
Date: October 8, 2010

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Action item H: Contested case no. WQ/D-NWR-08-019 regarding Magar Edward Magar.
October 20-22, 2010, EQC meeting.

**Introduction and
DEQ
recommendation**

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.

On May 15, 2008, DEQ issued Magar Edward Magar a Notice of Violation, Department Order and Civil Penalty Assessment alleging four violations and assessing civil penalties for three of those violations. On June 3, 2008, Magar appealed the notice, and on Oct. 13, 2009, a contested case hearing was held. Administrative Law Judge Ken L. Betterton issued a Proposed and Final Order on Dec. 31, 2009, and on Jan. 28, 2010, Magar petitioned the commission for review of that order.

In his exceptions and brief, Magar requests that the commission adopt alternate findings of fact and alternate conclusions of law, and reverse Judge Betterton's conclusion that Magar is liable for the violations. In its answering brief, DEQ requests that the commission uphold the order.

DEQ recommends that EQC issue a final order adopting Judge Betterton's order.

**Background and
findings of fact**

In the order, Judge Betterton found that Magar has owned Riverwood Mobile Home Park located near Ranier, Oregon, since the 1980s. The park consists of about 30 mobile homes and a few duplex units. Magar has maintained his own wastewater treatment system at the park through the National Pollutant Discharge Elimination System waste discharge permit system and is the permittee.¹

¹ Proposed and Final Order, page 2, finding of fact number 1.

On July 11, 2001, DEQ issued a formal enforcement action to Magar in case no. WQ/D-NWR-01-129 that assessed a civil penalty for six Class I violations of his NPDES permit for violations that occurred in March and April 2001. Magar paid the civil penalty in full on or about April 10, 2002.² On Feb. 7, 2006, DEQ issued a formal enforcement action to Magar in case no. WQ/D-NWR-05-181 for one Class I violation and for one Class II violation of his permit that occurred in June and July 2005. Magar paid the civil penalty on or about Aug. 18, 2006.³

In March 2007, Magar filed an application with DEQ to renew his permit. Magar personally completed the application form, listing himself as the “Responsible Official,” the “Facility Contact,” and the person to “receive invoices.” Magar listed his mailing address on the application as 1616 NW Northrup Street, Portland, Oregon 97209. This is the same mailing address that DEQ had on file for Magar for his NPDES permit issued in 2002.⁴

On April 5, 2007, DEQ mailed Magar a letter at his address on file, enclosing a copy of the proposed permit, and inviting him to review the proposed permit and make comments. The April 5, 2007 letter was not returned to DEQ by the United States Postal Service as not deliverable, and Magar did not file any comments.⁵

On April 25, 2007, Lyle Christensen of DEQ mailed Magar a letter at the same address, informing him that he had conducted a water quality inspection at the park. In his letter, Christensen listed a number of requirements in the permit that Magar was not meeting. The April 25, 2007, letter was not returned to DEQ as not deliverable. Christensen monitors about 40 permittees and facilities, including Magar’s. He has worked with Magar since 1992 and is familiar with both him and the park.⁶

On June 4, 2007, DEQ renewed Magar’s NPDES permit and mailed the permit to him at his address on file. The permit also listed Magar as the designated operator of the wastewater treatment facility at the park. The permit and accompanying cover letter were not returned to DEQ by the USPS as not deliverable.⁷

Schedule C, condition 1 of the renewed permit required Magar to have the

² Proposed and Final Order, page 2, finding of fact number 2.

³ Proposed and Final Order, page 3, finding of fact number 3.

⁴ Proposed and Final Order, page 3, finding of fact number 4.

⁵ Proposed and Final Order, page 3, finding of fact number 5.

⁶ Proposed and Final Order, page 3, finding of fact number 6.

