NW Metals Inc (the “Company”) stands by its assertions made in its October appeal, though Courtney Vance makes some good points in opposition on behalf of DEQ. In this reply I focus on a few of the contested issues, specifically concerning those penalty assessments that are most clearly unfair to the Company, as to which DEQ’s contrary arguments are least adequate. These are as follows:

Violation 4. Unpermitted storage of excess waste tires. The $7,600 penalty assessed for unpermitted storage of excess waste tires (alleged violation #4) should be reduced to $0. This penalty was assessed because DEQ argued, and the ALJ found, that there were more than 1500 “waste” tires stored on-site (the Company, as a licensed wrecking business, was allowed to have on hand up to 1500 waste tires.) However, both DEQ and the ALJ were mistaken insofar as they failed to distinguish waste tires from still serviceable used tires – but rather unlawfully maintained that all of the on-site used tires were “waste” tires.

Imagine big piles of used tires kept on the Company’s property, the size of the piles waxing and waning over time as the Company continuously brought in hundreds of scrap cars for processing and also periodically sorted tires removed from scrap cars and either sold them by the 4 or 5 hundreds to others if they were good-enough used tires – generating about 25% of the Company’s revenues – or, if the tires could not be re-used, shipped them at a nominal cost in substantially smaller numbers to licensed recyclers for disposal.

What happened is that DEQ counted all of these used tires, in the piles, as “waste” tires, when in fact most of them were still serviceable – making no effort to exclude those tires from its count to 1500. The ALJ found likewise, also simply assuming that all tires not kept in neat marked sets of 4-5 matching-size tires could not be resold for re-use (I speculate that the ALJ did not know that all tires have their dimensions and characteristics embossed in the rubber itself, so that even the most messily-stored tires can be readily sorted into matching sets). However, in doing so, DEQ and the ALJ ignored the DEQ regulation defining a “waste
tire” (OAR 340-064-110(33) as simply a tire no longer “suitable for its original intended purpose”, i.e., no longer usable as a vehicle tire. Under that definition, obviously, a still serviceable used tire is not a “waste” tire. Also, under that definition, tires are not rendered “waste” when they are stored in messy piles or in unmatched sets.

The penalty assessment also relied on a second justification, which is equally faulty. This has to do with the separate definition of a “waste tire generated in Oregon” set forth in OAR 340-064-0010(34). I wrote about this on pp. 5-6 of the appeal brief, and ask the EQC to re-read that paragraph, rather than unpack again the long argument. I assert that the meaning given that regulation by DEQ – and adopted by the ALJ – is clearly wrong for five reasons:

1. Applying the subpart (34) regulation ignores its context insofar as the regulation is intended only to determine which kinds of waste tires qualify their recyclers for reimbursement by the State of Oregon of certain recycling costs – and not to define further what is or is not a “waste” tire.

2. If the subpart (34) regulation applied, it would prevent altogether the reselling of tires recovered by wrecking yards from scrap cars by new-tire sellers from customers, making unlawful the transactions engaged in every day by thousands of business concerns, including the Company. That no one ever prosecutes these business concerns for this purported violation shows that the subpart (34) regulation does not mean what DEQ says it does.

3. Note that, if what DEQ says were true, the subpart (34) regulation would allow resales of tires removed from cars by wrecking business outside Oregon – but not if the tires were removed in Oregon. The subpart (34) regulation would also not reach tires accepted by an Oregon tire reseller in exchange for replacement tires sold that were not new. This makes no sense at all. This kind of illogical mismatch is a strong sign that DEQ’s construction is not tenable.

4. The subpart (34) regulation greatly expands the numbers of waste tires far beyond the scope of the clearly applicable and primary “waste tire” definition in subpart (33), without ever even making reference to that subpart (33) definition. If the two regulation subparts were meant to be connected (i.e., that both had to be consulted to determine what is or is not a “waste” tire), then why are there two separate regulations that do not mention each other? Who would promulgate regulations employing such a confused mechanism?

5. DEQ’s reading of the subpart (34) regulation, making into “waste” tires used but still serviceable tires recovered by a wrecking yard, contradicts the subpart (33) definition, which simply and clearly excludes “suitable” used tires.
The notion that all of the Company’s used tires on hand, stored pending resale, counted as “waste” tires because the Company was an auto wrecking yard must be wrong and is clearly contrary to law. It’s true, as DEQ states in its answering brief, that DEQ has some discretion to construe its own regulation, but indubitably this is an erroneous interpretation of subpart (34), outside the range of discretion, and altogether inconsistent with subpart (33).

**Violation 6. Unpermitted use of replacement shredding machine.**

The $10,165 penalty assessed against the Company for not having obtained an air emission permit (alleged violation #6) should be reduced to $0. The Company’s argument that it did not violate the permitting requirement because it was not required to get a permit is set forth on pp. 7-9 of its appeal brief. The Company makes the following arguments:

1. The shredding machine broke down so often and was used so relatively little (an average 9.56 hours/week only) that its use did not produce air emissions anywhere even remotely near the 10 tons/year permitting threshold (below 10 tons/year no permit is required),

2. The pertinent regulation (OAR 340-216-8010, Table 1, B85) sets the permitting threshold keyed to round-the-clock machine operational capacity (i.e., for 24/7 = 168 hours/week X 52 = 8736 hours/year), but only “if the [polluting] source were to operate uncontrolled”. Thus, as the Company argues, under this clause if use were limited to a lesser number of hours (or if emissions were otherwise “controlled”), then the 8736 hour/year measuring convention would not apply. Rather, one would look to the calculated per-hour emissions for the pollution source, multiplied by the Company’s total allowed hours of usage over a year, and if the product were less than 10 tons/year for all criteria pollutants, then no permit would be required. DEQ argues that the same regulation has a different meaning: that “if the source were to operate uncontrolled” really means that one must ignore any limitation. In my opinion DEQ is twisting the meaning of the clause, which, if it really meant that no limitation mattered would simply say that much moiré clearly, but let’s assume this particular wording is ambiguous. The problem for DEQ is that DEQ fails, in its answering brief, to address the other regulation cited in the Company’s brief that also applies.

3. This other regulation shows that the Company’s argument is correct. OAR 340-200-0020(124)(b) defines “Potential to Emit” as follows:

   “Potential to emit: or “PTE” means the lesser of:
   (a) The regulated pollution emissions capacity of a stationary source”; or
   (b) The maximum allowable regulated pollution emissions taking into consideration any physical or operational limitation, including use of control devices and restrictions on hours of operation . . ., if the limitation is enforceable by the Administrator.”
This second definitional regulation shows how the arguable ambiguous clause, “if the source were to operate uncontrolled” in the first regulation should be read: to provide an exception to the assumed 24/7/52 hour usage presumption in measuring total emissions against the permitting threshold. It supports explicitly the Company’s construction of the clause and clearly shows that DEQ cannot just ignore the idea of limiting hours of usage in calculating emissions – not consistently with the second definitional regulation.

Here, at the per-hour-usage emission rate calculated by DEQ for the machine source (47.76 tons/year div. by 8736 hours/year), the Company’s actual 9.56 hour/week usage generated only some 1.569 tons over 30 months (annualized at 2.72 tons/year) for VOC’s, as compared to the 10 tons/year permitting threshold – the amounts are even less for the other pollutants emitted (CO and NOx). Usage could be increased by a factor of up to 3.67 (an average 35 hours/week) and the total VOC emissions for the year would still not reach 10 tons/year.

The Company offered several times to limit hours of machine use; DEQ refused to entertain the idea, insisting erroneously that only maximum emission capacity (at 8736 hour/year usage) mattered or that a limitation could be enforced only if a permit were issued (after, of course, the Company first paid for the permit). However, it seems to me that an agreement between DEQ and the Company limiting hours of use would be fully and readily “enforceable by the Administrator”, like any other binding contract, particularly because the shredding machine is equipped with a built-in counter that keeps a running tally and displays total historical hours of use that could be easily reported/checked anytime. There could be no doubt whether or not the Company violated an agreed-upon usage limitation. DEQ’s argument that DEQ could not force upon the Company a usage limitation except through the permitting process fails because, again, the Company was always willing to enter into any such agreement.

Even if the Company were wrong about not needing a permit, and if DEQ and the ALJ were right to impose the penalty assessment, the amount of the penalty should be reduced by $2400 from $10,165 to $9365 because the “magnitude” of its alleged violation was “minor” and not “moderate” insofar as, again, the actual emission amounts were only a small fraction of the 10 tons/year permitting threshold. An additional penalty reduction of up to another $2400 is also fair because the Company had good reason to believe in good faith that a permit was not required – hence an “M” 8 point aggravation score based on a “gross deviation” from normal behavior was not warranted in these circumstances.

**Violation 2. Placing wastes where likely to enter groundwater.**

The $6,600 penalty assessed against the Company for placing wastes where likely to enter groundwater (alleged violation #2) should be reduced to $0. Please see the Company’s appeal brief on pp. 3-4. This
penalty was imposed in addition to the $14,400 penalty imposed for using/storing hazardous substances in the vicinity of its drywells – though the Company asserted in its appeal brief (pp. 1-3) various reasons why that assessment was not warranted, including the facts that the Company obtained guidance from the City of Portland Environmental Services before it began operations and BES did not say anything about the drywells and that the Company, as a mere tenant, had no authority to shut down the drywells. ¹ Obviously, the two alleged violations are related, insofar as both are intended to protect groundwater and the relevant evidence of the Company’s business practices, stormwater surface runoff flow, and the condition of the soil under and near the drywells, as tested currently and in the past, is the same for both alleged violations. In my opinion, imposing two separate penalties here constitutes double punishment for essentially the same purportedly harmful conduct. However, putting aside that argument, I focus now only on the alleged “placing wastes where likely to enter groundwater” violation.

The Company repeats its argument that DEQ did not prove that groundwater contamination was “likely”, only that eventually there might be some impact on groundwater. This failure of proof is clearly demonstrated by DEQ’s Exhibit A24 and the Company’s Exhibit 4A, where the documents prepared by DEQ state only that impact on groundwater is “possible”. Nothing mentioned in DEQ’s answering brief on this point on page 8 or 18 shows otherwise: the testimony of P. Richerson and D. Sandoz, DEQ employees, as described in DEQ’s brief, speaks only to possible groundwater contamination that could happen through downward soil migration or UIC injection – and emphatically not to actual or even “likely” contamination. The Company does not, as argued by DEQ, “ignore” the testimony of these gentlemen. Rather, DEQ argues they said more than they ever in fact did.

Almost anything is possible: but given evidence in the record of attenuation as distance from possible sources of contamination increased, there was wholly lacking any evidence that pollution of state waters had occurred or was “likely” to occur, as required by ORS 468B.025(1). Absent proof that migration to groundwater has occurred or is “likely”, that statute does not allow a penalty to be assessed against the Company.

**Aggravating/mitigating factors in general.**

The last subject I will address is to address the portions of the penalty assessments that were not “base penalties” for the alleged violations, but were rather tacked on to the base penalties to punish the Company

¹ In fact, the landlord and DEQ separately agreed in recent months after the hearing with ALJ Fair was held that one of the two drywells would be shut down and that a filtration system would be installed in the pipes leading to the other drywell, thereby preventing further contamination of the soil under and around the drywells (UIC’s).
further because aggravating factors also were found. The numbers are as follows: $23,750 were assessed as base penalties, while $29,900 were assessed as additional aggravating factor penalties.  These assessments were as follows:

<table>
<thead>
<tr>
<th>Violation no.</th>
<th>Base penalty</th>
<th>Aggravating factor penalty</th>
<th>Economic benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (UIC’s)</td>
<td>6000</td>
<td>8400</td>
<td></td>
</tr>
<tr>
<td>2 (Groundwater impact)</td>
<td>3000</td>
<td>3600</td>
<td></td>
</tr>
<tr>
<td>3 (Antifreeze mishandling)</td>
<td>750</td>
<td>300</td>
<td></td>
</tr>
<tr>
<td>4 (Excess waste tires)</td>
<td>4000</td>
<td>3600</td>
<td></td>
</tr>
<tr>
<td>5 (Tire storage)</td>
<td>2000</td>
<td>2800</td>
<td></td>
</tr>
<tr>
<td>6 (Air pollution permit)</td>
<td>2000</td>
<td>2800</td>
<td>5365</td>
</tr>
<tr>
<td>7 (RAO non-compliance)</td>
<td>6000</td>
<td>8400</td>
<td></td>
</tr>
<tr>
<td></td>
<td>23750</td>
<td>29900</td>
<td>5365</td>
</tr>
</tbody>
</table>

Now, the Company does not challenge all of that $29,900. Of that $29,900, a portion was assessed because it was found that the Company’s officers’ “mental state” (“M” factor) was graded at “8” due to “reckless” conduct or intentional disregard of a known requirement. That portion was assessed as follows:

<table>
<thead>
<tr>
<th>Violation no.</th>
<th>Aggravating factor penalty</th>
<th>Due to “M” (8”) factor</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (UIC’s)</td>
<td>8400</td>
<td>4800</td>
</tr>
<tr>
<td>2 (Groundwater impact)</td>
<td>3600</td>
<td>2400</td>
</tr>
<tr>
<td>3 (Antifreeze mishandling)</td>
<td>300</td>
<td>0</td>
</tr>
<tr>
<td>4 (Excess waste tires)</td>
<td>3600</td>
<td>3200</td>
</tr>
<tr>
<td>5 (Tire storage)</td>
<td>2800</td>
<td>1600</td>
</tr>
<tr>
<td>6 (Air pollution permit)</td>
<td>2800</td>
<td>1600</td>
</tr>
<tr>
<td>7 (RAO non-compliance)</td>
<td>8400</td>
<td>4800</td>
</tr>
<tr>
<td></td>
<td>29900</td>
<td>18400</td>
</tr>
</tbody>
</table>

The Company argues that all or much of this $18,400 assessed in respect of bad “mental state” (“M”) factor were not warranted in the circumstances and were, thus, imposed contrary to law. The precise reasons why this is so differ somewhat for each alleged violation, and, rather than restate all of the arguments made in the Company’s appeal brief I will, rather, respectfully request that the EQC members consult the brief details. I

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2 Another $5,365 (making the total $59,015) was assessed for the economic benefit to the Company for not having to pay for an air pollution permit. Except as argued above that no such permit was required, which argument if accepted by EQC would mean that the Company would not have to pay the $5,365, I do not challenge the economic benefit assessment.
also recommend that the ALJ’s opinion contains a clear explanation on pages 42-45 of 54 of how aggravating/mitigating factors are supposed to be assessed. I wanted, however, to make a few points:

1. The mental state factor assessments (along with other aggravating factor assessments) are imposed in addition to the base penalties for the violations.

