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

IN THE MATTER OF:

NW METALS INC

PROPOSED AND FINAL ORDER

OAH Case No. 2018-ABC-02082

Agency Case No. WQ/SW-NWR-2018-063

HISTORY OF THE CASE

On August 30, 2018, the Oregon Department of Environmental Quality (DEQ) issued NW Metals Inc. (Company) a Notice of Civil Penalty Assessment and Order, proposing to assess the Company civil penalties in the total amount of $52,854 and to issue the Company an order for compliance. On September 19, 2018, the Company filed a request for hearing and an answer.

On October 3, 2018, the Environmental Quality Commission (Commission) referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Samantha A. Fair to preside at hearing.

On December 3, 2018, DEQ issued the Company an Amended Notice of Civil Penalty Assessment and Order, proposing to assess the Company civil penalties in the total amount of $77,419 and to issue the Company an order for compliance.

On December 28, 2018, ALJ Fair convened a telephone prehearing conference. The Company appeared and was represented by attorney Adam Kimmell. Mayata Anotta, the Company’s manager, also appeared. DEQ appeared and was represented by Courtney Brown, a DEQ environmental law specialist. ALJ Fair scheduled the hearing for May 28 through 30, 2019, and set deadlines for submission of witness lists and exhibits.

On May 21, 2019, DEQ issued the Company a Second Amended Notice of Civil Penalty Assessment and Order (Second Amended Notice), proposing to assess the Company civil penalties in the total amount of $60,265 and to issue the Company an order for compliance.

On May 24, 2019, the Company filed a hearing brief and Mr. Kimmell withdrew as the Company’s attorney.¹

¹ In Mr. Kimmell’s communication, he indicated that Mr. Anotta, as the secretary and chief executive officer of the Company, would represent the Company during the hearing.
On May 28, 2019, ALJ Fair convened a hearing in Portland, Oregon, which continued through May 30, 2019. The Company appeared and was represented by Mr. Anotta. DEQ appeared and was represented by Ms. Brown.

On May 28, 2019, at the beginning of the hearing, Ms. Brown objected to the inclusion of the Company’s hearing brief as part of the record. ALJ Fair upheld her objection and excluded the Company’s hearing brief. On May 29, 2019, Mr. Anotta filed a motion requesting the ALJ reconsider her ruling that excluded the hearing brief. DEQ renewed its objection. The ALJ denied the motion.

On May 29, 2019, DEQ revised its civil penalty assessment for Violation 4 as listed in Amended Exhibit 4 of the Second Amended Notice by reducing the economic benefit portion of the equation to $0 that resulted in a $1,250 reduction in the amount of the proposed civil penalty. The Company did not object to the revision of the Second Amended Notice. The ALJ granted the revision and corrected the Second Amended Notice by inter.ptionation to reflect the reduction in the economic benefit to $0 and the overall reduction in the assessed civil penalty by $1,250.

During the hearing, DEQ called the following witnesses to testify: Michael Greenburg; Christopher Papinick, a DEQ solid waste inspector; Derek Sandoz, a DEQ underground injection control coordinator; David Graiver, a DEQ environmental engineer; Jay Collins, a DEQ hazardous waste inspector; Phil Richerson, a DEQ hydrogeologist; Esther Westbrook, a DEQ environmental law specialist; and Albert Salchenberg, manager of Sunbelt.

During the hearing, the Company called the following witnesses to testify: Mr. Greenburg; Mr. Papinick; Mr. Collins; Mr. Sandoz; and Mr. Anotta.

ISSUES

1. Whether the Company caused or allowed a Class V injection system to inject hazardous substances. OAR 340-044-0015(2)(c).

2. Whether the Company placed wastes in a location where they are likely to enter waters of the state. ORS 468B.025(1)(a).

3. Whether the Company failed to completely and accurately determine if residue at the Facility was hazardous waste and whether the Company mixed antifreeze with used oil. OAR 340-102-0011(2) and OAR 340-111-0010(2)(b).

4. Whether the Company established, operated, and expanded a waste tire storage site at the Facility without a waste tire storage permit. OAR 340-064-0015(1).

5. Whether the Company failed to operate a waste tire storage site in conformance with applicable standards. OAR 340-064-0015(2) and 340-064-0035(4).

2 The proposed civil penalty for Violation 4 went from $8,850 to $7,600.
6. Whether the Company constructed, installed, and operated a full size stationary vehicle shredder that caused an increase in regulated pollutant emissions without prior written notification to DEQ. OAR 340-210-0215(1).

7. Whether the Company installed and operated an air contaminant source without obtaining an Air Contaminant Discharge Permit (ACDP). OAR 340-216-0020(3).

8. Whether the Company violated the terms and conditions of a previously-issued DEQ order. ORS 465.260(4).

9. Whether the Company should be assessed civil penalties for any violations of ORS 468B.025(1)(a), Chapter 340 of the Oregon Administrative Rules, or a DEQ order and, if so, in what amount. OAR 340-012-0045.

**EVIDENTIARY RULINGS**

Exhibits A1 through A47, A51 through A61, A63 through A65, submitted by DEQ, were admitted into the record without objection. The Company objected to Exhibit A62, offered by DEQ. After DEQ presented testimony from Mr. Salchenberg that established the foundation and relevance of Exhibit A62, the ALJ overruled the Company's objection and admitted Exhibit A62 into the record.

Exhibits R1 through R25, submitted by the Company, were admitted into the record without objection.

DEQ objected to Exhibit R26, offered by the Company. Because the exhibit lacked foundation and was untimely submitted (submitted on the final day of the hearing), the ALJ upheld the objection and excluded Exhibit R26 from the record.

**FINDINGS OF FACT**

1. The Company is an auto-dismantler and scrapyard located on a two-acre lot at 7600 NE Killingsworth Street, Portland, Oregon (Facility) that ceased being open to the public in 2017. (Ex. A10 at 1; test. of Anotta.) The Company also operates a tire retail store at a separate location, which it opened in 2017, where it sells and installs tires for retail customers. The Company has plans to open a second tire retail store. (Test. of Anotta.) Mr. Anotta is the manager of the Company, which is owned by his family. The property on which the Facility is located is owned by FHA Holdings, LLC. (Ex. A10 at 1.) The Company began its operations at the Facility in 2014. (*Id.*; test. of Anotta.)

2. The Company's business model is to acquire vehicles that have been in accidents or bought at auction for salvage. Once delivered to the Facility, the Company removes the tires, fluids, and batteries from the vehicles. Once these items are removed, the vehicles are placed in the scrapyard at the south end of the Facility. (Ex. A10 at 2; test. of Anotta.) The Company then crushes the vehicles and sells the scrap metal to recyclers. (Ex. A60 at 3.) The Company either

---

3 On May 21, 2019, DEQ withdrew Exhibits A48 through A50 from its proposed exhibits.
reuses or recycles the fluids removed from the vehicles. The Company places antifreeze it
recovers from the vehicles into the same containers that it stores recovered used oil, which it then
sends to the recycler, labelling the containers as “used oil.” (Ex. A38 at 2; test. of Anotta.) If the
antifreeze has a strong color, then the Company will reuse it in its own vehicles. (Test. of
Anotta.)

3. Antifreeze contains hazardous substances, such as benzene from gasoline-fueled
engines and lead from older engines. (Ex. R4 at 2.) These hazardous substances make antifreeze
ignitable, corrosive and reactive, classifying it as hazardous waste. (Test. of Collins.)
Antifreeze, which is toxic, causes health problems if ingested by people or animals. Antifreeze
poured onto the ground or into a septic system may contaminate the groundwater. (Ex. A39 at 1;
A40 at 1; test. of Collins.) Antifreeze depletes water of oxygen, which can cause fish deaths.
(Test. of Collins.) Antifreeze does not bind to particulates, which makes it mobile in soil. (Ex.
A41 at 5.) Best management practices for antifreeze generators would include the storage of
used antifreeze in containers that are in good condition and labeled as “used antifreeze” and
never mixed with any other material, including used oil. (Exs. A39 at 1; A40 at 1.) DEQ treats
antifreeze as exempt from the hazardous waste definition when it is properly managed, which
would include a prohibition on mixing it with used oil and storing it in closed and labeled
containers. When antifreeze is mixed into used oil, it cannot be easily reclaimed from the used
oil and devalues it. During the process of reclamation of the used oil mixture, the antifreeze will
release benzenes. ORCO, a company that recycles used oil and antifreeze, will accept used oil
that contains antifreeze when the engine block of the vehicle caused the contamination. ORCO
will not knowingly accept used oil that has been deliberately mixed with antifreeze. The
Company delivers its used oil, including the used oil mixed with antifreeze labeled “used oil,” to
ORCO. (Test. of Collins.)

4. Gasoline has a variety of hazardous substances, including benzene, toluene, and
xylene, as well as additives, such as ethanol, methanol, and methyl tertiary butyl. Gasoline can
be ingested through contaminated liquids, absorbed through skin, or inhaled through its
evaporative vapors. (Ex. A42 at 1-2.) Although gasoline is toxic, acute toxicity (fatal exposure)
would not occur from exposure to gasoline vapors or ingestion of contaminated water. (Id. at 2.)
Localized effects of gasoline exposure can result in burning sensations, gastrointestinal tract
irritation, vomiting, colic, and diarrhea. Inhalation of gasoline fumes can cause lightheadedness,
mild confusion, or a psychosis-like state. (Id. at 3.) The additives in gasoline have additional
toxic effects. (Id. at 4-8.)

5. Used oil can be recycled to make new lubricants or used as an industrial fuel. Used
oil contains cancer-causing agents, metal contaminants, and organic compounds that can filter
into the groundwater supply. Such contamination of the groundwater can result in serious
human health hazards. (Ex. A43 at 1.) DEQ treats used oil as exempt from the hazardous waste
definition when it is properly managed, which would include a prohibition on mixing it with
antifreeze. (Test. of Collins.)

6. Oil, antifreeze and gas alter the chemical composition, taste and odor of water. (Test.
of Sandoz.)
7. DEQ inspectors determined that the Facility generated less than 220 pounds of hazardous waste in any one calendar month. (Ex. A45 at 1.)

8. The Facility is accessible from NE Killingsworth by a shared driveway that runs on the east side of the property. The shared driveway services neighboring light industrial businesses on the east side of the Facility. Approximately one-third down the east side of the Facility, the shared driveway becomes a split driveway, with one side continuing into the unpaved Facility, and the other side continuing to a neighboring business Sunbelt Rentals (Sunbelt). (Exs. A2; A10 at 1, 3.) Residential homes are located along the western side of the Facility atop a 30-foot embankment. Immediately south of the Facility is an empty lot with additional residential homes beyond the empty lot. (Ex. A10 at 1.) An overhead photo of the Facility and its surrounding areas is attached and incorporated as Exhibit A27 at 1. (Ex. A27 at 1.)

9. The Facility is located within the Portland Basin, which includes the Columbia and Willamette Rivers. (Ex. A15 at 7.) The nearest surface water feature is the Columbia Slough, approximately 2,000 feet north of the Facility. (Id. at 8.) Regional ground water is at a depth of approximately 52 feet below the ground surface and flows towards the Columbia River. (Exs. A15 at 8; A16 at 6.) Storm water at the Facility will evaporate, be absorbed by vegetation, infiltrate ground and vegetative areas, or will discharge to the storm water system. (Ex. A15 at 9.) Potential pollutants in storm water at the Facility include heavy metals, oil and grease, petroleum-related constituents, suspended solids, and volatile organic hydrocarbons. (Id. at 10.) Two dry wells (DW1A and DW1B or DWs), which are underground injection control systems (UICs) because they deliver storm water runoff into the subsurface, are located along the middle of the southern edge of the Facility. The DWs are designed to receive storm water runoff from multiple catch basins, including a catch basin (CB7) located on the southern edge of Sunbelt Rentals' property. The DWs are capped with risers as they are designed to only receive water from the connected catch basins. (Exs. A10 at 3; A15 at 9, 21; test. of Sandoz.) A map of the storm water system for the combined properties, which has the Facility's warehouse labeled as building 7600, is attached and incorporated as Exhibit A16 at 35. (Ex. A16 at 35.)

10. The topography of the regional area is generally flat with a regional slope to the north towards the Columbia River. The gradient at the Facility slopes gently to the south. There are no water wells on the Facility or surrounding properties. Based upon the regional topography, groundwater would flow to the north towards the Columbia River. (Ex. A18 at 5.) Based on the Facility's gradient, surface water flows in a southeasterly direction across the southern half of the Facility in the direction of the DWs, CB7, and further southeast. (Ex. A59 at 1.) The shared driveway and the separated driveway slope to the south and runoff can flow down the driveways. (Test. of Anotta.) Storm water runoff runs from the Facility onto Sunbelt's property and pools in the CB7 area whenever it rains. This runoff will have an oily sheen. (Ex. A62 at 1-8; test. of Salchenberg.) The Facility does not operate any storm water collection or treatment devices. (Ex. A60 at 3.)

11. From February through April 2013 prior to the Company's commencement of operations, DW1A and DW1B were inspected, samples were collected, and risers (large monuments that capped the DWs) were installed on the DWs. (Ex. A15 at 9-10.) The DWs'
accumulated sediments were removed, the sides and bottoms were pressure washed, and post-cleaning water and sediment were removed. (Ex. A16 at 7.) All storm lines were located and all blockages and breakages were cleaned out and repaired, including connecting catch basins. (Exs. A15 at 9-10; A16 at 6.) A sedimentation manhole was installed hydraulically up-gradient between the DWs and CB7. The sediment from the DWs had residual oil-range organics of a moderate concentration of 2,640 mg/kg. (Ex. A16 at 7.) Of volatile organic constituents (VOC), there was a very low concentration of toluene 0.814 mg/kg that was less than the lowest risk screening level. (Ex. A16 at 7, 39.) At the conclusion of the performed work, DEQ determined the DWs to be in compliance, properly registered, and authorized. (Ex. R10.) Despite this work, CB7 has always drained slowly and pooling was common when it rained. (Test. of Salchenberg and Anotta.)

