State of Oregon
Department of Environmental Quality Memorandum

Date: April 7, 2010

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item U, Action item: Contested Case No. LQ/SW-WR-07-225 regarding Dale Alan Pennie
April 29-30, 2010 EQC meeting

Introduction

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 a contested case hearing before an administrative law judge, and if they do not agree with the judge's decision, they may appeal to the commission.

Background

DEQ issued a Notice of Violation, Department Order and Assessment of Civil Penalty to Dale Alan Pennie on May 14, 2008. The notice alleged that Mr. Pennie had illegally established unpermitted solid waste disposal sites on two adjacent parcels of property. The notice assessed a civil penalty of $28,805, and ordered Mr. Pennie to correct the violations.

Mr. Pennie requested a contested case hearing before an administrative law judge and raised several affirmative defenses.[1] Mr. Pennie subsequently raised those defenses again by way of a Motion to Dismiss, a Motion to Suppress and a Motion to Take Judicial Notice, all of which he filed with Judge Gutman on June 11, 2009. On behalf of DEQ, the Department of Justice filed a response to the motions with Judge Gutman on June 19, 2009.

Judge Gutman took the motions under advisement and conducted a contested case hearing June 24, 2009. After the hearing, Judge Gutman granted the Motion to take Judicial Notice and denied both the Motion to Suppress and the Motion to Dismiss. Following the hearing, Judge Gutman issued a Proposed and Final Order on Aug. 6, 2009, in which she found that Mr. Pennie had violated ORS 4529.205(1) and OAR 340-093-0050(1) on both properties. Judge Gutman also upheld the civil penalty assessment of $28,805 and ordered that Mr. Pennie immediately initiate actions to correct the violations. On Sept.

[1] See Attachment G, Request for Contested Case Hearing on No. LQ/SW-WR-07-225.

1, 2009, Judge Gutman issued an Amended Proposed and Final Order that clarified the timeline and actions Mr. Pennie was required to take to correct the violations.

In his filings and brief to the commission, Mr. Pennie requests that the commission adopt alternate findings of fact and that the commission suppress the evidence the judge relied on in making her findings of fact and conclusions of law. DEQ requests that EQC uphold the judge's Amended Proposed and Final Order.

DEQ recommendation

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

Findings of fact

In 1988, Karen Pennie purchased Tax Lot 1111 in Coos County, Oregon. This parcel of land is hereafter referred to as the Pennie property.

At the time, Karen Pennie was married to Dale Pennie, the respondent in this case. The purchase included an easement for ingress and egress across the western portion of the adjacent property, Tax Lot 1106, Coos County, Oregon, This adjacent parcel will be referred to hereafter as the Cox property.[2]

This adjacent parcel was purchased by John and Jane Cox in 1990, subject to the easement previously granted to the Pennies.[3]

After the Pennies divorced in 1990, Dale Pennie continued to live on the Pennie property, with Karen Pennie's permission, although Karen Pennie retained sole ownership of the property.[4] During this time, Mr. Pennie and Mr. Cox had a verbal agreement that Mr. Pennie would maintain the easement, as the Cox family did not reside on their property but used it for camping.[5]

In 2003, the Cox family observed that Mr. Pennie had accumulated computer monitors, inoperable vehicles, and piles of garbage on the Cox property alongside of the easement that Mr. Pennie used to access the Pennie property. The Cox family spoke with Mr. Pennie about the accumulated items. Mr. Pennie acknowledged that he should not have placed these items on the Cox property, and stated that he would remove them.[6]

In early December 2005, the Cox family found the entrance to their property

[2] Amended Proposed and Final Order, page 6, finding of fact no. 1.
[3] Amended Proposed and Final Order, page 7, finding of fact no. 3.
[4] Amended Proposed and Final Order, page 7, finding of fact no. 5.
[5] Amended Proposed and Final Order, page 7, finding of fact no. 4.
[6] Amended Proposed and Final Order, page 7, finding of fact no. 6.

blocked with additional waste, and contacted the Coos County Sheriff's Office. Coos County Sheriff's Deputy Del Dahlen visited the Cox property with the Cox family members present. He observed several distinct piles of accumulated waste, including numerous inoperable vehicles and discarded computers. During this visit, Mr. Cox and his adult daughter, Ms. Ruth Anne Carothers, pointed out the boundaries of their property to Deputy Dahlen.[7]

On Dec. 20, 2005, John Cox signed a written consent agreement granting Deputy Dahlen permission to enter the Cox property for code enforcement purposes. Mr. Cox intended, by signing this agreement, to allow any representative of state or county government to access the Cox property for purposes of assisting in getting the property cleaned up.[8]

Deputy Dahlen subsequently made several attempts to get Mr. Pennie to clean up the waste, including citing Mr. Pennie for county code violations.[9] On March 13, 2007, Deputy Dahlen contacted DEQ for assistance.[10]

On March 19, 2007, DEQ solid waste specialist Craig Filip visited the property, accompanied by Deputy Dahlen and Mr. Pennie. Deputy Dahlen pointed out the boundaries of the Cox property to Mr. Filip. Mr. Filip observed and took pictures of the following items that Mr. Pennie had discarded along the easement on the Cox property: several abandoned cars and trucks, partially salvaged automobiles, a boat, a trailer, computer monitors, automobile parts, vehicle chassis, tires, oil filter, paint cans, batteries, electrical wiring and components, scrap metal objects, plastic and metal pipe, assorted household trash, gasoline and antifreeze containers and plastic storage containers.

Mr. Filip also observed similar discarded materials located along the access road that turned southwest from the Cox property towards the Pennie property. Mr. Filip did not leave the Cox property. Rather, from his vantage-point on the Cox property, he saw and took pictures of the waste that was accumulated along the road and on the adjacent Pennie property, which including metal pipe, building materials, wood materials, salvaged and abandoned vehicles, and an abandoned bus.[11]

Mr. Pennie did not have a solid waste disposal permit from DEQ for either property.[12] On April 6, 2007 DEQ issued a Warning Letter with Opportunity to

[7] Amended Proposed and Final Order, page 7, finding of fact no. 7.
[8] Amended Proposed and Final Order, page 8, finding of fact no. 10.
[9] Amended Proposed and Final Order, page 8, findings of fact nos. 11 through 17.
[10] Amended Proposed and Final Order, page 8, finding of fact no. 18.
[11] Amended Proposed and Final Order, page 9, finding of fact no. 21.
[12] Amended Proposed and Final Order, page 9, finding of fact no. 22.

Correct to Mr. Pennie for establishing or operating a disposal site without first obtaining a DEQ permit. DEQ requested that Mr. Pennie remove all solid waste from the Cox property by Oct. 1, 2007.[13]

On Oct. 15, 2007, Mr. Filip visited the Cox property again, and observed that Mr. Pennie had not complied with DEQ's request. Mr. Filip documented that there was a greater amount of waste accumulated along the easement than what he had observed on his prior visit.[14] DEQ issued a Pre-Enforcement Notice to Mr. Pennie on Dec. 4, 2007, which required Mr. Pennie to remove the waste by March 15, 2008.[15]

Also in December 2007, Mr. Filip testified as a witness in a Coos County Circuit Court trial that involved county code violations brought against Mr. Pennie. DEQ was not named in the case. The court found Mr. Pennie to be in violation of two Coos County land use ordinances.[16]

On March 27, 2008, Mr. Filip visited the Cox property for a third time, again limiting his investigation to the easement area on the Cox property. Again, Mr. Filip observed that additional waste had been placed along the easement since his previous visit. [17] Mr. Filip documented that Mr. Pennie had discarded 186 cubic yards of solid waste on the Cox property as of the March 2008 inspections.[18] By avoiding the costs of proper disposal for the solid waste he accumulated on the Cox property, Mr. Pennie gained an economic benefit of $11,205.[19]

In late May 2009, Mr. Filip secured an administrative search warrant to inspect the Pennie property directly. On June 1 and June 2, 2009, Mr. Filip documented significant amounts of waste discarded throughout the Pennie property, at least three times again as much by volume as previously documented on the Cox property.[20]

The discarded materials on the Pennie property included 116 vehicles, most of which were filled with waste, several buses filled with waste, two travel trailers, a semi-truck trailer, tractor trailer container, automotive parts, materials, and tires, lead acid batteries, caches of computer equipment, copying

[13] Amended Proposed and Final Order, page 12, finding of fact no. 25.
[14] Amended Proposed and Final Order, page 12-13, finding of fact no. 26.
[15] Amended Proposed and Final Order, page 13, finding of fact no. 27.
[16] Amended Proposed and Final Order, page 15, finding of fact no. 28.
[17] Amended Proposed and Final Order, page 15, finding of fact no. 29.
[18] Amended Proposed and Final Order, page 15, finding of fact no. 30.
[19] Amended Proposed and Final Order, page 15, finding of fact no. 32.
[20] Amended Proposed and Final Order, page 19, finding of fact no. 36.

machines, microfiche readers, electrical equipment, broken fluorescent light tubes, household appliances, including stove, washer, bathtub, fiberglass shower, toilet, construction materials, demolition materials, various wooden objects, wooden pallets, various plastic containers, plastic pipe, piles of household trash, bags of garbage, various metal objects, metal pipe, scrap metal, wire cages, bikes, propane canisters, gasoline cans, a partially burned mobile home and the floor of a burned down trailer[21]

Conclusions of the administrative law judge

In the Amended Proposed and Final Order, Judge Gutman concluded, based on the findings of fact, that:

1. Because Deputy Dahlen was given express consent to enter the Cox property, and because Mr. Filip was given implied consent as the representative of DEQ, no warrant was required for Mr. Filip's inspections of the Cox property.

2. No warrant was required for Mr. Filip to observe and take pictures of the waste that was located on the Pennie property that was in plain view from a vantage point within the boundaries of the Cox property.

3. Mr. Filip stayed within the confines of the Cox property during his first three inspections, and therefore did not enter the Pennie property illegally.

4. DEQ was not a party to the prior action brought against Mr. Pennie in Coos County Circuit Court, andwas not bound by the final judgments rendered in those cases.. Therefore, DEQ was not precluded from bringing this enforcement action against Mr. Pennie.

5 . Mr. Pennie violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Cox property from Dec. 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

6. Mr. Pennie violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Pennie property from Dec. 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

Proposed civil penalty and order

Judge Gutman proposed that DEQ order that civil penalties in the amount of $28,805 be imposed against Mr. Pennie, pursuant to OAR 340-012-0045, and that Mr. Pennie remove and properly dispose of all solid waste accumulated on the Cox and Pennie properties within thirty days.

[21] Amended Proposed and Final Order, page 18-19, finding of fact no. 35

Issues on appeal

Mr. Pennie has requested that EQC find that the evidence gathered during DEQ's inspections of the Cox property be discarded because DEQ did not have a warrant for those inspections. Mr. Pennie also requests that EQC find that DEQ trespassed on his property.

Mr. Pennie's argument:
Mr. Pennie claims that DEQ's evidence of the environmental violations was gathered during a series of illegal searches, because DEQ did not first secure administrative search warrants for its March 19, 2007, Oct. 15, 2007 or March 27, 2008 inspections of the Cox property.

DEQ's response:
Attachment F1 to this report is a legal brief prepared by the Oregon Department of Justice that was submitted to Judge Gutman in this case. This brief details the legal standards that apply to DEQ inspections conducted without a search warrant. The brief also describes the conditions under which evidence gathered during such inspections can properly be relied upon in contested case proceedings. One of those conditions is when the property owner gives consent for inspectors to enter his or her property.

DEQ's inspections on March 19, 2007, Oct. 15, 2007 and March 27, 2008 were legal because the property owner, Mr. Cox, gave his express written consent for law enforcement personnel to enter the Cox property. Judge Gutman found that DEQ "was given implied consent" to conduct the relevant inspections, because Mr. Cox expressly granted access to Deputy Dahlen, and in doing so intended to grant permission to any state or county representative who could assist in cleaning up the hazardous and solid waste that was accumulating on the Cox property.[22]

The evidence in the record to support this finding includes the written consent agreement signed by Mr. Cox, and the testimony of Mr. Cox's daughter, Ruth AnnCarothers, who was present with her father when he signed the written consent agreement authorizing Mr. Dahlen to access the Cox property, and the testimony of Deputy Dahlen.

Under such circumstances, an administrative search warrant is not required in order for DEQ to conduct inspections and rely on the evidence gathered during the inspections.

[22] Amended Proposed and Final Order at page 3.

Mr. Pennie's argument:
Mr. Pennie argues that the witness testimony given by Ms. Ruth Ann Carothers is not reliable. Judge Gutman relied on the testimony of Ms. Carothers for a number of key findings of fact, including that Mr. Cox intended to allow any government representative, including DEQ's inspector, to access to the Cox property, and that DEQ's inspector stayed within the confines of the Cox property during the relevant inspections.

DEQ's response:
The commission should defer to both the express and implicit credibility findings made by Judge Gutman. These findings are based on the judge's own first-hand observation of the witnesses' demeanor, as well as the judge's findings that the witness testimony is consistent with other testimony given by the same witness, and that the testimony in question is consistent with the testimony of other witnesses.[23]

Mr. Pennie did not directly challenge Ms. Carothers' credibility at the hearing. He offered testimony of his friend Susan Billings in an apparent attempt to rebut portions of Ms. Carothers' testimony regarding the location of the boundary line between the two properties. However, Judge Gutman expressly found that Ms. Billings was not a credible witness, in part because Ms. Billings later admitted that she did not actually know where the property line was located. In contrast, Judge Gutman implicitly found Ms. Carothers to be credible, in that the Judge relied on Ms. Carothers' identification of the property line to support a finding that DEQ's inspector did not leave the Cox property during the relevant inspections.

Mr. Pennie's argument:
Mr. Pennie argues that Deputy Dahlen's testimony is not reliable. Mr. Pennie claims that Deputy Dahlen gave testimony during the Coos County Circuit Court trial that conflicts with his later testimony at the June 24, 2009 DEQ contested case hearing.

DEQ's response:
There is no evidence of any allegedly conflicting testimony. No transcripts from the Coos County Circuit Court proceedings were admitted as evidence at the DEQ hearing. When cross-examined by Mr. Pennie, Deputy Dahlen denied that there was any conflict between his testimony before the Coos County Circuit Court and his testimony at the June 24, 2009 DEQ hearing.

Mr. Pennie's argument:
Mr. Pennie claims that EQC should adopt an alternative proposed finding of

[23] Amended Proposed and Final Order at page 5-6.

fact that Deputy Dahlen entered upon adjacent private property without a warrant prior to Mr. Cox's Dec. 20, 2005 written express consent for law enforcement access to the Cox property.

DEQ's Response:
This argument was not raised at the hearing, and there is no evidence in this record to support this claim. OAR 340-011-0575(5)(a) requires that Mr. Pennie identify the portions of the record that support proposed alternative findings and conclusions. Mr. Pennie has not cited any supporting evidence in the hearing record. He has only cited transcripts from the Coos County proceeding, but those transcripts are not part of the evidentiary record here.

Mr. Pennie's argument:
Mr. Pennie claims that he will submit the transcripts from the Coos County Circuit Court trial during oral argument before the commission, to support his claim that Deputy Dahlen's testimony is not credible.

DEQ's response:
Mr. Pennie cannot submit these transcripts into the record for this contested case proceeding at this late date. The commission's rules require that a request to present additional evidence must be submitted by motion and be accompanied by a statement specifying the reason for the failure to present the evidence to the administrative law judge at hearing. See OAR 340-011-0575(6)). Mr. Pennie did not submit such a motion or specify reasons for presenting this alleged evidence for the first time before the commission. It would be improper for the commission to consider this additional evidence or to rely on it for making any alternative factual findings.

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.[24] The proposed order was issued under current statutes and rules governing the Administrative Law Judge Panel.[25] 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

[24] ORS 183.635.
[25] ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.

commission made the modifications.[26]

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.[27] 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 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.[28]

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.[29]

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.[30]

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.[31]

Alternatives

The EQC may either:

1. As requested by DEQ, issue a final order adopting Judge Gutman'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 Gutman should be changed.

[26] ORS 183.650(2).
[27] 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.
[28] OAR 137-003-0655(3) and (4).
[29] OAR 137-003-0655(5).
[30] OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.
[31] OAR 137-003-0655(4).

Attachments

A. Documents regarding review by the EQC:
   1. Letter from Stephanie Clark to Respondent, dated January 8, 2010.
   2. Respondent's Reply Brief, dated January 6, 2010.
   3. Letter from Stephanie Clark to Regina Cutler, DEQ, dated December 21, 2009.
   4. DEQ's Answering Brief, with attachments.
   5. Letter from Stephanie Clark to Regina Cutler, dated November 30, 2009.
   6. Letter from Regina Cutler to Stephanie Clark, dated November 20, 2009.
   7. Letter from Stephanie Clark to Respondent, dated October 29, 2009.
   8. Proposed and Final Order (Alternative), submitted by Respondent, received by DEQ October 22, 2009.
   9. Letter from Stephanie Clark to Respondent, dated October 14, 2009.
   10. Letter from Stephanie Clark to Respondent, dated September 23, 2009.
   11. Request for an Extension of Time, submitted by Respondent, dated September 22, 2009.
   12. Letter from Stephanie Clark to Respondent, dated August 25, 2009.
   13. Respondent's Petition for Commission Review, dated August 24, 2009.

B. Amended Proposed and Final Order, issued by Judge Gutman on September 1, 2009.

C. Motion for Clarification, filed by DEQ on August 21, 2009.

D. Proposed and Final Order, issued by Judge Gutman on August 6, 2009.

E. Exhibits from June 24, 2009 contested case hearing, numbered A1 through A28, and R1 through R12.

F. Pre-hearing Motions and Orders:
   1. DEQ's Response to Motion to Dismiss (Motion to Suppress), filed by DOJ on behalf of DEQ, dated June 18, 2009, with attachments.
   2. Motion to Suppress (captioned as Motion to Dismiss) filed by Respondent, dated June 10, 2009.
   3. Motion to Dismiss (on grounds of Issue Preclusion and *Res Judicata*) filed by Respondent, dated June 10, 2009.
   4. Motion to Take Judicial Notice filed by Respondent, dated June 10, 2009.
   5. Notice of Amended In-Person Hearing **Change of Hearing Location**, issued June 17, 2009.
   6. Pre-Hearing Order, issued by Judge Gutman on May 22, 2009
   7. Notice of Amended In-Person Hearing (address correction), issued May 22, 2009.
   8. Notice of In-Person Hearing, issued May 4, 2009.

G. Request for Contested Case Hearing on No. LQ/SW-WR-07-225, filed by Respondent, received by DEQ June 2, 2008.

H. Notice of Violation, Department Order, and Civil Penalty Assessment, issued by DEQ on May 14, 2008.

Available upon request

Transcript of the following proceedings:

1. June 24, 2009 contested case hearing
2. May 21, 2009 pre-hearing conference

Approved:

_____

Leah E. Koss
Office of Compliance and Enforcement Acting Administrator

Report prepared by: Regina Cutler
Environmental Law Specialist
Phone: (503) 229-5058

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

January 8, 2010

Dale Pennie
56295 Tom Smith Road
Bandon, OR 97411

Re: In the Matter of Dale Pennie
OAH Case No. 901024
DEQ Case No. LQ/SW-WR-07-225

Dear Mr. Pennie,

On January 6, 2010, the Environmental Quality Commission received your reply brief in the matter referenced above. It was received in a timely manner, and is considered the final filing in the contested case process.

This matter will be presented for consideration at the commission's April 2010 meeting, scheduled for April 29 and 30. The exact meeting times and location have not been determined, and I will notify you by mail when those matters are confirmed. Prior to the meeting, I will send you a copy of the staff report and all related attachments and contested case materials.

If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY
Regina Cutler, Department of Environmental Quality

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

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF:	)	RESPONDENTS REPLY BRIEF
	)	
DALE ALAN PENNIE	)	OAH Case No. 901024
	)	DEQ Case No. LQ/SW-WR-07-225
Respondent	)	

Respondent replies thusly:

When the ALJ took Judicial Notice of the cases listed, including the transcripts, the cases became a part of the record. The cases cited directed the court to the cases which contradicted the testimony heard that day, by the same persons, again, under oath. The testimony which contradicts what the ALJ found to be truthful but in fact was perjured testimony.

In as much as no witness list had been provided Respondent was unable to provide the specific cases and pages of transcripts which showed the false testimony beforehand .He does in fact plan on providing the specific passages of testimony at oral argument. One piece of "new evidence" will be a certified copy of the last (and latest) survey recorded, to demonstrate what Respondent testified to at hearing, which is NO SURVEY was performed by John Cox at purchase in 1990.

The intention of Respondent is merely to introduce PROOF of false and/or misleading testimony regarding:

(A) Actual property control

(B) Admitted trespass and investigation of Deputy Dahlen, despite previous and later denials of entry so as to be "in compliance" with 4th Amendment issues; Filip is also guilty by fruit of the poisonous tree doctrine.

(C) Prior in consistent testimony of Ruth Ann Carouthers.

All of the above in fact does not introduce new evidence, but clarifies existing evidence to show a constitutional violation by the State of Oregon.

Dated this 5th day of January, 2010 Dale Alan Pennie

DALE ALAN PENNIE
56295 Tom Smith Road
Bandon, OR 97411

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Respondents Reply Brief on the 6th day of January, 2010 by over night mail upon:

The Oregon Environmental Quality Commission
c/o Stephanie Clark, Assistant to the Commission
811 SW Sixth Avenue
Portland, OR 97204

And by 1st Class mail to:

Regina Cutler
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

by placing a true copy of the above in a sealed envelope, with postage prepaid, at Bandon, OR.

Jan 6th, 2010

Dale A. Penn

Oregon

ENVIRONMENTAL
QUALITY
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BY HAND DELIVERY

December 21, 2009

Regina Cutler
Department of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204

Re: Request for extension to file answering brief
OAH Case No. 901024
DEQ Case No. LQ/SW-WR-07-225

Dear Ms. Cutler,

On December 18, 2009, the Environmental Quality Commission received DEQ's answering brief in the matter referenced above.

Mr. Pennie has 20 days to submit a reply brief, but this brief is not a required filing and has no bearing on whether the contested case moves forward. If Mr. Pennie chooses to file a reply brief with the Environmental Quality Commission, it must be received by Thursday, January 7, 2010. Once all briefs have been filed, this contested case will be presented for consideration at a regularly scheduled commission meeting. I will notify you of the meeting's date and time.

If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY U.S. POSTAL MAIL
Dale Pennie
56295 Tom Smith Road
Bandon, OR 97411

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

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: DALE ALAN PENNIE, Respondent.	))))	DEPARTMENT'S ANSWERING BRIEF OAH Case No. 901024 DEQ Case No. LQ/SW-WR-07-225

The Department of Environmental Quality (DEQ or Department) submits this Answering Brief to the Environmental Quality Commission (Commission) for its consideration in the matter of Dale Alan Pennie, DEQ Case No. LQ/SW-WR-07-225.

I. CASE HISTORY

On May 14, 2008, DEQ assessed Respondent a civil penalty of $28,805 for establishing, operating or maintaining a solid waste disposal site without first obtaining a solid waste disposal site permit on two pieces of adjoining property near Bandon, Oregon known as "the Cox property" and the "Pennie property. DEQ also ordered Respondent to remove and properly dispose of all solid waste accumulated on the two properties. On May 30, 2008, Respondent appealed.

On June 11, 2009 Respondent filed a Motion to Suppress, a Motion to Dismiss, and a Motion to Take Judicial Notice. On June 19, 2009, the Oregon Department of Justice filed Responses to those Motions on behalf of DEQ. On June 23, 2009, Administrative Law Judge (ALJ) Gutman informed the parties that she was taking the Motions to Suppress and the Motion to Dismiss under advisement and would rule on them after the contested case hearing.

A contested case hearing was held on June 24, 2009 in Coquille, Oregon.

On September 1, 2009, ALJ Gutman issued an Amended Proposed and Final Order (ALJ's Proposed Order). She denied Respondent's Motion to Suppress, finding that a warrant was not required for DEQ's March 19, 2007, October 15, 2007 and March 27, 2008 inspections. ALJ Gutman denied Respondent's Motion to Dismiss, finding that the legal doctrines of claim and issue preclusion did not bar DEQ's administrative penalty assessment and proposed Department Order.

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ALJ Gutman further concluded that: (1) Respondent established, operated or maintained a disposal site on the Cox property without first obtaining a solid waste disposal site permit from DEQ; (2) Respondent established, operated or maintained a disposal site on the Pennie property without first obtaining a solid waste disposal site permit from DEQ; (3) the proposed civil penalty of $28,805 is appropriate and should be imposed against Respondent; and (4) the proposed Department Order directing Respondent to remove and properly dispose of all solid waste accumulated on the Cox and Pennie properties is appropriate. Respondent timely appealed ALJ Gutman's Proposed Order, and on October 22, 2009 submitted an alternative Proposed and Final Order (Respondent's Proposed Order) and a Memorandum In Support.[1]

II. COMMISSION ACTION REQUESTED

The Department requests that the Commission issue a Final Order upholding ALJ Gutman's Proposed Order, dated September 1, 2009.

III. ARGUMENTS

A. DEQ properly gathered evidence of the alleged violations, and ALJ Gutman properly denied Respondent's Motion to Suppress.

Respondent proposes that the Commission discard certain evidence gathered during DEQ's inspections of the Cox property because DEQ did not first obtain a search warrant. However, ALJ Gutman correctly rejected this argument, finding that a search warrant was not required in this case. The legal standards applicable to this issue are amply stated in DEQ's Response to Motion to Suppress, which was submitted by the Oregon Department of Justice to ALJ Gutman on June 18, 2009 and attached to this brief. The citations and arguments stated in that Response brief are

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[1] Respondent did not submit a brief stating specific exceptions to ALJ Gutman's order. Rather, Respondent submitted his own "proposed order" which is signed by Respondent's Proposed Order is signed by Respondent and contains many legal conclusions and factual findings that are at directly at odds with ALJ Gutman's findings. Respondent's Proposed Order does not address the merits of the solid waste violation, but instead focuses narrowly on the issues presented by Respondent's Motion to Suppress. Respondent presumably intends to ask the Commission to adopt this alternative set of findings, in lieu of ALJ Gutman's Proposed Order. The Commission may modify an ALJ's finding of historical fact only if the Commission determines that the finding of historical fact is not supported by a preponderance of the evidence in the hearing record. ORS 183.650(2). However, findings of fact are best determined by ALJ Gutman, especially when there is conflicting evidence in the record. These findings are often based on the demeanor or credibility of the witness at the hearing, which is difficult to evaluate when reviewing the record.

hereby incorporated by reference, to the extent they address material conclusions of law made by ALJ Gutman and those challenged by Respondent on appeal.

ALJ Gutman's findings are supported by a preponderance of evidence in the record, and she properly applied the relevant legal standards from the Fourth Amendment to the United States Constitution and from Article I, section 9, of the Oregon Constitution. The Commission should affirm and uphold ALJ Gutman's denial of Respondent's Motion to Suppress.

ALJ Gutman found that in December 2005 the late Mr. John Cox, then-owner of the Cox property, gave consent for law enforcement personnel to enter the Cox property for purposes of evaluating complaints of illegal accumulation of hazardous and solid waste. She further found, based on testimony from Mr. Cox's daughter, that "Mr. Cox's intent...was to grant permission to any representative of the state or county that could assist in cleaning up the hazardous and solid waste that was accumulating on his property." (ALJ's Proposed Order at page 3). ALJ Gutman concluded that DEQ "was given implied consent" for the inspections carried out by DEQ on March 19, 2007, October 15, 2007 and March 27, 2008. These findings and conclusions are supported by the testimony of Coos County Sheriff's Deputy Del Dahlen, by the testimony of Ms. Ruth Ann Carothers,[2] the current owner of the Cox property and daughter of the late Mr. John Cox, and by Exhibits A22, A21 and A20.

Mr. Pennie challenges the credibility of both Ms. Carothers and Deputy Dahlen. However, it is the role of the ALJ to evaluate the testimony of all witnesses, to determine their credibility and to determine the weight to be given to their testimony. In this case, ALJ Gutman found the testimony of Ms. Carothers to be reliable based on her first-hand knowledge of her father's intent at the time he signed the written consent for law enforcement to enter his property. She also found

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[2] Respondent argues that Ms. Carothers' testimony is not reliable. However, Respondent offered no evidence to support that assertion at the hearing. Moreover, ALJ Gutman relied on Ms. Carothers' testimony in reaching her conclusions of law, and therefore must have found her to be a credible witness. In contrast, ALJ Gutman expressly found that the testimony of Respondent's witnesses, which was offered in rebuttal of Ms. Carothers' testimony regarding the location of the property line between the Cox and Pennie properties, was not reliable. (ALJ's Proposed Order at page 6). The Commission should defer to these express credibility determinations, which are based not only on ALJ Gutman's first-hand observation of the witnesses' testimony, but also on its logic, consistency, and whether there was corroborating testimony from other credible witnesses. ALJ's Proposed Order at page 5-6.

reliable the testimony of Deputy Dahlen, who explained at the hearing that he was familiar with the boundaries of the Cox property because the Cox family had pointed out those boundary lines to him during a visit to their property in early December 2005, just prior to executing the written consent. (ALJ's Proposed Order at page 7, Finding of Fact No. 7). Ms. Carothers' testimony further corroborates Deputy Dahlen's recollection of the events of early December 2005.

Accordingly, ALJ Gutman appropriately determined that DEQ's inspector could enter the Cox property in 2006 and 2007 without a warrant because a warrant is not required when consent is given. (*See* legal authorities cited in DEQ's Response to Motions to Suppress, and in ALJ's Proposed Order at pages 3-4).

Respondent presents an alternative proposed finding that Deputy Dahlen entered upon adjacent private property without a warrant prior to Mr. Cox's December 20, 2005 written express consent for law enforcement access to the Cox property. However, Respondent has not identified any evidence in this record to support that claim. See OAR 340-011-0575(5)(a) (requiring that a Respondent identify the portions of the record that support proposed alternative findings and conclusions). Instead, Respondent's Memorandum claims that Deputy Dahlen admitted as much "on May 5, 2009 while under Oath at another trial." However, Respondent did not submit evidence of Deputy Dahlen's alleged May 5, 2009 testimony[3] during the June 24, 2009 hearing in this case before ALJ Gutman. There is therefore no basis on the record to support Respondent's alternative proposed finding.

Respondent claims he will present transcripts from the Alleged May 5, 2009 trial at oral argument before the Commission. However, any such transcript would be new or additional evidence that was not introduced at the hearing and not considered by ALJ Gutman. The Commission's rules require that a request to present additional evidence must be submitted by motion and be accompanied by a statement specifying the reason for the failure to present the evidence to ALJ Gutman. (See OAR 340-011-0575(6)). Respondent did not submit such a motion

[3] Respondent does not explain the subject matter or venue of the alleged May 5, 2009 trial. DEQ has no basis for knowing the either the context or content of the testimony the Respondent references.

or a statement specifying the reason for his failure to present this evidence to ALJ Gutman. Further, OAR 137-003-0655(5) states that on review of exceptions to a proposed order, an agency "may not consider new or additional evidence unless the agency requests the administrative law judge to conduct further hearings." Therefore it would be improper for the Commission to consider this additional evidence.

Moreover, whether or not Deputy Dahlen may have visited other property at an earlier date without a warrant does not change the material fact that DEQ's inspector was authorized to enter the Cox property without a warrant due to express consent from the owner of the Cox property.

ALJ Gutman also found that DEQ did not violate constitutional warrant requirements while gathering evidence of solid waste accumulation on the Pennie property, which is located directly south and adjacent to the Cox property and which is occupied and controlled by Mr. Pennie. ALJ Gutman found that at no time did DEQ's inspector trespass on property controlled by Mr. Pennie. Rather, ALJ Gutman found that DEQ collected this evidence, in the form of photographs and first-hand observations, during inspections of the adjacent Cox property while the DEQ inspector and law enforcement personnel were standing on the Cox property. (See Finding of Fact No. 21 at ALJ's Proposed Order, page 9 ("Mr. Filip took pictures of the solid waste that was in plain view")).

These findings are supported by a preponderance of evidence in the record, specifically the testimony of Craig Filip, which was amply corroborated by the testimony of Deputy Dahlen. Mr. Filip testified that he was aware of the location of the relevant property boundaries because Deputy Dahlen had shown him where the boundaries were. Mr. Filip also stated that at no time during the relevant inspections did he stray from the Cox property while making observations and taking photographs of waste accumulated on the Cox and Pennie properties. ALJ Gutman made explicit findings of the credibility of Mr. Filip's testimony, and that Mr. Filip's testimony was corroborated by Deputy Dahlen's testimony on this issue. (See ALJ's Proposed Order at page 5-6.)

Respondent offered conflicting evidence in an effort to prove that DEQ had trespassed on his property. However, ALJ Gutman expressly found that Respondent's evidence on this point was not reliable, while that of DEQ's witnesses was "credible, logical, consistent, and corroborated."

(ALJ's Proposed Order at page 6). ALJ Gutman properly determined that Mr. Filip did not trespass on the Pennie property and that the photographs and observations of solid waste accumulated on the Pennie property were subject to the plain view exception to the warrant requirement.

B. ALJ Gutman's Proposed Order is supported a preponderance of the evidence

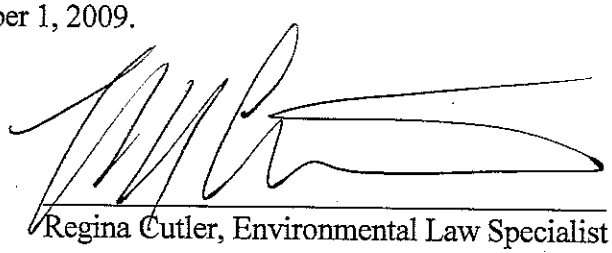
Respondent has not presented any challenge to the sufficiency of DEQ's evidence that Respondent established an illegal solid waste disposal site on the Cox and Pennie properties. As noted by ALJ Gutman, the record contains literally hundreds of photographs of a wide variety of wastes that Mr. Pennie accumulated and illegally disposed of on his and his neighbor's property. In fact, Respondent does not dispute that he is responsible for placing these solid and potentially hazardous wastes on the Cox and Pennie properties. Therefore, there is no basis for reversing or remanding this case to ALJ Gutman for further proceedings.

Further, Respondent does not contend that DEQ improperly calculated or improperly assessed the civil penalty in this case. In the absence of any reason for a penalty adjustment, none should be made. ALJ Gutman's Conclusions of Law are each supported by sufficient factual findings, and each Finding of Fact is supported by a preponderance of evidence in the record.

IV. CONCLUSION

Respondent's sole argument on appeal is that some of the evidence supporting ALJ Gutman's Proposed Order was gathered during a search for which no warrant had been issued. However, ALJ Gutman properly found that no search warrant was required under the facts of this case, due to the express and implied consent given by Mr. Cox to enter his property, and due to the plain view of waste on the Pennie property that the DEQ inspector had from the Cox property. For the reasons stated above, the Department asks the Commission to issue a Final Order upholding ALJ Gutman's Proposed Order of September 1, 2009.

12/18/09
Date



Regina Cutler, Environmental Law Specialist

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Department's Answering Brief on the 18th day of December, 2009 by PERSONAL SERVICE upon:

The Oregon Environmental Quality Commission
c/o Stephanie Clark, Assistant to the Commission
811 SW Sixth Avenue
Portland, OR 97204

and upon

Dale Alan Pennie
56295 Tom Smith Road
Bandon, OR 97411

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at the U.S. Post Office in Portland, Oregon, on December 18, 2009.

Dec 18, 2009
Date

Name

JOHN R. KROGER
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

June 18, 2009

Dove Gutman
Administrative Law Judge
Office of Administrative Hearings
2510 Oakmont Way
Eugene, OR 97401

Re: *In the Matter of Dale Alan Pennie*
OAH Case No. 901024
DOJ File No.: 340410-GN0259-09

Dear Judge Gutman:

Enclosed for filing please find the *Response to Motion to Dismiss (Motion to Suppress)* and *Response to Motion to Dismiss (Claim Preclusion)* in the above mentioned matter for your consideration.

Sincerely,

Jas Jeffrey Adams
Attorney-In-Charge
Natural Resources Section

jja:lal/1464105

Enclosures
cc: Regina Cutler, DEQ

1162 Court Street NE, Salem, OR 97301-4096
Telephone: (503) 947-4500 Fax: (503) 378-3802 TTY: (800) 735-2900 www.doj.state.or.us

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF OREGON

IN THE MATTER OF: DALE ALAN PENNIE, an individual, Respondent.	RESPONSE TO MOTION TO DISMISS (MOTION TO SUPPRESS) Hearing Panel No. 901024 DEQ No. LQ/SW-WR-07-225

This memorandum addresses the legal issues raised by Respondent in his Motion to Dismiss seeking suppression of evidence based on the claim of an unlawful search. It is intended to supplement the closing brief of the Department of Environmental Quality (DEQ).

Introduction

Respondent has filed a Motion to Dismiss in which he moves "for an Order suppressing all evidence gathered by Coos County Sheriff Deputy Dahlen * * * and those he enabled to enter and photograph." The gist of the motion is that a warrant was required before investigators could enter upon the access road or "seize" Respondent's property by taking photographs.

A. Respondent has no standing to challenge a "plain view" search conducted on the Cox property with consent from the Cox property landowner.

The three investigation reports of the DEQ investigator Craig Filip indicate that his investigation and his taking of photographs of the solid waste violations relating to Respondent took place entirely within the boundaries of property owned by the Cox family (Cox property), which is adjacent to Respondent's separate property. (Exhibits A-5, A-11, and A-13).[1]

Respondent is able to access his property through an access easement on the Cox property consisting of a road with a gate, but Respondent's right is limited to use of the access

[1] Exhibits referenced in this response are the same documents, and are identified by the same exhibit number, as provided by DEQ for use in the contested case hearing in this matter. Copies of the referenced exhibits were provided to Respondent and ALJ Gutman on June 10, 2009.

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road; he does not own the property underlying the access easement, and Respondent has been instructed by legal counsel for the Cox family to remove the no trespassing sign and to stop locking the gate. (Ex A-8).

In 2005, Mr. John Cox gave express consent to Coos County Deputy Sheriff Dahlen to access the Cox property, including the access road, in order to enforce the county code provisions governing solid waste. (Ex A-22). In the 2007 letter from the Cox family's attorney, counsel advised Respondent that "Mr. Cox intends to cooperate with *any* government officials in an attempt to clean up the site." (Ex A-8, p 2) (emphasis added).

When a person grants unqualified consent to allow officers to enter a residence to investigate, that consent generally also includes permission for entry by other investigative personnel. *State v. Voits*, 186 Or App 643, 650, 64 P3d 1156, *rev den* 336 Or 17 (2003). Unless the consent provides otherwise, the general authority of certain named officers does not necessarily prohibit assistance from others, such as crime lab personnel. *State v. Voits*, 186 Or App at 650; *State v. Lerch*, 63 Or App 707, 713, 666 P2d 840 (1983), *aff'd* 296 Or 377, 677 P2d 678 (1984).

In this context, DEQ investigator Filip accompanied Coos County Deputy Dahlen and stayed entirely within the Cox property and the access road on the Cox property during the investigations permitted by the express consent of Mr. Cox. (Exhibits A-5, A-8, A-11, and A-13). It is reasonable to include from all the foregoing that the consent from the Cox family for law enforcement to go upon the Cox property in order to enforce solid waste violations by Respondent extended to include the investigative work by DEQ investigator Craig Filip.

Respondent is not in a position to complain about an investigation conducted entirely within the boundaries of another landowner's real property with that landowner's consent, when

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the solid waste violations on the Cox property and on Respondent's property were observable through "plain view." Under the "plain view" doctrine, "if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no search." *Minnesota v. Dickerson*, 508 US 266, 275 (1993). "[A] police officer's unaided observation, purposive or not, from a lawful vantage point is not a search under Article I, section 9, of the Oregon Constitution." *State v. Ainsworth*, 310 Or 613, 621, 801 P2d 749 (1990).

The "contraband" in this context is the abandoned vehicles, computers, monitors, tires and paint cans, which were in plain sight as depicted in the investigative reports of DEQ investigator Craig Filip. (Exhibits A-5, A-11, and A-13). Neither the County land use zoning enforcement nor DEQ's enforcement of the state permit requirement are criminal proceedings. *A fortiori*, there was no unlawful search in this context, given that the "search" was conducted with consent within the boundaries of adjacent property not owned by Respondent and consisted of plain view observations of solid waste in plain sight by DEQ investigator Filip from his lawful vantage point.

B. Respondent's arguments regarding an unlawful search lack merit.

Respondent appears to argue that a locked gate with a no trespassing sign on the access road gave him the right to exclude all others from "his" property. But Respondent had only the right to use the access road; he did not own it, much less have the exclusive right to that road, as reflected in the letter from the Cox family's attorney to Respondent. (Ex A-8). The locked gate and no trespassing signs were *ultra vires* actions by Respondent that were ineffective to exclude the landowner Mr. Cox from the access road. And law enforcement officers had express consent from the Cox family to go onto the Cox property, including on the access road located on the

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Cox property, in order to enforce the respective solid waste regulations of the County and of the State. And because it is clear that the DEQ investigator did not leave the access road during the investigations, no search other than a plain view search occurred on Respondent's own property.

Respondent also appears to argue that because the initial complaint from the Cox family that instigated the investigations stated that the violations were visible "only from a distance," that somehow rendered invalid the subsequent investigations conducted entirely from within the boundaries of the Cox property. Again, the investigations on the access road were with the Cox family's express consent, the investigations were conducted by plain view observation of the solid waste littered on the sides of the access road itself and on Respondent's adjacent property, and it is irrelevant what was stated in the initial complaint that triggered the investigations.

This would be a different case had the investigators gone past a fence posted with a "no trespsassing" sign and actually physically entered upon land owned by Respondent for purposes of the investigation. Absent consent from Respondent, such a search would arguably have required a search warrant. But that is not what happened here. Rather, the investigations were conducted entirely from within the boundaries of the Cox property with the Cox family's express consent, and they were conducted by plain view observation of the solid waste littered on the sides of the access road itself and on Respondent's adjacent property,

C. Issue preclusion is determinative against Respondent on his identical motion to suppress raised in the county proceedings.

Claim or issue preclusion cannot be asserted against DEQ, which was not a party to the county proceedings. But Respondent was a party to both proceedings. His identical motion to suppress (Attachment 1) was denied by the Coos County Circuit Court (Attachment 2). Hence,

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issue preclusion does operate against Respondent on an identical motion to suppress denied by the circuit court.

"Issue preclusion arises in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding." *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). Issue preclusion is a jurisprudential rule that promotes judicial efficiency. *Id* (citing *State v. Ratliff*, 304 Or 254, 257, 744 P2d 247 (1987)).

There are five requirements essential to the application of issue preclusion: (1) the issue in the two proceedings is identical; (2) the issue actually was litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which this court will give preclusive effect. *Barackman v. Anderson*, 338 Or 365, 368, 109 P3d 370 (2005); *Nelson* at 104; *Waxman v. Waxman & Associates, Inc.* 224 Or App 499, 512 (2008).

All those elements are met with respect to Respondent's motion to suppress. (1) The motion filed by Respondent in the county proceedings was identical. (Attachment 1). (2) The decision was actually litigated and was resolved against Respondent by the Circuit Court. (Attachment 2). (3) Respondent has an opportunity to be heard on his motion to suppress in Circuit Court. (4) Respondent was a party to the county proceedings. (5) The Circuit Court proceeding was a judicial proceeding and hence necessarily the kind of proceeding to which tribunals give preclusive effect.

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Conclusion

This court should deny Respondent's motion to dismiss based on his motion to suppress. Respondent is not in a position to object to an investigation conducted entirely within the boundaries of the Cox property with the express consent of the landowner. Respondent has the right to use the access road, but he does not own it, nor does he have the right to exclude the actual landowner from the access road with unauthorized signs and a locked gate. The investigations in question consisted of plain view observations of abandoned automobiles, computers, monitors, waste tires and paint cans strewn on the sides of the access road and visible on Respondent's property from the Cox property. The "search" in this context was a plain view investigation by enforcement officers observing items in plain sight from a lawful vantage point.

Respondent has not identified any photographs or any other items of evidence that he can prove were taken by entering on Respondent's own property. Rather, Respondent's motion is based on his erroneous belief that he has the right to exclude even the landowner of the property from the road to which he merely has a non-exclusive right to use for access purposes. In the event, however, that this tribunal finds that any of the photos offered by DEQ were taken off the Cox property and on Respondent's own property, DEQ will not rely on such photos but will rely only on photos taken from the lawful vantage point of the Cox property.

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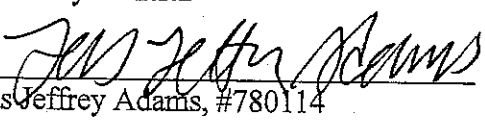
Finally, issue preclusion principles obviate the need for this tribunal to revisit the identical motion previously made by Respondent in Coos County Circuit Court. If there were any doubt about the lack of merit of Respondent's motion to suppress, this tribunal would be entitled to deny it summarily as having already been adversely resolved against Respondent.

DATED this 18th day of June, 2009.

Respectfully submitted,

JOHN R. KROGER
Attorney General



Jas Jeffrey Adams, #780114
Attorney-In-Charge
Of Attorneys for Department of Environmental Quality, State of Oregon

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DALE A. PENNIE, Pro se
56295 Tom Smith Road
Bandon, OR 97411
541-347-9387

OREGON STATE CIRCUIT COURT

FOR COOS COUNTY

State of OREGON,	
Plaintiff,	**Case No. 09NB0301, 09NB0303, 09NB0303**
DALE A. PENNIE,	**MOTION TO SUPPRESS EVIDENCE**
~~Defendant~~	

COMES NOW DALE a. Pennie, defendant in the above entitled matter, to move this court for an Order suppressing all evidence gathered by Coos County Sheriff Deputy Dahlin in his performance as a codes compliance officer for Coos County . This motion is made in good faith and is not for purposes of delay, as is set out in the accompanying Memorandum of Law.

Respectfully submitted,

June 8 ~~April~~ __, ~~2008~~ 2009

Dale A. Pennie
DALE A. PENNIE, Pro se

MEMORANDUM OF LAW

Motion to Suppress Evidence

The issue in this matter revolves around a warrantless search upon the rural property of defendant Dale A. Pennie by Coos County Sheriff Deputy Dahlin. The search was to discover whether defendant had violated Coos County ordinances for "maintaining a Junk Yard" and "accumulation of solid waste" This search was initiated by a complaint filed with the county by abutting land owners, who complained :

> "Hazardous dump site with over 100 non running junk cars that are leaching oil gasoline into groundwater springs. There are also numerous computers leaching lead and silver. Looks like a huge dump. Also a fire hazard"

additionally, The property owner wrote:

> " Can only see from a distance from our property. "

Based on the above complaint, deputy Dahlin accompanied the adult children of the property owner onto the easement and onto defendant's property as well. Written permission was given at a later date for the deputy to enter onto the easement. Numerous citations have been issued to defendant by this deputy, who has also brought state employee Craig Filip of Oregon DEQ, who has since issued a warning letter with opportunity to correct. The deputy has also brought other deputies and filed complaints with the Coos Planning department.

Oregon Constitution Article 1, section 9 and the United States Constitution's fourth Amendment protect citizens from unreasonable searches and seizures. Oregon Constitution Article 1, section 9 has been interpreted to provide greater protection, in some instances, than the fourth Amendment of the U.S. Constitution. The Oregon Supreme Court has held that Article 1, section 9 of the Oregon Constitution should be interpreted independently from the fourth

Amendment (State v. Caraher, 293 Or 741, 748-750, 653 P2d 942 (1982). The court also recognized that, as a general rule, state courts should resolve state constitutional questions before reaching federal issues. State vs. Kennedy, 295 Or 260, 266-267, 666 P2d 1316 (1983).

FOUNDATION

There are 5 foundational issues to be considered when defendant seeks to suppress evidence:

(1) Was the person who performed the alleged search or seizure a Federal or state officer or agent?

In this instance, the County Sheriff Deputy is considered a state actor;

(2) Do the challenged acts constitute a search or seizure within the meaning of Article 1, section 9 of the Oregon Constitution, the fourth amendment of the US Constitution, or both?

Private property, protected from approach by a locked, posted (NO TRESPASSING) gate, and by trees and brush, plus additional NO TRESPASSING notices, and the complainant's statement on the complaint form ("can only see from a distance from our property") all indicate defendants intent to exclude others from his property and home. Taking of photographs, some CLEARLY taken from defendant's property indicate a search, and the photos are a seizure ("this is what I saw while on defendant's property).

(3) Did the search or seizure violate the defendants protected property or privacy rights?

A warrantless search is unreasonable on its face; the state must bear the burden to prove the warrant was constitutional. ORS 133.693(4); State vs. Tucker, 330 Or 85, 88-89, 997 P2d 182 (2000).

(4) Was the search or seizure conducted for criminal or civil purposes?

Well, obviously there have been fines levied, threats of larger fines and/or jail, and continuing enforcement. Definitely criminal purposes

(5) Is the evidence obtained by means of the search or seizure subject to suppression under the exclusionary rule?

The right to be free from unreasonable searches and seizures; is it reasonable for a state actor to enter upon private, gated and posted property for the purpose of issuing citations for violations not known until a search has been made? Defendant is entitled to privacy as a matter of law, and, further, has repeatedly demanded a search warrant be provided, and, when that is denied him, continues his objection, all evidence so gathered, and all further evidence gathered as a result of that initial warrantless entry must be suppressed.

ARGUMENT

While the initial complaint was from a private citizen, he stated from the onset the violations were only visible from a distance on his property. When the deputy was escorted upon the easement, and then upon defendant's property, he had absolutely NO RIGHT to do so without a warrant. The adult child of the property owner could not grant permission to enter upon defendant's land (one person can not waive the rights of another (Coos County, et al vs. Reeves (163 OrApp 497; 988 P2d 433). In case in point, the Reeves case is quite similar to the instant matter: A state agent (game officer) entered onto a protected road to investigate a possible game violation. Upon arriving at the house the officer spoke with the father of the suspected game violators (juveniles) and, after asking for permission to search located the game violations, and cited the 2 juveniles The court suppressed the evidence and dismissed the case, because the officer

did not have a warrant, drove upon protected private property (in that matter a sign stating "no unauthorized persons beyond this point") and a request for permission to search after the fact. The court found the father could not waive, particularly after the fact, the rights of another. The permission to search was found insufficient.

Defendant Pennie has never consented to a search sans a warrant, nor has he ever not asked for it. He has not confronted the deputy beyond that, maintaining his rights but not being combative. The deputy, on the other hand, has repeatedly stated he does not need a warrant because he has "probable cause." The probable cause is **GROUNDS** for a warrant.

Because this matter began as a quasi criminal matter (only fines) does not remove the need

for a warrant. In Marshall vs. Barlow's Inc. The U.S. Secretary of Labor appealed a ruling from the lower court stating he had the right to inspect (an OSHA inspector) a business for compliance

and did not need a warrant. The United States Supreme Court ruled the requirement of obtaining a search warrant was not overly burdensome on the inspection system or the courts and that it would provide assurances that the inspections were reasonable under the constitution.

(436 U.S. 307; 98 S,Ct.1816; 56 L.Ed.2d 305; 1978 Lexis 26; 8 ELR 20434)

The State can not expect a lower standard for them, and, in fact, the federal system has the lower standards (the fourth amendment) then Oregon (Article 1, section 9). The deputy should have sought an administrative search warrant, based on the complaint of the neighbor, and the statement "only visible from a distance on our property". There is a test set out by the Oregon Supreme Court, articulated in Dixson/Digby:

> "A person who wishes to preserve a constitutionally protected privacy interest In land outside the curtilage must manifest an intention to exclude the public By erecting barriers to entry, such as fences, or by posting signs. This rule will not unduly hamper police officers in their attempts to curtail manufacture of and Trafficking in illegal drugs, because it does not require investigating officers to draw any deduction other than that required of the general public; if land is Fenced, posted or otherwise closed off, one does not enter it without permission, Or in the officer's situation, permission or a warrant'."

Set out in State v. Walch, 99 OrApp 180; 781 P2d 406

CONCLUSION

The deputy was required to obtain a search warrant from the onset. Only then could he enter onto the private, protected property of defendant. No matter "its just a violation, not an arrest", especially now, after repeated demands from defendant, and repeated referrals to other agencies, some with criminal sanctions in mind. This court has no choice but to suppress all of the evidence gathered in this matter, from either the initial entry or the fruits gathered since that time. To hold otherwise would be to ignore state and federal constitutions and laws.

Respectfully submitted,

June 8, 2009 Dale A. Pennie

DALE A. PENNIE, Pro se

I certify I have caused to be mailed via the US Postal service, postage paid, a true copy of this Motion and Memorandum addressed to:

Coos County Sheriff's Office
Deputy Dahlin
2nd and Baxter Streets
Coos County Courthouse
Coquille, OR 97423

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

AMENDED

THE STATE OF OREGON, Plaintiff,
vs.
Dale A. Pennie, Defendant
True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NB0301

Prohibited accumulation of Solid Waste

FILED
2009 JUN -9 PM 1:57
COOS COUNTY COURT
NORTH BEND OREGON

6-9-09

The following proceedings were held in the above-captioned case before the undersigned judge on 6-9-09 District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
(X) Other: Court Trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibited accumulation of Solid Waste.
(X) Other: Motion to Supress evidence is denied
(X) Pay $ 1003.00 by 7-09-09 and balance at $ _____ /month beginning _____ or appear at 9AM next Judicial day. Or the Clerk
(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____.
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $ _____ ($ _____ Posted)

Dated 6-09-09 Reporter A. Washington

Circuit Judge

cc: Jail, DA, Def. Atty, P &P
cc: mailed to def 6-09-09

06/16/2009 TUE 10:57 FAX ☑003/004

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS + AMENDED

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,
vs.
Dale A. Rennie Defendant
True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NB0302

prohibited accumulation of solid waste

FILED
2009 JUN -9 PM 5:57
COOS COUNTY CIRCUIT COURT
NORTH BEND, OREGON

The following proceedings were held in the above-captioned case before the undersigned judge on 6-9-09
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as Interpreter.
(X) Other: Court trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: prohibited accumulation of solid waste
(X) Other: Motion to Supress evidence is denied
(X) Pay $ 1003.00 by 7-09-09 and balance at $ _____ /month beginning _____ or appear at 9AM next Judicial day. or the Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____, Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $ _____ ($ _____ Posted)

Dated 6-09-09 Reporter A. Wadsworth

Circuit Judge

cc: Jail, DA, Def. Atty, P & P
cc: Mailed to def 6-09-09

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

AMENDED

THE STATE OF OREGON, Plaintiff,

vs.

Dale A. Pennie
Defendant

True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NB0303

Prohibited accumulation of Solid Waste

FILED
2009 JUN -9 P 1:54
COOS COUNTY CIRCUIT COURT
COOS COUNTY, OREGON

The following proceedings were held in the above-captioned case before the undersigned Judge on 6.09.09
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____. ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
(X) Other: Court Trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibited accumulation of Solid Waste

(X) Other: Motion to Supress evidence is denied

(X) Pay $ 1003.00 by 7.09.09 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. Or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____. Sentencing: Today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____.
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release. ( ) Security continued at $ _____ ($ _____ Posted)

Dated 6.09.09 Reporter A. Waddington

Circuit Judge

cc: Jail, DA, Def Atty, P & P
cc: mailed to def 6.09.09

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

BY HAND DELIVERY

November 30, 2009

Regina Cutler
Department of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204

Re: Request for extension to file answering brief
OAH Case No. 901024
DEQ Case No. LQ/SW-WR-07-225

Dear Ms. Cutler,

On November 20, 2009, the Environmental Quality Commission received your timely request for an extension of the time to file your answering brief for the above-referenced case. Your request has been granted, and you have an extension of 30 days. Your brief is now due Sunday, December 20, 2009.

To file your answering brief, please send all documents to: Environmental Quality Commission, c/o Stephanie Clark, 811 SW 6th Avenue, Portland, Oregon 97204 with a copy to Dale Pennie at 56295 Tom Smith Road, Bandon, Oregon 97411.

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

If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: Dale Pennie

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

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
TTY 1-800-735-2900

November 20, 2009

Environmental Quality Commission
c/o Stephani Clark
811 SW Sixth Avenue
Portland, OR 97204

Re: Request for Extension
In the Matter of: Dale A. Pennie
Office of Administrative Hearings Case No. 901024
Agency Case No. LQ/SW-WR-07-225

Dear Ms. Clark:

The Department of Environmental Quality (the Department) hereby requests a 30 day extension in which to file its answering brief in the above referenced matter.

Sincerely,

Regina Cutler
Environmental Law Specialist
Office of Compliance and Enforcement

cc: Dale A. Pennie

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

October 29, 2009

Dale A. Pennie
56295 Tom Smith Road
Bandon, Oregon 97411

Re: Contested case hearing
OAH Case No. 901024
DEQ Case No. LQ/SW-WR-07-225

Dear Mr. Pennie,

On October 22, 2009, the Environmental Quality Commission received your timely filing in the above-referenced case. The Department of Environmental Quality now has 30 days from your date of filing to submit an answering brief.

Per your voicemail, I disregarded the initial copy of your document, sent by UPS express methods, and have included the corrected document, received by fax on Oct. 22, 2009, as your official filing. To ensure all parties are working from the same material, I have included a copy of this filing with this letter for reference.

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

If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

Stephanie Clark
Assistant to the Environmental Quality Commission

Enclosure: Copy of official filing from Mr. Pennie

Cc: BY HAND DELIVERY: Regina Cutler, DEQ

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

ORIGINAL

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

IN THE MATTER OF:
DALE ALAN PENNIE,

Respondent

PROPOSED AND FINAL ORDER

OAH Case No.: 901024
Agency Case No.: LQ/SW-WR-07-225

HISTORY OF THE CASE

On May 14, 2008, the Department of Environmental Quality for the State of Oregon (DEQ) issued a Notice of Violation, Department Order and Civil Penalty Assessment (Notice of Violation) to Dale Alan Pennie (Respondent). On May 30, 2008, Respondent requested a hearing. On April 14, 2009, the matter was referred to the Office of Administrative Hearings (OAH).

On A pril 29, 2009, Senior Administrative Law Judge (ALJ) Dove L. Gutman was assuigned to preside at hearing. On May 21, 2009, a pre-hearing telephone conference was held. ALJ Gutman presided. Respondent appeared and represented himself. Regina Cutler represented DEQ. On May 21, 2009, ALJ Gutman issued a Pre-Hearing Order.

On June 11, 2009, Respondent filed a Motion to Suppress, a Motion to Dismiss, and a Motion to Take Judicial Notice. On June 19, 2009, DEQ filed its response. On June 23, 2009, ALJ Gutman informed the parties that she was taking the Motions to Suppress and Dismiss under advisement.

On June 24, 2009, an in-person hearing was held in Coquille, Oregon. ALJ Gutman presided. Respondent represented himself and testified. Sue Billings and Gary Corbett, Respondent's friends, also testified on behalf of Respondent. Ms. Cutler represented DEQ. Craig Filip, DEQ Solid Waste Analyst; Del Dahlen, Coos County Sheriff's Deputy; and Ruth Ann Carouthers, property owner, testified on behalf of DEQ. The record closed on June 24, 2009.

ISSUES

1. Whether Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Cox property from December 20, 2005 through March 27, 2008 without first obtaining a solid waste permit from DEQ.

2. Whether Respondent violated ORS 459.205 and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Pennie Property from December 20,

2005 through March 27, 2008, without first obtaining a solid waste permit from DEQ.

3. Whether civil penalties in the amount of $28,805 shall be imposed against Respondent, pursuant to OAR 340-012-0045.

4. Whether Respondent shall be ordered to immediately initiate actions necessary to correct all of the above cited viiolations and come into full compliance with Orego's statutes and regulations.

EVIDENTIARY RULINGS

Exhibits A1 through A4, A6 through A10, A12, A`14 through A18, A20 through A26, and A28 offered by DEQ, were admitted into the record without objection. Exhibits R1 through R12, offered by Respondent were admitted into the record without objection.

Respondent objected to Exhibits A19 and A29 on the basis of relevance. The objections were overruled and Exhibits A19 and A 29 were admitted into the record.

Respondent objected to Exhibits A5, A11, A13 and A27 on the basis that the evidence contained in the exhibits was obtained illegally. Respondent's objection to Exhibit 27 was overruled and exhibit A27 was admitted into the record. A LJ Gutman withheld ruling on exhibits A5,A11` and A13 pending her decision on Respondent's Motions to Dismiss and Supress.

A set forth below, Respondent's Motion to Suppress is granted, Exhibits A5, A11, A13 arer not admitted into the record.

MOTIONS TO SUPPRESS AND DISMISS

1. Motion to Suppress

Respondent contends that his Motioin to Suppress Exhibits A5, A11 and A13 should be granted based on a warrantless search by Deputy Dahlen. DEQ contends that it should be denied. I agree with Respondent.

A. Consent to Search

Under Oregon Constitution and the Fourth Amendment to the United States Constitution, warrantless searches and seizures by the government are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement. *Katz v. United States*, 389 US 347, 357 (1967); *State v. Snow*, 337 Or 219, 223 (2004); *State v. Bridewell*,306 Or 231, 235 (1988).

Consent is a recognized exception to the warrant requirement of both the state and federal constitutions. *State v. Weaver-*, 319 Or 212. 2198 (1994); *Schneckloth v. Bustamonte,* 412 US

218, 222 (1973). A valid search may be made without a warrant and without probable cause if the person to be searched of the person in control of the property to be searched gives voluntary consent for the search.

Article 1, section 9, of the Oregon Constitution is more restrictive than the fourth amendment. It requires the person who provides the consent to have actual rather than apparent authority. *State v. Surface/Hurly, 183 OrApp 368, 372 (2002); State v. Jenkins,* 179 Or App 92, 99 *(2002).* Actual Authority comes from joint use or control of, or access to an area for most purposes. *State v. Meredith,* 337 Or 299, 306, 07 (2004); *State v. Johnson,* 123 Or App 124, 127 (1993); *State v. Surface/Hurly,* 183 Or App at 373; *State v. Wren,* 150 Or App 96 (1997); *State v. Carsey,* 295 Or 32, 44 (1983).

On December 20, 2005, John Cox, the owner of the Cox property, allegedly gave express consent to Deputy Dahlen to enter upon his property for code enforcement purposes. Mr. Cox's intent, as evidenced by his daughter, was to grant permission to any representative of the State or County that could assist in cleaning up the hazardous and solid waste that was accumulating on his property. While cleaning up his property was of concern, he also wanted Respondent's property cleaned up. Mr. Cox could grant authority to enter upon his property, but as set out above actual authority over the easement was in Respondent's control, and still is. He has a locked gate, posted, and has attempted to block unsolicited entry by the deputy for more than three years. An attorney for John Cox, apparently, sent a letter with demands, that mis-stated the actual easement existence, and made demands that have not been followed through with, several years later. I find Ms. Ruth Ann Carouthers, now apparent owner, testimony highly suspect, as it now appears she has no problem stating what she wants, rather than what actually is.

On the d ates of March 19, 2007, October 15, 2007, and March 27, 2008, Deputy Dahlen and Mr. Filip, the DEQW investigator for the State, entered upon the Cox property to conduct inspections of the solid waste accumulating on both properties. During the inspections and while on the Cox property, and questionably upon the Respondent property,, Deputy Dahlen and Mr. Filip also observed waste oin tax lot 1111 (Pennie Property) that they felt was in plain view. Deputy Dahlen has stated he has never been on Respondent's property, and has also testified several times recently that he has been on the Pennie property several times, previously, to investigate and take photographs. Therefore, I find he has entered upon private property in violation of the Oregon Constitution, and Craig Filip has been tainted with fruit of the poisonous tree and, there, his search is also unreasonable and shall be suppressed.

If contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no search. *Minnesota v. Dickerson,* 508 US 266, 275 (1993). A police officer's unaided observation, purposive or not , from a lawful vantage point is not a search under article 1, section 9 of the Oregon Constitution. *State v. Ainsworth,* 310 Or 613, 621 (1990). I find the deputy and Craig Filip were, at times, on Respondent's property, and despite the belief of Craig Filip to the contrary, his dependence upon Deputy Dahlen has again, tainted his investigation, at leaset as fruit from the poisoned tree.

Despite Deputy Dahlen being given express consent to enter the Cox property, and because Craig Filip was given implied consent as the representative of DEQ, a warrant was required for Mr. Filip and/or Deputy Dahlen to enter upon the Pennie Property, which at least Deputy Dahlen has done several times. Therefore, Respondent's Motion to Suppress is GRANTED and the Exhibits A5, A11, and A13 are not admitted into the record.

Respondent argued that Mr. Filip entered the Pennie property illegally when he approached the tree in Dump site D with the No Trespassing sign posted on it, and, as a result, all of the pictures that Mr. Filip took should be suppressed. As set forth above and in the credibility finding, there is a preponderance of evidence to support Respondent's assertion and his Motion is Granted, and all of Mr. Filip's photographs are removed from the record, at a minimum as fruit from the poisoned tree.

11. Motion to Dismiss

Respondent contends that his Motion to Dismiss should be granted based on issue preclusion and *res judicata*. DEQ contends it should be denied. I agree with DEQ.

A. Claim preclusion

"Preclusion by former adjudication" is a doctrine of rules and principles governing the binding effect on a subsequent proceeding of a final judgment previously entered into a claim. The term comprises two doctrines: claim preclusion, also known as *res judicata*, and issue preclusion, also known as collateral estoppel. *In re Drews*, 310 Or 134, 139 (1990).

Claim preclusion prohibits a oparty from relitigating a cause of action against the same defendant involving the same factual transaction as was litigated in the previous adjudication. *Id.; see also Shuler v. Distribution Trucking Co.*, 164 Or App 615, 621 (1999).

As set forth in the record, DEQ was not a party to the prior action brought against Respondent in Coos County Circuit Court. Accordingly, claim preclusion does not apply.

B. Issue preclusion

Issue preclusion prevents the litigation of a legal issue or determinative fact previously litigated. *In re Drews*, 310 at 139-40. To preclude an issue from litigation, five conditions must exist: (1) the issue in question in the present proceeding must be identical to the issue in the prior proceeding; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded must have had a full and fair opportunity to be heard on that issue in the prior proceeding; (4) the party sought to be precluded must have been a party or in privity with a party to the prior proceeding; and (5) the prior proceeding must have been the type of proceeding to which courts will give preclusive effect. *Nelson v. Emerald* People's *Utility District.*, 318 Or 99, 103-04 (1993); see also *state v. Ratliff*, 304 Or 254 (1987); *State v. Krieger 170 Or App 12 (2000), rev den 332 Or 240 (2001).*

"Privity" pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if he were a party. *Black's law dictionary* 1079 (5th ed. 1979)

DEQ was not a party to the prior action brought against Respondent in Coos County Circuit Court
. In addition, DEQ was not bound by the final judgments rendered against Respondent. Thus, DEQ was not in privity with Respondent to the prior proceeding. As such, issue preclusion does not apply in this case. Therefore, Respondent's Motion to Dismiss for these issues is denied.

JUDICIAL NOTICE

Judicial Notice is hereby taken that the following case numbers involving Respondent were heard in Coos County Circuit Court: 06NB1448; 07NB1336; 07NB1338; 07NB1339; 07NB1352; 07NB0453; 07NB0669; 07NB1794; 07NB1796; 08NB0609L 08NB0610; 08NB0611; 08NB1552; 08NB1553; 08NB1554; 08NB1555; 09NB0301;09NB0302; 09NB0303.

CREDIBILITY DETERMINATION

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically credible. *Tew v. DMV,* 179 Or App 443 (2002).

Mr. Filip testified that he stayed within the confines of an easement (or the Cox property) whewn he took the pictures contained in Exhibits A5, A11, and A13, including when he approached the tree in Dump site D with the "No Trespassing" sign on it. Mr. Filip testified he also researched the easement prior to conducting the site inspections, and that Deputy Dahlen pointed out the `Cox property boundaries during the inspections. Mr. Filips testimony was credible, logical, consistent but corroborated by Deputy Dahlen, wh has made numerous assertions that he has then later contradicted, including acknowledging he investigated and photographed, and entered into evidence evidence he collected on the Pennie property at the onset to the investigation, contrary to other testimony he has made, including at this hearing, where he stated he had never gone on to the Pennie property or past the "No Trespassing" tree. Therefore, I find all of Mr. Filips photos and testimony has been tainted as fruit of the poisoned tree.

Respondent and Ms. Billings both testified that the "No Trespassing" tree was well onto the Pennie property, Ms. Billings stating she measured the tree from a Northern property pin.

FINDINGS OF FACTS

1. On March 9, 1988, Karen Pennie, then wife of Respondent, purchased Tax Lot 1111 (Pennie property), a parcel of land in the SE 1/4 of the SE 1/4 of Section 16, and in the SW 1/4 of the SW 1/4 of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon. Ms. Pennie received a 50-foot wide and 400 feet long easement for ingress and egress across the western portion of Tax lot 1106, which is adjacent to the Pennie property. A dirt road ran along the easement. (Exs. A1, A5, A14, A16, A17, A18.)

2. Ms. Pennie's warranty deed set forth the boundaries of the easement in the following relevant detail:

> The boundaries of this 50-foot wide easement are located 25 feet from the following described centerline:
>
> Beginning at the Southwest corner of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon, the 297.79 feet; thence nce North 0 17' 21" East along the West line of said Section 15 810 feet; thence North 89 35' West 170 feet; thence North 59 55'40" West 297.79 feet; thence North 30 07' 36" 142.96 feet along the easterly boundary of Tom Smith County Road; thence North 23 27' 32" East 89 feet along the easterly boundary of said County Road to the point of beginning of this easement; thence south 83 East 112; thence North 88 East 59 feet; thence South 83 East 112 feet; thence 87 East 118 feet; thence South 87 East 131 feet; thence South 21 West 49.5 5 feet to the North line of property herein above described.

(Ex. AS17).

3. On March 2, 1990, John Cox and Jane Cox purchased Tax Lot 1106 (Cox property), a parcel of land in the SE1/4 of the SE 1/4 of Section 16 and in the SW 1/4 of the SW 1/4 of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon. The Cox property had various encumbrances on it, including the easement granted to Karen Pennie for ingress and egress.
(Ex s. A14, A15, A18, A28, A29).

4. The Cox family did not reside on the Cox property, but used it for camping purposes. (Test. Of Carouthers)

5. In July 1990, Karen Pennie divorced Respondent. She maintained sole ownership of the Pennie property. (Ex.A19).Karen Pennie gave Respondent permission to reside on the Pennie property (Test. Of Respondent).

(N earlt 2003, the Cox family noticed the computer monitors, inoperable vehicles, and

piles of garbage had started to accumulate on the Cvox property. Ruth Ann Carothers, the daughter of John Cox, spoke with Respondent, who acknowledged that he should not have placed the items on the Cox property and would remove them. (Test. Of Carothers).

7. Sometime in early December 2005, Mr. Cox and Ms. Carouthers visited the Cox property, but were unable to safely drive down the easement access road due to the accumulated waste. Ms Carouthers contacted Coos County Sheriff's department. Eventually Deputy Dahlen viewed the Cox property

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

October 14, 2009

Dale A. Pennie
56295 Tom Smith Road
Bandon, Oregon 97411

Re: Request for additional seven day extension to file exceptions and brief
OAH Case No. 901024
DEQ Case No. LQ/SW-WR-07-225

Dear Mr. Pennie,

On October 14, 2009, the Environmental Quality Commission received your timely request for an additional extension of seven days to file your exceptions and brief for the above-referenced case. Your original request asked for 21 days, and this additional request of seven days extends the deadline to a 30-day extension from the original deadline of September 24, 2009.

Your request has been granted, and you have an extension of seven days. Your exceptions must specify the findings and conclusions in the proposed order that you object to and alternative proposed findings.

To file your exceptions and brief, please mail these documents to: Environmental Quality Commission, c/o Stephanie Clark, 811 SW 6th Avenue, Portland, Oregon 97204 with a copy to Regina Cutler at 811 SW 6th Avenue, Portland, Oregon 97204. Your exceptions and brief must be received by October 22, 2009, or the EQC may dismiss your petition for review.

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

If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

Stephanie Clark
Assistant to the Environmental Quality Commission

Cc: BY HAND DELIVERY: Regina Cutler, DEQ

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

Oct. 14, 2009

Oregon Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204-1390

By Fax (503)229-6762

Re: Petition for commission review
OAH Case No. 901024
DEQ Case No. LQ-SW-WR-07-225

On September 24, 2009 a request for a 21 day extension of time was granted, making the Petition due on October 15, 2009. I am requesting another 7 days of time. Making the Petition due on October 22, 2009. This would be a 30 day extension from the due date of September 24, 2009.

Dale A. Pennie

Dale A. Pennie
56295 Tom Smith Rd.
Bandon, OR 97411
(541)347-9387

RECEIVED
OCT 14 2009
Oregon DEQ
Office of the Director

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

September 23, 2009

Dale A. Pennie
56295 Tom Smith Road
Bandon, Oregon 97411

Re: Request for extension to file exceptions and brief
OAH Case No. 901024
DEQ Case No. LQ/SW-WR-07-225

Dear Mr. Pennie,

On September 23, 2009, the Environmental Quality Commission received your timely request for an extension of the time to file your exceptions and brief for the above-referenced case.

Your request has been granted, and you have an extension of 21 days. Your exceptions must specify the findings and conclusions in the proposed order that you object to and alternative proposed findings.

To file your exceptions and brief, please mail these documents to: Environmental Quality Commission, c/o Stephanie Clark, 811 SW 6th Avenue, Portland, Oregon 97204 with a copy to Regina Cutler at 811 SW 6th Avenue, Portland, Oregon 97204. Your exceptions and brief must be received by October 15, 2009, or the EQC may dismiss your petition for review.

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

If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

Stephanie Clark
Assistant to the Environmental Quality Commission

Cc: BY HAND DELIVERY: Regina Cutler, DEQ

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

Environmental Quality Commission
C/o Stephanie Clark
811 SW 6th Avenue
Portland, Oregon 97204

September 22, 2009

Re. Petition for commission review
OAH Case No. 901024
DEQ Case No. LQ/SW-WR-07-225

Request for an Extension of Time.

Opening brief in the above case is due on September 24, 2009.
Respondent, Dale Alan Pennie, request an extension on 21 days.
Opening brief due on October 15, 2009.

Dale A. Pennie
56295 Tom Smith Rd.
Bandon, OR 97411

Faxed to (503) 229-6762
Overnight

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

August 25, 2009

BY CERTIFIED MAIL

Dale A. Pennie
56295 Tom Smith Road
Bandon, Oregon 97411

Re: Petition for commission review
OAH Case No. 901024
DEQ Case No. LQ/SW-WR-07-225

Dear Mr. Pennie,

On August 24, 2009, the Environmental Quality Commission received your timely petition for review of the proposed order for the above-referenced case.

You must file exceptions and a brief within thirty days from the filing of your request for commission review. Your exceptions must specify the findings and conclusions in the proposed order that you object to and alternative proposed findings.

To file your exceptions and brief, please mail these documents to: Environmental Quality Commission, c/o Stephanie Clark, 811 SW 6th Avenue, Portland, Oregon 97204 with a copy to Regina Cutler at 811 SW 6th Avenue, Portland, Oregon 97204. Your exceptions and brief must be received by September 24, 2009, or the EQC may dismiss your petition for review.

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

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

Sincerely,

Stephanie Clark
Assistant to the Environmental Quality Commission

Enclosure: OAR 340-011-0575
Cc: BY HAND DELIVERY: Regina Cutler, DEQ

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

Oregon Administrative Rules 340-011-0575

Review of Proposed Orders in Contested Cases

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

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

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

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

(5) Procedures on Review:

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

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

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

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

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

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

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

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

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

(7) Scope of Review: The commission may substitute its judgment for that of the administrative law judge in making any particular finding of fact, conclusion of law, or order except as limited by OAR 137-003-0655 and 137-003-0665.

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

Stat. Auth.: ORS 183.341 & 468.020
Stats. Implemented: ORS 183.460, 183,464 & ORS 183.470
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 115, f. & ef. 7-6-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0132 by DEQ 18-2003, f. & cert. ef. 12-12-03

PETITION FOR COMMISSION REVIEW

Dale Alan Pennie, Respondent in OAH case No. 901024, agency case number LQ/SW-WR-07-225, hereby requests the review of PROPOSED AND FINAL ORDER mailed August 6, 2009. This Notice complies with OAR 340-011-0575 and is timely filed.

Dated August 24, 2009 Dale A. Pennie

Dale A. Pennie
56295 Tom Smith Road
Bandon, Oregon 97411

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

IN THE MATTER OF:	) **AMENDED PROPOSED AND FINAL**
	) **ORDER**[1]
DALE ALAN PENNIE,	) OAH Case No.: 901024
Respondent	) Agency Case No.: LQ/SW-WR-07-225

HISTORY OF THE CASE

On May 14, 2008, the Department of Environmental Quality for the State of Oregon (DEQ) issued a Notice of Violation, Department Order and Civil Penalty Assessment (Notice of Violation) to Dale Alan Pennie (Respondent). On May 30, 2008, Respondent requested a hearing. On April 14, 2009, the matter was referred to the Office of Administrative Hearings (OAH).

On April 29, 2009, Senior Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at hearing. On May 21, 2009, a pre-hearing telephone conference was held. ALJ Gutman presided. Respondent appeared and represented himself. Regina Cutler represented DEQ. On May 21, 2009, ALJ Gutman issued a Pre-Hearing Order.

On June 11, 2009, Respondent filed a Motion to Suppress, a Motion to Dismiss, and a Motion to Take Judicial Notice. On June 19, 2009, DEQ filed its Response. On June 23, 2009, ALJ Gutman informed the parties that she was taking the Motions to Suppress and Dismiss under advisement.

On June 24, 2009, an in-person hearing was held in Coquille, Oregon. ALJ Gutman presided. Respondent represented himself and testified. Sue Billings and Gary Corbett, Respondent's friends, also testified on behalf of Respondent. Ms. Cutler represented DEQ. Craig Filip, DEQ Solid Waste Analyst; Del Dahlen, Coos County Sheriff's Deputy; and Ruth Ann Carothers, property owner, testified on behalf of DEQ. The record closed on June 24, 2009. On August 6, 2009, ALJ Gutman issued the Proposed and Final Order in this matter.

On August 21, 2009, DEQ filed a Motion for Clarification pursuant to OAR 340-011-0573(2), requesting that ALJ Gutman supplement the Proposed and Final Order to include a specific deadline for Respondent's compliance, and to include the specific actions that Respondent must take to correct the cited violations and come into full compliance with Oregon's statutes and regulations. Respondent did not file a timely Response. Therefore, by issuance of this Amended Proposed and Final Order, DEQ's Motion is GRANTED.

[1] The amended parts of the order are in bold.

ISSUES

1. Whether Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Cox property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

2. Whether Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Pennie property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

3. Whether civil penalties in the amount of $28,805 shall be imposed against Respondent, pursuant to OAR 340-012-0045.

4. Whether Respondent shall be ordered to immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations **by:**

a. Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 of the Notice of Violation, within thirty (30) days of the date of this Order. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility as appropriate; and

b. Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Order.

All documentation should be sent to:
Department of Environmental Quality
1102 Lincoln, Suite 210
Eugene, Oregon 97401
Attention: Craig Filip

EVIDENTIARY RULINGS

Exhibits A1 through A4, A6 through A10, A12, A14 through A18, A20 through A26, and A28, offered by DEQ, were admitted into the record without objection. Exhibits R1 through R12, offered by Respondent, were admitted into the record without objection.

Respondent objected to Exhibits A19 and A29 on the basis of relevance. The objections were overruled and Exhibits A19 and A29 were admitted into the record.

Respondent objected to Exhibits A5, A11, A13, and A27 on the basis that the evidence contained in the exhibits was obtained illegally. Respondent's objection to Exhibit A27 was overruled and Exhibit A27 was admitted into the record. ALJ Gutman withheld ruling on Exhibits A5, A11, and A13 pending her decision on Respondent's Motions to Suppress and Dismiss.

As set forth below, because Respondent's Motions are denied, Exhibits A5, A11, and A13 are admitted into the record at this time.

MOTIONS TO SUPPRESS AND DISMISS

I. Motion to Suppress

Respondent contends that his Motion to Suppress Exhibits A5, A11 and A13 should be granted based on the warrantless search by Deputy Dahlin. DEQ contends that it should be denied. I agree with DEQ.

A. Consent to search

Under the Oregon Constitution and the Fourth Amendment to the United States Constitution, warrantless searches and seizures by the government are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement. *Katz v. United States*, 389 US 347, 357 (1967); *State v. Snow*, 337 Or 219, 223 (2004); *State v. Bridewell*, 306 Or 231, 235 (1988).

Consent is a recognized exception to the warrant requirement of both the state and federal constitutions. *State v. Weaver*, 319 Or 212, 219 (1994); *Schneckloth v. Bustamonte*, 412 US 218, 222 (1973). A valid search may be made without a warrant and without probable cause if the person to be searched or the person in control of the property to be searched gives voluntary consent for the search.

Article I, section 9, of the Oregon Constitution is more restrictive than the Fourth Amendment. It requires that the person who provides the consent to have actual rather than apparent authority. *State v. Surface/Hurly*, 183 Or App 368, 372 (2002); *State v. Jenkins*, 179 Or App 92, 99 (2002). Actual authority comes from joint use or control of, or access to an area for most purposes. *State v. Meredith*, 337 Or 299, 306-07 (2004); *State v. Johnson*, 123 Or App 124, 127 (1993); *State v. Surface/Hurly*, 183 Or App at 373; *State v. Wrenn*, 150 Or App 96 (1997); *State v. Carsey*, 295 Or 32, 44 (1983).

On December 20, 2005, John Cox, the owner of the Cox property, gave express written consent to Deputy Dahlen to enter his property for enforcement purposes. Mr. Cox's intent, as evidenced by his daughter, was to grant permission to any representative of the state or county that could assist in cleaning up the hazardous and solid waste that was accumulating on his

property.

On the dates of March 19, 2007, October 15, 2007, and March 27, 2008, Deputy Dahlen and Mr. Filip, the DEQ investigator for the state, entered the Cox property to conduct inspections of the solid waste that was accumulating on the property. During the inspections and while on the Cox property, Deputy Dahlen and Mr. Filip also observed waste on Tax Lot 1111 (Pennie property) that was in plain view. Mr. Filip took pictures of the waste on both properties while staying within the boundaries of the Cox property.

If contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no search. *Minnesota v. Dickerson*, 508 US 266, 275 (1993). A police officer's unaided observation, purposive or not, from a lawful vantage point is not a search under Article I, section 9, of the Oregon Constitution. *State v. Ainsworth*, 310 Or 613, 621 (1990).

Because Deputy Dahlen was given express consent to enter the Cox property, and because Mr. Filip was given implied consent as the representative of DEQ, no warrant was required. In addition, because Mr. Filip took pictures of the waste that was in plain view on the Pennie property, no warrant was required. Accordingly, Respondent's Motion to Suppress Exhibits A5, A11 and A13 is DENIED.

Respondent argued that Mr. Filip entered the Pennie property illegally when he approached the tree in Dumpsite D with the "No Trespassing" sign posted on it and, as a result, all of the pictures that Mr. Filip took should be suppressed. However, as set forth in the credibility finding, there is no reliable evidence to support Respondent's assertion. Thus, Respondent's argument is unpersuasive.

II. Motion to Dismiss

Respondent contends that his Motion to Dismiss should be granted based on issue preclusion and *res judicata*. DEQ contends that it should be denied. I agree with DEQ.

A. Claim preclusion

"Preclusion by former adjudication" is a doctrine of rules and principles governing the binding effect on a subsequent proceeding of a final judgment previously entered in a claim. The term comprises two doctrines: claim preclusion, also known as *res judicata*, and issue preclusion, also known as collateral estoppel. *In re Drews*, 310 Or 134, 139 (1990).

Claim preclusion prohibits a party from relitigating a cause of action against the same defendant involving the same factual transaction as was litigated in the previous adjudication. *Id.*; *see also Shuler v. Distribution Trucking Co.*, 164 Or App 615, 621 (1999).

As set forth in the record, DEQ was not a party to the prior action brought against Respondent in Coos County Circuit Court. Accordingly, claim preclusion does not apply in this case.

B. Issue Preclusion

Issue preclusion prevents the litigation of a legal issue or determinative fact previously litigated. *In re Drews*, 310 at 139-40. To preclude an issue from litigation, five conditions must exist: (1) the issue in question in the present proceeding must be identical to the issue in the prior proceeding; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded must have had a full and fair opportunity to be heard on that issue in the prior proceeding; (4) the party sought to be precluded must have been a party or in privity with a party to the prior proceeding; and (5) the prior proceeding must have been the type of proceeding to which courts will give preclusive effect. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103-04 (1993); *see also State v. Ratliff*, 304 Or 254 (1987); *State v. Krueger*, 170 Or App 12 (2000), *rev den* 332 Or 240 (2001).

"Privity" pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will bound by the final judgment as if he were a party. *Black's Law Dictionary* 1079 (5th ed 1979).

DEQ was not a party to the prior action brought against Respondent in Coos County Circuit Court. In addition, DEQ was not bound by the final judgments rendered against Respondent. Thus, DEQ was not in privity with Respondent to the prior proceeding. As such, issue preclusion does not apply in this case. Therefore, Respondent's Motion to Dismiss is DENIED.

JUDICIAL NOTICE

Judicial Notice is hereby taken that the following case numbers involving Respondent were heard in Coos County Circuit Court: 06NB1448; 07NB1336; 07NB1338; 07NB1339; 07NB1352; 07NB0453; 07NB0669; 07NB1794; 07NB1796; 08NB0609; 08NB0610; 08NB0611; 08NB1552; 08NB1553; 08NB1554; 08NB1555; 09NB0301; 09NB0302; 09NB0303.

CREDIBILITY DETERMINATION

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

> A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience

demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

Mr. Filip testified that he stayed within the confines of the easement (or the Cox property) when he took the pictures contained in Exhibits A5, A11, and A13, including when he approached the tree in Dumpsite D with the "No Trespassing" sign posted on it. Mr. Filip also testified that he researched the easement prior to conducting the site inspections, and that Deputy Dahlen pointed out the Cox property boundaries during the inspections. Mr. Filip's testimony was credible, logical, consistent, and corroborated by Deputy Dahlen.

Respondent and Ms. Billings, on the other hand, both testified that the tree in Dumpsite D with the "No Trespassing" sign posted on it stands inside the Pennie property. However, neither Respondent nor Ms. Billings are licensed surveyors. In addition, on cross-examination, Respondent admitted that the Pennie property had never been surveyed by a licensed surveyor. Furthermore, Ms. Billings admitted that she did not know where the Pennie property line was actually located.

Accordingly, I find by a preponderance of the reliable evidence that Mr. Filip stayed within the confines of the easement (or Cox property) when he took the pictures contained in Exhibits A5, A11, and A13.

FINDINGS OF FACT

1. On March 9, 1988, Karen Pennie, then wife of Respondent, purchased Tax Lot 1111 (Pennie property), a parcel of land in the SE ¼ of the SE ¼ of Section 16 and in the SW ¼ of the SW ¼ of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon. Ms. Pennie received a 50-foot wide and 400-foot long easement for ingress and egress across the western portion of Tax Lot 1106, which is adjacent to the Pennie property. A dirt road ran along the easement. (Exs. A1, A5, A14, A16, A17, A18.)

2. Ms. Pennie's warranty deed set forth the boundaries of the easement in the following relevant detail:

> The boundaries of this 50 foot wide easement are located 25 feet from the following described centerline:
>
> Beginning at the Southwest corner of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon, thence North 0° 17' 21" East along the West line of said Section 15 810 feet; thence North 89° 35' West 170 feet; thence North 59° 55' 40" West 297.79 feet; thence North 30° 07' 36" East 142.96 feet along the Easterly boundary of Tom Smith Country Road; thence North 23° 27' 32" East 89 feet along the Easterly boundary of said county road to the point of beginning of this easement; thence South 83° East 112 feet; thence North 88° East 59 feet; thence South 87° East 300 feet; thence North 87° East 118 feet; thence South 87° East 131 feet; thence South 21° West 49.55

feet to the North line of property herein above described.

(Ex. A17.)

3. On March 2, 1990, John Cox, Jr. & Jane Cox purchased Tax Lot 1106 (Cox property), a parcel of land in the SE ¼ of the SE ¼ of Section 16 and in the SW ¼ of the SW ¼ of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon. The Cox property had various encumbrances on it, including the easement granted to Karen Pennie for ingress and egress. Mr. Cox had the Cox property surveyed by a registered and professional land surveyor. The surveyor flagged the entire Cox property, which included the dirt road that ran along the easement. The Cox property extended approximately 20 feet south from the south edge of the dirt road. Mr. Cox improved the dirt road (easement access road) and installed a gate on the easement access road that allowed several vehicles to park outside of the gate. (Test. of Carothers; Exs. A14, A15, A18, A28, A29.)

4. The Cox family did not reside on the Cox property, but used it for camping purposes. Mr. Cox had a verbal agreement with Respondent that Respondent would maintain the easement. (Test. of Carothers.)

5. In July 1990, Karen Pennie divorced Respondent. She maintained sole ownership of the Pennie property. (Ex. A19.) Karen Pennie gave Respondent permission to reside on the Pennie property. (Test. of Respondent.)

6. In early 2003, the Cox family noticed that computer monitors, inoperable vehicles, and piles of garbage had started to accumulate on the Cox property. Ruth Ann Carothers, the daughter of Mr. Cox, spoke with Respondent, who acknowledged that he should not have placed the items on the Cox property and would remove them. (Test. of Carothers.)

7. Sometime in early December 2005, Mr. Cox and Ms. Carothers visited the Cox property, but were unable to safely drive down the easement access road due to the accumulated waste. Ms. Carothers contacted Deputy Dahlen of the Coos County Sheriff's Department. Deputy Dahlen viewed the Cox property with the Cox family members. Mr. Cox and Ms. Carothers pointed out the Cox property boundaries to the deputy, as well as the piles of accumulated waste. Deputy Dahlen observed, among other things, numerous inoperable vehicles, a large bus crammed full of materials, a boat, a trailer, and a huge pile of computers. Deputy Dahlen took pictures of the accumulated waste and advised Mr. Cox to file the proper complaints. (Test. of Carothers; test. of Dahlen.)

8. On December 6, 2005, John Cox filed a Coos County Code Violation Complaint against Respondent and Karen Pennie for placing cars, trucks, trailers, and computers on the Cox property. Mr. Cox also filed a Coos County Code Violation Complaint against Respondent and Karen Pennie for placing over 100 inoperable vehicles and numerous computers on the Pennie property. (Exs. A20, A21.)

9. On December 13, 2005, Deputy Dahlen sent Respondent notification of the county code violations. (Ex. A23.)

10. On December 20, 2005, John Cox signed a consent agreement that stated, in material part:

> I, John H. Cox, give Coos County Sheriff's Deputy Del Dahlen permission to entry [sic] my property on Tom Smith Road Bandon Oregon for code enforcement.

(Ex. A22). Mr. Cox's intent, as he reported to his daughter, was to allow any representative of the state or county onto his property who could assist in cleaning up the hazardous and solid waste. (Test. of Carothers.)

11. On January 5, 2006, Deputy Dahlen gave Respondent two weeks to show improvement on the Cox property. (Ex. A23.)

12. On February 23, March 22, May 8, July 10, September 25, and October 9, 2006, Deputy Dahlen inspected the Cox property and noted there was no change. (*Id* at 2-3.)

13. On October 12, 2006, Deputy Dahlen issued citations to Respondent for the following county code violations:

7.01.110	Prohibited Accumulation of Solid Waste
4.2.400	Maintenance of Property as a Junk Yard

(Ex. A23.) Deputy Dahlen advised Respondent that he would cancel the citations if the Cox property was cleaned off in two weeks. The deputy noted that Respondent had moved several vehicles off the Cox property. (*Id.* at 3.)

14. On October 27, 2006, Deputy Dahlen inspected the Cox property. The deputy noted that the property had not been cleaned up as promised. (*Id.*)

15. During December 2006 through February 2007, Deputy Dahlen took no action regarding the accumulated waste on the Cox property due to the weather. (*Id.*)

16. Sometime prior to March 6, 2007, Respondent moved the gate on the easement access road to a location that was closer to Tom Smith Road. Respondent also placed locks on the gate that prevented access to the Cox property. (Test. of Dahlen; test. of Carothers; Ex. A8.)

17. On March 6, 2007, Deputy Dahlen inspected the Cox property. The deputy found that the gate had been moved and locked. Deputy Dahlen contacted Ms. Carothers to report the matter. Ms. Carothers advised that she would be contacting an attorney regarding Respondent's actions. (Ex. A23 at 3.)

18. On March 13, 2007, Deputy Dahlen filed a Pollution Complaint with DEQ against Respondent and Karen Pennie. Craig Filip, Solid Waste Analyst, took the complaint and scheduled a site visit of the Cox property. Mr. Filip researched the easement on the Cox

property. (Test. of Filip; Ex. A4.)

19. On March 14, 2007, Deputy Dahlen spoke with Sue Billings, Respondent's live-in girlfriend, about the locked gate and the violations. (Test. of Dahlen; Ex. A23 at 3.)

20. On March 18, 2007, Sergeant Summers of the Coos County Sheriff's Department advised Respondent that DEQ was coming to inspect the site and he was not to lock the gate. (Ex. A23 at 3.)

21. On March 19, 2007, Mr. Filip conducted a site investigation of the Cox property with Deputy Dahlen and Respondent. Deputy Dahlen pointed out the boundaries of the Cox property. Mr. Filip limited his investigation to the area of the easement. Mr. Filip observed and took pictures of the following solid waste that was discarded by Respondent on the Cox property:

* several abandoned cars and trucks
* partially salvaged automobiles
* boat
* trailer
* computer monitors
* automobile parts, vehicle chassis, tires
* oil filter, paint cans, batteries
* electrical wiring and components
* scrap metal objects
* plastic and metal pipe
* assorted household trash
* gasoline and antifreeze containers
* plastic storage containers

(Test. of Filip; Ex. A5.) Mr. Filip also observed piles of solid waste that was discarded by Respondent along the road that turned southwest from the easement access road towards the Pennie property. Mr. Filip took pictures of the solid waste that was in plain view from the area of the easement, including metal pipe, building materials, wood materials, salvaged and abandoned vehicles, and a bus. The inspection lasted 30 minutes. Mr. Filip took approximately 20 pictures. (Test. of Filip; Ex. A5.)

22. Respondent did not have a solid waste disposal permit from DEQ for either the Cox property or the Pennie property. (Ex. A1.)

23. Mr. Filip subsequently identified four dumpsites along the easement that he labeled Dumpsites A through D. (Test. of Filip; Ex. A6.)

24. On April 2, 2007, W. Scott Phinney, attorney at law, sent Respondent a letter that stated, in relevant part:

Dear Mr. Pennie:

I represent the interests of Mr. John H. Cox, Jr. with respect to his property located on Tom Smith Road. As you are aware, his property is adjacent to yours. You have an ingress/egress easement which allows you to use a driveway on Mr. Cox's property to access your property. In exchange for this easement you are to maintain the driveway. The easement does not give you the right to use the driveway for any use other than access. It does not give you the right to use any other part of the property for any purpose.

I have information that you are abusing the easement and taking actions that are not permitted. You must stop these activities immediately.

* You are not to cut any trees on the easement or any other part of Mr. Cox's property. If you do so you may be liable for civil and criminal penalties.

* You are not allowed to lock the gate on the easement. You may not put your own gate on the property. You do not own this property. You may not exclude Mr. Cox or his representative or invitees from this property. You simply have a right to use it. If a gate has been installed it must be removed.

* You may not move the gate owned by Mr. Cox or alter his property in any way. If the gate has been moved it must be restored to its original location.

* You may not have a dog or other animal on Mr. Cox's property either loose or restrained.

* You may not restore, work on, or bury any items on Mr. Cox's property including the easement.

* You must remove all items, including, but not limited to, vehicles, office equipment, computers, garbage, and waste from Mr. Cox's property, including the easement.

* You will be held responsible for any loss or damage to Mr. Cox and his property including the cost to remove any items or clean up any waste or contamination. In addition, Mr. Cox may take steps to terminate the easement. Mr. Cox intends to cooperate with any government officials in an attempt to clean up the site.

* You have been aware of this situation since at least 2003. Please take the appropriate actions immediately. Your failure to

cooperate may lead to legal actions.

(Ex. A8.)

25. On April 6, 2007, Mr. Filip sent Respondent a Warning Letter with Opportunity to Correct (Warning Letter) that stated, in pertinent part:

> Dear Mr. and Ms. Pennie:
>
> *****
>
> On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, Craig Filip of the Eugene office of DEQ conducted an inspection on the property owned by Mr. Cox located at 56295 Tom Smith Road, in Bandon, OR. Mr. Filip was accompanied on this inspection by Deputy Dahlen and Mr. Dale Pennie.
>
> Based upon the investigation of this ingress/egress easement, the Department has concluded that you are responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): Establishing or operating a disposal site without first obtaining a registration or permit.
>
> **This is a Class I violation.** Class I violations are the most serious violations of Oregon environmental law.
>
> During my inspection of the easement on Mr. Cox's property, I observed numerous abandoned vehicles (some of them dismantled); automotive parts (including batteries and at least one oil filter on the ground) and containers of automotive fluids (including gasoline and coolant); piles of computer terminals (one with a broken screen) and components, some under tarps; stacks of used building materials; piles of electrical wiring and equipment; and, piles of assorted trash in various locations. I also observed more of the same along the access road leading from the easement onto your property.
>
> The solid wastes I observed within the easement had been managed in a manner constituting disposal.
>
> To maintain compliance with the Oregon Administrative Rules, we request that you implement the following corrective actions by the dates indicated:
>
> **Corrective Actions Requested**

> 1) By October 1, 2007, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this request by another site inspection following that date, if necessary.
>
> 2) By October 1, 2007, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.
>
> Should these violations remain uncorrected or should you repeat any of these violations, this matter may be referred to the Department's Office of Compliance and Enforcement for formal enforcement action, including assessment of civil penalties and/or a Department order. Civil penalties can be assessed for each day of the violation.
>
> Also, please be aware that if you are engaged in the business of vehicle dismantling, as the evidence I observed suggests, you are required to obtain a dismantler certificate from the Oregon Department of Transportation (ODOT) (ORS 822.110). Failure to do so is a violation of Oregon law and is classified as a Class A misdemeanor. In addition, ODOT "may impose a civil penalty of not more than $5,000 on a person who conducts a motor vehicle dismantling business without a certificate." (ORS 822.100(4)). I am enclosing "Instructions for Becoming a Dismantler" for your convenience.

(Test. of Filip; Ex. A9.) Mr. Filip did not receive any response from Respondent. (Test. of Filip.)

26. On October 15, 2007, Mr. Filip conducted a second site investigation of the Cox property to ascertain Respondent's compliance with the Warning Letter. Mr. Filip was accompanied by Deputy Dahlen and Officer Justin Clayburn of the Bandon Police Department. Mr. Filip limited his investigation to the area of the easement. Mr. Filip observed and took pictures of the following solid waste that was discarded by Respondent on the Cox property:

> **Dumpsite A (measured approximately 30 feet by 50 feet)**
> * two abandoned vehicles
> * a boat on a trailer
> * two black garbage bags
> * furniture
> * three paint cans
> * assorted automobile parts

* bulky metal objects
* electronic equipment
* plastic material

Dumpsite B
* abandoned pick-up truck with used tires and debris in the bed

Dumpsite C (measured approximately 60 feet by 100 feet)
* whole and partially dismantled vehicles
* vehicle parts, tires, exposed lead-acid batteries
* numerous opaque plastic containers of unknown content
* electrical wiring and conduit
* large metal cabinets
* automotive fluid containers, including antifreeze and motor oil
* household trash

Dumpsite D (measured approximately 125 feet by 75 feet)
* numerous whole and partially dismantled vehicles
* automobile parts, including tires and exposed lead-acid batteries
* electrical wire and equipment, including two fluorescent light ballasts
* numerous automotive fluid containers, including antifreeze, motor oil, and gasoline containers
* building materials, supplies and tools
* opaque containers of unknown content
* apparent cutting torch with gas canisters
* furniture and household trash

(Test. of Filip; Ex. A11.) Mr. Filip noted that Dumpsites A and B were unchanged, and Dumpsites C and D had increased since the visit on March 19, 2007. The inspection lasted 45 minutes. Mr. Filip took approximately 22 pictures. (Ex. A11.)

27. On December 4, 2007, Mr. Filip sent Respondent and Karen Pennie a Pre-Enforcement Notice that stated in material part:

Dear Mr. and Mrs. Pennie:

*****

On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, and in the company of Deputy Dahlen and Dale Pennie, I conducted an inspection of this ingress/egress easement located at 56295 Tom Smith Road, in Bandon, OR (referred to hereinafter as "the subject property").

*****

Based upon this investigation of the subject property, the Department concluded that you were responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): Establishing or operating a disposal site without first obtaining a registration or permit. This is a Class I violation.

As a follow-up to the Warning Letter with Opportunity to Correct sent to you as a result of my initial site investigation, I conducted a second visit to the subject property on October 15, 2007, in the company of Deputy Dahlen and Officer Justin Clayburn of the Bandon Police Department. I observed the same apparent wastes in the same apparent locations, along with additional wastes and vehicles.

Please be advised that the act of vehicle dismantling, along with mismanagement of the parts, materials and fluids I observed on-site, can result in the release of heavy metals and hazardous substances into the environment.

In order to correct the violation cited above and minimize its impact, the Department requires you take the following actions by the date indicated:

Correction Action(s) Required

1) By March 15, 2008, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this requirement with another site inspection following that date, if necessary. And,

2) By March 15, 2008, provide the Department with copies of receipts for disposal and/or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.

Your timely and responsive action on these items will be taken into consideration in any civil penalty assessment issued by the Department.

The Department is concerned that additional violations may have occurred or will occur, including illegal burial of solid waste currently accumulated on the property or movement of the solid wastes within the easement onto your property adjacent to the easement. To comply with solid waste regulations and avoid

> additional civil or criminal penalties, you need to complete the corrective actions outlined above.
>
> As confirmed by my second site visit to the subject property on 10/15/07, you failed to take the corrective actions set forth in the Warning Letter with Opportunity to Correct that I issued to you on April 6, 2007. We are therefore referring this matter to the Department's Office of Compliance and Enforcement for formal enforcement action, which may include assessment of civil penalties and/or issuance of a Department order. A formal enforcement action may include a civil penalty for each day of violation.

(Test. of Filip; Ex. A12.) Mr. Filip did not receive any response from Respondent. (Test. of Filip.)

28. In December 2007, Mr. Filip testified as a witness in *State of Oregon v. Dale A. Pennie*. The trial took place in Coos County Circuit Court and involved the county code violations brought against Respondent by Deputy Dahlen. DEQ was not a named party in the case. Respondent was found guilty of Prohibited Accumulation of Solid Waste and Maintenance of Property as a Junk Yard. DEQ was not bound by the court's decision. (Test. of Filip; Exs. A1, R5.)

29. On March 27, 2008, Mr. Filip conducted a third site investigation of the Cox Property to ascertain Respondent's compliance with the Pre-Enforcement Notice. Mr. Filip was accompanied by Deputy Dahlen and Officer Josh Garrett of the Bandon Police Department. Mr. Filip limited his investigation to the area of the easement. Mr. Filip noted that Dumpsites A through C appeared unchanged, and Dumpsite D had additional waste placed on it. The inspection lasted 60 minutes. Mr. Filip took approximately 26 pictures. (Test. of Filip; Ex. A13.)

30. Respondent discarded 186 cubic yards (or 53.6 tons) of solid waste on the Cox property. In 2008, the cost to clean up the solid waste on the Cox Property was $10,950. (Test. of Mr. Filip; Exs. A1, A3, A24.)

31. One cubic yard is 3 feet by 3 feet by 3 feet. A truck bed can hold approximately two cubic yards of waste. (Test. of Filip.)

Notice of Violation

32. Respondent did not clean up the solid waste that he discarded on the Cox property. The economic benefit that Respondent gained by not cleaning up the solid waste was $11,205. (Test. of Filip; Ex. A1.)

33. On May 14, 2008, the Department of Environmental Quality (Department) issued a Notice of Violation, Department Order and Civil Penalty Assessment (Notice of Violation) to

Respondent. The Notice of Violation stated, in relevant part:

II. FINDINGS

1. Respondent occupies real property located at 56295 Tom Smith County Road near Bandon, Oregon, also known as Tax Lot 1111 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Pennie property).

2. The John H. Cox Jr. Revocable Trust owns real property adjacent to the Pennie property, located at 56295 Tom Smith Road near Bandon, Oregon, otherwise known as Tax Lot 1106 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Cox property).

3. Respondent claims a 50-foot wide and approximately 400-foot long easement for ingress and egress across the western portion of the Cox property (the easement). A dirt road runs along the easement.

4. On December 20, 2005, Coos County Deputy Sheriff Del Dahlen conducted an inspection of the easement and the Cox property.

5. On March 19, 2007, October 15, 2007 and March 27, 2008, Department staff conducted inspections of the easement and Cox property. Deputy Dahlen accompanied the Department on these inspections.

6. During the inspections, Deputy Dahlen and Department staff observed approximately six wrecked or abandoned automobiles and 186 cubic yards (53.6 tons) of useless or discarded materials scattered along the easement and the Cox property, including automobile parts, automobile batteries, discarded scrap metal, a boat and boat trailer, discarded computers and computer monitors, discarded electrical components including electrical wiring, empty paint cans, waste tires, discarded building materials, metal pipe, and miscellaneous household trash.

7. During the inspections, Deputy Dahlen and Department staff observed abandoned vehicles and discarded materials disposed of or managed in a manner constituting disposal on the Pennie property.

8. Respondent placed the materials described in paragraphs 6 and 7 above on the easement, on the Cox property and on the Pennie

property.

9. The Department has not issued a solid waste disposal permit to Respondent or to any other person owning or controlling the easement, the Pennie or the Cox properties.

III. VIOLATIONS

Based upon the Findings above, Respondent has violated Oregon's laws as follows:

1. Since at least December 20, 2005 and continuing until at least March 27, 2008, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site without first obtaining a solid waste disposal site permit from the Department. Specifically, Respondent accumulated on the easement and on the Cox property the useless or discarded materials specified in Section II, paragraphs 6, in lieu of proper disposal at a permitted facility. According to OAR 340-012-0065(1)(a), this is a Class I violation.

2. Since at least December 20, 2005 and continuing until at least March 27, 2008, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site without first obtaining a solid waste disposal site permit from the Department. Specifically, Respondent accumulated on the Pennie property the useless or discarded materials specified in Section II, paragraph 7 above, in lieu of proper disposal at a permitted facility. According to OAR 340-012-0065(1)(a), this is a Class I violation.

IV. DEPARTMENT ORDER

Based on the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

1. Immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations by:

a. Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 above, within thirty (30) days of the date of this Notice. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility

as appropriate; and

b. Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Notice.

All documentation required by this Section should be sent to:
Department of Environmental Quality
1102 Lincoln, Suite 210
Eugene, Oregon 97401
Attention: Craig Filip

V. CIVIL PENALTY ASSESSMENT

The Department imposes a civil penalty of $28,805 for the violation cited in Section III, paragraph 1 above. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-012-0045, are attached and incorporated as Exhibit No. 1.

(Ex. A1.)

Pennie property

34. On May 4, 2009, Mr. Filip sent a letter to Respondent and requested access onto the Pennie property. On May 13, 2009, Respondent denied the request. (Ex. R6.)

35. On June 1 and June 2, 2009, Mr. Filip conducted a site inspection of the Pennie property after obtaining an administrative search warrant. Mr. Filip observed the following solid waste that was discarded by Respondent on the Pennie property:

* 116 vehicles, most of which were filled with waste[2]
* several buses filled with waste
* two travel trailers
* semi-truck trailer
* tractor trailer container
* automotive parts, materials, and tires
* lead acid batteries
* caches of computer equipment
* copying machines, microfiche readers
* electrical equipment, broken fluorescent light tubes
* household appliances, including stove, washer
* bathtub, fiberglass shower, toilet
* construction materials

[2] Because a cubic yard is 3 feet by 3 feet by 3 feet, the reasonable inference is that one standard sized vehicle is equivalent to at least one cubic yard of waste.

* demolition materials
* various wooden objects, wooden pallets
* various plastic containers, plastic pipe
* piles of household trash, bags of garbage
* various metal objects, metal pipe, scrap metal
* wire cages, bikes
* propane canisters, gasoline cans
* partially burned mobile home
* floor of a burned down trailer

(Test. of Filip; Ex. A27.) Mr. Filip also observed a burn pit that contained the burned remnants of a mattress, tires, and household trash. Mr. Filip took almost two days to catalogue the vast amount of solid waste on the Pennie property. Mr. Filip took 326 pictures of the Pennie property. (Test. of Filip.)

36. The amount of solid waste that Respondent discarded on the Pennie property is, at a minimum, three times the amount of solid waste that was placed on the Cox property. (Exs. A5, A11, A13, A27.)

37. Respondent did not clean up the Cox property because DEQ did not initially obtain an administrative search warrant for that property. (Test. of Respondent.)

38. Respondent is unemployed. He receives monthly Social Security benefits. (*Id.*)

CONCLUSIONS OF LAW

1. Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Cox property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

2. Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Pennie property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

3. Civil penalties in the amount of $28,805 shall be imposed against Respondent, pursuant to OAR 340-012-0045.

4. Respondent is hereby ordered to immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations **by:**

a. Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 of the Notice of Violation, within thirty (30) days of the date

of this Order. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility as appropriate; and

b. Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Order.

All documentation should be sent to:
Department of Environmental Quality
1102 Lincoln, Suite 210
Eugene, Oregon 97401
Attention: Craig Filip

OPINION

DEQ contends that Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) and should pay a civil penalty. As the proponent of this position, DEQ has the burden of proof. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). As set forth below, DEQ has met its burden.

1. The violation

ORS 459.205 is titled "Permit required" and provides, in pertinent part:

> (1) Except as provided by ORS 459.215, a disposal site shall not be established, operated, maintained or substantially altered, expanded or improved, and a change shall not be made in the method or type of disposal at a disposal site, until the person owning or controlling the disposal site obtains a permit therefore from the Department of Environmental Quality as provided in ORS 459.235.

OAR 340-093-0050 is titled "Permit Required" and provides, in material part:

> (1) Except as provided by section (3) of this rule, no person shall establish, operate, maintain or substantially alter, expand, improve or close a disposal site, and no person shall change the method or type of disposal at a disposal site, until the person owning or controlling the disposal site obtains a permit therefore from the

Department.

The evidence in the record establishes that from December 20, 2005 through March 27, 2008, Respondent established, operated and maintained a disposal site on the Cox and Pennie properties without first obtaining a solid waste disposal permit from DEQ. Accordingly, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1).

2. The penalty

ORS 459.995 is titled "Civil penalties" and provides, in relevant part:

> (1) Except as provided in subsection (2) of this section, in addition to any other penalty provided by law:
>
> > (a) Any person who violates ORS 459.205 *** or any rule or order of the Environmental Quality Commission pertaining to the disposal, collection, storage or reuse or recycling of solid wastes, as defined by ORS 459.005 *** shall incur a civil penalty not to exceed $10,000 a day for each day of the violation.

"Solid waste" means all useless or discarded putrescible and nonputrescible materials, including but not limited to garbage, rubbish, refuse, ashes, paper and cardboard, sewage sludge, septic tank and cesspool pumpings or other sludge, useless or discarded commercial, industrial, demolition and construction materials, discarded or abandoned vehicles or parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid materials, dead animals and infectious waste as defined in ORS 459.386. ORS 459.005(24).

Pursuant to ORS 459.995, DEQ has the authority to assess a civil penalty for each day that Respondent collected, stored, and/or disposed of solid waste on the Cox and Pennie properties. In this matter, DEQ is seeking a penalty from Respondent in the amount of $28,805 for establishing, operating or maintaining a disposal site without a permit. I will review the calculations.

OAR 340-012-0045 is titled "Civil Penalty Determination Procedure" and provides, in pertinent part:

> Except as provided in OAR 340-012-0038(3), in addition to any other liability, duty, or other penalty provided by law, the department may assess a civil penalty for any violation. Except for civil penalties assessed under OAR 340-012-0155(2), the department determines the amount of the civil penalty using the following procedures:
>
> (1) The classification of each violation is determined by consulting OAR 340-012-0053 to 340-012-0097;

(2) The magnitude of the violation is determined as follows:

(a) The selected magnitude categories in OAR 340-012-0135 are used.

(b) If a selected magnitude is not specified in OAR 340-012-0135, or if information is not reasonably available to determine which selected magnitude applies, OAR 340-012-0130 is used to determine the magnitude of the violation.

(c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.

(d) The base penalty is adjusted by the application of aggravating or mitigating factors (P = prior significant actions, H = history in correcting prior significant actions, O = repeated or ongoing violation, M = mental state of the violator and C = efforts to correct) as set forth in OAR 340-012-0145.

(e) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150(2). The results of the determinations made in section (1) are applied in the following formula to calculate the penalty: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB.

The first step in the civil penalty determination procedure is to determine the class of Respondent's violation. OAR 340-012-0045(1).

OAR 340-012-0065 is titled "Solid Waste Management Classification of Violations" and provides, in material part:

(1) **Class I:**

(a) Establishing or operating a disposal site without first obtaining a registration or permit;

As stated previously, Respondent established, operated and maintained a disposal site on the Cox and Pennie properties without first obtaining a solid waste disposal permit from DEQ. Consequently, Respondent's violation is classified as a Class I violation.

The next step is to determine the magnitude of Respondent's violation. OAR 340-012-0045(2)(a).

OAR 340-012-0135 is titled "Selected Magnitude Categories" and provides, in pertinent part:

> (3) Magnitudes for selected violations pertaining to Solid Waste will be determined as follows if sufficient information is reasonably available to the department to make a determination:
>
> > (a) Operating a solid waste disposal facility without a permit:
> >
> > > (A) Major -- The volume of material disposed of exceeds 400 cubic yards;

The evidence in the record establishes that Respondent disposed of approximately 186 cubic yards of waste on the Cox property. The evidence also establishes that Respondent disposed of at least 558 cubic yards of waste on the Pennie property. As such, the magnitude for Respondent's violation is major.

The third step is to determine the appropriate base penalty. OAR 340-012-0045(2)(c).

OAR 340-012-0140 is titled "Determination of Base Penalty" and provides, in relevant part:

> (2) $8,000 Penalty Matrix:
>
> > (a) The $8,000 penalty matrix applies to the following:
> >
> > *****
> >
> > > (N) Unless specifically listed under another penalty matrix, any violation of ORS Chapter 459 or any violation of a solid waste statute, rule, permit, or related order committed by:
> > >
> > > > (i) A person that has or should have a solid waste disposal permit.
> >
> > *****
> >
> > (b) The base penalty values for the $8,000 penalty matrix are as follows:
> >
> > > (A) Class I:
> > >
> > > > (i) Major -- $8,000;

Respondent was required to obtain a solid waste disposal permit before establishing, operating and maintaining a disposal site on the Cox and Pennie properties. Respondent failed to do so. Accordingly, the base penalty for Respondent's Class I major violation is $8,000.

The final step is to determine the amount of the penalty for Respondent's violation. OAR 340-012-0045(2).

The penalty for a single violation is determined by adjusting the base penalty by other factors, such as prior significant actions (P), history in correcting prior significant actions (H), repeated or ongoing violation (O), mental state of the violator (M), efforts to correct (C), and the economic benefit (EB) Respondent gained from noncompliance. The formula to calculate the penalty is: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB. OAR 340-012-0045(2)(d), (e).

In its Notice, DEQ alleged no prior significant actions (P), no history in correcting prior significant actions (H), a violation that existed for more than 28 days (O), the mental state of the violator as 6 (M), no effort to correct (C), and an EB of $11,205.

I will review the mental state of Respondent.

OAR 340-012-0145 is titled "Determination of Aggravating or Mitigating Factors" and provides, in relevant part:

> (1) Each of the aggravating or mitigating factors is determined, as described below, and then applied to the civil penalty formula in OAR 340-012-0045(2).
>
> *****
>
> (5) "M" is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply.
>
> > (a) The values for "M" and the finding that supports each are as follows:
> >
> > *****
> >
> > > (C) 6 if the respondent's conduct was reckless, or the respondent had actual knowledge that its conduct would be a violation and respondent's conduct was intentional. A respondent that previously received a Notice of Noncompliance, WL, PEN or any FEA for the same violation is presumed to have actual knowledge. Holding a permit that prohibits or requires conduct may be

> actual knowledge depending on the specific facts of the case.

In this case, DEQ sent Respondent a Warning Letter and a Pre-Enforcement Notice about the violation he was committing on the Cox property. Despite this knowledge, Respondent continued to discard waste on the Cox property. Therefore, Respondent's conduct was reckless. Consequently, Respondent's mental state was correctly determined as 6.

Applying the amounts from above, the civil penalty for Respondent's violation in this case, without the EB amount, is $8,000 + [(0.1 x $8,000) x (0 + 0 + 4 + 6 + 2)], or $17,600.

In addition, because Respondent gained an economic benefit of $11,205 by not complying with the law, that amount is added to the equation. OAR 340-012-0045(2)(e), OAR 340-012-0150. Accordingly, a civil penalty in the amount of $28,805 ($17,600 + $11,205) shall be assessed against Respondent.

Respondent argued that some of the computer equipment was new and, therefore, not useless. However, the definition of solid waste also includes discarded materials. Because Respondent discarded the computer equipment on the Cox and Pennie properties, the argument is unpersuasive.

Respondent also argued that the amount of waste that was discarded on the Cox property is incorrect. However, Respondent did not present evidence to contradict DEQ's calculations. Thus, Respondent's argument is unpersuasive.

Respondent finally argued that he is unable to pay the penalty. I sympathize with Respondent. Nevertheless, because Respondent committed the violation, he is responsible for the civil penalty.

3. Immediate compliance

ORS 459.376 is titled "Action to enforce rules or orders" and provides:

> (1) The Environmental Quality Commission may take whatever action is appropriate for enforcement of its rules or orders.
>
> (2) The commission may institute proceedings to enforce compliance with or restrain violations of ORS chapters 459 and 459A, or any rule, standard, permit or order adopted, entered or issued pursuant to ORS chapters 459 and 459A.

Pursuant to the authority cited above, DEQ may enforce compliance with violations of ORS chapter 459. In this case, Respondent violated ORS 459.205. Therefore, DEQ may require that Respondent immediately initiate actions to correct the violations and come into compliance with Oregon's statutes and regulations **by removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned**

or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 of the Notice of Violation, within thirty (30) days of the date of this Order; and submitting written documentation to DEQ, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Order.

ORDER

I propose the DEQ issue the following order:

1. Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Cox property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

2. Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Pennie property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

3. Civil penalties in the amount of $28,805 shall be imposed against Respondent, pursuant to OAR 340-012-0045.

4. Respondent is hereby ordered to immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations **by:**

a. Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 of the Notice of Violation, within thirty (30) days of the date of this Order. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility as appropriate; and

b. Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Order.

All documentation should be sent to:
Department of Environmental Quality
1102 Lincoln, Suite 210
Eugene, Oregon 97401
Attention: Craig Filip

For Dove L. Gutman
Senior Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: September 1, 2009

APPEAL RIGHTS

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

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

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

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

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

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

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

CERTIFICATE OF MAILING

On September 1, 2009, I mailed the foregoing Amended Proposed and Final Order in OAH Case No. 901024.

By: First Class and Certified Mail
Certified Mail Receipt #7008 1830 0003 4612 1088

Dale Pennie
56295 Tom Smith Road
Bandon OR 97411

By: First Class Mail

Regina Cutler
Dept. of Environmental Quality
811 SW 6th Ave
Portland OR 97204

Pam for Carol Buntjer
Administrative Specialist
Hearing Coordinator

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: DALE ALAN PENNIE, Respondent	)))))	DEPARTMENT'S MOTION FOR CLARIFICATION OAH Case No.: 901024 Agency Case No.: LQ/SW-WR-07-225

The Department of Environmental Quality (the Department), via this Motion for Clarification filed pursuant to OAR **340-011-0573** (2), moves that the Administrative Law Judge clarify or supplement the Proposed and Final Order in this case to include a specified deadline for compliance and that specifies the actions Respondent must take to correct the cited violations and come into full compliance with Oregon's Statutes and regulations.

RELVENT CASE HISTORY

On May 14, 2008, the Department issued a Notice of Violation, Department Order and Civil Penalty Assessment (NOV) to Dale Alan Pennie, alleging that he had illegally established a solid waste disposal site without a permit from the Department on two parcels of property near Bandon, Oregon. The NOV assessed a civil penalty of$28,805 for the violations The NOV also contained a Department Order as follows:

"Based upon the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

1. Immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations by:

   a. Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 above, within thirty (30) days of the date of this Notice. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility as appropriate; and

b. Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Notice.

All documentation required by this Section should be sent to: Department of Environmental Quality, 1102 Lincoln, Suite 210, Eugene, Oregon 97401, Attention: Craig Filip."

Respondent Dale Alan Pennie timely appealed the NOV and a contested case hearing was held before Administrative Law Judge (ALJ) Dove Gutman in Coquille, Oregon on June 24, 2009.

On August 6, 2009, ALJ Gutman issued the enclosed Proposed and Final Order (Proposed Order). See Exhibit 1 to this Motion. In her written opinion, ALJ Gutman found that the Department had met its burden of proof on all issues and rejected Respondent's motions to dismiss and other affirmative defenses. Accordingly, the ALJ upheld the Department's assessment of civil penalties for violation of Oregon's solid waste laws and regulations. The ALJ also ordered that Respondent "immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations."

The Proposed Order did not, however, identify the specific actions Respondent is required to take to correct the violations. For example, the Proposed Order does not require removal of solid waste from the subject properties and does not require that the waste be properly recycled or disposed of at a permitted facility. Nor does the Proposed Order contain any schedule for compliance or deadline by which removal of waste must be completed and compliance with Oregon law achieved.

II. APPLICABLE LAW

OAR 340-011-0573 provides that upon motion of a participant in a contested case hearing involving the Department, the ALJ may issue an amended proposed order that clarifies or supplements the initial proposed order. Requirements for proposed orders in such cases are contained in OAR 137-003-0645(3). And, as correctly noted in the attached Proposed and Final Order, ORS 459.376 authorizes the Department to "take whatever action is appropriate for enforcement of its rules or orders".

ARGUMENT

As noted, the Proposed Order does not contain specific directive as to how or what Respondent is required to do to correct the violations. In contrast, the Department Order included in the NOV required that all solid waste be removed from the subject properties and properly recycled or disposed of at a permitted facility. Nor does the Proposed Order contain any deadline by which removal of waste must be completed and compliance with Oregon law achieved. The Department Order included in the NOV specified that removal of waste be completed within thirty (30) days of the effective date of the Order.

Testimony at hearing established that it would neither be feasible nor legal for Respondent to secure a permit for operation of a solid waste disposal site at this location. Therefore, the only appropriate action for achieving compliance is removal of all solid waste from the subject properties. The absence of clear direction to remove waste and a firm deadline by which compliance can be measured renders the Proposed Order an inadequate vehicle for enforcement of the Department's rules prohibiting maintenance of an illegal disposal site.

Instead, the Proposed Order merely directs Respondent to begin to address the violations immediately. The Department appreciates and agrees with the urgency of achieving compliance. However, a more specific identification of actions required, and a firm deadline for completing those actions, is both necessary and appropriate for the enforcement of the relevant laws. This is particularly true here, where the Respondent has a history of failing to comply with prior requests from both County and state law enforcement to remove solid waste from the subject properties, and has repeatedly missed informal deadlines previously established by the Department.

The Department is also concerned that, as currently stated, Respondent could potentially fully comply with the Proposed Order by taking some initial yet relatively inconsequential actions, such as removing one or two computer monitors, and yet achieve little or no actual progress towards compliance or environmental protection. Because the Order simply requires Respondent to "immediately initiate actions " to correct the violations, it does not meet the standard of what is necessary and appropriate to enforce the Departments rules in this case.

Finally, the Proposed Order does not explain why the ALJ chose not to adopt the more specific requirements of the Department's proposed Department Order. The Proposed Order does not contain any explanation as to why the specific requirements of the Department Order as stated in the NOV were not adopted in full by the ALJ. Accordingly, the Proposed Order does not satisfy the requirement of OAR 137-003-0615(3)(h) that it contain an explanation of the reasoning supporting the decision and recommendation.

VI. CONCLUSIONS

In conclusion, the Department moves that ALJ Gutman clarify or supplement the Proposed Order to require Respondent take the specific compliance actions identified in the Department Order included in the NOV, and further to require that those actions be completed within a specified timeframe.

8/21/09
Date

Regina M. Cutler
Environmental Law Specialist

CERTIFICATE OF MAILING

I hereby certify that I served: ~~Notice of Assessment of Civil Penalty~~ Department's Motion for Clarification

Case No. OAH 901024

Served upon:

DALE PENNIE
56295 TOM SMITH ROAD
BANDON, OR 97411

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid, at the U.S. Post Office in Portland, Oregon on 8/21/09

Department of Environmental Quality

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

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
DALE ALAN PENNIE,	) OAH Case No.: 901024
Respondent	) Agency Case No.: LQ/SW-WR-07-225

HISTORY OF THE CASE

On May 14, 2008, the Department of Environmental Quality for the State of Oregon (DEQ) issued a Notice of Violation, Department Order and Civil Penalty Assessment (Notice of Violation) to Dale Alan Pennie (Respondent). On May 30, 2008, Respondent requested a hearing. On April 14, 2009, the matter was referred to the Office of Administrative Hearings (OAH).

On April 29, 2009, Senior Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at hearing. On May 21, 2009, a pre-hearing telephone conference was held. ALJ Gutman presided. Respondent appeared and represented himself. Regina Cutler represented DEQ. On May 21, 2009, ALJ Gutman issued a Pre-Hearing Order.

On June 11, 2009, Respondent filed a Motion to Suppress, a Motion to Dismiss, and a Motion to Take Judicial Notice. On June 19, 2009, DEQ filed its Response. On June 23, 2009, ALJ Gutman informed the parties that she was taking the Motions to Suppress and Dismiss under advisement.

On June 24, 2009, an in-person hearing was held in Coquille, Oregon. ALJ Gutman presided. Respondent represented himself and testified. Sue Billings and Gary Corbett, Respondent's friends, also testified on behalf of Respondent. Ms. Cutler represented DEQ. Craig Filip, DEQ Solid Waste Analyst; Del Dahlen, Coos County Sheriff's Deputy; and Ruth Ann Carothers, property owner, testified on behalf of DEQ. The record closed on June 24, 2009.

ISSUES

1. Whether Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Cox property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

2. Whether Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Pennie property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from

DEQ.

3. Whether civil penalties in the amount of $28,805 shall be imposed against Respondent, pursuant to OAR 340-012-0045.

4. Whether Respondent shall be ordered to immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations.

EVIDENTIARY RULINGS

Exhibits A1 through A4, A6 through A10, A12, A14 through A18, A20 through A26, and A28, offered by DEQ, were admitted into the record without objection. Exhibits R1 through R12, offered by Respondent, were admitted into the record without objection.

Respondent objected to Exhibits A19 and A29 on the basis of relevance. The objections were overruled and Exhibits A19 and A29 were admitted into the record.

Respondent objected to Exhibits A5, A11, A13, and A27 on the basis that the evidence contained in the exhibits was obtained illegally. Respondent's objection to Exhibit A27 was overruled and Exhibit A27 was admitted into the record. ALJ Gutman withheld ruling on Exhibits A5, A11, and A13 pending her decision on Respondent's Motions to Suppress and Dismiss.

As set forth below, because Respondent's Motions are denied, Exhibits A5, A11, and A13 are admitted into the record at this time.

MOTIONS TO SUPPRESS AND DISMISS

I. Motion to Suppress

Respondent contends that his Motion to Suppress Exhibits A5, A11 and A13 should be granted based on the warrantless search by Deputy Dahlin. DEQ contends that it should be denied. I agree with DEQ.

A. Consent to search

Under the Oregon Constitution and the Fourth Amendment to the United States Constitution, warrantless searches and seizures by the government are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement. *Katz v. United States*, 389 US 347, 357 (1967); *State v. Snow*, 337 Or 219, 223 (2004); *State v. Bridewell*, 306 Or 231, 235 (1988).

Consent is a recognized exception to the warrant requirement of both the state and federal constitutions. *State v. Weaver*, 319 Or 212, 219 (1994); *Schneckloth v. Bustamonte*, 412 US 218, 222 (1973). A valid search may be made without a warrant and without probable cause if the

person to be searched or the person in control of the property to be searched gives voluntary consent for the search.

Article I, section 9, of the Oregon Constitution is more restrictive than the Fourth Amendment. It requires that the person who provides the consent to have actual rather than apparent authority. *State v. Surface/Hurly*, 183 Or App 368, 372 (2002); *State v. Jenkins*, 179 Or App 92, 99 (2002). Actual authority comes from joint use or control of, or access to an area for most purposes. *State v. Meredith*, 337 Or 299, 306-07 (2004); *State v. Johnson*, 123 Or App 124, 127 (1993); *State v. Surface/Hurly*, 183 Or App at 373; *State v. Wrenn*, 150 Or App 96 (1997); *State v. Carsey*, 295 Or 32, 44 (1983).

On December 20, 2005, John Cox, the owner of the Cox property, gave express written consent to Deputy Dahlen to enter his property for enforcement purposes. Mr. Cox's intent, as evidenced by his daughter, was to grant permission to any representative of the state or county that could assist in cleaning up the hazardous and solid waste that was accumulating on his property.

On the dates of March 19, 2007, October 15, 2007, and March 27, 2008, Deputy Dahlen and Mr. Filip, the DEQ investigator for the state, entered the Cox property to conduct inspections of the solid waste that was accumulating on the property. During the inspections and while on the Cox property, Deputy Dahlen and Mr. Filip also observed waste on Tax Lot 1111 (Pennie property) that was in plain view. Mr. Filip took pictures of the waste on both properties while staying within the boundaries of the Cox property.

If contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no search. *Minnesota v. Dickerson*, 508 US 266, 275 (1993). A police officer's unaided observation, purposive or not, from a lawful vantage point is not a search under Article I, section 9, of the Oregon Constitution. *State v. Ainsworth*, 310 Or 613, 621 (1990).

Because Deputy Dahlen was given express consent to enter the Cox property, and because Mr. Filip was given implied consent as the representative of DEQ, no warrant was required. In addition, because Mr. Filip took pictures of the waste that was in plain view on the Pennie property, no warrant was required. Accordingly, Respondent's Motion to Suppress Exhibits A5, A11 and A13 is DENIED.

Respondent argued that Mr. Filip entered the Pennie property illegally when he approached the tree in Dumpsite D with the "No Trespassing" sign posted on it and, as a result, all of the pictures that Mr. Filip took should be suppressed. However, as set forth in the credibility finding, there is no reliable evidence to support Respondent's assertion. Thus, Respondent's argument is unpersuasive.

II. Motion to Dismiss

Respondent contends that his Motion to Dismiss should be granted based on issue preclusion and *res judicata*. DEQ contends that it should be denied. I agree with DEQ.

A. Claim preclusion

"Preclusion by former adjudication" is a doctrine of rules and principles governing the binding effect on a subsequent proceeding of a final judgment previously entered in a claim. The term comprises two doctrines: claim preclusion, also known as *res judicata*, and issue preclusion, also known as collateral estoppel. *In re Drews*, 310 Or 134, 139 (1990).

Claim preclusion prohibits a party from relitigating a cause of action against the same defendant involving the same factual transaction as was litigated in the previous adjudication. *Id.*; *see also Shuler v. Distribution Trucking Co.,* 164 Or App 615, 621 (1999).

As set forth in the record, DEQ was not a party to the prior action brought against Respondent in Coos County Circuit Court. Accordingly, claim preclusion does not apply in this case.

