

MEMORANDUM

TO: Jim Orr, Project Manager, Oregon Department of Environmental Quality (DEQ)  
Jim Anderson, Section Supervisor, NW Region Division, DEQ

FROM: Claudia Powers

DATE: August 10, 2010

RE: First Phase of Paving IRAM at Northwest Pipe Company Constitutes Remedial  
Action Entitled to Permit Waiver

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**I. Background**

Northwest Pipe Company (“Northwest Pipe”) and the Oregon Department of Environmental Quality (“DEQ”) entered into a Voluntary Agreement for Remedial Investigation and Source Control Measures, DEQ No. LQDVC-NWR-04-01 effective December 30, 2004 (the “Administrative Order”). Pursuant to the Administrative Order, Northwest Pipe is planning to complete an interim remedial action (the “IRAM”) at its Portland facility (the “Site”). This IRAM was developed to address soil at the Site that exceeds either occupational worker risk-based concentrations or Joint Source Control Strategy (“JSCS”) guidance document screening levels, with the goals of rendering the soil exposure pathway incomplete as well as achieving and demonstrating source control for stormwater.

The IRAM is being implemented in phases. The first phase was implemented in 2009 in certain areas in the southern portion of the facility, as described in the DEQ approved work plan entitled *Focused Paving Plan, Northwest Pipe Company ECSI #138, Portland, Oregon*, prepared by CH2M HILL on behalf of Northwest Pipe in October 2009 (the “Paving Plan”). The second phase is the recommended alternative in the *Surface Soil Risk Screening and Focused Feasibility Study for Interim Action, Northwest Pipe Company, Portland, Oregon*, which was submitted to DEQ on May 27, 2010 (the “Risk Screening and Focused Feasibility Study”).

In a July 14, 2010 meeting, DEQ’s Jim Anderson indicated that ORS 465.315(3)—which exempts remedial actions conducted on-site from the requirement to obtain any state or local permit, license, or other authorization—would apply to both IRAM phases if Northwest Pipe demonstrates that the IRAM meets the substantive requirements of local permits. On July 16, 2010, and based on DEQ’s request at the July 14<sup>th</sup> meeting, Northwest Pipe delivered to DEQ a written request that DEQ exempt the on-site portion of any removal or remedial actions conducted under the Administrative Order—i.e., the IRAM—from any state or local permit, license, or other authorization.

In a July 22, 2010 Jim Orr responded as follows:

DEQ will consider NW Pipe’s request for a Permit Exemption if the following conditions are satisfied:

1. Submittal of a description of the substantive requirements for the work to be performed,
2. Submittal of how the substantive requirements will be satisfied,
3. DEQ approval of the work based on #1 and #2.

This part of Mr. Orr's response is consistent with the meeting and finds support in applicable law. Northwest Pipe, via a July 30, 2010 memorandum from CH2M HILL, has already made the showings contemplated by steps (1) and (2) and demonstrated its entitlement to the permit waiver provisions of ORS 465.315(3).

In the same July 22<sup>nd</sup> email, Mr. Orr continued to discuss the permit waiver with the following assertion: "DEQ will not approve a permit waver [sic] for the first phase of paving since it was not a removal or remedial action." That assertion contradicts DEQ's historical treatment and approval of the IRAM as well as applicable Oregon law.

## **II. Northwest Pipe's Phase 1 Paving Constitutes a Removal or Remedial Action**

### **A. Northwest Pipe and DEQ Have Always Treated the IRAM as a Two-Phase Project**

In the Paving Plan, Northwest Pipe made it clear that the IRAM would be conducted in phases. In particular, the Paving Plan stated as follows:

The availability of capital needed to complete paving at the site and the availability of weather consistent with paving activities will cause the work to be completed [in] two (or more) phases . . . . Additional areas will be paved in a subsequent phase or phases as capital improvement budgets allow. Northwest Pipe will provide subsequent paving plans to address future phases of paving.

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The first phase of the paving activity is scheduled to commence on October 19, 2009. Due to current seasonal conditions and pending weather that tends to be cold and wet – conditions that are not conducive to paving activities – the next phase of this work is planned for the early [part of] 2010 or later.

In an October 15, 2009 email from Mr. Orr, DEQ approved the proposed process. In particular, Mr. Orr wrote as follows:

I have reviewed the Focused Paving Plan and approve the Phase 1 Plan.

Additional planning is required before paving the remaining areas of the site where there is soil with higher levels of constituents that exceed worker screening levels. Worker health and safety, potential soil removal, and confirmation sampling should be decided before the next phase of paving.

Following the of the [sic] remaining soil samples analysis the results of all shallow soil sampling should be evaluated by a Focused Feasibility Study. The study should provide a conceptual site model, assess risk, and present the remedial measure details.

Thank you for your continued progress to completing the site cleanup.

The procedure that DEQ approved is taking place. Northwest Pipe completed Phase I and is now—after submitting the study that DEQ contemplated (i.e., the CH2M Hill study dated May 27, 2010) and approved—preparing to undertake Phase II. There is no basis to now distinguish Phase I from Phase II when determining the IRAM’s eligibility for the permit waiver provisions of ORS 465.315(3).

**B. The Phase I Paving Falls Within the Statutory Definition of Remedial Action**

The permit waiver provision provides, in pertinent part, as follows:

Without affecting substantive requirements, no state or local permit, license or other authorization shall be required for, and no procedural requirements shall apply to, the portion of any removal or remedial action conducted on-site where such removal or remedial action has been selected or approved by the director under this section

ORS 465.315(3).

The IRAM is being conducted on-site, has been approved by DEQ, and (as detailed in the July 30, 2010 memorandum from CH2M Hill) meets the substantive requirements of state or local authorizations. Therefore, the only remaining consideration in determining whether a permit waiver applies is whether the IRAM constitutes a “removal or remedial action.” As discussed below, it unquestionably constitutes a removal or a remedial action.

Oregon law defines “removal” and “remedial action”, in the most pertinent parts, as follows:

“Removal” means the cleanup or removal of a released hazardous substance from the environment, such actions as may be necessary taken in the event of the threat of release of a hazardous substance into the environment, . . . the disposal of removed material, or the taking of such other actions as may be necessary to prevent,

minimize or mitigate damage to the public health, safety, welfare or to the environment . . . .

“Remedial action” means those actions consistent with a permanent remedial action taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of a hazardous substance so that it does not migrate to cause substantial danger to present or future public health, safety, welfare or the environment. "Remedial action" includes, but is not limited to:

- (a) Such actions at the location of the release as storage, confinement, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, . . . dredging or excavations, . . . on-site treatment or incineration, . . . and any monitoring reasonably required to assure that the actions protect the public health, safety, welfare and the environment. . . .

ORS 465.200(25) & (23).

Pursuant to the Administrative Order, DEQ is requiring Northwest Pipe to conduct the IRAM to control potential sources of contamination so that, to the extent possible, concentrations of soil that either exceed occupational worker risk based concentrations or JSCS guidance document screening levels do not leave the site via the stormwater pathway and potential occupational exposure is eliminated. In other words, the IRAM, which includes the Phase I paving, is an action to prevent the release of a hazardous substance so that it does not migrate to cause danger to present or future public health, safety, or the environment. This falls squarely within both of the above definitions. Therefore, the Phase I paving is entitled to the permit waiver protections of ORS 465.315(3).

### **III. Conclusion**

Northwest Pipe’s prior paving was the first phase of the IRAM approved by DEQ. Both phases of the IRAM meet the statutory definition of removal or remedial action and, therefore, are entitled to the permit waiver protections of ORS 465.315(3).