12. Best management practices that would prevent toxic or hazardous substances from reaching surface or ground waters would include no dumping in the areas of the catch basins that discharge to the DWs; vehicle maintenance would only occur under cover of a building; oil and debris would be removed from the DWs; and items stored in DWs’ drainage areas would be covered to prevent rain intrusion. (Ex. A15 at 11-12.) The Company did not engage in these practices. (Test. of Sandoz and Collins.)

13. Sunbelt performs equipment rental, sales and service. It performs light repairs of equipment within its shop on the property adjacent to the Facility. It only performs repairs on equipment outside of the shop when the equipment cannot be moved into the shop. Sunbelt uses oil booms and oil absorbent pads to contain and handle spills. It keeps containers of all fluids in the shop in double-walled, sealed containers, surrounded by retaining walls. (Test. of Salchenberg.) Sunbelt does not have any industrial activities exposed to the elements, and its property is paved so it would not cause sediment buildup. (Test. of Sandoz.)

14. Since the Company has first begun operations, it has consistently accepted more vehicles at the Facility than it could dismantle and sell to recyclers. Over the years, this policy has resulted in the steady accumulation of a large amount of scrap vehicles and automotive parts at the Facility. (Ex. A10 at 2.)

15. In 2013 before the Company first began its operations, all parts of the Facility were completely accessible with virtually no items stored on the open ground of the Facility. (Ex. A30 at 1.) In 2014, all parts of the Facility remained accessible. The lot in front of the warehouse was about half covered with cars parked in neat rows. The far portion of the southern lot was covered with cars parked in neat rows, with a smaller group of cars and one truck parked in rows in front of the far portion. Additional cars and a debris pile were beginning to grow in a haphazard manner in the area directly behind the warehouse. (Id. at 2.) By 2015, the Facility was no longer completely accessible. The front lot and the southern half of the back lot were completed covered in rows of cars. The portion of the back lot behind the warehouse was covered in debris and strewn cars. The driveway that split off from the combination driveway remained clear but only penetrated about one-third into the southern lot. In the front lot, there was only a short driveway that penetrated one-fourth of the lot. (Ex. A30 at 3.) In 2016 and 2017, the number of cars and debris pile continued to increase. There was barely any driveway in the front lot as it had been reduced to a single narrow path, surrounded by cars. The driveway...
to the back lot had also narrowed with cars and debris piles placed alongside it. *(Id. at 4-5.)* By May 22, 2017, the Facility was completely covered in cars to the very edges of all sides of the Facility. *(Ex. A14 at 1.)* Photos are attached and incorporated, marked as Exhibits A28 at 2 and 3, and A62 at 1 and 6,\(^4\) to visually demonstrate the appearance of the Facility during 2018. *(Exs. A28 at 2-3; A62 at 1, 6.)*

16. On June 11, 2014, the Company submitted a No Exposure Certification to DEQ, in which the Company asserted that it did not require permit coverage for storm water discharges associated with its industrial activity. In the certification, the Company asserted that all fueling of vehicles and repair of vehicles occurred inside the warehouse. The Company further asserted that the following items were never exposed to precipitation: materials or residuals on the ground from spills and leaks; materials or products during loading and unloading activities; materials contained in open, deteriorated or leaking storage containers; and waste material in uncovered containers. *(Ex. A58 at 1-2.)*

17. On July 22, 2014, the City of Portland’s Bureau of Environmental Services (BES) performed an inspection of the Facility. The Company was in operation Monday through Friday and had three employees. BES observed that the Facility sloped to a southern gravel area where water infiltrated. *(Ex. A60 at 2.)* Because the Company indicated that there was no off-site discharge, BES did not require the Company to obtain a storm water permit. *(Id. at 5.)* The BES noted the existence of the DWs but did not advise the Company that the DWs were UICs that were subject to DEQ regulation. *(Id.; test. of Anotta.)* At the time of this inspection, the Company stored pre-dismantled vehicles on the north side of the warehouse, which area drained to a catch basin that discharged to a drywell. *(Ex. A60 at 5-6.)* Other pre-dismantled vehicles and some partially dismantled vehicles were stored in the southwestern corner of the Facility. *(Id. at 13.)* Most of the post-dismantled scrap was contained in the warehouse with some scrap, used tires, and storage bins stored behind the warehouse. There were in excess of 15 stacks of used tires, stored in unricked columns at least six feet in height, in an uncovered area pressed against the back wall of the warehouse. *(Id. at 7-12.)*

18. On October 27, 2017, the Oregon Department of Transportation issued the Company a Dismantler Certificate, number WR3546, that authorized the Company to engage “in buying, selling, or dealing in vehicles for the purpose of dismantling * * * under the provisions of ORS 822.110” at the Facility. *(Ex. A57 at 1.)* The certificate expires September 30, 2020. DEQ issued a pamphlet detailing best management practices, which included the storage requirements for tires, to all certified dismantlers, including the Company. *(Test. of Papinsick.)*

19. The Company has never been subjected to any prior significant actions (PSAs) issued by DEQ. *(Test. of Sandoz.)*

---

\(^4\) Exhibit A28 at 2 includes a photo of the tire pile along the south side of the Facility’s warehouse and another tire pile located against a trailer next to the warehouse. Exhibit A28 at 3 is taken from the upper embankment on the west side of the Facility where the residential homes are located. Exhibit A62 are photos taken from the southern half of Sunbelt’s property, looking towards the Facility.

In the Matter of NW Metals Inc. - OAH Case No. 2018-ABC-02082
Proposed and Final Order
Page 7 of 54
March 12, 2018 Fire

20. Shortly before March 2018, the Company had purchased an Arjes shredder to shred the vehicles, rather than just crush them as the Company had done in the past, prior to selling the metal to recyclers. Recyclers pay more than 50 percent higher price for shredded metal than they pay for crushed metal. (Test. of Anotta and Greenburg.) The Arjes shredder reduces vehicle husks to approximate five-inch pieces that are then segregated into three recycle streams: ferrous metal, non-ferrous metal, and low density material. The Arjes shredder can process one car every five minutes. (Ex. A18 at 17.) The Arjes shredder and its conveyor belt were located in the center of the southern scrap yard of the Facility. (Exs. A4 at 3; A5 at 1.)

21. On the morning of March 12, 2018, while preparing vehicles to feed into the Arjes shredder, a Company employee discovered a fire as it was burning in the foam pile beneath the Arjes shredder. At that time, the fire had approximately 5-foot flames that quickly became 10-foot flames. Two Company employees unsuccessfully attempted to extinguish the fire with portable fire extinguishers. Within a few moments, the fire had spread to the surrounding vehicle husks. (Ex. R2 at 4.) Eventually, the fire involved the entire southern scrap yard with the most substantial areas of damage on the west and north portions of the scrap yard because of the direction the wind blew. (Id. at 4-5.) The large pile of used tires stored behind the warehouse burned during the fire, producing extremely high levels of fire and significant black smoke. (Ex. A26 at 2.) The black smoke from the fire extended for miles from the Facility and obscured the horizon. (Ex. A1.)

22. Portland Fire and Rescue (Portland Fire) first reported to the Facility at 9:10 a.m. on March 12, 2018. (Ex. R2 at 2-3.) At least eight fire trucks from Portland Fire responded to the fire at the Facility. The fire trucks used the neighboring properties and the driveway shared by the Facility and Sunbelt in order to gain access to the fire. Other than the single shared driveway and a short portion of the Facility’s dedicated driveway where it first led into the southern scrap yard, the fire trucks had no room to enter the Facility. (Exs. A2 and A3.)

23. Used vehicles, tires, vehicle fluids, vehicle plastics, a rubber conveyor belt, and the Arjes shredder burned during the fire. Smoke and particulate emissions from tire and vehicle combustion create priority pollutant metals, dioxins, furans, polycyclic aromatic hydrocarbons, VOCs, and other uncontrolled combustion products. Dioxins, furans, polycyclic aromatic hydrocarbons are cancer-causing agents and highly toxic. The combustion process of the fire caused the release of these hazardous substances from the scrap to the air and ground. (Exs. A10 at 3; A17 at 2-3; A18 at 4; R3 at 1; test. of Greenburg.)

24. After arriving at the scene, Portland Fire issued a warning to all residents within one mile of the Facility and evacuated all residents within a four-block radius of the Facility because of the severity of the fire and the particulate matter and air toxins expelled by the fire. (Exs. A10 at 3; A17 at 1-2.) The evacuation zone was expanded when the federal Environmental Protection Agency (EPA) found unhealthy air quality. (Ex. A17 at 1-2.) The fire spread from the Facility and burned residences located next to the Facility. (Ex. A10 at 1-2; A18 at 4.)

25. While responding to the fire, Portland Fire applied large amounts of fire suppression
foam, which contains additional toxins, and large volumes of water to fully suppress the fire. The mixed foam and water along with the released hazardous substances washed across the surface of the ground of the Facility, draining to the south of the Facility in the area of the DWs and to the southern portion of Sunbelt’s property and CB7. This runoff had an oily sheen and left an oily residue in its wake. (Exs. A10 at 3; A17 at 2-3; A18 at 4; R3 at 1; test. of Greenburg.) These fluids pooled on the Sunbelt property in the area of CB7 and dissipated slowly, indicating that the drainage system was clogged at some point between CB7 and the DWs. (Test. of Sandoz.)

26. Because of the very large fuel loads in the scrap yard, the fire continued to burn through March 13, 2018, with 30 to 40-foot flames and heavy, dark smoke that blew to the west. (Ex. R2 at 4-5.) Portland Fire continued its fire suppression efforts through March 13, 2018, until the fire was extinguished. (Exs. R2 at 2-3; A17 at 1-2.) Air quality improved and Portland Fire allowed residents to return to the area. (Ex. A17 at 1-2.) The fire caused one injury to a firefighter, the death of 16 pets, the total loss of two residential buildings, and exposure damage to a third residential structure. (Ex. R2 at 2.)

27. Portland Fire completed an investigation of the fire and classified the cause of the fire as undetermined. Portland Fire determined that potential causes of the fire included the following: incendiary cause; transient activity; discarded smoking material; the Arjes shredder; or other tools used in the area of the origin of the fire. Portland Fire eliminated transient activity as a cause of the fire because, although there were signs of transient activity in the lot to the south of the Facility, there were no signs of transient activity in the Facility. Portland Fire eliminated the Arjes shredder as a cause of the fire based upon Mr. Anotta’s representation that the shredder had not been used in the week prior to the fire. Portland Fire eliminated other tool usage as a cause because the onsite employees on the morning of the fire were not using equipment that could cause a fire and were not working in the area where the fire began. Portland Fire could not eliminate the possibility of an individual initiating the fire with an incendiary device or the possibility of discarded smoking material, which could have been consumed by the fire. (Ex. R2 at 5-6.)

28. On March 13, 2018, Portland Fire completed its fire investigation and released the site back to the Company. (Ex. R24.) Numerous media outlets featured the fire in its news programming, and DEQ fielded a number of contacts from the public who expressed concerns about the fire. (Test. of Greenburg.)

29. Prior to the fire, the Company received about 50 to 60 cars per day. Following the fire, the Company resumed its vehicle and scrap metal recycling operations with its existing inventory that was not fire damaged and resumed purchasing scrap vehicles at auction. Its operations were considerably reduced immediately after the fire. The vehicles were processed at

---

5 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.
the Facility, stored outside on the Facility’s exposed ground and temporarily on Sunbelt’s property, and some were crushed by the use of heavy equipment. Vehicles were removed from the Facility on flatbed trailers and hauled off-site for recycling. The Company delayed crushing and removing vehicles while it waited to replace the burned Arjes shredder. (Ex. A18 at 6; test. of Anotta.)

March 14, 2018 Site Inspection

30. On March 14, 2018, DEQ and the EPA performed a joint inspection of the Facility. (Ex. A10 at 1.) At the time of the inspection, the agencies’ inspectors made the following observations:

- A large number of used tires were stored throughout the Facility. Several of the tire piles had existed for a number of years. Multiple tire piles failed to include any identification so that sizes or types of tires could not be identified. Some tire piles were overgrown with vegetation. (Exs. A4 at 1-3; A10 at 2.) Most of the areas at the Facility where used tires were stored were inaccessible. (Ex. A27 at 2.) Used tires were also buried with the vehicle husks and other scrap throughout the Facility. (Test. of Papinsick.) There were more than 1,500 used tires stored on the grounds of the Facility. (Ex. A4 at 1-2.)

- The Company stored used antifreeze and used oil in the same waste containers, labeled as “used oil.” (Ex. A10 at 2.) Two of the 275-gallon totes that stored this mixture were intact but structurally damaged with the tops of the totes crushed. These totes are stored outside of the building with no cover. Because the tops of the containers are crushed, water can accumulate and could seep into the containers. There were used oil containers with no lids, leaking antifreeze, and an uncapped diesel container stored on the grounds of the Facility without any cover. Some of the scraped vehicles stored in the yard still contained automotive fluids. There were multiple petrol stains on the grounds throughout the Facility. (Exs. A4 at 1, 3; A10 at 2; test. of Sandoz and Collins.)

