State of Oregon
Department of Environmental Quality Memorandum

Date: Sept. 26, 2011

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item F, Action item: Contested Case No. WQ/I-WR-09-092 regarding Bandon Pacific, Inc.
Oct. 20-21, 2011, EQC meeting

Introduction and background information

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

On Nov. 30, 2009, DEQ issued a Notice of Civil Penalty Assessment and Order to Bandon Pacific, Inc., a seafood processor, for failing to comply with its wastewater discharge permit and other water quality laws. The Notice assessed Bandon Pacific three penalties: 1) $174,766 for failing to conduct required monitoring on 2,248 occasions, 2) $18,000 for discharging waste to waters of the state without a permit on 915 occasions, and 3) $15,788 for failing to properly screen its wastewater prior to discharge on 915 occasions. In total, DEQ assessed Bandon a $208,554 penalty.

On Dec. 22, 2009, Bandon Pacific requested a contested case hearing before an administrative law judge. Bandon Pacific did not deny the violations, but claimed that the penalties were excessive and not in accordance with DEQ policy or Oregon law.

Administrative Law Judge John Mann conducted a contested case hearing Feb. 23, 2011. Judge Mann issued a Proposed and Final Order June 1, 2011 in which he found that Bandon Pacific had committed the violations alleged in DEQ's Notice and assessed a total penalty of $200,266 for the violations.

DEQ recommendation and EQC motion

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

Findings of fact

Bandon Pacific, Inc. owned and operated a retail seafood business at 250 First Street in Bandon, Oregon, from 1998 through 2010. The business was located adjacent to the Coquille River, approximately one-half mile from the point that the river fed into the Pacific Ocean. Between 2004 and 2008, the facility processed approximately 49,000 to 59,000 pounds of seafood per year.[1]

From 2004 through 2008, the period covered by the Notice, Bandon Pacific processed fish in a room in the back of the retail operation. Wastewater from cleaning the fish emptied into a square drain on the floor of the room. Bandon Pacific installed a stainless steel screen on the top of the drain to capture solids. Bandon Pacific employees would remove solids from the screen and place them in a tote with fish carcasses and other discarded pieces of fish for disposal. Employees then emptied the tote onto a concrete chute that emptied into the Coquille.[2]

Bandon Pacific's facility was covered by a 900-J National Pollution Discharge permit from August 1999 through May 2009. The 900-J permit required Bandon Pacific to process wastewater through a screen of not less than 40 mesh.[3] From at least 2001 through December 2008, wastewater from the facility's drain emptied into a sump, and then drained into the Coquille River. A steel grate was installed at the top of the drain to catch some solids. The grate was less than the 40-mesh screen required under the NPDES permits.[4]

From January 2004 through August 2006, the 900-J permit required Bandon Pacific to monitor its wastewater discharge on a daily basis for effluent flow. The permit also required Bandon Pacific to sample and analyze its wastewater at least once per month for total suspended solids, biochemical oxygen demand, oil and grease and pH levels. From September 2006 through December 2008, the permit required Bandon Pacific to monitor for fecal coliform and e-coli bacteria, in addition to the above parameters.[5]

Each month from February 2004 through January 2009, Bandon Pacific

[1] Proposed and Final Order at 3.
[2] Ibid
[3] "Mesh" refers to the number of openings per square inch on the screen. When a screen has a higher mesh count, each hole is normally smaller than would be the case with a lower mesh screen. When the mesh is higher, fewer solids can pass through the screen. Thus, a screen with 20 mesh would screen out fewer solids than would one with 40 mesh. A 120 mesh screen would filter out more solids than would a 40 mesh screen. The NPDES permits required a screen of not less than 40 mesh, but would have allowed a screen with a higher mesh.
[4] Proposed and Final Order at 3.
[5] Ibid.

submitted discharge monitoring reports to DEQ, covering the period from January 2004 through December 2008. On each page of these reports, Bandon Pacific wrote "no production." Bandon Pacific performed none of the wastewater monitoring required under its 900-J permit during the period from January 2004 through December 2008.[6]

