SMITH Bryan

From: CLARK Stephanie
Sent: Tuesday, September 07, 2010 4:25 PM
To: SMITH Bryan
Subject: RE: extension request

Per your letter attached to the original email, which I did receive in hard copy on September 7, your request is approved.

I will anticipate your staff report by 5 p.m. on Thursday, Sept. 16, 2010.
- Stephanie

Stephanie Clark
Assistant to the Environmental Quality Commission
811 SW 6th Ave, Portland
email: Clark.Stephanie@deq.state.or.us
phone: (503) 229-5301
fax: (503) 229-6762

From: SMITH Bryan
Sent: Tuesday, September 07, 2010 2:31 PM
To: CLARK Stephanie
Subject: extension request

I routed you a hard copy just now as well. Thanks!

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 7, 2010

Oregon Environmental Quality Commission
Attention: Stephanie Clark, Assistant to the Commission
811 SW 6th Avenue
Portland, OR 97204

Re: Magar Edward Magar
OAH Case No. 901117
Notice of Civil Penalty Assessment and Order
Case No. WQ/D-NWR-08-019
Columbia County

Dear Ms. Clark:

Just today I was informed of the September 13, 2010, deadline for DEQ's Staff Report in this matter. Given this short notice, DEQ respectfully requests an extension of the deadline until September 16, 2010.

Sincerely,

Bryan Smith
Environmental Law Specialist

cc: Magar Edward Magar, 14102 N.E. 40th Vancouver, WA 98682

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

July 7, 2010

ORIGINAL SENT BY REGULAR U.S. MAIL WITH ONE COPY BY FAX

Magar E. Magar
14102 NE 40th Street
Vancouver, WA 98682
Fax number: 360-314-4781

Re: Contested case hearing postponed until October 2010
OAH Case No. 901117
DEQ Case No. WQ/D-NWR-08-109

Dear Mr. Magar,

The Oregon Environmental Quality Commission received your fax on July 6, 2010, requesting that your contested case hearing, previously scheduled for August 18, be postponed due to family obligations. Your contested case hearing before the commission will be postponed until the next regular EQC meeting, **October 21-22, 2010**. The meeting is tentatively scheduled for Portland, or the Portland metropolitan area. I will send you a letter with the specific date, location and approximate time of your hearing no later than Oct. 1, 2010.

Per your inquiry over fax, the staff report will be prepared by the DEQ environmental law specialist assigned to your case, Bryan Smith, and will include all material pertaining to the case. This typically includes all evidence used in a hearing or trial, previously submitted briefs and letters related to the case and any proposed orders issued by a judge. This is not a comprehensive list of what could be included with the final staff report, but I will mail you a copy of the materials before the commission meeting. Under state law, these materials will constitute the record that the Oregon Environmental Quality Commission will review and upon which it will take action for your contested case hearing.

If you have any further questions about this process, please call me at 503-229-5301, or contact me by fax at 503-229-6762.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY: Bryan Smith, DEQ

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

For: Bryan Smith

Fax number: 503 229 6124

From: Magar Magar

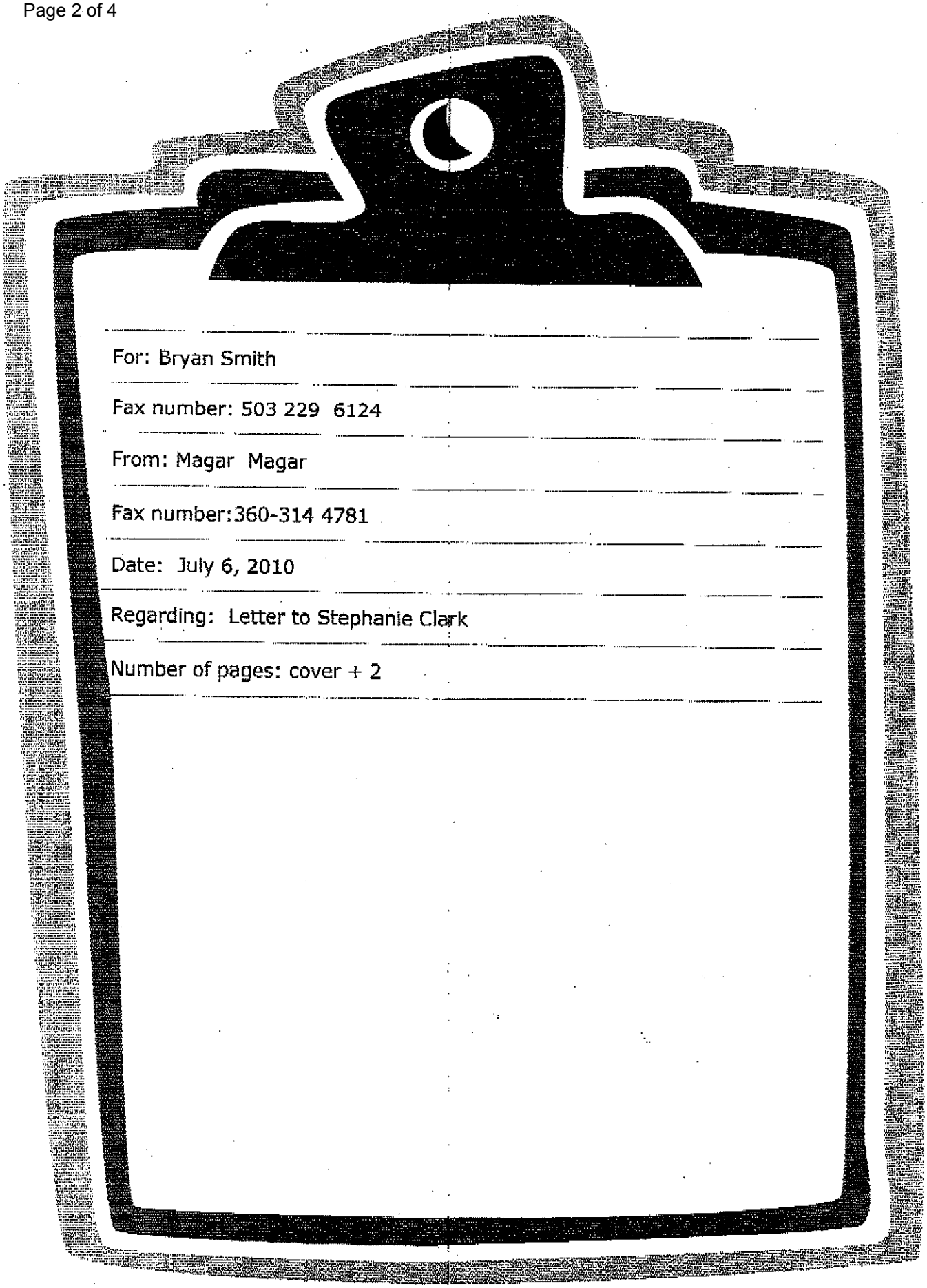
Fax number:360-314 4781

Date: July 6, 2010

Regarding: Letter to Stephanie Clark

Number of pages: cover + 2

JUL 06 2010



For: Bryan Smith

Fax number: 503 229 6124

From: Magar Magar

Fax number:360-314 4781

Date: July 6, 2010

Regarding: Letter to Stephanie Clark

Number of pages: cover + 2

Magar E. Magar

14102 NE 40th Street
Vancouver WA. 98682

Tel 360 314 4444, cell 503 929 1094 fax 360 314 4781

July 6, 2010

By fax to 503 229 5301 and Regular First Class Mail

Stephanie Clark

Assistant to DEQ Commission

811 SW Sixth Avenue

Portland, Or 97204-1390

By fax and Regular Mail

RE: Contested Case Hearing OAH Case #901117

Dear Ms. Clark

I am sorry I did not get to this earlier but I was seeing doctors and taking some medication as well as trying to arrange for a badly need surgery.

Between August 14, 2010 and August 24, 2010 my two daughters and I will be in Oakland, New York and Boston visiting several of my first cousins (4 in all) and my sister. This visit is long overdue and had in fact been planned for Christmas 2009. It did not take place then because I was in the process of being diagnosed with Diffuse Large B-cell Lymphoma. Once the diagnosis was established I was treated with Chemotherapy a treatment that lasted until mid April 2010 followed by radiation therapy which ended June 8, 2010. I am still due for one final surgery, a dilation of the esophagus which I will try and schedule in the coming two weeks. Then, hopefully I will be done with treatment.

My cousins are in their 80's and none of them have seen my younger daughter. Two have seen my older daughter.

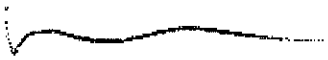
There is another reason for the trip, my brother passed away this May 2010 and he had expressed a desire to have a memorial service presided over by nephew in Long Island NY which the family will attend. He has not had a memorial service. I do not know when exactly the service will take place. I anticipate it will take place between August 17 and August 22, 2010.

For the above reasons I request a set-over to the next available date.

In your letter you asked if I had if I had any questions. I do have one, what is the staff report that you mention in the letter. Who is the staff (in what department of DEQ are they?) and what material do they use or consult to generate the report.

Thank you for your attention to this letter

Very truly yours,



Magar E. Magar

Cc Bryan Smith by fax to 229 6124 and e-mail attachment.

Oregon

ENVIRONMENTAL QUALITY COMMISSION

June 29, 2010

ORIGINAL SENT BY REGULAR U.S. MAIL WITH ONE COPY BY FAX

Magar E. Magar
14102 NE 40th Street
Vancouver, WA 98682
Fax number: 360-314-4781

Re: Contested case hearing scheduled: Aug.18, 2010
OAH Case No. 901117
DEQ Case No. WQ/D-NWR-08-109

Dear Mr. Magar,

The Oregon Environmental Quality Commission will meet to consider all briefs and hear arguments for the contested case referenced above on the morning of **August 18, 2010**.

The case will be heard during the course of a regular commission meeting. I will mail you a copy of the item's staff report, all attachments and an approximate time when the commission will hear this matter on August 18. The meeting will be held in room EQC-A, on the 10th floor of DEQ's headquarters at 811 SW 6th Avenue in Portland.

If you have any questions about this process, please call me at 503-229-5301, or contact me by fax at 503-229-6762.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY: Bryan Smith, DEQ

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

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

May 5, 2010

ORIGINAL SENT BY REGULAR U.S. MAIL WITH ONE COPY BY FAX

Magar E. Magar
14102 NE 40th Street
Vancouver, WA 98682
Fax number: 360-314-4781

Re: Reply brief
OAH Case No. 901117
DEQ Case No. WQ/D-NWR-08-109

Dear Mr. Magar,

On May 3, 2010, the Oregon Environmental Quality Commission received your reply brief in the contested case referenced above.

The reply brief is the last filing in a contested case before EQC. The commission will consider all briefs and hear arguments at a regularly scheduled commission meeting and I will notify you of the date and location of that meeting.

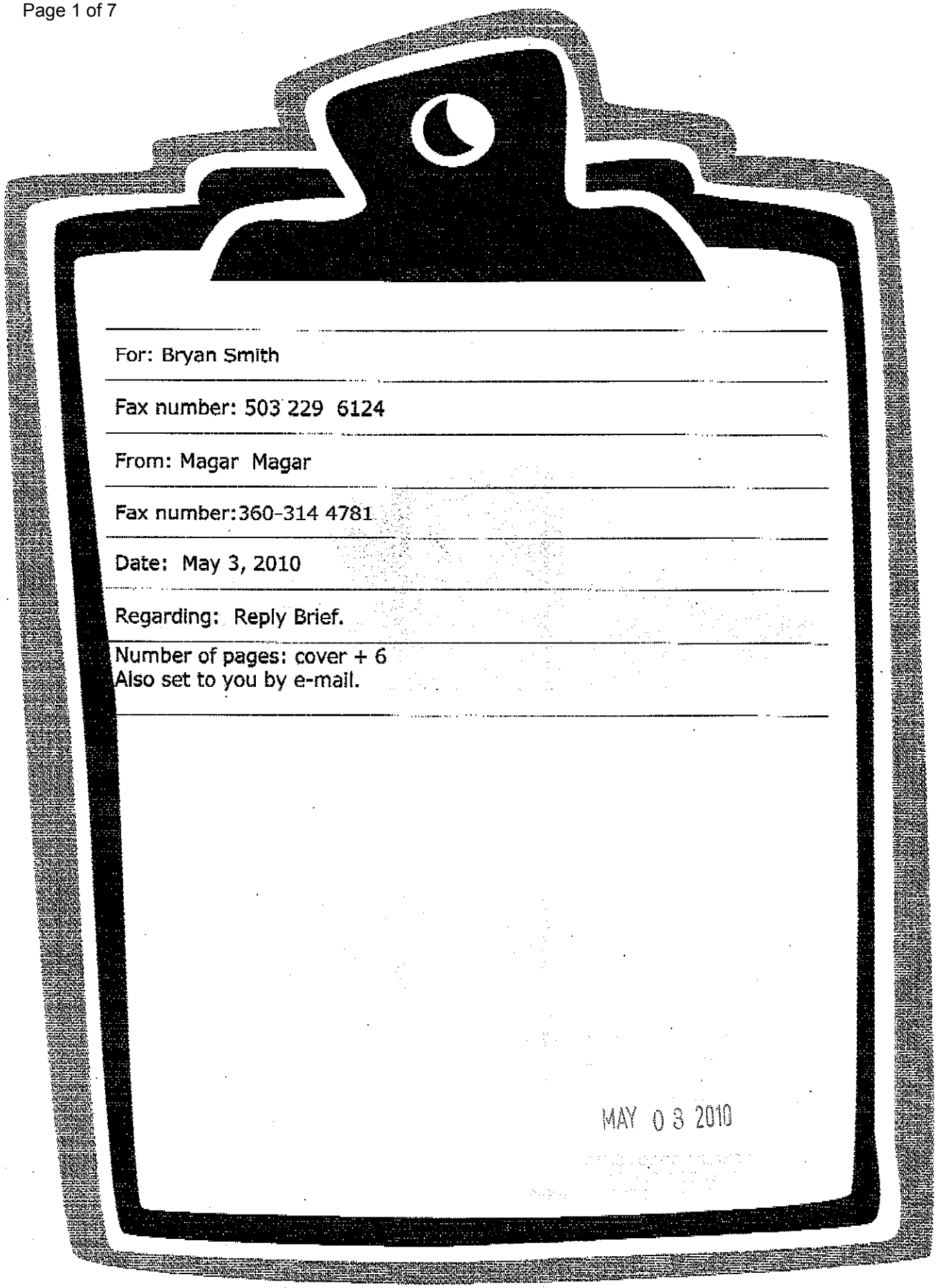
If you have any questions about this process, please call me at 503-229-5301, or contact me by fax at 503-229-6762.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY: Bryan Smith, DEQ

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



For: Bryan Smith

Fax number: 503 229 6124

From: Magar Magar

Fax number: 360-314 4781

Date: May 3, 2010

Regarding: Reply Brief.

Number of pages: cover + 6
Also set to you by e-mail.

MAY 0 3 2010

Respondent's Reply Brief

Case OAH No. 9001117

DEQ Case No. WQ/D-NWR-08-109/

On the first violation (failure to evaluate the system) Respondent claims no advanced notice was given to Respondent as required by statute ORS 468.126. DEQ does not dispute that advanced notice was not given but rather argues that DEQ is not required to give advanced notice because to do so would disqualify the state program from federal approval or delegation.

The argument of DEQ that it is not required to give advance notice of the violation is based on OAR 340-012-0038 (e) (E) (ii).[1] It requires reproducing all of OAR 340-012-0038 **again** to see if DEQ argument makes sense. The entire rule is reproduced because it speaks about the form of advanced notices (warning letters, pre-enforcement notices, notice of permit violation etc.)

340-012-0038

Warning Letters, Pre-Enforcement Notices, and Notices of Permit Violation and Expedited Enforcement Offers

(1) A Warning Letter (WL) is a written notice of an alleged violation for which formal enforcement is not anticipated. WLs may contain an opportunity to correct noncompliance as a means of avoiding formal enforcement. A WL generally will identify the alleged violation(s) found, what needs to be done to comply, and the consequences of further noncompliance. WLs will be issued under the direction of a manager or authorized representative. A person receiving a WL may provide information to the department to clarify the facts surrounding the alleged violation(s). If the department determines that the conduct identified in the WL did not occur, the department will withdraw or amend the WL, as appropriate, within 30 days. A WL is not an FEA and does not afford any person a right to a contested case hearing.