B. Issue Preclusion

Issue preclusion prevents the litigation of a legal issue or determinative fact previously litigated. *In re Drews*, 310 at 139-40. To preclude an issue from litigation, five conditions must exist: (1) the issue in question in the present proceeding must be identical to the issue in the prior proceeding; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded must have had a full and fair opportunity to be heard on that issue in the prior proceeding; (4) the party sought to be precluded must have been a party or in privity with a party to the prior proceeding; and (5) the prior proceeding must have been the type of proceeding to which courts will give preclusive effect. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103-04 (1993); *see also State v. Ratliff*, 304 Or 254 (1987); *State v. Krueger*, 170 Or App 12 (2000), *rev den* 332 Or 240 (2001).

"Privity" pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will bound by the final judgment as if he were a party. *Black's Law Dictionary* 1079 (5th ed 1979).

DEQ was not a party to the prior action brought against Respondent in Coos County Circuit Court. In addition, DEQ was not bound by the final judgments rendered against Respondent. Thus, DEQ was not in privity with Respondent to the prior proceeding. As such, issue preclusion does not apply in this case. Therefore, Respondent's Motion to Dismiss is DENIED.

JUDICIAL NOTICE

Judicial Notice is hereby taken that the following case numbers involving Respondent were heard in Coos County Circuit Court: 06NB1448; 07NB1336; 07NB1338; 07NB1339; 07NB1352; 07NB0453; 07NB0669; 07NB1794; 07NB1796; 08NB0609; 08NB0610; 08NB0611; 08NB1552; 08NB1553; 08NB1554; 08NB1555; 09NB0301; 09NB0302; 09NB0303.

CREDIBILITY DETERMINATION

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

> A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

Mr. Filip testified that he stayed within the confines of the easement (or the Cox property) when he took the pictures contained in Exhibits A5, A11, and A13, including when he approached the tree in Dumpsite D with the "No Trespassing" sign posted on it. Mr. Filip also testified that he researched the easement prior to conducting the site inspections, and that Deputy Dahlen pointed out the Cox property boundaries during the inspections. Mr. Filip's testimony was credible, logical, consistent, and corroborated by Deputy Dahlen.

Respondent and Ms. Billings, on the other hand, both testified that the tree in Dumpsite D with the "No Trespassing" sign posted on it stands inside the Pennie property. However, neither Respondent nor Ms. Billings are licensed surveyors. In addition, on cross-examination, Respondent admitted that the Pennie property had never been surveyed by a licensed surveyor. Furthermore, Ms. Billings admitted that she did not know where the Pennie property line was actually located.

Accordingly, I find by a preponderance of the reliable evidence that Mr. Filip stayed within the confines of the easement (or Cox property) when he took the pictures contained in Exhibits A5, A11, and A13.

FINDINGS OF FACT

1. On March 9, 1988, Karen Pennie, then wife of Respondent, purchased Tax Lot 1111 (Pennie property), a parcel of land in the SE ¼ of the SE ¼ of Section 16 and in the SW ¼ of the SW ¼ of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon. Ms. Pennie received a 50-foot wide and 400-foot long easement for ingress and egress across the western portion of Tax Lot 1106, which is adjacent to the Pennie property. A dirt road ran along the easement. (Exs. A1, A5, A14, A16, A17, A18.)

2. Ms. Pennie's warranty deed set forth the boundaries of the easement in the following relevant detail:

> The boundaries of this 50 foot wide easement are located 25 feet from the following described centerline:
>
> Beginning at the Southwest corner of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon, thence North 0° 17' 21" East along the West line of said Section 15 810 feet; thence North 89° 35' West 170 feet; thence North 59° 55' 40" West 297.79 feet; thence North 30° 07' 36" East 142.96 feet along the Easterly boundary of Tom Smith Country Road; thence North 23° 27' 32" East 89 feet along the Easterly boundary of said county road to the point of beginning of this easement; thence South 83° East 112 feet; thence North 88° East 59 feet; thence South 87° East 300 feet; thence North 87° East 118 feet; thence South 87° East 131 feet; thence South 21° West 49.55 feet to the North line of property herein above described.

(Ex. A17.)

3. On March 2, 1990, John Cox, Jr. & Jane Cox purchased Tax Lot 1106 (Cox property), a parcel of land in the SE ¼ of the SE ¼ of Section 16 and in the SW ¼ of the SW ¼ of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon. The Cox property had various encumbrances on it, including the easement granted to Karen Pennie for ingress and egress. Mr. Cox had the Cox property surveyed by a registered and professional land surveyor. The surveyor flagged the entire Cox property, which included the dirt road that ran along the easement. The Cox property extended approximately 20 feet south from the south edge of the dirt road. Mr. Cox improved the dirt road (easement access road) and installed a gate on the easement access road that allowed several vehicles to park outside of the gate. (Test. of Carothers; Exs. A14, A15, A18, A28, A29.)

4. The Cox family did not reside on the Cox property, but used it for camping purposes. Mr. Cox had a verbal agreement with Respondent that Respondent would maintain the easement. (Test. of Carothers.)

5. In July 1990, Karen Pennie divorced Respondent. She maintained sole ownership of the Pennie property. (Ex. A19.) Karen Pennie gave Respondent permission to reside on the Pennie property. (Test. of Respondent.)

6. In early 2003, the Cox family noticed that computer monitors, inoperable vehicles, and piles of garbage had started to accumulate on the Cox property. Ruth Ann Carothers, the daughter of Mr. Cox, spoke with Respondent, who acknowledged that he should not have placed the items on the Cox property and would remove them. (Test. of Carothers.)

7. Sometime in early December 2005, Mr. Cox and Ms. Carothers visited the Cox property, but were unable to safely drive down the easement access road due to the accumulated waste. Ms. Carothers contacted Deputy Dahlen of the Coos County Sheriff's Department.

Deputy Dahlen viewed the Cox property with the Cox family members. Mr. Cox and Ms. Carothers pointed out the Cox property boundaries to the deputy, as well as the piles of accumulated waste. Deputy Dahlen observed, among other things, numerous inoperable vehicles, a large bus crammed full of materials, a boat, a trailer, and a huge pile of computers. Deputy Dahlen took pictures of the accumulated waste and advised Mr. Cox to file the proper complaints. (Test. of Carothers; test. of Dahlen.)

8. On December 6, 2005, John Cox filed a Coos County Code Violation Complaint against Respondent and Karen Pennie for placing cars, trucks, trailers, and computers on the Cox property. Mr. Cox also filed a Coos County Code Violation Complaint against Respondent and Karen Pennie for placing over 100 inoperable vehicles and numerous computers on the Pennie property. (Exs. A20, A21.)

9. On December 13, 2005, Deputy Dahlen sent Respondent notification of the county code violations. (Ex. A23.)

10. On December 20, 2005, John Cox signed a consent agreement that stated, in material part:

> I, John H. Cox, give Coos County Sheriff's Deputy Del Dahlen permission to entry [sic] my property on Tom Smith Road Bandon Oregon for code enforcement.

(Ex. A22). Mr. Cox's intent, as he reported to his daughter, was to allow any representative of the state or county onto his property who could assist in cleaning up the hazardous and solid waste. (Test. of Carothers.)

11. On January 5, 2006, Deputy Dahlen gave Respondent two weeks to show improvement on the Cox property. (Ex. A23.)

12. On February 23, March 22, May 8, July 10, September 25, and October 9, 2006, Deputy Dahlen inspected the Cox property and noted there was no change. (*Id* at 2-3.)

13. On October 12, 2006, Deputy Dahlen issued citations to Respondent for the following county code violations:

7.01.110	Prohibited Accumulation of Solid Waste
4.2.400	Maintenance of Property as a Junk Yard

(Ex. A23.) Deputy Dahlen advised Respondent that he would cancel the citations if the Cox property was cleaned off in two weeks. The deputy noted that Respondent had moved several vehicles off the Cox property. (*Id.* at 3.)

14. On October 27, 2006, Deputy Dahlen inspected the Cox property. The deputy noted that the property had not been cleaned up as promised. (*Id.*)

15. During December 2006 through February 2007, Deputy Dahlen took no action regarding the accumulated waste on the Cox property due to the weather. (*Id.*)

16. Sometime prior to March 6, 2007, Respondent moved the gate on the easement access road to a location that was closer to Tom Smith Road. Respondent also placed locks on the gate that prevented access to the Cox property. (Test. of Dahlen; test. of Carothers; Ex. A8.)

17. On March 6, 2007, Deputy Dahlen inspected the Cox property. The deputy found that the gate had been moved and locked. Deputy Dahlen contacted Ms. Carothers to report the matter. Ms. Carothers advised that she would be contacting an attorney regarding Respondent's actions. (Ex. A23 at 3.)

18. On March 13, 2007, Deputy Dahlen filed a Pollution Complaint with DEQ against Respondent and Karen Pennie. Craig Filip, Solid Waste Analyst, took the complaint and scheduled a site visit of the Cox property. Mr. Filip researched the easement on the Cox property. (Test. of Filip; Ex. A4.)

19. On March 14, 2007, Deputy Dahlen spoke with Sue Billings, Respondent's live-in girlfriend, about the locked gate and the violations. (Test. of Dahlen; Ex. A23 at 3.)

20. On March 18, 2007, Sergeant Summers of the Coos County Sheriff's Department advised Respondent that DEQ was coming to inspect the site and he was not to lock the gate. (Ex. A23 at 3.)

21. On March 19, 2007, Mr. Filip conducted a site investigation of the Cox property with Deputy Dahlen and Respondent. Deputy Dahlen pointed out the boundaries of the Cox property. Mr. Filip limited his investigation to the area of the easement. Mr. Filip observed and took pictures of the following solid waste that was discarded by Respondent on the Cox property:

* several abandoned cars and trucks
* partially salvaged automobiles
* boat
* trailer
* computer monitors
* automobile parts, vehicle chassis, tires
* oil filter, paint cans, batteries
* electrical wiring and components
* scrap metal objects
* plastic and metal pipe
* assorted household trash
* gasoline and antifreeze containers
* plastic storage containers

(Test. of Filip; Ex. A5.) Mr. Filip also observed piles of solid waste that was discarded by Respondent along the road that turned southwest from the easement access road towards the Pennie property. Mr. Filip took pictures of the solid waste that was in plain view from the area

of the easement, including metal pipe, building materials, wood materials, salvaged and abandoned vehicles, and a bus. The inspection lasted 30 minutes. Mr. Filip took approximately 20 pictures. (Test. of Filip; Ex. A5.)

22. Respondent did not have a solid waste disposal permit from DEQ for either the Cox property or the Pennie property. (Ex. A1.)

23. Mr. Filip subsequently identified four dumpsites along the easement that he labeled Dumpsites A through D. (Test. of Filip; Ex. A6.)

24. On April 2, 2007, W. Scott Phinney, attorney at law, sent Respondent a letter that stated, in relevant part:

> Dear Mr. Pennie:
>
> I represent the interests of Mr. John H. Cox, Jr. with respect to his property located on Tom Smith Road. As you are aware, his property is adjacent to yours. You have an ingress/egress easement which allows you to use a driveway on Mr. Cox's property to access your property. In exchange for this easement you are to maintain the driveway. The easement does not give you the right to use the driveway for any use other than access. It does not give you the right to use any other part of the property for any purpose.
>
> I have information that you are abusing the easement and taking actions that are not permitted. You must stop these activities immediately.
>
> * You are not to cut any trees on the easement or any other part of Mr. Cox's property. If you do so you may be liable for civil and criminal penalties.
>
> * You are not allowed to lock the gate on the easement. You may not put your own gate on the property. You do not own this property. You may not exclude Mr. Cox or his representative or invitees from this property. You simply have a right to use it. If a gate has been installed it must be removed.
>
> * You may not move the gate owned by Mr. Cox or alter his property in any way. If the gate has been moved it must be restored to its original location.
>
> * You may not have a dog or other animal on Mr. Cox's property either loose or restrained.

> * You may not restore, work on, or bury any items on Mr. Cox's property including the easement.
>
> * You must remove all items, including, but not limited to, vehicles, office equipment, computers, garbage, and waste from Mr. Cox's property, including the easement.
>
> * You will be held responsible for any loss or damage to Mr. Cox and his property including the cost to remove any items or clean up any waste or contamination. In addition, Mr. Cox may take steps to terminate the easement. Mr. Cox intends to cooperate with any government officials in an attempt to clean up the site.
>
> * You have been aware of this situation since at least 2003. Please take the appropriate actions immediately. Your failure to cooperate may lead to legal actions.

(Ex. A8.)

25. On April 6, 2007, Mr. Filip sent Respondent a Warning Letter with Opportunity to Correct (Warning Letter) that stated, in pertinent part:

> Dear Mr. and Ms. Pennie:
>
> *****
>
> On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, Craig Filip of the Eugene office of DEQ conducted an inspection on the property owned by Mr. Cox located at 56295 Tom Smith Road, in Bandon, OR. Mr. Filip was accompanied on this inspection by Deputy Dahlen and Mr. Dale Pennie.
>
> Based upon the investigation of this ingress/egress easement, the Department has concluded that you are responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): Establishing or operating a disposal site without first obtaining a registration or permit.
>
> **This is a Class I violation.** Class I violations are the most serious violations of Oregon environmental law.
>
> During my inspection of the easement on Mr. Cox's property, I observed numerous abandoned vehicles (some of them dismantled); automotive parts (including batteries and at least one oil filter on the ground) and containers of automotive fluids

(including gasoline and coolant); piles of computer terminals (one with a broken screen) and components, some under tarps; stacks of used building materials; piles of electrical wiring and equipment; and, piles of assorted trash in various locations. I also observed more of the same along the access road leading from the easement onto your property.

The solid wastes I observed within the easement had been managed in a manner constituting disposal.

To maintain compliance with the Oregon Administrative Rules, we request that you implement the following corrective actions by the dates indicated:

Corrective Actions Requested

1) By October 1, 2007, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this request by another site inspection following that date, if necessary.

2) By October 1, 2007, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.

Should these violations remain uncorrected or should you repeat any of these violations, this matter may be referred to the Department's Office of Compliance and Enforcement for formal enforcement action, including assessment of civil penalties and/or a Department order. Civil penalties can be assessed for each day of the violation.

Also, please be aware that if you are engaged in the business of vehicle dismantling, as the evidence I observed suggests, you are required to obtain a dismantler certificate from the Oregon Department of Transportation (ODOT) (ORS 822.110). Failure to do so is a violation of Oregon law and is classified as a Class A misdemeanor. In addition, ODOT "may impose a civil penalty of not more than $5,000 on a person who conducts a motor vehicle dismantling business without a certificate." (ORS 822.100(4)). I am enclosing "Instructions for Becoming a Dismantler" for your convenience.

(Test. of Filip; Ex. A9.) Mr. Filip did not receive any response from Respondent. (Test. of

Filip.)

26. On October 15, 2007, Mr. Filip conducted a second site investigation of the Cox property to ascertain Respondent's compliance with the Warning Letter. Mr. Filip was accompanied by Deputy Dahlen and Officer Justin Clayburn of the Bandon Police Department. Mr. Filip limited his investigation to the area of the easement. Mr. Filip observed and took pictures of the following solid waste that was discarded by Respondent on the Cox property:

Dumpsite A (measured approximately 30 feet by 50 feet)
* two abandoned vehicles
* a boat on a trailer
* two black garbage bags
* furniture
* three paint cans
* assorted automobile parts
* bulky metal objects
* electronic equipment
* plastic material

Dumpsite B
* abandoned pick-up truck with used tires and debris in the bed

Dumpsite C (measured approximately 60 feet by 100 feet)
* whole and partially dismantled vehicles
* vehicle parts, tires, exposed lead-acid batteries
* numerous opaque plastic containers of unknown content
* electrical wiring and conduit
* large metal cabinets
* automotive fluid containers, including antifreeze and motor oil
* household trash

Dumpsite D (measured approximately 125 feet by 75 feet)
* numerous whole and partially dismantled vehicles
* automobile parts, including tires and exposed lead-acid batteries
* electrical wire and equipment, including two fluorescent light ballasts
* numerous automotive fluid containers, including antifreeze, motor oil, and gasoline containers
* building materials, supplies and tools
* opaque containers of unknown content
* apparent cutting torch with gas canisters
* furniture and household trash

(Test. of Filip; Ex. A11.) Mr. Filip noted that Dumpsites A and B were unchanged, and Dumpsites C and D had increased since the visit on March 19, 2007. The inspection lasted 45 minutes. Mr. Filip took approximately 22 pictures. (Ex. A11.)

27. On December 4, 2007, Mr. Filip sent Respondent and Karen Pennie a Pre-Enforcement Notice that stated in material part:

> Dear Mr. and Mrs. Pennie:
>
> *****
>
> On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, and in the company of Deputy Dahlen and Dale Pennie, I conducted an inspection of this ingress/egress easement located at 56295 Tom Smith Road, in Bandon, OR (referred to hereinafter as "the subject property").
>
> *****
>
> Based upon this investigation of the subject property, the Department concluded that you were responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): Establishing or operating a disposal site without first obtaining a registration or permit. This is a Class I violation.
>
> As a follow-up to the Warning Letter with Opportunity to Correct sent to you as a result of my initial site investigation, I conducted a second visit to the subject property on October 15, 2007, in the company of Deputy Dahlen and Officer Justin Clayburn of the Bandon Police Department. I observed the same apparent wastes in the same apparent locations, along with additional wastes and vehicles.
>
> Please be advised that the act of vehicle dismantling, along with mismanagement of the parts, materials and fluids I observed on-site, can result in the release of heavy metals and hazardous substances into the environment.
>
> In order to correct the violation cited above and minimize its impact, the Department requires you take the following actions by the date indicated:
>
> **Correction Action(s) Required**
>
> 1) By March 15, 2008, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this requirement with another site inspection following that date, if necessary. And,

> 2) By March 15, 2008, provide the Department with copies of receipts for disposal and/or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.
>
> Your timely and responsive action on these items will be taken into consideration in any civil penalty assessment issued by the Department.
>
> The Department is concerned that additional violations may have occurred or will occur, including illegal burial of solid waste currently accumulated on the property or movement of the solid wastes within the easement onto your property adjacent to the easement. To comply with solid waste regulations and avoid additional civil or criminal penalties, you need to complete the corrective actions outlined above.
>
> As confirmed by my second site visit to the subject property on 10/15/07, you failed to take the corrective actions set forth in the Warning Letter with Opportunity to Correct that I issued to you on April 6, 2007. We are therefore referring this matter to the Department's Office of Compliance and Enforcement for formal enforcement action, which may include assessment of civil penalties and/or issuance of a Department order. A formal enforcement action may include a civil penalty for each day of violation.

(Test. of Filip; Ex. A12.) Mr. Filip did not receive any response from Respondent. (Test. of Filip.)

28. In December 2007, Mr. Filip testified as a witness in *State of Oregon v. Dale A. Pennie*. The trial took place in Coos County Circuit Court and involved the county code violations brought against Respondent by Deputy Dahlen. DEQ was not a named party in the case. Respondent was found guilty of Prohibited Accumulation of Solid Waste and Maintenance of Property as a Junk Yard. DEQ was not bound by the court's decision. (Test. of Filip; Exs. A1, R5.)

29. On March 27, 2008, Mr. Filip conducted a third site investigation of the Cox Property to ascertain Respondent's compliance with the Pre-Enforcement Notice. Mr. Filip was accompanied by Deputy Dahlen and Officer Josh Garrett of the Bandon Police Department. Mr. Filip limited his investigation to the area of the easement. Mr. Filip noted that Dumpsites A through C appeared unchanged, and Dumpsite D had additional waste placed on it. The inspection lasted 60 minutes. Mr. Filip took approximately 26 pictures. (Test. of Filip; Ex. A13.)

30. Respondent discarded 186 cubic yards (or 53.6 tons) of solid waste on the Cox property. In 2008, the cost to clean up the solid waste on the Cox Property was $10,950. (Test. of Mr. Filip; Exs. A1, A3, A24.)

31. One cubic yard is 3 feet by 3 feet by 3 feet. A truck bed can hold approximately two cubic yards of waste. (Test. of Filip.)

Notice of Violation

32. Respondent did not clean up the solid waste that he discarded on the Cox property. The economic benefit that Respondent gained by not cleaning up the solid waste was $11,205. (Test. of Filip; Ex. A1.)

33. On May 14, 2008, the Department of Environmental Quality (Department) issued a Notice of Violation, Department Order and Civil Penalty Assessment (Notice of Violation) to Respondent. The Notice of Violation stated, in relevant part:

> II. FINDINGS
>
> 1. Respondent occupies real property located at 56295 Tom Smith County Road near Bandon, Oregon, also known as Tax Lot 1111 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Pennie property).
>
> 2. The John H. Cox Jr. Revocable Trust owns real property adjacent to the Pennie property, located at 56295 Tom Smith Road near Bandon, Oregon, otherwise known as Tax Lot 1106 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Cox property).
>
> 3. Respondent claims a 50-foot wide and approximately 400-foot long easement for ingress and egress across the western portion of the Cox property (the easement). A dirt road runs along the easement.
>
> 4. On December 20, 2005, Coos County Deputy Sheriff Del Dahlen conducted an inspection of the easement and the Cox property.
>
> 5. On March 19, 2007, October 15, 2007 and March 27, 2008, Department staff conducted inspections of the easement and Cox property. Deputy Dahlen accompanied the Department on these inspections.
>
> 6. During the inspections, Deputy Dahlen and Department staff observed approximately six wrecked or abandoned automobiles

and 186 cubic yards (53.6 tons) of useless or discarded materials scattered along the easement and the Cox property, including automobile parts, automobile batteries, discarded scrap metal, a boat and boat trailer, discarded computers and computer monitors, discarded electrical components including electrical wiring, empty paint cans, waste tires, discarded building materials, metal pipe, and miscellaneous household trash.

7. During the inspections, Deputy Dahlen and Department staff observed abandoned vehicles and discarded materials disposed of or managed in a manner constituting disposal on the Pennie property.

8. Respondent placed the materials described in paragraphs 6 and 7 above on the easement, on the Cox property and on the Pennie property.

9. The Department has not issued a solid waste disposal permit to Respondent or to any other person owning or controlling the easement, the Pennie or the Cox properties.

III. VIOLATIONS

Based upon the Findings above, Respondent has violated Oregon's laws as follows:

1. Since at least December 20, 2005 and continuing until at least March 27, 2008, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site without first obtaining a solid waste disposal site permit from the Department. Specifically, Respondent accumulated on the easement and on the Cox property the useless or discarded materials specified in Section II, paragraphs 6, in lieu of proper disposal at a permitted facility. According to OAR 340-012-0065(1)(a), this is a Class I violation.

2. Since at least December 20, 2005 and continuing until at least March 27, 2008, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site without first obtaining a solid waste disposal site permit from the Department. Specifically, Respondent accumulated on the Pennie property the useless or discarded materials specified in Section II, paragraph 7 above, in lieu of proper disposal at a permitted facility. According to OAR 340-012-0065(1)(a), this is a Class I violation.

IV. DEPARTMENT ORDER

Based on the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

1. Immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations by:

a. Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 above, within thirty (30) days of the date of this Notice. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility as appropriate; and

b. Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Notice.

All documentation required by this Section should be sent to:
Department of Environmental Quality
1102 Lincoln, Suite 210
Eugene, Oregon 97401
Attention: Craig Filip

V. CIVIL PENALTY ASSESSMENT

The Department imposes a civil penalty of $28,805 for the violation cited in Section III, paragraph 1 above. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-012-0045, are attached and incorporated as Exhibit No. 1.

(Ex. A1.)

Pennie property

34. On May 4, 2009, Mr. Filip sent a letter to Respondent and requested access onto the Pennie property. On May 13, 2009, Respondent denied the request. (Ex. R6.)

35. On June 1 and June 2, 2009, Mr. Filip conducted a site inspection of the Pennie property after obtaining an administrative search warrant. Mr. Filip observed the following solid waste that was discarded by Respondent on the Pennie property:

* 116 vehicles, most of which were filled with waste[1]
* several buses filled with waste
* two travel trailers
* semi-truck trailer
* tractor trailer container
* automotive parts, materials, and tires
* lead acid batteries
* caches of computer equipment
* copying machines, microfiche readers
* electrical equipment, broken fluorescent light tubes
* household appliances, including stove, washer
* bathtub, fiberglass shower, toilet
* construction materials
* demolition materials
* various wooden objects, wooden pallets
* various plastic containers, plastic pipe
* piles of household trash, bags of garbage
* various metal objects, metal pipe, scrap metal
* wire cages, bikes
* propane canisters, gasoline cans
* partially burned mobile home
* floor of a burned down trailer

(Test. of Filip; Ex. A27.) Mr. Filip also observed a burn pit that contained the burned remnants of a mattress, tires, and household trash. Mr. Filip took almost two days to catalogue the vast amount of solid waste on the Pennie property. Mr. Filip took 326 pictures of the Pennie property. (Test. of Filip.)

36. The amount of solid waste that Respondent discarded on the Pennie property is, at a minimum, three times the amount of solid waste that was placed on the Cox property. (Exs. A5, A11, A13, A27.)

37. Respondent did not clean up the Cox property because DEQ did not initially obtain an administrative search warrant for that property. (Test. of Respondent.)

38. Respondent is unemployed. He receives monthly Social Security benefits. (*Id.*)

CONCLUSIONS OF LAW

1. Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Cox property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

2. Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing,

[1] Because a cubic yard is 3 feet by 3 feet by 3 feet, the reasonable inference is that one standard sized vehicle is equivalent to at least one cubic yard of waste.

operating or maintaining a disposal site on the Pennie property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

3. Civil penalties in the amount of $28,805 shall be imposed against Respondent, pursuant to OAR 340-012-0045.

4. Respondent is hereby ordered to immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations.

OPINION

DEQ contends that Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) and should pay a civil penalty. As the proponent of this position, DEQ has the burden of proof. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). As set forth below, DEQ has met its burden.

1. The violation

ORS 459.205 is titled "Permit required" and provides, in pertinent part:

> (1) Except as provided by ORS 459.215, a disposal site shall not be established, operated, maintained or substantially altered, expanded or improved, and a change shall not be made in the method or type of disposal at a disposal site, until the person owning or controlling the disposal site obtains a permit therefore from the Department of Environmental Quality as provided in ORS 459.235.

OAR 340-093-0050 is titled "Permit Required" and provides, in material part:

> (1) Except as provided by section (3) of this rule, no person shall establish, operate, maintain or substantially alter, expand, improve or close a disposal site, and no person shall change the method or type of disposal at a disposal site, until the person owning or controlling the disposal site obtains a permit therefore from the Department.

The evidence in the record establishes that from December 20, 2005 through March 27, 2008, Respondent established, operated and maintained a disposal site on the Cox and Pennie properties without first obtaining a solid waste disposal permit from DEQ. Accordingly,

Respondent violated ORS 459.205(1) and OAR 340-093-0050(1).

2. The penalty

ORS 459.995 is titled "Civil penalties" and provides, in relevant part:

> (1) Except as provided in subsection (2) of this section, in addition to any other penalty provided by law:
>
> > (a) Any person who violates ORS 459.205 *** or any rule or order of the Environmental Quality Commission pertaining to the disposal, collection, storage or reuse or recycling of solid wastes, as defined by ORS 459.005 *** shall incur a civil penalty not to exceed $10,000 a day for each day of the violation.

"Solid waste" means all useless or discarded putrescible and nonputrescible materials, including but not limited to garbage, rubbish, refuse, ashes, paper and cardboard, sewage sludge, septic tank and cesspool pumpings or other sludge, useless or discarded commercial, industrial, demolition and construction materials, discarded or abandoned vehicles or parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid materials, dead animals and infectious waste as defined in ORS 459.386. ORS 459.005(24).

Pursuant to ORS 459.995, DEQ has the authority to assess a civil penalty for each day that Respondent collected, stored, and/or disposed of solid waste on the Cox and Pennie properties. In this matter, DEQ is seeking a penalty from Respondent in the amount of $28,805 for establishing, operating or maintaining a disposal site without a permit. I will review the calculations.

OAR 340-012-0045 is titled "Civil Penalty Determination Procedure" and provides, in pertinent part:

> Except as provided in OAR 340-012-0038(3), in addition to any other liability, duty, or other penalty provided by law, the department may assess a civil penalty for any violation. Except for civil penalties assessed under OAR 340-012-0155(2), the department determines the amount of the civil penalty using the following procedures:
>
> (1) The classification of each violation is determined by consulting OAR 340-012-0053 to 340-012-0097;
>
> (2) The magnitude of the violation is determined as follows:
>
> > (a) The selected magnitude categories in OAR 340-012-0135 are used.

> (b) If a selected magnitude is not specified in OAR 340-012-0135, or if information is not reasonably available to determine which selected magnitude applies, OAR 340-012-0130 is used to determine the magnitude of the violation.
>
> (c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.
>
> (d) The base penalty is adjusted by the application of aggravating or mitigating factors (P = prior significant actions, H = history in correcting prior significant actions, O = repeated or ongoing violation, M = mental state of the violator and C = efforts to correct) as set forth in OAR 340-012-0145.
>
> (e) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150(2). The results of the determinations made in section (1) are applied in the following formula to calculate the penalty: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB.

The first step in the civil penalty determination procedure is to determine the class of Respondent's violation. OAR 340-012-0045(1).

OAR 340-012-0065 is titled "Solid Waste Management Classification of Violations" and provides, in material part:

> (1) **Class I:**
>
> > (a) Establishing or operating a disposal site without first obtaining a registration or permit;

As stated previously, Respondent established, operated and maintained a disposal site on the Cox and Pennie properties without first obtaining a solid waste disposal permit from DEQ. Consequently, Respondent's violation is classified as a Class I violation.

The next step is to determine the magnitude of Respondent's violation. OAR 340-012-0045(2)(a).

OAR 340-012-0135 is titled "Selected Magnitude Categories" and provides, in pertinent part:

> (3) Magnitudes for selected violations pertaining to Solid Waste

> will be determined as follows if sufficient information is reasonably available to the department to make a determination:
>
> > (a) Operating a solid waste disposal facility without a permit:
> >
> > > (A) Major -- The volume of material disposed of exceeds 400 cubic yards;

The evidence in the record establishes that Respondent disposed of approximately 186 cubic yards of waste on the Cox property. The evidence also establishes that Respondent disposed of at least 558 cubic yards of waste on the Pennie property. As such, the magnitude for Respondent's violation is major.

The third step is to determine the appropriate base penalty. OAR 340-012-0045(2)(c).

OAR 340-012-0140 is titled "Determination of Base Penalty" and provides, in relevant part:

> (2) $8,000 Penalty Matrix:
>
> > (a) The $8,000 penalty matrix applies to the following:
> >
> > *****
> >
> > > (N) Unless specifically listed under another penalty matrix, any violation of ORS Chapter 459 or any violation of a solid waste statute, rule, permit, or related order committed by:
> > >
> > > > (i) A person that has or should have a solid waste disposal permit.
> > >
> > > *****
> >
> > (b) The base penalty values for the $8,000 penalty matrix are as follows:
> >
> > > (A) Class I:
> > >
> > > > (i) Major -- $8,000;

Respondent was required to obtain a solid waste disposal permit before establishing, operating and maintaining a disposal site on the Cox and Pennie properties. Respondent failed to do so. Accordingly, the base penalty for Respondent's Class I major violation is $8,000.

The final step is to determine the amount of the penalty for Respondent's violation. OAR 340-012-0045(2).

The penalty for a single violation is determined by adjusting the base penalty by other factors, such as prior significant actions (P), history in correcting prior significant actions (H), repeated or ongoing violation (O), mental state of the violator (M), efforts to correct (C), and the economic benefit (EB) Respondent gained from noncompliance. The formula to calculate the penalty is: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB. OAR 340-012-0045(2)(d), (e).

In its Notice, DEQ alleged no prior significant actions (P), no history in correcting prior significant actions (H), a violation that existed for more than 28 days (O), the mental state of the violator as 6 (M), no effort to correct (C), and an EB of $11,205.

I will review the mental state of Respondent.

OAR 340-012-0145 is titled "Determination of Aggravating or Mitigating Factors" and provides, in relevant part:

> (1) Each of the aggravating or mitigating factors is determined, as described below, and then applied to the civil penalty formula in OAR 340-012-0045(2).
>
> *****
>
> (5) "M" is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply.
>
> > (a) The values for "M" and the finding that supports each are as follows:
> >
> > *****
> >
> > > (C) 6 if the respondent's conduct was reckless, or the respondent had actual knowledge that its conduct would be a violation and respondent's conduct was intentional. A respondent that previously received a Notice of Noncompliance, WL, PEN or any FEA for the same violation is presumed to have actual knowledge. Holding a permit that prohibits or requires conduct may be actual knowledge depending on the specific facts of the case.

In this case, DEQ sent Respondent a Warning Letter and a Pre-Enforcement Notice about the violation he was committing on the Cox property. Despite this knowledge, Respondent

continued to discard waste on the Cox property. Therefore, Respondent's conduct was reckless. Consequently, Respondent's mental state was correctly determined as 6.

Applying the amounts from above, the civil penalty for Respondent's violation in this case, without the EB amount, is $8,000 + [(0.1 x $8,000) x (0 + 0 + 4 + 6 + 2)], or $17,600.

In addition, because Respondent gained an economic benefit of $11,205 by not complying with the law, that amount is added to the equation. OAR 340-012-0045(2)(e), OAR 340-012-0150. Accordingly, a civil penalty in the amount of $28,805 ($17,600 + $11,205) shall be assessed against Respondent.

Respondent argued that some of the computer equipment was new and, therefore, not useless. However, the definition of solid waste also includes discarded materials. Because Respondent discarded the computer equipment on the Cox and Pennie properties, the argument is unpersuasive.

Respondent also argued that the amount of waste that was discarded on the Cox property is incorrect. However, Respondent did not present evidence to contradict DEQ's calculations. Thus, Respondent's argument is unpersuasive.

Respondent finally argued that he is unable to pay the penalty. I sympathize with Respondent. Nevertheless, because Respondent committed the violation, he is responsible for the civil penalty.

3. Immediate compliance

ORS 459.376 is titled "Action to enforce rules or orders" and provides:

> (1) The Environmental Quality Commission may take whatever action is appropriate for enforcement of its rules or orders.
>
> (2) The commission may institute proceedings to enforce compliance with or restrain violations of ORS chapters 459 and 459A, or any rule, standard, permit or order adopted, entered or issued pursuant to ORS chapters 459 and 459A.

Pursuant to the authority cited above, DEQ may enforce compliance with violations of ORS chapter 459. In this case, Respondent violated ORS 459.205. Therefore, DEQ may require that Respondent immediately initiate actions to correct the violations and come into compliance with Oregon's statutes and regulations.

ORDER

I propose the DEQ issue the following order:

1. Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Cox property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

2. Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site on the Pennie property from December 20, 2005 through March 27, 2008, without first obtaining a solid waste disposal site permit from DEQ.

3. Civil penalties in the amount of $28,805 shall be imposed against Respondent, pursuant to OAR 340-012-0045.

4. Respondent is hereby ordered to immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations.

for Dove Gutman
Senior Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: August 6, 2009

APPEAL RIGHTS

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

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

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

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

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

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

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

CERTIFICATE OF MAILING

On August 6, 2009, I mailed the foregoing Proposed and Final Order in OAH Case No. 901024.

By: First Class and Certified Mail
Certified Mail Receipt #7008 1830 0003 4609 5143

Dale Pennie
56295 Tom Smith Road
Bandon OR 97411

By: First Class Mail

Regina Cutler
Dept. of Environmental Quality
811 SW 6th Ave
Portland OR 97204

Carol Buntjer
Administrative Specialist
Hearing Coordinator

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COO

FILED
2007 MAY -4 PM 12:05
COURT
OREGON

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,

vs.

Dale A. Pennie
Defendant

True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. CM0300453

1) Prohibited accum. of solid waste
2) Maintenance of property as a junkyard

The following proceedings were held in the above-captioned case before the undersigned judge on 5.04.07.
_____ District Attorney appearing for the State.

RECEIVED
JUN 11 2007
Env. Admin. Hearings

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
(X) Other: Court trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant entered a plea of ( ) Not Guilty (X) Guilty ( ) No Contest/( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibited accum. of solid waste; Maintenance of property as a junkyard
(X) Other: If proof of property being cleaned up is submitted to the court, fines may be reduced.
(X) Pay $ $1,650.00 by 6.4.07 and balance at $ _____ /month beginning _____ or appear at 9AM next Judicial day. or See Clerk
$1650

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____.
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $ _____ ($ _____ Posted)

Dated 5.04.07 Reporter _____ Circuit Judge

cc: Jail, DA, Def, Atty, P & P

Item U 000119

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

MAY -4 PM 12:05
COOS COUNTY OREGON NORTH

THE STATE OF OREGON,
Plaintiff,
vs.
Dale A. Rennie
Defendant
True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 06VB1448
1) prohibited accum. of solid waste
2) maintenance of property as a junkyard

The following proceedings were held in the above-captioned case before the undersigned judge on 5.04.07 . ______ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ ______ ( ) Release Agreement Revoked
( ) ______ present and appointed as interpreter.
(X) Other: Court trial

( ) Defendant appeared with counsel ______ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed ______ /continued proceedings to ______ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held ______ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: prohibited accum. of solid waste, maintenance of property as a junkyard
(X) Other: if proof of property being cleaned up is submitted to the court fines may be reduced.
(X) Pay $ ~~[illegible]~~ $1165.00 by 6.04.07 and balance at $ ______ /month beginning ______ or appear at 9AM next Judicial day. or see clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: ______ at ______.
Writ of Habeas Corpus/Other: ______ at ______.
Plea: ______ at ______. Sentencing: today at ______.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial ______ at ______.
Other: ______

( ) Cancel date of ______.
( ) ______ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ ______
( ) Defendant held in custody. ( ) No release ( ) Security continued at $ ______ ($ ______ Posted)

Dated 5.04.07 Reporter ______

[signature]
Circuit Judge Item U 000120

cc: Jail, DA, (Def) Atty, P & P

08

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,

vs.

DALE A. PENNIE Defendant

True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 08NB0609

1) PROHIBITED ACCUM. OF SOLID WASTE

2) MAINTENANCE OF PROPERTY AS A JUNKYARD

FILED
2008 JUN -9 AM 11:52
COOS COUNTY CIRCUIT COURT
NORTH BEND, OREGON

The following proceedings were held in the above-captioned case before the undersigned judge on 6/09/08. _____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoke
( ) _____ present and appointed as interpreter.
(X) Other: JURISDICTIONAL HEARING - Court Trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) ~~Court~~ / Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibited Accum. of Solid Waste; Maintenance of property as a junkyard
(X) Other: This Court is the proper jurisdiction
(X) Pay $ 1165.00 by 7-09-08 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Change of Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.
( ) Remanded to custody to be released. ( ) Meet with Verification Officer.
( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Defendant held in custody. ( ) Security $_____ ($_____Posted

Dated 6/09/08

_____
Circuit Judge

cc: Jail, DA, Def, Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,

vs.

DALE A. PENNIE Defendant

_____ True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 08NB0610

1) PROHIBITED ACCUM. OF SOLID WASTE

2) MAINTENANCE OF PROPERTY AS A JUNKYARD

FILED
2008 JUN 9 AM 11:52
COOS COUNTY CIRCUIT COURT
COQUILLE, OREGON

The following proceedings were held in the above-captioned case before the undersigned judge on 6/09/08. _____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoke
( ) _____ present and appointed as interpreter.
(X) Other: JURISDICTION HEARING - Court Trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) ~~Court~~ / Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibited accum. of solid waste; Maintenance of Property as a Junkyard (ORS)
(X) Other: this Court is the proper jurisdiction
(X) Pay $ 765.00 by 7/9/08 and balance at $ _____ /month beginning _____ or appear at 9AM next Judicial day. or see clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Change of Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.
( ) Remanded to custody to be released. ( ) Meet with Verification Officer.
( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Defendant held in custody. ( ) Security $_____ ($_____Posted

Dated 6/09/08

_____
Circuit Judge

cc: Jail, DA, Def. Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,
vs.
DALE A. PENNIE Defendant
_____ True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 08NB0611

1) PROHIBITED ACCUM. OF SOLID WASTE

2) MAINTENANCE OF PROPERTY AS A JUNKYARD

FILED
2008 JUN -9 AM 11:12
COOS COUNTY CIRCUIT COURT
NORTH BEND, OREGON

The following proceedings were held in the above-captioned case before the undersigned judge on 6/09/08.
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoke
( ) _____ present and appointed as interpreter.
(X) Other: JURISDICTION HEARING - Court trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) ~~Court~~ / Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibit accum. of Solid Waste; Maintenance of property as a junkyard
(X) Other: this court is the proper jurisdiction

(X) Pay $ 765.00 by 7/9/08 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. or the Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Change of Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.
( ) Remanded to custody to be released. ( ) Meet with Verification Officer.
( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Defendant held in custody. ( ) Security $_____ ($_____Posted

Dated 6/09/08

_____
Circuit Judge

cc: Jail, DA, Def, Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,

vs.

DALE A. PENNIE Defendant

True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 07NB1796

1) PROHIBITED ACCUM. OF SOLID WASTE

2) MAINTENANCE OF PROPERTY AS A JUNKYARD

FILED
2008 JUN -9 AM 11:52
COOS COUNTY CIRCUIT COURT
COOS COUNTY, OREGON

The following proceedings were held in the above-captioned case before the undersigned judge on 6/09/08 _____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoke
( ) _____ present and appointed as interpreter.
(X) Other: COURT TRIAL AND MOTION TO SUPRESS

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) ~~Court~~ / Defendant ~~entered a plea of~~ WAS FOUND ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: PROHIBITED ACCUM. OF SOLID WASTE: MAINTENANCE OF PROPERTY AS A JUNKYARD
(X) Other: Motion to Supress is denied.
(X) Pay $ Waived by 7-09-08 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Change of Plea: _____ at _____. Sentencing: Today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.
( ) Remanded to custody to be released. ( ) Meet with Verification Officer.
( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Defendant held in custody. ( ) Security $_____ ($_____Posted

Dated 6/09/08

_____
Circuit Judge

cc: Jail, DA, Def, Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,
vs.
DALE A. PENNIE Defendant
_____ True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 07NB1795

1) PROHIBITED ACCUM. OF SOLID WASTE

2) MAINTENANCE OF PROPERTY AS A JUNKYARD

FILED
2008 JUN -9 AM 11:5
COOS COUNTY COURT
COOS COUNTY, OREGON

The following proceedings were held in the above-captioned case before the undersigned judge on 6/09/08. _____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoke
( ) _____ present and appointed as interpreter.
(X) Other: COURT TRIAL AND MOTION TO SUPRESS

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Court / Defendant ~~entered a plea of~~ WAS FOUND ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: PROHIBITED ACCUM. OF SOLID WASTE: MAINTENANCE OF PROPERT AS A JUNKYARD.
(X) Other: Motion to supress is denied.
(X) Pay $ 765.00 by 7-09-08 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Change of Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.
( ) Remanded to custody to be released. ( ) Meet with Verification Officer.
( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Defendant held in custody. ( ) Security $_____ ($_____Posted

Dated 6/09/08

_____
Circuit Judge

cc: Jail, DA, Def, Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,
vs.
DALE A. PENNIE Defendant
_____ True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 07NB1794

1) PROHIBITED ACCUM. OF SOLID WASTE

2) MAINTENANCE OF PROPERTY AS A JUNKYARD

FILED
2008 JUN 9 AM 11:55
COOS COUNTY COURT
NORTH BEND, OREGON

The following proceedings were held in the above-captioned case before the undersigned judge on 6/09/08.
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoke
( ) _____ present and appointed as interpreter.
(X) Other: COURT TRIAL AND MOTION TO SUPRESS

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) ~~Court~~ / Defendant ~~entered a plea of~~ WAS FOUND ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: PROHIBITED ACCUM. OF SOLID WASTE: MAINTENANCE OF PROPERTY AS A JUNKYARD
(X) Other: motion to suppress is denied.
(X) Pay $ 705.00 by 7/09/08 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Change of Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.
( ) Remanded to custody to be released. ( ) Meet with Verification Officer.
( ) Cancel date of _____.
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Defendant held in custody. ( ) Security $_____ ($_____Posted)

Dated 6/09/08

_____
Circuit Judge

cc: Jail, DA, Def. Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,

vs.

Dale A. Pennie
Defendant

True Names

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 08NB1552 08NB1553 08NB1554 08NB1555

FILED
2009 FEB 13 PM 2:45
COOS COUNTY COURT
COQUILLE, OREGON

Solid Waste Accumulation

The following proceedings were held in the above-captioned case before the undersigned judge on 2-13-09
Dahlen ~~Pete~~ Delbert ~~District Attorney~~ appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
X(XX) Other: Court Trial

(X) Defendant appeared with counsel ~~_____~~ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance COURT FINDS DEF
(X) ~~Court / Defendant entered a plea of~~ ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: 08NB1552, 08NB1553, 08NB1554 08NB153
X Motion to hold in abeyance Denied. Court takes judicial notice of all other files
(X) Other: fines & Costs 603.00 per case; money owed to be added to account & pay as pay plan states.
( ) Pay $ _____ by _____ and balance at $ _____ /month beginning _____ or appear at 9AM next Judicial day.

( ) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Change of Plea: _____ at _____. Sentencing: _____ at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.
( ) Remanded to custody to be released. ( ) Meet with Verification Officer.
( ) Cancel date of _____.
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Defendant held in custody. ( ) Security $ _____ ($ _____ Posted)

Dated 2-13-09

Circuit Judge

cc: Jail, DA, Def, Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,
vs.
Dale A. Rennie Defendant
_____ True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NB0201

Prohibited accumulation of Solid Waste

The following proceedings were held in the above-captioned case before the undersigned judge on 6.09.09.
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
(X) Other: Court Trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibited accumulation of Solid Waste
( ) Other: _____
(X) Pay $ 600.00 by 7.09.09 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. of the Clerk
(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $_____ ($_____Posted)

Dated 6.09.09 Reporter AWaddington

JESSE C. MARGOLIS
Circuit Judge

Item U 000128

cc: Jail, DA, Def, Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,
vs.
Dale A. Rennie Defendant
_____ True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NBD302

Prohibited accumulation of solid waste

The following proceedings were held in the above-captioned case before the undersigned judge on 6/01/09.
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
(X) Other: Court Trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibited accumulation of solid waste

( ) Other: _____

(X) Pay $ 600.00 by 7.09.09 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $_____ ($_____Posted)

Dated 6.09.09 Reporter A. Waddington

JESSE C. MARGOLIS
Circuit Judge

cc: Jail, DA, Def, Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,
vs.
Dale A. Rennie Defendant
True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NB0303

prohibited accumulation of solid waste

The following proceedings were held in the above-captioned case before the undersigned judge on 6.09.09.
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
(X) Other: Court Trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: prohibited accumulation of solid waste

( ) Other: _____

(X) Pay $ 603.00 by 7.09.09 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $_____ ($_____Posted)

Dated 6.09.09 Reporter A. Waddington

JESSE C. MARGOLIS
Circuit Judge

Item U 000130

cc: Jail, DA, Def, Atty, P & P

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CO

☐ Family Court
☐ Non-Family Cour

THE STATE OF OREGON, Plaintiff,

vs.

Dale A. Pennie, Defendant

True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 07NB1338 07NB1339 07NB0669 07NB1335, 07NB1336 07NB1352
1. Solid Waste Accumulation
2. Oper Junk Yard in Res. Area

The following proceedings were held in the above-captioned case before the undersigned judge on 12-27-07 12-17-07
Del Dahlen District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revok
( ) _____ present and appointed as interpreter.
(X) Other: Court Trial

(X) Defendant appeared with ~~counsel~~ atty _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendar could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance Court finds Def
(X) ~~Court / Defendant entered a plea of~~ ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contemp to the following charges: All Cases & Counts
(X) 07NB1338, 07NB1339, 07NB0669, 07NB1335, 07NB1336, 07NB1352
( ) Other: Ct 1 Fines & Costs 603 per case – Ct 2 fines & costs
(ms) $162 per case Total $4590 – Motions to suppress are denied.
(X) Pay $ 50 – by 1/10/08 and balance at $ 50 – /month beginning 2/10/08 or appear at 9AM next Judicial day. You may meet with fm officer to combine payments.

( ) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____
Writ of Habeas Corpus/Other: _____ at _____
Change of Plea: _____ at _____. Sentencing: _____ at _____
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____
Other: _____
( ) Remanded to custody to be released. ( ) Meet with Verification Officer.
( ) Cancel date of _____.
( ) _____( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Defendant held in custody. ( ) Security $_____ ($_____ Poste

Dated 12-17-07 & 12-27-07

Circuit Judge

cc: Jail, DA, Def, Atty, P & P
Dahlen, Def

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR COOS COUNTY

09CR0523

STATE OF OREGON, Department of Environmental Quality,

IN THE MATTER OF THE APPLICATION FOR AN ADMINISTRATIVE SEARCH WARRANT

RETURN OF ADMINISTRATIVE SEARCH WARRANT

I, Craig C. Filip, an authorized representative of the Department of Environmental Quality of the State of Oregon, certify that I received the original and a true copy of the administrative warrant issued for entry into the properties and buildings located at 56295 Tom Smith Road, Bandon, Oregon, for the purpose of ascertaining compliance with the department's statutes and rules relating to the management (including the generation, storage, transport and disposal) of solid and hazardous wastes at those facilities.

I served the true copy of the administrative warrant at _____A.M./P.M. on June ____, 2009 by posting the warrant on or about the doors at the above-described properties.

I served the true copy of the administrative warrant at 8:45 A.M./P.M. on June 2, 2009 by reading the warrant out loud and then giving a copy of the warrant to DALE A. PENNIE, the person in apparent control of the facility.

The above-described property was entered on the above-stated date and inspected for the purpose of ascertaining compliance with the department's statutes and rules relating to the

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LP/ej1/1422855

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PORTLAND, OREGON 97201
PHONE (971) 673-1880

management of solid and hazardous wastes at and from that facility. I hereby return the original administrative warrant.

DATED this 2 day of June, 2009.

Craig C. Filip

Subscribed and sworn to before me this 2d day of June 2009 at Coquille, Oregon

Circuit Judge

DEPARTMENT OF JUSTICE
1515 S.W. 5th AVENUE, SUITE 410
PORTLAND, OREGON 97201
PHONE (971) 673-1880

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR COOS COUNTY

09CR0503

STATE OF OREGON, Department of Environmental Quality, IN THE MATTER OF THE APPLICATION FOR AN ADMINISTRATIVE SEARCH WARRANT FOR 56295, TOM SMITH ROAD, BANDON, OREGON	ADMINISTRATIVE SEARCH WARRANT

TO: The Director of the Oregon Department of Environmental Quality (DEQ), or any of his designated representatives, and to any police officer in the State of Oregon designated to accompany DEQ.

RE: 56295 Tom Smith Road, Bandon, Oregon, more particularly known as Coos County Tax Map No. T28S, R14W, Sec. 15, TL 1111 and Coos County Tax Map No. T28S, R14W, Sec. 15, TL 1106

IN THE NAME OF THE STATE OF OREGON:

WHEREAS, representatives of the Oregon Department of Environmental Quality are authorized by ORS 459.385 and other environmental statutes to enter the above-described property and facility at any reasonable time to conduct an inspection for the purpose of ascertaining compliance with the state's environmental statutes and rules relating to solid waste, hazardous waste, air quality, and water quality and whereas, based on the accompanying Affidavit, it appears that the purpose of the inspection for which entry is sought are within the scope of DEQ's authority.

THEREFORE, YOU ARE HERBY AUTHORIZED to enter and inspect the property and facility (including the interiors of any non-residential buildings, vehicles, and storage tanks

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and/or containers) located at 56295 Tom Smith Road, Bandon, Oregon for the purpose of ascertaining compliance with Oregon environmental statutes and rules. You are authorized to inspect (including use of camera and other video equipment), sample (including, without limitation, removing samples off-site for analysis), and review and copy records pertinent to compliance with applicable statutes and rules. You are authorized to obtain the assistance of the Oregon State Police to gain access to the property and facility, if necessary. This warrant shall be executed during normal daylight hours on June 2, 2009. DEQ may return to the Court for an order for extended access should conditions warrant remediation or further investigation.

ISSUED at Coquille, Oregon this 1st day of June, 2009 at 4:55 a.m. (p.m.)

Circuit Court Judge

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2

FILED
2009 JUN -3 AM 8:54
COOS COUNTY COURT
COQUILLE, OREGON

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR COOS COUNTY

09CR053

STATE OF OREGON, Department of Environmental Quality, IN THE MATTER OF THE APPLICATION FOR AN ADMINISTRATIVE SEARCH WARRANT	RETURN OF ADMINISTRATIVE SEARCH WARRANT

I, Craig C. Filip, an authorized representative of the Department of Environmental Quality of the State of Oregon, certify that I received the original and a true copy of the administrative warrant issued for entry into the properties and buildings located at 56295 Tom Smith Road, Bandon, Oregon, for the purpose of ascertaining compliance with the department's statutes and rules relating to the management (including the generation, storage, transport and disposal) of solid and hazardous wastes at those facilities.

I served the true copy of the administrative warrant at 12:45 A.M./(P.M.) on June 1, 2009 by posting the warrant on or about the doors at the above-described properties, and

MS 6-2-09

I served the true copy of the administrative warrant at 3:05 A.M./(P.M.) on June 1, 2009 by reading the warrant out loud and then giving a copy of the warrant to DALE A. PENNIE, the person in apparent control of the facility.

The above-described property was entered on the above-stated date and inspected for the purpose of ascertaining compliance with the department's statutes and rules relating to the

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management of solid and hazardous wastes at and from that facility. I hereby return the original administrative warrant.

DATED this 2 day of June, 2009.

Craig C. Filip

Subscribed and sworn to before me this 2d day of June 2009 at Coquille, Oregon

Circuit Judge

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PHONE (971) 673-1880

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR COOS COUNTY

09CR0503

STATE OF OREGON, Department of Environmental Quality, IN THE MATTER OF THE APPLICATION FOR AN ADMINISTRATIVE SEARCH WARRANT FOR 56295, TOM SMITH ROAD, BANDON, OREGON	ADMINISTRATIVE SEARCH WARRANT

TO: The Director of the Oregon Department of Environmental Quality (DEQ), or any of his designated representatives, and to any police officer in the State of Oregon designated to accompany DEQ.

RE: 56295 Tom Smith Road, Bandon, Oregon, more particularly known as Coos County Tax Map No. T28S, R14W, Sec. 15, TL 1111 and Coos County Tax Map No. T28S, R14W, Sec. 15, TL 1106

IN THE NAME OF THE STATE OF OREGON:

WHEREAS, representatives of the Oregon Department of Environmental Quality are authorized by ORS 459.305 and other environmental statutes to enter the above-described property and facility at any reasonable time to conduct an inspection for the purpose of ascertaining compliance with the state's environmental statutes and rules relating to solid waste, hazardous waste, air quality, and water quality and whereas, based on the accompanying Affidavit, it appears that the purpose of the inspection for which entry is sought are within the scope of DEQ's authority.

MS 5-1-09

THEREFORE, YOU ARE HERBY AUTHORIZED to enter and inspect the property and facility (including the interiors of any non-residential buildings, vehicles, and storage tanks

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and/or containers) located at 56295 Tom Smith Road, Bandon, Oregon for the purpose of ascertaining compliance with Oregon environmental statutes and rules. You are authorized to inspect (including use of camera and other video equipment), sample (including, without limitation, removing samples off-site for analysis), and review and copy records pertinent to compliance with applicable statutes and rules. You are authorized to obtain the assistance of the Oregon State Police to gain access to the property and facility, if necessary. This warrant shall be executed during normal daylight hours on June 1, 2009. DEQ may return to the Court for an order for extended access should conditions warrant remediation or further investigation.

ISSUED at Coquille, Oregon this 1st day of ~~May~~ June, 2009 at 10:00 (a.m.)/p.m.

Martha E Stone

Circuit Court Judge

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3

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR COOS COUNTY

09CR0523

STATE OF OREGOn, Department of Environmental Quality, IN THE MATTER OF AN EX PARTE APPLICATION FOR AN ADMINISTRATIVE SEARCH WARRANT FOR 56295 TOM SMITH ROAD, BANDON, OREGON	APPLICATION FOR ADMINISTRATIVE SEARCH WARRANT

Pursuant to ORS 459.385 and 466.190 the Oregon Department of Environmental Quality (DEQ) hereby requests that the Court issue an administrative search warrant to enable DEQ officials to investigate compliance with Oregon's solid and hazardous waste laws at the properties described as 56295 Tom Smith Road, Bandon, Oregon, more particularly known as Coos County Tax Map No. T28S, R14W, Sec. 15, TL 1111 ("the Pennie Property") and Coos County Tax Map No. T28S, R14W, Sec. 15, TL 1106.

The Pennie Property is owned by Karen I. Pennie. Dale A. Pennie currently resides there. Access to the Pennie Property is by way of an access easement located on the adjacent property (TL 1106), which is owned by John Cox Jr. DEQ seeks a warrant to enable DEQ to investigate the Pennie Property and the access easement ("Easement Area")

Application is made pursuant to DEQ's statutory entry and inspection authorities set forth in ORS 459.385 and 466.195 (copies attached). ORS 459.385 authorizes DEQ to enter upon private premises at any reasonable time to determine compliance with and to enforce state laws and rules pertaining to the management of solid and hazardous wastes, including without limitation ORS 459.005 to 459.105, 459.205 to 459.385, and ORS 466.005 to 466.385, and any rules promulgated thereunder.

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ORS 466.195 authorizes DEQ to enter at reasonable times any establishment or places in which hazardous waste is or has been generated, stored, treated, disposed of or transported from, to inspect and obtain samples of such waste and any containers or labeling for such waste, and to access and copy all records related to such waste. *See* ORS 466.195(2) and (3). DEQ further is authorized to take such action as necessary to enforce these provisions. *See e.g.,* ORS 459.376 and ORS 466.210.

The Easement Area

DEQ has reason to believe that state solid and hazardous waste management laws and rules are being violated on the Easement Area. As more fully described in the attached affidavit of DEQ inspector Craig Filip, a Pollution Complaint alleging illegal disposal of solid waste on the Easement Area was filed by Coos County Sheriff Deputy Del Dahlen. Mr. Filip and Deputy Dahlen conducted a site inspection with permission from the Easement Area's property owner, Mr.Cox, in March 2007. During that inspection, Mr. Filip observed solid waste such as abandoned cars, automotive parts, automotive fluids, and computer equipment in four discrete sites located, in part, on the Easement Area. Based on that inspection, Mr. Pennie was directed to take corrective action to address the disposal sites. Follow-up visits in October 2007 and March 2008 revealed that site conditions remained unchanged.

Although consent to enter the Easement Area has been obtained from Mr. Cox , Mr. Pennie alleges that DEQ trespassed when Mr. Filip entered the Easement Area to conduct the earlier site inspections . Although Mr. Pennie has only an access easement, in light of Mr. Pennie's allegations, DEQ requests that the warrant include the Easement Area.

The Pennie Property

During his March 2007 inspection of the Easement Area, Mr. Filip observed that 3 of the 4 unpermitted disposal sites located on the Easement Area extended on to the adjoining Pennie Property and that the majority of the solid waste observed at the disposal sites was actually located on the Pennie Property. Mr. Filip attempted to inspect the solid waste piles that extended

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onto the Pennie Property at that time but was denied access by Mr. Pennie. As a consequence, DEQ has been unable to assess the types and full extent of waste present on the Pennie Property.

Mr. Filip again requested access to the Pennie Property by letter dated May 4, 2009. Mr. Pennie denied the request by letter dated May 13, 2009. Both letters are attached to Mr. Filip's affidavit.

Inspection of the Easement Area and the Pennie Property (including the properties themselves, the interiors of any non-residential buildings, and any equipment, containers and records) is necessary to assess the extent of potential solid and hazardous waste management violations, as well as the potential risks to public health and safety resulting from any such violations.

DATED this 27th day of May 2009.

Respectfully submitted,

JOHN R. KROGER
Attorney General

Lynne Perry, OSB #904560
Assistant Attorney General
Counsel for DEQ

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF COOS

09CR0523

STATE OF OREGON, Department of Environmental Quality,

IN THE MATTER OF THE APPLICATION FOR AN ORDER ALLOWING ENTRY, SAMPLING AND INSPECTION PURSUANT TO ORS 468.025 and 459.385.

AFFIDAVIT OF CRAIG C. FILIP IN SUPPORT OF EX PARTE APPLICATION FOR ORDER ALLOWING ENTRY AND INSPECTION

I, Craig C. Filip, hereby swear that the following is true to the best of my knowledge:

1. I am currently employed by the Oregon Department of Environmental Quality (the Department). I am a Solid Waste Reduction Analyst assigned to the Department's Regional Environmental Solutions Section, Western Region, in Eugene. I have been employed by the Department for approximately 2 years and seven months. I hold a Bachelor of Science degree in Biology, and have professional experience in Superfund enforcement support, solid waste planning and technical assistance, and in conducting Environmental Site Assessments.

2. I believe that Oregon environmental law has been, and is currently being, violated at two adjoining properties in Coos County, Oregon as further described in this affidavit.

3. On March 13, 2007, Coos County Sheriff's Deputy Del Dahlen filed a Pollution Complaint alleging illegal disposal of solid waste with the Department's Coos Bay office (See Complaint attached as Exhibit 1). The site of the alleged disposal was an access easement located at 56295 Tom Smith Rd. (legal description: T28S, R14W, Sec. 15, TL 1106), in Coos County near Bandon, ("the Easement Area"). The property is owned by Mr. John Cox Jr. of Temple City, California, but the access easement is held by Karen I. Pennie. The easement

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allows access to the adjoining property to the south (legal description: T28S, R14W, Sec. 15, TL 1111) ("the Pennie Property), which is also owned by Karen I. Pennie. Dale Pennie currently resides on the Pennie Property.

4. On March 19, 2007, I conducted a site investigation of the Easement Area in the company of Coos County Sheriff's Deputy Del Dahlen and Dale Pennie. I documented four discrete sites where solid waste has been accumulated (See Inspection Report attached as Exhibit 2). The solid waste I documented includes numerous abandoned vehicles (some of them partially dismantled); automotive parts (including batteries and at least one oil filter on the ground) and containers of automotive fluids (including gasoline and coolant); computer equipment (including one monitor with a broken screen) and components, some under tarps; stacks of used building materials; piles of electrical wiring and equipment; and, piles of assorted household trash. All of these wastes are exposed to the elements and have been managed in a manner I judge to be disposal.
5. The boundaries of three of the four unpermitted disposal sites extend from the Easement Area onto the Pennie Property. In fact, the majority of solid waste I observed in these disposal sites lay beyond the Easement Area on the Pennie Property. My investigation was, however, limited to the Easement Area because Mr. Pennie denied Deputy Dahlen and I access to the Pennie Property.
6. Based on this site investigation, I issued a Warning Letter with Opportunity to Correct to Dale Pennie and Karen Pennie on April 6, 2007 (See Letter attached as Exhibit 3). In this letter I stated that the Department had concluded that they were responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): *Establishing or operating a disposal site without first obtaining a registration or permit.* I also requested that the Pennies take the following Corrective Actions:

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a. "By October 1, 2007, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this request by another site inspection following that date, if necessary.

b. By October 1, 2007, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above."

7. On October 15, 2007, I conducted a follow-up compliance inspection of the Easement Area in the company of Deputy Dahlen and Office Justin Clayburn of the Bandon Police Department, and found site conditions to be essentially unchanged from my initial site visit on March 19, 2007 (See Inspection Report attached as Exhibit 4). Mr. Pennie was not present during this inspection.

8. On December 4, 2007, I issued Karen Pennie and Dale Pennie Pre-Enforcement Notice #PEN-WMC/SW-WRE 2007-0057 (See PEN attached as Exhibit 5). In this letter, I stated that the Department had concluded that they were responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): *Establishing or operating a disposal site without first obtaining a registration or permit.* I also required that the Pennies take the following Corrective Actions:

a. "By March 15, 2008, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this request by another site inspection following that date, if necessary.

b. By March 15, 2008, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the

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subject property. These receipts can be sent to my attention at the address shown above.

9. On December 14, 2007, I submitted an enforcement referral for this violation to the Department's Office of Compliance and Enforcement (See Referral attached as Exhibit 6).

10. On March 27, 2008, I conducted a follow-up compliance inspection of the Easement Area in the company of Deputy Dahlen and Officer Josh Garrett of the Bandon Police Department, and found site conditions to be essentially unchanged from my second site visit on October 15, 2007 (See Inspection Report attached as Exhibit 7).

11. The quantity of solid waste disposed on the Easement Area is difficult to quantify because it is spread over several areas and extends onto the adjacent Pennie Property. I have conservatively calculated the amount of disposed solid waste on the Easement Area to be approximately 185 cubic yards, which roughly translates into 53.6 tons of mixed and unknown solid waste and brush. This volume and tonnage estimate does not include the six abandoned vehicles I observed on-site during my inspections. Adding the solid waste observed on the Pennie Property to this total would add several times the amount of solid waste that I have estimated was disposed on the Easement Area.

12. The potential toxicity of the solid wastes present stems from the activities evidenced on-site, such as automobile dismantling and possible equipment repair; careless storage of automotive fluids, such as antifreeze, used oil and gasoline; and careless management of such materials as automobiles and automotive parts (including lead-acid batteries, many of which were observed exposed), electrical and electronic equipment (such as computers and monitors, at least one of which were observed to have been broken), and miscellaneous parts and supplies, such as containers of potassium permanganate. The soil underlying these materials has almost certainly

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been impacted to some degree; however, site conditions did not allow for sufficient observation of such potential contamination. The Easement Area is undeveloped and access is limited to Mr. Cox and the Pennies, so human exposure is restricted. Impacts to wildlife are unknown. The solid waste disposed onto the subject property has changed very slightly in its content and volume since my initial involvement in March 2007. Based on our investigation to date, I believe that Oregon environmental law has been, and is currently being, violated at the properties located at, or accessed via, 56295 Tom Smith Rd., Bandon, Oregon, at property in Coos County, Oregon (legal description: T28S, R14W, Sec. 15, TL 1106 and 1111).

13. I was denied access to Mr. Pennie's property verbally by Mr. Pennie during my first visit to the Easement Area on March 19, 2009 (see Exhibit 2). I again sought access to Mr. Pennie's property by mailing him a written request for permission to enter his property on May 4, 2009 (see letter attached as Exhibit 8). In a written response, dated May 13, 2009, Mr. Pennie denied my request to enter his property (see letter attached as Exhibit 9).

Dated this 29th day of May 2009.

Craig C. Filip
Department of Environmental Quality

Sworn and subscribed to me this 29th day of May 2009.

OFFICIAL SEAL
JESSIE M ALVARADO-WERT
NOTARY PUBLIC - OREGON
COMMISSION NO. 431336
MY COMMISSION EXPIRES AUGUST 26, 2012

Notary Public for Oregon

My Commission Expires: AUG. 26, 2012

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EXHIBITS

Exhibit 1: Copy of the complaint form generated by Craig C. Filip in response to the Pollution Complaint filed by Coos County Sheriff's Deputy Del Dahlen on March 13, 2007

Exhibit 2: Copy of a memo report of the site investigation by Craig C. Filip of the subject property, dated March 26, 2007.

Exhibit 3: Copy of the Warning Letter with Opportunity to Correct mailed to Mr. and Mrs. Pennie by Craig C. Filip, dated April 6, 2007.

Exhibit 4: Copy of a memo report of the follow-up site investigation by Craig C. Filip of the subject property, dated October 23, 2007.

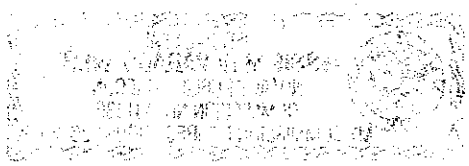
Exhibit 5: Copy of Pre-Enforcement Notice ##PEN-WMC/SW-WRE 2007-0057, dated December 4, 2007.

Exhibit 6: Copy of the signed enforcement referral form submitted to DEQ's Office of Compliance and Enforcement on December 14, 2007.

Exhibit 7: Copy of a memo report of the follow-up site investigation by Craig C. Filip of the subject property, dated March 28, 2008.

Exhibit 8: Copy of a letter and Permission to Conduct Inspection form from Craig C. Filip to Mr. Dale A. Pennie, dated May 4, 2009, asking Mr. Pennie to grant permission to Mr. Filip to enter Mr. Pennie's property for the purpose of conducting a site investigation.

Exhibit 9: Copy of a letter from Mr. Dale A. Pennie to Craig C. Filip, dated May 13, 2009, denying Mr. Filip permission to enter Mr. Pennie's property.



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State of Oregon
Department of Environmental Quality
Western Region

Complaint Number: WRE-2007 – 0024
Year #
Received By: Linda Van Tassel

POLLUTION COMPLAINT

COMPLAINT INFORMATION

Date Received 3/13/07 Time Received 4:00 PM When Observed on-going since December 2005

Pollution Source Karen and Dale Pennie Phone _____
[Source= name of responsible party causing pollution. (ie – business, property owner, etc.) if known, "unknown" otherwise]

Pollution Location 56295 Box 34, Tom Smith Rd.
[Location = specific address of site of pollution or directions to the site]

City Name Bandon Zip Code 97411 County Coos

Description A strip of land intended for use as an ingress/egress easement has been filled with junk cars, used appliances, used computers, electrical wire and miscellaneous trash.
[Description of pollution (ie – sheen on water, etc.). Leave out complainant information.]

REFERRAL

Referred to (if outside DEQ) _____ -or- DEQ Program Contact Craig Filip

DEQ Program
☐ AQ/AB(ASBESTOS) ☐ AQ/ACDP ☐ AQ/DUST ☐ AQ/FB (FIELD BURNING)
☐ AQ/OB (OPEN BURNING) ☐ AQ/V (TITLE V) ☐ AQ/MISC
☐ WMC/E (CLEAN UP) ☐ WMC/HW (HAZ WST) ☐ WMC/RC (RECYCLING)
☐ WMC/SP (SPILLS) ☒ WMC/SW (SOLID WST) ☐ WMC/T (TANKS)
☐ WQ/D (DOMESTIC) ☐ WQ/I (INDUSTRIAL) ☐ WQ/M (MUNICIPAL) ☐ WQ/MISC
☐ WQ/O (INDIVIDUAL ONSITE) ☐ WQ/OI (ONSITE INSTALRS & PMPRS) ☐ WQ/SW (STORMWATER)

COMPLAINANT

Anonymous? ☐
Confidential? ☐

Name Del Dahlen, Civil Deputy, Coos Co. Sheriff's Office

Address Coos County Courthouse

City Coquille State OR Zip Code 97423

Home Phone _____ Work Phone (541) 396-5932 Ext 724

POTENTIAL RESPONSIBLE PARTY

Same as Source?: ☒ Confirmed as Resp. Party?: ☒

Name Karen and Dale Pennie Phone _____ Ext _____

Address 56295 Box 34, Tom Smith Rd.

City Bandon State OR Zip Code 97411

Priority: O High X Medium O Low
(To be determined by program contact)

COMPLAINT ACTION (FOLLOWUP ACTION)

This complaint was referred to the Coos Bay office by Deputy Dahlen. Linda called me on 3-13 about a file on this complaint Deputy Dahlen had left with her. I subsequently contacted Deputy Dahlen on his cell phone (541-404-5395) and scheduled a site visit for 3-19-07. On 3-19, I called Deputy Dahlen from the Coos Bay office and later met him near the site of the complaint. This complaint was brought to his attention by the landowner who had negotiated an ingress/egress easement through his property with Mr. Pennie so that Mr. Pennie could access Tom Smith Rd. from his land, which has no road access. Some time following this agreement, the property owner visited the easement and discovered that huge quantities of solid waste in the form of junk cars, used computers, appliances, electrical components and miscellaneous trash had been stored either side of the ingress, allegedly by Mr. Pennie. Shortly thereafter, the landowner filed a Code Violation Complaint with the county against Mr. Pennie. Deputy Dahlen has been working on this complaint since then, with limited success. His frustration with the pace of resolution to this complaint caused him to refer it to DEQ. Since the deputy and PRP know each other, the issue of confidentiality is moot. See attached site inspection report for further details. Warning Letter with Opportunity to Correct issued by CF on 4/6/07. 9/5: CF called Deputy Dahlen, re: the Oct. 1 compliance deadline for Mr. Pennie. 10/3: Deputy Dahlen called, VM. 10/4: CF called Deputy Dahlen back. We agreed to meet on-site on 10/15 to check on Mr. Pennie's progress towards compliance. 10/15: Beginning around 10:15 AM, CF visited the subject property in the company of Deputy Dahlen and Office J. Clayburn of the Bandon Police Department. Mr. Pennie did not appear during our site visit. The subject property appeared largely unchanged since March, although certain areas seemed to contain more wastes that previously observed. Please refer to the site investigation report of this visit, dated 10/23/07 for further details.

Complainant Contacted? Y☒ N☐ Complainant Contact Date 3/19/07

Site Visit? Y☒ N☐ Site Visit Date 3/19/07, 10/15/07, 3/28/08 Site Inspector Craig C. Filip

Resolution Date _____ Staff Hours _____ [Resolution Days computer will calculate in database]

NON Issue Date _____ NON Number _____

2005-2539

Coos County Code Violation Complaint Form

Please complete this form with as much detail and accuracy as possible.

Location of Violation: 56295 Box 34 Tom Smith Rd Bandon Or 97411
(street address and city)

Legal Description of Property: 28 (Township) 14 (Range) 16 (Section) 1111 (Tax lot #)

Tax Account Number_____

Alleged Violator Name: Karen/Dale Peoples
Address: 56295 Box 34 Tom Smith Rd Bandon OR 97411

Property Owner Name: Karen Peoples
Address:_____

Description of Violation: Hazardous dumpsite with over 100 non running junk cars that are leaching oil gasoline into ground water springs. There are also numerous computers leaching lead and silver. Looks like a huge dump. Also is a fire hazard.

Documentation or Evidence Attached? (circle) YES (NO)
Can only see from a distance from our property.

Contact information for person completing form:

Name John H Cox
Address 9247 East Sparkett
Temple City CA 91780
Phone (626) 287-3297

The above information is confidential until either the case is closed or at such time as the violator is required to appear in court and requests the information under rights of discovery.

John H Cox
SIGNATURE

12-6-05
DATE

Coos County Code Violation Complaint Form

Please complete this form with as much detail and accuracy as possible.

Location of Violation: Tom Smith Rd Bandon Oregon 97411
(street address and city)

Legal Description of Property: 28 (Township) 14 (Range) 16 (Section) 1106 (Tax lot #)

Tax Account Number 9507.07

Alleged Violator Name: Karen / Dale Pennie
Address: 56595 Box 34 Tom Smith Rd Bandon OR 97411

Property Owner Name: John H Cox
Address: 9247 East Sparkett Temple City CA

Description of Violation: Hazardous material (cars, computers, trucks trailors) that are leaching oil, silver, lead and gasoline on our property that we granted easement for ingress and egress only Trees have been removed from the easement and there is a vicious dog dog that makes us fearful to visit our own property Note the easement looks ~~like~~ worse than a junk yard!.

Documentation or Evidence Attached? (circle) (YES) NO
Photo of easement prior to Violation

Contact information for person completing form:

Name John H Cox
Address 9247 East Sparkett
Temple City CA 91780
Phone (626) 287-3297

The above information is confidential until either the case is closed or at such time as the violator is required to appear in court and requests the information under rights of discovery.

John H Cox
SIGNATURE

12-6-05
DATE

State of Oregon
Department of Environmental Quality Memorandum

To: **File** **Date: 3/26/07**
Pollution Complaint WRE 2007-0024

From: **Craig C. Filip**
WR-RES, Eugene

Subject: **Site Investigation Report of 56295 Tom Smith Rd., Bandon, OR 97411**

Background

The subject property was a fifty-foot by approximately one-eighth-mile ingress/egress easement on property owned by a Mr. John Cox. Some time in 2005, Mr. Cox, who resides in California, paid a visit to his property only to find that the easement he had negotiated with potentially responsible parties (PRPs) Karen and Dale Pennie, had become filled with junked automobiles, discarded computers, some with smashed monitors, discarded electrical supplies, and miscellaneous trash. In December 2005, Mr. Cox filed a code violation complaint form with Coos Co. charging the Pennies with contaminating his property with hazardous materials from the used automobiles and computers stored in the easement. Enforcement of code compliance in this case is the responsibility of Coos County Sheriff's Deputy Del Dahlen, who stated to me that he has been working on this case since October 2005, at which time he issued a citation to Mr. Pennie for code violations. Deputy Dahlen referred this complaint to the DEQ Coos Bay office on March 13, 2007.

Because I did not have permission to enter onto the PRP's property, my investigation was limited to the area of the easement, which roughly consisted of a width of twenty-five feet either side of the centerline of the two-track access road on the subject property from Tom Smith Road to the point at which it entered the PRP's property, a distance of roughly one-eighth mile.

Site Investigation

The weather at the time of this site investigation was rainy with temperatures in the low to mid-50's. I met Coos County Sheriff's Deputy Del Dahlen at the intersection of Hwy. 101 and Prospect Junction Rd. at approxiately 12 PM on 3/19/07. He told me that Mr. Pennie, might meet us at thethe subject property and could be combative and verbally abusive. He stated that the pictures he had provided in the file he left in the Coos Bay office on 3/13 did not, in his opinion, adequately protray the situation on the property, which he characterized as a "real mess" stemming from the storage of junked automobiles and auto parts, broken computers and assorted trash.

Following Deputy Dahlen, we arrived at the subject property a few minutes later. At this point, Tom Smith Rd. runs northeast and southwest. The easement into the subject property runs to the east-southeast and contains a two-tracked access road. There was a metal gate

across the access road which Deputy Dahlen found locked, contrary, he stated, to his instructions to Mr. Pennie. Mr. Pennie appeared minutes later and unlocked the gate. He attempted to block Deputy Dahlen's and my entry onto the property, stating that I did not have his permission to enter. Deputy Dahlen replied that he had the property owner's permission to access the property and that I was with him. Mr. Pennie produced a disposable camera with which he insisted on recording the inspection. Deputy Dahlen replied that he could photograph him giving Mr. Pennie a citation for continued non-compliance. This angered Mr. Pennie, who became verbally abusive of Deputy Dahlen and continued to curse and berate the deputy for nearly the entire duration of the site investigation, which took approximately half an hour. Mr. Pennie detained me long enough to take my picture, over the objections of Deputy Dahlen.

Mr. Pennie had parked a large moving-style vehicle on the narrow access road, effectively blocking all view and access to the easement (Picture 1, view to the west-northwest towards Tom Smith Rd., open rear of truck in distance). Deputy Dahlen alleged it had been parked there to restrict our access. Mr. Pennie caustically rejoined that he parked it there so that he could begin moving his discarded materials off-site to be recycled and not landfilled as Deputy Dahlen had allegedly required. Immediately past the parked truck, in a small clearing along the southwestern side of the easement, were observed two abandoned vehicles, a boat, auto parts including a vehicle chassis covered in mixed solid waste (including paint cans), and blue and brown tarps covering unidentifiable objects (Picture 2). Deputy Dahlen stated that the objects under the tarps were computers which were only recently covered as shown (an allegation Mr. Pennie vigorously denied). Picture 3 reveals that these tarps were secured with computer monitors placed screens-down.

Continuing southeast within the easement an abandoned pick-up truck was observed on the southwestern side of the access road (Picture 4). Under the prevailing conditions of continual rain, no soil staining was observable. No stressed vegetation was observed, nor was any other solid waste observed for most of the length of the subject property. However, Deputy Dahlen stated that it had been filled at one time with abandoned vehicles, auto parts, computer equipment, and other assorted solid waste, as shown photographs he had taken previously (see file for copies). As the three of us proceeded along the easement away from the small clearing, Deputy Dahlen directed Mr. Pennie to walk in front of him, stating that he did not feel comfortable having Mr. Pennie follow behind him. Mr. Pennie peevishly complied with this directive. Hood on and eyes forward, I continued down the easement only to hear Mr. Pennie cry out and fall into a puddle in the road. Deputy Dahlen and I pressed on while Mr. Pennie cursed the deputy and accused him of cutting him off and pushing him down. I did not witness this allegation.

Upon arriving near the end of the easement, two abandoned vehicles were observed along the southwestern side of the access road (Pictures 5 and 6). An abandoned pick-up truck was observed a short distance to the southeast, its bed filled with solid waste (Picture 7). This vehicle was at the edge of a clearing along the southwestern edge of the subject property in which a breathtaking array of solid wastes were observed (Pictures 7-11), with more solid waste and abandoned vehicles (including a semi trailer) in the distance (Picture 11). This area was filled with automobile parts, including batteries (Pictures 8 and 9), electrical wiring and

components (Pictures 7-11), at least one broken computer monitor (Pictures 9 and 10), numerous containers (Picture 11) scrap metal objects and assorted household trash. At this point I asked Mr. Pennie what he did for a living and he replied that he performed electrical work around town and brought leftover components back to his property.

Continuing further along, the access road turned sharply to the southwest and onto the property of Mr. Pennie, who denied us access. At this turn was observed numerous abandoned vehicles, and a partially salvaged automobile (including oil filter) (Pictures 12 and 13). Opposite this area at the edge of the bend in the access road was another large pile of solid waste containing automobile parts, apparent antifreeze containers, electrical wiring and components, and at least one apparent computer component under a blue tarp (Pictures 14-16). Further away was yet another large pile of solid waste, this containing automobile parts (including a battery), electrical wiring and components, plastic pipe, apparent gasoline containers, scrap metal parts and assorted trash (Picture 17).

Along the northwestern side of the access road leading into Mr. Pennie's property was observed stacked building materials, including wood and metal pipe (Picture 18). Opposite this area, across the access road along its southeastern side were observed numerous stacked storage containers, cardboard boxes, coils of electrical cord and wire, metal pipe and miscellaneous trash (Pictures 19-21). In the distance along the access road were observed numerous additional abandoned vehicles and stockpiled materials.

During this point of the inspection Mr. Pennie, who had been in a heated discussion with Deputy Dahlen, asked about the possibility of recycling some computer components. I told him that Monitors and More in Roseburg took used computers for recycling. I promised to send him information on recycling some of his materials, and took down his mailing address.

My site investigation concluded at around 12:30 pm. Deputy Dahlen and I departed the site shortly thereafter and met at the intersection of Tom Smith Rd. and Prospect Junction Rd. to briefly discuss the site investigation. Deputy Dahlen stated that he had cited Mr. Pennie in October 2005 for county code violations and again this morning for continued non-compliance, and stated that he gives him 30 days between site visits to show evidence of compliance. He promised to send me a CD with more photos taken on the subject property, with dates. I told him I would confer with my supervisor regarding the level of the violations observed and write a letter to Mr. Pennie citing them, copying Deputy Dahlen. We parted at approximately 12:45 PM.

Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 3-19-07 by CCF

Picture 1: Westerly view of subject property from access road. Rear of truck blocking road in distance, center.

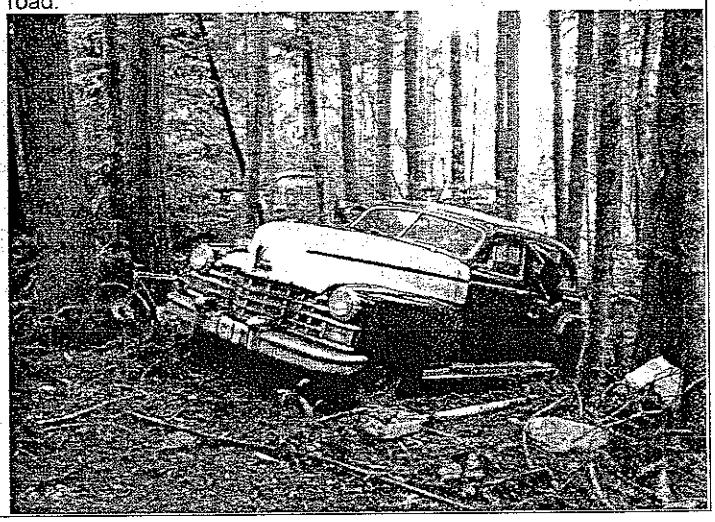
Picture 2: View of subject property along southern side of access road.

Picture 3: Close-up of tarped materials shown in Picture 2. Note the use of upturned computer monitors to secure tarps.

Picture 4: View of subject property along southern side of access road.

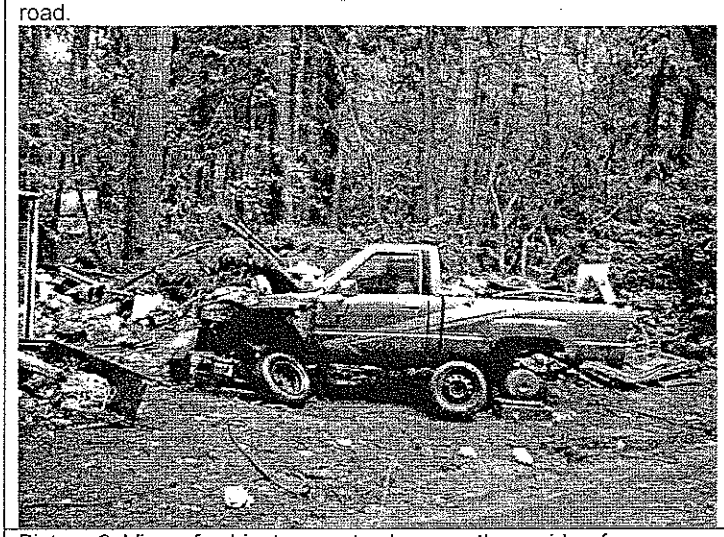
Picture 5: View of subject property along southern side of access road.

Picture 6: View of subject property along southern side of access road.

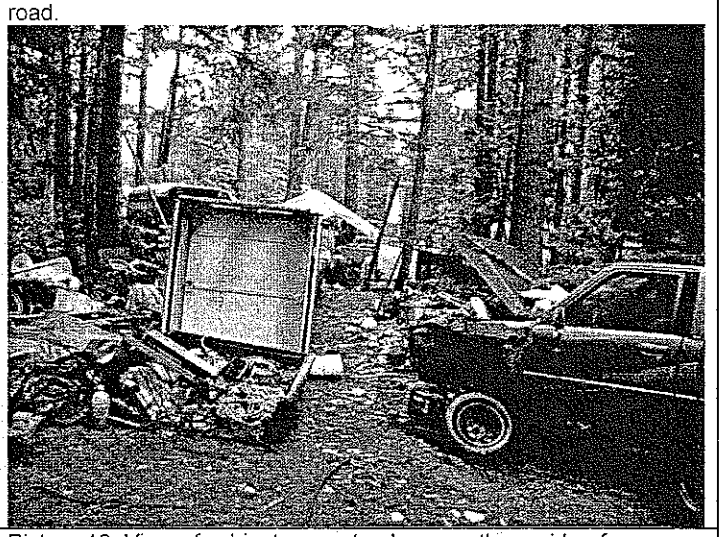


Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 3-19-07 by CCF

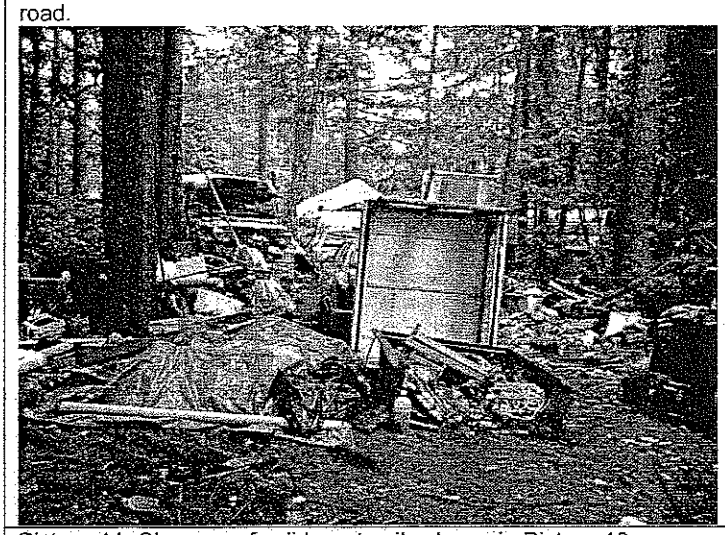
Picture 7: View of subject property along southern side of access road.



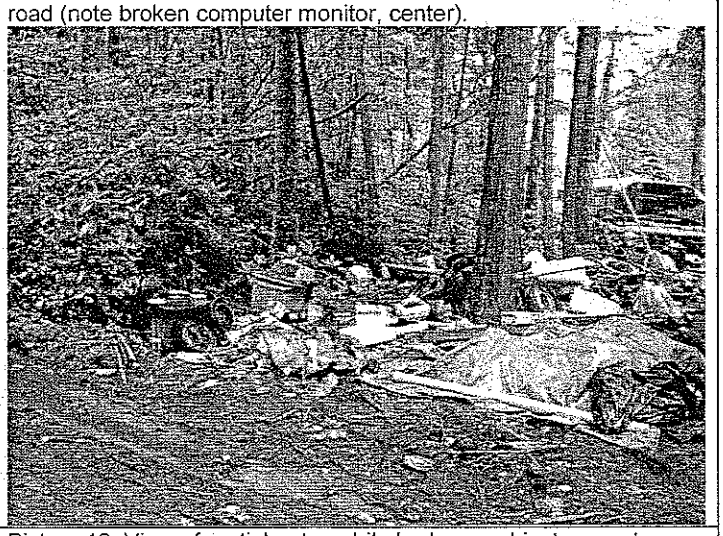
Picture 8: View of subject property along southern side of access road.



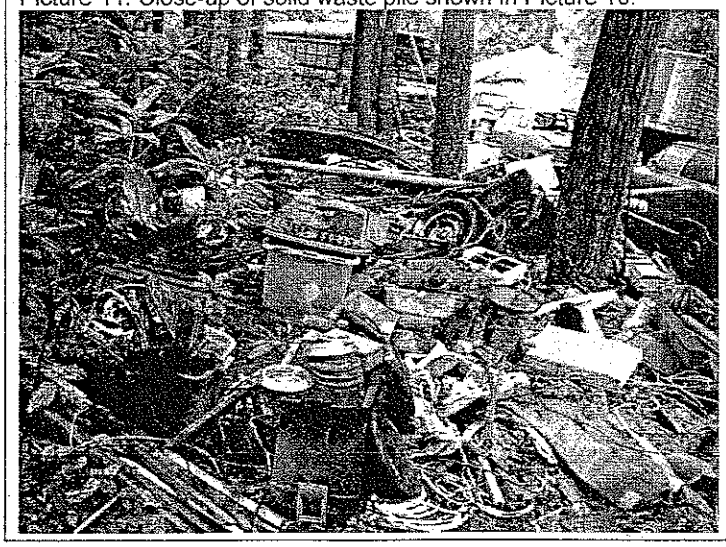
Picture 9: View of subject property along southern side of access road.



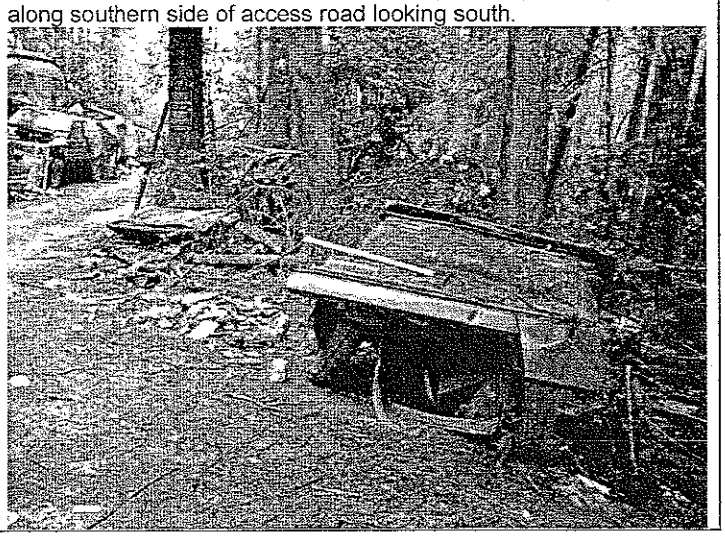
Picture 10: View of subject property along southern side of access road (note broken computer monitor, center).



Picture 11: Close-up of solid waste pile shown in Picture 10.



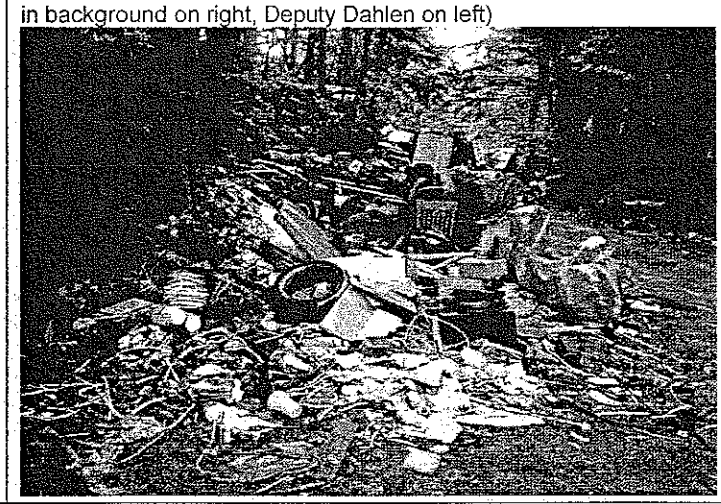
Picture 12: View of partial automobile body on subject property along southern side of access road looking south.



Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 3-19-07 by CCF

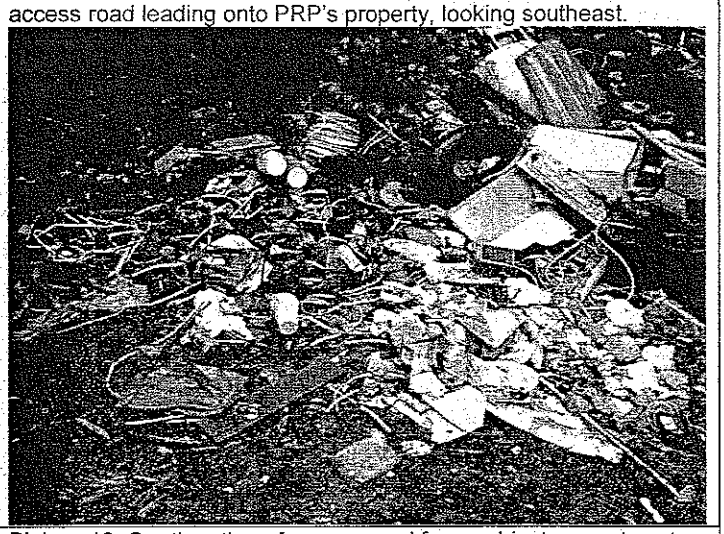
Picture 13: Alternate view of Picture 12 on the subject property looking northwest.

Picture 14: View of subject property across access road from Picture 13 looking south, leading onto PRP's property (Mr. Pennie in background on right, Deputy Dahlen on left)

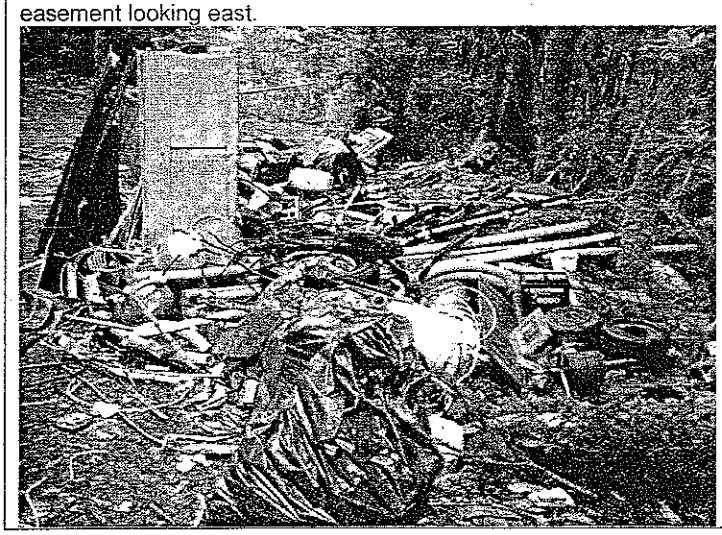


Picture 15: Close-up of Picture 14 (note computer component under tarp next to chair)

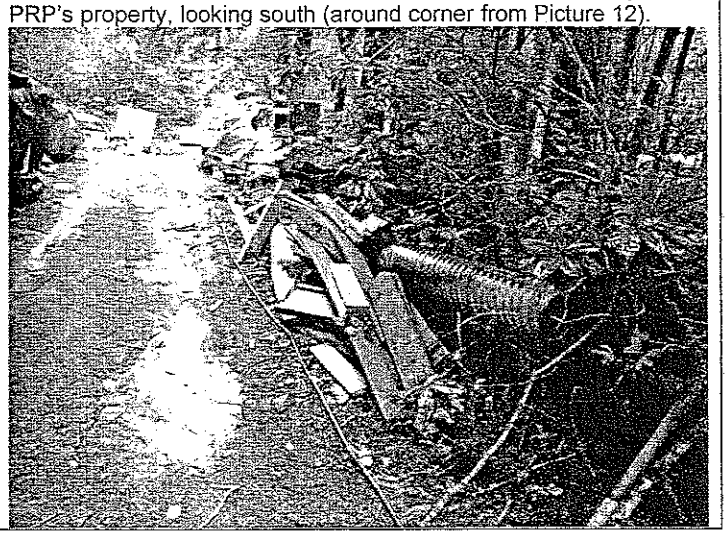
Picture 16: View to the left of Picture 15 on subject property along access road leading onto PRP's property, looking southeast.



Picture 17: View to the left of Picture 16 on subject property near easement looking east.

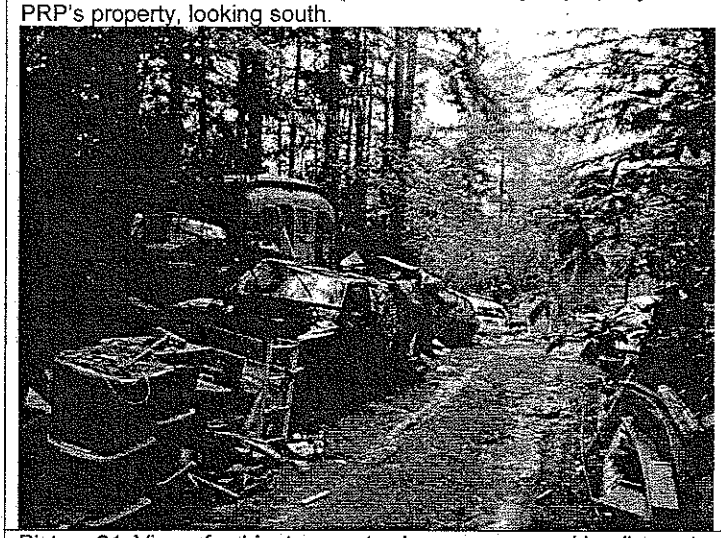


Picture 18: Continuation of access road from subject property onto PRP's property, looking south (around corner from Picture 12).



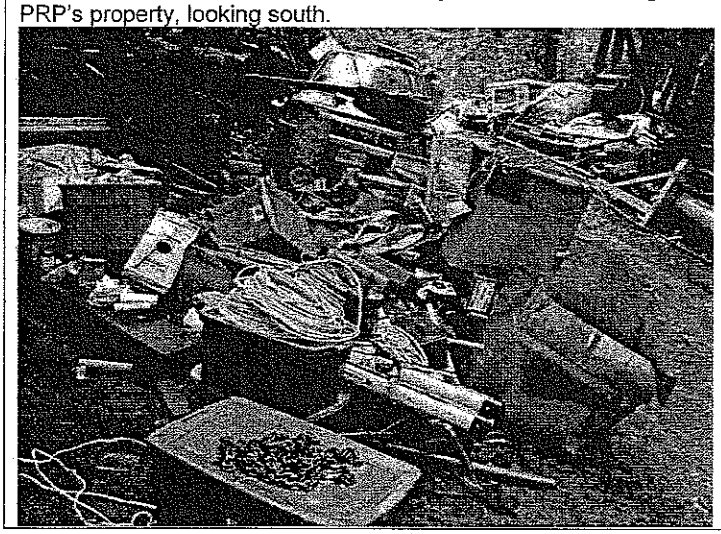
Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 3-19-07 by CCF

Picture 19: Continuation of access road from subject property onto PRP's property, looking south.



Picture 20: View of subject property along access road leading onto PRP's property, looking south.

Picture 21: View of subject property along access road leading onto PRP's property, looking south.



Oregon
Theodore R. Kulongoski, Governor

Department of Environmental Quality
Western Region - Eugene Office
1102 Lincoln, Suite 210
Eugene, OR 97401
(541) 686-7838
FAX (541) 686-7551

April 6, 2007

UNSIGNED
COPY

Dale and Karen Pennie
POB 1743
56295 Tom Smith Road
Bandon, OR 97411-6306

RE: Warning Letter with Opportunity to Correct
Ingress/egress easement located at:
56295 Tom Smith Road
Bandon, OR 97411-6306
WL – WMC/SW-WRE-2007-0025
Coos County

Dear Mr. and Ms. Pennie:

The Coos County Sheriff's Office referred a county code violation complaint to the Coos Bay office of the Department of Environmental Quality (DEQ) on March 13, 2007. This complaint pertained to the unauthorized accumulation of abandoned vehicles, used computers and miscellaneous solid wastes along an ingress/egress easement controlled by you but owned by the complainant John Cox, a resident of California.

On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, Craig Filip of the Eugene office of DEQ conducted an inspection on property owned by Mr. Cox located at 56295 Tom Smith Road, in Bandon, OR. Mr. Filip was accompanied on this inspection by Deputy Dahlen and Mr. Dale Pennie.

Based upon the investigation of this ingress/egress easement, the Department has concluded that you are responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): *Establishing or operating a disposal site without first obtaining a registration or permit.*

- OR -

Oregon Administrative Rule (OAR) 340-012-0065(1)(c): *Disposing of or authorizing the disposal of a solid waste at a location not permitted by the department to receive that solid waste.*

This is a Class I violation. Class I violations are the most serious violations of Oregon environmental law.

- OR -

Oregon Revised Statutes (ORS) 164.805(1): *A person commits the crime of **offensive littering** if the person* creates an objectionable stench or *degrades the beauty or appearance of property or*

detracts from the natural cleanliness or safety of property by intentionally: (a) Discarding or depositing any rubbish, trash, garbage debris or other refuse upon the land of another without permission of the owner, or upon any public way or in or upon any public transportation facility *(emphasis added)*.

(4) Offensive littering is a Class C misdemeanor, punishable by a fine of up to $1,000 and 30 days imprisonment.

During my inspection of the easement on Mr. Cox's property I observed numerous abandoned vehicles (some of them dismantled); automotive parts (including batteries and at least one oil filter on the ground) and containers of automotive fluids (including gasoline and coolant); piles of computer terminals (one with a broken screen) and components, some under tarps; stacks of used building materials; piles of electrical wiring and equipment; and, piles of assorted trash in various locations. I also observed more of the same along the access road leading from the easement onto your property.

The solid wastes I observed within the easement had been managed in a manner constituting disposal.
To maintain compliance with Oregon Administrative Rules, we request that you implement the following corrective actions by the dates indicated:

Corrective Actions Requested

1) By October 1, 2007, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this request by another site inspection following that date, if necessary.
2) By October 1, 2007, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.

Should these violations remain uncorrected or should you repeat any of these violations, this matter may be referred to the Department's Office of Compliance and Enforcement for formal enforcement action, including assessment of civil penalties and/or a Department order. Civil penalties can be assessed for each day of violation.

Also, please be aware that if you are engaged in the business of vehicle dismantling, as the evidence I observed suggests, you are required to obtain a dismantler certificate from the Oregon Department of Transportation (ODOT) (ORS 822.110) Failure to do so is a violation of Oregon law and is classified as a Class A misdemeanor. In addition, ODOT "may impose a civil penalty of not more than $5,000 on a person who conducts a motor vehicle dismantling business with out a certificate" (ORS 822.100(4)). I am enclosing "Instructions for Becoming a Dismantler" for your convenience.

If you believe any of the facts in this Warning Letter are in error, you may provide information to me at the office at the address shown at the top of this letter. The Department will consider new information you submit and take appropriate action.

The Department endeavors to assist you in your compliance efforts. As promised during the inspection, I have enclosed information on the recycling of electronic waste…Should you have any questions about the content of this letter, please feel free to contact me in writing or by telephone at (541) 686-7868, or via e-mail at: filip.craig@deq.state.or.us.

Sincerely,

Craig C. Filip
Solid Waste Reduction Analyst

ec: Bill Mason, DEQ – Eugene (without enclosures)
Susan Shewczyk, DEQ – Salem (without enclosures)

cc: Deputy Del Dahlen, Coos County Sheriff's Department
Office of Compliance and Enforcement, DEQ Headquarters (without enclosures)

State of Oregon
Department of Environmental Quality Memorandum

To: **File** **Date: 10/23/07**
Pollution Complaint WRE 2007-0024

From: **Craig C. Filip**
WR-RES, Eugene

Subject: **Site Investigation Report of 56295 Tom Smith Rd., Bandon, OR 97411**

Background

This is a follow-up memorandum to the one written at the time of the first complaint investigation conducted on the subject property by Craig C. Filip of DEQ. Please refer to that memorandum (WRE 2007-0024MEM.doc) for background information.

Following this first investigation, I issued a Warning Letter with Opportunity to Correct to Potentially Responsible Parties (PRPs) Dale and Karen Pennie on April 6, 2007, wherein they were directed to:

1) By October 1, 2007, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this request by another site inspection following that date, if necessary.
2) By October 1, 2007, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.

On October 15, 2007, I conducted an investigation of the subject property to ascertain compliance with the above-referenced warning letter.

Site Investigation

The weather at the time of this site investigation was rainy with temperatures in the upper 50's. I met Coos County Sheriff's Deputy Del Dahlen at the intersection of Prosper Junction Rd. and Tom Smith Rd. at approxiately 10:05 AM. Deputy Dahlen informed me that Mr. Pennie had filed a lawsuit against him stemming from his fall during the previous complaint investigation for which he blamed Deputy Dahlen for causing. As a result, Deputy Dahlen had requested the presence of a uniformed member of the Bandon Police Dept. to accompany us on our investigation, should Mr. Pennie show up. At approximately 10:10 AM, Bandon Police Officer Justin Clayburn drove up to meet us. After introductions, we proceeded to the subject property, arriving at approximately 10:15 AM. Prior to this investigation, Deputy Dahlen had stated that the Pennies had not complied with the Warning Letter I had issued and, in his opinion, had actually disposed of more material onto the subject property.

The subject property consists of a 30-foot-wide ingress-egress easement across property owned by a Mr. John Cox, a resident of California. This easement, approximately 400 feet long, runs in an easterly direction and contains an unimproved access road. The metal gate across the

access road was locked, according to Deputy Dahlen, contrary to both his instructions to Mr. Pennie and those of the complainant's attorney. Deputy Dahlen and Officer Clayburn walked over the chain locking the gate to a wooden post and proceeded into the subject property (Picture 1, view to the east from the opposite side of Tom Smith Rd.).

Approximately 60 feet into the subject property we encountered Dumpsite A (Pictures 2-4). this dumpsite measured approximately 30 feet wide by 50 feet deep (difficult to estimate depth from the access road). Dumpsite A consisted of two vehicles, a boat on a trailer, two filled black garbage bags, furniture, three paint cans, assorted automotive parts, bulky metal objects, electronic equipment and plastic material. This dumpsite had not changed much since my last visit (see previous complaint investigation report and picture table).

Approximately 175 feet into the subject property we encountered Dumpsite B (Picture 5), consisting of a pick-up truck whose bed was filled with used tires and debris. This dumpsite also appeared unchanged since my last visit.

Approximately 300 feet into the subject property we encountered Dumpsite C (Pictures 6-10). This dumpsite was quite extensive, measuring approximately 60 feet wide by 100 feet deep (difficult to estimate depth from the access road due to amount of collected material). Dumpsite C consisted of a large amount of material, extending south from the easement. Wastes within this dumpsite included: whole and partially dismantled vehicles, vehicle parts (including tires and exposed lead-acid batteries); numerous opaque plastic containers of unknown content; electrical wiring and conduit; large metal cabinets; automotive fluid containers (including antifreeze and motor oil); and, household trash. It was not clear whether this dumpsite extended onto the complainant's property or, at this point, resided on the PRP's property. This dumpsite appeared to have grown since my last visit in March.

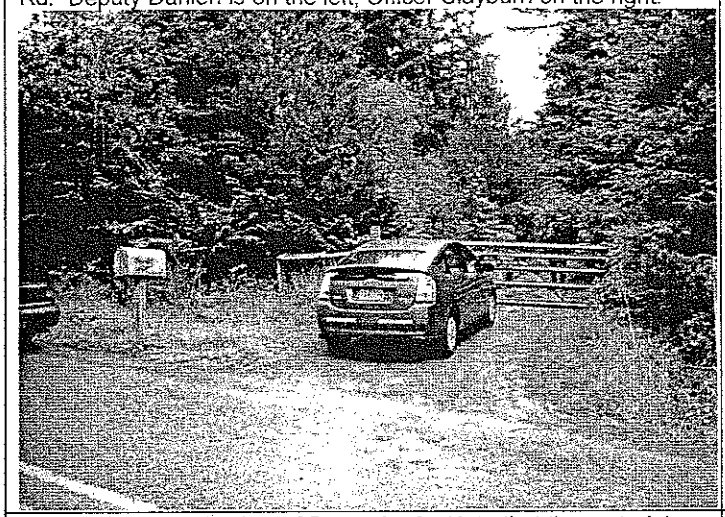
At the end of the easement, we encountered the Dumpsite D, the largest of the four on-site (Pictures 11-22). Dumpsite D was deposited along the southern edge of the access road and around the bend in the road as it entered the PRP's property to the east and south. The dumpsite could be seen extending well into the PRP's property on both sides of the access road (Picture 16). It was difficult to estimate the size of this dumpsite, given the distribution of its wastes, but it covered an area of roughly 100 to 125 feet by 50 to 75 feet, not including the waste visible in the distance on the PRP's property along the access road into that property.

Dumpsite D contained a vast amount of wastes, including: numerous whole and partially dismantled vehicles and automobile parts, including tires and exposed lead-acid batteries; electrical wire and miscellaneous electrical and electronic equipment (including two observed fluorescent light ballasts); numerous automotive fluid containers, including antifreeze, motor oil, and apparent gasoline containers; building materials, supplies and tools; opaque containers of unknown content; an apparent cutting torch with gas canisters; furniture and household trash. This dumpsite definitively contained more and different wastes than previously observed (Pictures 13-16), including several more vehicles (Pictures 19-22)

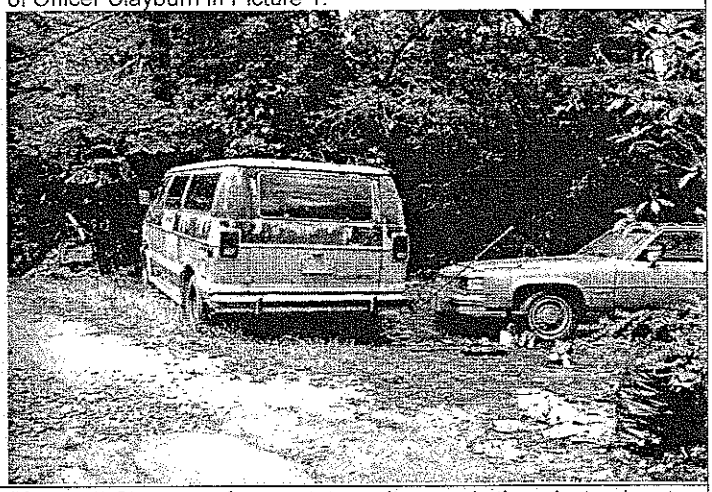
My site investigation concluded at around 11:00 am. Deputy Dahlen, Officer Clayburn and I departed the site shortly thereafter.

Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 10-15-07 by CCF

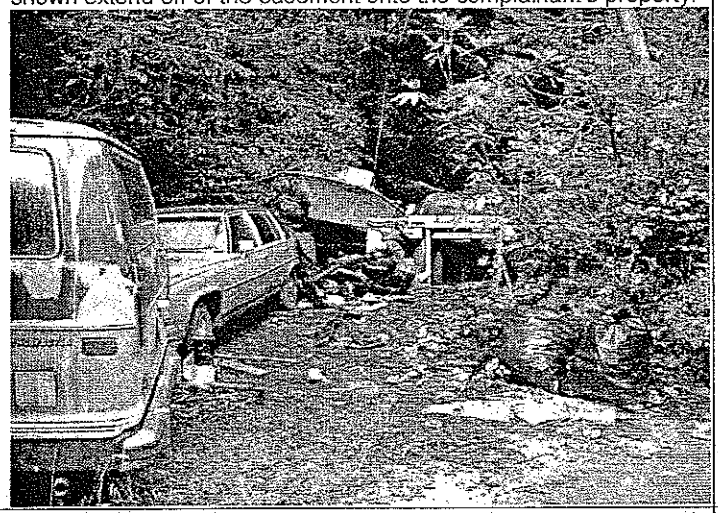
Picture 1: Easterly view of subject property from across Tom Smith Rd. Deputy Dahlen is on the left, Officer Clayburn on the right.



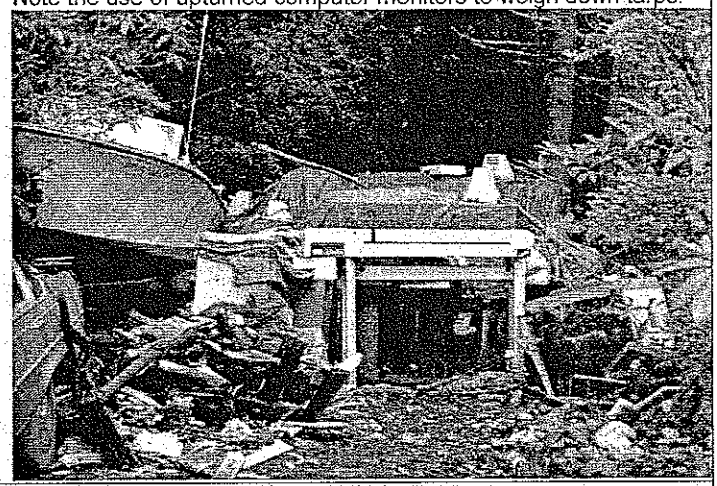
Picture 2: View of Dumpsite A along southern edge of access road. The back of the van shown below is just visible to the right of Officer Clayburn in Picture 1.



Picture 3: Southerly view of Dumpsite A. Note that the materials shown extend off of the easement onto the complainant's property.



Picture 4: Close-up of computer monitors and other electronic equipment shown in the background of Picture 3, Dumpsite A. Note the use of upturned computer monitors to weigh down tarps.

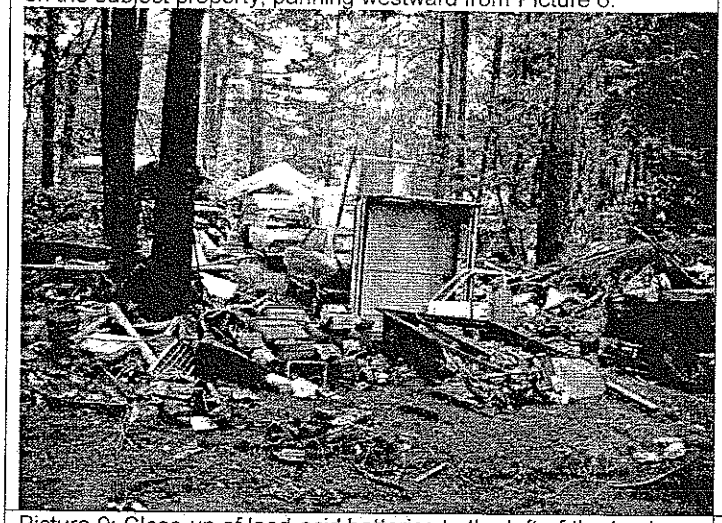


Picture 5: View of Dumpsite B along southern edge of access road on the subject property. This dumpsite appears to extend off of the easement onto the complainant's property.

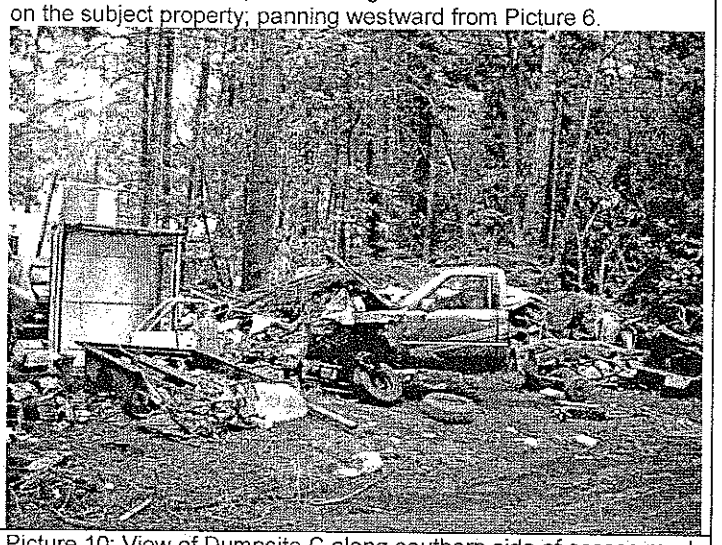
Picture 6: Eastern edge of Dumpsite C along southern edge of access road on the subject property.

Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 10-15-07 by CCF

Picture 7: View of Dumpsite C along southern side of access road on the subject property; panning westward from Picture 6.

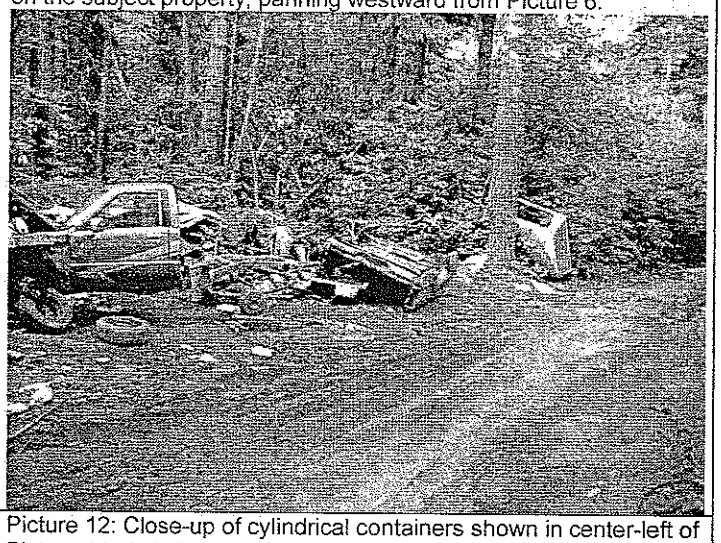


Picture 8: View of Dumpsite C along southern side of access road on the subject property; panning westward from Picture 6.

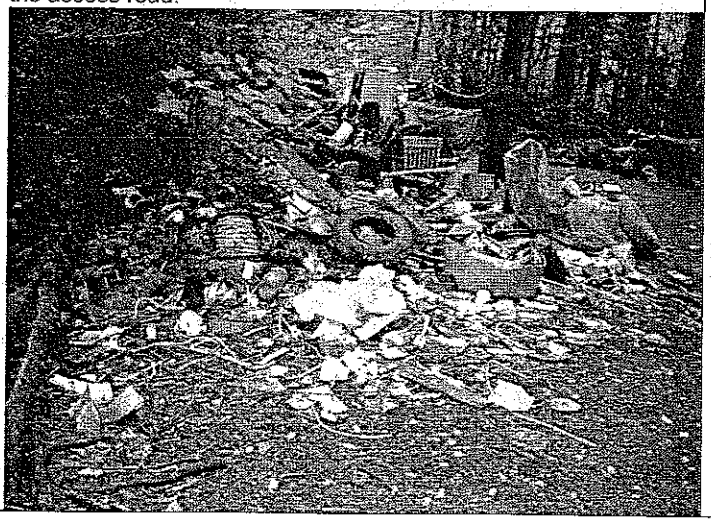


Picture 9: Close-up of lead-acid batteries to the left of the truck chassis shown in the center of Picture 8.

Picture 10: View of Dumpsite C along southern side of access road on the subject property; panning westward from Picture 6.



Picture 11: Eastern edge of Dumpsite D along southern edge of the access road.

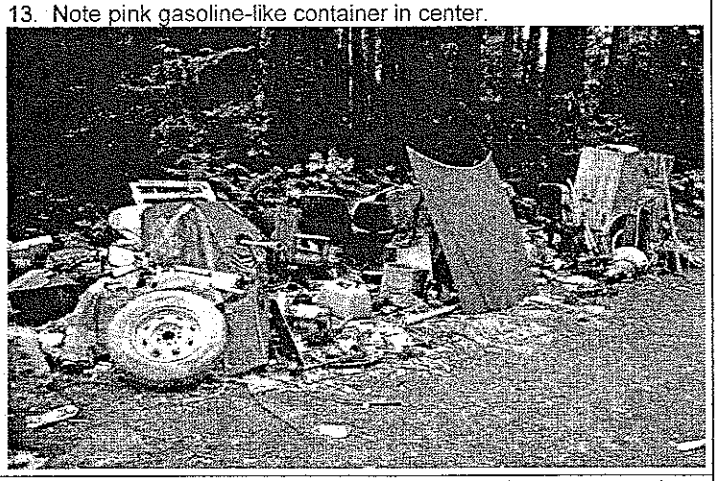


Picture 12: Close-up of cylindrical containers shown in center-left of Picture 11. Label reads: "Danger: contains potassium permanganate."

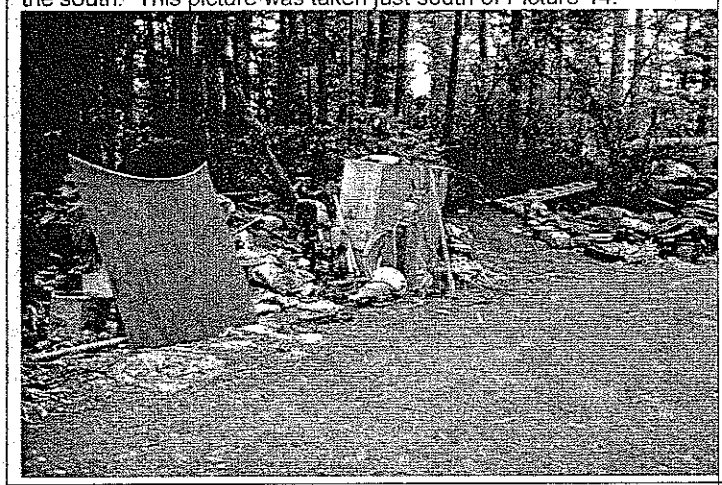
Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 10-15-07 by CCF

Picture 13: Eastern edge of Dumpsite D along southern edge of the access road, viewed just west of Picture 11.

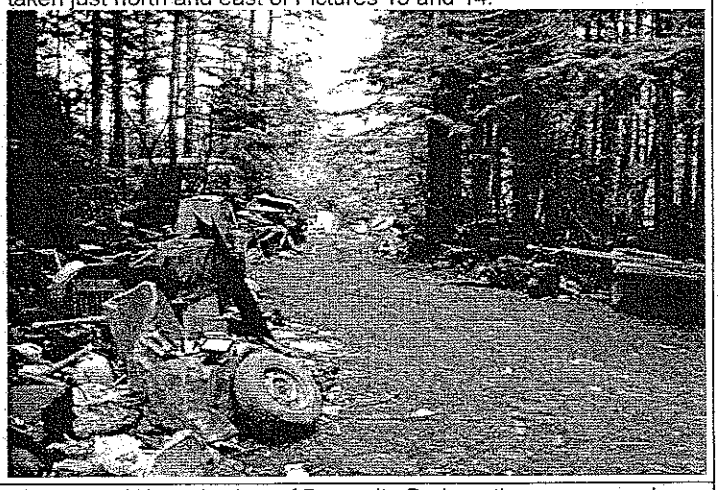
Picture 14: Southeasterly view of Dumpsite D along the access road at the point of turning onto the adjacent (PRP's) property to the southeast; panning in a circle to the right (west) from Picture 13. Note pink gasoline-like container in center.



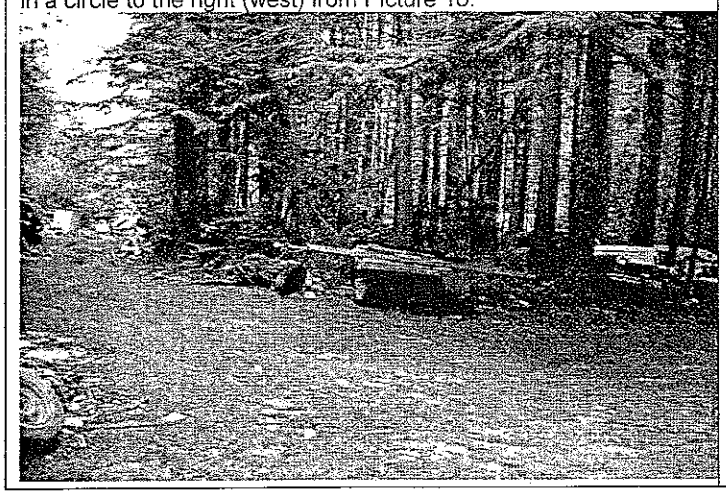
Picture 15: Southeasterly view of Dumpsite D along the access road at the point of turning onto the adjacent (PRP's) property to the south. This picture was taken just south of Picture 14.



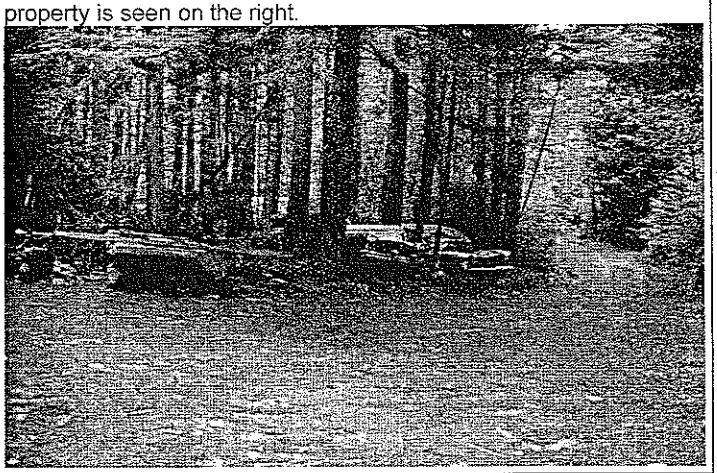
Picture 16: Southerly view of Dumpsite D along the access road onto the adjacent (PRP's) property to the south. This photo was taken just north and east of Pictures 13 and 14.



Picture 17: Southwesterly view of Dumpsite D along the access road onto the adjacent (PRP's) property to the southeast; panning in a circle to the right (west) from Picture 16.

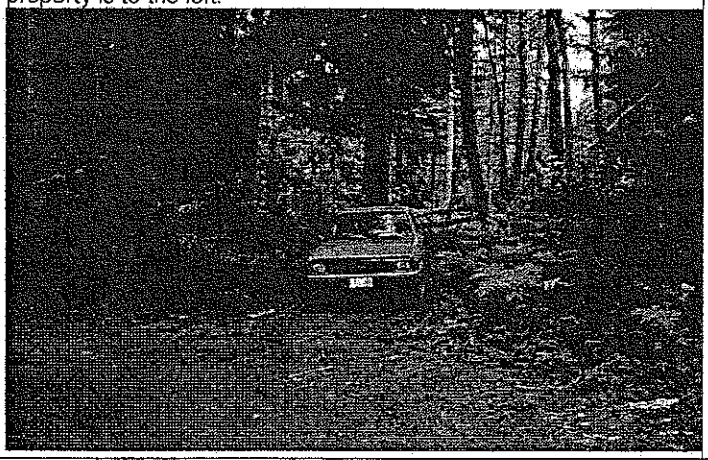


Picture 18: Westerly view of Dumpsite D along the access road onto the adjacent (PRP's) property to the south (left); panning in a circle to the right (west) from Picture 16. The access road into the property is seen on the right.



Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 10-15-07 by CCF

Picture 19: Northeasterly view of Dumpsite D along the northern edge of access road onto the subject property; panning in a circle to the right (now east) from Picture 16. The access road into the property is to the left.



Picture 20: Easterly view of Dumpsite D at the end of the access road at the point where it turns onto the adjacent (PRP's) property; panning in a circle (new east) from Picture 16. The access road into the property is behind me. Office Clayburn is pictured at right.

Picture 21: Northwesterly view of vehicles, shown in Picture 20, parked at the end of the access road leading onto PRP's property.

Picture 22: Northerly view of vehicles, shown in Picture 20, parked at the end of the access road leading onto PRP's property.

Oregon
Theodore R. Kulongoski, Governor

Department of Environmental Quality
Western Region - Eugene Office
1102 Lincoln, Suite 210
Eugene, OR 97401
(541) 686-7838
FAX (541) 686-7551

CERTIFIED MAIL
NO. 7007 0710 0000 0609 7884

December 4, 2007

Dale and Karen Pennie
POB 1743
56295 Tom Smith Road
Bandon, OR 97411-6306

RE: Pre-Enforcement Notice
Ingress/egress easement located at:
56295 Tom Smith Road
Bandon, OR 97411-6306
PEN – WMC/SW-WRE 2007 0057
Coos County

Dear Mr. and Ms. Pennie:

As you know, the Coos County Sheriff's Office referred a county code violation complaint to the Coos Bay office of the Department of Environmental Quality (DEQ) on March 13, 2007. This complaint pertained to the unauthorized accumulation of abandoned vehicles, used computers and miscellaneous solid wastes along an ingress/egress easement controlled by you but owned by complainant John Cox of California.

On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, and in the company of Deputy Dahlen and Dale Pennie, I conducted an inspection of this ingress/egress easement located at 56295 Tom Smith Road, in Bandon, OR (referred to hereinafter as "the subject property").

This initial inspection revealed the accumulation of numerous abandoned vehicles (some of them dismantled); automotive parts (including batteries and at least one oil filter on the ground) and containers of automotive fluids (including gasoline and coolant); piles of computer terminals (one with a broken screen) and components, some under tarps; stacks of used building materials; piles of electrical wiring and equipment; and, piles of assorted trash in various locations on the subject property. I also observed more of the same along the access road leading from the subject property onto your property adjacent.

The material I observed accumulated on the subject property had been managed in a manner constituting disposal.

Based upon this investigation of the subject property, the Department concluded that you were responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): *Establishing or operating a disposal site without first obtaining a registration or permit.* This is a Class I violation.

As a follow-up to the Warning Letter with Opportunity to Correct sent to you as a result of my initial site investigation, I conducted a second visit to the subject property on October 15, 2007, in the company of Deputy Dahlen and Officer Justin Clayburn of the Bandon Police Department. I observed the same apparent wastes in the same apparent locations, along with additional wastes and vehicles.

Please be advised that the act of vehicle dismantling, along with mismanagement of the parts, materials, and fluids I observed on-site, can result in the release of heavy metals and hazardous substances into the environment.

In order to correct the violation cited above and minimize its impact, the Department requires you take the following actions by the date indicated:

Corrective Action(s) Required

1) By March 15, 2008, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this requirement with another site inspection following that date, if necessary. And,
2) By March 15, 2008, provide the Department with copies of receipts for disposal and/or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.

Your timely and responsive action on these items will be taken into consideration in any civil penalty assessment issued by the Department.

The Department is concerned that additional violations may have occurred or will occur, including illegal burial of solid waste currently accumulated on the property or movement of the solid wastes within the easement onto your property adjacent to the easement. To comply with solid waste regulations and avoid additional civil or criminal penalties, you need to complete the corrective actions as outlined above.

As confirmed by my second site visit to the subject property on 10/15/07, you failed to take the corrective actions set forth in the Warning Letter with Opportunity to Correct that I issued to you on April 6, 2007. We are therefore referring this matter to the Department's Office of Compliance and Enforcement for formal enforcement action, which may include assessment of civil penalties and/or issuance of a Department order. A formal enforcement action may include a civil penalty assessment for each day of violation.

If you believe any of the facts in this Pre-Enforcement Notice are in error, you may provide written information to me at the address shown at the top of this letter. The Department will consider new information you submit and take appropriate action.

The Department endeavors to assist you in your compliance efforts. Should you have any questions about the content of this letter, please feel free to contact me in writing, by telephone at (541) 686-7868, or via e-mail at: filip.craig@deq.state.or.us.