On Dec. 3, 2008, DEQ received a letter from Bandon Pacific's attorney that disclosed that Bandon Pacific's discharge monitoring reports were inaccurate from at least 2006. The letter disclosed that Bandon Pacific had production of between 28,000 to 56,000 pounds of seafood every year since 2006 but had been reporting "no production" on the discharge monitoring reports and had not been performing any of the required wastewater monitoring.[7]

On April 6, 2009, DEQ received corrected discharge monitoring reports from Bandon Pacific for the period from January 2004 through December 2008. The reports included the amount of seafood processed for each month, but did not include any information about water sampling results or about solid waste disposal. The corrected reports showed that Bandon Pacific processed seafood on 195 separate days in 2004, 116 separate days in 2005, 187 separate days in 2006, 190 separate days in 2007, and 175 separate days in 2008. Bandon Pacific discharged wastewater into the Coquille River on each day of production and did not perform any sampling or analysis of the wastewater as required under the terms of its permits.[8]

In 2010, Bandon Pacific retained the services of Alan Ismond, a chemical engineer, and his company Aqua-Terra Consultants. In late 2010, Ismond commissioned a survey of the Coquille River bed in the area near the Bandon Pacific facility. Bandon Pacific discharged fish wastes in an area of the river near the mouth of the Pacific Ocean. Because of that proximity, currents and tidal exchanges were substantial and likely dispersed any discharges of wastewater and fish carcasses very quickly. Because the waste was composed of non-toxic organic material, and because the waste did not accumulate on the river bed, Ismond concluded that the material was likely quickly dispersed into the ocean with no significant impact on the environment.[9]

Conclusions of the administrative law judge

Bandon Pacific failed to monitor wastewater discharges, as required under the terms of a 900-J National Pollution Discharge permit, from January 2004 through December 2008, in violation of ORS 468B.025(2). Bandon Pacific discharged waste into the waters of the state without a permit, from January

[6] Proposed and Final Order at 4.
[7] Ibid.
[8] Ibid.
[9] Ibid.

2004 through December 2008, in violation of ORS 468B.050(1)(a). Bandon Pacific failed to pass wastewater discharges through a 40 mesh screen, as required under the terms of a 900-J National Pollution Discharge permit, from January 2004 through December 2008, in violation of ORS 468B.025(2).

Bandon Pacific is subject to a civil penalty of $174,766 for failing to monitor wastewater discharges in violation of ORS 468B.025(2), $18,000 for discharging waste into the waters of the state without a permit in violation of ORS 468B.050(1)(a), and $7,500 for failing to pass wastewater discharges through a 40 mesh screen in violation of ORS 468B.025(2). The total amount of civil penalties is $200,266.

Issues on appeal

In its Exceptions and Brief, Bandon Pacific raises four arguments for setting aside the judge's order. It argues that:

1) DEQ incorrectly calculated the civil penalty for Bandon Pacific's failing to monitor by determining that all the violations penalized were Class I violations per the civil penalty calculation formula established by Oregon Administrative Rules (OAR) Chapter 340, Division 12
2) When calculating the civil penalties, DEQ incorrectly assigned a magnitude of moderate to the violations when the magnitude was minor
3) DEQ assessed penalties for violations that were outside an applicable statute of limitations
4) DEQ improperly considered Bandon Pacific's relationship to the Pacific Seafoods Group when determining the size of the civil penalty.

Bandon Pacific's argument

Division 12 assigns a class of I, II or III to all violations for the purpose of calculating civil penalties. Class I violations are subject to higher penalties than Class II or III violations. Prior to March 31, 2006, failing to monitor as required by a wastewater discharge permit was a Class II violation. On and after March 31, 2006, failing to monitor was a Class I violation. Bandon Pacific's violations occurred during the period January 2004 through December 2008, thus some were Class II violations and others were Class I. Exhibit 1 of the Notice states "Of the 2,248 occurrences of the violation, the Department elects to assess separate penalties for 46 Class I occurrences of the violation. The Department arrived at 46 violations by assessing one penalty per monitoring requirement violated per year."

Bandon Pacific argues that the language "one penalty per monitoring requirement violated per year" means DEQ intended to assess penalties for violations that occurred in 2004 and 2005 and that these Class II violations were improperly treated as Class I violations when DEQ calculated the civil penalty resulting in a larger civil penalty.