(2) A Pre-Enforcement Notice (PEN) is a written notice of an alleged violation that the department is considering for formal enforcement. A PEN generally will identify the alleged violations found, what needs to be done to comply, the consequences of further noncompliance, and the formal enforcement process that may occur. PENs will be issued under the direction of a manager or authorized representative. A person receiving a PEN may provide information to the department to clarify the facts surrounding the alleged violations. If the department determines that the conduct identified in the PEN did not occur, the department will withdraw or amend the PEN, as appropriate, within 30 days. Failure to send a PEN does not preclude the department from issuing an FEA. A PEN is not a formal enforcement action and does not afford any person a right to a contested case hearing.

(3) Notice of Permit Violation (NPV):

(a) Except as provided in subsection (3) (e) below, an NPV will be issued for the first occurrence of an alleged Class I violation of an air, water or solid waste permit issued by the department, and for repeated or continuing alleged Class II or Class III violations of an air, water, or solid waste permit issued by the department when a Notice of Noncompliance or WL has failed to achieve compliance or satisfactory progress toward compliance.

(b) An NPV is in writing, specifies the violation and states that a civil penalty will be imposed for the permit violation unless the permittee submits one of the following to the department within five working days of receipt of the NPV:

(A) A written response from the permittee certifying that the permittee is complying with all terms and conditions of the permit from which the violation is cited. The response must include a description of the information on which the permittee's certification relies sufficient to enable the department to determine that compliance has been achieved. The certification must be signed by a Responsible Official based on information and belief after making reasonable inquiry. For purposes of this rule, "Responsible Official" means one of the following:

(i) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(ii) For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

(iii) For a municipality, state, federal, or other public agency: either a principal executive officer or appropriate elected official.

(B) A written proposal, acceptable to the department, describing how the permittee will bring the facility into compliance with the permit. At a minimum, an acceptable proposal must include the following:

(i) A detailed plan and time schedule for achieving compliance in the shortest practicable time;

(ii) A description of the interim steps that will be taken to reduce the impact of the permit violation until the permittee is in compliance with the permit; and

(iii) A statement that the permittee has reviewed all other conditions and limitations of the permit

(C) For a water quality permit violation, a written request to the department that the department follow procedures described in ORS 468B.032. Notwithstanding the requirement for a response to the department within five working days, the permittee may file a request under this paragraph within 20 days from the date of service of the NPV.

(c) If a compliance schedule approved by the department under paragraph (3)(b)(B) provides for a compliance period of more than six months, the compliance schedule must be incorporated into a final order that provides for stipulated penalties in the event of any failure to comply with the approved schedule. The stipulated penalties may be set at amounts equivalent to the base penalty amount appropriate for the underlying violation as set forth in OAR 340-012-0140;

(d) If the NPV is issued by a regional authority, the regional authority may require that the permittee submit information in addition to that described in subsection (3)(b).

(e) The department may assess a penalty without first issuing an NPV if: (emphasis supplied)

(A) The violation is intentional;

(B) The water or air violation would not normally occur for five consecutive days;

(C) The permittee has received an NPV or an FEA with respect to any violation of the permit within the 36 months immediately preceding the alleged violation;

(D) The permittee is subject to the Oregon Title V operating permit program and violates any rule or standard adopted under ORS Chapter 468A or any permit or order issued under Chapter 468A; or

(E) The requirement to provide an NPV would disqualify a state program from federal approval or delegation. The permits and permit conditions to which this NPV exception applies include:

Federal Clean Air Act;

(ii) Water Pollution Control Facility (WPCF) permit conditions that implement the Underground Injection Control program under the federal Safe Drinking Water Act;

(iii) National Pollutant Discharge Elimination System (NPDES) Permit conditions; and

(iv) Municipal Landfill Solid Waste Disposal Permit conditions that implement Subtitle D of the federal Solid Waste Disposal Act.

(f) For purposes of section (3), a "permit" includes permit renewals and modifications. No such renewal or modification will result in the requirement that the department provide the permittee with an additional advance notice before formal enforcement if the permittee has received an NPV, or other FEA, with respect to the permit, within the 36 months immediately preceding the alleged violation.

(4) An Expedited Enforcement Offer (EEO) is a written offer by the department to settle an alleged violation that the department has determined may be resolved through its expedited enforcement procedures. An EEO will identify the alleged violation or violations to which the EEO applies and the amount for which the department will settle the alleged violation(s). It may also specify corrective actions that must be taken to address those violations. An EEO constitutes the department's offer to settle the violation(s) through a consent order. The EEO will be incorporated into a final commission order only if the alleged violator accepts the department's offer to settle by signing the EEO, paying the full amount stipulated in the offer, and waiving any right to administrative and judicial review regarding the EEO, the final commission order, or any violations settled therein. Violations cited in an EEO that are incorporated into a final commission order will be treated as "prior significant actions" in any subsequent formal enforcement action.

DEQ argument is based on the underlined portion. The argument is not comprehensible to respondent particularly in the context of this case.

Respondent's complaint is that he did not receive the pre-enforcement letter which, had it been received, would have been more than adequate advance notice. To this DEQ is saying or seems to be saying that they did not have to send advance notice because to send it would disqualify the state program from federal approval or delegation. DEQ answering brief p.5 ll.16-20.

Well DEQ did send a pre-enforcement letter and the program is not disqualified from Federal approval. What sense does DEQ argument make.

Next the cited portion of the rule is. ***(e) The department may assess a penalty without first issuing an NPV if: (emphasis supplied).*** In this case the Department assessed a penalty **after** issuing a notice of violation. So what relevance does the cited rule have to this proceeding? What is the relevance of the cited rule which says the ***(e) The department may assess a penalty without first issuing an NPV***

Further despite issuing pre-enforcement notices and warning letters the state program has not been disqualified nor has the federal approval or delegation been withdrawn.

The conclusion is obvious DEQ had an obligation to issue an advance warning which it always does in other cases but failed to do so in this case. Had the advanced warning been issues and received this violation would not have occurred in the sense that it would have been corrected before formal procedures were started. The evaluation was done.

That is not all DEQ records show that DEQ had known respondent's Washington address since at least October 2007. Also The DEQ had no trouble locating respondent when the time came to officially serve Respondent. To say nothing of the fact that DEQ knows where the 10 acre facility is.

Magnitude of Violations Two And Three

The ALJ was not persuaded by respondent's argument that the magnitude of the violation was minor. The ALJ and the DEQ have given their reasons. Among the reasons is Respondent did not present evidence. Respondent argues that the magnitude is determined by referring to **the rules and the definitions in the rules.**

The Rule OAR 340-012-0130 specifically defines minor and the rule provide

1) For each civil penalty assessed, the magnitude is moderate unless.....:

(4) **The magnitude of the violation is minor if the department finds that the violation had no more than a de minimus adverse impact on human health or the environment, and posed no more than a de minimus threat to human health or other environmental receptors.** In making this finding, the department will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.

The rule looks to an adverse impact of the violation on human health or the environmental receptors. .

The submission of late reports respondents submits had no effect on human health or on the environment.

With respect to the other violation of failure to sample, relating a few facts is in order directed to respondent's mental state. For approximately twenty years we have had the same lab come and pick up the samples once a month. Respondent arranges with the lab for those pickups. In that particular month, the sub-operator (the fourth one) says he had the samples ready but the lab failed to pick them up. If I have to judge what happened between my employee and the laboratory then, I would, on the basis of past performance be inclined to say the lab is correct.

There is a finite probability that the sub-operator could be correct but I judge that probability to be close to zero.

Respondent's point is he did what he always does and there was a failure. How could his mental state be reckless? That rates a mental state of negligence not recklessness.

Now as to the magnitude of the violation. The basic fact is there was no sample analyzed that month. Without analyzing the situation DEQ concludes that the magnitude is moderate implying that there was a more than de minimus adverse impact on human health or the environment.

DEQ does not know that. Respondent on the other hand (who does not have the burden of proof) "applied true and tried statistical methods used in science and taught high school or college to estimate the mean and a confidence interval on the mean.

Not having the data respondent essentially produced historical data on the clearance by the filter. The Statistical analysis based on 37 data points showed that estimated BOD had a mean of 4.73 mg/L and the total suspended solids had a mean of 3.29 mg/L. and the 99% confidence interval for the BOD is 2.06 to 7.4 mg/L and the 99% confidence interval for the TSS is 2.41-3.9mg/L. All well below the bounds of the discharge limits allowed by the permit.

The meaning of the confidence interval is if one sampled the BOD from this sewer plant one hundred times and sampled the TSS one hundred times one would expect, for BOD only one sample to be outside the range 2.06 to 7.4 mg/L and for TSS only one sample in one hundred would be outside the range 2.41-3.9mg/L. These concentrations of BOD and TSS are deminimus and are far less the permissible limits of discharge allowed by the permit.

This Respondent submits is the evidence that the violation causes a deminimus on human health and the environment.

There was no new evidence presented here all the evidence was before the ALJ and he appears to have paid selective attention to it. The environmental law specialist

Conclusions.

For the first violation there should be no penalty on the grounds that there was no advanced warning. And the magnitude of the other two violations should be reduced to minor based on their impact on human health and the environment.

Respectfully Submitted.

Magar E, Magar

March 3, 2010.

I certify that I served this reply brief on the DEQ by faxing it as per instructions to Stephanie Clark at 503-229 ~~5301~~ 6262 and on Bryan Smith by faxing it to 503 229 6124 and also mailing to Bryan Smith at 811 SW Sixth Ave,, Portland, OR 97204-1390.

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[i] Actually DEQ means OAR 340-012-0038(e)(E)(iii) not (ii)

[ii] See Ors 183.450 (5). Under this statute the proponent of a fact has to prove by reliable and probative and substantial evidence. That standard was articulated by the Oregon Supreme Court in Rencken v. Young, 300 352, 364 (1985)

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

April 12, 2010

ORIGINAL SENT BY REGULAR MAIL WITH ONE COPY BY FAX

Magar E. Magar
14102 NE 40th Street
Vancouver, WA 98682
Fax number: 360-314-4781

Re: DEQ's answering brief
OAH Case No. 901117
DEQ Case No. WQ/D-NWR-08-109

Dear Mr. Magar,

On April 12, 2010, the Environmental Quality Commission received DEQ's answering brief in the contested case referenced above. You may file a reply brief within 20 days, or by May 2, but this brief is not required and has no bearing on the contested case process moving forward.

To file your reply brief, please mail these documents to: Environmental Quality Commission, c/o Stephanie Clark, 811 SW 6th Avenue, Portland, Oregon 97204 with a copy to Bryan Smith at 811 SW 6th Avenue, Portland, Oregon 97204. Since May 2 is a Sunday, your reply brief must be received by 5 p.m. on May 3, 2010, the next business day, or EQC may dismiss your petition for review. Alternatively, you may submit your documents by fax, addressed to Stephanie Clark, at 503-229-6762.

The reply brief is the last possible brief that may be filed in a contested case before EQC. The commission will consider all 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, or contact me by fax at 503-229-6762.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY: Bryan Smith, DEQ

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: MAGAR EDWARD MAGAR,	)	DEPARTMENT'S ANSWERING BRIEF No. WQ/D-NWR-08-019
Respondent.	)	COLUMBIA COUNTY

The Department of Environmental Quality (Department) submits this Answering Brief to the Environmental Quality Commission (Commission) for its consideration in the matter of Magar Edward Magar, Case No. WQ/D-NWR-08-019.

I. CASE HISTORY

1. On May 15, 2008, the Department assessed Respondent a civil penalty of $9,450 for (1) failing to comply with a compliance schedule contained in Respondent's National Pollutant Discharge Elimination System Waste Discharge permit (the Permit) which required Respondent to have the existing treatment system at the Facility evaluated by a qualified consultant within 180 days of permit renewal; (2) failing to collect monitoring data for total suspended solids (TSS), biochemical oxygen demand (BOD-5) and bacteria; (3) failing to timely submit the monthly discharge monitoring reports (DMRs) for six months; and (4) discharging wastewater with a concentration of 610 E. coli organisms per 100 mL to waters of the state.

2. On June 3, 2008, Respondent appealed and on October 13, 2009, a contested case hearing was held.

3. On December 31, 2009, the Administrative Law Judge issued a Proposed and Final Order (Proposed Order). The ALJ concluded that: (1) Respondent violated ORS 468B.025(2) by failing to comply with the Permit by not having his system evaluated by a qualified consultant within the 180 days required, and ordered that Respondent submit a plan to DEQ immediately to repair, upgrade or modify his system and to make such repairs, upgrades or modifications as required by DEQ within 90 days of the plan's approval by DEQ; (2) Respondent violated ORS 468B.025(2) by failing to comply with the Permit by failing to collect monitoring data for

Pollutants; (3) Respondent violated ORS 468B.025(2) by failing to comply with the Permit by failing to submit timely monthly discharge monitoring reports; (4) Respondent violated ORS 468B.025(2) by failing to comply with the Permit by discharging waste water with a higher concentration of bacteria than allowable by law into waters of the state; and (5) a civil penalty of $8,345 is appropriate.

4. On January 28, 2010, Respondent appealed the Proposed Order.

5. On March 12, 2010, Respondent submitted his Exceptions and Brief to the Commission for review of the Proposed Order.

II. ARGUMENTS

A. *The magnitude of violation two should be "moderate."*

Respondent argues that the ALJ erred in finding the magnitude of Violation Two to be "moderate."[1] To support this argument, Respondent refers to a page with data which is the third page in his Exceptions and Brief, and labeled with a handwritten "2A" at the bottom of the page. First, this document ("2A") is new or additional evidence that was not introduced at the hearing and was therefore not considered by the ALJ. The Commission's rules require that a request to present additional evidence must be submitted by motion and must be accompanied by a statement specifying the reason for the failure to present the evidence to the ALJ. (OAR 340-011-0575(5)) Respondent did not submit a motion or a statement specifying the reason for his failure to present this evidence to the ALJ. Therefore, the Commission may not consider the evidence. (OAR 137-003-0655(5))

Second, even if the Commission were to accept this new evidence, the magnitude of Violation Two should remain "moderate." The data listed on "2A," but not the statistical analyses, is also found on page 10 of Exhibit R6, which Respondent introduced at the hearing. Thus, the ALJ had the opportunity to evaluate the data portrayed on "2A," and Respondent had the opportunity to refer to this data when he testified that the magnitude of Violation Two should be "minor."

[1] Respondent's Exceptions and Brief, page 1-3.

However, the Department's witness disagreed with the conclusion that Respondent drew from page 10 of Exhibit R6, and implicitly, "2A," as did the ALJ. The ALJ reasoned 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."[2] The ALJ then addressed Respondent's argument regarding the magnitude of Violation Two and found that "Respondent presented no basis for his contention,"[3] and "Respondent has the burden to present evidence that a magnitude should apply other than the presumed magnitude. Respondent presented no such evidence."[4] In other words, Respondent had the opportunity to make this argument at the hearing, and it was unsuccessful. Respondent's Exception fails to explain why the ALJ was incorrect to rule that Respondent failed to meet his burden of showing that the default magnitude of "moderate" should not be applied to Violation Two. Rather, Respondent's Exception merely reiterates the same argument that he presented at the contested case hearing and which the ALJ found unpersuasive.

Finally, Respondent's Exception to the Magnitude for Violation Two is flawed because he attempts to extrapolate conclusions that cannot be extrapolated, as the Department's witness testified. Specifically, Respondent represents "2A" as "data corresponding to the effluent BOD and TSS of the sewer plant from January 2004 to February 2007 measured mg/L." Respondent then argues that his "statistical analysis" of this historical data leads to the conclusion that because those 37 months were allegedly de minimis in terms of environmental impact, so must be the months that are the subject of Violation Two. However, the 37 months of January 2004 through February 2007 are not at issue.[5] Rather, the month of December 2007 is at issue as it is the subject of Violation Two. Therefore, the data in "2A" is irrelevant to the determination of the proper magnitude of Violation Two. For the above reasons the ALJ correctly ruled that Respondent failed to meet his burden of showing that the impact of Violation Two caused no

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[2] Proposed and Final Order, page 12
[3] Proposed and Final Order, page 11
[4] Proposed and Final Order, page 12
[5] Nor can the Department conclude that any violations that may have occurred between January 2004 and February 2007 were de minimis based on the data in "2A."

more than a de minimis threat to human health or the environment, and the magnitude should remain "moderate."

