

State of Oregon
Department of Environmental Quality

Memorandum

Date: July 23, 2010

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item E, Action item: Contested Case No. LQ/HW-NWR-07-177
regarding Robert M. Noble
August 18-19, 2010 EQC meeting

Introduction The Oregon Department of Environmental Quality implements environmental protection laws. While most people voluntarily comply, 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 and Department Order of Civil Penalty to Robert M. Noble on Jan. 15, 2008. DEQ assessed Noble a total civil penalty of \$9,300 for allegedly illegally transporting (\$4,800) and storing (\$4,500) hazardous waste. The Notice also ordered Noble to perform hazardous waste determinations and appropriately manage several containers of suspect wastes.

Noble filed a written response to the notice requesting a contested case hearing before an administrative law judge and denying the violations.¹ After meeting with Noble, DEQ dismissed Violation 2 of the Notice, illegal storage of hazardous waste and the associated civil penalty of \$4,500, and the Order portion of the Notice.

Administrative Law Judge John Mann conducted a contested case hearing Sept. 18, 2009. Judge Mann issued a Proposed and Final Order on Dec. 9, 2009 in which he found that Noble transported hazardous waste without a manifest in violation of 40 Code of Federal Regulations §263.20(1)(a) and penalized Noble \$4,800.

In his filings and brief to the commission, Noble requests that the commission adopt alternate findings of fact, and conclude that he did not transport hazardous waste without a manifest and is not subject to a civil penalty.

¹ See Attachment F, Request for Contested Case Hearing on No. LQ/HW-NWR-07-177.

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

Findings of fact On Oct. 26, 2006, the DEQ received a report from the Metro Solid Waste Enforcement Section that there were several containers of liquids dumped at property owned by the Sunrise Water District in Clackamas Oregon. DEQ contacted Sunrise Water District who agreed to take responsibility for managing the wastes. Sunrise contracted with Cowlitz Clean Sweep to coordinate the cleanup and disposal of the materials.²

Cowlitz examined the materials and identified 31 containers, which it labeled using individual letter designations. It also identified a cubic-yard box with oil-based paint materials. Cowlitz took samples from the containers that it submitted for laboratory analysis sometime prior to April 12, 2007. Based on its analysis, Cowlitz identified 14 containers, and the cubic-yard box, as containing hazardous waste.³

Metro subsequently investigated and determined that the barrels were the property of a company called Emmert International. Metro further determined that the barrels had previously been stored in utility trailers owned by Emmert. On March 27, 2007, Rebecca Paul, a DEQ hazardous waste inspector, wrote Emmert's owner, Terry Emmert, and informed him that Emmert was responsible for recovering the barrels. Paul explained that DEQ had tested material in the barrels and that at least four of the barrels contained hazardous waste that must be disposed of at a permitted hazardous waste disposal facility. Paul noted that the remaining barrels appeared to contain paint waste and related non-hazardous materials that could be disposed of as solid waste. Paul requested that Emmert remove the barrels from the Sunrise property, return them to his property, and then dispose of them appropriately.⁴

On April 9, 2007, DEQ received a letter from Emmert acknowledging that at least some of the waste found on the Sunrise property was connected to the theft of Emmert's trailers. Emmert asked DEQ to identify any waste on the Sunrise property that was owned by Emmert personally, or by any of his corporations, so that he could dispose of it appropriately.⁵

On April 13, 2009, Paul asserted that all of the waste discovered on the Sunrise property originated with Emmert. Consequently, she asserted that Emmert was responsible for the proper disposal of all of the material. This included 31

² Proposed and Final Order, page 2, finding of fact no. 1.

³ Proposed and Final Order, page 2, finding of fact no. 2.

⁴ Proposed and Final Order, page 2, finding of fact no. 3.

⁵ Proposed and Final Order, page 2, finding of fact no. 4.

drums and two one-cubic-yard drop boxes containing soil waste resulting from cleaning up spills of paint waste from some of the drums. Paul informed Emmert that Cowlitz had sampled material from the barrels and determined that some of them contained hazardous waste. Paul wrote "In addition to other requirements, those hazardous wastes must be properly labeled and manifested for disposal."⁶

On April 21, 2007, at Emmert's request, Noble went to the Sunrise property and observed multiple barrels of material. The barrels all had labels with preprinted language in large bold print stating "This Container on Hold Pending Analysis" and "Do Not Tamper with Container, Authorized Personnel Only." The labels also bore handwritten information about the contents. Several were labeled "Hazardous" or "Potentially Hazardous." Each label also had the name and phone number of a contact person. Noble saw the labels on the barrels when he went to the Sunrise property.⁷