2. Except for alleged violation no. 3, DEQ and the ALJ graded the Company’s mental state at the “8” level, finding that there was “reckless” conduct or intentional disregard of a known requirement. This conclusion was not appropriate on all the evidence. In all cases, the Company either did not know it had to do something (such as with the UIC’s) or believed in good faith and for legitimate reasons that it was not legally required to do something (such as with obtaining the air pollution or waste tire storage permits). In these instances an “M” grading of “2” in respect of “constructive knowledge (reasonably should have known) of the requirement” is the most that is accurately ascribed to the Company’s conduct. Even a “4” grading in respect of “conduct [that] was negligent” is a stretch. Certainly, an “8” “M” grading, for reckless/grossly deviational conduct or intentional/knowing misconduct is far from the mark on all the evidence.

3. Where the Company made known to DEQ its disagreement as to legal requirements (such as regarding the air pollution or tire storage permits), the fact that DEQ told the Company it was required to take actions does not, of course, render the Company’s mental state any more egregious.

4. The March 2018 fire was a financial disaster for the Company. It could not prevent the Fire Department from scouring the landscape with high-pressure water hoses or dousing portions of the site with potentially hazardous fire-retardant chemicals. The primary task of clearing fire debris could not possibly be done all at once, not given the facts that the only way to remove the burnt cars was to shred them with a replacement shredding machine that kept breaking down as it labored cutting through metals made much more dense by the burning. No debris clearing could have been paid for by the Company unless it also at the same time was able to generate revenue from maintaining some semblance of its pre-fire operations, which revenues were needed to pay for the shredding machine, to pay rent for the site, to keep its long-time personnel employed, and to hire engineers and other people to do other work required by DEQ. In that respect DEQ’s continuing complaints about the Company bringing on-site more scrap cars after the fire miss entirely the essential point. Furthermore, the Company and its landlord were working at all times in close coordination with DEQ, with which there was no actual expectation/agreement that all work would or could be accomplished within the purported five- or ten-day deadlines set forth in the RAO. Finally, the Company’s dire financial situation made impossible taking all remedial actions at the same time. There is no
real basis to infer from the resulting circumstances that such delays as ensued were due to the Company’s indifference to environmental concerns.

Finally, the Company asserts that it is due, against the penalty assessments, some credit for actions it has taken to mitigate or remediate the damage resulting from the fire. It has spent tens of thousands of dollars to pay for environmental engineers, soil-testing workers, and wages of employees performing clean-up tasks. The regulations governing aggravating/mitigating factors allow for mitigating credits (please refer to page 44 of 54 of the ALJ’s decision.) Except with respect to alleged violation #3, no mitigation credits were awarded. This is grossly unfair to the Company and contrary to law. If EQC agrees, the way it would work is for EQC to (1) multiply the graded rating (-5 to +2) and (2) the base penalty figure and (3) then divide by 10.

DATED: January 30, 2020

Respectfully submitted,

s/ Adam Kimmell
Adam Kimmell (OSB 91517)
Attorney for Respondent
NW Metals Inc.
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **NWM PETITION FOR REVIEW** on:

DEQ
Office of Compliance and Enforcement - Appeals
700 NE Multnomah St., Suite 600
Portland, OR 97232

by causing a full, true, and correct copy thereof, addressed to the last-known office address of the attorney (except when served by fax), to be sent by the following indicated method or methods, on the date set forth below:

[ xx ] by mailing in a sealed, first-class postage-prepaid envelope and deposited with the United States Postal Service in Portland, Oregon.

[ xx ] by sending an electronic copy to the recipient by email at DEQappeals@deq.state.or.us.

DATED: January 30, 2020

________________________________________
Adam Kimmell
BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: NW METALS INC.,
Respondent. )  DEQ’S ANSWERING BRIEF TO
)  RESPONDENT’S EXCEPTIONS
)  AND BRIEF
)  OAH CASE NO. 2018-ABC-02082
)  DEQ CASE NO. WQ/SW-NWR-2018-063

AUTHORITY

Pursuant to OAR 340-011-0575(4)(b), the Department of Environmental Quality (the Department or DEQ) files this Answer to NW Metals Inc.’s (Respondent or Company) “Brief and Exceptions on Review” (Brief and Exceptions) to the Environmental Quality Commission (the Commission or EQC) of the Proposed and Final Order (the Order) entered in the above-captioned matter by the Office of Administrative Hearings and mailed on August 29, 2019.

INTRODUCTION

Respondent’s Brief and Exceptions fails to establish that the Order’s findings of fact are not based on a preponderance of the evidence and supported by substantial evidence or that the Order erroneously interpreted a provision of law. In many instances, Respondent mischaracterizes testimony, ascribes testimony to witnesses that did not occur, ignores evidence in the Record, and makes assertions that are not supported by the Record. Respondent’s Brief and Exceptions was written and submitted by Adam Kimmell, former and now current attorney for Respondent, who did not attend the contested case hearing, having withdrawn as Respondent’s counsel just prior to its commencement. See Order, p.1.

DEQ requests that the Commission uphold the Order in the above-referenced case, as the Administrative Law Judge’s (ALJ’s) findings are based on a preponderance of the evidence and supported by substantial evidence in the hearing Record. The ALJ properly interpreted and applied the law to those facts and determined that Respondent: 1) allowed a Class V injection system to inject hazardous substances; 2) placed wastes in a location where they were likely to enter waters of the state; 3) failed to
completely and accurately determine if residue at the Facility was hazardous waste and the Company mixed antifreeze with used oil; 4) established, operated, and expanded a waste tire storage site at the Facility without a waste tire storage permit; 5) failed to operate a waste tire storage site in conformance with applicable standards; 6) constructed, installed and operated a full size stationary vehicle shredder that caused an increase in regulated pollutant emissions without prior written notification to DEQ; 7) installed and operated an air contaminant source without obtaining an Air Contaminant Discharge Permit (ACDP); 8) violated the terms and conditions of a previously-issued DEQ order; 9) should be assessed civil penalties in the total amount of $59,015 for its violations of ORS 468B.025(1)(a), Chapter 340 of the Oregon Administrative Rules, and a DEQ order. In addition, the ALJ found that the corrective actions required by DEQ are necessary for Respondent to comply with the law.

FACTS AND PROCEDURAL HISTORY

Respondent owns and operates an automotive dismantling facility that was the site of a catastrophic five-alarm fire on March 12-14, 2018, in the Cully neighborhood of Northeast Portland. Order, Findings of Fact #1, #20-27.

After the fire, DEQ discovered numerous violations of state law. On March 28, 2019, DEQ issued a Removal Action Order (RAO) requiring Respondent to perform a comprehensive assessment of the contamination that resulted at the site. Order, Findings of Fact #34-36, p. 12.

On August 30, 2018, DEQ issued Respondent a Notice of Civil Penalty Assessment and Order citing Respondent for numerous violations of state law. Respondent appealed, filing a request for a hearing and an answer. On December 3, 2018, DEQ issued an Amended Notice adding additional violations for Respondent’s failure to obtain an Air Contaminant Discharge Permit and for failing to meet the deadlines in the RAO. On May 21, 2019, DEQ issued Respondent a Second Amended Notice of Civil Penalty Assessment and Order proposing to assess increased civil penalties for Respondent’s continued non-compliance in the amount of $60,265 and requiring additional corrective actions. Order, p.1.

A contested case hearing was held May 28-30, 2019 before ALJ Samantha Fair. ALJ Fair issued a Proposed and Final Order on August 29, 2019, upholding DEQ’s Second Amended Notice in its
entirety and ruling that Respondent violated Oregon laws and is responsible for civil penalties and compliance actions as alleged in the Second Amended Notice. ¹

STANDARDS OF REVIEW

As a general matter, all findings of fact in a proposed or final order must be based on a preponderance of the evidence and supported by substantial evidence in the Record. OAR 340-011-0545(2); ORS 183.482(8)(c). “Substantial evidence” means that “[s]ubstantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.482(8)(c); see also Tye v. McFetridge, 342 Or 61, 73-74 (2006) (explaining substantial evidence standard).

The EQC may substitute its judgment for that of the ALJ in making any finding of fact, conclusion of law, or order, except as limited by ORS 183.650 and OAR 137-003-0665. OAR 340-011-0575(6).

In order to modify a finding of “historical fact,” the EQC must determine that there is clear and convincing evidence in the Record that the finding made by the ALJ was wrong. ORS 183.650(3); OAR 137-003-0665(4). The clear and convincing evidence standard means that the fact finder must believe that the evidence is fully intelligible and free from confusion and that the truth of the facts asserted is highly probable. Riley Hill General Contractor, Inc. v. Tandy Corp., 303 Or. 390, 407, 737 P.2d 595 (1987). The ALJ makes findings of “historical fact” when the ALJ determines that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing. ORS 183.650(3); OAR 137-003-0665(4).

If the EQC modifies the ALJ’s Order in any substantial manner (by changing a finding of fact or the outcome of, or basis for, the Order), the EQC must identify the modification and explain to the parties the reason for the modification. ORS 183.650(2); OAR 137-003-0665(3).

Questions of law are reviewed to determine whether “the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action.” ORS 183.482(8)(a). The

¹ At the hearing DEQ unilaterally withdrew the “economic benefit” portion of the civil penalty calculation for violation #4 in recognition of Respondent’s recent efforts to remove waste tires. This reduced the civil penalty DEQ proposed to assess at the hearing from $60,265 down to $59,015.
agency’s exercise of discretion is reviewed for whether it is “(A) [o]utside the range of discretion delegated to the agency by law; (B) [i]nconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or (C) [o]therwise in violation of a constitutional or statutory provision.” ORS 183.482(8)(b).

**DISCUSSION**

Respondent fails to establish that the Order’s findings of fact are not based on substantial evidence or that the Order erroneously interprets a provision of law. Specifically, for each of Respondent’s claims discussed below, Respondent mischaracterizes testimony, ascribes to witnesses testimony that did not occur, ignores evidence in the Record, and routinely fails to cite the Record for its assertions. In addition, Respondent makes a wholly unsubstantiated allegation that the ALJ demonstrated bias in her decision, merely because she ruled in favor of DEQ on all violations. Respondent’s arguments are unsupported or corroborated by evidence in the Record or the testimony presented at the hearing.

I. “Operation of unpermitted UIC system”

DEQ cited Respondent for “causing a prohibited Class V injection system at its Facility,” a violation of OAR 340-044-0015(2)(c) (emphasis added). Allowable Class V injection systems are drywells (also known as “Underground Injection Control” systems or “UICs” or “drywells” or “DW”) that “inject fluids other than hazardous waste or radioactive waste to the subsurface” (see OAR 340-044-0011(50) (emphasis added)), and include “[s]tormwater injection systems that inject only stormwater runoff from residential, commercial or industrial facilities.” OAR 340-044-0011(5)(d) (emphasis added). *Prohibited* Class V injection systems are wells that inject “fluids from industrial … areas where hazardous substances or toxic materials including petroleum products are stored, used or handled.” OAR 340-044-0015(2)(c).²

The Order includes multiple Findings of Fact to support the ALJ’s first conclusion of law: that Respondent allowed a prohibited Class V injection system. See Order, Findings of Fact, #3, 4, 5, 9, 10-

² OAR 340-044-0015(2)(c) states: “No person shall cause or allow the following types of Class V injection systems injecting: … c) Fluids from industrial or commercial operation areas where hazardous substances or toxic materials including petroleum products are stored or handled.”

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However, in its Brief and Exceptions Respondent largely ignores the substantial findings of fact in the Order.

Respondent argues that DEQ did not prove that Respondent caused hazardous substances, toxic materials or petroleum to enter UICs on the property and suggests that fire-fighting activity was to blame. This is false. First, for Respondent to be liable for operating a prohibited Class V injection system DEQ need not prove these substances entered the UIC – only that the UIC injects fluids from Respondent’s industrial area where these hazardous, toxic and petroleum substances are stored, used or handled. Regardless, DEQ presented data and analysis of sludge and water samples taken from inside Drywell 1A (DW1A), a Class V UIC, which revealed that, in fact, the UIC was contaminated as it contained 10 metals, petroleum hydrocarbons, and 11 semi volatile organic compounds (SVOCs). Hearing.2019_05_28_2_B, Testimony of P. Richerson at 1:13:31 (DEQ’s senior hydrologist Phil Richerson discussing Ex. 24, his analysis of sludge, soil, and water samples taken from in and around DW1A). Eleven volatile organic compounds (VOCs) were detected in the water samples in DW1A. Id. These VOCs were typical of petroleum, fuel additives, plastics, refrigerants, and cleaning solvents that would be generated from automotive operations. See Order, Findings of Fact #46-50 and Ex. A22, Ex A23, and Ex.24. Additionally, Mr. Richerson testified that the sampling results “suggest[] the possibility that contaminants could [have] been migrating downward [into the soil] from the dry well prior to those recent fire-fighting efforts.” Hearing.2019_05_28_2_B, Testimony of P. Richerson at 1:33:14-45. Therefore, the ALJ did consider evidence in the Record that both connected the contaminants found in the UIC to Respondent’s operations and distinguished Respondent’s operations – and not fire-fighting efforts - as the cause of contaminants in the dry well.

