>19</sup> Proposed and Final Order, page 9, finding of fact number 39.

<sup>20</sup> Proposed and Final Order, page 9, finding of fact number 40.

<sup>21</sup> Proposed and Final Order, page 9, finding of fact number 38.

<sup>22</sup> Proposed and Final Order, page 10, finding of fact number 42.

<sup>23</sup> Proposed and Final Order, page 10, finding of fact number 43.

<sup>24</sup> Proposed and Final Order, page 10, finding of fact number 45.

Endicott reported that on May 3, 2009, her tenants at the Salem property hired the respondent to pump the septic tank at the property.<sup>25</sup> Cross then told tenants that additional work was needed. On May 5, 2009, the owner called Cross, who said that additional work was needed, including two additional lines for drainage of the distribution field.<sup>26</sup>

On May 22, 2009, the owner investigated the work at her property, took pictures, and on May 26, 2009, left the respondent a message about her dissatisfaction with the work. That same day Cross called Endicott, who confirmed with him that no permit had been issued. Cross stated that the county allowed work to be done in an emergency situation and that this was an emergency situation for which a permit was not required because of the sewage backup.<sup>27</sup>

On June 10, 2009, the owner contacted Marion County about the respondent's activities and found that the respondent had not been issued a permit.<sup>28</sup> On June 10, 2009, the owner met with Cross, who stated that he would not be getting a county permit because the work was only temporary and a permit was not required. The respondent failed to provide the owner with an invoice, despite numerous requests. Cross threatened to have the system condemned, and informed the owner that the respondent's attorney would put a lien on the house for the unpaid amount for the work and for attorney fees.<sup>29</sup>

On June 11, 2009, the owner received from her tenants a detailed summary regarding their observations and interactions with Cross and the employee who performed the work. The respondent began work on May 6, 2009, and continued through May 15, 2009. The tenants confirmed again that Cross had told them no permit was needed.<sup>30</sup>

On June 12, 2009, the owner sent the notes about and the photographs of the work done to Marion County. The county then contacted DEQ and forwarded copies of documentation of the work performed at the Salem property.<sup>31</sup>

Emergency permits do not cover drain field work. Applicants may apply for

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<sup>25</sup> Proposed and Final Order, page 10, finding of fact number 46.

<sup>26</sup> Proposed and Final Order, page 10, finding of fact number 47.

<sup>27</sup> Proposed and Final Order, page 11, finding of fact number 48-50.

<sup>28</sup> Proposed and Final Order, page 11, finding of fact number 53.

<sup>29</sup> Proposed and Final Order, page 11, finding of fact number 54.

<sup>30</sup> Proposed and Final Order, page 12, finding of fact number 56.

<sup>31</sup> Proposed and Final Order, page 12, finding of fact number 57.

emergency permits up to 72 hours after the work is performed. The respondent did not apply for an emergency permit within 72 hours for work at the Salem property.<sup>32</sup>

On July 2, 2009, Joye visited the Salem property and observed that the photographs correlated with her observations. She observed that the respondent had installed approximately 100 lineal feet of infiltrator, and that the drainfield installed was not to code. The drainfield was within 40 feet of a pond that emptied into a year-round creek on the property, and within 60 feet of the creek. The drainfield did not meet the setback requirements from either the pond or the creek as required under DEQ rules. The work was not to the required depth, which could impede the proper functioning of the system. In addition, the tenants had used the system prior to proper repair and permitting, which increased the potential harm from allowing sewage to reach the creek or pond.<sup>33</sup>

Despite several opportunities and reminders that he needed a license for onsite sewage disposal, the respondent continued to conduct activities without coming to DEQ for a license or to make any good faith effort to come into compliance.<sup>34</sup>

Following his purchase of the business, the respondent sought training in the industry, including traveling out of state, and among other things, becoming a member of, and attending the symposium of, the National Association of Waste Transporters, which sets industry wide standards. Cross also subscribes to relevant industry publications.<sup>35</sup>

**Conclusions of the  
administrative law  
judge**

On Nov. 22, 2010, Judge House issued a Proposed and Final Order. Judge House concluded that:

(1) The respondent's work on the septic system at the Salem property and at the Lebanon property without the required permits violated ORS 454.655(1) and OAR 340-071-0130(15)(a), and constituted a Class I violation according to OAR 340-012-0060(1)(b). DEQ's proposed civil penalty of \$2500 for each violation is appropriate.