On April 21, 2007, Noble used a truck to transport the material at the Sunrise property to the Emmert property. He did not have a hazardous waste manifest. At the time he went to the Sunrise property, Noble understood that it was the site of an illegal dumping and that DEQ was involved. Noble has many years of experience in the transport of hazardous waste and is aware that such material cannot be transported without a hazardous waste manifest.⁸

On April 25, 2007, Mike Kortenhof, a manager in DEQ's hazardous waste compliance section, met with Emmert to discuss the material found on the Sunrise property. At the meeting, Emmert explained that Noble had already moved the material to the Emmert property. Prior to that meeting, DEQ was not aware that the material had been moved.⁹

On May 14, 2007, Paul went to the Emmert property along with Bruce Long, an investigator with the EPA. Paul and Long observed a large blue drop box that bore the name A & R Environmental and listed a phone number. Long called the phone number and eventually spoke with Noble who then came to the Emmert property. Noble agreed to return the following day with equipment to move the material out of the box so that Long and Paul could inspect it.¹⁰

On May 15, 2007, Long and Paul met Noble, and one of his co-workers, at the Emmert property. Noble and his assistant removed the material from the drop

⁶ Proposed and Final Order, page 2, finding of fact no. 5.

⁷ Proposed and Final Order, pages 2-3, finding of fact no. 6.

⁸ Proposed and Final Order, page 3, finding of fact no. 7.

⁹ Proposed and Final Order, page 3, finding of fact no. 8.

¹⁰ Proposed and Final Order, page 3, finding of fact no. 10.

box. Long was able to identify the material using an inventory provided by Cowlitz which identified each container by letter designation which was clearly visible on the containers. Long photographed each of the containers using a label which he placed on the top of the container. Long was able to locate 13 of the 14 containers of material identified as hazardous by Cowlitz. The only missing container was a five-gallon pail designated as “V” by Cowlitz.¹¹

On May 11, 2007, Mr. Noble wrote a letter to Ms. Paul giving a detailed chronology of events and his interactions with the DEQ. Mr. Noble began the letter:

Dear Rebecca,

Since we began our communication concerning the [Sunrise] property on the 7th of May, 2007, and because both of us have been brought into this project after it had already been initiated by others, I wish to give you a summary of the facts as I know them. * * *

The letter then provides a narrative of Mr. Noble’s activities with regard to the site. Mr. Noble wrote that he visited the site in April 2007 and observed the material being stored in such a way as to allow vandals to come into contact with them and that he recommended to Mr. Emmert that the materials be moved and secured to protect the health and safety of persons who may come into contact with them. The day after that conversation, the letter states, Mr. Emmert advised Mr. Noble that all of the hazardous material had been removed by Cowlitz. According to the letter, Mr. Noble called Cowlitz and spoke to a dispatcher who told him that the hazardous waste had been removed. However, according to the letter, the

dispatcher promised to call Mr. Noble to confirm that there was no hazardous waste remaining on the property. The letter does not mention any subsequent contact with the dispatcher. Nor does the letter state that Mr. Noble had any further contact with Sunrise or Cowlitz before he moved the material. After reciting these events, the letter states that Mr. Emmert told Mr. Noble of Ms. Paul’s involvement and gave him her phone number. Mr. Noble wrote that he called Ms. Paul and left a message which she returned on May 9, 2007. There is no mention of any contact between Mr. Noble and Mr. Paul prior to May 2007.¹²

Sometime after May 15, 2007, Emmert had the material analyzed and

¹¹ Proposed and Final Order, page 3, finding of fact no. 11.

¹² Proposed and Final Order, pages 3-4, finding of fact no. 12.

confirmed that the material previously identified as hazardous by Cowlitz was, in fact, hazardous waste. In addition, Emmert determined that material in drums marked “HH” and “MM” by Cowlitz contained hazardous waste.¹³

On June 4, 2007, at Emmert’s request, Burlington Environmental, Inc. removed the material from the Emmert property and transferred it to its disposal facility in Kent, Washington. The hazardous waste manifest for the material lists 255 gallons of hazardous waste.¹⁴

**Conclusions of
the
administrative
law judge**

In the Proposed and Final Order, Judge Mann concluded, based on the findings of fact, that Noble transported hazardous waste without a manifest in violation of 40 CFR §263.20(1)(a) and is subject to a civil penalty of \$4,800.