Respondent further suggests that “no toxic/hazardous chemical originating with the company could have reached the dry wells via CB7 located on the Sunbelt property except … for a short time period immediately after the fire when the fire-fighters gouged a gap with one of their truck in the dirt berm.” Brief and Exceptions, p. 1. Again, this is false and ignores the Order’s Finding of Fact #10 that “stormwater runoff runs from the Facility onto Sunbelt’s property and pools in the CB7 areas whenever

3 CB7 is located on the “Sunbelt” property adjacent to NW Metals. It is a catchbasin that drains to the UICs at NW Metals via underground piping. See Order, Finding of Fact #9.
It rains. This runoff will have an oily sheen” (indicating the presence of petroleum …). Ex A62 (emphasis added). The Order refers to photos (Ex 62 and Ex 60) taken by Sunbelt’s manager Albert Salchenberg who testified at the hearing that photos of discharges from NW Metals to the Sunbelt property were taken in December of 2017, many months before the fire.

Respondent also argues that contamination in the UICs was pre-existing, and not generated by Respondent. In support of this assertion, Respondent cited Ex. A16, a Technical Memorandum on the UICs at the property which had been prepared for the previous property owner by Creekside Environmental Consulting, prior to NW Metals occupying the site. Referring to this exhibit, Respondent claimed the ALJ did “not even acknowledge that any such evidence was ever presented.” To the contrary, the Order’s Finding of Fact # 11 described in detail the work Creekside did to fully clean out the UICs prior to NW Metals occupying the facility. The Finding even relies on Ex. 16 which Respondent claims the ALJ had ignored.

Respondent claims that plastic sheeting was “all that NW Metals could have done to prevent the prohibited UICs.” Brief and Exceptions, p. 2. Respondent claims that no DEQ witness contradicted this claim. This is false and ignores testimony regarding a panoply of potential best management practices Respondent could have employed - but did not - all of which are described in Finding of Fact #12 and to which DEQ witnesses Derek Sandoz and Jay Collins testified, as cited in the Order.

Respondent is liable for causing the operation of a prohibited Class V UIC by simply having UICs that inject fluids from an industrial area where hazardous substances, toxic materials and petroleum products are stored used or handled.

Respondent asks the EQC to modify the factors DEQ used to calculate the civil penalty, which were entirely upheld by the ALJ. Respondent argues that the M factor of 8, representing DEQ’s allegation that Respondent was “reckless” in operating the prohibited UIC, was not justified “in light of uncontradicted evidence that the Company did not even know there were drywells on the property” and because the City of Portland had not told Respondent about the UICs. However, the City of Portland does not regulate UICs and had inspected the Respondent’s facility for other purposes. See Finding of Fact #17. Moreover, it is difficult to accept Respondent’s claim that it did not know about the drywells
when they are plainly visible. They have a riser and a metal plate on top – similar to a manhole ingress to a city sewer. See Finding of Fact #9. Respondent would have seen the UICs when it was working in its yard. As the Order describes, “Mr. Anotta’s testimony in this matter was contradictory as he testified to a lack of knowledge of the existence of the DWs [dry wells] and then testified about knowledge of their existence but not as a UIC. Additionally, the DWs are not hidden structures until the Company buried them in vehicle husks and scraps. It was the responsibility of the Company that was handling hazardous substances to verify the nature of the structures on the property it leased especially before burying those structures under vehicle husks and other scraps.” Order p. 25.

Respondent also asks the EQC to modify the C factor in the civil penalty formula, arguing that Respondent should be given some mitigating credit for “some efforts to minimize the effects” of the violation because it paid for sampling around the drywells (as ordered by DEQ), repaired the DW1 riser and installed a berm on the eastern property boundary (between it and Sunbelt). Brief and Exceptions, p. 3. This argument must be rejected. There was no evidence before the ALJ - and Respondent offers no evidence with its Brief and Exceptions - that any such berm was put in place. As for the plastic sheeting, Respondent acknowledges that DEQ’s witness Mr. Sandoz testified it was not a permanent solution and argues that Mr. Anotta testified “without contradiction by any DEQ witness” that installing plastic sheeting was “all that the Company could do to correct that violation.” Brief and Exceptions, p. 2. This is a gross misstatement of the testimony by Mr. Sandoz and Mr.Collins and ignores the ALJ’s findings and conclusions regarding the myriad of best management practices Respondent could have implemented to prevent toxic or hazardous substance from reaching the drywells, and the exposure of these materials to stormwater. Order, Finding of Fact #12 (citing the testimony of Mr. Sandoz and Mr. Collins). Respondent completely ignores the evidence presented regarding Respondent’s general mismanagement of hazardous materials at its site and that much of its industrial operations occur out in the open where they are exposed to stormwater when it rains. Order, Findings of Fact #30, #58, #62. The ALJ concluded that “[b]ecause the Company has continuously exposed stormwater runoff to the hazardous materials it handles on the uncovered grounds of the

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4 Mr. Moyatta Anotta is the manager of NW Metals.
Facility, the Company has violated OAR 340-044-0015(2) … The Company has been handling hazardous materials for years without making any efforts to protect the environment from any spills of these materials.” Order, p. 45.

The ALJ’s determination to uphold the factors DEQ assigned in its civil penalty formula, specifically, the M factor and the C factor, were supported by substantial evidence in the Record. Respondent has failed to present clear and convincing evidence that the ALJ was wrong.

II. “Placing wastes where likely to enter groundwater”

Respondent argues that DEQ’s evidence and testimony only showed that migration of contamination to waters of the state was “possible” and that the evidence lacked any showing that pollution had actually occurred or was “likely” to occur. However, once again, Respondent ignores testimony on the Record.

The ALJ’s conclusion was based on substantial evidence in the Record. In addition to evidence of contamination inside DW1A, as described in section I above, the Record also contains testimony that contamination will continue to migrate downward in the soil over time if not remediated. Hearing.2019_05_28_2_B, Testimony of P. Richerson at 1:34:55 – 1:35:20: see also Ex A24. DEQ’s UIC coordinator, Derek Sandoz, testified that UICs are “constructed with the purpose of emplacing fluid to the subsurface” and that DEQ regulates UICs in order to protect groundwater\(^5\) and prevent contaminants from entering subsurface soils and groundwater; UICs can act as a conduit to groundwater. Hearing.2019_05_28_1, Testimony of D.Sandoz at 1:55:45-1:56:48. Further, Mr. Richerson testified that “it’s possible contamination has moved to groundwater.” Hearing.2019_05_28_2_B, Testimony of P. Richerson at 1:34:33- 34:54

The ALJ’s findings of fact were supported by substantial evidence in the record. Respondent has failed to show that DEQ erroneously interpreted ORS 468B.025(1)(a) and Respondent has offered no basis to support its argument or dispute the testimony of Mr. Richerson and Mr. Sandoz.

\(^5\) Groundwater is considered “waters of the state.” See ORS 468B.005(10).
III. “Mishandling of used antifreeze and used oil”

Respondent does not contest the violation of failing to perform a hazardous waste determination on antifreeze and its antifreeze mixed with used oil but it asks the EQC to revise the ALJ’s application of the M factor and the C factor applied to the calculation of this civil penalty. To be clear, in its Second Amended Notice DEQ cited Respondent for two separate violations regarding Respondent’s handling of its used oil and antifreeze: 1) unlawfully mixing its used oil with antifreeze, and 2) failing to perform a hazardous waste determination on these materials. DEQ did not assess penalties for the former. Still, Respondent asks the EQC to give mitigating “C” factor credit towards the $1,050 civil penalty assessed for not doing a hazardous waste determination claiming it deserves mitigating credit “because the Company stopped the mixing of used antifreeze and oils as soon as DEQ told it to do so.” However, as noted above, DEQ did not assess a penalty for that violation. DEQ assessed a penalty for failing to do a hazardous waste determination. For that violation, stopping the practice of mixing those two residues is not a corrective action for having not done a determination; the two violations are not related. In any event, Respondent’s claim that it stopped mixing antifreeze and used oil is false. The Order found that “[d]espite [DEQ recommendations regarding best management practices for handling used oil] [Respondent] continued to mix the hazardous substances …..” Order p. 46. Therefore, Respondent deserves no mitigating credit.

Respondent also asks the EQC to lower the aggravating “M” factor assessed for the hazardous waste determination violation, arguing that “there is no basis for the finding the Company was negligent.” Brief and Exceptions, p. 4. To the contrary, the Order stated that “[b]ecause the Company ignored the foreseeable risk that failing to perform a hazardous waste determination would result in ongoing violations of its handling of its recovered antifreeze and used oil, the Company was negligent.” Order, p. 46.

Respondent’s arguments must be rejected as it fails to present any factual or legal basis for the EQC to change the ALJ’s findings of fact or its conclusions regarding these violations. There is no basis to amend the Order.

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IV. **“Unpermitted storage of excess waste tires”**

DEQ alleged that Respondent violated OAR 340-064-0015(1) by establishing, operating, and expanding a waste tire storage site at NW Metals, which stored more than 1,500 waste tires, without obtaining a waste tire storage permit from DEQ. Respondent argued that DEQ did not prove this violation because DEQ “showed only that more than 1500 tires were present” without distinguishing between which tires were “used” and which were “waste.” The ALJ rejected this distinction, finding the Company’s claim that tire sales were a major and regular source of Company revenues and its assertion that, therefore, some tires were simply “used” and not “waste” was unsupported by the evidence.

Order, p. 29. The ALJ’s conclusion was based on: the way tires were stored in “multiple, large, haphazard piles,” how they were “unmarked so that there was no way to identify the sizes or types of tires buried in piles,” and that “the Company threw used tires into the large scrap piles that covered the southern scrap yard, which demonstrated the lack of any intent to reuse these tires.” Order p. 29.

The ALJ also found the Company’s used tires were “waste tires” based on the plain language of the definition of “waste tires generated in Oregon” in OAR 340-064-0010(34)(b) which includes “tires removed from a junked auto at an auto wrecking yard in Oregon.” Order, p.30.

Respondent’s Brief and Exceptions goes to great lengths to ask the EQC to adopt an alternative application of the definition at OAR 340-064-0010(34)(b). As described above, questions of law are reviewed to determine whether “the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action.” ORS 183.482(8)(a). The agency’s exercise of discretion is reviewed for whether it is “(A) [o]utside the range of discretion delegated to the agency by law; (B) [i]nconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or (C) [o]therwise in violation of a constitutional or statutory provision.” ORS 183.482(8)(b).

Respondent’s brief has offered no argument to support a ruling by the EQC that the agency’s exercise of discretion – namely, its determination that all tires at Respondent’s facility were “waste tires” based on the definition of “waste tires generated in Oregon” in OAR 340-064-0010(3) – was a)
outside the range of discretion delegated to the agency by law; b) inconsistent with an agency rule, an
official stated agency position, or a prior agency practice, or c) otherwise in violation of a constitutional
or statutory provision. Respondent has not shown that DEQ “erroneously interpreted” this provision of
law and that “a correct interpretation compels a particular action” as required by ORS 183.482(8)(a).

V. “Improper storage of waste tires”

DEQ alleged that regardless of whether Respondent obtains a permit for operating a waste tire
storage site, it must still comply with DEQ regulations regarding safe and lawful storage of waste tires.
Specifically, DEQ alleged that Respondent violated the “Standards for Waste Tire Storage Sites in
OAR 340-064-0035(4) based on OAR 340-064-0015(2) which states “[p]ersons owning or controlling
the following are exempted from the [requirement] to obtain a waste tire storage
permit, but shall comply with all other regulations regarding waste tire management.” (Emphasis
added). Subsection (e) of that rule includes a “wrecking business who stores not more than 1,500 waste
tires for each retail business location.” In other words, even if Respondent was exempt from the
requirement to obtain a waste tire storage site permit (because it had fewer than 1,500 tires) the rule at -0015(2) still required it to comply with the Standards for Waste Tire Storage Sites at -0035(4).

Respondent goes through some contortions to argue that the “Standards for Waste Tire Storage
Sites” at -0035(4) don’t apply to it, ultimately arguing that the word “management” used in -0015(2) is
not used in the “standards” rule at -0035, and raising a question of law: whether or not -0035(4) applies
to unpermitted storage sites.

As discussed above, questions of law are reviewed to determine whether “the agency has
erroneously interpreted a provision of law and that a correct interpretation compels a particular action.”
Respondent offers no argument or evidence to support its challenge to DEQ’s interpretation of -0015(2)
and -0035(4). It makes no attempt to show that DEQ’s interpretation is outside DEQ’s discretion,
inconsistent with agency rule or an officially stated position or prior practice, or that it violates another
constitutional or statutory provision. To the contrary, DEQ’s application of the “Standards for Waste
Tire Storage Sites” is in line with the plain language of the rules. A reasonable person would conclude
that when -0015(2) requires an unpermitted site to comply with “all other regulations regarding waste
tire management” the intent is for the waste tire storage standards to apply. Storage requirements fall clearly within the plain meaning of “management.” Clearly, DEQ intended for storage requirements to apply to unpermitted sites; otherwise, the “management” language in OAR 340-064-0015(2) would be rendered meaningless as the rules regarding waste tires at Chapter 064 contain zero reference to any rule that specifically describes “management.”

Most importantly, requiring even unpermitted waste tire storage sites to comply with the storage standards at -0035 furthers the state’s goals of ensuring that all waste tires are stored in a safe and environmentally sound manner. DEQ solid waste inspector Chris Papinsick testified that DEQ regulates waste tires to “protect … human health and the environment, to prevent situations like [the NW Metals] fire and if fires do occur, to limit their spread and toxicity.” He testified that tires are very flammable and “once they catch fire they are hard to put out because they burn so hot.” Hearing.2019_05_29_1, Testimony of C. Papinsick at 1:50:48-1:51:17. Further, Mr. Papinsick testified that “the best way to prevent big fires is to shut them down before they spread ….” and good housekeeping, oversight, limiting the number of tires onsite and spacing are methods that can be used to prevent and limit large fires. Hearing.2019_05_29_1, Testimony of C. Papinsick at 1:51:46 – 1:53:16. DEQ’s waste tire storage standards at OAR 340-064-0035(4) are designed to do just that.