(2) The respondent failed to provide its origin-destination documents within 14 days following DEQ's July 2, 2009 request, for work performed March 1, through May 31, 2009 under license numbers 35378 and 33315 in violation of OAR 340-071-0600(13)(d) which is a Class II violation according to OAR

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<sup>32</sup> Proposed and Final Order, page 12, finding of fact number 58.

<sup>33</sup> Proposed and Final Order, page 12, finding of fact number 59-60.

<sup>34</sup> Proposed and Final Order, page 14, finding of fact number 71-72.

<sup>35</sup> Proposed and Final Order, page 14, finding of fact number 74.

340-012-0053(2). DEQ's proposed civil penalty of \$1,375 is appropriate.

(3) The respondent's conduct between Jan. 1, 2009 through Jan. 8, 2009 in pumping and then disposing of at least 21,000 gallon of sewage at 1624 Christmas Tree Lane, Albany, Oregon without a license to perform onsite sewage disposal services violated ORS 494.695(1) and is a Class II violation according to OAR 340-012-0060(1)(a). DEQ's proposed civil penalty of \$2,125 is appropriate.

(4) The respondent's conduct in allowing an uncertified employee to perform the work at the Lebanon property, violated OAR 340-071-0650(1)(a), and is a Class II violation according to OAR 340-012-0060(2)(g). DEQ's proposed civil penalty of \$875 is appropriate.

(5) DEQ may revoke the respondent's Onsite Sewage Disposal Service Provider's license, based on the respondent's violations of ORS chapter 494 and OAR chapter 340 division 071.

#### **Issues on appeal**

##### **1. The appropriate penalty for violation one**

###### *The respondent's argument:*

The respondent admits that it committed violation one - causing the construction, alteration, or repair of an onsite system or any part thereof without a permit - but argues that the judge incorrectly calculated the penalty for this violation. The respondent argues that it installed the drainfield without applying for a permit because it was confused about the relevant rules concerning permit requirements under "emergency repair" situations.<sup>36</sup> The respondent argues that its ignorance of the rules is a mitigating factor in the penalty that should reduce its mental state for the violation.

###### *DEQ's argument:*

DEQ responds that the respondent is a licensed onsite sewage disposal service provider and is or should be aware that "emergency repair" is defined in the applicable rules. This rule specifically excludes "new or additional absorption facilities," such as drainfields, from the scope of emergency repair work. Furthermore, DEQ responds, the respondent took approximately ten days to install the drainfield, which is inconsistent with the nature of "emergency repairs" that can only be undertaken without a permit in order to prevent sewage from backing up into a dwelling or to repair a broken sewer pipe, and undermines the respondent's claim that it believed digging a drainfield was emergency work that did not require a permit. In fact, the respondent did not apply for a permit within 72 hours, as the rule requires, or

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<sup>36</sup> The respondent's Exceptions, page 3.

at all.<sup>37</sup>

Additionally, the record shows that when the Salem property owner and tenants raised the issue, on at least three occasions, of whether a permit was required, the respondent did not investigate the issue and denied that a permit was required.<sup>38</sup> Therefore, DEQ argues, Judge House was correct to find that the respondent had been informed of the permit requirement through multiple contacts with DEQ and committed violation one recklessly.<sup>39</sup>

## 2. The appropriate penalty for violation two

### *The respondent's argument:*

The respondent admits that it committed violation two - causing the construction, alteration, or repair of an onsite system or any part thereof without a permit - but argues that Judge House incorrectly calculated the penalty for this violation. The respondent argues that it performed emergency work for which it obtained a minor repair permit instead of the major repair permit that was required, implying that it simply applied for the wrong permit before starting the work.<sup>40</sup>

### *DEQ's argument:*

DEQ responds that the record contradicts the respondent's claim that it applied for a permit before starting work at the Lebanon property. Instead, the record shows that the respondent installed the drainfield on or prior to July 17, 2009,<sup>41</sup> but did not submit any permit application until July 30, 2009.<sup>42</sup>

DEQ also responds that the respondent committed violation two at about the same time it committed violation one, committing the same violation of an unpermitted installation at each property. These were not isolated incidents but, rather, part of a pattern of installing inappropriate and unacceptable drainfields without going through the permit process designed to avoid such improper installations.<sup>43</sup> In committing violation two, the respondent consciously disregarded the rules governing drainfield installations and permit requirements, and the penalty for violation two is correct and should be upheld.<sup>44</sup>

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<sup>37</sup> DEQ's Answering Brief, Pages 2-3.