⁷ Proposed and Final Order, page 3, finding of fact number 7.

existing treatment system at the facility evaluated by a qualified consultant within 180 days of the permit renewal and submit the results of the evaluation to DEQ. This condition also required that if DEQ determined that repairs, upgrades or modifications were needed, Magar would develop and submit a plan to DEQ for repairs, upgrades or modifications within 90 days of DEQ notification, and then complete all required upgrades within 90 days of the plan's approval by DEQ.⁸ Christensen put this condition in the permit because of concerns about water he had seen standing on the facility's recirculating gravel filter field as the standing water can attract flies and mosquitoes as a place to live and breed. Christensen believed the standing water indicated that the treatment system had some fundamental problems that needed correcting.⁹

The condition required Magar to have his treatment system evaluated by a consultant by Dec. 4, 2007. He did not have the evaluation done by that deadline but he did have the evaluation completed June 25, 2008. The consultant Magar hired to conduct the evaluation made several recommendations for repairs, upgrades or modifications. Magar had not made the recommended repairs, upgrades or modifications as of the date of the hearing.¹⁰

Schedule B, condition 2(a) of the permit requires Magar to file discharge monitoring reports with DEQ for each calendar month by the 15th day of the following month.¹¹ Magar submitted his report for June 2007 on July 15, 2007; he submitted his report for August 2007 on Sept. 26, 2007; he submitted his report for September 2007 on Oct. 30, 2007; he submitted his report for October 2007 on Dec. 3, 2007; he submitted his report for February 2008 on April 1, 2008.¹²

Schedule B, condition 1 of the permit requires Magar to collect monitoring data for total suspended solids, biochemical oxygen demand (BOD-5), and bacteria, at least once a month.¹³ Magar failed to collect monitoring data for TSS, BOD-5, and bacteria for December 2007.¹⁴

Schedule A, condition 1(a)(3) of the permit requires that E. coli bacteria samples not exceed 406 organisms per 100 mL for a single sample.¹⁵ On Jan.

⁸ Proposed and Final Order, pages 3-4, finding of fact number 8.

⁹ Proposed and Final Order, page 4, finding of fact number 9.

¹⁰ Proposed and Final Order, page 4, finding of fact number 9.

¹¹ Proposed and Final Order, page 3, finding of fact number 8.

¹² Proposed and Final Order, page 4, finding of fact number 11.

¹³ Proposed and Final Order, page 3, finding of fact number 8.

¹⁴ Proposed and Final Order, page 4, finding of fact number 12.

¹⁵ Proposed and Final Order, page 3, finding of fact number 8.

10, 2008, Magar's facility discharged wastewater with a concentration of 610 E. coli organisms per 100 mL, as shown on the report Magar filed for January 2008.¹⁶

On Dec. 5, 2007, Christensen mailed a pre-enforcement notice to Magar at 1616 NW Northrup Street, Portland, Oregon 97209. The notice informed Magar that he was in violation of his permit. The notice was returned by as not deliverable. Christensen found an address for another business owned by Magar that was located physically near the mobile home park and re-mailed the notice to that address on Dec. 11, 2007. The re-mailed notice was not returned by the USPS as not deliverable.¹⁷

On May 15, 2008, DEQ issued the Notice of Violation, Department Order and Civil Penalty Assessment to Magar alleging that he violated Schedule C, Condition 1, Schedule B, Condition 1, Schedule B, Condition 2(a), and Schedule A, Condition 1(a)(3) of his Permit. The notice also ordered Magar to have the treatment system at the facility evaluated by a qualified consultant and submit the evaluation to DEQ. If the evaluation recommended that repairs, upgrades or modifications to the system were required, Magar was required to develop a plan for such repairs, upgrades or modifications and submit the plan to DEQ within 90 days of notification to DEQ, and make the repairs, upgrades or modifications as approved by DEQ within 90 days of DEQ's approval of the plan.¹⁸

**Conclusions of the
administrative law
judge**

On Dec. 31, 2009, Administrative Law Judge Betterton issued a proposed and final order. Judge Betterton concluded that:

(1) Magar violated ORS 468B.025(2) by failing to comply with his pollutant waste discharge permit by not having his system evaluated by a qualified consultant within the 180 days required. Magar must develop and submit a plan to DEQ immediately to repair, upgrade or modify his system and make such repairs, upgrades or modifications as required by DEQ within 90 days of the plan's approval by DEQ.