Respondent admonishes DEQ to “make sure its own regulations are more clear before it assess penalties for [a] violation.” This admonishment of DEQ ignores the fact that for 12 months, DEQ repeatedly informed Respondent that it was in violation of the waste tire storage rules, and that it needed to address the accumulation of tires at its site. Hearing.2019_05_29_1, Testimony of C. Papinsick at 2:20:56 - 2:24:00.

Respondent asks the EQC to reduce the M factor of “reckless” because Respondent “believed in good faith that it was exempt” from the tire storage requirements. As noted directly above, and as evidenced in the record, Respondent’s stated belief that it was exempt from waste tire storage requirement, was in direct conflict with repeated correspondence from DEQ informing it of the storage requirements and requests that it come into compliance with the rules.

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Item F 000033
VI. “Unpermitted use of replacement shredding machine”

DEQ cited Respondent for two violations related to the operation of its metal shredder, a new source of regulated air pollutant emissions. The first violation DEQ cited without penalty was for installing and operating the shredder that burned in the fire without previously notifying DEQ in writing as required by OAR 340-210-0215(1). The second violation was for violating OAR 340-216-0020(3) by installing and operating a replacement shredder without first obtaining an Air Contaminant Discharge Permit (ACDP). Specifically, DEQ alleged that NW Metals’ replacement “Arjes” shredder would have actual emissions, if the source were to operate uncontrolled, of 10 or more tons per year of several “criteria pollutants” as defined by OAR 340-200-0020(36).

Respondent argues that because the replacement shredder “hardly ever worked at all” it resulted in “de minimis” air emissions and the permitting standards shouldn’t apply. Brief and Exceptions, p. 7. Respondent offers no basis or support for this position. The applicable rule states that sources “which would have actual emissions, if the source were to operate uncontrolled of … 10 or more tons per year of any single criteria pollutant” must get a permit. OAR 340-216-8010, Table 1, part B, #85 (emphasis added). Respondent’s argument ignores that “DEQ interprets ‘operate uncontrolled’ to be the maximum capacity of the emitting source at full operations, 24/hours per day, 365 days/year, unless there is control equipment or a DEQ-enforceable control strategy.” Order, p. 33; see also Hearing.2019_05_29_1, Testimony of D. Graiver at 20:09-20:30. Whether or not a permit is needed is based on the source’s “potential to emit … which means the maximum capacity of a source at full operation.” Hearing.2019_05_29_1, Testimony of D. Graiver at 20:25-20:59. Respondent’s shredder would emit nitrogen oxide, carbon monoxide and VOCs at levels which exceed the threshold of 10 tons/year if it were operated 24 hours/day, 365 days/year. Order, p.33. Its actual emissions are irrelevant when determining if a permit is required. “Potential to emit does not take into account any proposed or actual emissions of the source.” Hearing.2019_05_29_1, Testimony of D. Graiver at 21:22-34; see also OAR 340-216-0020(3) and OAR 340-216-8010, Table 1, part B, #85.

At the hearing, DEQ air permit writer David Graiver testified that DEQ could impose an enforceable limitation on the shredder only via an ACDP, which is enforceable via a formal

Respondent argues that a DEQ letter telling Respondent to limit its usage of the shredder to the hours of 8:00 AM to 5:00 PM, coupled with the shredder’s visible counter, were “controls” which should have been sufficient to limit Respondent’s usage to thresholds under the permitted amount. Respondent suggests that DEQ could “control” its usage by suing in court for a breach of an agreement regarding hours of maximum use, and that with the shredder’s counter DEQ could easily prove non-compliance. First, DEQ has no agreement with NW Metals. Second, DEQ’s letter requesting NW Metals limit its hours of operation and requesting compliance with other best management practices (with which Respondent did not comply) is not enforceable. Hearing.2019_05_29_1, Testimony of D. Graiver at 53:43- 54:07 (describing the letter’s requests as “recommendations”); see also Hearing.2019_05_29_1, Testimony of D. Graiver at 1:36:47-37:33 (explaining that an hour meter or a limitation on hours needs to be in an enforceable document such as a permit which has prescribed record keeping and monitoring and that “without the permit there is no enforceable limitation”). There is no other enforceable mechanism to limit Respondent’s operation of the shredder absent the ACDP.

Respondent has failed to offer factual support for its argument and has failed to offer support to show that DEQ erroneously interpreted this provision of its ACDP rules.

Respondent asks the EQC to adjust some of the factors used to calculate the civil penalty for this violation. First, Respondent would like the “magnitude” of the violation lowered from the default of “moderate” to a “minor” magnitude based on the low levels its shredder operations would have emitted given its low usage, according to Respondent. According to OAR 340-012-0130 the default “moderate” magnitude applies “unless evidence shows that the magnitude is “major” or “minor” under paragraph (4).” Subsection (4) states that “[t]he magnitude of the violation is minor if DEQ finds that the violation had no more than a de minimis adverse impact on human health of the environment, and posed no more than a de minimis threat to human health or the environment.” OAR 340-012-0130(4). DEQ has made no such finding in this case, and there is no basis on the record to make such a finding. To the contrary, DEQ presented evidence at the hearing that criteria pollutant standards (the standards that establish when a permit is needed) are enacted by EPA and are designed to protect human health

Item F 000035
and the environment. Hearing.2019_05_29_1, Testimony of D. Graiver at 19:33-19:36. DEQ made no finding that Respondent’s violation was de minimis because it could not say that Respondent’s emissions of pollutants that have been deemed harmful to human health or the environment “had no more than a de minimis adverse impact on human health or the environment.”

Respondent argues that the M factor for this violation was unfair “when the company had every reason to believe a permit was not required.” Respondent offers no support for why Respondent allegedly held this belief. Respondent’s argument ignore the facts presented at hearing that “[o]n at least four occasions including one [Pre-Enforcement Notice], DEQ informed the Company of the requirement for it to file an application for an ACDP …. The Company has refused to file any such application.” Order, p. 47; see also Ex. 46 and Ex. 47; Hearing.2019_05_29_1, Testimony of D. Graiver at 26:00-:27; and at 28:50-29:25. Also, according to its Brief and Exceptions, Respondent was “loathe to pay” the permit fee. This is not an exception to the permitting requirement. Respondent cannot ignore DEQ’s repeated requests and the law simply because it does not like it and does not want to pay the permit fee. The ALJ found that Respondent was reckless because it “consciously disregarded the substantial and unjustifiable risk that it will continue to violate [the permitting rule]. Because the Company’s behavior was a gross deviation from the standard of care a reasonable person would exercise, its conduct was reckless.” Order p. 47. In the absence of any factual basis or legal arguments to supports its claims, they must be rejected.

VII. “Non-compliance with RAO deadlines”

Respondent argues that there were no deadlines for completing work in the RAO and that any purported deadlines were superseded by the approval of Respondent’s work plan (which did not contain any deadlines) and occurred in July after the RAO was issued in March. Respondent argues, without offering any factual or legal basis, that the Work Plan became “the governing document” and because it did not contain deadlines then, apparently, none applied.

This argument ignores the plain language of the RAO. The RAO included timelines that were triggered by DEQ’s approval of the underlying work plan. For instance, according to the RAO, Respondent “shall implement the work plan within 5 days of DEQ approval,” or “Respondent shall
implement and complete the sampling and analysis plan within 10 working days of DEQ approval of the work plan” (emphasis added). DEQ approved the work plan on July 12, 2018, reminding Respondent in its notice of approval that it must “begin debris removal work within 5 days of DEQ approval.” Ex. A19 at p.1 and Ex. A25 at p. 1, p. 13, 54. The facts are that Respondent did very little to try to adhere to the RAO. It continued to accept new car husks on site for shredding and recycling – carrying on its business as usual – even though doing so added to the accumulation of materials at the Facility covering up the burned debris it was required to remove, and burying the soils which the RAO required it to test. See Order p. 48, 54.

Respondent also argues that the factors in the civil penalty formula for this violation should be lowered. Respondents asks the EQC to reduce the magnitude from moderate to minor because the resulting delays “have not created any new or additional harm.” This claim is offered without any support and is contrary to the evidence DEQ presented at the hearing (and discussed above) regarding the VOCs, heavy metals, and other toxic pollutants that entered the UICs, and were found in and around the dirt. DEQ’s senior hydrogeologist testified that these contaminants will continue to migrate downward towards groundwater. Also, the purpose of the RAO was to require comprehensive testing of the site to determine at what level it had been contaminated. Until that testing is complete, it is impossible to say that delaying over 12 months to fully implement the RAO requirements has created no new or additional harm.

Respondent urges the EQC to reduce the M factor because it “struggled ‘in good faith’” to complete the work as soon as possible. Again, this betrays the facts presented at hearing that Respondent had not – even 18 months after the fire – completed the first requirement of the RAO (to remove fire debris) nor has it completed the soil sampling, due in part to its accumulation of new material on-site. Order, p.35. Respondent actually hampered efforts to meet the RAO requirements because it continued to accept material for processing at its site. Order, p. 35. All that material was stored and accumulated on top of the very ground that needed to be tested and scraped, according to the RAO.

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Respondent suggests it deserves some C factor credit in light of the “tremendous sums” it has spent on consultants and attorneys yet it offers no evidence to support that it has paid anything, much less that it was a “tremendous sum.” Respondent claims it has removed 95% of the burnt cars and accomplished 80% of the soil sampling yet, again, offers no evidence to support these claims.

The EQC must reject Respondent’s arguments as they are offered with no factual or legal basis.

VIII. “Other failings of the ALJ”

Respondent’s conclusions about the “failings” of the ALJ should be ignored because Respondent raises no issues of fact or law to support its assertions. Furthermore, Respondent accuses the ALJ of bias against it summarily because the ALJ did not find in Respondent’s favor.

Respondent points to the ALJ’s disallowance of Respondent’s “hearing brief” as evidence of bias. Respondent fails to mention that it attempted to file a “hearing brief” unannounced and unplanned on the eve of the hearing. This was despite a schedule established months in advance of the hearing, and agreed to by the parties, for submitting witness lists and exhibits two weeks before the hearing (so the parties could adequately prepare). Respondent had ample opportunity to provide some advance notice that it intended to file a hearing brief and to request an amendment to the schedule to file its brief. Respondent, however, made no mention of its intent to file a hearing brief but instead submitted it on the eve of the hearing, at 5:00 pm on Friday before Memorial Day when the hearing was scheduled first thing Tuesday morning after the Memorial Day holiday. DEQ had no advance notice or time to respond or prepare a brief of its own.

In its Brief and Exceptions, Respondent alleges that the ALJ “gave no reason for the exclusion.” This is patently false and contradicted by the Record. See Hearing.2019_05_28_1 at 3:05 (the ALJ discussing the “timing” of the “unplanned” filing); see also Hearing.2019_05_30_1 at 8:02-10 (ALJ ruling on Respondent’s Motion for Reconsideration stating: “[the hearing brief] was unexpected and gave the department no opportunity to respond”). Finally, and perhaps most importantly, the ALJ allowed Respondent to read the hearing brief into the Record as part of its closing argument, so there was no actual exclusion. See Hearing.2019_05_30_2_B at 0:00-1:18:37.

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Lastly, Respondent takes issue with the ALJ’s statement about the potential cause of the fire. Specifically, the ALJ found that “Portland Fire eliminated the Arjes shredder as a cause of the fire based upon Mr. Anotta’s representation that the shredder has not been used in the week prior to the fire.” In the footnote following, the ALJ found “that representation [that the shredder was not used] was false.” Order, p. 9. This is the result of Mr. Anotta’s inconsistent and contradictory testimony regarding the operation of the shredder, not ALJ bias. Order, p. 9.

Regardless of the above, potential bias of the ALJ is outside the scope of EQC review and Respondent’s arguments on the subject should be ignored.

CONCLUSION

For the reasons stated herein, DEQ respectfully requests that the Commission deny all of Respondent’s Exceptions and issue a Final Order consistent with the analysis herein that finds that Respondent violated Oregon law as alleged in DEQ’s Second Amended Notice and orders Respondent to pay civil penalties and comply with the corrective actions as set forth in the ALJ’s Order.

DATED this 3rd day of December 2019.

Respectfully Submitted,

_________________________________________
Courtney Brown
Environmental Law Specialist
Oregon Department of Environmental Quality
Hello,

Your request for an extension until 5 p.m. on Jan. 30, 2020, is approved. Based on that adjusted briefing schedule, this matter will be scheduled as part of the March 18-19, 2020, EQC regular meeting. That meeting location has not yet been set, but is expected to be in the Salem metropolitan area. I will provide additional logistical information and details once all briefs are received in this matter.

To note, a Reply Brief is not required, but the Respondent has a right to that final filing after DEQ’s Answering Brief is received, if they so choose.

Please let me know if you have any questions regarding the process.

Sincerely,
Stephanie

Stephanie Caldera
Policy analyst
Oregon DEQ, headquarters office
700 NE Multnomah Street, Suite 600, Portland Oregon 97232
Phone: 503-229-5301

Stephanie/Courtney-

I write to request an extension until January 30, 2020 for filing of NW Metals’ reply to the Answering Brief of DEQ. I will be out of the country on vacation from 12/4/19 until 1/10/20. I will not have time to write up a reply before I leave.

Adam Kimmell
Hello,

The request for an extension, until 5 p.m. on Tuesday, Dec. 3, is accepted. Please submit the DEQ Answering Brief by that date and time, in writing, with a copy to the Respondent in this matter.

Once the DEQ materials are received, the Respondent has 20 calendar days to submit a Reply Brief.

Once all materials are filed in this matter, it will go before the Environmental Quality Commission for review and action. Based on projected timelines, this matter will likely be scheduled as part of the Jan. 23-24, 2020, meeting, to be held in Hillsboro. I will affirm all meeting dates, locations, logistics and other protocol information once all materials are filed.