DEQ's reply

DEQ argues that Judge Mann correctly ruled that it had been DEQ's intent to assess penalties for only Class I occurrences of failure to monitor that occurred after March 31, 2006.[10] He based this conclusion on the language in Exhibit 1, which stated "of the 2,248 occurrences of the violation, the Department elects to assess separate penalties for 46 Class I occurrences of the violation" and because the Notice expressly identified which of the occurrences were Class I and which were Class II. Regarding the "one penalty per monitoring requirement violated per year" language in Exhibit 1, Judge Mann stated that this did not indicate intent to assess a penalty for occurrences of Bandon Pacific's failure to monitor that occurred in each year of the period of violation, but rather explained the rationale for assessing penalties for 46 of the 2,248 occurrences of the violation.

Bandon Pacific's argument

As part of the civil penalty calculation formula in Division 12, the violation penalized is assigned a magnitude, which may be major, moderate or minor. Division 12 assigns specific magnitudes for certain violations. All other violations are moderate by default unless there is sufficient information available to raise the magnitude to major or reduce it minor. There are no specific magnitudes for Bandon Pacific's violations and DEQ assigned magnitudes of moderate. Bandon Pacific argues that the magnitudes should have been reduced to minor.

OAR 340-012-0130(2) states "the department's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude." OAR 340-12-0130(4) states that a violation is of minor magnitude "if the department finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors."

Bandon Pacific asserts that the testimony of its witness, Alan Ismond, and the survey that was performed of the Coquille River bottom in the vicinity of its facility are sufficient evidence to prove that its violations had no more than a de minimis adverse impact to human health or the environment and posed no more than a de minimis threat.

[10] Among other changes to Division 12 adopted in 2006, the Commission elevated failing to conduct monitoring required by a wastewater discharge permit after deciding that failing to monitor is among the most serious of violations because it denies DEQ and the public the ability to determine whether permittees are complying with their permit limits.

DEQ's reply
DEQ argues that Judge Mann correctly ruled that because the violations occurred over a period of five years and included failing to conduct wastewater monitoring, it is impossible to determine the potential or actual impact of Bandon Pacific's violations. Since there is insufficient information available to prove Bandon Pacific had no more than de minimis adverse impact or posed no more than a de minimis risk of harm, the appropriate magnitude is moderate.

DEQ also argues that because of the large number of violations committed by Bandon Pacific over a five-year period, Bandon Pacific's violations were a gross deviation from its permit obligations and therefore could not be assigned a magnitude of minor per OAR 340-0012-130(4), which states:

> "In making this finding, the department will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive."

Bandon Pacific's argument
Bandon Pacific claims that state law for statute of limitations barred DEQ from assessing civil penalties for any violations that occurred more than two years prior to the issuance of the Notice on Nov. 30, 2009, and that federal law barred penalties for violations occurring more than five years prior to the Notice. According to Bandon Pacific, some of the violations for which DEQ assessed penalties occurred more than two years or five years prior to the Notice's issuance, and those penalties should be dismissed.

DEQ's reply
DEQ argues that Judge Mann correctly ruled that no federal statute of limitations applies because this case is a matter of state law, and the state statute of limitations cited by Bandon Pacific does not apply to the administrative civil penalties assessed Bandon Pacific. DEQ also argues that even if a statute of limitations applies, far more violations occurred within two years of the issuance of the Notice than DEQ penalized.

Bandon Pacific's argument
Bandon Pacific argues that Judge Mann erred when he did not reduce the civil penalty because DEQ impermissibly considered Bandon Pacific's relationship to its corporate parent, Pacific Seafoods Group, when determining the size of the civil penalty. According to Bandon Pacific, DEQ should not have considered the fact that Pacific Seafoods Group owns Bandon Pacific because they are separate legal entities. Bandon Pacific also argues that the penalties

assessed it are grossly disproportionate to the civil penalties assessed in other water quality cases and constitute an abuse of discretion by DEQ.

DEQ's reply
DEQ argues that Judge Mann was correct in finding that DEQ did not impermissibly take into account Bandon's subsidiary relationship to Pacific Seafoods. Judge Mann noted that past violations by Pacific Seafoods or its other subsidiaries were not a factor in the civil penalty calculations, nor did DEQ seek to impose penalties against Pacific Seafoods for violations committed by Bandon Pacific. Judge Mann also found that the civil penalties DEQ assessed Bandon Pacific were well within the discretion afforded the agency by law and that the fact that DEQ has assessed lower penalties in other cases is insufficient to prove that the agency abused its discretion.