B. ***The magnitude of violation three should be "moderate."***

Respondent argues that Violation Three should be assigned a magnitude of "minor" because "a late report cannot have an impact on human health or the environment."[6] However, the Department's witness disagreed with this argument and testified that he often identified problems with treatment systems based on his review of the required monthly reports and that early detection of deficiencies can prevent a threat to human health or the environment. Therefore, it is incorrect to conclude that Violation Three, representing the late submissions of five months worth of required monthly reports, "posed no more than a de minimis threat to human health or other environmental receptors." (OAR 340-012-0130(4)) The ALJ agreed with the Department and its witness, finding that "[M]oreover, Violation [3] was repeated over several months."[7] For these reasons the ALJ correctly ruled that Respondent failed to meet his burden of showing that the impact of Violation Three caused no more than a de minimis threat to human health or the environment.

C. ***The "M Factor" of violation two should be "6" for reckless.***

Respondent argues that the "M Factor" or "mental state" of Violation Two should be a "2" for "negligent" and not a "6" for "reckless."[8] Respondent does not supply a reason for this argument in his Exceptions and brief. Exceptions must include proposed alternative findings of fact and conclusions of law, and 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." (OAR 340-011-0575(4)(a)). Therefore, Respondent is unable to challenge the ALJ's conclusion of law that the mental state of Violation Two should be "6" for "reckless."

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[6] Respondent's Exceptions and Brief, page 1.
[7] Proposed and Final Order, page 12
[8] Respondent's Exceptions and Brief, page 3.

Additionally, even if the Commission were to consider this Exception, the ALJ supported DEQ's assessment of an M Factor of "6" for "reckless" for Violation Two, citing the Department's reasoning to support the M Factor in Exhibit 2 of the Notice: "Respondent has been cited for this violation previously in Notice of Violation, Department Order and Civil Penalty Assessment WQ/D-NWR-05-181. Respondent acted recklessly in failing to assure that the sampling was done and therefore acted recklessly in committing this violation."[9] Therefore, because Respondent did not provide the Commission with a reason for his Exception to the ALJ's conclusion, the M Factor of Violation Two should remain "6" for "reckless."

D. ***Respondent is not entitled to advance notice of permit violations and the penalty for violation one should be upheld.***

Respondent argues that he did not receive the two Pre-Enforcement Notices (PENs) mailed by the Department, and alleges this as a defense to Violation One.[10] Respondent cites ORS 468.126 to support his argument that the Department cannot impose a penalty without giving advance notice. Respondent appears to be arguing that the Department may not penalize him for Violation One unless it can prove that it provided him with advance notice of the violation. However, the ALJ addressed Respondent's 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 program from federal approval or delegation."[11] Respondent's Permit is an NPDES permit and Violation One is for failure to comply with a permit condition. Therefore, advance notice is not required for Violation One.

Respondent states that the ALJ is wrong because "in this case and in others before it DEQ has given Respondent pre-enforcement warnings and has yet to lose its approval for its program."[12]

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[9]Proposed and Final Order, page 10
[10]Respondent's Exceptions and Brief, pages 5-7.
[11]Proposed and Final Order, page 6
[12]Respondent's Exceptions and Brief, page 5.

This argument is not logical. Merely alleging that the Department has not lost its delegation for the NPDES program does not demonstrate an advance notice requirement.

The ALJ further addressed Respondent's argument that he did not receive the PENs by citing OAR 340-011-0525, which addresses service of documents, stating "[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."[13] DEQ mailed the PENs to the most recent address that Respondent provided. The ALJ applies this rule to the two PENs and states "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)."[14] In conclusion, there is no advance notice requirement, the Department had the authority to penalize Respondent for Violation One, and the ALJ correctly upheld the civil penalty of $3,409 for this violation.

III. CONCLUSION

The Department has issued civil penalties to Respondent for permit violations in 2001, 2006 and 2009, for a total of four enforcement actions including the instant case. Respondent is aware that as a permittee, he is required to comply with conditions in the Permit and that he can be penalized for failure to comply with those conditions. Respondent does not contest that the violations of his permit occurred. Rather, he offers an affirmative defense to Violation One by arguing that the Department must provide "advance notice" of that violation. However, as the Proposed and Final Order shows, there is no such "advance notice" requirement, and the Department had the authority to penalize Respondent for his permit violations. The permit process in Oregon depends upon permittees taking responsibility for permit conditions, which, at

[13]Proposed and Final Order, page 6
[14]Proposed and Final Order, page 6

a minimum, requires reading and being familiar with one's permit. The Department requests that the Commission uphold the $8,345 civil penalty and the ALJ's Order that requires Respondent to develop and submit a plan to DEQ to immediately 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.

4/12/10
Date

Bryan W. Smith
Bryan Smith, Environmental Law Specialist

CERTIFICATE OF SERVICE

I hereby certify that I served the Hearing Memorandum within on the 12th day of April, 2010 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

Magar Edward Magar
14102 N.E. 40th Street
Vancouver, WA 98682

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 April 12, 2010.

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

March 17, 2010

BY FAX WITH ONE COPY BY U.S. MAIL

Magar E. Magar
14102 NE 40th Street
Vancouver, WA 98682
Fax: 360-314-4781

Re: Exceptions and brief
OAH Case No. 901117

Dear Mr. Magar,

On March 12, 2010, the Environmental Quality Commission received your timely filing of exceptions and brief in the above-referenced matter.

A representative from DEQ has 30 days from your date of filing to submit an answering brief in this matter, or by April 11. This filing is not required for the contested case process to move forward. Once all briefs have been filed, 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 or contact me by fax at 503-229-6762.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY: Bryan Smith, DEQ

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

BRADY SMITH MAGAR J. MAGAR

Exceptions and Brief.

Respondent has three Exceptions.

The first Exception is to the finding that Respondent violated a special condition of the permit that he evaluate his sewer system.

The second Exception is the finding that the failure to collect monitoring date had a magnitude of moderate. Respondent contends that the magnitude was minor and that his state of mind for this violation was 2 (negligent) instead of 6 (reckless)

The third Exception is the finding that failure to submit timely monitoring reports had a magnitude of moderate. Respondent contends that the magnitude was minor.

Second and Third Exceptions

Taking the last two exceptions first neither the failure to collect monitoring data nor the failure to submit timely reports have an assigned magnitude.

When a violation does not have an assigned or selected magnitude then pursuant OAR 340-12-0130(1) which provides

(1) For each civil penalty assessed, the magnitude is moderate unless:

(a) A selected magnitude is specified in 340-012-0135 and information is reasonably available to the department to determine the application of that selected magnitude; or

(b) The department determines, using information reasonably available to it, that the magnitude should be major under section (3) or minor under section (4).

(2) If the department determines, using information reasonably available to the department, that a general or selected magnitude applies, the department's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude.

(3) The magnitude of the violation is major if the department finds that the violation had a significant adverse impact on human health or the environment. In making this finding, the department will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statues or commission and department rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.

4) The magnitude of the violation is minor if the department finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors. In making this finding, the department will consider all reasonably available information including, but not limited to: the degree of deviation

from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.

Respondent argued to the ALJ that the magnitude is minor but the ALJ stated p.11 of the opinion that Respondent presented no basis for his contention.

The principal basis is the very definition of minor which is that such a violation causes no more than a deminimus adverse impact on human health or the environment. The commission may well ask well if the measurement were not taken how does respondent know that to be the case. Respondents answer submitted to the ALJ but completely ignored by him (as he ignored many matters submitted by respondent) lies in a statistical analysis of the historical data from the sewer plant.

On the next page are the data corresponding to the effluent BOD and TSS of the sewer plant from January 2004 to February 2007 measured mg/L. These numbers are historical data of the measured TTS and BOD over a period of 37 months compiled by Lyle Christensen in his evaluation report of the sewer plant. These numbers and the statistical analysis associated with them are placed in next page. [1]

These data show if one sampled the BOD from this sewer plant one hundred times and the TSS one hundred times one would expect, for BOD, only one sample to be outside the range 2.06 - 7.4 mg/L, and for TSS only one sample in one hundred would be outside the range 2.41-3.9mg/L. These concentrations of BOD and TSS are nowhere near the permissible limits of discharge allowed by the permit which requires no discharge greater than 20mg/L for BOD for the facility from May to October is 20mg/L. And likewise for the same period nothing greater than 20mg/L for total suspended solids See Schedule A of the permit dated June 6, 2007. The limits for the rest of the year that is November 1-April 30 are 30mg/L and 30mg/L for both BOD and TSS.

In short there is only a deminimus impact on the environment. So when DEQ argues one does not know what was discharged, Respondent is prepared to show and does in fact show

[1] These data are missing the month of June 2005. The reason is these data were not analyzed for that month. In that month Respondent had arranged with Fedex to pick the samples up from the sewer plant to be flown to Boise for analysis. Respondent employee whom we shall call the sub-operator told the Fedex person that he was not submitting any samples because he was quitting his job. The sub-operator was dismissed but it was too late in the month to collect another sample. The missing data which are the subject matter of this violation came about when the new sub-operator (the third one after the previous operator was removed) failed to have the samples ready for Alexin Analytical of Tigard to pick up. The sub-operator claimed that he had the samples ready but Alexin Analytical did not pick them up. Since Respondent has always dealt with Alexin Analytical and they have always been reliable Respondent was not prepared to vouch for his sub-operators claim. Nevertheless Respondent argues that he can only be negligent not reckless because Respondent made all the arrangements for the sample to be picked up.

month	bod effl	tss eff
2004 jan		38
2004 feb		14
2004 masr		6
2004 apr.		6
2004 may		6
2004june		6
2004 july		4
2004 aug		4
2004 sept		4
2004 oct		4
2004 nov		4
2004 dec		4
2005 jan		4
2005 feb		4
2005 mar		4
2005 apr		4
2005 may		3
2005 jul		3
2005 aug		3
2005 sept.		3
2005 oct		3
2005 nov		3
2005 dec		3
2006 jan		3
2006 feb		3
2006 mar		3
2006 apr		3
2006may		3
2006 jun		3
2006 july		3
2006 aug		4
2006 sept		3
2006 oct		2
2006 nov		2
2006 dec		2
2007 jan		2
2007 feb		2

bod effluent

	Column1
Mean	4.72972973
Standard Error	0.983076504
Median	3
Mode	3
Standard Deviation	5.979820922
Sample Variance	35.75825826
Kurtosis	28.38237278
Skewness	5.142814941
Range	36
Minimum	2
Maximum	38
Sum	175
Count	37
Confidence Level(99.0%)	2.673461439

Total Suspended Solids

	Column1
Mean	3.297297297
Standard Error	0.328489273
Median	3
Mode	3
Standard Deviation	1.998122242
Sample Variance	3.992492492
Kurtosis	10.12464662
Skewness	2.966278234
Range	10
Minimum	2
Maximum	12
Sum	122
Count	37
Confidence Level(99.0%)	0.893321528

2A

using well established statistical techniques taught in any elementary class in statistics that the harm to the environment was deminimus.

To conclude, on the second violation the computation of the base penalty should be halved and the state of mind M should be assigned a value of 2 and not 6,

As to the third exception the failure to timely submit the Monitoring Reports Respondent argues that magnitude is minor. A late report cannot have an impact on human health or the environment. This is true because the permit has a requirement found in Section D 5 that Respondent report within 24 hours any non-compliance that may endanger health or the environment.

On the basis of the above the base penalty must be halved.

First Exception.

Finally the First Exception.

Before going into the first exception it is worth noting that sewer system is very small. When drawing up the guideline as to what to require in the permit of a system as small as this Respondent draws the Commission attention to a matrix put out by the DEQ to classify some sewer systems by output. This matrix is Exhibit A to these exceptions. The principal row, the first row of that matrix divides the systems by design capacity in millions of gallons per day. The first column is for systems less than 50,000 gallons. That includes our system which has a design capacity of 13,000 gallons per day. The succeeding columns in gallons per day are 50,000-100,000, 110,000-500,000, 510,000-1,000,000, 1,010,000-5,000,000, 5,010,000-10,000,000 and greater than 10,000,000.

These numbers should put our system in perspective.

This sewer system is located in a small mobile home park near Rainier which has approximately 41 spaces plus 8 apartments of which 4 apartments are one bedroom and 4 apartments are 3 bedroom. The average population is approximately 150 people. The system was rebuilt and repaired with the repairs completed on or about October 2004. The old system was first put in place on or about 1984 (at that time respondent did not own the system). Respondent purchased the system in the summer 1985. The old system which was approved by the DEQ had two buried 5000 gallon metal septic tanks supposedly with cathode protections. Into those 2 metal septic tanks flowed the domestic sewage put out by the residents and pulled by gravity. From the two metal septic tanks the sewage flowed into a pond which had a plastic liner. In that pond there were two one horse power pumps which could be electrically controlled and which pumped the sewage onto a recirculation gravel containing media. The filtrate from the gravel filter was then divided into five parts four of which were recalculated back to the pond and one part flowed to the exterior where the effluent was chlorinated by placing chlorine tablets in the piping and passed through a contact chamber. On its way out a turbine meter measured the

volume of the effluent ultimately discharged or an approximate estimate of the discharged was obtained by measuring the height of the water at a v-notch weir.

As stated, the system was rebuilt in 2004 with the following changes. The two 5000 gallon metal septic tank were replaced by a single 15,000 gallon plastic septic tank. The pond, much to the disgust of Respondent[2] , was eliminated and in its place one new 8000 gallon plastic recirculation tank was put in. In order to pump the water on the gravel filter a quadruplet of one half horse power pumps instead of the two one horse pumps with controls were placed in the recirculation tank. The rest of the system remained basically the same except that the turbo meter was replaced by a magnetic flow meter with a transmitter which transmitted the flow data to a totalized. A shed was rebuilt and enlarged and a panel to accommodate the greater service supply was put in. The rebuilt system came on line in October 2004 The cost of rebuilding the system including the fees of the design engineer was $135,000 (one hundred and thirty five one thousand dollars).

Prior to the rebuilding process Respondent had filed a chapter 11 bankruptcy. The final plan of reorganization paid all of the claims all of Respondent unsecured creditors in full that is 100 cents on the dollar, plus the maximum interest allowed by law at that time. During the reorganization Respondent was not in control of the affairs of his bankruptcy estate and could not make key decisions. Those decisions were made by the Ken Eiler his trustee and his unsecured creditors.

During the reorganization Ken Eiler was the permit holder. Ken Eiler ceased to be the permit holder on or about October 2004 when the estate was closed and the property vested back in the Respondent debtor.

The permit came up for renewal in 2007 and Respondent made application for a new one. The application had respondent's address 1616 NW Northrup. Although respondent was not living there at that time because, on January 16-17, 2006, a fire totally destroyed his house. Respondent had anticipated that he would be able to build the house within six months. This was not to be because the City of Portland had other ideas on the completion date. That house had no footings and no structural engineer was willing to design any structure without placing footings or some substitute for them. **Not even to rebuild the house exactly as it was before.** In the end twenty (ten on each of two side) three inch steel piles were driven to bedrock and a metal bracket put on them which brackets slid under the original foundation.

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[2] After the system was repaired and rebuilt it was discovered by Respondent and missed by the engineer that ground water was breaching the old cast iron pipes greatly increasing the flow volume requiring much more frequent pumping of the septic and recirculation tanks at considerable expense. This had not been noticed before because the pond seems to handle much of the excess. Respondent is now repairing the system by replacing the cast iron pipes by plastic pipes, by redirecting the flow from the creek away from the manholes by digging and putting culverts. By replacing gaskets and seals on manholes. So far, according to respondent 2008 tax return, the cost of repairs have exceeded $35,000 (thirty five thousand dollars) not counting the tractor a Kubota B-26 tractor with backhoe and front loader. More expenses associate with this project will appear in the 2009 and 2010 returns.

The long and short of this is that Respondent was not able to return to 1616 NW Northrup but for personal reasons he relocated to his present address at 14102 NE 40th Street, Vancouver Washington 98682.