Thank you,
Stephanie

Stephanie Caldera
Policy analyst
Oregon DEQ, headquarters office
700 NE Multnomah Street, Suite 600, Portland Oregon 97232
Phone: 503-229-5301

From: BROWN Courtney <BROWN.Courtney@deq.state.or.us>
Sent: Wednesday, November 27, 2019 12:47 PM
To: CALDERA Stephanie <caldera.stephanie@deq.state.or.us>
Cc: 'Adam Kimmell' <adamkimmell@comcast.net>; 'anottam@gmail.com' <anottam@gmail.com>
Subject: Request for Extension to file DEQ's Answering Brief

Stephanie – DEQ would like to request an extension of six days, until the Tuesday December 3, 2019 to file our Response to Respondent NW Metals’ “Brief and Exceptions on Review” before the EQC. Thank you.

Courtney Brown, J.D. | Environmental Law Specialist
Oregon DEQ | Office of Compliance & Enforcement
700 Multnomah St., Ste. 600, Portland, OR 97232
☎ 503.229.6839 | ☎ 503.229.5100
Hello,

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Stephanie

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: ) NW METALS BRIEF
NW Metals Inc., ) AND EXCEPTIONS ON REVIEW
an Oregon corporation, )
) Respondent.
) DEQ CASE NO. WQ/SW-NWR-2018-063
) MULTNOMAH COUNTY
) OAH Case No. 2018-ABC- 02082

NW Metals Inc (the “Company”) asserts as follows:

The decision by ALJ Samantha A. Fair (the “ALJ”) is unfair to the Company because it appears the ALJ simply ignored much of the evidence submitted at the hearing and because the decision fails to apply the law accurately. Substantial parts of the Proposed and Final Order should be revised by the Environmental Quality Commission, to wit:

Violation 1. Operation of unpermitted UIC system.

The Department of Environmental Quality (“DEQ”) did not prove that the Company caused hazardous substances to enter the underground injection control system on the property. The ALJ also failed to distinguish between the activities of the fire-fighters called to the scene of the March 2018 fire, for which the Company was not responsible, and the activities of the Company before and after the fire. Mr. Anotta testified for the Company that (1) surface water runoff flowed to the “Sunbelt” property east of the Company’s property (and from there back via catch basin 7 to DW1) only from the northerly potion of the Company’s property (upslope from the area where Company personnel drained fluids from scrap cars) (please see DEQ’s aerial photo taken after the March 2018 fire, Exhibit A10, p. 5 of 5) and that therefore no toxic/hazardous chemicals originating with the Company could have reached the dry wells via CB7 located on the Sunbelt property, except (2) for a short time period immediately after the fire when the fire-fighters gouged a gap with one of their trucks in a dirt berm that ran along part of the east boundary of the southerly part of the Company’s property, previously preventing water flow eastwards to the Sunbelt property, which berm was shortly thereafter repaired (again restricting water flow eastwards), and (3) the plastic sheeting placed over

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DW1 (which had been dislodged by massive once-in-a-lifetime water flows directed by the fire-fighters) after the fire effectively blocked any surface stormwater flow directly into DW1 from the southerly portion of the Company’s property. None of this testimony was rebutted by any of the people who testified for DEQ. The testimony presented by DEQ to the effect its representatives observed small, if many different, spills of used oil and other fluids onto the ground at the Company’s property is insufficient evidence in the absence of any proven conduit or connection to the dry well injection system. Nor does DEQ’s evidence of soil contamination around and under the drywells (gathered by soil sampling the Company paid for) show that the toxic/hazardous substances found there in limited concentrations, mostly barely above normal background concentrations (except for fire suppressant chemicals applied by the Portland Fire Bureau) were generated by the Company, not in light of the evidence that similar soil contamination had been detected around the same drywell sites in 2013 (please see page 39 of 40 of the “Creekside Report”, written before the Company moved in during 2014, DEQ’s Exhibit A16). Mr. Richerson admitted that DEQ had not compared the Creekside Report soil contamination readings to the 2018 soil sampling results or analyzed whether or not it was anything the Company – as opposed to its predecessors at the site – had done that had caused the limited soil contamination. None of these facts found their way into the ALJ’s decision: in fact, the ALJ did not even acknowledge that any such evidence was ever presented, nor explain why the Company’s arguments contra were rejected.

Furthermore, though Mr. Sandoz testified for DEQ that plastic sheeting was not a permanent solution to prevent stormwater runoff from entering DW1, he did not say that the sheeting was not effective for the time being. (Please see the photo of the covered DW1 riser, the Company’s Exhibit 21A.) Mr. Anotta testified, without contradiction by any DEQ witness, that installing plastic sheeting was all that the Company, as lessee of the property, could do pending decision by the landlord regarding decommissioning of the drywells.

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1 Mr. Sandoz testified for DEQ that he saw stormwater flowing with an oily sheen from the Company property to the Sunbelt property on a particular day; the Company showed weather reports proving it was not raining that day in Portland.

2 In these respects, the Company takes exceptions to the statements of the ALJ contained at the bottom of page 10 of 54, at the bottom/top of pages 23-24 of 54, and at the lower part of page 45 of 54. Furthermore, in light of the Creekside Report, the Company takes exception to the ALJ’s footnote 8 on page 24 or 54, insofar as the conclusion stated therein that the hazardous substances found in the “subsurface of the DWs .... originated with the Company” is unproven and indeed contrary to the evidence.

3 The landlord was also charged by DEQ for the same underground injection systems violation, but DEQ refused to have the claim against the landlord tried at the same time as the claim against the Company. This piecemeal approach was unfair to the Company insofar as the Company is being punished, in part, for failure to take corrective actions it had no power to adopt, and without reference to the landlord’s shared responsibility for lack of knowledge regarding the existence of the drywells.
The Company asserts that it should not be required to pay any penalty for injection of hazardous substances that was more clearly caused by the Portland Fire Bureau\(^4\) than by the Company, to the extent it was caused by anyone, if indeed anything was proved by DEQ more than that the Company occasionally spilled scrap car fluids on the ground. If the Commission disagrees and upholds the decision of the ALJ to penalize the Company on the first charge, it should at least modify parts of the additional penalty assessed for aggravating factors (please see discussion of aggravating and mitigating factors generally on pp. 42-45 of the ALJ decision), to wit:

a. $2400 additional money assessed against the Company for “recklessly” committing the violation under aggravating factor “M” (mental state), figure “8”, is not justified, in light of uncontradicted evidence that the Company did not even know there were drywells on the property (and that the City environmental authority (BES) had, when asked by the Company to inspect the property before the Company began operations in 2014, not told the Company about the drywells). At most, an “M” value of “2” is more appropriate, which applies to a finding that the Company should have known about the drywell injection system. That would reduce the $4800 tacked on to $1200.

b. $600 extra sought by DEQ for the Company’s alleged failure to “address the violation” is not justified, given that the Company both repaired the DW1 Riser and the east property boundary berm and paid for soil sampling around the drywells (though ordered to do so by DEQ). Rather, the Company should be given some mitigating credit for “C” (correction), to the extent of “-2” at least insofar as the Company made “some efforts to minimize the effects” of the alleged violation. If the Commission agrees, the Company would not be assessed the additional $600, and would receive a $600 credit against the penalty.

Thus, the base penalty would be $6000, plus $2400 for “O” (ongoing) repeat occurrences (not contested by the Company), plus $1200 for “M” (mental state), minus $1200 for “C” (correction), a total $8400.

**Violation 2. Placing wastes where likely to enter groundwater.**

Even if it were proven by DEQ that the Company caused toxic/hazardous substances to be injected to soil via the drywells, still DEQ did not prove that the Company placed those substances in locations where they are likely to enter waters of the State. It is a long way from the drywells to groundwater, and a much

\(^4\) The Fire Bureau applied massive amounts of water to the site under high pressure. The water flows scoured the site, picking up surface soil contaminants that might have accumulated over a century or more. As mentioned previously, the fire fighters also gouged a hole in the dirt berm, which previously prevented eastward stormwater flow from the southern portion of the Company’s property to the Sunbelt property (from whence water might flow back westerly through the catchbasin system to the drywells on the Company’s property).
farther distance to any surface waters. Neither Mr. Richerson, nor any other DEQ witness, said more than that the Company had allowed stormwater runoff containing toxic or hazardous substances to enter the soil (either directly or through the drywells) from whence migration to state waters was “possible”. (Please see Mr. Richerson’s report, DEQ’s Exhibit A24 and see also DEQ’s “ENFORCEMENT REFERRAL – STORMWATER”, the Company’s Exhibit 4A.) Almost anything is possible: given evidence in the record of attenuation as distance from possible sources of contamination increased, there was wholly lacking any evidence that pollution of state waters had occurred or was “likely” to occur, as required by ORS 468B.025(1).

Absent proof that migration to state waters has occurred or is “likely”, that statute does not allow a penalty to be assessed against the Company.

**Violation 3. Mishandling of used antifreeze and used oil.**

The Company does not contest the ALJ’s assessment of penalty against the Company penalty for having mixed antifreeze and used oil in the past, except that the Company disputes the ALJ’s application of certain aggravating/mitigating factors. (Please see the ALJ’s decision on page 46 of 54. The ALJ ascribed a total 4 aggravating points, costing the Company $75 each. There is no basis for the finding the Company was negligent (“M” (mental state) factor “4”), as opposed to a finding that the Company should have known about the requirement (“M” factor “2”). And, because the Company stopped the mixing of used antifreeze and oil as soon as DEQ told it to do so, the Company should receive “-1” mitigating credit for having made reasonable efforts to ensure that the violation would not be repeated. If the Commission agrees, the total penalty assessment would be $825, instead of $1050.

**Violation 4. Unpermitted storage of excess waste tires.**

DEQ did not prove that the Company operated an unpermitted waste tire storage site because it did not show that the Company had on hand, at any one time, more than 1500 waste tires. (The Company is allowed to have on-site up to 1500 waste tires without obtaining a waste tire storage site permit, due to its “wrecking business” as an auto dismantler.) In this context, a “waste tire” is a defined term of art, meaning a tire no longer usable with a vehicle, not to be confused with a still serviceable used tire. DEQ showed only that more than 1500 tires were present, but Mr. Papinsick for DEQ admitted that he never made any effort to count waste tires separately from used tires. DEQ argued all of the tires on site were “waste tires” – this despite evidence presented that thousands of tires were sold by the Company wholesale to used tire resellers and at retail to customers directly, and despite Mr. Anotta’s testimony for the Company that tire sales were a major and regular source of Company revenues. DEQ argued that tires left in disorganized piles around the Company property could not be resold as usable tires because they were not segregated in sets of tires of similar size or
“identified”, but these facts do not show they were not saleable as used tires (and were not therefore “waste tires”) – given that every tire has embossed in its sidewall its size and salient characteristics, and given that the Company’s tire sales records showed hundreds of sales transactions involving less than a full set of four/five tires. (Please see the Company’s tire sale records, Exhibit R14). I surmise, frankly, that the ALJ may never have looked closely enough at any tire to have known about the embossed markings, and for that reason simply made false factual assumptions that it would be impossible for the Company to resell the tires as usable tires. However messily tires were stockpiled by the Company, those tires that were serviceable did not become “waste tires” because Company personnel did not get around to sorting them out more rapidly, particularly after the fire, and did not keep them in neat ricked piles. The manner of storage has nothing to do with whether or not the tires were still serviceable as tires. The regulation (OAR 340-065-0010(33) defining “waste tire” looks only to the physical properties of the tire itself, and not to anything else or any other factor.

The ALJ also supported the penalty assessment by reference to OAR 340-064-0010(34), which defines a “Waste Tire Generated in Oregon” (see ALJ decision at page 30 of 54). However, the ALJ wrongly misconstrued that regulation to mean that any tire recovered by the Company from a scrapped car at a wrecking yard was necessarily a “waste tire”. Why this is wrong is not easy to explain, but it is surely wrong. This is shown by reference to the general “waste tire” definition in OAR 340-064-0010 (33) and the context and purpose of the separate regulation in subpart (34). The only reason for that subpart (34) is because Oregon runs a program allowing people storing tires to receive reimbursement from the State of some costs, but not only for a “waste tire generated in Oregon” (see OAR 340-064, parts -0090 through -0170.) Nothing as to reimbursement is involved in this dispute. In subpart (34), the drafter intended only to make clear, as examples, that tires removed in Oregon by a tire retailer or auto wrecking yard were deemed Oregon tires – no matter where the tires originally came from – as opposed to imported tire casings where the retreading does not restore the tire. The subpart (34) regulation thus only determines who can and who cannot ask Oregon for reimbursement of costs. The drafter might have, to avoid confusion, inserted into subparts (34)(a) and (b) the word “waste” before the word “tires”, but the confusion is not real, but rather only contrived. Nothing in subpart (34) changes the fact that tires recovered by tire retailers and wrecking yards might or might not be “waste tires” – depending on whether or not the tires themselves are, in fact, still serviceable as tires – under the definition of “waste tire” in subpart (33) of the regulation. If DEQ really intended that all tires recovered by tire retailers or auto wrecking years were “waste tires”, it would have added that language directly to subpart (33), rather than using subpart (34) as some strange indirect run-around the usual requirement – that a “waste” tire be no longer usable as a tire. Thus, the idea that subpart (34) makes all tires recovered by tire
retailers and wrecking yards “waste tires”, including perfectly serviceable ones, is not plausible – given, again, the context and purpose of the regulation. If the ALJ were right, then tire retailers and wrecking yards could not, legally, resell their used tires at all, and many of the retailers and essentially all of the wrecking yards would go out of business. Again, the proof is uncontested that the Company in fact resold thousands of such tires at wholesale and retail.

ORS 459.715(2)(d) exempts any business with an auto dismantler certificate (like the Company) from the obligation to obtain a waste tire storage permit unless more than 1500 waste tires are being stored. DEQ has not proven that the Company ever had on hand more than 1500 “waste tires”. The assessment of penalty against the Company is therefore not supported by the evidence, and is based on legal error.