Issues on appeal

In his Exceptions and Brief, Noble raises three arguments: 1) that he was ignorant to the fact that any of the containers he accepted for transport contained hazardous waste, 2) DEQ did not prove that any of the containers contained hazardous waste, and 3) the Sunrise Water District failed to comply with hazardous waste generator regulations.

Noble’s argument

Noble argues that because the Sunrise Water District and Terry Emmert allegedly told him that all the hazardous waste had been removed prior to his transporting any containers from the Sunrise property, he did not violate Oregon law by transporting hazardous waste without a manifest.

DEQ’s reply

Judge Mann addresses the relevance of Noble’s knowledge of the container contents in page five of his Proposed Order, correctly noting that violation of 40 Code of Federal Regulations 263.20(1)(a) is a strict liability offense. Noble need not have known that the containers contained hazardous waste to violate the law. Judge Mann’s ruling is consistent with the Environmental Quality Commission’s decision in Case No. WQ/M-NWR-01-100, which is attached to DEQ’s reply brief. In that case, the commission held that a respondent’s mental state is relevant only to the calculation of a civil penalty and is not an element of a violation unless the rule or statute at issue expressly makes mental state an element.

Noble’s argument

Noble argues that he was misled by Daryl Zinser of Sunrise when Zinser allegedly told him that all the hazardous waste had been removed from the

¹³ Proposed and Final Order, page 4, finding of fact no. 13.

¹⁴ Proposed and Final Order, page 4, finding of fact no. 14.

Sunrise property. Noble's only evidence that Zinser ever made such a statement is Noble's own uncorroborated testimony. Judge Mann found Noble's testimony unpersuasive because it was implausible or conflicted with other evidence entered into the record by Noble himself. See Proposed Order at pages five through six and eight.

DEQ's reply

While the commission may reverse or modify an administrative law judge's finding of fact, it can do so only if it determines that the finding is not supported by a preponderance of the evidence in the hearing record. OAR 137-003-0665(4). Findings of fact are often best determined by the judge, especially when there is conflicting evidence in the record. These findings are often based on the demeanor or credibility of the witness which is difficult to evaluate when reviewing the record. This is particularly relevant in this case where Noble is asking the commission to reverse a number of the judge's Findings of Fact primarily because the judge found his testimony unpersuasive. DEQ argues that the commission should reject Noble's exceptions to the ALJ's Findings of Fact because his exceptions are not supported by a preponderance of evidence in the hearing record.

Noble's argument

Noble argues that DEQ failed to prove at hearing that the waste he transported was in fact hazardous, and even if it was, that the total amount of hazardous waste transported was 255 pounds. Noble states that Bruce Long with EPA testified at hearing that neither he nor Rebecca Paul opened the container at issue or physically measured or tested what was inside the drums. In addition, Noble asserts that the containers were never opened and retested by any governmental official.

DEQ's reply

The hearing record contains ample evidence that the waste Noble transported was determined to be hazardous and to total 255 gallons. Judge Mann found that Cowlitz examined the materials dumped at the Sunrise Water District and identified 31 separate containers that it labeled using individual letter designations. He further found that Cowlitz took samples from the containers which it submitted for laboratory analysis, and that the analysis determined that 14 separate containers contained hazardous waste. Judge Mann specifically referenced the testimony of Bruce Long, and Exhibits A5 and A26-A30 as the bases for these findings.

Judge Mann, relying on Long's testimony, and Exhibits A5 and A7-A19, further found that Long located 13 of the 14 containers of material identified as hazardous by Cowlitz among those transported by Noble from the Sunrise property to Emmert's property. Judge Mann also found that Terry Emmert had

the contents of the containers transported by Noble analyzed and confirmed that the material previously identified as hazardous by Cowlitz was, in fact, hazardous waste. In addition, Emmert determined that material in drums marked “HH” and “MM” by Cowlitz contained hazardous waste. Judge Mann referenced Brue Long’s testimony and Exhibits A19-A24 as the basis for this finding.

Finally, Judge Mann, relying on Exhibit A4, found that, at Emmert’s request, Burlington Environmental, Inc., removed the material from the Emmert property and transferred it to its disposal facility in Kent, Washington. The hazardous waste manifest for the material listed 255 pounds of hazardous waste.

Noble’s argument

Noble argues that he cannot be penalized because the Sunrise Water District allegedly failed to comply with regulations applicable to hazardous waste generators.