(2) Magar violated ORS 468B.025(2) by failing to comply with his pollutant waste discharge permit by failing to collect monitoring data for pollutants.

(3) Magar violated ORS 468B.025(2) by failing to comply with his pollutant waste discharge permit by failing to submit timely monthly discharge monitoring reports.

(4) Magar violated ORS 468B.025(2) by failing to comply with his pollutant waste discharge permit by discharging waste water with a higher

¹⁶ Proposed and Final Order, page 4, finding of fact number 14.

¹⁷ Proposed and Final Order, page 4, finding of fact number 13.

¹⁸ Proposed and Final Order, pages 4-5, finding of fact number 15.

concentration of bacteria than allowable by law into waters of the state.

(5) A civil penalty of \$8,345 is appropriate.

Issues on appeal

1. Magnitude of violation two

Magar's argument:

Mr. Magar argues that the judge erred in finding the magnitude of violation two (failing to collect monitoring data for pollutants) to be "moderate."¹⁹ To support this argument, Magar refers to the third page in his exceptions and brief, which is "2A" at the bottom of the page. Magar represents page "2A" as data gathered by Lyle Christensen and states in his exceptions that it is "corresponding to the effluent BOD and TSS of the sewer plant from January 2004 to February 2007 measured mg/L."²⁰ Magar argues that because his analysis of those 37 months show de minimis environmental impact, so must be the months that are the subject of violation two, and thus the magnitude of this violation should be "minor." Magar states that "when DEQ argues one does not know what was discharged, Respondent is prepared to show and does in fact show using well established statistical techniques taught in any elementary class in statistics that the harm to the environment was de minimis."

DEQ's argument:

The magnitude of violation two is properly assessed at "moderate." Judge Betterton had the opportunity to evaluate the data portrayed on "2A,"²¹ and Magar had the opportunity to refer to this data at the hearing. The judge disagreed with Magar's conclusion that the magnitude should be minor, reasoning that "OAR 340-012-0130(1) states that the magnitude is moderate unless there is a basis for finding the magnitude to be major or minor."²² Thus, the judge addressed Magar's argument, found that "Mr. Magar presented no basis for his contention,"²³ and concluded that "Mr. Magar has the burden to present evidence that a magnitude should apply other than the presumed magnitude. Mr. Magar presented no such evidence."²⁴ Additionally, the statistical analysis in "2A" should not be considered because it is new or additional evidence that was not presented to Judge Betterton at the hearing. Therefore, the judge did not have the opportunity to consider it the evidence or determine its foundation or relevance. Because Magar did not present a motion or a statement specifying the reason for the

¹⁹ Mr. Magar's Exceptions, page 1-3.

²⁰ Mr. Magar's Exceptions, page 1-3.

²¹ The data on "2A" can be found on page 10 of Attachment A of Exhibit R6 from the contested case hearing of October 13, 2009.

²² Proposed and Final Order, page 12.

²³ Proposed and Final Order, page 11.

²⁴ Proposed and Final Order, page 12.

failure to present the evidence to the judge, as required by the commission's rules in OAR 340-011-0575(5), the commission should not consider this evidence.²⁵

Secondly, DEQ argues that the data listed on "2A" is irrelevant because Magar represents "2A" as data corresponding to the effluent biological oxygen demand and total suspended solids of the park from January 2004 to February 2007. However, the subject of violation two is the effluent from December 2007, which was not included in the data listed in "2A." Therefore, the data in "2A" is irrelevant to the determination of the magnitude of violation two, and the judge properly found that the magnitude should be "moderate" because Magar presented no evidence to support a different finding.

2. Magnitude of violation three

Magar's argument:

Magar argues that violation three (failing to submit timely monthly discharge monitoring reports) should be assigned a magnitude of "minor" because "a late report cannot have an impact on human health or the environment."²⁶ He argues that this because the permit requires that he, as the permittee, must report within 24 hours any non-compliance that may endanger health or the environment, the late report cannot have an environmental impact.