**Violation 5. Improper storage of waste tires.**

The ALJ found that the Company also violated OAR 340-064-0035, which regulation sets standards for the storage of waste tires. (The Company did not argue it met all those standards). However, that regulation does not apply, for the simple reason that the regulation, by its own terms, applies only to “permitted waste tire storage sites.” If the Company does not operate a “permitted” site because it did not need to have a permit, then it cannot violate the regulation. The regulation does not apply to the Company. To make the Company liable for violating this regulation is to read the word “permitted” out of the regulation.

Now, OAR 340-064-0015(2), the subpart that exempts the Company from the obligation to obtain a permit, does state that exempt persons “shall comply with all of the regulations regarding waste tire management and solid waste disposal”, but it is by no means clear to what other regulations this scanty cross-reference applies. Other parts of the same tire (064) regulation, parts (0040), (0052) and (0080), are not by their own terms limited to permittees or permitted sites – as is part (0035) – and the cross-reference might apply to those parts only. Furthermore, the word, “management”, as in “waste tire management”, used in the cross-reference clause of part (0015(2)), is not used in part (0035). So, by what logic is part (0035) implicated? Granted, the Company’s argument against liability for penalty on this charge may not be as strong as is the case with violations 1, 2 and 4 above, but still DEQ should make sure its own regulations are more clear before it assesses penalties for violation, and still the Company had sufficient reason to believe that exempt meant exempt. At the least, some part of the penalty assessed by the ALJ due to aggravating factors is not unjustified, in particular the additional $1600 tacked on in respect of a “reckless” mental state (“M”), which requires that a person both (1) consciously disregard an obligation and (2) behave in a way constituting a gross deviation from reasonable behavioral norms, or that the person acted or failed to act with actual knowledge of the requirement. Given that the Company believed in good faith that it was
exempt because it never had on hand more than 1500 waste tires at any one time, the full “8” figure for “M” (mental state) is unwarranted. At most, the “M” factor should be “2” (the person should have known of the requirement), which would make the penalty $2000 plus $1600, total $3600, rather than total $4800.

Violation 6. Unpermitted use of replacement shredding machine.

There is something profoundly wrong about assessing a penalty against the Company for operating without an air pollution permit a machine that made de minimus air emissions, far below the emission thresholds above which a permit is required, because the machine hardly ever worked at all. To understand this, it is most convenient to analyze emission thresholds and actual machine use numerically. DEQ calculated the machine would, if it were run 24 hours/day, 7 days/week, and 52 weeks/yr (168 hours/week or 8736 hours/year), generate more than 10 tons/yr of three particular air pollutants. (A permit is required only if the 10 tons/year threshold is exceeded.) In fact, however, the machine broke down so frequently that the Company was able to run the machine for a grand total of only 287 hours\(^5\) during the 30 weeks between August 2018, when the machine was installed, and the May 2019 hearing date before the ALJ, or an average of only 9.56 hours/week. Compare 9.56 hours/week actual machine operation to 168 hours/week maximum potential around-the-clock operation: the latter number is more than 17.57 times larger. Consider that, as to the three pollutants that might be emitted following round-the-clock operation in amounts exceeding 10 tons/year, per DEQ evidence (Exhibit A48), the 10 tons/year threshold would be exceeded by factors of only 1.928 for one pollutant (CO), 3.56 for the second (NOx) and 4.776 for the third (VOC). Since the 17.57 machine operation disparity factor is obviously much greater than any of the three excess pollutant threshold factors, the Company’s use of the machine did not, in fact, cause air emissions that came anywhere near exceeding the pollutant thresholds above which a permit is required. Put another way, multiply 47.76 tons (for VOC) by (9.56 div. by 168 = .0569) and it comes to 2.72 tons/year (or 1.569 tons over 30 months). This shows that the machine actually generated less than 1/5 of the 10 tons required before a permit must be obtained (or, if the machine had been run at the same rate for a whole year, just a little more than 1/4 of the required 10 tons). Obviously, with respect to the other two pollutants, the corresponding figures are lower.

This argument that the pollution thresholds for required permitting were not exceeded was made to the ALJ, who rejected it (on page 33 of 54) on the basis that Mr. Gravier testified for DEQ that there was no way for DEQ to limit operation to less than the maximum potential 8736 hours/year – this despite the evidence of much lesser actual use which the ALJ described as “definitive”; despite Mr. Anotta’s testimony that the

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5 Please see the Company’s Exhibit R20.
Company – which could not afford after the fire to pay $7200 for the permit and should never have had to pay for it – was willing at all times to limit its shredder machine use so that the pollutant thresholds were not exceeded; despite OAR 340-216-8010, Table I, B85, and OAR 340-200-0020(124)(b), which both specifically allow for a pollutant emission calculation not based on maximum potential 24/7/52 usage where a lesser use limitation is “enforceable”; despite the actions of DEQ itself in imposing a usage-time limitation on the use of the machine before 8:00 o’clock or after 17:00 o’clock (see DEQ’s Exhibit A47); and despite the fact the machine itself had a visible counter that displayed at all times cumulative hours of machine usage, making checking for compliance with a usage-time limitation a simple matter (please see the Company’s Exhibit R20). All of this evidence was rejected by the ALJ on the basis only of Mr. Gravier’s testimony that no use limitation would be enforceable, although Mr. Gravier testified to no reason or basis supporting this extraordinary assertion. Why could DEQ not sue the Company in court for breach of an agreement as to hours of maximum use? (Perhaps DEQ could not force the Company to agree in the first place, but if the Company did so agree, I can’t imagine why an agreement would not be enforceable.) Again, since the machine itself displays a cumulative use/hour counter, proving/disproving compliance with a usage-time limitation would be simple.

Even if what Mr. Gravier said were true, why would DEQ have in place such an approach to persons causing relatively insignificant air emissions, and not instead have in place some system of enforcing a usage-time limitation such that the Company would not have to pay for a permit it would not otherwise need?

If the Company is nevertheless held subject to a penalty assessment for this alleged violation under these bizarre circumstances, surely the “magnitude” under OAR 340-012-0130(4) of its violation was shown to be “minor”, based on 9.56 hours/week usage over only 30 weeks, generating only a small fraction of the maximum potential usage (287 div. by 8736 = 03.285% or .033285, which times 47.76 tons (VOCs) works out to 1.569 tons emitted over 30 weeks – as compared to the 10 tons/year threshold. The figures for the other two pollutants are obviously even lower. This is by any standard “minor” – not even considering the facts that DEQ had ordered the Company to clear the site of fire debris and that shredding of the burnt scrap cars was the only way to accomplish this task. Designating magnitude as “minor”, rather than “moderate”, naturally reduces the penalty by half, including the amounts tacked on for aggravating factors (but excluding economic benefit, which is not affected), from $4800 to $2400, plus $5365.

Furthermore, as to aggravating factors, it seems altogether unfair to apply for “M” (mental state) an “8” (reckless/gross deviation) figure in these circumstances, when the Company had every reason to believe a permit was not required. The Company was loath to pay $7200 for a permit (money it did not have after the
fire completely destabilized its finances and while at the same time the Company had to pay for lawyers and engineers to deal with the consequences of the fire, including DEQ’s demands), while at that time the Company was learning that the replacement shredding machine might very well have to be replaced itself before too long. Would the Company have to pay again for another permit in that event? To hold that the Company’s failure to pay for the permit was, under these circumstances, a “gross deviation” from normal behavior seems to me simply grotesque. An “M” figure of “8” equates to an additional $1600 penalty – or $800 more if the Commission agrees the “magnitude” was “minor”. An “M” figure of “0” is much more appropriate; at the most it should be “2” (the person should have known).

**Violation 7. Non-compliance with RAO deadlines.**

DEQ alleged, and the ALJ agreed, that the Company should be punished for missing the deadlines promulgated in DEQ’s Removal Action Order (“RAO”) (DEQ’s Exhibit A17) in March 2018, purportedly requiring that (1) all fire debris be removed within 5 days after DEQ approval of a Work Action Plan (the “Work Plan”) (DEQ’s Exhibit A18) prepared by the Company’s hired engineer consultants and finally adopted by all parties, including DEQ, on July 12, 2018, and that (2) all soil sampling be completed within 10 working days after adoption of the Work Plan. First of all, the RAO requires, in respect of fire debris removal, only that the Work Plan be “implemented” within 5 days (on p. 6 of the RAO), not that debris removal be “implemented and completed”, which is the language used in the RAO with respect to soil sampling on p. 7. Thus, with respect to fire debris removal, there never was any deadline for completion set in the RAO.

Furthermore, with respect to both debris removal and soil sampling, DEQ’s allegation fails in light of the plain conclusion that the purported RAO deadlines, promulgated in March 2018, were superseded by the Work Plan approved by all parties months later in July – the Work Plan itself becoming the governing document, as contemplated and required by the RAO. In no part of the Work Plan (which was of course approved by DEQ) is any reference made to any 5- or 10-working-day deadline. The Work Plan contains no schedule at all for the completion of the various mandated tasks, among them removal of fire debris (mostly the remains of burnt cars, most of them molten/fused together, referred to in the Work Plan as “stockpiled car husks”), and submission to DEQ of laboratory soil sampling results – all of which tasks were to be completed.
generally as soon as reasonably practicable\textsuperscript{6}. It is clear from the treatment in the Work Plan of specific tasks and from the overall context of the Work Plan that the 5- and 10-day RAO deadlines were not even feasible, much less legally binding. For example, on page 4 of 17 of the Work Plan, it is clearly stated that on-site soil sampling will necessarily be delayed until after the stockpiled car husks and overlying debris materials are first moved out of the way to allow access, with the actual collection of soil samples to be staged as car husks are moved from one soil sampling area to another – then followed by compositing of collected samples, followed by transmission to the laboratory, followed by laboratory processing, followed by receipt of results from the laboratory, followed by submission of results to DEQ. The notion that all of this would be accomplished – or particularly that DEQ still expected or demanded that this would be accomplished – within 10 working days is contrary to all the evidence and all common sense. The fact that soil collection did not take place until July 19 and July 30, with results not available until dates ranging from July 23 to August 23 – all while contact was maintained with DEQ personnel and who said nothing to the effect that there was any imminent deadline for completion – belies DEQ’s current allegation.

Returning to removal of fire debris, the Company asserts, again, that it was required under the RAO only to “implement” the Work Plan within 5 days – and the Work Plan itself sets no particular date for complete removal of all car husks. It was never intended, and never ordered by DEQ, that the Company complete removal within such a short period. That would have been simply impossible. The Work Plan (p. 3 of 17) calls for shredding of the car husks, followed by off-site transportation, “upon delivery and installation of a replacement shredder”. As shown in the Shredding Machine Breakdown Schedule, the Company’s Exhibit R19, the replacement shredding machine did not even arrive until July 19, 2018 (but unaccompanied by necessary components), and could not be first operated until August 20. Reference to the dismal story of its subsequent dysfunction has already been made. During the time after August 20, the Company desperately tried to save its business, keep its employees engaged in processing a continuing stream of scrap cars so that it could keep them busy and not have to lay them off, and so that it could generate some revenue

\textsuperscript{6} The first of the tasks contemplated by the RAO and Work Plan undertaken was to inspect the UIC’s and related catch basin system and to sample soils (1) within and around the UIC’s and (2) also on the neighboring property located to the west of the Company’s property. All of this was discussed with DEQ personnel before and during the performance of these tasks, and DEQ representatives were usually, though not always, present on-site. These tasks were tackled first because it was not necessary to clear much fire debris (“stockpiled car husks”) before those first tasks could be accomplished. Even for those first tasks, nothing was – or could feasibly have been – completed within the 10-day period to which DEQ now seeks to hold the Company.
mostly from tire sales), and at the same time clear with a faltering shredding machine the debris left after the fire and also hire and pay for environmental consultants and engineers, not to mention lawyers, in order to comply with the RAO and Work Plan. NWM did the best it could. The notion that the Company has gone about its own business with no concern for DEQ’s requirements, which notion pervades the ALJ’s decision, is far from the truth.

At all times since the March 2018 fire, DEQ’s representatives were at all times kept fully informed. Scheduling was always a work in progress, a shifting compromise of good intentions and diminished capabilities, and was never set in stone. Please see the message sent by DEQ September 10, 2018 to the chief officers of the Company (Anotta) and of the consulting engineer firm, AKANA (Hosaka) (filed by the Company as Exhibit R22), which message acknowledges NWM’s “good faith effort to meet the scope of work”, “hampered” by “a series of logistical problems”. From there DEQ jumped directly to its First Amended Notice of Penalty Assessment in December to add its new RAO deadlines-missing allegation and new Exhibit 7.

The charge is unfounded that the Company violated the RAO that it is still in the process of completing.

The Company renews its denial that it committed any violation, but it does not contest the ALJ’s decision that this violation, if sustained, should be adjudged a “Class I” violation under the $12000 “penalty matrix”. The violation magnitude should be considered “minor” because the resulting delays, while frustrating to everyone, have not created any kind of new or additional harm. Aggravation by a “4” factor in

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7 Shredding the burnt cars has proven to be hard to accomplish – and very hard as well on the shredding machine – because the material, much of it molten and fused, is much more dense than are normal cars before burning. After the fire the Company tried to arrange for shipment of car husks off-site, without shredding first by the Company, but no one else wanted the material. Many of the burnt cars could not even be shipped out, at any price, because they are so misshaped that they could not fit safely/securely on the backs of truck trailers.

8 This spring, as the rain finally decreased and the ground began to dry, making practicable removal of overlying dirt and debris necessary to prepare the site for remaining soil sampling, the Company set aside for almost an entire month its normal business of processing scrap cars in order to work exclusively on shredding and removing burnt cars. This was done in order to complete the soil sampling task without further delay. The first batch of on-site soil samples (non-UIC-related) were collected on May 13, 2019. Since then, a report detailing progress under the RAO was prepared by the Company’s environmental engineers and submitted to DEQ in September.