- The Company separated recovered regular gas and diesel fuel in barrels for reuse in the Company’s vehicles. (Ex. A10 at 2.)

- The Company stored removed batteries on a pallet in the main warehouse with additional batteries scattered outside on the ground of the Facility. There were also scraped vehicles on the Facility’s ground that still contained their batteries. (Exs. A4 at 4; A10 at 2.)

- Only DW1A was accessible, and there was visible high water flow leading to it. The sediment along the south end of the Facility was disturbed due to high water flow from the fire-fighting activities, which included water and firefighting foam. The sediment disturbance included the areas along the concrete barriers on the southern edge of the Facility. (Ex. A10 at 3.) DW1A’s riser was ajar from its casing, so that the interior of the DW was exposed. (Exs. A4 at 4; A10 at 3.)

- The Company had no measures in place for the control of storm water. Storm water flowed towards the south and east of the Facility to the area of CB7. (Test. of Sandoz.)
31. During the inspection, DEQ informed the Company that it should hire a licensed environmental cleanup company to remove and dispose of the materials impacted by the fire. (Ex. A10 at 3.) DEQ also informed the Company of the requirements for best practices for the handling of used oil, including preventing spills and keeping containers sealed. (Test. of Collins.)

*March 23, 2018 Site Inspection*

32. On March 23, 2018, DEQ conducted another site inspection at the Facility. Since the March 14, 2018 inspection, the Company had acquired 10 more salvaged vehicles at the Facility. (Ex. A10 at 3-4.) At the time of the March 23, 2018 inspection, the agency’s inspectors made the following observations:

- In the area where the active fire had been, piles of mixed burned material stood more than five feet tall. These mixed materials included stacked cars, interspersed with burned tires, rims, and other miscellaneous metals and parts. (Ex. A9 at 3.)

- Outside of the warehouse, there were several rubber mats with oily sheens spreading from the mats to the ground. (Ex. A9 at 2.)

- There were approximately 1,500 used individual tires piled in various locations throughout the Facility. (Ex. A10 at 4.) The tires were haphazardly strewn about in large unorganized piles, regularly mixed in with a wide variety of demolished items. There were areas where the tires were overgrown with vegetation. In these areas, the inside of the tires were filled with water. There were only a handful of used tire piles in which the tires were stacked directly on top of one another to make vertical, unripped piles. (Exs. A9 at 1-2; A28 at 1-5; test. of Papinsick.)

- There were two additional large areas where more than 1,500 tires were accumulated. These two areas were in the southern half of the Facility. (Ex. A10 at 4-5.) The used tire pile directly south of the main warehouse was more than 6 feet in height and continued for more than 25 feet leaning against the southern side of the warehouse. (Exs. A9 at 1; A28 at 3; test. of Papinsick.) Except for a small number of used tires stored under an overhang, these tires were stored outside, on the ground, and exposed to the elements. (Ex. A10 at 4.) Next to this pile, a large number of tires were haphazardly thrown into a pile on top of a large blue plastic tarp. There were additional used tires lying underneath the tarp. (Ex. A9 at 3.)

- DW1B remained inaccessible. (Ex. A10 at 4.)

33. DEQ again reminded the Company of the requirements for best practices for the handling of used oil, including preventing spills and keeping containers sealed. (Test. of Collins.)
March 28, 2018 Removal Action Order

34. On March 28, 2018, DEQ issued the Company and FHA Holdings a Removal Action Order (RAO) in response to the fire. (Ex. A17.)

35. The RAO required the Company and FHA Holdings to submit a fire debris removal work plan to DEQ for proper characterization and disposal of waste materials generated by the fire. In regards to the fire debris removal, the RAO specifically provided:

Respondents shall implement the work plan within 5 days of DEQ approval and notice to proceed.

(Ex. A17 at 5-6.)

36. The RAO required the Company and FHA Holdings to submit a surficial soils characterization work plan to assess the extent of hazardous substances released to the soil. The RAO required that surface inert materials, such as gravel, would need to moved aside and surface soil samples collected at the ground surface to three inches below grade from the areas affected by the fire. The RAO further required testing of additional ground surface samples from the residential lots on the west side of the Facility. (Ex. A17 at 6-7.) The RAO provided:

Respondents shall implement and complete the sampling and analysis plan within 10 working days of DEQ approval of the work plan.

(Id. at 7.)

37. The RAO further provided that the Company’s failure to comply with the RAO could result in the assessment of civil penalties. (Ex. A17 at 9.) The RAO did not include any requirements for the proper storage and handling of the used oil and antifreeze because there was no evidence of a substantial risk of an imminent hazard and the necessary changes in business practices to cause these substances to be exempt were relatively simple. The Company had also informed DEQ of its intent to improve its practices. (Test. of Collins.)

38. On March 28, 2018, DEQ also issued the Company a pre-enforcement notice (PEN), requiring it to obtain a DEQ waste tire storage permit. (Ex. A32 at 1.)

39. On March 30, 2018, the Company informed DEQ that it would cease mixing used antifreeze with used oil and would keep marked containers for the storage of used antifreeze. (Ex. A38 at 2.)

40. On May 8 and May 14, 2018, the two insurance companies involved with the Facility had completed their investigations of the fire. At this point, the Company could begin cleanup and environmental work at the Facility. (Ex. R24.) Prior to this date, the Company had access to the Facility but could not disturb the fire area. (Test. of Greenburg.)

41. On June 20, 2018, DEQ issued an approval letter in response to the Company’s filing
of a Notice of Intent to Construct for the installation of a Arjes VZ950 Universal Shredder to be used to shred scrap vehicles at the Facility in lieu of the one destroyed by the fire. (Ex. A47 at 1.) In its approval letter, DEQ included a variety of general conditions, one of which was a requirement that the Company must operate the Arjes shredder in compliance with an ACDP. (Ex. R25 at 1-2.) The conditions placed in the approval letter are not enforceable by DEQ. (Test. of Gravier.)

42. The Company and FHA Holdings hired Akana to prepare the work plans required by the RAO. (Ex. A18 at 4.) On June 28, 2018, Akana produced the Work Plan that provided for the characterization and management of the on-site materials affected by the fire, the analysis of potentially hazardous substances in the fire-damaged material and soil, the disposition of contaminants, and the removal or recycling of fire-damaged materials. (Exs. A18 at 1, 4; A19 at 1.) In the Work Plan, Akana anticipated the Company, which would perform the work itself, would complete the processing of the fire-damaged vehicle husks within 10 to 15 business days after the new Arjes shredder was installed, based upon the shredder’s processing rate. (Ex. A18 at 17.) The Work Plan divided the Facility into five areas and provided that one relatively clear area would be completely cleared and soil samples taken. Then subsequent areas would be cleared by moving the vehicle husks to the cleared area and taking soil samples from the newly-cleared area for testing. The fire debris layer would be collected and stored until soil analysis was completed, at which time, the fire debris layer would be disposed. (Id. at 17-18.) The Work Plan also provided for taking samples from the DWs. (Id. at 18.)

43. On July 3, 2018, DEQ notified the Company and FHA Holdings that the Work Plan was approved with some modifications. In its notice of approval, DEQ reminded the Company and FHA Holdings that they must “begin debris removal work within 5 days of DEQ approval and notice to proceed. Please advise as to the operability of that time frame (work begun by Wednesday July 11th).” (Ex. A19 at 1.) On July 12, 2018, Akana produced a revised Work Plan. (Ex. A18.) On that same day, DEQ approved the revised Work Plan. (Ex. A25 at 1.)

July 12, 2018 Site Inspection

44. On July 12, 2018, DEQ performed a site inspection at the Facility. At the time of the inspection, the agency’s inspectors made the following observations:

- The Company had stacked half of the used tires in vertical, unricked columns in two of the smaller areas previously inspected in March 2018. In a third area, some tires had been stacked in vertical, unricked columns but most remained strewn in unorganized piles. The stacked tires had no visible signs denoting the tire sizes. The remaining areas of unused tires continued to be covered in overgrown vegetation or strewn haphazardly in large piles. The used tire pile behind the warehouse was still a large, disorganized pile along the whole side of the warehouse and continued to exceed six feet in height. Other areas of the Facility were inaccessible but used tires were visible. Waste tires piles were stacked up against buildings and in piles directly adjacent to buildings. (Exs. A28 at 1-2; A29 at 1-2.) There were more than 1,500 used tires stored on the grounds of the Facility. (Exs. A28 and A29.)
• There were no 50-foot fire lanes around the perimeters of each waste tire pile. Any lanes of travel around the tire piles were less than 10-foot in width. (Exs. A28 at 1-2; A29 at 1-2; A32 at 2.)

• The DW1B was plugged with metal slag from scrap that had melted during the fire. (Test. of Greenburg.)

45. At the time of the July 2018 inspection, DEQ provided the Company with a copy of the waste tire storage regulations. (Ex. A32 at 1; test. of Papinsick.) DEQ again reminded the Company of the requirements for best practices for the handling of used oil, including preventing spills and keeping containers sealed. (Test. of Collins.)

**July 2018 Samples**

46. On July 19 and 30, 2018, Akana took samples of the water and the sludge at the bottom of DW1A. (Ex. A24 at 1-2; test. of Greenburg.) Akana could not take samples of sludge and water from DW1B because it was blocked by the metal slag. (Test. of Richerson.) On July 30, 2018, samples were taken of soil adjacent and below DW1A and DW1B. Eleven VOCs were detected in the water samples that would normally not be found in groundwater. These VOCs were typical of petroleum, fuel additives, plastics, refrigerants, and cleaning solvents that would be generated from automotive operations. None of the VOCs had concentrations greater than minimum concentration levels. (Ex. A24 at 1; test. of Richerson.)

47. The July 2018 sludge samples in DW1A contained 10 metals, petroleum hydrocarbons, and 11 SVOCs. (Ex. A24 at 1.) The SVOCs are products generated from diesel operations. (Test. of Richerson.) Four metals, including zinc, lead, copper and cadmium, exceeded background metals concentrations for the Portland Basin. The petroleum hydrocarbons did not exceed DEQ’s risk-based concentrations. Five SVOCs exceeded the EPA’s regional screening levels. (Ex. A24 at 1, 9.)

48. The July 2018 soil samples near DW1A contained 10 metals, 4 VOCs, 11 SVOCs, and petroleum hydrocarbons. (Ex. A24 at 1.) Two metals, copper and lead, exceeded background metals concentrations for the Portland Basin. (Id. at 1, 5.) Two SVOCs exceeded the EPA’s regional screening levels. (Id. at 2, 5.)

49. The July 2018 soil samples near DW2A contained 9 metals, 6 VOCs, 10 SVOCs, and petroleum hydrocarbons. One SVOC exceeded the EPA’s regional screen level. None of the metals or VOCs exceeded DEQ’s risk-based concentrations. (Ex. A24 at 2, 7.)

50. The July 2018 sampling demonstrated the following:

• Contaminants in the water and sludge at the bottom of DW1A were also found in the soil adjacent and below the DW, demonstrating that the contaminants in DW1A had moved into the surrounding soil;

• VOCs found in the soil below the DW had higher concentrations than in the water in
DW1A, suggesting downward migration from the DW prior to the March 2018 fire;

- Of 16 analytes (metals and organics) found in both the sludge and the soil beneath DW1A, 14 of the concentrations were higher in the sludge than the soil beneath the DW, suggesting that most contaminants are attenuating with depth;

- Contaminants had moved to at least a depth of 5 to 10 feet below the DWs;

(Ex. A24 at 2; test. of Richerson.)

51. The Company had purchased a replacement Arjes shredder, which first arrived at the Facility on July 19, 2018. Its conveyor arrived on August 9, 2018, and its generator arrived on August 17, 2018. From August 20, 2018, through January 11, 2019, the Arjes shredder only ran intermittently because of persistent mechanical failures. During the course of this period, the Company operated the Arjes shredder for a total of 25 days. When in operation, it usually ran two to four hours per day. (Ex. R19 at 1.) The Company continued to intermittently operate the Arjes shredder, and as of May 6, 2019, the Company had operated the Arjes shredder for a total of 287 hours. (Ex. R 20 at 1.) At this rate of operations, the carbon monoxide, nitrous oxide, and VOC emissions would be less than 10 tons per year. (Test. of Gravier.)

52. Based upon 8,760 hours of operation per year, the Arjes shredder’s engine would emit nitrous oxide at a rate of 35.60 tons per year; emit carbon monoxide at 19.28 tons per year, and emit VOCs at a rate of 35.60 tons per year. The Arjes shredder’s crusher would emit an additional 12.16 tons per year of VOCs. (Ex. A64 at 4.) National ambient air quality standards determine that criteria pollutants, including VOCs, nitrous oxide and carbon monoxide, are a threat to human health when produced at a rate higher than 10 tons per year. These rates are based upon data from tests of hammermill machines (crush metal), not shearing machines (that shred metal). The Arjes shredder is a shearing machine. It is the act of the destruction and the type of product that creates the emissions. The nature of the destruction, whether crushed or sheared, does not change the amount of the emissions. (Test. of Gravier.)

53. For its administrative rules regarding determinations of emissions, DEQ interprets “operate uncontrolled” to be the maximum capacity of the emitting source at full operations, 24 hours per day and 365 days per year, unless there is control equipment or a DEQ-enforceable control strategy. DEQ-enforceable control strategies would be conditions included on an ACDP. (Test. of Graiver.)