<sup>38</sup> DEQ's Answering Brief, Page 3.

<sup>39</sup> DEQ's Answering Brief, Page 3.

<sup>40</sup> The respondent's Exceptions, page 3.

<sup>41</sup> Proposed and Final Order, page 7, finding of fact 23 and 24.

<sup>42</sup> Proposed and Final Order, page 8, finding of fact 31.

<sup>43</sup> DEQ's Answering Brief, Page 5.

<sup>44</sup> DEQ's Answering Brief, Page 4.



### 3. The appropriate penalty for violation three

#### *The respondent's argument:*

The respondent admits that it committed violation three - failing to make origin-destination records for sewage disposal services rendered available for review - but argues that the judge incorrectly calculated the penalty for this violation. The respondent argues that it did not know what records DEQ was requesting, and therefore the judge should have reduced the mental state for this violation from reckless.<sup>45</sup>

#### *DEQ's argument:*

DEQ responds that Judge House properly found the respondent's mental state to be reckless as The respondent had actual knowledge of DEQ's specific request because DEQ sent the respondent a letter on July 2, 2009, requesting copies of its origin-destination records for March 1 through May 31, 2009, and provided the applicable rule as authority for the request (OAR 340-071-0600(13)(d)).<sup>46</sup> The judge did not agree with the respondent's argument that the request was confusing.<sup>47</sup> The respondent also did not provide the required records until May 2010, despite DEQ's repeated requests, and provided no excuse for its delay.<sup>48</sup> The record shows that the respondent had numerous opportunities to comply, and consciously disregarded the risk that in failing to comply with DEQ's request it would commit violation three. This penalty is correct and should be upheld.<sup>49</sup>

### 4. The appropriate penalty for violation four

#### *The respondent's argument:*

The respondent admits that it committed violation four - performing onsite sewage disposal services without a license - but argues that Judge House incorrectly calculated the penalty. The respondent explains that it was confused by the license transfer process after its purchase of a previously-licensed business. The respondent argues that its confusion should reduce its mental state for this violation from reckless.<sup>50</sup>

#### *DEQ's argument:*

DEQ responds that violation four concerns a period well beyond when the respondent handled the license transfer. The respondent completed the transfer

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<sup>45</sup> The respondent's Exceptions, page 2.

<sup>46</sup> Proposed and Final Order, page 26.

<sup>47</sup> *Id.*

<sup>48</sup> Proposed and Final Order, page 6, finding of fact 19.

<sup>49</sup> DEQ's Answering Brief, Page 5.

<sup>50</sup> The respondent's Exceptions, page 2.

process - with substantial help from DEQ staff - between Dec. 2008 and Jan. 2009.<sup>51</sup> The respondent's license expired June 30, 2009, but the respondent's July 2, 2009, renewal application was incomplete and not paid in full.<sup>52</sup> Fincher spoke with the respondent's employee on July 6, 2009, and informed the employee that the respondent was not licensed and should not be conducting business.<sup>53</sup> However, the respondent then performed sewage disposal services on at least six different dates between July 6 and July 13, 2009.