DEQ's argument:

During the hearing, Christensen testified that he has often identified problems with treatment systems based on his review of the required monthly reports and that the early detection of deficiencies via reports can prevent a threat to human health or the environment. Additionally, DEQ argues that the likelihood of harm was increased by the fact that Magar submitted late reports in not just one but five different months and Judge Betterton agreed, noting when assessing the magnitude of violation three that "(m)oreover, Violation [3] was repeated over several months."²⁷

3. The "M Factor" (mental state) of violation two

Magar's argument:

Magar argues that the "M Factor" or mental state of violation two (failing to collect monitoring data for pollutants) should be "negligent" rather than

²⁵ See OAR 340-003-0655(5) which states that the agency or ALJ may not consider new or additional evidence unless the agency requests the ALJ to conduct further hearings under section (1) of this rule.

²⁶ Mr. Magar's Exceptions, page 1.

²⁷ Proposed and Final Order, page 12.

“reckless.”²⁸ While he did not supply supporting reasoning for this argument in his exceptions, in his reply brief Magar explains that for approximately twenty years he has had the same lab pick up samples once a month and that he arranges with the lab for those pickups. Magar argues that he believes his “sub-operator” was responsible for the missed sampling, thereby attributing the fault for the violation to his employee rather than to himself.”²⁹

DEQ’s argument:

Judge Betterton upheld DEQ’s assessment of an M Factor of reckless for violation two, citing DEQ’s reasoning to support the M Factor in Exhibit 2 of the notice: “Mr. Magar has been cited for this violation previously in Notice of Violation, Department Order and Civil Penalty Assessment WQ/D-NWR-05-181. Mr. Magar acted recklessly in failing to assure that the sampling was done and therefore acted recklessly in committing this violation.”³⁰

4. Advance notice regarding violation one

Magar’s argument:

Magar argues that he did not receive the two December 2007 pre-enforcement notices mailed by DEQ as a defense to violation one.³¹ Magar cites ORS 468.126³² to support his argument that DEQ cannot impose a penalty for violation one without giving advance notice. Magar further states that had he received the notices, he “would have been alerted to the brand new special condition and Respondent would have complied.”³³

DEQ’s argument:

DEQ argues that the judge addressed this argument and concluded “ORS 468.126(2)(e) states that advance notice is not required if such notice would disqualify a state program from federal approval or delegation. OAR 340-012-0038(e)(E)(ii) specifically exempts NPDES permit conditions from an advance notice requirement because such advance notice would disqualify the state

²⁸ Mr. Magar’s Exceptions, page 1.

²⁹ Mr. Magar’s Reply Brief, pages 4-5.

³⁰ Proposed and Final Order, page 10.

³¹ Mr. Magar’s Exceptions and Brief, pages 5-7.

³² ORS 468.126 states, in relevant part, “(1) No civil penalty prescribed under ORS 468.140 shall be imposed for a violation of an air, water or solid waste permit issued by the Department of Environmental Quality until the permittee has received five days’ advance warning in writing from the department, specifying the violation and stating that a penalty will be imposed for the violation unless the permittee submits the following to the department in writing within five working days after receipt of the advance warning:

(2) No advance notice shall be required under subsection (1) of this section if:

(e) The requirement to provide such notice would disqualify a state program from federal approval or delegation. [1991 c.650 §9 (enacted in lieu of 468.125); 1993 c.790 §3; 1999 c.975 §4]”

³³ Mr. Magar’s Exceptions, page 5.

program from federal approval or delegation.”³⁴

As Magar’s permit is an NPDES permit and violation one is for failure to comply with a permit condition, DEQ argues that advance notice is not required for violation one.