54. On August 2, 2018, DEQ sent a PEN to the Company to supplement its prior March 28, 2018 PEN, in which it required the Company to obtain a waste tire storage permit. In the August 2, 2018 PEN, DEQ informed the Company that it considered the tires to be waste tires and that the tires were stored in a manner that violated waste tire storage requirements, such as the absence of fire lanes and tire piles that were unricked and higher than six feet. (Ex. A32 at 1.) In the PEN, DEQ informed the Company that it had until August 31, 2018, to properly store the tires and submit photographs to DEQ that documented such compliance. (Id. at 2.) The Company never submitted photographs to DEQ. As of April 2019, the Company had never filed an application for a waste tire storage permit. (Test. of Papinsick.)
55. On August 21, 2018, DEQ sent a warning letter to the Company, advising the Company that it had failed to remove the fire-damaged vehicle husks and had not completed the soil sample collection. DEQ notified the Company that the failure to complete these tasks was a violation of the RAO’s requirements for the timely removal of fire debris and the timely collection of soil samples. DEQ advised the Company that it could correct the violations by clearing the southern portion of the Facility to provide access for fire debris removal and sample collection by September 7, 2018, and complete the soil collection by September 14, 2018. DEQ concluded the letter by warning the Company that failure to correct these actions would lead to formal enforcement action and the assessment of civil penalties. (Ex. A25 at 1-2.)

56. On August 24, 2018, DEQ issued a letter to the Company, requiring it to submit an application for an ACDP for the Arjes shredder within 60 days of the receipt of the letter. In the letter, DEQ extended its approval of the Company’s operation of the Arjes shredder, subject to specific operational requirements, during the permit process so that the Company could implement the Work Plan. (Ex. A47 at 1.) DEQ did not receive an ACDP application from the Company in response to this letter. (Test. of Graiver.)

57. On September 14, 2018, the Company had not completed the soil sample collections required by the RAO. As of April 2019, the Company had cleared and taken samples from two of the five Work Plan denoted fire debris areas in the Facility’s southern scrap yard. The remaining three areas had never been cleared or sampled and continued to be covered in vehicles and the Arjes shredder. The Company’s ongoing purchasing of scrap vehicles has prevented it from clearing all the areas that had been burned during the March 2018 fire. (Test. of Greenburg.)

*October 2, 2018 Site Inspection*

58. On October 2, 2018, DEQ performed a site inspection at the Facility. At the time of the inspection, the agency’s inspectors made the following observations:

- The southern yard of the Facility was covered with large accumulations of old materials, mostly scrap metal interspersed with crushed cars buried in other miscellaneous items, including used tires. Some of the crushed cars still had tires on them. The accumulations were twice the height of a man and intersected with approximately five to six-foot pathways that traveled through the debris. (Ex. A12 at 1-2.)

- Used tires were strewn about in haphazard piles, mixed in with a variety of car debris and other miscellaneous items. The large tire pile behind the warehouse remained pressed along the length of the warehouse and continued to exceed six feet in height. There were other piles of mixed debris, including used tires buried within the debris, that exceeded six feet in height and rested against a nearby outdoor overhang and a trailer. The pile next to the trailer exceeded the height of the trailer, which was half buried by the pile. The covered area under which cars were dismantled was only a few feet from the trailer and the debris pile extended around the back of the trailer to the covered area. (Exs. A33 at 1-3; A61 at 6.)
• Since the July 2018 inspection, one area near the warehouse had been cleared of tires, including the tires that had been overgrown by vegetation. Most of the tires in a second area had been stacked in unricked columns. In a third area, tires that were stored under the overhang had been stacked in unricked columns. The remaining tires along the side of the warehouse remained unorganized although some were stacked in unricked columns. The area along the west of the building had half the number of tires it had in the past, but the remaining tires in this area were covered in vegetation. (Ex. A34 at 1-2; A61 at 3-6.) There were more than 1,500 used tires stored on the grounds of the Facility. (Exs. A12, A33, A34 and A61.)

• There was a large drum container, marked “Recycle Coolant,” that was opened with its cap sitting upside down next to the opening. There was an unmarked drum that was open and missing its cap. There were multiple buckets that contained liquids with no lids. (Ex. A61 at 1-2.) Areas of the ground at the Facility were stained with dark fluids. (Ex. A12 at 1.)

**November 1, 2018 Site Inspection**

59. On November 1, 2018, DEQ performed a site inspection at the Facility. At the time of the inspection, the agency’s inspectors made the following observations:

• The split driveway that led to the southern lot contained a large pile of car husks mixed with other debris to a height that exceeded six feet. The pile caused the driveway to significantly narrow as it led to the southern lot. The Company had a line of cars parked in the driveway that blocked access except for a narrow walking path to the southern lot. On the rise above the driveway, there was another large pile of car husks and other debris that exceeded six feet in height. Both piles contained used tires buried within the debris. (Ex. A35 at 2.)

• Along the southern edge of the Facility, there were tremendous piles of car husks and other debris, including tires, that ran across the whole edge of the lot and was more than six feet in height. There was a narrow path that ran through the large debris pile. (Ex. A35 at 1, 3.)

60. On November 7, 2018, DEQ issued a PEN to the Company, because DEQ had not received an ACDP application from the Company for its Arjes shredder. In the PEN, DEQ advised the Company that it was in violation of OAR 340-216-0020(3) and OAR 340-012-0054(2)(a) by operating an air contaminant source without obtaining an ACDP. The PEN required the Company to submit an ACDP within 14 days. (Ex. A51 at 1.) DEQ has still not received an ACDP application from the Company. The fee for such an application is $7,400. (Test. of Graiver.)

**November 29, 2018 Site Inspection**

61. On November 29, 2018, DEQ performed a site inspection at the Facility. At the time
of the inspection, the agency’s inspectors made the following observations:

- Outside of the warehouse, there were several feet of ground that were covered with dark, oily stains. (Ex. A13 at 1-2.)

- Since the October 2018 inspection, many of the tire piles remained in the same condition. One small pile had the majority of its tires stacked in unripped columns. In the narrow area on the west side of the warehouse, almost all the tires had been removed. The area along the back of the warehouse and southern part of the lot remained unchanged. The pile of used tires that rested against the back of the warehouse was more than the 10 feet in height. (Exs. A13 at 1-2; A36 at 1-2.) There were more than 1,500 used tires stored on the grounds of the Facility. (Exs. A13 and A36.)

- The Company had shredded most of the burnt cars. There remained enormous piles of cars throughout the Facility that were purchased by the Company after the fire. These piles prevented the Company from clearing the ground and taking soil samples. The Company indicated it might have an area cleared for sampling the following week. (Ex. A37 at 1.)

- The area of the southern yard in which the UICs were located was covered in large piles of accumulated crushed cars, car parts and other debris. (Ex. A13 at 1-2.) The DWs could not be accessed because of these large piles of debris. (Ex. A37 at 1.)

- The Sunbelt lot had sediment in the CB area but there was no sign of drainage indicating that the sediment had originated at the Facility as the Sunbelt’s paved lot would not produce sediment. There was no sign of significant amounts of oil or other fluids on the surface of the Sunbelt lot. (Ex. A37 at 1; test. of Greenburg.)

**February 26, 2019 Site Inspection**

62. On February 26, 2019, DEQ performed a site inspection at the Facility. At the time of the inspection, the agency’s inspectors made the following observations:

- The debris pile in the southern lot of the Facility was more than five feet higher than the raised embankment and level with the height of the Facility’s warehouse roof. The Facility reported that it rarely used the Arjes shredder, which accounted for the increased size of the debris pile. (Ex. A44 at 1-8.)

- Some areas of tire accumulation had been reorganized or removed. There were additional tires mixed in with the large debris pile that covered the southern lot. There remained the large pile of haphazardly-stored tires against the back of the warehouse that was more than six feet in height. There was another large stack of haphazardly-stored tires in a pile against the west side of the warehouse. There was also a dump truck filled with haphazardly thrown used tires that were being removed from the Facility. (Ex. A44 at 1-8.) There were more than 1,500 used tires stored on the grounds of the Facility. (Ex. A44.)
- There was a car being dismantled and its fluids drained in an open, uncovered area of the Facility. There were fresh spills of fluids around the open container in which the car’s fluids were being drained. There were six open used oil containers, three of which were not labeled, that were not kept in covered locations. A Company employee did not know where lids for the containers were stored and suggested that he could cover the containers with boards. There were at least five separate spills of oils or other fluids on the grounds of the Facility. (Ex. A44 at 1-8; test. of Collins.) All of these areas of the Facility would drain towards CB7. CB7 and both DWs had not been decommissioned. (Ex. A44 at 1-8.) DW1A had a sheet of industrial plastic as a cover. (Test. of Sandoz and Anotta.)

63. During the February 26, 2019 inspection, DEQ again reminded the Company of the requirements for best practices for the handling of used oil, including preventing spills and keeping containers sealed. (Test. of Collins.)

64. On March 11, 2019, FHA Holdings issued a letter to the Company, placing it on notice that it was in material breach of its Lease Agreement for the Facility by failing to comply with environmental laws. FHA Holdings advised the Company that it needed to come into compliance with all environmental laws and comply with all orders issued by DEQ. (Ex. A56 at 1.)

65. On March 14, 2019, DEQ sent a warning letter to the Company, alleging violations of used oil storage laws, such as using unlabeled and unsealed containers. DEQ informed the Company that it could correct these violations by cleaning up the spills, using correctly marked containers, submitting a waste sampling plan, and properly disposing of the spilled material. (Ex. A45 at 1-3.) The Company provided DEQ with photos showing that it had replaced some of the damaged containers, used lids for all the containers, labeled the containers, and had obtained oil absorbent pads in case of spills. (Test. of Collins.)

*April 23, 2019 Site Inspection*

66. On April 23, 2019, DEQ performed a site inspection at the Facility. At the time of the inspection, the agency’s inspectors made the following observations:

- The scrap pile in the southern part of the Facility exceeded 20 feet in height and contained numerous car husks and other scrap. Tires were buried within the scrap pile. A crushed school bus lay in the scrap pile with its bus seats piled on top of the crushed bus. (Ex. A52 at 1; test. of Greenburg.) The scrap pile, in varying heights, extended throughout the southern part of the Facility with one small cleared area in the southeastern corner. The area where the DWs lay were covered in scrap. (Ex. A52 at 2.) The scrap piles were higher during this inspection than during any previous inspection with newer scrap placed on top of older scrap. (Test. of Papinski.)

- There were still uncovered used oil containers and automotive work being performed outside on the grounds of the Facility without any cover. There were still petroleum stains on the ground throughout the Facility. (Test. of Sandoz.)
67. On April 23, 2019, the Arjes shredder company offered to exchange the Company’s existing shredder with another that had a different engine that would be a Tier IV engine, instead of the current Tier II engine. The Tier IV engine, based upon 8,760 hours of operation per year, would emit 19.37 tons per year and 19.37 tons per year of carbon monoxide and nitrous oxide. The Tier IV engine would emit 1.05 tons per year of VOC and the crusher would emit 12.16 tons per year. (Ex. R18 at 4, 6.) The Company has not submitted a Notice of Intent to Construct for this proposed Arjes shredder to DEQ. The Company would still need to obtain an ACDP for this Arjes shredder as the emissions for uncontrolled operations could exceed 10 tons per year if operated uncontrolled. (Test. of Gravier.)

68. On April 30, 2019, DEQ again informed the Company that its Arjes shredder required an ACDP. DEQ further informed the Company that it was authorized to operate the Arjes shredder “in the interim before the permit is issued,” subject to certain operational requirements. (Ex. A46 at 1.)

69. The Company is currently operating under the used oil and antifreeze exemptions from hazardous waste because it has improved its storage practices and no longer mixes used oil with antifreeze. (Test. of Collins.)

70. DEQ performed a BEN calculation for the violation involving the Company’s failure to obtain an ACDP permit based upon its avoidance of the $7,200 cost of a permit. As of January 27, 2019, based upon the value of the avoidance of such a cost, the BEN calculation resulted in an economic benefit to the Company of $5,365. (Ex. A55.)

71. DEQ issued a directive to its staff to provide uniform parameters for the regulation of solid waste. DEQ determined solid waste included waste that has been stored for more than six months, had no clear evidence of productive use, or constituted a potential environmental problem. DEQ will exempt a solid waste storage pile that exists for more than six months if the stored material is potentially recyclable and has a feasible means of being recycled and at least 75 percent of the stored material has been recycled within a calendar year. (Ex. A31 at 1; test. of Papinsick.)

72. The Company never kept an inventory of used tires obtained during its dismantling operations. (Test. of Anotta.)

73. During the period January 2017 through March 2019, the Company sold at least 4,736 used tires to recyclers and used tire re-sellers. (Ex. A65 at 1; test. of Sandoz.) For the period July and August 2018, the Company sold at least 1,705 used tires to a recycler. During the period August 10, 2017 through December 4, 2018, the Company sold 2,199 used tires to another recycler. The majority of these used tires were sold during November and December 2018. (Ex. A65 at 1.) The majority of tire sales were to recyclers at a price of $1 to $1.25 per tire. (Test. of Sandoz.) DEQ determined that such a figure was so minor that the economic benefit to the Company was virtually nonexistent. (Test. of Papinsick.)

74. From September 4, 2018, through at least March 28, 2019, the Company sold
significant volumes of shredded metal to recyclers. (Ex. R7.)

CONCLUSIONS OF LAW

1. The Company allowed a Class V injection system to inject hazardous substances.

2. The Company placed wastes in a location where they were likely to enter waters of the state.

3. The Company failed to completely and accurately determine if residue at the Facility was hazardous waste and the Company mixed antifreeze with used oil.