Sincerely,

Craig C. Filip
Solid Waste Reduction Analyst

ec: Mr. David Belyea, DEQ – Eugene
cc: Deputy Del Dahlen, Coos County Sheriff's Department
Office of Compliance and Enforcement, DEQ – Portland

Eugene Office

To: OFFICE OF COMPLIANCE AND ENFORCEMENT
Enforcement Referral Alan

Name of Violator: Mr. and Mrs. Dale Pennie

Is this a high priority case? **No**
With ongoing violations? **Yes**

County: Coos

Facility or Permit Number: *N/A*

Region: Western

HPV/SNC? No

Referring Program: solid waste

Attachments:

☒	WL/PEN	☒	Inspection Report	☒	Photos
☐	WL/PEN Response	☐	Letters	☒	Complaint Form
☒	Diagrams	☐	Memos	☐	Witness Statement
☐	Sample Results	☐	E-mails	☒	Location Maps

CLEARANCES:

{Signature} Prepared by: Craig C. Filip — 12-14-07 Date

{Signature} Manager: David Belyea (Acting) — 12-14-2007 Date

{Signature} Administrator: Keith Andersen (Acting) — 12/17/07 Date

ENFORCEMENT SECTION USE ONLY

Case Number: LQ/SW-WR-07-225

Review By & Date: 12/22

Assigned to & Date: Cutler 12/24/07

Investigation Completion Date: _____ PEN Date: _____

Violation(s): _____

Location: _____

Comments: _____

INVESTIGATION DETAILS:

1. **Responsible Party (include the legal name of the party)**
Dale and Karen Pennie

2. **Description of the Triggering event(s) (describe the events that resulted in the Department discovering the violations):** The Coos County Sheriff's Office referred a county code violation complaint to the Coos Bay office of DEQ on March 13, 2007. This complaint pertained to the unauthorized accumulation of abandoned vehicles, used computers and miscellaneous solid wastes along an ingress/egress easement controlled by the Pennies but owned by the complainant John Cox, a resident of California. On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, Craig Filip of the Eugene office of DEQ conducted an inspection of this ingress/easement (hereinafter referred to as "the subject property") owned by Mr. Cox located at 56295 Tom Smith Road, in Bandon, OR

3. **Violations (Identify the violations; the permit conditions, program rules, statutes or enforcement rules cited; the dates for which they were cited):** Based upon this investigation of the subject property, Craig Filip concluded that the Pennies were responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): *Establishing or operating a disposal site without first obtaining a registration or permit.*

4. **Status of the violations (Are the violations on-going? How has the violator corrected the violations or minimized the impacts of the violations? From the date of the WL or PEN, how quickly did the violator act to correct or minimize the violations?). Explain:** Craig Filip issued a Warning Letter with Opportunity to Correct on April 6, 2007. In this letter, he specified that the following corrective actions be taken on the subject property:

1) By October 1, 2007, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, Craig Filip will confirm the Pennie's compliance with this request by another site inspection following that date, if necessary.
2) By October 1, 2007, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to the attention of Craig Filip at the address indicated.

Deputy Dahlen continued to monitor the Pennie's progress on these corrective actions during the intervening months. On 10/15/07, Craig Filip conducted a follow-up inspection of the subject property to ascertain compliance with the Warning Letter issued six months before, and found that no corrective action had been taken.

5. **What information do you have about the past compliance history of the violator (e.g., past NONs, WLs, PENs, verbal warnings, other correspondence, phone conversations, interaction with another government entity (such as a county regulator, OSHA, DHHS), other program violations)?** No other DEQ violations have been assessed to my knowledge. It is my understanding that Coos County initiated an investigation of the subject property in October 2005, in response to concerns of code violations expressed by property owner John Cox. The county began enforcement proceedings in December 2005, based on the filing of a formal complaint by Mr. Cox. The Coos County Planning Department issued a code violation letter to the Pennies on April 11, 2007 regarding the establishment of a junk yard/salvage yard in

violation of zoning provisions, as well as violations pertaining to the illegal siting and use of mobile homes on the Pennie's property.

6. **If not described above, how long did each violation continue (i.e., provide the number of days of violation and an explanation of how you derived this number from observations, documentation and reasonable inference.)? If the violation was not continuous, but repeated over time, please provide the number of days of occurrence and an explanation of how you derived this number from observations, documentation and reasonable inference.** See above.

7. **What else do you know about this violator? For example, how long has the company or the responsible employees been in business? Do you know whether the company or its employees have prior experience with this area of environmental regulation (has it had or does it have any relevant permits or licenses)? What other information do you have that might show that the company, the individual or employees should have known that they should not have caused the actions leading to the violation or that the actions would be illegal (e.g., prior experience related to the regulated industry or activity that is the core of this violation)?** Coos County initiated an investigation and subsequent code enforcement proceedings against the Pennies beginning in late 2005. Craig Filip conducted a site investigation on 3/19/07, and subsequently issued a Warning Letter with Opportunity to Correct on 4/6/07. Craig Filip conducted a follow-up inspection of the subject property on 10/15/07, resulting in this referral. However, a larger volume of similar wastes have been disposed on the adjoining Pennie property. Because I did not have permission to access that property, I was unable to accurately quantify and characterize all of this waste. However, visual observation from the subject property indicated similar wastes were similarly disposed on the adjoining Pennie property and should likewise be removed.

8. **Describe the amounts of the materials involved; toxicity of the materials; duration of the violation(s); emissions quantity; impacts to people, the environment, property, or wildlife; etc.** The quantity of illegally disposed solid waste on the subject property is difficult to quantify because it is spread over several areas and extends onto the adjoining Pennie property. I have conservatively calculated the amount of illegally disposed solid waste on the subject property to be approximately 185 cubic yards, which roughly translates into 53.6 tons of mixed and unknown solid waste and brush.. This volume and tonnage estimate does not include the six abandoned vehicles on-site. However, adding the solid waste observed on the adjacent Pennie's property to this total would add several times the amount of solid waste disposed that I have estimated for the subject property only.

The toxicity of the solid waste would stem from the activities evidenced on-site, such as automobile dismantling and possible equipment repair; careless storage of automotive fluids, such as antifreeze, used oil and gasoline; and careless management of such materials as automobiles and automotive parts (including lead-acid batteries, many of which were observed exposed), electrical and electronic equipment (such as computers and monitors, at least one of which were observed to have been broken), and miscellaneous parts and supplies, such as containers of potassium permanganate. The soil underlying these materials has almost certainly been impacted to some degree; however, site conditions did not allow for sufficient observation of such potential contamination. No surface waters or waterways were observed on-site. The subject property is undeveloped and access is limited to Mr. Cox and the Pennies, so human exposure is restricted. Impacts to wildlife are unknown. The solid waste disposed onto the subject property has changed slightly in its content and volume since discovery, but has likely been on the property since at least October 2006, and probably for months prior.

I assert that this waste characterization would apply equally to the Pennie property, on which similar wastes were observed, but in greater quantities. Exactly what kinds and quantities of solid waste are present on the Pennie's property, however, it is impossible to estimate without site access.

9. **What specific economic benefit(s) did the violator gain by being in non-compliance? (Refer to the Economic Benefit Policy for guidance.)** It would appear that free additional storage and avoided disposal costs were the primary benefits. Utilizing the Illegal Dumping Economic Assessment (IDEA) model for estimating illegal dumpsite cleanups, developed by Environmental Protection Agency Region 5, I have estimated cleanup costs for the subject property to be approximately $10,950. See substantiating documentation attached for further reference.

10. **Additional factual information not available elsewhere:** I have nothing further to add.

State of Oregon
Department of Environmental Quality Memorandum

To: File
Pollution Complaint #WRE 2007-0024

Date: 3/28/08

From: Craig C. Filip
WR, RES - Eugene

Subject: Compliance visit to 56295 Tom Smith Rd, Bandon, OR 97411: the Dale Pennie property.

I arrived at the property at approximately 12:10 PM on Thursday, March 27, 2008. The weather was unseasonably cool, in the upper 40's, and had rained for most of the last 24 hours, but was in the process of clearing. I was scheduled to meet with Coos County Sheriff's Deputy Del Dahlen, who phoned me en route to let me know he would be about 15 minutes late. I parked in the driveway of the access road and waited. After about 5 minutes, Officer Josh Garrett of the Bandon Police Department arrived to accompany us. He had with him an unidentified female companion, who remained in his cruiser during our site visit. Approximately 10 minutes later, Deputy Dahlen arrived. Deputy Dahlen brought with him some paper towels with which to clean off the locked gate across the access road. On his last visit to the property to check on Mr. Pennie's compliance, he and the accompanying officer from the Bandon Police Department had discovered, to their dismay, that graphite grease had been smeared all along the top of the gate, making climbing over this gate both hazardous and messy.

After wiping off the gate, Deputy Dahlen, Officer Garrett and I proceeded over the gate and down the access road, at approximately 12:25 PM. I observed a large pile of cut trees and brush near the entrance and by Dumpsite A, which Deputy Dahlen said had been the result of recent storm damage. Possibly as a result of this clearing activity, the contents of Dumpsite A were more readily visible on this visit. The tarps which had previously covered the wastes in this area had been removed, allowing me to see the extent of the electronic waste stored and scattered in this dumpsite, of which I took numerous photographs. Deputy Dahlen mentioned that there was a pond located beyond the foliage near this location. I replied that I had heard of that, but had been unable to verify it.

Dumpsite B appeared the same as on my two prior visits, as did Dumpsite C, though, given the extent of this dumpsite, it was hard to tell what changes had occurred. I attempted to photograph t dumpsite from the same vantage points as on my two prior visits to enable comparisons. I also sp more time amongst the wastes, photographing them as well as standing in the easement to photograph wastes off-site on Mr. Pennie's property, with which the wastes in the easement were contiguous.

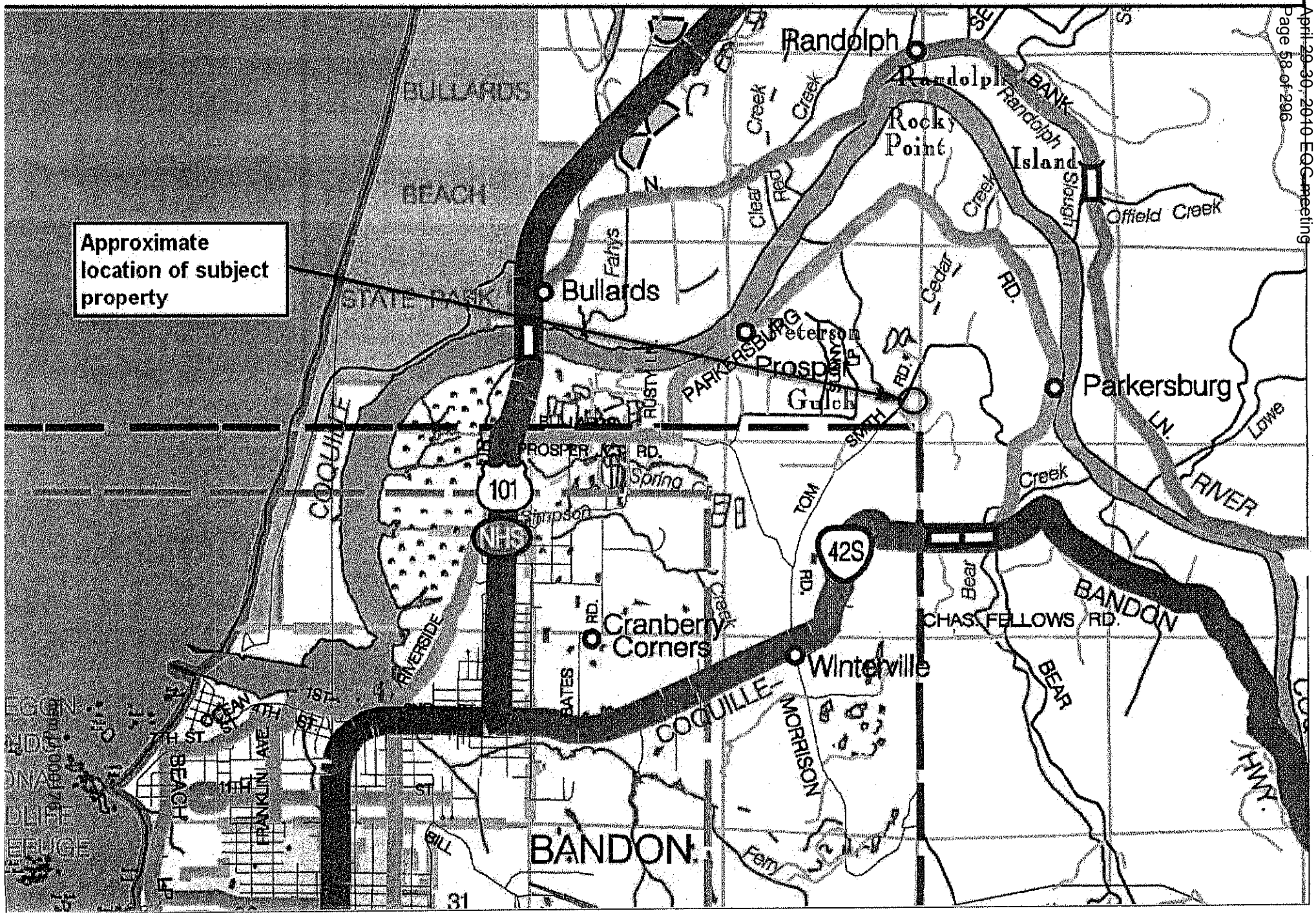
Dumpsite D also appeared to be mostly the same as previously photographed, although another vehicle had been parked within it and there appeared to be more electrical-related materials. In relation to these, Deputy Dahlen mentioned that Mr. Pennie is a licensed electrician. The potassium permanganate canisters previously observed in this dumpsite were gone. Here, I also spent more time documenting wastes on the adjoining Pennie property as best as I could view them from the

easement. Deputy Dahlen stated that there were extensive waste piles on Mr. Pennie's property that he had witnessed months ago which would undoubtedly be of interest to me if I could acquire access to the property.

We left the subject property at approximately 1:10 PM. Officer Garrett departed shortly thereafter. Deputy Dahlen and I chatted for a few minutes along the roadside about the property and Mr. Pennie. I had previously mentioned to Deputy Dahlen my interest in obtaining an administrative search warrant to gain access to Mr. Pennie's adjoining property for the purpose of investigating the wastes which appeared to have been disposed therein. Deputy Dahlen reiterated the County's interest in joining me in that investigation, if possible. He mentioned that Mr. Pennie had inherited his father's property in California and that he had plans to move there and take up asbestos remediation work, but that legal troubles had forced him to postpone those plans. Deputy Dahlen stated that the attorney who had worked for Mr. Pennie on legal issues associated with his late father's estate was suing him for $35,000. Deputy Dahlen went on to state that Mr. Pennie's brother has been missing for some time and that Coos County had been contacted by officials from the county in which Mr. Pennie's brother had previously resided in an attempt to locate the missing brother. According to the grapevine, as relayed by Deputy Dahlen, Mr. Pennie is rumored to have murdered his brother to obtain all of their father's inheritance, and that the brother's body is buried in a bus on Mr. Pennie's property. I replied that, if true, it could help explain Mr. Pennie's hostility towards government, in general, and Deputy Dahlen in particular, which I had always previously attributed to personal animosity.

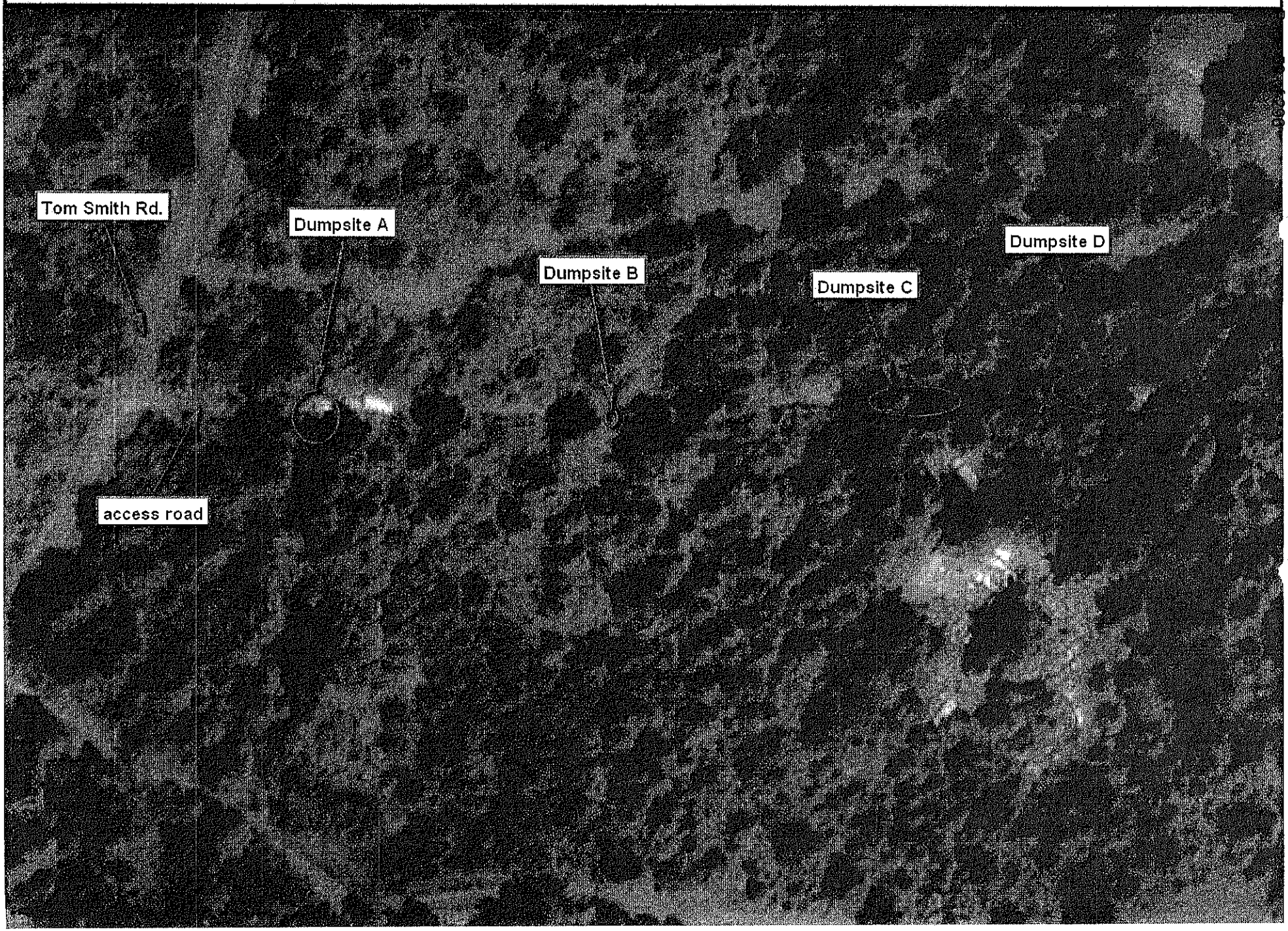
The camera I used during this site investigation was different from those I had used previously and, upon review, the images appeared less clear in some instances. This camera appears to have a smaller field of view and to be more motion-sensitive than previous models I've used on-site.

Approximate location of the subject property: 56295 Tom Smith Rd., Bandon, OR 97411-6306



12/6/2007 5:19:20 PM

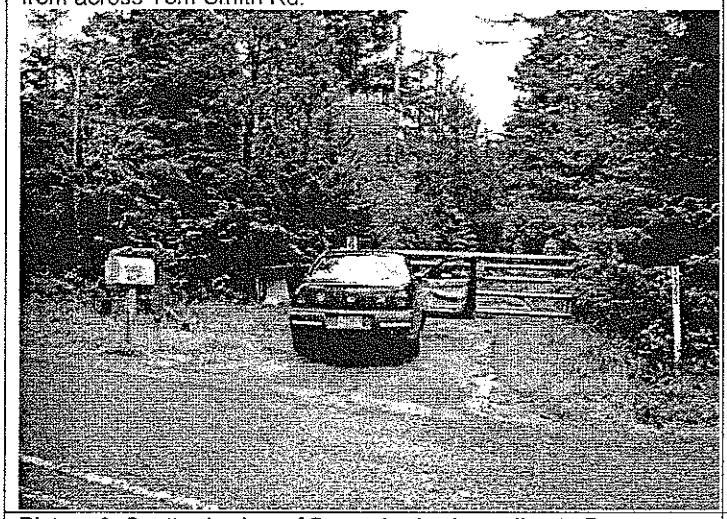
Site Map of the ingress/egress easement at 56295 Tom Smith Rd., Bandon OR. All dumpsite locations and boundaries are approximate.



Attachment E
April 29-30, 2010 EQC meeting

Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

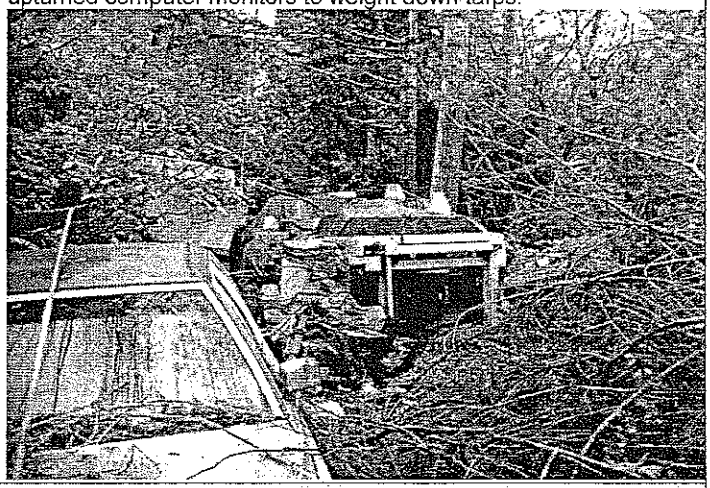
Picture 1: Easterly view to the entrance to the subject property from across Tom Smith Rd.



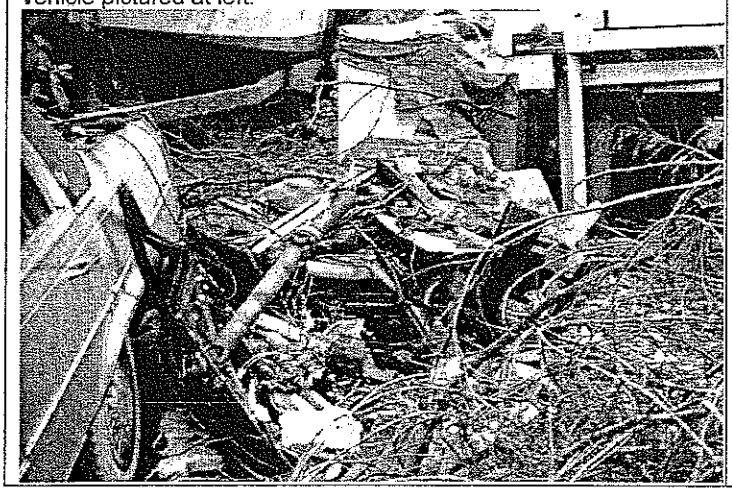
Picture 2: View of Dumpsite A along the southern edge of access road. The rear of the van pictured here is just visible at center-right in Picture 1.

Picture 3: Southerly view of Dumpsite A. According to Deputy Dahlen, a recent windstorm had cause the treefall which obscured my view of this dumpsite

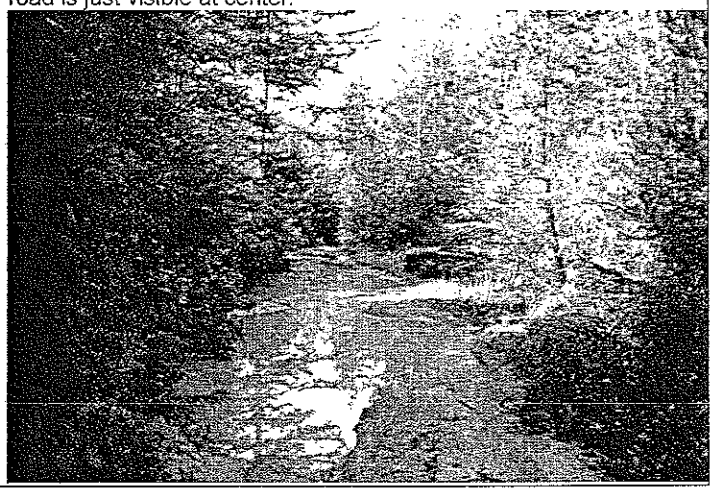
Picture 4: Close-up of computer monitors and other electronic equipment behind the treefall within Dumpsite A. Note the use of upturned computer monitors to weight down tarps.



Picture 5: Close-up of solid waste within Dumpsite A. According to Deputy Dahlen, the easement ends at the rear fender of the vehicle pictured at left.



Picture 6: View of the access road looking west within the easement towards Tom Smith Rd. The gate across the access road is just visible at center.



Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

Picture 7: View of Dumpsite B along southern edge of access road on the subject property.

Picture 8: View of the bed of the pickup truck within Dumpsite B, shown in Picture 7.

Picture 9: Eastern edge of Dumpsite C along the southern edge of access road on the subject property.

Picture 10: View of Dumpsite C along the southern edge of the access road on the subject property, panning west (right) from Picture 9.

Picture 11: View of Dumpsite C along the southern edge of the access road on the subject property, panning west (right) from Picture 10.

Picture 12: View of Dumpsite C along the southern edge of the access road on the subject property, panning west (right) from Picture 11.

Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

Picture 13: Close-up of the lead-acid batteries to the left of the truck chassis shown in the center of Picture 11.

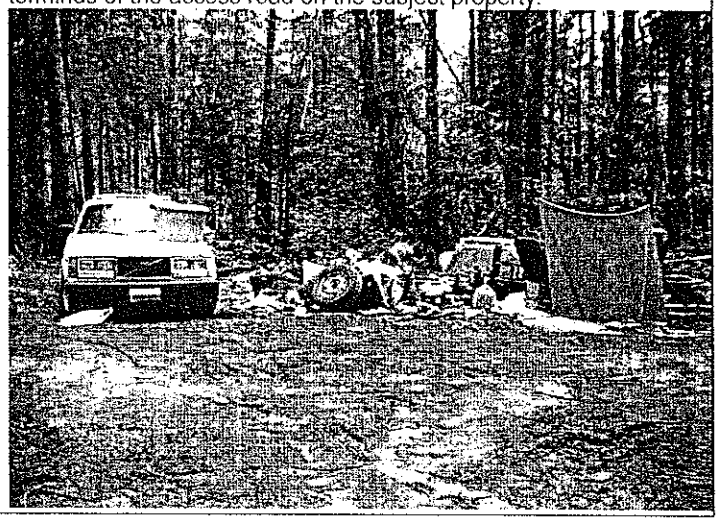
Picture 14: Abandoned vehicle in Dumpsite D along the southern edge of the access road near its eastern terminus on the subject property.

Picture 15: Abandoned vehicle in Dumpsite D along the southern edge of the access road near its eastern terminus on the subject property.

Picture 16: Eastern edge of Dumpsite D along southern edge of the access road on the subject property. The two cylindrical containers labeled "potassium permanganate" last observed here on 10/15/07, are missing. Deputy Dahlen is pictured at left; Bandon Police Officer Josh Garrett is pictured at right.

Picture 17: Close-up of area within Dumpsite D where cylindrical containers labeled "potassium permanganate" were last observed on 10/15/07 by CCF.

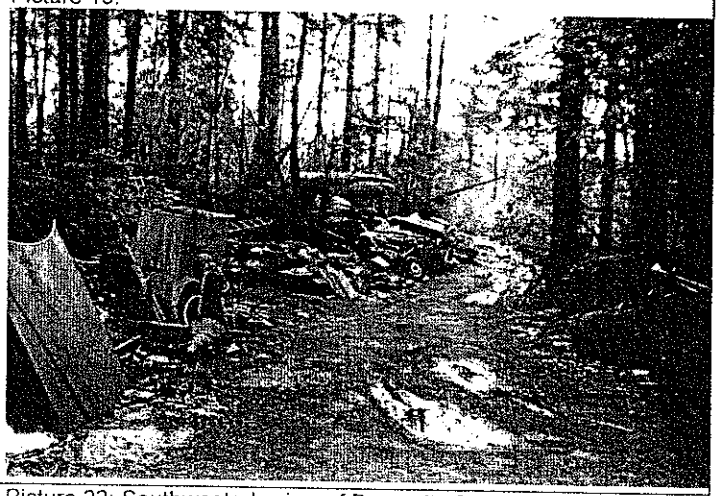
Picture 18: Eastern edge of Dumpsite D viewed looking east at the terminus of the access road on the subject property.



Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

Picture 19: Southeasterly view of Dumpsite D along the access road on the subject property where it turns south into the adjacent (PRP's) property. Panning south (right) from Picture 18.

Picture 20: Southerly view of Dumpsite D along the access road onto the adjacent (PRP's) property. Panning west (right) from Picture 19.



Picture 21: Southerly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning west (right) from Picture 20.

Picture 22: Southwesterly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning west (right) from Picture 21.

Picture 23: Westerly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning north (right) from picture 22.

Picture 24: Northwesterly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning north (right) from picture 23.

Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

Picture 25: Northeasterly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning east (right) from picture 24.

Picture 26: Easterly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning east (right) from picture 25.

1 of 1 DOCUMENT

In the Matter of Joshua L. Reeves and Jared Reeves, Minor Children. STATE ex rel JUVENILE DEPARTMENT OF COOS COUNTY, Appellant, v. JOSHUA L. REEVES and JARED REEVES, Respondents.

CA A101679, (Control); A101752 (Cases Consolidated)

COURT OF APPEALS OF OREGON

163 Ore. App. 497; 988 P.2d 433; 1999 Ore. App. LEXIS 1822; 76 A.L.R.5th 755

May 6, 1999, Argued and Submitted
October 27, 1999, Filed

PRIOR HISTORY: [***1] JV7154; JV7155. Appeal from Circuit Court, Coos County. Robert F. Walberg, Judge.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Witnesses > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN1] Although the appellate court's review is de novo, because the trial court is in a better position to assess the credibility of the witnesses, the appellate court defers to the trial court's assessment of the witnesses' credibility.

Criminal Law & Procedure > Pretrial Motions & Procedures > Suppression of Evidence
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress
[HN2] In non-de novo review of suppression rulings, reviewing court is bound by trial court's findings of fact if those findings are supported by constitutionally sufficient evidence.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
[HN3] An individual's privacy interest in land he or she has left unimproved and unbounded is not sufficient to trigger the protections of *Or. Const. art. I, § 9*. Thus, it is not sufficient that the property in question is privately owned, or that it is shielded from view by vegetation or topographical barriers, because those features do not necessarily indicate the owner's intention that the property be kept private. A person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs. If land is fenced, posted or otherwise closed off, one does not enter it without permission or, in the officers' situation, permission or a warrant.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith
[HN4] "Keep Out" signs at the beginning of a driveway do not manifest an intent to exclude if officers, in good faith, fail to see them.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > General Overview
[HN5] "No Trespassing" sign on a boundary fence does not adequately convey an intent to exclude because a reasonable visitor could assume that that sign is intended only to exclude those who might put the property to their own uses, but that it does not apply to visitors who desire to contact the residents.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Exigent Circumstances
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > General Overview
[HN6] Police officers are no more authorized than anyone else to invade property, absent the legal sanction of a warrant or some exigency.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search
[HN7] A consent can relate back to validate an otherwise unlawful earlier search. However, such retroactive consent can be found only where there is evidence that the person giving the consent intended the consent to be retroactive.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search
[HN8] Retroactive consent is essentially a matter of waiver, and a third party cannot waive a prior violation of another person's constitutionally protected interests.

COUNSEL: Jonathan H. Fussner, Assistant Attorney General, argued the cause for appellant. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Steven H. Gorham argued the cause and filed the brief for respondents.

JUDGES: Before De Muniz, Presiding Judge, and Haselton and Wollheim, Judges.

OPINION BY: HASELTON

OPINION

[*499] [**434] HASELTON, J.

In this juvenile proceeding involving allegations of game-related offenses [1] against two adolescent brothers, the state appeals from an order of suppression. The trial court concluded that the investigating officer unlawfully entered the property where the brothers lived with their father. We agree that the officer's initial entry onto the property was unlawful. We further conclude that brothers' father could not effectively retroactively consent to the unlawful invasion of brothers' privacy interests. Accordingly, we affirm.

1 Both brothers were charged with acts that would constitute the crime of failure to tag a deer, *ORS 496.162*, one brother was charged with exceeding the bag limit on buck deer, *ORS 498.002*, and the other brother was charged with unlawfully taking a spike deer. *ORS 498.002*.

[***2] The material facts are as follows: On October 12, 1998, Trooper Pearson of the Oregon State Police Fish and Wildlife Division received a teletype that an anonymous caller had reported that "[Brothers], who live at North Way in North Bend, have shot four bucks and a spike so far this year and none have been tagged. All are hanging in a shop at the residence." In response to the teletype, Pearson drove to the property where brothers lived with their father. The property was completely fenced, with the exception of a gated driveway leading 150 to 200 yards from the public road to the residence. Three "Keep Out - No Trespassing" signs were fixed at intervals on the fence between the property and the public road. When Pearson reached the driveway, he saw a sign [**435] posted on the fence next to the gate that read:

"PRIVATE ROAD

NO UNAUTHORIZED PERSONS

BEYOND THIS POINT." [2]

2 At the suppression hearing, the parties disputed whether, when Pearson arrived, the gate was open or closed and chained but not locked. Given our analysis and disposition as to the lawfulness of Pearson's entry, we need not resolve that dispute.

[***3] Pearson testified that he understood the sign to mean that the property owner wanted to exclude people who did not have "a legitimate reason to be there," but that he believed that he was authorized to enter because he wished to contact brothers to discuss the game-violation report. Pearson drove [*500] up the driveway, parked beside the house, and got out of his car. He saw a garage roughly 50 feet away, and, because the

garage door was raised about four or five feet, he could see the hindquarters of two skinned deer hanging inside the garage.

At that point, brothers' father came out of a barn next to the house, and Pearson introduced himself. Father did not, at that time or at any time thereafter, tell Pearson that he was trespassing, ask him to leave, or give any other indication that Pearson was unwelcome on the property.

After engaging in some small talk, Pearson then "asked [father] if he would mind if I checked the tags on the deer that I could see hanging in the garage." Pearson testified that father "told me to help myself." After further discussion about the number of deer in the garage and whether they were tagged, Pearson again asked if they could go take a look in the garage, [***4] and father said they could. [3] Pearson and father then walked over to the garage together, father rolled the garage door the rest of the way up, and they entered the garage. Once inside, Pearson saw four untagged buck deer carcasses, one of which was a spike deer.

> 3 At the hearing, father testified that he never gave Pearson consent or permission to look in the garage. However, based on its belief that the "officer's testimony was probably more accurate," the trial court made a specific finding that Pearson's search of the garage was a "consensual search." We defer to the trial court's credibility-based finding that, contrary to the father's testimony, he did, in fact, explicitly agree that Pearson could search the garage. **See *Short and Short***, *155 Ore. App. 5, 18, 964 P.2d 1033 (1998)* ("Although [HN1] our review is **de novo**, because the trial court is in a better position to assess the credibility of the witnesses, we defer to the trial court's assessment of the witnesses' credibility * * * ."). **Accord *State v. Ehly***, *317 Ore. 66, 74-75, 854 P.2d 421 (1993)* (in [HN2] non-**de novo** review of suppression rulings, reviewing court is bound by trial court's findings of fact if those findings are supported by constitutionally sufficient evidence).

[***5] Brothers were charged with having committed acts that, had they been adults, would constitute the crimes of failure to tag a deer, *ORS 496.162*, exceeding the bag limit on buck deer, *ORS 498.002*, and unlawfully taking a spike deer. *ORS 498.002*. Before trial, brothers moved to suppress all evidence obtained following Pearson's warrantless entry onto the property, asserting, **inter alia**, that that entry was unlawful because the clearly posted sign, "PRIVATE ROAD NO UNAUTHORIZED PERSONS BEYOND THIS POINT," [*501] expressly manifested an intent to exclude the public. The state responded that (1) the posted sign did not adequately exclude all members of the public because it suggested that persons with "legitimate business" were free to enter, and (2) even if Pearson's initial entry on the property was unlawful, father's subsequent consent to Pearson's request to search the garage retroactively ratified, and validated, Pearson's initial unlawful entry. The state did **not** argue, under ***State v. Rodriguez***, *317 Ore. 27, 854 P.2d 399 (1993)*, that father's consent to the search of the garage was not the product of exploitation of any prior illegality in entering the property [***6] and, that, thus, regardless of whether the initial entry was unlawful, the search of the garage was lawful.

The trial court rejected the state's arguments. The court concluded that the driveway sign was "sufficient warning and sufficient expression of the intent" to exclude the public from the property. Moreover, although making a specific finding that, after Pearson's initial unlawful entry, the "rest of the search"--**i.e.**, the search of the garage--was consensual, the court implicitly rejected the state's "retroactive consent" argument. [**436] Accordingly, the court granted brothers' motion to suppress.

The state appeals, reiterating its alternative arguments that Pearson's entry was lawful and that, in all events, father, by consenting to the search of the garage, necessarily retroactively consented to Pearson's antecedent "trespass." As amplified below, we reject both arguments.

State v. Dixson/Digby, *307 Ore. 195, 766 P.2d 1015 (1988)*, and its progeny, frame our analysis of the lawfulness of Pearson's initial entry. In **Dixson/Digby**, the Supreme Court announced that "the search and seizure provision in the Oregon Constitution [Article I, section 9] protects [***7] land outside the 'curtilage' of a residence" under certain conditions:

> "An [HN3] individual's privacy interest in land he or she has left unimproved and unbounded is not sufficient to trigger the protections of Article I, section 9. Thus, it

163 Ore. App. 497, *501; 988 P.2d 433, **436;
1999 Ore. App. LEXIS 1822, ***7; 76 A.L.R.5th 755

> is not sufficient that the property in question is privately owned, or that it is shielded from view by vegetation or topographical barriers, because those features do not necessarily indicate the [*502] owner's intention that the property be kept private. **A person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs.** * * * If land is fenced, posted or otherwise closed off, one does not enter it without permission or, in the officers' situation, permission or a warrant." *307 Ore. at 211-12* (emphasis added).

Applying that rule, the court concluded that the officers had not conducted an illegal search by entering the defendants' property. The court reasoned that, although the defendants had posted "No Hunting" signs and blocked vehicle access to their property with a cable [***8] across the road, the signs and cable did not express an intent to exclude persons from the property entirely, such as for uses other than hunting. **Id.**

In several post-**Dixson/Digby** cases, we have considered whether a landowner's posting of a sign or signs on the property manifests a clear intent to exclude the public, thereby creating a protected privacy interest in the property under the Oregon Constitution. For example, in ***State v. Gorham***, *121 Ore. App. 347, 353, 854 P.2d 971*, **rev den** *318 Ore. 171, 867 P.2d 1385 (1993)*, we concluded that, where the defendant had posted "No Trespassing" and "No Hunting" signs on trees in a field adjacent to the defendant's driveway but separated from it by a fence, the signs did not "establish that the defendant intended to restrict access to his driveway." Similarly, in ***State v. Gabbard***, *129 Ore. App. 122, 877 P.2d 1217*, **rev den** [HN4] *320 Ore. 131, 881 P.2d 815 (1994)*, the defendant had posted "Keep Out" and "Beware of Dog" signs near the beginning of his driveway, which the officers did not see, and a "No Trespassing" sign on a boundary fence next to the driveway, which the officers [***9] did see. We concluded that the signs at the beginning of the driveway did not manifest an intent to exclude because the officers, in good faith, failed to see them. [4] We further concluded that the [HN5] sign on the boundary fence did not adequately convey an intent to exclude because "[a] reasonable [*503] visitor could have assumed that that sign was intended only to exclude those who might put the property to their own uses, but that it did not apply to visitors who desired to contact the residents." ***Gabbard***, *129 Ore. App. at 128*.

> 4 We employed similar reasoning in ***State v. Hitesman/Page***, *113 Ore. App. 356, 361, 833 P.2d 306*, **rev den** *314 Ore. 574, 840 P.2d 1296 (1992)*, where we concluded that, because the defendants' two "No Trespassing" signs were "old, faded and difficult to see," one of the signs was "not very legible," and the property was not fenced, the circumstances did not "give the police objectively reasonable notice that their entry onto the land was unlawful." **Cf.** ***State v. Poulos***, *149 Ore. App. 351, 356 n 1, 942 P.2d 901 (1997)* (declining to decide "what effect, if any, an officer's failure to see posted signs might have on determination" of landowner's intent to exclude the public).

[***10] Conversely, in ***State v. Poulos***, *149 Ore. App. 351, 942 P.2d 901 (1997)*, we concluded that the defendant's signs succeeded in manifesting a clear intent to exclude the public from accessing his residence via the driveway. There, the defendant had posted a sign directly to the right of the driveway entrance [**437] reading "No Hunting or Trespassing Under Penalty of Law," a "Guard Dog On Duty" sign beyond that, and a large red "STOP" sign further up the driveway. We rejected the state's argument that only a gate or barrier could sufficiently express an intent to exclude the public from entering a driveway, and concluded that "there was no evidence that even the customary casual visitor would be welcome on [the] defendant's property." ***Poulos***, *149 Ore. App. at 356-57*.

In this case, the state argues that the driveway sign, "PRIVATE ROAD NO UNAUTHORIZED PERSONS BEYOND THIS POINT," did not effectively exclude the public. The state's principal argument is that the sign excluded only "unauthorized persons," and that "any ordinary citizen" would reasonably understand that "a person [like Pearson] having legitimate business with [brothers' family] would be sufficiently [***11] 'authorized' to drive up the driveway and ring the doorbell." [5] Defendants respond that the totality of the circumstances, and the wording of the sign in particular,

clearly evinced an intent to exclude any person who did not have permission to enter. We agree with defendants.

> 5 The state also argues that intent to exclude the public could be manifested only with a "physical barrier to access." This argument fails in light of our holding in **Poulos** that signs alone demonstrated that "defendant wished to have his privacy respected." *149 Ore. App. at 357* (citing ***Dixson/Digby**, 307 Ore. at 211* ("In this society, signs, such as 'No Trespassing' signs, the erection of high, sturdy fences and other, similar measures are all indications that the possessor wishes to have his privacy respected.")).

[*504] Here, the sign on the property was posted on the fence immediately to the right of the driveway gate. The sign was plainly visible, [6] and Pearson testified that he saw the sign. Both the location [***12] of the sign and its express reference to the driveway ("Private Road") make it clear that the sign related to the driveway--and not, **see, e.g.** ***Gorham**, 121 Ore. App. at 353*, to the field behind the fence.

> 6 Photographs of the gate and sign were admitted as exhibits.

We further reject the state's assertion that the words "unauthorized persons" expressed an intent to exclude only persons "without legitimate business" on the property. Rather, an objectively reasonable member of the public would understand that "authorization" to enter must be obtained from the property owner--and not from the putative trespasser's self-assessment of the legitimacy of his or her business. If the state's view were correct, political canvassers, religious proselytizers, and Girl Scouts selling cookies could all invade the property in their service of some perceived greater good. In this connection, we emphasize that [HN6] police officers are no more "authorized" than anyone else to invade property, absent the legal sanction [***13] of a warrant or some exigency. Pearson's initial entry onto the property was, consequently, unlawful. [7]

> 7 Because we conclude that the fencing and sign alone manifested a clear intent to exclude the public, we need not resolve the dispute as to whether the driveway gate was open or closed and chained. **See** ***Poulos**, 149 Ore. App. at 357* (property owner "not required to indicate further that [he] wished to have [his] privacy respected").

We proceed to the state's alternative "retroactive consent" argument. Relying on ***State v. Weaver**, 319 Ore. 212, 874 P.2d 1322 (1994)*, the state argues that, in the totality of the circumstances, father's express consent to Pearson's request to search the garage constituted effective retroactive consent to Pearson's antecedent trespass. We disagree.

At the outset, we emphasize, and reiterate, that the state is **not** arguing that, under **Rodriguez**, father's consent to the search of the garage rendered that search lawful regardless of [***14] any prior illegality. The state did not make a **Rodriguez**-based argument to the trial court, **see** *163 Ore. App. 497, 500-501, 988 P.2d 433, 435-436, 1999 Ore. App. LEXIS 1822*, *5-6, [*505] and appellate counsel candidly acknowledged that omission. The state's alternative argument rests solely on **Weaver**.

In **Weaver**, several officers began searching the defendant's secondhand store for evidence of violations of certain county ordinances without a warrant or consent. While that search was in progress, a deputy contacted the defendant store owner at another [**438] location to ask for his consent to search the store. *319 Ore. at 214-15*. Without any knowledge of the search in progress at his store, and several hours after the officers started searching his store, the defendant signed a written consent form. The state argued that the defendant's consent retroactively validated the search and seizures that occurred before he consented. The Supreme Court agreed with the state that [HN7] a consent **could** "relate back" to validate an otherwise unlawful earlier search. *Weaver, 319 Ore. at 221-22*. However, such retroactive consent can be found only where there is evidence "that the person giving the consent intended the consent [***15] to be retroactive." **Id**. Applying that rule, the court concluded that the evidence did not demonstrate that the defendant intended to retroactively consent to the earlier search. [8]

> 8 A concurring opinion highlighted that aspect of the court's holding:
>
> "The effect of our decision today is to say that, although the scope of a consent to search is a question of fact, **in the absence of any evidence as to that issue, the default outcome is that a consent**

> **is treated for the purposes of *Article I, section 9, of the Oregon Constitution*, as being intended to be prospective only.** This means, in any case in which the prosecution wishes to rely on consent as a basis for obtaining evidence that was acquired before the consent was given, that there must be affirmative evidence (that is accepted by the trial judge) that it was the intention of the person giving consent to include within the scope of that consent the earlier official conduct." *Weaver, 319 Ore. at 222-23* (Gillette, J., concurring) (emphasis in original).

[***16] In ***State v. Larson**, 159 Ore. App. 34, 977 P.2d 1175*, **rev den** *329 Ore. 318 (1999)*, we addressed **Weaver**'s application to a purported retroactive consent to search given by a third party, and not by the defendant. There, police officers, without prior consent, entered a common area at the rear of an apartment building and, from that point, smelled the odor of marijuana wafting from the defendant's second floor apartment. Several months later, after being charged with drug offenses, the defendant moved to suppress evidence discovered as a result of the officers' observations, arguing that the [*506] officers' unconsented to and warrantless entry into the rear area was unlawful. Thereafter, the police obtained written consent from another tenant that purported to explicitly authorize the initial entry. The trial court granted the motion to suppress, and the state appealed.

In affirming, we rejected the state's argument that the third-party tenant's "consent" validly effectuated retroactive consent under **Weaver**:

> "The state is correct that, in **Weaver**, under some circumstances, a defendant's consent may 'relate back' to the beginning [***17] of a search if there is evidence in the record that the defendant intended the consent to be retroactive. By consenting to the search after the fact, the defendant is essentially waiving any objection to the unlawfulness of the earlier police conduct. This case, however, presents a different question from **Weaver** because the consent here was not obtained from the defendant but, rather, from a third party. We decline to hold that, under the circumstances here, a third party may waive the unlawfulness of police conduct with respect to the defendant." ***Larson**, 159 Ore. App. at 42-43.*

Thus, our premise in **Larson** was [HN8] that retroactive consent is "essentially" a matter of waiver and that a third party cannot waive a prior violation of another person's constitutionally protected interests.

That principle is conclusive here. In entering the property unlawfully, Pearson violated not only father's privacy interests but brothers' as well. Father could, by retroactive consent, waive that violation as to himself. But he could not waive that violation as to his sons.

The [***18] trial court properly allowed the motion to suppress.

Affirmed.

LexisNexis®

LEXSEE 436 U.S. 307

MARSHALL, SECRETARY OF LABOR, ET AL. v. BARLOW'S, INC.

No. 76-1143

SUPREME COURT OF THE UNITED STATES

436 U.S. 307; 98 S. Ct. 1816; 56 L. Ed. 2d 305; 1978 U.S. LEXIS 26; 8 ELR 20434

January 9, 1978, Argued
May 23, 1978, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO.

DISPOSITION: *424 F.Supp. 437*, affirmed.

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview
[HN1] The *Fourth Amendment* prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations.

Labor & Employment Law > Occupational Safety & Health > Duties & Rights
[HN2] See *29 U.S.C.S. § 657 (f)(1)*.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Reasonableness & Prudence Standard
Labor & Employment Law > Occupational Safety & Health > Administrative Proceedings > Citations & Inspections
[HN3] The authority to make warrantless administrative searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the United States Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the United States Supreme Court's decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes.

SUMMARY:

After a businessman refused to permit an inspector from the Occupational Safety and Health Administration to conduct a warrantless search of his business premises pursuant to 8(a) of the Occupational Safety and Health Act of 1970 (*29 USCS 657(a)*), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, the Secretary petitioned the United States District Court for the District of Idaho for an order compelling admittance of the inspector. The requested order was issued, but the businessman again refused to permit the inspection, and sought injunctive relief against warrantless searches under the Act. Entering an injunction against searches and inspections pursuant to 8(a), the three-judge District Court ruled that the *Fourth Amendment* required a

warrant for the type of search involved, and that the statutory authorization for warrantless inspections was unconstitutional. (*424 F Supp 437*).

On direct appeal, the United States Supreme Court affirmed. In an opinion by White, J. joined by Burger, Ch. J. and Stewart, Marshall, and Powell, JJ. it was held that (1) 8(a) violated the *Fourth Amendment* insofar as it purported to authorize inspections without a warrant or its equivalent, but the Secretary was not prohibited from exercising the inspection authority conferred by 8(a) pursuant to regulations and judicial process satisfying the *Fourth Amendment*, and (2) the entitlement of the Secretary to inspect, under a warrant or other process, pursuant to 8(a) did not depend on his demonstrating probable cause to believe that conditions in violation of the Act existed on the premises but could be based on a showing that reasonable legislative or administrative standards for conducting an inspection were satisfied with respect to a particular establishment.

Stevens, J., joined by Blackmun and Rehnquist, JJ., dissented, expressing the view that (1) the warrantless inspection was not "unreasonable" within the meaning of the *Fourth Amendment*, and therefore was not prohibited by that Amendment, and (2) if such warrantless inspections were in fact unreasonable in the constitutional sense, the issuance of a warrant not based upon a true showing of particularized probable cause could not validate them.

Brennan, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

SEIZURE §25

OSHA -- inspection -- warrant --

Headnote:[1A][1B][1C]

Section 8(a) of the Occupational Safety and Health Act of 1970 (*29 USCS 657(a)*), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, violates the *Fourth Amendment* insofar as it purports to authorize inspections without a warrant or its equivalent; however, the Secretary is not prohibited from exercising the inspection authority conferred by 8(a) pursuant to regulations and judicial process satisfying the *Fourth Amendment*. (Stevens, Blackmun, and Rehnquist, JJ., dissented from this holding.)

[***LEdHN2]

SEIZURE §25

Fourteenth Amendment -- warrant clause --

Headnote:[2]

The warrant clause of the *Fourth Amendment* protects commercial buildings as well as private homes.

[***LEdHN3]

SEIZURE §25

Fourth Amendment -- search warrant -- particular industries --

Headnote:[3]

With regard to the search warrant requirement of the *Fourth Amendment*, certain industries have such a history of government oversight that no reasonable expectation of privacy can exist for a proprietor over the stock of such an enterprise; liquor and firearms are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation.

[***LEdHN4]

SEIZURE §25

OSHA -- warrantless search --

Headnote:[4]

With regard to inspections conducted pursuant to 8(a) of the Occupational Safety and Health Act of 1970 (*29 USCS 657(a)*), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, the government inspector, without a warrant, stands in no better position than a member of the public--what is observable by the public being observable, without a warrant, by the government inspector as well; the owner of a business has not, by the necessary utilization of

employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of government agents, and the fact that an employee is free to report, and the government is free to use, any evidence of noncompliance with the Act that the employee observes, furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.

[***LEdHN5]

SEIZURE §25

OSHA -- inspections -- warrant --

Headnote:[5A][5B]

While 8(a) of the Occupational Safety and Health Act of 1970 (*29 USCS 657(a)*), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, purports to authorize inspections without a warrant, nevertheless it does not forbid the Secretary from proceeding to inspect only by warrant or other process.

[***LEdHN6]

SEIZURE §27

OSHA -- inspection -- probable cause --

Headnote:[6]

The entitlement of the Secretary of Labor to inspect under a warrant or other process with or without prior notice pursuant to 8(a) of the Occupational Safety and Health Act of 1970 (*29 USCS 657(a)*), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, does not depend on his demonstrating probable cause to believe that conditions in violation of the Act exist on the premises, probable cause in the criminal sense not being required; for purposes of such an administrative search, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment; a warrant showing that a specific business has been chosen for a search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, will protect an employer's *Fourth Amendment* rights. (Stevens, Blackmun, and Rehnquist, JJ., dissented from this holding.)

[***LEdHN7]

SEIZURE §25

regulatory statutes -- warrantless search -- reasonableness --

Headnote:[7]

With regard to the constitutionality of warrantless search provisions in regulatory statutes, the reasonableness of such a search will depend upon the specific enforcement needs and privacy guarantees of each statute.

[***LEdHN8]

SEIZURE §25

OSHA -- document inspection -- warrant --

Headnote:[8A][8B]

During the course of an inspection conducted pursuant to 8(a) of the Occupational Safety and Health Act of 1970 (*29 USCS 657(a)*), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, an inspection of those documents specified in *29 CFR 1903.3*, which includes among an Occupational Safety and Health Administration inspector's powers the authority "to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection," may not be effected without a warrant.

SYLLABUS

Appellee brought this action to obtain injunctive relief against a warrantless inspection of its business premises pursuant to § 8 (a) of the Occupational Safety and Health Act of 1970 (OSHA), which empowers agents

of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations. A three-judge District Court ruled in appellee's favor, concluding, in reliance on *Camara v. Municipal Court, 387 U.S. 523, 528-529*, and *See v. Seattle, 387 U.S. 541, 543*, that the *Fourth Amendment* required a warrant for the type of search involved and that the statutory authorization for warrantless inspections was unconstitutional. *Held*: The inspection without a warrant or its equivalent pursuant to § 8 (a) of OSHA violated the *Fourth Amendment*. Pp. 311-325.

(a) The rule that warrantless searches are generally unreasonable applies to commercial premises as well as homes. *Camara v. Municipal Court, supra*, and *See v. Seattle, supra*. Pp. 311-313.

(b) Though an exception to the search warrant requirement has been recognized for "closely regulated" industries "long subject to close supervision and inspection," *Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77*, that exception does not apply simply because the business is in interstate commerce. Pp. 313-314.

(c) Nor does an employer's necessary utilization of employees in his operation mean that he has opened areas where the employees alone are permitted to the warrantless scrutiny of Government agents. Pp. 314-315.

(d) Insofar as experience to date indicates, requiring warrants to make OSHA inspections will impose no serious burdens on the inspection system or the courts. The advantages of surprise through the opportunity of inspecting without prior notice will not be lost if, after entry to an inspector is refused, an *ex parte* warrant can be obtained, facilitating an inspector's reappearance at the premises without further notice; and appellant Secretary's entitlement to a warrant will not depend on his demonstrating probable cause to believe that conditions on the premises violate OSHA but merely that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. Pp. 315-321.

(e) Requiring a warrant for OSHA inspections does not mean that, as a practical matter, warrantless-search provisions in other regulatory statutes are unconstitutional, as the reasonableness of those provisions depends upon the specific enforcement needs and privacy guarantees of each statute. Pp. 321-322.

COUNSEL: Solicitor General McCree argued the cause for appellants. With him on the briefs were Deputy Solicitor General Wallace, Stuart A. Smith, and Michael H. Levin.

John L. Runft argued the cause for appellee. With him on the brief was Iver J. Longeteig. *

* Warren Spannaus, Attorney General of Minnesota, Richard B. Allyn, Solicitor General, and Steven M. Gunn and Richard A. Lockridge, Special Assistant Attorneys General, filed a brief for 11 States as amici curiae urging reversal, joined by the Attorneys General for their respective States as follows: Frank J. Kelley of Michigan, William F. Hyland of New Jersey, Toney Anaya of New Mexico, Rufus Edmisten of North Carolina, Robert P. Kane of Pennsylvania, Daniel R. McLeod of South Carolina, M. Jerome Diamond of Vermont, Anthony F. Troy of Virginia, and V. Frank Mendicino of Wyoming. Briefs of amici curiae urging reversal were filed by J. Albert Woll and Laurence Gold for the American Federation of Labor and Congress of Industrial Organizations; and by Michael R. Sherwood for the Sierra Club et al.

Briefs of amici curiae urging affirmance were filed by Wayne L. Kidwell, Attorney General of Idaho, and Guy G. Hurlbutt, Chief Deputy Attorney General, Robert B. Hansen, Attorney General of Utah, and Michael L. Deamer, Deputy Attorney General, for the States of Idaho and Utah; by Allen A. Lauterbach for the American Farm Bureau Federation; by Robert T. Thompson, Lawrence Kraus, and Stanley T. Kaleczyc for the Chamber of Commerce of the United States; by Anthony J. Obadal, Steven R. Semler, Stephen C. Yohay, Leonard J. Theberge, Edward H. Dowd, and James Watt for the Mountain States Legal Foundation; by James D. McKevitt for the National Federation of Independent Business; and by Ronald A. Zumbrun, John H. Findley, Albert Ferri, Jr., and W. Hugh O'Riordan for the Pacific Legal Foundation.

Briefs of amici curiae were filed by Robert E. Rader, Jr., for the American Conservative Union; and by David Goldberger, Barbara O'Toole,

436 U.S. 307, *; 98 S. Ct. 1816, **;
56 L. Ed. 2d 305, ***; 1978 U.S. LEXIS 26

McNeill Stokes, Ira J. Smotherman, Jr., and David Rudenstine for the Roger Baldwin Foundation, Inc., of the American Civil Liberties Union, Illinois Division.

JUDGES: WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, post, p. 325. BRENNAN, J., took no part in the consideration or decision of the case.

OPINION BY: WHITE

OPINION

[*309] [***309] [**1818] MR. JUSTICE WHITE delivered the opinion of the Court.

Section 8 (a) of the Occupational Safety and Health Act of 1970 (OSHA or Act) [1] [**1819] empowers agents of the Secretary of Labor (Secretary) to search the work area of any employment facility within the Act's jurisdiction. The purpose of the search is to inspect for safety hazards and violations of OSHA regulations. No search warrant or other process is expressly required under the Act.

1 "In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --

"(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

"(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee." 84 Stat. 1598, *29 U. S. C. § 657 (a)*.

On the morning of September 11, 1975, an OSHA inspector entered the customer service area of Barlow's, Inc., an electrical and plumbing installation business located in Pocatello, Idaho. The president and general manager, Ferrol G. "Bill" Barlow, was on hand; and the OSHA inspector, after showing his credentials, [2] informed Mr. Barlow that he wished to conduct [*310] a search of the working areas of the business. Mr. Barlow inquired whether any complaint had been received about his company. The inspector answered no, but that Barlow's, Inc., had simply turned up in the agency's selection process. The inspector again asked to enter the nonpublic area of the business; Mr. Barlow's response was to inquire whether the inspector had a search warrant. The inspector had none. Thereupon, Mr. Barlow refused the inspector admission to the employee area of his business. He said he was relying on his rights as guaranteed by the *Fourth Amendment of the United States Constitution*.

2 This is required by the Act. See n. 1, *supra*.

Three [***310] months later, the Secretary petitioned the United States District Court for the District of Idaho to issue an order compelling Mr. Barlow to admit the inspector. [3] The requested order was issued on December 30, 1975, and was presented to Mr. Barlow on January 5, 1976. Mr. Barlow again refused admission, and he sought his own injunctive relief against the warrantless searches assertedly permitted by OSHA. A three-judge court was convened. On December 30, 1976, it ruled in Mr. Barlow's favor. *424 F.Supp. 437*. Concluding that *Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967)*, and *See v. Seattle, 387 U.S. 541, 543 (1967)*, controlled this case, the court held that the *Fourth Amendment* required a warrant for the type of search involved here [4] and that the statutory authorization for warrantless inspections was unconstitutional. An injunction against searches or inspections pursuant to § 8 (a) was entered. The Secretary appealed, challenging the judgment, and we noted probable jurisdiction. *430 U.S. 964*.

3 A regulation of the Secretary, *29 CFR § 1903.4 (1977)*, requires an inspector to seek compulsory process if an employer refuses a requested search. See *infra*, at 317, and n. 12.

4 No *res judicata* bar arose against Mr. Barlow from the December 30, 1975, order authorizing a search, because the earlier decision reserved the

constitutional issue. See *424 F.Supp. 437.*

[*311] I

[***LEdHR1A] [1A]The Secretary urges that warrantless inspections to enforce OSHA are reasonable within the meaning of the *Fourth Amendment*. Among other things, he relies on § 8 (a) of the Act, *29 U. S. C. § 657 (a)*, which authorizes inspection of business premises without a warrant and which the Secretary urges represents a congressional construction of the *Fourth Amendment* that the courts should not reject. Regrettably, we are unable to agree.

[***LEdHR2] [2]The Warrant Clause of the *Fourth Amendment* protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, [**1820] and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia *Bill of Rights*, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed." [5] The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. [6] The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. [7] "[The] *Fourth Amendment's* [***311] commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States v. Chadwick, 433 U.S. 1, 7-8 (1977).* [*312] See also *G. M. Leasing Corp.* v. *United States, 429 U.S. 338, 355 (1977).* Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

5 H. Commager, Documents of American History 104 (8th ed. 1968).

6 See, *e. g.*, Dickerson, Writs of Assistance as a Cause of the Revolution in The Era of the American Revolution 40 (R. Morris ed. 1939).

7 The Stamp Act of 1765, the Townshend Revenue Act of 1767, and the tea tax of 1773 are notable examples. See Commager, *supra*, n. 5, at 53, 63. For commentary, see 1 S. Morison, H. Commager, & W. Leuchtenburg, The Growth of the American Republic 143, 149, 159 (1969).

This Court has already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes. In *Camara* v. *Municipal Court, supra*, at 528-529, we held:

"[Except] in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

On the same day, we also ruled:

"As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *See v. Seattle, supra, at 543.*

These same cases also held [HN1] that the *Fourth Amendment* prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. *Ibid.* The reason is found in the "basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara, supra, at 528.* If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or [*313] regulatory standards. It therefore appears that unless some recognized exception to the warrant requirement applies, *See* v. *Seattle* would require a warrant to conduct the inspection sought in this case.

[***LEdHR3] [3]The Secretary urges that an exception from the search warrant requirement has been recognized for "pervasively regulated [businesses]," *United States v. Biswell, 406 U.S. 311, 316 (1972)*, and for "closely regulated" industries "long subject to close supervision and inspection." *Colonnade Catering* [**1821] *Corp.* v. *United States, 397 U.S. 72, 74, 77 (1970).*These cases are

indeed exceptions, but they represent responses [***312] to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz v. United States, 389 U.S. 347, 351-352 (1967)*, could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.

Industries such as these fall within the "certain carefully defined classes of cases," referenced in *Camara, 387 U.S., at 528*. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. "A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973)*.

The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary would make it the rule. Invoking [*314] the Walsh-Healey Act of 1936, *41 U. S. C. § 35 et seq.*, the Secretary attempts to support a conclusion that all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions. But the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates. It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.

The Secretary also attempts to derive support for a *Colonnade-Biswell*-type exception by drawing analogies from the field of labor law. In *Republic Aviation Corp.* v. *NLRB, 324 U.S. 793 (1945)*, this Court upheld the rights of employees to solicit for a union during nonworking time where efficiency was not compromised. By opening up his property to employees, the employer had yielded so much of his private property rights as to allow those employees to exercise § 7 rights under the National Labor Relations Act. But this Court also held that the private property rights of an owner prevailed over the intrusion of nonemployee organizers, even in nonworking areas of the plant and [***313] during nonworking hours. *NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)*.

[***LEdHR4] [4]The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent. [8] Employees [*315] are not being prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy. The Government inspector, however, is not an employee. Without a warrant [**1822] he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspector as well. [9] The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search. [10]

8 The Government has asked that Mr. Barlow be ordered to show cause why he should not be held in contempt for refusing to honor the inspection order, and its position is that the OSHA inspector is now entitled to enter at once, over Mr. Barlow's objection.

9 Cf. *Air Pollution Variance Bd.* v. *Western Alfalfa Corp., 416 U.S. 861 (1974)*.

10 The automobile-search cases cited by the Secretary are even less helpful to his position than the labor cases. The fact that automobiles occupy a special category in *Fourth Amendment* case law is by now beyond doubt due, among other factors, to the quick mobility of a car, the registration

requirements of both the car and the driver, and the more available opportunity for plain-view observations of a car's contents. *Cady v. Dombrowski, 413 U.S. 433, 441-442 (1973)*; see also *Chambers v. Maroney, 399 U.S. 42, 48-51 (1970)*. Even so, probable cause has not been abandoned as a requirement for stopping and searching an automobile.

II

The Secretary nevertheless stoutly argues that the enforcement scheme of the Act requires warrantless searches, and that the restrictions on search discretion contained in the Act and its regulations already protect as much privacy as a warrant would. The Secretary thereby asserts the actual reasonableness of OSHA searches, whatever the general rule against warrantless searches might be. Because "reasonableness is still the ultimate standard," *Camara v. Municipal* [*316] *Court, 387 U.S., at 539*, the Secretary suggests that the Court decide whether a warrant is needed by arriving at a sensible balance between the administrative necessities of OSHA inspections and the incremental protection of privacy of business owners a warrant would afford. He suggests that only a decision exempting OSHA inspections from the Warrant Clause would give "full recognition to the competing public and private interests here at stake." *Ibid.*

The Secretary submits that warrantless inspections are essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence to preserve the advantages of surprise. While the dangerous conditions outlawed by the Act include [***314] structural defects that cannot be quickly hidden or remedied, the Act also regulates a myriad of safety details that may be amenable to speedy alteration or disguise. The risk is that during the interval between an inspector's initial request to search a plant and his procuring a warrant following the owner's refusal of permission, violations of this latter type could be corrected and thus escape the inspector's notice. To the suggestion that warrants may be issued *ex parte* and executed without delay and without prior notice, thereby preserving the element of surprise, the Secretary expresses concern for the administrative strain that would be experienced by the inspection system, and by the courts, should *ex parte* warrants issued in advance become standard practice.

[***LEdHR5A] [5A]We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective. In the first place, the great majority of businessmen can be expected in normal course to consent to inspection without warrant; the Secretary has not brought to this Court's attention any widespread pattern of refusal. [11] In those cases where [**1823] an owner does insist [*317] on a warrant, the Secretary argues that inspection efficiency will be impeded by the advance notice and delay. The Act's penalty provisions for giving advance notice of a search, *29 U. S. C. § 666 (f)*, and the Secretary's own regulations, *29 CFR § 1903.6 (1977)*, indicate that surprise searches are indeed contemplated. However, the Secretary has also promulgated a regulation providing that upon refusal to permit an inspector to enter the property or to complete his inspection, the inspector shall attempt to ascertain the reasons for the refusal and report to his superior, who shall "promptly take appropriate action, including compulsory process, if necessary." *29 CFR § 1903.4 (1977)*. [12] The [***315] regulation represents a choice to proceed [*318] by process where entry is refused; and on the basis of evidence available from present practice, the Act's effectiveness has not been crippled by providing those owners who wish to refuse an initial requested entry with a time lapse while the inspector obtains the necessary process. [13] Indeed, the kind of process sought in this case and apparently anticipated by the regulation provides notice to the business operator. [14] [*319] If this safeguard [***316] [**1824] endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it. Nor is it immediately [*320] apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an *ex parte* warrant and to reappear at the premises without further notice to the establishment being inspected. [15]

11 We recognize that today's holding itself might have an impact on whether owners choose to resist requested searches; we can only await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be.

12 [***LEdHR5B] [5B]It is true, as the Secretary asserts, that § 8 (a) of the Act, *29 U. S. C. § 657 (a)*, purports to authorize inspections

without warrant; but it is also true that it does not forbid the Secretary from proceeding to inspect only by warrant or other process. The Secretary has broad authority to prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under this chapter, "including rules and regulations dealing with the inspection of an employer's establishment." § 8 (g)(2), *29 U. S. C. § 657 (g)(2)*. The regulations with respect to inspections are contained in 29 CFR Part 1903 (1977). *Section 1903.4*, referred to in the text, provides as follows:

"Upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with *§ 1903.3*, or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Compliance Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and he shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary."

When his representative was refused admission by Mr. Barlow, the Secretary proceeded in federal court to enforce his right to enter and inspect, as conferred by *29 U. S. C. § 657*.

13 A change in the language of the Compliance Operations Manual for OSHA inspectors supports the inference that, whatever the Act's administrators might have thought at the start, it was eventually concluded that enforcement efficiency would not be jeopardized by permitting employers to refuse entry, at least until the inspector obtained compulsory process. The 1972 Manual included a section specifically directed to obtaining "warrants," and one provision of that section dealt with *ex parte* warrants:

"In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted. Cases of this nature should also be referred through the Area Director to the appropriate Regional Solicitor and the Regional Administrator alerted." Dept. of Labor, OSHA Compliance Operations Manual V-7 (Jan. 1972).

The latest available manual, incorporating changes as of November 1977, deletes this provision, leaving only the details for obtaining "compulsory process" *after* an employer has refused entry. Dept. of Labor, OSHA Field Operations Manual, Vol. V, pp. V-4-V-5. In its present form, the Secretary's regulation appears to permit establishment owners to insist on "process"; and hence their refusal to permit entry would fall short of criminal conduct within the meaning of *18 U. S. C. §§ 111* and *1114 (1976 ed.)*, which make it a crime forcibly to impede, intimidate, or interfere with federal officials, including OSHA inspectors, while engaged in or on account of the performance of their official duties.

14 The proceeding was instituted by filing an "Application for Affirmative Order to Grant Entry and for an Order to show cause why such affirmative order should not issue." The District Court issued the order to show cause, the matter was argued, and an order then issued authorizing the inspection and enjoining interference by Barlow's. The following is the order issued by the District Court:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, United States Department of Labor, Occupational Safety and Health Administration, through its duly designated representative or

representatives, are entitled to entry upon the premises known as Barlow's Inc., 225 West Pine, Pocatello, Idaho, and may go upon said business premises to conduct an inspection and investigation as provided for in Section 8 of the Occupational Safety and Health Act of 1970 (*29 U. S. C. 651, et seq.*), as part of an inspection program designed to assure compliance with that Act; that the inspection and investigation shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor, at 29 C. F. R., Part 1903; that appropriate credentials as representatives of the Occupational Safety and Health Administration, United States Department of Labor, shall be presented to the Barlow's Inc. representative upon said premises and the inspection and investigation shall be commenced as soon as practicable after the issuance of this Order and shall be completed within reasonable promptness; that the inspection and investigation shall extend to the establishment or other area, workplace, or environment where work is performed by employees of the employer, Barlow's Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including but not limited to records, files, papers, processes, controls, and facilities) bearing upon whether Barlow's Inc. is furnishing to its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow's Inc. is complying with the Occupational Safety and Health Standards promulgated under the Occupational Safety and Health Act and the rules, regulations, and orders issued pursuant to that Act; that representatives of the Occupational Safety and Health Administration may, at the option of Barlow's Inc., be accompanied by one or more employees of Barlow's Inc., pursuant to Section 8 (e) of that Act; that Barlow's Inc., its agents, representatives, officers, and employees are hereby enjoined and restrained from in anyway whatsoever interfering with the inspection and investigation authorized by this Order and, further, Barlow's Inc. is hereby ordered and directed to, within five working days from the date of this Order, furnish a copy of this Order to its officers and managers, and, in addition, to post a copy of this Order at its employee's bulletin board located upon the business premises; and Barlow's Inc. is hereby ordered and directed to comply in all respects with this order and allow the inspection and investigation to take place without delay and forthwith."

15 Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed *ex parte* to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process."

[***LEdHR6] [6]Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation [16] but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara* [*321] *v. Municipal Court, 387 U.S., at 538.*A warrant showing that a specific [**1825] business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's *Fourth Amendment* rights. [17] We doubt that the consumption [***317] of enforcement energies in the obtaining of such warrants will exceed manageable proportions.

16 Section 8 (f)(1), [HN2] *29 U. S. C. § 657 (f)(1)*, provides that employees or their representatives may give written notice to the Secretary of what they believe to be violations of safety or health standards and may request an

inspection. If the Secretary then determines that "there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable." The statute thus purports to authorize a warrantless inspection in these circumstances.

17 The Secretary, Brief for Petitioner 9 n. 7, states that the Barlow inspection was not based on an employee complaint but was a "general schedule" investigation. "Such general inspections," he explains, "now called Regional Programmed Inspections, are carried out in accordance with criteria based upon accident experience and the number of employees exposed in particular industries. U.S. Department of Labor, Occupational Safety and Health Administration, Field Operations Manual, *supra*, 1 CCH Employment Safety and Health Guide para. 4327.2 (1976)."

[***LEdHR7] [7]Finally, the Secretary urges that requiring a warrant for OSHA inspectors will mean that, as a practical matter, warrantless-search provisions in other regulatory statutes are also constitutionally infirm. The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply. Some statutes already envision resort to federal-court enforcement when entry is refused, employing specific language in some cases [18] and general language in others. [19] In short, we base [*322] today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes.

18 The Federal Metal and Nonmetallic Mine Safety Act provides:

"Whenever an operator . . . refuses to permit the inspection or investigation of any mine which is subject to this chapter . . . a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the Secretary in the district court of the United States for the district . . . ." 30 U. S. C. § 733 (a). "The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court . . . whenever such operator or his agent . . . refuses to permit the inspection of the mine . . . . Each court shall have jurisdiction to provide such relief as may be appropriate." *30 U. S. C. § 818*. Another example is the Clean Air Act, which grants federal district courts jurisdiction "to require compliance" with the Administrator of the Environmental Protection Agency's attempt to inspect under *42 U. S. C. § 7414 (1976 ed., Supp. I)*, when the Administrator has commenced "a civil action" for injunctive relief or to recover a penalty. *42 U. S. C. § 7413 (b)(4) (1976 ed., Supp. I)*.

19 Exemplary language is contained in the Animal Welfare Act of 1970 which provides for inspections by the Secretary of Agriculture; federal district courts are vested with jurisdiction "specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter." *7 U. S. C. § 2146 (c) (1976 ed.)*. Similar provisions are included in other agricultural inspection Acts; see, *e. g., 21 U. S. C. § 674* (meat product inspection); *21 U. S. C. § 1050* (egg product inspection). The Internal Revenue Code, whose excise tax provisions requiring inspections of businesses are cited by the Secretary, provides: "The district courts . . . shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction . . . and such other orders and processes, and to render such . . . decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." *26 U. S. C. § 7402 (a)*. For gasoline inspections, federal district courts are granted jurisdiction to restrain violations and enforce standards (one of which, 49 U. S. C. § 1677, requires gas transporters to permit entry or inspection). The owner is to be afforded the opportunity for notice and response in most cases, but "failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief [by the district court]." 49 U. S. C. § 1679 (a).

[***LEdHR8A] [8A]Nor do we agree that the

incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed. [*323] [HN3] The authority [**1826] to make warrantless searches devolves almost unbridled discretion upon executive [***318] and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. [20] Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. [21] These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to [*324] inspections for compliance with regulatory statutes. [22] *Camara v. Municipal Court, 387 U.S. 523* [***319] *(1967); See v. Seattle, 387 U.S. 541 (1967)*. We conclude that the concerns expressed by the Secretary do not suffice to [**1827] justify warrantless inspections under OSHA or vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained.

20 The application for the inspection order filed by the Secretary in this case represented that "the desired inspection and investigation are contemplated as a part of an inspection program designed to assure compliance with the Act and are authorized by Section 8 (a) of the Act." The program was not described, however, or any facts presented that would indicate why an inspection of Barlow's establishment was within the program. The order that issued concluded generally that the inspection authorized was "part of an inspection program designed to assure compliance with the Act."

21 Section 8 (a) of the Act, as set forth in *29 U. S. C. § 657 (a)*, provides that "[in] order to carry out the purposes of this chapter" the Secretary may enter any establishment, area, work place or environment "where work is performed by an employee of an employer" and "inspect and investigate" any such place of employment and all "pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and . . . question privately any such employer, owner, operator, agent, or employee." Inspections are to be carried out "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner." The Secretary's regulations echo the statutory language in these respects. *29 CFR § 1903.3 (1977)*. They also provide that inspectors are to explain the nature and purpose of the inspection and to "indicate generally the scope of the inspection." *29 CFR § 1903.7 (a) (1977)*. Environmental samples and photographs are authorized, *29 CFR § 1903.7 (b) (1977)*, and inspections are to be performed so as "to preclude unreasonable disruption of the operations of the employer's establishment." *29 CFR § 1903.7 (d) (1977)*. The order that issued in this case reflected much of the foregoing statutory and regulatory language.

22 [***LEdHR8B] [8B]Delineating the scope of a search with some care is particularly important where documents are involved. Section 8 (c) of the Act, *29 U. S. C. § 657 (c)*, provides that an employer must "make, keep and preserve, and make available to the Secretary [of Labor] or to the Secretary of Health, Education and Welfare" such records regarding his activities relating to OSHA as the Secretary of Labor may prescribe by regulation as necessary or appropriate for enforcement of the statute or for developing information regarding the causes and prevention of occupational accidents and illnesses. Regulations requiring employers to maintain records of and to make periodic reports on "work-related deaths, injuries and illnesses" are also contemplated, as are rules requiring accurate records of employee exposures to potential toxic materials and harmful physical agents.

In describing the scope of the warrantless inspection authorized by the statute, § 8 (a) does not expressly include any *records* among those items or things that may be examined, and § 8 (c) merely provides that the employer is to "make available" his pertinent records and to make periodic reports.

The Secretary's regulation, *29 CFR § 1903.3 (1977)*, however, expressly includes among the inspector's powers the authority "to review records required by the Act and regulations

published in this chapter, and other records which are directly related to the purpose of the inspection." Further, *§ 1903.7* requires inspectors to indicate generally "the records specified in *§ 1903.3* which they wish to review" but "such designations of records shall not preclude access to additional records specified in *§ 1903.3*." It is the Secretary's position, which we reject, that an inspection of documents of this scope may be effected without a warrant.

The order that issued in this case included among the objects and things to be inspected "all other things therein (including but not limited to records, files, papers, processes, controls and facilities) bearing upon whether Barlow's, Inc. is furnishing to its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow's, Inc. is complying with . . ." the OSHA regulations.

[*325] III

[***LEdHR1B] [1B]We hold that Barlow's was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent. 23 The judgment of the District Court is therefore affirmed.

23 [***LEdHR1C] [1C]The injunction entered by the District Court, however, should not be understood to forbid the Secretary from exercising the inspection authority conferred by § 8 pursuant to regulations and judicial process that satisfy the *Fourth Amendment*. The District Court did not address the issue whether the order for inspection that was issued in this case was the functional equivalent of a warrant, and the Secretary has limited his submission in this case to the constitutionality of a warrantless search of the Barlow establishment authorized by § 8 (a). He has expressly declined to rely on *29 CFR § 1903.4 (1977)* and upon the order obtained in this case. Tr. of Oral Arg. 19. Of course, if the process obtained here, or obtained in other cases under revised regulations, would satisfy the *Fourth Amendment*, there would be no occasion for enjoining the inspections authorized by § 8 (a).

So ordered.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

DISSENT BY: STEVENS

DISSENT

MR. JUSTICE STEVENS, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

Congress enacted the Occupational Safety and Health Act to safeguard employees against hazards in the work areas of businesses subject to the Act. To ensure compliance, Congress authorized the Secretary of Labor to conduct routine, nonconsensual inspections. Today the Court holds that the *Fourth Amendment* prohibits such inspections without a warrant. The Court also holds that the constitutionally required warrant may be issued without any showing of probable cause. I disagree with both of these holdings.

The *Fourth Amendment* contains two separate Clauses, each [*326] flatly prohibiting a category of governmental conduct. The first Clause states that the right to be free from unreasonable searches "shall not be violated"; [1] the second unequivocally prohibits the issuance of warrants except "upon probable cause." [2] In this case the ultimate question is whether the category of warrantless searches authorized by the statute is "unreasonable" [***320] within the meaning of the first Clause.

1 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

2 "[And] no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In cases involving the investigation of criminal activity, the Court has held that the reasonableness of a search generally depends upon whether it was conducted pursuant to a valid warrant. See, *e. g., Coolidge v. New Hampshire, 403 U.S. 443*. There is, however, also a

category of searches which are reasonable within the meaning of the first Clause even though the probable-cause requirement of the Warrant Clause cannot be satisfied. See *United States v. Martinez-Fuerte, 428 U.S. 543*; *Terry v. Ohio, 392 U.S. 1*; *South Dakota v. Opperman, 428 U.S. 364*; *United States v. Biswell, 406 U.S. 311*. The regulatory inspection program challenged in this case, in my judgment, falls within this category.

I

The warrant requirement is linked "textually . . . to the probable-cause concept" in the Warrant Clause. *South Dakota v. Opperman, supra, at 370 n. 5*. [**1828] The routine OSHA inspections are, by definition, not based on cause to believe there is a violation on the premises to be inspected. Hence, if the inspections were measured against the requirements of the Warrant Clause, they would be automatically and unequivocally unreasonable.

[*327] Because of the acknowledged importance and reasonableness of routine inspections in the enforcement of federal regulatory statutes such as OSHA, the Court recognizes that requiring full compliance with the Warrant Clause would invalidate all such inspection programs. Yet, rather than simply analyzing such programs under the "Reasonableness" Clause of the *Fourth Amendment*, the Court holds the OSHA program invalid under the Warrant Clause and then avoids a blanket prohibition on all routine, regulatory inspections by relying on the notion that the "probable cause" requirement in the Warrant Clause may be relaxed whenever the Court believes that the governmental need to conduct a category of "searches" outweighs the intrusion on interests protected by the *Fourth Amendment*.

The Court's approach disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the *Fourth Amendment* -- "the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England." [3] This preconstitutional history includes the controversy in England over the issuance of general warrants to aid enforcement of the seditious libel laws and the colonial experience with writs of assistance issued to facilitate collection of the various import duties imposed by Parliament. The Framers' familiarity with the abuses attending the issuance of such general warrants provided the principal stimulus for the restraints on arbitrary governmental intrusions embodied in the *Fourth Amendment*.

[***321] "[Our] constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from [*328] looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches . . . ." [4]

3 J. Landynski, Search and Seizure and the Supreme Court 19 (1966).

4 T. Taylor, Two Studies in Constitutional Interpretation 41 (1969).

Since the general warrant, not the warrantless search, was the immediate evil at which the *Fourth Amendment* was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. While the subsequent course of *Fourth Amendment* jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness standard in the first Clause, not the Warrant Clause, that the Framers adopted to limit this category of searches. It is, of course, true that the existence of a valid warrant normally satisfies the reasonableness requirement under the *Fourth Amendment*. But we should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the *Fourth Amendment* definition of a "search" into a judicially developed, warrant-preference scheme.

Fidelity to the original understanding of the *Fourth Amendment*, therefore, leads to the conclusion that the Warrant Clause has no application to routine, regulatory inspections of commercial premises. If such inspections are valid, it is because they comport with the ultimate reasonableness standard of the *Fourth Amendment*. If the Court were correct in its view that such inspections, if undertaken without a warrant, [**1829] are unreasonable in the constitutional sense, the issuance of a "new-fangled warrant" -- to use Mr. Justice Clark's characteristically expressive term -- without any true

showing of particularized probable cause would not be sufficient to validate them. [5]

5 *See v. Seattle, 387 U.S. 541, 547* (Clark, J., dissenting).

[*329] II

Even if a warrant issued without probable cause were faithful to the Warrant Clause, I could not accept the Court's holding that the Government's inspection program is constitutionally unreasonable because it fails to require such a warrant procedure. In determining whether a warrant is a necessary safeguard in a given class of cases, "the Court has weighed the public interest against the *Fourth Amendment* interest of the individual . . . ." *United States v. Martinez-Fuerte, 428 U.S., at 555.* Several considerations persuade me that this balance should be struck in favor of the routine inspections authorized by Congress.

Congress has determined that regulation and supervision of safety in [***322] the workplace furthers an important public interest and that the power to conduct warrantless searches is necessary to accomplish the safety goals of the legislation. In assessing the public interest side of the *Fourth Amendment* balance, however, the Court today substitutes its judgment for that of Congress on the question of what inspection authority is needed to effectuate the purposes of the Act. The Court states that if surprise is truly an important ingredient of an effective, representative inspection program, it can be retained by obtaining *ex parte* warrants in advance. The Court assures the Secretary that this will not unduly burden enforcement resources because most employers will consent to inspection.

The Court's analysis does not persuade me that Congress' determination that the warrantless-inspection power as a necessary adjunct of the exercise of the regulatory power is unreasonable. It was surely not unreasonable to conclude that the rate at which employers deny entry to inspectors would increase if covered businesses, which may have safety violations on their premises, have a right to deny warrantless entry to a compliance inspector. The Court is correct that this problem could be avoided by requiring inspectors to obtain a warrant prior to every inspection visit. But the adoption of [*330] such a practice undercuts the Court's explanation of why a warrant requirement would not create undue enforcement problems. For, even if it were true that many employers would not exercise their right to demand a warrant, it would provide little solace to those charged with administration of OSHA; faced with an increase in the rate of refusals and the added costs generated by futile trips to inspection sites where entry is denied, officials may be compelled to adopt a general practice of obtaining warrants in advance. While the Court's prediction of the effect a warrant requirement would have on the behavior of covered employers may turn out to be accurate, its judgment is essentially empirical. On such an issue, I would defer to Congress' judgment regarding the importance of a warrantless-search power to the OSHA enforcement scheme.

The Court also appears uncomfortable with the notion of second-guessing Congress and the Secretary on the question of how the substantive goals of OSHA can best be achieved. Thus, the Court offers an alternative explanation for its refusal to accept the legislative judgment. We are told that, in any event, the Secretary, who is charged with enforcement of the Act, has indicated that inspections without delay are not essential to the enforcement scheme. The Court bases this conclusion on a regulation prescribing the administrative response when a compliance inspector is denied entry. It provides: "The Area Director shall immediately consult with the Assistant Regional [**1830] Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary." *29 CFR § 1903.4 (1977).* The Court views this regulation as an admission by the Secretary that no enforcement problem is generated by permitting employers to deny entry and delaying the inspection until a warrant has been obtained. I disagree. The regulation was promulgated against the background of a statutory right to immediate entry, of which covered employers [***323] are presumably [*331] aware and which Congress and the Secretary obviously thought would keep denials of entry to a minimum. In these circumstances, it was surely not unreasonable for the Secretary to adopt an orderly procedure for dealing with what he believed would be the occasional denial of entry. The regulation does not imply a judgment by the Secretary that delay caused by numerous denials of entry would be administratively acceptable.

Even if a warrant requirement does not "frustrate" the legislative purpose, the Court has no authority to impose an additional burden on the Secretary unless that

burden is required to protect the employer's *Fourth Amendment* interests. [6] The essential function of the traditional warrant requirement is the interposition of a neutral magistrate between the citizen and the presumably zealous law enforcement officer so that there might be an objective determination of probable cause. But this purpose is not served by the newfangled inspection warrant. As the Court acknowledges, the inspector's "entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. . . . For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based . . . on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Ante*, at 320. To obtain a warrant, the inspector need only show that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived [*332] from neutral sources . . . ." *Ante*, at 321. Thus, the only question for the magistrate's consideration is whether the contemplated inspection deviates from an inspection schedule drawn up by higher level agency officials.

> 6 When it passed OSHA, Congress was cognizant of the fact that in light of the enormity of the enforcement task "the number of inspections which it would be desirable to have made will undoubtedly for an unforeseeable period, exceed the capacity of the inspection force . . . ." Senate Committee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess., 152 (Comm. Print 1971).

Unlike the traditional warrant, the inspection warrant provides no protection against the search itself for employers who the Government has no reason to suspect are violating OSHA regulations. The Court plainly accepts the proposition that random health and safety inspections are reasonable. It does not question Congress' determination that the public interest in workplaces free from health and safety hazards outweighs the employer's desire to conduct his business only in the presence of permittees, except in those rare instances when the Government has probable cause to suspect that the premises harbor a violation of the law.

What purposes, then, are served by the administrative warrant procedure? The inspection warrant purports to serve three functions: to inform the employer that the inspection is authorized by the statute, to advise him of the lawful limits of the inspection, and to assure him [***324] that the person demanding entry is an authorized inspector. *Camara v. Municipal Court, 387 U.S. 523, 532.* An examination of these functions in the OSHA context reveals that the inspection warrant adds little to the protections already afforded by the statute and pertinent regulations, and the slight additional benefit it might provide is insufficient to identify a constitutional violation or to justify [**1831] overriding Congress' judgment that the power to conduct warrantless inspections is essential.

The inspection warrant is supposed to assure the employer that the inspection is in fact routine, and that the inspector has not improperly departed from the program of representative inspections established by responsible officials. But to the extent that harassment inspections would be reduced by the necessity of obtaining a warrant, the Secretary's present enforcement scheme would have precisely the same effect. [*333] The representative inspections are conducted "'in accordance with criteria based upon accident experience and the number of employees exposed in particular industries.'" *Ante*, at 321 n. 17. If, under the present scheme, entry to covered premises is denied, the inspector can gain entry only by informing his administrative superiors of the refusal and seeking a court order requiring the employer to submit to the inspection. The inspector who would like to conduct a nonroutine search is just as likely to be deterred by the prospect of informing his superiors of his intention and of making false representations to the court when he seeks compulsory process as by the prospect of having to make bad-faith representations in an *ex parte* warrant proceeding.

The other two asserted purposes of the administrative warrant are also adequately achieved under the existing scheme. If the employer has doubts about the official status of the inspector, he is given adequate opportunity to reassure himself in this regard before permitting entry. The OSHA inspector's statutory right to enter the premises is conditioned upon the presentation of appropriate credentials. *29 U. S. C. § 657 (a)(1).* These credentials state the inspector's name, identify him as an OSHA compliance officer, and contain his photograph and signature. If the employer still has doubts, he may

make a toll-free call to verify the inspector's authority, *Usery v. Godfrey Brake & Supply Service, Inc., 545 F.2d 52, 54 (CA8 1976)*, or simply deny entry and await the presentation of a court order.

The warrant is not needed to inform the employer of the lawful limits of an OSHA inspection. The statute expressly provides that the inspector may enter all areas in a covered business "where work is performed by an employee of an employer," *29 U. S. C. § 657 (a)(1)*, "to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . . all pertinent conditions, structures, machines, apparatus, [*334] devices, equipment, and materials therein . . . ." *29 U. S. C. § 657 (a)(2)*. See also 29 CFR § 1903 (1977). While it is true that the inspection power granted by Congress is broad, the warrant procedure required by the Court [***325] does not purport to restrict this power but simply to ensure that the employer is apprised of its scope. Since both the statute and the pertinent regulations perform this informational function, a warrant is superfluous.

Requiring the inspection warrant, therefore, adds little in the way of protection to that already provided under the existing enforcement scheme. In these circumstances, the warrant is essentially a formality. In view of the obviously enormous cost of enforcing a health and safety scheme of the dimensions of OSHA, this Court should not, in the guise of construing the *Fourth Amendment*, require formalities which merely place an additional strain on already overtaxed federal resources.

Congress, like this Court, has an obligation to obey the mandate of the *Fourth Amendment*. In the past the Court "has been particularly sensitive to the Amendment's broad standard of 'reasonableness' where . . . authorizing statutes permitted the challenged searches." *Almeida-Sanchez v. United States, 413 U.S. 266, 290* (WHITE, J., dissenting). In *United States v. Martinez-Fuerte, 428 U.S. 543*, for example, respondents challenged the routine stopping of vehicles to check for aliens at permanent checkpoints located away from the border. [**1832] The checkpoints were established pursuant to statutory authority and their location and operation were governed by administrative criteria. The Court rejected respondents' argument that the constitutional reasonableness of the location and operation of the fixed checkpoints should be reviewed in a *Camara* warrant proceeding. The Court observed that the reassuring purposes of the inspection warrant were adequately served by the visible manifestations of authority exhibited at the fixed checkpoints.

[*335] Moreover, although the location and method of operation of the fixed checkpoints were deemed critical to the constitutional reasonableness of the challenged stops, the Court did not require Border Patrol officials to obtain a warrant based on a showing that the checkpoints were located and operated in accordance with administrative standards. Indeed, the Court observed that "[the] choice of checkpoint locations must be left largely to the discretion of Border Patrol officials, to be exercised in accordance with statutes and regulations that may be applicable . . . [and] [many] incidents of checkpoint operation also must be committed to the discretion of such officials." *428 U.S., at 559-560, n. 13*. The Court had no difficulty assuming that those officials responsible for allocating limited enforcement resources would be "unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." *Id., at 559*.

The Court's recognition of Congress' role in balancing the public interest advanced by various regulatory statutes and the private interest in being free from arbitrary governmental intrusion has not been limited to situations in which, for example, Congress is exercising its special power to exclude aliens. Until today, we have not rejected a congressional judgment concerning the reasonableness of a category of regulatory inspections of commercial [***326] premises. [7] While businesses are unquestionably entitled to *Fourth Amendment* protection, we have "recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." [*336] *G. M. Leasing Corp.* v. *United States, 429 U.S. 338, 353*. Thus, in *Colonnade Catering Corp.* v. *United States, 397 U.S. 72*, the Court recognized the reasonableness of a statutory authorization to inspect the premises of a caterer dealing in alcoholic beverages, noting that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." *Id., at 76*. And in *United States v. Biswell, 406 U.S. 311*, the Court sustained the authority to conduct warrantless searches of firearm dealers under the Gun Control Act of 1968 primarily on the basis of the reasonableness of the congressional evaluation of the

interests at stake. [8]

7 The Court's rejection of a legislative judgment regarding the reasonableness of the OSHA inspection program is especially puzzling in light of recent decisions finding law enforcement practices constitutionally reasonable, even though those practices involved significantly more individual discretion than the OSHA program. See, *e. g., Terry v. Ohio, 392 U.S. 1*; *Adams v. Williams, 407 U.S. 143*; *Cady v. Dombrowski, 413 U.S. 433*; *South Dakota v. Opperman, 428 U.S. 364*.

8 The Court held:

"In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends . . . on the authority of a valid statute.

. . . .

"We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." *406 U.S., at 315, 317*.

The Court, however, concludes that the deference accorded Congress in *Biswell* and *Colonnade* should be limited to situations [**1833] where the evils addressed by the regulatory statute are peculiar to a specific industry and that industry is one which has long been subject to Government regulation. The Court reasons that only in those situations can it be said that a person who engages in business will be aware of and consent to routine, regulatory inspections. I cannot agree that the respect due the congressional judgment should be so narrowly confined.

In the first place, the longevity of a regulatory program does not, in my judgment, have any bearing on the reasonableness of routine inspections necessary to achieve adequate enforcement of that program. Congress' conception of what constitute [*337] urgent federal interests need not remain static. The recent vintage of public and congressional awareness of the dangers posed by health and safety hazards in the workplace is not a basis for according less respect to the considered judgment of Congress. Indeed, in *Biswell*, the Court upheld an inspection program authorized by a regulatory statute enacted in 1968. The Court there noted that "[federal] regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but [***327] close scrutiny of this traffic is undeniably" an urgent federal interest. *406 U.S., at 315*. Thus, the critical fact is the congressional determination that federal regulation would further significant public interests, not the date that determination was made.

In the second place, I see no basis for the Court's conclusion that a congressional determination that a category of regulatory inspections is reasonable need only be respected when Congress is legislating on an industry-by-industry basis. The pertinent inquiry is not whether the inspection program is authorized by a regulatory statute directed at a single industry, but whether Congress has limited the exercise of the inspection power to those commercial premises where the evils at which the statute is directed are to be found. Thus, in *Biswell*, if Congress had authorized inspections of all commercial premises as a means of restricting the illegal traffic in firearms, the Court would have found the inspection program unreasonable; the power to inspect was upheld because it was tailored to the subject matter of Congress' proper exercise of regulatory power. Similarly, OSHA is directed at health and safety hazards in the workplace, and the inspection power granted the Secretary extends only to those areas where such hazards are likely to be found.

Finally, the Court would distinguish the respect accorded Congress' judgment in *Colonnade* and *Biswell* on the ground that businesses engaged in the liquor and firearms industry "'accept the burdens as well as the benefits of their trade . . . .'" [*338] *Ante*, at 313. In the Court's view, such businesses consent to the restrictions placed upon them, while it would be fiction to conclude that a businessman subject to OSHA consented to routine safety inspections. In fact, however, consent is fictional in both contexts. Here, as well as in *Biswell*, businesses are required to be aware of and comply with regulations governing their business activities. In both situations, the validity of the regulations depends not upon the consent of those regulated, but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's work force or

the limitation of illegal firearms traffic outweighs the businessman's interest in preventing a Government inspector from viewing those areas of his premises which relate to the subject matter of the regulation.

The case before us involves an attempt to conduct a warrantless search of the working area of an electrical and plumbing contractor. The statute authorizes such an inspection during reasonable hours. The inspection is limited to those areas over which Congress has exercised its proper legislative authority. [9] The area is also one to [**1834] which employees [*339] have regular access without any suggestion that the work performed or the equipment used [***328] has any special claim to confidentiality. [10] Congress has determined that industrial safety is an urgent federal interest requiring regulation and supervision, and further, that warrantless inspections are necessary to accomplish the safety goals of the legislation. While one may question the wisdom of pervasive governmental oversight of industrial life, I decline to question Congress' judgment that the inspection power is a necessary enforcement device in achieving the goals of a valid exercise of regulatory power. [11]

9 What the Court actually decided in *Camara v. Municipal Court, 387 U.S. 523*, and *See v. Seattle, 387 U.S. 541*, does not require the result it reaches today. *Camara* involved a residence, rather than a business establishment; although the *Fourth Amendment* extends its protection to commercial buildings, the central importance of protecting residential privacy is manifest. The building involved in *See* was, of course, a commercial establishment, but a holding that a locked warehouse may not be entered pursuant to a general authorization to "enter all buildings and premises, except the interior of dwellings, as often as may be necessary," *387 U.S., at 541*, need not be extended to cover more carefully delineated grants of authority. My view that the *See* holding should be narrowly confined is influenced by my favorable opinion of the dissent written by Mr. Justice Clark and joined by Justices Harlan and STEWART. As *Colonnade* and *Biswell* demonstrate, however, the doctrine of *stare decisis* does not compel the Court to extend those cases to govern today's holding.

10 The Act and pertinent regulation provide protection for any trade secrets of the employer. *29 U. S. C. §§ 664-665*; *29 CFR § 1903.9 (1977)*.

11 The decision today renders presumptively invalid numerous inspection provisions in federal regulatory statutes. *E. g., 30 U. S. C. § 813* (Federal Coal Mine Health and Safety Act of 1969); 30 U. S. C. §§ 723, 724 (Federal Metal and Nonmetallic Mine Safety Act); *21 U. S. C. § 603* (inspection of meat and food products). That some of these provisions apply only to a single industry, as noted above, does not alter this fact. And the fact that some "envision resort to federal-court enforcement when entry is refused" is also irrelevant since the OSHA inspection program invalidated here requires compulsory process when a compliance inspector has been denied entry. *Ante*, at 321.

I respectfully dissent.

REFERENCES

Am Jur 2d New Topic Service, Occupational Safety and Health Acts 12

10 Federal Procedural Forms L Ed, Health, Education, and Welfare 37:171 et seq.

16 Am Jur Pl & Pr Forms (Rev), Labor and Labor Relations, Forms 381 et seq.

2 Am Jur Proof of Facts 2d 517, Failure to Provide Safe Place to Work

29 USCS 657(a); *Constitution, 4th Amendment*

FRES, Job Safety and Health 11:8

US L Ed Digest, Search & Seizure 25, 27

ALR Digests, Search and Seizure 8, 17

L Ed Index to Annos, Occupational Safety and Health Acts; Search and Seizure

ALR Quick Index, Occupational Safety and Health Act; Search and Seizure

Federal Quick Index, Occupational Safety and Health Acts; Search and Seizure

Annotation References :

Validity, under Federal Constitution, of provisions of

Occupational Safety and Health Act of 1970 (*29 USCS 651 et seq.*) relating to inspections, enforcement of civil penalties, and administrative or judicial review. 34 ALR Fed 82.

Search and seizures by health officers without warrant. 12 ALR 2d 969.

LexisNexis

LEXSEE 387 U.S. 541

SEE v. CITY OF SEATTLE

No. 180

SUPREME COURT OF THE UNITED STATES

387 U.S. 541; 87 S. Ct. 1737; 18 L. Ed. 2d 943; 1967 U.S. LEXIS 1255

February 15, 1967, Argued
June 5, 1967, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF WASHINGTON.

DISPOSITION: *67 Wash. 2d 475, 408 P. 2d 262*, reversed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN1] See Seattle, Wash., Fire Code § 8.01.050.

Criminal Law & Procedure > Sentencing > Fines
Governments > Local Governments > Ordinances & Regulations
[HN2] See Seattle, Wash., Fire Code § 8.01.140.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN3] *U.S. Const. amend. IV* bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > General Overview
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN4] A search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant. *U.S. Const. amend. IV.*

Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure
Civil Procedure > Pretrial Matters > Subpoenas
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN5] Warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.

Administrative Law > Agency Investigations > Scope > Subpoenas
Administrative Law > Judicial Review > General Overview
Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > Inspection Rights > General Overview
[HN6] When an administrative agency subpoenas corporate books or records, the *Fourth Amendment* requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated

by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply. It is these rather minimal limitations on administrative action which are constitutionally required in the case of investigative entry upon commercial establishments.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN7] Administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN8] The basic component of a reasonable search under *U.S. Const. amend. IV*-- that it not be enforced without a suitable warrant procedure -- is applicable to business as well as to residential premises. .

SUMMARY:

Defendant was convicted, in a Washington state court, for refusing to permit a representative of the City of Seattle Fire Department to inspect his locked commercial warehouse without a warrant. The Supreme Court of Washington affirmed. (*67 Wash 2d 475, 408 P2d 262.*)

On appeal, the Supreme Court of the United States reversed. In an opinion by White, J., expressing the view of six members of the court, it was held that the *Fourth Amendment* forbids warrantless inspections of commercial structures as well as of private residences.

Clark, J., joined by Harlan and Stewart, JJ., dissented, expressing the view that no warrant was required for inspections under municipal fire, health, and housing inspection programs.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

SEARCH AND SEIZURE §25

inspection of commercial structures -- warrant --

Headnote:[1]

The rule that the *Fourth Amendment* bars prosecution of a person who has refused to permit a warrantless inspection of his residence in the course of a municipal fire, health, and housing inspection program is equally applicable to similar inspections of commercial structures which are not used as private residences.

[***LEdHN2]

SEARCH AND SEIZURE §25

search of commercial property -- warrant --

Headnote:[2]

The search of private commercial property, as well as the search of private houses, is presumptively unreasonable if conducted without a warrant.

[***LEdHN3]

SEARCH AND SEIZURE §20

production of books and records --

Headnote:[3]

When an administrative agency subpoenas corporate books or records, the *Fourth Amendment* requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome; the agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but must delimit the confines of a search by designating the needed documents in a formal subpoena, and, in addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

[***LEdHN4]

SEARCH AND SEIZURE §27

inspection of commercial premises -- reasonableness --

Headnote:[4]

An administrative agency's demand for access to commercial premises for inspection under a municipal fire, health, or housing inspection program will be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved.

[***LEdHN5]

SEARCH AND SEIZURE §25

inspection of commercial premises -- warrant --

Headnote:[5]

Administrative entry, without consent, upon the portions of commercial premises which are not open to the public, may only be compelled through prosecution or physical force within the framework of a warrant procedure.

[***LEdHN6]

SEARCH AND SEIZURE §8

inspection of business premises -- reasonableness --

Headnote:[6]

Business premises may reasonably be inspected in many more situations than private homes; any constitutional challenge to the reasonableness of programs for inspection of business premises, such as for licensing purposes, can only be resolved on a case-by-case basis under the general *Fourth Amendment* standard of reasonableness.

[***LEdHN7]

SEARCH AND SEIZURE §25

inspection by fire inspector -- warrant --

Headnote:[7]

The *Fourth Amendment* bars prosecution of a person who has refused to permit a fire inspector to inspect his locked warehouse without a warrant.

SYLLABUS

A suitable warrant procedure *held* required by the *Fourth Amendment* to effect unconsented administrative entry and inspection of private commercial premises. Cf. *Camara* v. *Municipal Court, ante*, p. 523. Pp. 542-546.

COUNSEL: Norman Dorsen argued the cause for appellant. With him on the briefs were Melvin L. Wulf and Marvin M. Karpatkin.

A. L. Newbould argued the cause for appellee. With him on the brief was Charles S. Rhyne.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

OPINION BY: WHITE

OPINION

[*541] [***945] [**1738] MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant seeks reversal of his conviction for refusing to permit a representative of the City of Seattle Fire Department to enter and inspect appellant's locked commercial warehouse without a warrant and without probable cause to believe that a violation of any municipal ordinance existed therein. The inspection was conducted as part of a routine, periodic city-wide canvass to obtain compliance with Seattle's Fire Code. City of Seattle Ordinance No. 87870, c. 8.01. After he refused the inspector access, appellant was arrested and charged with violating § 8.01.050 of the Code:

[HN1] "INSPECTION OF BUILDING AND PREMISES. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

387 U.S. 541, *542; 87 S. Ct. 1737, **1738;
18 L. Ed. 2d 943, ***945; 1967 U.S. LEXIS 1255

[*542] Appellant was convicted and given a suspended fine of $ 100 [1] despite his claim that § 8.01.050, if interpreted to authorize this warrantless inspection of his warehouse, would violate his rights under the *Fourth* and *Fourteenth Amendments*. We noted probable jurisdiction and set this case for argument with *Camara* v. *Municipal Court, ante*, p. 523. *385 U.S. 808*. [**1739] We find the principles enunciated in the *Camara* opinion applicable here and therefore we reverse.

1 Conviction and sentence were pursuant to § 8.01.140 of the Fire Code:

> [HN2] "PENALTY. Anyone violating or failing to comply with any provision of this Title or lawful order of the Fire Chief pursuant hereto shall upon conviction thereof be punishable by a fine not to exceed Three Hundred Dollars ($ 300.00), or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense."

In *Camara*, we held that [HN3] the *Fourth Amendment* bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence. The only question which this case presents is whether *Camara* applies [***946] to similar inspections of commercial structures which are not used as private residences. The Supreme Court of Washington, in affirming appellant's conviction, suggested that this Court "has applied different standards of reasonableness to searches of dwellings than to places of business," citing *Davis v. United States, 328 U.S. 582*. The Washington court held, and appellee here argues, that § 8.01.050, which excludes "the interiors of dwellings," [2] establishes a [*543] reasonable scheme for the warrantless inspection of commercial premises pursuant to the Seattle Fire Code.

2 "Dwelling" is defined in the Code as "a building occupied exclusively for residential purposes and having not more than two (2) dwelling units." Such dwellings are subject to the substantive provisions of the Code, but the Fire Chief's right to enter such premises is limited to times "when he has reasonable cause to believe a violation of the provisions of this Title exists therein." § 8.01.040. This provision also lacks a warrant procedure.

[***LEdHR1] [1] [***LEdHR2] [2]In *Go-Bart Importing Co.* v. *United States, 282 U.S. 344*; *Amos v. United States, 255 U.S. 313*; and *Silverthorne Lumber Co.* v. *United States, 251 U.S. 385*, this Court refused to uphold otherwise unreasonable criminal investigative searches merely because commercial rather than residential premises were the object of the police intrusions. Likewise, we see no justification for so relaxing *Fourth Amendment* safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a [HN4] search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

As governmental regulation of business enterprise has mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation. [3] Official entry upon commercial property [*544] is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit inspection of the structure in which a business is housed, as in this case, or inspection of business products, or a perusal of financial books and records. This Court has not had occasion to consider the *Fourth Amendment's* relation [**1740] to this broad range of investigations. [4] However, we [***947] have dealt with the *Fourth Amendment* issues raised by another common investigative technique, the administrative subpoena of corporate books and records. We find strong support in these subpoena cases for our conclusion that [HN5] warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.

3 See Antitrust Civil Process Act of 1962, 76 Stat. 548, *15 U. S. C. §§ 1311-1314*; H. R. Rep. No. 708, 83d Cong., 1st Sess. (1953) (reporting the "factory inspection" amendments to the Federal Food, Drug, and Cosmetic Act, 67 Stat.

476, *21 U. S. C. § 374*); Davis, The Administrative Power of Investigation, 56 Yale L. J. 1111; Handler, The Constitutionality of Investigations by the Federal Trade Commission, I & II, 28 Col. L. Rev. 708, 905; Schwartz, Crucial Areas in Administrative Law, 34 Geo. Wash. L. Rev. 401, 425-430; Note, Constitutional Aspects of Federal Tax Investigations, 57 Col. L. Rev. 676.

4 In *United States v. Cardiff, 344 U.S. 174*, this Court held that the Federal Food, Drug, and Cosmetic Act did not compel that consent be given to warrantless inspections of establishments covered by the Act. (As a result, the statute was subsequently amended, see n. 3, *supra.*) See also *Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298.*

[***LEdHR3] [3]It is now settled that, [HN6] when an administrative agency subpoenas corporate books or records, the *Fourth Amendment* requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. [5] The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced [*545] by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

5 See *United States v. Morton Salt Co., 338 U.S. 632*; *Oklahoma Press Pub. Co.* v. *Walling, 327 U.S. 186*; *United States v. Bausch & Lomb Optical Co., 321 U.S. 707*; *Hale v. Henkel, 201 U.S. 43*. See generally 1 Davis, Administrative Law §§ 3.05-3.06 (1958).

[***LEdHR4] [4]It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field. [6] Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search, *Oklahoma Press Pub. Co.* v. *Walling, 327 U.S. 186, 202*, is subject to *Fourth Amendment* limitations which do not apply to actual searches and inspections of commercial premises.

6 We do not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes.

[***LEdHR5] [5] [***LEdHR6] [6] [***LEdHR7] [7]We therefore conclude that [HN7] administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. [7] We do not in [**1741] any way [*546] imply that business premises [***948] may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general *Fourth Amendment* standard of reasonableness. We hold only that [HN8] the basic component of a reasonable search under the *Fourth Amendment* -- that it not be enforced without a suitable warrant procedure -- is applicable in this context, as in others, to business as well as to residential premises. Therefore, appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse.

387 U.S. 541, *546; 87 S. Ct. 1737, **1741;
18 L. Ed. 2d 943, ***948; 1967 U.S. LEXIS 1255

7 *Davis v. United States, 328 U.S. 582*, relied upon by the Supreme Court of Washington, held only that government officials could demand access to business premises and, upon obtaining consent to search, could seize gasoline ration coupons issued by the Government and illegally possessed by the petitioner. *Davis* thus involved the reasonableness of a particular search of business premises but did not involve a search warrant issue.

Reversed.

DISSENT BY: CLARK

DISSENT

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting. *

* [This opinion applies also to No. 92, *Camara* v. *Municipal Court of the City and County of San Francisco, ante*, p. 523.]

Eight years ago my Brother Frankfurter wisely wrote in *Frank v. Maryland, 359 U.S. 360 (1959)*:

"Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive [*547] action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few." At 372.

Today the Court renders this municipal experience, which dates back to Colonial days, for naught by overruling *Frank* v. *Maryland* and by striking down hundreds of city ordinances throughout the country and jeopardizing thereby the health, welfare, and safety of literally millions of people.

But this is not all. It prostitutes the command of the *Fourth Amendment* that "no Warrants shall issue, but upon probable cause" and sets up in the health and safety codes area inspection a newfangled "warrant" system that is entirely foreign to *Fourth Amendment* standards. It is regrettable that the Court wipes out such a long and widely accepted practice and creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop. I dissent.

I.

I shall not treat in any detail the constitutional issue involved. For [***949] me it was settled in *Frank v. Maryland, supra.* I would adhere to that decision and the reasoning therein of my late Brother Frankfurter. Time has not shown any need for change. Indeed the opposite is true, as I shall show later. As I read it, the *Fourth Amendment* guarantee of individual privacy is, by its language, specifically qualified. It prohibits only those searches that are "unreasonable." The majority seem to recognize this for they set up a new test for the long-recognized and enforced *Fourth Amendment's* "probable-cause" requirement for the issuance of warrants. They would permit the issuance of paper warrants, in area inspection programs, with probable cause based on area inspection standards as set out in municipal codes, and [*548] with warrants issued by the rubber stamp of a willing magistrate. [1] In my view, this degrades the *Fourth Amendment.*

1 Under the probable-cause standard laid down by the Court, it appears to me that the issuance of warrants could more appropriately be the function of the agency involved than that of the magistrate. This would also relieve magistrates of an intolerable burden. It is therefore unfortunate that the Court fails to pass on the validity of the use of administrative warrants.

II.

Moreover, history supports the *Frank* disposition. Over 150 years of city *in rem* inspections for health and safety purposes have continuously been enforced. In only one case during all that period have the courts denied municipalities this right. See *District of Columbia v. Little, 85 U. S. App. D. C. 242, 178 F.2d 13 (1949)*, aff'd on other grounds, *339 U.S. 1 (1950)*. In addition to the two cases in this Court (*Frank, supra,* and *Eaton v. Price, 364 U.S. 263 (1960))*, which have upheld the municipal action, not a single state high court has held against the validity of such ordinances. Indeed, since our *Frank* decision five of the States' highest courts

have found that reasonable inspections are constitutionally permissible and in fact imperative, for the protection of health, safety, and welfare of the millions who inhabit our cities and towns. [2]

> 2 *DePass v. City of Spartanburg, 234 S. C. 198, 107 S. E. 2d 350 (1959)*; *City of St. Louis v. Evans, 337 S. W. 2d 948 (Mo. 1960)*; *Camara v. Municipal Court, 237 Cal. App. 2d 128, 46 Cal. Rptr. 585 (1965)*, pet. for hearing in Cal. Sup. Ct. den. (Civ. No. 22128) Nov. 19, 1965; *Commonwealth v. Hadley, 351 Mass. 439, 222 N. E. 2d 681*, appeal docketed, Jan. 5, 1967, No. 1179, Misc., O. T. 1966; *City of Seattle* v. *See, 67 Wash. 2d 475, 408 P. 2d 262 (1965)*.

I submit that under the carefully circumscribed requirements of health and safety codes, as well as the facts and circumstances of these particular inspections, [*549] there is nothing unreasonable about the ones undertaken here. These inspections meet the *Fourth Amendment's* test of reasonableness and are entirely consistent with the Amendment's commands and our cases.

There is nothing here that suggests that the inspection was unauthorized, unreasonable, for any improper purpose, or designed as a basis for a criminal prosecution; nor is there any indication of any discriminatory, arbitrary, or capricious action affecting the appellant in either case. Indeed, Camara was admittedly violating the Code by living in quarters prohibited thereby; and See was operating a locked warehouse -- a business establishment subject to inspection.

The majority say, however, that [***950] under the present system the occupant has no way of knowing the necessity for the inspection, the limits of the inspector's power, or whether the inspector is himself authorized to perform the search. Each of the ordinances here is supported by findings as to the necessity for inspections of this type and San Francisco specifically bans the conduct in which appellant Camara is admittedly engaged. Furthermore, all of these doubts raised by the Court could be resolved very quickly. Indeed, the inspectors all have identification cards which they show the occupant and the latter could easily resolve the remaining questions by a call to the inspector's superior or, upon demand, receive a written answer thereto. The record here shows these challenges could have been easily interposed. The inspectors called on several occasions, but still no such questions were raised. [3] These cases, from the outset, were based on the *Fourth Amendment*, not on any of the circumstances surrounding the attempted inspection. To say, therefore, [*550] that the inspection is left to the discretion of the officer in the field is to reach a conclusion not authorized by this record or the ordinances involved here. The Court says the question is not whether the "inspections may be made, but whether they may be made without a warrant." With due respect, inspections of this type have been made for over a century and a half without warrants and it is a little late to impose a death sentence on such procedures now. In most instances the officer could not secure a warrant -- such as in See's case -- thereby insulating large and important segments of our cities from inspection for health and safety conditions. It is this situation -- which is even recognized by the Court -- that should give us pause.

> 3 Indeed, appellant Camara was summoned to the office of the district attorney -- but failed to appear -- where he certainly could have raised these questions.

III.

The great need for health and safety inspection is emphasized by the experience of San Francisco, a metropolitan area known for its cleanliness and safety ever since it suffered earthquake and fire back in 1906. For the fiscal year ending June 30, 1965, over 16,000 dwelling structures were inspected, of which over 5,600 required some type of compliance action in order to meet code requirements. And in 1965-1966 over 62,000 apartments, hotels, and dwellings were inspected with similar results. During the same period the Public Works Department conducted over 52,000 building inspections, over 43,000 electrical ones and over 33,000 plumbing inspections. During the entire year 1965-1966 inspectors were refused entry on less than 10 occasions where the ordinance required the householder to so permit.

In Seattle, the site of No. 180, *See* v. *City of Seattle*, fire inspections of commercial and industrial buildings totaled over 85,000 in 1965. In Jacksonville, Florida, over 21,000 fire inspections were carried on in the same year, while in excess of 135,000 health inspections were [*551] conducted. In Portland, Oregon, out of 27,000 health and safety inspections over 4,500 violations of regulations were uncovered and the fire marshal in

Portland found over 17,000 violations of the fire code in 1965 alone. In Boston over 56,000 code violations were uncovered in 1966 while in Baltimore a somewhat similar situation was reported.

[***951] In the larger metropolitan areas such as Los Angeles, over 300,000 inspections (health and fire) revealed over 28,000 hazardous violations. In Chicago during the period November 1965 to December 1966, over 18,000 buildings were found to be rodent infested out of some 46,000 inspections. And in Cleveland the division of housing found over 42,000 violations of its code in 1965; its health inspectors found over 33,000 violations in commercial establishments alone and over 27,000 dwelling code infractions were reported in the same period. And in New York City the problem is even more acute. A grand jury in Brooklyn conducted a housing survey of 15 square blocks in three different areas and found over 12,000 hazardous violations of code restrictions in those areas alone. Prior to this test there were only 567 violations reported in the three areas. The pressing need for inspection is shown by the fact that some 12,000 additional violations were actually present at that very time.

An even more disastrous effect will be suffered in plumbing violations. These are not only more frequent but also the more dangerous to the community. Defective plumbing causes back siphonage of sewage and other household wastes. Chicago's disastrous amoebic dysentery epidemic is an example. Over 100 deaths resulted. Fire code violations also often cause many conflagrations. Indeed, if the fire inspection attempted in *District of Columbia v. Little, 339 U.S. 1 (1950)*, [*552] had been permitted a two-year-old child's death resulting from a fire that gutted the home involved there on August 6, 1949, might well have been prevented.

Inspections also play a vital role in urban redevelopment and slum clearance. Statistics indicate that slums constitute 20% of the residential area of the average American city, still they produce 35% of the fires, 45% of the major crimes, and 50% of the disease. Today's decision will play havoc with the many programs now designed to aid in the improvement of these areas. We should remember the admonition of MR. JUSTICE DOUGLAS in *Berman v. Parker, 348 U.S. 26, 32 (1954)*:

"Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden."

IV.

The majority propose two answers to this admittedly pressing problem of need for constant inspection of premises for fire, health, and safety infractions of municipal codes. First, they say that there will be few refusals of entry to inspect. Unlike the attitude of householders as to codes requiring entry for inspection, we have few empirical statistics on attitudes where consent must be obtained. It is true that in the required entry-to-inspect situations most occupants welcome the periodic visits of municipal inspectors. In my view this will not be true when consent is necessary. The City of Portland, Oregon, has a voluntary home inspection program. The 1966 record shows that out of 16,171 calls where the occupant was at home, entry was refused in 2,540 cases -- approximately one out of six. This [***952] is a large percentage and would place an intolerable burden on the inspection service [*553] when required to secure warrants. What is more important is that out of the houses inspected 4,515 hazardous conditions were found! Hence, on the same percentage, there would be approximately 840 hazardous situations in the 2,540 in which inspection was refused in Portland.

Human nature being what it is, we must face up to the fact that thousands of inspections are going to be denied. The economics of the situation alone will force this result. Homeowners generally try to minimize maintenance costs and some landlords make needed repairs only when required to do so. Immediate prospects for costly repairs to correct possible defects are going to keep many a door closed to the inspector. It was said by way of dissent in *Frank v. Maryland, supra, at 384*, that "one rebel a year" is not too great a price to pay for the right to privacy. But when voluntary inspection is relied upon this "one rebel" is going to become a general rebellion. That there will be a significant increase in refusals is certain and, as time goes on, that trend may well become a frightening reality. It is submitted that voluntary compliance cannot be depended upon.

The Court then addresses itself to the propriety of warrantless area inspections. [4] The basis of "probable cause" for area inspection warrants, the Court says, begins with the *Fourth Amendment's* reasonableness

387 U.S. 541, *553; 87 S. Ct. 1737, **1741;
18 L. Ed. 2d 943, ***952; 1967 U.S. LEXIS 1255

requirement; in determining whether an inspection is reasonable "the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." It adds that there are "a number of persuasive factors" [*554] supporting "the reasonableness of area code-enforcement inspections." It is interesting to note that the factors the Court relies upon are the identical ones my Brother Frankfurter gave for excusing warrants in *Frank v. Maryland, supra.* They are: long acceptance historically; the great public interest in health and safety; and the impersonal nature of the inspections -- not for evidence of crime -- but for the public welfare. Upon this reasoning, the Court concludes that probable cause exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." These standards will vary, it says, according to the code program and the condition of the area with reference thereto rather than the condition of a particular dwelling. The majority seem to hold that warrants may be obtained after a refusal of initial entry; I can find no such constitutional distinction or command. These boxcar warrants will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more -- with space for the street number to be inserted -- and issued by magistrates in broadcast fashion as a matter of course.

> 4 It is interesting to note that in each of the cases here the authorities were making periodic area inspections when the refusals to allow entry occurred. Under the holding of the Court today, "probable cause" would therefore be present in each case and a "paper warrant" would issue as a matter of course. This but emphasizes the absurdity of the holding.

I ask: Why go through such an exercise, such a pretense? As the same essentials are being followed under the present procedures, I ask: Why the ceremony, the delay, the [***953] expense, the abuse of the search warrant? In my view this will not only destroy its integrity but will degrade the magistrate issuing them and soon bring disrepute not only upon the practice but upon the judicial process. It will be very costly to the city in paperwork incident to the issuance of the paper warrants, in loss of time of inspectors and waste of the time of magistrates and will result in more annoyance to the public. It will also be more burdensome to the occupant of the premises to be inspected. Under a search warrant the inspector [*555] can enter any time he chooses. Under the existing procedures he can enter only at reasonable times and invariably the convenience of the occupant is considered. I submit that the identical grounds for action elaborated today give more support -- both legal and practical -- to the present practice as approved in *Frank v. Maryland, supra,* than they do to this legalistic facade that the Court creates. In the Court's anxiety to limit its own holding as to mass searches it hopes to divert attention from the fact that it destroys the health and safety codes as they apply to individual inspections of specific problems as contrasted to area ones. While the latter are important, the individual inspection is often more so; that was true in *District of Columbia* v. *Little* and it may well be in both *Camara* and *See.* Frankly, I cannot understand how the Court can authorize warrants in wholesale fashion in the case of an area inspection, but hold the hand of the inspector when a specific dwelling is hazardous to the health and safety of its neighbors.

REFERENCES

Am Jur, Searches and Seizures (1st ed 13)

US Digest Anno, Search and Seizure 25

ALR Digests, Search and Seizure 17, 18

L ed Index to Anno, Search and Seizure

ALR Quick Index, Search and Seizure

Annotation References:

Searches and seizures by health officer without warrant. *13 ALR2d 969.*

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LEXSEE 387 U.S. 523

CAMARA v. MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

No. 92

SUPREME COURT OF THE UNITED STATES

387 U.S. 523; 87 S. Ct. 1727; 18 L. Ed. 2d 930; 1967 U.S. LEXIS 1254

February 15, 1967, Argued
June 5, 1967, Decided

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

DISPOSITION: *237 Cal. App. 2d 128, 46 Cal. Rptr. 585*, vacated and remanded.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview
Criminal Law & Procedure > Bail > Denial of Bail
Real Property Law > Zoning & Land Use > Building & Housing Codes

[HN1] San Francisco, Cal., Housing Code § 503, stated that authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > General Overview
Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > General Overview

[HN2] See *U.S. Const. amend. IV.*

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Bill of Rights > State Application

[HN3] The basic purpose of the *Fourth Amendment* is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The *Fourth Amendment* thus gives concrete expression to a right of the people which is basic to a free society. As such, the *Fourth Amendment* is enforceable against the states through the *Fourteenth Amendment*.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

[HN4] Except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Administrative Law > Agency Investigations > Scope > Inspections

Criminal Law & Procedure > Sentencing > Fines
Real Property Law > Zoning & Land Use > Building & Housing Codes
[HN5] A routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. But the *Fourth Amendment* interests at stake in these inspection cases are not merely peripheral. Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant. Finally, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence.

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview
Real Property Law > Zoning & Land Use > Building & Housing Codes
[HN6] In assessing whether the public interest demands creation of a general exception to the *Fourth Amendment's* warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN7] Administrative searches such as those conducted by municipal building inspectors are significant intrusions upon the interests protected by the *Fourth Amendment*. Such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the *Fourth Amendment* guarantees to the individual. The arguments that the searches are designed to make the least possible demand on the individual occupant or that the public interest demands such searches are insufficient to justify so substantial a weakening of the *Fourth Amendment's* protections.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Criminal Law & Procedure > Search & Seizure > Requirement of Government Action
Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
[HN8] In cases in which the *Fourth Amendment* requires that a warrant to search be obtained, probable cause is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is reasonable only when there is probable cause to believe that they will be uncovered in a particular dwelling.

Administrative Law > Agency Investigations > Scope > Inspections
[HN9] The only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures.

Governments > Local Governments > Finance
Governments > Public Improvements > Community Redevelopment
Real Property Law > Zoning & Land Use > Building & Housing Codes
[HN10] Section 311(a) of the Housing and Urban Development Act of 1965, 42 U.S.C.S. § 1468, authorizes grants of federal funds to cities, other municipalities, and counties for the purpose of assisting such localities in carrying out programs of concentrated code enforcement in deteriorated or deteriorating areas in which such enforcement, together with those public improvements to be provided by the locality, may be expected to arrest the decline of the area.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

[HN11] Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. But a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions -- faulty wiring is an obvious example -- are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Governments > Local Governments > Licenses

[HN12] Having concluded that the area inspection is a reasonable search of private property within the meaning of the *Fourth Amendment*, it is obvious that probable cause to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e. g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > General Overview

[HN13] The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview

[HN14] In the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the *Fourth Amendment's* requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.

SUMMARY:

While awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit building inspectors to inspect his residence without warrant, the defendant brought an action for a writ of prohibition to be issued to the criminal court, alleging that the ordinance authorizing such inspections was unconstitutional on its face. The Superior Court of California denied the writ, the District Court of Appeals affirmed (*237 Cal App 2d 128, 46 Cal Rptr 585*), and the Supreme Court of California denied a petition for hearing.

On appeal, the Supreme Court of the United States vacated the judgment below. In an opinion by White, J., expressing the views of six members of the court, it was held that under the *Fourth Amendment* the defendant had a constitutional right to insist that the inspectors obtain a warrant to search, and that he may not constitutionally be convicted for refusal to consent to the inspection. The court's contrary decision in *Frank v Maryland, 359 US*

360, 3 L ed 2d 877, *79 S Ct 804*, was overruled.

Clark, J., joined by Harlan and Stewart, JJ., dissented, expressing the view that *Frank v Maryland, supra*, which had settled the question, should be adhered to by the court.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

SEARCH AND SEIZURE §4

Fourth Amendment -- purpose --

Headnote:[1]

The basic purpose of the *Fourth Amendment* is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials; the Amendment thus gives concrete expression to a right of the people which is basic to a free society.

[***LEdHN2]

CONSTITUTIONAL LAW §34

SEARCH AND SEIZURE §4

state violations --

Headnote:[2]

The guaranty against unreasonable searches and seizures contained in the *Fourth Amendment* is applicable to the states by reason of the *due process clause of the Fourteenth Amendment*.

[***LEdHN3]

SEARCH AND SEIZURE §25

necessity of warrant --

Headnote:[3]

Except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant.

[***LEdHN4]

SEARCH AND SEIZURE §5

Fourth Amendment -- scope --

Headnote:[4]

The protection of the *Fourth Amendment* against unreasonable searches and seizures is not limited to a situation in which an individual is suspected of criminal behavior.

[***LEdHN5]

SEARCH AND SEIZURE §26

inspection of premises -- warrant --

Headnote:[5]

Without any reassessment of the basic decision of a municipal housing agency to canvass an area, a neutral magistrate, in issuing a search warrant, may review questions as to whether enforcement of the municipal code involved requires inspection of the premises, what the lawful limits of an inspector's power to search are, and whether the inspector himself is acting under proper authorization.

[***LEdHN6]

SEARCH AND SEIZURE §25

inspection of premises -- warrant --

Headnote:[6]

The discretion of an official in the field, making inspection of private premises for the enforcement of municipal fire, health, or housing inspection programs, is the kind of discretion which the Supreme Court of the United States has consistently circumscribed by a requirement that a disinterested party warrant the need to search; broad statutory safeguards are no substitute for individualized review.

[***LEdHN7]

ADMINISTRATIVE LAW §254

CONSTITUTIONAL LAW §9

reasonableness standard --

Headnote:[7]

In applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration.

[***LEdHN8]

SEARCH AND SEIZURE §25

necessity of warrant --

Headnote:[8]

In assessing whether the public interest demands creation of a general exception to the *Fourth Amendment's* warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

[***LEdHN9]

SEARCH AND SEIZURE §25

administrative search --

Headnote:[9]

Administrative searches to enforce a municipal fire, health, or housing inspection program being significant intrusions upon the interests protected by the *Fourth Amendment*, such searches, when authorized and conducted without a warrant procedure, lack the traditional safeguards which the *Fourth Amendment* guarantees to the individual.

[***LEdHN10]

SEARCH AND SEIZURE §27

probable cause --

Headnote:[10]

In cases in which the *Fourth Amendment* requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness; to apply this standard, it is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.

[***LEdHN11]

SEARCH AND SEIZURE §27

search for goods -- reasonableness --

Headnote:[11]

A search for specific stolen or contraband goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

[***LEdHN12]

SEARCH AND SEIZURE §27

inspection of premises -- reasonableness --

Headnote:[12]

In determining whether a particular inspection in the enforcement of a municipal fire, health, or housing inspection program is reasonable--and thus in determining whether there is probable cause to issue a warrant for that inspection--the need for the inspection must be weighed in terms of the reasonable goals of code enforcement.

[***LEdHN13]

SEARCH AND SEIZURE §8

area inspection --

Headnote:[13]

Area inspection carried out in the enforcement of a municipal fire, health, or housing inspection program is a reasonable search of private property within the meaning of the *Fourth Amendment*.

[***LEdHN14]

SEARCH AND SEIZURE §27

inspection of premises -- probable cause --

Headnote:[14]

Probable cause to issue a warrant to inspect premises in the enforcement of a municipal fire, health, or housing

inspection program must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling; such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building, or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling; if a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

[***LEdHN15]

SEARCH AND SEIZURE §25

inspection of premises -- emergency --

Headnote:[15]

Prompt inspection of premises, even without a warrant, is proper in emergency situations, such as the seizure of unwholesome food, compulsory smallpox vaccination, health quarantine, or summary destruction of tubercular cattle.

[***LEdHN16]

CONSTITUTIONAL LAW §526

SEARCH AND SEIZURE §25

warrant -- housing inspection --

Headnote:[16]

Under the *Fourth Amendment*, applicable to the states through the *due process clause of the Fourteenth Amendment*, a person has a constitutional right to insist that building inspectors, before entering his residence, obtain a warrant to search, and he may not constitutionally be convicted for refusing to consent to the inspection.