From the time the house caught fire until Respondent permanently moved to Vancouver on or about July 23, 2007 Respondent put the necessary forwarding of his address with the United States Post Service. Each forwarding was good for six months. Much mail for whatever reason was lost.

Legal Argument on First Exception

The statutory and administrative procedures established by the DEQ rules to deal with violations is to give permit holders -Respondent an opportunity to correct the violation before formal enforcement action is commenced.

There should be no penalty for this violation. Once it came to Respondent notice that he had to supply an evaluation he did it. The statute is clear that the agency cannot impose a penalty without giving advance notice. ORS 468.126 states as follows.

468.126 Advance notice. (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 permit tee submits the following to the department in writing within five working days after receipt of the advance warning:

The provision of this statute has been elaborated by the administrative rules. Now administrative rules have the effect of statutes. Administrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute *State v.Norris* 188 Or app 318 (2003) and *Haskins v. Employment Dept.*156 Or App 285 (1998).

DEQ has always provided notices as prescribed by the OAR in the form of Warning Letters and

OAR 340-012-0038(2) provides for pre-enforcement notices in a way codifying the ORS 468.126 (1) as shown in the notes of the statutory authority found in the end notes of the OAR's The fact that a pre-enforcement notice does not preclude formal enforcement action does not render the requirement of the notice superfluous, particularly since, in respondents case at least, it has always sent it.. In this case had the pre-enforcement notice required by the statute could have resolved the issue with the doing of the evaluation.

Had the pre-enforcement notice been received Respondent would have been alerted to the brand new special condition and Respondent would have complied. Therefore the failure to receive the pre-enforcement letter for this violation only would

trigger the statute and there should be no penalty. Respondent cannot make the same claim for other violations

The OAR's describes the necessary warnings, and procedures in particular;

340-012-0038

Warning Letters, Pre-Enforcement Notices, and Notices of Permit Violation and Expedited Enforcement Offers

(1) A Warning Letter (WL) is a written notice of an alleged violation for which formal enforcement is not anticipated. WLs may contain an opportunity to correct noncompliance as a means of avoiding formal enforcement. A WL generally will identify the alleged violation(s) found, what needs to be done to comply, and the consequences of further noncompliance. WLs will be issued under the direction of a manager or authorized representative. A person receiving a WL may provide information to the department to clarify the facts surrounding the alleged violation(s). If the department determines that the conduct identified in the WL did not occur, the department will withdraw or amend the WL, as appropriate, within 30 days. A WL is not an FEA and does not afford any person a right to a contested case hearing.

(2) A Pre-Enforcement Notice (PEN) is a written notice of an alleged violation that the department is considering for formal enforcement. A PEN generally will identify the alleged violations found, what needs to be done to comply, the consequences of further noncompliance, and the formal enforcement process that may occur. PENs will be issued under the direction of a manager or authorized representative. A person receiving a PEN may provide information to the department to clarify the facts surrounding the alleged violations. If the department determines that the conduct identified in the PEN did not occur, the department will withdraw or amend the PEN, as appropriate, within 30 days. Failure to send a PEN does not preclude the department from issuing an FEA. A PEN is not a formal enforcement action and does not afford any person a right to a contested case hearing.

From the above in particular the provisions of the Pre-Enforcement it is clearly seen that the enforcement mechanism contemplates providing notice to the permit holder who in turn provides information to the Department which includes what the permit holder intends to do and the facts surrounding the alleged violation.

In the instant case had the Pre-enforcement notice been received by respondent he would have been made aware of the new condition (requiring evaluation of the treatment system by a qualified consultant). Respondent would have been upset at the existence of this new and special condition , particularly since he had spent $135,000 to upgrade the system but he would have had no choice but to comply because , not having seen the permit in draft form, he did not object to this condition and was therefore stuck with it.

The ALJ p. 6 of proposed final order stated the following Pre-Enforcement notices dated December 5, 2007 and December 11, 2007

Finally, Respondent argues that if he had received the PEN mailed December 5, 2007, "we would not be here" on Violation (1). The December 5, 2007 PEN was returned to DEQ by the United States Postal Service. 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).

Now the ALJ mentions OAR 340- 011-0525 (4) which provides : Regardless of other provisions in this rule, documents sent by the department or commission through the U.S. Postal Service by regular mail to a person's last known address are presumed to have been received, subject to evidence to the contrary. On the basis of this rule the ALJ concludes "It is reasonable to infer the Respondent received the re-mailed PEN." Well it may be reasonable to so conclude except there is no finding that the second notice was sent to Respondent **last known address**. In fact according to the ALJ it was sent to another address for Respondent that was located near the mobile home park.

Perhaps realizing the weakness of that argument the ALJ then says that failure to send a PEN does not preclude DEQ from issuing a formal enforcement action (FEA). That is true, there are certain conditions and circumstances where that would be the case. However once the procedures are put in place by sending the PEN the settled expectations require that the Agency to follow the procedures prescribed in the rules.

DEQ in its argument that it is not required to give advance warnings has argued and the ALJ has accepted that to do so would disqualify the state program from federal approval or delegation. The ALJ says p.6 of opinion Respondent argues that he should not be found liable for Violation (1) because he did not receive "advance notice" of the violation, citing ORS 468.126. However, 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(3) (e) (E) (ii) specifically exempts NPDES permit conditions from an advance notice requirement because such advance notice would disqualify the state program from federal approval or delegation.

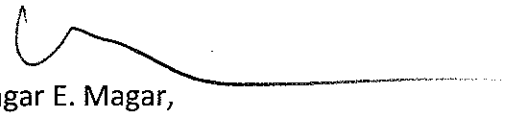
That is wrong. In the first place in this case and in others before it DEQ has given Respondent pre-enforcement warnings and has yet to lose its approval for its program. Further as far as Respondent know the delegation there.

Second. OAR 340-012-0038(3) (e) (E) (ii) does not say what DEQ claims for it.

Respondent asserts DEQ has had his Washington address since at least October 2007 and further the location of the mobile home court is not a secret nor is Respondent's e-mail address.

In conclusion Respondent did not violate the special Condition to evaluate the system because he did not know about it and once he knew of it he evaluated the system.

Respectfully Submitted.



Magar E. Magar,

Respondent.

On March 12, 2010 these Exceptions and Brief were hand delivered the DEQ.

Table 1
WPCF and NPDES Domestic Treatment Facilities
Activated Sludge & Trickling Filter Treatment Facility Monitoring Requirements
(effluent monitoring for WPCF and NPDES permittees unless otherwise indicated)
(SWM-JN-00456)

ITEM OR PARAMETER	DESIGN CAPACITY, MGD						
	< 0.05	0.05 - 0.10	0.11 - 0.50	0.51 - 1.00	1.01 - 5.00	5.01 - 10.00	>10.00
Total Flow[1] (influent & effluent)	Daily, Measurement	Daily, Measurement	Daily, Measurement	Daily, Measurement	Daily, Measurement by totalizing meter	Daily, Measurement by totalizing meter	Daily, Measurement by totalizing meter
Flow Meter Calibration	Annual, Verification	Annual, Verification	Annual, Verification	Annual, Verification	Semi-annual, Verification	Semi-annual, Verification	Quarterly, Verification
BOD[2] & TSS (influent & effluent)	1/month, 24-hr composite	Once every 2 weeks, 24-hr composite	1/week, 24-hr composite	2/week, 24-hr composite	2/week, 24-hr composite	3/week, 24-hr composite	3/week, 24-hr composite
Pounds Discharged BOD[2] & TSS (NPDES)	1/month, Calculation	Once every 2 weeks, Calculation	1/week, Calculation	2/week, Calculation	2/week, Calculation	3/week, Calculation	3/week, Calculation
pH (influent & effluent)	2/week, Grab	2/week, Grab	2/week, Grab	3/week, Grab	3/week, Grab	Daily, Grab	Daily, Continuous
Temperature[3] (NPDES)	2/week, Grab	2/week, Grab	2/week, Grab	3/week, Grab	3/week, Grab	Daily, Grab	Daily, Continuous
E. coli bacteria-or *fecal coliform* if permit requires (NPDES)	1/month, Grab	once every 2 weeks, Grab	1/week, Grab	1/week, Grab	2/week, Grab	3/week, Grab	3/week, Grab
Total Coliform, Turbidity[4]							
Chlorine Residual or Ultraviolet Radiation Intensity (NPDES)	Daily, Grab	Daily, Grab	Daily, Grab	Daily, Grab	Daily, Grab	Daily, Grab	Daily, Continuous recording
BOD & TSS (Average % Removal Efficiency) (NPDES)	Monthly, Calculation	Monthly, Calculation	Monthly, Calculation	Monthly, Calculation	Monthly, Calculation	Monthly, Calculation	Monthly, Calculation

Total flow reported is to be representative of flow(s) received, treated and discharged from the facility and may be influent, effluent or both depending upon the type and configuration of the treatment system and final discharge point(s).

In evaluating the appropriateness of the flow measurement location to characterize the wastewater flows, the permit writer should take into consideration: 1) recirculation flows and bypasses which may occur upstream of the flow measurement device, 2) waste streams which may enter the treatment process after the flow measurement device, 3) bypasses of the treatment process which occur after the influent measurement device, 4) discharges of effluent to irrigation or other uses which may not be recorded, and 5) systems where flow measurement does not account for evaporation and rainfall (lagoons and other storage systems).

It may be necessary to have the permittee submit to the Department a plan and schedule for implementing the changes necessary to provide accurate flow characterization or evaluate methods and procedures to provide the flow information requested. The permit writer should consider including a compliance schedule in the permit.

Frequency of analysis for BOD also applies for CBOD if one or both are reported.

Frequency of temperature analysis should be the same as pH, except should be continuous sampling when receiving water body is under a Total Daily Maximum Load, or when the site has water quality based effluent limit based on an excess thermal load calculation.

If a facility disposes of treated effluent through reuse under Division 55, "The Regulations Pertaining to the Use of Reclaimed Water (Treated Effluent) from Sewage Treatment Plants", the permittee will be required to monitor for parameters in accordance with OAR 340, Division 55, Table I.

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

March 9, 2010

ORIGINAL SENT BY REGULAR MAIL AND WITH ONE COPY BY FAX

Magar E. Magar
14102 NE 40th Street
Vancouver, WA 98682
Fax number: 360-314-4781

Re: Additional extension of time to file exceptions and brief
OAH Case No. 901117

Dear Mr. Magar,

On March 9, 2010, the Environmental Quality Commission received your request for an additional extension of time to file exceptions and a brief in the contested case referenced above. Your request of an additional extension until March 12, 2010, has been granted.

You must file exceptions and a brief on or before March 12, 2010. 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 Bryan Smith at 811 SW 6th Avenue, Portland, Oregon 97204. Your exceptions and brief must be received by 5 p.m. on March 12, 2010, 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.

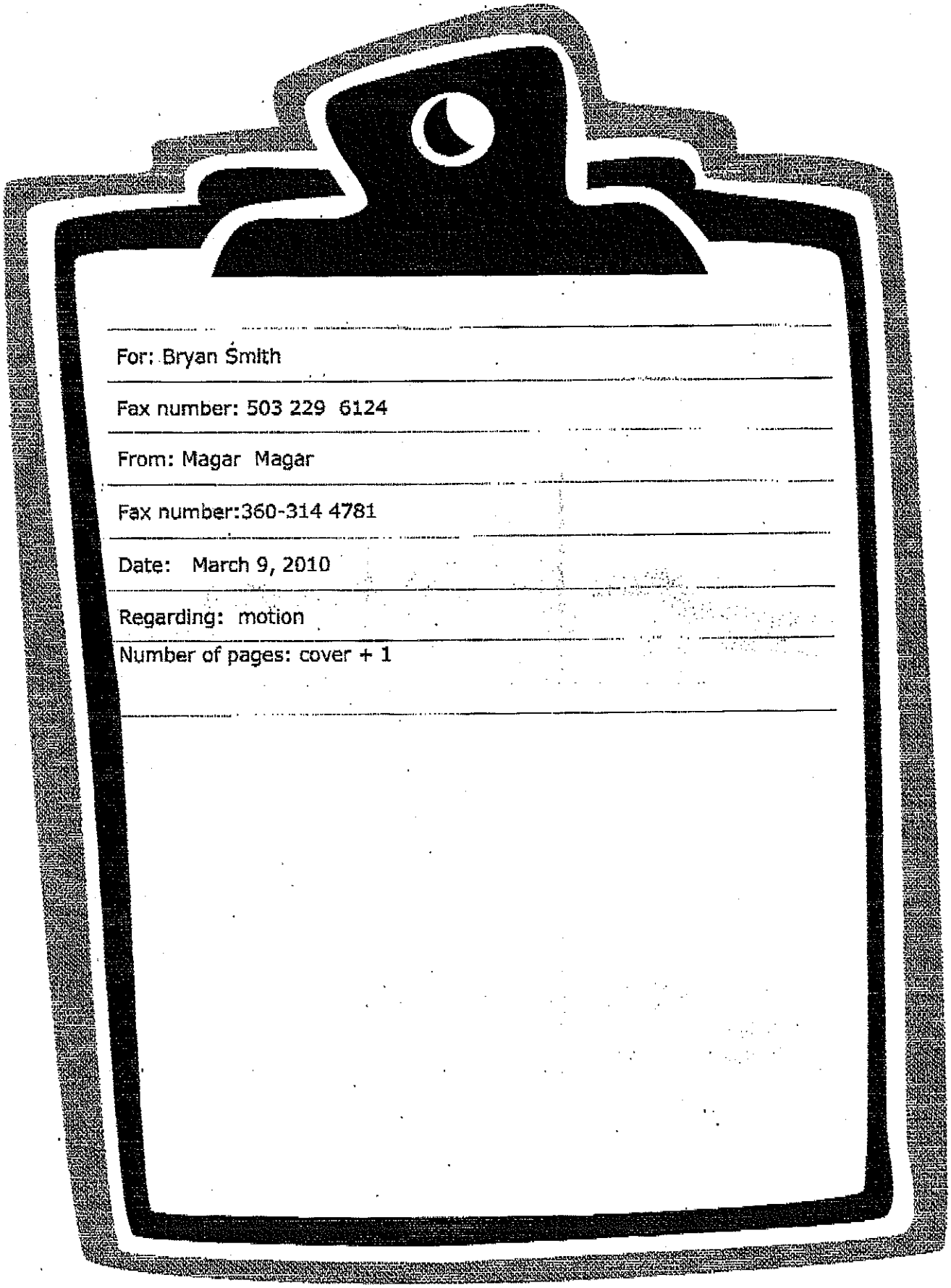
If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY: Bryan Smith, DEQ

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



For: Bryan Smith

Fax number: 503 229 6124

From: Magar Magar

Fax number:360-314 4781

Date: March 9, 2010

Regarding: motion

Number of pages: cover + 1

Magar E. Magar
Pro Se.
14102 NE 40th St.
Vancouver, WA 98682
Phone # 360 314 4444
Fax # 360 314 4781
Cell # 503 929 1094
E: Mail: calsport@msn.com

Before the Department of Environmental Quality Commission
Of the State of Oregon

In the Matter of Magar E. Magar, Respondent	Case No.: No. 90111? Motion for Extento sion of time to file Exceptions Brief **Pursuant to OAR 340-011-0575 (4)(e)**

Magar E. Magar Respondent moves for an extension of time until March 12, 2010 to file his exceptions brief in the above entitled proceedings'

A prior request was made for an extension of time. This second request is made because Respondent did not get enough fever and nausea free time that he estimated he would get when he requested the first extension. The problem is that the chemotherapy depresses the bone marrow therefore lessening the amount of white blood cells and platelets put out. In order to counteract that effect of the chemotherapy and fight infections an injection of a drug called the colony stimulating factor is taken and it is that drug that causes the fever and flu like symptoms that are so debilitating and devastating. Respondent has not been able to go to the law library or on some days do much of anything. Therefore Respondent respectfully submits this request for extension. Thank you for your consideration of the motion.

Submitted by Magar E. Magar Respondent by fax to Dick Pedersen Director of DEQ by faxing same on February March 9, 2010 to 503 229 6762 (the Director's Office) as directed on p.15 of the order that is sought to be reviewed.