4. The Company established, operated, and expanded a waste tire storage site at the Facility without a waste tire storage permit.

5. The Company failed to operate a waste tire storage site in conformance with applicable standards.

6. The Company 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. The Company installed and operated an air contaminant source without obtaining an Air Contaminant Discharge Permit (ACDP).

8. The Company violated the terms and conditions of a previously-issued DEQ order.

9. The Company 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.

OPINION

DEQ proposes to assess the Company civil penalties in the total amount of $59,015, based on alleged violations of multiple environmental laws and violations of the RAO. As the proponent of these allegations, DEQ has the burden to establish, by a preponderance of the evidence, that the allegations are correct and that it is entitled to assess the civil penalties. OAR 340-011-0545(1) (general rule that the burden of proof is on the proponent of the fact or position). OAR 340-011-0545(2) (“All findings in a * * * order must be based on a preponderance of evidence in the record[]”) Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. Riley Hill General Contractor v. Tandy Corp., 303 Or 390, 402 (1987).
Operating a Class V Injection System

OAR 340-044-0005 provides, in part:

(21) "Industrial Activities" for the purpose of storm water injection control means, but is not limited to, manufacturing, processing and material handling activities and those areas of an industrial facility associated with such activities. Material handling activities include the storage, loading and unloading, transport or conveyance of any raw material, intermediate product, final product or waste product, and specifically includes hazardous substances, toxic materials and petroleum products.

* * * * *

(24) "Injection System" or "Underground Injection System" means a well, improved sinkhole, sewage drain hole, subsurface fluid distribution system or other system or groundwater point source used for the subsurface emplacement or discharge of fluids.

* * * * *

(45) "Toxic Material" means any material that will cause or can reasonably be expected to cause a hazard to aquatic, human or animal life[.]

OAR 340-044-00116 provides, in part:

Injection systems are classified as follows:

* * * * *

(5) Class V. Injection systems not included in Classes I, II, III or IV that inject fluids other than hazardous waste or radioactive waste into the subsurface. Types of Class V injection systems include, but are not limited to, the following:

* * * * *

(d) Storm water injection systems that inject only storm water runoff from residential, commercial or industrial facilities or roadways[.]

---

6 Class I through IV injection systems are designed to inject fluids that contain hazardous wastes, or inject fluids that are produced by oil and natural gas operations, or inject fluids used for extraction of minerals. See OAR 340-044-0011(1) through (4).
Attachment B1: Proposed and Final Order
May 7, 2020, EQC meeting
Page 23 of 54

OAR 340-022-0015 provides, in part:

(2) 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, used or handled, except as allowed in OAR 340-044-0018(3).[ ]

OAR 340-044-0018 provides, in part:

(3) Injection systems injecting storm water are authorized by this rule if the owner or operator is in compliance with the following requirements, as applicable:

* * * * *

(d) Industrial and commercial facilities — For industrial and commercial facilities including facilities owned by municipalities or other governmental units where hazardous substances, toxic materials and petroleum products are used, handled or stored, the storm water draining into the injection system shall not be exposed to these materials. Storm water is not exposed to hazardous substances, toxic materials and petroleum products if all manufacturing, processing and material handling activities and those areas of an industrial or commercial facility associated with such activities are protected by a storm resistant shelter to prevent contact with rain, snow, snowmelt and/or runoff.[ ]

The Company receives wrecked cars and purchases salvage cars from auction, has them delivered to the Facility, stores them at the Facility, dismantles the cars and drains their fluids, stores the fluids for reuse or to be sold to offsite recyclers, stores the vehicle husks in the scrap yard in the southern part of the Facility, crushes or shreds the cars in the scrap yard of the Facility, and then delivers the scrap metal to an offsite scrap metal recycler. Based upon these processing and material handling activities that include the handling of petroleum products, the Company engages in industrial activities at the Facility and in the southern part of the Facility where the DWs are located, as defined by OAR 340-044-0005(21).

The DWs receive storm water runoff via the catch basin system installed on the joint properties on which both the Company and Sunbelt and other businesses are located. The DWs then deliver this runoff to the subsurface. Additionally, DW1A’s riser has been dislodged and was subsequently replaced with a sheet of industrial plastic. In the absence of a secure, raised
riser, DW1A will receive storm water runoff directly from the surface. The DWs are a Class V underground injection system, as defined by OAR 340-044-0005(24) and OAR 340-044-0011(5)(d).

The topography of the Facility causes storm water to run to the south and east of the Facility. Runoff from the Facility regularly flows onto Sunbelt’s southern lot and pools in the area of CB7. The pooling demonstrated that CB7 is not draining properly, but the evidence did not demonstrate that it was completely obstructed. The pool does dissipate, demonstrating that draining is occurring but just at a slower rate than if there was no obstruction. Additionally, the July 2018 testing of the sludge, water and subsurface soils of the DWs demonstrated that the petroleum products from the Facility are draining into the DWs and have been draining into the DWs prior to the March 12, 2018 fire. The DWs receive storm water runoff from CB7 and/or by direct entry from the surface of the DWs, at least for DW1A.

The Company performs the majority of its operations of storing, draining, dismantling and crushing/shredding cars on the uncovered, open grounds of the Facility. Petroleum products, including used oil and antifreeze, are stored in containers on the uncovered grounds of the Facility and regularly have opened containers and missing lids. Car batteries regularly remain in the vehicle hulks, and sometimes the automotive fluids also, while the cars are stored in the scrap yard. Car batteries are also left on the uncovered ground of the Facility. Prior to DEQ’s warning letter of March 14, 2019, the Company had no oil absorbent pads to clean up spills at the Facility. The Company also has no storm water runoff prevention or mitigation measures. The Company’s lack of clean-up efforts was demonstrated by the regular petroleum staining found throughout the grounds of the Facility. Used oil, antifreeze and other petroleum products contain toxic and cancer-causing agents and are hazardous to human health and the environment. Because the Company stored and handled these materials in uncovered areas on the Facility’s grounds and the evidence established that these materials were spilled on the ground, these hazardous substances came into contact with storm water and would be carried with storm water runoff into the southern area of the Facility where the DWs were located and to CB7, which drained to the DWs.

The Company argued that FHA Holdings, as the owner of the DWs, bore sole responsibility for any issues that arise with them. The Company also asserted that Portland Fire bore responsibility for placing wastes into the DWs. The administrative rules do not limit the liability or responsibility strictly to the owner of the DWs. OAR 340-022-0015(2) provides that “no person” shall cause a Class V injection system to inject industrial wastes into the subsurface. OAR 340-044-0018(3) further provides that either the owner or the operator can be exempt by

---

7 DW1B was clogged with melted metal slag as a result of the March 12, 2018 fire. This metal slag prevented access to the interior of DW1B from the surface, and there was no evidence that the metal slag had been removed.

8 The Company also suggested that Sunbelt bore responsibility. However, the evidence established that Sunbelt follows all the best management practices, performs its automotive services inside its building, and has multiple systems in place to prevent and mitigate any spills. The hazardous substances found in the water, sludge and subsurface of the DWs, which had all been cleaned shortly before the Company began its operations at the Facility, originated with the Company.
ensuring that storm water is not exposed to any of the hazardous substances. Although other persons may violate OAR 340-022-0015(2), the Company remains liable for its own conduct in regards to the DWs. In this case, the Company leased the Facility on which the DWs are located, the Company stored and handled hazardous substances in such a manner that regularly exposed these substances to storm water, and the Company placed vehicle husks and other scrap around and on top of the DWs (aptly demonstrated by the melted metal slag that plugged DW1B). The hazardous substances that the Company regularly drained, spilled and stored are the same substances found in the water, sludge and subsurface soils from the DWs, and the existence of these substances pre-dated the March 12, 2018 fire. The evidence established that the Company exposed storm water to hazardous substances that were then injected into the DWs, a Class V injection system.9

The Company also argued that it lacked the prerequisite knowledge to violate OAR 340-022-0015(2)(c). However, Mr. Anotta’s testimony in this matter was contradictory, as he testified to a lack of knowledge of the existence of the DWs 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 scrap. 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 scrap. Mr. Anotta also testified that BES failed to inform him that the DWs were UICs subject to DEQ regulation, which claim appeared credible, but also suggested that BES indicated they were just part of the sewers, which was not credible as BES noted exactly what the DWs were at the time of its inspection. The Company’s argument that it did not cause hazardous substances to be injected into the subsurface by the DWs because it did not install the DWs is not persuasive. It is not necessary that the Company install the DWs. It is only necessary that the Company caused hazardous substances to be injected into the DWs, which, as shown above, the evidence established.

The Company caused the DWs, a Class V underground injection system, to inject fluids from its industrial activities where petroleum products were stored, used and handled, in violation of OAR 340-022-0015(2)(c). Because the Company did not store and perform all of its industrial activities under a storm resistant shelter, the Company is not eligible for the exemption provided in OAR 340-044-0018.

Wastes in Waters of the State

ORS 468B.025(1) provides, in part:

Except as provided in ORS 468B.050 or 468B.053, no person shall:

(a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or

---

9 The Company also asserted protection from liability because of the No Exposure Certification. However, that certification was based on inaccurate information provided by the Company. As the evidence established, the Company performed vehicle work outside of the warehouse and regularly handled hazardous substances on the exposed ground of the Facility.
be carried into the waters of the state by any means[.]

ORS 468B.005 provides, in part:

(5) “Pollution” or “water pollution” means such alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself or in connection with any other substance, create a public nuisance or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof.

* * * * *

(9) “Wastes” means sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive or other substances which will or may cause pollution or tend to cause pollution of any waters of the state.

(10) “Water” or “the waters of the state” include lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction.

The Facility is located in Oregon and contains DWs that inject storm water runoff into the subsurface with groundwater located approximately 52 feet below the surface and the Columbia Slough about 2,000 feet away. As the July 2018 samples demonstrated, hazardous substances are leaching into the soil from the DWs and moving down towards the groundwater. As defined by ORS 468B.005(10) underground waters and rivers are waters of the state. The products that the Company routinely drains and stores on the grounds of the Facility, such as antifreeze, gas, and used oil, will change the chemical composition, taste and odor of any water it contacts and are thus pollution and wastes as defined by ORS 468B.005(5) and (9). As explained above, the Company routinely placed such hazardous wastes on the Facility’s grounds, causing petroleum staining on the grounds and producing oily sheens on storm water runoff. Because the Company had no measures in place to contain any storm water runoff from its Facility, these wastes were likely to escape or be carried into the waters of the state by any means, and here especially via the DWs. Because the Company placed these wastes in a location where the wastes were likely to escape and reach nearby waters of the state, the Company violated ORS 468B.025(1)(a).
Failing to Perform Hazardous Waste Determinations and Mixing Antifreeze and Used Oil

OAR 340-102-0011(2) provides, in part:

A person who generates a residue as defined in OAR 340-100-0010 must determine if that residue is a hazardous waste[.]

OAR 340-100-0010(2) provides, in part:

(ec) “Residue” means solid waste as defined in 40 C.F.R. § 261.2[.]

40 CFR §261.2 provides, in part:

(b) Materials are solid waste if they are abandoned by being:

(1) Disposed of; or

(2) Burned or incinerated; or

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated; or

(4) Sham recycled, as explained in paragraph (g) of this section.

* * * *

(g) Sham recycling. A hazardous secondary material found to be sham recycled is considered discarded and a solid waste. Sham recycling is recycling that is not legitimate recycling as defined in §260.43[.]

(Emphasis in original.)

40 CFR §260.43 provides, in part:

(a) Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations must be legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste[.]

OAR 340-111-0010 provides, in part:

(1) In addition to provisions under 40 C.F.R. § 279.10, the following provisions under sections (2) through (5) of this rule shall apply.

(2) Mixtures and residues of used oil and other wastes:
(b) No person may mix hazardous or non-hazardous substances or waste with used oil to render the substances or wastes non-hazardous except as provided in 40 C.F.R. § 279.10(b)(2)(iii) and (b)(3). Wastes that will reduce the recyclability of used oil shall not purposely be mixed with used oil.]

The Company drained automotive fluids from the vehicles in preparation for crushing or shredding them. The Company routinely mixed the drained antifreeze with the drained used oil, labeled the containers “used oil,” and sent the used oil containers to ORCO for recycling. There was nothing on the containers that would inform ORCO that antifreeze had been purposely mixed into the used oil. By adding the antifreeze, a hazardous material, into the used oil containers and providing no notice to the recycler of this addition, the antifreeze was not being legitimately recycled. The Company was engaged in sham recycling as defined in 40 CFR §261.2(b)(4)(g), which makes the mixture a solid waste as defined in 40 CFR §261.2(b).

OAR 340-102-0010(2) requires any person to perform a hazardous waste determination on a residue. Pursuant to OAR 340-100-0010(2)(ee), because the Company’s mixture of used oil and antifreeze is solid waste, the mixture is a residue and the Company was required to perform a hazardous waste determination on the mixture and failed to do so, in violation of OAR 340-102-0010(2).

Antifreeze, as well as being a hazardous substance, also reduces the value of used oil when it is mixed into it. Until recently, the Company routinely mixed antifreeze with used oil, in violation of OAR 340-111-0010(2)(b).

Operating a Waste Tire Storage Site Without a Permit

OAR 340-064-0015 provides, in part:

(1) Except as provided by section (2) of this rule, no person shall establish, operate, maintain or expand a waste tire storage site until the person owning or controlling the waste tire storage site obtains a permit or permit modification/addendum therefor from the Department.