DEQ’s reply

Judge Mann makes no mention of these allegations in his Proposed Order because they are not relevant. What Sunrise may or may not have done does not alter the fact that Noble accepted hazardous waste for transport without receiving a hazardous waste manifest. Regardless of whether a particular container is labeled as hazardous waste, Noble has an absolute duty to ascertain whether wastes he accepts for transport are hazardous, and if so, to require a manifest be provided. In this instance, labeling on the Sunrise containers, including “hazardous,” “suspect hazardous” and “potentially hazardous” put Mr. Noble on notice that he needed to be particularly diligent in fulfilling this duty.

Documents were available from Sunrise, Cowlitz and DEQ that inventoried all the relevant containers on the Sunrise property and their contents. Cowlitz performed hazardous waste determinations on all the containers, and the results of those determinations were available to Noble. Noble could have compared the information in the documents with what he observed on the ground to confirm that all hazardous waste had, in fact, been removed.

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.¹⁵ The proposed order was issued under current statutes and rules

¹⁵ ORS 183.635.

governing the Administrative Law Judge Panel.¹⁶ Under ORS 183.600 to 183.690, EQC's authority to change or reverse an administrative law judge's proposed order is limited.

The most important limitations are as follows:

1. EQC may not modify the form of the administrative law judge's Amended Proposed and Final Order in any substantial manner without identifying the modifications and providing an explanation why the commission made the modifications.¹⁷
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.¹⁸ 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.¹⁹
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.²⁰

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.²¹

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

¹⁶ ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.

¹⁷ ORS 183.650(2).

¹⁸ 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.

¹⁹ OAR 137-003-0655(3) and (4).

²⁰ OAR 137-003-0655(5).

²¹ OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.

not presented to the administrative law judge.²²

Alternatives

The EQC may either:

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

Attachments

- A. Documents regarding review by the EQC:
 1. Letter from Stephanie Clark to Respondent, dated March 4, 2010.
 2. Department's Reply Brief, dated March 3, 2010.
 3. Letter from Stephanie Clark to Respondent, dated Feb. 8, 2010.
 4. Amendment to Respondent's Exceptions and Brief, dated Feb. 3, 2010.
 5. Respondent's Exceptions and Brief, dated Feb. 1, 2010
 6. Letter from Stephanie Clark to Respondent, dated Jan. 6, 2010
 7. Respondent's Petition for Commission Review, dated Jan. 5, 2010
- B. Proposed and Final Order, issued by Judge Mann on Dec. 9, 2009
- C. Closing Arguments
 1. Respondent's Closing Argument, dated Oct. 6, 2009
 2. DEQ's Closing Argument, dated Oct. 7, 2009
 3. Respondent's Reply to DEQ's Closing Argument, dated Oct. 13, 2009
- D. Exhibits from September 18, 2009 contested case hearing, numbered A1 through A30, and R1 through R13
- E. Pre-hearing Documents:
 1. Respondent's Pre-Hearing Memorandum entitled "Response to Notice of Violation Department Order and Civil Penalty Assessment No. LQ/HW-07-177, Clackamas County," dated Sept. 8, 2009.
 2. DEQ Amendment to Notice of Violation, dated Sept. 4, 2009.
 3. Notice of In-Person Hearing, issued July 17, 2009.
 4. Letter from Judge Mann to Respondent and DEQ regarding scheduling of pre-hearing conference, dated June 29, 2009.
 5. Notice of Pre-Hearing Conference, issued May 27, 2009.
 6. Letter from Judge Mann to Respondent and DEQ regarding scheduling of rescheduling of hearing, dated May 7, 2009.
 7. Letter from DEQ to Judge Mann and Respondent requesting rescheduling of hearing, dated May 1, 2009.
 8. DEQ Amendment to Notice of Violation, dated April 23, 2009.
 9. Notice of In-Person Hearing, issued Feb. 26, 2009.
 10. Notice of Pre-Hearing Conference, issued Dec. 22, 2008.
- F. Request for Contested Case Hearing on No. LQ/HQ-NWR-07-177, filed by

²² OAR 137-003-0655(4).

Respondent, received by DEQ Feb. 4, 2008.
G. Notice of Violation, Department Order, and Civil Penalty Assessment,
issued by DEQ on Jan. 15, 2008.

**Available upon
request**

Transcript of the following proceedings:
1. Sept. 18, 2009 contested case hearing
2. July 17, 2009 pre-hearing conference
3. Feb. 20, 2009 pre hearing conference

Approved:

Leah E. Koss
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