Judge House summarized this timeline of events by stating "(t)he record established at hearing shows that, despite many contacts with DEQ personnel informing it of the need to have a license and of the process to obtain either the transfer of the existing licenses or to obtain a new license, The respondent knowingly and repeatedly provided onsite sewage disposal services without a license."<sup>54</sup>

#### 5. Whether DEQ's revocation of the respondent's license is proper

##### *The respondent's argument:*

The respondent argues that the proposed revocation of its license should be reversed. The respondent's main arguments are that it will improve its business practices in the future, the proposed revocation would cause an increase in the rates for its current customers as there would be less competition for the services it offers, and that the Santiam River watershed and the environment will be harmed by the revocation.<sup>55</sup>

##### *DEQ's argument:*

DEQ responds that Judge House correctly applied the following standard for revocation: "DEQ may revoke or suspend a license if it determines, as in the current matter, that a licensee has failed to comply with applicable provisions of ORS chapter 454 or has violated any rule of the Environmental Quality Commission regarding sewage disposal services. ORS 454.715(2) and (3)."<sup>56</sup> The respondent committed at least five violations of these rules, therefore DEQ has the authority to pursue revocation.

First, regarding the respondent's commitment to improving its business practices, the record shows that the respondent's violations were committed prior to August 2009. However, on March 22, 2010, the Construction Contractor's Board for Oregon found that the respondent committed two

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<sup>51</sup> Proposed and Final Order, pages 4-5, finding of fact 4-8.

<sup>52</sup> *Id.*

<sup>53</sup> Proposed and Final Order, page 6, FOF 18.

<sup>54</sup> Proposed and Final Order, page 31.

<sup>55</sup> The respondent's Exceptions and Brief, page 4.

<sup>56</sup> Proposed and Final Order, page 30.

violations of its laws in November 2009 and February 2010, well after the violations alleged by DEQ.<sup>57</sup> This conduct demonstrates that the respondent did not seek to comply with the laws following DEQ's proposed revocation action, and committed new violations of law. Judge House correctly reasoned that the respondent's history illustrates its inability or unwillingness to comply with DEQ's laws and regulations.<sup>58</sup>

Second, regarding potential harm to the respondent's customers if its license is revoked, DEQ responds that the respondent has a pattern of harming its customers through its incompetent work. The record shows that the respondent repeatedly misrepresented to the tenants and the owner of the Salem property that a permit was not required, and the owner of the Salem property had to hire another licensed installer to complete the work the respondent failed to properly perform.<sup>59</sup>

At the Lebanon property, the respondent allowed an uncertified installer to install that septic system, thereby committing violation five.<sup>60</sup> This installer installed the drainfield too deeply and under a driveway.<sup>61</sup> As with the Salem property, the owner of the Lebanon property had to hire another licensed installer to correct the mistakes made by the respondent.<sup>62</sup> If the respondent's license is revoked, other customers will not be subjected to similar unlawful service. The record also shows that both these customers were able to hire other licensed providers to correct and complete the work the respondent started illegally.

Finally, DEQ responds that the respondent introduced no evidence to support its theory that if its license is revoked, prices for services will rise, causing the Santiam River watershed to be harmed through customers failing to service and maintain their onsite systems.<sup>63</sup>

**EQC authority**

The commission has the authority to hear this appeal under OAR 340-011-0575.

DEQ's contested case hearings must be conducted by an administrative law judge.<sup>64</sup> The Proposed and Final Order was issued under current statutes and rules governing the administrative law judge panel.<sup>65</sup>

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<sup>57</sup> Proposed and Final Order, page 14, finding of fact 69.

<sup>58</sup> Proposed and Final Order, page 31.

<sup>59</sup> Proposed and Final Order, page 13, finding of fact 61.

<sup>60</sup> Proposed and Final Order, page 28.

<sup>61</sup> Proposed and Final Order, page 10, finding of fact 42-43.

<sup>62</sup> Proposed and Final Order, page 9, finding of fact 38.

<sup>63</sup> DEQ's Answering Brief, Page 8.

<sup>64</sup> ORS 183.635.

Under ORS 183.600 to 183.690, the commission's authority to change or reverse an administrative law judge's Proposed and Final Order is limited.