(2) Persons owning or controlling the following are exempted from the above requirement to obtain a waste tire storage permit, but shall comply with all other regulations regarding waste tire management and solid waste disposal:

* * * * *

(e) A wrecking business who stores not more than 1,500 waste tires for each retail business location[.]
OAR 340-064-0010 provides, in part:

(25) “Store” or “Storage” means to accumulate waste tires above ground, or to own or control property on which there are waste tires above ground. “Storage” includes the beneficial use of waste tires as fences and other uses with similar potential for causing environmental risks. “Storage” does not include the use of waste tires as a ballast to maintain covers on agricultural materials or at a construction site or a beneficial use such as planters except when the Department determines such uses create environmental risks.

** ** **

(33) “Waste Tire” means a tire that is no longer suitable for its original intended purpose because of wear, damage or defect, and is fit only for:

(a) Remanufacture into something else, including a retreaded tire; or

(b) Some other use which differs substantially from its original use.

(34) “Waste Tires Generated in Oregon” means Oregon is the place at which the tire first becomes a waste tire. A tire casing imported into Oregon for potential retreading, but which proves unusable for that purpose, is not a waste tire generated in Oregon. Examples of waste tires generated in Oregon include but are not limited to:

** ** **

(b) Tires removed from a junked auto at an auto wrecking yard in Oregon.

(35) “Wrecking Business” means a business operating according to a certificate issued under ORS 822.110.

The Company asserted that the tires stored at the Facility were not waste tires because the Company intended to sell them for reuse. However, the evidence failed to support this assertion. The evidence established that the Company failed to store the used tires it removed from the vehicle husks in any sort of fashion that would allow the tires to be utilized for reuse. The Company kept the used tires in multiple, large and haphazard piles. The used tires were unmarked so that there was no way to identify the sizes or types of tires buried in the piles. The Company’s assertions that these tires would be reused as tires was not credible when it would not be possible to locate the size and style of tire, let alone four tires, needed to re-tire a car.

Additionally, 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. Several used
tire piles had vegetation growing over them, indicating that the tires had been kept for multiple growing seasons. DEQ performed site inspections from March 2018 through April 2019. During that period, the large tire pile against the southern side of the warehouse remained unchanged, both in its size and the lack of any identifiable storage system. Although the Company did sell some used tires to a retailer, those sales were incidental to the Company’s primary use of the used tires, which was storage and occasional sales to recyclers. The used tires at the Facility were “waste tires,” as defined by OAR 340-064-0010(33) and DEQ’s plausible interpretation of its solid waste rules.

The Company’s used tires were also “waste tires,” as defined by OAR 340-064-0010(34)(b). The Company operates as an auto wrecking yard because its primary business function is to obtain wrecked vehicles or auctioned vehicles, dismantle them, and crush and shred them for sale to a recycler. In 2017, the Company obtained a dismantler’s certificate that had been issued by the Oregon Department of Transportation under ORS 822.110. Therefore, any tire removed by the Company is, by definition, a waste tire. The Company established and operated a waste tire storage site at the Facility.

The Company accumulates waste tires on the grounds of the Facility. As a wrecking business with one retail location, the Company can store up to 1,500 waste tires without having to obtain a waste tire storage permit. See OAR 340-064-0015(2)(c). During DEQ’s multiple inspections, the Company clearly had in excess of 1,500 waste tires stored at the Facility. The large pile of tires resting against the southern side of the warehouse visibly exceeded this tire limitation without even considering the additional tire piles and buried tires in the scrap yard. Therefore, the Company is not exempt from the requirement of obtaining a waste tire storage permit. Because the Company never obtained a waste tire storage permit, the Company violated OAR 340-064-0015(1).

Operating a Waste Tire Storage Site Without Complying with Applicable Storage Standards

OAR 340-064-0035 provides, in part:

(4) Operation. A waste tire storage site shall be operated in compliance with the following standards:

(a) An outdoor waste tire pile shall have no greater than the following maximum dimensions:

* * * * *

(C) Height: 6 feet.

(b) A 50-foot fire lane shall be placed around the perimeter of each waste tire pile. Access to the fire lane for emergency vehicles must be unobstructed at all times;

(c) Waste tire piles shall be located at least 60 feet from buildings;
(d) Waste tires to be stored for one month or longer shall be ricked, unless the Department waives this requirement."

OAR 340-064-0010(24) provides:

"Rick" means to horizontally stack tires securely by overlapping so that the center of a tire fits over the edge of the tire below it.

Pursuant to OAR 340-064-0015(2), waste tire storage sites must comply with the operation requirements listed in OAR 340-064-0035. During the DEQ inspections, the Company consistently had waste tire piles that were greater than six feet in height, that were located directly adjacent or leaning against the sides of the warehouse, and that were stored in unricked piles for more than one month. Additionally, the Company never maintained fire lanes around each tire pile, and there was no evidence that the Company ever maintained a single unobstructed 50-foot fire lane anywhere in the Facility. The Company failed to comply with the operation requirements of a waste tire storage facility in violation of 340-064-0015(2) and violated multiple provisions of the operation requirements for a waste tire storage site, including OAR 340-064-0035(4)(a)(C), (b), (c) and (d).

**Installing the Arjes Shredder Without Prior Written Notice to DEQ**

OAR 340-210-0215(1) provides:

New Sources. No person is allowed to construct, install, or establish a new source that will cause an increase in any regulated pollutant emissions without first notifying DEQ in writing.

OAR 340-200-0020 provides, in part:

(134) "Regulated air pollutant" or "Regulated pollutant":

(a) Except as provided in subsections (b), (c) and (d), means:

(A) Nitrogen oxides or any VOCs;

* * * * *

(b) As used in OAR 340 division 220, Oregon Title V Operating Permit Fees, regulated pollutant means particulate matter, volatile organic compounds, oxides of nitrogen and sulfur dioxide."

---

10 Even if the Company was exempt from the requirement of obtaining a waste tire storage permit, it still needs to comply with the operation requirements of OAR 340-064-0035. See OAR 340-064-0015(2).

11 Even after the Company started stacking some of the tires, the tires were stacked in straight, vertical columns, instead of overlapping, ricked stacks.
* * * * *

(166) “Source” means any * * * installation or combination thereof that emits or is capable of emitting air contaminants to the atmosphere [.]

Shortly before the March 12, 2018 fire, the Company acquired its original Arjes shredder. The Arjes shredder’s engine and crusher emits nitrous oxide, carbon monoxide and VOCs in varying amounts, which are regulated pollutants as defined by OAR 340-200-0020(134). Because the Arjes shredder emits regulated pollutants, it is a source as defined by OAR 340-200-0020(166). OAR 340-210-0215(1) requires a person to notify DEQ in writing prior to installing a new source. Although the Company did file a Notice of Intent to Construct for the post-fire replacement Arjes shredder, the Company had failed to provide any written notice of its acquisition of the original Arjes shredder, in violation of OAR 340-210-0215(1).

*Operating the Arjes Shredder Without an ACDP*

OAR 340-216-0020 provides, in part:

(3) No person may construct, install, establish, develop or operate any air contaminant source listed in OAR 340-216-8010 without first obtaining an Air Contaminant Discharge Permit (ACDP) from DEQ or LRAPA and keeping a copy onsite at all times, unless otherwise deferred from the requirement to obtain an ACDP in subsection (3)(b) or DEQ has granted an exemption from the requirement to obtain an ACDP under subsection (3)(f). No person may continue to operate an air contaminant source if the ACDP expires, or is terminated, denied, or revoked; except as provided in 340-216-0082[.]

OAR 340-216-8010, Table 1, Part B provides, in part:

85 All other sources, both stationary and portable, not listed herein which would have actual emissions, if the source were to operate uncontrolled, of 5 or more tons per year of direct PM2.5 or PM10 if located in a PM2.5 or PM10 nonattainment or maintenance area, or 10 or more tons per year of any single criteria pollutant if located in any part of the state[.]

OAR 340-200-0020 provides, in part:

(36) “Criteria pollutant” means any of the following regulated pollutants: nitrogen oxides, volatile organic compounds, particulate matter, PM10, PM2.5, sulfur dioxide, carbon monoxide, and lead.

* * * * *
(123) "Portable" means designed and capable of being carried or moved from one location to another. Indicia of portability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

* * * * *

(173) "Stationary source" means any building, structure, facility, or installation at a source that emits or may emit any regulated pollutant. Stationary source includes portable sources that are required to have permits under OAR 340 division 216[.]

Based upon operations of 24 hours per day and 365 days per year (8,760 annual hours), the Arjes shredder's engine emits nitrous oxide at a rate of 35.60 tons per year, emit carbon monoxide at 19.28 tons per year, and emit VOCs at a rate of 35.60 tons per year. The Arjes shredder's crusher would emit an additional 12.16 tons per year of VOCs. The Company disputed DEQ's claims regarding the emission standards for the Arjes shredder. First, the Company asserted that the Company does not operate the Arjes shredder for 8,760 hours per year. The Company provided definitive evidence that its current Arjes shredder had only operated 287 hours during the period of August 17, 2018, through May 6, 2019. The Company's business practices also demonstrated that it does not operate 24 hours per day and 365 days per year. However, OAR 340-216-8010 requires the emissions to be based upon the source, here the Arjes shredder, operating in an uncontrolled manner.

DEQ interprets "operate uncontrolled" to be the maximum capacity of the emitting source at full operations, 24 hours per day and 365 days per year, unless there is control equipment or a DEQ-enforceable control strategy. This interpretation is plausible in light of the actual language, particularly the word "uncontrolled" which indicates no limitations, of the administrative rule; and the purpose of the rule to assist DEQ in its goal to protect human health and the environment, which would support requiring permits if there was no actual or legal way to restrict the use of the source. See Don't Waste Oregon Committee v. Energy Facility Siting Council, 320 Or 132, 142 (1994) (The courts are required to give deference to a state agency's "plausible interpretation of its own rule.") As noted by DEQ, the approval letter it issued was not an enforceable order or an enforceable condition on a permit. Because, the Arjes shredder did not have any actual or legal way to restrict the hours of its use, its uncontrolled operations would be 8,760 hours per year.

The Company also argued that the emission standards used by DEQ were inaccurate because they were based on a hammermill source, not a shearing source. Because the Arjes shredder was a shearing source, a small source that shreds the metal, versus the larger hammermill source, that crushes the metal, the Company argued that the emission standards used by DEQ were not applicable. Although the emission standards were based upon hammermill sources, the only evidence in the record established that it is the act of the work performed and the type of product (here the destruction of metal), not the nature or manner of that destruction (crushed versus shredded), that creates the emissions. Based upon the evidence in the record, DEQ's use of its emissions standards to rate the Arjes shredder was accurate and reliable.
The Company’s prior and existing Arjes shredders emit carbon monoxide, nitrous oxide and VOCs at a rate that exceeds 10 tons per year if operated uncontrolled. In August 2018, November 2018, and April 2019, DEQ informed the Company that it needed to file an application for an ACDP, which the Company has failed to do. The Company has operated an Arjes shredder without an ACDP, in violation of OAR 340-216-0020(3).

Violating the RAO

ORS 465.260(4) provides:

The director may require a person liable under ORS 465.255 to conduct any removal or remedial action or related actions necessary to protect the public health, safety, welfare and the environment. The director’s action under this subsection may include but need not be limited to issuing an order specifying the removal or remedial action the person must take.

ORS 465.255(1) provides:

The following persons shall be strictly liable for those remedial action costs incurred by the state or any other person that are attributable to or associated with a facility and for damages for injury to or destruction of any natural resources caused by a release:

(a) Any owner or operator at or during the time of the acts or omissions that resulted in the release[

On March 12, 2018, the scrap yard in the Facility’s southern area burned for two days. Used vehicles, tires, vehicle fluids, vehicle plastics, a rubber conveyor belt, and the Arjes shredder burned during the fire. Smoke and particulate emissions from tire and vehicle combustion create priority pollutant metals, dioxins, furans, polycyclic aromatic hydrocarbons, VOCs, and other uncontrolled combustion products. The combustion process of the fire caused the release of these hazardous substances from the scrap in the yard to the air and ground. As a result of the fire, on March 28, 2018, DEQ issued the Company and FHA Holdings a RAO to require them to conduct removal and remedial actions to determine the extent of any hazardous substances and the appropriate handling and removal of such hazardous substances from the Facility.

The Company argued that the RAO should not have been issued to it because it was not a “person liable” as required by ORS 465.260(4). Because the Company was the operator of the Facility at the time that the fire occurred, the Company is a “person liable” and can be subject to a RAO. The Company also argued that DEQ issued the RAO as a result of public pressure. The evidence did not support that as the sole reason for the issuance of the RAO. Additionally, even if public pressure factored into DEQ’s decision, the RAO would still be valid as it was an action necessary to protect the public that was significantly harmed by this fire, as demonstrated by the destruction to neighboring homes, the death of multiple pets, and the injury to a firefighter.
The RAO included the following two conditions: the completion of fire debris removal within five days of DEQ approval of the Work Plan; and the completion of soil sampling within 10 days of DEQ approval of the Work Plan. DEQ issued its final approval of the revised Work Plan on July 12, 2018. Therefore, fire debris removal would need to be completed by July 17, 2018, and soil sampling by July 22, 2018. As of April 2019, the Company has still not completed either the fire debris removal or the soil sampling.

The Company first argued that it was not feasible to complete the fire debris removal and soil sampling within the time frames provided by the RAO because the Facility had not been released to them by Portland Fire or the insurance companies. However, the evidence did not support this argument. Portland Fire completed its investigation and released the scene on March 13, 2018. On May 8 and May 14, 2018, both insurance companies released the Facility back to the Company. In July 2018, the Company had free access to the Facility to complete any necessary actions for fire debris removal and soil sampling.