Also served on Bryan Smith by fax to 503 229 6124.

____

Magar E. Magar
Respondent.

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

February 26, 2010

ORIGINAL SENT BY REGULAR MAIL AND WITH ONE COPY BY FAX

Magar E. Magar
14102 NE 40th Street
Vancouver, WA 98682
Fax number: 360-314-4781

Re: Extension of time to file exceptions and brief
OAH Case No. 901117

Dear Mr. Magar,

On February 26, 2010, the Environmental Quality Commission received your request for an extension of time to file exceptions and a brief in the contested case referenced above. Your request of an extension until March 10, 2010, has been granted.

You must file exceptions and a brief on or before March 10, 2010. 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 Bryan Smith at 811 SW 6th Avenue, Portland, Oregon 97204. Your exceptions and brief must be received by 5 p.m. on March 10, 2010, 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.

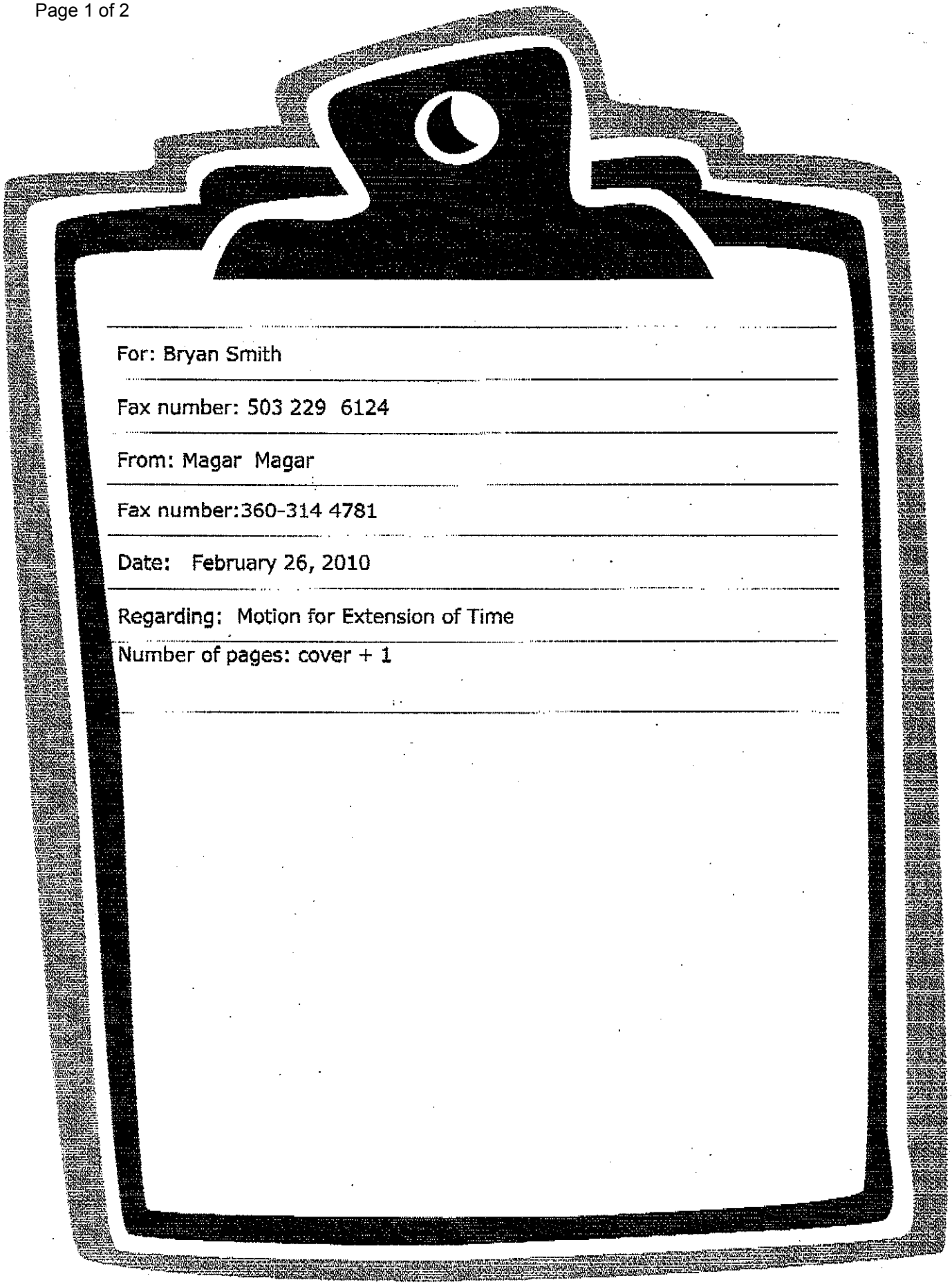
If you have any questions about this process, please call me at 503-229-5301.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Cc: BY HAND DELIVERY: Bryan Smith, DEQ

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



For: Bryan Smith

Fax number: 503 229 6124

From: Magar Magar

Fax number:360-314 4781

Date: February 26, 2010

Regarding: Motion for Extension of Time

Number of pages: cover + 1

Magar E. Magar
Pro Se.
14102 NE 40th St.
Vancouver, WA 98682
Phone # 360 314 4444
Fax # 360 314 4781
Cell # 503 929 1094
E: Mail: calsport@msn.com

Before the Department of Environmental Quality Commission
Of the State of Oregon

In the Matter of Magar E. Magar, Respondent	Case No.: No. 90111/ Motion for Extento sion of time to file Exceptions Brief **Pursuant to OAR 340-011-0575 (4)(e)**

Magar E. Magar Respondent and participant having stated his intent to petition for review moves for an extension of time until March 10, 2010 to file his exceptions brief in the above entitled proceedings'

The request is made because Respondent has been diagnosed with a diffuse B-cell lymphoma for which he is receiving chemotherapy. The chemotherapy is scheduled for three cycles each cycle lasting three weeks. The first was started on January 31, 2010 and the second was started on February 24, 2010. At present respondent is feeling the effects of the recently received chemotherapy and is in no position to accomplish the requisite task by the deadline. If how respondent felt after the previous cycle is any indication then Respondent will not be able to complete the exceptions brief before March 10, 2010.

Therefore Respondent respectfully submits this request for extension. Thank you for your consideration of the motion.

Submitted by Magar E. Magar Respondent by fax to Dick Pedersen Director of DEQ by faxing same on February 26, 2010 to 503 229 6762 (the Director's Office) as directed on p.15 of the order that is sought to be reviewed.

Also served on Bryan Smith by fax to 503 229 6124.

Magar E. Magar
Respondent.

Oregon

ENVIRONMENTAL
QUALITY
COMMISSION

February 1, 2010

BY CERTIFIED MAIL

Magar E. Magar
14102 NE 40th Street
Vancouver, WA 98682

Re: Petition for commission review
OAH Case No. 901117

Dear Mr. Magar,

On January 28, 2010, 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 Bryan Smith at 811 SW 6th Avenue, Portland, Oregon 97204. Your exceptions and brief must be received by February 27, 2010, 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.

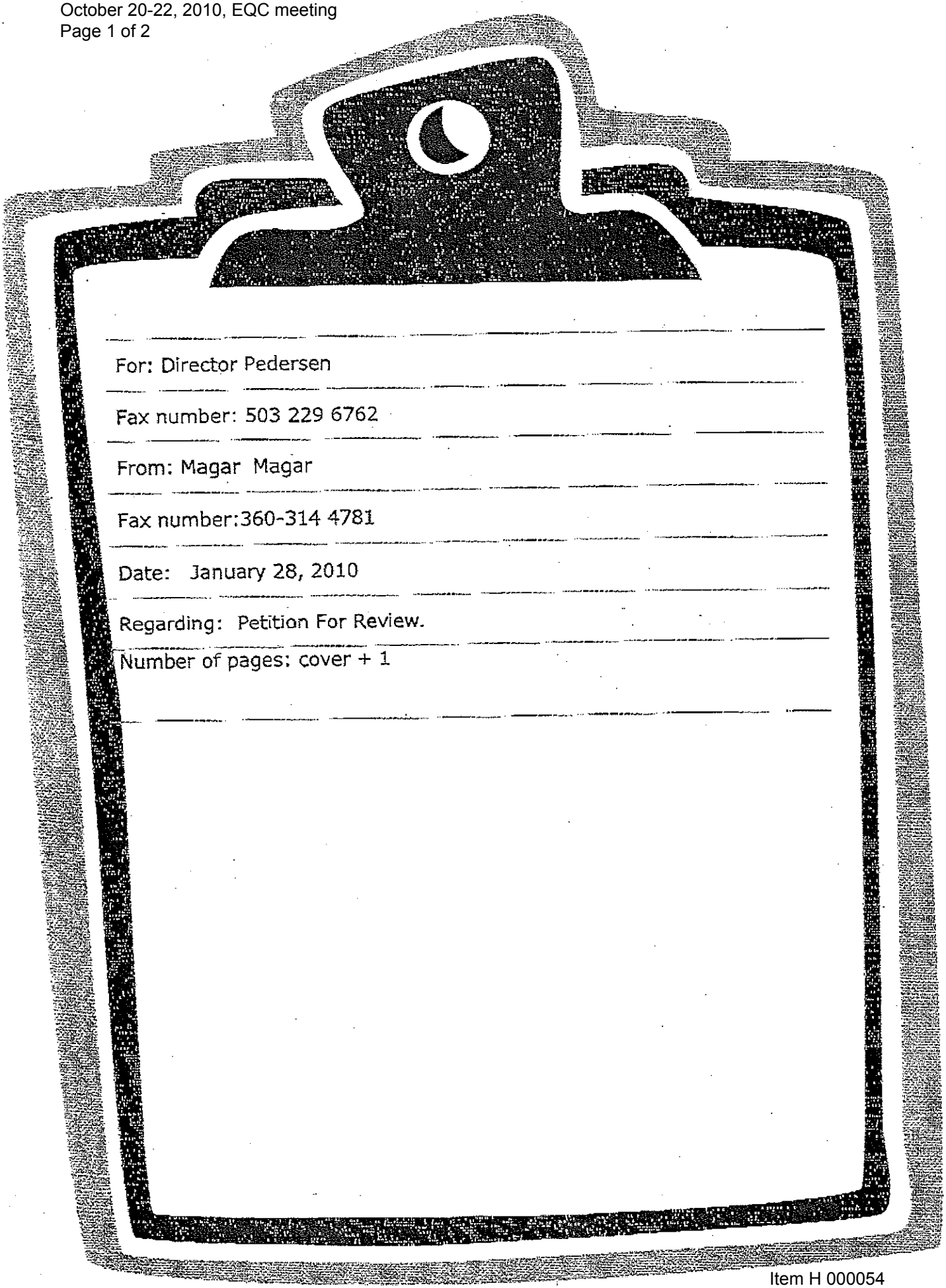
If you have any questions about this process, please call me at 503-229-5301. If you need additional time to file your exceptions and brief, you must request an extension of time in writing and make sure it arrives at the address listed above before the deadline expires.

Sincerely,

Stephanie Clark
Assistant to the Oregon Environmental Quality Commission

Enclosure: OAR 340-011-0575
Cc: BY HAND DELIVERY: Bryan Smith, DEQ

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



For: Director Pedersen

Fax number: 503 229 6762

From: Magar Magar

Fax number:360-314 4781

Date: January 28, 2010

Regarding: Petition For Review.

Number of pages: cover + 1

Magar E. Magar
Pro Se.
14102 NE 40th St.
Vancouver, WA 98682
Phone # 360 314 4444
Fax # 360 314 4781
Cell # 503 929 1094
E: Mail: calsport@msn.com

Before the Department of Environmental Quality Commission
Of the State of Oregon

In the Matter of Magar E. Magar, Respondent	Case No.: No. 90111/ Petition for Review **Pursuant to OAR 340-011-0575 (2)**

Magar E. Magar Respondent and participant in the above entitled proceedings states his intent that the Commission review the proposed order in this case by Administrative Law Judge Ken Betterton mailed to Respondent on December 31, 2009.

Submitted by Magar E. Magar Respondent by fax to Dick Pedersen Director of DEQ by faxing same on January 28, 2010 to 503 229 6762 (the Director's Office) as directed on p.15 of the order that is sought to be reviewed.

----------.
Magar E. Magar
Respondent.

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

IN THE MATTER OF:	) **PROPOSED AND FINAL ORDER**
	)
MAGAR EDWARD MAGAR, an individual,	) OAH Case No.: 901117
	) Agency Case No.: WQ/D-NWR-08-019
	)
Respondent.	) COLUMBIA COUNTY

HISTORY OF THE CASE

On May 15 2008, the Department of Environmental Quality for the State of Oregon (DEQ) issued a Notice of Violation, Department Order, and Civil Penalty Assessment to Magar Edward Magar (Respondent), alleging that he violated DEQ laws. On or about June 3, 2008, Respondent requested a hearing and filed a response. Respondent filed an amended response on or about September 11, 2008.

DEQ referred the hearing request to the Office of Administrative Hearings (OAH) on June 1, 2009. The case was assigned to Senior Administrative Law Judge (ALJ) Ken L. Betterton. A pre-hearing conference was held by telephone on June 24, 2009. Respondent appeared *pro se*. DEQ was represented by Leah Koss, Environmental Law Specialist.

A hearing was held on October 13, 2009 in Portland, Oregon. Respondent appeared *pro se*. DEQ was represented by Bryan Smith, Environmental Law Specialist. Lyle W. Christensen, DEQ Compliance Officer, testified for DEQ. Respondent testified on his own behalf.

The final written closing argument was filed December 3, 2009, at which time the matter was taken under advisement.

ISSUES

(1) Whether Respondent violated ORS 468B.025(2) by failing to comply with his pollutant waste discharge permit by not having his treatment system evaluated by a qualified consultant within the time limit specified; and whether Respondent should develop and submit a plan to DEQ for repairs, upgrades or modifications to his treatment system, and make such repairs, upgrades or modifications as required by DEQ.

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

(3) Whether Respondent 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) Whether Respondent violated ORS 468B.025(2) by failing to comply with his pollutant waste discharge permit by discharging waste water with a higher concentration of bacteria than allowable by law into waters of the state.

(5) If Respondent committed one or more of the above violations, what is the appropriate penalty?

EVIDENTIARY RULING

Exhibits A through A17 and A19, offered by DEQ, were admitted into evidence without objection. Exhibit A18 was not admitted into evidence because it was not relevant. DEQ withdrew Exhibits A20 through A22.

Exhibits R2 through R6, offered by Respondent, were admitted into evidence without objection. Exhibits R1 and R7 were not admitted into evidence because they were not relevant.

STIPULATIONS

(A) DEQ agreed to reduce the "C" factor for the penalty calculation in Violation (1) from +2 to -1, and agreed to reduce the "EB" value for the penalty calculation in Violation (1) from $764 to $34. Respondent agreed to those changes, provided that DEQ proved the violation.

(B) The parties also agreed that the "EB" value for the penalty calculation in Violation (2) would be $61, provided that DEQ proved the violation.

FINDINGS OF FACT

(1) Respondent has owned Riverwood Mobile Home Park located near Ranier, Columbia County, Oregon since the 1980s. The park consists of about 30 mobile homes and a few duplex units. (Respondent's testimony.) Respondent has maintained his own waste water treatment system at the park through the National Pollutant Discharge Elimination System (NPDES) waste discharge permit system. The NPDES permitting system in Oregon is administered by DEQ. (Lyle Christensen's testimony.)

(2) Respondent has had a history over the years of non-compliance with his NPDES permit. On July 11, 2001, DEQ issued a formal enforcement action to Respondent in Case No. WQ/D-NWR-01-129 that assessed a civil penalty for six Class I violations of Oregon law and his permit for violations that occurred in March and April 2001. The civil penalty was paid in full on or about April 10, 2002. (Ex. A.) Respondent filed for bankruptcy after the incidents occurred that led DEQ to charge Respondent with the violations. Respondent's bankruptcy trustee paid the civil penalty out of bankruptcy funds to satisfy Respondent's obligation. (Lyle Christensen's testimony.)