The most important limitations are as follows:

1. EQC may not modify the form of the administrative law judge's Proposed and Final Order in any substantial manner without identifying and explaining the modifications.<sup>66</sup>
2. EQC may not modify a recommended finding of historical fact made by the administrative law judge assigned from the Office of Administrative Hearings unless it determines that there is clear and convincing evidence in the record that the finding was wrong.<sup>67</sup> Accordingly, EQC may not modify any historical fact unless it has reviewed the entire record or at least all portions of the record that are relevant to the finding.
3. EQC may not consider any new or additional evidence, but may only remand the matter to the administrative law judge to take the evidence.<sup>68</sup>

The rules implementing these statutes also have more specific provisions addressing how commissioners must declare and address any ex parte communications and potential or actual conflicts of interest.<sup>69</sup>

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

1. EQC will not consider matters not raised before the administrative law judge unless it is necessary to prevent a manifest injustice.<sup>70</sup>
2. EQC will not remand a matter to the administrative law judge to consider new or additional facts unless the proponent of the new evidence has properly filed a written motion explaining why evidence was not presented to the hearing officer.<sup>71</sup>

## Alternatives

When reviewing a proposed final order in an enforcement case, the commission may have one or more of the following alternatives, depending on the nature of the case, the specific issues raised in the petition for review, and whether a proper motion to allow additional evidence has been filed.

These alternatives are that:

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<sup>65</sup> ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.

<sup>66</sup> ORS 183.650(2).

<sup>67</sup> ORS 183.650(3). A historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist either before or at the time of the hearing.

<sup>68</sup> OAR 137-003-0655(5).

<sup>69</sup> OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.

<sup>70</sup> OAR 340-011-0132(3)(a).

<sup>71</sup> *Id.* at (4).

1. The commission may issue an order affirming the judge's proposed order.
2. The commission may change or add a conclusion of law. If this approach is taken, the commission is required to explain why it has found the judge's conclusions to be insufficient or incorrect based on evidence in the record.
3. The commission may change a finding of historical fact. This may be done only if the commission has reviewed the record and determined, based on clear and convincing evidence in the record, that the judge's finding of historical fact is incorrect.
4. The commission may determine that the judge's proposed order does not adequately address an issue in the case and ask the judge to revise the proposed decision, either with or without reopening the hearing for the purpose of considering additional argument or taking additional evidence.
5. If a timely motion to allow additional evidence into the record has been filed and the commission decides to grant the motion, the commission must ask the Judge to conduct a further hearing and provide an opportunity for the respondent or DEQ to submit the additional evidence and DEQ or the respondent to submit a rebuttal evidence.

If the commission has questions about whether a particular alternative applies to a particular issue in the case, it may request that DEQ and the respondent address the matter in their oral arguments and it may direct questions to the commission's legal counsel.

**Attachments**

- A. Letter from Stephanie Clark to respondent, dated May 5, 2011.
- B. Respondent's Answering Brief, received May 3, 2011.
- C. Letter from Stephanie Clark to respondent, dated April 14, 2011.
- D. DEQ's Answering Brief, dated April 13, 2011.
- E. Letter from Stephanie Clark to respondent, dated April 8, 2011.
- F. Letter from Stephanie Clark to respondent, dated March 15, 2011.
- G. Respondent's exceptions and brief, received March 14, 2011.
- H. Letter from Stephanie Clark to respondent, dated March 7, 2011.
- I. Letter from respondent to Stephanie Clark, dated March 7, 2011.
- J. Letter from Stephanie Clark to respondent, dated Jan. 25, 2011.
- K. Letter from respondent to Stephanie Clark, dated Jan. 19, 2011.
- L. Letter from Stephanie Clark to respondent, dated Dec. 22, 2010.