9 Unfortunately, this email was not sent to the lawyers for either the Company nor the landlord, though the lawyers had all been in regular contact with DEQ since the RAO was issued, and unfortunately the email was not shared by Anotta or Hosaka – otherwise a new agreement and order would surely have been worked out, disclosing all parties’ positions and clearing up any confusion. Before that, DEQ may have prepared the letter dated August 21, 2019 claiming that the Company and its landlord had violated the RAO (see DEQ’s Exhibit A25), about which letter Mr. Greenberg for DEQ testified, but neither Mr. Anotta nor his lawyer, nor the landlord nor the landlord’s lawyer, ever received a copy.
respect of “O” (ongoing) is unjustified insofar as multiple day-occurrence counting is particularly inappropriate where there is no fixed deadline, no cumulating discrete daily harm, and where the totality of the delay is the only conceivably fair basis for the violation. Additional aggravation by an “8” factor in respect of “M” (mental state) is belied by all the evidence showing the Company has struggled “in good faith” to complete the work as soon as possible. Equally unjustified is the “2” aggravating factor ascribed to “C” (correction) for failure to address the violation. Finally, considering that (1) tremendous sums have been spent by the Company for environmental consulting engineers, two different soil sampling firms, multiple soil sampling laboratory reports (plus lawyers’ fees, lost operating revenue and increased operating costs) and that the Company had by the time of the hearing (2) removed some 95% of the burnt cars and (3) accomplished some, say, 80% of the soil sampling, the Company clearly deserves some substantial mitigation credit in respect of “C” (correction), say at least “-3”, if not “-5”, under OAR 340-12-0145(6). The ALJ tacked on 14 combined units of aggravating factors, each in the amount of $600, and totaling $8400, added to the base penalty of $6000. Rather, the aggregate penalty should be decreased from $14,400 to $3000 ($6000 base less five times $600 for “C” (correction)).

Other Failings of the ALJ.

There are two other things done by the ALJ that were wrong and, I fear, though I did not attend the hearing personally, harmful to the Company. The Commission should be aware of these things, though they do not bear directly, necessarily, on the various specific issues raised in this brief.

First, the ALJ refused to accept submission by Mr. Anotta of a Hearing Brief I wrote for him to submit. There was absolutely no proper legal basis for the ALJ to refuse even to look at the brief: only proposed exhibits that would be evidence had to be submitted by a date preceding the hearing, but not briefs, which are routinely submitted in Oregon the day before a hearing date. After the first day of the hearing I specifically had Mr. Anotta submit a motion for the ALJ to reconsider that refusal, pointing out the utter lack of legal basis for the ALJ’s action, and still the ALJ would not allow submission of the brief. Imagine the situation facing Mr. Anotta, who could not afford a lawyer to be there, lacking a written document presenting the Company’s positions on the many different issues in a coherent, reasoned way.

In refusing even to look at the Company’s brief, the ALJ failed in her duty under ORS 183.417(8) to “ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues ... and the correct application of the law to those facts”. It was tremendously unfair for the ALJ to reject the submission, which was after all just argument (not evidence) in written form, particularly when Mr. Anotta was there alone without a lawyer while DEQ was represented by Ms. Vance. I

Item F 000056
personally struggle to understand, even now, what the ALJ was thinking: according to Mr. Anotta, the ALJ gave no reason for the exclusion, neither at the outset nor after there was a filed the Motion for Reconsideration. One would expect that the ALJ would, in a complicated case, welcome all the available help, particularly because the rejected brief was also accompanied by copies of all of the statutes, regulations and exhibits cited in the brief, all in order making the submission easy to follow. Had the ALJ read it, I think it less likely that the ALJ would have so frequently misunderstood particular details contained in Mr. Anotta’s testimony – and, most of all, might not have so readily rejected arguments made by Mr. Anotta, out of hand, without even bothering to explain in the decision the ALJ’s reasons for rejection. These kinds of things happened an awful lot with this ALJ’s decision, much more than normal.

Second, the ALJ included in the decision on page 9 of 54, footnote 5, an extraordinary passage stating that:

“The Company frequently asserted that the Company did not cause the fire. That assertion is not necessarily accurate. Portland Fire could not determine the cause of the fire, which does not eliminate the Company as the potential cause. Portland Fire eliminated the Arjes shredder as the ignition source based upon the Company’s representation that the machine had not been used during the past week. The evidence established that representation was false, which makes the Arjes shredder the possible source of ignition.” (emphasis added)

The ALJ never identified the evidence establishing the conclusion stated in the last sentence that the Company’s representation was false. There is absolutely no such evidence in the record, to my best knowledge. The ALJ did not refer again to the cause of the March 2018 fire in the written decision. I cannot tell whether the ALJ meant to say (and was thinking) that the Company caused the fire, or only that it lied about the cause of the fire, but I’m not sure there is much difference between the two. Either way, this was a highly suspect and, if you will, combustible statement to have made part of the decision. It is strongly indicative of bias, of unreasoned antagonism, against the Company. That the ALJ awarded against the Company every penny sought by DEQ, down the line, supports this supposition. There was not one single ruling, not one single thing sought and denied, against DEQ.

I raise these two things about the ALJ but do not propose that the Commission take any particular action in response, other than to urge the Commission to devote as much time and attention to this
complicated and challenging case as the Commission can muster – and not to assume the ALJ has impartially, fairly, or carefully already sifted through the details.

DATED: September 27, 2019

Respectfully submitted,

Adam Kimmell (OSB 915176)
Attorney for Respondent
NW Metals Inc.
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing
NW METALS BRIEF AND EXCEPTIONS ON REVIEW

on:

Department Environmental Quality
Attn: Courtney Brown, Environmental Law Specialist
700 NE Multnomah St., Suite 600
Portland, OR 97232

by causing a full, true, and correct copy thereof, addressed to the last-known office address of
the attorney (except when served by fax), to be sent by the following indicated method or
methods, on the date set forth below:

[ xx ] by hand-delivery.

DATED: October 28, 2019

Jedidah Anotta
BY CERTIFIED MAIL

Oct. 1, 2019

Moyata Anotta
NW Metals, Inc.
7600 NE Killingsworth Street
Portland, Oregon 97218

Re: In the Matter of NW Metals, Inc.
OAH Case No. 2018-ABC-02082
DEQ Case No. WQ/SW-NWR-2018-063.

Hello,

The Oregon Environmental Quality Commission received your request for commission review on Sept. 27, 2019. Your request was received in a timely manner. Per the administrative rules guiding this process, you have 30 calendar days from the date of the initial filing to file your Exceptions and Brief. That date is a Sunday, so the materials are due received by 5 p.m. on the next business day, Monday, Oct. 28, 2019. This is a required filing in the contested case process.

A copy of the Oregon administrative rules guiding this contested case process is enclosed with this letter. These rules outline the specific items and components for your Exceptions and Brief and other documents in this contested case process.

Please send your exceptions and brief to Stephanie Caldera, EQC assistant, at 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232, with a copy to Courtney Brown, Environmental Law Specialist, at the same address.

Once both parties have filed all briefs in this process, this case will be scheduled at a regular commission meeting.

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

Sincerely,

Stephanie Caldera
Assistant to the Oregon Environmental Quality Commission

Enclosure: Copy of OAR 340-011-0575

Cc: BY HAND DELIVERY – Courtney Brown, DEQ Environmental Law Specialist

Item F 000060
Oregon Administrative Rules governing contested cases before the Oregon Environmental Quality Commission

OAR 340-011-0575

Review of Proposed Orders in Contested Cases

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

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

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

(4) Procedures on Review:

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

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

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

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

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

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

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

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

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

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

Stats. Implemented: ORS 183.460, 183.464 & 183.470
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 115, f. & ef. 7-6-76; DEQ 25-1979, f. & ef. 7-6-79; DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0132 by DEQ 18-2003, f. & cert. ef. 12-12-03; DEQ 5-2008, f. & cert. ef. 3-20-08
BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:)
) NWM PETITION FOR REVIEW
) )
) )
) )
) Respondent.
) )
) ) DEQ CASE NO. WQ/SW-NWR-2018-063
) ) MULTNOMAH COUNTY
) ) OAH Case No. 2018-ABC-02082

NW Metals Inc ("NWM") hereby timely petitions for review by the Environmental Quality
Commission of the PROPOSED AND FINAL ORDER issued by ALJ Samantha Fair in this case and served
on NWM on August 29, 2019. NWM intends that the Commission review the proposed order. NWM will
file with the Commission Exceptions and Brief within the next 30 days.

A copy of ALJ Fair's decision is attached hereto.

DATED: September 27, 2019

Respectfully submitted,

Moyata Anotta
On behalf of NW Metals Inc.
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing NWM PETITION FOR REVIEW on:

DEQ
Office of Compliance and Enforcement - Appeals
700 NE Multnomah St., Suite 600
Portland, OR 97232

by causing a full, true, and correct copy thereof, addressed to the last-known office address of the attorney (except when served by fax), to be sent by the following indicated method or methods, on the date set forth below:

[ xx ] by mailing in a sealed, first-class postage-prepaid envelope and deposited with the United States Postal Service in Portland, Oregon.

[ xx ] by sending an electronic copy to the recipient by email at DEQappeals@deq.state.or.us.

DATED: September 27, 2019

Moyattia Anotta
Ms. Caldera-

During our phone call yesterday you advised that you might be willing to circulate among the EQC members a corrected version of NW Metals' reply brief that does not contain a few typographical errors that, unfortunately, were not caught by me before filing on January 30. The version attached shows the changes made from that original text.

Adam, Kimmell
BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF: )  NWM REPLY BRIEF
NW Metals Inc., 
an Oregon corporation, )
)  DEQ CASE NO. WQ/SW-NWR-2018-063
Respondent. )  MULTNOMAH COUNTY
)  OAH Case No. 2018-ABC-02082

NW Metals Inc (the “Company”) stands by its assertions made in its October appeal, though Courtney Brown makes some good points in opposition on behalf of DEQ. In this reply I focus on a few of the contested issues, specifically concerning those penalty assessments that are most clearly unfair to the Company, as to which DEQ’s contrary arguments are least adequate. These are as follows:

Violation 4. Unpermitted storage of excess waste tires. The $7,600 penalty assessed for unpermitted storage of excess waste tires (alleged violation #4) should be reduced to $0. This penalty was assessed because DEQ argued, and the ALJ found, that there were more than 1500 “waste” tires stored on-site (the Company, as a licensed wrecking business, was allowed to have on hand up to 1500 waste tires.) However, both DEQ and the ALJ were mistaken insofar as they failed to distinguish waste tires from still serviceable used tires – but rather unlawfully maintained that all of the on-site used tires were “waste” tires.

Imagine big piles of used tires kept on the Company’s property, the size of the piles waxing and waning over time as the Company continuously brought in hundreds of scrap cars for processing and also periodically sorted tires removed from scrap cars and either sold them by the 4 or 5 hundreds to others if they were good-enough used tires – generating about 25% of the Company’s revenues – or, if the tires could not be re-used, shipped them at a nominal cost in substantially smaller numbers to licensed recyclers for disposal. What happened is that DEQ counted all of these used tires, in the piles, as “waste” tires, when in fact most of them were still serviceable – making no effort to exclude those tires from its count to 1500. The ALJ found likewise, also simply assuming that all tires not kept in neat marked sets of 4-5 matching-size tires could not be resold for re-use (I speculate that the ALJ did not know that all tires have their dimensions and characteristics embossed in the rubber itself, so that even the most messily-stored tires can be readily sorted into matching sets). However, in doing so, DEQ and the ALJ ignored the DEQ regulation defining a “waste
tire” (OAR 340-064-110(33) as simply a tire no longer “suitable for its original intended purpose”, i.e., no longer usable as a vehicle tire. Under that definition, obviously, a still serviceable used tire is not a “waste” tire. Also, under that definition, tires are not rendered “waste” when they are stored in messy piles or in unmatched sets.

The penalty assessment also relied on a second justification, which is equally faulty. This has to do with the separate definition of a “waste tire generated in Oregon” set forth in OAR 340-064-0010(34). I wrote about this on pp. 5-6 of the appeal brief, and ask the EQC to re-read that paragraph, rather than unpack again the long argument. I assert that the meaning given that regulation by DEQ – and adopted by the ALJ – is clearly wrong for five reasons:

1. Applying the subpart (34) regulation ignores its context insofar as the regulation is intended only to determine which kinds of waste tires qualify their recyclers for reimbursement by the State of Oregon of certain recycling costs – and not to define further what is or is not a “waste” tire.

2. If the subpart (34) regulation applied, it would prevent altogether the reselling of tires recovered by wrecking yards from scrap cars or by new-tire sellers from customers, making unlawful the transactions engaged in every day by thousands of business concerns, including the Company. That no one ever prosecutes these business concerns for this purported violation shows that the subpart (34) regulation does not mean what DEQ says it does.

3. Note that, if what DEQ says were true, the subpart (34) regulation would allow resales of tires removed from cars by wrecking business outside Oregon – but not if the tires were removed in Oregon. The subpart (34) regulation would also not reach tires accepted by an Oregon tire reseller in exchange for replacement tires sold that were not new. This makes no sense at all. This kind of illogical mismatch is a strong sign that DEQ’s construction is not tenable.

4. The subpart (34) regulation greatly expands the numbers of waste tires far beyond the scope of the clearly applicable and primary “waste tire” definition in subpart (33), without ever even making reference to that subpart (33) definition. If the two regulation subparts were meant to be connected (i.e., that both had to be consulted to determine what is or is not a “waste” tire), then why are there two separate regulations that do not mention each other? Who would promulgate regulations employing such a confused mechanism?