(3) On February 7, 2006, DEQ issued a formal enforcement action to Respondent in Case No. WQ/D-NWR-05-181 for one Class I violation and for one Class II violation that occurred in June and July 2005. One of the violations was that Respondent failed to do sampling of biochemical oxygen demand (BOD) and total suspended solids (TSS) at the treatment plant as required by his permit. The civil penalty was paid on or about August 18, 2006. (Ex. A.)

(4) DEQ issued Respondent a NPDES permit June 10, 2002 that was set to expire May 31, 2007. (Ex. A5.) In March 2007, Respondent filed an application with DEQ to renew his NPDES permit. Respondent personally completed the application form. He listed himself as the "Responsible Official," the "Facility Contact," and the person to "receive invoices." Respondent listed his mailing address on the application as "1616 N.W. Northrup, Portland, Oregon 97209." This is the same mailing address that DEQ had on file for Respondent for his NPDES permit issued in 2002. (Ex. A9 at 2-6; Respondent's testimony.)

(5) DEQ reviewed Respondent's application and drafted a proposed permit. On April 5, 2007, DEQ mailed Respondent a letter at his address on file, acknowledged receipt of his NPDES permit application, enclosed a copy of the proposed permit, and invited Respondent to review the proposed permit and make comments. (Ex. A8; Lyle Christensen's testimony.) The April 5, 2007 letter was not returned to DEQ by the United States Postal Service as not deliverable. Respondent did not file any comments. (Lyle Christensen's testimony.)

(6) On April 25, 2007, Lyle Christensen (Christensen), DEQ Environmental Specialist, mailed Respondent a letter at his address on file informing him that he had conducted a water quality inspection at the mobile home park. In his letter, Christensen listed a number of requirements in Respondent's permit that Respondent was not meeting. (Ex. A10.) The April 25, 2007 letter was not returned to DEQ by the United States Postal Service as not deliverable. Christensen monitors about 40 permittees and facilities, including Respondent's. He has worked with Respondent since 1992 and is familiar with him and his facility. (Lyle Christensen's testimony.)

(7) On June 4, 2007, DEQ renewed Respondent's NPDES permit with an expiration date of May 31, 2012. The permit was mailed to Respondent at his address on file. The permit also listed Respondent as the designated operator of the waste water treatment facility at the mobile home park. (Ex. A7.) The permit and accompanying cover letter were not returned to DEQ by the United States Postal Service as not deliverable. (Lyle Christensen's testimony.)

(8) Schedule A, Condition 1(a)(3) of Respondent's NPDES permit issued June 4, 2007 requires that E. coli Bacteria samples not exceed 406 organisms per 100 mL for a single sample. (Ex. A7 at 1.) Schedule B, Condition 1 of the permit requires Respondent to collect monitoring data for total suspended solids (TSS), biochemical oxygen demand (BOD-5), and bacteria, at least once a month. (*Id.* at 3.) Schedule B, Condition 2(a) of the permit requires Respondent to file discharge monitoring reports (DMRs) with DEQ for each calendar month by the 15th day of the following month. (*Id.* at 4.) Schedule C, Condition 1 of the permit required Respondent to have the 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. Schedule C,

Condition 1 also required that if DEQ determined that repairs, upgrades or modifications were needed, that Respondent would develop and submit a plan to DEQ plans for repairs, upgrades or modifications within 90 days of Department notification, and that Respondent would complete all required upgrades within 90 days of plan's approval by DEQ. (*Id.* at 5.)

(9) Christensen put the requirement in the permit that Respondent have his facility's treatment system evaluated within 180 days, because of concerns about water he had seen standing on the facility's recirculating gravel filter (RGF) field. Water standing on gravel filter system 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. (Lyle Christensen's testimony.)

(10) Schedule C, Condition 1 in the permit required Respondent to have his treatment system's evaluation by a consultant completed by December 4, 2007. Respondent did not have the evaluation done by the December 4, 2007 deadline. He had the evaluation completed June 25, 2008. (Lyle Christensen's testimony.) The consultant Respondent hired to conduct the evaluation made several recommendations for repairs, upgrades or modifications. (Ex. A13.) Respondent had not made the recommended repairs, upgrades or modifications as of the date of the hearing. (Lyle Christensen's testimony.)

(11) Respondent submitted his DMR for June 2007 on July 15, 2007; he submitted his DMR for August 2007 on September 26, 2007; he submitted his DMR for September 2007 on October 30, 2007; he submitted his DMR for October 2007 on December 3, 2007; he submitted his DMR for February 2008 on April 1, 2008. (Ex. A15.)

(12) Respondent failed to collect monitoring data for TSS, BOD-5, and bacteria for December 2007. (Ex. A15.)

(13) On December 5, 2007, Christensen mailed a Pre-Enforcement Notice (PEN) to Respondent at 1616 N.W. Northrup Street, Portland, Oregon 97209. The PEN informed Respondent that he was in violation of Schedule C, Condition 1, and in violation of Schedule B, Condition 2(a) of his permit. The PEN was returned by the United States Postal Service. (Ex. A11.) Christensen tracked down an address for another business owned by Respondent that was located physically near the mobile home park and re-mailed the PEN to that address on December 11, 2007. (Ex. A12.) The re-mailed PEN was not returned by the United States Postal Service as not deliverable. (Lyle Christensen's testimony.)

(14) On January 10, 2008, Respondent's facility discharged waste water with a concentration of 610 E. coli organisms per 100 mL to waters of the state, as shown on the DMR Respondent filed for January 2008. (Ex. A15.)

(15) On May 15, 2008, DEQ issued the Notice of Violation, Department Order and Civil Penalty Assessment to Respondent. The notice alleged that Respondent 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 that Respondent 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, Respondent 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. (Notice of Violation, Department Order and Civil Penalty Assessment at 2-3.)

CONCLUSIONS OF LAW

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

(3) Respondent 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) Respondent violated ORS 468B.025(2) by failing to comply with his pollutant waste discharge permit by discharging waste water with a higher concentration of bacteria than allowable by law into waters of the state.

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

OPINION

DEQ has the burden of proof to establish its allegations. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683 (1980). DEQ must prove the allegations by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1989).

DEQ has authority under ORS 468B.025(2) to impose civil penalties against a person who violates conditions of a NPDES permit issued under Oregon law. DEQ issued Respondent a renewal of his NPDES permit in June 2007, and has alleged that he violated several conditions of his permit.

Those violations and applicable civil penalties are addressed in turn.

Violation (1)—Failure to have the system evaluated by a qualified consultant

DEQ accused Respondent of failing to comply with Schedule C, Condition 1 of the permit. That condition required Respondent to have his existing treatment system at the facility evaluated by a qualified consultant within 180 days of the permit renewal. The permit was renewed June 4, 2007. Respondent needed to have the treatment system evaluated by December 4, 2007. He did not have the evaluation done until June 25, 2008, more than six months late.

Respondent argues that he should not be found liable for Violation (1) because he did not receive "advance notice" of the violation, citing ORS 468.126. However, 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(3)(e)(E)(ii) specifically exempts NPDES permit conditions from an advance notice requirement because such advance notice would disqualify the state program from federal approval or delegation.

Respondent also argues that he should not be liable for Violation (1) because he did not receive either the draft of the proposed permit or the renewal permit that was subsequently issued June 4, 2007. Respondent relies upon OAR 340-045-0035(5) to support his argument.

OAR 340-045-0035(5) provides that after public notice has been drafted and the proposed NPDES permit provisions have been prepared by DEQ, they will be forwarded to the applicant for review and comment. The applicant has 14 days to submit comments in writing. Nothing in the rule prohibits DEQ from finding a violation if the applicant does not receive a draft of the proposed permit or a copy of the final permit.

OAR 340-011-0525 address service of documents. Section (2) of the rule states that a person holding a license or a permit will be conclusively presumed able to be served at the address given in the license or permit application. Section (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. DEQ mailed both the proposed permit and the renewal permit to Respondent at the address Respondent used on his permit application. Neither mailing was returned to DEQ by the United States Postal Service as not deliverable. It is reasonable to infer that Respondent received both mailings. OAR 340-011-0525(4).

Finally, Respondent argues that if he had received the PEN mailed December 5, 2007, "we would not be here" on Violation (1). The December 5, 2007 PEN was returned to DEQ by the United States Postal Service. 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).

DEQ correctly charged Respondent with Violation (1).

Respondent violated ORS 468B.025(2) by failing to comply with Schedule C, Condition 1 of the permit by not having his treatment system evaluated by a qualified consultant within 180 days.

Schedule C, Condition 1 also requires Respondent to submit a plan to DEQ for repairs, upgrades or modifications to his treatment system within 90 days of notification of the evaluation, if such repairs, upgrades or modifications are necessary, and that Respondent make the repairs, upgrades or modifications within 90 days of the plan's approval by DEQ. The consultant Respondent finally hired to do the evaluation made recommendations for repairs, upgrades or modifications. As of the date of the hearing, Respondent had not made any of those repairs, upgrades or modifications. Respondent should develop and submit a plan and specifications to DEQ immediately (because the 90-day time limit for submitting such a plan has already expired), and complete all repairs, upgrades or modifications within 90 days of DEQ's approval of the plan.

The next issue is what penalty should be imposed for Violation (1).

Penalty

The formula for determining the amount of penalty for a violation is:

$$BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$$

"BP" represents the base penalty. The "P" factor considers whether the respondent has had any prior significant violations; the "H" factor addresses the respondent's history of correcting prior significant action(s); the "O" factor is whether the violation was repeated or ongoing; the "M" factor addresses the respondent's mental state or knowledge at the time of the violation; and the "C" factor represents the respondent's efforts to correct the violation. "EB" represents the economic benefit under the EPA's BEN computer model. OAR 340-012-0045(2)(e).

DEQ calculates the penalty for this violation as:

$$\text{Penalty}^{1} = BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$$

---

[1] DEQ made the following determinations for the penalty calculation for this violation:

VIOLATION 1: Failing to comply with a compliance scheduled in Schedule C, Condition 1 of the permit, in violation of ORS 468B.025(2).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0053(1)(a).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), because there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the department does not indicate a minor or major magnitude.

= $1,250 + [(0.1 x $1,250) x (9 + -1 + 4 + 6 + - 1)] + $34
= $1,250 + [($125) x (17)] + $34
= $1,250 + $2,125 + $34
= $3,409

Respondent contends that DEQ incorrectly assessed the "P" factor for Violations (1), (2) and (3). He argues that DEQ should not have counted the six Class I violations alleged against him in the Notice of Civil Penalty Case No. WQ/D-NWR-01-129, because they were settled by his bankruptcy trustee, and he was not in "privity" with the trustee, because he considered the trustee an "adverse party," and because the violations were not litigated. The violations all occurred as a result of Respondent's actions while he was the permittee under his permit. The bankruptcy trustee acted on behalf of the estate to resolve the violations. Whether the violations were actually litigated, as opposed to settled, makes no difference legally. The FEAs became

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"BP" is the base penalty, which is $1,250 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(E)(i).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent. This factor receives a value of 9 according to OAR 340-012-0145(2)(a)(B), (C) and (D), because Respondent has seven Class I and two Class II prior significant actions in the same media in case No. WQ/D-NWR-05-181 issued February 7, 2006, and in Case No. WQ/D-NWR-01-129 issued November 7, 2001.

"H" is Respondent's history of correcting prior significant actions(s) and receives a value of -1 according to OAR 340-012-0145(3)(a)(B), because some of the violations were uncorrectable, but Respondent took reasonable efforts to minimize the effects of some of the violations by repairing the waste water treatment system that was failing and by obtaining an operator certificate.

"O" is whether 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 did not meet the compliance schedule deadline of December 4, 2007.

"M" is the mental state of the Respondent and receives a value of 6 according to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. Respondent has had a NPDES permit for the system at Respondent's facility since at least 2002. The permit sets forth conditions and requirements for compliance with the permit. The compliance schedule, which was added to the renewal permit in June 2007, was applied for and reviewed by Respondent before issuance. Respondent, as permittee, had actual knowledge of and is required to comply with the compliance schedule as set forth in the permit and Respondent consciously disregarded this permit condition.

"C" is Respondent's efforts to correct the violation and receives a value of -1 according to OAR 340-012-0145(6)(a)(C), because the Department agreed to reduce the C value from +2 to -1.

"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, the parties agreed to an EB value of $34.

prior significant actions (PSAs) once they were made final by payment of a civil penalty, which occurred when Respondent's bankruptcy trustee paid the civil penalty to DEQ to resolve the case. OAR 340-012-0030(10)[2] and (17).[3]

Respondent argues that the "P" factor for Violations (1), (2) and (3) should be reduced pursuant to OAR 340-012-0145(2)(d)(A)(i)[4] because all FEAs on which the PSAs were based were issued more than three years before the date of the violations for the current case. The FEA for Case No. WQ/D-NWR-05-181 was issued February 7, 2006. All four violations in the current case occurred prior to February 7, 2009, which would be three years after the issuance of the last FEA. Because not all the FEAs in which PSAs were cited were issued more than three years before the date the current violations occurred, DEQ properly calculated the "P" factor as 9 for Violations (1), (2) and (3) in the current case.

Finally, Respondent argues that the "P" factor is incorrect because DEQ did "no actual computation" of that factor, and that there is insufficient evidence in the record to support DEQ's determination. OAR 340-012-0145(2) does not require a "computation" per se. The "P" factor is based on the number of PSAs. DEQ correctly determined the "P" factor.

I find that DEQ correctly calculated the penalty. A civil penalty of $3,409 should be imposed against Respondent for Violation (1).

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[2] "Formal Enforcement Action" (FEA) means a proceeding initiated by the department that entitles a person to a contested case hearing or that settles such entitlement, including, but not limited to, Notices of Violation, Notices of Civil Penalty, Demand Notices, department orders, commission orders, Mutual Agreement and Orders, and other contest orders. OAR 340-012-0030(10).

[3] "Prior Significant Action" (PSA) means any violation cited in a FEA, with or without admission of a violation, that becomes final by payment of a civil penalty, by a final order of the commission or the department, or by judgment of a court. OAR 340-012-0030(17).

[4] OAR 340-012-0145(2) provides:

"P" is whether the respondent has any prior significant actions (PSAs). A violation becomes a PSA on the date the first FEA in which it is cited is issued.

(a) Except as otherwise provided in this section, the values for "P" and the finding that supports each are as follows:

(A) 0 if no PSAs or there is insufficient information on which to base a finding under this section.

(B) 1 if the PSA included one Class II violation or two Class III violations.

(C) 2 if the PSA(s) included one Class I violation or Class I equivalent.

(D) For each additional Class I violation or Class I equivalent, the value of "P" is increased by 1.

(b) The value of "P" will not exceed 10.

(c) If any of the PSAs were issued under ORS 468.996, the value of "P" will be 10.

(d) In determining the value of "P", the department will:

(A) Reduce the value of "P" by:

(i) 2 if all the formal enforcement actions in which PSAs were cited were issued more than three years before the date the current violation occurred.

(ii) 4 if all the formal enforcement actions in which PSAs were cited were issued more than three years before the date the current violation occurred.

Violation (2)—Failing to collect monitoring data

DEQ accused Respondent of failing to comply with Schedule B, Condition 1 of the permit. That condition requires Respondent to collect monitoring data each month for TSS, BOD-5, and bacteria. Respondent failed to collect such monitoring data for December 2007. Thus he violated ORS 468B.025(2) by failing to comply with this condition in the permit.

Penalty

DEQ calculates the penalty for Violation (2) as:

Penalty[5] = BP + [(0.1 x BP) x (P + H + O + M + C)] + EB

---

[5] DEQ made the following determinations for the penalty calculation for this violation:

VIOLATION 2: Failing to collect monitoring data as required by Schedule B, Condition 1 of the permit, in violation of ORS 468B.025(2).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(o).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012- 0130(1), because there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the department does not indicate a minor or major magnitude.

"BP" is the base penalty, which is $1,250 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(E)(i).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent. This factor receives a value of 9 according to OAR 340-012-0145(2)(a)(B), (C) and (D), because Respondent has seven Class I and two Class II prior significant actions in the same media in Case No. WQ/D-NWR-05-181 issued February 5, 2006, and in Case No. WQ/D-NWR-01-129 issued November 7, 2001.