Additionally, Judge Betterton explicitly rejected Magar’s argument that he did not actually receive the PENs by citing OAR340-011-0525, which states: “(s)ection [4] of the rule states that documents mailed through the United States Postal Service by regular mail to the person’s last known address are presumed to have been received, subject to evidence to the contrary.”³⁵ DEQ argues that the record shows that, in compliance with the rule, it mailed the PENs to Magar’s last known address that he provided to DEQ. Judge Betterton also found that “DEQ re-mailed the PEN on December 11, 2007 to another address for Respondent that was located near the mobile home park. The December 11 mailing was not returned to DEQ by the United States Postal Service as not deliverable. It is reasonable to infer that Respondent received the re-mailed PEN. OAR 340-011-0525(4). However, even if Respondent did not receive the PEN, OAR 340-012-0038(2) specifically states that failure to send a PEN does not preclude DEQ from issuing a formal enforcement action (FEA).”³⁶ For these reasons, DEQ argues that there is no advance notice requirement regarding violation one and the penalty for violation one should be upheld.

EQC authority

The commission has the authority to hear this appeal under OAR 340-011-0575. DEQ’s contested case hearings must be conducted by an administrative law judge.³⁷ The proposed and final order was issued under current statutes and rules governing the administrative law judge panel.³⁸ Under ORS 183.600 to 183.690, the commission’s authority to change or reverse an administrative law judge’s proposed and final order is limited.

The most important limitations are as follows:

1. The commission may not modify the form of the administrative law judge’s proposed and final order in any substantial manner without identifying and explaining the modifications.³⁹
2. The commission may not modify a recommended finding of historical fact made by the administrative law judge assigned from the Office of

³⁴ Proposed and Final Order, page 6.

³⁵ Proposed and Final Order, page 6.

³⁶ Proposed and Final Order, page 6.

³⁷ ORS 183.635.

³⁸ ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.

³⁹ ORS 183.650(2).

Administrative Hearings unless it determines that there is clear and convincing evidence in the record that the finding was wrong.⁴⁰ 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. The commission may not consider any new or additional evidence, but may only remand the matter to the administrative law judge to take the evidence.⁴¹

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.⁴²

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

- (1) The commission will not consider matters not raised before the administrative law judge unless it is necessary to prevent a manifest injustice.⁴³
- (2) The commission will not remand a matter to the administrative law judge to consider new or additional facts unless the proponent of the new evidence has properly filed a written motion explaining why evidence was not presented to the hearing officer.⁴⁴

Alternatives

The commission may:

1. As requested by DEQ, issue a final order adopting Judge Betterton's proposed and final order.
2. Issue a final order determining that the findings of fact were not based on a preponderance of the evidence, explain why and amend Judge Betterton's proposed and final order accordingly.

Attachments

- A. Email from Stephanie Clark to Bryan Smith, dated Sept. 7, 2010.
- B. Letter from Bryan Smith to Stephanie Clark, dated Sept. 7, 2010.
- C. Letter from Stephanie Clark to Magar, dated July 7, 2010.
- D. Letter from Magar to Stephanie Clark, dated July 6, 2010.
- E. Letter from Stephanie Clark to Magar, dated June 29, 2010.
- F. Letter from Stephanie Clark to Magar, dated May 5, 2010.

⁴⁰ ORS 183.650(3). A historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist either before or at the time of the hearing.

⁴¹ OAR 137-003-0655(5).

⁴² OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.

⁴³ OAR 340-011-0132(3)(a).

⁴⁴ *Id.* at (4).