- M. Respondent's petition for commission review, received Dec. 21, 2010.
- N. Proposed and Final Order, dated Nov. 22, 2010.
- O. Letter from Leah Koss to Chief Judge Forsythe, dated Oct. 29, 2010.
- P. Amended Notice of In-Person Hearing, dated June 24, 2010.
- Q. Email from Judge House to Bryan Smith and R. Grant Cook, dated June 23, 2010.
- R. Letter from Judge House to R. Grant Cook and Bryan Smith, dated June 22, 2010.
- S. Letter from Grant Cook to Judge House and Bryan Smith, dated June 17, 2010.
- T. Notice of In-Person Hearing, dated May 21, 2010.
- U. Letter from Judge House to R. Grant Cook and Bryan Smith, dated May 20, 2010.
- V. Notice of Status Conference, dated May 14, 2010.
- W. Letter from Judge House to Alec Laidlaw, dated May 14, 2010.
- X. Notice of Pre-Hearing Conference, dated May 13, 2010.
- Y. Email from Michael Cross to Judge House, dated May 13, 2010.
- Z. Email from Bryan Smith to Michael Cross and Judge House, dated May 13, 2010.
- AA. Email from Bryan Smith to Alec Laidlaw and Judge House, dated May 13, 2010 (and attached to an email from Alec Laidlaw to Judge House and Bryan Smith, dated May 6, 2010)
- BB. Motion and Order for Withdrawal of The respondent's Attorney, dated May 7, 2010 (Granted May 10, 2010, by Judge House)
- CC. Email from Alec Laidlaw to Judge House and Bryan Smith, dated May 6, 2010
- DD. Notice of In-Person Hearing, dated April 2, 2010.
- EE. Email from Judge House to Alec Laidlaw and Bryan Smith, dated March 31, 2010
- FF. Notice of Pre-Hearing Conference, dated March 8, 2010.
- GG. The respondent's Answer and Request For Hearing, dated January 5, 2010 and received January 7, 2010 (re: Case No. WQ/OI-WR-09-203).
- HH. The respondent's Answer and Request For Hearing, dated January 5, 2010 and received January 7, 2010 (re: Case No. WQ/OI-WR-09-144).
- II. Notice of Civil Penalty Assessment and Order to Comply, dated Dec. 16, 2009.
- JJ. Notice of Revocation of Onsite Sewage Disposal Service Provider's License, dated Dec. 11, 2009.
- KK. Exhibits from July 6, 2010, contested case hearing.
  - A-1. Letter from Jan Heron to Michael Cross, dated July 30, 2009.
  - A-2. Invoice from Hank's Septic to June McCready, dated June 19, 2009.
  - A-3. Statement from Michael Hamer to Del Cline dated July 24, 2009.
  - A-4. Photographs taken by Hamer's employee (six photographs).
  - A-5. Complaint Summary drafted by June McCready.

- A-6. Statement from Janice Endicott to Marion County Building Inspection, received June 11, 2009.
- A-7. Email from Lisa Fincher to Bryan Smith, dated April 29, 2010.
- A-8. Letter from Jessica Joye to Marion County public Works, dated July 6, 2009.
- A-9. Photographs taken by Ms. Endicott (six photographs).
- A-10. Phone log, drafted by Lisa Fincher between December 2008 and January 2009.
- A-11. Email "chain" from Lisa Fincher to others, dated between December 2008 and January 2009.
- A-12. The respondent's origin-destination records, provided January 14, 2009.
- A-13. Application for onsite sewage disposal service provider's license, issued Jan. 12, 2009.
- A-14. The respondent's onsite sewage disposal service provider's license nos. 35378 and 33315, each issued Jul. 1, 2006.
- A-15. Email from Lisa Fincher to Bryan Smith, dated Sept. 29, 2009.
- A-16. Renewal application for onsite sewage disposal service provider's license, dated June 23, 2009.
- A-17. Email from Lisa Fincher to Bryan Smith, dated Oct. 13, 2009.
- A-18. Letter from Lisa Fincher to Michael Cross, dated July 2, 2009.
- A-19. Email from Lisa Fincher to Bryan Smith and Alec Laidlaw, dated March 1, 2010.
- A-20. Enforcement Referral, drafted by Del Cline.
- A-21. Pre-Enforcement Notice sent by Del Cline to Michael Cross, dated July 31, 2009.
- A-22. Email from Lisa Fincher to Bryan Smith, dated April 15, 2010, including attached Default Order from Construction Contractors Board of Oregon.
- R-1. Respondent's onsite sewage disposal service provider's license no. 35378, issued Jul. 1, 2009.
- R-2. Newspaper article dated April 28, 2009 - considered by Judge House but not accepted into the record.
- R. Audio recording of the July 6, 2010 contested case hearing (one CD)

**Available upon  
request**

- 1. OAR Chapter 340, Divisions 11 and 12; ORS Chapter 468B

Approved:

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Report prepared by: Bryan Smith  
Phone: 503-229-5395