"H" is Respondent's history of correcting prior significant action(s) and receives a value of -1 according to OAR 340-012-0145(3)(a)(B), because some of the violations were uncorrectable, but Respondent took reasonable efforts to minimize the effects of some of the violations by repairing the waste water treatment system that was failing and by obtaining an operator certificate.

"O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(a)(A), because the violation occurred one time.

"M" is the mental state of the Respondent and receives a value of 6 according to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. Respondent has had a NPDES permit for the treatment system at his facility since 2002. The permit expressly requires Respondent to monitor his system's waste water for TSS, BOD-5, and bacteria. Respondent, as permittee, is

= $1,250 + [(0.1 x $1,250) x (9 + -1 + 0 + 6 + 0)] + $61
= $1,250 + [($125) x (14)] + $61
= $1,250 + $1,750 + $61
= $3,061

Respondent contends that the magnitude for Violations (2) and (3) should be "minor" rather than "moderate," as found by DEQ. OAR 340-012-0130.[6] Respondent presented no basis for his contention.

---

required to comply with the sampling requirements as set forth in the permit and Respondent consciously disregarded this permit condition. Further, Respondent has been cited for this violation previously in Notice of Violation, Department Order and Civil Penalty Assessment No. WQ/D-NWR-05-181. Respondent acted recklessly in failing to assure that the sampling was done and therefore acted recklessly in committing this violation.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because the violation or the effects of the violation could not be corrected or minimized.

"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, the parties agreed that the EB value is $61.

[6] OAR 340-012-0130 provides, in relevant part:

(1) For each civil penalty, the magnitude is moderate unless:
* * * * *
(b) The department determines, using information reasonably available to it, that the magnitude should be major under section (3) or minor under section (4).
(2) If the department determines, using information reasonably available to the department, that a general or selected magnitude applies, the department's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude.
(3) The magnitude of the violation is major if the department finds that the violation had a significant adverse impact on human health or the environment. In making this finding, the department will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statues or commission and department rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.
(4) The magnitude of the violation is minor if the department finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or other environmental receptors. In making this finding, the department will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials

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. DEQ reasonably concluded that the magnitude is moderate for both Violations (2) and (3), which became the presumed magnitude. OAR 340-012-0130(2). No evidence was presented that the violations had no more than a de minimis adverse impact on human health or the environment. Moreover, Violation (3) was repeated over several months. Finally, Respondent has the burden to present evidence that a magnitude should apply other than the presumed magnitude. Respondent presented no such evidence. OAR 340-012-0130(2).

Respondent also challenged the "P" factor value found by DEQ. As previously discussed under Violation (1), DEQ correctly calculated the "P" factor for this violation as 9.

I find that DEQ correctly calculated the penalty for this violation. A civil penalty of $3,061 should be imposed against Respondent for Violation (2).

Violation (3)—Failing to submit timely DMRs

DEQ accused Respondent of failing to comply with Schedule B, Condition 2(a) of the permit. That condition requires Respondent to submit monthly DMRs to DEQ by the 15th day of the following month. Respondent submitted untimely DMRs for June, August, September, October and December 2007, and February 2008. Respondent violated ORS 468B.025(2) by failing to comply with the conditions of this permit.

Penalty

DEQ calculates the penalty for this violation as:

$$\text{Penalty}^{7} = BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$$

---

involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.

[7] DEQ made the following determinations for the penalty calculation for this violation:

VIOLATION 3: Failing to comply with Schedule B, Condition 2(a) of the permit, in violation of ORS 468B.025(2).

CLASSIFICATION: These are Class II violations pursuant to OAR 340-012-0055(2)(b).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), because there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the department does not indicate a minor or major magnitude.

= $625 + [(0.1 x $625) x (9 + -1 + 2 + 10 + 0)] + $0
= $625 + [($62.50) x (20)] + $0
= $625 + $1,250 + $0
= $1,875

"BP" is the base penalty, which is $625 for a Class II, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(B)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(E)(i).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(17), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent. This factor receives a value of 9 according to OAR 340-012-0145(2)(a)(B), (C) and (D), because Respondent has seven Class I and two Class II prior significant actions in the same media in Case No. WQ/D-NWR-05-181 issued February 7, 2006, and in Case No. WQ/D-NWR-01-129 issued November 7, 2001.

"H" is Respondent's history of correcting prior significant action(s) and receives a value of -1 according to OAR 340-012-0145(3)(a)(B), because some of the violations were uncorrectable, but Respondent took reasonable efforts to minimize the effects of some of the violations by repairing the waste water treatment system that was failing and by obtaining an operator certificate.

"O" is whether the violation was repeated or ongoing and receives a value of 2 according to OAR 340-012-0145(4)(a)(B), because Respondent failed to timely file discharge monitoring reports (DMRs) for June, August, September, October and December 2007, and for February 2008.

"M" is the mental state of the Respondent and receives a value of 10 according to OAR 340-012-0145(5)(a)(D), because Respondent acted flagrantly. Respondent has had a NPDES permit for the system at Respondent's facility since 2002. The permit sets forth the conditions and requirements for compliance with the permit, including the requirement to submit DMRs for each month by the 15th day of the following month. Respondent, as permittee, is required to comply with this requirement as set forth in the permit. Respondent systematically and consciously disregarded this permit condition. Further, the department reminded Respondent of the failure to submit the DMRs on time in a letter dated April 25, 2007, after a compliance inspection. Respondent nevertheless continued to routinely submit DMRs late, despite actual knowledge of the condition in the permit to submit DMRs for each month by the 15th day of the following month. Respondent acted flagrantly in committing this violation.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because the violation or the effects of the violation could not be corrected or minimized.

"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, the EB value is 0 because Respondent did not obtain an economic advantage in committing the violation.

Respondent challenged the "P" factor value and the magnitude determined by DEQ. As previously discussed, DEQ correctly determined the "P" factor and the magnitude for Violation (3).

I find that DEQ correctly calculated the penalty for this violation. A civil penalty of $1,875 should be imposed against Respondent for Violation (3).

Violation (4)—Discharging waste water with a concentration of bacteria higher than allowed

DEQ accused Respondent of failing to comply with Schedule A, Condition 1(a)(3) of the permit. That condition requires Respondent not to discharge waste water with a concentration of more than 406 organisms per 100 mL for a single sample. On January 10, 2008, Respondent's system discharged waste water with a concentration of 610 E. coli organisms per 100 mL, which exceeded the limit allowed in the permit. Thus Respondent violated ORS 468B.025(2) by failing to comply with this condition in the permit.

However, DEQ is not seeking a civil penalty for this violation.

In sum, Respondent committed three violations for which civil penalties should be imposed: $3,409 for Violation 1; $3,061 for Violation 2; and $1,875 for Violation 3; for a total civil penalty of $8,345.

ORDER

I propose DEQ issue the following order:

Respondent Magar Edward Magar develop and submit a plan immediately to DEQ for repairs, upgrades or modifications to his treatment system, and that he make the repairs, upgrades or modifications as required by DEQ within 90 days of the plan's approval by DEQ.

Respondent be assessed a civil penalty of $8,345.

Ken L. Betterton
Senior Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: December 31, 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 December 31, 2009, I mailed the foregoing Proposed Order and Final Order in OAH Case No. 901117.

By: First Class and Certified Mail
Certified Mail Receipt #7009 0820 0001 6776 7101

Magar Magar
14102 NE 40th Street
Vancouver WA 98682

By: First Class Mail

Bryan Smith
Dept. of Environmental Quality
811 SW 6th St
Portland OR 97204

Carol Buntjer
Administrative Specialist
Hearing Coordinator

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

IN THE MATTER OF:	)	**NOTICE OF RESCHEDULED**
	)	**IN-PERSON HEARING**
MAGAR E MAGAR	)	
	)	OAH Case No.: 901117
	)	Agency Case No.: WQ/D-NWR-08-019

PLEASE TAKE NOTICE that a contested case hearing has been scheduled in the above matter before the Office of Administrative Hearings.

Hearing Date: **October 13, 2009** **Hearing Time:** **9:30 am**

Location: **DEQ-Portland Office**
Check-in with receptionist
811 SW 6th Ave
Portland OR 97204

Your case has been assigned to **Administrative Law Judge Ken Betterton** 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:

Ken Betterton
Office of Administrative Hearings
PO Box 14020
Salem, OR 97309-4020
Fax: (503) 947-1531

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 July 2, 2009, I mailed the foregoing NOTICE OF IN-PERSON HEARING in OAH Case No. 901117.

By: First Class and Certified Mail
Certified Mail Receipt # 7008 1830 0003 4612 0104

Magar Magar
14102 NE 40th Street
Vancouver WA 98682

By: First Class Mail

Leah Koss
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.*

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

IN THE MATTER OF:	)	**NOTICE OF PREHEARING CONFERENCE**
	)	
MAGAR E MAGAR	)	OAH Case No.: 901117
	)	Agency Case No.: WQ/D-NWR-08-019

PLEASE TAKE NOTICE that a prehearing conference has been scheduled in the above matter before the Office of Administrative Hearings.

Prehearing Date: **June 24, 2009** **Prehearing Time:** **9:00 am**

Location: **By Telephone: Prehearing Phone Numbers and Access Code:**

- Local (Salem) call – 503-378-5680
- Toll Free – 1-866-498-2718
- ACCESS CODE – 7101117

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 Ken Betterton** 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:

Ken Betterton
Office of Administrative Hearings
PO Box 14020
Salem, OR 97309-4020
Fax: (503) 947-1531

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 16, 2009, I mailed the foregoing NOTICE OF PREHEARING CONFERENCE in OAH Case No. 901117.

By: First Class Mail

Magar Magar
14102 NE 40th Street
Vancouver WA 98682

Leah Koss
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.*

Magar E. Magar
Pro Se.
14102 NE 40th St.
Vancouver, WA 98682
Phone # 360 254 7131
Fax # 360 254 0405
Cell # 503 929 1094
E: Mail: calsport@msn.com

Before the Department of Environmental Quality Commission
Of the State of Oregon

In the Matter of Magar E. Magar, Respondent	Case No.: No. WQD-NWR-08-019 Second Amended Response to Notice of Violation and **Request for Contested Hearing** and **Request For Conference.**

1.

The agency has Jurisdiction but does not have jurisdiction over ponding in any part of the system. Perhaps another Agency but not DEQ.

2A. **Failure to Evaluate System.**

Admits that a permit was issued on June 2002, but alleges that the Agency failed to follow the prescribed in the issuance or renewal of the permit, pursuant OAR 340-045-0035(5). In particular the Department failed to submit to respondent a draft of the renewed permit as required by the administrative rules, failed to send respondent a schedule for drafting the permit or a schedule for public notice and for public comment and failed to send the final permit, all this in violation of the aforementioned OAR. If a draft permit was issued it was not received by respondent and further respondent did not have any knowledge of the new condition until the date of the notice because respondent has never seen the renewed permit until he obtained inadequate discovery on June 5, 2008.

Respondent was not aware there was a new condition in the permit not having actually seen it.

2B.

Respondent did not receive warning of the violation as required by the statutes and rules.

2C.

Respondent in the monitoring report of December 2007 actually submitted an evaluation regarding most important aspect of the proper function of the entire system, infiltration of water causing the system to exceed its effluent design limits. Respondent discovered this by video camera that in periods of excessive rain the ground is saturated with water which then infiltrates "comes pouring in" the cast iron sewer pipes.

2D.

The notice should be dismissed and if it is not the computations of the penalty is in error for the following reasons the: The classifications of magnitude is wrong, the priors are wrong, the history is wrong particularly on the first violation is wrong, the mental state is dead wrong (The computation of economic benefits is in error both in theory and in the ultimate magnitude).

3 A. **Failure to Sample or Analyze.**

In the relevant month December 2007 , Respondent made all the necessary arrangement for the sample to be picked up by the Alexin laboratory. Alexi routinely analyses the facility's samples. Whether respondent's employee failed to collect on the first Thursday of the relevant month or the laboratory failed to pick it up Respondent cannot tell. Respondent employee asserts he did have it ready. The lab insists that they did not pick up a sample. Respondent has instituted procedures to see that does not happen again by having the manager report to him the status of the pickup when the pickup is made.

3B.

The computations of the penalty is in error for the following reasons the: The classifications of magnitude is wrong, the priors are

wrong, the history is wrong particularly on the first violation is wrong, the mental state is dead wrong (The computation of economic benefits is in error both in theory and in the ultimate magnitude).

4A- Failure to Submit Timely Reports.

The reports were submitted. That is substantial compliance. The Agency cannot demonstrate any prejudice to the environment from the late submittal of the reports. It is an abuse of agency discretion by the agency employees to insist on strict compliance as to time in a an essentially self reporting system.

The penalty is improperly computed.

4B.

The computations of the penalty is in error for the following reasons the: The classifications of magnitude is wrong, the priors are wrong, the history is wrong particularly on the first violation is wrong, the mental state is dead wrong (The computation of economic benefits is in error both in theory and in the ultimate magnitude).

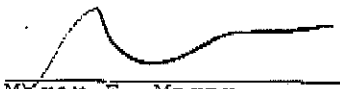
5A. **Excessive E.Coli**

Respondent admits that the laboratory results should that concentration particular of bacteria . Respondent alleges that the chlorine residual concentration in exhibit A. shows it never fell below 0.2 parts per million and that when the sample was taken the chlorine concentration was either 0.4 parts per million or 0.7 parts per million. Respondent denies that his facility caused a discharge of that nature.

5B.

The computations of the penalty is in error for the following reasons the: The classifications of magnitude is wrong, the priors are wrong,

Respectfully submitted.



Magar E. Magar.
Respondent. Pro Se.
Served by fax to Deborah Nesbit fax #503 229 5100 and to Leah Koss by fax to 503 229 6142

FAXED
9/11/2008

For: Nesbit

Fax number: 503 229 5000 229 5100

From: Magar Magar

Fax number:360-254 0405

Date: June 9, 2008

Regarding: Response

Number of pages: cover + 3

Magar E. Magar
Pro Se.
14102 NE 40th St.
Vancouver, WA 98682
Phone # 360 254 7131
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Cell # 503 929 1094
E: Mail: calsport@msn.com

Before the Department of Environmental Quality Commission
Of the State of Oregon

In the Matter of Magar E. Magar, Respondent	Case No.: No. WQD-NWR-08-019 Amended Response to Notice of Violation and **Request for Contested Hearing** and **Request For Conference.**

1.

The agency has Jurisdiction but does not have jurisdiction over ponding in any part of the system. Perhaps another Agency but not DEQ.

2.

Admits that a permit was issued on June 2002 but denies that the Agency followed their prescribed procedure in the renewal process in particular the Department failed to submit to respondent a draft of the renewed permit as required by the administrative rules, failed to send respondent a schedule for drafting the permit or a schedule for public notice and for public comment. By the Agency own estimate the new conditions in the new permit was going to cost respondent from $1,000 to $10,C00.00 such an expense requires proper notice indeed it requires the agency to take special measures to inform respondent. If a draft permit was issued it was not received by respondent and further respondent did not have any knowledge of the new condition until the date of the notice because respondent has never seen the renewed permit until he obtained inadequate discovery on June 5, 2008.

Respondent was not aware there was a new condition in the permit not having actually seen it. Respondent needs to get some discovery to examine the correspondence and respond appropriately.

3.

As to the violation with respect to failure to evaluate respondent denies. Respondent needs more time to evaluate than the time granted by the order. Respondent intends to employ another engineer other than Smits who has failed in his duty to respondent by failing to provide the contacted for operation manuals of the system and failing to investigate all possible sources of the excessive hydraulic load on the system. Obviously Smits is not the person to make evaluations.

4.

The computations on all penalties on all violations are all in error for the following reasons the: The classifications of magnitude is wrong, the priors are wrong, the history is wrong particularly on the first violation is wrong, the mental state is dead wrong (as long as you have Lyle Christensen supplying you information on respondent mental state) you will have it wrong. Respondent has a history with Christensen as will become evident. Perhaps Lyle Christensen recalls the threats he made to respondent on the transfer of the permit from the estate to respondent. The effort at correction on the first violation is wrong it assumes knowledge on the part of respondent that an evaluation was required. The computation of economic benefits is in error both in theory and in the ultimate magnitude.

5.