- G. Magar's reply brief, dated May 3, 2010.
- H. Letter from Stephanie Clark to Magar, dated April 12, 2010.
- I. DEQ's answering brief, dated April 12, 2010.
- J. Letter from Stephanie Clark to Magar, dated March 17, 2010.
- K. Magar's exceptions and brief, received March 12, 2010.
- L. Letter from Stephanie Clark to Magar, dated March 9, 2010.
- M. Magar's motion for extension of time, dated March 9, 2010.
- N. Letter from Stephanie Clark to Magar, dated Feb. 26, 2010.
- O. Letter from Magar to Stephanie Clark, dated Feb. 26, 2010.
- P. Letter from Stephanie Clark to . Magar, dated Feb. 1, 2010.
- Q. Magar's petition for commission review of the proposed and final order, dated and received Jan. 28, 2010.
- R. Proposed and final order, dated Dec. 31, 2009.
- S. Notice of rescheduled in-person hearing and contested case rights, dated July 2, 2009.
- T. Notice of pre-hearing conference and contested case rights, dated June 16, 2009.
- U. Magar's second amended answer and request for hearing, dated and received Sept. 11, 2008.
- V. Magar's amended answer and request for hearing, dated and received June 9, 2008.
- W. Magar's answer and request for hearing, dated and received June 3, 2008.
- X. Notice of Violation, Department Order and Assessment of Civil Penalty, dated May 15, 2008.
- Y. Exhibits from Oct. 13, 2009, contested case hearing.
 - A. Affidavit of Amy Smothers, dated Sept. 30, 2009.
 - A-1. DEQ civil penalty receipt and associated documents pertaining to payment of civil penalty no. WQ/D-NWR-01-129, dated April 10, 2002.
 - A-2. Notice of assessment of civil penalty no. WQ/D-NWR-01-129, dated July 11, 2001.
 - A-3. Settlement letter from Jane Hickman to Magar, concerning case no. WQ/I-NWR-05-181, dated Aug. 18, 2006.
 - A-4. Notice of Violation, Department Order and Assessment of Civil Penalty Assessment No. WQ/I-NWR-05-181, dated Feb. 7, 2006.
 - A-5. NPDES permit, dated June 10, 2002.
 - A-6. Investigation details, drafted by Lyle Christensen, undated.
 - A-7. NPDES permit, dated June 4, 2007.
 - A-8. Letter from Lyle Christensen to Magar, dated April 5, 2007.
 - A-9. Letter from Neil Mullane to Magar, dated June 4, 2007, and NPDES permit application of Magar, dated March 9, 2007.
 - A-10. Letter from Lyle Christensen to Magar, dated April 25, 2007.
 - A-11. Pre-enforcement notice from Lyle Christensen to Magar, dated Dec. 5, 2007.

- A-12. Pre-enforcement notice from Lyle Christensen to Magar, dated Dec. 11, 2007.
- A-13. Memorandum/evaluation from John Smits to Magar, undated.
- A-14. Warning letter from Lyle Christensen to Magar, dated Feb. 28, 2008.
- A-15. Discharge monitoring reports submitted by Magar for the months of June 2007 through February 2008.
- A-16. Data and statistical analysis provided by Magar relating to the discharge monitoring reports for the months of June 2007 through February 2008.
- A-17. Lyle Christensen's investigation details, undated.
- A-18. Letter from Lyle Christensen to Magar, dated Oct. 15, 2008.
- A-19. Emails between . Magar and DEQ employees, dated Dec. 30, 2008, Feb. 17, 2009, and July 22, 2009.
- A-20. Emails between DEQ employees and John Smits, dated Aug. 28, 2008, through Sept. 2, 2008.
- A-21. Economic benefit calculations and memorandum, dated Oct. 7, 2008.
- A-22. Economic benefit calculations and memorandum, dated March 12, 2008.
- R-1. DEQ facility history of Riverwood Mobile Home Park, dated July 7, 2008.
- R-2. Pre-enforcement notice from Lyle Christensen to Magar, dated Dec. 5, 2007.
- R-3. Letter from Magar to Lyle Christensen, undated.
- R-4. Magar's memorandum stating exceptions and discussing penalty amounts, undated.
- R-5. Permit application in progress, undated.
- R-6. Fact sheet and NPDES permit evaluation, and Attachment A, undated.
- R-7. Magar's amended answer and request for hearing, dated Sept. 10, 2001.
- Z. Audio recording of the October 13, 2009 contested case hearing (one CD)

**Available upon
request**

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

Approved:

Leah E. Koss, Interim Manager
Office of Compliance and Enforcement

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