[***LEdHN17]

PROHIBITION §5

to prevent unconstitutional conviction --

Headnote:[17]

Under California law a writ of prohibition will issue to prevent a conviction of crime barred by the *Fourth Amendment*.

SYLLABUS

Appellant was charged with violating the San Francisco Housing Code for refusing, after three efforts by city housing inspectors to secure his consent, to allow a warrantless inspection of the ground-floor quarters which he leased and residential use of which allegedly violated the apartment building's occupancy permit. Claiming the inspection ordinance unconstitutional for failure to require a warrant for inspections, appellant while awaiting trial sued in a State Superior Court for a writ of prohibition, which the court denied. Relying on *Frank v. Maryland, 359 U.S. 360*, and similar cases, the District Court of Appeal affirmed, holding that the ordinance did not violate the *Fourth Amendment*. The State Supreme Court denied a petition for hearing. *Held*:

1. The *Fourth Amendment* bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence. *Frank v. Maryland, supra, pro tanto* overruled. Pp. 528-534.

(a) The basic purpose of the *Fourth Amendment*, which is enforceable against the States through the Fourteenth, through its prohibition of "unreasonable" searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. P. 528.

(b) With certain carefully defined exceptions, an unconsented warrantless search of private property is "unreasonable." Pp. 528-529.

(c) Contrary to the assumption of *Frank v. Maryland, supra*, *Fourth Amendment* interests are not merely "peripheral" where municipal fire, health, and housing inspection programs are involved whose purpose is to determine the existence of physical conditions not complying with local ordinances. Those programs, moreover, are enforceable by criminal process, as is refusal to allow an inspection. Pp. 529-531.

(d) Warrantless administrative searches cannot be justified on the grounds that they make minimal demands on occupants; that warrants in such cases are unfeasible; or that area inspection programs could not function under reasonable search-warrant requirements. Pp. 531-533.

2. Probable cause upon the basis of which warrants are to be issued for area code-enforcement inspections is not dependent on the inspector's belief that a particular dwelling violates the code but on the reasonableness of the enforcement agency's appraisal of conditions in the area as a whole. The standards to guide the magistrate in the issuance of such search warrants will necessarily vary with the municipal program being enforced. Pp. 534-539.

3. Search warrants which are required in nonemergency situations should normally be sought only after entry is refused. Pp. 539-540.

4. In the nonemergency situation here, appellant had a right to insist that the inspectors obtain a search warrant. P. 540.

COUNSEL: Marshall W. Krause argued the cause for appellant. With him on the briefs was Donald M. Cahen.

Albert W. Harris, Jr., Assistant Attorney General of California, argued the cause for appellee. With him on the brief were Thomas C. Lynch, Attorney General, and Gloria F. DeHart, Deputy Attorney General.

Leonard J. Kerpelman filed a brief for Homeowners in Opposition to Housing Authoritarianism, as amicus curiae, urging reversal.

Briefs of amici curiae, urging affirmance, were filed by Thomas M. O'Connor, John W. Sholenberger, Roger Arnebergh, Barnett I. Shur, Alexander G. Brown, David Stahl and Robert E. Michalski for the Member Municipalities of the National Institute of Municipal Law Officers, and by Elliot L. Richardson, Attorney General, Willie J. Davis, Assistant Attorney General, Edward T. Martin, Deputy Attorney General, Max Rosenblatt, Lewis H. Weinstein and Loyd M. Starrett for the Commonwealth of Massachusetts et al.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

OPINION BY: WHITE

OPINION

[*525] [***933] [**1728] MR. JUSTICE WHITE delivered the opinion of the Court.

In *Frank v. Maryland, 359 U.S. 360,* this Court upheld, by a five-to-four vote, a state court conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a search warrant. In *Eaton v. Price, 364 U.S. 263*, a similar conviction [**1729] was affirmed by an equally divided Court. Since those closely divided decisions, more intensive efforts at all levels of government to contain and eliminate urban blight have led to increasing use of such inspection techniques, while numerous decisions of this Court have more fully defined the *Fourth Amendment's* effect on state and municipal action. *E. g., Mapp v. Ohio, 367 U.S. 643*; *Ker v. California, 374 U.S. 23*. In view of the growing nationwide importance of the problem, we noted probable jurisdiction in this case and in *See* v. *City of Seattle, post,* p. 541, to re-examine whether administrative inspection programs, as presently authorized and conducted, violate *Fourth Amendment* rights as those rights are enforced against the States through the *Fourteenth Amendment. 385 U.S. 808*.

Appellant brought this action in a California Superior Court alleging that he was awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence, and that a writ of prohibition should issue to the criminal court because the ordinance authorizing such inspections is unconstitutional on its face. The Superior Court denied the writ, the District Court of Appeal affirmed, and the Supreme Court of California denied a petition for hearing. Appellant properly raised and had considered by the California courts the federal constitutional questions he now presents to this Court.

Though there were no judicial findings of fact in this prohibition proceeding, we shall set forth the parties' factual allegations. On November 6, 1963, an inspector [*526] of the Division of Housing Inspection of the San Francisco Department of Public Health entered an apartment building to make a routine annual inspection for possible violations of [***934] the city's Housing Code. [1] The building's manager informed the inspector that appellant, lessee of the ground floor, was using the rear of his leasehold as a personal residence. Claiming that the building's occupancy permit did not allow residential use of the ground floor, the inspector confronted appellant and demanded that he permit an inspection of the premises. Appellant refused to allow the inspection because the inspector lacked a search warrant.

387 U.S. 523, *526; 87 S. Ct. 1727, **1729;
18 L. Ed. 2d 930, ***934; 1967 U.S. LEXIS 1254

1 The inspection was conducted pursuant to § 86 (3) of the San Francisco Municipal Code, which provides that apartment house operators shall pay an annual license fee in part to defray the cost of periodic inspections of their buildings. The inspections are to be made by the Bureau of Housing Inspection "at least once a year and as often thereafter as may be deemed necessary." The permit of occupancy, which prescribes the apartment units which a building may contain, is not issued until the license is obtained.

The inspector returned on November 8, again without a warrant, and appellant again refused to allow an inspection. A citation was then mailed ordering appellant to appear at the district attorney's office. When appellant failed to appear, two inspectors returned to his apartment on November 22. They informed appellant that he was required by law to permit an inspection under § 503 of the Housing Code:

"Sec. 503 RIGHT TO ENTER BUILDING. [HN1] Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

[*527] Appellant nevertheless refused the inspectors access to his apartment without a search warrant. Thereafter, a complaint was filed charging him with refusing [**1730] to permit a lawful inspection in violation of § 507 of the Code. [2] Appellant was arrested on December 2 and released on bail. When his demurrer to the criminal complaint was denied, appellant filed this petition for a writ of prohibition.

2 "Sec. 507 PENALTY FOR VIOLATION. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($ 500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue."

Appellant has argued throughout this litigation that § 503 is contrary to the *Fourth* and *Fourteenth Amendments* in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein. Consequently, appellant contends, he may not be prosecuted under § 507 for refusing to permit an inspection unconstitutionally authorized by § 503. Relying on *Frank* v. *Maryland, Eaton* v. *Price*, and decisions in other States, [3] [***935] the District [*528] Court of Appeal held that § 503 does not violate *Fourth Amendment* rights because it "is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions." Having concluded that *Frank* v. *Maryland*, to the extent that it sanctioned such warrantless inspections, must be overruled, we reverse.

3 *Givner v. State, 210 Md. 484, 124 A. 2d 764 (1956)*; *City of St. Louis v. Evans, 337 S. W. 2d 948 (Mo. 1960)*; *State ex rel. Eaton v. Price, 168 Ohio St. 123, 151 N. E. 2d 523 (1958)*, aff'd by an equally divided *Court, 364 U.S. 263 (1960)*. See also *State v. Rees, 258 Iowa 813, 139 N. W. 2d 406 (1966)*; *Commonwealth v. Hadley, 351 Mass. 439, 222 N. E. 2d 681 (1966)*, appeal docketed Jan. 5, 1967, No. 1179, Misc., O. T. 1966; *People v. Laverne, 14 N. Y. 2d 304, 200 N. E. 2d 441 (1964)*.

I.

[***LEdHR1] [1] [***LEdHR2] [2][HN2] The *Fourth Amendment* provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [HN3] The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental

officials. The *Fourth Amendment* thus gives concrete expression to a right of the people which "is basic to a free society." *Wolf v. Colorado, 338 U.S. 25, 27.* As such, the *Fourth Amendment* is enforceable against the States through the *Fourteenth Amendment. Ker v. California, 374 U.S. 23, 30.*

[***LEdHR3] [3]Though there has been general agreement as to the fundamental purpose of the *Fourth Amendment*, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, [**1731] one governing principle, justified by history and by current experience, has consistently been followed: [HN4] except in certain carefully defined classes of cases, a search of private property without proper consent [*529] is "unreasonable" unless it has been authorized by a valid search warrant. See, *e. g., Stoner v. California, 376 U.S. 483*; *United States v. Jeffers, 342 U.S. 48*; *McDonald v. United States, 335 U.S. 451*; *Agnello v. United States, 269 U.S. 20.* As the Court explained in *Johnson v. United States, 333 U.S. 10, 14*:

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

In *Frank* v. *Maryland*, this Court upheld the conviction of one who refused to permit a warrantless inspection of private premises for the purposes of locating and abating a suspected public nuisance. Although *Frank* can arguably be distinguished from this case on its facts, [4] the *Frank* opinion has generally [***936] been interpreted as carving out an additional exception to the rule that warrantless searches are unreasonable under the *Fourth Amendment.* See *Eaton v. Price, supra.* The District Court of Appeal so interpreted *Frank* in this case, and that ruling is the core of appellant's challenge here. We proceed to a re-examination of the factors which [*530] persuaded the *Frank* majority to adopt this construction of the *Fourth Amendment's* prohibition against unreasonable searches.

4 In *Frank*, the Baltimore ordinance required that the health inspector "have cause to suspect that a nuisance exists in any house, cellar or enclosure" before he could demand entry without a warrant, a requirement obviously met in *Frank* because the inspector observed extreme structural decay and a pile of rodent feces on the appellant's premises. Section 503 of the San Francisco Housing Code has no such "cause" requirement, but neither did the Ohio ordinance at issue in *Eaton* v. *Price*, a case which four Justices thought was controlled by *Frank. 364 U.S., at 264, 265, n. 2* (opinion of MR. JUSTICE BRENNAN).

To the *Frank* majority, municipal fire, health, and housing inspection programs "touch at most upon the periphery of the important interests safeguarded by the *Fourteenth Amendment's* protection against official intrusion," *359 U.S., at 367*, because the inspections are merely to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances. Since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action" which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the *Fourth* and *Fifth Amendments* [5] are said not to be involved, but only the less intense "right to be secure from intrusion into personal privacy." *Id., at 365.*

5 See *Boyd v. United States, 116 U.S. 616.* Compare *Schmerber v. California, 384 U.S. 757, 766-772.*

[***LEdHR4] [4]We may agree that [HN5] a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, *Frank* differed from the great bulk of *Fourth Amendment* cases which have been considered by this Court. But we cannot agree that the *Fourth Amendment* interests at [**1732] stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the *Fourth Amendment* only when the individual is suspected of criminal behavior. [6] For instance, even the most law-abiding citizen [*531] has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of

criminal entry under the guise of official sanction is a serious threat to personal and family security. And even accepting *Frank*'s rather remarkable premise, inspections of the kind we are here considering do in fact jeopardize "self-protection" interests of the property owner. Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint. [7] Even in cities where discovery of a violation produces [***937] only an administrative compliance order, [8] refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant. [9] Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence.

6 See *Abel v. United States, 362 U.S. 217, 254-256* (MR. JUSTICE BRENNAN, dissenting); *District of Columbia v. Little, 85 U. S. App. D. C. 242, 178 F.2d 13*, aff'd, *339 U.S. 1*.

7 See New York, N. Y., Administrative Code § D26-8.0 (1964).

8 See Washington, D. C., Housing Regulations § 2104.

9 This is the more prevalent enforcement procedure. See Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 813-816.

The *Frank* majority suggested, and appellee reasserts, two other justifications for permitting administrative health and safety inspections without a warrant. First, it is argued that these inspections are "designed to make the least possible demand on the individual occupant." *359 U.S., at 367*. The ordinances authorizing inspections are hedged with safeguards, and at any rate the inspector's particular decision to enter must comply with the constitutional standard of reasonableness even if he may enter without a warrant. [10] In addition, the argument [*532] proceeds, the warrant process could not function effectively in this field. The decision to inspect an entire municipal area is based upon legislative or administrative assessment of broad factors such as the area's age and condition. Unless the magistrate is to review such policy matters, he must issue a "rubber stamp" warrant which provides no protection at all to the property owner.

10 The San Francisco Code requires that the inspector display proper credentials, that he inspect "at reasonable times," and that he not obtain entry by force, at least when there is no emergency. The Baltimore ordinance in *Frank* required that the inspector "have cause to suspect that a nuisance exists." Some cities notify residents in advance, by mail or posted notice, of impending area inspections. State courts upholding these inspections without warrants have imposed a general reasonableness requirement. See cases cited, n. 3, *supra*.

[***LEdHR5] [5] [***LEdHR6] [6]In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the *Fourth Amendment*. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of [**1733] the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to [*533] search. See cases cited, p. 529, *supra*. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked [***938] at the risk of a criminal penalty.

[***LEdHR7] [7] [***LEdHR8] [8]The final justification suggested for warrantless administrative searches is that the public interest demands such a rule: it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. Of course, in applying any reasonableness standard,

including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. For example, to say that gambling raids may not be made at the discretion of the police without a warrant is not necessarily to say that gambling raids may never be made. [HN6] In assessing whether the public interest demands creation of a general exception to the *Fourth Amendment's* warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. See *Schmerber v. California, 384 U.S. 757, 770-771*. It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.

[*534] [***LEdHR9] [9]In summary, we hold that [HN7] administrative searches of the kind at issue here are significant intrusions upon the interests protected by the *Fourth Amendment*, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the *Fourth Amendment* guarantees to the individual, and that the reasons put forth in *Frank* v. *Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the *Fourth Amendment's* protections. Because of the nature of the municipal programs under consideration, however, these conclusions must be the beginning, not the end, of our inquiry. The *Frank* majority gave recognition to the unique character of these inspection programs by refusing to require search warrants; to reject that disposition does not justify ignoring the question whether some other accommodation between public need and individual rights is essential.

II.

The *Fourth Amendment* provides that, "no Warrants shall issue, but upon probable cause." Borrowing from more [**1734] typical *Fourth Amendment* cases, appellant argues not only that code enforcement inspection programs must be circumscribed by a warrant procedure, but also that warrants should issue only when the inspector possesses probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced. We disagree.

[***939] [***LEdHR10] [10] [***LEdHR11] [11][HN8] In cases in which the *Fourth Amendment* requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected [*535] interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

[***LEdHR12] [12]Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures. 11 In determining whether a particular inspection is reasonable -- and thus in determining whether there is probable cause to issue a warrant for that inspection -- the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.

11 See *Abbate Bros.* v. *City of Chicago, 11 Ill. 2d 337, 142 N. E. 2d 691*; *City of Louisville v. Thompson, 339 S. W. 2d 869* (Ky.); *Adamec v. Post, 273 N. Y. 250, 7 N. E. 2d 120*; *Paquette v. City of Fall River, 338 Mass. 368, 155 N. E. 2d 775*; *Richards v. City of Columbia, 227 S. C. 538,*

88 S. E. 2d 683; *Boden v. City of Milwaukee, 8 Wis. 2d 318, 99 N. W. 2d 156.*

There is unanimous agreement among those most familiar with this field that [HN9] the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic [*536] inspections of all structures. [12] It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building. Appellee contends that, if the probable cause standard urged by appellant is adopted, the area inspection [**1735] will be eliminated as a means of seeking compliance with code standards and the reasonable [***940] goals of code enforcement will be dealt a crushing blow.

12 See Osgood & Zwerner, Rehabilitation and Conservation, 25 Law & Contemp. Prob. 705, 718 and n. 43; Schwartz, Crucial Areas in Administrative Law, 34 Geo. Wash. L. Rev. 401, 423 and n. 93; Comment, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304, 316-317; Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 807, 851; Note, Municipal Housing Codes, 69 Harv. L. Rev. 1115, 1124-1125. [HN10] Section 311 (a) of the Housing and Urban Development Act of 1965, 79 Stat. 478, 42 U. S. C. § 1468 (1964 ed., Supp. I), authorizes grants of federal funds "to cities, other municipalities, and counties for the purpose of assisting such localities in carrying out programs of concentrated code enforcement in deteriorated or deteriorating areas in which such enforcement, together with those public improvements to be provided by the locality, may be expected to arrest the decline of the area."

[***LEdHR13] [13]In meeting this contention, appellant argues first, that his probable cause standard would not jeopardize area inspection programs because only a minute portion of the population will refuse to consent to such inspections, and second, that individual privacy in any event should be given preference to the public interest in conducting such inspections. The first argument, even if true, is irrelevant to the question whether the area inspection is reasonable within the meaning of the *Fourth Amendment*. The second argument is in effect an assertion that the area inspection is an unreasonable search. [HN11] Unfortunately, there can be no ready test for determining reasonableness [*537] other than by balancing the need to search against the invasion which the search entails. But we think that a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. See *Frank v. Maryland, 359 U.S., at 367-371*. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions -- faulty wiring is an obvious example -- are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy. Both the majority and the dissent in *Frank* emphatically supported this conclusion:

"Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned." *359 U.S., at 372.*

[*538] ". . . This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would

justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain [***941] period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of 'probable cause' required by the *Fourth Amendment* can take into account the nature of the search that is being sought." *359 U.S., at 383* (MR. JUSTICE DOUGLAS, dissenting).

[***LEdHR14] [14][HN12] Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the *Fourth Amendment*, it is obvious [**1736] that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e. g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a "synthetic search warrant" and thereby to lessen the overall protections of the *Fourth Amendment. Frank v. Maryland, 359 U.S., at 373.* [*539] But we do not agree. [HN13] The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Cf. *Oklahoma Press Pub. Co.* v. *Walling, 327 U.S. 186.* Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy. See *Eaton v. Price, 364 U.S., at 273-274* (opinion of MR. JUSTICE BRENNAN).

III.

[***LEdHR15] [15]Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. See *North American Cold Storage Co.* v. *City of Chicago, 211 U.S. 306* (seizure of unwholesome food); *Jacobson v. Massachusetts, 197 U.S. 11* (compulsory smallpox vaccination); *Compagnie Francaise v. Board of Health, 186 U.S. 380* (health quarantine); *Kroplin v. Truax, 119 Ohio St. 610, 165 N. E. 498* (summary destruction of tubercular cattle). On the other hand, [HN14] in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the *Fourth Amendment's* requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless [*540] there has been a citizen complaint [***942] or there is other satisfactory reason for securing immediate entry. Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.

IV.

[***LEdHR16] [16] [***LEdHR17] [17]In this case, appellant has been charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. There was no emergency demanding immediate access; in fact, the inspectors made three trips to the building in an attempt to obtain appellant's consent to search. Yet no warrant was obtained and thus appellant was unable to verify either the need for or the appropriate limits of the inspection. No doubt, the inspectors entered the public portion of the building with the consent of the landlord, through the building's manager, but appellee does not contend that such consent was sufficient [**1737] to authorize inspection of appellant's premises. Cf. *Stoner v. California, 376 U.S. 483*; *Chapman v. United States, 365 U.S. 610*; *McDonald v. United States, 335 U.S. 451.* Assuming the facts to be as the parties have alleged, we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection. It appears from the opinion of the District Court of Appeal that under these

circumstances a writ of prohibition will issue to the criminal court under California law.

The judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE CLARK, see *post*, p. 546.]

REFERENCES

Am Jur, Health (1st ed 36); Searches and Seizures (1st ed 13)

US Digest Anno, Search and Seizure 25

ALR Digests, Search and Seizure 17, 18

L ed Index to Anno, Search and Seizure

ALR Quick Index, Health; Search and Seizure

Annotation References:

Searches and seizures by health officers without warrant. *13 ALR2d 969.*

LexisNexis

LEXSEE 230 OR. 204

GORDON CREEK TREE FARMS, INC. v. LAYNE et al, HILLYARD et al

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF OREGON, Department One

230 Ore. 204*; *368 P.2d 737*; *1962 Ore. LEXIS 278

February 7, 1962

PRIOR HISTORY: [***1] Appeal from Circuit Court, Multnomah County. Barnett H. Goldstein, Judge Pro Tem. Original Opinion of January 25, 1961, Reported at: *230 Ore. 204*.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Judgments > Nonsuits > General Overview
Criminal Law & Procedure > Witnesses > Credibility
Evidence > Procedural Considerations > Weight & Sufficiency
[HN1] The findings have the effect of a verdict. They can not be set aside unless the court is of the opinion that the findings are not supported by any competent, substantial evidence, as distinguished from the task of weighing the evidence. It is not the function of this court in law actions to pass on the credibility of witnesses, to weigh the evidence, or to resolve conflicting testimony. It is, however, the province of the appellate court, when properly presented, to decide whether there is substantial evidence to support the findings of the court or the verdict of the jury. It is settled that whenever a defendant has not rested upon a motion for nonsuit, but proceeds instead to adduce evidence in support of his own contentions, such evidence may be considered in order to sustain a recovery by the plaintiff. The court has repeatedly held that it will not reverse a ruling of the trial court denying a nonsuit whenever upon the whole case, as presented by both parties, the record shows sufficient substantial evidence to take the case to the jury.

Civil Procedure > Pretrial Judgments > Nonsuits > General Overview
Civil Procedure > Trials > Judgment as Matter of Law > General Overview
[HN2] When giving consideration to a motion for nonsuit or one for a directed verdict, the evidence must be viewed in the light most favorable to plaintiff and accord plaintiff the benefit of every reasonable inference which may be drawn from the evidence and every intendment is in his favor.

Torts > Vicarious Liability > Independent Contractors > General Overview
[HN3] The general rule that an employer is not liable for the torts of an independent contractor or his servants is subject to numerous qualifications and exceptions It is well settled that an employer who orders work to be performed from which, in the natural course of things, injurious consequences must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see that necessary precautions are taken to prevent injury and such person can not by employing some other person relieve himself of his liability to do what is necessary to prevent the work from becoming wrongful. The foregoing rule is sufficiently comprehensive to embrace not only work which is regarded as "inherently" or "intrinsically dangerous," but also work which will in the ordinary course of events occasion injury to others if certain precautions are

omitted, but which may as a general rule be safely executed if such precautions are taken.

Real Property Law > Torts > Trespass to Real Property
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > General Overview
Torts > Premises Liability & Property > Trespass > Defenses > General Overview
[HN4] A burden rests upon all to avoid trespassing upon the property of others. The weight of this burden is enhanced by the few defenses available to one so charged. When one commits a trespass upon the property of another, whether intentional or unintentional, there are few defenses which will excuse and relieve him from liability. This burden to avoid trespass is especially constant between adjoining landowners or parties in possession of abutting parcels. As between them it is a mutual and reciprocal duty. The law permits every person to make use of his property as he will, provided he uses it in such a manner as not to injure others. The court has held that a party in the exercise of a right on his own land which involves danger to the property of his neighbor is bound to provide against such by the exercise of all reasonable prudence and care. In accord with the general rule, neither a mistake of law nor one of fact constitutes an entry any less a trespass. Nor does ignorance excuse an entry upon the land of another; hence, one can not defend by showing a lack of knowledge of the boundary lines even when the owner of the invaded close has failed to erect any artificial markings on his boundaries.

Torts > Premises Liability & Property > Trespass > General Overview
[HN5] It is a defendant's duty to have determined in advance the exact location of his boundary line. The "duty" is the duty to take the necessary precautions by proper survey to insure against the highly probable damage which would otherwise ensue to the owner of an adjacent property.

Torts > Vicarious Liability > Independent Contractors > General Overview
[HN6] As a general rule, if injury results from work done by an independent contractor in accordance with defective plans or specifications furnished by the contractee, the latter will be liable for the injury.

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview
Real Property Law > Adjoining Landowners > Mines & Mining
Torts > Premises Liability & Property > Trespass > Remedies > Damages > General Overview
[HN7] When one sends a party to a certain area to cut timber or to remove minerals and fails to have the boundaries sufficiently surveyed as a precaution against trespass and damages result to an adjoining owner, then the person whose duty it was to have boundaries correctly established is held as a cotrespasser and can not avoid liability because the party actively logging the timber was an independent contractor.

Torts > Premises Liability & Property > Trespass > General Overview
[HN8] The trespass liability of the defendants is not and was not intended to be dependent upon their participation in the actual severance and removal of the timber either personally or through an agent or employee. The failure to discharge the duty, assumed by the land-owning defendants acting through their agent, to show the correct location of the boundary lines, casts on them the liability for the damage resulting from that failure. That damage has been found to be the stumpage value of the timber cut from the plaintiffs' land.

Civil Procedure > Judicial Officers > Judges > General Overview
Civil Procedure > Appeals > Dismissals of Appeals > Involuntary Dismissals
[HN9] *Ore. Rev. Stat. § 17.430* is the controlling statute and establishes the filing time for findings and objections thereto. It is plain and unambiguous. Its mandatory language requires no construction. Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk within 30 days after the submission of the issue of fact to the court. The decision shall consist of either general or special findings without argument or reason therefor. All parties appearing in the case shall have the right to request either special or general findings. Any findings so requested by any party shall be served upon all other parties who have appeared in the case, and such adverse parties may, within 10 days after such service, present to the judge objections to such proposed findings or any part thereof and request other, different or additional findings. When the findings are prepared by the court or judge thereof without request by

any party for either special or general findings, such findings shall be filed with the clerk, and the clerk forthwith shall mail a copy thereof to an attorney of record for each party appearing in the case, and any such party may, within 10 days after the filing of such findings, object thereto and request other, different or additional findings.

Civil Procedure > Appeals > Dismissals of Appeals > Involuntary Dismissals

[HN10] If no objections are timely taken to the findings, they are conclusive and the court can not consider the evidence upon which the findings were based. In such a case, erroneous rulings upon questions of law may be appealed only on the ground that the established facts cannot support the judgment.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > Damages > Punitive Damages > Conduct Supporting Awards

Torts > Premises Liability & Property > Trespass > Remedies > Damages > Punitive Damages

[HN11] *Ore. Rev. Stat. § 105.815*, providing for double damages for wrongful cutting of trees in cases where the trespass is casual or involuntary or under a belief of right, is intended to provide only accumulative damages rather than penal damages. *Ore. Rev. Stat. § 105.810* makes provision for treble damages when the cutting was wilful, intentional and without plaintiff's consent and was intended as a statutory measure for punitive or exemplary damages under such circumstances.

COUNSEL: *Bert E. Joachims* and *David W. Young*, Portland, argued the cause for appellants. On the briefs were Klosterman & Joachims and Weiser, Bowles & Young, Portland.

Bruce M. Hall, Portland, argued the cause for respondent. On the brief were Bonyhadi & Hall, Portland.

JUDGES: McAllister, Chief Justice, and Rossman, Warner, Perry and Lusk, Justices.

OPINION BY: WARNER

OPINION

[*214] [**738] **ON THE MERITS**

[*215] This is an action for damages brought by the plaintiff Gordon Creek Tree Farms, Inc., hereinafter called "Gordon," for trespass and the severance and removal of trees from its timber farm in the Larch Mountain area of Multnomah County, Oregon.

The defendants John Hillyard and John Harris are copartners. They held a contract with the U. S. Bureau of Land Management for the removal of timber from a section of land adjacent to the timber farm. To accomplish their purpose, they first contracted with defendant Calvin Harmon as their logger and later with defendants W. S. Layne and Gail Layne, his [***2] son. An order of involuntary nonsuit was allowed as to defendant Harmon.

The case was tried by the trial judge without a jury. The court found that defendants Layne, while serving defendants Hillyard and Harris, had wilfully and wantonly trespassed upon plaintiff's land and removed therefrom timber of the value of $ 4,615.20. [*216] Relying on *ORS 105.815*, the [**739] court entered judgment against the Laynes and Hillyard and Harris for double that amount. From that judgment, Hillyard and Harris, alone, appeal. We will from this point refer to Hillyard and Harris as "the defendants" and when necessary, refer to the defendants Layne as "the Laynes."

The following facts are not disputed. Plaintiff Gordon was the owner and in possession of timbered real property in Sections 2 and 12, Township 1 South, Range 5 East, and Section 36, Township 1 North, Range 5 East, W.M., in Multnomah County, Oregon. The alleged trespasses occurred during the years 1958 and 1959.

In January, 1957, the U. S. Bureau of Land Management entered into a contract with the defendants for the sale of certain timber in Section 1, Township 1 South, Range 5 East, W.M., in the Mt. Hood National Forest. Their [***3] cutting rights expired February 25, 1959, with a year thereafter to remove any severed timber from the contract area. The boundary lines of Sections 36 and 12 connect with the north and south boundary lines of Section 1.

Harmon intermittently logged for the defendants from April, 1957, until October 27, 1958. The Laynes, who started immediately after Harmon left, were continuously active until sometime in October or November, 1959. The trespasses for which Gordon recovered judgment occurred during the period of the

Laynes' activity and explains why a motion for nonsuit as to defendant Harmon was allowed.

The appellants concede that there was some cutting on Sections 12 and 36.

The appellants assign 10 items of alleged error. In orderof the defendants' presentation, the first relates [*217] to the court's denial of their motions for nonsuit and directed verdict. The second assignment represents that the findings of fact do not support the judgment. The seven following assignments rest upon the court's adverse rulings on their objections to its findings of fact or refusal to make certain findings requested by them. The tenth and last assignment is addressed to the denial of defendants' [***4] motion to set aside the judgment and grant a new trial.

We first look to the defendants' representations that error was committed in denying their motions for nonsuit and directed verdict.

The grounds therefor are the same in both motions: first, that there is no evidence of trespass committed by the four defendants; and, second, that there is no evidence of a relationship between Hillyard and Harris and the Laynes which would cast upon the first two defendants named any legal responsibility for the acts of the Laynes. At this juncture we note that the plaintiff Gordon did not plead any particular legal relationship between the Laynes and the defendants; that is, whether the Laynes were employees of defendants or labored as independent contractors.

In arriving at our conclusion with reference to this assignment our review of the record has been governed by the following rules.

The trial judge made findings of fact on both points relied upon by the defendants, but contrary to their contentions. Under the circumstances, [HN1] the findings have the effect of a verdict. They can not be set aside unless this court is of the opinion that the findings are not supported by any competent, substantial [***5] evidence, as distinguished from the task of weighing the evidence. *Burke Machinery Co. v. Copenhagen,* [*218] *138 Or. 314, 316, 6 P.2d 886*, and cases there cited.

We said in *Sexton v. Kelly, 185 Or. 1, 12, 200 P.2d 950*:

> "It is not the function of this court in law actions to pass on the credibility of witnesses, to weigh the evidence, or to resolve conflicting testimony. These are matters for the determination of the Circuit Court. It is, however, the province of this court, when properly presented, to decide whether there is substantial evidence to support the findings of the court or the verdict of the jury, as the case may be. * * *"

[**740] It is settled that whenever a defendant has not rested upon a motion for nonsuit, but proceeds instead to adduce evidence in support of his own contentions, such evidence may be considered in order to sustain a recovery by the plaintiff. We have repeatedly held that we will not reverse a ruling of the trial court denying a nonsuit whenever upon the whole case, as presented by both parties, the record shows sufficient substantial evidence to take the case to the jury. *Johnson v. Underwood, 102 Or. 680, 688, 203 P.* [***6] *879*, and cases there cited; *Berkshire v. Harem, 181 Or. 42, 75, 178 P.2d 133*; *Buckles, Exec. v. Continental Cas. Co., 197 Or. 128, 133, 251 P.2d 476*, supplemental op., *197 Or. 139, 252 P.2d 184*.

We also take note that [HN2] when giving consideration to a motion for nonsuit or one for a directed verdict, the evidence must be viewed in the light most favorable to plaintiff and accord plaintiff the benefit of every reasonable inference which may be drawn from the evidence and every intendment is in his favor. *Buckles, Exec. v. Continental Cas. Co., supra (197 Or. at 134)*; *Keys v. Griffith, 153 Or. 190, 196, 55 P.2d 15*, and cases there cited.

[*219] Under the circumstances we have treated the court's denial of both motions together.

We have given careful attention to the long record of testimony and the 58 exhibits which were introduced, as well as the earnest arguments of the defendants in support of their contentions of existent error. We have also given consideration to the thoughtful and extended opinion of the able trial judge who had the additional advantage of being able to evaluate the credibility of the several witnesses. As a result we are persuaded that the [***7] court did not err in denying the motions which are the subject of the first assignment and that its findings to

which the defendants object were supported by substantial evidence. We have not, however, set down our step-by-step analysis of the record. To do so would unduly extend this opinion without any advantage to the profession or the parties litigant.

It is sufficient to say that there was ample proof of trespass and substantial evidence warranting a holding which cast upon Hillyard and Harris liability as cotrespassers.

Contrary to the court's finding that defendants Layne were agents and employees of Hillyard and Harris, the defendants argue that the Laynes were independent contractors. Relying on that premise, appellants conclude that they are not chargeable with the trespass.

The question whether the Laynes were employees and agents or independent contractors is a close one and made more difficult by the absence of any writing which might be of assistance in its resolution. However, even if it be assumed that the Laynes were independent contractors, it would not, under the circumstances [*220] present in this case, exonerate the defendants Hillyard and Harris from [***8] liability.

[HN3] The general rule that an employer is not liable for the torts of an independent contractor or his servants is subject to numerous qualifications and exceptions 57 CJS 353, Master and Servant § 584. It is well settled that an employer who orders work to be performed from which, in the natural course of things, injurious consequences must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see that necessary precautions are taken to prevent injury and such person can not by employing some other person relieve himself of his liability to do what is necessary to prevent the work from becoming wrongful. *Law v. Phillips, 136 W. Va. 761, 68 S.E.2d 452, 33 A.L.R.2d 95, 105*; 27 Am. Jur. 515, Independent Contractors § 38; Prosser, Torts (2d ed), 358, § 64. The foregoing rule is sufficiently comprehensive to embrace not only work which is regarded as "inherently" or "intrinsically dangerous," but also work which will in the ordinary course of events occasion injury to others if certain precautions are omitted, but which may as a general rule be safely executed if such precautions are taken. 27 Am. Jur., supra, at 315-316.

[***9] [**741] [HN4] A burden rests upon all to avoid trespassing upon the property of others. The weight of this burden is enhanced by the few defenses available to one so charged. "When one commits a trespass upon the * * * property of another," says Am. Jur. (Vol 52, Trespass, 864, § 35), "whether intentional or unintentional, there are few defenses which will excuse and relieve him from liability."

This burden to avoid trespass is especially constant between adjoining landowners or parties in [*221] possession of abutting parcels. As between them it is a mutual and reciprocal duty. The law permits every person to make use of his property as he will, provided he uses it in such a manner as not to injure others. 1Am. Jur. 505, Adjoining Landowners, § 3; 2 CJS 6, Adjoining Landowners § 1. We have held that a party in the exercise of a right on his own land which involves danger to the property of his neighbor is bound to provide against such by the exercise of all reasonable prudence and care. *Hummell v. Terrace Co., 20 Or. 401, 26 P. 277 (1891).*

But as an adjacent property owner, plaintiff Gordon was not required to maintain a constant watch lest nearby logging operations invade [***10] his property. *Kinzua Lumber Co. v. Daggett, 203 Or. 585, 606, 281 P.2d 221 (1955).*

In accord with the general rule, neither a mistake of law nor one of fact constitutes an entry any less a trespass. 52 Am. Jur., supra, at 845. Nor does ignorance excuse an entry upon the land of another; hence, one can not defend by showing a lack of knowledge of the boundary lines (*Boulton v. Telfer, 52 Idaho 185, 12 P.2d 767, 83 A.L.R. 1341, 1346)*; even when the owner of the invaded close has failed to erect any artificial markings on his boundaries. *Cosgriff v. Miller, 10 Wyo. 190, 68 P. 206*; 52 Am. Jur., supra, at 846.

The potentialities for trespass, intentional or unintentional, are increased when timber is harvested in places where there are contiguous areas of timber held under different ownerships and easily encroached upon unless boundary lines are clearly and definitely established. Visible monuments and other perceptible indicia of boundary lines in the vast and relatively remote timbered districts of this state are the exception [*222] rather than the rule and present a constant danger of encroachment on a neighboring area unless there are clearly marked boundaries.

[***11] *Longview Fibre Co. v. Johnston, 193 Or. 385, 238 P.2d 722 (1951)*, was a contest between the

owners of adjoining timber properties. The boundary lines of the trespassed area were the principal cause of the dispute. The defendant in that case had failed, as did the defendants in the case at bar, to determine in advance the exact location of the boundary lines. In resolving the issues in favor of the plaintiff, we said at page 400:

> [HN5] "It was defendant's *duty* to have determined in advance the exact location of his boundary line. There is no evidence that he made any attempt whatever to do so until after his cutting of timber upon plaintiff's land had been called in question. This fact tends rather to aggravate the trespass than to excuse it." (Emphasis supplied.)

The "duty" to which the court referred was the duty to take the necessary precautions by proper survey to insure against the highly probable damage which would otherwise ensue to the owner of the adjacent property.

The evidence supports the conclusion that Hillyard and Harris had knowledge of the probabilities of trespass and the earlier but unintentional trespass of Harmon even before the Laynes began to cut. [***12] In addition to their knowledge of the dangers of trespass in the logging area for want of adequate boundary lines, the defendants continuously labored under a heavy burden to avoid any overt acts which might subject the United States to claims for damages. Their contract with the government obligated them to save [*223] it harmless from all losses resulting from their negligent acts or those of their "contractors, subcontractors or employees," and particularly stipulated losses resulting from trespass. It would [**742] seem with such an inducement to caution, prudence and self-interest that Hillyard and Harris would have been less laggard and less indifferent than they were in establishing the boundary lines and informing the Laynes of the nature of the contiguous ownerships. At all times they had in their possession maps and data which would have enabled a surveyor to find and readily mark the necessary lines.

Here the duty of Hillyard and Harris is manifest. In 1957 they had been alerted by Mr. Noyes, an officer of Gordon, to the danger of trespass by the earlier operations of Harmon. But before the Laynes began operations in the first part of November, 1958, Harris, in [***13] defendants' office, did no more than to show the Laynes two aerial maps of the area and a wall map. These he used to point out to the senior Layne, with surprising vagueness, where the corners were supposed to be. Harris gave Layne no information as to the surrounding ownership and Layne had no personal knowledge as to the true boundary lines. From the exhibits we know that the defendants' office was at or near Boring, Oregon, some miles distant from the Larch Mountain area. Hillyard and Harris relied on the assistance of a Mr. Holmes, an occasional employee, but not a surveyor, to show the Laynes the exact boundaries. Holmes was not called as a witness. The testimony of W. S. Layne indicates that this was not done until after the Laynes had begun operations; and then, Holmes did no more than "point out" lines in Section 1. Holmes was later a party on the Marx survey in 1959. Defendant Gail Layne stated that he [*224] had no personal knowledge as late as May, 1959, of where the true boundary lines were.

W. S. Layne testified that in the latter part of January or February, 1959 (some two or three months after the Laynes had started operations), some lines were run by the Marx [***14] brothers, surveyors, for Hillyard and Harris and their location was later shown him. It would appear that the activities of the Marx brothers mark the first display of interest by the defendants in definitely and clearly establishing boundary lines for the guidance of the Laynes. But this was not done until it appeared that the defendants might be charged for the trespasses of the Laynes. Even then the markings were so uncertain that the Laynes were not aware that any trespass had been committed until so informed by Mr. Bjork, another surveyor later retained by Hillyard and Harris, after hearing complaints of trespass from Gordon, in May, 1959. By that time the cutting had long ceased and the Laynes were in the process of removing logs previously felled.

In answer to an inquiry by the trial judge, Harris testified that he had never been to the trespass area, had never gone over the boundary lines, and was "too busy" to know where the actual boundary lines were. Hillyard admitted having said in his deposition in answer to a question concerning the extent of his knowledge of the area, "I don't hardly know where the place is." These were the two men who had the primary duty of pointing [***15] out to the Laynes the area in which they were to log and protecting the adjacent owner against possible trespass.

Apparently, neither Hillyard nor Harris ever took the time to confirm the lines personally and in the beginning contented themselves with merely warning [*225] the Laynes against trespassing. But there is nothing in the record to indicate that either Hillyard or Harris made any effort to find out if the Laynes were observing this admonition. On the whole, the testimony of the Laynes as to their actual knowledge of the true boundary lines was also very uncertain. The testimony of Hillyard and Harris was not only vague concerning their efforts to establish boundary lines, but evinced an indifference to the necessity for their clear establishment. Of this, however, we are certain: no surveys of value for boundary lines were made until sometime in 1959 and months after the operations of the Laynes began. We are equally certain that the defendants had heard of the trespasses long before the boundaries were marked and surveyed. Viewing the Laynes as independent contractors, the concurring negligence for which the defendants would be [**743] answerable to Gordon was [***16] their failure to discharge the duty of showing the Laynes the correct location of the boundary lines. In 57 CJS 358, Master and Servant § 589, we find the following statement:

> "[HN6] As a general rule, if injury results from work done by an independent contractor in accordance with defective plans or specifications furnished by the contractee, the latter will be liable for the injury. * * *"

See, also, *Amann v. City of Tacoma, 170 Wash. 296, 16 P.2d 601, 607.*

If liability is cast upon the employer of an independent contractor because of damage arising from the use of defective plans and specifications, reason dictates that the employer's liability likewise accrues as to damages arising from the contractor's activities resulting from a want of plans or specifications in [*226] work where plans and specifications were essential to the accomplishment of the contractor's undertaking without damage to the employer's neighbors. Here, the "plans and specifications" needed by the contractor was a survey of boundary lines to avoid trespassing on the property of Gordon.

The following cases sustain the proposition that [HN7] when one sends a party to a certain area to cut timber or [***17] to remove minerals and fails to have the boundaries sufficiently surveyed as a precaution against trespass and damages result to an adjoining owner, then the person whose duty it was to have boundaries correctly established is held as a cotrespasser and can not avoid liability because the party actively logging the timber was an independent contractor. *Kirby Lbr. Corp. v. Karpel, 233 F.2d 373, 375 (5th Cir 1956)*; *Lewis v. Mays, 208 Ark. 382, 186 S.W.2d 178 (1945)*; *Crisler v. Ott, 72 Miss. 166, 16 So. 416 (1894)*; *Cummer Mfg. Co. v. Copeland* (Tex Civ App 1931), *35 S.W.2d 758 (1931)*; *W. E. Belcher Lbr. Co. v. Woodstock Land & Mineral Co., 245 Ala. 5, 15 So.2d 625, 629 (1943).*

The following cases apply the same fundamental rule of liability for trespasses incident to imperfect descriptions arising under slightly different circumstances. In *Lewis v. Phillips, 223 Ark. 380, 266 S.W.2d 68 (1954)*, the damage was to bridges on adjacent property. In *Hutto v. Kremer, 222 Miss. 374, 76 So.2d 204 (1954)*, the trespass to the neighbor's timber was the result of a seller furnishing a purchaser of timber a misleading description as to its location. In *Kershishian v. Johnson* [***18] , *210 Mass. 135, 96 N.E. 56, 57 (1911)*, the owner of a lot sent a contractor to build a house on a lot of uncertain boundary.

In all the cases above cited except one it will be found that the defendant employer rested on the defense [*227] of nonliability because the work had been done by an independent contractor. In every instance where such a defense was asserted it was brushed aside by the appellate court.

Kirby Lbr. Corp. v. Karpel, supra, presents a factual situation similar to the one before us and the federal court's reasoning there is highly persuasive. In *Kirby* an agent of the land-owning defendants arranged with defendant White to cut and remove timber from defendants' land. Since White was unfamiliar with the boundary lines, the agent took him to the land and pointed out one or two of the lines and warned White to stay within them. But the agent referred White to third parties to point out to White the other lines necessary to his guidance. This the third parties ultimately did, but incorrectly, thereby causing White to trespass and cut trees on plaintiffs' land. The proceeds from the sale of the timber, both from plaintiffs' and defendants' property, were [***19] divided between White and the rest of the defendants. The same kind of division was made in the instant case between the Laynes and Hillyard and Harris.

In holding the land-owning defendants responsible to Kirby for the acts of White, the court said:

> "There was not, to be sure, any physical cutting and removing of timber by the appellants from the land of plaintiffs. We think it is unnecessary to determine whether the role of McKinley White, who did the physical cutting and removing of timber from plaintiffs' lands, was employee or agent, [**744] or an independent contractor of the land-owning defendants, or whether he was a timber purchaser. [HN8] The liability of the defendants is not and was not intended to be dependent upon their participation in the actual severance and removal of the timber either personally or through an agent or employee. [*228] * * * [citing *McDaniel Bros. v. Wilson (Tex Civ App 1934), 70 S.W.2d 618, 621]*
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> "* * * *
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> "* * * The failure to discharge the duty, assumed by the land-owning defendants acting through their agent, to show the correct location of the boundary lines, casts on them the liability for the damage resulting from that failure. That [***20] damage has been found to be the stumpage value of the timber cut from the plaintiffs' land." (*233 F.2d at 375*)

See, also, VI Casner, American Law of Property, 1534, § 28.1.

In *Hutto v. Kremer, supra (76 So.2d 204)*, one Hutto furnished Brooks with a misdescription of land from which he was to cut timber. The mistake led Brooks into a trespass on the lands of Kremer. The appellate court of Mississippi in holding Hutto as a joint-tortfeasor with Brooks, declared:

> "It was of course an actionable wrong for Brooks to cut Kremer's timber without authority from him to do so; and if the appellant induced that action by a misrepresentation of the location of the west boundary line of the 23-acre tract, even though that misrepresentation may not have been made with the intention to mislead, the appellant became a joint tortfeasor, and was liable for the damage done. The jury by their verdict have found that the appellant was liable because of the misdirection given by him to Brooks as to the location of the boundary line of the 23-acre tract on which Hutto's timber was situated. * * *" (*76 So.2d at 208*)

Crisler v. Ott, supra (16 So. 416), was a case wherein Crisler, [***21] the owner of timber on land adjacent to Ott, contracted with Halbert, as an independent contractor, to cut his timber. Halbert trespassed upon Ott's land [*229] because of the uncertainty of the boundary line between the Crisler and Ott holdings. Crisler was held liable as a cotrespasser with Halbert because "he [Crisler] negligently failed to acquaint himself with the true line." (16 S at 417) We find no cases to the contrary. See, also, Falk, Timber and Forest Products Law, 119, § 161 (1958); 1 Cooley, Torts (4th ed), 273 § 85; 57 CJS 365-366, Master and Servant § 591.

Although we find no timber trespass cases in Oregon raising the precise question found in the lastmentioned decisions, we do find that this court has declared against the exoneration of an employer for tortious acts of his independent contractor when they arise under circumstances or out of legal relationships akin to those found in the cases above cited. See *Eitel v. Times, Inc., 221 Or. 585, 591, 352 P.2d 485 (1960)*; *Giaconi v. City of Astoria, 60 Or. 12, 36-37, 113 P. 855*, different results reached on reh'g, *60 Or. 24, 118 P. 180, 37 LRA (NS) 1150* (1911).

The failure of Hillyard and Harris to [***22] promptly disavow the acts of the Laynes or to take prompt action to avoid further trespasses may well be interpreted as an implied ratification. *Kneeland v. Shroyer, 214 Or. 67, 93, 328 P.2d 753*; *Glaser v. Slate Const. Co., 196 Or. 625, 639, 251 P.2d 441*. Had the defendants been diligent in doing these things, it is reasonable to believe this trespass might not have occurred.

There are circumstances in this matter which make the rule committing Hillyard and Harris to liability for damages particularly applicable. We have already

observed that the gross returns from the sales of the logs cut by the Laynes were divided on the basis of 60 per cent to the Laynes and 40 per cent to Hillyard and Harris. These divisions included the proceeds from the sales of all logs cut and sold by the Laynes. [*230] It would be contrary to principles of justice to allow Hillyard and Harris to retain [**745] a share in the fruits of the trespasses and at the same time exonerate them from all liability for the damage sustained by the plaintiff Gordon.

The question whether the appellants discharged their duty to ascertain the boundary lines and inform the Laynes of their location was a [***23] question of fact for the determination of the trial judge sitting as a jury. As there was substantial evidence of the appellants' failure in that regard, this court is without power to disturb the lower court's finding.

Notwithstanding that appellants claiming error in the denial of motions for nonsuit or directed verdict are limited on appeal to the grounds stated in their original motions (*Pokorny v. Williams, 199 Or. 17, 23, 260 P.2d 490*; *Edvalson v. Swick, 190 Or. 473, 478, 227 P.2d 183*), the defendants in their brief attempt to raise an additional ground in support of their motions. We quote: "There is no substantial evidence to base a judgment for damages in any amount." Under the authority of the cases cited, we are compelled to ignore it.

We will later review the defendants' second assignment, but now give attention to the defendants' assignments of error numbered 3 to 9, inclusive. This requires that we first dispose of the question of the timeliness of the filing of the defendants' objections to the findings as made by the court on September 20, 1960.

[HN9] *ORS 17.430* [1] is the controlling statute and establishes [*231] the filing time for findings and objections [***24] thereto. It is plain and unambiguous. Its mandatory language requires no construction.

> 1 "Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk within 30 days after the submission of the issue of fact to the court. The decision shall consist of either general or special findings without argument or reason therefor. All parties appearing in the case shall have the right to request either special or general findings. Any findings so requested by any party shall be served upon all other parties who have appeared in the case, and such adverse parties may, within 10 days after such service, present to the judge objections to such proposed findings or any part thereof and request other, different or additional findings. When the findings are prepared by the court or judge thereof without request by any party for either special or general findings, such findings shall be filed with the clerk, and the clerk forthwith shall mail a copy thereof to an attorney of record for each party appearing in the case, and any such party may, within 10 days after the filing of such findings, object thereto and request other, different or additional findings. If objections are filed to such findings and request is made for other, different or additional findings, such objections and request shall be heard and determined by the court within 50 days from the date of filing of the findings, and not thereafter, and if not so heard and determined within that time the objections and request shall be conclusively taken and determined denied. Nothing in this section shall prevent the court from either shortening or extending the time in which to file objections or request other, different or additional findings or prevent the parties to the case stipulating or agreeing to the findings to be entered."

[***25] From the record we learn that the trial was concluded on July 15, 1960. On August 29, 1960, the court handed down a memorandum opinion. In accordance with the direction therein contained, counsel for Gordon prepared findings and a judgment order. A copy of plaintiff's proposed findings, conclusions and form of judgment was served on counsel for the defendants on September seventh. The defendants thereafter failed to file any objections thereto or to request other, different or additional findings "within 10 days after such service" (*ORS 17.430*, supra). Therefore, the trial judge on September twentieth adopted without alteration the findings and conclusions requested by plaintiff, and at the same time entered judgment against the defendants. This was docketed the following [*232] day. It was not until September twenty-seventh, 17 days after service of plaintiff's proposed findings, and seven days after the entry of judgment, that the defendants served the following-entitled papers upon plaintiff: "Objections to Findings of Fact and Conclusions of Law [**746] and Decree [as entered by the court on September twentieth] and Motion for Order Setting Aside

Judgment and Allowing [***26] New Trial" and "Requested Findings of Fact, Conclusions of Law and Judgment."

The plaintiff, relying on *ORS 17.430*, supra, promptly moved to strike from the files the defendants' objections to the findings previously entered and their requested findings on the ground that they had not been filed within the time prescribed by that section. The court, however, denied the motion and heard argument on the defendants' objections to the findings previously entered.

The papers filed by the defendants on September 27, 1960, were not accompanied by any affidavit or other statement tendering an excuse or offer of explanation for their delay, nor did the defendants make any application for an extension of time in which to file objections to those tendered by plaintiff. See 17.430, supra. Apparently, the defendants chose to rely solely upon their erroneous construction of *ORS 17.430* as entitling them to proceed as they had done. This conclusion is supported by a recital found in the court's order denying plaintiff's motion to strike the defendants' papers from the files. It reads: "Defendants contend the pleading served upon defendants on about September 7, 1960 and entered in this Court's Journal [***27] on about September 20, 1960, designated 'Findings of Fact, Conclusions of Law and Decree,' *constitutes findings prepared by the Court* [*233] *or by the Judge thereof without request by any party for either special or general findings*." (Emphasis supplied.)

After hearing, the court overruled the defendants' objections and denied their requested findings. Based upon that order, the defendants assign seven separate assignments of error on this appeal challenging the order of the court in overruling certain of their objections to findings or requests as to others (assignments 3 to 9, inclusive).

We note that the defendants' reply brief ignores plaintiff's reference to the delayed filing of the papers to which we above make reference. If the defendants are relying on the recital taken from the court's order as legal exoneration for their delay, then we declare it is devoid of merit. The fact that plaintiff served its proposed findings on the defendants on September seventh is sufficient proof that they were the requested findings of plaintiff and not findings prepared by the court "without request by any party." (*ORS 17.430*, supra)

We hold the findings adopted by the court on [***28] September twentieth and filed with the clerk on September twenty-first were, in terms of the statute, findings requested by plaintiff and not within the statutory category of "findings * * * prepared by the court * * * without request by any party." Therefore, the defendants' right to object thereto or request additional findings expired 10 days after service made by plaintiff and not 10 days after the date the findings were filed with the clerk. *ORS 17.430*, supra.

While this court has not heretofore been presented with a statement of circumstances precisely like those revealed here, it has on several occasions passed upon matters similar thereto arising under *ORS 17.430*. In [*234] *Carlson v. Steiner, 189 Or. 255, 220 P.2d 100*; *DuMond v. Byron Jackson Co., 139 Or. 57, 6 P.2d 1096*; *Twin Falls Bank v. City Electric, 218 Or. 542, 346 P.2d 84*; *Winters v. Bisaillon, 153 Or. 509, 57 P.2d 1095, 104 A.L.R. 968*; and *Scott v. Lawrence Whse. Co., 227 Or. 78, 360 P.2d 610 (1961)*, emphasis was placed upon a *timely filing of objections* to proposed findings if the objector was to successfully avail himself on appeal from overruled objections. See, also, *Consolidated* [***29] *Freightways, Inc. v. West Coast Fast Freight, Inc., 188 Or. 117, 212 P.2d 1075*, reh'g denied, *188 Or. 122, 214 P.2d 475*.

In *Carlson v. Steiner, supra (189 Or. at 267)*, this court declined to consider an objection made to a certain finding because of "the failure to submit objections to the findings of fact * * * *within the time allowed*, or at all, * * *." (Emphasis supplied.) *Winters v. Bisaillon, supra, at 516*, is to the same effect.

[**747] In *DuMond, supra (139 Or. at 60-61)*, emphasis was not only placed on a timely request for findings, but it was also there declared that such a request must be made before entry of judgment. The necessity of filing objections before entry of the judgment is also noted in the *Twin Falls Bank* case, supra (*218 Or. 542*).

The following pertinent statement from 89 CJS 499, Trial § 655, summarizes our position:

> "* * * It is too late to except to a finding after the decisions is made. Where the time for objections is specified by statute, or rule of court, an objection or exception made thereafter is ordinarily too late, * * *." (Citing *Twin Falls Bank v. City*

Electric Co., supra.)

See, also, 3 Bancroft, Code [***30] Pleading, Practice and Remedies (10 yr supp), 2206, § 1671.

[*235] We hold that the objections of the defendants should have been filed within 10 days after the service of plaintiff's requested findings upon them or within the time granted by an extension for that purpose, if an extension of time had been seasonably applied for and granted; and that plaintiff's motion to strike their objections and request for findings should have been allowed; and that the hearing had thereon was a nullity affording no foundation for the order which they here make the basis for their seven assignments of error, numbered 3 to 9, inclusive.

[HN10] If no objections are timely taken to the findings, they are conclusive and this court can not consider the evidence upon which the findings were based. *Mullennex v. Draper, 220 Or. 1, 2, 347 P.2d 990.* "In such a case, erroneous rulings upon questions of law may be appealed only on the ground that the established facts cannot support the judgment." *Scott v. Lawrence Whse. Co., supra (360 P.2d at 620).*

The last statement brings to the fore the defendants' second assignment of error, wherein they contend that the court's findings are "at variance with [***31] and do not support and conform with the judgment entered herein."

That assignment is predicated upon a complex of four or five different findings made by the court. They point to the fact that the court found that the Laynes were agents or employees of the defendants Hillyard and Harris and that the defendants had ratified and acquiesced in the trespass of the Laynes; that it also found that the trespasses of the Laynes were wilful and wanton with consequential liability for treble damages, but that there was no evidence of physical trespass on the part of the Laynes' employers; and that at the time of the ratification of the acts of the Laynes [*236] by Hillyard and Harris, the latter had no knowledge of the wilful and wanton character of the acts of the Laynes as distinguished from casual, involuntary or nonwilful trespass.

These findings referred to above produced the following conclusion of law by the trial judge:

> "Although plaintiff has carried the burden of proof that the trespass on the part of defendants Layne was willful and wanton, plaintiff has failed to carry the burden of proof that the trespass was willful and wanton on the part of defendants Hillyard and Harris, [***32] and therefore since all of these defendants are being held liable, the judgment should -- on the principle that in suing all defendants, plaintiff has waived its right to exemplary damages if some are not subject thereto -- be entered herein at double the sum of $ 4,615.20 in accordance with *ORS 105.815*."

Consistent with the foregoing, the court thereafter entered judgment against all the defendants in the amount of $ 9,230.40, which is double the sum of $ 4,615.20, in accordance with *ORS 105.815* when a trespass is casual or involuntary. This it did, and we think correctly, notwithstanding that plaintiff's prayer was for treble damages (*ORS 105.810*).

[**748] The defendants argue that because the trespass was found to be wilful and wanton on the part of the Laynes, the court had no alternative but to enter judgment for treble damages against all four defendants, and having failed to do so, there can be no valid judgment against the defendants Hillyard and Harris. We find no merit in this argument.

[HN11] *ORS 105.815*, providing for double damages for wrongful cutting of trees in cases where the trespass is casual or involuntary or under a belief of right, was intended to provide only [***33] accumulative damages [*237] rather than penal damages. *Kinzua Lumber Co. v. Daggett, supra (203 Or. at 607). ORS 105.810* makes provision for treble damages when the cutting was wilful, intentional and without plaintiff's consent and was intended as a statutory measure for punitive or exemplary damages under such circumstances. *Kinzua Lumber Co. v. Daggett, supra; Wilson v. Kruse, 199 Or. 1, 6-7, 258 P.2d 112; Eastman v. Jennings-McRae Logging Co., 69 Or. 1, 12, 138 P. 216.* See *Michigan Land & Iron Co. v. Deer Lake Co., 60 Mich 143, 27 NW 10, 11*, where the court, construing a statute allowing treble damages for a timber trespass, observed: "Treble damages under this statute are in their nature punitory, * * *." "The fact that the trespass was willful or malicious is material only for the purpose of obtaining punitive damages." 87 CJS 959,

Trespass § 5; 15 Am. Jur. 742, Damages § 300.

Thus, we find under the findings defendants Hillyard and Harris are potentially liable for the compensatory damages as measured by *ORS 105.815* and defendants Layne, because of their wilful and wanton conduct, would normally respond in treble damages under *ORS 105.810*.

In this [***34] jurisdiction plaintiff could not recover against the defendants in different amounts. *Gill v. Selling, 125 Or. 587, 594, 267 P. 812, 58 A.L.R. 1556.* As said in 2 Sutherland, Damages (4th ed), 1327 § 407, and cited with approval in the *Gill* case:

> "* * * In such a case the plaintiff has his election to proceed against any or all of the wrongdoers. By making them all defendants he waives his right to exemplary damages if some of them are not subject thereto. * * *"

See, also, *Bowles v. Creason, 156 Or. 278, 298, 66 P.2d* [*238] *1183*; *Pelton v. General Motors Accept. Corp., 139 Or. 198, 205, 7 P.2d 263*, reh'g denied, *139 Or. 207, 9 P.2d 128*.

Under the court's findings of fact the judgment as rendered for double instead of treble damages was clearly proper.

And lastly the defendants urge upon us that the trial court erred in denying their motion for a new trial. The motion is a nullity. It submits nothing which occurred after the close of the trial and presents nothing for our consideration on appeal. *Klemgard v. Wade Seed Company, 217 Or. 409, 420, 342 P.2d 757*; *Lenchitsky v. H. J. Sandberg Co., 217 Or. 483, 494, 343 P.2d 523*; *Sherman v. Bankus* [***35] *, 218 Or. 271, 274, 344 P.2d 771*.

Affirmed.

LexisNexis

LEXSEE 389 U.S. 347

KATZ v. UNITED STATES

No. 35

SUPREME COURT OF THE UNITED STATES

389 U.S. 347; 88 S. Ct. 507; 19 L. Ed. 2d 576; 1967 U.S. LEXIS 2

October 17, 1967, Argued
December 18, 1967, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *369 F.2d 130*, reversed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
[HN1] The *Fourth Amendment* protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of *Fourth Amendment* protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Substantive Due Process > Privacy > General Overview
[HN2] No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the *Fourth Amendment*. One who occupies a telephone booth, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > General Overview
[HN3] The premise that property interests control the right of the government to search and seize has been discredited.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > General Overview
Torts > Premises Liability & Property > Trespass > Defenses > Constitutional Considerations
[HN4] The *Fourth Amendment* governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any technical trespass under local property law.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
[HN5] The Unites States Supreme Court concludes that the underpinnings of *Olmstead v. United States, 277 U.S. 438 (1928)* and *Goldman v. United States, 316 U.S. 129 (1942)* have been so eroded by the Court's subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling.

Criminal Law & Procedure > Search & Seizure > Electronic Eavesdropping > Warrants
Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
[HN6] Under sufficiently "precise and discriminate circumstances," a federal court may empower government agents to employ a concealed electronic device for the narrow and particularized purpose of ascertaining the truth of the allegations of a detailed factual affidavit alleging the commission of a specific criminal offense.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Reasonableness & Prudence Standard
[HN7] Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Issuance by Neutral & Detached Magistrates
[HN8] The United States Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview
[HN9] The mandate of the *Fourth Amendment* requires adherence to judicial processes, and searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the *Fourth Amendment*, subject only to a few specifically established and well-delineated exceptions.

SUMMARY:

Defendant was convicted in the United States District Court for the Southern District of California of transmitting wagering information by telephone. At trial the government was permitted, over the defendant's objection, to introduce evidence of his end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he placed his calls. The Court of Appeals for the Ninth Circuit affirmed. (*369 F2d 130.*)

On certiorari, the Supreme Court of the United States reversed. In an opinion by Stewart, J., expressing the views of seven members of the court, it was held that antecedent judicial authorization, not given in the instant case, was a constitutional precondition of the kind of electronic surveillance involved.

Douglas, J., with the concurrence of Brennan, J., joined the court's opinion, rejecting, however, the view expressed by White, J., in his concurring opinion, that no antecedent judicial authorization is necessary for electronic surveillance if the President of the United States or the Attorney General has authorized electronic surveillance as required by national security.

Harlan, J., also concurred, joining in and elaborating on the opinion of the court.

White, J., also joined the opinion of the court.

Black, J., dissented on the ground that eavesdropping carried on by electronic means does not constitute a "search" or "seizure" within the meaning of the *Fourth Amendment.*

Marshall, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

WITNESSES §84

self-incrimination -- immunity --

Headnote:[1A][1B]

While pursuant to the grant, in *47 USC 409(l)*, of immunity to one compelled, after claiming his privilege against self-incrimination, to testify before the Federal Communications Commission, his testimony cannot be used against him in any future trial, the statute does not confer immunity from punishment pursuant to a prior prosecution and adjudication of guilt.

[***LEdHN2]

CONSTITUTIONAL LAW §101

SEARCH AND SEIZURE §5

STATES §33.5

right of privacy --

Headnote:[2A][2B]

The *Fourth Amendment*, prohibiting unreasonable searches and seizures, cannot be translated into a general constitutional "right to privacy"; other provisions of the Constitution protect personal privacy from other forms of governmental invasion, such as the *First Amendment's* imposing limitation upon governmental abridgment of freedom to associate and privacy in one's associations, the *Third Amendment's* prohibiting the unconsented peacetime quartering of soldiers, and to some extent, the *Fifth Amendment's* reflecting the Constitution's concern for the right of each individual to a private enclave where he may lead a private life, whereas the protection of a person's general right to privacy is, like the protection of his property and of his very life, left largely to the law of the individual states.

[***LEdHN3]

PRIVACY §1

right to --

Headnote:[3]

The right of privacy is the right to be let alone by other people.

[***LEdHN4]

SEARCH AND SEIZURE §5

Fourth Amendment --

Headnote:[4]

The *Fourth Amendment* protects people, not places.

[***LEdHN5]

SEARCH AND SEIZURE §8

protected area --

Headnote:[5A][5B]

A private home is an area protected by the *Fourth Amendment*, but an open field is not.

[***LEdHN6]

SEARCH AND SEIZURE §8

protected area --

Headnote:[6A][6B]

While the Supreme Court of the United States has occasionally described its conclusions as to the scope of the *Fourth Amendment* in terms of "constitutionally protected areas," the court has never suggested that this concept can serve as a talismanic solution to every *Fourth Amendment* problem.

[***LEdHN7]

SEARCH AND SEIZURE §8

protected area -- exposure to public --

Headnote:[7]

What a person knowingly exposes to the public, even in his own home or office, is not a subject of *Fourth Amendment* protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

[***LEdHN8]

SEARCH AND SEIZURE §8

protected areas -- telephone booth --

Headnote:[8]

No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the *Fourth Amendment*, since one who occupies it is entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

[***LEdHN9]

SEARCH AND SEIZURE §23

eavesdropping --

Headnote:[9]

The *Fourth Amendment* governs not only the seizure of tangible items, but extends as well to the recording of oral statements that are overheard without any technical trespass under local law; the reach of the amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

[***LEdHN10]

SEARCH AND SEIZURE §23

electronic listening device -- telephone booth --

Headnote:[10]

The government's activities in attaching an electronic listening and recording device to the outside of a public telephone booth from which a suspect placed his calls constitutes a "search and seizure" within the meaning of the *Fourth Amendment*; the fact that the electronic device employed did not penetrate the wall of the booth has no constitutional significance.

[***LEdHN11]

SEARCH AND SEIZURE §26

electronic devices -- judicial order --

Headnote:[11]

A judicial order may authorize the carefully limited use of electronic surveillance.

[***LEdHN12]

SEARCH AND SEIZURE §29

notice of purpose --

Headnote:[12A][12B]

Officers need not announce their purpose before conducting an authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.

[***LEdHN13]

SEARCH AND SEIZURE §29

electronic surveillance -- notice --

Headnote:[13A][13B]

Considerations as to notice to be given by police officers as a prerequisite to search and seizure are not relevant to the problems presented by judicially authorized electronic surveillance.

[***LEdHN14]

SEARCH AND SEIZURE §29

service of warrant -- time --

Headnote:[14A][14B]

Federal Criminal Procedure Rule 41(d), requiring federal officers to serve upon the person searched a copy of the warrant, does not invariably require that this be done before the search takes place.

[***LEdHN15]

SEARCH AND SEIZURE §25

electronic surveillance -- without judicial sanction --

Headnote:[15]

The attaching by FBI agents, of an electronic listening and recording device to the outside of a public telephone booth from which a suspect placed his call, constitutes a violation of the *Fourth Amendment's* prohibition of unreasonable searches and seizures, in the absence of an antecedent order judicially sanctioning such surveillance upon the officers' presentation of their estimate of probable cause, and requiring them to observe precise limits and to notify the authorizing magistrate in detail of all that has been seized.

[***LEdHN16]

SEARCH AND SEIZURE §25

necessity of warrant --

Headnote:[16]

Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the *Fourth Amendment*, subject only to a few specifically established and well-delineated exceptions, such as searches incident to a lawful arrest or searches with the suspect's consent.

[***LEdHN17]

SEARCH AND SEIZURE §12

incident to arrest -- electronic surveillance --

Headnote:[17]

Electronic surveillance substantially contemporaneous with an individual's arrest can hardly be deemed an "incident" of that arrest, within the meaning of the rule that the *Fourth Amendment* does not prohibit search and seizure without a search warrant where incident to a lawful arrest.

[***LEdHN18]

SEARCH AND SEIZURE §12

incident to arrest -- surreptitious surveillance --

Headnote:[18A][18B]

The concept of an "incidental" search, within the rule that the *Fourth Amendment* does not prohibit a warrantless search and seizure where incident to lawful arrest, cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

[***LEdHN19]

SEARCH AND SEIZURE §25

surveillance of telephone booth --

Headnote:[19]

Surveillance of a telephone booth is not exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause, at least in a situation not involving the national security.

[***LEdHN20]

SEARCH AND SEIZURE §14

consent --

Headnote:[20A][20B]

A search to which an individual consents meets *Fourth Amendment* requirements.

[***LEdHN21]

APPEAL §1562

EVIDENCE §681.3

electronic surveillance of telephone booth --

Headnote:[21]

Admission, in a criminal prosecution for transmitting wagering information by telephone, of evidence of conversations overheard by FBI agents through an electronic listening and recording device attached to the outside of a public telephone booth from which the suspect had placed his calls, requires reversal of the conviction where the government agents proceeded without the required antecedent judicial authorization that is central to the *Fourth Amendment's* prohibition of unreasonable searches and seizures.

[***LEdHN22]

SEARCH AND SEIZURE §5

unreasonableness --

Headnote:[22]

Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.Point from Separate Opinion

[***LEdHN23]

SEARCH AND SEIZURE §26

electronic surveillance -- necessity of judicial order --

Headnote:[23]

Antecedent judicial authorization of electronic surveillance is necessary even though national security matters are involved. [From separate opinion by Douglas and Brennan, JJ. Contra: Separate opinion by White, J.]

SYLLABUS

Petitioner was convicted under an indictment charging him with transmitting wagering information by telephone across state lines in violation of *18 U. S. C. § 1084.* Evidence of petitioner's end of the conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the

telephone booth from which the calls were made, was introduced at the trial. The Court of Appeals affirmed the conviction, finding that there was no *Fourth Amendment* violation since there was "no physical entrance into the area occupied by" petitioner. *Held*:

1. The Government's eavesdropping activities violated the privacy upon which petitioner justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the *Fourth Amendment*. Pp. 350-353.

(a) The *Fourth Amendment* governs not only the seizure of tangible items but extends as well to the recording of oral statements. *Silverman v. United States, 365 U.S. 505, 511*. P. 353.

(b) Because the *Fourth Amendment* protects people rather than places, its reach cannot turn on the presence or absence of a physical intrusion into any given enclosure. The "trespass" doctrine of *Olmstead v. United States, 277 U.S. 438*, and *Goldman v. United States, 316 U.S. 129*, is no longer controlling. Pp. 351, 353.

2. Although the surveillance in this case may have been so narrowly circumscribed that it could constitutionally have been authorized in advance, it was not in fact conducted pursuant to the warrant procedure which is a constitutional precondition of such electronic surveillance. Pp. 354-359.

COUNSEL: Burton Marks and Harvey A. Schneider argued the cause and filed briefs for petitioner.

John S. Martin, Jr., argued the cause for the United States. With him on the brief were Acting Solicitor General Spritzer, Assistant Attorney General Vinson and Beatrice Rosenberg.

JUDGES: Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas; Marshall took no part in the consideration or decision of the case.

OPINION BY: STEWART

OPINION

[*348] [***580] [**509] MR. JUSTICE STEWART delivered the opinion of the Court.

[***LEdHR1A] [1A]The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute. [1] At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the *Fourth Amendment*, [*349] because "there was no physical entrance into the area occupied by [the petitioner]." [2] [**510] We granted certiorari in order to consider the constitutional questions thus presented. [3]

1 *18 U. S. C. § 1084*. That statute provides in pertinent part:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $ 10,000 or imprisoned not more than two years, or both.

"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

2 *369 F.2d 130, 134*.

[***LEdHR1B] [1B]

3 *386 U.S. 954*. The petition for certiorari also challenged the validity of a warrant authorizing the search of the petitioner's premises. In light of our disposition of this case, we do not reach that issue. We find no merit in the petitioner's further

suggestion that his indictment must be dismissed. After his conviction was affirmed by the Court of Appeals, he testified before a federal grand jury concerning the charges involved here. Because he was compelled to testify pursuant to a grant of immunity, 48 Stat. 1096, as amended, *47 U. S. C. § 409 (l)*, it is clear that the fruit of his testimony cannot be used against him in any future trial. But the petitioner asks for more. He contends that his conviction must be vacated and the charges against him dismissed lest he be "subjected to [a] penalty . . . on account of [a] . . . matter . . . concerning which he [was] compelled . . . to testify . . . ." *47 U. S. C. § 409 (l)*. *Frank v. United States, 347 F.2d 486*. We disagree. In relevant part, *§ 409 (l)* substantially repeats the language of the Compulsory Testimony Act of 1893, 27 Stat. 443, *49 U. S. C. § 46*, which was Congress' response to this Court's statement that an immunity statute can supplant the *Fifth Amendment* privilege against self-incrimination only if it affords adequate protection from future prosecution or conviction. *Counselman v. Hitchcock, 142 U.S. 547, 585-586*. The statutory provision here involved was designed to provide such protection, see *Brown v. United States, 359 U.S. 41, 45-46*, not to confer immunity from punishment pursuant to a *prior* prosecution and adjudication of guilt. Cf. *Reina v. United States, 364 U.S. 507, 513-514*.

The [***581] petitioner has phrased those questions as follows:

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

[*350] "B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the *Fourth Amendment to the United States Constitution*."

[***LEdHR2A] [2A] [***LEdHR3] [3]We decline to adopt this formulation of the issues. In the first place, the correct solution of *Fourth Amendment* problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the *Fourth Amendment* cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. [4] Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. [5] But the protection of a [**511] person's *general* right to privacy -- his right to be let alone by other people [6] -- is, like the [*351] protection of his property and of his very life, left largely to the law of the individual States. [7]

4 "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home." *Griswold v. Connecticut, 381 U.S. 479, 509* (dissenting opinion of MR. JUSTICE BLACK).

[***LEdHR2B] [2B]

5 The *First Amendment*, for example, imposes limitations upon governmental abridgment of "freedom to associate and privacy in one's associations." *NAACP v. Alabama, 357 U.S. 449, 462*. The *Third Amendment's* prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the *Fifth Amendment* too "reflects the Constitution's concern for . . . '. . . the right of each individual "to a private enclave where he may lead a private life."'" *Tehan v. Shott, 382 U.S. 406, 416*. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

6 See Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

7 See, *e. g., Time, Inc.* v. *Hill, 385 U.S. 374*. Cf. *Breard v. Alexandria, 341 U.S. 622*; *Kovacs v. Cooper, 336 U.S. 77*.

[***LEdHR4] [4] [***LEdHR5A] [5A]

389 U.S. 347, *351; 88 S. Ct. 507, **511;
19 L. Ed. 2d 576, ***LEdHR6A; 1967 U.S. LEXIS 2

[***LEdHR6A] [6A] [***LEdHR7] [7]Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from [***582] which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. [8] But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. [9] For [HN1] the *Fourth Amendment* protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of *Fourth Amendment* protection. See *Lewis v. United States, 385 U.S. 206, 210*; *United States v. Lee, 274 U.S. 559, 563*. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [*352] See *Rios v. United States, 364 U.S. 253*; *Ex parte Jackson, 96 U.S. 727, 733*.

[***LEdHR5B] [5B]

8 In support of their respective claims, the parties have compiled competing lists of "protected areas" for our consideration. It appears to be common ground that a private home is such an area, *Weeks v. United States, 232 U.S. 383*, but that an open field is not. *Hester v. United States, 265 U.S. 57*. Defending the inclusion of a telephone booth in his list the petitioner cites *United States v. Stone, 232 F.Supp. 396*, and *United States* v. *Madison*, 32 L. W. 2243 (D. C. Ct. Gen. Sess.). Urging that the telephone booth should be excluded, the Government finds support in *United States v. Borgese, 235 F.Supp. 286*.

[***LEdHR6B] [6B]

9 It is true that this Court has occasionally described its conclusions in terms of "constitutionally protected areas," see, *e. g., Silverman v. United States, 365 U.S. 505, 510, 512*; *Lopez v. United States, 373 U.S. 427, 438-439*; *Berger v. New York, 388 U.S. 41, 57, 59*, but we have never suggested that this concept can serve as a talismanic solution to every *Fourth Amendment* problem.

[***LEdHR8] [8]The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. [HN2] No less than an individual in a business office, [10] in a friend's apartment, [11] or in a taxicab, [12] a person in a telephone booth may rely upon the protection of the *Fourth Amendment*. One who occupies it, shuts the door behind him, and pays the toll that permits [**512] him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

10 *Silverthorne Lumber Co.* v. *United States, 251 U.S. 385*.
11 *Jones v. United States, 362 U.S. 257*.
12 *Rios v. United States, 364 U.S. 253*.

[***LEdHR9] [9]The Government contends, however, that the activities of its agents in this case should not be tested by *Fourth Amendment* requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose [***583] further *Fourth Amendment* inquiry, *Olmstead v. United States, 277 U.S. 438, 457, 464, 466*; *Goldman v. United States, 316 U.S. 129, 134-136*, for that Amendment was thought to limit only searches and seizures of tangible [*353] property. [13] But [HN3] "the premise that property interests control the right of the Government to search and seize has been discredited." *Warden v. Hayden, 387 U.S. 294, 304*. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that [HN4] the *Fourth Amendment* governs not only the seizure of tangible items, but extends as well to the recording of oral statements,

overheard without any "technical trespass under . . . local property law." *Silverman v. United States, 365 U.S. 505, 511.* Once this much is acknowledged, and once it is recognized that the *Fourth Amendment* protects people -- and not simply "areas" -- against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

13 See *Olmstead v. United States, 277 U.S. 438, 464-466.* We do not deal in this case with the law of detention or arrest under the *Fourth Amendment.*

[***LEdHR10] [10][HN5] We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the *Fourth Amendment.* The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

[*354] The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, [14] and [**513] they took [***584] great care to overhear only the conversations of the petitioner himself. [15]

14 Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations concerning the placing of bets and the receipt of wagering information.

15 On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

[***LEdHR11] [11] [***LEdHR12A] [12A] [***LEdHR13A] [13A] [***LEdHR14A] [14A]Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of [*355] such an authorization, holding that, [HN6] under sufficiently "precise and discriminate circumstances," a federal court may empower government agents to employ a concealed electronic device "for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense." *Osborn v. United States, 385 U.S. 323, 329-330.* Discussing that holding, the Court in *Berger v. New York, 388 U.S. 41,* said that "the order authorizing the use of the electronic device" in *Osborn* "afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." *Id., at 57.*[16] Here, too, [**514] a similar [*356] [***585] judicial order could have accommodated "the legitimate needs of law enforcement" [17] by authorizing the carefully limited use of electronic surveillance.

[***LEdHR12B] [12B] [***LEdHR13B] [13B] [***LEdHR14B] [14B]

16 Although the protections afforded the petitioner in *Osborn* were "*similar* . . . to those . . . of conventional warrants," they were not

identical. A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in *Osborn* simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. See *Ker v. California, 374 U.S. 23, 37-41.*

Although some have thought that this "exception to the notice requirement where exigent circumstances are present," *id., at 39*, should be deemed inapplicable where police enter a home before its occupants are aware that officers are present, *id., at 55-58* (opinion of MR. JUSTICE BRENNAN), the reasons for such a limitation have no bearing here. However true it may be that "innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion," *id., at 57*, and that "the requirement of awareness . . . serves to minimize the hazards of the officers' dangerous calling," *id., at 57-58*, these considerations are not relevant to the problems presented by judicially authorized electronic surveillance. Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. *Rule 41 (d)* does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place. *Nordelli v. United States, 24 F.2d 665, 666-667.*

Thus the fact that the petitioner in *Osborn* was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in *Berger* from reaching the conclusion that the use of the recording device sanctioned in *Osborn* was entirely lawful. *388 U.S. 41, 57.*

17 *Lopez v. United States, 373 U.S. 427, 464* (dissenting opinion of MR. JUSTICE BRENNAN).

[***LEdHR15] [15] [***LEdHR16] [16]The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive [*357] means consistent with that end. [HN7] Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello v. United States, 269 U.S. 20, 33*, for [HN8] the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Wong Sun v. United States, 371 U.S. 471, 481-482.* "Over and again this Court has emphasized that [HN9] the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States v. Jeffers, 342 U.S. 48, 51*, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the *Fourth Amendment* [18] -- subject only to a few specifically established and well-delineated exceptions. [19]

18 See, *e. g., Jones v. United States, 357 U.S. 493, 497-499*; *Rios v. United States, 364 U.S. 253, 261*; *Chapman v. United States, 365 U.S. 610, 613-615*; *Stoner v. California, 376 U.S. 483, 486-487.*

19 See, *e. g., Carroll v. United States, 267 U.S. 132, 153, 156*; *McDonald v. United States, 335 U.S. 451, 454-456*; *Brinegar v. United States,*

389 U.S. 347, *357; 88 S. Ct. 507, **514;
19 L. Ed. 2d 576, ***LEdHR16; 1967 U.S. LEXIS 2

338 U.S. 160, 174-177; *Cooper v. California, 386 U.S. 58*; *Warden v. Hayden, 387 U.S. 294, 298-300.*

[***LEdHR17] [17] [***LEdHR18A] [18A] [***LEdHR19] [19] [***LEdHR20A] [20A]It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest. [20] [*358] [**515] Nor could the use of electronic surveillance [***586] without prior authorization be justified on grounds of "hot pursuit." [21] And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent. [22]

[***LEdHR18B] [18B]

20 In *Agnello v. United States, 269 U.S. 20, 30*, the Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

Whatever one's view of "the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest," *United States v. Rabinowitz, 339 U.S. 56, 61*; cf. *id., at 71-79* (dissenting opinion of Mr. Justice Frankfurter), the concept of an "incidental" search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

21 Although "the *Fourth Amendment* does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," *Warden v. Hayden, 387 U.S. 294, 298-299*, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

[***LEdHR20B] [20B]

22 A search to which an individual consents meets *Fourth Amendment* requirements, *Zap v. United States, 328 U.S. 624*, but of course "the usefulness of electronic surveillance depends on lack of notice to the suspect." *Lopez v. United States, 373 U.S. 427, 463* (dissenting opinion of MR. JUSTICE BRENNAN).

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. [23] It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

"bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio, 379 U.S. 89, 96.*

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from *Fourth Amendment* [*359] violations "only in the discretion of the police." *Id., at 97.*

23 Whether safeguards other than prior authorization by a magistrate would satisfy the *Fourth Amendment* in a situation involving the national security is a question not presented by this case.

[***LEdHR21] [21] [***LEdHR22] [22]These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the *Fourth Amendment*," [24] a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the

surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

24 See *Osborn v. United States, 385 U.S. 323, 330.*

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

CONCUR BY: DOUGLAS; HARLAN; WHITE

CONCUR

[***587] MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, concurring.

[***LEdHR23] [23]

While I join the opinion of the Court, I feel compelled to reply to the separate concurring opinion of my Brother [**516] WHITE, which I view as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels "national security" matters.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate [*360] and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the *Fourth Amendment* as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of *Fourth Amendment* rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.

There is, so far as I understand constitutional history, no distinction under the *Fourth Amendment* between types of crimes. Article III, § 3, gives "treason" a very narrow definition and puts restrictions on its proof. But the *Fourth Amendment* draws no lines between various substantive offenses. The arrests in cases of "hot pursuit" and the arrests on visible or other evidence of probable cause cut across the board and are not peculiar to any kind of crime.

I would respect the present lines of distinction and not improvise because a particular crime seems particularly heinous. When the Framers took that step, as they did with treason, the worst crime of all, they made their purpose manifest.

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks v. United States, 232 U.S. 383*, and unlike a field, *Hester v. United States, 265 U.S. 57*, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the *Fourth Amendment*; [*361] and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the *Fourth Amendment* protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has [***588] emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. *Hester v. United States, supra.*

The critical fact in this case is that "one who occupies it, [a telephone [**517] booth] shuts the door

behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. *Ante*, at 352. The point is not that the booth is "accessible to the public" at other times, *ante*, at 351, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. *Rios v. United States, 364 U.S. 253.*

In *Silverman v. United States, 365 U.S. 505*, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the *Fourth Amendment.* [*362] That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure," and that the examination or taking of physical property was not required. This view of the *Fourth Amendment* was followed in *Wong Sun v. United States, 371 U.S. 471, at 485*, and *Berger v. New York, 388 U.S. 41, at 51.* Also compare *Osborn v. United States, 385 U.S. 323, at 327.* In *Silverman* we found it unnecessary to re-examine *Goldman v. United States, 316 U.S. 129*, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the *Fourth Amendment.* This case requires us to reconsider *Goldman*, and I agree that it should now be overruled. * Its limitation on *Fourth Amendment* protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

* I also think that the course of development evinced by *Silverman, supra, Wong Sun, supra, Berger, supra*, and today's decision must be recognized as overruling *Olmstead v. United States, 277 U.S. 438*, which essentially rested on the ground that conversations were not subject to the protection of the *Fourth Amendment.*

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the *Fourth Amendment*, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

[***589] MR. JUSTICE WHITE, concurring.

I agree that the official surveillance of petitioner's telephone conversations in a public booth must be subjected [*363] to the test of reasonableness under the *Fourth Amendment* and that on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the *Fourth Amendment* need not interfere with legitimate needs of law enforcement. *

* In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the *Fourth Amendment*, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, *Hoffa v. United States, 385 U.S. 293 (1966)*; (2) by a recording device hidden on the person of such an informant, *Lopez v. United States, 373 U.S. 427 (1963)*; *Osborn v. United States, 385 U.S. 323 (1966)*; and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, *On Lee v. United States, 343 U.S. 747 (1952).* When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The *Fourth Amendment* does not protect against unreliable (or law-abiding) associates. *Hoffa v. United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

In [**518] joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been

authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. See *Berger v. New York, 388 U.S. 41, 112-118 (1967)* (WHITE, J., [*364] dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

DISSENT BY: BLACK

DISSENT

MR. JUSTICE BLACK, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion. For on that premise my Brother STEWART sets out methods in accord with the *Fourth Amendment* to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. In this respect today's opinion differs sharply from *Berger v. New York, 388 U.S. 41*, decided last Term, which held void on its face a New York statute authorizing wiretapping on warrants issued by magistrates on showings of probable cause. The *Berger* case also set up what appeared to be insuperable obstacles to the valid passage of such wiretapping laws by States. The Court's opinion in this case, however, removes the doubts about state power in this field and [***590] abates to a large extent the confusion and near-paralyzing effect of the *Berger* holding. Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the *Fourth Amendment*.

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable.

[*365] While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The *Fourth Amendment* says that

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." [**519] These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one "describe" a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what [*366] is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says "particularly describing"? Rather than using language in a completely artificial way, I must conclude that the *Fourth Amendment* simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the *Fourth Amendment* was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger, supra*, recognized, "an ancient practice which at common law was condemned as a nuisance. 4 Blackstone, Commentaries 168. In those

389 U.S. 347, *366; 88 S. Ct. 507, **519;
19 L. Ed. 2d 576, ***590; 1967 U.S. LEXIS 2

days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond [***591] their walls seeking out private discourse." *388 U.S., at 45*. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the *Fourth Amendment*. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the *Bill of Rights* without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give to the *Fourth Amendment's* language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires and that this Court often has said that the *Bill of Rights'* safeguards should be given a liberal construction. This [*367] principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the "seizure" of conversations. The *Fourth Amendment* was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of *Fourth Amendment* restrictions. See, *e. g., Olmstead v. United States, 277 U.S. 438 (1928)*, and *Goldman v. United States, 316 U.S. 129 (1942)*.

[**520] So far I have attempted to state why I think the words of the *Fourth Amendment* prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption and that the Court's decision in this case, along with its amorphous holding in *Berger* last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the *Fourth Amendment's* applicability to eavesdropping through a wiretap was, of course, *Olmstead, supra*. In holding that the interception of private telephone conversations by means of wiretapping was not a violation of the *Fourth Amendment*, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

"The Amendment itself shows that the search is to be of material things -- the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is [*368] that it must specify the place to be searched and the person or *things* to be seized. . . .

. . . .

"Justice Bradley in the *Boyd* case [*Boyd v. United States, 116 U.S. 616]*, and Justice Clark[e] in the *Gouled* case [*Gouled v. United States, 255 U.S. 298]*, said that the *Fifth Amendment* and [***592] the *Fourth Amendment* were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight." *277 U.S., at 464-465*.

Goldman v. United States, 316 U.S. 129, is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the *Fourth Amendment*. There federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to *Olmstead*, found no *Fourth Amendment* violation.

It should be noted that the Court in *Olmstead* based its decision squarely on the fact that wiretapping or eavesdropping does not violate the *Fourth Amendment*. As shown, *supra*, in the cited qoutation from the case, the Court went to great pains to examine the actual language of the Amendment and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court in citing *Hester v. United States, 265 U.S. 57*, indicated that even where there was a trespass the *Fourth Amendment* does not automatically apply to evidence obtained by "hearing or [*369] sight." The

Olmstead majority characterized *Hester* as holding "that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects." *277 U.S., at 465*. Thus the clear holding of the *Olmstead* and *Goldman* cases, undiluted by any question of trespass, is that eavesdropping, in both its original and modern forms, is not violative of the *Fourth Amendment*.

While my reading of the *Olmstead* and *Goldman* cases convinces me that they were decided on the basis of the inapplicability [**521] of the wording of the *Fourth Amendment* to eavesdropping, and not on any trespass basis, this is not to say that unauthorized intrusion has not played an important role in search and seizure cases. This Court has adopted an exclusionary rule to bar evidence obtained by means of such intrusions. As I made clear in my dissenting opinion in *Berger v. New York, 388 U.S. 41, 76*, I continue to believe that this exclusionary rule formulated in *Weeks v. United States, 232 U.S. 383*, rests on the "supervisory power" of this Court over other federal courts and is not rooted in the *Fourth Amendment*. See *Wolf* v. *Colorado*, concurring opinion, *338 U.S. 25, 39, at 40*. See also *Mapp* v. *Ohio*, concurring opinion, *367 U.S. 643, 661-666*. This rule has caused the Court to refuse to accept evidence where there has been such an intrusion regardless of whether there has been a search or seizure in violation of the *Fourth Amendment*. As this [***593] Court said in *Lopez v. United States, 373 U.S. 427, 438-439*, "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear [citing [*370] *Olmstead* and *Goldman*]. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman* v. *United States*."

To support its new interpretation of the *Fourth Amendment*, which in effect amounts to a rewriting of the language, the Court's opinion concludes that "the underpinnings of *Olmstead* and *Goldman* have been . . . eroded by our subsequent decisions . . . ." But the only cases cited as accomplishing this "eroding" are *Silverman v. United States, 365 U.S. 505*, and *Warden v. Hayden, 387 U.S. 294*. Neither of these cases "eroded" *Olmstead* or *Goldman*. *Silverman* is an interesting choice since there the Court expressly refused to re-examine the rationale of *Olmstead* or *Goldman* although such a reexamination was strenuously urged upon the Court by the petitioners' counsel. Also it is significant that in *Silverman*, as the Court described it, "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners," *365 U.S., at 509*, thus calling into play the supervisory exclusionary rule of evidence. As I have pointed out above, where there is an unauthorized intrusion, this Court has rejected admission of evidence obtained regardless of whether there has been an unconstitutional search and seizure. The majority's decision here relies heavily on the statement in the opinion that the Court "need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls." (At 511.) Yet this statement should not becloud the fact that time and again the opinion emphasizes that there has been an unauthorized intrusion: "For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an *unauthorized physical penetration* into the premises occupied by the petitioners." (At 509, emphasis added.) "Eavesdropping [*371] accomplished by means of such a *physical intrusion* is beyond the pale of even those decisions . . . ." (At 509, emphasis added.) "Here . . . the officers overheard the petitioners' conversations only by *usurping* part of the petitioners' house or office . . . ." (At 511, emphasis added.) "Decision here . . . is based upon the reality of an *actual intrusion* . . . ." (At 512, emphasis added.) "We find no occasion to re-examine *Goldman* [**522] here, but we decline to go beyond it, *by even a fraction of an inch*." (At 512, emphasis added.) As if this were not enough, Justices Clark and Whittaker concurred with the following statement: "In view of the determination by the majority that the *unauthorized physical penetration* into petitioners' premises constituted sufficient trespass to remove [***594] this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion." (At 513, emphasis added.) As I made clear in my dissent in *Berger*, the Court in *Silverman* held the evidence should be excluded by virtue of the exclusionary rule and "I would not have agreed with the Court's opinion in *Silverman* . . . had I thought that the result depended on finding a violation of the *Fourth Amendment* . . . ." *388 U.S., at 79-80*. In light of this and the fact that the Court expressly refused to

reexamine *Olmstead* and *Goldman*, I cannot read *Silverman* as overturning the interpretation stated very plainly in *Olmstead* and followed in *Goldman* that eavesdropping is not covered by the *Fourth Amendment*.

The other "eroding" case cited in the Court's opinion is *Warden v. Hayden, 387 U.S. 294*. It appears that this case is cited for the proposition that the *Fourth Amendment* applies to "intangibles," such as conversation, and the following ambiguous statement is quoted from the opinion: "The premise that property interests control the right of the Government to search and seize has been discredited." *387 U.S., at 304*. But far from being concerned [*372] with eavesdropping, *Warden* v. *Hayden* upholds the seizure of *clothes*, certainly tangibles by any definition. The discussion of property interests was involved only with the common-law rule that the right to seize property depended upon proof of a superior property interest.

Thus, I think that although the Court attempts to convey the impression that for some reason today *Olmstead* and *Goldman* are no longer good law, it must face up to the fact that these cases have never been overruled or even "eroded." It is the Court's opinions in this case and *Berger* which for the first time since 1791, when the *Fourth Amendment* was adopted, have declared that eavesdropping is subject to *Fourth Amendment* restrictions and that conversations can be "seized." * I must align myself with all those judges who up to this year have never been able to impute such a meaning to the words of the Amendment.

> * The first paragraph of my Brother HARLAN's concurring opinion is susceptible of the interpretation, although probably not intended, that this Court "has long held" eavesdropping to be a violation of the *Fourth Amendment* and therefore "presumptively unreasonable in the absence of a search warrant." There is no reference to any long line of cases, but simply a citation to *Silverman*, and several cases following it, to establish this historical proposition. In the first place, as I have indicated in this opinion, I do not read *Silverman* as holding any such thing; and in the second place, *Silverman* was decided in 1961. Thus, whatever it held, it cannot be said it "has [been] long held." I think my Brother HARLAN recognizes this later in his opinion when he admits that the Court must now overrule *Olmstead* and *Goldman*. In having to overrule these cases in order to establish the holding the Court adopts today, it becomes clear that the Court is promulgating new doctrine instead of merely following what it "has long held." This is emphasized by my Brother HARLAN's claim that it is "bad physics" to adhere to *Goldman*. Such an assertion simply illustrates the propensity of some members of the Court to rely on their limited understanding of modern scientific subjects in order to fit the Constitution to the times and give its language a meaning that it will not tolerate.

[*373] Since I see no way in which the words of the *Fourth Amendment* can be construed to apply to eavesdropping, [***595] that closes the matter for me. In interpreting the *Bill of Rights*, I willingly go as far [**523] as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the *Fourth Amendment*, which started only recently when the Court began referring incessantly to the *Fourth Amendment* not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the *Fourth Amendment* its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. As I said in *Griswold v. Connecticut, 381 U.S. 479*, "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law

ever to be passed which might abridge the 'privacy' [*374] of individuals. But there is not." (Dissenting opinion, at 508.) I made clear in that dissent my fear of the dangers involved when this Court uses the "broad, abstract and ambiguous concept" of "privacy" as a "comprehensive substitute for the *Fourth Amendment's* guarantee against 'unreasonable searches and seizures.'" (See generally dissenting opinion, at 507-527.)

The *Fourth Amendment* protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons I respectfully dissent.

REFERENCES

29 Am Jur 2d, Evidence 434, 435; Am Jur, Searches and Seizures (1st ed 6-13)

17 Am Jur Proof of Facts 1, Tape Recordings as Evidence

US Digest Anno, Appeal and Error 1562; Evidence 681.3; Search and Seizure 8, 23-28

ALR Digests, Evidence 712, 984(9); Search and Seizure 2-12

L ed Index to Anno, Evidence; Search and Seizure

ALR Quick Index, Eavesdropping; Electronic Eavesdropping Device; Search and Seizure

Annotation References:

Eavesdropping as violating right of privacy. *11 ALR3d 1296.*

Right of privacy. *138 ALR 22, 168 ALR 446, 14 ALR2d 750.*

Admissibility, in criminal prosecution, of evidence secured by mechanical or electronic eavesdropping device. *97 ALR2d 1283.*

Admissibility of sound recordings in evidence. *58 ALR2d 1024.*

Admissibility of evidence of fact of making or receiving telephone calls. *13 ALR2d 1409.*

Memorandum of telephone conversation as admissible in evidence. 167 ALR 405.

Admissibility of telephone conversations in evidence. 71 ALR 5, 105 ALR 326.

Admissibility of evidence obtained by governmental or other public officer by intercepting letter or telegraph or telephone message. 53 ALR 1485, 66 ALR 397, 134 ALR 614.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. *89 ALR2d 715.*

Transiently occupied room in hotel, motel, or roominghouse as within provision forbidding unreasonable searches and seizures . *86 ALR2d 984.*

Premises temporarily unoccupied as dwelling within provision forbidding unreasonable search of dwellings. *33 ALR2d 1430.*

Validity and adequacy, as a matter of constitutional law, of federal statute granting immunity in lieu of privilege against self-incrimination. 100 L ed 533, 5 L ed 2d 249.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination. *53 ALR2d 1030.*

Necessity and sufficiency of assertion of privilege against self- incrimination, as condition of statutory immunity of witness from prosecution. 145 ALR 1416.

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
TTY (503) 229-6993

May 14, 2008

Certified Mail No. 70060100000282620158

Dale Alan Pennie
PO Box 1734
56295 Tom Smith Road
Bandon, Oregon 97411-6306

Re: Notice of Violation, Department Order, and Civil Penalty Assessment
No. LQ/SW-WR-07-225
Coos County

Enclosed is a Notice of Violation, Department Order, and Civil Penalty Assessment (Notice and Order) relating to the Department of Environmental Quality's (Department's) March 19, 2007, October 15, 2007 and March 27, 2008 compliance inspections of property owned by the John H. Cox Jr. Revocable Trust and located at 56295 Tom Smith Road near Bandon, Oregon, also known as Tax Lot 1106 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Cox property). You claim an easement over the Cox property for ingress and egress to the adjacent property, which is owned by Karen Pennie (the Pennie property). This Notice and Order is a result of solid waste violations identified during these inspections.

During these inspections, Department staff determined that you have accumulated six wrecked or abandoned automobiles and approximately 186 cubic yards (53.6 tons) of useless or discarded materials on the Cox property, including automobile parts, automobile batteries, discarded scrap metal, a boat and boat trailer, discarded computers and computer monitors, discarded electrical components including electrical wiring, empty paint cans, waste tires, discarded building materials, metal pipe, and miscellaneous household trash. These materials are being managed in a manner constituting disposal.

Although the Department was not able to access the adjacent Pennie property directly, the Department also determined that you have accumulated a number of abandoned vehicles and additional discarded materials on that property as well. These materials were also being managed in a manner constituting disposal.

Oregon law requires that any person using property for the management or disposal of solid waste first obtain a solid waste disposal permit from the Department. Your accumulation of discarded materials on the Cox and Pennie properties and your management of these materials in a manner constituting disposal is an ongoing violation of Oregon law.

Because you have violated Oregon law, you are liable for a civil penalty assessment. In the enclosed Notice and Order, the Department has assessed a civil penalty of $28,805 for operating a solid waste disposal site without a permit. Of that amount, $10,950 represents the economic benefit

PLAINTIFF'S EXHIBIT 47

you obtained by avoiding the cost of proper disposal of approximately 53.6 tons of solid waste. This estimate does not include costs for repairing, recycling, towing or disposing of the six abandoned vehicles at a permitted wrecking facility. If you remove the solid waste and abandoned vehicles and properly recycle or dispose of them, the Department may recalculate this economic benefit as delayed rather than avoided and reduce the civil penalty accordingly.

The penalty was determined as set forth in Oregon Administrative Rule (OAR) 340-012-0045. The Department's findings and civil penalty determination are attached to the Notice and Order as Exhibit No. 1.

Also included in Section IV is an Order requiring you to remove all solid waste, including the abandoned vehicles, boat and boat trailer, from the Cox and Pennie properties within 30 days. The Order also requires you to submit to the Department all documentation of proper disposal or recycling of these items.

The steps you must follow to request a review of the Department's allegations and determinations in this matter in a contested case hearing are set forth in Section VI of the enclosed Notice and Order and in OAR 340-011-0530. You need to follow the rules to ensure that you do not lose the opportunity to dispute the enclosed Notice and Order.

If you wish to dispute the Notice and Order, you must send a written request for a contested case hearing, including a written response that admits or denies all of the facts alleged in the enclosed Notice and Order. The written response should also allege all affirmative defenses and explain why they apply in this matter. You will not be allowed to raise these issues at a later time, unless you can show good cause for that failure.

If the Department does not receive a request for a contested case hearing within **twenty calendar days** from the date you receive the enclosed documents, the Department will issue a Default Order and the civil penalty assessment and Order will become final and enforceable. You can fax a request for a contested case hearing to the Department at 503-229-5100 or mail it to the address stated in Section VI of the Notice.

If you wish to discuss this matter with the Department, or believe there are mitigating factors that the Department might not have considered in assessing the civil penalty or issuing the enclosed Order, you may include a request for an informal discussion in the request for a contested case hearing. If you request an informal discussion, you still have the right to a contested case hearing.

Copies of referenced rules are enclosed. Also enclosed is a description of the Department's policy allowing partial mitigation of the civil penalty upon a party's completion of a Supplemental Environmental Project (SEP) approved by the Department. If you are interested in having a portion of the civil penalty fund a SEP, you should review the policy.

I look forward to your cooperation in complying with Oregon environmental law in the future. If, however, any additional violations occur, you may be assessed additional civil penalties.

If you have any questions about the Notice and Order, please contact Regina Cutler with the Department's Office of Compliance and Enforcement in Portland at 503-229-5058, or toll-free at 1-800-452-4011, extension 5058.

Sincerely,

Joni Hammond
Interim Deputy Director

Enclosures

cc: Craig Filip, Eugene Office, DEQ
Land Quality Division, HQ, DEQ
Larry Knudsen, Oregon Department of Justice, Portland Office
U. S. Environmental Protection Agency
Coos County District Attorney
John H. Cox Jr. Revocable Trust, 9247 E. Sparklett Street, Temple city, CA 91780
Deputy Sheriff Del Dahlen, Coos County Courthouse, Coquille, Oregon 97423

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: DALE ALAN PENNIE, an individual, Respondent.	)	NOTICE OF VIOLATION, DEPARTMENT ORDER AND CIVIL PENALTY ASSESSMENT NO. LQ/SW-WR-07-225 COOS COUNTY

I. AUTHORITY

This Notice of Violation, Department Order and Civil Penalty Assessment (Notice and Order) is issued to Dale Alan Pennie (Respondent) by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through 468.140, ORS 459.376, ORS 459.995, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012, and 093.

II. FINDINGS

1. Respondent occupies real property located at 56295 Tom Smith County Road near Bandon, Oregon, also known as Tax Lot 1111 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Pennie property).

2. The John H. Cox Jr. Revocable Trust owns real property adjacent to the Pennie property, located at 56295 Tom Smith Road near Bandon, Oregon, otherwise known as Tax Lot 1106 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Cox property).

3. Respondent claims a 50-foot wide and approximately 400-foot long easement for ingress and egress across the western portion of the Cox property (the easement). A dirt road runs along the easement.

4. On December 20, 2005, Coos County Deputy Sheriff Del Dahlen conducted an inspection of the easement and the Cox property.

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5. On March 19, 2007, October 15, 2007 and March 27, 2008, Department staff conducted inspections of the easement and Cox property. Deputy Dahlen accompanied the Department on these inspections.

6. During the inspections, Deputy Dahlen and Department staff observed approximately six wrecked or abandoned automobiles and 186 cubic yards (53.6 tons) of useless or discarded materials scattered along the easement and the Cox property, including automobile parts, automobile batteries, discarded scrap metal, a boat and boat trailer, discarded computers and computer monitors, discarded electrical components including electrical wiring, empty paint cans, waste tires, discarded building materials, metal pipe, and miscellaneous household trash.

7. During the inspections, Deputy Dahlen and Department staff observed abandoned vehicles and discarded materials disposed of or managed in a manner constituting disposal on the Pennie property.

8. Respondent placed the materials described in paragraphs 6 and 7 above on the easement, on the Cox property and on the Pennie property.

9. The Department has not issued a solid waste disposal permit to Respondent or to any other person owning or controlling the easement, the Pennie or the Cox properties.

III. VIOLATIONS

Based upon the Findings above, Respondent has violated Oregon's laws as follows:

1. Since at least December 20, 2005 and continuing until at least March 27, 2008, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site without first obtaining a solid waste disposal site permit from the Department. Specifically, Respondent accumulated on the easement and on the Cox property the useless or discarded materials specified in Section II, paragraphs 6, in lieu of proper disposal at a permitted facility. According to OAR 340-012-0065(1)(a), this is a Class I violation.

2. Since at least December 20, 2005 and continuing until at least March 27, 2008, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site without first obtaining a solid waste disposal site permit from the

Department. Specifically, Respondent accumulated on the Pennie property the useless or discarded materials specified in Section II, paragraph 7 above, in lieu of proper disposal at a permitted facility. According to OAR 340-012-0065(1)(a), this is a Class I violation.

IV. DEPARTMENT ORDER

Based upon the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

1. Immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations by:

   a. Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 above, within thirty (30) days of the date of this Notice. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility as appropriate; and

   b. Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Notice.

All documentation required by this Section should be sent to:

Department of Environmental Quality
1102 Lincoln, Suite 210
Eugene, Oregon 97401
Attention: Craig Filip

V. CIVIL PENALTY ASSESSMENT

The Department imposes a civil penalty of $28,805 for the violation cited in Section III, paragraph 1 above. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-012-0045, are attached and incorporated as Exhibit No. 1.

VI. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right to have a contested case hearing before an administrative law

judge regarding the matters contained in this Notice and Order, provided Respondent files a written request for a contested case hearing **within twenty (20) calendar days from the date of service of this Notice and Order**. The request for a contested case hearing must be received by the Department within twenty (20) calendar days from the date of service of this Notice and Order. Pursuant to OAR 340-011-0530(4), if Respondent fails to file a timely request for a hearing, the late filing will not be allowed unless the late filing was beyond Respondent's reasonable control.

The request for a hearing must include a written response to this Notice and Order that admits or denies all factual matters alleged in this Notice and Order. In the written response, Respondent must also allege any and all affirmative defenses and explain the reasoning in support of each affirmative defense. The contested case hearing will be limited to those issues raised in this Notice and Order and in Respondent's request for a contested case hearing. Unless Respondent is able to show good cause:

1. Factual matters not denied in a timely manner will be considered admitted;

2. Failure to timely raise a defense will waive the ability to raise that defense at a later time;

3. New matters alleged in the request for a hearing are denied by the Department unless admitted in subsequent stipulation by the Department.

Send the request for hearing and answer to: **Deborah Nesbit, Oregon Department of Environmental Quality, 811 S.W. 6th Avenue, Portland, Oregon 97204, or via fax at 503-229-5100.** Following the Department's receipt of a request for a contested case hearing, Respondent will be notified of the date, time and place of the contested case hearing.

If Respondent fails to file a timely request for contested case hearing, Respondent may lose the right to a contested case hearing, and the Department may enter a Default Order for the relief sought in this Notice and Order.

Failure to appear at a scheduled contested case hearing may result in a Default Order.

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The Department's case file at the time this Notice and Order was issued will serve as the record for purposes of entering a Default Order.

VII. OPPORTUNITY FOR INFORMAL DISCUSSION

In addition to filing a request for a contested case hearing, Respondent may also request an informal discussion with the Department by including such a request in the request for a contested case hearing. Respondent's request for an informal discussion does not waive Respondent's right to a contested case hearing, provided a timely request for a hearing has been received.

VIII. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after the Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of $28,805 should be made payable to **"State Treasurer, State of Oregon"** and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204.**

5-14-08
Date

Joni Hammond
Interim Deputy Director

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENTS' CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Establishing, operating or maintaining a disposal site without a permit from the Department of Environmental Quality (Department) in violation of ORS 459.205(1) and OAR 340-093-0050(1).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0065(1)(a).

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-012-0135(3(a)(A), as the volume of material disposed of is greater than or equal to 400 cubic yards in volume.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty which is $8,000 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(2)(a)(N)(i).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(16), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether or not the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation existed for more than 28 days. Respondent has been operating or maintaining the disposal site without a permit since at least December 20, 2005 and continuing until at least March 27, 2008.

"M" is the mental state of the Respondent and receives a value of 6 pursuant to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. On at least two occasions the Department notified Respondent that the material he was accumulating on the properties in question was solid waste and that, by placing the material on the properties, he was illegally establishing a solid waste disposal site without a permit. On April 6, 2007 and again on December 4, 2007, the Department sent letters to Respondent requesting that he remove the solid waste accumulated on the properties by a date certain. Despite these warnings, Respondent continued to accumulate waste material on the properties in question and failed to remove and properly recycle or dispose of the materials. Respondent therefore consciously disregarded the substantial and unjustifiable risk that he was establishing, operating or maintaining an illegal solid waste disposal site.

"C" is Respondent's efforts to correct the violation and receives a value of 2 according to OAR 340-012-0145(6)(a)(E), because Respondent did not address the violations as described in paragraphs OAR

340-012-0145(6)(a)(A) through (6)(a)(C) and the facts do not support a finding under paragraph (6)(a)(D) because the violation could be corrected.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, EB receives a value of $11,205. This is the amount Respondent gained by avoiding spending an estimated $10,950 in disposal costs (including labor, equipment rental and transportation, and tipping fees of $79/ton at Beaver Hill Disposal Site) to properly dispose of approximately 53.6 tons of solid waste.

This estimate does not include costs for repairing, recycling, towing or disposing of the six abandoned vehicles at a permitted wrecking facility because the Department does not have sufficient information to estimate these avoided costs. This estimate also does not include costs for disposing of materials on the Pennie property because Respondent denied the Department access to the Pennie property and therefore the Department was unable to accurately estimate the precise nature and volume of materials on the Pennie property.

This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + M + C)] + EB
= $8,000 + [(0.1 x $8,000) x (0 + 0 + 4 + 6 + 2)] + $11,205
= $8,000 + ($800 x 12) + $11,205
= $8,000 + $9,600 + $11,205
= $28,805

Pursuant to OAR 340-012-0042(1)(c)(F)(iv), the Department elects to treat the violation as extending over as many days as is necessary to recover the economic benefit of noncompliance.

CERTIFICATE OF MAILING

I hereby certify that I served a Civil Penalty to Dale Alan Pennie Case No. LQ/SW-WR-07-225

Served upon: **Dale Alan Pennie**
PO Box 1734
56295 Tom Smith Road
Bandon OR 97411-6306

by mailing a true copy of the above by placing it in a sealed envelope, with postage prepaid at the US Post Office in Portland, Oregon on 5-14-08

Amy Smothers
Amy Smothers, DEQ

7006 0100 0002 8262 0158

U.S. Postal Service
CERTIFIED MAIL RECEIPT
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OFFICIAL USE

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage
Sent To
Street, Apt. No. or PO Box No.
City, State, ZIP

Dale Alan Pennie
PO Box 1734
56295 Tom Smith Road
Bandon OR 97411-6306

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Dale Alan Pennie
PO Box 1734
56295 Tom Smith Road
Bandon OR 97411-6306

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Dale Alan Pennie ☐ Agent ☒ Addressee

B. Received by (Printed Name) Dale A Penn C. Date of Delivery May 21, xxx

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7006 0100 0002 8262 0158

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-15

Dale A. Pennie
56295 Tom Smith Road
Bandon, OR 97411

Deborah Nesbit
Oregon Department of Environmental Quality
811 S.W. 6thy Avenue
Portland, OR 97204

Written Request for Contested Case Hearing on NO. LQ/SW-WR-07-225

Dale A. Pennie, Respondent, hereby requests a contested case hearing based on the following:

(1) Not one person has lawfully been upon the property located on Tom Smith Road, in Bandon, Oregon named in this Notice of Violation; specifically, not one state agent (including deputy sheriff Dahlen) has entered the property in question with a search warrant, as required by both Oregon State and United States Constitutions and specifically demanded, repeatedly, by Dale A. Pennie;

(2) Dale A. Pennie has already been specifically charged under County Ordinances for the identical violations you are, once again, attempting to charge Dale A. Pennie with (in simpler terms, you are recharging an already decided issue, which, coincidentally is currently on appeal with the Oregon Appellate court, said charges IDENTICAL in facts and nature to your charges, violating both double jeopardy (constitutional violation) and legal principal (res judicata, as well as stare decis and other practices) and said violations having been heard in open court by a Circuit Court Judge, with your same evidence and photographs, and the testimony of Craig Filip of your Eugene office;

(3) The specific denials of your findings as set out below:

(A) On finding 2, Cox Trust has nothing to do with mail box 56295 Tom Smith Road;

(B) On finding 3, The easement is a DEEDED right, preceding Cox's purchase of his property, the locked gate also preceding Cox's land purchase, as Dale A. Pennie's RIGHT to secure his property (the easement itself is Pennie property) from outsiders and intruders;

(C) On finding 4, Deputy Dahlen Trespassed unlawfully upon Dale A. Pennie's property illegally, through Cox property easement, unlawfully photographing as well as entering upon the private, posted (NO TRESPASSING) property of Dale A. Pennie and his personal property;

(D) On finding 5 these inspections were performed upon the Pennie property, illegally, as no search warrant was procured prior to the entry, as required by law; At the times of these specific inspections, no waste (if it was ever)was any longer upon the land of Cox, having been moved by Dale A. Pennie at the request of Deputy Dahlen previously;

(E) On Finding 6, Dale A. Pennie denies each and every allegation in this finding;

(F) On Finding 7, Dale A. Pennie denies each and every allegation, on both constitutional and statute basis, among other, for illegal entry upon Dale A. Pennie land and also, said "waste" not being disposed, but part and parcel to Pennie Electric business wares;

(G) Finding 8, as set out previously, denies this allegation completely;

(H) Dale A. Pennie has not requested, and has never needed, a permit to own "personal property" for either himself or his business;

(I) The violations listed, based on the faulty findings of fact, are denied completely, in their entirety as well as in the individual status;

FURTHER:

Dale A. Pennie has been harassed illegally, selectively prosecuted repeatedly, in infringement to his Constitutional rights, his basic human rights as an American, for his demanding his rights be honored (a belligerent claimant, as it were) in a manner consistent with established law, and this attempt by the Oregon DEQ to blatantly accuse Dale A. Pennie of operating illegal enterprises by failure to acquire permits only the agency itself has deemed necessary, in as much as no disposal business is being operated or conducted, all "solid waste" is exactly **not** that, rather, personal property.

Respectfullysubmitted,

Dated this 30th day of May, 2008

Dale A. Pennie
DALE A. PENNIE

BEFORE THE OREGON ENVIRONMENTAL QUALITY COMMISSION

In the Matter of:

DALE ALAN PENNIE
Case No. LQ/SW-WR-07-225

AFFIDAVIT OF SARAH WHEELER

STATE OF OREGON

I, Sarah Wheeler, being duly sworn, depose and say that the following is true to the best of my knowledge:

1. That, I, Sarah Wheeler, am currently employed by the Oregon Department of Environmental Quality as an Environmental Law Specialist.

2. That in the course of my employment, I regularly perform calculations to determine the economic benefit portion of civil penalties assessed by the Department as prescribed in OAR 340-012-0045.

3. That I, pursuant to OAR 340-012-0150, make economic benefit calculations using the United States Environmental Protection Agency's "BEN" computer model.

4. That I used BEN to calculate the economic benefit in Case no. LQ/SW-WR-07-225, which assessed a civil penalty against Dale Alan Pennie.

5. That the attached Memorandum, dated March 11, 2008, and attached "BEN" calculation sheets, were prepared by me in the normal course of my employment.

Date: 6/8/09

Sarah Wheeler
Sarah Wheeler
Department of Environmental Quality

Sworn and subscribed before me this 8th day of June, 2009.

OFFICIAL SEAL
DENISE ROTH
NOTARY PUBLIC-OREGON
COMMISSION NO. 419413
MY COMMISSION EXPIRES AUG. 18, 2011

Denise Roth
Notary Public for Oregon
My Commission Expires

8.18.2011

PLAINTIFF'S EXHIBIT 43

State of Oregon
Department of Environmental Quality **Memorandum**

Date: March 11, 2008
To: File
From: Sarah Greenley, Environmental Law Specialist, Office of Compliance and Enforcement
Subject: BEN calculation for Dale Alan Pennie

I. General Purpose and Authority

The economic benefit portion of the civil penalty formula is simply the monetary benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance.

Oregon Revised Statute 468.130(2)(c,h) directs the Environmental Quality Commission to consider economic conditions of the entity in assessing a penalty as well as other factors that Commission makes relevant by rule. Accordingly, the Commission adopted economic benefit as part of its penalty calculation in Oregon Administrative Rules (OAR) 340-012-0045(1)(e) and -0155. Pursuant to OAR 340-012-0150, the Department generally uses the U.S. Environmental Protection Agency's BEN computer model to determine economic benefit and will use it upon request of a respondent.

II. Theory of Economic Benefit

Compliance with environmental regulations may require an entity to expend financial resources. These expenditures support the public goal of better environmental quality, but often do not yield direct financial return to the entity. Economic benefit is the amount by which an entity is financially better off from not having complied with environmental requirements in a timely manner. If an entity avoids an expenditure, it increases its profit margin or has additional funds available for other profit-making activities. Sometimes the benefit may not be intuitive. For example, if an entity would have had to obtain a loan to make the expenditure, it might seem that the entity did not enjoy the benefit of the extra money – but avoiding the need to repay a loan is a direct financial advantage. If an entity did not make the expenditure on time, but later did make the expenditure, it might seem that the entity did not retain an economic advantage – but temporary access to the monies it should have spent is equivalent to an interest-free loan during the period of noncompliance which is also a direct financial advantage. For this reason BEN generally ignores the potential or likely source of the monies not used.

Economic benefit is "no fault" in nature. An entity need not have deliberately chosen to delay compliance, or even have been aware of its noncompliance, for it to accrue an economic benefit of noncompliance. An economic benefit may accrue before the entity is in actual

violation because planning costs, permitting fees, and similar costs often must be paid long before beginning the regulated activity that is in violation.

An appropriate economic benefit calculation represents the amount of money that would make the entity indifferent between compliance and noncompliance. If DEQ does not recover, through a civil penalty, at least this economic benefit, then the entity will retain a gain. Because of the precedent of this retained gain, other regulated companies may see an economic advantage in similar noncompliance. The U.S. Supreme Court has noted that deterrence is a primary purpose of a penalty[1] and that a penalty which fails to include sufficient economic benefit to remove the advantage of noncompliance will fail to deter future violations.[2]

III. Basis of the Costs Considered

Determining economic benefit always requires evaluating circumstances to determine what necessary or reasonable costs would have been required to obtain compliance or to determine what benefits were received from noncompliance. Often, an entity has more than one option to reach compliance and the Department evaluates the circumstances to determine what probable or reasonable steps the entity should have taken. The Department then estimates the reasonable costs and benefits pursuant to OAR 340-012-0150(2).

Dale Alan Pennie should have properly disposed of the solid waste on his property by March 19, 2007. By avoiding an estimated $10,950 in disposal costs (including labor, equipment rental and transportation, and tipping fees of $79/ton at Beaver Hill Disposal Site) to properly dispose of 53.6 tons of solid waste, Mr. Pennie benefited by an estimated **$11,205**.

IV. Applicability of Standard Rates Presumed by Rule

The BEN model relies on income-tax rates, inflation rates, and discount rates. The model allows the operator to input particular rates, but in the absence of operator input, the BEN model uses standard values based on the years of the violation, the state where the violation occurred and the entity's legal and profit status (*e.g.*, C-corporation, other for profit, non-profit, municipality, or federal facility). It calculates inflation rates from the Plant Cost Index (PCI) published by the magazine *Chemical Engineering* and from the Consumer Price Index. Alternative optional inflation indices include:

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[1] *See Tull v. United States*, 481 U.S. 412 (1987) (finding that the legislature intended penalties for environmental violations under the Clean Water Act to create deterrence). *Note also* OAR 340-012-0026(1)(c) which states that a goal of enforcement under the Oregon Environmental Quality Commission rules is deterrence.

[2] *See Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, fn. 2 (2000) (discussing the insufficiency of the economic benefit portion of a penalty for hazardous waste violations).

Abbreviation and Full Name		Description	Typical Applications
2.5 %	Constant rate of 2.5%	Assumes annual inflation rate is constant at 2.5 percent.	
CCI	Construction Cost Index	Construction costs (based on 1.128 tons Portland cement, 1,088 bd. ft. 2x4 lumber) and 200 common labor.	General construction costs, especially where labor costs are a high proportion of total costs.
ECI	Employment Cost Index	Total civilian compensation for all workers, seasonally adjusted.	One-time nondepreciable expenditures or annual costs that comprise mainly labor.
GDP	Gross Domestic Product Implicit Price Deflator	Measured by U.S. Commerce Department through the Bureau of Economic Analysis. Equals GDP in current dollars divided by GDP in constant dollars.	general expenses that affect multiple sectors of the economy (e.g., labor and construction).
PCI	Plant Cost Index	Plant cost index published by *Chemical Engineering*.	Standard default and for plant equipment costs.
PPI	Producer Price Index for Finished Goods	Reflects the price level for processing finished goods.	Processing finished goods, general expenses that affect multiple sectors of the economy (*e.g.*, labor and construction).

Pursuant to OAR 340-012-0150(1), the "model's standard values for income tax rates, inflation rate and discount rate shall be presumed to apply to all Respondents unless a specific Respondent can demonstrate that the standard value does not reflect the Respondent's actual circumstance."

V. Description of the Attached Run

BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures. Such expenditures can include: (1) capital investments (*e.g.*, larger pollution control or monitoring equipment, costs of design and installation), (2) one-time non-depreciable expenditures (*e.g.*, permit fees, clean-up costs, setting up a reporting system, acquiring land needed for a capital improvement), (3) annually recurring costs (*e.g.*, routine operating and maintenance costs, utilities). Each of these expenditures can be either delayed or avoided. BEN's baseline assumption is that capital investments and one-time non-depreciable expenditures are merely delayed over the period of noncompliance, whereas annual costs are avoided entirely over this period.

The calculation incorporates the economic concept of the "time value of money." Stated simply, a dollar today is worth more than a dollar tomorrow, because you can invest today's dollar to start earning a return immediately. Thus, the further in the future the dollar is, the less it is worth in "present-value" terms. Similarly, the greater the time value of money (*i.e.*, the greater the "discount" or "compound" rate used to derive the present value), the lower the present value of future costs. To calculate an entity's economic benefit, BEN uses standard financial cash flow and net-present-value analysis techniques based on modern and generally accepted financial principles, which were subjected to extensive national notice-and-comment processes.[3]

Inputs to the model include costs specific to the situation of the entity which include the values described in Section III as well as the presumed standard indexes and rates described in Section IV. The values used are listed in the lower three-quarters of the attached BEN Run Table. Using these values, BEN makes a series of calculations the results of which are listed in the top of the attached BEN Run Table by the letter indicated below.

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[3] *See* Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Request for comment, 61 Fed. Reg. 53025-53030 (Oct. 9, 1996); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Extension of time for request for comment, 61 Fed. Reg. 65391 (Dec. 12, 1996); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Advance notice of proposed action, response to comment, and request for additional comment, 64 Fed. Reg. 32947-32972 (June 18, 1999); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Advance notice of proposed action, response to comment, and request for additional comment, 64 Fed. Reg. 39135-39136 (July 21, 1999); Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Notice of final action and response to comment, 70 Fed. Reg. 50326-50345 (August 26, 2005) available at http://www.epa.gov/EPA-GENERAL/2005/August/Day-26/g17033.htm.

A) **On-Time Capital & One-Time Costs**. This is what compliance would have cost had the entity made its purchases of capital on time or paid its one-time costs on time. BEN calculates this value from the estimated costs as of the date the costs are estimated by discounting the annual cash flows at an average of the cost of capital throughout this time period. The value of the costs is adjusted to account for tax deductibility and depreciation. " A" is the value of noncompliance as of the date of initial noncompliance. (*See* **Fig. 1**) If " A" is zero, there are no capital or one-time costs in the calculation.

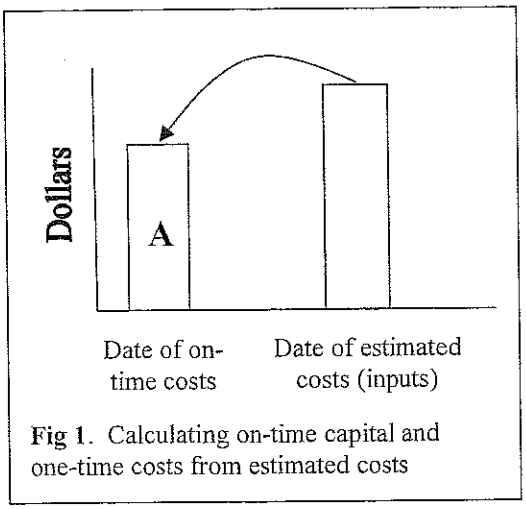

Fig 1. Calculating on-time capital and one-time costs from estimated costs

B) **Delay Capital & One Time Costs**. If the entity eventually did pay or will pay the costs of compliance in the future, BEN calculates what the entity would have needed to set aside on the date of noncompliance so as to have sufficient funds as of the date of delayed compliance. This number is used to mitigate the economic benefit by considering the known amount the entity will pay. BEN derives this number by: (1) determining the predicted delayed costs by adjusting for inflation and to account for tax deductibility in the year in which the funds were or will be spent and also for future depreciation tax shields, and (2) discounting the annual cash flows at an average of the cost of capital throughout this time period to account for interest. (*See* **Fig. 2**) " B" will be zero if all costs were avoided.

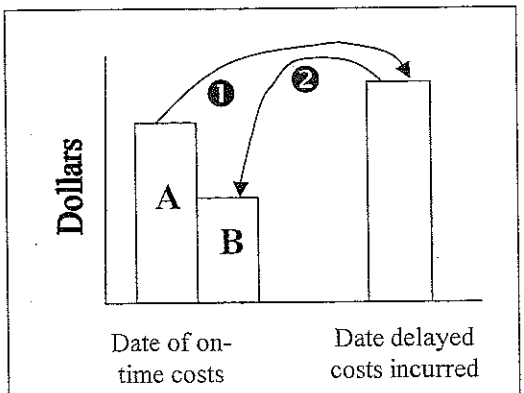

Fig. 2. Calculating the delayed capital and one-time costs from estimated costs

C) **Avoided Annually Recurring Costs**. This is the value of the avoided annual recurring costs as of the date of initial noncompliance. BEN derives this value by discounting the annual cash flows at an average of the cost of capital throughout this time period and accounting for tax deductibility. (*See* **Fig. 3**) " C" will be zero if there are no recurring annual costs.

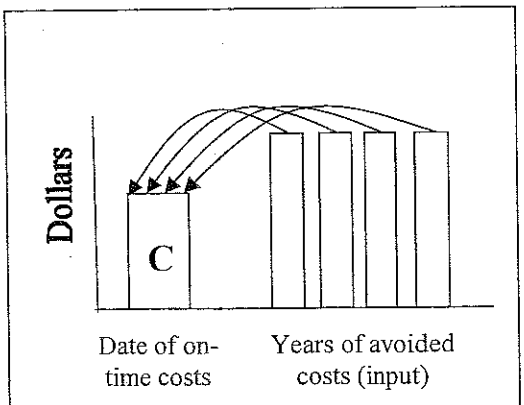

Fig. 3. Calculating annual recurring costs

D) **Initial Economic Benefit (A – B+ C)**. The values for A, B, and C are all values as of the date of noncompliance. The economic benefit received as of the date of noncompliance is determined by taking the on-time capital and one-time costs that should have been paid (A), subtracting the delayed capital and one-time costs which had been or will be paid (B), and adding the avoided annually recurring costs (C). The result is the economic benefit received as of the date of noncompliance. (*See* **Fig. 4**) The economic benefit is often much lower than the originally-estimated costs. This is because inflation tends to make more recent costs higher than historical costs and because the entity could have taken a tax deduction for the year in which the expenditure was made.

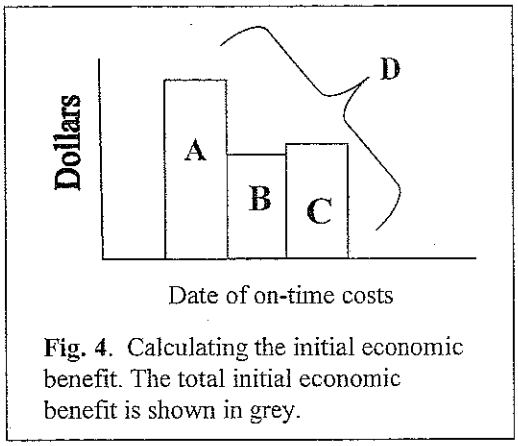

Fig. 4. Calculating the initial economic benefit. The total initial economic benefit is shown in grey.

E) **Final Economic Benefit at Penalty Payment Date**. BEN compounds the initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance. (*See* **Fig. 5**) Occasionally an entity looses money because the economic benefit is a negative number. In that case the economic benefit used in the penalty calculation is zero.

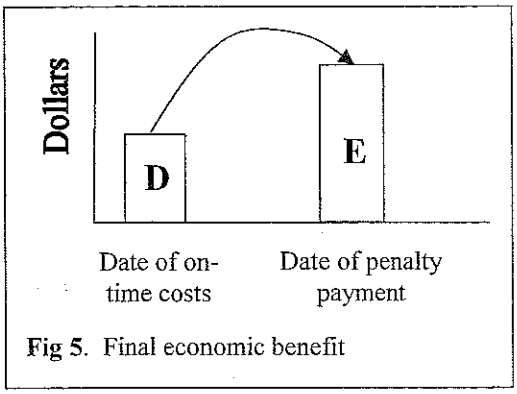

Fig 5. Final economic benefit

IV. Final Economic Benefit Is Likely an Underestimate

The economic benefit calculated above may underestimate the total economic benefit that the respondent received to date because it is based on conservative assumptions and does not include unknown or incidental costs. It also does not address uncertain indirect financial benefits, including:

- *Advantage-of-risk* – the value of (1) the risk of never getting caught and (2) keeping future options open by delaying a decision to institute a process or purchase capital;
- *Competitive advantage* – (1) beginning production earlier than would be possible if in compliance; (2) attracting clients by avoiding compliance costs, having a higher profit margin and therefore being able to offer goods or services at a lower cost than competitors;

(3) keeping those clients attracted by lower prices because of brand loyalty or high switching costs; or (4) using the time or money saved to increase production; and

- *Illegal profits* – selling illegal products or services.

EPA has undertaken a review of these indirect factors and may craft an economic method for calculating them.[4] Until that evaluation is complete, I consider these other economic benefits to be "de minimis" in light of the difficulties in calculation. Pursuant to OAR 340-012-0150(3), the Department need not calculate an economic benefit if that benefit is de minimis.

Another reason that the estimate above may be an underestimate is that the calculation is based on the time value of money, and is sensitive to when delayed costs are actually incurred and when penalties are actually paid. When the Department calculates an economic benefit for incorporation in a Notice of Civil Penalty Assessment, it often assumes the entity will comply with the schedule in the Order and that the penalty will be paid without the delays required for an appeal. This results in a lower economic benefit than would be obtained if the actual dates were initially known and used. For this reason the Department may recalculate the economic benefit for the hearing or in settlement so as to reach a more accurate final economic benefit.