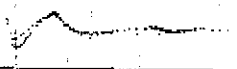
There are mitigating circumstances to all the violation. Respondent is aware that the system needs to be repaired. To this end during this winter a sewer line camera purchased by respondent showed that on the South Side of the upper court during periods of heavy rain the iron sewer line was repeatedly breached by subsurface underground water flowing in the line. Respondent intends to replace all or part of the line within the next month or two. Respondent assumes that the consultant will recommend the gravel filter be reconstructed. The gravel filter is the only part of the system that has not been renovated in 2003 inasmuch as the two metal septic tanks were replaced by a larger non-metal one and the recirculation tank was new addition. The life time of the gravel filter especially the liner is unfortunately finite.

6.

This answer will be amended once discovery is complete. Respondent wishes to examine the whole file not the pitifully inadequate discovery supplied by Leah Koss in

particular all correspondence from the date it was first determined that the sewage treatment plant be repaired.

Respectfully submitted.



Magar E. Magar.
Respondent. Pro Se.
Served by fax to Deborah Nesbit fax #503 229 5100 and to Leah Koss by fax to 503 229 6142

Before the Department of Environmental Quality Commission
of the State of Oregon

In the Matter of Magar E. Magar, Respondent	Case No.: No. WQD-NWR-08-019 Preliminary Response to Notice of Violation and Request for Hearing.

This is a preliminary Response to the Notice and request for further time to respond fully and a Request for Hearing.

Respondent was not aware there was a new condition in the permit not having actually seen it. Respondent needs to get some discovery to examine the correspondence and respond appropriately.

Further respondent has had a sore throat since May 31, 2008 and has been running a temperature which has only recently subsided.

Dated this June 3rd 2008.

Magar E. Magar.
Served by fax to Deborah
Nesbit fax #503 229 5100

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 15, 2008

CERTIFIED MAIL No. 7006 0100 0002 8261 7448

Magar E. Magar
1015 NW 16th Ave.
Portland, OR 97209

Re: Notice of Violation, Department Order and Civil Penalty Assessment
Case No. WQ/D-NWR-08-019
Columbia County

On June 10, 2002, the Department of Environmental Quality (Department) issued you National Pollutant Discharge Elimination System (NPDES) Permit No. 102520 (Permit) which authorizes you to operate a wastewater treatment system at the Riverwood Mobile Home Park which you own and control (the Facility), and to discharge properly treated wastewater into waters of the state according to the schedules in the Permit. On June 4, 2007, the Department issued a renewal permit with the new compliance schedule condition requiring you to have the treatment system at the Facility evaluated, within 180 days of issuance of the renewal Permit, by a qualified consultant experienced in the operation of recirculating gravel filters (RGFs), and to submit the report of this evaluation to the Department. As of this date, you have not had the treatment system at the Facility evaluated or submitted any report to the Department, though the Permit required this to be done by December 4, 2007.

The purpose of the Permit compliance schedule condition is to determine the source of the surfacing wastewater on the RGF. During inspections of the Facility in 2006 and 2007, Department staff observed wastewater ponding on the surface gravel of the RGF. Surfacing and ponding indicate that either the filter is likely clogged or the underdrain system that collects the treated water is blocked. Surfacing and ponding create a public health risk because the water is a place for fly and mosquitos to propagate.

You have also repeatedly filed your discharge monitoring reports (DMRs) late, in violation of your Permit. You have submitted late reports for five of the last nine months. Additionally, the discharge monitoring reports you submitted for December 2007 were incomplete as you did not collect monitoring data for total suspended solids (TSS), biochemical oxygen demand (BOD-5) and bacteria as required by your Permit. The Department assessed you a penalty for the same violation in 2006.

The Department requires that wastewater treatment facilities be operated according to the conditions set forth in the NPDES Permit in order to ensure the protection of the public's health and the environment. Permitted facilities are required to abide by specific waste disposal limitations and methods, minimum monitoring and reporting requirements, and compliance conditions and schedules to assure proper and environmentally sound wastewater management.

Monitoring and reporting is a critical check on the system to ensure it is operating properly and disposing of the sewage waste in a manner that protects the environment.

In the enclosed Notice of Violation, Department Order and Civil Penalty Assessment (Notice and Order), the Department has assessed a civil penalty of $9,450 for failing to comply with the compliance schedule in the Permit, for failing to conduct the required monthly sampling, and for submitting late discharge monitoring reports. Of this amount, $764 represents the economic benefit you obtained by failing to have the treatment system evaluated by a qualified consultant. If you incur the cost to have the system evaluated as described in Schedule C of the Permit, the Department will recalculate the cost as delayed rather than avoided and will reduce the civil penalty assessed in Exhibit No. 1 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 Nos. 1, 2 and 3.

Also included in Section IV is an Order requiring you, within thirty (30) days of receipt of this Notice and Order, to have the treatment system at the Facility evaluated by a qualified consultant experienced in the operation of recirculating gravel filters and to submit the complete report to the Department. If the evaluation determines that repair, upgrade or modification to the system is needed, you must develop and submit plans and specifications within ninety (90) days of Department notification.

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 Sections II and III of 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 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.

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.

Copies of referenced rules are enclosed. Also enclosed is a description of the Department's policy allowing partial mitigation of the civil penalty upon the 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.

If you have any questions about the Notice and Order, please contact Leah Koss with the Department's Office of Compliance and Enforcement in Portland at 503-229-6408, or toll-free at 1-800-452-4011, extension 6408.

Sincerely,

Joni Hammond
Interim Deputy Director

Enclosures

cc: Lyle Christensen, Northwest Region, Portland Office, DEQ
Water Quality Division, HQ, DEQ
Larry Knudsen, Oregon Department of Justice, Portland Office
U. S. Environmental Protection Agency
Columbia County District Attorney

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

OF THE STATE OF OREGON

IN THE MATTER OF: MAGAR EDWARD MAGAR, an individual, Respondent.	)	NOTICE OF VIOLATION, DEPARTMENT ORDER AND CIVIL PENALTY ASSESSMENT NO. WQ/D-NWR-08-019 COLUMBIA COUNTY

I. AUTHORITY

This Notice of Violation, Department Order and Civil Penalty Assessment (Notice and Order) is issued to Respondent, Magar Edward Magar, by the Department of Environmental Quality (Department) on behalf of the Environmental Quality Commission pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through 468.140, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011 and 012.

II. PERMIT

On June 10, 2002, the Department issued National Pollutant Discharge Elimination System Waste Discharge (NPDES) Permit No. 102520 (the Permit) to Magar E. Magar (Respondent) for the wastewater treatment system located just outside the City of Rainier, in Columbia County, Oregon, known as the Riverwood Mobile Home Park (the Facility), which Respondent controls and operates. The Permit authorizes Respondent to operate and maintain a wastewater treatment and disposal system and to discharge to Columbia River, public waters, adequately treated wastewater only in conformance with all the requirements, limitations, and conditions set forth in the Permit schedules. The Permit was in effect at all pertinent times.

III. VIOLATIONS

1. From approximately December 5, 2007 to at least the date of this Notice, Respondent has violated ORS 468B.025(2) by failing to comply with a compliance schedule contained in Schedule C, Condition 1, of the Permit. Specifically, the Permit requires Respondent to have the existing treatment system at the Facility evaluated by a qualified consultant within 180 days of permit renewal. The Permit was renewed on June 4, 2007, and as of the date of this Notice

and Order, Respondent has not had the system evaluated. According to OAR 340-012-0053(1)(a), this is a Class I violation.

2. For the month of December 2007, Respondent violated ORS 468B.025(2) by failing to comply with Schedule B, Condition 1, of the Permit. Specifically, Respondent failed to collect monitoring data for total suspended solids (TSS), biochemical oxygen demand (BOD-5) and bacteria, during the month of December 2007. According to OAR 340-012-0055(1)(o), this is a Class I violation.

3. For reporting months June, August, September, October and December 2007 and February 2008, Respondent violated ORS 468B.025(2) by failing to comply with Schedule B, Condition 2(a) of the Permit. Specifically, Respondent failed to timely submit the monthly discharge monitoring reports (DMRs) for June, August, September, October and December 2007 and February 2008, due by the 15th of the following month. According to OAR 340-012-0055(2)(b), these are Class II violations.

4. In January 2008, Respondent violated ORS 468B.025(2) by failing to comply with Schedule A, Condition 1(a)(3) of Respondent's Permit. Specifically, on January 10, 2008, Respondent discharged wastewater with a concentration of 610 E. coli organisms per 100 mL to waters of the state. According to OAR 340-012-0055(3)(b), this is a Class III 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.

2. Within thirty (30) days of receipt of this Notice and Order, have the treatment system at the Facility evaluated by a qualified consultant experienced in the operation of recirculating gravel filters in conformance with the parameters in Schedule C, Condition 1, of the Permit and submit the complete report to the Department within one week of the evaluation;

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3. If the evaluation recommends repair, upgrade or modification to the system, develop and submit plans and specifications within ninety (90) days of Department notification of the report in conformance with Schedule C, Condition 2 of the Permit; and

4. Complete all repairs, upgrades or modifications needed within ninety (90) days of the Department's approval of the plans;

All submittals required by this Order must be mailed to: **Lyle Christensen, Department of Environmental Quality, 2020 SW 4th Avenue, #400, Portland, Oregon 97201-4987.**

V. CIVIL PENALTY ASSESSMENT

The Department imposes civil penalties for the violations cited in Section III, paragraphs 1, 2 and 3 as follows:

Violation	Penalty Amount
1	$4,514
2	$3,061
3	$1,875

Respondent's total civil penalty is $9,450. The findings and determination of Respondent's civil penalty, pursuant to OAR 340-012-0045, are attached and incorporated as Exhibit Nos. 1, 2 and 3.

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 timely written request for a contested case hearing. The Department must receive a written request for a contested case hearing **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 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 an entry of a Default Order.

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 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.

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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 $9,450 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.**

5-15-08
Date

Joni Hammond
Interim Deputy Director

EXHIBIT NO. 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 1: Failing to comply with a compliance schedule in Schedule C, Condition 1, of the Permit, in violation of ORS 468B.025(2).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0053(1)(a).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the Department does not indicate a minor or major magnitude.

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 $1,250 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(E)(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 9 according to OAR 340-012-0145(2)(a)(C) and (D), because Respondent has seven (7) Class I and two (2) Class II prior significant actions in the same media in case no. WQ/I-NWR-05-181 issued February 7, 2006 and case no. WQ/D-NWR-01-129 issued November 7, 2001.

"H" is Respondent's history of correcting prior significant action(s) and receives a value of -1 according to OAR 340-012-0145(3)(a)(B), because some of the violations were uncorrectable, but Respondent took reasonable efforts to minimize the effects of some of the violations by repairing the wastewater treatment system that was failing and by obtaining an operator certificate.

"O" is whether the violation was repeated or ongoing and receives a value of 4 according to OAR 340-012-0145(4)(a)(D), because the violation has existed for more than 28 days. Respondent still has not met the compliance schedule deadline of December 5, 2007.

"M" is the mental state of the Respondent and receives a value of 6 according to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. Respondent has had an NPDES Permit for the system at Respondent's Facility since 2002 which states the conditions and requirements for compliance with the Permit. The compliance schedule, which was added to the renewal Permit in June 2007, was applied for and reviewed by Respondent before issuance. Respondent, as permittee, had actual knowledge of and is required to comply with the compliance schedule as set forth in the Permit and Respondent consciously disregarded this permit condition.

"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 violation as described in paragraphs (6)(a)(A)

through (6)(a)(C) and the facts do not support a finding under paragraph (6)(a)(D). Respondent has not complied with the compliance schedule in the Permit as of the date of this Notice.

"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 $764. This is the amount Respondent gained by avoiding spending $1,250 to have the treatment system evaluated by a qualified consultant. 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
= $1,250 + [(0.1 x $1,250) x (9 + -1 + 4 + 6 + 2)] + $764
= $1,250 + [($125) x (20)] + $764
= $1,250 + $2,500 + $764
= $4,514

EXHIBIT NO. 2

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 2: Failing to collect monitoring data as required by Schedule B, Condition 1, of the Permit, in violation of ORS 468B.025(2).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(o).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the Department does not indicate a minor or major magnitude.

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 $1,250 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(E)(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 9 according to OAR 340-012-0145(2)(a)(C) and (D), because Respondent has seven (7) Class I and two (2) Class II prior significant actions in the same media in case no. WQ/I-NWR-05-181 issued February 7, 2006 and case no. WQ/D-NWR-01-129 issued November 7, 2001.

"H" is Respondent's history of correcting prior significant action(s) and receives a value of -1 according to OAR 340-012-0145(3)(a)(B), because some of the violations were uncorrectable, but Respondent took reasonable efforts to minimize the effects of some of the violations by repairing the wastewater treatment system that was failing and by obtaining an operator certificate.

"O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(a)(A), because the violation occurred one time.

"M" is the mental state of the Respondent and receives a value of 6 according to OAR 340-012-0145(5)(a)(C), because Respondent's conduct was reckless. Respondent has had an NPDES Permit for the system at Respondent's Facility since 2002. The Permit expressly requires Respondent to monitor its wastewater for TSS, BOD-5 and bacteria. Respondent, as permittee, is required to comply with the sampling requirement as set forth in the Permit and Respondent consciously disregarding this permit condition. Further, Respondent has been cited for this violation previously in Notice of Violation, Department Order and Civil Penalty Assessment No. WQ/I-NWR-05-181. Respondent acted recklessly in failing to assure that the sampling was done and therefore acted recklessly in committing this violation.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because the violation or the effects of the violation could not be corrected or minimized.

"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 $61. This is the amount Respondent gained by avoiding spending $100 to conduct sampling as required by the Permit for December 2007. 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
= $1,250 + [(0.1 x $1,250) x (9 + -1 + 0 + 6 + 0)] + $61
= $1,250 + [($125) x (14)] + $61
= $1,250 + $1,750 + $61
= $3,061

EXHIBIT NO. 3

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 3: Failing to comply with Schedule B, Condition 2(a), of the Permit, in violation of ORS 468B.025(2).

CLASSIFICATION: These are Class II violations pursuant to OAR 340-012-0055(2)(b).

MAGNITUDE: The magnitude of the violations is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 for this violation, and the information reasonably available to the Department does not indicate a minor or major magnitude.

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 $625 for a Class II, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(B)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(E)(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 9 according to OAR 340-012-0145(2)(a)(C) and (D), because Respondent has seven (7) Class I and two (2) Class II prior significant actions in the same media in case no. WQ/I-NWR-05-181 issued February 7, 2006 and case no. WQ/D-NWR-01-129 issued November 7, 2001.

"H" is Respondent's history of correcting prior significant action(s) and receives a value of -1 according to OAR 340-012-0145(3)(a)(B), because some of the violations were uncorrectable, but Respondent took reasonable efforts to minimize the effects of some of the violations by repairing the wastewater treatment system that was failing and by obtaining an operator certificate.

"O" is whether the violation was repeated or ongoing and receives a value of 2 according to OAR 340-012-0145(4)(a)(B), because Respondent failed to timely file discharge monitoring reports the (DMRs) for June, August, September, October and December 2007 and February 2008.

"M" is the mental state of the Respondent and receives a value of 10 according to OAR 340-012-0145(5)(a)(D), because Respondent acted flagrantly. Respondent has had an NPDES Permit for the system at Respondent's Facility since 2002 which states the conditions and requirements for compliance with the Permit, including the requirement to submit DMRs by the 15th of the following month, every month. Respondent, as permittee, is required to comply with this requirement as set forth in the Permit and Respondent systematically and consciously disregarded this permit condition. Further, the Department reminded Respondent of the failure to submit the DMRs on time in a letter dated April 25, 2007 after a compliance inspection. Still, Respondent continued to routinely submit the DMRs late despite actual knowledge of the Permit condition to submit DMRs by the 15th of each month, and therefore, Respondent acted flagrantly in committing this violation.

"C" is Respondent's efforts to correct the violation and receives a value of 0 according to OAR 340-012-0145(6)(a)(D), because the violation or the effects of the violation could not be corrected or minimized.

"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 $0 because Respondent did not obtain an economic advantage in committing the violation. "EB" is 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
= $625 + [(0.1 x $625) x (9 + -1 + 2 + 10 + 0)] + $0
= $625 + [($62.50) x (20)] + $0
= $625 + $1,250 + $0
= $1,875