The Company also argued that it was not financially feasible for the Company to complete fire debris removal and soil sampling within those time frames. On August 21, 2018, DEQ provided new time frames for completion of both of these tasks with the fire debris removal to be completed by September 7, 2018, and the soil collection completed by September 14, 2018. The Company again failed to complete either of these two tasks. Meanwhile, since May 14, 2018, when the Facility was released to the Company, the Company has resumed its regular business operations and the scrap yard now contains even more vehicles and other scrap than it did at the time of the March 12, 2018. The Company has not demonstrated any reduction in its business operations. Instead, the Company has demonstrated that resuming and increasing business operations is its priority, not compliance with the RAO. Additionally, the Company has reduced its delivery of scrap metal to the recycler because of its insistence on using the Arjes shredder. The Company wants to sell the scrap metal at the significantly higher price it would receive if it uses the Arjes shredder rather than the lower price it previously received when it just crushed the vehicles. Thus, the Company has again prioritized its ongoing business operations over compliance with the RAO. Rather than demonstrating that the deadlines are not feasible, the Company has demonstrated that it could have performed the operations, but it preferred to continue to accumulate more vehicle husks and scrap, which inhibited its ability to clear the scrap yard for fire debris removal and sampling, and then refused to remove the old and the new scrap, which it could have sold in the same manner it has sold such material since 2014, until such time as it could get a reliable and operational shredder, something it has still not acquired.

The Company failed to comply with the deadlines provided in the RAO for fire debris removal and soil sampling, in violation of the conditions of the RAO.

Assessment of Civil Penalties

In its Second Amended Notice, DEQ did not seek to assess any civil penalties for the Company’s violations of OAR 340-111-0010(2), mixing antifreeze with used oil, and OAR 340-210-0215(1), failing to give written notice of installation of the Arjes shredder. Therefore, no civil penalties are assessed for these violations.
Pursuant to ORS 468.140(1)(b) and (c), DEQ is authorized to assess a civil penalty for each day of a violation against any person who violates any provision of ORS Chapter 468B or any order or administrative rule issued by DEQ. Pursuant to the authority granted by ORS 468.130, the Commission promulgated administrative rules for the assessment of civil penalties. The procedure for calculating civil penalties is set forth in OAR 340-012-0045 and provides:

DEQ may assess a civil penalty for any violation, in addition to any other liability, duty, or other penalty provided by law. Except for civil penalties assessed under either OAR 340-012-0155 or OAR 340-012-0160, DEQ determines the amount of the civil penalty using the following formula: 
\[ BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB. \]

(1) BP is the base penalty and is determined by the following procedure:

(a) The classification of each violation is determined according to OAR 340-012-0053 to 340-012-0097.

(b) The magnitude of the violation is determined according to OAR 340-012-0130 and 340-012-0135.

(c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.

(2) The base penalty is adjusted by the application of aggravating or mitigating factors set forth in OAR 340-012-0145.

(3) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.

A. Base Penalty

OAR 340-012-0068 determines the classification of violations that apply to hazardous wastes. It provides, in part:

(1) Class I:

(a) Failing to make a complete and accurate hazardous waste determination of a residue as required by OAR 340-102-0011[.]

OAR 340-012-0066 determines the classification of violations for the certain solid waste tire operations. It provides, in part:

(1) Class I:

(a) Establishing or operating a waste tire storage site without first
obtaining a permit[.]

OAR 340-012-0054(2) determines the classification of air quality violations. It provides, in part:

(2) Class II:

(a) Constructing or operating a source required to have an Air Contaminant Discharge Permit (ACDP), ACDP attachment, or registration without first obtaining such permit or registration, unless otherwise classified[.]

OAR 340-012-0053 determines the classification of violations that apply to all DEQ programs. It provides, in part:

(1) Class I:

(a) Violating a requirement or condition of a commission or department order, consent order, agreement, consent judgment (formerly called judicial consent decree) or compliance schedule contained in a permit or permit attachment;

* * * * *

(2) Class II: Violating any otherwise unclassified requirement.

OAR 340-012-0055 determines the classification of water quality violations. It provides, in part:

(1) Class I:

* * * * *

(p) Contracting for operation or operating a prohibited Underground Injection Control (UIC) system other than a cesspool that only disposes of human waste;

* * * * *

(2) Class II:

* * * * *

(c) Causing any wastes to be placed in a location where such wastes are likely to be carried into waters of the state by any means[.]
OAR 340-012-0130 determines magnitude of violations, not including certain solid waste and asbestos violations. It provides, in part:

(1) The appropriate magnitude of each civil penalty is determined by first applying the selected magnitude in OAR 340-012-0135. If none is applicable, the magnitude is moderate unless evidence shows that the magnitude is major under paragraph (3) or minor under paragraph (4).

(2) The person against whom the violation is alleged has the opportunity and the burden to prove that a magnitude under paragraph (1), (3) or (4) of this rule is more probable than the alleged magnitude, regardless of whether the magnitude is alleged under OAR 340-012-0130 or 340-012-0135.

(3) The magnitude of the violation is major if DEQ finds that the violation had a significant adverse impact on human health or the environment.

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

OAR 340-012-0135 determines magnitude of select violations. It provides, in part:

(4) Magnitudes for selected Hazardous Waste violations will be determined as follows:

(a) Failure to make a hazardous waste determination;

********

(C) Minor — Failure to make the determination on one or two waste streams[.]

OAR 340-012-0140 sets the base penalty for Class I and II violations. OAR 340-012-0140 provides, in part:

(2) $12,000 Penalty Matrix:

(a) The $12,000 penalty matrix applies to the following:
(D) Any violation of ORS 468B.025(1)(a) or (1)(b), or of 68B.050(1)(a) by a person without a National Pollutant Discharge Elimination System (NPDES) permit, unless otherwise classified.

(E) Any violation of a water quality statute, rule, permit or related order by:

(iv) A person that installs or operates a prohibited Class I, II, III, IV or V UIC system, except for a cesspool.

(P) Any violation of ORS Chapter 465, UST or environmental cleanup statute, rule, related order or related agreement.

(b) The base penalty values for the $12,000 penalty matrix are as follows:

(A) Class I:

(i) Major — $12,000;

(ii) Moderate — $6,000;

(iii) Minor — $3,000.

(B) Class II:

(i) Major — $6,000;

(ii) Moderate — $3,000;

(iii) Minor — $1,500.

(3) $8,000 Penalty Matrix:

(a) The $8,000 penalty matrix applies to the following:
(A) Any violation of an air quality statute, rule, permit, permit attachment, or related order committed by a person that has or should have an ACDP permit, except for NSR, PSD and Basic ACDP permits, unless listed under another penalty matrix.

* * * * *

(i) Unless specifically listed under another penalty matrix, any violation of ORS Chapter 459 or other solid waste statute, rule, permit, or related order committed by:

(i) A person that has or should have a waste tire permit;

* * * * *

(b) The base penalty values for the $8,000 penalty matrix are as follows:

(A) Class I:

(i) Major — $8,000.

(ii) Moderate — $4,000.

(iii) Minor — $2,000.

(B) Class II:

(i) Major — $4,000.

(ii) Moderate — $2,000.

(iii) Minor — $1,000.

* * * * *

(4) $3,000 Penalty Matrix:

(a) The $3,000 penalty matrix applies to the following:

* * * * *

(P) Any violation of an oil and hazardous material spill and release statute, rule, or related order committed by a person not listed under another matrix.
(b) The base penalty values for the $3,000 penalty matrix are as follows:

(A) Class I:

** ***

(iii) Minor — $750.[]

i. Base Penalty for Operation of a Class V Underground Injection System

Pursuant to OAR 340-012-0055(1)(p), operating a prohibited UIC system is a Class I violation. There is no select magnitude for such violations in OAR 340-012-0135. Pursuant to OAR 340-012-0130(1), the magnitude of the violation is moderate, as the evidence failed to support a finding of major or minor magnitude. Pursuant to OAR 340-012-0140(2)(a)(E)(iv) and (2)(b)(A)(ii), the base penalty for a Class I violation of moderate magnitude is $6,000.

ii. Base Penalty for Placement of Wastes in Waters of the State

Pursuant to OAR 340-012-0055(2)(c), placing wastes in an area where they are likely to enter the waters of the state is a Class II violation. There is no select magnitude for such violations in OAR 340-012-0135. Pursuant to OAR 340-012-0130(1), the magnitude of the violation is moderate, as the evidence failed to support a finding of major or minor magnitude. Pursuant to OAR 340-012-0140(2)(a)(D) and (2)(b)(B)(ii), the base penalty for a Class II violation of moderate magnitude is $3,000.

iii. Base Penalty for Failure to Perform Hazardous Waste Determination

Pursuant to OAR 340-012-0068(1)(a), failing to make a hazardous waste determination is a Class I violation. OAR 340-012-0135(4)(a)(C) determines the magnitude of violations for failing to make a hazardous waste determination. The Company inappropriately handled two hazardous wastes, antifreeze and used oil. Because the violation was limited to two hazardous waste streams, the magnitude of the violation is minor. Pursuant to OAR 340-012-0140(4)(a)(P) and (4)(b)(A)(i), the base penalty for a Class I violation of minor magnitude is $750.

iv. Base Penalty for Operation of a Waste Tire Storage Site Without a Permit

Pursuant to OAR 340-012-0066(1)(a), establishing or operating a waste tire storage site without a permit is a Class I violation. There is no select magnitude for such violations in OAR 340-012-0135. Pursuant to OAR 340-012-0130(1), the magnitude of the violation is moderate, as the evidence failed to support a finding of major (no evidence of a significant adverse impact on human health or the environment) or minor magnitude. A minor magnitude is not supported by the evidence because the conditions of the Facility significantly exacerbated the fire in its

---

[1] OAR 340-012-0130(2) places the burden of establishing a minor or major magnitude on the Company. The Company failed to meet its burden for each of the relevant violations.
severity and duration and resulted in the destruction of multiple structures, the deaths of multiple pets, and the temporary evacuation of neighboring homes and businesses. Pursuant to OAR 340-012-0140(3)(a)(l)(i) and (3)(b)(A)(ii), the base penalty for a Class I violation of moderate magnitude is $4,000.

v. Base Penalty for Violations of Waste Tire Storage Operation Standards

Pursuant to OAR 340-012-0053(2), the violations of any unclassified DEQ requirements, such as complying with the operations standards for a waste tire storage site, is a Class II violation. There is no select magnitude for such violations in OAR 340-012-0135. Pursuant to OAR 340-012-0130(1), the magnitude of the violation is moderate, as the evidence failed to support a finding of major or minor magnitude, as shown above. Pursuant to OAR 340-012-0140(3)(a)(l)(i) and (3)(b)(B)(ii), the base penalty for a Class II violation of moderate magnitude is $2,000.

vi. Base Penalty for Failure to Operating an Air Contaminant Discharge Source without an ACDP

Pursuant to OAR 340-012-0054(2)(a), operating a source without the required ACDP is a Class II violation. There is no select magnitude for such violations in OAR 340-012-0135. Pursuant to OAR 340-012-0130(1), the magnitude of the violation is moderate, as the evidence failed to support a finding of major or minor magnitude. Pursuant to OAR 340-012-0140(3)(a)(A) and (3)(b)(B)(ii), the base penalty for a Class II violation of moderate magnitude is $2,000.

vii. Base Penalty for Violations of Conditions of a RAO

Pursuant to OAR 340-012-0053(1)(a), violating a DEQ order is a Class I violation. There is no select magnitude for such violations in OAR 340-012-0135. Pursuant to OAR 340-012-0130(1), the magnitude of the violation is moderate, as the evidence failed to support a finding of major or minor magnitude. Pursuant to OAR 340-012-0140(2)(a)(P) and (2)(b)(A)(ii), the base penalty for a Class I violation of moderate magnitude is $6,000.

B. Aggravating and Mitigating Factors

OAR 340-012-0145 defines the aggravating and mitigating factors that are applicable to the civil penalty formula. It provides, in part:

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

(a) Except as otherwise provided in this section, the values for “P” and the finding that supports each are as follows:
(A) 0 if no PSAs or there is insufficient information on which to base a finding under this section.

* * * * *

(3) "H" is the respondent's history of correcting PSAs. The values for "H" and the finding that supports each are as follows:

* * * * *

(c) 0 if there is no prior history or if there is insufficient information on which to base a finding under paragraphs (3)(a) or (b).

* * * * *

(4) "O" is whether the violation was repeated or ongoing. A violation can be repeated independently on the same day, thus multiple occurrences may occur within one day. Each repeated occurrence of the same violation and each day of a violation with a duration of more than one day is a separate occurrence when determining the "O" factor. Each separate violation is also a separate occurrence when determining the "O" factor. The values for "O" and the finding that supports each are as follows:

(a) 0 if there was only one occurrence of the violation, or if there is insufficient information on which to base a finding under paragraphs (4)(b) through (4)(d).

(b) 2 if there were more than one but less than seven occurrences of the violation.

(c) 3 if there were from seven to 28 occurrences of the violation.

(d) 4 if there were more than 28 occurrences of the violation.

* * * * *

(5) "M" is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply. The values for "M" and the finding that supports each are as follows:

(a) 0 if there is insufficient information on which to base a finding under paragraphs (5)(b) through (5)(d).
(b) 2 if the respondent had constructive knowledge (reasonably should have known) of the requirement.