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[4] *See* EPA Office of Enforcement and Compliance Assurance, "*Identifying and Calculating Economic Benefit That Goes Beyond Avoided and/or Delayed Costs*," (May 25, 2003) available at http://www.epa.gov/compliance/resources/publications/civil/programs/econben-costs.pdf; EPA Illegal Competitive Advantage Economic Benefit Advisory Panel of the Science Advisory Board, Advisory no. EPA-SAB-ADV-05-003, (Sept. 7, 2005) available at http://www.epa.gov/sab/pdf/ica_eb_sab-adv-05-003.pdf; EPA Office of Enforcement and Compliance Assurance, Response to advisory, (July 19, 2006) available at http://www.epa.gov/sab/pdf/sab-adv-05-003_response_07-19-06.pdf.

Run Name =	1
Present Values as of Noncompliance Date (NCD),	19-Mar-2007
A) On-Time Capital & One-Time Costs	$10,824
B) Delay Capital & One-Time Costs	$0
C) Avoided Annually Recurring Costs	$0
D) Initial Economic Benefit (A-B+C)	$10,824
E) Final Econ. Ben. at Penalty Payment Date,	
11-Apr-2008	**$11,205**
Municipality, which pays no taxes	
Discount/Compound Rate	3.3%
Discount/Compound Rate Calculated By:	User
Compliance Date	11-Apr-2008
Capital Investment:	
Cost Estimate	$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Consider Future Replacement (Useful Life)	N/A (N/A)
One-Time, Nondepreciable Expenditure:	avoided
Cost Estimate	$10,950
Cost Estimate Date	15-Oct-2007
Cost Index for Inflation	PCI
Tax Deductible?	N
Annually Recurring Costs:	
Cost Estimate	$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
User-Customized Specific Cost Estimates:	N/A
On-Time Capital Investment	
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

State of Oregon
Department of Environmental Quality — Memorandum

Date: February 22, 2008

To: Sarah Greenley

From: Regina Cutler

Subject: EB request

Name:	Dale Alan Pennie
Type:	Individual
Violation 1:	Establishing a solid waste disposal site without a permit.
Cost:	$10,950 to properly dispose of 53.6 tons of solid waste.
	This includes estimated costs of labor, equipment rental and hauling, plus tipping fees of $79/ton at Beaver Hill Disposal Site.
Estimate Date:	10/15/07
Violation Date:	3/19/07
Compliance Date:	unknown
Payment Date:	unknown
Type:	Avoided
Q-Time:	26266

State of Oregon
Department of Environmental Quality
Western Region

Complaint Number: WRE-2007 – 0024
Year #

Received By: Linda Van Tassel

POLLUTION COMPLAINT

COMPLAINT INFORMATION

Date Received 3/13/07 Time Received 4:00 PM When Observed on-going since December 2005

Pollution Source Karen and Dale Pennie Phone _____
[Source= name of responsible party causing pollution. (ie – business, property owner, etc.) if known, "unknown" otherwise]

Pollution Location 56295 Box 34, Tom Smith Rd.
[Location = specific address of site of pollution or directions to the site]

City Name Bandon Zip Code 97411 County Coos

Description A strip of land intended for use as an ingress/egress easement has been filled with junk cars, used appliances, used computers, electrical wire and miscellaneous trash.
[Description of pollution (ie – sheen on water, etc.). Leave out complainant information.]

REFERRAL

Referred to (if outside DEQ) _____ -or- DEQ Program Contact Craig Filip

DEQ Program
☐AQ/AB(ASBESTOS) ☐AQ/ACDP ☐AQ/DUST ☐AQ/FB (FIELD BURNING)
☐AQ/OB (OPEN BURNING) ☐AQ/V (TITLE V) ☐AQ/MISC
☐WMC/E (CLEAN UP) ☐WMC/HW (HAZ WST) ☐WMC/RC (RECYCLING)
☐WMC/SP (SPILLS) ☒WMC/SW (SOLID WST) ☐WMC/T (TANKS)
☐WQ/D (DOMESTIC) ☐WQ/I (INDUSTRIAL) ☐WQ/M (MUNICIPAL) ☐WQ/MISC
☐WQ/O (INDIVIDUAL ONSITE) ☐WQ/OI (ONSITE INSTALRS & PMPRS) ☐ WQ/SW (STORMWATER)

COMPLAINANT

Anonymous? ☐
Confidential? ☐

Name Del Dahlen, Civil Deputy, Coos Co. Sheriff's Office

Address Coos County Courthouse

City Coquille State OR Zip Code 97423

Home Phone _____ Work Phone (541) 396-5932 Ext 724

POTENTIAL RESPONSIBLE PARTY

Same as Source?: ☒ Confirmed as Resp. Party?: ☒

Name Karen and Dale Pennie Phone _____ Ext _____

Address 56295 Box 34, Tom Smith Rd.

City Bandon State OR Zip Code 97411

Priority: O High X Medium O Low
(To be determined by program contact)

COMPLAINT ACTION (FOLLOWUP ACTION)

This complaint was referred to the Coos Bay office by Deputy Dahlen. Linda called me on 3-13 about a file on this complaint Deputy Dahlen had left with her. I subsequently contacted Deputy Dahlen on his cell phone (541-404-5395) and scheduled a site visit for 3-19-07. On 3-19, I called Deputy Dahlen from the Coos Bay office and later met him near the site of the complaint. This complaint was brought to his attention by the landowner who had negotiated an ingress/egress easement through his property with Mr. Pennie so that Mr. Pennie could access Tom Smith Rd. from his land, which has no road access. Some time following this agreement, the property owner visited the easement and discovered that huge quantities of solid waste in the form of junk cars, used computers, appliances, electrical components and miscellaneous trash had been stored either side of the ingress, allegedly by Mr. Pennie. Shortly thereafter, the landowner filed a Code Violation Complaint with the county against Mr. Pennie. Deputy Dahlen has been working on this complaint since then, with limited success. His frustration with the pace of resolution to this complaint caused him to refer it to DEQ. Since the deputy and PRP know each other, the issue of confidentiality is moot. See attached site inspection report for further details. Warning Letter with Opportunity to Correct issued by CF on 4/6/07. 9/5: CF called Deputy Dahlen, re: the Oct. 1 compliance deadline for Mr. Pennie. 10/3: Deputy Dahlen called, VM. 10/4: CF called Deputy Dahlen back. We agreed to meet on-site on 10/15 to check on Mr. Pennie's progress towards compliance. 10/15: Beginning around 10:15 AM, CF visited the subject property in the company of Deputy Dahlen and Office J. Clayburn of the Bandon Police Department. Mr. Pennie did not appear during our site visit. The subject property appeared largely unchanged since March, although certain areas seemed to contain more wastes that previously observed. Please refer to the site investigation report of this visit, dated 10/23/07 for further details.

Complainant Contacted? Y☒ N☐ Complainant Contact Date 3/19/07

Site Visit? Y☒ N☐ Site Visit Date 3/19/07, 10/15/07 Site Inspector Craig C. Filip

Resolution Date 12/14/07 Staff Hours 40 [Resolution Days computer will calculate in database]

NON Issue Date _____ NON Number _____

PLAINTIFF'S EXHIBIT
Item 00028 A4
Tabbies

Enf. Referral Date _____ PS [redacted] No. _____ Facility/Site ID [redacted]

Document1

State of Oregon
Department of Environmental Quality Memorandum

To: File
Pollution Complaint WRE 2007-0024

Date: 3/26/07

From: Craig C. Filip
WR-RES, Eugene

Subject: Site Investigation Report of 56295 Tom Smith Rd., Bandon, OR 97411

Background

The subject property was a fifty-foot by approximately one-eighth-mile ingress/egress easement on property owned by a Mr. John Cox. Some time in 2005, Mr. Cox, who resides in California, paid a visit to his property only to find that the easement he had negotiated with potentially responsible parties (PRPs) Karen and Dale Pennie, had become filled with junked automobiles, discarded computers, some with smashed monitors, discarded electrical supplies, and miscellaneous trash. In December 2005, Mr. Cox filed a code violation complaint form with Coos Co. charging the Pennies with contaminating his property with hazardous materials from the used automobiles and computers stored in the easement. Enforcement of code compliance in this case is the responsibility of Coos County Sheriff's Deputy Del Dahlen, who stated to me that he has been working on this case since October 2005, at which time he issued a citation to Mr. Pennie for code violations. Deputy Dahlen referred this complaint to the DEQ Coos Bay office on March 13, 2007.

Because I did not have permission to enter onto the PRP's property, my investigation was limited to the area of the easement, which roughly consisted of a width of twenty-five feet either side of the centerline of the two-track access road on the subject property from Tom Smith Road to the point at which it entered the PRP's property, a distance of roughly one-eighth mile.

Site Investigation

The weather at the time of this site investigation was rainy with temperatures in the low to mid-50's. I met Coos County Sheriff's Deputy Del Dahlen at the intersection of Hwy. 101 and Prospect Junction Rd. at approxiately 12 PM on 3/19/07. He told me that Mr. Pennie, might meet us at thethe subject property and could be combative and verbally abusive. He stated that the pictures he had provided in the file he left in the Coos Bay office on 3/13 did not, in his opinion, adequately protray the situation on the property, which he characterized as a "real mess" stemming from the storage of junked automobiles and auto parts, broken computers and assorted trash.

Following Deputy Dahlen, we arrived at the subject property a few minutes later. At this point, Tom Smith Rd. runs northeast and southwest. The easement into the subject property runs to the east-southeast and contains a two-tracked access road. There was a metal gate

across the access road which Deputy Dahlen found locked, contrary, he stated, to his instructions to Mr. Pennie. Mr. Pennie appeared minutes later and unlocked the gate. He attempted to block Deputy Dahlen's and my entry onto the property, stating that I did not have his permission to enter. Deputy Dahlen replied that he had the property owner's permission to access the property and that I was with him. Mr. Pennie produced a disposable camera with which he insisted on recording the inspection. Deputy Dahlen replied that he could photograph him giving Mr. Pennie a citation for continued non-compliance. This angered Mr. Pennie, who became verbally abusive of Deputy Dahlen and continued to curse and berate the deputy for nearly the entire duration of the site investigation, which took approximately half an hour. Mr. Pennie detained me long enough to take my picture, over the objections of Deputy Dahlen.

Mr. Pennie had parked a large moving-style vehicle on the narrow access road, effectively blocking all view and access to the easement (Picture 1, view to the west-northwest towards Tom Smith Rd., open rear of truck in distance). Deputy Dahlen alleged it had been parked there to restrict our access. Mr. Pennie caustically rejoined that he parked it there so that he could begin moving his discarded materials off-site to be recycled and not landfilled as Deputy Dahlen had allegedly required. Immediately past the parked truck, in a small clearing along the southwestern side of the easement, were observed two abandoned vehicles, a boat, auto parts including a vehicle chassis covered in mixed solid waste (including paint cans), and blue and brown tarps covering unidentifiable objects (Picture 2). Deputy Dahlen stated that the objects under the tarps were computers which were only recently covered as shown (an allegation Mr. Pennie vigorously denied). Picture 3 reveals that these tarps were secured with computer monitors placed screens-down.

Continuing southeast within the easement an abandoned pick-up truck was observed on the southwestern side of the access road (Picture 4). Under the prevailing conditions of continual rain, no soil staining was observable. No stressed vegetation was observed, nor was any other solid waste observed for most of the length of the subject property. However, Deputy Dahlen stated that it had been filled at one time with abandoned vehicles, auto parts, computer equipment, and other assorted solid waste, as shown photographs he had taken previously (see file for copies). As the three of us proceeded along the easement away from the small clearing, Deputy Dahlen directed Mr. Pennie to walk in front of him, stating that he did not feel comfortable having Mr. Pennie follow behind him. Mr. Pennie peevishly complied with this directive. Hood on and eyes forward, I continued down the easement only to hear Mr. Pennie cry out and fall into a puddle in the road. Deputy Dahlen and I pressed on while Mr. Pennie cursed the deputy and accused him of cutting him off and pushing him down. I did not witness this allegation.

Upon arriving near the end of the easement, two abandoned vehicles were observed along the southwestern side of the access road (Pictures 5 and 6). An abandoned pick-up truck was observed a short distance to the southeast, its bed filled with solid waste (Picture 7). This vehicle was at the edge of a clearing along the southwestern edge of the subject property in which a breathtaking array of solid wastes were observed (Pictures 7-11), with more solid waste and abandoned vehicles (including a semi trailer) in the distance (Picture 11). This area was filled with automobile parts, including batteries (Pictures 8 and 9), electrical wiring and

components (Pictures 7-11), at least one broken computer monitor (Pictures 9 and 10), numerous containers (Picture 11) scrap metal objects and assorted household trash. At this point I asked Mr. Pennie what he did for a living and he replied that he performed electrical work around town and brought leftover components back to his property.

Continuing further along, the access road turned sharply to the southwest and onto the property of Mr. Pennie, who denied us access. At this turn was observed numerous abandoned vehicles, and a partially salvaged automobile (including oil filter) (Pictures 12 and 13). Opposite this area at the edge of the bend in the access road was another large pile of solid waste containing automobile parts, apparent antifreeze containers, electrical wiring and components, and at least one apparent computer component under a blue tarp (Pictures 14-16). Further away was yet another large pile of solid waste, this containing automobile parts (including a battery), electrical wiring and components, plastic pipe, apparent gasoline containers, scrap metal parts and assorted trash (Picture 17).

Along the northwestern side of the access road leading into Mr. Pennie's property was observed stacked building materials, including wood and metal pipe (Picture 18). Opposite this area, across the access road along its southeastern side were observed numerous stacked storage containers, cardboard boxes, coils of electrical cord and wire, metal pipe and miscellaneous trash (Pictures 19-21). In the distance along the access road were observed numerous additional abandoned vehicles and stockpiled materials.

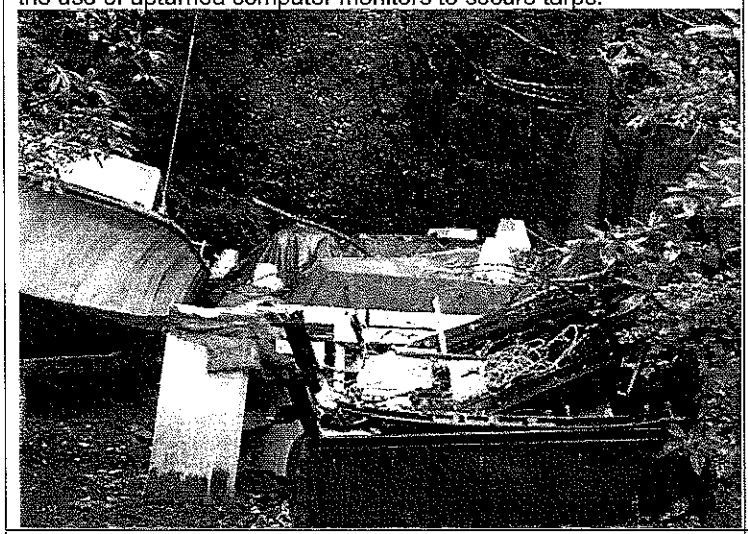
During this point of the inspection Mr. Pennie, who had been in a heated discussion with Deputy Dahlen, asked about the possibility of recycling some computer components. I told him that Monitors and More in Roseburg took used computers for recycling. I promised to send him information on recycling some of his materials, and took down his mailing address.

My site investigation concluded at around 12:30 pm. Deputy Dahlen and I departed the site shortly thereafter and met at the intersection of Tom Smith Rd. and Prospect Junction Rd. to briefly discuss the site investigation. Deputy Dahlen stated that he had cited Mr. Pennie in October 2005 for county code violations and again this morning for continued non-compliance, and stated that he gives him 30 days between site visits to show evidence of compliance. He promised to send me a CD with more photos taken on the subject property, with dates. I told him I would confer with my supervisor regarding the level of the violations observed and write a letter to Mr. Pennie citing them, copying Deputy Dahlen. We parted at approximately 12:45 PM.

Picture 1: Photo of subject property from access road. Rear of truck blocking road in distance, center.

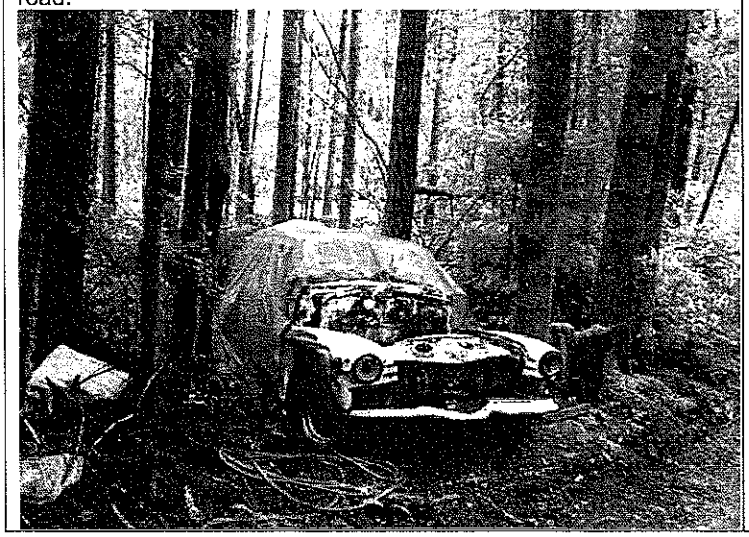
Picture 2: View of subject property along southern side of access road.

Picture 3: Close-up of tarped materials shown in Picture 2. Note the use of upturned computer monitors to secure tarps.



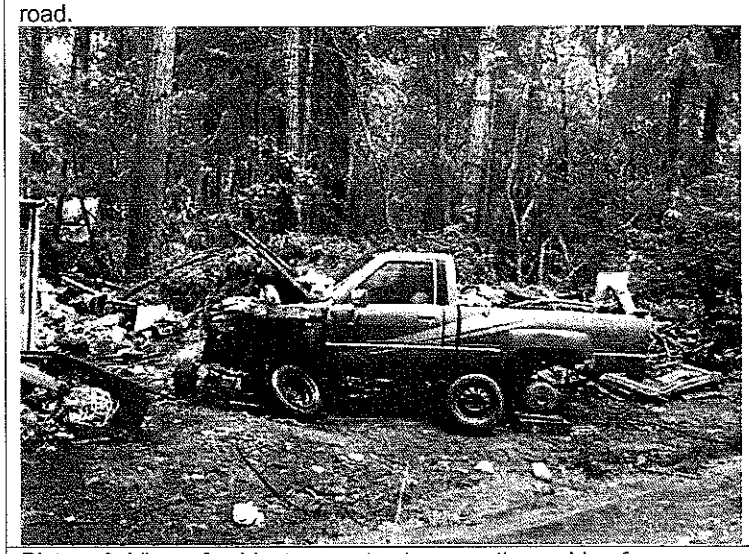
Picture 4: View of subject property along southern side of access road.

Picture 5: View of subject property along southern side of access road.



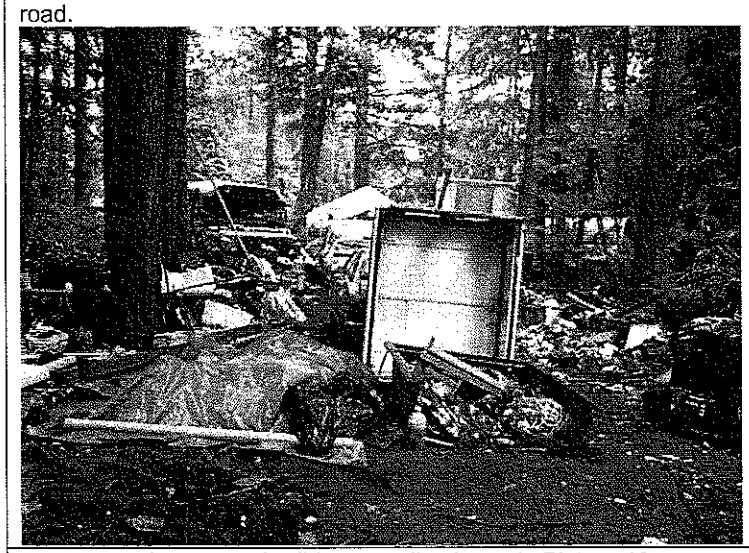
Picture 6: View of subject property along southern side of access road.

Picture 7: View of subject property along southern side of access road.



Picture 8: View of subject property along southern side of access road.

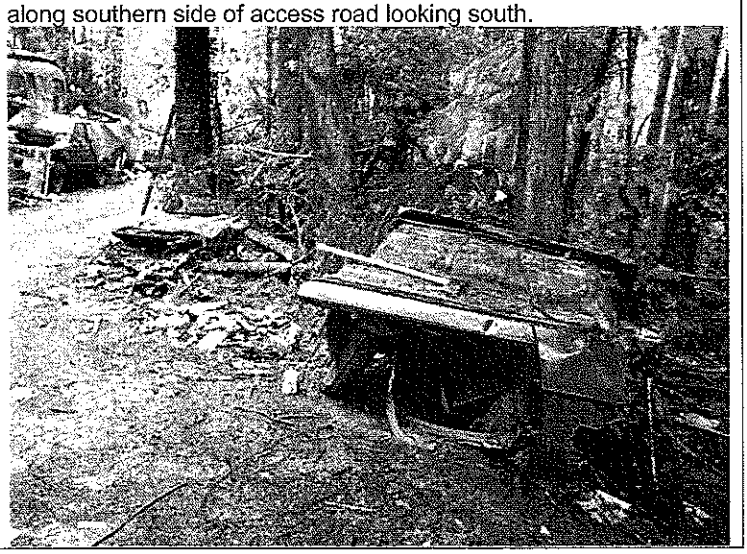
Picture 9: View of subject property along southern side of access road.



Picture 10: View of subject property along southern side of access road (note broken computer monitor, center).

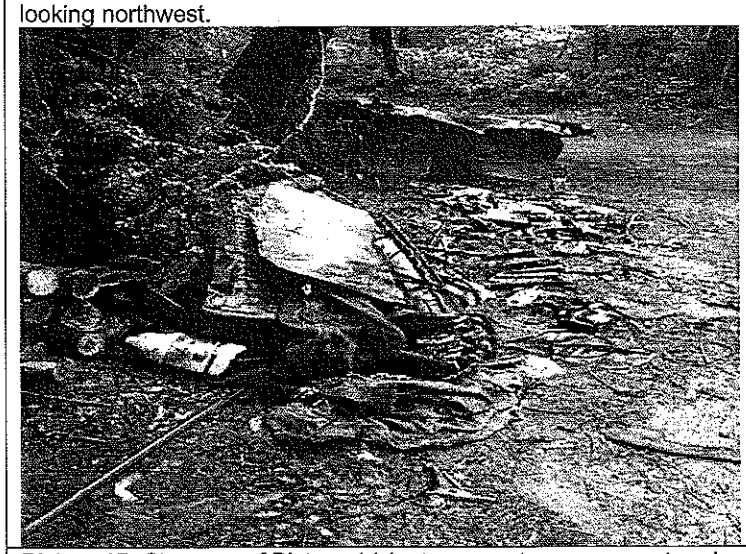
Picture 11: Close-up of solid waste pile shown in Picture 10.

Picture 12: View of partial automobile body on subject property along southern side of access road looking south.

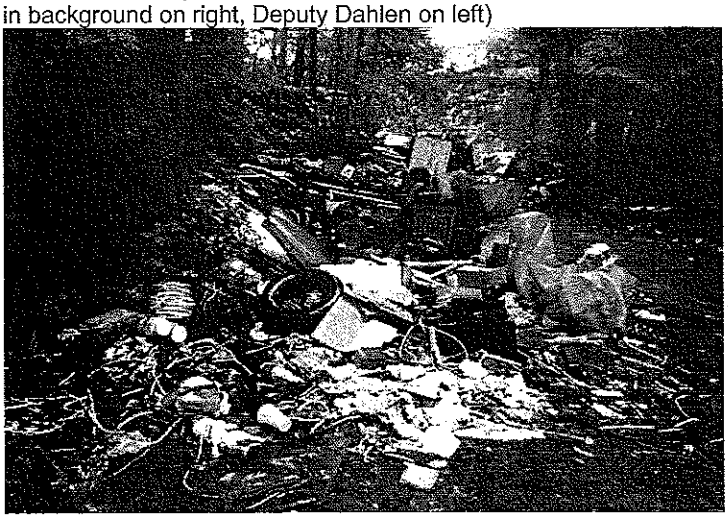


024, Site Inspection Photographs of Subject Property taken on 3-19-07 by CCF

Picture 13: Alternate view of Picture 12 on the subject property looking northwest.

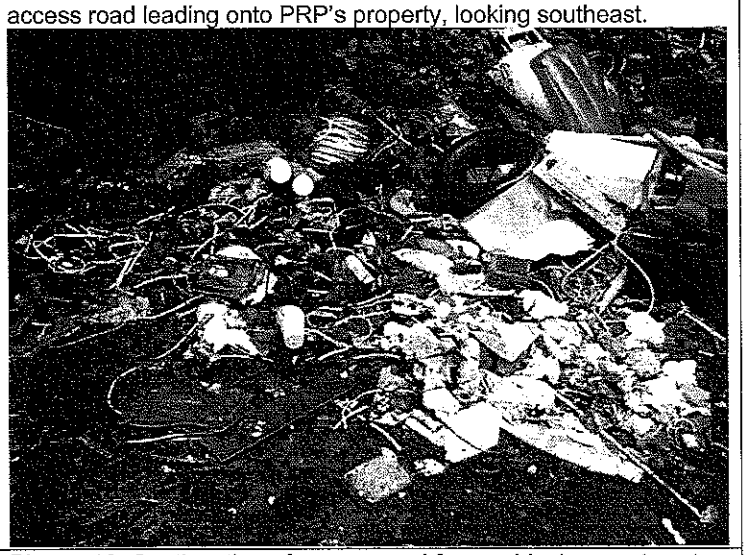


Picture 14: View of subject property across access road from Picture 13 looking south, leading onto PRP's property (Mr. Pennie in background on right, Deputy Dahlen on left)



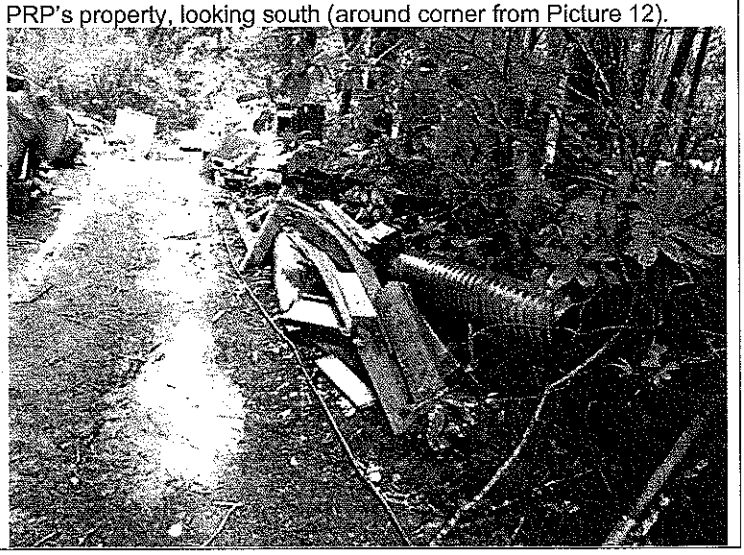
Picture 15: Close-up of Picture 14 (note computer component under tarp next to chair)

Picture 16: View to the left of Picture 15 on subject property along access road leading onto PRP's property, looking southeast.



Picture 17: View to the left of Picture 16 on subject property near easement looking east.

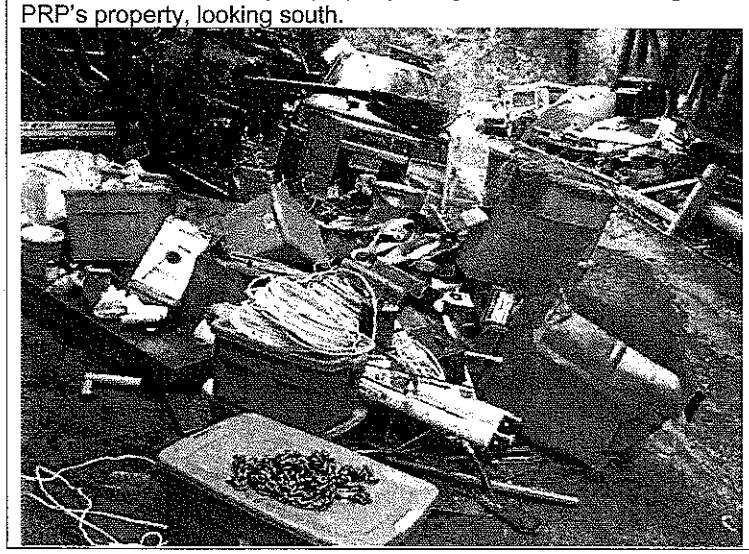
Picture 18: Continuation of access road from subject property onto PRP's property, looking south (around corner from Picture 12).



Picture 19: Continuation of access road from subject property onto PRP's property, looking south.

Picture 20: View of subject property along access road leading onto PRP's property, looking south.

Picture 21: View of subject property along access road leading onto PRP's property, looking south.



12/6/2007 5:19:20 PM

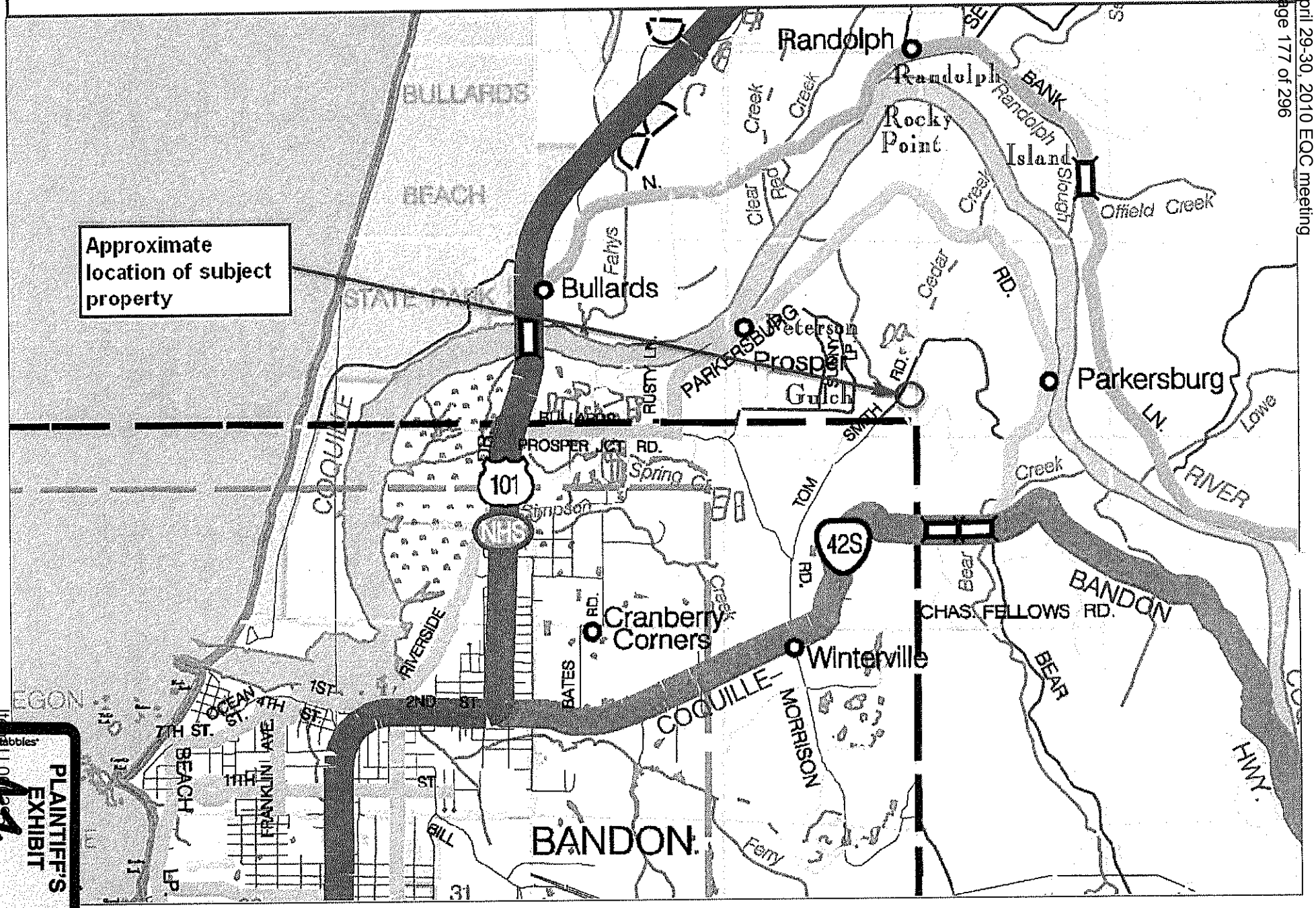
Site Map of the ingress/egress easement at 56295 Tom Smith Rd., Bandon OR. All dumpsite locations and boundaries are approximate.

PLAINTIFF'S EXHIBIT

Attachment E

12/14/2007 1:46:18 PM

Approximate location of the subject property: 56295 Tom Smith Rd., Bandon, OR 97411-6306



PLAINTIFF'S EXHIBIT 44

W. Scott Phinney
ATTORNEY AT LAW

Lake Oswego: (503) 697-9528
Salem: (503) 551-0888
FAX: (503) 635-9010

E-mail: scotphin@aol.com

Suite 101
1 Mount Jefferson Terrace
Lake Oswego, Oregon 97035

COPY

April 2, 2007

CERTIFIED MAIL

Karen I. Pennie
c/o Dale A. Pennie
P.O. Box 1734
Bandon, OR 97411

Re: 56295 Tom Smith Road

Dear Mr. Pennie:

I represent the interests of Mr. John H. Cox, Jr. with respect to his property located on Tom Smith Road. As you are aware, his property is adjacent to yours. You have an ingress/egress easement which allows you to use a driveway on Mr. Cox's property to access your property. In exchange for this easement you are to maintain the driveway. The easement does not give you the right to use the driveway for any use other than access. It does not give you the right to use any other part of the property for any purpose.

I have information that you are abusing the easement and taking actions that are not permitted. You must stop these activities immediately.

- You are not to cut any trees on the easement or any other part of Mr. Cox's property. If you do so you may be liable for civil and criminal penalties.
- You are not allowed to lock the gate on the easement. You may not put your own gate on the property. You do not own this property. You may not exclude Mr. Cox or his representatives or invitees from this property. You simply have a right to use it. If a gate has been installed it must be removed.
- You may not move the gate owned by Mr. Cox or alter his property in any way. If the gate has been moved it must be restored to its original location.
- You may not have a dog or other animal on Mr. Cox's property either loose or restrained.
- You may not store, work on, or bury any items on Mr. Cox's property including the easement.

PLAINTIFF'S EXHIBIT
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- You must remove all items, including, but not limited to, vehicles, office equipment, computers, garbage, and waste from Mr. Cox's property, including the easement.

You will be held responsible for any loss or damage to Mr. Cox and his property including the cost to remove any items or clean up any waste or contamination. In addition, Mr. Cox may take steps to terminate the easement. Mr. Cox intends to cooperate with any government officials in an attempt to clean up the site.

You have been aware of this situation since at least 2003. Please take the appropriate actions immediately. Your failure to cooperate may lead to legal actions. If you would like to discuss this matter, feel free to contact me.

Very truly yours,

W. Scott Phinney

W. Scott Phinney

cc: Deputy Del Dahlen, Coos County Sheriff's Office
John H. Cox, Jr.

COPY

Oregon
Theodore R. Kulongoski, Governor

Department of Environmental Quality
Western Region - Eugene Office
1102 Lincoln, Suite 210
Eugene, OR 97401
(541) 686-7838
FAX (541) 686-7551

April 6, 2007

Dale and Karen Pennie
POB 1743
56295 Tom Smith Road
Bandon, OR 97411-6306

RE: Warning Letter with Opportunity to Correct
Ingress/egress easement located at:
56295 Tom Smith Road
Bandon, OR 97411-6306
WL – WMC/SW-WRE-2007-0025
Coos County

Dear Mr. and Ms. Pennie:

The Coos County Sheriff's Office referred a county code violation complaint to the Coos Bay office of the Department of Environmental Quality (DEQ) on March 13, 2007. This complaint pertained to the unauthorized accumulation of abandoned vehicles, used computers and miscellaneous solid wastes along an ingress/egress easement controlled by you but owned by the complainant John Cox, a resident of California.

On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, Craig Filip of the Eugene office of DEQ conducted an inspection on property owned by Mr. Cox located at 56295 Tom Smith Road, in Bandon, OR. Mr. Filip was accompanied on this inspection by Deputy Dahlen and Mr. Dale Pennie.

Based upon the investigation of this ingress/egress easement, the Department has concluded that you are responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): *Establishing or operating a disposal site without first obtaining a registration or permit.*

This is a Class I violation. Class I violations are the most serious violations of Oregon environmental law.

During my inspection of the easement on Mr. Cox's property I observed numerous abandoned vehicles (some of them dismantled); automotive parts (including batteries and at least one oil filter on the ground) and containers of automotive fluids (including gasoline and coolant); piles of computer terminals (one with a broken screen) and components, some under tarps; stacks of used building materials; piles of electrical wiring and equipment; and, piles of assorted trash in various locations. I also observed more of the same along the access road leading from the easement onto your property.

The solid wastes I observed within the easement had been managed in a manner constituting disposal.

To maintain compliance with Oregon Administrative Rules, we request that you implement the following corrective actions by the dates indicated:

Corrective Actions Requested

1) By October 1, 2007, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this request by another site inspection following that date, if necessary.
2) By October 1, 2007, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.

Should these violations remain uncorrected or should you repeat any of these violations, this matter may be referred to the Department's Office of Compliance and Enforcement for formal enforcement action, including assessment of civil penalties and/or a Department order. Civil penalties can be assessed for each day of violation.

Also, please be aware that if you are engaged in the business of vehicle dismantling, as the evidence I observed suggests, you are required to obtain a dismantler certificate from the Oregon Department of Transportation (ODOT) (ORS 822.110). Failure to do so is a violation of Oregon law and is classified as a Class A misdemeanor. In addition, ODOT "may impose a civil penalty of not more than $5,000 on a person who conducts a motor vehicle dismantling business without a certificate" (ORS 822.100(4)). I am enclosing "Instructions for Becoming a Dismantler" for your convenience.

If you believe any of the facts in this Warning Letter are in error, you may provide information to me at the office at the address shown at the top of this letter. The Department will consider new information you submit and take appropriate action.

The Department endeavors to assist you in your compliance efforts. As promised during the inspection, I have enclosed information on the recycling of electronic waste. Should you have any questions about the content of this letter, please feel free to contact me in writing or by telephone at (541) 686-7868, or via e-mail at: filip.craig@deq.state.or.us.

Sincerely,

Craig G. Filip
Solid Waste Reduction Analyst

ec: Bill Mason, DEQ – Eugene (without enclosures)
Susan Shewczyk, DEQ – Salem (without enclosures)

cc: Deputy Del Dahlen, Coos County Sheriff's Department
Office of Compliance and Enforcement, DEQ Headquarters (without enclosures)

Coos County Planning Department
Coos County Courthouse Annex, Coquille, Oregon 97423
Mailing Address: Planning Department, Coos County Courthouse, Coquille, Oregon 97423

(541) 396-3121 Ext.210
FAX (541) 396-2690 / TDD (800) 735-2900

PATTY EVERNDEN PLANNING DIRECTOR

April 11, 2007

Dale Pennie
PO Box 1743
Bandon OR 97411

RE: Violation on property located at
Township 28, Range 14, Section 15, Tax Lot #1111
Property owner: Karen Pennie
Property zoned Rural Residential (RR-5)

Dear Mr. Pennie:

Deputy Del Dahlen has submitted evidence to the Coos County Planning Department showing that you are in violation of the Coos County Zoning and Land Development Ordinance (CCZLDO). The violation consists of having a junk yard/wrecking yard in a rural residential zoning district (RR-5). Please be advised there are no provisions in the CCZLDO that would allow this type of activity in the RR-5 zoning district.

In addition Planning research of both Planning records and Assessment records show that Karen Pennie obtained a zoning compliance letter in 1988 to site a mobile home. There were no mobiles or other homes assessed until 1992. In 1992 mobile home #98960 was listed by the Assessor's office. In 1996, the Assessor's office lists 3 mobile homes on the property, #1313, #118562, as well as #98960. In 1996, the Assessor's office deleted #118562 and listed it as a storage building. In 1997, the Assessor's office listed the two other mobiles. In 2001, the Assessor's office listed a single mobile home #118643. This is the mobile home which is listed in 2007. There was never any zoning clearance to either site additional mobiles, replace existing mobiles, or to use a mobile home as a storage building. Therefore, the current mobile home is in violation of Chapter 4 of the CCZLDO, as it was sited without clearance. In addition, the CCZLDO does not have provisions to allow mobile homes to be used as storage buildings, except in commercial or industrial zoning districts; therefore, if any mobile homes are being used as storage building, this is also a violation of the CCZLDO.

Deputy Dahlen has also submitted a letter from the Oregon Department of Environmental Quality (DEQ), stating that you also have a Class I environmental violation on the property. In this letter, it was suggested you might be able to obtain a dismantling permit from Oregon Department of Transportation (ODOT). Again, please be advised this type of activity is not a permitted use in the

rural residential zoning districts. ODOT will be notified of such and that the Planning Department cannot support such a permit request.

VIOLATIONS AND RESOLUTIONS:

1. Junkyard/wrecking yard – the property must be cleared of all vehicles and other junk. Deputy Dahlen will work with you to verify removal.
2. Mobile home sited as a replacement dwelling without County clearance. You must obtain an after-the-fact zoning compliance letter to site the mobile as a replacement dwelling. Pursuant to Section 1.3.825 of the CCZLDO, the after-the-fact fee for the zoning compliance letter will be doubled ($200.00).
3. Mobiles used as storage buildings. These must also be removed from the property. Deputy Dahlen will work with you to verify the removal of all mobiles except the primary dwelling.
4. The State violations must be resolved through the proper State agencies.

RECAP:

There are multiple violations on the property which must be resolved as soon as possible. A wrecking yard/junk yard is not an allowed use within the RR-5 zoning district; therefore, if you do apply for a dismantler's license, Coos County Planning Department will not be able to support this use. An after the fact zoning compliance letter must be obtained for replacing an existing dwelling with the current mobile home. Any other mobile homes on the property must also be removed.

There has been a violation flag placed on this property. This means no other permits can be issued until the violation issues have been resolved, both with the County and the State.

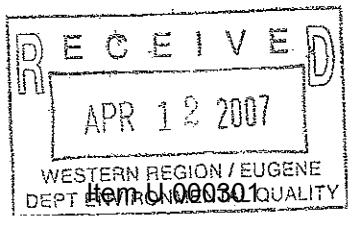
Deputy Dahlen will be working with you to resolve the violations on the property. Please co-operate with him to resolve all the issues in a timely manner. You may have 30 days from the date of this letter to obtain the after the fact zoning compliance letter and to submit a plan for your clean-up.

The Coos County Planning Department is opened to the public Monday – Friday from 8:00 AM – 5:00 PM (except lunch, 12:00 PM – 1:00 PM) and can be reached by telephone at 541-396-3121, extension 210.

Sincerely,
COOS COUNTY PLANNING DEPARTMENT
Debby Darling, Planning Tech

Debby Darling

c: *Patty Evernden, Coos County Planning Director
*Dave Perry, DLCD
Del Dahlen, Code Compliance Officer
Craig Filip, DEQ
Steve Gallier, DMV, Business Regulation Section
Karen Pennie, property owner



State of Oregon
Department of Environmental Quality — Memorandum

To: File
Pollution Complaint WRE 2007-0024

Date: 10/23/07

From: Craig C. Filip
WR-RES, Eugene

Subject: Site Investigation Report of 56295 Tom Smith Rd., Bandon, OR 97411

Background

This is a follow-up memorandum to the one written at the time of the first complaint investigation conducted on the subject property by Craig C. Filip of DEQ. Please refer to that memorandum (WRE 2007-0024MEM.doc) for background information.

Following this first investigation, I issued a Warning Letter with Opportunity to Correct to Potentially Responsible Parties (PRPs) Dale and Karen Pennie on April 6, 2007, wherein they were directed to:

1) By October 1, 2007, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this request by another site inspection following that date, if necessary.
2) By October 1, 2007, provide the Department with copies of receipts for either disposal or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.

On October 15, 2007, I conducted an investigation of the subject property to ascertain compliance with the above-referenced warning letter.

Site Investigation

The weather at the time of this site investigation was rainy with temperatures in the upper 50's. I met Coos County Sheriff's Deputy Del Dahlen at the intersection of Prosper Junction Rd. and Tom Smith Rd. at approxiately 10:05 AM. Deputy Dahlen informed me that Mr. Pennie had filed a lawsuit against him stemming from his fall during the previous complaint investigation for which he blamed Deputy Dahlen for causing. As a result, Deputy Dahlen had requested the presence of a uniformed member of the Bandon Police Dept. to accompany us on our investigation, should Mr. Pennie show up. At approximately 10:10 AM, Bandon Police Officer Justin Clayburn drove up to meet us. After introductions, we proceeded to the subject property, arriving at approximately 10:15 AM. Prior to this investigation, Deputy Dahlen had stated that the Pennies had not complied with the Warning Letter I had issued and, in his opinion, had actually disposed of more material onto the subject property.

The subject property consists of a 30-foot-wide ingress-egress easement across property owned by a Mr. John Cox, a resident of California. This easement, approximately 400 feet long, runs in an easterly direction and contains an unimproved access road. The metal gate across the

PLAINTIFF'S EXHIBIT 1

access road was locked, according to Deputy Dahlen, contrary to both his instructions to Mr. Pennie and those of the complainant's attorney. Deputy Dahlen and Officer Clayburn walked over the chain locking the gate to a wooden post and proceeded into the subject property (Picture 1, view to the east from the opposite side of Tom Smith Rd.).

Approximately 60 feet into the subject property we encountered Dumpsite A (Pictures 2-4). this dumpsite measured approximately 30 feet wide by 50 feet deep (difficult to estimate depth from the access road). Dumpsite A consisted of two vehicles, a boat on a trailer, two filled black garbage bags, furniture, three paint cans, assorted automotive parts, bulky metal objects, electronic equipment and plastic material. This dumpsite had not changed much since my last visit (see previous complaint investigation report and picture table).

Approximately 175 feet into the subject property we encountered Dumpsite B (Picture 5), consisting of a pick-up truck whose bed was filled with used tires and debris. This dumpsite also appeared unchanged since my last visit.

Approximately 300 feet into the subject property we encountered Dumpsite C (Pictures 6-10). This dumpsite was quite extensive, measuring approximately 60 feet wide by 100 feet deep (difficult to estimate depth from the access road due to amount of collected material). Dumpsite C consisted of a large amount of material, extending south from the easement. Wastes within this dumpsite included: whole and partially dismantled vehicles, vehicle parts (including tires and exposed lead-acid batteries); numerous opaque plastic containers of unknown content; electrical wiring and conduit; large metal cabinets; automotive fluid containers (including antifreeze and motor oil); and, household trash. It was not clear whether this dumpsite extended onto the complainant's property or, at this point, resided on the PRP's property. This dumpsite appeared to have grown since my last visit in March.

At the end of the easement, we encountered the Dumpsite D, the largest of the four on-site (Pictures 11-22). Dumpsite D was deposited along the southern edge of the access road and around the bend in the road as it entered the PRP's property to the east and south. The dumpsite could be seen extending well into the PRP's property on both sides of the access road (Picture 16). It was difficult to estimate the size of this dumpsite, given the distribution of its wastes, but it covered an area of roughly 100 to 125 feet by 50 to 75 feet, not including the waste visible in the distance on the PRP's property along the access road into that property.

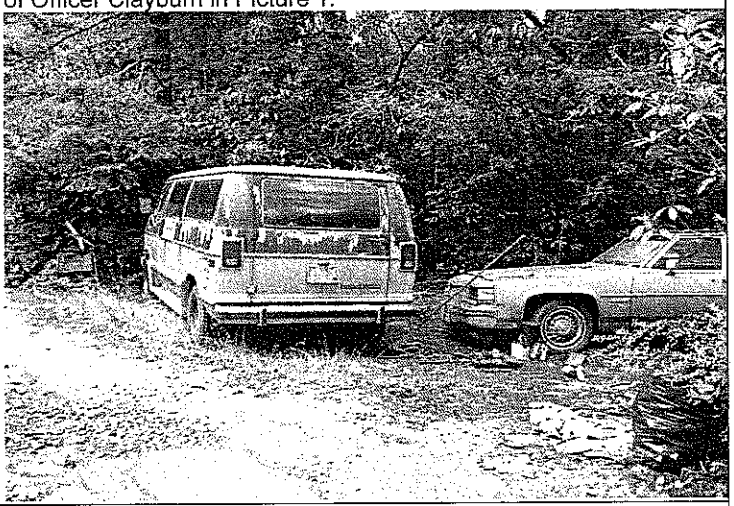
Dumpsite D contained a vast amount of wastes, including: numerous whole and partially dismantled vehicles and automobile parts, including tires and exposed lead-acid batteries; electrical wire and miscellaneous electrical and electronic equipment (including two observed fluorescent light ballasts); numerous automotive fluid containers, including antifreeze, motor oil, and apparent gasoline containers; building materials, supplies and tools; opaque containers of unknown content; an apparent cutting torch with gas canisters; furniture and household trash. This dumpsite definitively contained more and different wastes than previously observed (Pictures 13-16), including several more vehicles (Pictures 19-22)

My site investigation concluded at around 11:00 am. Deputy Dahlen, Officer Clayburn and I departed the site shortly thereafter.

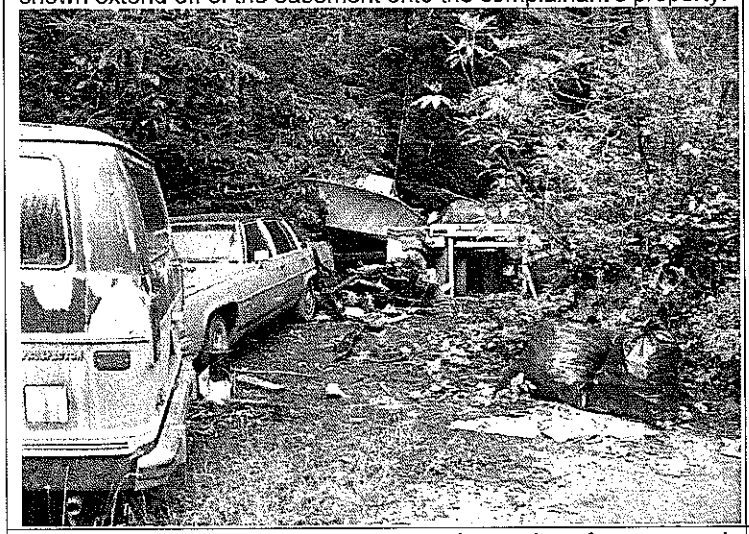
Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 10-15-07 by CCF

Picture 1: Easterly view of subject property from across Tom Smith Rd. Deputy Dahlen is on the left, Officer Clayburn on the right.

Picture 2: View of Dumpsite A along southern edge of access road. The back of the van shown below is just visible to the right of Officer Clayburn in Picture 1.



Picture 3: Southerly view of Dumpsite A. Note that the materials shown extend off of the easement onto the complainant's property.



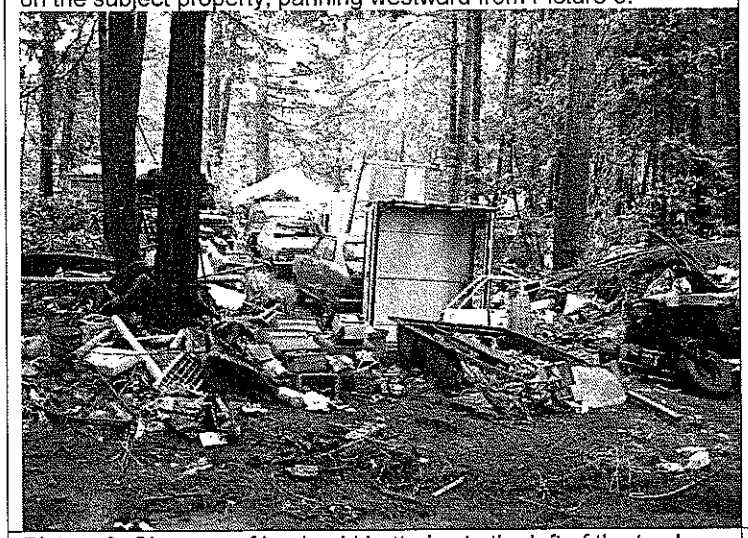
Picture 4: Close-up of computer monitors and other electronic equipment shown in the background of Picture 3, Dumpsite A. Note the use of upturned computer monitors to weigh down tarps.

Picture 5: View of Dumpsite B along southern edge of access road on the subject property. This dumpsite appears to extend off of the easement onto the complainant's property.

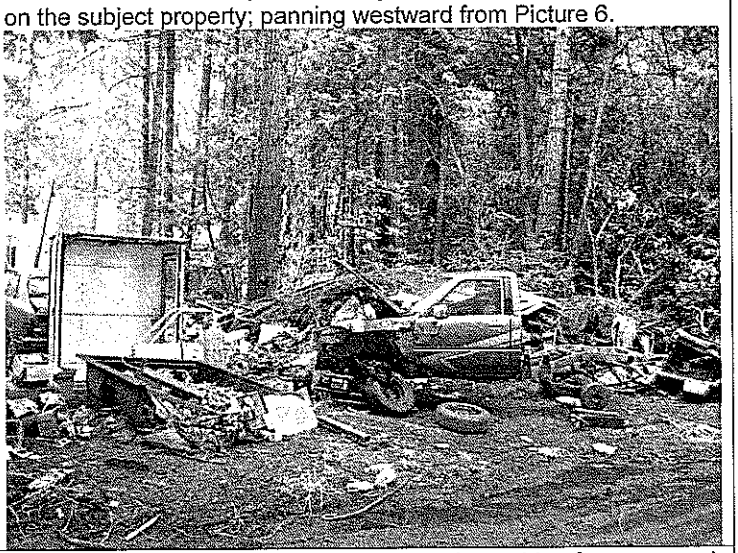
Picture 6: Eastern edge of Dumpsite C along southern edge of access road on the subject property.

Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 10-15-07 by CCF

Picture 7: View of Dumpsite C along southern side of access road on the subject property; panning westward from Picture 6.



Picture 8: View of Dumpsite C along southern side of access road on the subject property; panning westward from Picture 6.



Picture 9: Close-up of lead-acid batteries to the left of the truck chassis shown in the center of Picture 8.

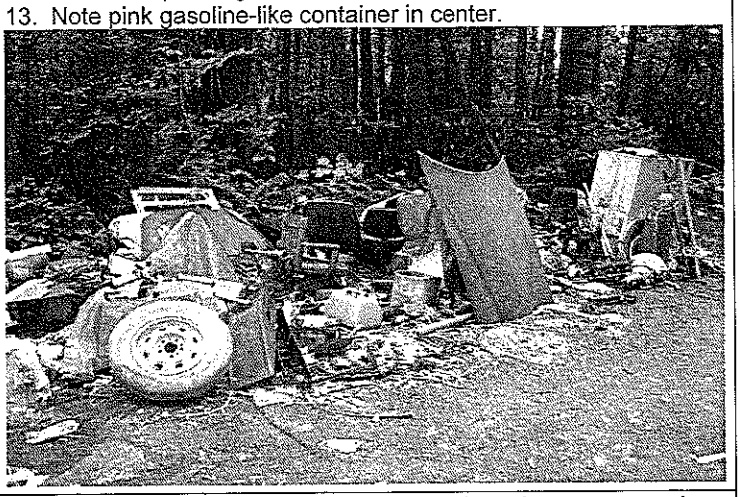
Picture 10: View of Dumpsite C along southern side of access road on the subject property; panning westward from Picture 6.

Picture 11: Eastern edge of Dumpsite D along southern edge of the access road.

Picture 12: Close-up of cylindrical containers shown in center-left of Picture 11. Label reads: "Danger: contains potassium permanganate."

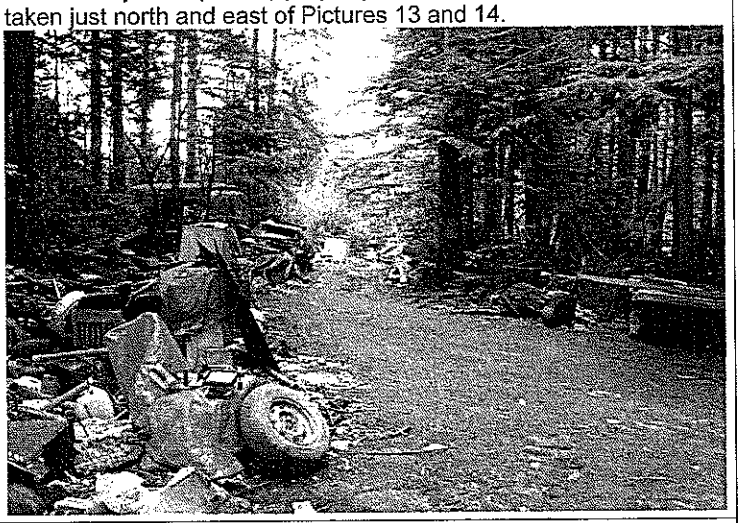
Picture 13: Eastern edge of Dumpsite D along southern edge of the access road, viewed just west of Picture 11.

Picture 14: Southeasterly view of Dumpsite D along the access road at the point of turning onto the adjacent (PRP's) property to the southeast; panning in a circle to the right (west) from Picture 13. Note pink gasoline-like container in center.



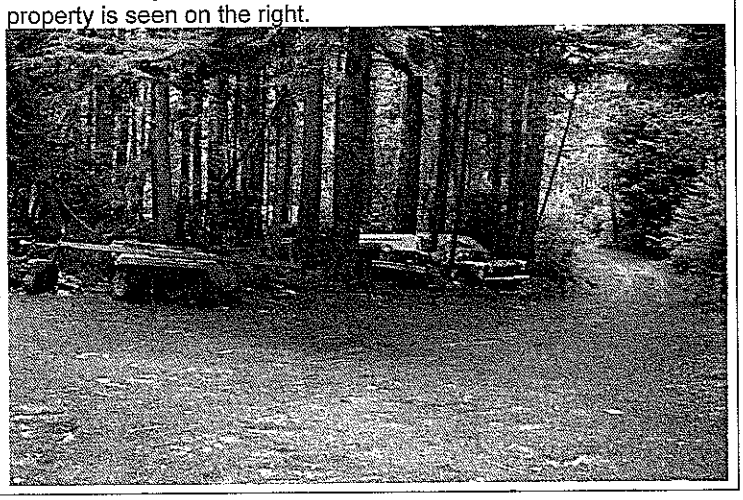
Picture 15: Southeasterly view of Dumpsite D along the access road at the point of turning onto the adjacent (PRP's) property to the south. This picture was taken just south of Picture 14.

Picture 16: Southerly view of Dumpsite D along the access road onto the adjacent (PRP's) property to the south. This photo was taken just north and east of Pictures 13 and 14.



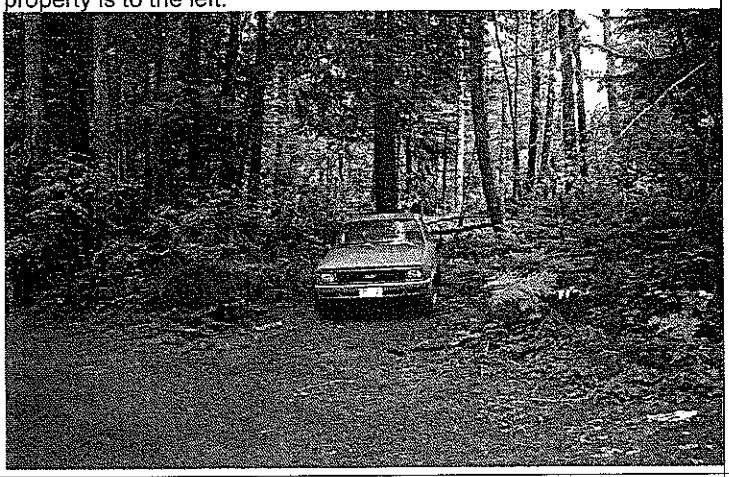
Picture 17: Southwesterly view of Dumpsite D along the access road onto the adjacent (PRP's) property to the southeast; panning in a circle to the right (west) from Picture 16.

Picture 18: Westerly view of Dumpsite D along the access road onto the adjacent (PRP's) property to the south (left); panning in a circle to the right (west) from Picture 16. The access road into the property is seen on the right.



Pollution Complaint WRE 2007-0024, Site Inspection Photographs of Subject Property taken on 10-15-07 by CCF

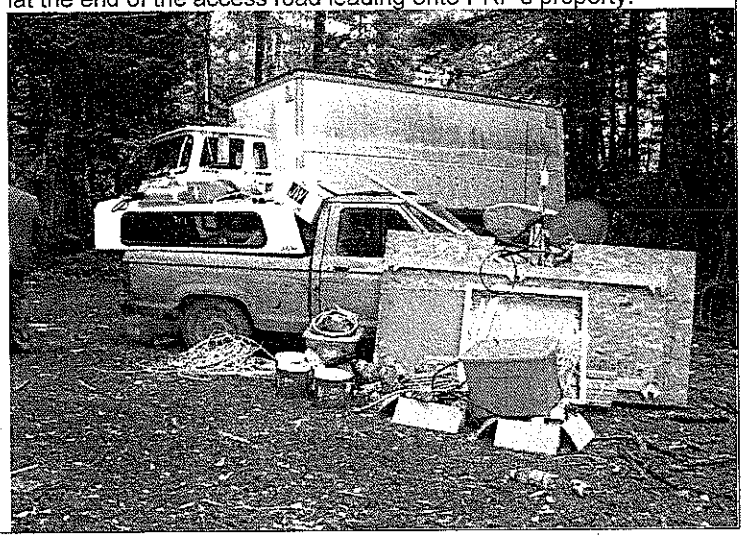
Picture 19: Northeasterly view of Dumpsite D along the northern edge of access road onto the subject property; panning in a circle to the right (now east) from Picture 16. The access road into the property is to the left.



Picture 20: Easterly view of Dumpsite D at the end of the access road at the point where it turns onto the adjacent (PRP's) property; panning in a circle (new east) from Picture 16. The access road into the property is behind me. Office Clayburn is pictured at right.

Picture 21: Northwesterly view of vehicles, shown in Picture 20, parked at the end of the access road leading onto PRP's property.

Picture 22: Northerly view of vehicles, shown in Picture 20, parked iat the end of the access road leading onto PRP's property.



Oregon
Theodore R. Kulongoski, Governor

Department of Environmental Quality
Western Region - Eugene Office
1102 Lincoln, Suite 210
Eugene, OR 97401
(541) 686-7838
FAX (541) 686-7551

CERTIFIED MAIL
NO. 7007 0710 0000 0609 7884

December 4, 2007

Dale and Karen Pennie
POB 1743
56295 Tom Smith Road
Bandon, OR 97411-6306

RE: Pre-Enforcement Notice
Ingress/egress easement located at:
56295 Tom Smith Road
Bandon, OR 97411-6306
PEN – WMC/SW-WRE 2007 0057
Coos County

Dear Mr. and Ms. Pennie:

As you know, the Coos County Sheriff's Office referred a county code violation complaint to the Coos Bay office of the Department of Environmental Quality (DEQ) on March 13, 2007. This complaint pertained to the unauthorized accumulation of abandoned vehicles, used computers and miscellaneous solid wastes along an ingress/egress easement controlled by you but owned by complainant John Cox of California.

On March 19, 2007, at the invitation of Coos County Sheriff's Deputy Del Dahlen, and in the company of Deputy Dahlen and Dale Pennie, I conducted an inspection of this ingress/egress easement located at 56295 Tom Smith Road, in Bandon, OR (referred to hereinafter as "the subject property").

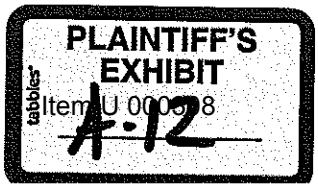
This initial inspection revealed the accumulation of numerous abandoned vehicles (some of them dismantled); automotive parts (including batteries and at least one oil filter on the ground) and containers of automotive fluids (including gasoline and coolant); piles of computer terminals (one with a broken screen) and components, some under tarps; stacks of used building materials; piles of electrical wiring and equipment; and, piles of assorted trash in various locations on the subject property. I also observed more of the same along the access road leading from the subject property onto your property adjacent.

The material I observed accumulated on the subject property had been managed in a manner constituting disposal.

Based upon this investigation of the subject property, the Department concluded that you were responsible for violating Oregon Administrative Rule (OAR) 340-012-0065(1)(a): *Establishing or operating a disposal site without first obtaining a registration or permit.* This is a Class I violation.

As a follow-up to the Warning Letter with Opportunity to Correct sent to you as a result of my initial site investigation, I conducted a second visit to the subject property on October 15, 2007, in the company of Deputy Dahlen and Officer Justin Clayburn of the Bandon Police Department. I observed the same apparent wastes in the same apparent locations, along with additional wastes and vehicles.

Please be advised that the act of vehicle dismantling, along with mismanagement of the parts, materials, and fluids I observed on-site, can result in the release of heavy metals and hazardous substances into the environment.



In order to correct the violation cited above and minimize its impact, the Department requires you take the following actions by the date indicated:

Corrective Action(s) Required

1) By March 15, 2008, remove and clean up all of the solid waste contained within the easement on the subject property. In consultation with Deputy Dahlen, I will confirm your compliance with this requirement with another site inspection following that date, if necessary. And,
2) By March 15, 2008, provide the Department with copies of receipts for disposal and/or recycling of the solid waste contained within the easement on the subject property. These receipts can be sent to my attention at the address shown above.

Your timely and responsive action on these items will be taken into consideration in any civil penalty assessment issued by the Department.

The Department is concerned that additional violations may have occurred or will occur, including illegal burial of solid waste currently accumulated on the property or movement of the solid wastes within the easement onto your property adjacent to the easement. To comply with solid waste regulations and avoid additional civil or criminal penalties, you need to complete the corrective actions as outlined above.

As confirmed by my second site visit to the subject property on 10/15/07, you failed to take the corrective actions set forth in the Warning Letter with Opportunity to Correct that I issued to you on April 6, 2007. We are therefore referring this matter to the Department's Office of Compliance and Enforcement for formal enforcement action, which may include assessment of civil penalties and/or issuance of a Department order. A formal enforcement action may include a civil penalty assessment for each day of violation.

If you believe any of the facts in this Pre-Enforcement Notice are in error, you may provide written information to me at the address shown at the top of this letter. The Department will consider new information you submit and take appropriate action.

The Department endeavors to assist you in your compliance efforts. Should you have any questions about the content of this letter, please feel free to contact me in writing, by telephone at (541) 686-7868, or via e-mail at: filip.craig@deq.state.or.us.

Sincerely,

Craig C. Filip
Solid Waste Reduction Analyst

ec: Mr. David Belyea, DEQ – Eugene
cc: Deputy Del Dahlen, Coos County Sheriff's Department
Office of Compliance and Enforcement, DEQ – Portland

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Sent To
DALE AND KAREN PENNIE
Street, Apt. No.; or PO Box No. PO BOX 1743
City, State, ZIP+4
BANDON OR 97411-6306

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

DALE AND KAREN PENNIE
PO BOX 1743
BANDON OR 97411-6306

COMPLETE THIS SECTION ON DELIVERY

Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) Dale Pennie
C. Date of Delivery 12-5-07

D. Is delivery address different from item 1? ☒ Yes
If YES, enter delivery address below: ☐ No

PO BOX 1734

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7007 0710 0000 0609 7884

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

State of Oregon
Department of Environmental Quality — Memorandum

To: File
Pollution Complaint #WRE 2007-0024

Date: 3/28/08

From: Craig C. Filip
WR, RES - Eugene

Subject: Compliance visit to 56295 Tom Smith Rd, Bandon, OR 97411: the Dale Pennie property.

I arrived at the property at approximately 12:10 PM on Thursday, March 27, 2008. The weather was unseasonably cool, in the upper 40's, and had rained for most of the last 24 hours, but was in the process of clearing. I was scheduled to meet with Coos County Sheriff's Deputy Del Dahlen, who phoned me en route to let me know he would be about 15 minutes late. I parked in the driveway of the access road and waited. After about 5 minutes, Officer Josh Garrett of the Bandon Police Department arrived to accompany us. He had with him an unidentified female companion, who remained in his cruiser during our site visit. Approximately 10 minutes later, Deputy Dahlen arrived. Deputy Dahlen brought with him some paper towels with which to clean off the locked gate across the access road. On his last visit to the property to check on Mr. Pennie's compliance, he and the accompanying officer from the Bandon Police Department had discovered, to their dismay, that graphite grease had been smeared all along the top of the gate, making climbing over this gate both hazardous and messy.

After wiping off the gate, Deputy Dahlen, Officer Garrett and I proceeded over the gate and down the access road, at approximately 12:25 PM. I observed a large pile of cut trees and brush near the entrance and by Dumpsite A, which Deputy Dahlen said had been the result of recent storm damage. Possibly as a result of this clearing activity, the contents of Dumpsite A were more readily visible on this visit. The tarps which had previously covered the wastes in this area had been removed, allowing me to see the extent of the electronic waste stored and scattered in this dumpsite, of which I took numerous photographs. Deputy Dahlen mentioned that there was a pond located beyond the foliage near this location. I replied that I had heard of that, but had been unable to verify it.

Dumpsite B appeared the same as on my two prior visits, as did Dumpsite C, though, given the extent of this dumpsite, it was hard to tell what changes had occurred. I attempted to photograph this dumpsite from the same vantage points as on my two prior visits to enable comparisons. I also spent more time amongst the wastes, photographing them as well as standing in the easement to photograph wastes off-site on Mr. Pennie's property, with which the wastes in the easement were contiguous.

Dumpsite D also appeared to be mostly the same as previously photographed, although another vehicle had been parked within it and there appeared to be more electrical-related materials. In relation to these, Deputy Dahlen mentioned that Mr. Pennie is a licensed electrician. The potassium permanganate canisters previously observed in this dumpsite were gone. Here, I also spent more time documenting wastes on the adjoining Pennie property as best as I could view them from the

PLAINTIFF'S EXHIBIT A.13

easement. Deputy Dahlen stated that there were extensive waste piles on Mr. Pennie's property that he had witnessed months ago which would undoubtedly be of interest to me if I could acquire access to the property.

We left the subject property at approximately 1:10 PM. Officer Garrett departed shortly thereafter. Deputy Dahlen and I chatted for a few minutes along the roadside about the property and Mr. Pennie. I had previously mentioned to Deputy Dahlen my interest in obtaining an administrative search warrant to gain access to Mr. Pennie's adjoining property for the purpose of investigating the wastes which appeared to have been disposed therein. Deputy Dahlen reiterated the County's interest in joining me in that investigation, if possible. He mentioned that Mr. Pennie had inherited his father's property in California and that he had plans to move there and take up asbestos remediation work, but that legal troubles had forced him to postpone those plans. Deputy Dahlen stated that the attorney who had worked for Mr. Pennie on legal issues associated with his late father's estate was suing him for $35,000. Deputy Dahlen went on to state that Mr. Pennie's brother has been missing for some time and that Coos County had been contacted by officials from the county in which Mr. Pennie's brother had previously resided in an attempt to locate the missing brother. According to the grapevine, as relayed by Deputy Dahlen, Mr. Pennie is rumored to have murdered his brother to obtain all of their father's inheritance, and that the brother's body is buried in a bus on Mr. Pennie's property. I replied that, if true, it could help explain Mr. Pennie's hostility towards government, in general, and Deputy Dahlen in particular, which I had always previously attributed to personal animosity.

The camera I used during this site investigation was different from those I had used previously and, upon review, the images appeared less clear in some instances. This camera appears to have a smaller field of view and to be more motion-sensitive than previous models I've used on-site.

Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

Picture 1: Easterly view to the entrance to the subject property from across Tom Smith Rd.

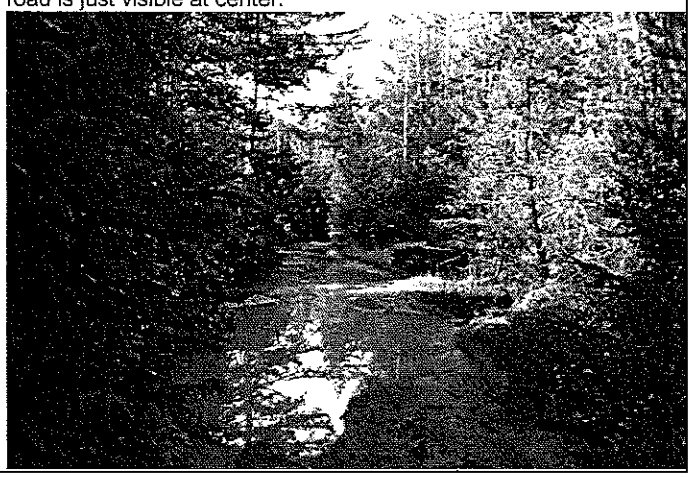
Picture 2: View of Dumpsite A along the southern edge of access road. The rear of the van pictured here is just visible at center-right in Picture 1.

Picture 3: Southerly view of Dumpsite A. According to Deputy Dahlen, a recent windstorm had cause the treefall which obscured my view of this dumpsite

Picture 4: Close-up of computer monitors and other electronic equipment behind the treefall within Dumpsite A. Note the use of upturned computer monitors to weight down tarps.

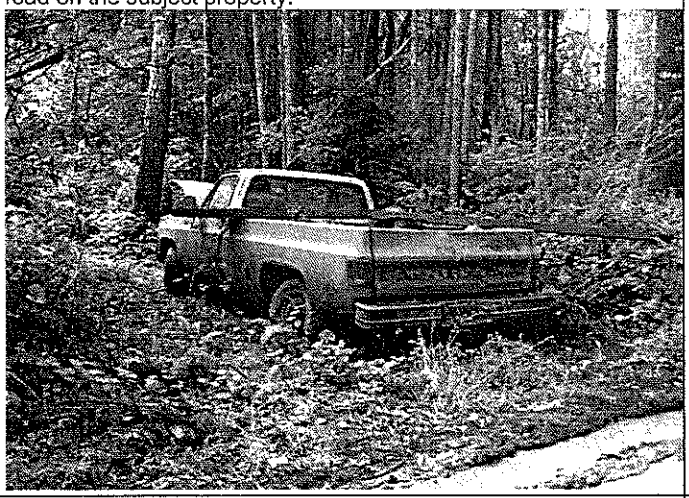
Picture 5: Close-up of solid waste within Dumpsite A. According to Deputy Dahlen, the easement ends at the rear fender of the vehicle pictured at left.

Picture 6: View of the access road looking west within the easement towards Tom Smith Rd. The gate across the access road is just visible at center.



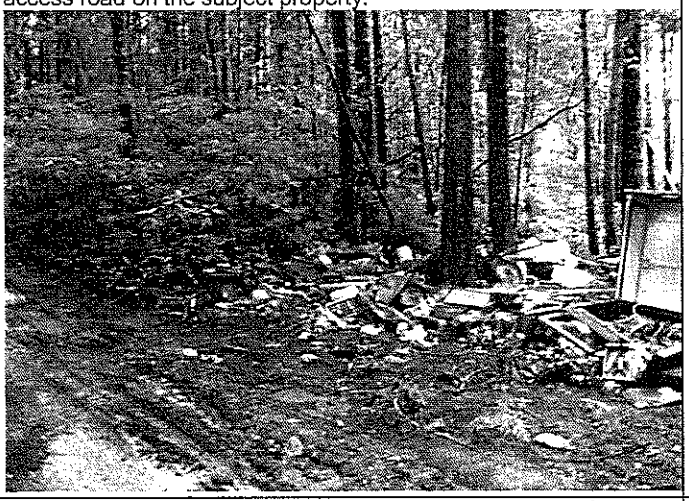
Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

Picture 7: View of Dumpsite B along southern edge of access road on the subject property.



Picture 8: View of the bed of the pickup truck within Dumpsite B, shown in Picture 7.

Picture 9: Eastern edge of Dumpsite C along the southern edge of access road on the subject property.



Picture 10: View of Dumpsite C along the southern edge of the access road on the subject property, panning west (right) from Picture 9.

Picture 11: View of Dumpsite C along the southern edge of the access road on the subject property, panning west (right) from Picture 10.

Picture 12: View of Dumpsite C along the southern edge of the access road on the subject property, panning west (right) from Picture 11.

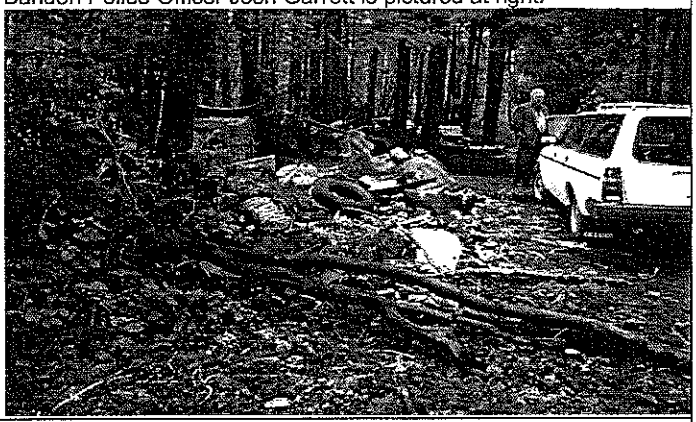
Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

Picture 13: Close-up of the lead-acid batteries to the left of the truck chassis shown in the center of Picture 11.

Picture 14: Abandoned vehicle in Dumpsite D along the southern edge of the access road near its eastern terminus on the subject property.

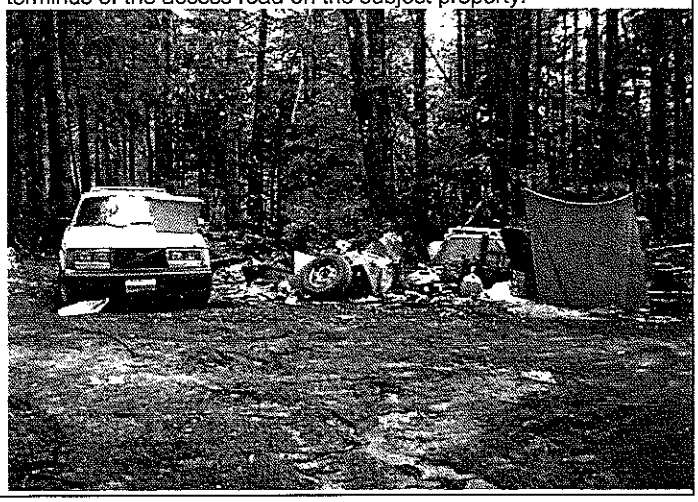
Picture 15: Abandoned vehicle in Dumpsite D along the southern edge of the access road near its eastern terminus on the subject property.

Picture 16: Eastern edge of Dumpsite D along southern edge of the access road on the subject property. The two cylindrical containers labeled "potassium permanganate" last observed here on 10/15/07, are missing. Deputy Dahlen is pictured at left; Bandon Police Officer Josh Garrett is pictured at right.



Picture 17: Close-up of area within Dumpsite D where cylindrical containers labeled "potassium permanganate" were last observed on 10/15/07 by CCF.

Picture 18: Eastern edge of Dumpsite D viewed looking east at the terminus of the access road on the subject property.



Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

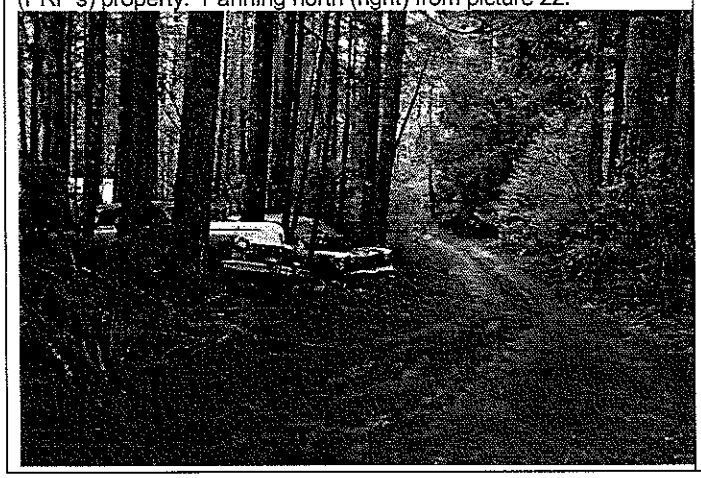
Picture 19: Southeasterly view of Dumpsite D along the access road on the subject property where it turns south into the adjacent (PRP's) property. Panning south (right) from Picture 18.

Picture 20: Southerly view of Dumpsite D along the access road onto the adjacent (PRP's) property. Panning west (right) from Picture 19.

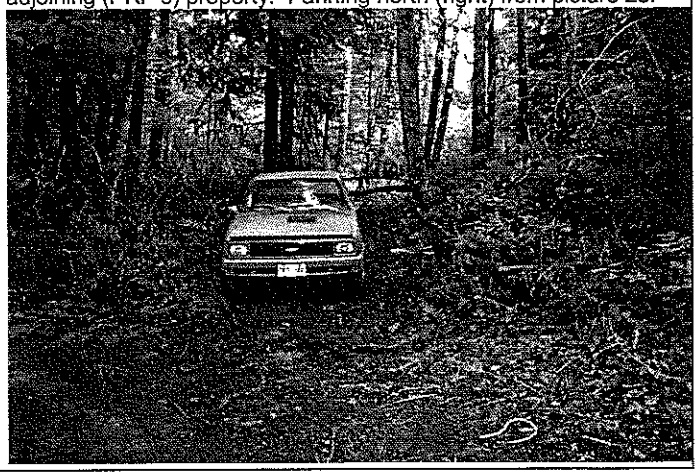
Picture 21: Southerly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning west (right) from Picture 20.

Picture 22: Southwesterly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning west (right) from Picture 21.

Picture 23: Westerly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning north (right) from picture 22.

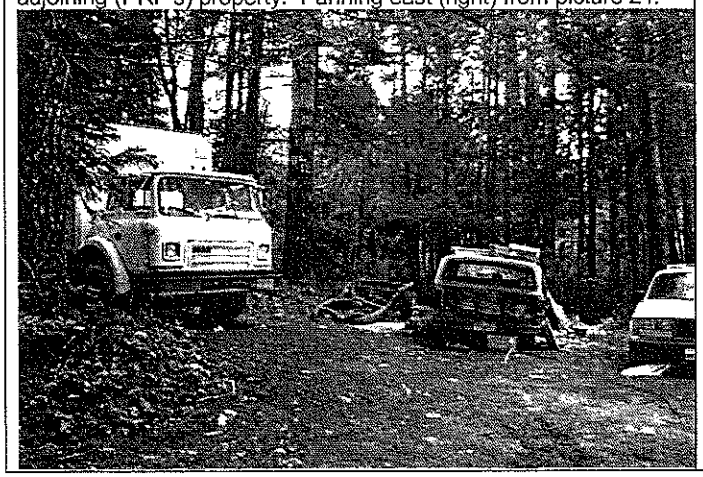


Picture 24: Northwesterly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning north (right) from picture 23.

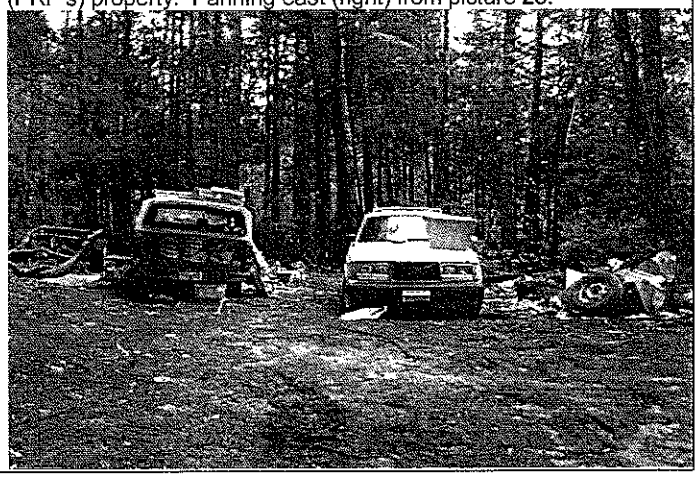


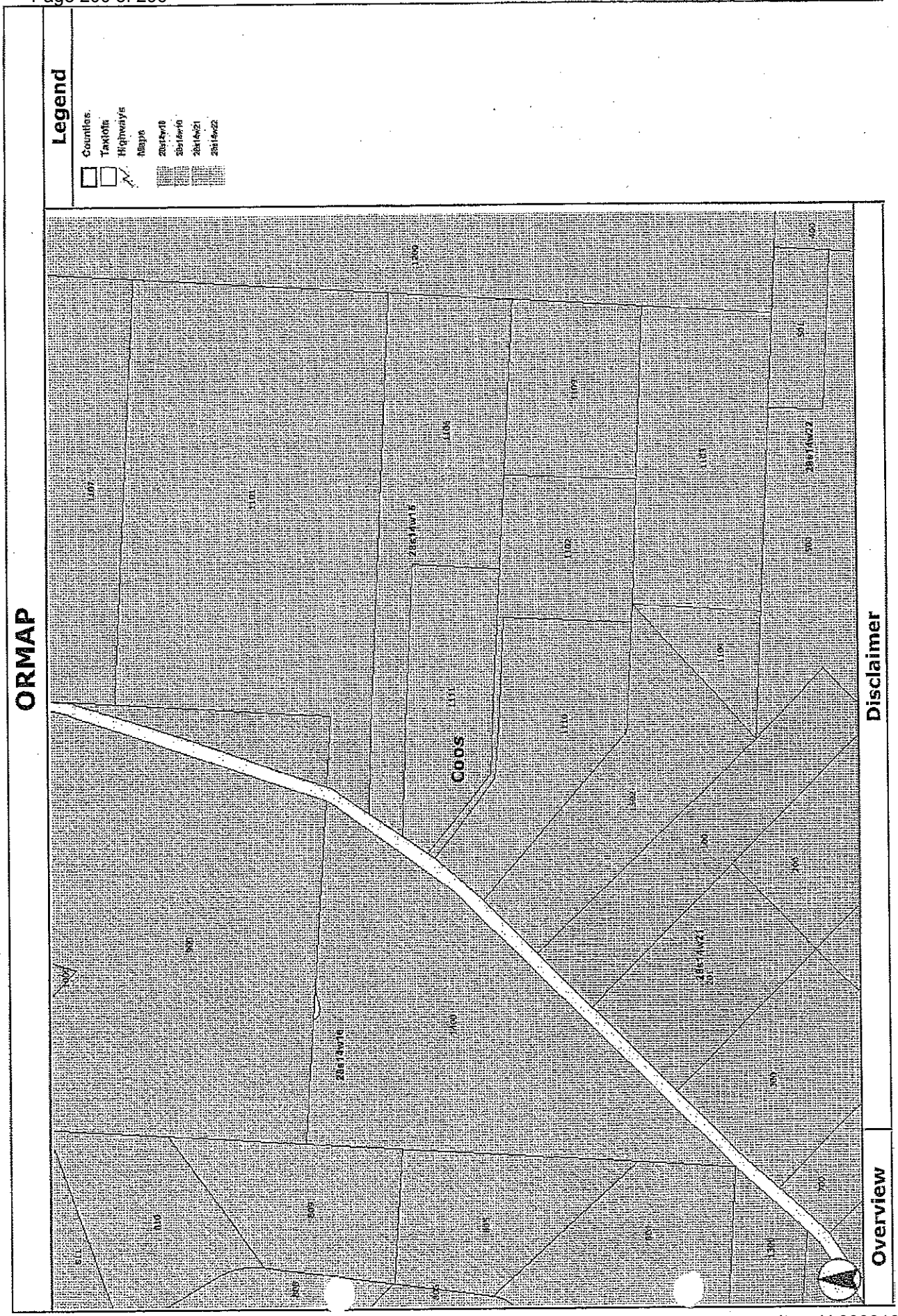
Pollution Complaint #WRE 2007-0024: Site Inspection Photographs of Subject Property taken on 3/27/08 by CCF

Picture 25: Northeasterly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning east (right) from picture 24.

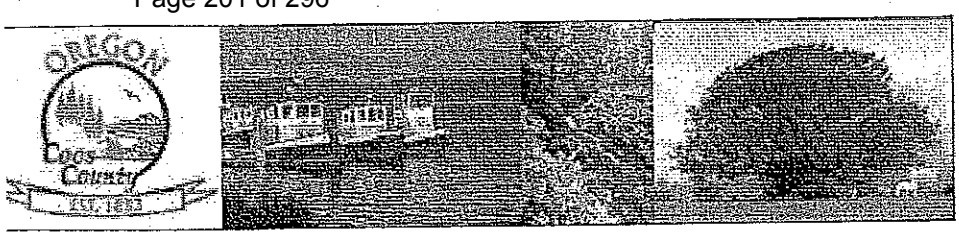


Picture 26: Easterly view of Dumpsite D along the access road on the subject property at the junction of its turning onto the adjoining (PRP's) property. Panning east (right) from picture 25.





PLAINTIFF'S EXHIBIT 4-14



ASSESSORS'S OFFICE
PHONE: (541) 396-3121
FAX: (541) 396-6071
HOURS: 8:00 A.M. to Noon
1:00 P.M. to 5:00 P.M.
EMAIL: Coos County Assessor

Assessor's Office

Account Detail - Assessment

Account#: 9507.07 **Year:** 2008

Map#: 28S 14 W 15 1106 Sales data Print

Name: JOHN H. COX JR. REVOCABLE TRUST
Address 1:
Address 2: 9247 E SPARKLETT ST
Address 3:
City/State: TEMPLE CITY , CA 91780

Code Area: 54.01 **Maint Area:** 6 **Value Area:** RRL
Prop Class: 440 UNIMPRVD TRACT OR W/WELL-DFU
Zone Code: RR-5 **Document #:** 2006-2562
Situs: 0

Mrkt Acres: 9.690 **Spcl Acres:** 0.000 **Fire Patrol:** 9.690 **Special Asmts:**

Account Detail - Assessment

Descriptions	RMV	MAV	SAV	MSAV	TAV
Land Values	2,529		2,529	0	
Improvements	0		0		
MFG Structure	0		0		
Sub Total/Base	2,529	0	2,529	1,862	
Exceptions		0		0	
Sub Total	2,529	0	2,529	1,862	1,862
Exemptions	0		0	0	0
Final Totals	2,529	0	2,529	1,862	1,862

Account Detail - Tax Information

Tax information is informational only, and does not include interest or any other charges that may be due.

Year Tax Amount Tax Paid

PLAINTIFF'S EXHIBIT A-15

2000	$18.14	$18.14
2001	$21.33	$21.33
2002	$21.36	$21.36
2003	$21.70	$21.70
2004	$34.96	$34.96
2005	$34.43	$34.43
2006	$34.64	$34.64
2007	$35.05	$35.05

Account Detail - Sales Information

Print

Account#: 9507.07

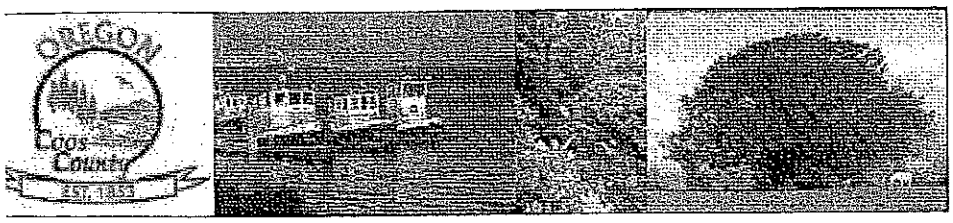
Sale Price: 75000 Sale Date: 05/01/1990

Buyer Name: COX, JOHN H JR & Seller Name:

MInstr TYP:		Roll YR:	1991	YR Built:	0	Pct GD:	0.00	Land:	1018
		Code Area:	54.01			FCTR BK:		Bldg:	0
		Zoning CD:	RR-5	Prop CLS:	440	Yr APPR:	1991	M.H.:	0
Map #:	28S 14 W 15 1106			Deed:	900501727	SQ Feet:	0	TOTL:	1018
MH SZ/MK:	/			Bd/Bth/Flr:	0/.0/0	ATT/Bsmt:		Acre:	9.220

Sales Information

Account #	Sale Price	Sale Date	Deed #	Additional Acct.	Deed Type	Map #
9507.07	$0	02/01/1981	810204972			28S 14 W 15 1106
9507.07	$35000	03/01/1982	820306753			28S 14 W 15 1106
9507.07	$75000	05/01/1990	900501727			28S 14 W 15 1106



ASSESSORS'S OFFICE
PHONE: (541) 396-3121
FAX: (541) 396-6071
HOURS: 8:00 A.M. to Noon
1:00 P.M. to 5:00 P.M.
EMAIL: Coos County Assessor

Assessor's Office

Account Detail - Assessment

Account#: 9507.11 Year: 2008

Map#: 28S 14W 15 1111 Sales data Print

Name: PENNIE, KAREN I.

Address 1: @ PENNIE, DALE A.

Address 2: PO BOX 1734

Address 3:

City/State: BANDON , OR 97411

Code Area: 54.03 Maint Area: 6 Value Area: RRL

Prop Class: 149 MH SITE W/ OR W/O IMP-FOREST

Zone Code: RR-5 Document #: 88-03-0553

Situs: 56295 TOM SMITH RD 97411

Mrkt Acres: 5.360 Spcl Acres: 0.000 Fire Patrol: 4.360 Special Asmts:

Account Detail - Assessment

Descriptions	RMV	MAV	SAV	MSAV	TAV
Land Values	66,016		66,016	0	
Improvements	0		0		
MFG Structure	0		0		
Sub Total/Base	66,016	0	66,016	15,232	
Exceptions		0		0	
Sub Total	66,016	0	66,016	15,232	15,232
Exemptions	0		0	0	0
Final Totals	66,016	0	66,016	15,232	15,232

Account Detail - Tax Information

Tax information is informational only, and does not include interest or any other charges that may be due.

Year Tax Amount Tax Paid

PLAINTIFF'S EXHIBIT A16 Gabbies

2000	$137.24	$137.24
2001	$185.87	$185.87
2002	$186.56	$186.56
2003	$199.15	$199.15
2004	$211.72	$211.72
2005	$207.89	$207.89
2006	$210.04	$210.04
2007	$213.94	$0.00

Account Detail - Sales Information

Print

Account#: 9507.11

Sale Price: 18000 Sale Date: 03/01/1988

Buyer Name: PENNIE, KAREN I Seller Name:

Minstr TYP:	Roll YR:	1991	YR Built:	0	Pct GD:	0.00	Land: 644
	Code Area:	54.01			FCTR BK:		Bldg: 0
	Zoning CD:		Prop CLS:	440	Yr APPR:	1991	M.H.: 0
Map #:	28S 14W 15 1111		Deed:	880300553	SQ Feet:	0	TOTL: 644
MH SZ/MK:	/		Bd/Bth/Flr:	0/0/0	ATT/Bsmt:		Acre: 11.040

Sales Information

Account #	Sale Price	Sale Date	Deed #	Additional Acct.	Deed Type	Map #
9507.11	$18000	03/01/1988	880300553	*		28S 14W 15 1111

TICOR TITLE INSURANCE 88 03 0553

STATUTORY WARRANTY DEED

JAMES A. HALL

Grantor,

conveys and warrants to KAREN I. PENNIE

Grantee, the following described real property free of encumbrances except as specifically set forth herein situated in COOS County, Oregon, to wit:

As described on attached Exhibit "A"------

TAX A/C #9507.00

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES. The said property is free from encumbrances except as described on attached Exhibit "A"-------

The true consideration for this conveyance is $ 18,000.00

(Here comply with the requirements of ORS 93.030)

Dated this 9th day of March 19 88

James A Hall

JAMES A. HALL

State of Oregon, County of COOS

The foregoing instrument was acknowledged before me this 9th day of MARCH, 19 88 by James A. Hall

Notary Public for Oregon
My commission expires: 10-16-1990

State of Oregon, County of _____

The foregoing instrument was acknowledged before me this _____ day of _____, 19____ by _____ President and _____ Secretary of _____ a _____ corporation, on behalf of the corporation.

Notary Public for Oregon
My commission expires:

WARRANTY DEED

JAMES A. HALL — GRANTOR

KAREN I. PENNIE — GRANTEE

Until a change is requested, all tax statements shall be sent to the following address:

KAREN I. PENNIE
P.O. Box 1734
Bandon, Oregon 97411

Escrow No. 6-54-274 Title No. 6-54-274

After recording return to:

KAREN I. PENNIE
P.O. Box 1734
Bandon, Oregon 97411

This Space Reserved for Recorder's Use

284 12661

State of Oregon
County of Coos 88-03-0553

I, Mary Ann Wilson, County Clerk, certify the within instrument was filed for record at Mar 9 2:50 pm 88

By D Taylor Deputy

#pages 2 Fees $ 10.-

Ticor Form No. 137 Statutory Warranty Deed 8/85

88 03 0554

EXHIBIT "A"

A parcel of land in the SE 1/4 of the SE 1/4 of Section 16 and in the SW 1/4 of the SW 1/4 of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon, described as follows: Beginning at the Southwest corner of said Section 15; thence North along the West line of said Section 15, 810 feet to the true point of beginning; thence North 89° 23' 40" East 480 feet; thence North 0° 17' 21" East 277.47 feet; thence South 89° 25' 22" West 837.37 feet to the Easterly boundary of the Tom Smith County Road; thence South 30° 07' 36" West 142.96 feet along the Easterly boundary of Tom Smith County Road; thence South 59° 55' 40" East 297.79 feet; thence South 89° 35' East 170 feet to the point of beginning.

TOGETHER WITH Easement for ingress and egress over the following described property:

The boundaries of this 50 foot wide easement are located 25 feet from the following described centerline:

Beginning at the Southwest corner of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon, thence North 0° 17' 21" East along the West line of said Section 15 810 feet; thence North 89° 35' West 170 feet; thence North 59° 55' 40" West 297.79 feet; thence North 30° 07' 36" East 142.96 feet along the Easterly boundary of Tom Smith County Road; thence North 23° 27' 32" East 89 feet along the Easterly boundary of said county road to the point of beginning of this easement; thence South 83° East 112 feet; thence North 88° East 59 feet; thence South 87° East 300 feet; thence North 87° East 118 feet; thence South 87° East 131 feet; thence South 21° West 49.55 feet to the North line of property herein above described.

The above described property is subject to the following:

1. As disclosed by the tax roll the premises herein described are classified as Forest Lands. In the event of declassification, said premises will be subject to additional taxes and interest pursuant to the provisions of ORS Chapter 321.

2. Rights of the public in streets, roads and highways.

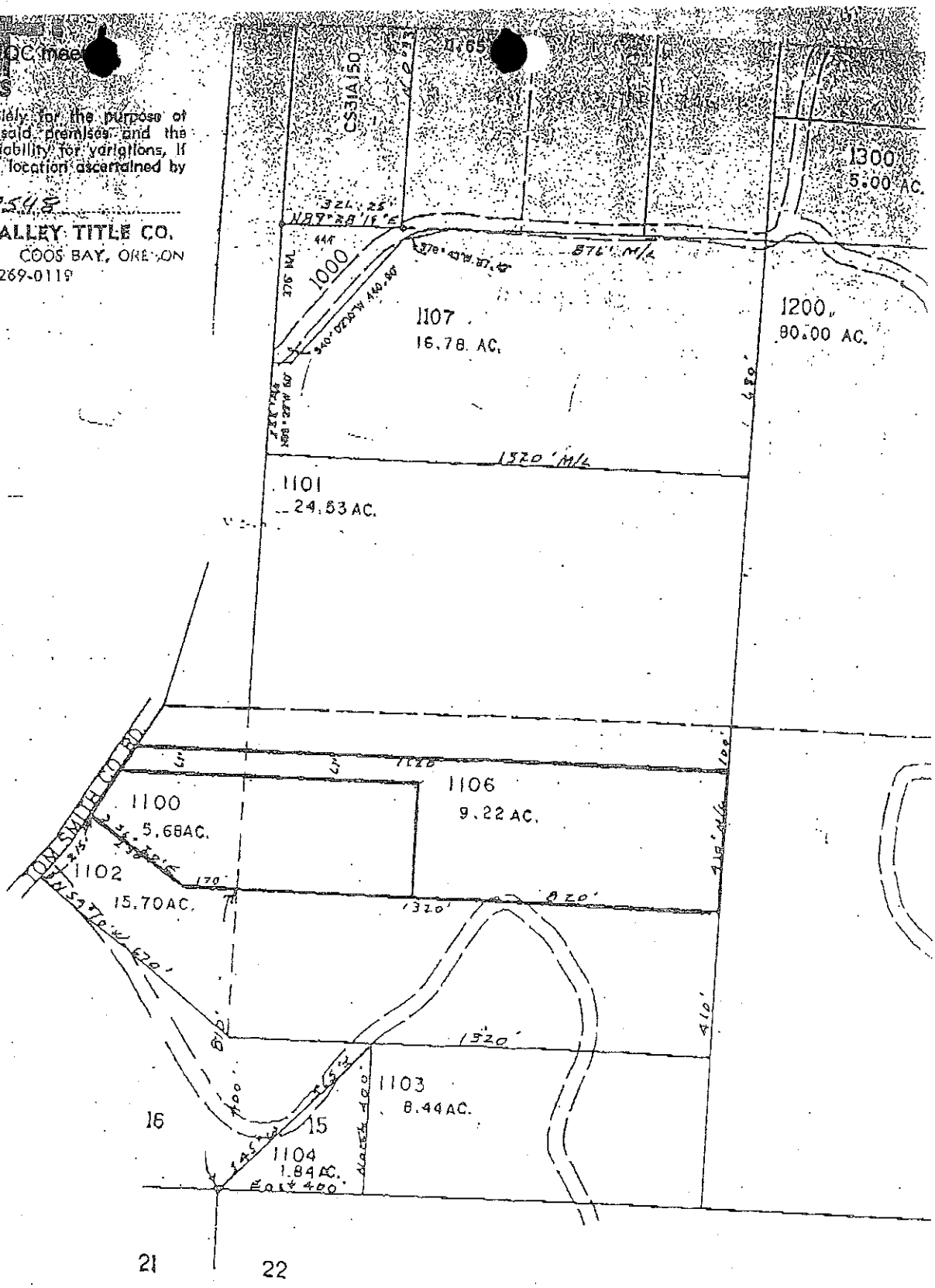
3. Right of Way Easement, including the terms and provisions thereof, for communication service, to General Telephone Company of the Northwest, Inc., by instrument recorded June 22, 1968 bearing Microfilm Reel #68-1-25155, Records of Coos County, Oregon.

4. Right of Way Easement, including the terms and provisions thereof, for power line, to Pacific Power & Light Company, a corporation, by instrument recorded 10/8/74, MR#74-10-105560, Records Coos County, Oregon.

5. Easement including the terms and provisions thereof, for power line, to Pacific Power & Light Company, by instrument recorded 10-18-74, MR#74-10-105950, Records of Coos County, Oregon.

6. Easement including the terms and provisions thereof, for communication service, to General Telephone Company of the Northwest, Inc., by instrument recorded 11/12/74 bearing MR#74-11-106757, Records of Coos County, Oregon.

7. Easement including the terms and provisions thereof, for power line, to Pacific Power & Light Company, by instrument recorded 9/6/79 bearing Microfilm Reel #79-4-6812, Records of Coos County, Oregon.



FORM No. 716—WARRANTY DEED (Individual or Corporate). (Grantees as Tenants by Entirety). STEVENS-NESS LAW PUBLISHING CO., PORTLAND, OR. 97204

WARRANTY DEED—TENANTS BY ENTIRETY 90 5 1727

KNOW ALL MEN BY THESE PRESENTS, That JAMES A. HALL

hereinafter called the grantor, for the consideration hereinafter stated to the grantor paid by JOHN H. COX, JR and JANE E. COX *, husband and wife, hereinafter called the grantees, does hereby grant, bargain, sell and convey unto the grantees, as tenants by the entirety, the heirs of the survivor and their assigns, that certain real property, with the tenements, hereditaments and appurtenances thereunto belonging or appertaining, situated in the County of* Coos *, State of Oregon, described as follows, to-wit:*

A parcel of land in the SE¼ of the SE¼ of Section 16 and the SW¼ of the SW¼ of Section 15, Township 28 South, Range 14 West of the Willamette Meridian, Coos County, Oregon more specifically described as follows:

Beginning at the SW Corner of said Section 15; thence North along the West line of said Section 15 810 feet; thence N 89°23'40" East 480 feet to the true point of beginning; thence N 0°17'21" E 277.47 feet; thence S 89°25'22" W 837.37 feet to the Easterly boundary of Tom Smith County Road; thence N 23°27'32" E 139.05 feet along the Easterly boundary of Tom Smith County Road; thence S 89°35'E 302.62 feet; thence N 89° 25'22" E 1304.30 feet; thence S 00°15'57"W 398.81 feet; thence S 89° 23'40" W 824.47 feet to the point of beginning. - -

This instrument does not guarantee that any particular use may be made of the property described in this instrument. A buyer should check with the appropriate City or County Planning Department to verify approved uses.

(continue on otherside) (IF SPACE INSUFFICIENT, CONTINUE DESCRIPTION ON REVERSE SIDE)

To Have and to Hold the above described and granted premises unto the said grantees, as tenants by the entirety, their heirs and assigns forever.

And grantor hereby covenants to and with grantees and the heirs of the survivor and their assigns, that grantor is lawfully seized in fee simple of the above granted premises, free from all encumbrances - - - - - - - - *and that grantor will warrant and forever defend the said premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever, except those claiming under the above described encumbrances.*

The true and actual consideration paid for this transfer, stated in terms of dollars, is $ 75,000.00 ~~*However, the actual consideration consists of or includes other property or value given or promised which is*~~ *the whole consideration (indicate which).* (The sentence between the symbols ①, if not applicable, should be deleted. See ORS 93.030.)

In construing this deed and where the context so requires, the singular includes the plural and all grammatical changes shall be implied to make the provisions hereof apply equally to corporations and to individuals.

In Witness Whereof, the grantor has executed this instrument this 2 *day of* March *, 19*90*; if a corporate grantor, it has caused its name to be signed and seal affixed by its officers, duly authorized thereto by order of its board of directors.*

(If executed by a corporation, affix corporate seal)

James A. Hall [signature]

STATE OF OREGON, County of Coos) ss. March 2, 1990	STATE OF OREGON, County of ....) ss. ...., 19....
Personally appeared the above named James A. Hall *and acknowledged the foregoing instrument to be* his *voluntary act and deed.*	*Personally appeared .... and .... who, being duly sworn, each for himself and not one for the other, did say that the former is the .... president and that the latter is the .... secretary of ...., a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and each of them acknowledged said instrument to be its voluntary act and deed.*
Before me: (OFFICIAL SEAL) Marian A. Wagner [signature] *Notary Public for Oregon* *My commission expires* 3-30-93	*Before me:* (OFFICIAL SEAL) *Notary Public for Oregon* *My commission expires:*

NOTARY PUBLIC STATE OF OREGON [seal]

James A. Hall
1525 California Street
Coos Bay, Oregon
GRANTOR'S NAME AND ADDRESS

John H. Cox, Jr. and Jane E. Cox
9247 Sparkletts
Temple City, Ca. 91780

STATE OF OREGON, County of ....) ss.

I certify that the within instrument was received for record on the .... day of ...., 19...., at .... o'clock ....M., and recorded

County Clerk, certify the ... for record 11 / 25 / 1990 ... Deputy

Page (Shrunk to Show Detail)

PLAINTIFF'S EXHIBIT Item U000328 A.18

No. 6788 P. 10

...... thence S 89°25'22" W 8..37 feet to the Easterly boundary of Tom Smith County Road; thence N 23°27'32" E 139.05 feet along the Easterly boundary of Tom Smith County Road; thence S 89°35'E 302.62 feet; thence N 89° 25'22" E 1304.30 feet; thence S 00°15'57"W 398.81 feet; thence S 89° 23'40" W 824.47 feet to the point of beginning. - -

This instrument does not guarantee that any particular use may be made of the property described in this instrument. A buyer should check with the appropriate City or County Planning Department to Verify approved uses.

(continue on otherside) (IF SPACE INSUFFICIENT, CONTINUE DESCRIPTION ON REVERSE SIDE)

To Have and to Hold the above described and granted premises unto the said grantees, as tenants by the entirety, their heirs and assigns forever.

And grantor hereby covenants to and with grantees and the heirs of the survivor and their assigns, that grantor is lawfully seized in fee simple of the above granted premises, free from all encumbrances - *and that grantor will warrant and forever defend the said premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever, except those claiming under the above described encumbrances.*

The true and actual consideration paid for this transfer, stated in terms of dollars, is $ 75,000.00. ~~®However, the actual consideration consists of or includes other property or value given or promised which is part of the~~ the whole consideration (indicate which).® *(The sentence between the symbols ®, if not applicable, should be deleted. See ORS 93.030.)*

In construing this deed and where the context so requires, the singular includes the plural and all grammatical changes shall be implied to make the provisions hereof apply equally to corporations and to individuals.

In Witness Whereof, the grantor has executed this instrument this 2 *day of* March, 19 90; *if a corporate grantor, it has caused its name to be signed and seal affixed by its officers, duly authorized thereto by order of its board of directors.*

(signature) James A. Hall

(If executed by a corporation, affix corporate seal)

STATE OF OREGON, County of Coos } ss.
March 2, 19 90

Personally appeared the above named James A. Hall *and acknowledged the foregoing instrument to be* his *voluntary act and deed.*

Before me: (signature)

(OFFICIAL SEAL) NOTARY PUBLIC STATE OF OREGON

Notary Public for Oregon
My commission expires: 3-30-93

STATE OF OREGON, County of ....) ss.
............, 19......
Personally appeared .... *and* .... *who, being duly sworn, each for himself and not one for the other, did say that the former is the* .... *president and that the latter is the* .... *secretary of* ...., *a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and each of them acknowledged said instrument to be its voluntary act and deed.*
Before me:
(OFFICIAL SEAL)
Notary Public for Oregon
My commission expires:

Page 1 enlarged to show signatures

James A. Hall
1525 California Street
Coos Bay, Oregon
GRANTOR'S NAME AND ADDRESS

John H. Cox, Jr. and Jane E. Cox
9247 Sparkletts
Temple City, Ca. 91780
GRANTEE'S NAME AND ADDRESS

After recording return to:
John H. Cox, Jr. and Jane E. Cox
9247 Sparkletts
Temple City, Ca 91780
NAME, ADDRESS, ZIP

Until a change is requested all tax statements shall be sent to the following address.
9247 Sparkletts
Temple City, Ca. 91780
NAME, ADDRESS, ZIP

State of Oregon, County of Coos ss. I, Mary Ann Wilson, County Clerk, certify the within instrument was filed for record at 2:40 P.M. May 25, 1990 90-5-1727 By Deputy Fee $10.00 #pages

STATE OF OREGON, } ss.
County of ....

I certify that the within instrument was received for record on the ...... *day of* ......, 19......, *at* ...... *o'clock* ....*M., and recorded in book* ...... *on page* ...... *or as file/reel number* ......, *Record of Deeds of said county.*

Witness my hand and seal of County affixed.

Recording Officer
By .... *Deputy*

WILLAMETTE VALLEY TITLE CO.
127.5418

90-5-1727A

DESCRIPTION CONTINUED

Rights of the public in and to that portion of the herein described property lying within the boundaries to roads and roadways.

Easement, including the terms and provisions thereof, conveyed to General Telephone Company of the Northwest, Inc. by instrument recorded January 22, 1968 as Microfilm No. 68-1-25155, Records of Coos County, Oregon.

Easement, including the terms and provisions thereof, conveyed to Pacific Power and Light Company by instrument recorded October 8, 1974 as Microfilm No. 74-10-105560, Records of Coos County, Oregon.

Easement, including the terms and provisions thereof, conveyed to General Telephone Company of the Northwest, Inc., by instrument recorded November 12, 1974 as Microfilm No. 74-11-106757, Records of Coos County, Oregon.

Easement, including the terms and provisions thereof, conveyed to Karen I. Pennie, by instrument recorded March 9, 1988 as Microfilm No. 88-03-0553, Records of Coos County, Oregon.

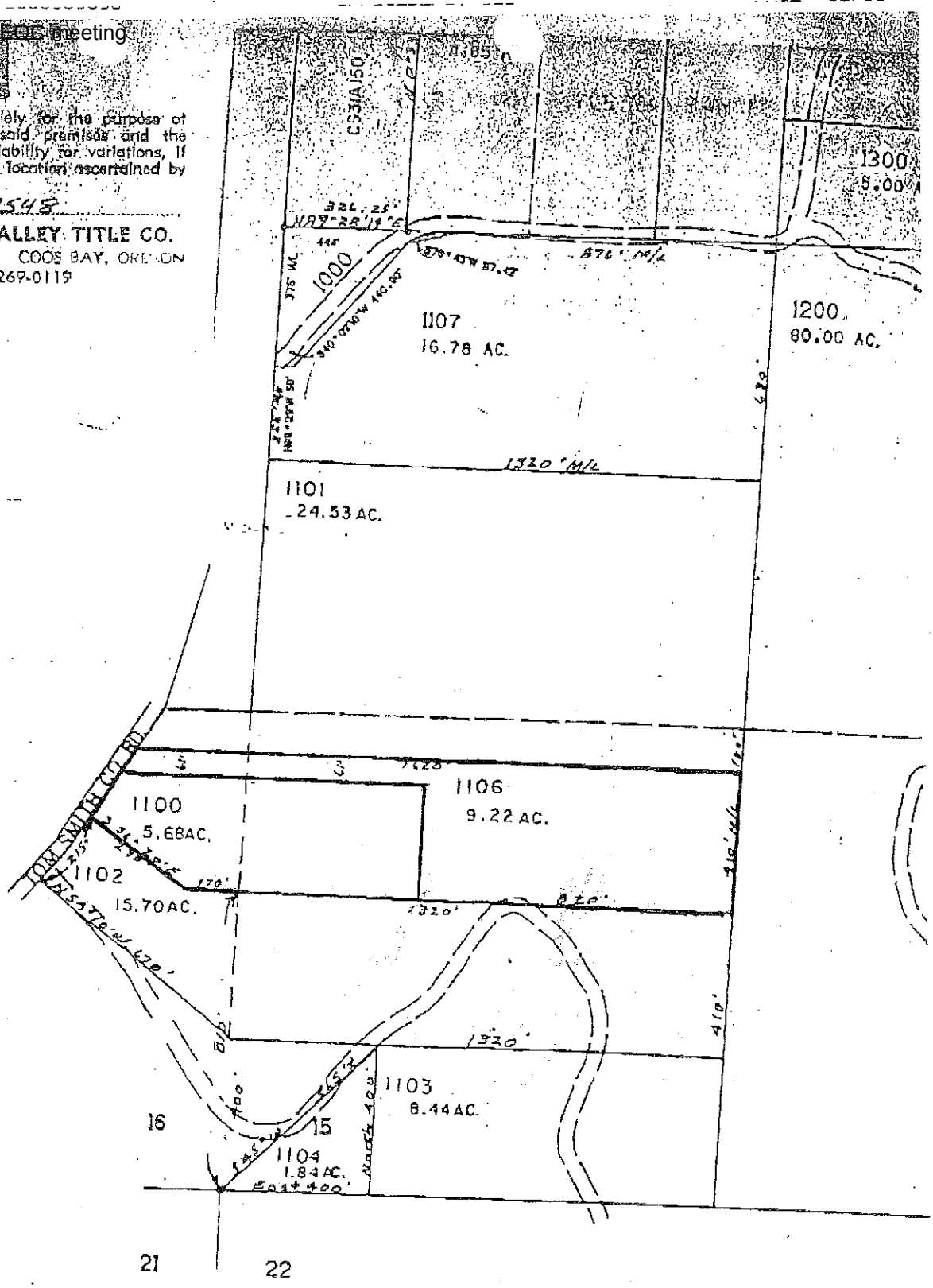
Easement, including the terms and provisions thereof, conveyed to Pacific Power and Light Company by instrument recorded October 19, 1989 as Microfilm No. 89-10-1302, Records of Coos County, Oregon.

back of page

This print is made solely for the purpose of assisting in locating said premises and the company assumes no liability for variations, if any, in dimensions and location ascertained by actual survey.

ORDER NO. 137548

WILLAMETTE VALLEY TITLE CO.
COOS BAY, OREGON
PHONE 269-0119



Attachment 2
Item U 6/3/08 BOC meeting
Page 1 of 4

FILED
1990 JUN 14 PM 2:32
COOS COUNTY COURT
COQUILLE, OREGON

CIRCUIT COURT
STATE OF OREGON
COOS COUNTY

In the Matter of the Marriage of
DALE A. PENNIE, Petitioner
and
KAREN I. PENNIE, Respondent

DECREE OF DISSOLUTION

Case No. 90DM0133

STATISTICAL FACTS

	Petitioner:	Respondent:
Resident or Legal Address:	Beach Jct. Tr. Pk. #15 Bandon, OR 97411	95750 Jerry Flat Rd. Riv. Vlg. Tr. Pk. #14 Gold Beach, OR 97444
Maiden Name:	N/A	Hendrickson
Former Married Names:	N/A	Brotton
Age:	40	34
Social Security Number:	544-50-3954	541-88-7718

Date and Place of Marriage: August 27, 1983, Powers, OR.

This matter is before the Court on the default of the Respondent. The Petitioner appeared by affidavit.

The Court has been fully advised, and therefore,

IT IS HEREBY DECREED THAT:

1. Prior wills: Any will previousil executed by either party with provisions in favor of the other is revoked with respect to those provisions, including any beneficiary benefits.

DECREE OF DISSOLUTION- Page 1

Certified True Copy Of The Original
Dated This 1st Day Of May, 2008
Trial Court Administrator
By:

PLAINTIFF'S EXHIBIT 4-14

Item U 00033

2. Division of Property:

(a) The Petitioner is awarded the following property: A 1968 Opel Automobile, A 1972 Opel GT Automobile, A 1976 Honda Motorcycle, and all personal property now in his possession.

(b) The Respondent is awarded the following property: A 1976 Chevrolet Automobile, A 1975 Opel Automobile, and all personal property now in her possession.

(c) Each Party is awarded any and all personal property in the other party's possession.

(d) Petitioner and Respondent each shall sign any documents necessary to remove his or her name as owner of personal property awarded to the other. If either fails to sign the necessary documents, a certified copy of this Decree shall serve as a conveyance of the property.

3. Payments of Debts:

(a) The Petitioner shall not be responsible for any debts involving the Respondent's children from a previous marriage.

(b) The Petitioner shall be responsible for all other debts and shall hold the Respondent harmless from any claims thereon and all indebtednesses incurred only during the time of living together.

4. Former name Restored:

(a) The Respondent's legal name shall be restored to her maiden name of: KAREN IDA HENDRICKSON.

(b) The Respondent shall never use the surname of PENNIE again.

Attachment E
Item 29 of 2015 ESC meeting
Page 3 of 3

5. Dissolution: This marriage is dissolved and shall terminate on the 31st day of July, 1990.

DATED this 24th day of June, 1990.

Circuit Court Judge
Richard L. Barron

Submitted by: Dale A. Pennie
Petitioner

FILED

1990 AUG 27 PM 3:45

COOS COUNTY COURT
COQUILLE, OREGON

CIRCUIT COURT
STATE OF OREGON
COOS COUNTY

DALE A. PENNIE Petitioner vs. KAREN I. HENDRICKSON Respondent	ORDER FOR PROVISIONAL PROCESS Case No. 90DM0133

THIS MATTER came on for hearing upon the petitioner's motion for the respondent to show cause, if any, why provisional process should not be issued requiring the respondent to deliver to the petitioner certain personal property, and after hearing the evidence, reviewing the Affidavit of the petitioner, the court finds that there is probable cause for sustaining the validity of the underlying claim, and the court

ORDERS that the respondent deliver to the petitioner the following property:

One 1964 Beatles album

One Model 34 S & W revolver and holster

One tire pump kit

One Marriage Licence

The respondent is order to pay the petitioner $50. cost encounter in this matter.

DATED this 27th day of Aug, 1990.

Robert B. Williams
CIRCUIT COURT JUDGE

Dale

20.21

COPY

Coos County Code Violation Complaint Form

Please complete this form with as much detail and accuracy as possible.

Location of Violation: Tom Smith Rd Bandon Oregon 97411
(street address and city)

Legal Description of Property: 28 (Township) 14 (Range) 16 (Section) 1106 (Tax lot #)

Tax Account Number 9507.07

Alleged Violator Name: Karen / Dale Pennie
Address: 56295 Box 37 Tom Smith Rd Bandon OR 97411

Property Owner Name: John H Cox
Address: 9247 East Sparkler Temple City CA

Description of Violation: Hazardous material (cars, computers, trucks trailers) that are leaching oil, silver, lead and gasoline on our property that we granted easement for ingress and egress only. Trees have been removed from the easement and there is a various dog dog that makes us fearful to visit our own property. Note the easement looks ~~~~ worse than a junk yard.

Documentation or Evidence Attached? (circle) (YES) NO
Photo of easement prior to violation

Contact information for person completing form:

Name John H Cox
Address 9247 East Sparkler
Temple City CA 91780
Phone (626) 287-3297

The above information is confidential until either the case is closed or at such time as the violator is required to appear in court and requests the information under rights of discovery.

John H Cox
SIGNATURE

12-6-05
DATE

PLAINTIFF'S EXHIBIT
tabbies
Item 000336
A-20

7005-2539

COPY

Coos County Code Violation Complaint Form

Please complete this form with as much detail and accuracy as possible.

Location of Violation: 56295 Box 37 Tom Smith Rd Bandon Or 97411
(street address and city)

Legal Description of Property: 28 (Township) 14 (Range) 16 (Section) 1111 (Tax lot #)

Tax Account Number_____

Alleged Violator Name: Karen/Dale Pennie
Address: 56295 Box 37 Tom Smith Rd Bandon OR 97411

Property Owner Name: Karen Pennie
Address:_____

Description of Violation: Hazardous dumpsite with over 100 non running junk cars that are leaching oil gasoline into ground water springs. There are also numerous computers leaching lead and silver. Looks like a huge dump. Also is a fire hazard.

Documentation or Evidence Attached? (circle) YES (NO)
Can only see from a distance from our property.

Contact information for person completing form:

Name John H Cox
Address 9247 East Sparkle
Temple City CA 91780
Phone (626) 287-3297

The above information is confidential until either the case is closed or at such time as the violator is required to appear in court and requests the information under rights of discovery.

John H Cox
SIGNATURE

12-6-05
DATE

PLAINTIFF'S EXHIBIT
Item U-100337
A-21

tabbies

NO. 688 P. 3

COPY

Dec 10, 2005

I John H Cox give
Coos County Sheriff's Deputy
Del Dahlen permission to
entry my property on Tom
Smith Road Bandon Oregon
for code enforcement.

John H Cox
9247 East Sparkett
Temple City CA 91780
(626) 287-3297

I will be staying at my daughters
until Dec 30
6111 SW Seville Ave
Lake Oswego OR 97035
(503) 636-2280
Bob & Ruthanne

PLAINTIFF'S EXHIBIT
tabbies
Item 1-00338
A-22

ORIGINAL

01/25/08

CS # SO2005-25391

SUMMARY: As a result of a signed citizen complaint, filled out on a Coos County Code Violation Complaint Form, a violation file was created on 12/13/05 for 53295 Tom Smith Road Bandon, Or. 97411. Refer to main body of report for chronological order of inspections, citations, and actions taken and continuing action.

PERSONS INFORMATION:

(RP/V) John H. Cox (Property owner)
9247 East Sparkletts
Temple City, Az. 91780
626-287-3297

(RP/V) Ruth Ann Carothers (Daughter/Power of Attorney over her fathers, John Coxs' affairs).
6111 Seville St.
Lake Oswego, Or. 97035
503-636-2280

(INV/S) Dale A. Pennie
56295 Tom Smith Rd.
Bandon, Or. 97411
347-9387

(INV/W) Susan Billings (live in girlfriend of Dale Pennie)
56295 Tom Smith Rd.
Bandon, Or. 97411
347-9387

(INV) W. Scott Phinney, Attorney at Law (Representing John Cox)
1 Mount Jefferson Terrace Ste. 101
Lake Oswego, Or. 97035
503-551-0888

(INV/W) Kristy Harvey, Deputy, CCSO
Codes Compliance Officer

(INV/W) Craig C. Filip, Oregon D.E.Q.
1102 Lincoln, Ste. 210
Eugene, Or. 97401
541-686-7838

(INV/W) Robert Webb, Chief, Bandon Police Dept.

(INV/W) Justin Clayburn, Officer, Bandon Police Dept.

(INV/W) J. Garrett, Officer, Bandon Police Dept.

(INV/W) Anthony Zunino, Officer, Bandon Police Dept.

EVIDENCE/PROPERTY INFORMATION: See attached/included CD'S of pictures and several pieces of correspondence generated as a result of the continuing case against Mr. Dale Pennie.

VEHICLE INFORMATION: Numerous inoperable/unlicensed vehicles on property in various stages of disrepair or rusting away due to weather conditions.

OBSERVATIONS:

On 12/13/05 a case number was obtained in reference to an alleged codes violation at 56295 Tom Smith Road Bandon, Or.

12/13/05 a notification of alleged violations on the mentioned property was sent to Mr. Pennie.

12/23/05 Mr. Pennie left a ph. Msg at CCSO with a return telephone number.

01/05/06 Mr. Pennie came in to CCSO. Was advised that a complaint had been made as to conditions/waste etc. stored on the property. Given two weeks to begin to show improvement by removing vehicles and debris from the left side of the road, prohibiting the owners from going onto their property.

01/13/06 Mr. Pennie called to advise that he is working on the problem. Some vehicles moved. Advised that mud, due to weather is causing a problem.

02/23/06 Site inspection conducted, no change. Left business card with message of visit.

03/22/06 Site inspection conducted. No change.

05/08/06 Site visit conducted, no change. I placed pieces of "pink" surveyors ribbon on all vehicles that needed to be moved off the neighbors property. Violation noted is a large number of inoperable vehicles. Piles of electrical supplies that appear to be waste.

** It should be noted that sometime during this period, I had contact with Mr. Pennie who advised that he was going between California and Oregon as his fathers health was failing and he had estate business to take care of. It is also mentioned that muddy conditions existed and I gave consideration to this which resulted in "gaps" in monthly visits.

07/10/06 Site visit. No change. Card left.

09/25/06 Site visit. No change. Card left.

10/09/06 Site visit. No change. Left card indicating cite pending due to no progress.

10/12/06 Made contact with Mr. Pennie. Issued citation. Advised that I would hold/cancel cite if I returned in two weeks and owners property was cleaned off as promised. At this time he was told that a cite was possible every thirty days from then on if no improvement was made/noted. Quite a few vehicles had been moved and quite a bit actually done, but as explained to him, not enough for the time he has had. Quite a bit of progress had been made at this point and all vehcles had been moved. The only remaining items on Cox property was numerous piles of garbage, minor car parts and debris.

10/27/06 Site inspection conducted. Property not cleaned up as promised. Citation passed in to NB Circuit Court.

Week of 11/15/06 Court left message about question of prosecution due to "our agreement" (re: cite cancelled if clean up done) I returned call to the court and advised the cite was not to be cancelled as the terms regarding the agreement were not met.

No action taken Dec., Jan., Feb., due to weather, and Mr. Pennie advised he was going between California and Oregon to take care of family business due to his fathers death.

03/06/07 0913-0945. Site inspection done. No change. Found gate locked. Left card with cite pending note. Called Ruth Ann Carothers about gate moved and locked. She advised she was going to contact an attorney as he was not to lock or move their Gate.

03/14/07 Spoke with Sue Billings (on phone) about gate being locked and violation still occurring.

03/15/07 0800. Sgt Summers took phone call from Mr. Pennie. Put phone call on conference speaker and he advised that he was doing what he could but he has three bad discs in his back. He also advised that if the cites continued he would start clearing trees along the road. He was advised that DEQ was coming to inspect the site and he was not to lock the gate.

03/19/07 Visited site with Craig Filip, DEQ. Met Mr. Pennie at the gate, which he unlocked to allow entry. He was hostile and uncooperative. At first denying Mr. Filip entry onto the property. I advised I had written permission for entry and he did move aside. He also had a large van blocking the road. He also took photos of us. While on the property, Mr. Pennie was walking behind us making

derogatory remarks, which were ignored. He was asked at one point to walk beside us as I really didn't feel comfortable with him behind me given his hostile attitude. He asked, "Whats the matter, paranoid?" I replied, "No, just safety conscious."

03/19/07 cont.
While walking along the dirt road, we came to a couple of large tire ruts. Mr. Filip went to the left side of the ruts, I stepped to the middle and Mr. Pennie went to the right side. About half way through, water splashed on my right leg and looking over saw, where Mr. Pennie had stepped on the side of a rut and slipped, causing him to fall onto the top of the right rut. I continued to walk to get out of the rutty area and heard Mr. Pennie yell, "You Bastard, Son of a Bitch, You pushed me." I raised my arms while still walking and said, "I never touched you." At this time he was sitting on top of the rut and starting to get up. He then yelled, "Well then you crowded me out. to make me fall." He then said "I'm making a complaint." "I said do what you want, I never touched you!" I did continue to observe him to see if he needed help or not and he got up and although limped slightly at first, continued on fine.

Mr. Pennie was given a copy of a letter from Mr. John Cox giving me permission to enter onto the property at anytime for purposes of the mentioned violation. Craig Mr. Filip also requested a copy of the permission letter for his records. A Citation was also issued in reference to the 03/06/07 visit.

04/02/07 Received copy of letter from Cox attorney to Mr. Pennie indicating the gate is to be replaced in it's original location, and left unlocked and other demands.

04/09/07 0938-1030 with Robert & Ruth Ann Carothers. Dep. Harvey present Pictures taken. Site is getting worse. Card left with note advising cite pending.

05/04/07 Court today with Mr. Pennie. He lost. He was also served cite ref. 04/09/07 visit.

05/08/07 Site visit with 532, (Harvey) No change except gate chained and locked shut. Left card with msg ref. locked gate and cite pending.

06/06/07 Site visit. Gate locked and chained. Site getting worse. Vehicles again Being parked on Cox property with garbage piling upon and around them. K. Harvey present. Pictures taken. Card left with msg. about cite pending.

07/11/07 Site visit. Gate locked and chained. Site getting worse. Pictures taken More refuse piling up on Cox property. J. Garrett BPD present. Card left ref. cite pending.

08/08/07 Site visit. Gate locked. New fence pole installed. Getting worse. Pictures taken. Left card ref. cite pending. Ofcr. J. Garrett BPD present.

09/07/07 Site visit. Gate locked. Getting worse. Pictures taken. Card left ref. cite pending. Ofcr. A. Zunino present.

09/14/07 Had court ref. cites. Issued 6 mos. worth of cites. Held over to trial in Dec. ref. Judge Bechtold gone.

10/15/07 1016-1057a.m. Site visit with DEQ, Craig Filip. Ofcr. J. Garrett BPD present. No change. Pictures taken. Card left on gate ref. cite pending.

11/20/07 Site visit. Getting worse. More refuse piled on another inoperable Vehicle on site on Cox property. Gate reinforced. Pictures taken. Card left on gate ref. cite pending. J. Garrett BPD present.

12/14/07 Site visit. No change. Pictures taken Card left ref. cite pending. A. Zunino BPD present.

12/17/07 Court in Coquille. Cont. to 12/27/07. Issued three additional cites. For Oct., Nov., Dec.

12/27/07 Court. Mr. Pennie found guilty on 6 cites issued 09/14/07 at court.

01/ 22/08 Site inspection conducted. No change. Left card for cite pending. Ofcr. A. Zunino present. Pictures taken.

STATEMENTS: After being found guilty of at least two separate citations For the listed violations, Mr. Pennie turnd to me and Ruth Ann Carothers and said, "Stay off my property."