5. DEQ’s reading of the subpart (34) regulation, making into “waste” tires used but still serviceable tires recovered by a wrecking yard, contradicts the subpart (33) definition, which simply and clearly excludes “suitable” used tires.
The notion that all of the Company’s used tires on hand, stored pending resale, counted as “waste” tires because the Company was an auto wrecking yard must be wrong and is clearly contrary to law. It’s true, as DEQ states in its answering brief, that DEQ has some discretion to construe its own regulation, but indubitably this is an erroneous interpretation of subpart (34), outside the range of discretion, and altogether inconsistent with subpart (33).

**Violation 6. Unpermitted use of replacement shredding machine.**

The $10,165 penalty assessed against the Company for not having obtained an air emission permit (alleged violation #6) should be reduced to $0. The Company’s argument that it did not violate the permitting requirement because it was not required to get a permit is set forth on pp. 7-9 of its appeal brief. The Company makes the following arguments:

1. The shredding machine broke down so often and was used so relatively little (an average 9.56 hours/week only) that its use did not produce air emissions anywhere even remotely near the 10 tons/year permitting threshold (below 10 tons/year no permit is required),

2. The pertinent regulation (OAR 340-216-8010, Table 1, B85) sets the permitting threshold keyed to round-the-clock machine operational capacity (i.e., for 24/7 = 168 hours/week X 52 = 8736 hours/year), but only “if the [polluting] source were to operate uncontrolled”. Thus, as the Company argues, under this clause if use were limited to a lesser number of hours (or if emissions were otherwise “controlled”), then the 8736 hour/year measuring convention would not apply. Rather, one would look to the calculated per-hour emissions for the pollution source, multiplied by the Company’s total allowed hours of usage over a year, and if the product were less than 10 tons/year for all criteria pollutants, then no permit would be required. DEQ argues that the same regulation has a different meaning: that “if the source were to operate uncontrolled” really means that one must ignore any limitation. In my opinion DEQ is twisting the meaning of the clause, which, if it really meant that no limitation mattered would simply say that much more clearly, But let’s assume this particular wording is ambiguous. The problem for DEQ is that DEQ fails, in its answering brief, to address the other regulation cited in the Company’s brief that also applies.

3. This other regulation shows that the Company’s argument is correct. OAR 340-200-0020(124)(b) defines “Potential to Emit” as follows:

   “Potential to emit: or “PTE” means the lesser of:
   (a) The regulated pollution emissions capacity of a stationary source”; or
   (b) The maximum allowable regulated pollution emissions taking into consideration any physical or operational limitation, including use of control devices and restrictions on hours of operation . . . , if the
limitation is enforceable by the Administrator.”

This second definitional regulation shows how the arguably ambiguous clause, “if the source were to operate uncontrolled” in the first regulation should be read: to provide an exception to the assumed 24/7/52 hour usage presumption in measuring total emissions against the permitting threshold. It supports explicitly the Company’s construction of the clause and clearly shows that DEQ cannot just ignore the idea of limiting hours of usage in calculating emissions – not consistently with the second definitional regulation.

Here, at the per-hour-usage emission rate calculated by DEQ for the machine source (47.76 tons/year div. by 8736 hours/year), the Company’s actual 9.56 hour/week usage generated only some 1.569 tons over 30 months (annualized at 2.72 tons/year) for VOC’s, as compared to the 10 tons/year permitting threshold – the amounts are even less for the other pollutants emitted (CO and NOx). Usage could be increased by a factor of up to 3.67 (an average 35 hours/week) and the total VOC emissions for the year would still not reach 10 tons/year.

The Company offered several times to limit hours of machine use; DEQ refused to entertain the idea, insisting erroneously that only maximum emission capacity (at 8736 hour/year usage) mattered or that a limitation could be enforced only if a permit were issued (after, of course, the Company first paid for the permit). However, it seems to me that an agreement between DEQ and the Company limiting hours of use would be fully and readily “enforceable by the Administrator”, like any other binding contract, particularly because the shredding machine is equipped with a built-in counter that keeps a running tally and displays total historical hours of use that could be easily reported/checked anytime. There could be no doubt whether or not the Company violated an agreed-upon usage limitation. DEQ’s argument that DEQ could not force upon the Company a usage limitation except through the permitting process fails because, again, the Company was always willing to enter into any such agreement.

Even if the Company were wrong about not needing a permit, and if DEQ and the ALJ were right to impose the penalty assessment, the amount of the penalty should be reduced by $2400 from $10,165 to $79365 because the “magnitude” of its alleged violation was “minor” and not “moderate” insofar as, again, the actual emission amounts were only a small fraction of the 10 tons/year permitting threshold. An additional penalty reduction of up to another $2400 is also fair because the Company had good reason to believe in good faith that a permit was not required – hence an “M” 8 point aggravation score based on a “gross deviation” from normal behavior was not warranted in these circumstances.

Violation 2. Placing wastes where likely to enter groundwater.

Item F 000070
The $6,600 penalty assessed against the Company for placing wastes where likely to enter groundwater (alleged violation #2) should be reduced to $0. Please see the Company’s appeal brief on pp. 3-4. This penalty was imposed in addition to the $14,400 penalty imposed for using/storing hazardous substances in the vicinity of its drywells – though the Company asserted in its appeal brief (pp. 1-3) various reasons why that assessment was not warranted, including the facts that the Company obtained guidance from the City of Portland Environmental Services before it began operations and BES did not say anything about the drywells and that the Company, as a mere tenant, had no authority to shut down the drywells. Obviously, the two alleged violations are related, insofar as both are intended to protect groundwater and the relevant evidence of the Company’s business practices, stormwater surface runoff flow, and the condition of the soil under and near the drywells, as tested currently and in the past, is the same for both alleged violations. In my opinion, imposing two separate penalties here constitutes double punishment for essentially the same purportedly harmful conduct. However, putting aside that argument, I focus now only on the alleged “placing wastes where likely to enter groundwater” violation.

The Company repeats its argument that DEQ did not prove that groundwater contamination was “likely”, only that eventually there might be some impact on groundwater. This failure of proof is clearly demonstrated by DEQ’s Exhibit A24 and the Company’s Exhibit 4A, where the documents prepared by DEQ state only that impact on groundwater is “possible”. Nothing mentioned in DEQ’s answering brief on this point on page 8 or 18 shows otherwise: the testimony of P. Richerson and D. Sandoz, DEQ employees, as described in DEQ’s brief, speaks only to possible groundwater contamination that could happen through downward soil migration or UIC injection – and emphatically not to actual or even “likely” contamination. The Company does not, as argued by DEQ, “ignore” the testimony of these gentlemen. Rather, DEQ argues they said more than they ever in fact did.

Almost anything is possible: but given evidence in the record of attenuation as distance from possible sources of contamination increased, there was wholly lacking any evidence that pollution of state waters had occurred or was “likely” to occur, as required by ORS 468B.025(1). Absent proof that migration to groundwater has occurred or is “likely”, that statute does not allow a penalty to be assessed against the Company.

Aggravating/mitigating factors in general.

1 In fact, the landlord and DEQ separately agreed in recent months after the hearing with ALJ Fair was held that one of the two drywells would be shut down and that a filtration system would be installed in the pipes leading to the other drywell, thereby preventing further contamination of the soil under and around the drywells (UIC’s).
The last subject I will address is to address the portions of the penalty assessments that were not “base penalties” for the alleged violations, but were rather tacked on to the base penalties to punish the Company further because aggravating factors also were found. The numbers are as follows: $23,750 were assessed as base penalties, while $29,900 were assessed as additional aggravating factor penalties. These assessments were as follows:

<table>
<thead>
<tr>
<th>Violation no.</th>
<th>Base penalty</th>
<th>Aggravating factor penalty</th>
<th>Economic benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (UIC’s)</td>
<td>6000</td>
<td>8400</td>
<td></td>
</tr>
<tr>
<td>2 (Groundwater impact)</td>
<td>3000</td>
<td>3600</td>
<td></td>
</tr>
<tr>
<td>3 (Antifreeze mishandling)</td>
<td>750</td>
<td>300</td>
<td></td>
</tr>
<tr>
<td>4 (Excess waste tires)</td>
<td>4000</td>
<td>3600</td>
<td></td>
</tr>
<tr>
<td>5 (Tire storage)</td>
<td>2000</td>
<td>2800</td>
<td></td>
</tr>
<tr>
<td>6 (Air pollution permit)</td>
<td>2000</td>
<td>2800</td>
<td>5365</td>
</tr>
<tr>
<td>7 (RAO non-compliance)</td>
<td>6000</td>
<td>8400</td>
<td></td>
</tr>
</tbody>
</table>

The Company argues that all or much of this $29,900 assessed in respect of bad “mental state” (“M”) factor was not warranted in the circumstances and were, thus, imposed contrary to law. The precise reasons why it was found that the Company’s officers’ “mental state” (“M” factor) was graded at “8” due to “reckless” conduct or intentional disregard of a known requirement. That portion was assessed as follows:

<table>
<thead>
<tr>
<th>Violation no.</th>
<th>Aggravating factor penalty</th>
<th>Due to “M” (“8”) factor</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (UIC’s)</td>
<td>8400</td>
<td>4800</td>
</tr>
<tr>
<td>2 (Groundwater impact)</td>
<td>3600</td>
<td>2400</td>
</tr>
<tr>
<td>3 (Antifreeze mishandling)</td>
<td>300</td>
<td>0</td>
</tr>
<tr>
<td>4 (Excess waste tires)</td>
<td>3600</td>
<td>3200</td>
</tr>
<tr>
<td>5 (Tire storage)</td>
<td>2800</td>
<td>1600</td>
</tr>
<tr>
<td>6 (Air pollution permit)</td>
<td>2800</td>
<td>1600</td>
</tr>
<tr>
<td>7 (RAO non-compliance)</td>
<td>8400</td>
<td>4800</td>
</tr>
</tbody>
</table>

Another $5,365 (making the total $59,015) was assessed for the economic benefit to the Company for not having to pay for an air pollution permit. Except as argued above that no such permit was required, which argument if accepted by EQC would mean that the Company would not have to pay the $5,365, I do not challenge the economic benefit assessment.
this is so differ somewhat for each alleged violation, and, rather than restate all of the arguments made in the Company’s appeal brief I will, rather, respectfully request that the EQC members consult the brief details. I also recommend that the ALJ’s opinion contains a clear explanation on pages 42-45 of 54 of how aggravating/mitigating factors are supposed to be assessed. I wanted, however, to make a few points:

1. The mental state factor assessments (along with other aggravating factor assessments) are imposed in addition to the base penalties for the violations.

2. Except for alleged violation no. 3, DEQ and the ALJ graded the Company’s mental state at the “8” level, finding that there was “reckless” conduct or intentional disregard of a known requirement. This conclusion was not appropriate on all the evidence. In all cases, the Company either did not know it had to do something (such as with the UIC’s) or believed in good faith and for legitimate reasons that it was not legally required to do something (such as with obtaining the air pollution or waste tire storage permits). In these instances an “M” grading of “2” in respect of “constructive knowledge (reasonably should have known) of the requirement” is the most that is accurately ascribed to the Company’s conduct. Even a “4” grading in respect of “conduct [that] was negligent” is a stretch. Certainly, an “8” “M” grading, for reckless/grossly deviational conduct or intentional/knowing misconduct is far from the mark on all the evidence.

3. Where the Company made known to DEQ its disagreement as to legal requirements (such as regarding the air pollution or tire storage permits), the fact that DEQ told the Company it was required to take actions does not, of course, render the Company’s mental state any more egregious.

4. The March 2018 fire was a financial disaster for the Company. It could not prevent the Fire Department from scouring the landscape with high-pressure water hoses or dousing portions of the site with potentially hazardous fire-retardant chemicals. The primary task of clearing fire debris could not possibly be done all at once, not given the facts that the only way to remove the burnt cars was to shred them with a replacement shredding machine that kept breaking down as it labored cutting through metals made much more dense by the burning. No debris clearing could have been paid for by the Company unless it also at the same time was able to generate revenue from maintaining some semblance of its pre-fire operations, which revenues were needed to pay for the shredding machine, to pay rent for the site, to keep its long-time personnel employed, and to hire engineers and other people to do other work required by DEQ. In that respect DEQ’s continuing complaints about the Company bringing on-site more scrap cars after the fire miss entirely the essential point. Furthermore, the Company and its landlord were working at all times in close coordination with DEQ, with which there was no actual expectation/agreement that all work would or could be accomplished within the purported five- or ten-day deadlines set forth in the RAO. Finally, the
Company’s dire financial situation made impossible taking all remedial actions at the same time. There is no real basis to infer from the resulting circumstances that such delays as ensued were due to the Company’s indifference to environmental concerns.

Finally, the Company asserts that it is due, against the penalty assessments, some credit for actions it has taken to mitigate or remediate the damage resulting from the fire. It has spent tens of thousands of dollars to pay for environmental engineers, soil-testing workers, and wages of employees performing clean-up tasks. The regulations governing aggravating/mitigating factors allow for mitigating credits (please refer to page 44 of 54 of the ALJ’s decision.) Except with respect to alleged violation #3, no mitigation credits were awarded. This is grossly unfair to the Company and contrary to law. If EQC agrees, the way it would work is for EQC to (1) multiply the graded ratings (-5 to +2) for each violation and (2) the base penalty figures and (3) then divide by 10.

DATED: January 30, 2020

Respectfully submitted,

s/ Adam Kimmell
Adam Kimmell (OSB 91517)
Attorney for Respondent
NW Metals Inc.
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing NWM PETITION FOR REVIEW on:

DEQ
Office of Compliance and Enforcement - Appeals
700 NE Multnomah St., Suite 600
Portland, OR 97232

by causing a full, true, and correct copy thereof, addressed to the last-known office address of the attorney (except when served by fax), to be sent by the following indicated method or methods, on the date set forth below:

[ xx ] by mailing in a sealed, first-class postage-prepaid envelope and deposited with the United States Postal Service in Portland, Oregon.

[ xx ] by sending an electronic copy to the recipient by email at DEQappeals@deq.state.or.us.

DATED: February 5, January 30, 2020

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Adam Kimmell