EQC authority

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

DEQ's contested case hearings must be conducted by an administrative law judge.[11] The proposed order was issued under current statutes and rules governing the Administrative Law Judge Panel.[12] Under ORS 183.600 to 183.690, EQC's authority to change or reverse an administrative law judge's proposed order is limited.

The most important limitations are as follows:

1. EQC may not modify the form of the administrative law judge's Amended Proposed and Final Order in any substantial manner without identifying the modifications and providing an explanation why the commission made the modifications.[13]

2. EQC may modify a finding of historical fact only if the commission determines that there is clear and convincing evidence in the record that the finding was wrong.[14] 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 must issue a proposed order and allow the parties to file exceptions to the proposed order if it intends to reject an order issued by an administrative law judge that is favorable to the respondent

[11] ORS 183.635.
[12] ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.
[13] ORS 183.650(2).
[14] ORS 183.650(3). A historical fact is a determination that an event did or did not occur in the past or that a circumstance or status did or did not exist either before or at the time of the hearing.

unless the commission either reviews the entire record or makes changes that are not within the scope of any exceptions to which there was an opportunity to respond by the parties.[15]

4. EQC may not consider any new or additional evidence, but may only remand the matter to the administrative law judge to take the evidence.[16]

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.[17]

In addition, EQC has established by rule a number of other procedural provisions, including that EQC will not remand a matter to the administrative law judge to consider new or additional evidence unless the proponent of the new evidence has properly filed a written motion explaining why evidence was not presented to the administrative law judge.[18]

Alternatives

The EQC may either:

1. As requested by DEQ, issue a final order adopting Judge Mann's Amended Proposed and Final Order; or
2. Issue a final order determining that the findings of fact were not based on a preponderance of the evidence, and that the conclusions of law reached by Judge Mann should be changed.

Attachments

A. Documents regarding review by the EQC:
   1. Letter from Stephanie Clark to Respondent, dated Aug. 30, 2011.
   2. Department's Reply Brief, dated Aug. 25, 2011.
   3. Letter from Stephanie Clark to Respondent, dated Aug. 1, 2011.
   4. Respondent's Exceptions and Brief and Alternative Findings of Fact, dated July 29, 2011.
   5. Letter from Stephanie Clark to Respondent, dated July 1, 2011.
   6. Respondent's Petition for Commission Review, dated June 30, 2011.

B. Proposed and Final Order, issued by Judge Mann on June 1, 2011.

C. Closing Arguments
   1. Respondent's Closing Argument, dated March 16, 2011.
   2. DEQ's Closing Argument, dated March 16, 2011.
   3. Respondent's Rebuttal to DEQ's Closing Argument, dated April 5, 2011.

[15] OAR 137-003-0655(3) and (4).
[16] OAR 137-003-0655(5).
[17] OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.
[18] OAR 137-003-0655(4).

D. Respondent's Motion for Discovery, dated March 2, 2011.
E. Exhibits from Feb. 23, 2011, contested case hearing, numbered A1 through A124, and R1 through R51.
F. Pre-hearing documents:
   1. Respondent's Pre-Hearing Memorandum, dated Feb. 22, 2011.
   2. Notice of In-Person Hearing, dated Dec. 20, 2010.
   3. Notice of Rescheduled Pre-Hearing Conference, dated Nov. 23, 2010
   4. E-Mail from Jeff Bachman to Robert L. Goss and Suzanne L. Campagne, dated Nov. 16, 2101.
   5. Notice of Pre-Hearing Conference, issued Sept. 20, 2011.
G. Request for Contested Case Hearing on No. WQ/I-WR-09-092, filed by Respondent, received by DEQ Dec. 22, 2009.
H. Notice of Violation, Department Order, and Civil Penalty Assessment, issued by DEQ Nov. 30, 2009.

Available upon request

Transcript of the following proceedings:
1. Feb. 23, 2011, contested case hearing.
2. Dec.10, 2010, pre-hearing conference.
3. Nov.12, 2010, pre hearing conference.

Approved:

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