At one point during the trial on 6 cites 12/17/07, Mr. Pennie again accused me of pushing him down. Later during the continued trial on 12/27/07 Mr. Pennie said, I bumped" him, causing him to fall.

ACTION(s) PENDING: Case continuing. Inspections/citations will continue. All citations issued were for: County Ord. 7.01.110, Prohibited Accumulation of Solid Waste, and 4.2.400, Maintenance of Property as a Junk Yard.

D.Dahlen Jr. #19955
CCSO.

01/25/08

ILLEGAL DUMPING ECONOMIC ASSESSMENT (IDEA) MODEL
Cost Estimate of an Individual Site*

Dumpsite A
56295 Tom Smith Rd.
Coos County
Bandon, Oregon 97411

Date Printed 12/10/2007
Date Evaluated 10/15/07

Illegal Dump Site Features

600 square feet of an abandonned/vacant lot in a rural setting. ≈7.2 tons

Waste Quantities and Types

21	cu yd	Mixed or unknown	0	Brush or landscape
0	cu yd	Household	0	Appliances
-		C&D--Building Materials	0	Tires
-		C&D--Concrete		

Cleanup, Waste Transport, and Disposal Costs:

Cleanup Costs

Total Labor Costs	$0		
Total Equipment Cost	$600		
	Subtotal	$600	
Waste Transport Costs		$200	
Disposal Costs		$600	
	Total Cleanup, Transport, and Disposal Costs		$1,400

Post-Cleanup Costs:

Site Restoration and Security Costs		$0	
Site Monitoring Costs			
Labor	$0		
Equipment	$0		
Materials	$0		
	Subtotal	$0	
	Total Post-Cleanup Costs		$0

Other Direct and Indirect Costs:

Net Property Liabilities[1]		$0	
Program Administrative Costs			
Labor	$0		
Equipment	$0		
Materials	$0		
	Subtotal	$0	
	Total Other Direct and Indirect Costs		$0

Offsetting Costs[2]**:** $0

Total Illegal Dumping Cost Estimate **$1,400**

* Costs rounded to the nearest $100

[1] These costs are highly variable; completion of this section does not constitute due diligence.

[2] This value from Schedule I is treated as a debit against total costs.

DUMPSITE B $150

$1,550

+ 2 TOWABLE VEHICLES @ $75 EA. = $150

GRAND TOTAL = $1,700

PLAINTIFF'S EXHIBIT 124

ILLEGAL DUMP[illegible]ECONOMIC ASSESSMENT [illegible]A) MODEL
Cost Estimate of an Individual Site*

Dumpsite C
56295 Tom Smith Rd.
Coos County
Bandon, OR 97411

Date Printed 12/10/2007
Date Evaluated 10/15/07

Illegal Dump Site Features

1000 square feet of an abandonned/vacant lot in a rural setting. ~ 35.0 Tons

Waste Quantities and Types

78	cu yd	Mixed or unknown	56	cu yd	Brush or landscape
-		Household	0		Appliances
-		C&D--Building Materials	5		Tires
-		C&D--Concrete			

Cleanup, Waste Transport, and Disposal Costs:

Cleanup Costs

Total Labor Costs	$300		
Total Equipment Cost	$3,300		
	Subtotal	$3,600	
Waste Transport Costs		$300	
Disposal Costs		$2,500	
	Total Cleanup, Transport, and Disposal Costs		$6,400

Post-Cleanup Costs:

Site Restoration and Security Costs $0

Site Monitoring Costs

Labor	$0		
Equipment	$0		
Materials	$0		
	Subtotal	$0	
	Total Post-Cleanup Costs		$0

Other Direct and Indirect Costs:

Net Property Liabilities[1] $0

Program Administrative Costs

Labor	$0		
Equipment	$0		
Materials	$0		
	Subtotal	$0	
	Total Other Direct and Indirect Costs		$0

Offsetting Costs[2]**:** $0

Total Illegal Dumping Cost Estimate **$6,400**

$150
$6550

* Costs rounded to the nearest $100

[1] These costs are highly variable; completion of this section does not constitute due diligence.

[2] This value from Schedule J is treated as a debit against total costs.

1 non-Tonnage Vehicle = $150

ILLEGAL DUMPING ECONOMIC ASSESSMENT (IDEA) MODEL
Cost Estimate of an Individual Site*

Dumpsite D
56295 Tom Smith Rd.
Coos County
Bandon, OR 97411

Date Printed 12/10/2007
Date Evaluated 10/15/07

Illegal Dump Site Features

6000 square feet of an abandonned/vacant lot in a rural setting. ~ 10.6 rds

Waste Quantities and Types

30	cu yd	Mixed or unknown	0	Brush or landscape
-		Household	0	Appliances
-		C&D--Building Materials	3	Tires
-		C&D--Concrete		

Cleanup, Waste Transport, and Disposal Costs:

Cleanup Costs

Total Labor Costs	$100		
Total Equipment Cost	$1,300		
	Subtotal	$1,400	
Waste Transport Costs		$200	
Disposal Costs		$800	
	Total Cleanup, Transport, and Disposal Costs		$2,400

Post-Cleanup Costs:

Site Restoration and Security Costs $0

Site Monitoring Costs

Labor	$0		
Equipment	$0		
Materials	$0		
	Subtotal	$0	
	Total Post-Cleanup Costs		$0

Other Direct and Indirect Costs:

Net Property Liabilities[1] $0

Program Administrative Costs

Labor	$0		
Equipment	$0		
Materials	$0		
	Subtotal	$0	
	Total Other Direct and Indirect Costs		$0

Offsetting Costs[2]**:** $0

Total Illegal Dumping Cost Estimate **$2,400**

+450
$ 2,850

* Costs rounded to the nearest $100

[1] These costs are highly variable; completion of this section does not constitute due diligence.

[2] This value from Schedule J is treated as a debit against total costs.

+ 3 non-towable vehicles = $450

To first adjust model's default v s for inflation, go to Schedule K.
If you want to replace default values with your own actual values, enter them in the yellow boxes.
The IDEA Model will use those values in the Default mode.
You can use a mix of default values and your own values.
You will also be able to use the Manual mode to affect line item costs in the IDEA Model Schedules.

Process Rates	Model Default Values	Enter Your Default Values	Schedules That Values Apply To
Mixed, unknown, household, C&D, brush or landscape wastes (cu. yd./hr.)	28		Schedule C, Part 2, Labor and Equipment
Appliances (units/hr.)	12		Schedule C, Part 3, Labor and Equipment
Tires (units/hr.)	240		Schedule C, Part 4, Labor and Equipment
Grading (sq. ft/hr.)	3,000		Schedule F, Site Restoration

Labor ($/Hr.)	Model Default Values*	Enter Your Default Values	Schedules That Values Apply To
Supervisor	$ 23.45	19.92	Schedule C, Parts 2, 3 and 4
Front-End Loader Operator	$ 27.20	18.14	Schedule C, Parts 2, 3 and 4
Dump Truck Driver	$ 22.10	16.85	Schedule C, Parts 2, 3 and 4
Other Worker	$ 21.45	10.89	Schedule C, Parts 3 and 4
Grader Operator	$ 32.40	19.45	Schedule F, Site Restoration

Equipment	Model Default Values*	Enter Your Default Values	Schedules That Values Apply To
Dump Truck ($/hr.)	$ 59.06	$ 24	Schedule C, Parts 2, 3 and 4
4-cu. yd. Front-End Loader ($/hr.)	$ 72.11	$ 49	Schedule C, Parts 2, 3 and 4
Grader ($/hr.)	$ 46.65	$ 52	Schedule F, Site Restoration
40-cu. yd. Dumpster (each)	$ 200.00		Schedule C, Parts 2, 3 and 4, "Per Unit Equipment Costs"

Materials	Model Default Values*	Enter Your Default Values	Schedules That Values Apply To
Fence Gates (each)	$ 250.00	313.53	Schedule F, Site Security
Fence ($ per linear ft.)	$ 30.00	37.62	Schedule F, Site Security
Traffic Barrier ($ per LF)	$ 28.00	35.12	Schedule F, Site Security
Signs (incl. Labor & Materials)	$ 48.00	60.20	Schedule F, Signs and Other Items

Disposal Facilities ($/ton)	Model Default Values*	Enter Your Default Values	Schedules That Values Apply To
Solid Waste Landfill/Transfer Sta.	$ 37.00	79	Schedule E
Solid Waste Incinerator	$ 40.00	79	Schedule E
C&D Landfill	$ 42.00	32.73	Schedule E
C&D Recycler	$ 28.00		Schedule E
Compost Landfill	$ 20.00	31.43	Schedule E
Metals Recycler	$ 22.00		Schedule E
Tire Recycler	$ 26.00		Schedule E
Tire Incinerator	$ 31.00	50 ~~79~~	Schedule E

**In 1999 Dollars*

LOOSE BRUSH = 250 LBS/CY. $\frac{2000}{250} = 8$ C.Y. BRUSH/TON × $5.50/C.Y. = $31.43 LOOSE BRUSH/TON

C+D = 16

SUPERVISOR

Occupational Summary for First-Line Supervisors/Managers Of Construction Trades And Extraction Workers (47-1011) in the Coos / Curry region

View Full Report

escription: Directly supervise and coordinate activities of construction or extraction workers.

Employment Projections

Region	Employment 2004	Employment 2014	Projected Annual Openings Growth	Replacement	Total
regon Statewide	5,168	6,010	84	100	184
oos / Curry	72	83	1	1	3

Wages

Region	2007 Wages Median Hourly	Avg Annual	Middle Range
Oregon Statewide	$26.96	$60,720	$21.18 - 33.79
Coos / Curry	19.92	43,506	17.67 - 24.00

Current Job Openings

Job Title	Location	Order Number	Wage Offered
ight Crew Manager	Portland	537051	$3,735/mo to $5,722/mo
ontract Administrator / roject Manager	Lebanon	536977	Neg.
ainting Area Supervisor	Corvallis	536427	$25,000/yr to $100,000/yr DOE
vac Project Manager	Tualatin	536401	DOE
laintenance Technician	Portland	535392	$18.00/hr to $22.00/hr DOE
upervisor - Field ispection Support 071253	Portland	535349	$59,400/yr to $77,000/yr DOE
roject Site Superintendent	Longview	533396	$7.80/hr to $35.00/hr DOE, Neg.
ead Carpenter/Project lanager	Hermiston	519926	$40,000/yr to $60,000/yr DOE
aving Supervisor	Albany	516141	$40,000/yr to $50,000/yr DOE
ite Superintendent / oreman	Aloha	511980	$1,000.00/wk to $1,400.00/wk DOE, Neg.

More Jobs

Industries of Employment

private sector only

Industry	2004 Employment
Total, All Industries	72
Construction	53

Occupations with Similar Skills

Occupation	Skill Overlap
Supervisors And Managers Of Mechanics, Installers, And Repairers	43%
Supervisors And Managers Of Transportation Helpers, Laborers, And Material Mover	36%
Construction Managers	33%
Supervisors And Managers Of Production And Operating Workers	32%
Supervisors And Managers Of Transportation And Material-Moving Machine And Vehic	28%

tatewide Employment Analysis
)04 employment is estimated to be larger than the statewide average This occupation is expected to grow at about the :atewide average. Total job openings are projected to be much higher than the statewide average.

easonable employment opportunities exist largely due to the significant number of job openings projected for this ccupation.

egional Employment Analysis
)04 employment is estimated to be larger than the regional average. This occupation is expected to grow at about the :gional average. Total job openings are projected to be somewhat higher than the regional average.

ducational Requirements
Vorkers must have related work experience to gain the necessary skills for this occupation. However, those with a achelor's degree have a competitive advantage in this labor market.

FRONT-END LOADER OPERATOR

OREGON EMPLOYMENT DEPARTMENT OLMIS

OREGON EMPLOYMENT DEPARTMENT WORKSOURCE OREGON

Occupational Summary for Operating Engineers And Other Construction Equipment Operators (47-2073) in the Coos / Curry region

View Full Report

Description: Operate one or several types of power construction equipment such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement. May repair and maintain equipment in addition to other duties. Exclude "Crane and Tower Operators" (53-7021) and equipment operators who work in extraction or other non-construction industries.

Employment Projections

Region	Employment 2004	Employment 2014	Projected Annual Openings Growth	Replacement	Total
Oregon Statewide	4,017	4,540	52	111	164
Coos / Curry	114	124	1	3	4

Current Job Openings

Job Title	Location	Order Number	Wage Offered
Heavy Equipment Operator	Hermiston	537621	$20.00/hr
Equipment Operator/Truck Driver	Hermiston	536949	$15.00/hr to $20.00/hr
Heavy/Light Equipment Operator	Lakeview	536356	DOE
Dump Truck Driver / Equipment Operator	Pleasant Hill	536217	$14.00/hr to $20.00/hr DOE
Heavy Equipment Operator	Prineville	534237	$14.00/hr to $16.00/hr DOE
Equipment Operator	Dallesport	533391	$14.00/hr DOE
Equipment Operator	Warrenton / Seaside	530296	$20.00/hr DOE
Grader Operator	Tillamook	527225	DOE
Equipment Operator	Portland	527194	$15.00/hr to $20.00/hr DOE
Equipment Operator	Portland	523286	$15.00/hr to $25.00/hr DOE

More Jobs

Wages

Region	2007 Wages ----- Median Hourly	Avg Annual	Middle Range
Oregon Statewide	$20.57	$43,934	$17.11 - 24.91
Coos / Curry	18.14	41,841	15.98 - 22.26

Industries of Employment

private sector only

Industry	2004 Employment
Total, All Industries	114
Construction	32
Mining	25
Agriculture, Forestry, Fishing and Hunting	10

Occupations with Similar Skills

Occupation	Skill Overlap
Earth Drillers, Water And Construction	58%
Excavating And Loading Machine And Dragline Operators	58%
Paving, Surfacing, And Tamping Equipment Operators	56%
Dredge Operators	43%
Rail-Track Laying And Maintenance Equipment Operators	40%

Statewide Employment Analysis

2004 employment is estimated to be larger than the statewide average This occupation is expected to grow at about the statewide average. Total job openings are projected to be much higher than the statewide average.

Reasonable employment opportunities exist largely due to the significant number of job openings projected for this occupation.

Regional Employment Analysis

2004 employment is estimated to be much larger than the regional average. This occupation is expected to grow at a somewhat slower rate than the regional average. Total job openings are projected to be much higher than the regional average.

Educational Requirements

Workers must have moderate term on-the job training to gain the necessary skills for this occupation. However, those with related work experience have a competitive advantage in this labor market.

OREGON EMPLOYMENT DEPARTMENT OLMIS

OREGON EMPLOYMENT DEPARTMENT WORKSOURCE OREGON

Occupational Summary for Truck Drivers, Heavy And Tractor-Trailer (53-3032) in the Coos / Curry region

View Full Report

escription: Drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW, to transport and liver goods, livestock, or materials in liquid, loose, or packaged form. May be required to unload truck. May require e of automated routing equipment. Requires commercial drivers' license.

Employment Projections

Region	Employment 2004	Employment 2014	Projected Annual Openings Growth	Projected Annual Openings Replacement	Projected Annual Openings Total
regon Statewide	23,143	26,146	300	416	717
oos / Curry	547	586	4	10	14

Current Job Openings

Job Title	Location	Order Number	Wage Offered
g And Chip Truck river	Coos Bay	536987	
uck Driver	Brookings	535672	DOE
g Truck Driver	Coos Bay	527124	$12.50/hr
eight Truck Driver	Coos Bay	495925	$10.50/hr
dl A Driver	Eugene	537796	$12.00/hr to $15.00/hr DOE, Neg.
ump Truck Driver	Hillsboro / Portland Metro	537611	N/A DOE
atbed Truck Driver	Roseburg	537514	DOE
g Truck And Low oy Driver	Pilot Rock/Pendleton	537411	$15.00/hr DOE
uck Drivers	Portland	537403	$16.50/hr DOE, Neg.
elivery Driver	Estacada	537312	$15.00/hr

Wages

Region	2007 Wages ----- Median Hourly	Avg Annual	Middle Range
Oregon Statewide	$16.49	$35,699	$13.98 - 19.87
Coos / Curry	16.85	36,520	14.35 - 20.39

Industries of Employment

private sector only

Industry	2004 Employment
Total, All Industries	547
Transportation and Warehousing	299
Agriculture, Forestry, Fishing and Hunting	73
Construction	56
Retail Trade	34
Mining	31
Wholesale Trade	23

Occupations with Similar Skills

Occupation	Skill Overlap
Truck Drivers, Light Or Delivery Services	76%
Taxi Drivers And Chauffeurs	54%
Bus Drivers, Transit And Intercity	49%
Bus Drivers, School	49%
Driver/Sales Workers	48%

tatewide Employment Analysis

)04 employment is estimated to be much larger than the statewide average. This occupation is expected to grow at)out the statewide average. Total job openings are projected to be much higher than the statewide average.

easonable employment opportunities exist largely due to the significant number of job openings projected for this ccupation.

egional Employment Analysis

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ducational Requirements

'orkers must have moderate term on-the job training to gain the necessary skills for this occupation. However, those ith related work experience have a competitive advantage in this labor market.

OLMIS - Occupational Information

OTHER WORKER

Occupational Summary for Construction Craft Laborers (47-2061) in the Coos / Curry region

View Full Report

Description: Perform tasks involving physical labor at building, highway, and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead, and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under "Helpers, Construction Trades" (47-3011 through 47-3016).

Employment Projections

Region	Employment 2004	Employment 2014	Projected Annual Openings Growth	Projected Annual Openings Replacement	Projected Annual Openings Total
Oregon Statewide	8,214	9,752	154	123	277
Coos / Curry	193	226	3	3	6

Wages

Region	2007 Wages ----- Median Hourly	Avg Annual	Middle Range
Oregon Statewide	$14.18	$32,469	$11.39 - 18.78
Coos / Curry	10.89	24,235	8.78 - 13.57

Current Job Openings

Job Title	Location	Order Number	Wage Offered
Gutter Installer	Coos Bay	537318	$7.80/hr DOE
Garage Door Installer	Coos Bay	533099	$7.80/hr DOE
Construction	Salem	537416	$10.00/hr to $18.00/hr DOE
Construction Installer	Springfield	537378	$12.00/hr to $15.00/hr DOE
Cabinet Installer (Throughout Oregon And Other States)	Medford	537325	$3,500/mo
Cabinet Installer (Throughout Oregon And Other States)	Bend	537305	$3,500/mo
Cabinet Installer (Throughout Oregon And Other States)	Eugene	537229	$3,500/mo
Cabinet Installer (Throughout Oregon And Other States)	Salem	537206	$3,500/mo
Rock Blaster	Bend	537034	$12.00/hr to $15.00/hr DOE
Youth Work Crew Leader	Dallas	536671	$1,265/mo

Industries of Employment

private sector only

Industry	2004 Employment
Total, All Industries	193
Construction	153
Administrative and Support and Waste Management and Remediation Services	19
Accommodation and Food Services	10

Occupations with Similar Skills

Occupation	Skill Overlap
Cement Masons And Concrete Finishers	52%
Construction And Related Workers, All Other	50%
Tapers	48%
Fence Erectors	46%
Floor Layers, Except Carpet, Wood, And Hard Tiles	46%

Statewide Employment Analysis

2004 employment is estimated to be larger than the statewide average This occupation is expected to grow somewhat faster than the statewide average. Total job openings are projected to be much higher than the statewide average.

Reasonable employment opportunities exist largely due to the significant number of job openings projected for this occupation.

Regional Employment Analysis

2004 employment is estimated to be much larger than the regional average. This occupation is expected to grow at about the regional average. Total job openings are projected to be much higher than the regional average.

Educational Requirements

Workers must have short term on-the job training to gain the necessary skills for this occupation. However, those with related work experience have a competitive advantage in this labor market.

OREGON EMPLOYMENT DEPARTMENT OLMIS

OREGON EMPLOYMENT DEPARTMENT WORKSOURCE OREGON

Occupational Summary for Paving, Surfacing, And Tamping Equipment Operators (47-2071) in the Coos / Curry region

View Full Report

escription: Operate equipment used for applying concrete, asphalt, or other materials to road beds, parking lots, or port runways and taxiways, or equipment used for tamping gravel, dirt, or other materials. Include concrete and phalt paving machine operators, form tampers, tamping machine operators, and stone spreader operators.

Employment Projections

Region	Employment 2004	Employment 2014	Projected Annual Openings Growth	Replacement	Total
egon Statewide	787	897	11	12	23
os / Curry	29	31	0	0	1

Wages

Region	2007 Wages Median Hourly	Avg Annual	Middle Range
Oregon Statewide	$19.45	$43,376	$15.67 - 22.61

Current Job Openings

Job Title	Location	Order Number	Wage Offered
ader Operator	Eugene	531660	$20.69/hr to $24.74/hr DOE
oller & Screed Operator / easonal	Albany	527716	$15.00/hr DOE, Neg.
ader Operator	Eugene	531660	$20.69/hr to $24.74/hr DOE
oller & Screed Operator / easonal	Albany	527716	$15.00/hr DOE, Neg.

Industries of Employment

private sector only

Industry	2004 Employment
Total, All Industries	29
Construction	26

Occupations with Similar Skills

Occupation	Skill Overlap
Operating Engineers And Other Construction Equipment Operators	56%
Rail-Track Laying And Maintenance Equipment Operators	52%
Earth Drillers, Water And Construction	48%
Excavating And Loading Machine And Dragline Operators	48%
Dredge Operators	44%

atewide Employment Analysis
04 employment is estimated to be at about the statewide average. This occupation is expected to grow at about the atewide average. Total job openings are projected to be at about the statewide average.

easonable, but limited, employment opportunities exist.

egional Employment Analysis
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ducational Requirements
orkers must have moderate term on-the job training to gain the necessary skills for this occupation. However, those th related work experience have a competitive advantage in this labor market.

OREGON DEPARTMENT OF FORESTRY
2007 WILDFIRE EQUIPMENT RENTAL RATES

GENERAL:

1. The Interagency Wildfire Equipment Rental Rates (IWERR) Committee, established by Interagency Memorandum of Understanding, is charged with maintaining a consistent interagency fire equipment rate structure for hiring of private resources to do emergency fire suppression work. It is expected that agencies will utilize the established rate structure when hiring resources for an emergency incident.

2. **Equipment Rental.** An Equipment Rental Agreement and Invoice (629-1-2-2-602) shall be executed for all rented equipment.

3. **Rental Compensation.** For the purpose of determining authorized travel for equipment under its own power, a distinction must be made on how the equipment arrives at the incident. If the equipment was ordered by the agency **(resource order form completed)**, allowance for travel will be paid from point of hire. If equipment is brought to the incident and made available, the incident becomes the point of hire and no allowance for travel will be paid.

4. **Maintenance.** Resources shall furnish all necessary maintenance and repairs due to ordinary use on an incident. Servicing and repair work will be done outside the hours for which rental is paid. No rental shall accrue during the period when equipment is inoperable. Rented equipment shall be hired at a rate which will include fuel, oil, filters, lube/oil changes necessary to operate the equipment.

5. **Rates Exclude Operator.** If equipment is hired with operator (s), the operator (s) will be paid separately using the appropriate AD/Industrial wage rate.

GUIDELINES OF HIRE FOR EQUIPMENT SIGN-UP:

1. Unique equipment not identified within the Agency Rental Rates may be at a negotiated rate by an authorized ODF representative. That representative may take into consideration the same provisions and considerations as provided by previously signed EERA (USDA/USDI Option Form 294) with the local USFS office (same area as the incident). Negotiated rates should be documented on appropriate Agency forms.

PROVISIONS OF AGREEMENT:

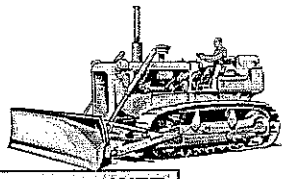
1. **Condition of Equipment.** All equipment under an equipment rental agreement must be in acceptable condition. The Oregon Department of Forestry (ODF) reserves the right to reject equipment which is not in safe and operable condition. Equipment that is determined to be in unsafe, or inoperable, condition will not be reimbursed for travel and is not considered under hire.

2. **Time Under Hire.** The time under hire will start at the time the resource begins traveling to the incident after being ordered by ODF and will end by notification to the resource by ODF that the equipment is released, except as provided in the Exceptions below.

2007 EQUIPMENT RENTAL RATES

✪ Use these rates if specific make and model is not listed.

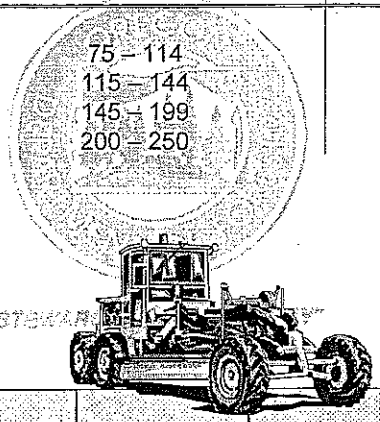
POWER CLASS	FLY WHEEL HORSE POWER RANGE	WET HOURLY RATE
III	under 100	$53
IIB	100 – 149	$77
IIA	150 – 199	$97
IC	200 – 249	$136
IB	250 – 299	$161
IA	300 over	$196



DOZER WITH BLADES:

MAKE	MODEL	FWHP	POWER CLASS	WET HOURLY RATE
CATERPILLAR	D3B, D3C, D4D (83J), D4E, E4H, D5C, D5G	< 100	III	$53
	D5B, D5H, D5M, D5N, D6C (10K), D6D, D6M, D6N	100-149	IIB	$77
	D6R, D6H, D6H HIGH TRACK, D7F (73 & 74)	150-199	IIA	$97
	D7G, D7H, D7R	200-249	IC	$136
	D7H HIGH TRACK, D8H (46A)	250-299	IB	$161
	D8K, D8L, D8N HIGH TRACK, D8R HIGH TRACK, D9G (66A), D9H, D9N, D9H HIGH TRACK, D10, D11	300 & UP	IA	$196
FIAT ALLIS	FD5, FD7, 8B	< 100	III	$53
	FD9, 10C	100-149	IIB	$77
	14C, FD14E, 16B	150-199	IIA	$97
	FD20	200-249	IC	$136
	21C, FD30, 31, FD40, FD40B, 41B, FD50, FD80, FD145, FD175, FD195	300 & UP	IA	$196
JOHN DEERE	350, 450, 550, 650	< 100	III	$53
	700, 750	100-149	IIB	$77
	850	150-199	IIA	$97
	950	200-249	IC	$136
	1000	300 & UP	IA	$196
KOMATSU	D21, D31A, D32, D37E, D38, D39, D45A	<100	III	$53
	D41, D53A, D58E, D58, D60P, D61, D65A	100-149	IIB	$77
	D65E-6, D65D-7&8, D68E, D85A	150-199	IIA	$97
	D85E-12, D85E-18, D85E	200-249	IC	$136
	D135A	250-299	IB	$161
	D155A, D275, D355A, D375A, D455A-1, D475A	300 & UP	IA	$196

POWER CLASS	FLY WHEEL HORSE POWER RANGE	WET HOURLY RATE
4	75 – 114	$52
3	115 – 144	$61
2	145 – 199	$72
1	200 – 250	$84



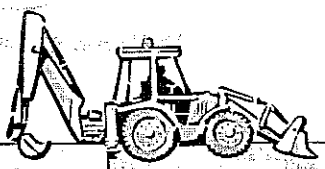
MOTOR GRADERS:

MAKE	MODEL	FWHP	POWER CLASS	WET HOURLY RATE
CASE	845	115-144	3	$61
	865	145-199	2	$72
	885	200-250	1	$84
CATERPILLAR	120H, 135H	115-144	3	$61
	12H, 140H, 143H, 160H, 163H	145-199	2	$72
	14H, 16H	200-250	1	$84
CHAMPION	C50A, C60A, C66A, C70A, C76A, C80A,C86A	75-114	4	$52
	710A, 716A	115-144	3	$61
	720A, 726A, 730A, 736A	145-199	2	$72
	D-686, 780, 740A, 750A, 780A	200-250	1	$84
FIAT ALLIS	65C	75-114	4	$52
	FG85A, FG105A	145-199	2	$72
GALION	830B, 830C	115-144	3	$61
	850B, 850C	145-199	2	$72
	T-700, 870B, 870C	200-250	1	$84
JOHN DEERE	670C, 670C II, 670CH, 672CH	115-144	3	$61
	670CH II, 672CH II, 770C, 770C II, 770CH, 770CH II, 772CH	145-199	2	$72
	772CH II	200-250	1	$84
KOMATSU	GD530A-2C, GD530AW-2C, GD555-3	115-144	3	$61
	GD650A-2C, GD650AW-2C, GD655-3, GD675-3	145-199	2	$72
	GD670A-2C, GD670AW-2C, GD750A-1, GD825A-2	200-250	1	$84
NEW HOLLAND	RG80, RG100	75-114	4	$52
	RG140, RG140B	115-144	3	$61
	RG170, RG170B	145-199	2	$72
	RG200, RG200B	200-250	1	$84

MAKE	MODEL	FWHP	POWER CLASS	WET HOURLY RATE
VOLVO	G60, G66, G80, G86	75-114	4	$52
	G710, G710B, G716 VHP	115-144	3	$61
	G720, G720B, G726 VHP, G726B, G730, G730B, G736 VHP	145-199	2	$72
	G740, G740B, G746B, G780, G780B	200-250	1	$84

- THE STANDARD METHOD OF HIRE IS:
  (1) WET (ALL OPERATING SUPPLIES, INCLUDING FUEL)
  (2) WITH 1 OPERATOR
  (3) WITH SERVICE VEHICLE

POWER CLASS	FLY WHEEL HORSE POWER RANGE	WET HOURLY RATE
8	50-60	48
7	61-75	51
6	76-85	59
5	86-110	67
4	111-135	81
3	136-160	90
2	161-230	108
1	>230	158



EXCAVATORS, HYDRAULIC:

MAKE	MODEL	FWHP	POWER CLASS	WET HOURLY RATE
CASE	CX75,9007B	50-60	8	$48
	CX130,CX135,CX160,9010 B,9020B	86-110	5	$67
	9030B,9030BN	111-135	4	$81
	CX210,CX225	136-160	3	$90
	CX240,CX290,9040B,9045B	161-230	2	$108
	CS330,CX460,CX800,9050 B,9060B	> 230	1	$158
CATERPILLAR	307B,307C,308C	50-60	8	$48
	311B,311C,312B,312BL	76-85	6	$59
	215,315C,315CL,313B,314C ,314CL,315B,315BL,315C,31 5CL	86-110	5	$67
	318B,318BL N,318 CL, 318 CL N,320B,320BL,320BN	111-135	4	$81
	320C,320CL,320CU,320CL U,321C LCR,322BL	136-160	3	$90
	322CL,325BL,325CL,330BL	161-230	2	$108
	330CL,345BL,345BL II,350L,365BL,375	> 230	1	$158
DAEWOOD	70-III	50-60	8	$48
	130LC-V	86-110	5	$67
	170-III, 170LC-V	111-135	4	$81
	220LC-5	136-160	3	$90
	250LC-V, 390LC-V	161-230	2	$108
	330LC-V, 400LC-V, 450-III	> 230	1	$158
JOHN DEERE	200C LC, 200LC, 225C LC	136-160	3	$90
	230LC, 230C LC, 270LC, 270C LC	161-230	2	$108
	330C LC, 330LC, 370, 370C, 450C LC, 450LC, 600C LC	> 230	1	$158

✪ THE STANDARD METHOD OF HIRE IS:

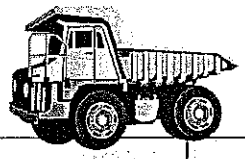
(1) WET (ALL OPERATING SUPPLIES, INCLUDING FUEL)
(2) WITH 1 OPERATOR
(3) WITH SERVICE VEHICLE

BACKHOES:

MAKE	MODEL	FWHP	POWER CLASS	WET HOURLY RATE
ALL MAKES		UP TO 75		$35
		OVER 75		NEGOTIABLE

- THE STANDARD METHOD OF HIRE IS:
  (1) WET (ALL OPERATING SUPPLIES, INCLUDING FUEL)
  (2) WITH 1 OPERATOR
  (3) WITH SERVICE VEHICLE

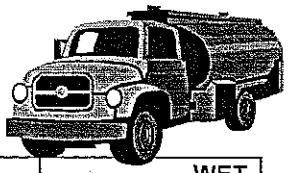
DUMP TRUCKS:



MAKE	MODEL	FWHP	POWER CLASS	WET HOURLY RATE
MIN CAPACITY	5 YARDS			$24
	10 YARDS			~~$41~~

- THE STANDARD METHOD OF HIRE IS:
  (1) WET (ALL OPERATING SUPPLIES, INCLUDING FUEL)
  (2) WITH 1 OPERATOR
  (3) WITH SERVICE VEHICLE
- ANY HOUR THAT A DUMP TRUCK IS USED AS A TRANSPORT (PROVIDES TILT BED TRAILER) ADD $5.00 TO HOURLY RATE.

WATER TRUCKS FOR DUST ABATEMENT:



MAKE	MODEL	FWHP	POWER CLASS	WET HOURLY RATE
1000	ALL			$28
2500	ALL			$52
5000	ALL			$63

- THE STANDARD METHOD OF HIRE IS:
  (1) WET (ALL OPERATING SUPPLIES, INCLUDING FUEL)
  (2) WITH 1 OPERATOR

- A WATER TRUCK FOR DUST ABATEMENT IS REQUIRED TO HAVE, AS A MINIMUM, AN EIGHT-FOOT WIDE SPRAY CAPABILITY (PRESSURE OR GRAVITY).
- THEY ALSO MUST HAVE A 100 GALLON PER MINUTE (GPM) SELF-LOADING CAPABILITY.

FILIP Craig

From: Cheryl Westgaard [cherylw@co.coos.or.us]
Sent: Tuesday, December 04, 2007 9:45 AM
To: FILIP Craig
Subject: RE: Disposal rates

Craig,

1. We only charge at Joe Ney by loose cubic yard. But we do convert the LCY to tonnage on our quarterly reports to DEQ. This was set up at least 15 years ago (before I was here).
   LCY*1100/2000
2. Cost per ton for tires at Beaver Hill is $50 @ ton for Coos County Waste Tire Haulers, Coos County tire dealerships or commercial tire repair facilities. Cost per ton for tires at Beaver Hill is $79 per ton from out of county waste tire haulers, tire dealerships or commercial tire repair facilities. We charge $1.00 for a 17 inch or smaller tire from the general public, $3.00 for a 17 inch or smaller tire on a rim from the general public. We charge $4.00 for a tire over 17 inch and under 24 inch from the general public. We are unable to take the larger tires on a wheel. At this time we are only accepting 4 tires a day from the general public.
3. I do not have a list of all the scrap metal processing locations in the county. This is something I can work on. All our metal is picked up by a metal processor (appliances and all) We go out for bid on this every year. We charge $8.50 for an appliance and $22.00 for an appliance with freon (we do have the freon removed)
4. Brush is still $5.50 even though we are grinding it. We do not have a specific conversion for converting loose brush to tons. It is just added in with all the loose garbage received from the general public. I was going to use the tonnage rates from the grinding company for my recycling report.

The other day when Roseburg Forest Products was out talking with the company that does the grinding, they said something about tax credits for green and woody waste. Can you tell me anything about these tax credits? They said Douglas County uses them – I have never heard of this

Hopefully this answers your questions – We are still without power
Cheryl

From: FILIP Craig [mailto:Filip.Craig@deq.state.or.us]
Sent: Monday, December 03, 2007 3:57 PM
To: Cheryl Westgaard
Subject: Disposal rates

Dear Cheryl,

Thanks for taking my call today. I'm sorry the weather has caused you so many problems. As we discussed, I am looking for the following rate information, or whatever conversion factors you use to convert cubic yards to tons:

1) Cost per ton of C&D waste at Joy Ney. I am also interested in the following:
2) Cost per ton for tires at Beaver Hill (if different from your 2006 fee of $79/ton).
3) Shinglehouse Auto & Salvage is the only listing in the Coos Bay yellow pages under "scrap metal processing and recycling." Are there other processors of this material in the county? What are they and what do they charge (if anything) for scrap metal? Where does the county take scrap appliances from B.H.?
4) Do you still charge $5.50/C.Y. for brush at B.H. even though you are having this material ground and removed? Do you use a particular conversion factor to convert loose brush to tons by which you charge? If yes, what is that figure?

Thanks, Cheryl.

ATTACHMENT B

MEASUREMENT STANDARDS AND REPORTING GUIDELINES

Most from the National Recycling Coalition

Material	Volume/Count	Weight (Tons)	Weight (Pounds)
Grass clippings	1 cubic yard	.475	400-1,500[2]
Leaves	1 cubic yard	.1875	250-500
Yard debris, loose	1 cubic yard	.125	250[3]
Yard debris, compacted	1 cubic yard	.32	640
Wood collected at landfills	1 cubic yard	.125	250
Wood chips, green	1 cubic yard	.236	472.97
Wood chips, dry	1 cubic yard	.121	243.25
Wood, cord	1 cubic yard	.25	500
Wood pallet	1	.0125	25
Christmas trees	1 cubic yard (loose)	.06	30
Sawdust, wet	1 cubic yard	.265	530
Sawdust, dry	1 cubic yard	.1375	275
Gypsum	1cubic yard	.31	620
Lead acid battery	1	.018	35.9
Used motor oil	1 gallon	.0037	7.4
Oil filters	1 drum, crushed	.35	700
Oil filters	1 drum, uncrushed	.087	175
Oil filters	1 gallon	.0025	5
Tire- passenger car	1	.0117	23.4
Tire- truck, light	1	.0175	35
Tire- semi	1	.0525	105
Fluorescent tubes	4-foot tube	.00036	.72
Paint	1 gallon	.005	10
Solvents	1 gallon	.0042	8.42
Antifreeze	1 gallon	.0042	8.42
Appliances:			
Stove	1	.075	150
Dryer	1	.062	125
Washer	1	.075	150
Refrigerator	1	.125	250
Dishwasher	1	.062	125

Revised 12/13/06 by the Oregon Department of Environmental Quality

[2]Yard waste densities are especially variable between communities and in different seasons because of differences in types of foliage, moisture, and humidity. The 1,500 density factor for grass is based on program experience in Minnesota.

[3]Uncompacted yard debris varies a great deal in weight. The figure of 250 pounds per cubic yard may be high for a lot of uncompacted yard debris. Loose piles may weigh as little as 100 pounds per cubic yard. Use your best judgment in using these conversions (100 pounds per cubic yard = .05 tons a cubic yard).

ATTACHMENT B

MEASUREMENT STANDARDS AND REPORTING GUIDELINES

Most from the National Recycling Coalition

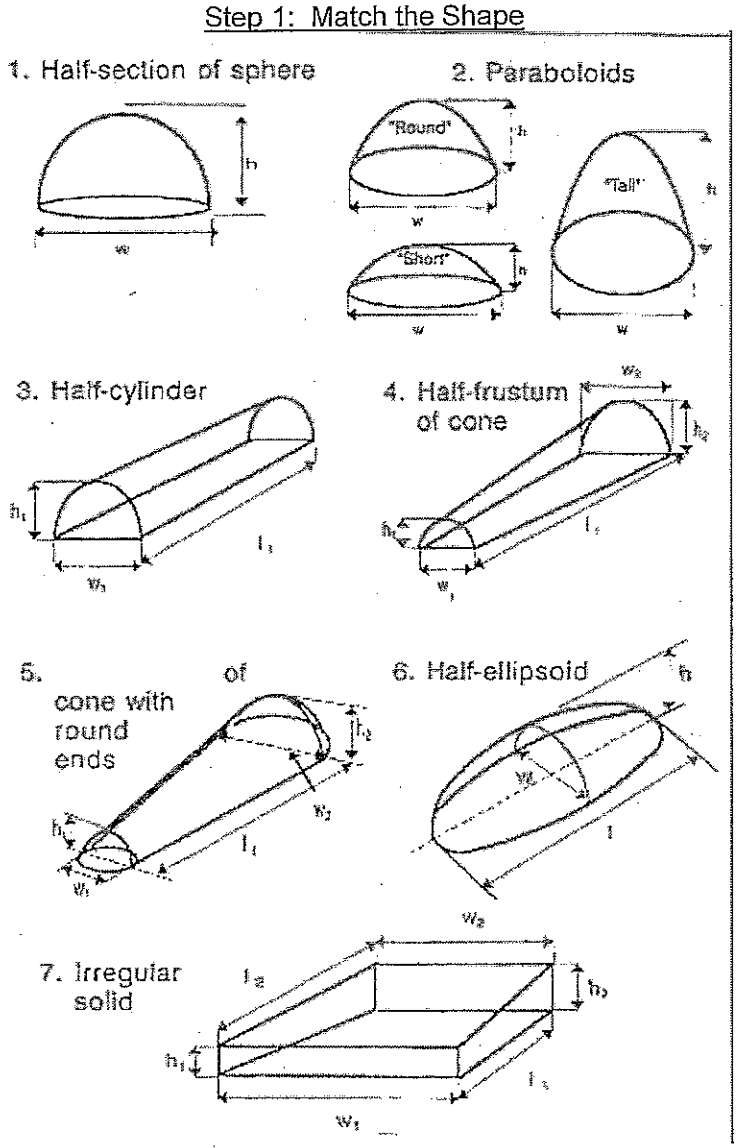
Material	Volume/Count	Weight (Tons)	Weight (Pounds)
Aluminum cans	Case (24), 12 oz (32 cans = 1 pound)	.0004	.750
Aluminum cans	1 full store collection bag	.009	18
Aluminum cans, whole	1 cubic yard	.031	50-74
Ferrous cans, whole	1 cubic yard	.075	150
Ferrous cans, flattened	1 cubic yard	.425	850
Beer bottles (refillable)	Case (24 bottles)	.006	12
Beer bottles	Case (24), 22 oz	.0112	22.5
Glass, whole bottles	Case (24), 12 oz.	.008	16
Glass, whole bottles	Case (24), 16 oz.	.0125	25
Glass, whole bottles	Case (12), 40 oz.	.0112	22.5
Glass, whole bottles	1 cubic yard	.400	600-1,000
Glass, semi-crushed	1 cubic yard	.700	1,000-1,800
PET soda bottles	Case (24), 16 oz	.0012	2.4
PET soda bottles	Case (24), 20 oz	.0013	2.5
PET bottles (water)	Case (15), 1.5 liter	.0007	1.4
PET soda bottles	Case (8), 2 liter	.0006	1.2
PET soda bottles	Case (8), 3 liter	.0008	1.5
PET soda bottles, whole, loose	1 cubic yard	.018	30-40
PET soda bottles, whole, loose	Gaylord[1]	.023	40-53
PET soda bottles, baled	30" x 62"	.250	500
PET soda bottles, granulated	Gaylord	.360	700-750
Polystyrene #6	Bag (14 cu. Ft.)	.002	4
Film, baled	30" x 42" x 48"	.550	1,100
HDPE milk jugs, whole, loose	6-7 gallon jugs	.0005	1
HDPE milk jugs, baled	32" x 60"	.225	400-500
HDPE (mixed), granulated	Gaylord	.450	800-1,000
Mixed PET, milk jugs, & other rigid containers, whole, loose	1 cubic yard	.019	Ave. 38
Mixed rigid, no film or milk jugs, whole, loose	1 cubic yard	.0245	Ave. 49
Newsprint, loose	1 cubic yard	.29	360-800
Newsprint, compacted	1 cubic yard	.43	720-1,000
Corrugated cardboard, loose	1 cubic yard	.15	300
Corrugated cardboard, baled	1 cubic yard	.55	1,000-1,200
Milk cartons	1 cubic yard	.022	45

[1]Gaylord size most commonly used: 40" X 48" x 36"

To calculate volume per pile,

1) From the first set of drawings below, choose the shape most similar to the piles. Note the shape code name or number.
2) Record whatever dimensions the picture for the pile's shape indicates are needed.
3) If the piles are typical round mounds (a.k.a. paraboloids), look up volume in the table that is next in this document. Half-sphere piles, the first column in the table, are uncommon.
4) Otherwise, either:
   - Calculate the volume using the formulas at the end of this document, or
   - Enter the dimensions in the embedded spreadsheet, which calculates volume.

Step 1: Match the Shape



Step 3: For round mounds, look up volume on the right half of this table.

Table 1—Gross pile volumes for half-section of a sphere (spheroid) and half-paraboloid pile shapes (shape codes 1 and 2, respectively)[a]

Pile width	Spheroids only		Volume by paraboloid height (in feet)								
	Height	Volume	4	6	8	10	12	14	16	18	20
	Feet		*Cubic feet*								
4	2.0	17	25	38	50	63	75	88	101	113	126
5	2.5	33	39	59	79	98	118	137	157	177	196
6	3.0	57	57	85	113	141	170	198	226	254	283
7	3.5	90	77	115	154	192	231	269	308	346	385
8	4.0	134	101	151	201	251	302	352	402	452	503
9	4.5	191	127	191	254	318	382	445	509	573	636
10	5.0	262	157	236	314	393	471	550	628	707	785
11	5.5	348	190	285	380	475	570	665	760	855	950
12	6.0	452	226	339	452	565	679	792	905	1018	1131
13	6.5	575	265	398	531	664	796	929	1062	1196	1327
14	7.0	718	308	462	616	770	924	1078	1232	1385	1539
15	7.5	884	353	530	707	884	1060	1237	1414	1590	1767
16	8.0	1072	402	603	804	1005	1206	1407	1608	1810	2011
17	8.5	1286	454	681	908	1135	1362	1589	1816	2043	2270
18	9.0	1527	509	763	1018	1272	1527	1781	2036	2290	2545
19	9.5	1796	567	851	1134	1418	1701	1985	2268	2552	2835
20	10.0	2094	628	942	1257	1571	1885	2199	2513	2827	3142
21	10.5	2425	693	1039	1385	1732	2078	2425	2771	3117	3464
22	11.0	2788	760	1140	1521	1901	2281	2661	3041	3421	3801
23	11.5	3185	831	1246	1662	2077	2493	2908	3324	3739	4155
24	12.0	3619	905	1357	1810	2262	2714	3167	3619	4072	4524

[a] The volume for a spheroid (column 3) is determined from either the width (column 1) or height (column 2). For a half-paraboloid, find the intersection of width (column 1) and height (columns 4-12)

Step 4a: Formulas

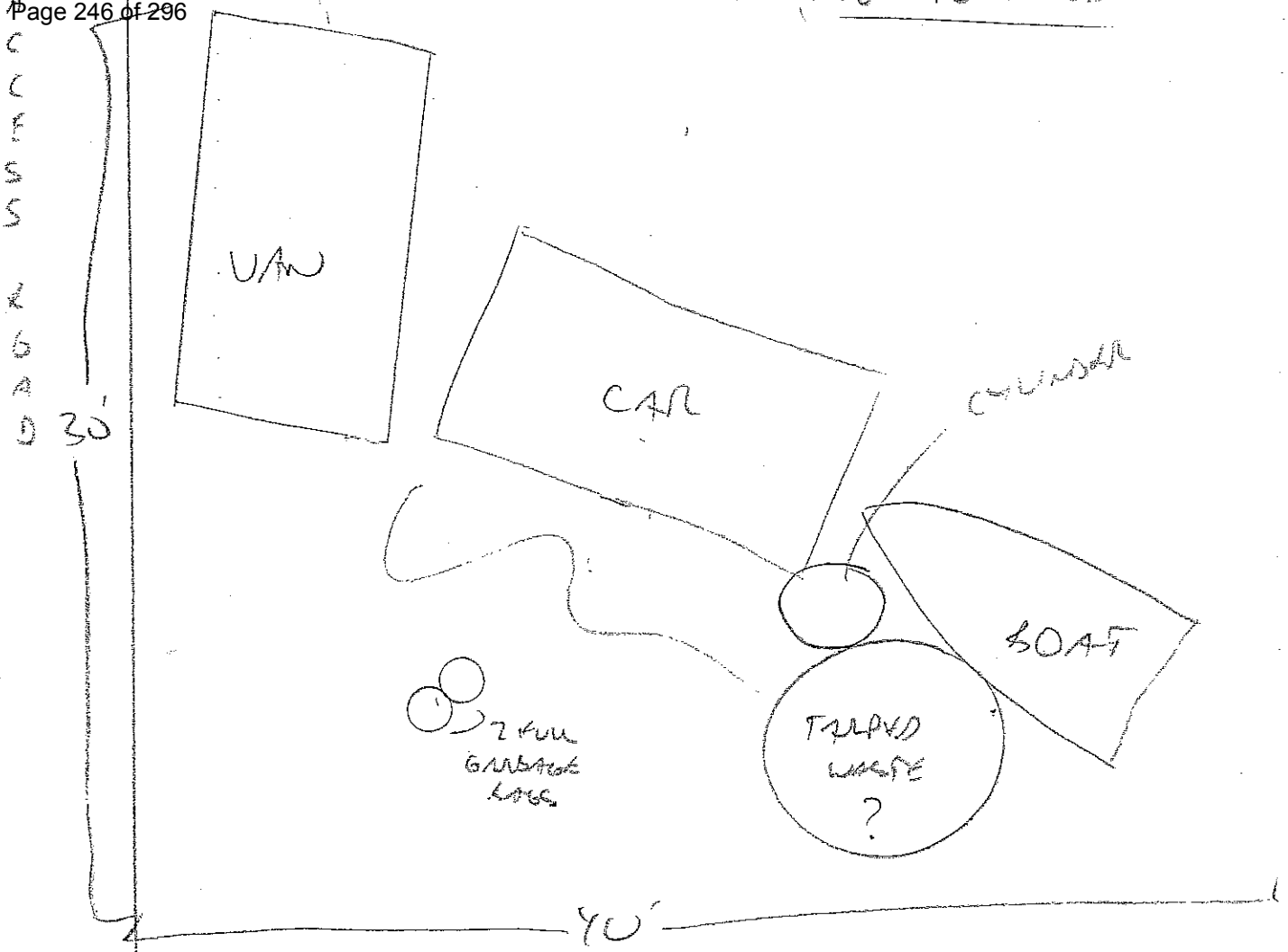
The most common pile shapes are in bold.

Shape Code	Shape Name	Volume Formula
1	half-sphere	$\pi hw^2/6$
2	**paraboloid**	$\pi hw^2/8$
3	**half-cylinder**	$\pi wlh/4$
4	half-frustum of cone	$\pi l_1(h_1^2+h_2^2+(h_1+h_2))/6$
5	cone with round ends	$\pi(l_1(w_1^2+w_2^2+(w_1w_2)+w_1^3w_2^3)/24$
6	**half-ellipsoid**	$\pi wlh/6$
7	irregular solid	$(l_1+l_2)(w_1+w_2)(h_1+h_2)/8$

OR Step 4b: Spreadsheet with formulas built in, which must be downloaded separately.

Reference: Colin Hardy, Guidelines for Estimating Volume, Biomass, and Smoke Production for Piled Slash PNW-GTR-364, 1996. For a .pdf of the entire publication, contact Colorado APCD, http://www.cdphe.state.co.us/ap/smoke/ContactUs.html.

NOT TO SCALE

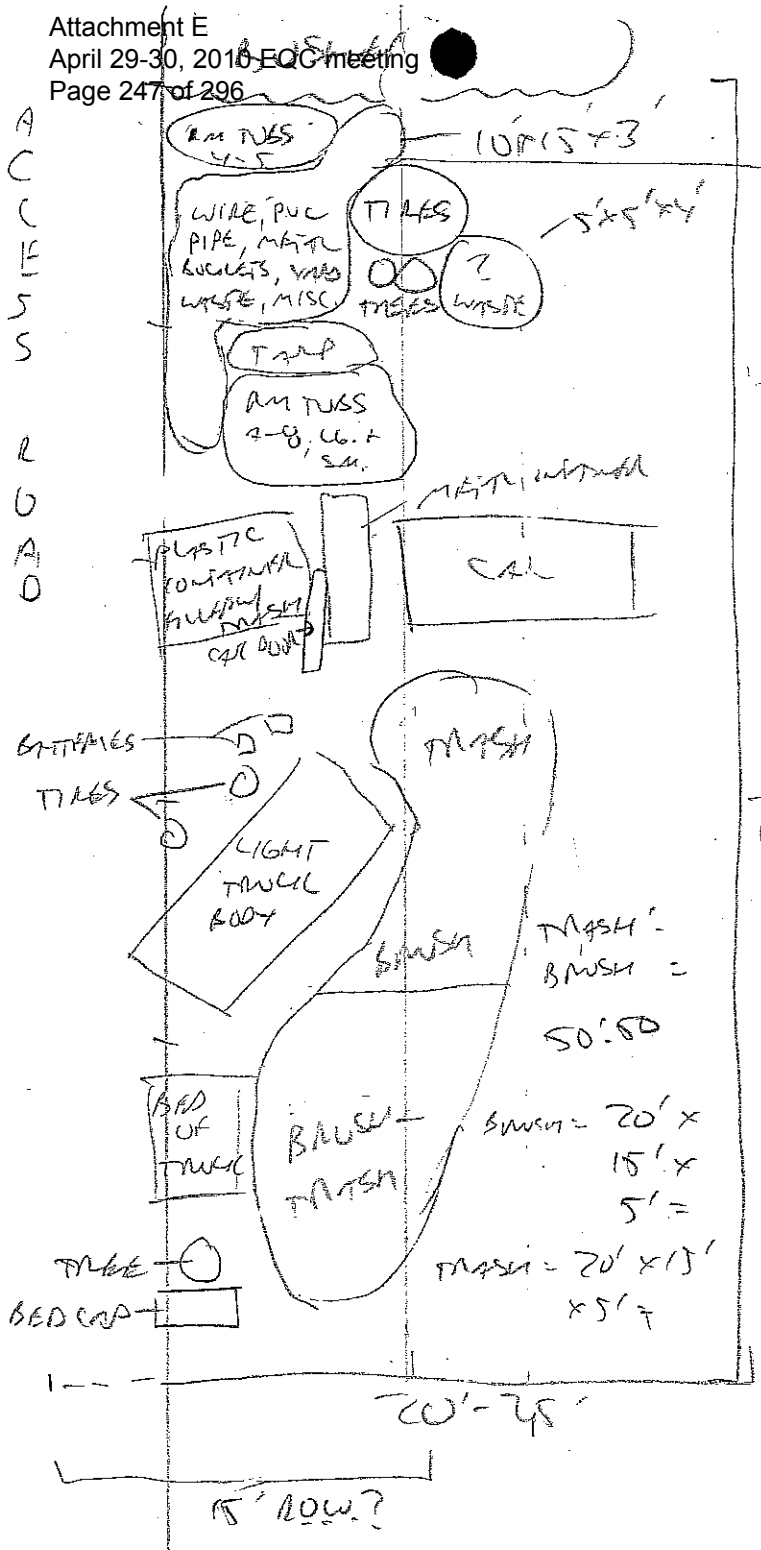


WASTES

1 VAN
1 CAR
1 BOAT
2, 32 GAL. GARBAGE BAGS
1 PLOTTER
1 TRASH PILE: CYLINDER, r = 2.5, H = 3 ~ 2 L.C.Y.
1 PILE OF ?: CUBE, 10 × 10 × 5 = 185 L.C.Y.
4 MOUNTAINS

DUMPSITE A

L.C.Y. = LOOSE CUBIC YARDS



AM = "RUBBAMAID-LIKE"

3' 5 x 3 = 1 CY

10 x 7 x 2 = 5 CY

5 x 3 x 2 = 1 CY

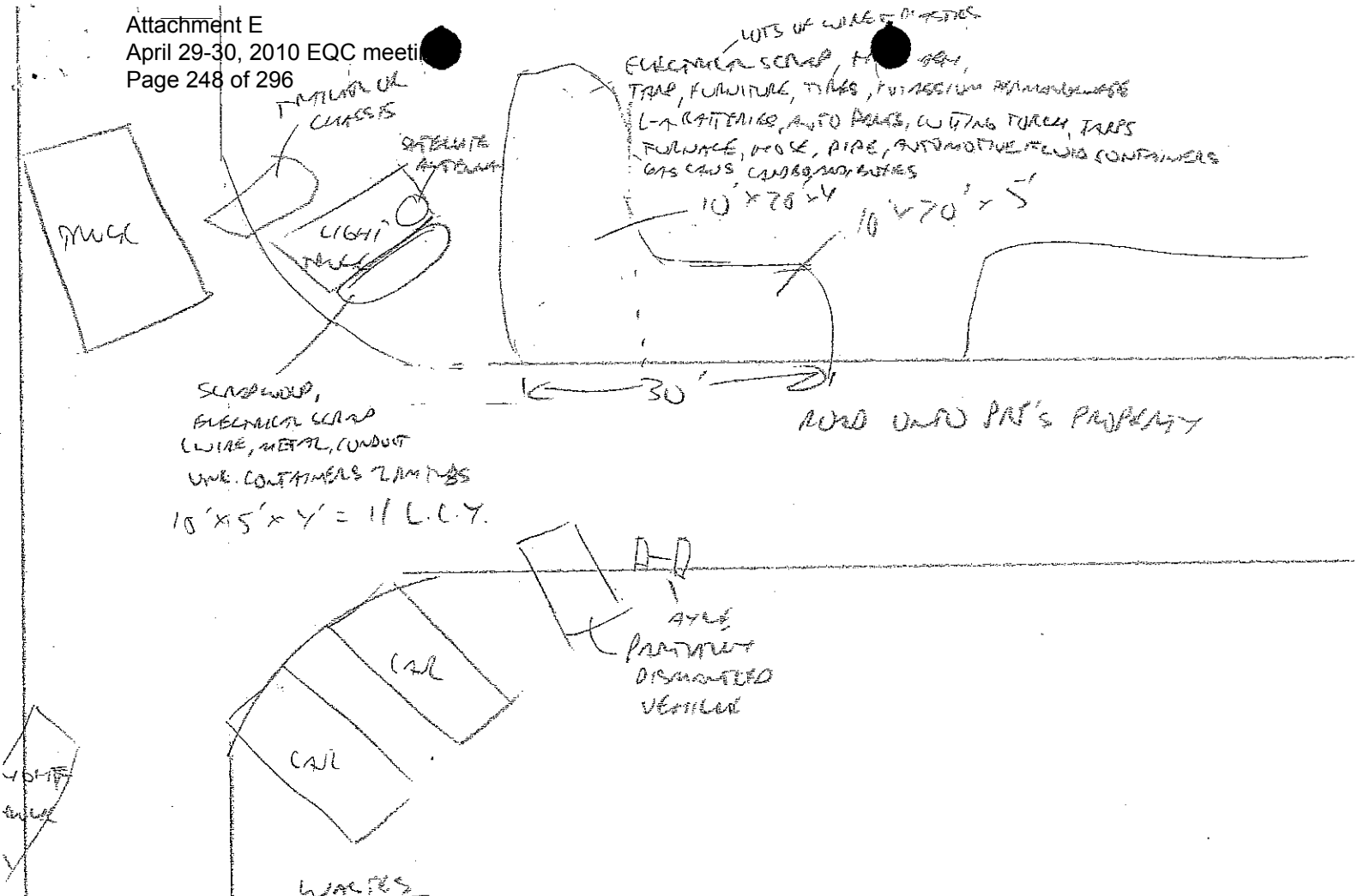
~~WASTES~~ + ODOR + BED CAP
1 MUCK + BED — UNTOWABLE
1 CAR — TOWABLE?

5 TIRES
1 WASTE PILE = 5' x 5' x 4' = 3.7 L.C.Y.
1 PLASTIC CONTAINER FILLED W/ MASH = 4' x 4' x 2' = 1.2 L.C.Y.
1 LG. BRUSH / MASH PILE:
MASH = 70' x 15' x 5' = 56 L.C.Y
BRUSH =
2 BATTERIES
1 MED. WASTE PILE = 10' x 5' x 3' = 17 L.C.Y.

AM TUBS → MOVE OFF SITE, N/C

SKETCH OF DUMPSITE C

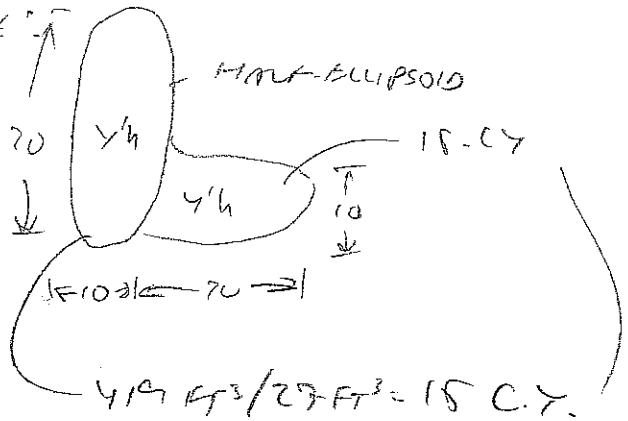
NOT TO SCALE


LOTS OF WIRE + PLASTICS
ELECTRICAL SCRAP, METAL,
TIRE, FURNITURE, TIRES, POTASSIUM PERMANGANATE
L-A BATTERIES, AUTO PARTS, CUTTING TORCH, TARPS
FURNACE, HOSE, PIPE, AUTOMOTIVE FLUID CONTAINERS
GAS CANS, CARDBOARD BOXES
10' x 70' x 4'
10' x 70' x 5'
TRUCK
LIGHT
SCRAP WOOD,
ELECTRICAL SCRAP
WIRE, METAL, CONDUIT
MISC. CONTAINERS TARPS
10' x 5' x 4' = 11 C.Y.
30'
ROAD AND PAT'S PROPERTY
CAR
CAR
AXLE
PARTIALLY
DISMANTLED
VEHICLE
WASTES
3 CAR BODIES - METAL - UNSALVAGEABLE
2 TOWABLE LIGHT TRUCKS
1 BIG TRUCK
1 B/L WASTE PILE: 30 C.Y.
1 SMALL WASTE PILE = 11 C.Y.
SKETCH OF DUMPSITE
NOT TO SCALE
ALL LOCATIONS APPROXIMATE

DUMPSITE D

> UNTUNABLE CARS = @450 TOTAL

BIG WASTE PILE:



30 C.Y. TOTAL.

SMALL WASTE PILE = N/C (ALL RECYCLABLE)

TOTAL C.Y. MSW

A = 21

B = 2

C = 37

D = 30

Langley and McDonald
A PROFESSIONAL CORPORATION
ENGINEERS • PLANNERS • SURVEYORS
VIRGINIA BEACH - WILLIAMSBURG, VIRGINIA

Subject TOM SMITH RD. DEMOLITION
DISPOSAL CALCULATIONS
Computed By CAF Checked By

Project No. WMF-2007-0024
Client
Date 12/7/07 Sheet No. 1/2

DUMPSITE A

1 VAN - TOWABLE : $75
1 CAR - TOWABLE : $75
1 ABOVE GR. TOWABLE TRAILER : N/C
7, 32 GAL. GARBAGE BAGS : $4/EA = $8
4 COMPUTER MONITORS @ $8/EA = $24
1 TRASH PILE ~ 2 C.Y. : $74
1 LG. TRASH PILE OF ? (LOOKS LIKE MSW) ~ 10 C.Y. = ?

DUMPSITE B

1 OLD PICK-UP TRUCK (NON-TOWABLE) : $150
~7 C.Y. - MASH PILE EA : $74

DUMPSITE C

1 DISMANTLED TRUCK BED FOR HEAD (UNTOWABLE) = $150
5, 17" TIRES = $5
2 LEAD-ACID BATTERIES = N/C
TRASH PILE (1/2 OF A WHOLE IS (1SPHEROID) : L=40, W=15, H=5 : $160
↳ 1571 FT³ / 27 FT³/CY = 58 ÷ 2 = 29
TRASH = SAME = $510
1 PLASTIC CONTAINER ~ 1 C.Y. = $18 (ADDED TO LINE ABOVE)
1 SM WASTE PILE (1SPHEROID) : r=2.5, H=4' = 33 FT³ / 27 = 1 CY = $18
1 MED. WASTE PILE = 7 CY = $126

AM CONTAINERS = N/C (TO BE HANDLED OFF-SITE)

CONT. FROM PAGE 4 ● WAREHOUSE: 541-[illegible]-3101

ASSUMPTIONS FOR DEMA

- SUBJECT PROPERTY → DEPOT MILE = 10 MI. 1 WAY
- GOVT MILEAGE RATE = 48.5¢/MI.
- WASTE DISPOSAL FEES @ D.M. (FROM PRICE SHEET DATED 1-1-07)
  - 1 32GL MGMT BAG = $4
  - 1 COMPUTER/LAPTOP = $5
  - 1 MONITOR = $8
  - UP TO 2 LCY = $24
    EA. ADDITIONAL = $16
  - UP TO 4, 32GL. BAGS = $14.50
  - C+D = $18/LCY
- COUCH COST AND WAREHOUSE CHARGES (11-30-07).
  - TOWABLE CAR: $75/CAR CHARGE NO SCRAP VALUE PAID
  - FLAT BED: $150-700/CAR, NO SCRAP VALUE PAID.
  - NO CHARGE FOR PROCESS, NO VALUE UN-SITE.
  - TOWABLE W/ DOLLIES, MAY TAKE FOR FREE
  - WILL PAY SCRAP VALUE FOR ANYTHING DELIVERED. MAKE, MODEL, YEAR, CONDITION ALL IMPORTANT FACTORS
- LOCAL BOAT MARINA:
  - TRAILER NO CHARGE
  - DESCRIBED BOAT AS FIBERGLASS HULLED 16' RUNABOUT
  - W/ TITLE, SEAWORTHY BOAT COULD GET $500-$800
  - OTHERWISE, NO SALVAGE OPTIONS. CUT UP FOR D.M.
- BARROW DISPOSAL + RECYCLING

30 YD. $592.96/LOAD + $3/DAY

450 LB/YD WEIGHT TOLERANCE
13,500 LB. TOTAL WEIGHT ALLOWANCE
EA. U. OVER = 4.5¢ EA.

604.70 AFTER TAX!

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
TTY (503) 229-6993

September 8, 2008

Dale A. Pennie
56295 Tom Smith Road
Bandon, Oregon 97411

Re: Follow-up to August 15, 2008 meeting
No. LQ/HW-WR-07-225

Dear Mr. Pennie:

Thank you for meeting with the Department of Environmental Quality (the Department) on August 15, 2008 regarding solid waste violations at property located off of Tom Smith Road outside Bandon, Oregon. Enclosed is a copy of the public records regarding this enforcement action, as you requested.

At our August 15, 2008 meeting, you and your associate, Susan Billings, indicated that she or you could provide disposal receipts and/or weight tickets for approximately 20 "contractor's bags" of solid waste materials that you removed from the property and took for disposal. You and Ms. Billings also said that you could provide weight tickets for the approximately 80 computer monitors that you took to Crescent City, CA for recycling.

Please send these receipts and/or weight tickets to me at the above address as soon as possible. In order to evaluate your request for a reduction in the civil penalty, the Department will need to re-calculate the penalty to reflect your efforts to clean up the property. However, we cannot do that until we receive your disposal and recycling receipts. If I do not receive this documentation from you **by October 3, 2007**, the Department will assume you are no longer interested in settling this case and will proceed to schedule a hearing before an Administrative Law Judge.

If you have made further progress cleaning up the property, please include disposal receipts or recycling weight tickets for any additional waste material has been removed from the property.

The Department appreciates your efforts to mitigate the effect of these violations by cleaning up the illegally disposed solid waste material pursuant to the Department Order included in the May 14, 2008 Notice of Violation, Department Order, and Civil Penalty Assessment (Notice and Order). Please note that the compliance order in section IV of that Notice and Order applies to both the easement across tax lot 1106 (the Cox property) and to any waste material accumulated on tax lot 1111 (the Pennie property).

PLAINTIFF'S EXHIBIT
Item 000370 4.25

I have attached an additional copy of the Notice and Order for your reference.

At our meeting you again indicated your intent to file a tort claim against the Department. As discussed, you must file such a claim directly with the Oregon Department of Administrative Services by submitting a signed letter giving date, time, place, circumstances and your estimate of damages. Include your address and phone number so you can be contacted.

Claims must be submitted either by fax to (503) 373-7337 or by mail to **Department of Administrative Services, State Services Division, Risk Management, 1225 Ferry Street SE, U150, Salem, OR 97301-4287**. Please refer to Oregon Revised Statutes (ORS) 30.260 to 30.300 for limitations and other requirements.

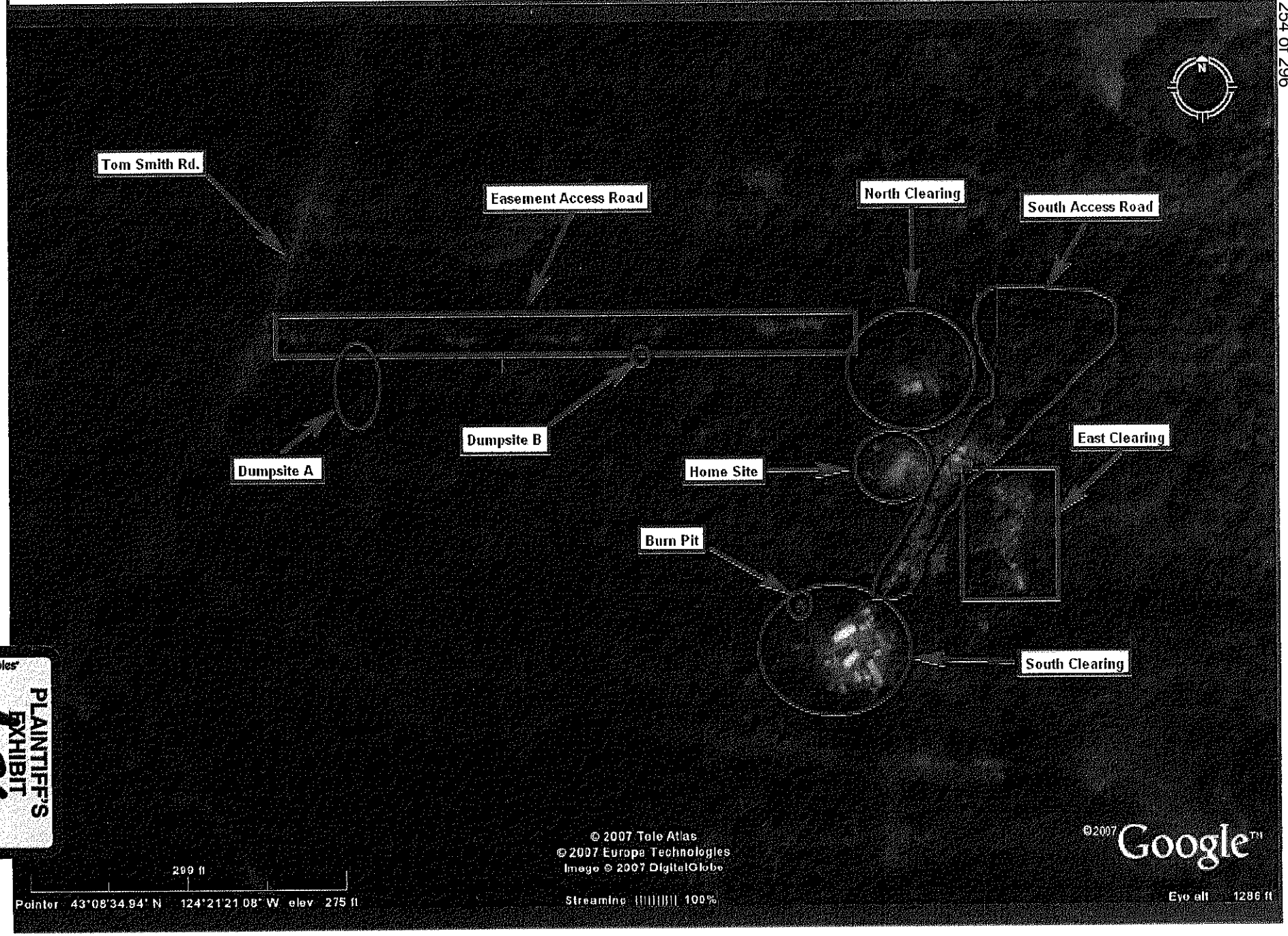
Thank you,

Regina Cutler
Environmental Law Specialist
Office of Compliance and Enforcement

cc: Craig Filip, DEQ/Eugene
Andy Jackson, Coos County Sheriff, Coos County Courthouse, Coquille, Oregon 97423

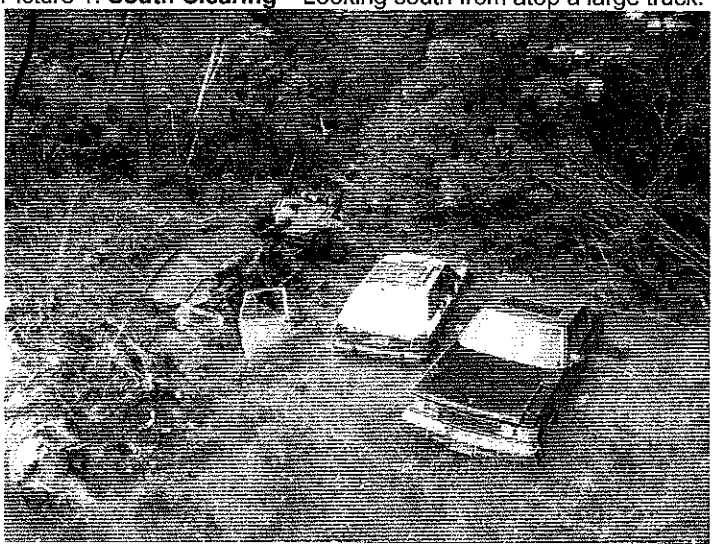
6/5/2009 11:47:24 AM

Index Map of areas and dumpsites investigated at 56295 Tom Smith Rd., Bandon, OR 97411-1743 (Coos County Tax Map Nos. T28S, R14W, Sec. 15, TL 1111 and T28S, R14W, Sec. 15, TL 1106), June 1 and 2, 2009.



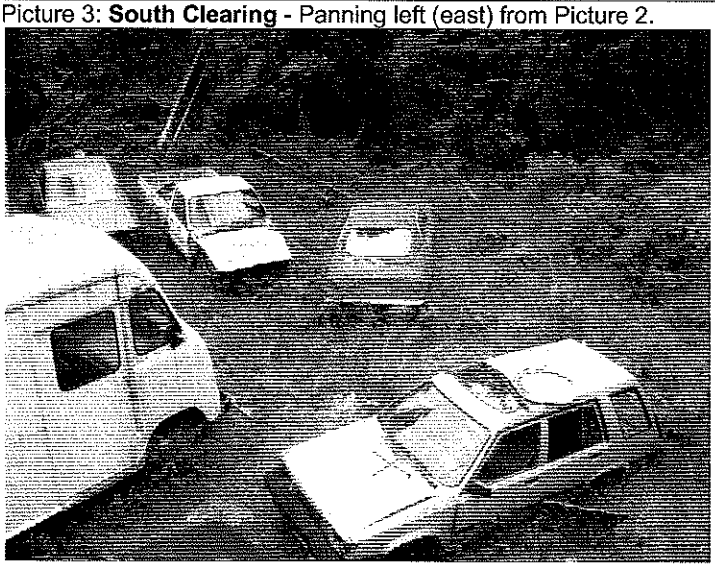
Site Inspection Photographs – 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 1: **South Clearing** – Looking south from atop a large truck.

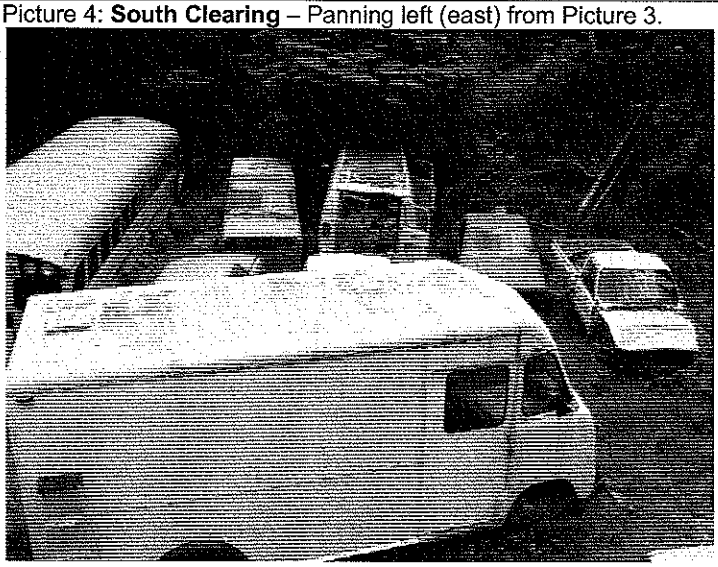


Picture 2: **South Clearing** – Panning left (east) from Picture 1.

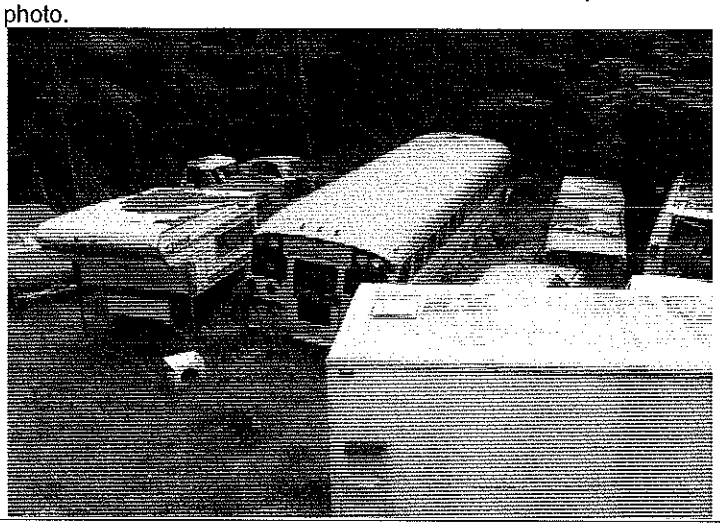
Picture 3: **South Clearing** - Panning left (east) from Picture 2.



Picture 4: **South Clearing** – Panning left (east) from Picture 3.



Picture 5: **South Clearing** – Panning left (north) from Picture 4. Note the school bus at center visible from the Index Map aerial photo.

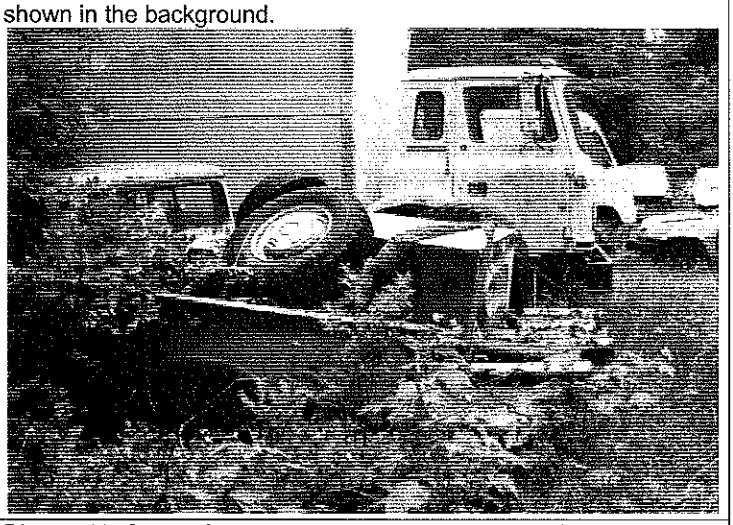


Picture 6: **South Clearing** – Panning left (north) from Picture 5.

Site Inspection Photographs: 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 7: **South Clearing** – Panning left from Picture 6, facing north.

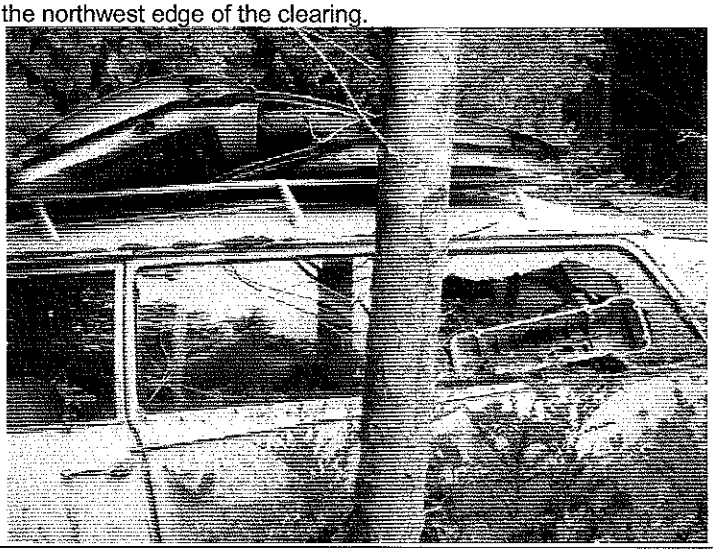
Picture 8: **South Clearing** – Looking east from the west edge of the clearing. Pictures 1-7 were taken from atop the white truck shown in the background.



Picture 9 **South Clearing** – abandoned dryer.

Picture 10: **South Clearing** – demolished vehicle in foreground.

Picture 11 **South Clearing** – vehicle filled with auto parts along the northwest edge of the clearing.

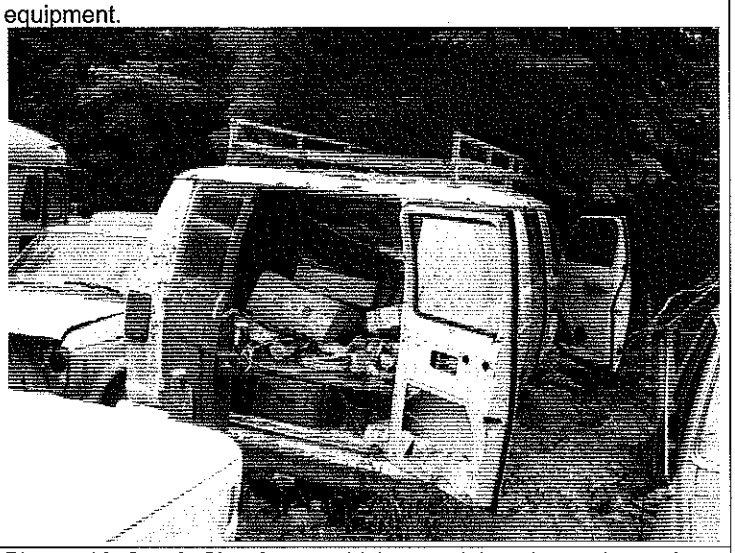


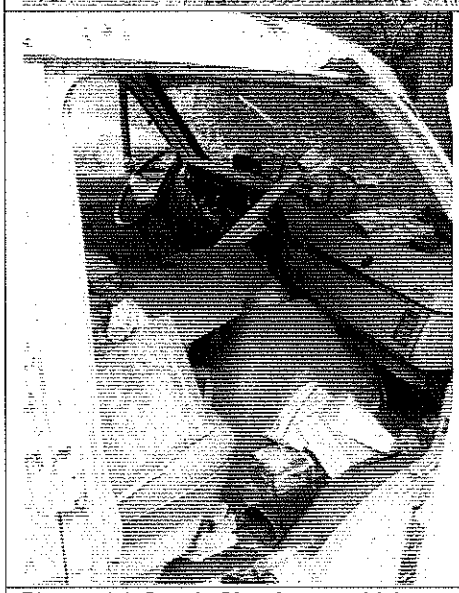
Picture 12: **South Clearing** – overturned demolished vehicle along the southern edge of the clearing.

Site Inspection Photographs, 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 13: **South Clearing** – demolished vehicle adjacent to the one shown in Picture 12, along the southern edge of the clearing.

Picture 14: **South Clearing** – van containing trash and electrical equipment.

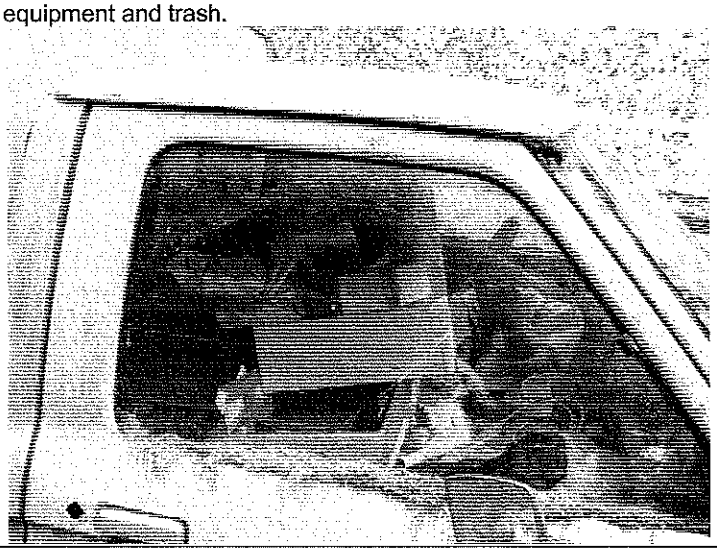




Picture 15: **South Clearing** – passenger seat of the van shown in Picture 14, containing trash.

Picture 16: **South Clearing** – vehicle containing electronics and trash.

Picture 17: **South Clearing** – vehicle containing computer equipment and trash.

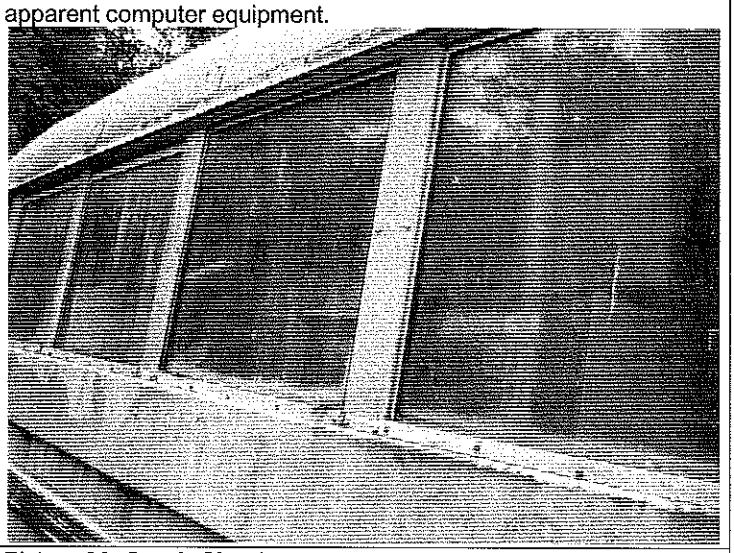


Picture 18: **South Clearing** – bed of the truck shown in Picture 17.

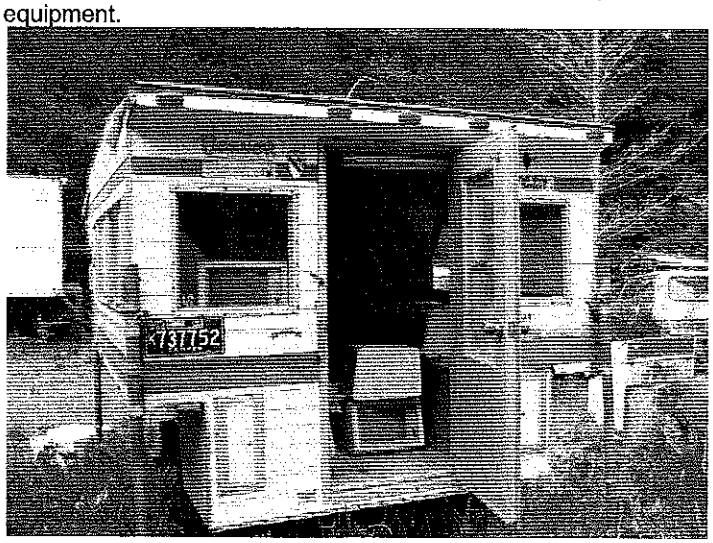
Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 19: **South Clearing** – bus filled with misc. materials.

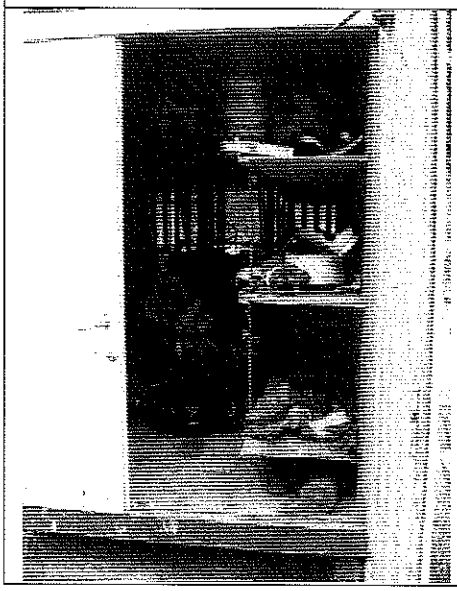
Picture 20: **South Clearing** – bus shown in Picture 19 filled with apparent computer equipment.



Picture 21: **South Clearing** – camper used to store computer equipment.

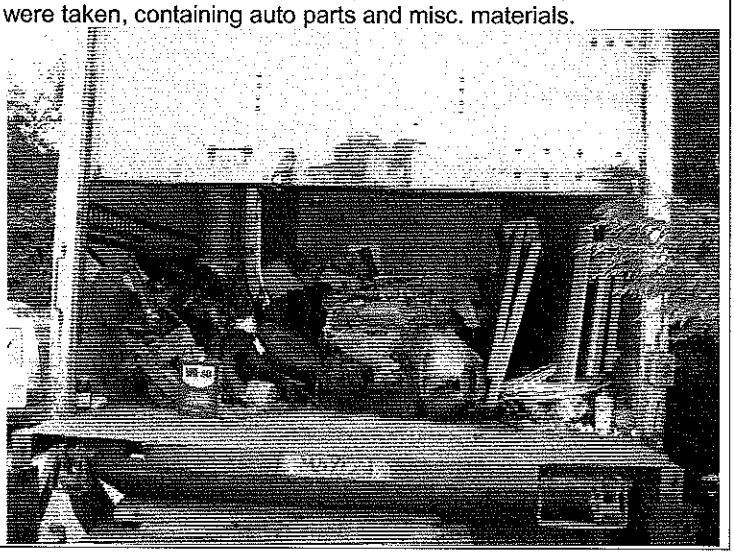


Picture 22: **South Clearing** – truck containing trash.



Picture 23: **South Clearing** –large truck shown in the foreground of Picture 4 containing an engine block on a stand and automotive parts.

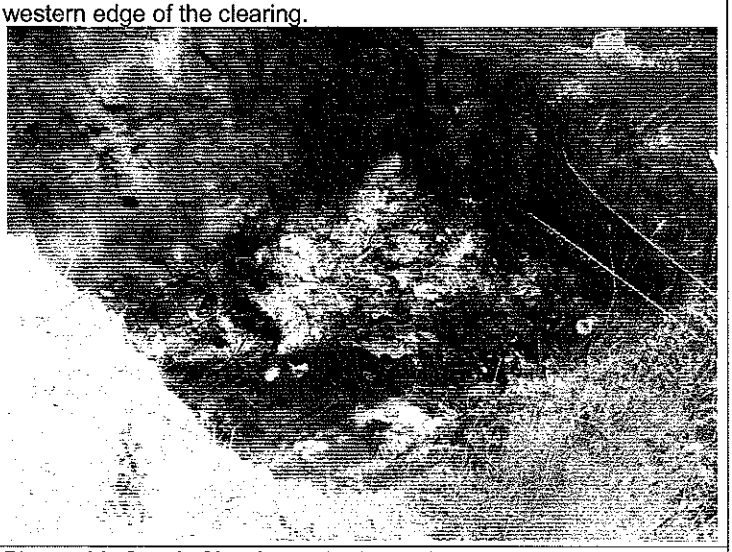
Picture 24: **South Clearing** – large truck atop which photos 1-7 were taken, containing auto parts and misc. materials.



Site Inspection Photograph – 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

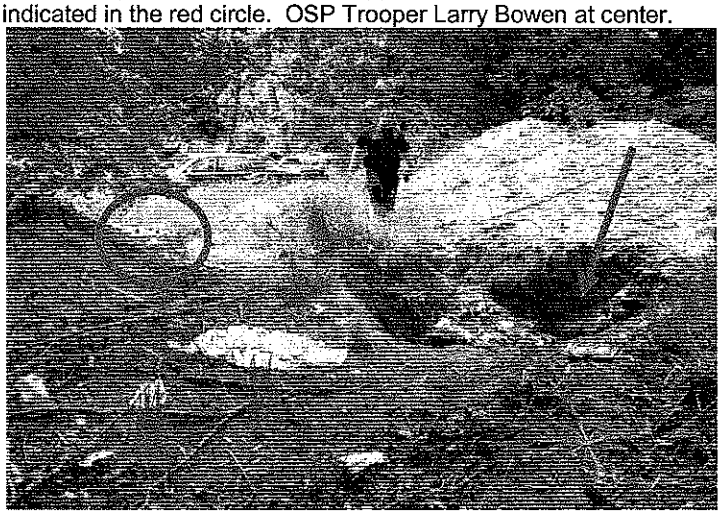
Picture 25: **South Clearing** – vehicle containing misc. materials.

Picture 26: **South Clearing** – large burn pit located along the western edge of the clearing.

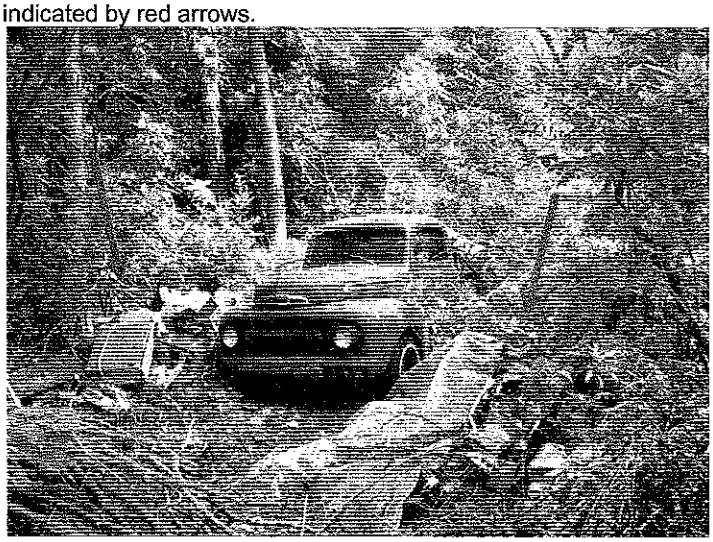


Picture 27: **South Clearing** – burn pit shown in Picture 21 showing apparent remnants of a mattress, tires and household trash.

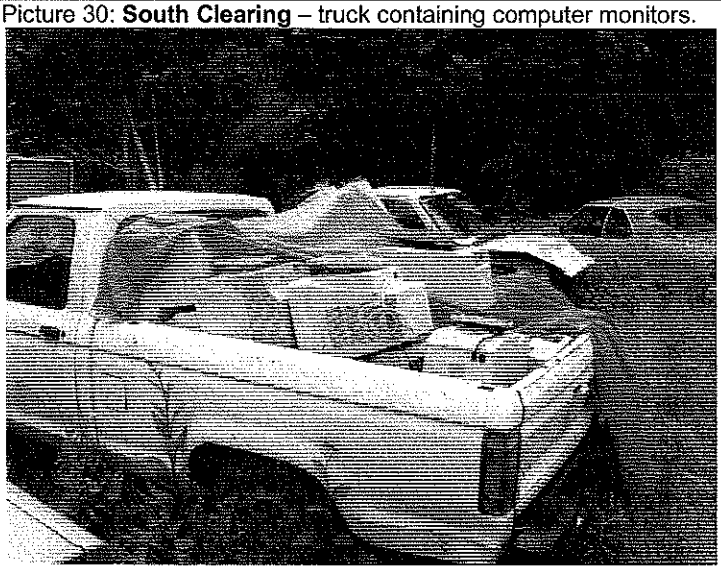
Picture 28: **South Clearing** – the burn pit shown in Picture 22 is indicated by the red arrow. Four apparent fuel containers are indicated in the red circle. OSP Trooper Larry Bowen at center.



Picture 29: **South Clearing** – piles of computer equipment indicated by red arrows.



Picture 30: **South Clearing** – truck containing computer monitors.



Site Inspection Photographs – 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

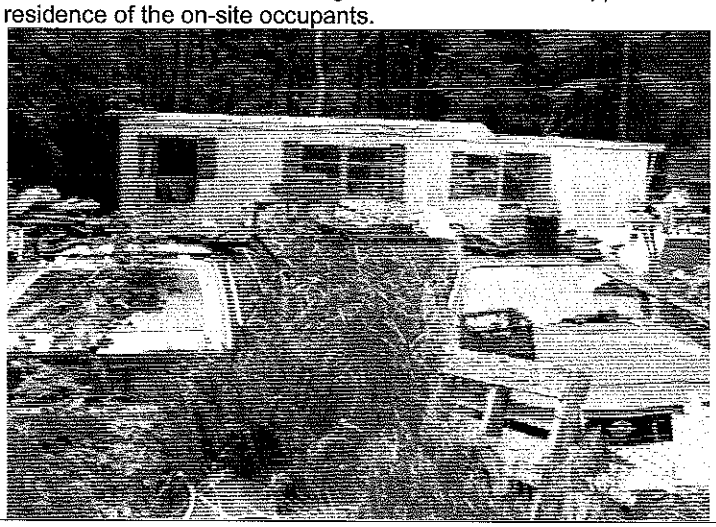
Picture 31: **Home Site** – standing in the middle of the South Access Road, looking southwest towards the South Clearing from the eastern edge of the Home Site.

Picture 32: **Home Site** – panning right (west) from Picture 31.

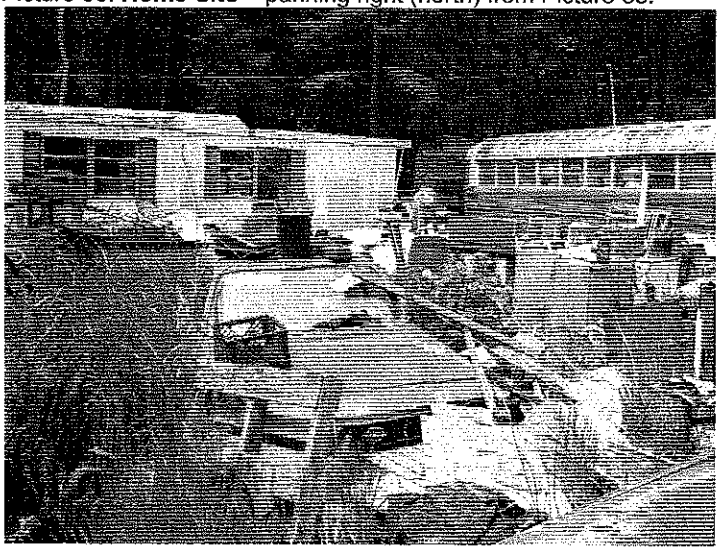
Picture 33: **Home Site** – panning right (west) from Picture 32.

Picture 34: **Home Site** – panning right (west) from Picture 33.

Picture 35: **Home Site** – panning right (west) from Picture 34. The while mobile home in background at center is the apparent residence of the on-site occupants.

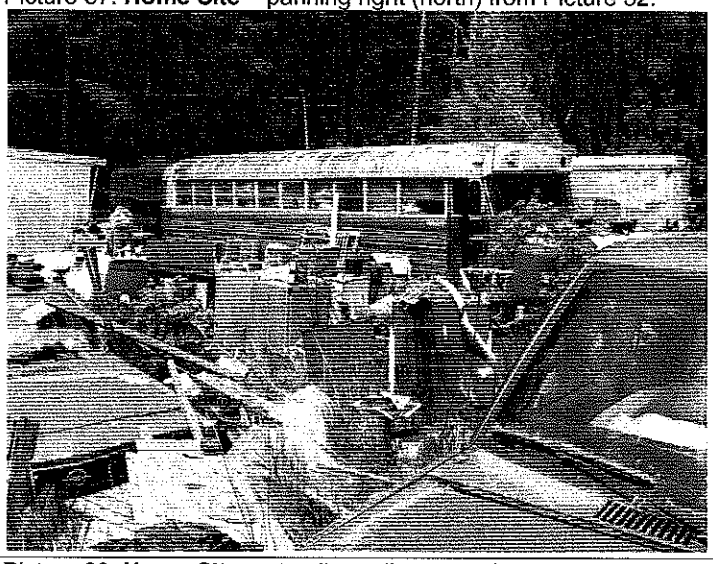


Picture 36: **Home Site** – panning right (north) from Picture 35.

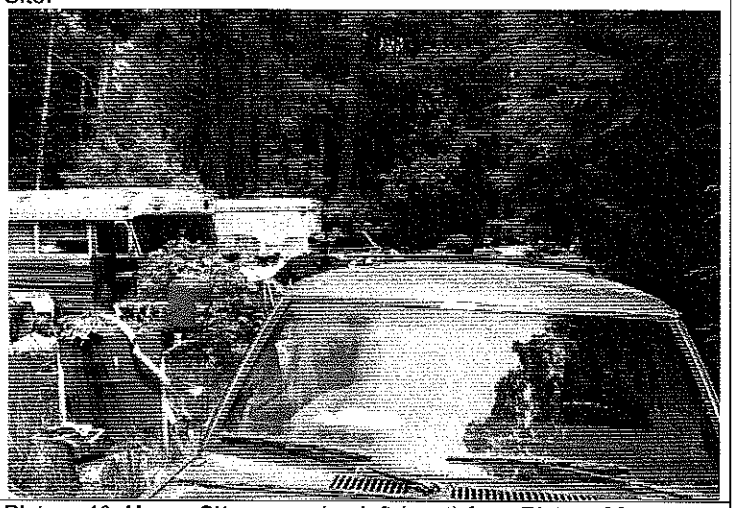


Site Inspection Photographs – 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 37: **Home Site** – panning right (north) from Picture 32.

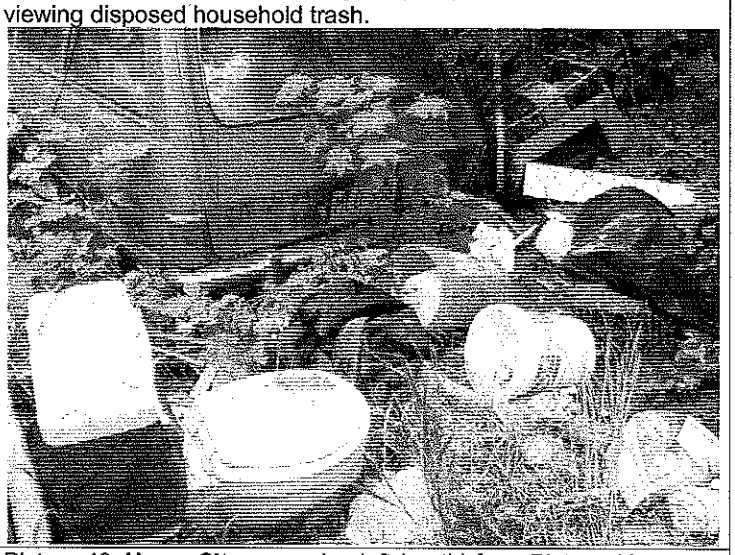


Picture 38: **Home Site** – standing in the middle of the South Access Road looking northeast from the eastern edge of the Home Site.



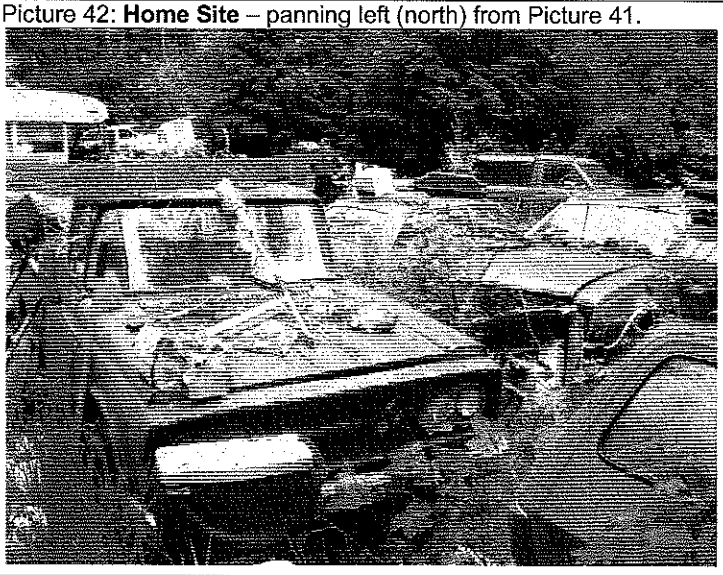
Picture 39: **Home Site** – standing adjacent to the east wall of the mobile home looking south at disposed household trash.

Picture 40: **Home Site** – panning left (east) from Picture 39, viewing disposed household trash.



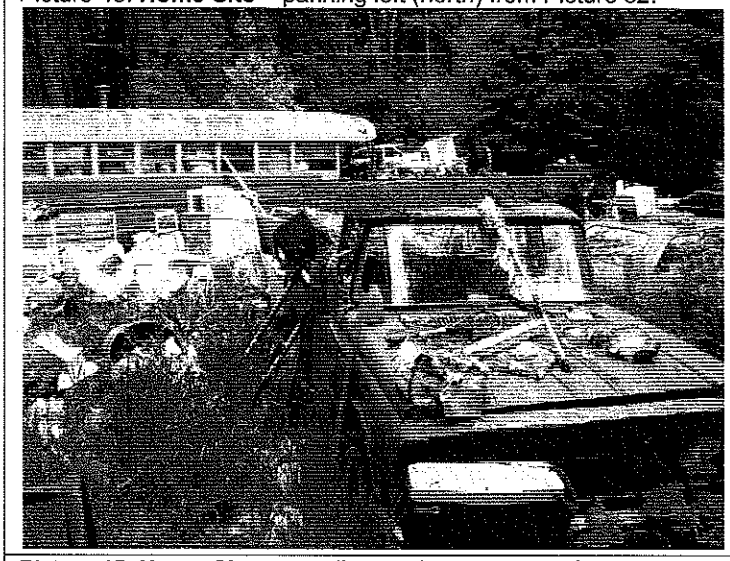
Picture 41: **Home Site** – panning left (east) from Picture 40.

Picture 42: **Home Site** – panning left (north) from Picture 41.

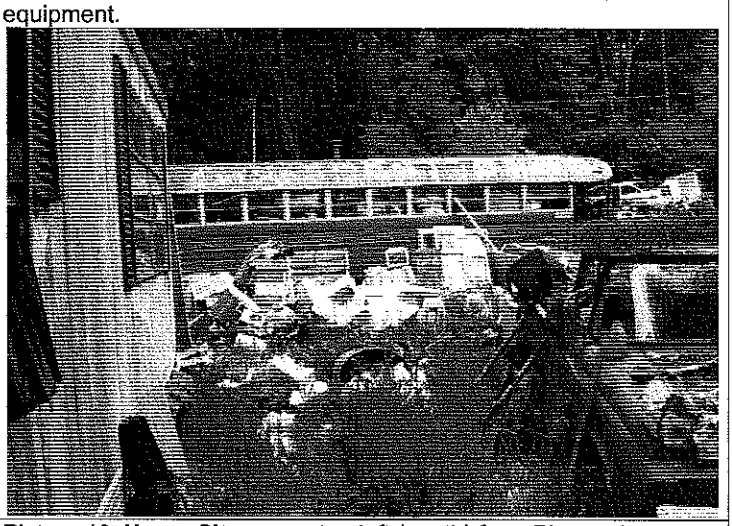


Site Inspection Photograph – 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

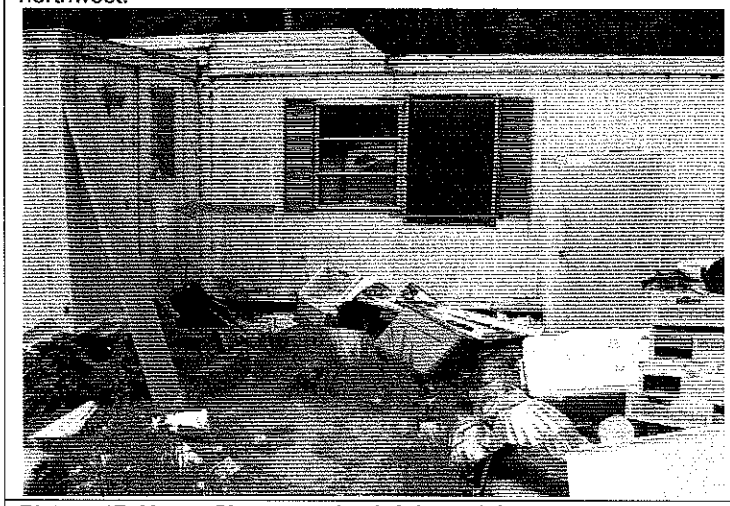
Picture 43: **Home Site** – panning left (north) from Picture 32.



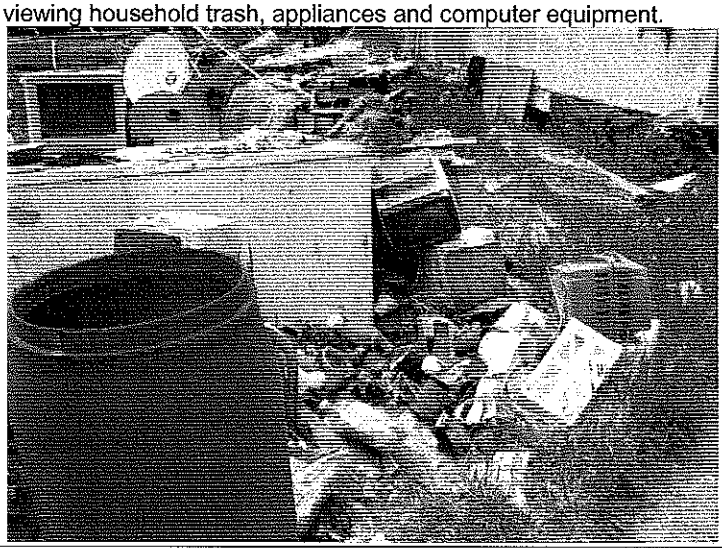
Picture 44: **Home Site** – looking north adjacent to the east wall of the mobile home, viewing household trash and piled computer equipment.



Picture 45: **Home Site** – standing on the path to the front door (indicated by red arrow) of the mobile home, looking west-northwest.

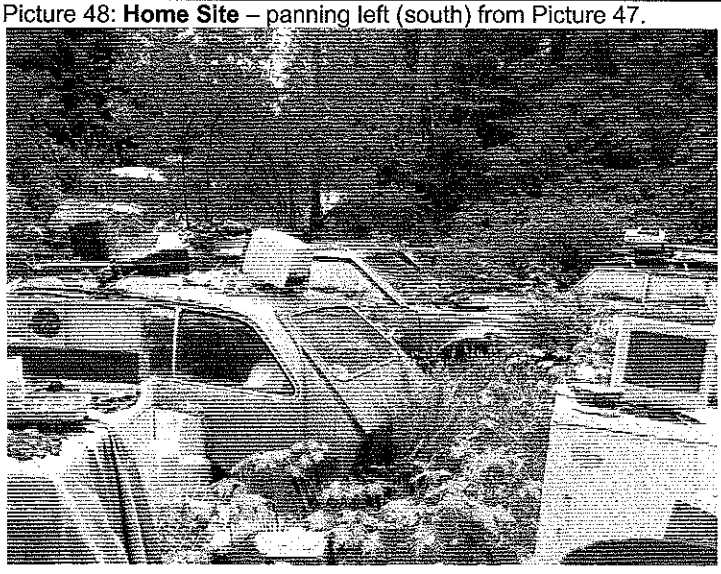


Picture 46: **Home Site** – panning left (south) from Picture 45, viewing household trash, appliances and computer equipment.



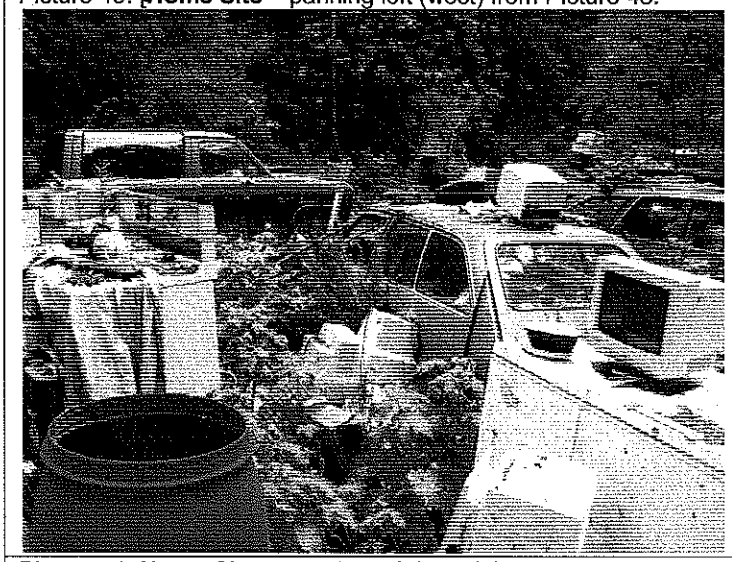
Picture 47: **Home Site** – panning left (south) from Picture 46.

Picture 48: **Home Site** – panning left (south) from Picture 47.



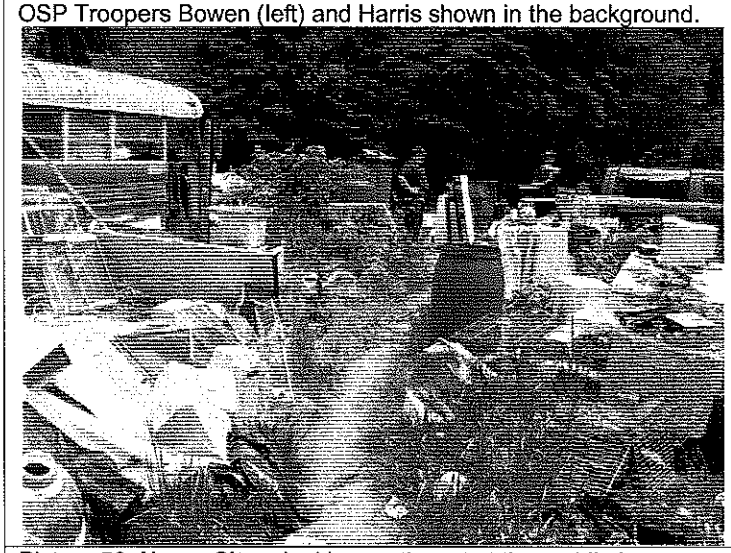
Site Inspection Photograp. #56295 Tom Smith Rd., Bandon, OR, taken o. une 1 and June 2, 2009 by CCF

Picture 49: **Home Site** – panning left (west) from Picture 48.

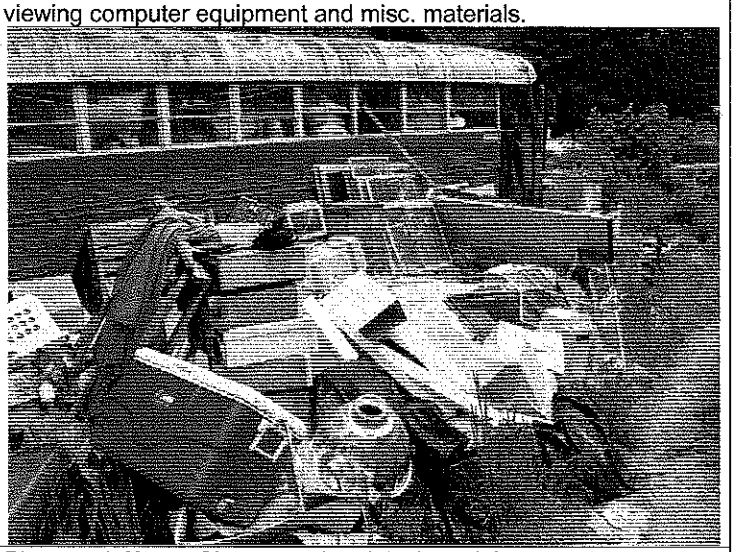


Picture 50: **Home Site** – panning left (south) from Picture 49.

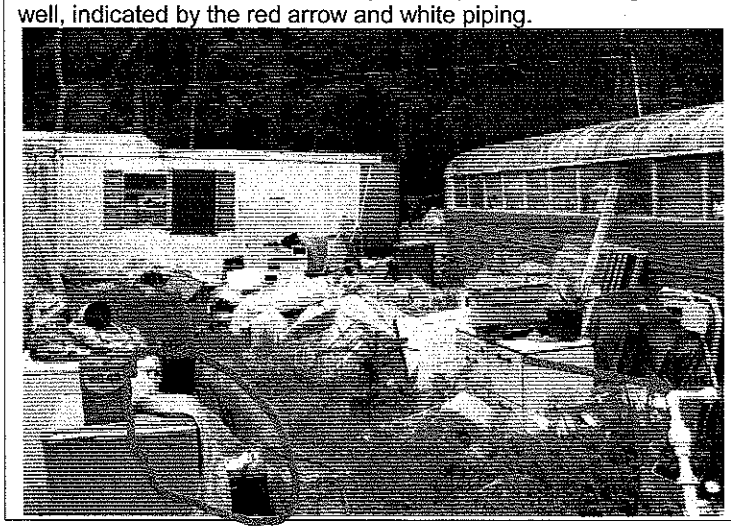
Picture 51: **Home Site** – panning left (north) from Picture 50. OSP Troopers Bowen (left) and Harris shown in the background.



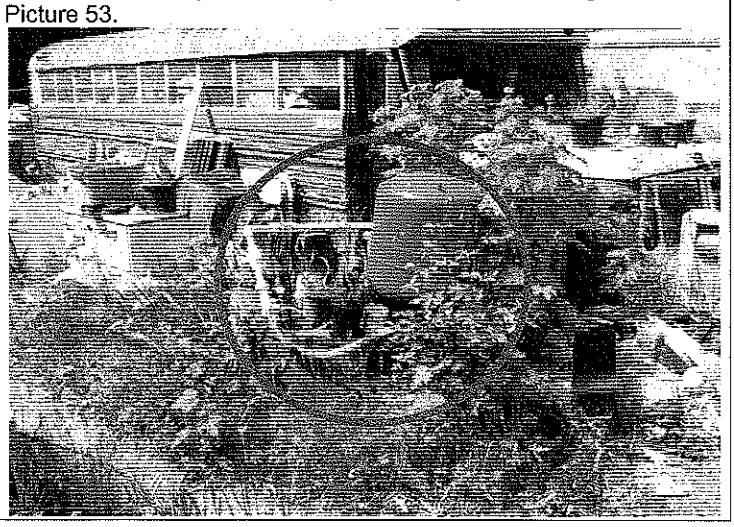
Picture 52: **Home Site** – panning left (north) from Picture 51, viewing computer equipment and misc. materials.



Picture 53: **Home Site** – looking northwest at the mobile home. Note stacked lead acid batteries (red oval) and the drinking water well, indicated by the red arrow and white piping.

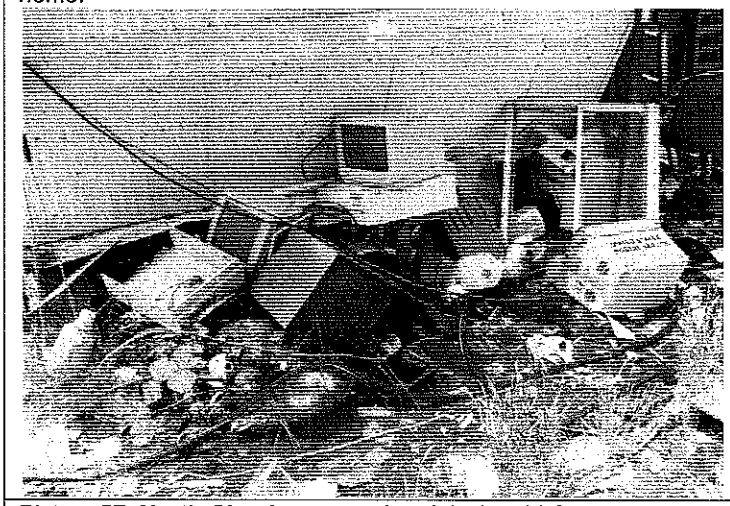


Picture 54: **Home Site** – panning right (north) from Picture 53 at the on-site drinking water well (in red circle) shown at right in Picture 53.

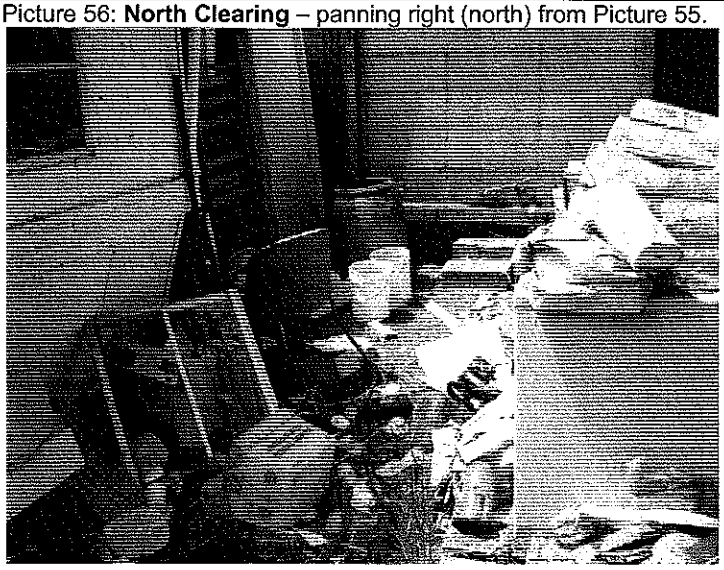


Site Inspection Photograph... 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

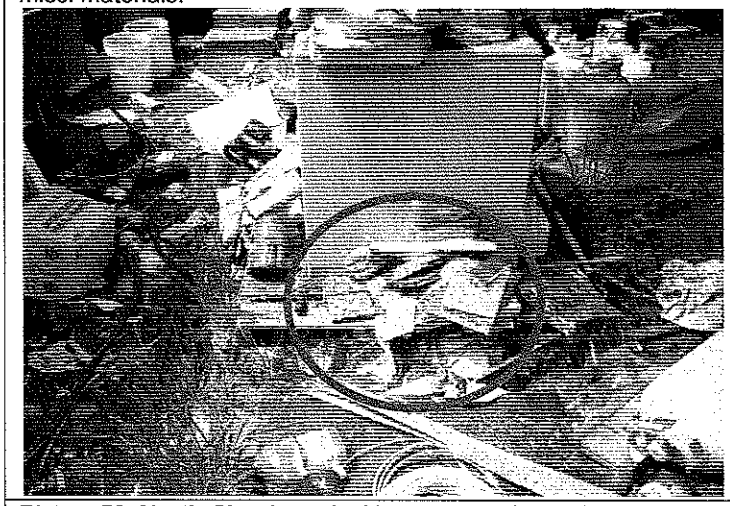
Picture 55: **North Clearing** – looking southeast at computers, household trash adjacent to the northeast end of the mobile home.



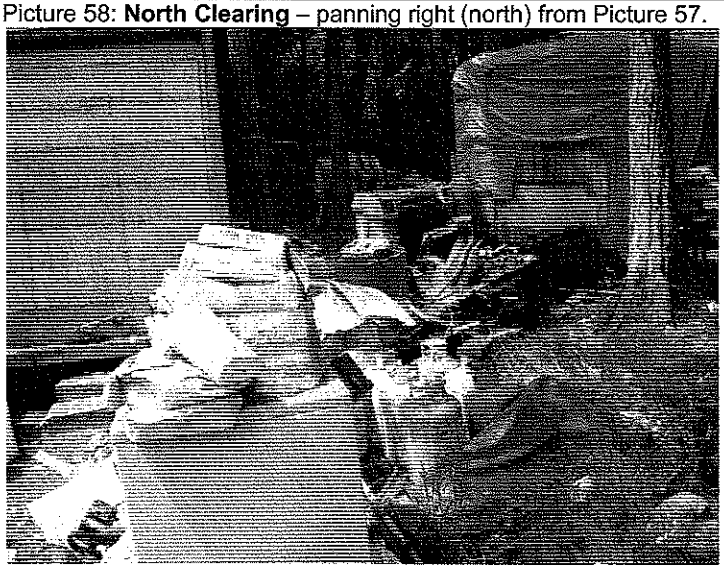
Picture 56: **North Clearing** – panning right (north) from Picture 55.



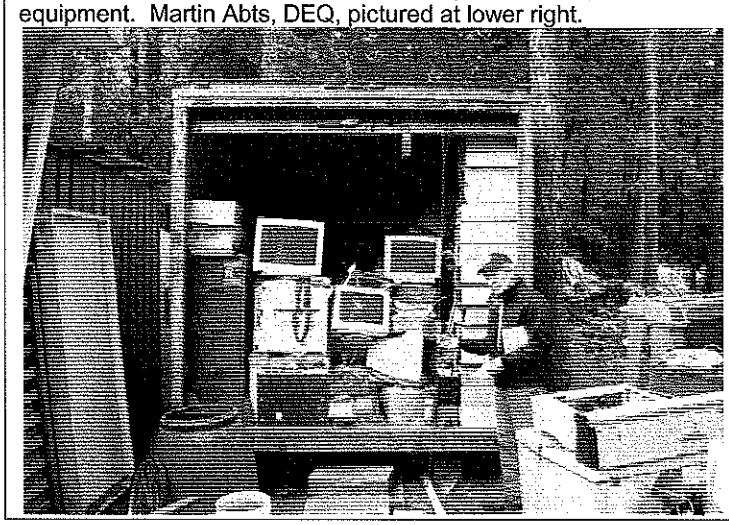
Picture 57: **North Clearing** – panning right (north) from Picture 56, viewing circuit boards (in red circle), appliances, trash and misc. materials.



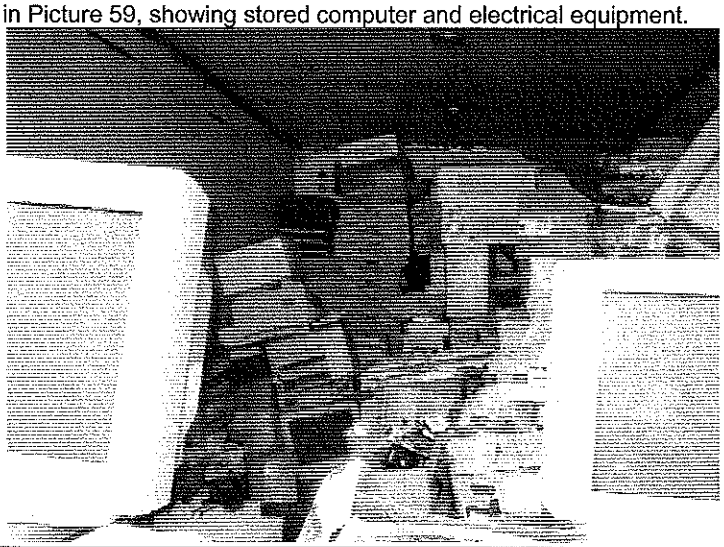
Picture 58: **North Clearing** – panning right (north) from Picture 57.



Picture 59: **North Clearing** – looking west-northwest into the truck body shown in Pictures 56 and 57 viewing stored computer equipment. Martin Abts, DEQ, pictured at lower right.



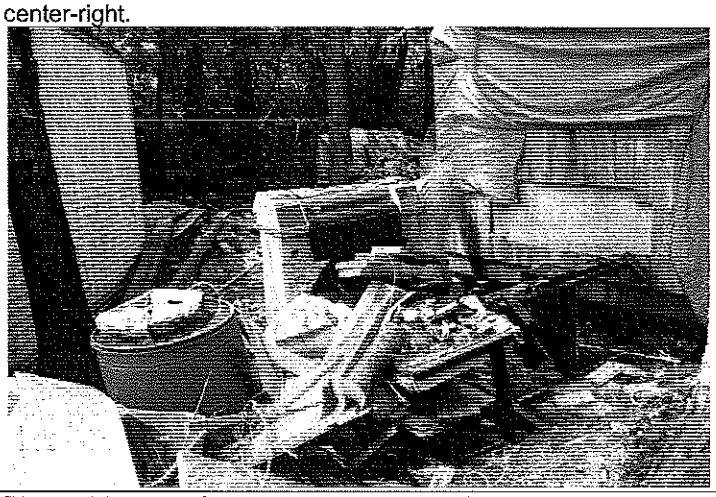
Picture 60: **North Clearing** – Interior view of the truck body shown in Picture 59, showing stored computer and electrical equipment.



Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

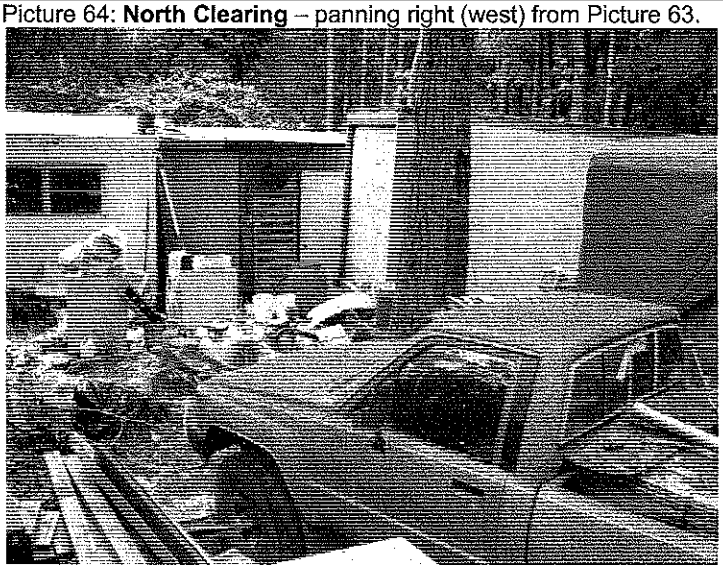
Picture 61: **North Clearing** – looking southwest at the northeast end of the mobile home (at left) and apparent addition (center), viewing appliances, household trash and a motor (in red circle).

Picture 62: North Clearing – panning right (north) from Picture 61, showing a close-up of the plotter (at center) seen in the background of Picture 58 and dismantled electronics at lower center-right.



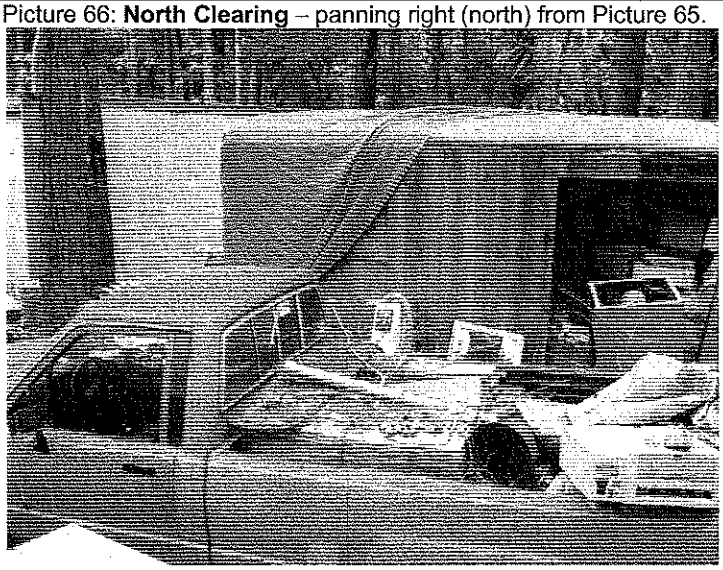
Picture 63: **North Clearing** – stepping back (moving north) from Picture 61.

Picture 64: **North Clearing** – panning right (west) from Picture 63.



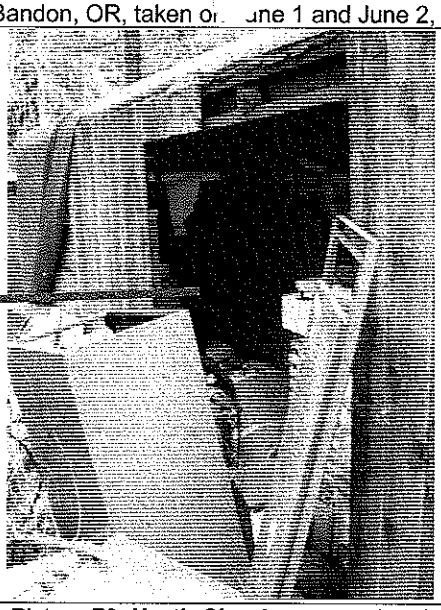
Picture 65: **North Clearing** – stepping back (moving northeast) to view the apparent copying machines stored exposed on-site.

Picture 66: **North Clearing** – panning right (north) from Picture 65.



Site Inspection Photographs – 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

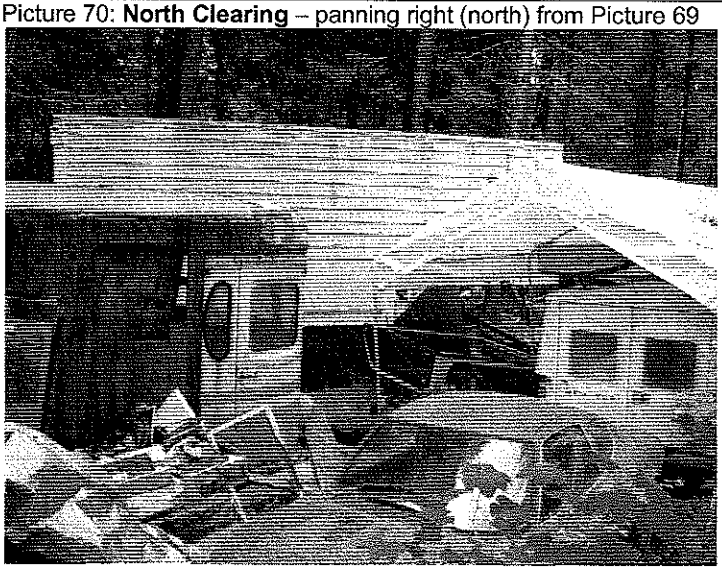
Picture 67: **North Clearing** – panning right (north) from Picture 66, viewing stockpiled, exposed electronic equipment and misc. materials.



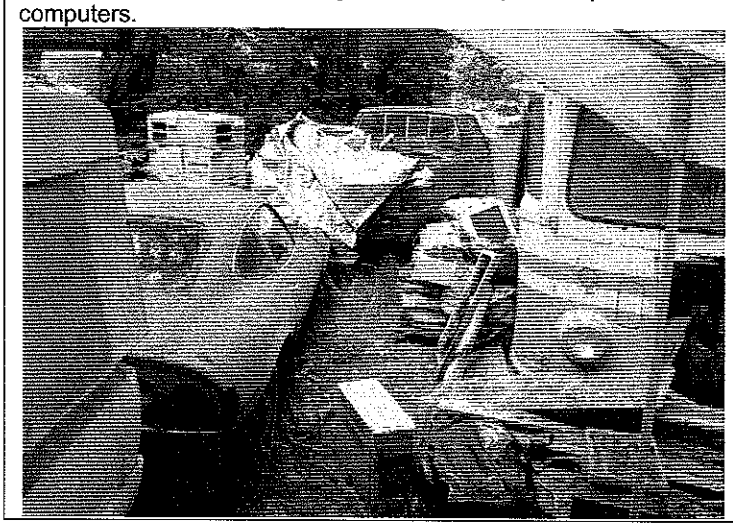
Picture 68: **North Clearing** – close-up of the opening in the side of the bus-like vehicle shown in the background of Picture 67 (at red arrow) viewing a computer monitor and other electronic equipment.

Picture 69: **North Clearing** – panning right (north) from Picture 68

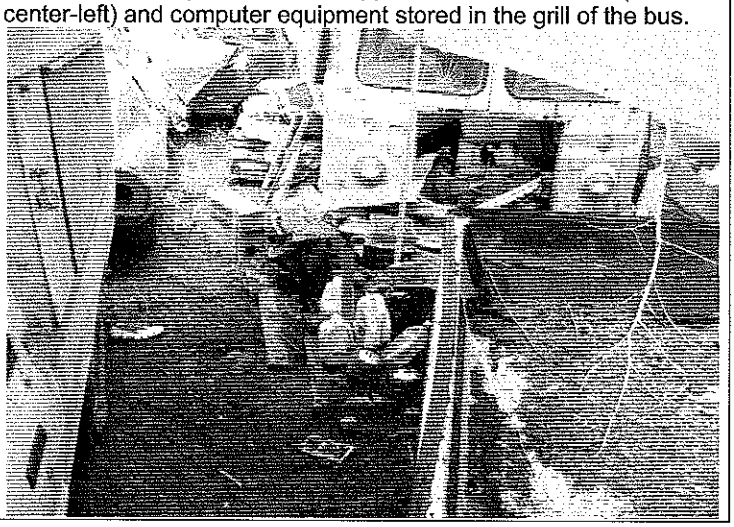
Picture 70: **North Clearing** – panning right (north) from Picture 69



Picture 71: **North Clearing** – standing in front of the bus-like vehicle pictured at right looking south at stockpiled, exposed computers.

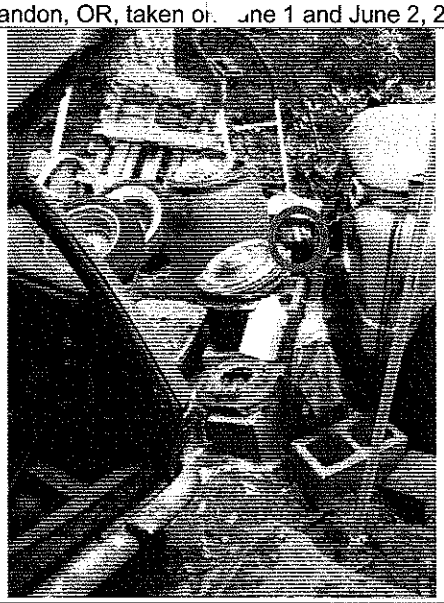


Picture 72: **North Clearing** – stepping back (moving north) from Picture 71 viewing containers of apparent automotive fluid (near center-left) and computer equipment stored in the grill of the bus.



Site Inspection Photograph – 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

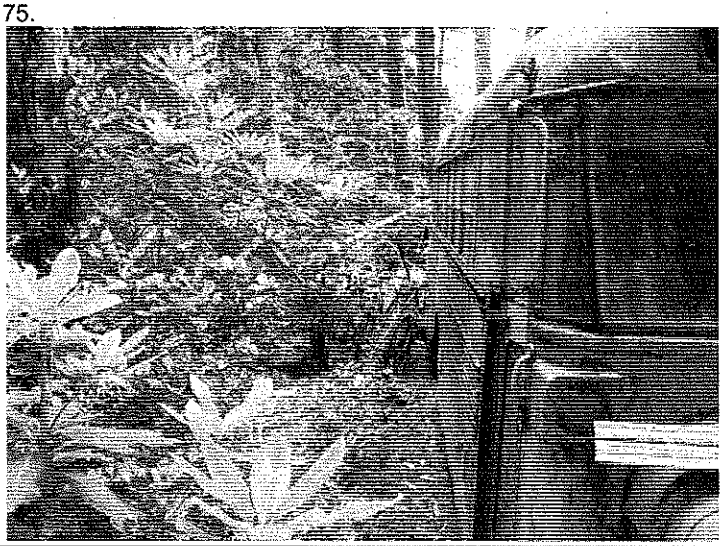
Picture 73: **North Clearing** – moving north and east from Picture 72, standing in front of the truck pictured in that photo at left, showing household trash.

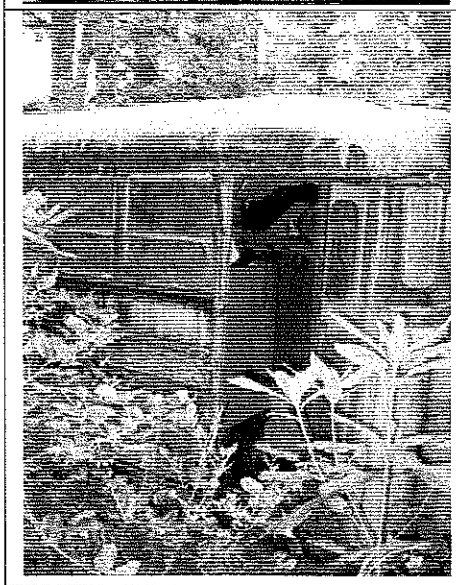


Picture 74: **North Clearing** – looking north east from the back of the vehicle shown at lower-right in Picture 73 showing an exposed lead acid battery (in red circle), automotive parts and construction materials.

Picture 75: **North Clearing** – moving north and east from Picture 74, looking south at construction materials and containerized substances (including brake fluid at red arrow) between the truck shown in Pictures 71-71 and the bus shown in Picture 74.

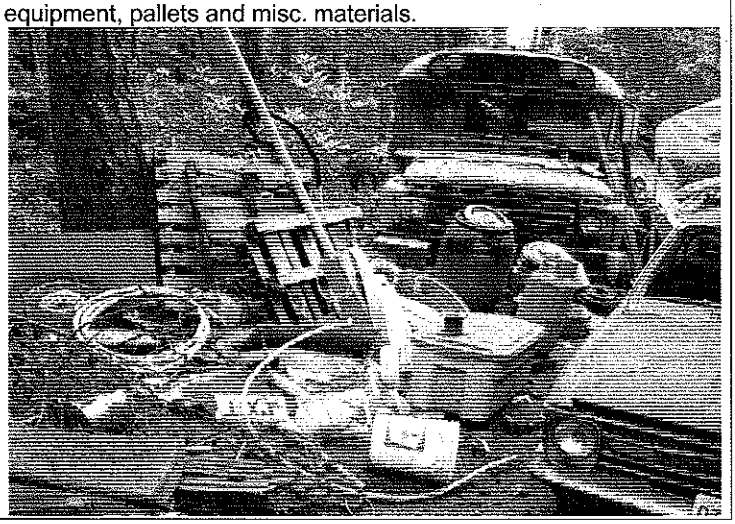
Picture 76: **North Clearing** – east side of the bus shown in Picture 75.





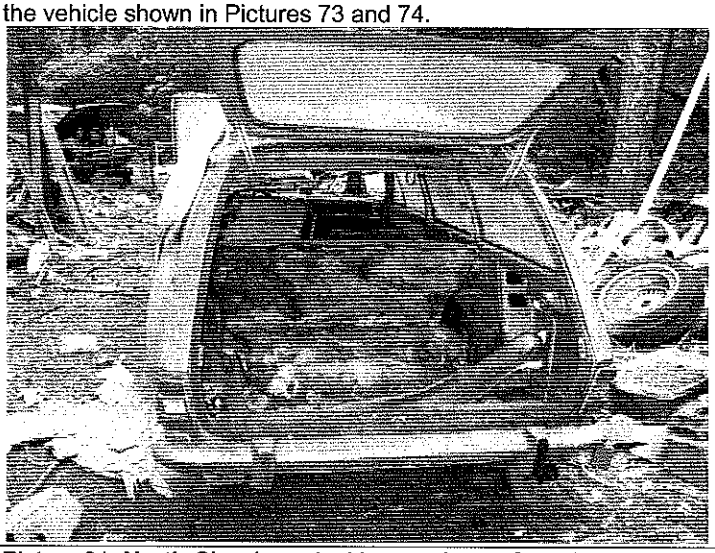
Picture 77: **North Clearing** – interior view of the bus shown in Pictures 74-76, viewing auto parts and misc. materials.

Picture 78: **North Clearing** – stepping back and right (moving north and west) from Picture 76 showing auto parts and electrical equipment, pallets and misc. materials.

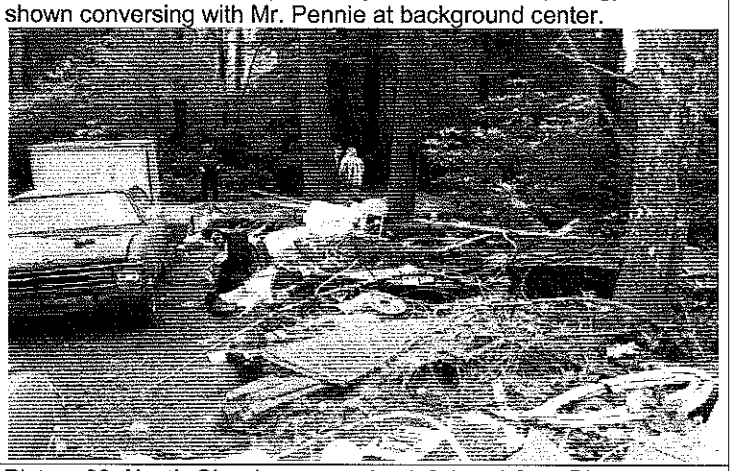


Site Inspection Photograp: 56295 Tom Smith Rd., Bandon, OR, taken o une 1 and June 2, 2009 by CCF

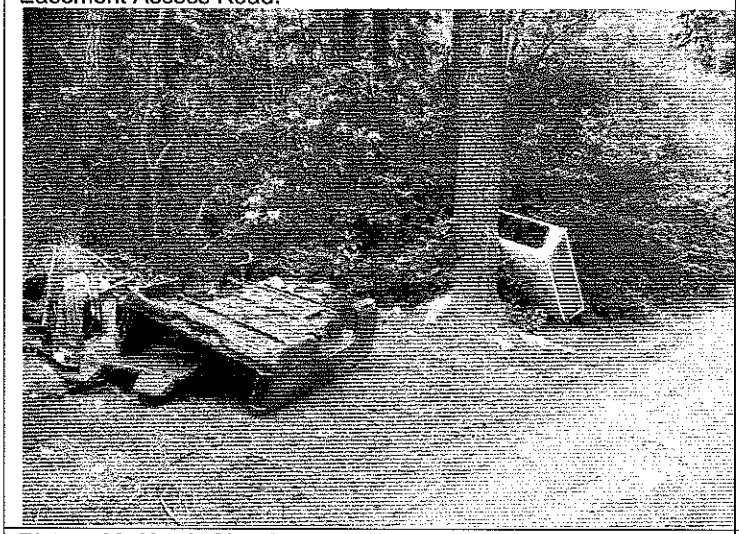
Picture 79: **North Clearing** – looking north into the open hatch of the vehicle shown in Pictures 73 and 74.



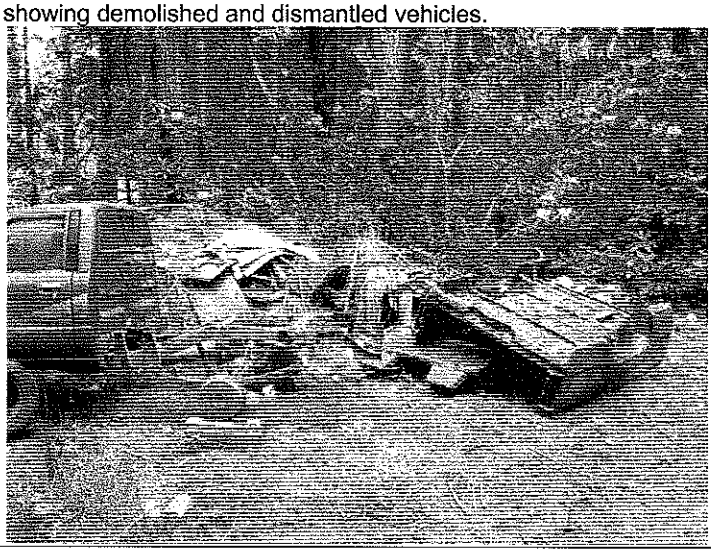
Picture 80: **North Clearing** – stepping to the right (moving east) of Picture 79, looking north at stockpiled, exposed auto parts, electrical equipment and misc. materials. OSP Senior Trooper Harris is pictured in background right. Martin Abts (facing) is shown conversing with Mr. Pennie at background center.



Picture 81: **North Clearing** – looking southwest from the Easement Access Road.

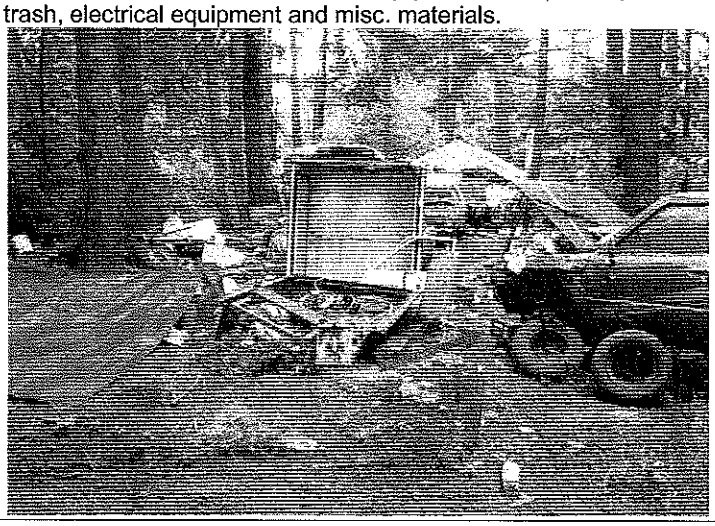


Picture 82: **North Clearing** – panning left (east) from Picture 81, showing demolished and dismantled vehicles.



Picture 83: **North Clearing** – panning left (east) from Picture 82.

Picture 84: **North Clearing** – panning left (east) from Picture 83, showing an exposed lead acid battery (at red arrow), auto parts, trash, electrical equipment and misc. materials.



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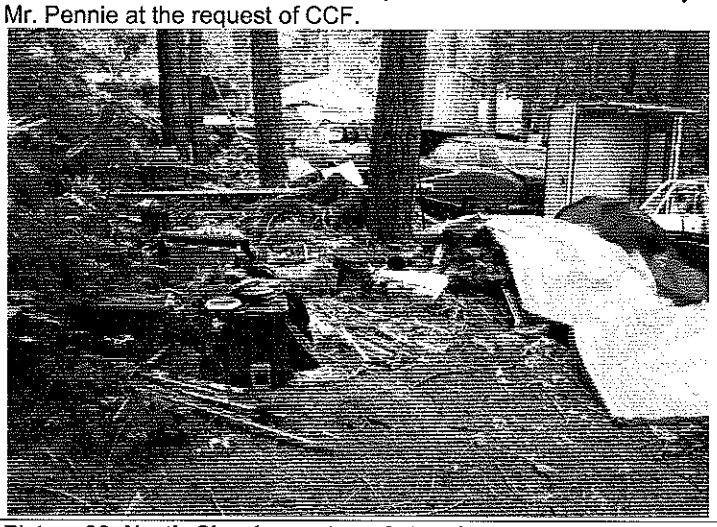
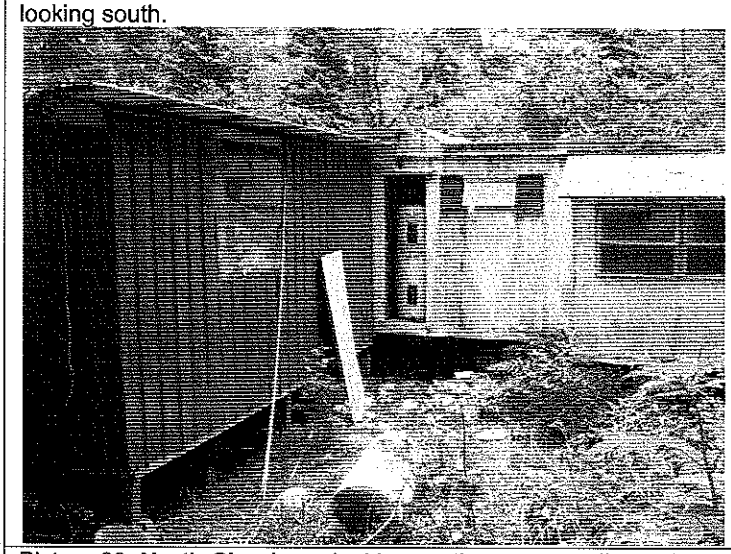
Picture 85: **North Clearing** – panning left (east) from Picture 84.

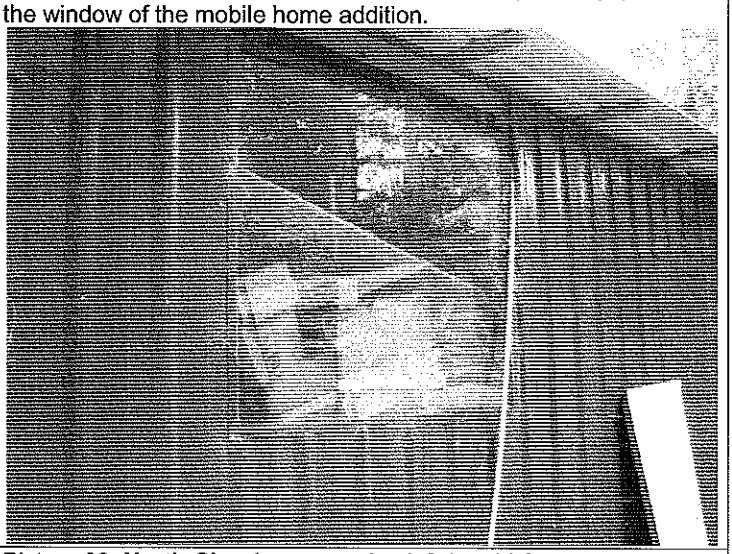
Picture 86: **North Clearing** – view of electrical equipment and containers shown under the blue tarp in Picture 85, uncovered by Mr. Pennie at the request of CCF.



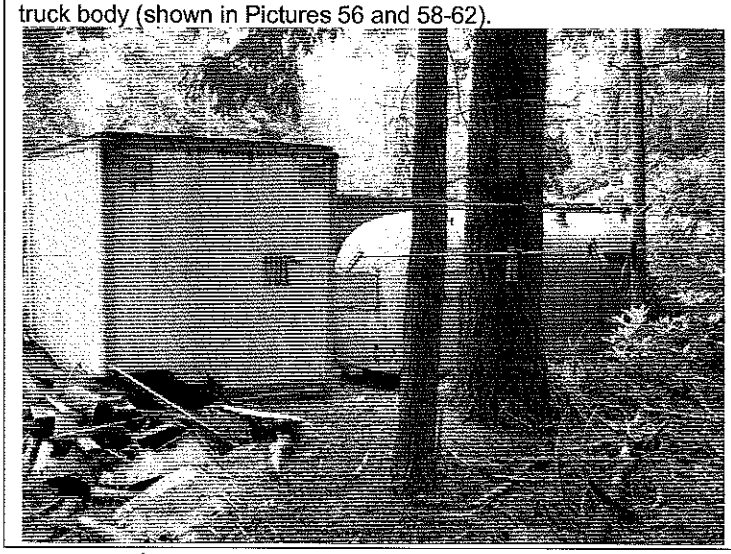
Picture 87: **North Clearing** –behind the Home Site mobile home, looking south.



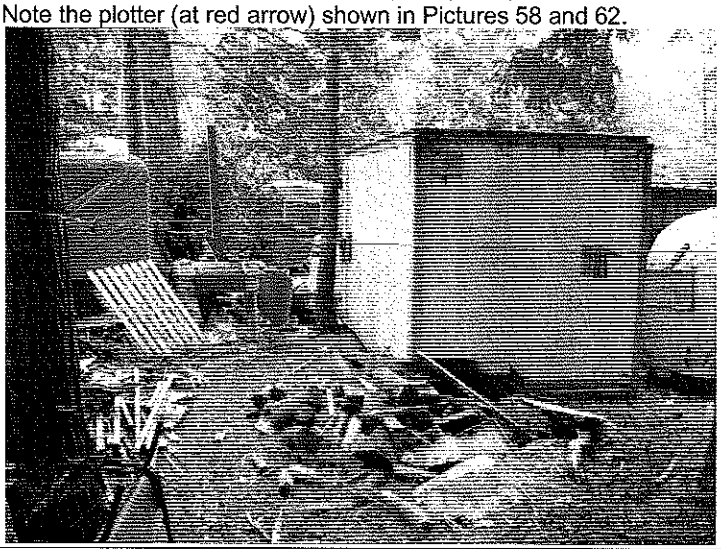
Picture 88: **North Clearing** – view of stored computer equipment in the window of the mobile home addition.



Picture 89: **North Clearing** – looking southeast at a trailer and truck body (shown in Pictures 56 and 58-62).



Picture 90: **North Clearing** – panning left (north) from Picture 89. Note the plotter (at red arrow) shown in Pictures 58 and 62.



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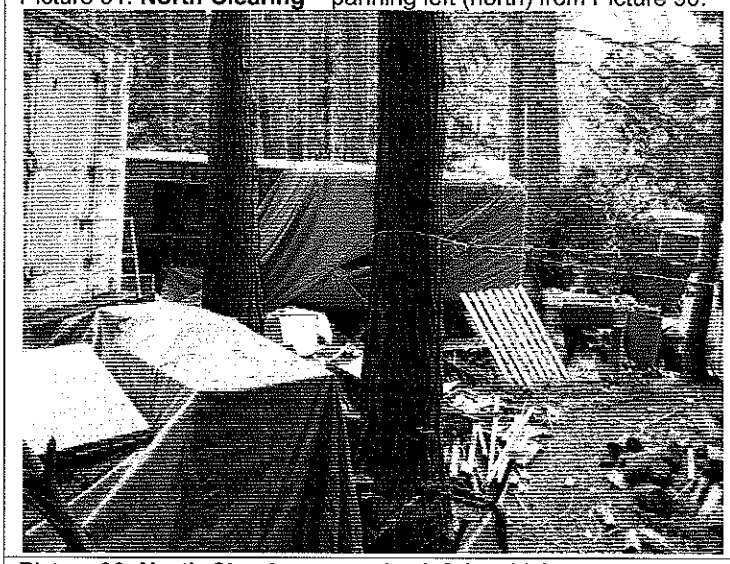
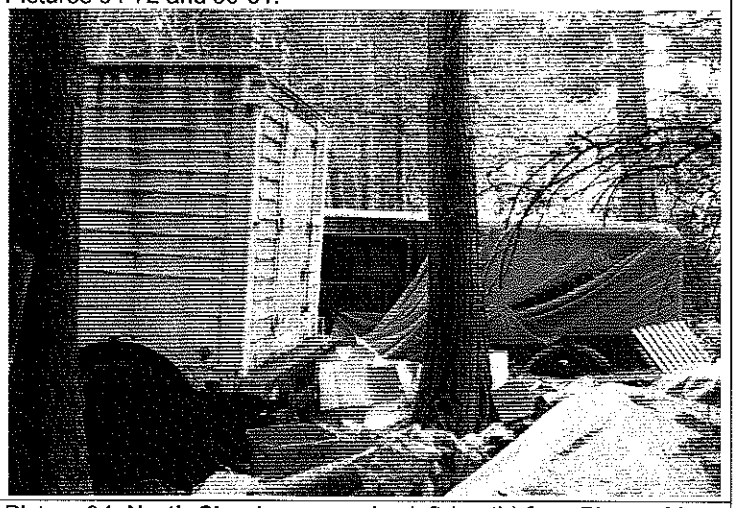
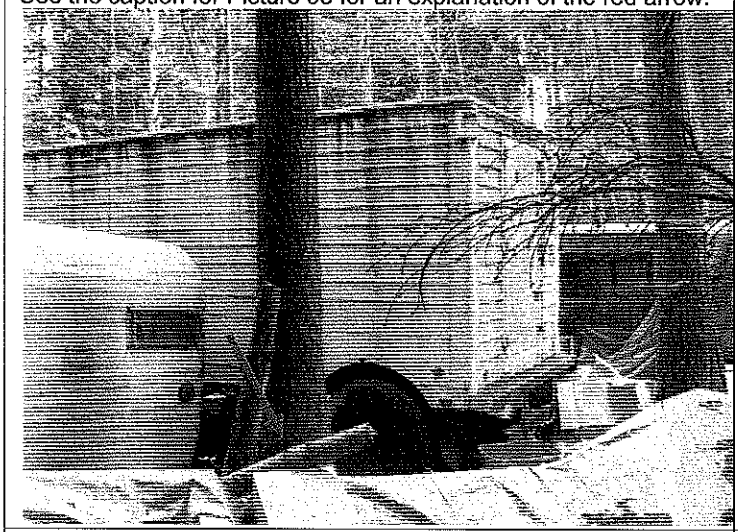
Picture 91: **North Clearing** – panning left (north) from Picture 90.



Picture 92: **North Clearing** – panning left (north) from Picture 91. Note the back of the bus-like vehicle with blue tarp shown in Pictures 64-72 and 90-91.



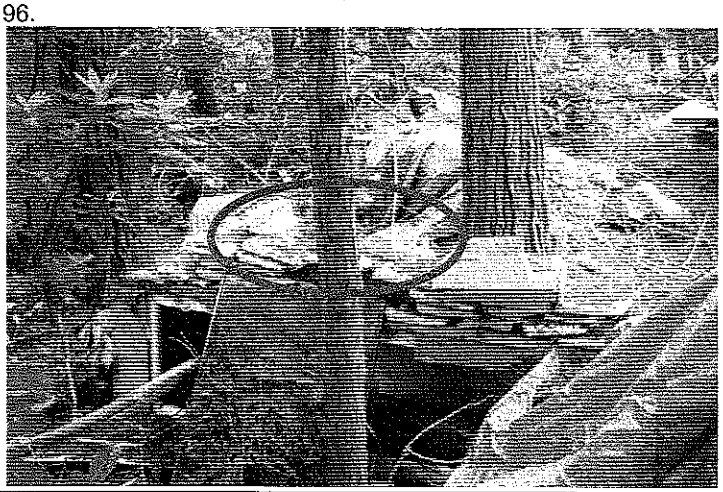
Picture 93: **North Clearing** – panning left (north) from Picture 92. See the caption for Picture 95 for an explanation of the red arrow.



Picture 94: **North Clearing** – panning left (north) from Picture 93.

Picture 95: **North Clearing** – view south of the covered computers shown at the bottom of Pictures 93 and 94 (note the stick leaning against the tarp in this and Picture 93, at red arrows).

Picture 96: **North Clearing** – looking north at the stockpiled computer equipment shown in the background at right in Picture 95 (note the telephone and red telephones circled in this and Picture 96.



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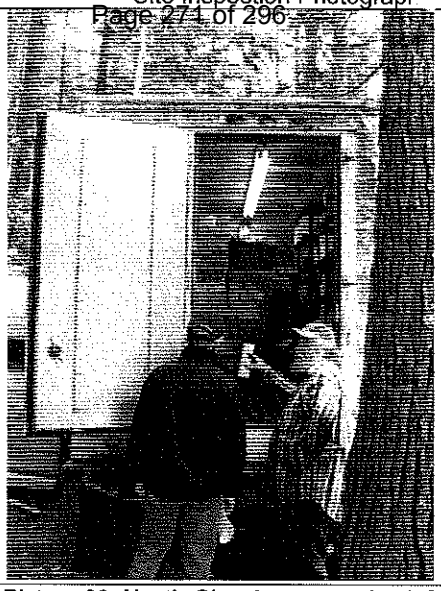
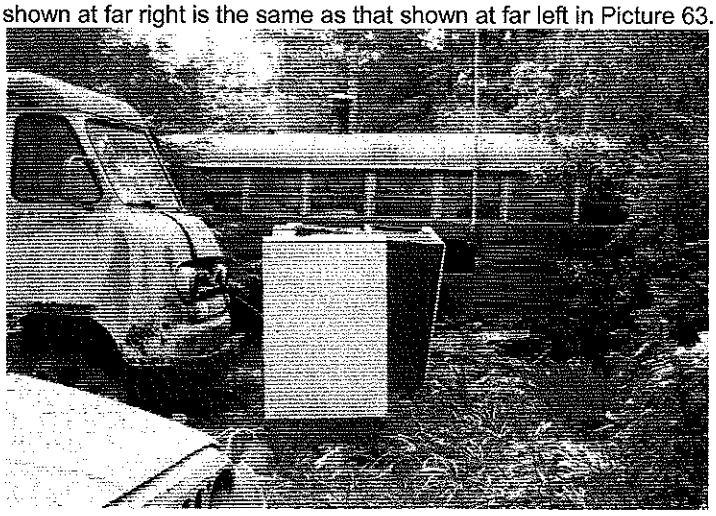


Picture 97: **North Clearing** – inside of the storage truck shown at the center of Picture 93, opened at the request of CCF by Mr. Pennie (shown conversing with Martin Abts, DEQ, and apparently holding his copy of my search warrant).

Picture 98: **North Clearing** – looking southwest at the green bus which borders the northeast site of the Home Site area. The tree shown at far right is the same as that shown at far left in Picture 63.

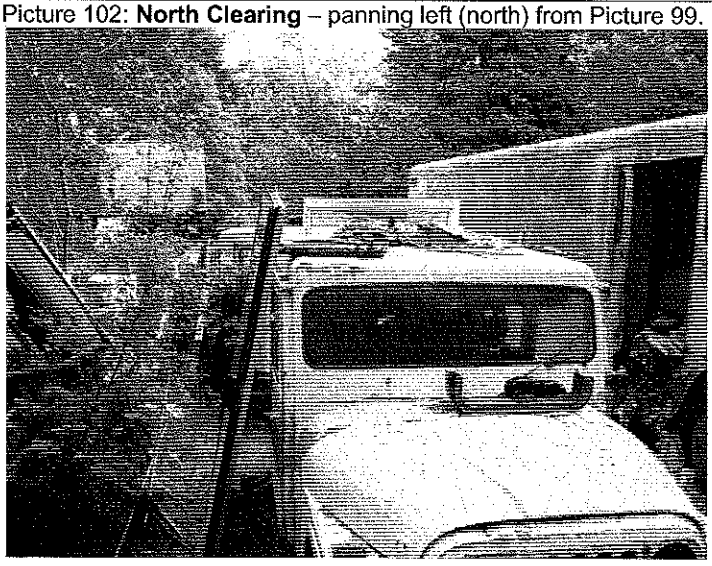


Picture 99: **North Clearing** – panning left (east) from Picture 98.

Picture 100: **North Clearing** – looking west-northwest at the ground adjacent to the large truck shown in the center of Picture 99, viewing a propane tank, trash and apparent container of used oil.

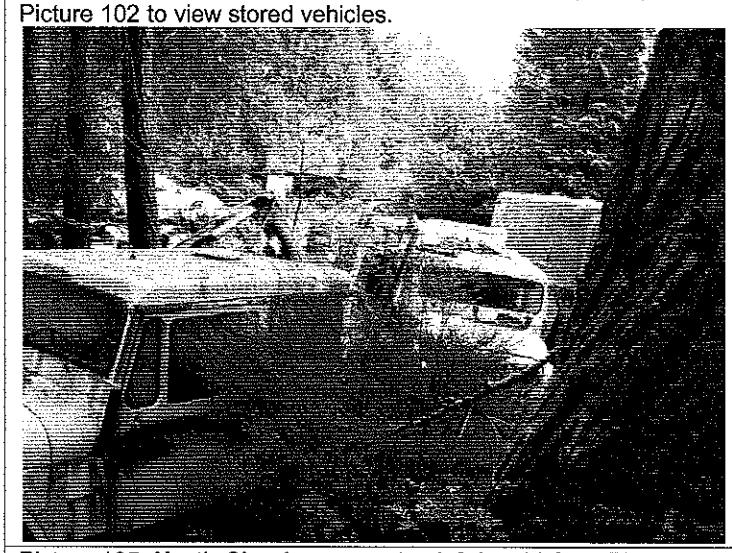
Picture 101: **North Clearing** – close-up of the doorway of the large truck shown in Pictures 99 and 100, viewing computer keyboards and electrical wiring.

Picture 102: **North Clearing** – panning left (north) from Picture 99.



Site Inspection Photograp[illegible] 56295 Tom Smith Rd., Bandon, OR, taken o[illegible]ne 1 and June 2, 2009 by CCF

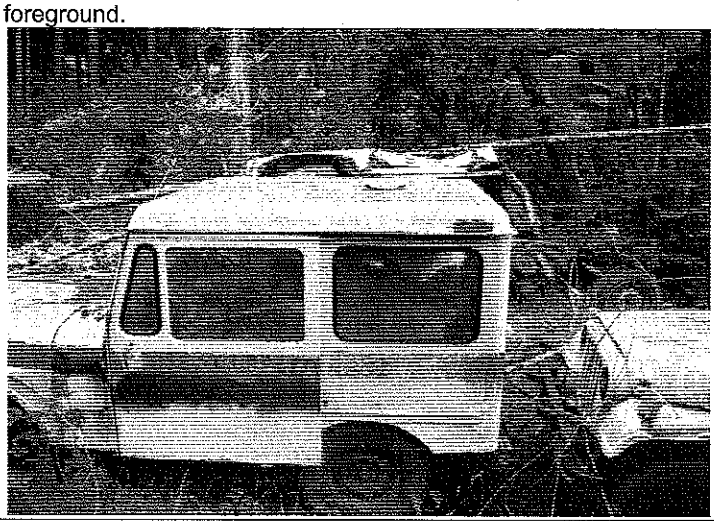
Picture 103: **North Clearing** – stepping back (moving west) from Picture 102 to view stored vehicles.



Picture 104: **North Clearing** –close-up of the demolished vehicle shown in picture 103 at background left.

Picture 105: **North Clearing** – panning left (north) from Picture 103.

Picture 106: **North Clearing** – panning left (west) from Picture 105. Note another demolished vehicle behind the Jeep in the foreground.

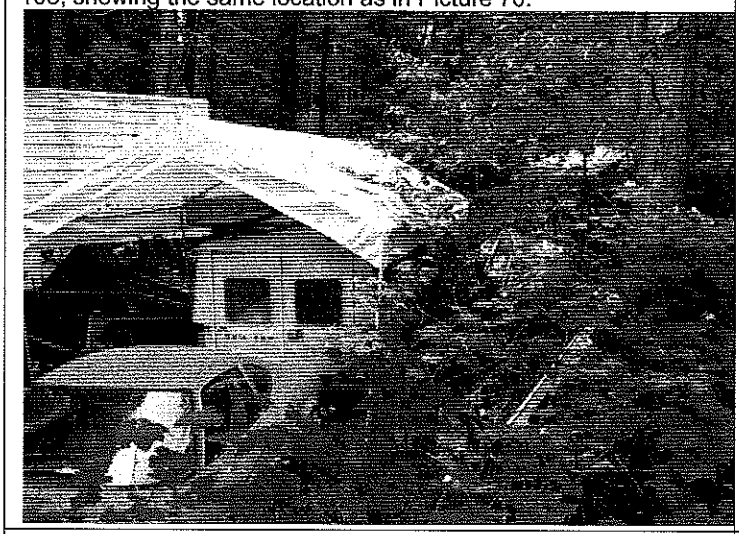


Picture 107: **North Clearing** – panning left (west) from Picture 106.

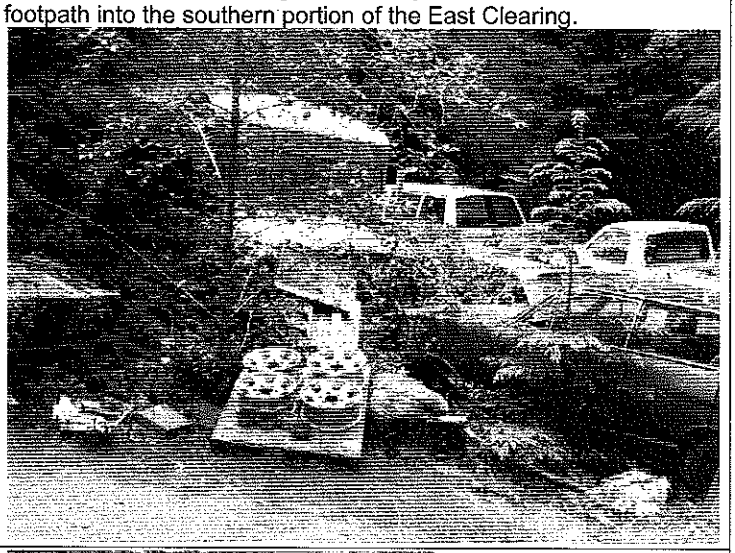
Picture 108: **North Clearing** – panning left from Picture 107. The bus shown in the background is the same as that shown in Pictures 74-78.

Site Inspection Photograp[illegible] 56295 Tom Smith Rd., Bandon, OR, taken o[illegible]ne 1 and June 2, 2009 by CCF

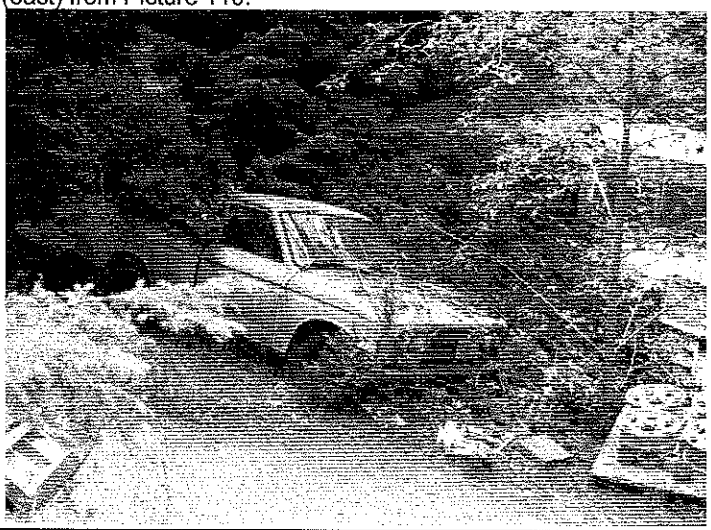
Picture 109: **North Clearing** – panning left (west) from Picture 108, showing the same location as in Picture 70.



Picture 110: **East Clearing, *southern portion*** – entrance to the footpath into the southern portion of the East Clearing.



Picture 111: **East Clearing, *southern portion*** – panning left (east) from Picture 110.



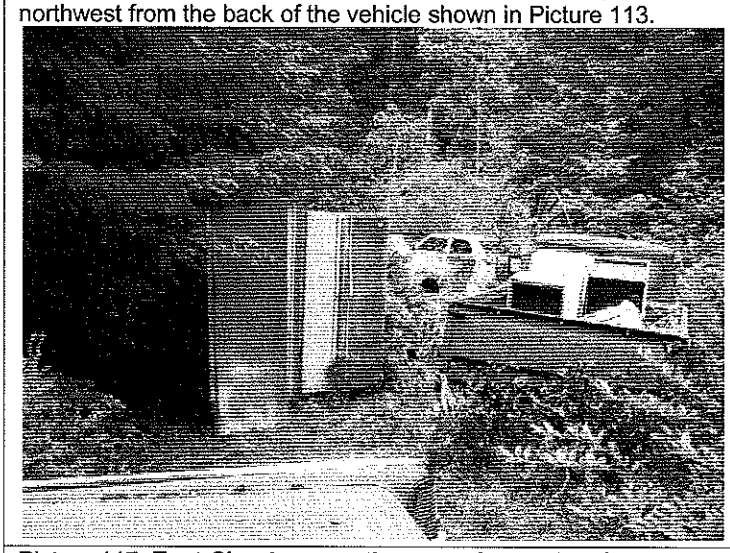
Picture 112: **East Clearing, *southern portion*** – looking southwest down a footpath into the southern portion of the East Clearing, viewing the truck shown in Pictures 110 and 111 and the Southern Access Road

Picture 113: **East Clearing, *southern portion*** – looking northeast along a footpath into the East Clearing blocked by this vehicle and another barely visible as a brown blotch at center (red arrow here and in Picture 114).

Picture 114: **East Clearing, *southern portion*** - looking south towards the South Clearing at a locked tractor trailer container and a door leaning against another abandoned truck.

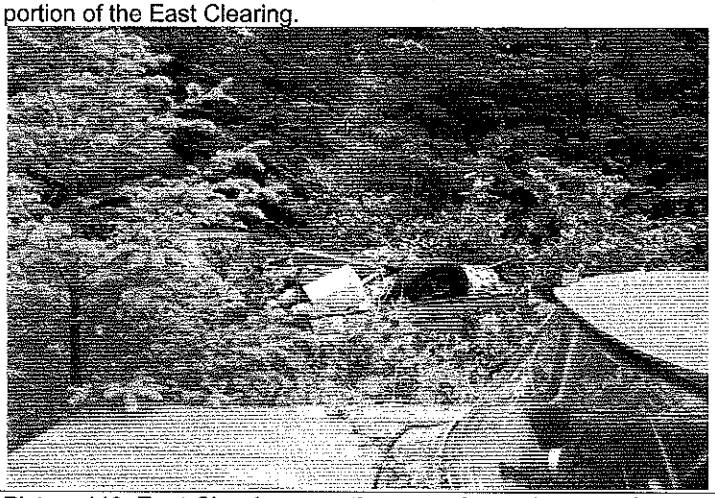
Site Inspection Photograp[illegible] 56295 Tom Smith Rd., Bandon, OR, taken [illegible]une 1 and June 2, 2009 by CCF

Picture 115: **East Clearing, *southern portion*** – looking to the northwest from the back of the vehicle shown in Picture 113.

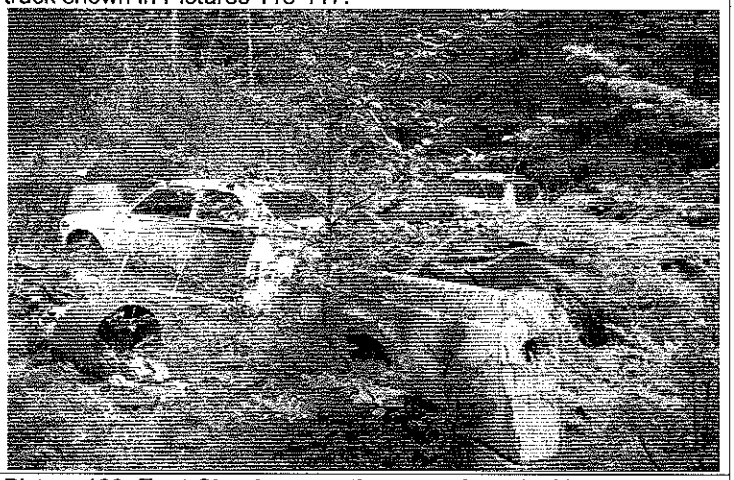


Picture 116: **East Clearing, *southern portion*** – close-up of what appear to be microfiche readers in the bed of the red pickup shown in Picture 115.

Picture 117: **East Clearing, *southern portion*** – taken from the left (west) side of the red pickup truck shown in Pictures 115 and 116, viewing vehicles stored around the perimeter of the southern portion of the East Clearing.

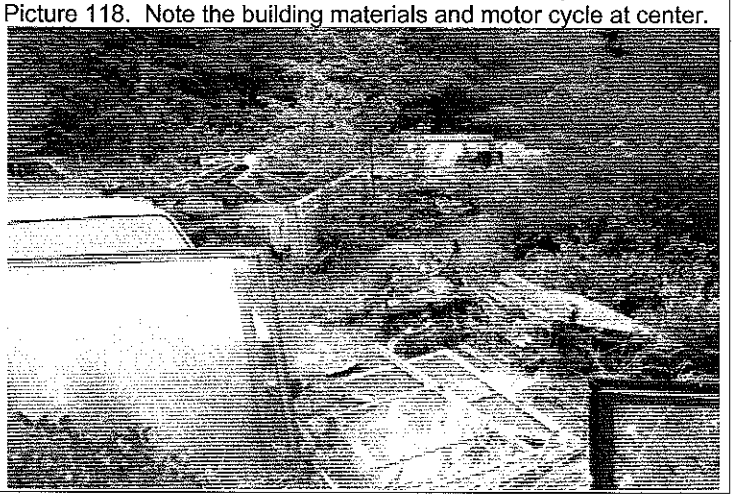


Picture 118: **East Clearing, *southern portion*** – looking at more stored vehicles around the perimeter of the southern portion of the East Clearing from a vantage point just north of the red pickup truck shown in Pictures 115-117.



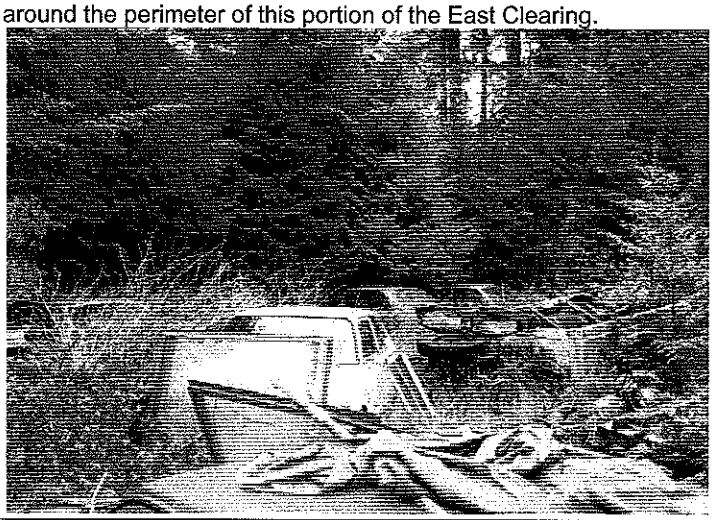
Picture 119: **East Clearing, *southern portion*** – close-up of an apparent burn barrel shown at the bottom left of Picture 118.

Picture 120: **East Clearing, *southern portion*** – looking southeast from a point northwest of Picture 118 showing the red pickup truck seen in Pictures 115-117 and the truck bed with scrap metal from Picture 118. Note the building materials and motor cycle at center.

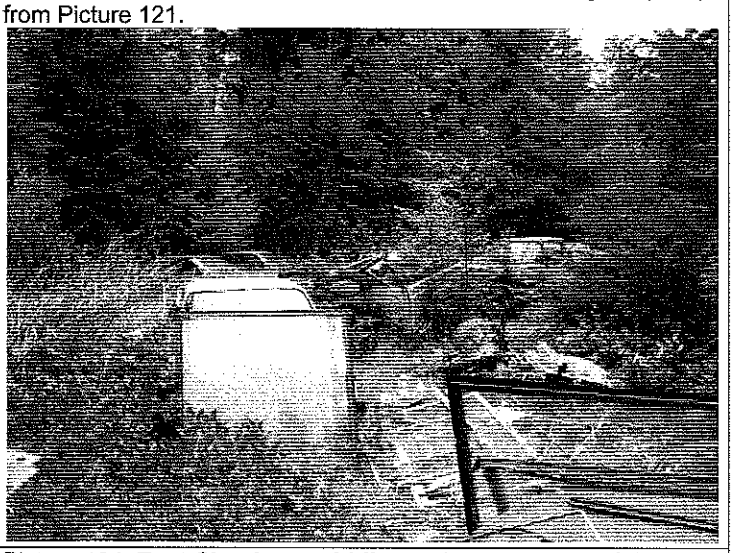


Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

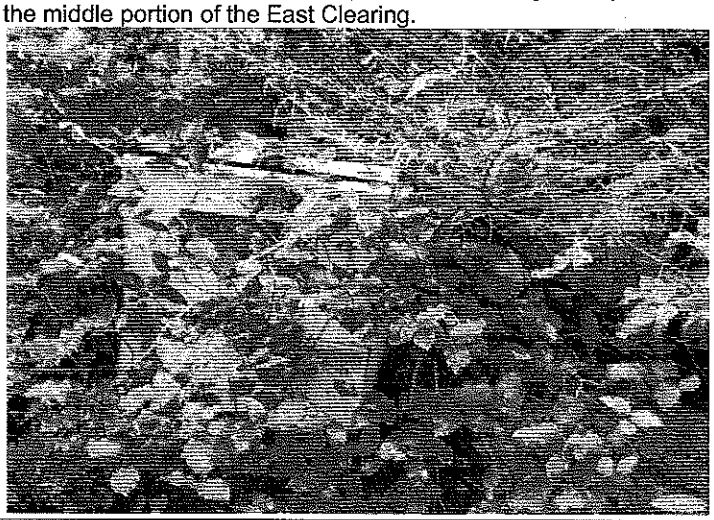
Picture 121: **East Clearing, *southern portion*** – stepping back (moving north) from Picture 120 to view the stored vehicles around the perimeter of this portion of the East Clearing.



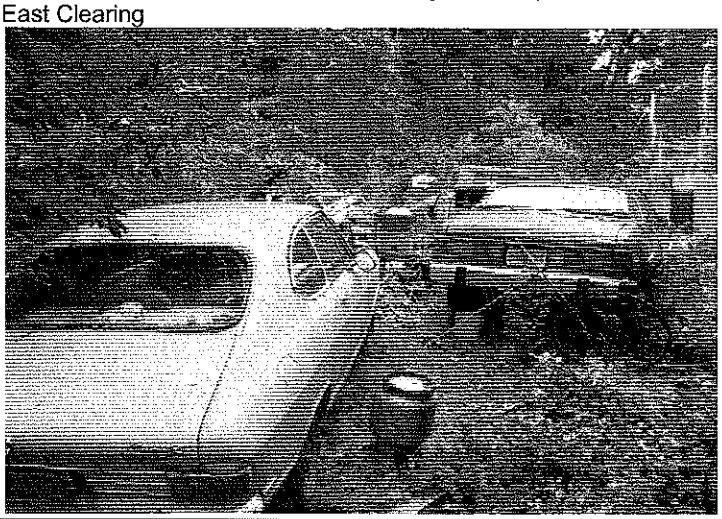
Picture 122: **East Clearing *southern portion*** – panning left (east) from Picture 121.



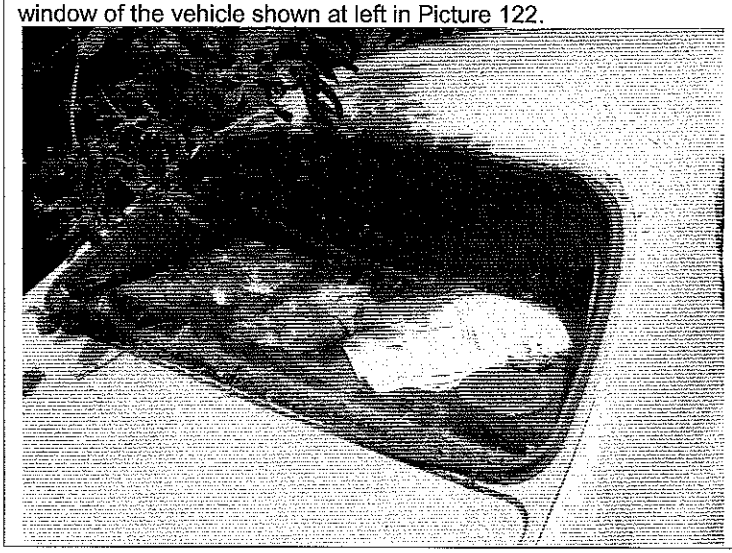
Picture 123: **East Clearing, *middle portion*** – looking at an apparent stove in the brush along the southern edge of a path into the middle portion of the East Clearing.



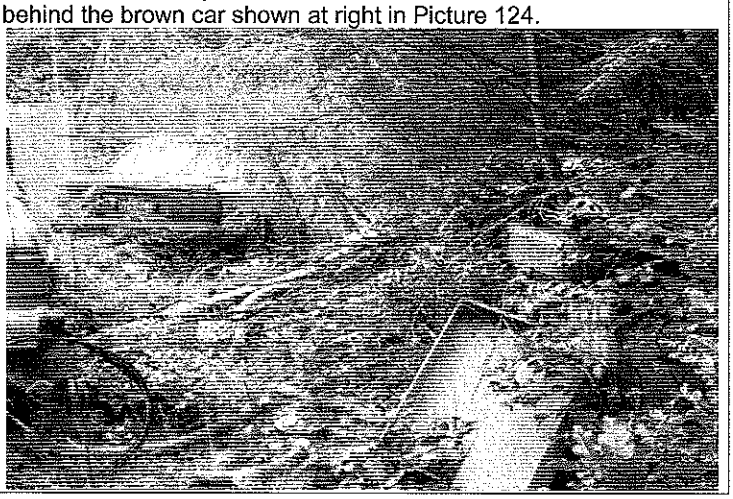
Picture 124: **East Clearing, *middle portion*** – panning left (north) from Picture 123 viewing the path leading into this portion of the East Clearing



Picture 125: **East Clearing, *middle portion*** –close-up of the back window of the vehicle shown at left in Picture 122.

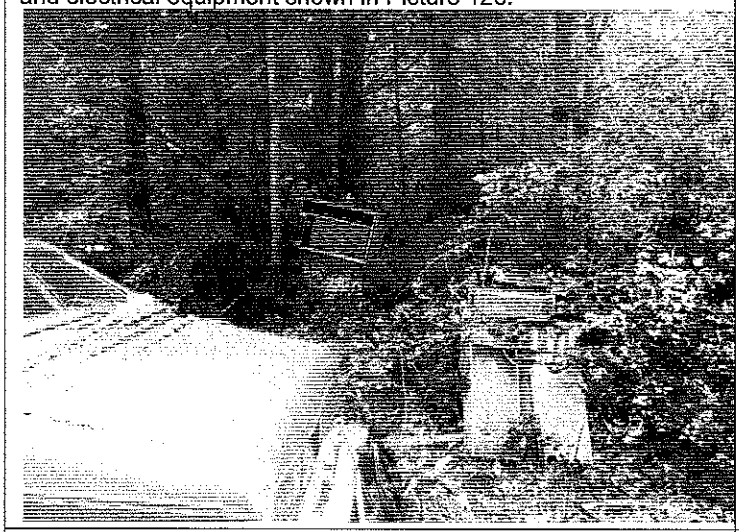


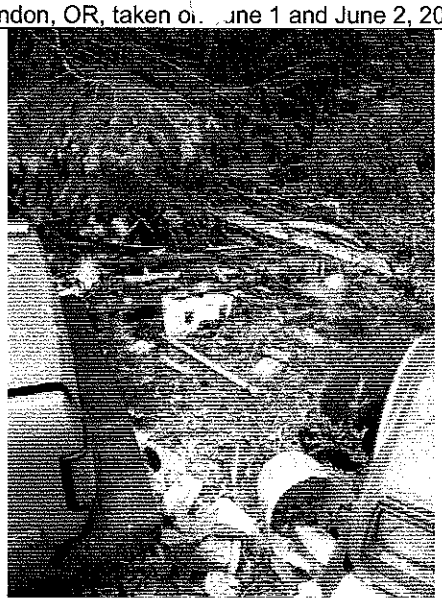
Picture 126: **East Clearing, *middle portion*** – panning right from Picture 124 along the right edge of a path leading into this portion of the East Clearing from the South Access Road; taken from behind the brown car shown at right in Picture 124.



Site Inspection Photograph of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

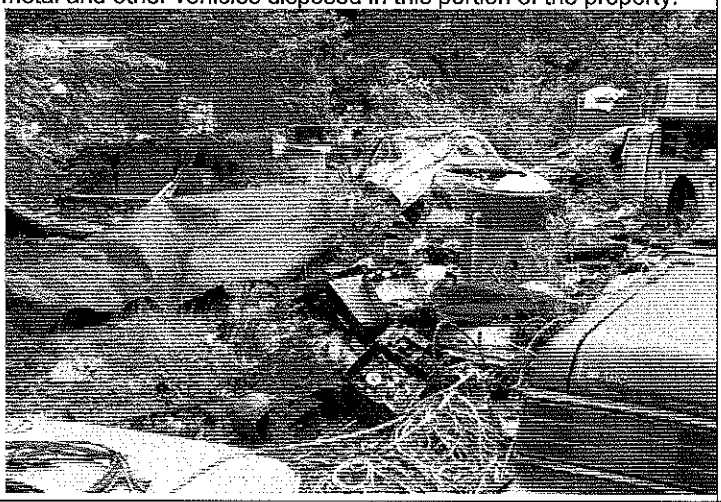
Picture 127: **East Clearing, *middle portion*** – view of appliances and electrical equipment shown in Picture 126.



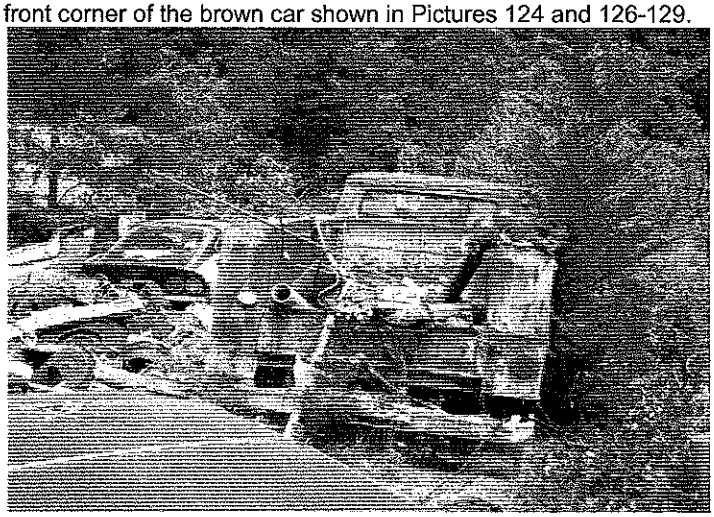


Picture 128: **East Clearing, *middle portion*** – close-up of solid waste and electrical equipment along the left (southeastern) side of the path leading into this portion of the East Clearing, between the brown and red vehicles shown in Picture 126.

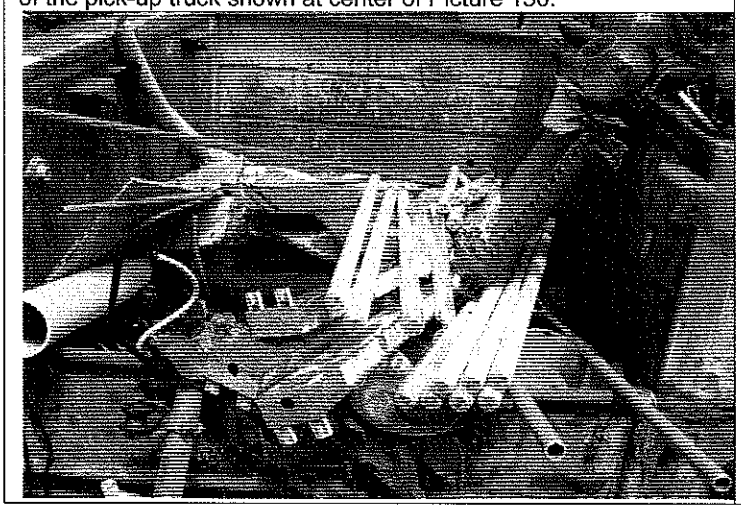
Picture 129: **East Clearing, *middle portion*** – panning left (north) from Picture 127 showing solid waste, electrical equipment, scrap metal and other vehicles disposed in this portion of the property.



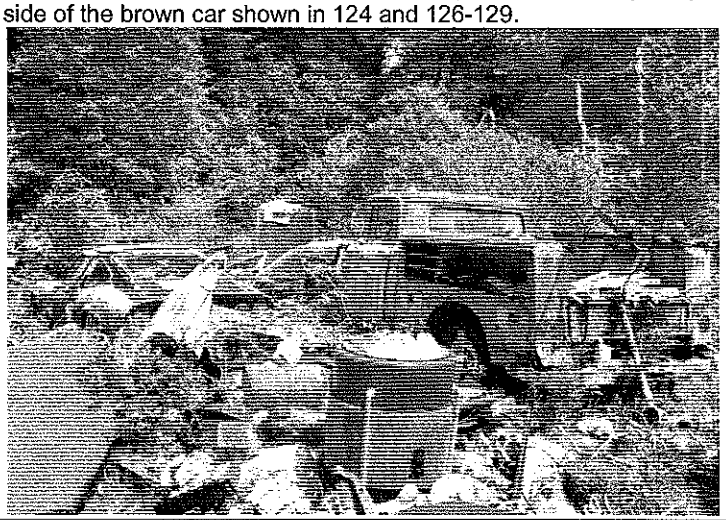
Picture 130: **East Clearing, *middle portion*** – looking at the bed of the pickup truck shown at top right in Picture 129, near the right front corner of the brown car shown in Pictures 124 and 126-129.



Picture 131: **East Clearing, *middle portion*** – close-up of electrical equipment and broken fluorescent light tubes in the back of the pick-up truck shown at center of Picture 130.

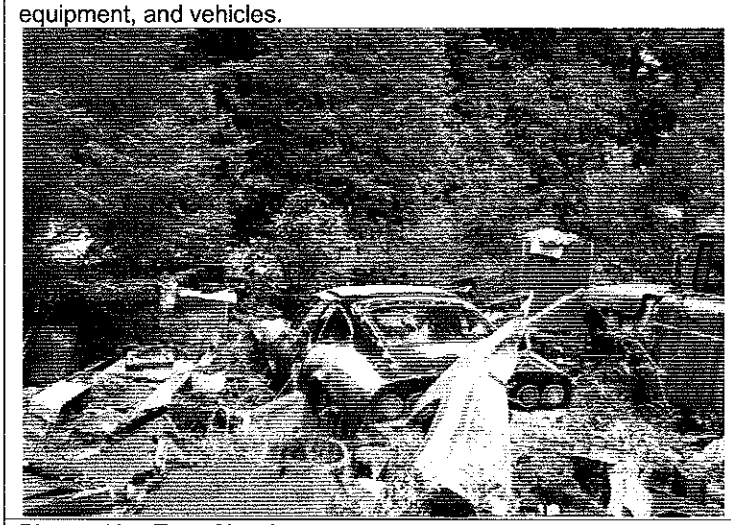


Picture 132: **East Clearing, *middle portion*** – view of solid waste, electrical equipment and auto parts from a point on the left (north) side of the brown car shown in 124 and 126-129.

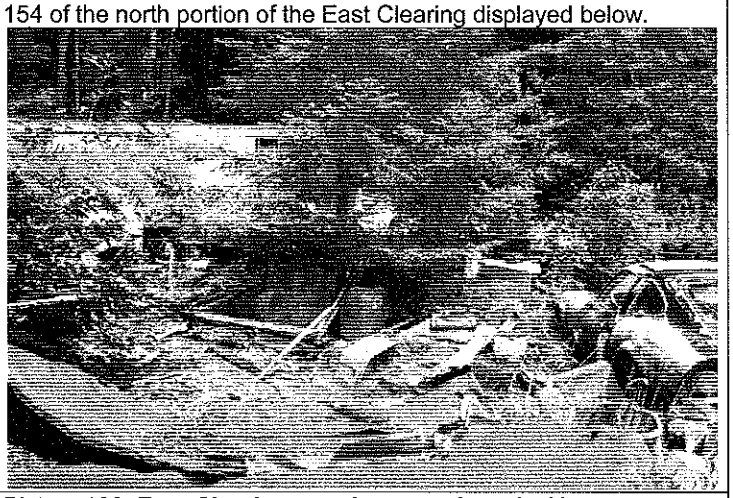


Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

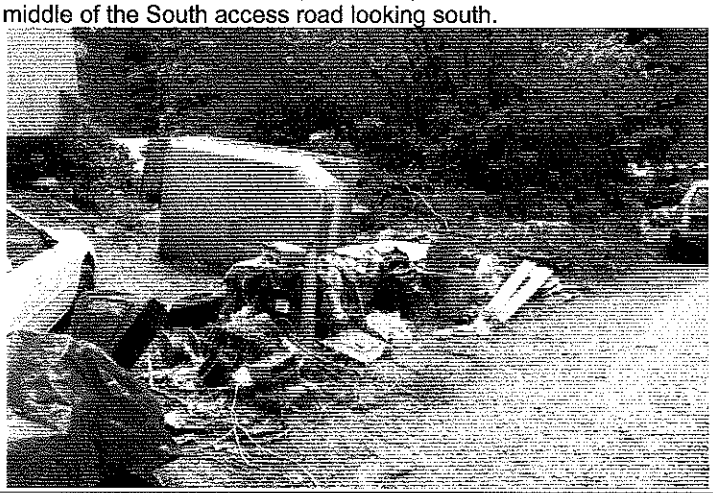
Picture 133: **East Clearing, *middle portion*** – panning left (west) from Picture 132, viewing solid waste, scrap metal, electrical equipment, and vehicles.



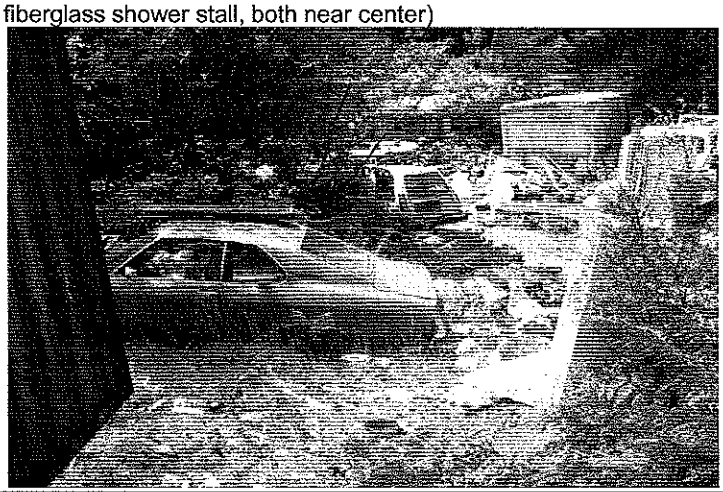
Picture 134: **East Clearing, *middle portion*** – panning left (west) from Picture 133. The large white structure in the background is the partially burned travel trailer shown Pictures 141-146 and 149-154 of the north portion of the East Clearing displayed below.



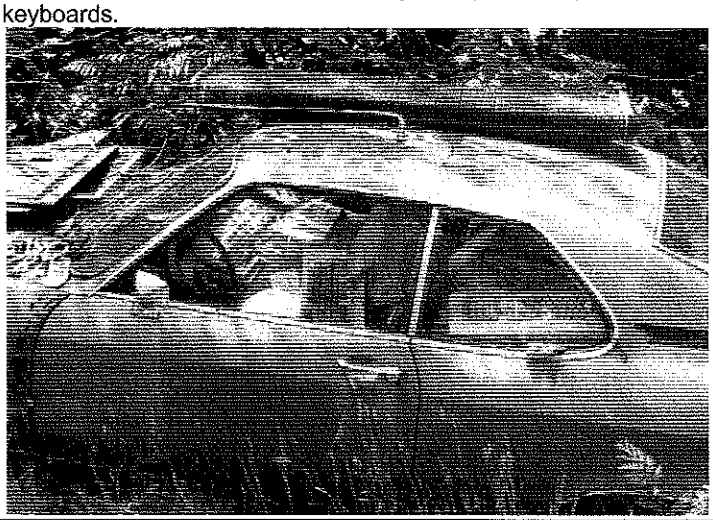
Picture 135: **East Clearing, *northern portion*** – looking at the access way into this portion of the East Clearing partially marked by a fiberglass shower stall (center-left), as viewed from the middle of the South access road looking south.



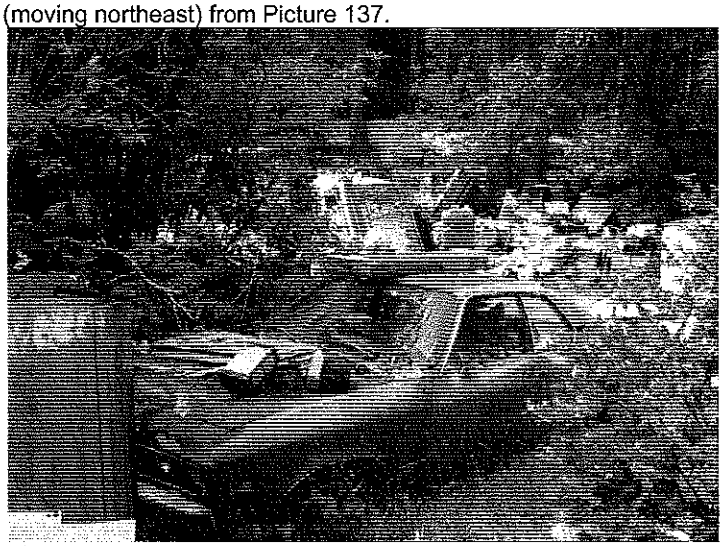
Picture 136: **East Clearing, *northern portion*** – looking west-southwest at the South Access Road from along the access way into this portion of the East Clearing (marked by the gray car and fiberglass shower stall, both near center)



Picture 137: **East Clearing, *northern portion*** – close-up of the gray car shown in Picture 136, viewing stockpiled computer keyboards.

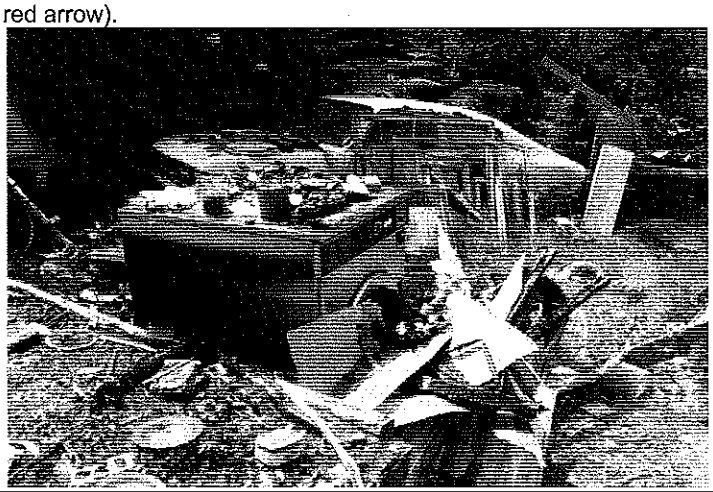


Picture 138: **East Clearing, *northern portion*** – stepping back (moving northeast) from Picture 137.

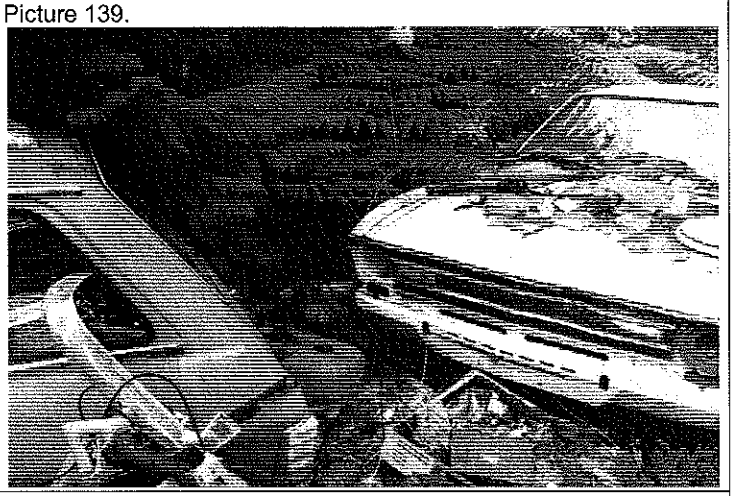


Site Inspection Photograph of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

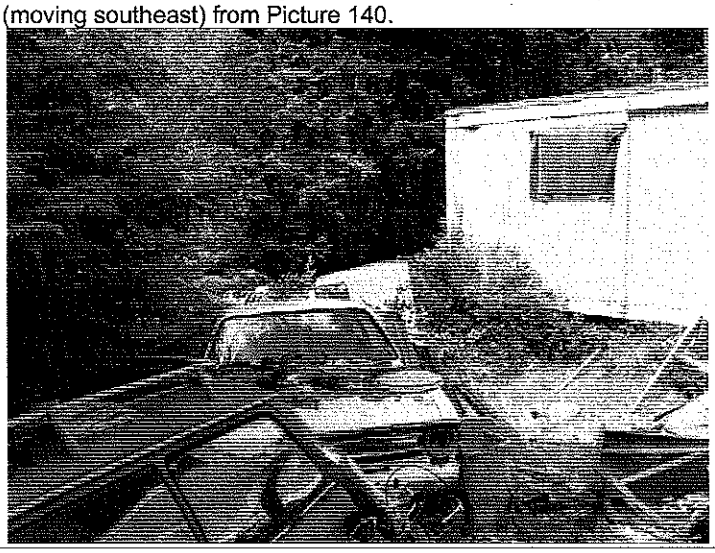
Picture 139: **East Clearing, *northern portion*** – stepping back further (moving northeast) from Picture 138 showing a washer and assorted solid waste, scrap metal, and burned wastes (gray car at red arrow).



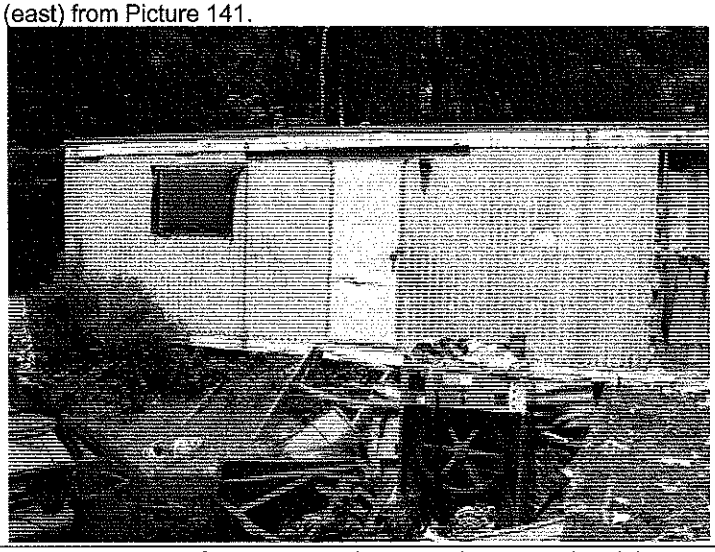
Picture 140: **East Clearing, *northern portion*** – view of solid waste, electronic equipment, auto parts and an apparent gas can between ahead of the white car shown in background center of Picture 139.



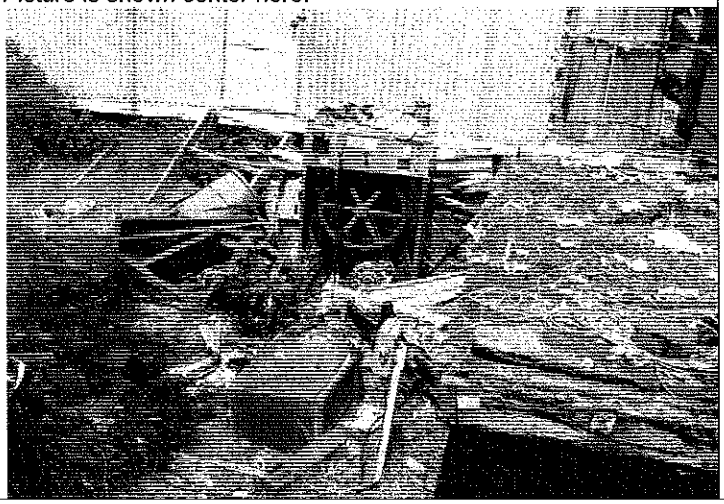
Picture 141: **East Clearing, *northern portion*** – stepping back (moving southeast) from Picture 140.



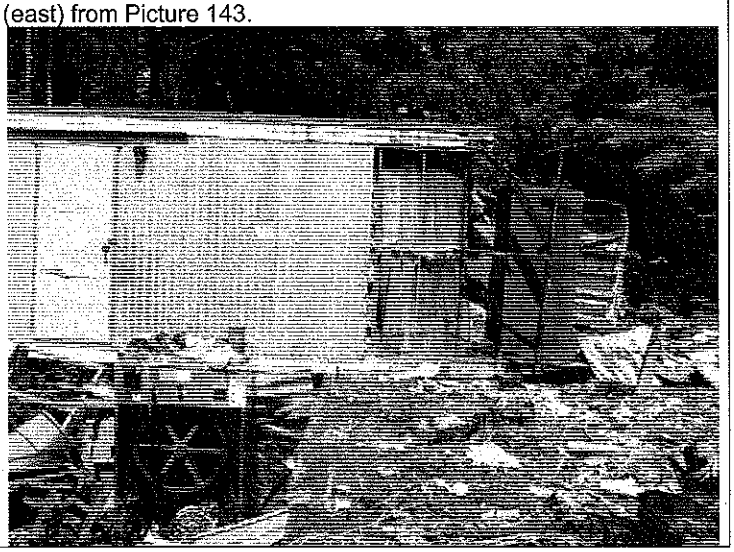
Picture 142: **East Clearing, *northern portion*** – panning right (east) from Picture 141.



Picture 143: **East Clearing, *northern portion*** – panning right (east) from Picture 142. The scrap washer shown center-left in Picture is shown center here.

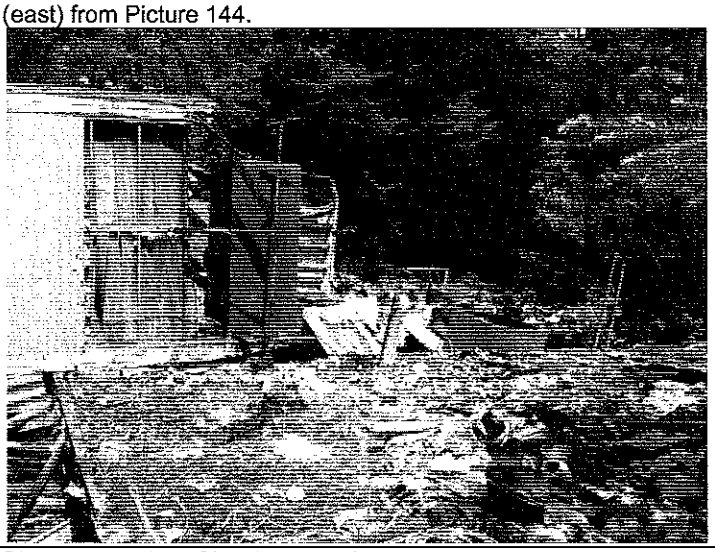


Picture 144: **East Clearing, *northern portion*** – panning right (east) from Picture 143.

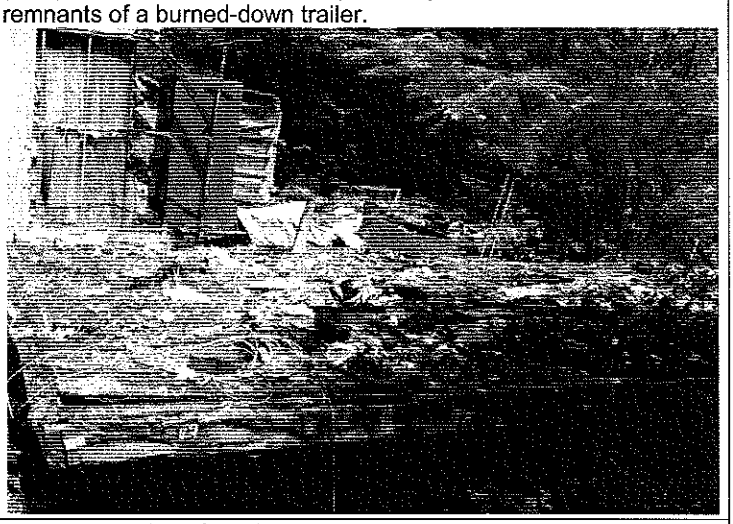


Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

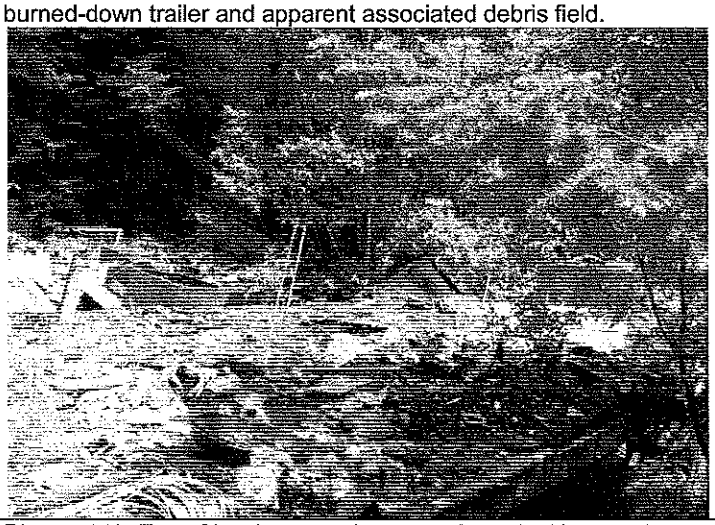
Picture 145: **East Clearing, *northern portion*** – panning right (east) from Picture 144.



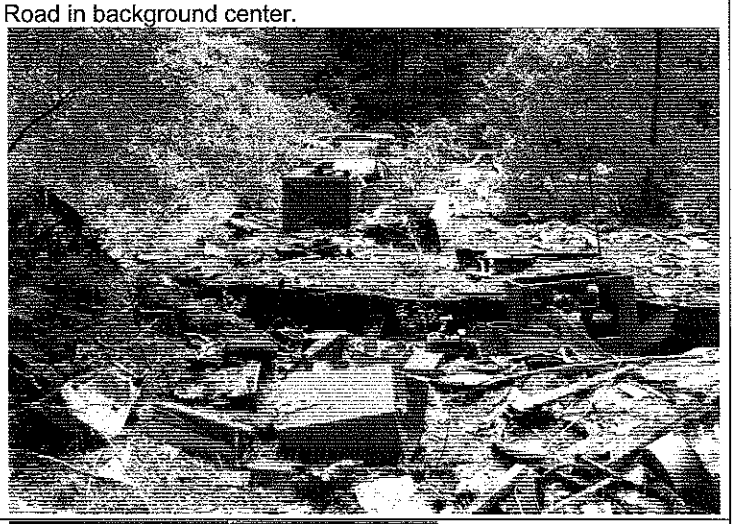
Picture 146: **East Clearing, *northern portion*** – Panning right (east) from Picture 145. The object filling this photo is the floor and remnants of a burned-down trailer.



Picture 147: **East Clearing, *northern portion*** – vantage point 180° from Picture 146 showing the floor and remnants of the burned-down trailer and apparent associated debris field.



Picture 148: **East Clearing, *northern portion*** – stepping back (northeast) from Picture 147 looking towards the Sough Access Road in background center.

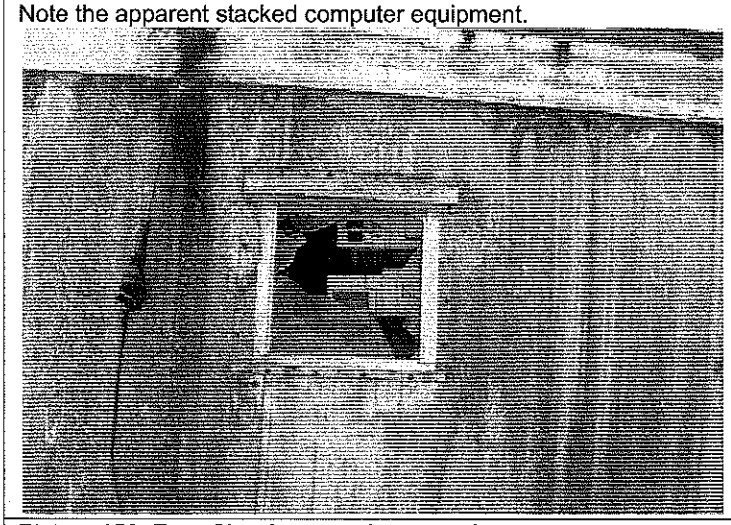


Picture 149: **East Clearing, *northern portion*** – looking southeast from near the northeast corner of the partially intact trailer located along the northern edge of the northern portion of the East Clearing.

Picture 150: **East Clearing, *northern portion*** – view of an apparent burned television adjacent to the northeast corner of the partially intact trailer located along the northern edge of the northern portion of the East Clearing.

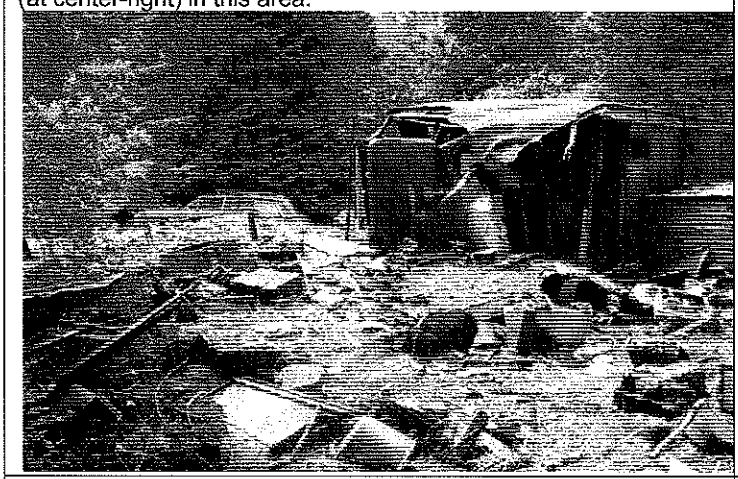
Site Inspection Photograp[illegible]f 56295 Tom Smith Rd., Bandon, OR, taken o[illegible]une 1 and June 2, 2009 by CCF

Picture 151: **East Clearing, *northern portion*** – view through a window in the north wall of the partially intact trailer in this area. Note the apparent stacked computer equipment.



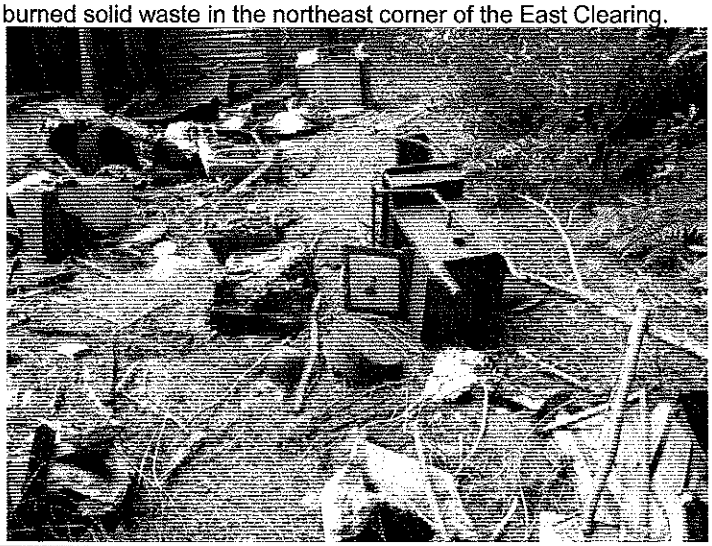
Picture 152: **East Clearing, *northern portion*** – looking southwest at the burned portion of the partially intact trailer in this area.

Picture 153: **East Clearing, *northern portion*** – stepping back (moving northeast) from Picture 152 at the apparent debris field adjacent to the partially burned trailer and the burned down trailer (at center-right) in this area.



Picture 154: **East Clearing, *northern portion*** – panning right (north) from Picture 153.

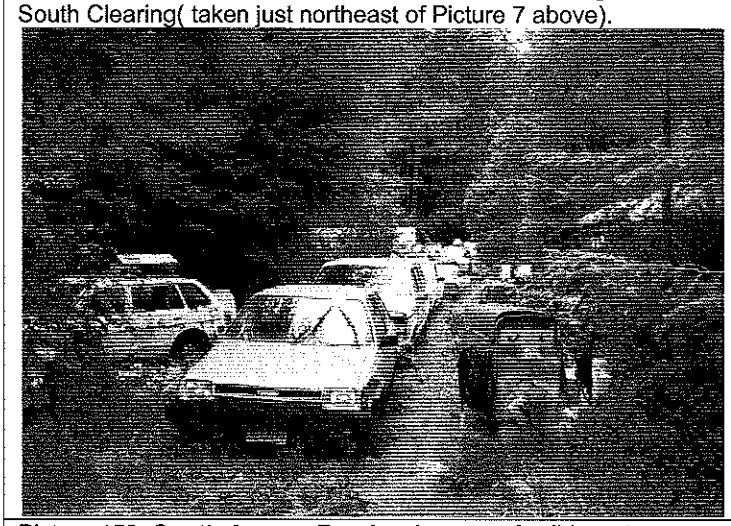
Picture 155: **East Clearing, *northern portion*** – close-up of burned solid waste in the northeast corner of the East Clearing.



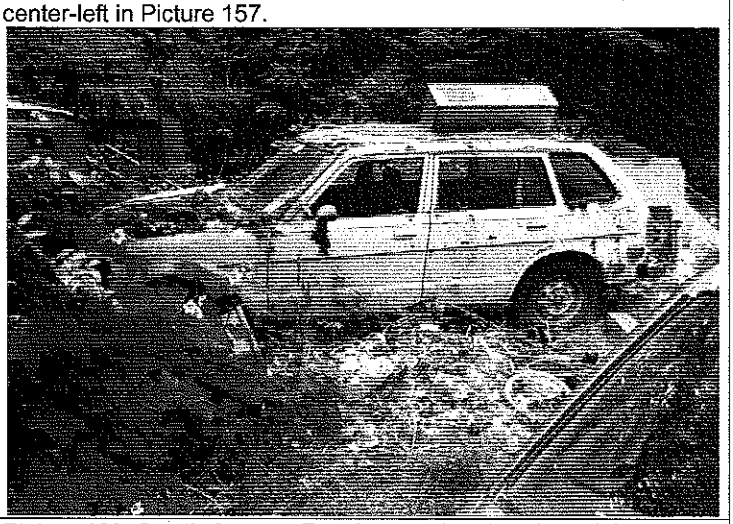
Picture 156: **East Clearing, *northern portion*** – close-up of an apparent burned computer (at center) shown at the bottom of Picture 155.

Site Inspection Photograp[illegible] of 56295 Tom Smith Rd., Bandon, OR, taken o[illegible] June 1 and June 2, 2009 by CCF

Picture 157: **South Access Road** – looking northeast in the middle of the South Access Road from the northern edge of the South Clearing(taken just northeast of Picture 7 above).

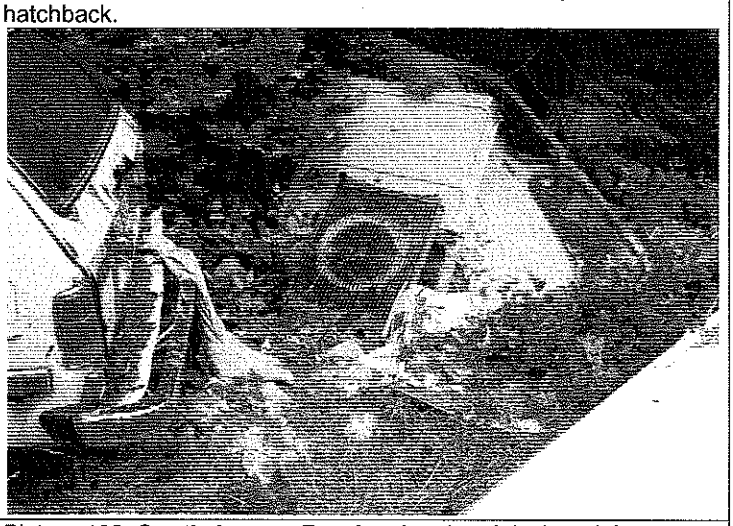


Picture 158: **South Access Road –** view to the northwest at solid waste adjacent to the yellow hatchback and light brown Toyota at center-left in Picture 157.

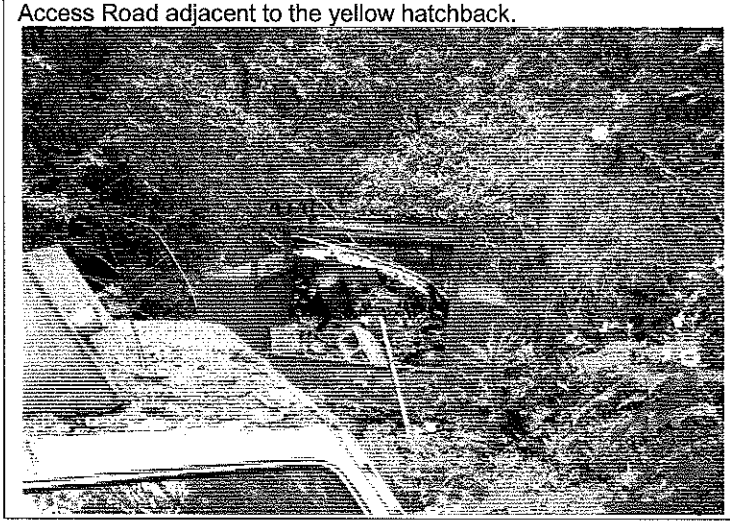


Picture 159: **South Access Road** – close-up of solid waste disposed between the yellow hatchback and light brown Toyota shown in Pictures 156 and 157.

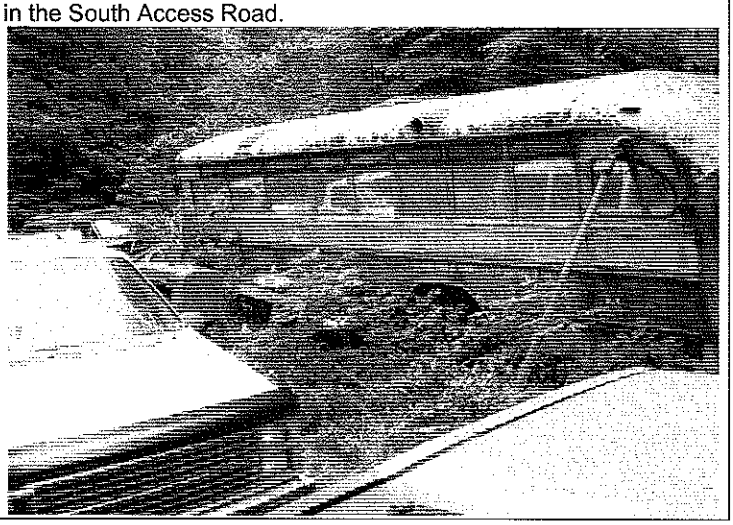
Picture 160: **South Access Road** – panning right (north) from Picture 159 at solid waste and auto parts behind the yellow hatchback.



Picture 161 **South Access Road –** looking up to the northwest at a parked truck in the brush along the west side of the South Access Road adjacent to the yellow hatchback.



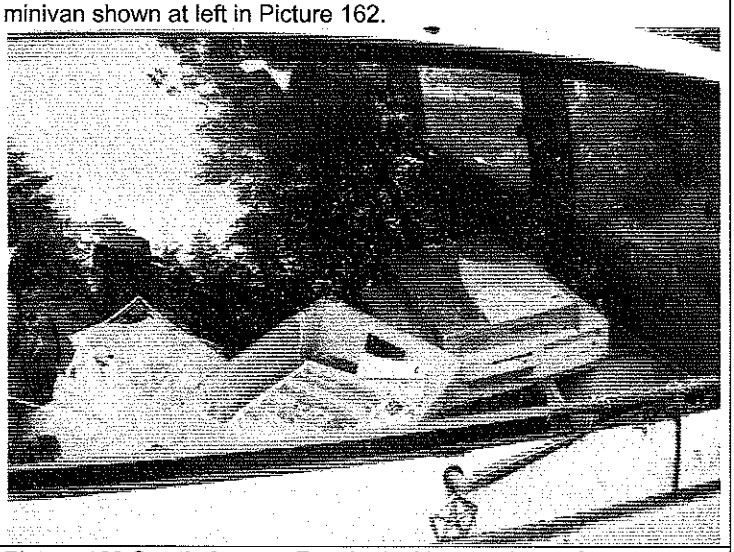
Picture 162: **South Access Road –** planning right (west) from Picture 161, looking northeast from next to the light brown Toyota in the South Access Road.



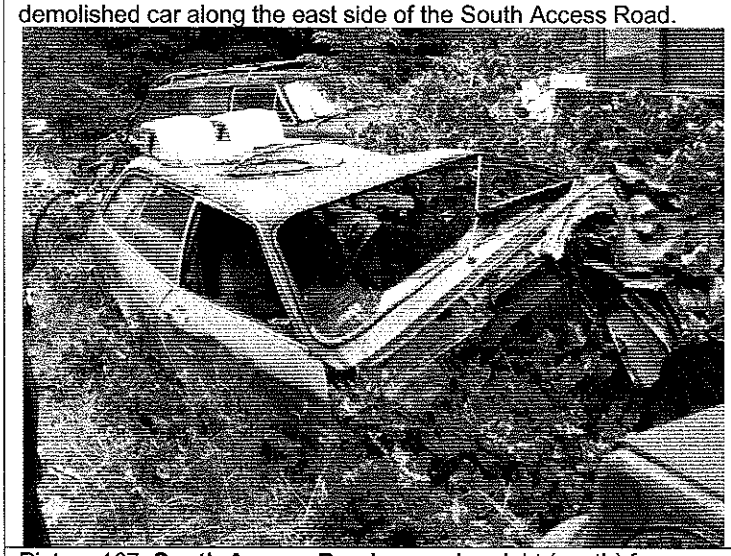
Site Inspection Photograp. of 56295 Tom Smith Rd., Bandon, OR, taken o. June 1 and June 2, 2009 by CCF

Picture 163 **South Access Road** – view east at containers adjacent to the light brown Toyota along the east side of the South Access Road

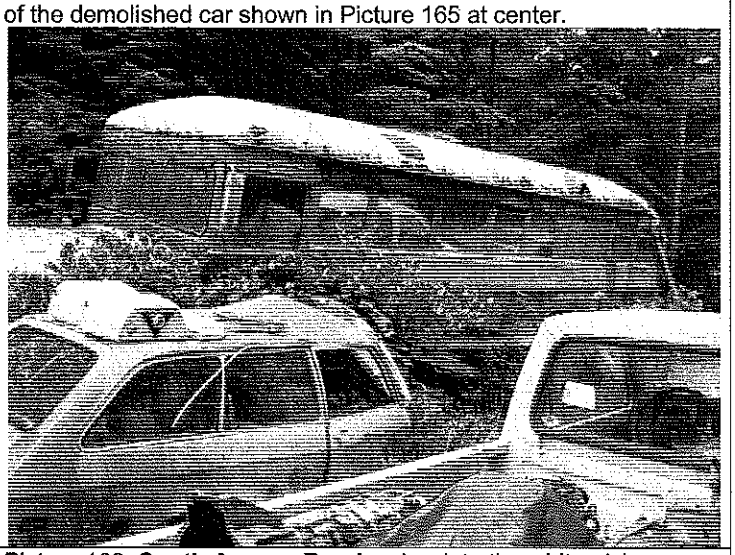
Picture 164: **South Access Road** – view into the back of the minivan shown at left in Picture 162.



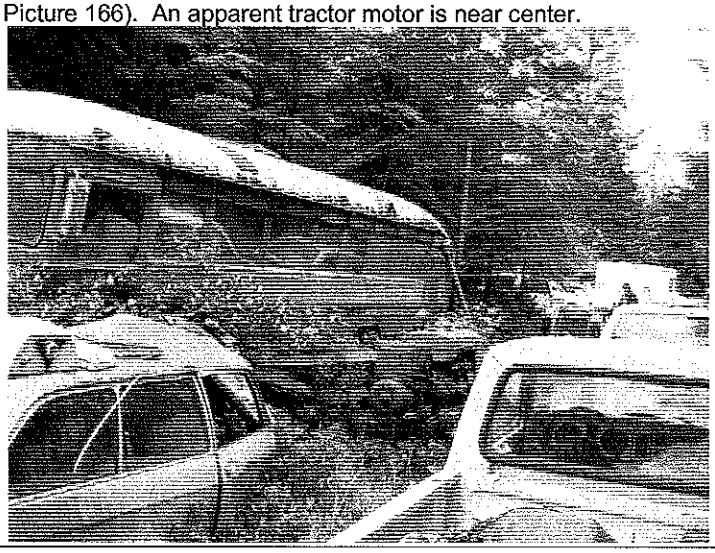
Picture 165: **South Access Road** – view to the northeast of a demolished car along the east side of the South Access Road.



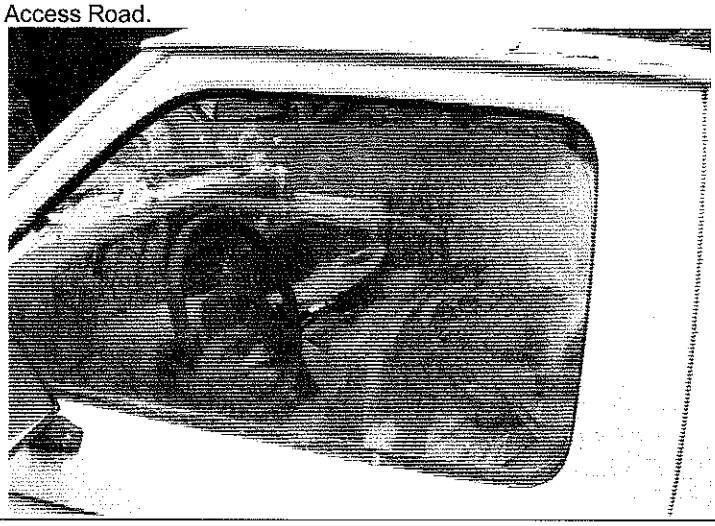
Picture 166 **South Access Road** – looking southeast from ahead of the demolished car shown in Picture 165 at center.



Picture 167: **South Access Road** – panning right (south) from Picture 166). An apparent tractor motor is near center.



Picture 168: **South Access Road** – view into the white pickup truck shown in Pictures 166 and 167 in the middle of the South Access Road.

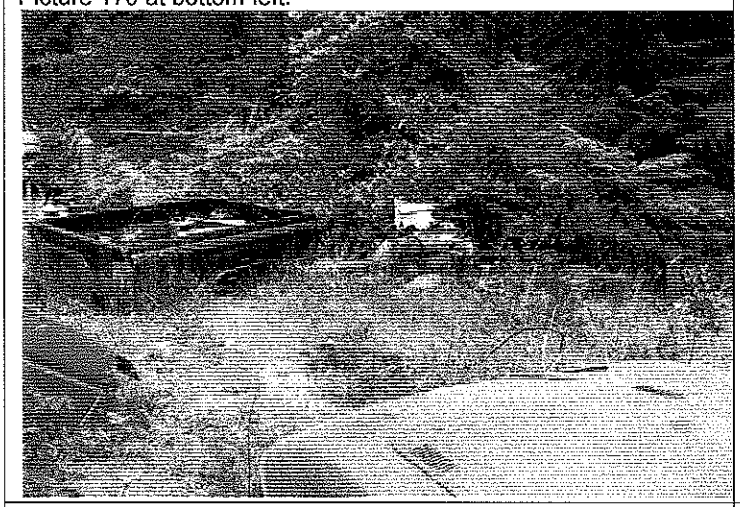


Site Inspection Photograp of 56295 Tom Smith Rd., Bandon, OR, taken c. June 1 and June 2, 2009 by CCF

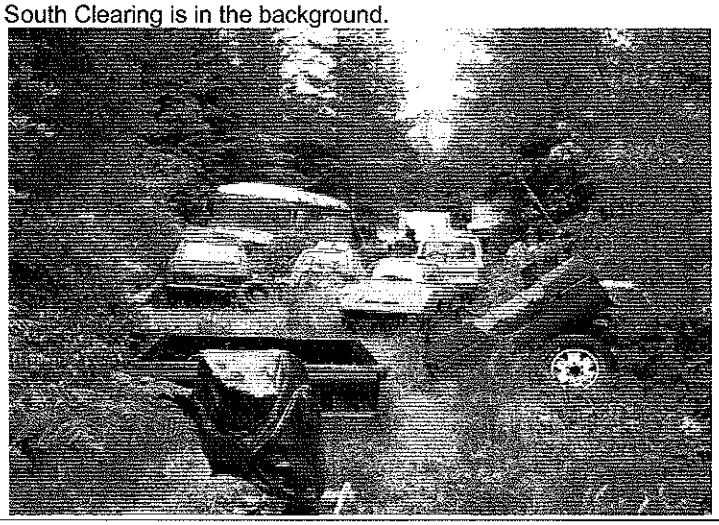
Picture 169: **South Access Road** – panning left (north) from Picture 167.

Picture 170: **South Access Road** – panning left (north) from Picture 169, showing wire, scrap metal and misc. materials.

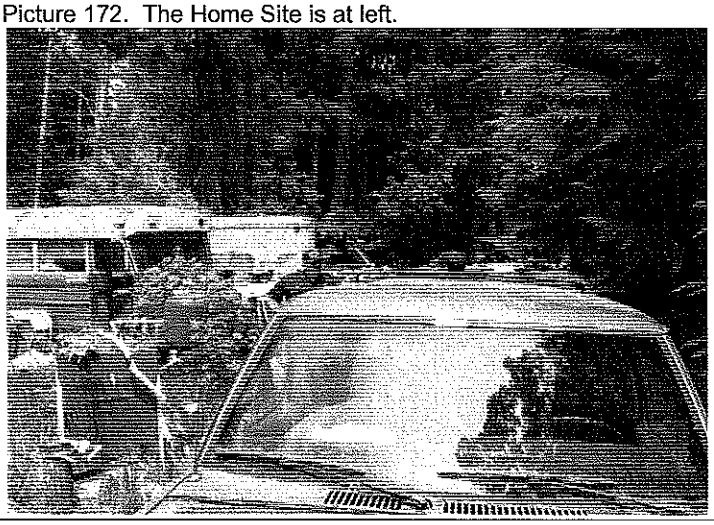
Picture 171: **South Access Road** – looking north from the middle of the South Access Road adjacent to the red car shown in Picture 170 at bottom-left.



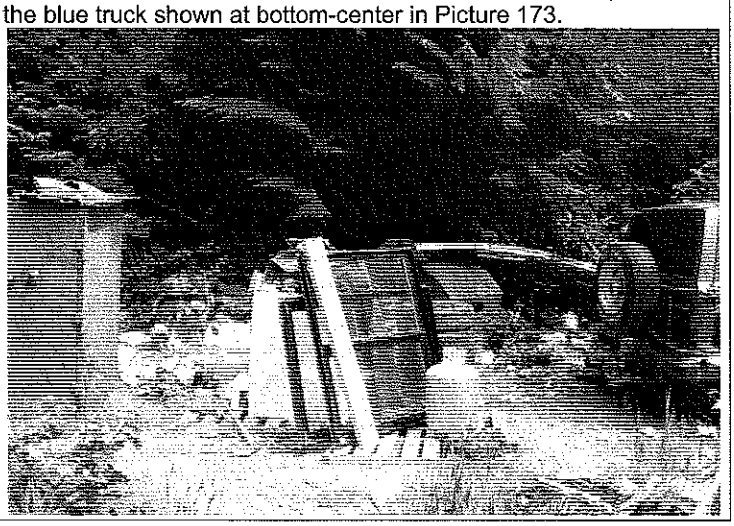
Picture 172: **South Access Road** – looking southwest from the middle of the South Access Road. Note the red car at center. The South Clearing is in the background.



Picture 173: **South Access Road** – looking northeast from the center of the South Access Road. Vantage point 180° from Picture 172. The Home Site is at left.



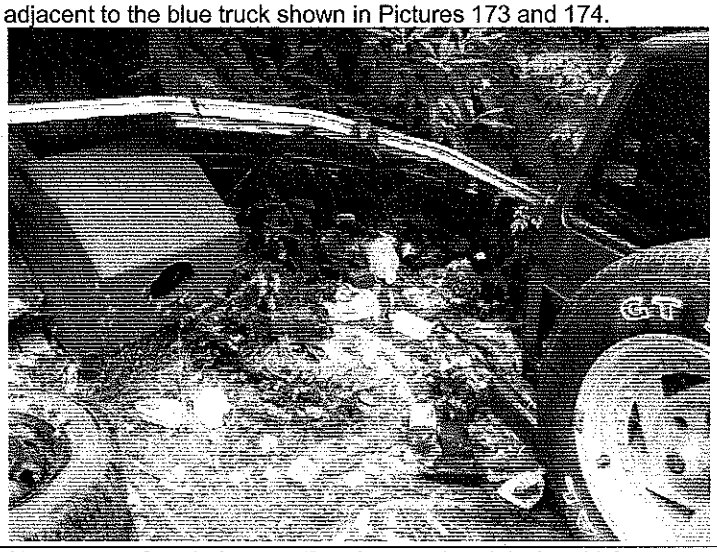
Picture 174: **South Access Road** – looking east at solid waste and misc materials in the center of the South Access Road adjacent to the blue truck shown at bottom-center in Picture 173.



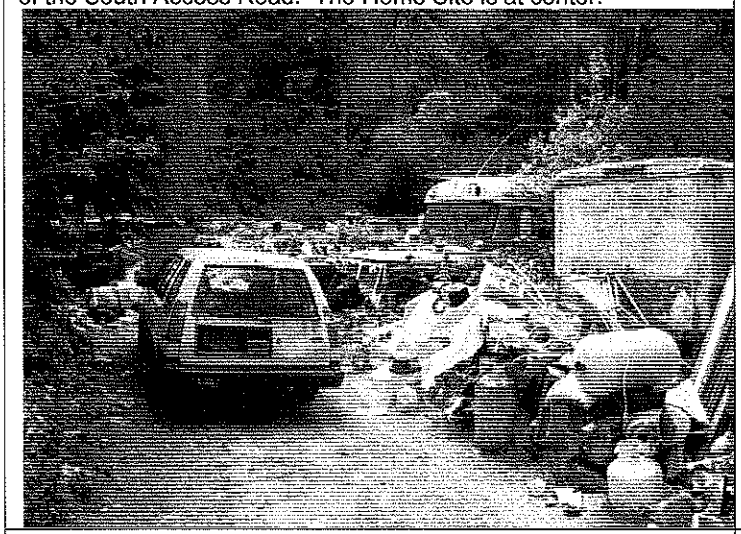
Site Inspection Photograp. of 56295 Tom Smith Rd., Bandon, OR, taken o.. June 1 and June 2, 2009 by CCF

Picture 175: **South Access Road –** panning left (north) from Picture 174. The on-site drinking water well is at bottom left at the blue pressure canister.

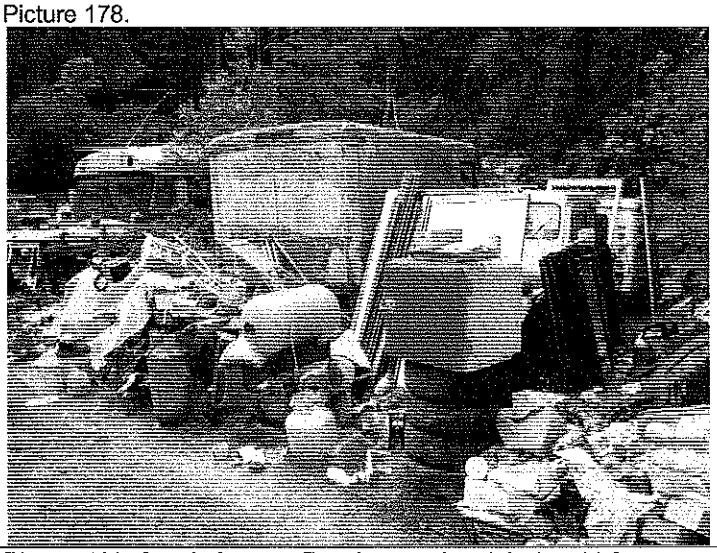
Picture 176: **South Access Road –** close-up of solid waste adjacent to the blue truck shown in Pictures 173 and 174.



Picture 177: **South Access Road –** looking south from the center of the South Access Road. The Home Site is at center.



Picture 178: **South Access Road –** panning right (north) from Picture 178.



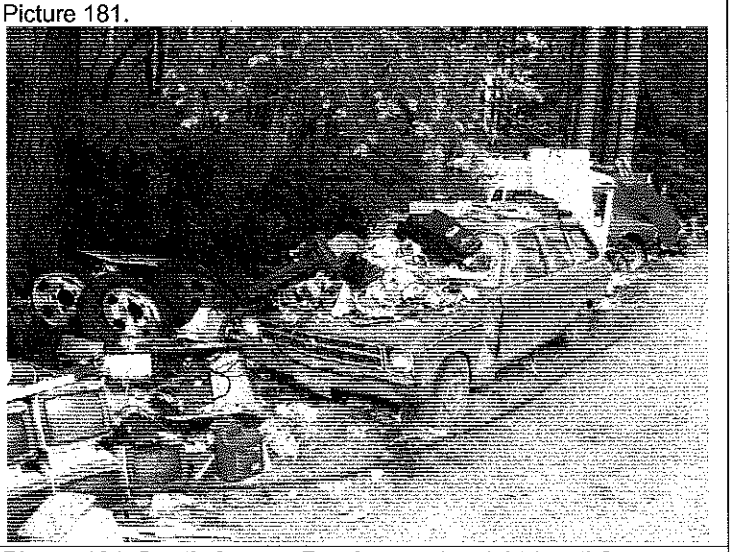
Picture 179: **South Access Road –** panning right (north) from Picture 178.

Picture 180: **South Access Road –** panning right (north) from Picture 179. Note the piled computers and monitors in the foreground.

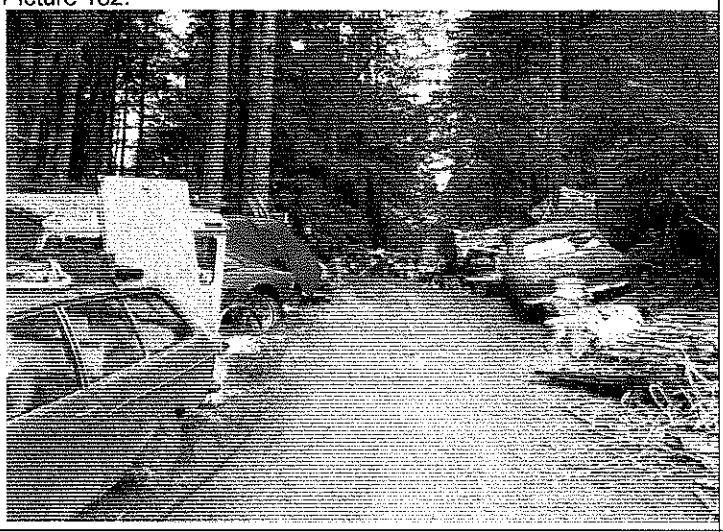
Site Inspection Photograp[illegible] of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 181: **South Access Road** – panning right (north) from Picture 180.

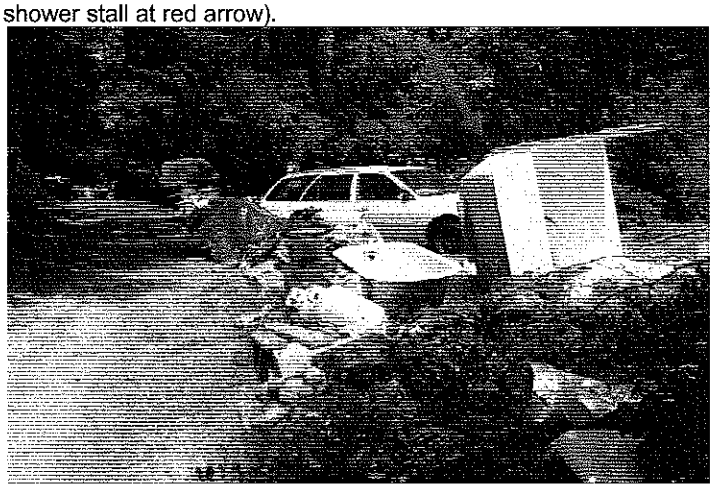
Picture 182: **South Access Road** – panning right (north) from Picture 181.



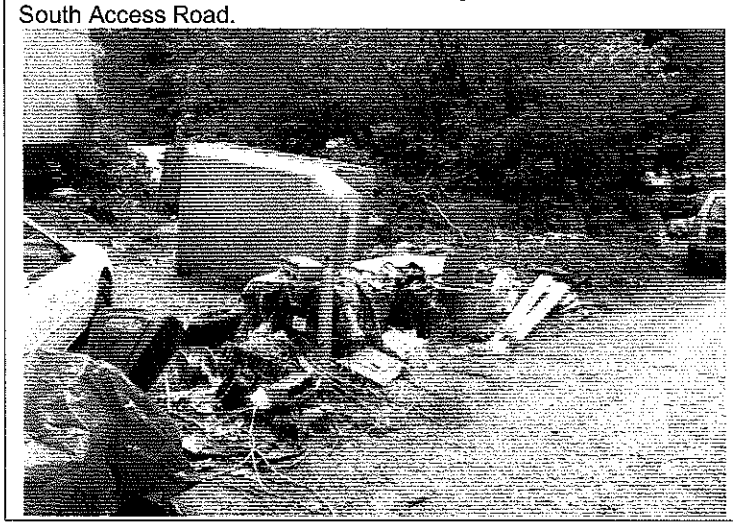
Picture 183: **South Access Road** – panning right (east) from Picture 182.



Picture 184: **South Access Road** – panning right (east) from Picture 183 along the east side of the South Access Road. The northern portion of the East Clearing is at right (note the fiberglass shower stall at red arrow).



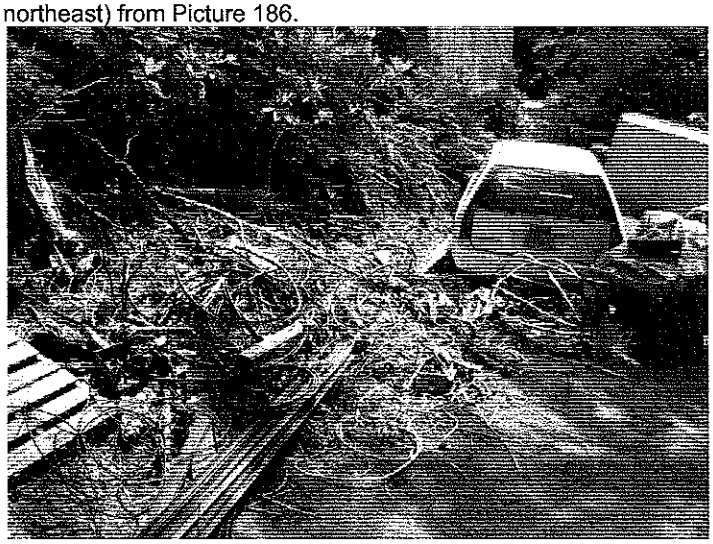
Picture 185: **South Access Road** – looking south at the entrance to the northern portion of the East Clearing from the center of the South Access Road.



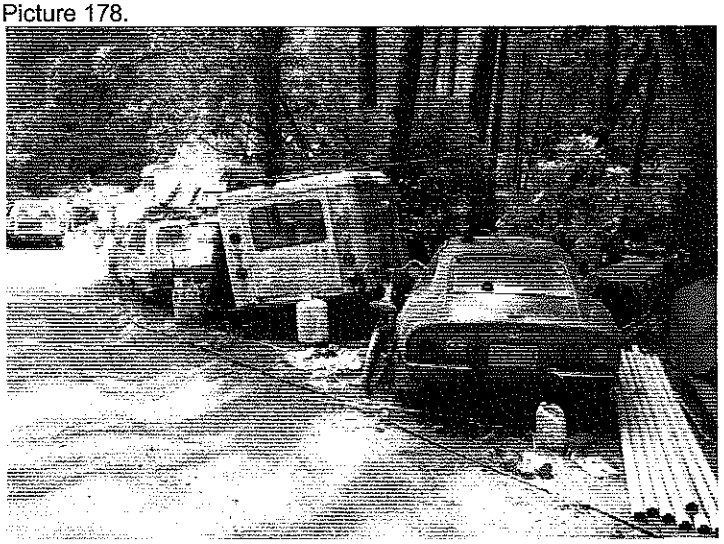
Picture 186: **South Access Road** – panning left (east) from Picture 185 at wire and misc. materials behind the white hatchback shown at center in Picture 184 and at left in Picture 185.

Site Assessment Photograp. of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

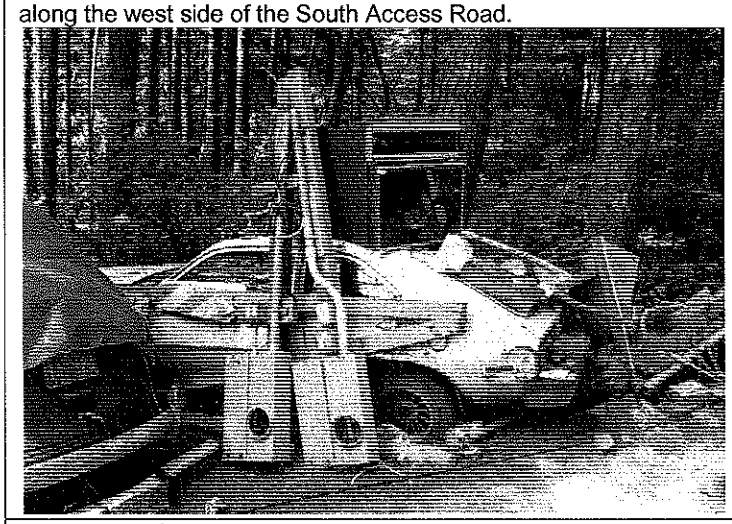
Picture 187: **South Access Road** – stepping back (moving northeast) from Picture 186.



Picture 188: **South Access Road** – panning right (west) from Picture 178.

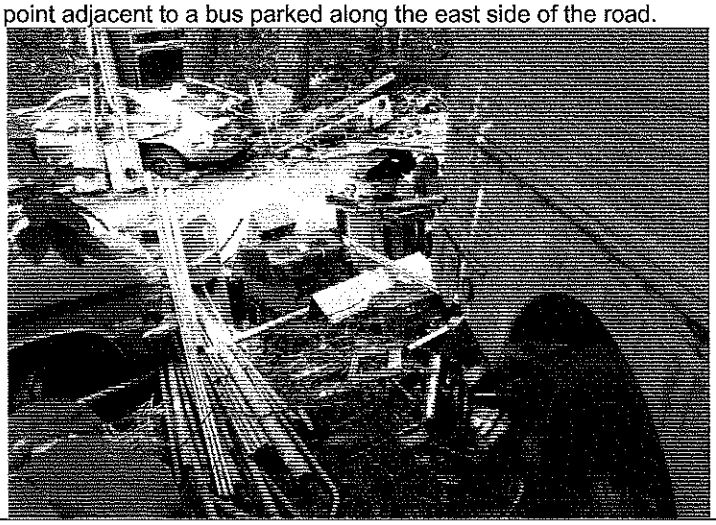


Picture 189: **South Access Road** – panning right (north) from Picture 188 to view vehicles appliances and electrical equipment along the west side of the South Access Road.

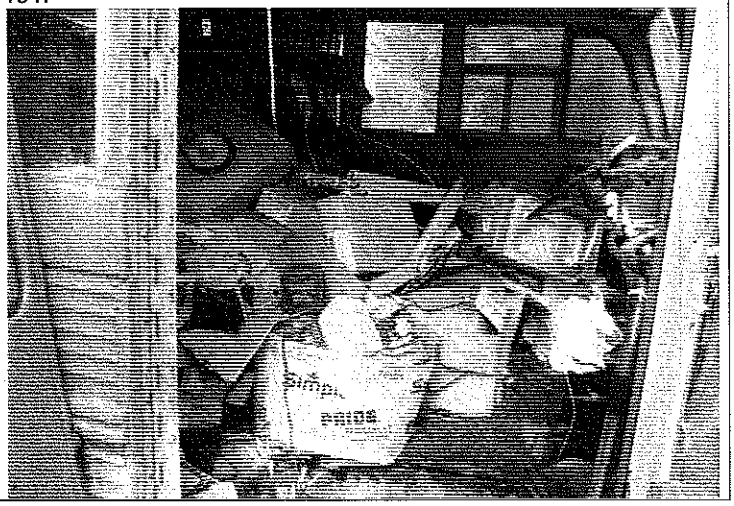


Picture 190: **South Access Road** – panning right (east) from Picture 189.

Picture 191: **South Access Road** – looking west across the South Access Road towards the subjects of Picture 189 from a point adjacent to a bus parked along the east side of the road.

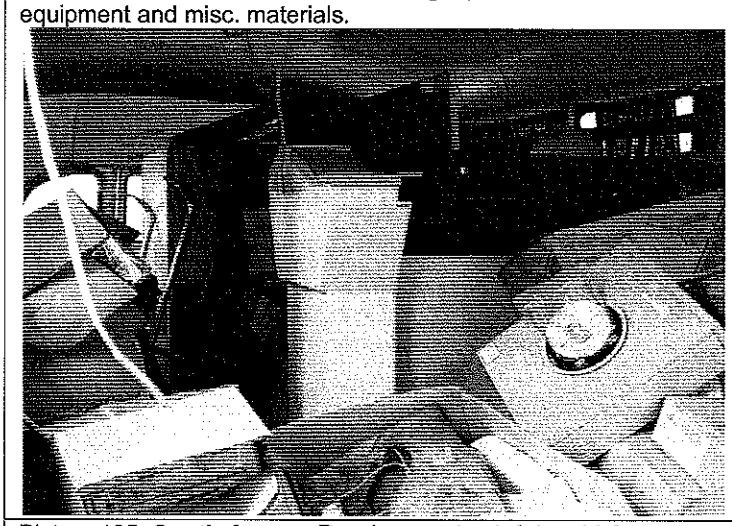


Picture 192: **South Access Road** – view inside the open door of solid waste and misc. materials in bus shown at right in Picture 191.



Site Inspection Photograph of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

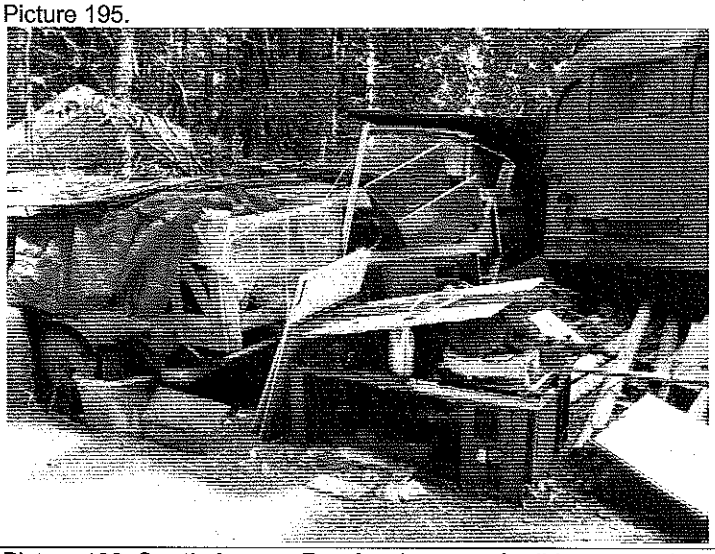
Picture 193: **South Access Road** – view deep inside the bus shown in Pictures 191 and 192 showing a plotter, electrical equipment and misc. materials.



Picture 194: **South Access Road** – close-up of solid waste and misc. materials adjacent to the bus shown in Pictures 191-193 and at vehicles and misc. materials along the east edge of the South Access Rd.

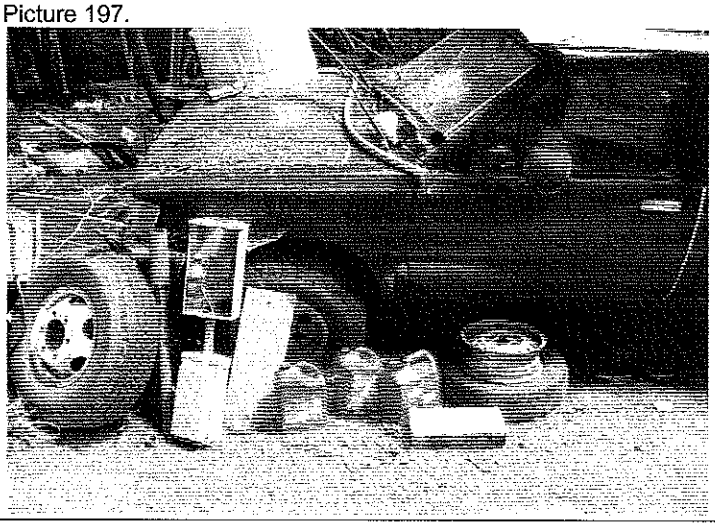
Picture 195: **South Access Road** – panning left (north) from Picture 194

Picture 196: **South Access Road** – panning left (north) from Picture 195.



Picture 197: **South Access Road** – panning left (north) from Picture 196.

Picture 198: **South Access Road** – close-up of solid waste and containers adjacent to the black pickup truck shown at center-left in Picture 197.



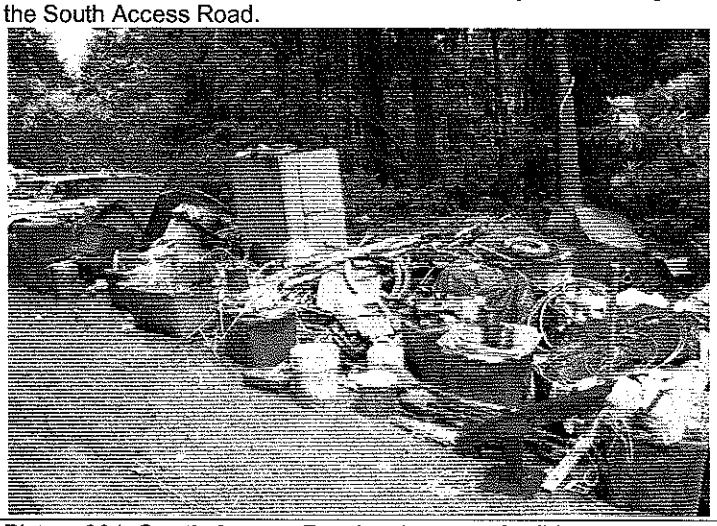
Site Inspection Photograp... of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 199: **South Access Road** – panning left (north) from Picture 198 of solid waste and misc. materials along the east edge of the South Access Road.

Picture 200: **South Access Road** – panning left (north) from Picture 199.

Picture 201: **South Access Road** – moving northeast from Picture 200 to view solid waste and misc. materials along the east edge of the South Access Road.

Picture 202: **South Access Road** – moving northeast from Picture 201 to view solid waste and misc. materials along the east edge of the South Access Road.

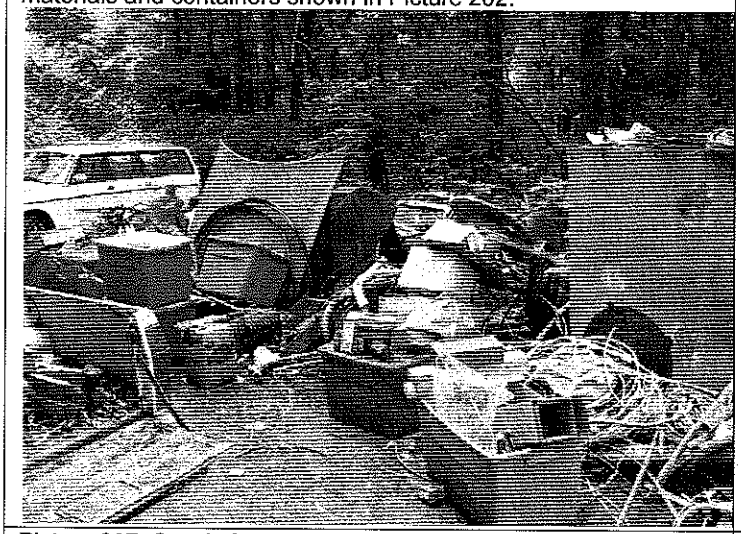


Picture 203: **South Access Road** – moving northeast from Picture 202 to view solid waste, vehicles and misc. materials along the east edge of the South Access Road.

Picture 204: **South Access Road** – close-up of solid waste and misc. materials adjacent to the white Volvo Wagon shown at right in Picture 203 (left front corner visible here at lower left corner)

Site Inspection Photograp[illegible] 56295 Tom Smith Rd., Bandon, OR, taken c. June 1 and June 2, 2009 by CCF

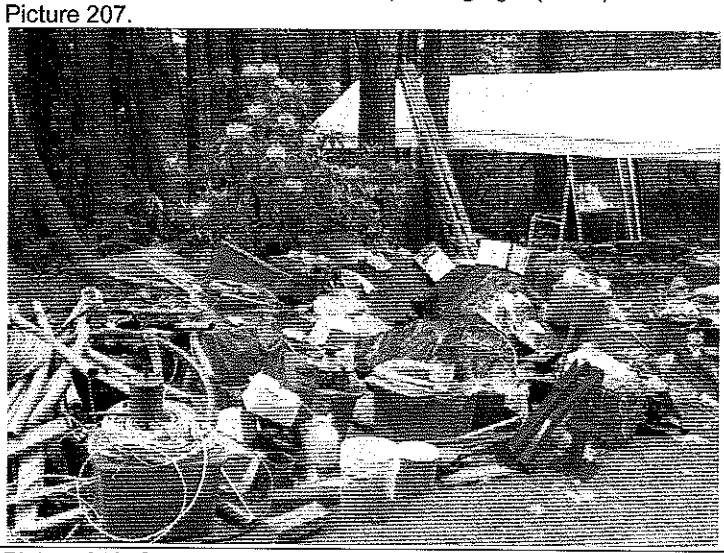
Picture 205: **South Access Road** – close-up of solid waste, misc. materials and containers shown in Picture 202.



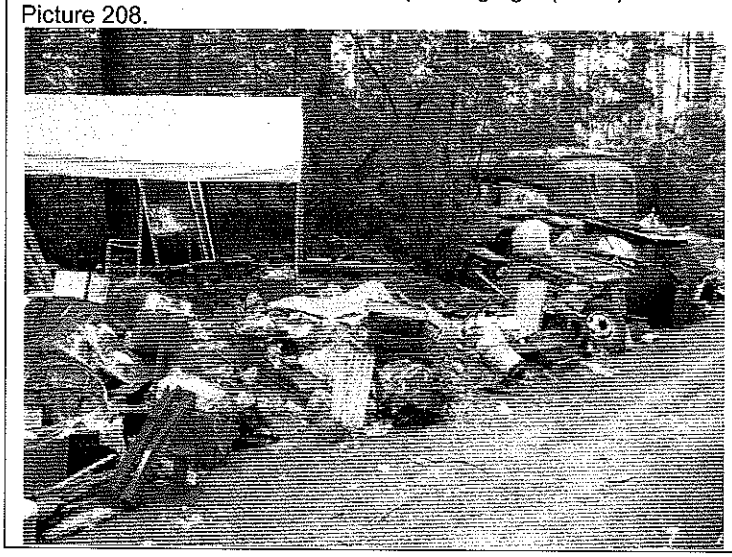
Picture 206: **South Access Road** – close-up of solid waste, electrical equipment and misc. materials shown in Picture 205.

Picture 207: **South Access Road** – panning right (south) from Picture 205.

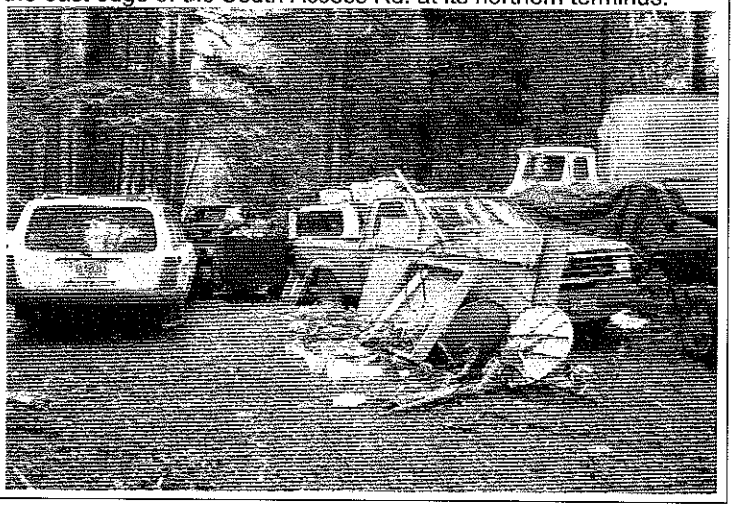
Picture 208: **South Access Road** – panning right (south) from Picture 207.



Picture 209: **South Access Road** – panning right (south) from Picture 208.

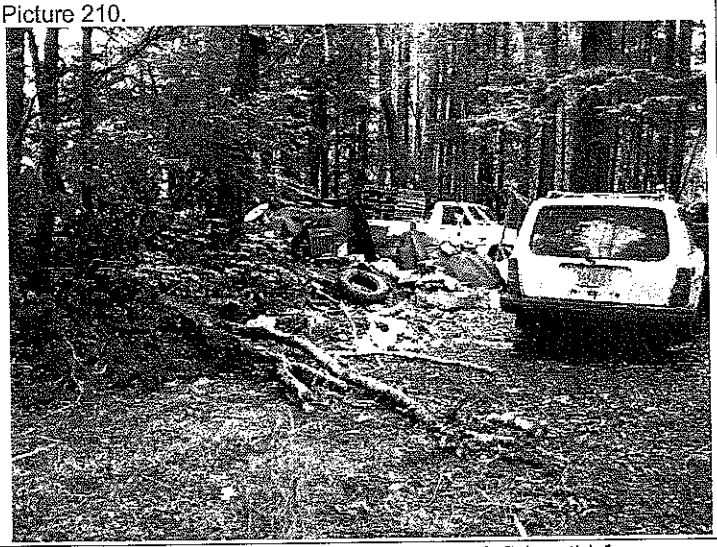


Picture 210: **South Access Road** – looking west at solid waste and misc. materials from behind the row of vehicles parked along the east edge of the South Access Rd. at its northern terminus.



Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 211: **South Access Road** – panning left (south) from Picture 210.



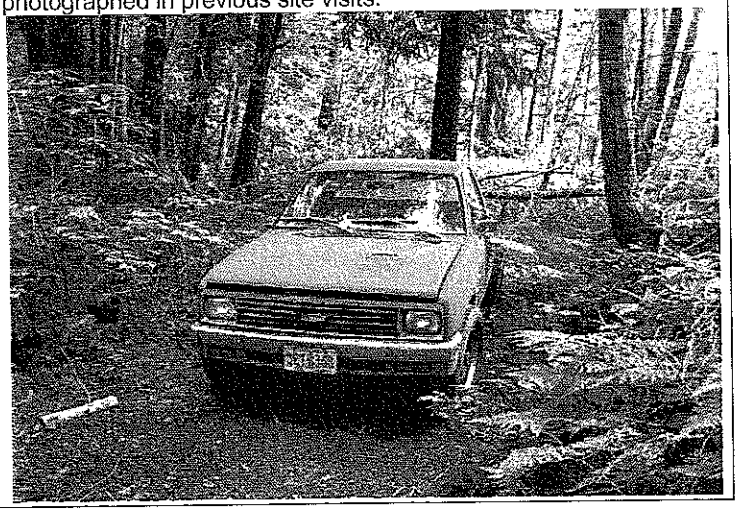
Picture 212: **South Access Road** – view to the west at solid waste and misc. materials from behind the white awning shown in Pictures 197, 199-200, and 208-209.

Picture 213: **South Access Road** – panning left (south) from Picture 212.

Picture 214: **South Access Road** – looking south along the northern end of the South Access Road at the "no trespassing" sign (in red circle) which marks the edge of the ingress/egress easement into the Pennie property.

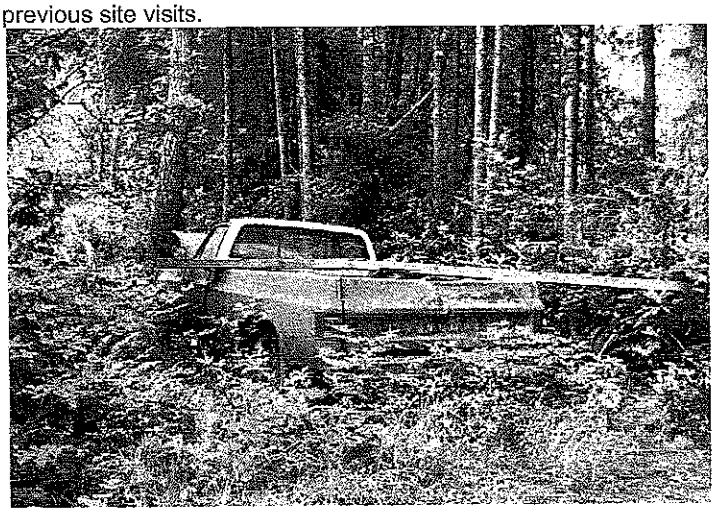
Picture 215: **Easement Access Road** – panning right (west) from Picture 214. These cars have been photographed in this location during 3 previous site visits. Blue State Police truck shown at far right.

Picture 216: **Easement Access Road** – panning right (north) across the Easement Access Road to the parked blue truck, also photographed in previous site visits.



Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

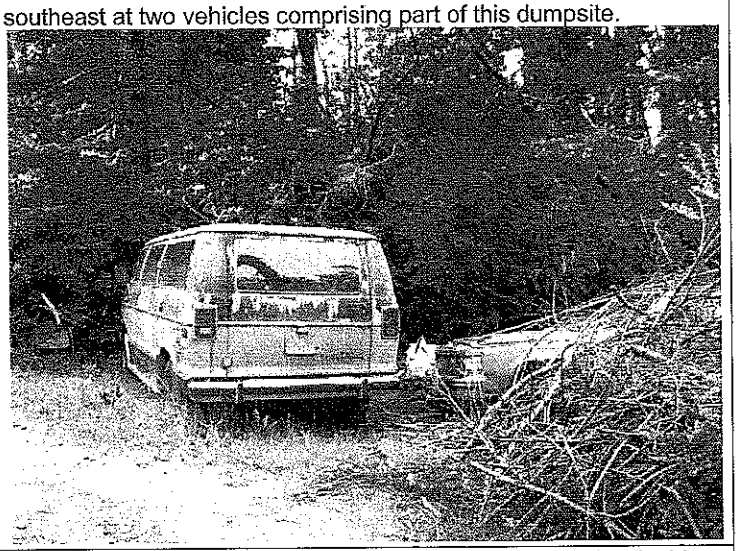
Picture 217: **Easement Access Road, Dumpsite B** – looking south at the red truck comprising this dumpsite, photographed in 3 previous site visits.



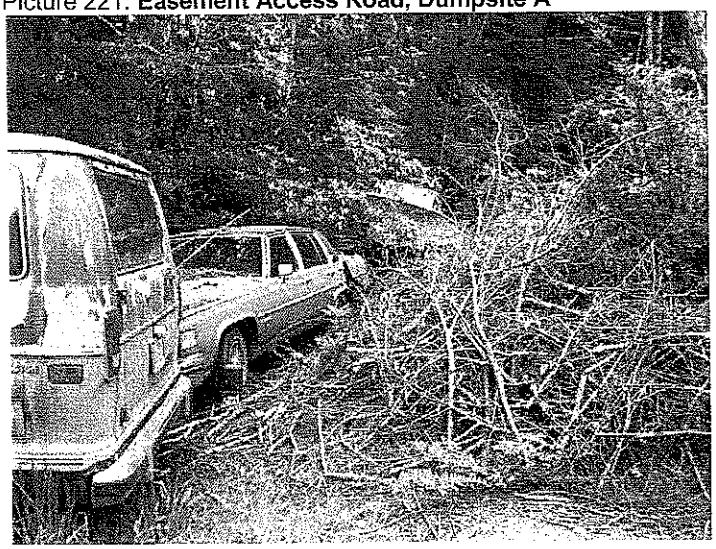
Picture 218: **South Access Road, Dumpsite B**

Picture 219: **Easement Access Road, Dumpsite B**

Picture 220: **South Access Road, Dumpsite A** – looking southeast at two vehicles comprising part of this dumpsite.



Picture 221: **Easement Access Road, Dumpsite A**

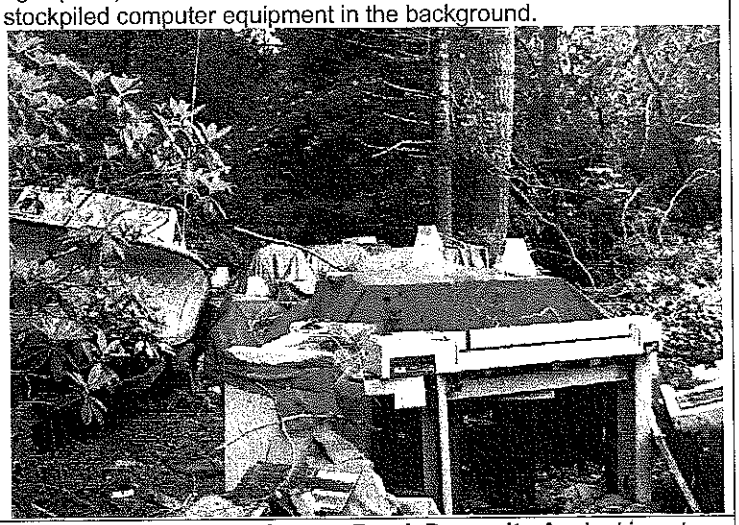


Picture 222: **Easement Access Road, Dumpsite A** – view inside the gray van shown at right in Pictures 220 and 221.

Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

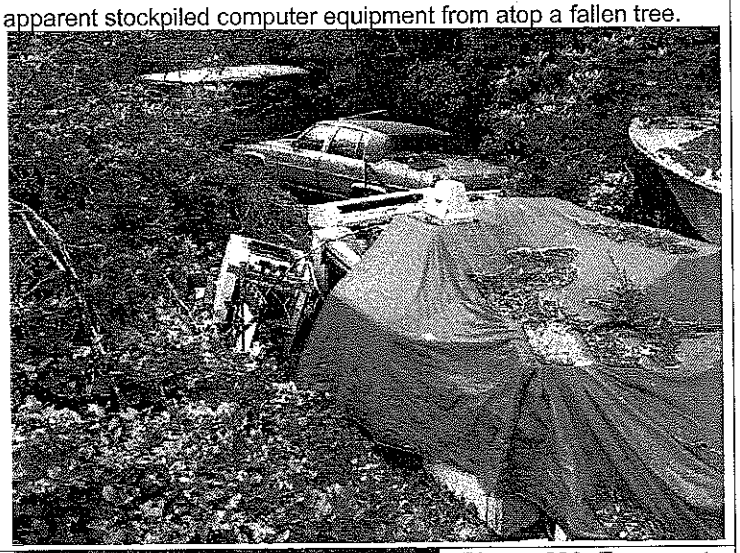
Picture 223: **Easement Access Road, Dumpsite A** – demolished electronic equipment adjacent to the blue Cadillac shown in Pictures 220 and 221.

Picture 224: **Easement Access Road, Dumpsite A** – panning right (west) from Picture 223 to view a boat, plotter, and apparent stockpiled computer equipment in the background.



Picture 225: **Easement Access Road, Dumpsite A** – view from behind (south of) the plotter and demolished electronic equipment shown in Picture 224.

Picture 226: **Easement Access Road, Dumpsite A** – looking at apparent stockpiled computer equipment from atop a fallen tree.

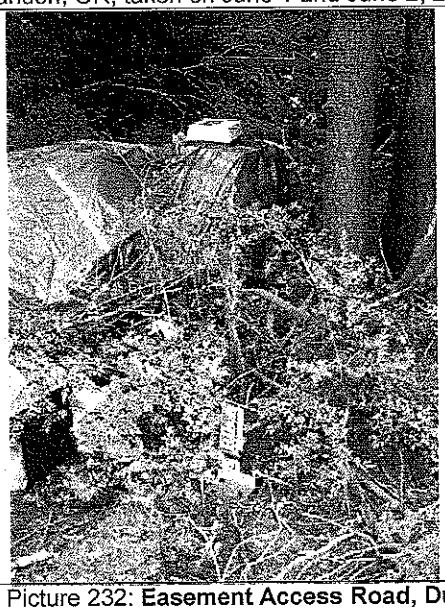


Picture 227: **Easement Access Road, Dumpsite A** – panning right (south) from Picture 226.

Picture 228: **Easement Access Road, Dumpsite A** – panning right (south) from Picture 227.

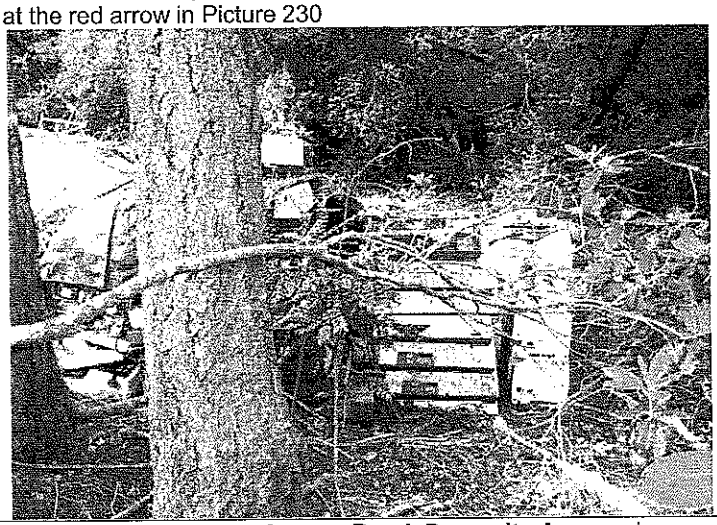
Site Inspection Photographs of 56295 Tom Smith Rd., Bandon, OR, taken on June 1 and June 2, 2009 by CCF

Picture 229: **Easement Access Road, Dumpsite A –** panning right (south) from Picture 228).



Picture 230: **Easement Access Road, Dumpsite A –** panning right (south) from Picture 229.

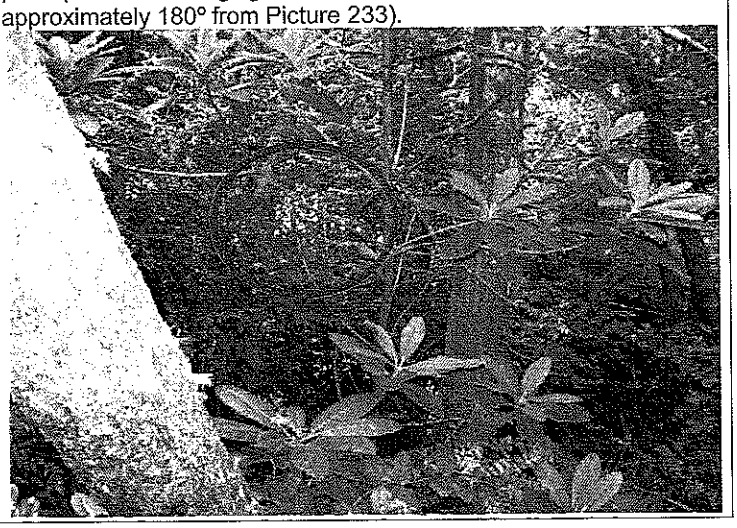
Picture 231: **Easement Access Road, Dumpsite A –** looking northeast at stockpiled computer equipment from behind the tree at the red arrow in Picture 230



Picture 232: **Easement Access Road, Dumpsite A –** view to the north opposite the vantage point of Picture 231 showing stockpiled computer equipment.

Picture 233: **Easement Access Road, Dumpsite A –** panning right (west) from Picture 232.

Picture 234: **Easement Access Road, Dumpsite A –** view of a pond (water reflecting light in red circle) from a vantage point approximately 180° from Picture 233).



SALE AGREEMENT AND RECEIPT FOR EARNEST MONEY

REALTOR

Portland Board of Realtors
Copyright 1974, 1977, 1983 (Rev. 8/84)

THIS LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE.

The undersigned purchaser offers to purchase the following described real property situated in the City of Bandon, County of Coos,

Description State of Oregon, to wit: A parcel of land in the SE¼ SE¼ Sec. 16 and the SW¼ SW¼ Sec. 15 T 29 S., R 14 W., W.M., in Coos County, Oregon, more particularly described for Total description, tax account # 6900 [illegible] 4.52 acres more or less

and commonly known as: Located on Thomas Smith Rd. and being 4.52 Acres more or less (street address)

Price for the purchase price of ..... $ 75,000.00

on the following terms, to-wit: Earnest money herein receipted for of ..... $ 1,000.00

on ..... as additional earnest money, the sum of ..... $

At or before closing, the balance of down payment ..... $

Upon acceptance of title and delivery of ☒ DEED ☐ CONTRACT the sum of (Lines 7, 8, 9, 10 must equal line 6) ..... $ 74,000.00

Payment of Balance Owing payable as follows: Cash on Closing

Financing If indebtedness is assumed in this transaction, in addition to the purchase price, purchaser to pay required assumption fee and reimburse seller for sums held in reserve accounts.
IF NEW LOAN IS REQUIRED, TRANSACTION SUBJECT TO PURCHASER AND PROPERTY QUALIFYING FOR THE LOAN. Purchaser agrees to make written application therefor not later than ....., 19....., complete necessary papers and exert best efforts to procure such financing; and if transaction is to be financed through FHA or Federal VA, seller agrees to pay the prevailing mortgage discount required by lender, not to exceed $.....

Special Conditions SPECIAL CONDITIONS: This transaction Buyer's fee - The Trade Center at 1st Pacific 32 San Louis Obispo County, No permit. California This Transaction shall be closed by Magness Real Estate

Smk. Dtr. Insl. Parties acknowledge that property may be subject to City, County or State Smoke Detector requirements, and if new construction, FTC insulation disclosure requirements.

Encumbrances THIS INSTRUMENT DOES NOT GUARANTEE THAT ANY PARTICULAR USE MAY BE MADE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT. A BUYER SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES. Unless otherwise herein provided, the property is to be conveyed by statutory warranty deed free and clear of all liens and encumbrances except zoning ordinances, building and use restrictions, reservations in Federal patents, utility easements of record which benefit the property or area in which the property is located, and No Exception - except easement for ingress and egress to adjacent 5 acre parcel

Earn. Mon. Title Forfeit./Insur. Refund and Insurance Seller shall furnish to purchaser a title insurance policy in the amount of the purchase price from a title insurance company showing good and marketable title. Prior to closing seller, upon request, will furnish to purchaser a preliminary title report made by a title insurance company showing the condition of the title to the property.
If seller does not approve the sale, or cannot furnish marketable title within thirty days after notice containing a written statement of defects is delivered to seller, or, having approved the sale, fails to consummate it, the earnest money herein receipted for shall be refunded, but acceptance by purchaser of the refund does not constitute a waiver of other remedies available to him; but, if seller approves the sale and title is marketable and purchaser fails to complete the purchase as herein provided the earnest money herein receipted for and any additional earnest money paid or agreed to be paid shall be forfeited to seller as liquidated damages and this contract thereupon shall be of no further binding effect; it being the intention of the parties that purchaser may forfeit the earnest money and be free of any further obligations under this agreement.
All built-in appliances, wall-to-wall carpeting, drapery and curtain rods, window and door screens, storm doors and windows, irrigation, plumbing, ventilating, cooling and heating fixtures and equipment (including stoker and oil tanks but excluding detached fireplace equipment), water heaters, attached electric light and bathroom fixtures, light bulbs, fluorescent lamps, venetian blinds, awnings, attached linoleum, attached television antennae, all planted shrubs, plants, and trees and all fixtures are to be left upon the premises as part of the property purchased except No Exceptions

Property Included & Excluded The following personal property in its present condition, unless otherwise stated herein, is included in the purchase price: Vacant Land

Seller Represents The following fixtures are not owned by seller and are not being sold: None
Seller represents: That the above dwelling is connected to: ☐ A public sewer system, ☐ A cesspool or septic tank, that he knows of no material structural defects; that all electrical wiring, heating, cooling and plumbing systems will be in good working order and that the balance of the property including yard will be in substantially its present condition, at the time purchaser is entitled to possession; that he has no notice of any liens to be assessed against the property; that he has no notice from any governmental agency of any violation of law relating to the property; except No Exceptions known

Escrow **THE SALE WILL BE CLOSED IN ESCROW.** Costs of escrow shall be borne by seller if purchaser is financing through Federal V.A., otherwise such costs shall be shared equally between seller and purchaser. If a contract sale, legal fees for contract preparation shall be paid by Purchaser. transfer tax, if any, shall be shared equally by purchaser and seller.

Closing Prorates Pro-rates for rents, current year's taxes, interest on assumed obligations, insurance premiums (if purchaser assumes existing policy) and other prepaid expenses attributable to the property shall be made as of (check one only) ☒ Date purchaser is entitled to possession; ☐ ..... days after delivery of above mentioned deed or contract; ☐ On ..... 19..... Seller to pay all utility bills accrued to date purchaser is entitled to possession and purchaser to pay seller for heating fuel then on premises, payment to be handled between purchaser and seller. That portion of any real property tax or assessment or interest thereon which is attributable to a period or periods on or before closing but the assessment of or due date for payment of which has been deferred, shall be paid by ..... (Purchaser/Seller indicate which)

Possession **TIME IS OF THE ESSENCE OF THIS AGREEMENT.** Transaction to be closed on or before March 2, 19 90 or as soon thereafter as financing documents can be prepared and marketable title delivered.
Seller to remove all personal property not sold to purchaser, and deliver possession to purchaser (check one only): ☐ ..... days after recording of above-mentioned deed or contract and disbursement of funds to seller; ☐ on ....., 19.....; or as soon thereafter as existing laws and regulations will permit removal of tenants, if any. Possession shall be deemed delivered when seller has vacated the property and delivered keys therefor to purchaser or the undersigned Realtor.

Ins. Seller to keep the property insured (Check one only): ☐ Until possession is delivered to purchaser or recording of above-mentioned deed or contract, whichever first occurs; or ☒ Date purchaser is entitled to possession. Insurance will be secured by purchaser at

Additional Provisions **THE PROVISIONS PRINTED ON THE REVERSE SIDE HEREOF WHICH ARE CHECKED BELOW ARE INCLUDED IN THIS AGREEMENT:**
☐ ADDITIONAL LAND SALES CONTRACT PROVISIONS ☐ FEDERAL VA APPRAISED VALUE CLAUSE ☐ CLOSING—POSSESSION RENTAL CLAUSE:
☒ AS IS CLAUSE/INSPECTION REPORT ☒ FHA APPRAISED VALUE CLAUSE Rent to Be $ ..... per day.
☐ CONDITION-OF-WELL-CLAUSE ☐ CITY INSPECTION AUTHORIZATION
This agreement is binding upon the heirs, personal representatives, successors and assigns of purchaser and seller. **If after closing purchaser will owe a portion of the purchase price to seller, purchaser's rights under this agreement or in the property are not assignable without written consent of seller.**

Earnest Money Deposit Seller and purchaser instruct the undersigned Realtor to handle the earnest money as follows: ☒ Retain in Realtor's client's trust account; ☐ Upon seller's acceptance of offer, deposit with ..... as escrow **(SEE ESCROW DEPOSIT CLAUSE ON REVERSE WHICH IS INCLUDED HERE AS PART OF THIS AGREEMENT).**
REALTOR SHALL HAVE NO FURTHER LIABILITY WITH RESPECT TO THE EARNEST MONEY UPON DEPOSIT WITH THE ESCROW DESIGNATED ABOVE. Listing Broker Agreement (Initial) .....

Receipt of Earnest Money The undersigned Realtor acknowledges receipt of earnest money (which Realtor agrees to handle as provided above) from purchaser in the sum of $ 1,000.00 evidenced by ☐ cash, ☒ check, ☐ promissory note payable on or before .....
Branch Address: ..... Magness Real Estate, Realtor
Branch Phone ..... Main Office Phone 382-3 By William A. Magness Agent
Main Office Address 545 Southwest 2nd Street Suite 100 Portland, Or. 97204

Agreement to Purchase **PURCHASER** (Print) John H. Cox Jr. and Jane E. Cox **HEREBY ACKNOWLEDGES RECEIPT OF A COMPLETELY FILLED IN COPY HEREOF WHICH PURCHASER HAS FULLY READ AND UNDERSTANDS AND ACKNOWLEDGES THAT HE HAS NOT RECEIVED OR RELIED UPON ANY STATEMENTS MADE BY SELLER OR ANY REAL ESTATE AGENT WHICH ARE NOT HEREIN EXPRESSED. DEED OR CONTRACT TO BE PREPARED IN THE NAME OF** John H. Cox Jr. and Jane E. Cox as joint tenants. This offer shall automatically expire ..... days after time of purchaser's signature, if not accepted within that time.
Address 9947 Sparkle Terr. Date Feb. 11 19 90 A.M., 5:50 P.M.
Tigard City Oregon Zip 97223 Purchaser
Phone: Res. 818 287 3269 Bus. Mr. Ms. Purchaser

Seller hereby **rejects** the foregoing offer and ☐ Makes the attached **counter offer.**
Seller hereby **accepts** the foregoing offer. **SELLER AGREES TO PAY NOT MORE THAN $ ..... FOR REPAIRS IF REQUIRED FOR FINANCING.** Seller agrees to pay forthwith above-named Realtor, or, if this is a co-op transaction, the listing broker, the sum of $ 3,750.00 for closing for services rendered in this transaction. Seller hereby grants such Realtor or listing broker a lien on the proceeds of sale to secure payment of said sum, and irrevocably assigns to such Realtor or listing broker an amount of those proceeds equal to said sum. Seller authorizes Realtor or listing broker to order title report and title insurance at Seller's expense and further authorizes them and escrow to pay out of the cash proceeds of sale the expenses of furnishing title insurance, seller's recording fees) seller's closing costs and any encumbrances on the property payable by Seller on or before closing. **SELLER HEREBY ACKNOWLEDGES RECEIPT OF A COMPLETELY FILLED IN COPY OF THIS AGREEMENT WHICH SELLER HAS FULLY READ AND UNDERSTANDS.** In the event purchaser fails to complete the sale as herein provided, forfeited earnest money shall be distributed as follows after deduction of any title insurance and escrow cancellation charges: ☐ To Realtor, or if this is a co-op transaction, to the extent of the agreed commission just as if the transaction had been consummated, with residue to seller ☐ .....

Agreement Sell Address 1525 California St. Date 7-6-11 19 90 A.M., 6:15 P.M.
Bay Area Zip ..... Seller
Phone: Res. 269 3534 Bus. Mr. Ms. Seller

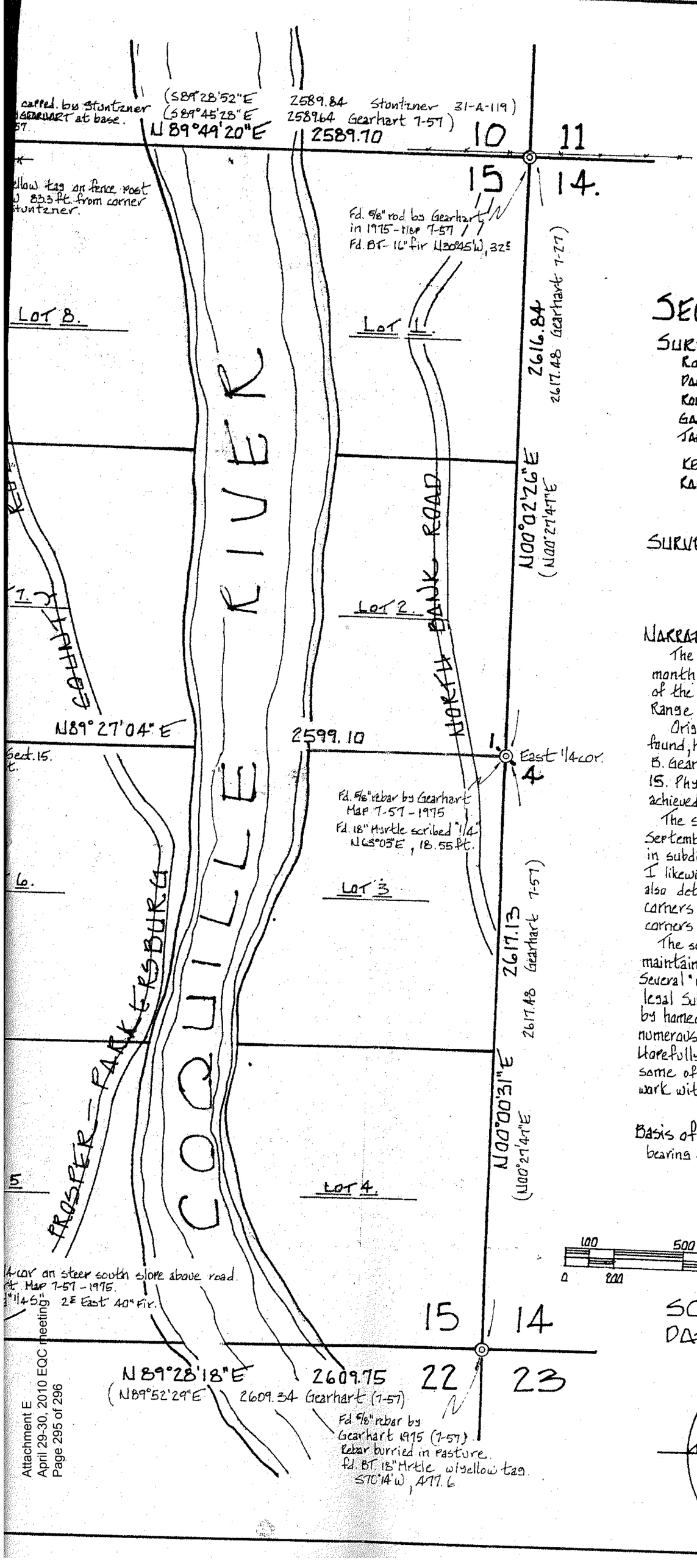
Purch. Acknowl. Date 7-6-11, 19 90, A.M. 6:33 P.M. Purchaser affirms the foregoing agreement and acknowledges receipt of a copy thereof signed by Seller.
..... Purchaser. ..... Purchaser

Co-op transaction between above named Realtor and ..... on basis, ... % / ..... %. Broker's initials .....
Listing Realtor Selling Realtor

PURCHASER'S RECEIPT

A-28

Attachment 4 April 29-30, 2013 OLCC meeting Page 28 of 28



REGISTERED
PROFESSIONAL
LAND SURVEYOR

OREGON
NOV. 5, 1963
LOUIS B. PRAHAR
308

SEPT. 14, 1982

Item U 000413

SUBDIVISION OF SECTION 15, T. 28S., R14W.,W

SURVEY FOR:

ROBERT BLANNIN ET UX.	Ref.#	79-25955
DANIEL BREWSTER →	Ref.#	80-51435
ROBERT PLALE →	Ref.#	81-26881
GAYLE GUYNUP ET.AL. →	Ref.#	78-53009
JAMES HALL →	Ref.#	80-50502 & 81-24872
KENNETH WARNOCK →	Ref.#	78-51224
RALPH ARTMAN ET UX. →	Ref.#	74-97320

SURVEY BY: LOUIS B. PRAHAR L.S.#
Rt. 1 Box 620
BANDON ORE. 97411
347-2254, 3702.

NARRATIVE:

The survey shown hereon was conducted over a s
month period from May to September 1982. The pur
of the survey is to Subdivide Section 15, Townshi
Range 15 W.W.M. Coos County Oregon.

Original Government survey corners common to Sect.
found, held, and tied to the corners reestablished b
B. Gearhart on the South, East, and North sides of
15. Physical field closure of better than 1:20,000 was
achieved using Citation EDM., Wild T-1A and H.P. 9815.

The survey by John B. Gearhart for Stalley & Young
September 18 1975 (Map 7-57) is of primary importa
in subdividing Section 15. As Gearhart notes on his s
I likewise searched for the missing original corners,
also determined them to be lost. Gearhart's reestabli
corners are well justified and accurately located. Th
corners are therefore used to break down the interior of

The survey shown hereon is of tremendous importan
maintaining the order of ownership within Section 15
several "paper" land divisions within the Section have ma
legal Subdivision of Section 15 imperative. Lot line esta
by homeowners and other non-professionals have result
numerous questions regarding true and/or deeded owners
Hopefully my work within Section 15 will help answe
some of the questions, and be held and respected in f
work with Section 15 T, 28 S. R14 W W.M.

Basis of Bearings: Survey _____ by L.B. Prahar, an
bearing from the Subdivision of Sect. 16, T.28, R.14, W.W.M.; Jan

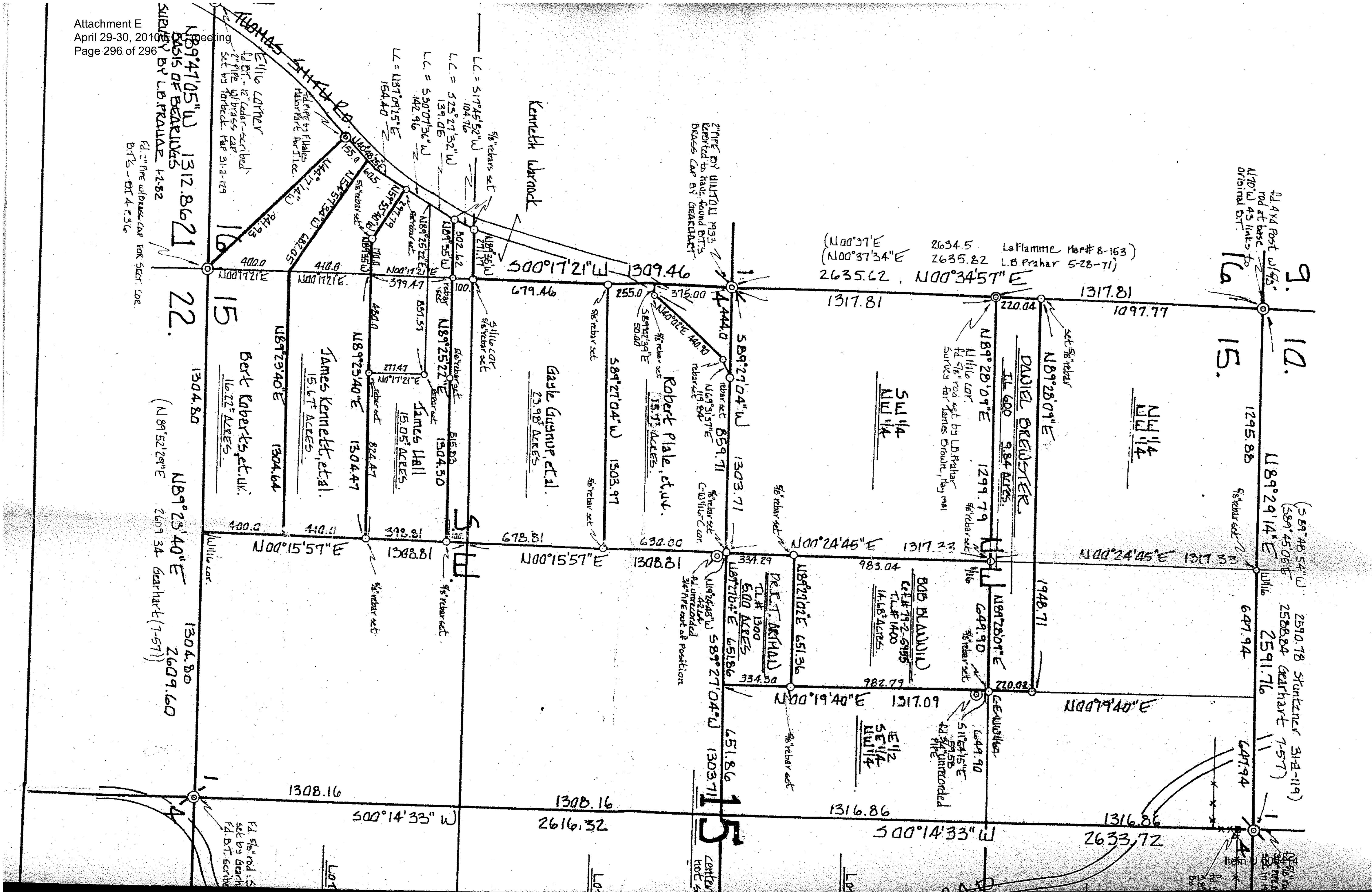
- ○ Corners Set shown thus 5/8" rebars w/yellow plastic caps "L.S. 3
- ◎ Corners found as described.

SCALE 1" = 400'

DATE SEPT. 14, 1982.

NORTH.

A29


THOMAS SHAW RD.
Kenneth Warnock
Bert Roberts, et.ux. 16.22± ACRES
James Kennett, et.al. 15.67± ACRES
James Hall 15.05± ACRES
Gayle Gusnup, et.al. 23.98± ACRES
Robert Plale, et.ux. 15.7± ACRES
DANIEL BREWSTER TL 600 9.84 ACRES
Dr. R.T. ARTHAU TL# 1300 5.00 ACRES
BOB BLAUW Cet.# 79-2-6955 T.L.# 1400 14.68± ACRES
SW 1/4 NW 1/4
NE 1/4 NW 1/4
E 1/2 SE 1/4 NW 1/4
BASIS OF BEARINGS SURVEY BY L.B. PRAHAR 12-82
N89°47'05"W 1312.86
S00°17'21"W 1309.46
2635.62, N00°34'57"E
(N00°37'E 2634.5 LaFlamme Map# 8-163)
(N00°37'34"E 2635.82 L.B. Prahar 5-28-71)
1317.81
N00°24'45"E 1317.33
N00°15'57"E 1308.81
N00°19'40"E 1317.09
S00°14'33"W 2616.32
S00°14'33"W 2633.72
S89°27'04"W 1303.71
N89°29'14"E 2591.76
N89°23'40"E 2609.60
(N89°52'29"E 2609.34 Gearhart (7-57))
(S89°48'54"W 2590.78 Stuntzner 31-2-119)
(S89°45'05"E 2588.84 Gearhart 7-57)
Fd. 4x4 post w/5/8" rod at base N70°W 43 links to original B.T.
2" PIPE BY WINTON 1933 Reported to have found B.T.'s BRASS CAP BY GEARHART
CE 1/16
C-W 1/16-C cor.
Item U 000414

JOHN R. KROGER
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

June 18, 2009

RECEIVED
JUN 19 2009
EMPLOYMENT HEARINGS

Dove Gutman
Administrative Law Judge
Office of Administrative Hearings
2510 Oakmont Way
Eugene, OR 97401

Re: *In the Matter of Dale Alan Pennie*
OAH Case No. 901024
DOJ File No.: 340410-GN0259-09

Dear Judge Gutman:

Enclosed for filing please find the *Response to Motion to Dismiss (Motion to Suppress)* and *Response to Motion to Dismiss (Claim Preclusion)* in the above mentioned matter for your consideration.

Sincerely,

Jas Jeffrey Adams
Attorney-In-Charge
Natural Resources Section

jja:lal/1464105

Enclosures
cc: Regina Cutler, DEQ

1162 Court Street NE, Salem, OR 97
Telephone: (503) 947-4500 Fax: (503) 378-3802 TTY: (80

DEQ
Craig C. Filip
Solid Waste Reduction Analyst
Regional Environmental Solutions
Office: (541) 686-7868
filip.craig@deq.state.or.us

Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
Western Region - Eugene
165 East 7th Avenue, Suite 100
Eugene, OR 97401-3049
Fax: (541) 686-7551
In Oregon (800) 844-8467
www.oregon.gov/DEQ

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF OREGON

IN THE MATTER OF: DALE ALAN PENNIE, an individual, Respondent.	RESPONSE TO MOTION TO DISMISS (MOTION TO SUPPRESS) Hearing Panel No. 901024 DEQ No. LQ/SW-WR-07-225

This memorandum addresses the legal issues raised by Respondent in his Motion to Dismiss seeking suppression of evidence based on the claim of an unlawful search. It is intended to supplement the closing brief of the Department of Environmental Quality (DEQ).

Introduction

Respondent has filed a Motion to Dismiss in which he moves "for an Order suppressing all evidence gathered by Coos County Sheriff Deputy Dahlen * * * and those he enabled to enter and photograph." The gist of the motion is that a warrant was required before investigators could enter upon the access road or "seize" Respondent's property by taking photographs.

A. Respondent has no standing to challenge a "plain view" search conducted on the Cox property with consent from the Cox property landowner.

The three investigation reports of the DEQ investigator Craig Filip indicate that his investigation and his taking of photographs of the solid waste violations relating to Respondent took place entirely within the boundaries of property owned by the Cox family (Cox property), which is adjacent to Respondent's separate property. (Exhibits A-5, A-11, and A-13).[1]

Respondent is able to access his property through an access easement on the Cox property consisting of a road with a gate, but Respondent's right is limited to use of the access

[1] Exhibits referenced in this response are the same documents, and are identified by the same exhibit number, as provided by DEQ for use in the contested case hearing in this matter. Copies of the referenced exhibits were provided to Respondent and ALJ Gutman on June 10, 2009.

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road; he does not own the property underlying the access easement, and Respondent has been instructed by legal counsel for the Cox family to remove the no trespassing sign and to stop locking the gate. (Ex A-8).

In 2005, Mr. John Cox gave express consent to Coos County Deputy Sheriff Dahlen to access the Cox property, including the access road, in order to enforce the county code provisions governing solid waste. (Ex A-22). In the 2007 letter from the Cox family's attorney, counsel advised Respondent that "Mr. Cox intends to cooperate with *any* government officials in an attempt to clean up the site." (Ex A-8, p 2) (emphasis added).

When a person grants unqualified consent to allow officers to enter a residence to investigate, that consent generally also includes permission for entry by other investigative personnel. *State v. Voits*, 186 Or App 643, 650, 64 P3d 1156, *rev den* 336 Or 17 (2003). Unless the consent provides otherwise, the general authority of certain named officers does not necessarily prohibit assistance from others, such as crime lab personnel. *State v. Voits*, 186 Or App at 650; *State v. Lerch*, 63 Or App 707, 713, 666 P2d 840 (1983), *aff'd* 296 Or 377, 677 P2d 678 (1984).

In this context, DEQ investigator Filip accompanied Coos County Deputy Dahlen and stayed entirely within the Cox property and the access road on the Cox property during the investigations permitted by the express consent of Mr. Cox. (Exhibits A-5, A-8, A-11, and A-13). It is reasonable to include from all the foregoing that the consent from the Cox family for law enforcement to go upon the Cox property in order to enforce solid waste violations by Respondent extended to include the investigative work by DEQ investigator Craig Filip.

Respondent is not in a position to complain about an investigation conducted entirely within the boundaries of another landowner's real property with that landowner's consent, when

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the solid waste violations on the Cox property and on Respondent's property were observable through "plain view." Under the "plain view" doctrine, "if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no search." *Minnesota v. Dickerson*, 508 US 266, 275 (1993). "[A] police officer's unaided observation, purposive or not, from a lawful vantage point is not a search under Article I, section 9, of the Oregon Constitution." *State v. Ainsworth*, 310 Or 613, 621, 801 P2d 749 (1990).

The "contraband" in this context is the abandoned vehicles, computers, monitors, tires and paint cans, which were in plain sight as depicted in the investigative reports of DEQ investigator Craig Filip. (Exhibits A-5, A-11, and A-13). Neither the County land use zoning enforcement nor DEQ's enforcement of the state permit requirement are criminal proceedings. *A fortiori*, there was no unlawful search in this context, given that the "search" was conducted with consent within the boundaries of adjacent property not owned by Respondent and consisted of plain view observations of solid waste in plain sight by DEQ investigator Filip from his lawful vantage point.

B. Respondent's arguments regarding an unlawful search lack merit.

Respondent appears to argue that a locked gate with a no trespassing sign on the access road gave him the right to exclude all others from "his" property. But Respondent had only the right to use the access road; he did not own it, much less have the exclusive right to that road, as reflected in the letter from the Cox family's attorney to Respondent. (Ex A-8). The locked gate and no trespassing signs were *ultra vires* actions by Respondent that were ineffective to exclude the landowner Mr. Cox from the access road. And law enforcement officers had express consent from the Cox family to go onto the Cox property, including on the access road located on the

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Cox property, in order to enforce the respective solid waste regulations of the County and of the State. And because it is clear that the DEQ investigator did not leave the access road during the investigations, no search other than a plain view search occurred on Respondent's own property.

Respondent also appears to argue that because the initial complaint from the Cox family that instigated the investigations stated that the violations were visible "only from a distance," that somehow rendered invalid the subsequent investigations conducted entirely from within the boundaries of the Cox property. Again, the investigations on the access road were with the Cox family's express consent, the investigations were conducted by plain view observation of the solid waste littered on the sides of the access road itself and on Respondent's adjacent property, and it is irrelevant what was stated in the initial complaint that triggered the investigations.

This would be a different case had the investigators gone past a fence posted with a "no trespsassing" sign and actually physically entered upon land owned by Respondent for purposes of the investigation. Absent consent from Respondent, such a search would arguably have required a search warrant. But that is not what happened here. Rather, the investigations were conducted entirely from within the boundaries of the Cox property with the Cox family's express consent, and they were conducted by plain view observation of the solid waste littered on the sides of the access road itself and on Respondent's adjacent property,

C. Issue preclusion is determinative against Respondent on his identical motion to suppress raised in the county proceedings.

Claim or issue preclusion cannot be asserted against DEQ, which was not a party to the county proceedings. But Respondent was a party to both proceedings. His identical motion to suppress (Attachment 1) was denied by the Coos County Circuit Court (Attachment 2). Hence,

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issue preclusion does operate against Respondent on an identical motion to suppress denied by the circuit court.

"Issue preclusion arises in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding." *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). Issue preclusion is a jurisprudential rule that promotes judicial efficiency. *Id* (citing *State v. Ratliff*, 304 Or 254, 257, 744 P2d 247 (1987)).

There are five requirements essential to the application of issue preclusion: (1) the issue in the two proceedings is identical; (2) the issue actually was litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which this court will give preclusive effect. *Barackman v. Anderson*, 338 Or 365, 368, 109 P3d 370 (2005); *Nelson* at 104; *Waxman v. Waxman & Associates, Inc.* 224 Or App 499, 512 (2008).

All those elements are met with respect to Respondent's motion to suppress. (1) The motion filed by Respondent in the county proceedings was identical. (Attachment 1). (2) The decision was actually litigated and was resolved against Respondent by the Circuit Court. (Attachment 2). (3) Respondent has an opportunity to be heard on his motion to suppress in Circuit Court. (4) Respondent was a party to the county proceedings. (5) The Circuit Court proceeding was a judicial proceeding and hence necessarily the kind of proceeding to which tribunals give preclusive effect.

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Conclusion

This court should deny Respondent's motion to dismiss based on his motion to suppress. Respondent is not in a position to object to an investigation conducted entirely within the boundaries of the Cox property with the express consent of the landowner. Respondent has the right to use the access road, but he does not own it, nor does he have the right to exclude the actual landowner from the access road with unauthorized signs and a locked gate. The investigations in question consisted of plain view observations of abandoned automobiles, computers, monitors, waste tires and paint cans strewn on the sides of the access road and visible on Respondent's property from the Cox property. The "search" in this context was a plain view investigation by enforcement officers observing items in plain sight from a lawful vantage point.

Respondent has not identified any photographs or any other items of evidence that he can prove were taken by entering on Respondent's own property. Rather, Respondent's motion is based on his erroneous belief that he has the right to exclude even the landowner of the property from the road to which he merely has a non-exclusive right to use for access purposes. In the event, however, that this tribunal finds that any of the photos offered by DEQ were taken off the Cox property and on Respondent's own property, DEQ will not rely on such photos but will rely only on photos taken from the lawful vantage point of the Cox property.

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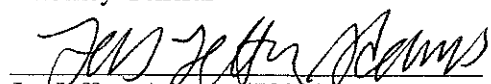
Finally, issue preclusion principles obviate the need for this tribunal to revisit the identical motion previously made by Respondent in Coos County Circuit Court. If there were any doubt about the lack of merit of Respondent's motion to suppress, this tribunal would be entitled to deny it summarily as having already been adversely resolved against Respondent.

DATED this 18th day of June, 2009.

Respectfully submitted,

JOHN R. KROGER
Attorney General



Jas Jeffrey Adams, #780114
Attorney-In-Charge
Of Attorneys for Department of Environmental Quality, State of Oregon

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DALE A. PENNIE, Pro se
56295 Tom Smith Road
Bandon, OR 97411
541-347-9387

OREGON STATE CIRCUIT COURT

FOR COOS COUNTY

State of OREGON,	
	Case No. 09NB0301, 09NB0303, 09NB0303
Plaintiff,	
DALE A. PENNIE,	**MOTION TO SUPPRESS EVIDENCE**
~~Defendant~~	

COMES NOW DALE a. Pennie, defendant in the above entitled matter, to move this court for an Order suppressing all evidence gathered by Coos County Sheriff Deputy Dahlin in his performance as a codes compliance officer for Coos County . This motion is made in good faith and is not for purposes of delay, as is set out in the accompanying Memorandum of Law.

Respectfully submitted,

~~April~~ June 8 ~~, 2008~~ 2009

DALE A. PENNIE, Pro se

MEMORANDUM OF LAW

Motion to Suppress Evidence

The issue in this matter revolves around a warrantless search upon the rural property of defendant Dale A. Pennie by Coos County Sheriff Deputy Dahlin. The search was to discover whether defendant had violated Coos County ordinances for "maintaining a Junk Yard" and "accumulation of solid waste" This search was initiated by a complaint filed with the county by abutting land owners, who complained :

> "Hazardous dump site with over 100 non running junk cars that are leaching oil gasoline into groundwater springs. There are also numerous computers leaching lead and silver. Looks like a huge dump. Also a fire hazard"

additionally, The property owner wrote:

> " Can only see from a distance from our property. "

Based on the above complaint, deputy Dahlin accompanied the adult children of the property owner onto the easement and onto defendant's property as well. Written permission was given at a later date for the deputy to enter onto the easement. Numerous citations have been issued to defendant by this deputy, who has also brought state employee Craig Filip of Oregon DEQ, who has since issued a warning letter with opportunity to correct. The deputy has also brought other deputies and filed complaints with the Coos Planning department.

Oregon Constitution Article 1, section 9 and the United States Constitution's fourth Amendment protect citizens from unreasonable searches and seizures. Oregon Constitution Article 1, section 9 has been interpreted to provide greater protection, in some instances, than the fourth Amendment of the U.S. Constitution. The Oregon Supreme Court has held that Article 1, section 9 of the Oregon Constitution should be interpreted independently from the fourth

Amendment (State v. Caraher, 293 Or 741, 748-750, 653 P2d 942 (1982). The court also recognized that, as a general rule, state courts should resolve state constitutional questions before reaching federal issues. State vs. Kennedy, 295 Or 260, 266-267, 666 P2d 1316 (1983).

FOUNDATION

There are 5 foundational issues to be considered when defendant seeks to suppress evidence:

(1) Was the person who performed the alleged search or seizure a Federal or state officer or agent?

In this instance, the County Sheriff Deputy is considered a state actor;

(2) Do the challenged acts constitute a search or seizure within the meaning of Article 1, section 9 of the Oregon Constitution, the fourth amendment of the US Constitution, or both?

Private property, protected from approach by a locked, posted (NO TRESPASSING) gate, and by trees and brush, plus additional NO TRESPASSING notices, and the complainant's statement on the complaint form ("can only see from a distance from our property") all indicate defendants intent to exclude others from his property and home. Taking of photographs, some CLEARLY taken from defendant's property indicate a search, and the photos are a seizure ("this is what I saw while on defendant's property).

(3) Did the search or seizure violate the defendants protected property or privacy rights?

A warrantless search is unreasonable on its face; the state must bear the burden to prove the warrant was constitutional. ORS 133.693(4); State vs. Tucker, 330 Or 85, 88-89, 997 P2d 182 (2000).

(4) Was the search or seizure conducted for criminal or civil purposes?

Well, obviously there have been fines levied, threats of larger fines and/or jail, and continuing enforcement. Definitely criminal purposes

(5) Is the evidence obtained by means of the search or seizure subject to suppression under the exclusionary rule?

The right to be free from unreasonable searches and seizures; is it reasonable for a state actor to enter upon private, gated and posted property for the purpose of issuing citations for violations not known until a search has been made? Defendant is entitled to privacy as a matter of law, and, further, has repeatedly demanded a search warrant be provided, and, when that is denied him, continues his objection, all evidence so gathered, and all further evidence gathered as a result of that initial warrantless entry must be suppressed.

ARGUMENT

While the initial complaint was from a private citizen, he stated from the onset the violations were only visible from a distance on his property. When the deputy was escorted upon the easement, and then upon defendant's property, he had absolutely NO RIGHT to do so without a warrant. The adult child of the property owner could not grant permission to enter upon defendant's land (one person can not waive the rights of another (Coos County, et al vs. Reeves (163 OrApp 497; 988 P2d 433). In case in point, the Reeves case is quite similar to the instant matter: A state agent (game officer) entered onto a protected road to investigate a possible game violation. Upon arriving at the house the officer spoke with the father of the suspected game violators (juveniles) and, after asking for permission to search located the game violations, and cited the 2 juveniles The court suppressed the evidence and dismissed the case, because the officer

did not have a warrant, drove upon protected private property (in that matter a sign stating "no unauthorized persons beyond this point") and a request for permission to search after the fact. The court found the father could not waive, particularly after the fact, the rights of another. The permission to search was found insufficient.

Defendant Pennie has never consented to a search sans a warrant, nor has he ever not asked for it. He has not confronted the deputy beyond that, maintaining his rights but not being combative. The deputy, on the other hand, has repeatedly stated he does not need a warrant because he has "probable cause." The probable cause is **GROUNDS** for a warrant.

Because this matter began as a quasi criminal matter (only fines) does not remove the need

for a warrant. In Marshall vs. Barlow's Inc. The U.S. Secretary of Labor appealed a ruling from the lower court stating he had the right to inspect (an OSHA inspector) a business for compliance

and did not need a warrant. The United States Supreme Court ruled the requirement of obtaining a search warrant was not overly burdensome on the inspection system or the courts and that it would provide assurances that the inspections were reasonable under the constitution.

(436 U.S. 307; 98 S,Ct.1816; 56 L.Ed.2d 305; 1978 Lexis 26; 8 ELR 20434)

The State can not expect a lower standard for them, and, in fact, the federal system has the lower standards (the fourth amendment) then Oregon (Article 1, section 9). The deputy should have sought an administrative search warrant, based on the complaint of the neighbor, and the statement "only visible from a distance on our property". There is a test set out by the Oregon Supreme Court, articulated in Dixson/Digby:

> "A person who wishes to preserve a constitutionally protected privacy interest In land outside the curtilage must manifest an intention to exclude the public By erecting barriers to entry, such as fences, or by posting signs. This rule will not unduly hamper police officers in their attempts to curtail manufacture of and Trafficking in illegal drugs, because it does not require investigating officers to draw any deduction other than that required of the general public; if land is Fenced, posted or otherwise closed off, one does not enter it without permission, Or in the officer's situation, permission or a warrant'."

Set out in State v. Walch, 99 OrApp 180; 781 P2d 406

CONCLUSION

The deputy was required to obtain a search warrant from the onset. Only then could he enter onto the private, protected property of defendant. No matter "its just a violation, not an arrest", especially now, after repeated demands from defendant, and repeated referrals to other agencies, some with criminal sanctions in mind. This court has no choice but to suppress all of the evidence gathered in this matter, from either the initial entry or the fruits gathered since that time. To hold otherwise would be to ignore state and federal constitutions and laws.

Respectfully submitted,

June 8, 2009 Dale A. Pennie

DALE A. PENNIE, Pro se

I certify I have caused to be mailed via the US Postal service, postage paid, a true copy of this Motion and Memorandum addressed to:

Coos County Sheriff's Office
Deputy Dahlin
2nd and Baxter Streets
Coos County Courthouse
Coquille, OR 97423

06/16/2009 TUE 10:56 FAX ☑002/004

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS AMENDED

☐ Family Court
☐ Non-Family Court

THE STATE OF OREGON, Plaintiff,
vs.
Dale A. Pennie Defendant
True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NB0301

prohibited accumulation of Solid waste

COOS COUNTY CIRCUIT COURT OREGON
2009 JUN -9 PM 1:57
FILED

The following proceedings were held in the above-captioned case before the undersigned judge on 6.09.09
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint.
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
(X) Other: Court Trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt. 6.09.09
to the following charges: prohibited accumulation of Solid waste

(X) Other: Motion to Supress evidence is denied

(X) Pay $ 1000.00 by 7.09.09 and balance at $ _____ /month beginning _____
or appear at 9AM next Judicial day. Or be Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____

( ) ~~Cancel date of~~ _____
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $ _____ ($ _____ Posted)

Dated 6.09.09 Reporter A. Washington

Circuit Judge

cc: Jail, DA, Def. Atty, P & P
cc: mailed to def 6.09.09

06/16/2009 TUE 10:57 FAX ☑003/004

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

AMENDED

THE STATE OF OREGON, Plaintiff,
vs.
Dale A. Rennie Defendant
True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NB0302

Prohibited accumulation of solid waste

FILED
2009 JUN -9 PM 2:57
COOS COUNTY CIRCUIT COURT
NORTH BEND, OREGON

The following proceedings were held in the above-captioned case before the undersigned judge on 6.09.09
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as Interpreter.
(X) Other: Court trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ Was found ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: prohibited accumulation of solid waste.

(X) Other: Motion to Supress evidence is denied

(X) Pay $ 1003.00 by 7.09.09 and balance at $ _____ /month beginning _____ or appear at 9AM next Judicial day. or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omni/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____, Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____.
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $ _____ ($ _____ Posted)

Dated 6.09.09 Reporter A. Waddington

Circuit Judge

cc: Jail, DA, Def. Atty, P & P
cc: Mailed to def 6.09.09

Attachment 2
Page 2 of 3

05/16/2009 TUE 10:58 FAX ☑004/004

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

☐ Family Court
☐ Non-Family Court

AMENDED

THE STATE OF OREGON, Plaintiff,
vs.
Dale A. Rennie Defendant
True Name

RECORD OF PROCEEDINGS AND JUDGMENT

Case No. 09NB0303

Prohibited accumulation of solid waste

FILED
2009 JUN -9 PM 1:51
COOS COUNTY CIRCUIT COURT
NORTH BEND, OREGON

The following proceedings were held in the above-captioned case before the undersigned Judge on 6.09.09
_____ District Attorney appearing for the State.

( ) Arraignment/New Charge/Continued/DA Info/Indictment/Citation/Fugitive Complaint
( ) Plea/Sentencing
( ) Arraignment-Probation Violation/Detainer/Contempt/RO Violation/Diversion Violation
( ) Defendant failed to appear. B/W ordered, Security set $ _____ ( ) Release Agreement Revoked
( ) _____ present and appointed as interpreter.
(X) Other: Court trial

( ) Defendant appeared with counsel _____ ( ) Waiver of personal appearance.
( ) Defendant appeared without counsel, was informed of right to retained or appointed counsel and the court appointed _____ /continued proceedings to _____ so defendant could retain counsel/talk to DA.
( ) Defendant waived right to counsel.

( ) Defendant advised of right to jury trial/hearing and confrontation, privilege against self-incrimination, and all other procedures and penalties required by law.

( ) Counsel / Defendant waived reading of accusatory instrument, acknowledged receipt of a true copy.
( ) The Court ( ) district attorney, read the indictment/information/fugitive complaint to the defendant/delivered a true copy to the defendant.

( ) Defendant waived Identity Hearing/Writ of Habeas Corpus/Extradition and signed a waiver and the court ordered defendant to be held _____ days.

( ) Defendant ordered to report to jail forthwith to be booked and released.
( ) Victim present / waives appearance
(X) Defendant ~~entered a plea of~~ 6.09.09 ( ) Not Guilty (X) Guilty ( ) No Contest ( ) Diversion ( ) Admitted PV/Contempt to the following charges: Prohibited accumulation of Solid Waste
(X) Other: Motion to Supress evidence is denied
(X) Pay $ 1023.00 by 7.09.09 and balance at $ _____/month beginning _____ or appear at 9AM next Judicial day. Or See Clerk

(X) THE ABOVE CASE HAS BEEN GIVEN A DAY AND TIME CERTAIN FOR:
PV/Omnl/Identity/Preliminary/Extradition/RO/Contempt of Court: _____ at _____.
Writ of Habeas Corpus/Other: _____ at _____.
Plea: _____ at _____. Sentencing: today at _____.
Jury Trial: ( ) 6 Person ( ) 12 Person/( ) Court Trial _____ at _____.
Other: _____.

( ) Cancel date of _____.
( ) _____ ( ) Will be dismissed pursuant to plea bargain ( ) Upon receipt of DA's written motion.

The following arrangements were made for the release of the defendant:
( ) Release on own recognizance. ( ) Continued ( ) Security set at $ _____
( ) Defendant held in custody. ( ) No release ( ) Security continued at $ _____ ($ _____ Posted)

Dated 6.09.09 Reporter A. Waldington

Circuit Judge

cc: Jail, DA, Def Atty, P & P
cc: mailed to def 6.09.09

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF OREGON

IN THE MATTER OF: DALE ALAN PENNIE, an individual, Respondent.	RESPONSE TO MOTION TO DISMISS (CLAIM PRECLUSION) Hearing Panel No. 901024 DEQ No. LQ/SW-WR-07-225

INTRODUCTION

This memorandum addresses the legal issues raised by Respondent in his Motion to Dismiss asserting claim preclusion based on the Coos County proceedings, and it is intended to supplement the closing brief of the Department of Environmental Quality (DEQ).

DISCUSSSION

Respondent asks this court to dismiss this matter on the basis of preclusion or "res judicata," on the ground that he has been convicted of violations in Coos County Circuit Court for possession of the "identical alleged waste" involved in this administrative proceeding initiated by DEQ. Respondent asserts that "this matter has been already processed through the Oregon Courts in Coos County." Respondent asks this court to take judicial notice of the county proceedings.

A. Claim preclusion based on the county's proceedings cannot be asserted against DEQ, which was not a party to those proceedings.

Although Respondent uses the term "issue preclusion," the context of his motion demonstrates that he is necessarily referring to claim preclusion. Claim preclusion applies where parties have previously litigated a case against one another through to a final determination. *Bloomfield v. Weakland*, 193 Or App 784, 792, 92 P3d 749 (2004), *aff'd*, 339 Or 504, 123 P3d

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275 (2005) ("The doctrine of claim preclusion, formerly known as res judicata, generally prohibits a party from relitigating the same claim or splitting a claim into multiple actions against the same opponent."). Claim preclusion applies when there was a former action litigated to finality that is binding on the parties, if the parties are identical or in privity with a former party. *Rennie v. Freeway Transport,* 294 Or 319, 323 (1982).

In this context, the Coos County code violations were enforced by Coos County, not by DEQ. DEQ was not a party to the County enforcement proceedings.

Nor can it be said that DEQ was in privity with Coos County. As the Oregon Supreme Court said in *State Farm v. Reuter*, 299 Or 155, 700 P2d 236 (1985), a person may be bound by a previous adjudication either by reason of being a party in the case, or by reason of participation that is substantially equivalent to having been a party, or from having a legal relationship that is derived from one who was a party:

> *Gaul v. Tourtellotte,* 260 Or. 14, 20, 488 P.2d 416, 420 (1971), states the rule: " * * * [C]ollateral estoppel may be invoked only *against* someone who was a party, or who was in privity with a party, to the first action. * * * Individuals in privity with named parties include those who control an action though not a party to it; those whose interests are represented by a party to the action; and successors in interest to those having derivative claims." (Emphasis in original; citations omitted.)

299 Or at 161.

While it is true that a DEQ representative accompanied the County Sheriff in investigating the solid waste conditions visible from the Cox property, DEQ did not step into the shoes of Coos County, or *vice versa*, in enforcing different provisions governing solid waste. DEQ was not in a position to control the county land use enforcement proceedings. DEQ's interest in ensuring that *state* permits were in place was not represented by Coos County in the county's enforcement of its zoning. For example, DEQ could not have appealed had the county proceedings been resolved against Coos County. Finally, DEQ was not a successor in interest to Coos County in the county's enforcement role.

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It follows that claim preclusion cannot apply against DEQ in this administrative action to bar it from enforcing the requirement that solid waste disposal sites must have a valid state solid waste disposal site permit in place.

B. Claim preclusion does not preclude parallel enforcement of different county and state violations.

This administrative enforcement action by DEQ is based on the alleged violation of ORS 459.205(1) and OAR 340-093-0050(1). DEQ alleges that by accumulating abandoned vehicles and discarded materials, including automobile batteries, computers and monitors, empty paint cans and waste tires, Respondent has established, operated or maintained a solid waste disposal site without first obtaining a solid waste disposal site permit from DEQ, a Class I violation.

In contrast, the actions by Coos County were for violations of Coos County Zoning and Land Development Ordinance Section 4.2.400 (Prohibited Accumulation of Solid Waste). (See Attachment 1). Table 4.2C demonstrates that solid waste disposal, whether or not permitted by DEQ, is not allowed in a Rural Residential 5 land use zone. The County's actions were to enforce compliance with its zoning regulations.

A plaintiff who has prosecuted one action against a defendant through to a final judgment is barred from prosecuting another action against the same defendant where the claim in the second action is of such a nature as could have been joined in the first action. *Rennie v. Freeway Transport*, 294 Or at 323; *see also Drews v EBI Companies*, 310 Or 134, 140, 795 P2d 531 (1990); *Van De Hey et al. v. United States National Bank*, 313 Or 86, 91, 829 P2d 695 (1992).

DEQ could not have joined its claimed violation of lack of a state solid waste disposal site permit to the violations sought by Coos County in the county's enforcement action, because the county's violations were for disposal of solid waste in a rural residential zone, whether or not permitted by DEQ. (Attachment 1). The absence of a DEQ permit is not an element of the

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county's prohibition, and hence DEQ's requirement for a site permit was irrelevant to the violations asserted by Coos County. Further, DEQ typically enforces solid waste permit violations through administrative enforcement under ORS Chapter 183. Claim preclusion principles thus do not preclude the parallel enforcement of different county and state violations in this context.

C. Double jeopardy does not apply to civil proceedings.

To the extent that Respondent is invoking the principles of double jeopardy by his references to his previous "convictions," the motion to dismiss is misplaced. In *Hudson v. United States*, 522 US 93, 98-99, 118 S Ct 488, 139 L Ed2d 450 (1997), the Supreme Court said:

> The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." We have long recognized that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, "'in common parlance,'" be described as punishment. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549, 63 S.Ct. 379, 387, 87 L.Ed. 443 (1943) (quoting *Moore v. Illinois*, 14 How. 13, 19, 14 L.Ed. 306 (1852)). The Clause protects only against the imposition of multiple criminal punishments for the same offense, *Helvering v. Mitchell*, 303 U.S. 391, 399, 58 S.Ct. 630, 633, 82 L.Ed. 917 (1938); *see also Hess, supra*, at 548-549, 63 S.Ct., at 386-387 ("Only" "criminal punishment" "subject[s] the defendant to 'jeopardy' within the constitutional mean-ing"); *Breed v. Jones*, 421 U.S. 519, 528, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975) ("In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution"), and then only when such occurs in successive proceedings, *see Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983).

Whether a civil remedy is a criminal punishment is determined by first looking at the statute itself to determine whether it expressly identifies the remedy as civil or criminal. *Id* at 98. ORS 203.065 states in relevant part: "(2) The violator of a county ordinance may be prosecuted by the county in the name of the county, or be made the defendant in a civil proceeding by the county seeking redress of the violation." The county proceedings were based on disposing of solid waste in a rural residential land use zone, and a relatively modest civil penalty of under

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$1000 was assessed for each month of violation. (See Attachment 2). Such enforcement is clearly civil in nature.

A civil remedy may still be found to be criminal depending on "whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Id* at 98. Whether the statutory scheme is too punitive is determined by seven factors set forth in *Hudson* (citing *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963)): : (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter* "; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." *Id* at 104.

In *Hudson,* the Court found that Congress "intended the OCC [Office of Comptroller of Currency] penalties and debarment sanctions imposed for violations of 12 U.S.C. §§ 84 and 375b to be civil in nature." 522 US at 104. A major consideration was the fact that Congress delegated sanctioning authority to an administrative agency, which traditionally handles civil and not criminal sanctions. The Court examined several factors, and noted that the money penalties and disbarment were not historically viewed as punishment, the sanctions did not impose disability or restraint "approaching imprisonment," and there was no need for a finding of scienter. *Id* at 104.

In this context, Coos County obtained relatively modest civil penalties from Respondent for disposing of solid waste in a rural residential land use zone, with each violation corresponding to a separate month. Those sanctions did not have a scienter element and did not

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impose restraint approaching imprisonment. Clearly, the County's penalties were civil in nature, as is DEQ's administrative enforcement ation, and hence the principles of double jeopardy are inapplicable.

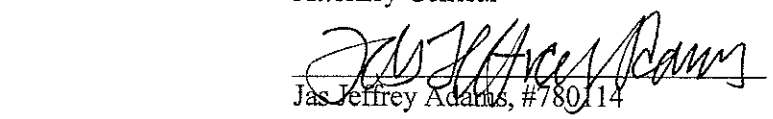
CONCLUSION

This tribunal should deny Respondent's motion to dismiss based on the assertion of claim preclusion. DEQ was not a party to the county proceedings and was not in privity with the County. Claim preclusion does not prevent parallel enforcement of county and state regulations. Finally, double jeopardy does not apply to civil proceedings like the County land use zoning enforcement and DEQ's action based on the lack of a solid waste disposal site permit.

DATED this 18th day of June, 2009.

Respectfully submitted,

JOHN R. KROGER
Attorney General



Jas Jeffrey Adams, #78014
Attorney-In-Charge
Of Attorneys for Department of Environmental Quality, State of Oregon

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Coos County Planning Department
Coos County Courthouse Annex, Coquille, Oregon 97423
Mailing Address: Planning Department, Coos County Courthouse, Coquille, Oregon 97423

(541) 396-3121 Ext.210
FAX (541) 396-2690 / TDD (800) 735-2900

PATTY EVERNDEN **PLANNING DIRECTOR**

MEMO

TO	:	Deputy Del Dahlen
FROM	:	Debby Darling Coos County Planning Department DD
DATE	:	September 2, 2008
RE:	:	Karen Pennie (Dale Pennie) property solid waste violations T.28, R.14, S.15, Tax Lot 1111
Zoning:		Rural Residential-5 (RR-5)

Attached with this fax please find the pertinent portion of Section 4.2.400 (Table 4.2C) of the Coos County Zoning and Land Development Ordinance, which shows that solid waste disposal, either ordered by the DEQ or not ordered by the DEQ is not allowed in the Rural Residential 5 zoning district.

Section 4.2.100 explains the symbols in the table.

If we can be of further help, please do not hesitate to contact the Planning Department.

ARTICLE 4.2 USES

SECTION 4.2.100. Use Matrices - General. The uses and activities allowed within the individual zoning districts prescribed in Section 4.1.100, together with those uses that may be conditionally allowed or which are prohibited, are set forth in Tables 4.2a through 4.2g.

These zoning use tables stipulate where and under what specific circumstances development may occur.

The following symbols denote whether or not the specific use or activity listed in the tables is permitted outright, may be permitted with conditions, may be allowed subject to an Administrative Conditional Use, may be allowed subject to a hearings Body Conditional Use, or prohibited in the specific zoning district:

P The use or activity is permitted outright.

P-# The use or activity may be allowed outright, but is specifically conditioned or limited by Section 4.2.900.

ACU-# This use or activity is subject to approval of an Administrative Conditional Use, subject to Section 4.2.900.

C-# This use or activity is subject to approval of a Hearings Body Conditional Use, subject to Section 4.2.900.

UC Lands located within an unincorporated community boundary designated in the Comprehensive Plan as a Rural Community, Rural Service Center or Resort Community in accordance with OAR 660, Division 22.

UUC Lands located within an unincorporated community boundary designated in the Comprehensive Plan as a Urban Unincorporated Community in accordance with OAR 660, Division 22.

" - " The use or activity is "not listed" as an allowed use in the respective zoning district.

SECTION 4.2.400. Rural Residential Zoning Districts including Rural Unincorporated Communities. The uses and activities regulated by the rural residential zoning districts are set forth below:

TABLE 4.2c

NOTE: U.C. - Unincorporated Communities

RURAL RESIDENTIAL USE	ZONE DISTRICT						
	RR-5	RR-2	RC - OUTSIDE U.C.	CREMP RR ZONE	CREMP RC ZONE OUTSIDE U.C.	RC INSIDE U.C.	CREMP RC ZONE INSIDE U.C.
Aquaculture	N	N	N	N	N	N	N
Agriculture:							
farm use pursuant to ORS 215.203	P	P	P	P-66	P-66	P	P-66
farm use pursuant to ORS 215.203 but not for profit	P	P	P	P-66	P-66	P	P-66
farm buildings	P	P	P	P	P	P	P-66
Commercial activities in conjunction with farm or forest use:							
equipment sales or repair	N	N	C-7	N	ACU-7,54	C-7	ACU-7,54
seasonal product sale	P-12	P-12	P-12	N	ACU-7,54	P-12	ACU-7,54
Commercial :							
water-dependent(WD)	N	N	N	N	C-7,54, 111	N	C-7,54, 112
water-related(WR)	N	N	N	N	C-7,54, 111	N	C-7,54, 112
non-WD/non-WR	N	N	N	N	N	N	N
veterinary clinic	C-7	C-7	C-7,111	N	ACU-7, 54,111	C-7,112	ACU-7, 54,112
kennel	C-7	C-7	C-7,111	N	ACU-7, 54,111	C-7,112	ACU-7, 54,112
off-road vehicle rental	N	N	N	N	N	N	N
race track	N	N	N	N	N	N	N
water-dependent	N	N	N	N	N	N	N
water-related	N	N	N	N	N	N	N
non-water-dep./related	N	N	N	N	N	N	N
hotel/motel	N	N	N	N	N	N	N
Log storage/sorting yard (land)	N	N	N	N	N	N	N
Dryland moorage	N	N	N	N	N	N	N
Industrial & port facilities	N	N	N	N	N	N	N
Land transportation facilities	N	N	N	N	N	N	N

TABLE 4.2c

NOTE: U.C. - Unincorporated Communities

RURAL RESIDENTIAL USE	ZONE DISTRICT						
	~~RR-5~~	RR-2	RC - OUTSIDE U.C.	CREMP RR ZONE	CREMP RC ZONE OUTSIDE U.C.	RC INSIDE U.C.	CREMP RC ZONE INSIDE U.C.
Restoration:							
passive	P	P	P	P	P	P	P
active restoration of fish & wildlife habitat or water quality & estuarine enhancement	N	N	N	N	N	N	N
Contaminated Soil/Land Farming	C-7	C-7	C-7	C-7	C-7	C-7	C-7
Forestry:							
propagation, management or harvesting of a forest product	P	P	P	ACU-52, 54	ACU-52-54	P	ACU-52, 54
primary processing of forest products	C-7,9	C-7,9	N	N	N	N	N
Exploration:							
geo-thermal	P-4	P-4	P-4	N	N	P-4	N
aggregate	P-4	P-4	P-4	N	N	P-4	N
other mineral or subsurface resource	P-4	P-4	P-4	N	N	P-4	N
Mining/mineral extraction, including dredging necessary for mineral extraction:							
geo-thermal	C-7,23	C-7,23	C-7,23	N	N	C-7,23	N
aggregate	C-7	C-7	C-7	N	N	C-7	N
other mineral or subsurface resource	C-7,23	C-7,23	C-7,23	N	N	C-7,23	N
Processing:							
geo-thermal	N	N	N	N	N	N	N
aggregate	N	N	N	N	N	N	N
other mineral or subsurface resource	N	N	N	N	N	N	N
Solid waste disposal including buildings and facilities:							
ordered by DEQ	N	N	N	N	N	N	N
not ordered by DEQ	N	N	N	N	N	N	N
Golf course	C-7	C-7	C-7	N	N	C-7	N
Hunting and fishing preserve	C-7	C-7	C-7	N	N	C-7	N
Campground	N	N	N	N	N	N	N
Recreational vehicle park	N	N	C-7,30	N	N	C-7,30	N

TABLE 4.2c

NOTE: U.C. - Unincorporated Communities

RURAL RESIDENTIAL USE	ZONE DISTRICT						
	RR-5	RR-2	RC - OUTSIDE U.C.	CREMP RR ZONE	CREMP RC ZONE OUTSIDE U.C.	RC INSIDE U.C.	CREMP RC ZONE INSIDE U.C.
Gift shop	N	N	C-7,111	N	N	C-7,112	N
Government building	N	N	C-7	N	N	C-7	N
Grocery	N	N	C-7,111	N	N	C-7,112	N
Vehicle sales/repair	N	N	C-7,111	N	N	C-7,112	N
Building supply sales	N	N	C-7,111	N	N	C-7,112	N
Cabinet/myrtlewood manufacturing sales	N	N	C-7,111	N	N	C-7,112	N
Zoos	N	N	C-7	N	N	C-7	N
Fertilizer bulk sales	N	N	C-7	N	N	C-7	N
Dikes:							
new construction	P	P	P	ACU-54, 77	ACU-54, 77	P	ACU-54, 77
maintenance/repair	P	P	P	ACU-54, 77	ACU-54, 77	P	ACU-54, 77
Drainage & tidegating	P	P	P	ACU-54, 78	ACU-54, 78	P	ACU-54, 78
Dredge material disposal	P	P	P	ACU-41, 51,54,79	ACU-41, 51,54,79	P	ACU-41, 51,54,79
Fill	P	P	P	ACU-54, 80	ACU-54, 80	P	ACU-54, 80
Mitigation	P	P	P	ACU-54	ACU-54	P	ACU-54
Stream alteration	N	N	N	N	N	N	N
Shoreland Stabilization:							
structural	ACU-102	ACU-102	ACU-102	ACU-46, 54,81	ACU-46, 54,81	ACU-102	ACU-46, 54,81
non-structural	P	P	P	P-81	P-81	P	P-81
Alcohol treatment center	C-7	C-7	N	N	N	N	N
Medical - rest home	C-7	C-7	N	N	N	N	N
Day care facility (12 or fewer persons)	P	P	P	P	P	P	P
Day care facility (13 or more persons)	ACU-7	ACU-7	ACU-7	ACU-7	ACU-7	ACU-7	ACU-7
Research & education observation structure	ACU-7, 54	ACU-7, 54	ACU-7, 54	ACU-7, 54	ACU-7, 54	ACU-7, 54	ACU-7, 54
Water-borne transportation	N	N	N	N	N	N	N
Contaminated soil/land farming	N	N	N	N	N	N	N
Winery *OR 04-1-002PL 6-30-04	ACU-7, 8, 64, 118	ACU-7, 8, 64, 118	ACU-7, 8, 64, 118	N	N	ACU-7, 8, 64, 118	N

CERTIFICATE OF FILING

I hereby certify that on June 18, 2009, I filed the originals of RESPONSE TO MOTION TO DISMISS (Motion to Suppress) and RESPONSE TO MOTION TO DISMISS (Claim Preclusion) with the Office of Administrative Hearings, 2510 Oakmont Way, Eugene, OR 97401 by UPS Next Day Air Express.

Jas Jeffrey Adams, #780117
Attorney-In-Charge
Of Attorneys for DEQ

CERTIFICATE OF MAILING

I certify that on June 18, 2009, I served the foregoing RESPONSE TO MOTION TO DISMISS (Motion to Suppress) and RESPONSE TO MOTION TO DISMISS (Claim Preclusion), upon the party hereto by UPS Next Day Air Express, a true, exact and full copy thereof to:

Dale A. Pennie
56295 Tom Smith Road
Bandon, OR 97411-6306

I certify that on June 18, 2009, I served the foregoing RESPONSE TO MOTION TO DISMISS (Motion to Suppress) and RESPONSE TO MOTION TO DISMISS (Claim Preclusion), upon the party hereto by regular mail, postage prepaid, a true, exact and full copy thereof to:

Oregon Dept of Environmental Quality
Attn: Regina Cutler
811 SW Sixth Avenue
Portland, OR 97204-1390

Dated this 18th day of June, 2009.

Jas Jeffrey Adams, #780117
Attorney-In-Charge
Of Attorneys for DEQ

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880

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
TTY 1-800-735-2900

June 9, 2009

BY OVERNIGHT MAIL

RECEIVED
JUN 10 2009
EMPLOYMENT HEARINGS

Dale Alan Pennie
PO Box 1734
56295 Tom Smith Road
Bandon, Oregon 97411-6306

Re: Witness List and Exhibits
In the Matter of: Dale Alan Pennie
OAH Case No. 901024; Agency Case No. LQ/SW-WR-07-225

Dear Mr. Pennie:

Pursuant to Administrative Law Judge Dove Gutman's May 22, 2009 Pre-Hearing Order, the Department of Environmental Quality (DEQ) is providing you with copies of exhibits that DEQ may submit at the June 24, 2009 hearing.

Witnesses for the Department will be:

- Craig Filip, DEQ Solid Waste Analyst
- Del Dahlen, Coos County Sheriff's Deputy
- Ruth Ann Carothers, property owner

If you have any questions, please call me at (503) 229-5058.

Sincerely,

Regina Cutler
Environmental Law Specialist

Enclosures

cc: Dove Gutman, ALJ, Office of Administrative Hearings
2510 Oakmont Way, Eugene, OR 97401

Craig Filip, DEQ/Eugene - *by regular mail*

Deputy Del Dahlen, Coos County Sheriff's Office - *by regular mail*
Coos County Courthouse, 250 N. Baxter, Coquille, OR 97423

Dale Pennie, Pro se
56295 Tom Smith Road
Bandon, OR 97411
541-347-9783

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON

for the
DEPT. OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: **MOTION TO DISMISS**

DALE A. PENNIE **OAH Case No.: LQSW-WR-076-225**

COMES NOW DALE a. Pennie, in the above entitled matter, to move this court for an Order suppressing all evidence gathered by Coos County Sheriff Deputy Dahlen in his performance as a codes compliance officer for Coos County, and those he enabled to enter and photograph

. This motion is made in good faith and is not for purposes of delay, as is set out in the accompanying Memorandum of Law.

Respectfully submitted,

June 10, 2009

DALE A. PENNIE, Pro se

MEMORANDUM OF LAW

Motion to Suppress Evidence

The issue in this matter revolves around a warrantless search upon the rural property of defendant Dale A. Pennie by Coos County Sheriff Deputy Dahlen. The search was to discover whether defendant had violated Coos County ordinances for "maintaining a Junk Yard" and "accumulation of solid waste" This search was initiated by a complaint filed with the county by abutting land owners, who complained :

> "Hazardous dump site with over 100 non running junk cars that are leaching oil gasoline into groundwater springs. There are also numerous computers leaching lead and silver. Looks like a huge dump. Also a fire hazard"

additionally, The property owner wrote:

> " Can only see from a distance from our property. "

Based on the above complaint, deputy Dahlin accompanied the adult children of the property owner onto the easement and onto defendant's property as well. Written permission was given at a later date for the deputy to enter onto the easement. Numerous citations have been issued to defendant by this deputy, who has also brought state employee Craig Filip of Oregon DEQ, who has since issued a warning letter with opportunity to correct. The deputy has also brought other deputies and filed complaints with the Coos Planning department.

Oregon Constitution Article 1, section 9 and the United States Constitution's fourth Amendment protect citizens from unreasonable searches and seizures. Oregon Constitution Article 1, section 9 has been interpreted to provide greater protection, in some instances, than the fourth Amendment of the U.S. Constitution. The Oregon Supreme Court has held that Article 1,

section 9 of the Oregon Constitution should be interpreted independently from the fourth Amendment (State v. Caraher, 293 Or 741, 748-750, 653 P2d 942 (1982). The court also recognized that, as a general rule, state courts should resolve state constitutional questions before reaching federal issues. State vs. Kennedy, 295 Or 260, 266-267, 666 P2d 1316 (1983).

FOUNDATION

There are 5 foundational issues to be considered when defendant seeks to suppress evidence:

(1) Was the person who performed the alleged search or seizure a Federal or state officer or agent?

In this instance, the County Sheriff Deputy is considered a state actor;

(2) Do the challenged acts constitute a search or seizure within the meaning of Article 1, section 9 of the Oregon Constitution, the fourth amendment of the US Constitution, or both?

Private property, protected from approach by a locked, posted (NO TRESPASSING) gate, and by trees and brush, plus additional NO TRESPASSING notices, and the complainant's statement on the complaint form ("can only see from a distance from our property") all indicate defendants intent to exclude others from his property and home. Taking of photographs, some CLEARLY taken from defendant's property indicate a search, and the photos are a seizure ("this is what I saw while on defendant's property).

(3) Did the search or seizure violate the defendants protected property or privacy rights?

A warrantless search is unreasonable on its face; the state must bear the burden to prove the warrant was constitutional. ORS 133.693(4); State vs. Tucker, 330 Or 85, 88-89, 997 P2d 182 (2000).

(4) Was the search or seizure conducted for criminal or civil purposes?

Well, obviously there have been fines levied, threats of larger fines and/or jail, and continuing

enforcement. Definitely criminal purposes

(5) Is the evidence obtained by means of the search or seizure subject to suppression under the exclusionary rule?

The right to be free from unreasonable searches and seizures; is it reasonable for a state actor to enter upon private, gated and posted property for the purpose of issuing citations for violations not known until a search has been made? Defendant is entitled to privacy as a matter of law, and, further, has repeatedly demanded a search warrant be provided, and, when that is denied him, continues his objection, all evidence so gathered, and all further evidence gathered as a result of that initial warrantless entry must be suppressed.

ARGUMENT

While the initial complaint was from a private citizen, he stated from the onset the violations were only visible from a distance on his property. When the deputy was escorted upon the easement, and then upon defendant's property, he had absolutely NO RIGHT to do so without a warrant. The adult child of the property owner could not grant permission to enter upon defendant's land (one person can not waive the rights of another (Coos County, et al vs. Reeves (163 OrApp 497; 988 P2d 433). In case in point, the Reeves case is quite similar to the instant matter: A state agent (game officer) entered onto a protected road to investigate a possible game violation. Upon arriving at the house the officer spoke with the father of the suspected game violators (juveniles) and, after asking for permission to search located the game violations, and cited the 2 juveniles The court suppressed the evidence and dismissed the case, because the officer

did not have a warrant, drove upon protected private property (in that matter a sign stating "no unauthorized persons beyond this point") and a request for permission to search after the fact. The court found the father could not waive, particularly after the fact, the rights of another. The

permission to search was found insufficient.

Defendant Pennie has never consented to a search sans a warrant, nor has he ever not asked for it. He has not confronted the deputy beyond that, maintaining his rights but not being combative. The deputy, on the other hand, has repeatedly stated he does not need a warrant because he has "probable cause." The probable cause is **GROUNDS** for a warrant.

Because this matter began as a quasi criminal matter (only fines) does not remove the need

for a warrant. In Marshall vs. Barlow's Inc. The U.S. Secretary of Labor appealed a ruling from the lower court stating he had the right to inspect (an OSHA inspector) a business for compliance

and did not need a warrant. The United States Supreme Court ruled the requirement of obtaining a search warrant was not overly burdensome on the inspection system or the courts and that it would provide assurances that the inspections were reasonable under the constitution.

(436 U.S. 307; 98 S,Ct.1816; 56 L.Ed.2d 305; 1978 Lexis 26; 8 ELR 20434)

The State can not expect a lower standard for them, and, in fact, the federal system has the lower standards (the fourth amendment) then Oregon (Article 1, section 9). The deputy should have sought an administrative search warrant, based on the complaint of the neighbor, and the statement "only visible from a distance on our property". There is a test set out by the Oregon Supreme Court, articulated in Dixson/Digby:

> "A person who wishes to preserve a constitutionally protected privacy interest In land outside the curtilage must manifest an intention to exclude the public By erecting barriers to entry, such as fences, or by posting signs. This rule will not unduly hamper police officers in their attempts to curtail manufacture of and Trafficking in illegal drugs, because it does not require investigating officers to draw any deduction other than that required of the general public; if land is Fenced, posted or otherwise closed off, one does not enter it without permission, Or in the officer's situation, permission or a warrant`."

Set out in State v. Walch, 99 OrApp 180; 781 P2d 406

CONCLUSION

The deputy was required to obtain a search warrant from the onset. Only then could he enter onto the private, protected property of defendant. No matter "its just a violation, not an arrest", especially now, after repeated demands from defendant, and repeated referrals to other agencies, some with criminal sanctions in mind. This court has no choice but to suppress all of the evidence gathered in this matter, from either the initial entry or the fruits gathered since that time. To hold otherwise would be to ignore state and federal constitutions and laws.

Respectfully submitted,

June 10, 2009 Dale A. Pennie

DALE A. PENNIE, Pro se

I certify I have caused to be mailed via the US Postal service, postage paid, a true copy of this Motion and Memorandum addressed to:

Coos County Sheriff's Office
Deputy Dahlin
2nd and Baxter Streets
Coos County Courthouse
Coquille, OR 97423

'Dale Pennie, Pro se
56295 Tom Smith Road
Bandon, OR 97411
541-347-9783

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPT. OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: **MOTION TO DISMISS**

DALE A. PENNIE **OAH Case No.: LQSW-WR-076-225**

Comes now Dale Pennie, named in the above entitled matter, to move this court for an order of dismissal based on the theory of Issue Preclusion (Res Judicata) for the simple fact this matter has been already processed through the Oregon Courts in Coos County (see Motion to take Judicial Notice of the many citations issued by Coos County, in which I have had a trial, been found guilty and am currently paying fines and fees upon these convictions, and these convictions are for possessing the exact and very same article as this tribunal is attempting to find me guilty of possessing, in direct violation of the statutes and constitutions of this State and the United States. To further indicate what I am referring to, examination of the cases listed "problems", include the same photographs and testimony. Until the Coos County Sheriff's office ceases issuing citations for the identical alleged "waste". Regardless of what one or another agency uses to describe a particular article, the mass is still the same mass.

This Motion is made based on the law as I know it to be.

Respectfully submitted this 10 day of June, 2009.

Dale A. Pennie

Dale Pennie, Pro se
56295 Tom Smith Road
Bandon, OR 97411
541-347-9783

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON

for the
DEPT. OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:

MOTION TO TAKE JUDICIAL NOITICE

DALE A. PENNIE

OAH Case No.: LQSW-WR-076-225

COMES NOW DALE A. PENNIE, named in the above entitled matter, to move this court to take judicial notice of the following cases heard in Oregon Circuit Court for Coos County:

o6NB1448; 07NB1336;07NB1338; 07NB1339; 07NB1352;07NB0453; 07NB0669; 07NB1794; 07NB1796; 08NB0609; 08NB0610; 08NB0611; 08NB1552; 08NB1553; 08NB1554; 08NB1555; 09NB0301; 09NB0302; 09NB0303;

The above cases are convictions for the exact same offenses, of the exact same materials, using the exact same (or similar) photographs and testimony.

June 10, 2009

Dale A. Pennie

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPT. OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:	)	**NOTICE OF AMENDED IN-PERSON**
	)	**HEARING **change of hearing location****
	)	
DALE A PENNIE	)	OAH Case No.: 901024
		Agency Case No.: LQ/SW-WR-07-225

PLEASE TAKE NOTICE that a contested case hearing has been scheduled in the above matter before the Office of Administrative Hearings.

Hearing Date: **June 24, 2009** **Hearing Time:** **10:00 am**

Location: **Owen Building**
Large Conference Room
201 North Adams
Coquille OR 97423

Your case has been assigned to **Administrative Law Judge Dove Gutman** an employee of the Office of Administrative Hearings. The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency proposing the action.

Unless otherwise notified, all correspondence, inquiries, exhibits and filings should be sent to:

Dove Gutman
Office of Administrative Hearings
2510 Oakmont Way
Eugene, OR 97401
Fax: (541) 686-7565

OAR 137-003-0520 requires a copy of any correspondence, exhibits or other filings to be provided to all parties and the agency at the same time they are provided to the ALJ. **Please use the OAH case number above on all correspondence and filings.**

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired, need a language interpreter or require another type of accommodation to participate in or attend the hearing, immediately notify the Office of Administrative Hearings at (503) 947-1581 or TDD at 1-800-735-1232 to make the appropriate arrangements. The Office of Administrative Hearings can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

You are required to notify the Office of Administrative Hearings at (503) 947-1581 immediately if you change your address or telephone number prior to a decision in this matter.

CERTIFICATE OF MAILING

On June 17, 2009, I mailed the foregoing NOTICE OF IN-PERSON HEARING in OAH Case No. 901024.

By: First Class and Certified Mail
Certified Mail Receipt # 7008 1830 0003 4609 7468

Dale Pennie
56295 Tom Smith Road
Bandon OR 97411

By: First Class Mail

Regina Cutler
Dept. of Environmental Quality
811 SW 6th Ave
Portland OR 97204

Carol Buntjer
Administrative Specialist
Hearing Coordinator

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Under ORS 183.413(2), you must be informed of the following:

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.

2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.

3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.

4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.

5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.

6. Interpreters. If you have a disability or do not speak English, the administrative law judge will arrange for an interpreter. DEQ will pay for the interpreter if (1) you require the interpreter due to a disability or (2) you file with the administrative law judge a written statement under oath that you are unable to speak English and you are unable to obtain an interpreter yourself. You must provide notice of your need for an interpreter at least 14 days before the hearing.

7. Witnesses. All witnesses will be under oath or affirmation to tell the truth. All parties and the administrative law judge will have the opportunity to ask questions of all witnesses. DEQ or the administrative law judge will issue subpoenas for witnesses on your behalf if you show that their testimony is relevant to the case and is reasonably needed to establish your position. You are not required to issue subpoenas for appearance of your own witnesses. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness fees and mileage is your responsibility.

8. Order of evidence. A hearing is similar to a court trial but less formal. The purpose of the hearing is to determine the facts and whether DEQ's action is appropriate. In most cases, DEQ will offer its evidence first in support of its action. You will then have an opportunity to present evidence to oppose DEQ's evidence. Finally, DEQ and you will have an opportunity to rebut any evidence.

9. Burden of presenting evidence. The party who proposes a fact or position has the burden of proving that fact or position. You should be prepared to present evidence at the hearing which will support your position. You may present physical, oral or written evidence, as well as your own testimony.

10. Admissible evidence. Only relevant evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs will be considered. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much the Commission will rely on it in reaching a decision.

There are four kinds of evidence:

a. Knowledge of DEQ and the administrative law judge. DEQ or the administrative law judge may take "official notice" of conclusions developed as a result of its knowledge in its specialized field. This includes notice of general, technical or scientific facts. You will be informed should DEQ or the administrative law judge take "official notice" of any fact and you will be given an opportunity to contest any such facts.

b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.

c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.

d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

a. The evidence is unreliable;

b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;

c. The evidence is unduly repetitious and duplicates evidence already received.

12. Continuances. There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. Please make sure you have all your evidence ready for the hearing. However, if you can show that the record should remain open for additional evidence, the administrative law judge may grant you additional time to submit such evidence.

13. Record. A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This will be done by tape recorder. This tape and any exhibits received in the record will be the whole record of the hearing and the only evidence considered by the administrative law judge. A copy of the tape is available upon payment of a minimal amount, as established by DEQ. A transcript of the record will not normally be prepared, unless there is an appeal to the Court of Appeals.

14. Proposed and Final Order. The administrative law judge has the authority to issue a proposed order based on the evidence at the hearing. The proposed order will become the final order of the Environmental Quality Commission if you do not petition the Commission for review within 30 days of service of the order. The date of service is the date the order is mailed to you, not the date that you receive it. The Department must receive your petition seeking review within 30 days. See OAR 340-011-0132.

15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: PENNIE

CASE NUMBER: ~~901069~~ 901024

ALJ: GUTMAN

DATE: 6/17/09

AMENDED HEARING NOTICE

Thanks, CAROL

GREEN CARD

ABC

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: CB 901024

Dale A Pennie
56295 Tom Smith Road
Bandon OR 97411

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Dale A. Pennie ☐ Agent ☒ Addressee

B. Received by (Printed Name) Dale A. Pennie C. Date of Delivery 6.19.09

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7008 1830 0003 4609 7468

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

WHITE & GREEN SLIP

7008 1830 0003 4609 7468

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Return Receipt Fee (Endorsement Required)	
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Total Postage & Fees	$

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Street, Apt. No.; or PO Box No.
City, State, ZIP+4

Dale A Pennie
56295 Tom Smith Road
Bandon OR 97411

PS Form 3800, August 2006 See Reverse for Instructions

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

In the Matter of	)	**PRE-HEARING ORDER**
	)	
DALE PENNIE,	)	DEQ Case No: LQ/SW-WR-07-225
Respondent	)	OAH Case No: 901024

A pre-hearing telephone conference in this matter was conducted by Senior Administrative Law Judge Dove L. Gutman of the Office of Administrative Hearings on May 21, 2009. Regina Cutler represented the Department of Environmental Quality (DEQ). Craig Phillip appeared on behalf of DEQ. Dale Pennie (Respondent) appeared and represented himself. This order memorializes the agreements made at the pre-hearing conference.

ISSUES

Regarding the Notice of Violation, Department Order and Civil Penalty Assessment (Notice) dated May 14, 2008, the following issues were identified:

(1) Whether Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site since at least December 20, 2005 and continuing until at least March 27, 2008, without first obtaining a solid waste disposal site permit from the Department. Specifically, whether Respondent accumulated on the easement and on the Cox property the useless or discarded materials specified in Section II paragraph 6 of the Notice, in lieu of proper disposal at a permitted facility.

(2) Whether Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site since at least December 20, 2005 and continuing until at least March 27, 2008, without first obtaining a solid waste disposal site permit from the Department. Specifically, whether Respondent accumulated on the Pennie property the useless or discarded materials specified in Section II paragraph 7 of the Notice, in lieu of proper disposal at a permitted facility.

(3) Whether Respondent shall be ordered to immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations by:

> (a) Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and

7 of the Notice, within thirty (30) days of the date of the Notice. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility as appropriate; and

(b) Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within 30 days of the date of the Notice.

(4) Whether civil penalties in the amount of $28,805 shall be imposed against Respondent, pursuant to OAR 340-012-0045.

AFFIRMATIVE DEFENSES

(1) Whether Deputy Sheriff Dahlen and DEQ staff trespassed on Respondent's property or entered Respondent's property without permission or a search warrant.

(2) Whether Respondent has been charged with identical violations in Circuit Court.

SCHEDULE

(1) **June 10, 2009** - The parties shall exchange witness lists, as well as the proposed exhibits they intend to offer at the hearing.

(2) **June 24, 2009** - The hearing will be held in person at DEQ offices in Coos Bay, Oregon, beginning at 10:00 a.m.

OTHER MATTERS

(1) DEQ will mark its exhibits consecutively, using A1, A2, A3, etc.

(2) Respondent will mark his exhibits consecutively, using R1, R2, R3, etc.

IT IS SO ORDERED.

Dove L. Gutman, Senior Administrative Law Judge
Office of Administrative Hearings

Dated: May 21, 2009.

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPT. OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:	)	**NOTICE OF AMENDED IN-PERSON HEARING (address correction)**
	)	
	)	
DALE A PENNIE	)	OAH Case No.: 901024 Agency Case No.: LQ/SW-WR-07-225

PLEASE TAKE NOTICE that a contested case hearing has been scheduled in the above matter before the Office of Administrative Hearings.

Hearing Date: **June 24, 2009** **Hearing Time:** **10:00 am**

Location: **Department of Environmental Quality**
381 N Second St
Check in with receptionist
Coos Bay OR 97420

Your case has been assigned to **Administrative Law Judge Dove Gutman** an employee of the Office of Administrative Hearings. The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency proposing the action.

Unless otherwise notified, all correspondence, inquiries, exhibits and filings should be sent to:

Dove Gutman
Office of Administrative Hearings
2510 Oakmont Way
Eugene, OR 97401
Fax: (541) 686-7565

OAR 137-003-0520 requires a copy of any correspondence, exhibits or other filings to be provided to all parties and the agency at the same time they are provided to the ALJ. **Please use the OAH case number above on all correspondence and filings.**

A request for reset of the hearing must be submitted in writing prior to the hearing. A postponement request will only be granted on a showing of good cause and with the approval of the administrative law judge.

If you are hearing impaired, need a language interpreter or require another type of accommodation to participate in or attend the hearing, immediately notify the Office of Administrative Hearings at (503) 947-1581 or TDD at 1-800-735-1232 to make the appropriate arrangements. The Office of Administrative Hearings can arrange for an interpreter at the hearing. Interpreters must be certified or qualified in order to participate in a contested case hearing and may not have a conflict of interest with the hearing participants.

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CERTIFICATE OF MAILING

On May 22, 2009, I mailed the foregoing NOTICE OF IN-PERSON HEARING in OAH Case No. 901024.

By: First Class and Certified Mail
Certified Mail Receipt # 7008 1830 0003 4609 7185

Dale Pennie
56295 Tom Smith Road
Bandon OR 97204

By: First Class Mail

Regina Cutler
Dept. of Environmental Quality
811 SW 6th Ave
Portland OR 97204

Carol Buntjer
Administrative Specialist
Hearing Coordinator

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

IMPORTANT INFORMATION FOR PREPARING FOR YOUR HEARING

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Under ORS 183.413(2), you must be informed of the following:

1. Law that applies. The hearing is a contested case and it will be conducted under ORS Chapter 183 and Oregon Administrative Rules of the Department of Environmental Quality, Chapters 137 and 340.

2. Rights to an attorney. You may represent yourself at the hearing, or be represented by an attorney or an authorized representative, such as a partner, officer, or an employee. If you are a company, corporation, organization or association, you must be represented by an attorney or an authorized representative. Prior to appearing on your behalf, an authorized representative must provide a written statement of authorization. If you choose to represent yourself, but decide during the hearing that an attorney is necessary, you may request a recess. About half of the parties are not represented by an attorney. DEQ will be represented by an Assistant Attorney General or an Environmental Law Specialist.

3. Administrative law judge. The person presiding at the hearing is known as the administrative law judge. The administrative law judge is an employee of the Office of Administrative Hearings under contract with the Environmental Quality Commission. The administrative law judge is not an employee, officer or representative of the agency.

4. Appearance at hearing. If you withdraw your request for a hearing, notify either DEQ or the administrative law judge that you will not appear at the hearing, or fail to appear at the hearing, a final default order will be issued. This order will be issued only upon a prima facie case based on DEQ's file. No hearing will be conducted.

5. Address change or change of representative. It is your responsibility to notify DEQ and the administrative law judge of any change in your address or a withdrawal or change of your representative.

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b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of facts may be received in evidence.

c. Writings. Written documents including letters, maps, diagrams and other written materials may be received in evidence.

d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence if they are reliable.

11. Objections to evidence. Objections to the consideration of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

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b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;

c. The evidence is unduly repetitious and duplicates evidence already received.

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15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: **PENNIE**

CASE NUMBER: 901024

ALJ: GUTMAN

DATE: 05/22/09

AMENDED HEARING NOTICE

Thanks, Carol

GREEN CARD

ABC

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: 901024 CB

Dale A Pennie
56295 Tom Smith Road
Bandon OR 97204

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Dale A. Pennie ☐ Agent ☒ Addressee

B. Received by (Printed Name) DALE A. PENNIE
C. Date of Delivery 5-27-09

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

correct zip code
97411

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Transfer from service label)* 7008 1830 0003 4609 7185

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
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Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

Sent To
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

Dale A Pennie
56295 Tom Smith Road
Bandon OR 97204

7008 1830 0003 4609 7185

PS Form 3800, August 2006 See Reverse for Instructions

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPT. OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:	)	**NOTICE OF IN-PERSON HEARING**
	)	
DALE A PENNIE	)	OAH Case No.: 901024
	)	Agency Case No.: LQ/SW-WR-07-225

PLEASE TAKE NOTICE that a contested case hearing has been scheduled in the above matter before the Office of Administrative Hearings.

Hearing Date: **June 24, 2009** **Hearing Time:** **10:00 am**

Location: **Department of Environmental Quality**
381 N Second St
Check in with receptionist
Coos Bay OR 97420

Your case has been assigned to **Administrative Law Judge Dove Gutman** an employee of the Office of Administrative Hearings. The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency proposing the action.

Unless otherwise notified, all correspondence, inquiries, exhibits and filings should be sent to:

Dove Gutman
Office of Administrative Hearings
2510 Oakmont Way
Eugene, OR 97401
Fax: (541) 686-7565

OAR 137-003-0520 requires a copy of any correspondence, exhibits or other filings to be provided to all parties and the agency at the same time they are provided to the ALJ. **Please use the OAH case number above on all correspondence and filings.**

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CERTIFICATE OF MAILING

On May 4, 2009, I mailed the foregoing NOTICE OF IN-PERSON HEARING in OAH Case No. 901024.

By: First Class and Certified Mail
Certified Mail Receipt # 7008 1830 0003 4609 6850

Dale Pennie
56295 Tom Smith Road
Portland OR 97204

By: First Class Mail

Regina Cutler
Dept. of Environmental Quality
811 SW 6th Ave
Portland OR 97204

Carol Buntjer
Administrative Specialist
Hearing Coordinator

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

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15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

PLEASE PLACE IN ORIGINAL FILE

CASE NAME: **PENNIE**

CASE NUMBER: 901024

ALJ: GUTMAN

DATE: 05/04/09

HEARING NOTICE

Thanks, Carol

GREEN CARD

ABC

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: CB 901024

Dale A Pennie
56295 Tom Smith Road
Portland OR 97204

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☒ Addressee

B. Received by (Printed Name) Dale A. PENNIE C. Date of Delivery 5/6

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7008 1830 0003 4609 6850

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

WHITE & GREEN SLIP

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com®
OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

Sent To
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

Dale A Pennie
56295 Tom Smith Road
Portland OR 97204

PS Form 3800, August ... Instructions

7008 1830 0003 4609 6850

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPT. OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:	)	**NOTICE OF PREHEARING CONFERENCE**
	)	
DALE A PENNIE	)	OAH Case No.: 901024
	)	Agency Case No.: LQ/SW-WR-07-225

PLEASE TAKE NOTICE that a prehearing conference has been scheduled in the above matter before the Office of Administrative Hearings.

Prehearing Date: **May 21, 2009** **Prehearing Time:** **3:00 pm**

Location: **By Telephone: Prehearing Phone Numbers and Access Code:**

- Local (Salem) call – 503-378-5680
- Toll Free – 1-866-498-2718
- ACCESS CODE – 7101024

IMPORTANT PREHEARING PHONE INSTRUCTIONS

At the date and time of your prehearing conference you **must:**

1. Call the local or toll free prehearing phone number listed above.
2. When asked for the Access Code, enter the code listed above followed by the "#" key.
3. If the administrative law judge is not already on the line, remain on the line for ten (10) minutes past the prehearing time.
4. If you fail to call within fifteen (15) minutes after the time set for the prehearing conference, the prehearing conference may proceed without you.
5. If you have any trouble connecting to the hearing or are on hold more than ten (10) minutes past the hearing start time, call the Office of Administrative Hearings immediately at (503) 947-1581.
6. ONLY call the prehearing phone number to attend your prehearing.

The following may be addressed at the prehearing conference: identification of issues, motions, preliminary rulings, documentary and testimonial evidence (if known), exchange of witness lists (if known), procedural conduct of the hearing, date, time and location of the hearing, and other matters relating to the hearing. Failure to participate in the prehearing will not preclude the Administrative Law Judge from making decisions on issues raised during the prehearing. (OAR 137-003-0575)

Your case has been assigned to **Administrative Law Judge Dove Gutman** an employee of the Office of Administrative Hearings. The Office of Administrative Hearings is an impartial tribunal, and is independent of the agency proposing the action.

Unless otherwise notified, all correspondence, inquiries, exhibits and filings should be sent to:

Dove Gutman
Office of Administrative Hearings
2510 Oakmont Way
Eugene, OR 97401
Fax: (541) 686-7565

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CERTIFICATE OF MAILING

On April 29, 2009, I mailed the foregoing NOTICE OF PREHEARING CONFERENCE in OAH Case No. 901024.

By: First Class Mail

Dale Pennie
56295 Tom Smith Road
Portland OR 97204

Regina Cutler
Dept. of Environmental Quality
811 SW 6th Ave
Portland OR 97204

Carol Buntjer
Administrative Specialist
Hearing Coordinator

DEPARTMENT OF ENVIRONMENTAL QUALITY HEARINGS

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15. Appeal. If you are not satisfied with the decision of the Commission, you have 60 days from the date of service of the order, to appeal this decision to the Court of Appeals. See ORS 183.480 *et seq.*

Dale A. Pennie
56295 Tom Smith Road
Bandon, OR 97411

Deborah Nesbit
Oregon Department of Environmental Quality
811 S.W. 6thx Avenue
Portland, OR 97204

Written Request for Contested Case Hearing on NO. LQ/SW-WR-07-225

Dale A. Pennie, Respondent, hereby requests a contested case hearing based on the following:

(1) Not one person has lawfully been upon the property located on Tom Smith Road, in Bandon, Oregon named in this Notice of Violation; specifically, not one state agent (including deputy sheriff Dahlen) has entered the property in question with a search warrant, as required by both Oregon State and United States Constitutions and specifically demanded, repeatedly, by Dale A. Pennie;

(2) Dale A. Pennie has already been specifically charged under County Ordinances for the identical violations you are, once again, attempting to charge Dale A. Pennie with (in simpler terms, you are recharging an already decided issue, which, coincidentally is currently on appeal with the Oregon Appellate court, said charges IDENTICAL in facts and nature to your charges, violating both double jeopardy (constitutional violation) and legal principal (res judicata, as well as stare decis and other practices) and said violations having been heard in open court by a Circuit Court Judge, with your same evidence and photographs, and the testimony of Craig Filip of your Eugene office;

(3) The specific denials of your findings as set out below:

(A) On finding 2, Cox Trust has nothing to do with mail box 56295 Tom Smith Road;

(B) On finding 3, The easement is a DEEDED right, preceding Cox's purchase of his property, the locked gate also preceding Cox's land purchase, as Dale A. Pennie's RIGHT to secure his property (the easement itself is Pennie property) from outsiders and intruders;

(C) On finding 4, Deputy Dahlen Trespassed unlawfully upon Dale A. Pennie's property illegally, through Cox property easement, unlawfully photographing as well as entering upon the private, posted (NO TRESPASSING) property of Dale A. Pennie and his personal property;

(D) On finding 5 these inspections were performed upon the Pennie property, illegally, as no search warrant was procured prior to the entry, as required by law; At the times of these specific inspections, no waste (if it was ever)was any longer upon the land of Cox, having been moved by Dale A. Pennie at the request of Deputy Dahlen previously;

(E) On finding 6, Dale A. Pennie denies each and every allegation in this finding;

(F) On Finding 7, Dale A. Pennie denies each and every allegation, on both constitutional and statute basis, among other, for illegal entry upon Dale A. Pennie land and also, said "waste" not being disposed, but part and parcel to Pennie Electric business wares;

(G) Finding 8, as set out previously, denies this allegation completely;

(H) Dale A. Pennie has not requested, and has never needed, a permit to own "personal property" for either himself or his business;

(I) The violations listed, based on the faulty findings of fact, are denied completely, in their entirety as well as in the individual status;

FURTHER:

Dale A. Pennie has been harassed illegally, selectively prosecuted repeatedly, in infringement to his Constitutional rights, his basic human rights as an American, for his demanding his rights be honored (a belligerent claimant, as it were) in a manner consistent with established law, and this attempt by the Oregon DEQ to blatantly accuse Dale A. Pennie of operating illegal enterprises by failure to acquire permits only the agency itself has deemed necessary, in as much as no disposal business is being operated or conducted, all "solid waste" is exactly **not** that, rather, personal property.

Respectfullysubmitted,

Dated this ____ day of May, 2008 _____
DALE A. PENNIE

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
TTY (503) 229-6993

May 14, 2008

Certified Mail No. 70060100000282620158

Dale Alan Pennie
PO Box 1734
56295 Tom Smith Road
Bandon, Oregon 97411-6306

Re: Notice of Violation, Department Order, and Civil Penalty Assessment
No. LQ/SW-WR-07-225
Coos County

Enclosed is a Notice of Violation, Department Order, and Civil Penalty Assessment (Notice and Order) relating to the Department of Environmental Quality's (Department's) March 19, 2007, October 15, 2007 and March 27, 2008 compliance inspections of property owned by the John H. Cox Jr. Revocable Trust and located at 56295 Tom Smith Road near Bandon, Oregon, also known as Tax Lot 1106 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Cox property). You claim an easement over the Cox property for ingress and egress to the adjacent property, which is owned by Karen Pennie (the Pennie property). This Notice and Order is a result of solid waste violations identified during these inspections.

During these inspections, Department staff determined that you have accumulated six wrecked or abandoned automobiles and approximately 186 cubic yards (53.6 tons) of useless or discarded materials on the Cox property, including automobile parts, automobile batteries, discarded scrap metal, a boat and boat trailer, discarded computers and computer monitors, discarded electrical components including electrical wiring, empty paint cans, waste tires, discarded building materials, metal pipe, and miscellaneous household trash. These materials are being managed in a manner constituting disposal.

Although the Department was not able to access the adjacent Pennie property directly, the Department also determined that you have accumulated a number of abandoned vehicles and additional discarded materials on that property as well. These materials were also being managed in a manner constituting disposal.

Oregon law requires that any person using property for the management or disposal of solid waste first obtain a solid waste disposal permit from the Department. Your accumulation of discarded materials on the Cox and Pennie properties and your management of these materials in a manner constituting disposal is an ongoing violation of Oregon law.

Because you have violated Oregon law, you are liable for a civil penalty assessment. In the enclosed Notice and Order, the Department has assessed a civil penalty of $28,805 for operating a solid waste disposal site without a permit. Of that amount, $10,950 represents the economic benefit

you obtained by avoiding the cost of proper disposal of approximately 53.6 tons of solid waste. This estimate does not include costs for repairing, recycling, towing or disposing of the six abandoned vehicles at a permitted wrecking facility. If you remove the solid waste and abandoned vehicles and properly recycle or dispose of them, the Department may recalculate this economic benefit as delayed rather than avoided and reduce the civil penalty accordingly.

The penalty was determined as set forth in Oregon Administrative Rule (OAR) 340-012-0045. The Department's findings and civil penalty determination are attached to the Notice and Order as Exhibit No. 1.

Also included in Section IV is an Order requiring you to remove all solid waste, including the abandoned vehicles, boat and boat trailer, from the Cox and Pennie properties within 30 days. The Order also requires you to submit to the Department all documentation of proper disposal or recycling of these items.

The steps you must follow to request a review of the Department's allegations and determinations in this matter in a contested case hearing are set forth in Section VI of the enclosed Notice and Order and in OAR 340-011-0530. You need to follow the rules to ensure that you do not lose the opportunity to dispute the enclosed Notice and Order.

If you wish to dispute the Notice and Order, you must send a written request for a contested case hearing, including a written response that admits or denies all of the facts alleged in the enclosed Notice and Order. The written response should also allege all affirmative defenses and explain why they apply in this matter. You will not be allowed to raise these issues at a later time, unless you can show good cause for that failure.

If the Department does not receive a request for a contested case hearing within **twenty calendar days** from the date you receive the enclosed documents, the Department will issue a Default Order and the civil penalty assessment and Order will become final and enforceable. You can fax a request for a contested case hearing to the Department at 503-229-5100 or mail it to the address stated in Section VI of the Notice.

If you wish to discuss this matter with the Department, or believe there are mitigating factors that the Department might not have considered in assessing the civil penalty or issuing the enclosed Order, you may include a request for an informal discussion in the request for a contested case hearing. If you request an informal discussion, you still have the right to a contested case hearing.

Copies of referenced rules are enclosed. Also enclosed is a description of the Department's policy allowing partial mitigation of the civil penalty upon a party's completion of a Supplemental Environmental Project (SEP) approved by the Department. If you are interested in having a portion of the civil penalty fund a SEP, you should review the policy.

I look forward to your cooperation in complying with Oregon environmental law in the future. If, however, any additional violations occur, you may be assessed additional civil penalties.

If you have any questions about the Notice and Order, please contact Regina Cutler with the Department's Office of Compliance and Enforcement in Portland at 503-229-5058, or toll-free at 1-800-452-4011, extension 5058.

Sincerely,

Joni Hammond
Interim Deputy Director

Enclosures

cc: Craig Filip, Eugene Office, DEQ
Land Quality Division, HQ, DEQ
Larry Knudsen, Oregon Department of Justice, Portland Office
U. S. Environmental Protection Agency
Coos County District Attorney
John H. Cox Jr. Revocable Trust, 9247 E. Sparklett Street, Temple city, CA 91780
Deputy Sheriff Del Dahlen, Coos County Courthouse, Coquille, Oregon 97423

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: DALE ALAN PENNIE, an individual, Respondent.	))))))	NOTICE OF VIOLATION, DEPARTMENT ORDER AND CIVIL PENALTY ASSESSMENT NO. LQ/SW-WR-07-225 COOS COUNTY

I. AUTHORITY

This Notice of Violation, Department Order and Civil Penalty Assessment (Notice and Order) is issued to Dale Alan Pennie (Respondent) by the Department of Environmental Quality (Department) pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through 468.140, ORS 459.376, ORS 459.995, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012, and 093.

II. FINDINGS

1. Respondent occupies real property located at 56295 Tom Smith County Road near Bandon, Oregon, also known as Tax Lot 1111 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Pennie property).

2. The John H. Cox Jr. Revocable Trust owns real property adjacent to the Pennie property, located at 56295 Tom Smith Road near Bandon, Oregon, otherwise known as Tax Lot 1106 in Section 15, Township 28 South, Range 14 West, Willamette Meridian, Coos County, Oregon (the Cox property).

3. Respondent claims a 50-foot wide and approximately 400-foot long easement for ingress and egress across the western portion of the Cox property (the easement). A dirt road runs along the easement.

4. On December 20, 2005, Coos County Deputy Sheriff Del Dahlen conducted an inspection of the easement and the Cox property.

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5. On March 19, 2007, October 15, 2007 and March 27, 2008, Department staff conducted inspections of the easement and Cox property. Deputy Dahlen accompanied the Department on these inspections.

6. During the inspections, Deputy Dahlen and Department staff observed approximately six wrecked or abandoned automobiles and 186 cubic yards (53.6 tons) of useless or discarded materials scattered along the easement and the Cox property, including automobile parts, automobile batteries, discarded scrap metal, a boat and boat trailer, discarded computers and computer monitors, discarded electrical components including electrical wiring, empty paint cans, waste tires, discarded building materials, metal pipe, and miscellaneous household trash.

7. During the inspections, Deputy Dahlen and Department staff observed abandoned vehicles and discarded materials disposed of or managed in a manner constituting disposal on the Pennie property.

8. Respondent placed the materials described in paragraphs 6 and 7 above on the easement, on the Cox property and on the Pennie property.

9. The Department has not issued a solid waste disposal permit to Respondent or to any other person owning or controlling the easement, the Pennie or the Cox properties.

III. VIOLATIONS

Based upon the Findings above, Respondent has violated Oregon's laws as follows:

1. Since at least December 20, 2005 and continuing until at least March 27, 2008, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site without first obtaining a solid waste disposal site permit from the Department. Specifically, Respondent accumulated on the easement and on the Cox property the useless or discarded materials specified in Section II, paragraphs 6, in lieu of proper disposal at a permitted facility. According to OAR 340-012-0065(1)(a), this is a Class I violation.

2. Since at least December 20, 2005 and continuing until at least March 27, 2008, Respondent violated ORS 459.205(1) and OAR 340-093-0050(1) by establishing, operating or maintaining a disposal site without first obtaining a solid waste disposal site permit from the

Department. Specifically, Respondent accumulated on the Pennie property the useless or discarded materials specified in Section II, paragraph 7 above, in lieu of proper disposal at a permitted facility. According to OAR 340-012-0065(1)(a), this is a Class I violation.

IV. DEPARTMENT ORDER

Based upon the foregoing FINDINGS AND VIOLATIONS, Respondent is hereby ORDERED TO:

1. Immediately initiate actions necessary to correct all of the above-cited violations and come into full compliance with Oregon's statutes and regulations by:

   a. Removing and properly disposing of all solid waste accumulated on the Cox and Pennie properties, including but not limited to the abandoned or wrecked vehicles and useless or discarded material identified in Section II paragraphs 6 and 7 above, within thirty (30) days of the date of this Notice. These materials must be taken for recycling or disposed of at a permitted solid waste disposal facility as appropriate; and

   b. Submitting written documentation, including receipts for proper disposal or recycling of all solid waste and photographs showing that all solid waste has been removed, within thirty (30) days of the date of this Notice.

All documentation required by this Section should be sent to:

Department of Environmental Quality
1102 Lincoln, Suite 210
Eugene, Oregon 97401
Attention: Craig Filip

V. CIVIL PENALTY ASSESSMENT

The Department imposes a civil penalty of $28,805 for the violation cited in Section III, paragraph 1 above. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-012-0045, are attached and incorporated as Exhibit No. 1.

VI. OPPORTUNITY FOR CONTESTED CASE HEARING

Respondent has the right to have a contested case hearing before an administrative law

judge regarding the matters contained in this Notice and Order, provided Respondent files a written request for a contested case hearing **within twenty (20) calendar days from the date of service of this Notice and Order**. The request for a contested case hearing must be received by the Department within twenty (20) calendar days from the date of service of this Notice and Order. Pursuant to OAR 340-011-0530(4), if Respondent fails to file a timely request for a hearing, the late filing will not be allowed unless the late filing was beyond Respondent's reasonable control.

The request for a hearing must include a written response to this Notice and Order that admits or denies all factual matters alleged in this Notice and Order. In the written response, Respondent must also allege any and all affirmative defenses and explain the reasoning in support of each affirmative defense. The contested case hearing will be limited to those issues raised in this Notice and Order and in Respondent's request for a contested case hearing. Unless Respondent is able to show good cause:

1. Factual matters not denied in a timely manner will be considered admitted;

2. Failure to timely raise a defense will waive the ability to raise that defense at a later time;

3. New matters alleged in the request for a hearing are denied by the Department unless admitted in subsequent stipulation by the Department.

Send the request for hearing and answer to: **Deborah Nesbit, Oregon Department of Environmental Quality, 811 S.W. 6th Avenue, Portland, Oregon 97204, or via fax at 503-229-5100.** Following the Department's receipt of a request for a contested case hearing, Respondent will be notified of the date, time and place of the contested case hearing.

If Respondent fails to file a timely request for contested case hearing, Respondent may lose the right to a contested case hearing, and the Department may enter a Default Order for the relief sought in this Notice and Order.

Failure to appear at a scheduled contested case hearing may result in a Default Order.

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The Department's case file at the time this Notice and Order was issued will serve as the record for purposes of entering a Default Order.

VII. OPPORTUNITY FOR INFORMAL DISCUSSION

In addition to filing a request for a contested case hearing, Respondent may also request an informal discussion with the Department by including such a request in the request for a contested case hearing. Respondent's request for an informal discussion does not waive Respondent's right to a contested case hearing, provided a timely request for a hearing has been received.

VIII. PAYMENT OF CIVIL PENALTY

The civil penalty is due and payable ten (10) days after the Order imposing the civil penalty becomes final by operation of law or on appeal. Respondent may pay the penalty before that time. Respondent's check or money order in the amount of $28,805 should be made payable to "**State Treasurer, State of Oregon**" and sent to the **Business Office, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 97204**.

5-14-08
Date

Jon Hammond
Interim Deputy Director

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENTS' CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Establishing, operating or maintaining a disposal site without a permit from the Department of Environmental Quality (Department) in violation of ORS 459.205(1) and OAR 340-093-0050(1).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0065(1)(a).

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-012-0135(3(a)(A), as the volume of material disposed of is greater than or equal to 400 cubic yards in volume.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB

"BP" is the base penalty which is $8,000 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(2)(a)(N)(i).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(16), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because Respondent has no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(a)(C), because Respondent has no prior history.

"O" is whether or not the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation existed for more than 28 days. Respondent has been operating or maintaining the disposal site without a permit since at least December 20, 2005 and continuing until at least March 27, 2008.

"M" is the mental state of the Respondent and receives a value of 6 pursuant to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. On at least two occasions the Department notified Respondent that the material he was accumulating on the properties in question was solid waste and that, by placing the material on the properties, he was illegally establishing a solid waste disposal site without a permit. On April 6, 2007 and again on December 4, 2007, the Department sent letters to Respondent requesting that he remove the solid waste accumulated on the properties by a date certain. Despite these warnings, Respondent continued to accumulate waste material on the properties in question and failed to remove and properly recycle or dispose of the materials. Respondent therefore consciously disregarded the substantial and unjustifiable risk that he was establishing, operating or maintaining an illegal solid waste disposal site.

"C" is Respondent's efforts to correct the violation and receives a value of 2 according to OAR 340-012-0145(6)(a)(E), because Respondent did not address the violations as described in paragraphs OAR

340-012-0145(6)(a)(A) through (6)(a)(C) and the facts do not support a finding under paragraph (6)(a)(D) because the violation could be corrected.

"EB" is the approximate economic benefit that an entity gained by not complying with the law. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, EB receives a value of $11,205. This is the amount Respondent gained by avoiding spending an estimated $10,950 in disposal costs (including labor, equipment rental and transportation, and tipping fees of $79/ton at Beaver Hill Disposal Site) to properly dispose of approximately 53.6 tons of solid waste.

This estimate does not include costs for repairing, recycling, towing or disposing of the six abandoned vehicles at a permitted wrecking facility because the Department does not have sufficient information to estimate these avoided costs. This estimate also does not include costs for disposing of materials on the Pennie property because Respondent denied the Department access to the Pennie property and therefore the Department was unable to accurately estimate the precise nature and volume of materials on the Pennie property.

This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:

Penalty= BP + [(0.1 x BP) x (P + H + O + M + C)] + EB
= $8,000 + [(0.1 x $8,000) x (0 + 0 + 4 + 6 + 2)] + $11,205
= $8,000 + ($800 x 12) + $11,205
= $8,000 + $9,600 + $11,205
= $28,805

Pursuant to OAR 340-012-0042(1)(c)(F)(iv), the Department elects to treat the violation as extending over as many days as is necessary to recover the economic benefit of noncompliance.