(c) 4 if the respondent’s conduct was negligent.

(d) 8 if the respondent’s conduct was reckless or the respondent acted or failed to act intentionally with actual knowledge of the requirement.

(e) 10 if respondent acted flagrantly.

(6) “C” is the respondent’s efforts to correct or mitigate the violation. The values for “C” and the finding that supports each are as follows:

(a) -5 if the respondent made extraordinary efforts to correct the violation or to minimize the effects of the violation, and made extraordinary efforts to ensure the violation would not be repeated.

(b) -4 if the respondent made extraordinary efforts to ensure that the violation would not be repeated.

(c) -3 if the respondent made reasonable efforts to correct the violation, or took reasonable affirmative efforts to minimize the effects of the violation.

(d) -2 if the respondent eventually made some efforts to correct the violation, or to minimize the effects of the violation.

(e) -1 if the respondent made reasonable efforts to ensure that the violation would not be repeated.

(f) 0 if there is insufficient information to make a finding under paragraphs (6)(a) through (6)(e), or (6)(g) or if the violation or the effects of the violation could not be corrected or minimized.

(g) 2 if the respondent did not address the violation as described in paragraphs (6)(a) through (6)(e) and the facts do not support a finding under paragraph (6)(f).

The determination of the appropriate valuation for the “M” factor relies upon definitions of various mental state terms. OAR 340-012-0030 defines several of these terms. It provides, in part:

(11) “Flagrant” or “flagrantly” means the respondent had actual knowledge that the conduct was unlawful and consciously set out to commit the violation.
(13) “Intentional” means the respondent acted with a conscious objective to cause the result of the conduct.

(15) “Negligence” or “Negligent” means the respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation.

(20) “Reckless” or “Recklessly” means the respondent consciously disregarded a substantial and unjustifiable risk that the result would occur or that the circumstance existed. The risk must be of such a nature and degree that disregarding that risk constituted a gross deviation from the standard of care a reasonable person would observe in that situation[.]

i. The Class V Underground Injection Systems Violation

The Company has no PSAs, and, therefore, no prior history of correcting PSAs. The Company’s “P” and “H” factors for all the violations are 0. The Company first started violating OAR 340-044-0015(2)(c) when it began its industrial activities on the uncovered grounds of the Facility as early as 2014. Because the Company has continuously exposed storm water runoff to the hazardous materials it handles on the uncovered grounds of the Facility, the Company has violated OAR 340-044-0015(2)(c) for more than 28 occurrences. The Company has been handling hazardous materials for years without making any efforts to protect the environment from any spills of these materials. Beginning with the March 14, 2018 site inspection, DEQ has repeatedly advised the Company about best management practices for its hazardous wastes including used oil. However, it was only after DEQ sent a warning letter on March 14, 2019, to the Company that it began to store oil absorbent pads that could be used on any potential spills. The topography of the Facility clearly shows that storm water runoff from the Facility will flow off the Facility’s grounds and onto Sunbelt’s property and the southern edge of the Facility where the DWs area located. By failing to protect the run off from the hazardous wastes handled by the Company, the Company disregarded a substantial and unjustifiable risk that contamination would occur. Therefore, the Company engaged in reckless conduct, and the “M” factor is 8, as assessed by DEQ. The “O” factor is 0, as assessed by DEQ. Because the Company continues to perform its industrial activities on the exposed grounds of the Facility without closing the DWs, the Company has made no efforts to correct its violation. The “C” factor is 2, as assessed by DEQ.

ii. The Wastes in the Waters of the State Violation

The Company has no PSAs, and, therefore, no prior history of correcting PSAs. The
Company’s “P” and “H” factors for all the violations are 0. The Company first started violating OAR 340-044-0015(2)(c) when it began its industrial activities on the uncovered grounds of the Facility as early as 2014. Because the Company has continuously exposed storm water runoff to the hazardous materials it handles on the uncovered grounds of the Facility, the Company has violated OAR 340-044-0015(2)(c) for more than 28 occurrences. As explained above, the Company’s failure to protect storm water runoff from its hazardous substances was reckless conduct. The “M” factor is 8, as assessed by DEQ. The “O” factor is 0, as assessed by DEQ. DEQ assessed the “C” factor as 0, based upon its finding that there was insufficient information to support another value. The “C” factor is 0.

iii. The Hazardous Waste Determination Violation

The “P” and “H” factors are 0. The Company has for years mixed antifreeze with used oil, thus preventing the Company from claiming an exemption to the requirement to perform a hazardous waste determination. DEQ assessed a value of 0 for the “O” factor.\textsuperscript{13} During the March 2018 site inspections, DEQ advised the Company of the best management practices for handling used oil. Such best practices included prohibitions on mixing the used oil with antifreeze. Despite these recommendations, the Company continued to mix the hazardous substances and send them for recycling to ORCO without making a determination as to whether the mixture qualified as a hazardous waste. Because 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’s conduct was negligent. The “M” factor is 4. The Company failed to perform hazardous waste determinations during a period when it was required to do so. Because such a failure cannot be corrected as the prior hazardous waste has been sent to ORCO, the “C” factor is 0.

iv. The Operation of a Waste Tire Storage Site Without a Permit Violation

The “P” and “H” factors are 0. DEQ assessed a value of 3 for the “O” factor. On each date of the eight DEQ site inspections, the Company stored more than 1,500 waste tires at the Facility without obtaining a waste tire storage site permit. Because the Company violated OAR 340-064-0015(1) on more than seven occasions, the “O” factor is 3. Over the course of its operations, the Company amassed a tremendous amount of waste tires and continued to accumulate more tires without having an effective plan to recycle or reuse the tires. DEQ repeatedly advised the Company of the requirement to obtain a waste tire storage permit, which the Company made no efforts to obtain. The Company consciously disregarded the substantial and unjustified risks that its refusal to apply for a waste tire storage permit would result in ongoing violations of OAR 340-064-0015(1). Because the Company’s behavior was a gross deviation from the standard of care a reasonable person would exercise, its conduct was reckless and the “M” factor is 8, as assessed by DEQ. DEQ assessed a value of -2 for the “C” factor based upon its determination that the Company mitigated the violation when it removed and reduced some of the waste tire piles at the Facility.

\textsuperscript{13} DEQ found the information insufficient to determine on how many occasions the Company generated the hazardous waste and for how long the Company stored the hazardous waste.
v. The Failure to Comply with Waste Tire Storage Site Requirements Violation

The “P” and “H” factors are 0. DEQ assessed a value of 4 for the “O” factor. As observed during all eight of the site inspections, the Company has never complied with the operations standards for a waste tire storage site. The Facility still lacks the proper fire lanes around the tire piles, the tire columns that do exist are unricked, and the massive tire pile that leans against the southern wall of the warehouse remains unchanged. Because of the unchanged nature of this massive tire pile from March 14, 2018, through April 23, 2019, the evidence established that the Company has violated the provisions of OAR 340-064-0015(2) and OAR 240-064-0035(4) on a daily basis for more than 28 occurrences. DEQ correctly assessed the “O” factor as 4. Over the course of its operations, the Company amassed a tremendous amount of waste tires and continued to accumulate more tires without having an effective plan to recycle or reuse the tires. In the process, the tires created a significant hazard by the haphazard manner in which they were stored which resulted in no fire lanes of any size around the tire piles and tires piles that were so high and improperly stacked as to be a danger to persons in the area. This significant accumulation and the lack of access to the tire piles directly contributed to the severity of the March 12, 2018 fire. The Company consciously disregarded the substantial and unjustified risks that its manner of storing these waste tires would contribute to such a fire. Because the Company’s behavior was a gross deviation from the standard of care a reasonable person would exercise, its conduct was reckless and the “M” factor is 8, as assessed by DEQ. As noted above, the Company has made no efforts to comply with the requirements to keep tire piles at less than six feet, to maintain fire lanes around all tire piles, to keep tire piles away from the sides of buildings, and to rick the tire piles. The “C” factor is 2, as assessed by DEQ.

vi. The Operation of the Arjes Shredder Without an ACDP

The “P” and “H” factors are 0. DEQ assessed a value of 4 for the “O” factor. The Company obtained all the components for the Arjes shredder by August 17, 2018. For the period of August 17, 2018, through January 11, 2019, the Company operated the Arjes shredder for 2 to 4 hours per day for a total of 25 days. By May 6, 2019, the Company had operated the Arjes shredder for a total of 287 hours, approximately 212 hours more than it had operated it prior to January 11, 2019 (3 hours of average use x 25 days = 75 hours). The evidence established that the Company operated the Arjes shredder without a permit for more than 28 occurrences. The “O” factor is 4. On at least four occasions including one PEN, DEQ informed the Company of the requirement for it to file an application for an ACDP for its use of the Arjes shredder. The Company has refused to file any such application, consciously disregarding the substantial and unjustifiable risk that it will continue to violate OAR 340-216-0020(3). Because the Company’s behavior was a gross deviation from the standard of care a reasonable person would exercise, its conduct was reckless and the “M” factor is 8, as assessed by DEQ. The Company has made no efforts to comply with the requirement that it obtain an ACDP to operate the Arjes shredder. The “C” factor is 2, as assessed by DEQ.

vii. The Violation of the RAO

The “P” and “H” factors are 0. DEQ assessed a value of 4 for the “O” factor. The RAO required fire debris removal and completion of soil sampling by July 17 and 28, 2018,
respectively. On August 21, 2018, DEQ extended those deadlines to September 7 and 14, 2018. As of April 2019, the Company had still not completed fire debris removal or the soil sampling. Therefore, the Company has been out of compliance with the RAO for more than 28 days. The “O” factor is 4. On March 28, 2018, DEQ issued the RAO to the Company. The RAO included language advising the Company that a failure to comply with the RAO could result in civil penalties. On August 21 and September 14, 2018, DEQ again informed the Company of its requirement, and its failure, to complete the fire debris removal and soil sampling. Rather than comply with the RAO, the Company has continued to increase the amount of vehicle husks and scrap in its southern scrap yard, which inhibits its ability to perform the tasks required by the RAO. The Company’s delays in completing the requirements of the RAO and its actions that actually prevent it from completing those requirements demonstrate the Company’s conscious disregard of the substantial and unjustifiable risk that it will continue to violate the RAO. Because the Company’s behavior was a gross deviation from the standard of care a reasonable person would exercise, its conduct was reckless and the “M” factor is 8, as assessed by DEQ. As demonstrated by its increase in the size of the scrap at the Facility, the Company has not made any reasonable efforts to comply with the RAO. Because its efforts to comply with the RAO are less than reasonable and compliance with RAO is possible, the “C” factor is 2, as assessed by DEQ.

C. Economic Benefit

OAR 340-012-0150 authorizes DEQ to assess an economic benefit based upon the “dollar value of the benefit gained and the costs avoided or delayed * ** as a result of the respondent’s noncompliance” by applying the Environmental Protection Agency’s BEN computer model.

DEQ only assessed an economic benefit “EB” factor to the Company’s violation of OAR 340-216-0020(3), operating the Arjes shredder without an ACDP. The Company has avoided paying the $7,200 cost for the ACDP application fee. As authorized by OAR 340-012-0150, DEQ performed a BEN computation and, based upon the Company’s avoidance of the cost of the application fee, the “EB” factor is $5,365.14

D. Assessed Civil Penalties

i. The Class V Underground Injection Systems Violation

The civil penalty for the Company’s violation of OAR 340-044-0015(2)(c) is $14,400 ($6,000 base penalty + [(0.1 x $6,000 base penalty) x (0 “P” + 0 “H” + 4 “O” + 8 “M” + 2 “C”)] + $0 “EB”).

ii. The Wastes in the Waters of the State Violation

The civil penalty for the Company’s violation of ORS 468B.025(1)(a) is $6,600 ($3,000 base penalty + [(0.1 x $3,000 base penalty) x (0 “P” + 0 “H” + 4 “O” + 8 “M” + 0 “C”)] + $0

14 DEQ found its information was insufficient to determine delayed or avoided costs for the remaining violations. See Second Amended Notice.
iii. The Hazardous Waste Determination Violation

The civil penalty for the Company’s violation of OAR 340-102-0011(2) is $1,050 ($750 base penalty + [(0.1 x $750 base penalty) x (0 “P” + 0 “H” + 0 “O” + 4 “M” + 0 “C”)] + $0 “EB”).

iv. The Operation of a Waste Tire Storage Site Without a Permit Violation

The civil penalty for the Company’s violation of OAR 340-064-0015(1) is $7,600 ($4,000 base penalty + [(0.1 x $4,000 base penalty) x (0 “P” + 0 “H” + 3 “O” + 8 “M” + -2 “C”)] + $0 “EB”).

v. The Failure to Comply with Waste Tire Storage Site Requirements Violation

The civil penalty for the Company’s violation of OAR 340-064-0015(2) and OAR 340-064-0035(4) is $4,800 ($2,000 base penalty + [(0.1 x $2,000 base penalty) x (0 “P” + 0 “H” + 4 “O” + 8 “M” + 2 “C”)] + $0 “EB”).

vi. The Operation of the Arjes Shredder Without an ACDP

The civil penalty for the Company’s violation of OAR 340-216-0020(3) is $10,165 ($2,000 base penalty + [(0.1 x $2,000 base penalty) x (0 “P” + 0 “H” + 4 “O” + 8 “M” + 2 “C”)] + $5,365 “EB”).

vii. The Violation of the RAO

The civil penalty for the Company’s violation of the RAO is $14,400 ($6,000 base penalty + [(0.1 x $6,000 base penalty) x (0 “P” + 0 “H” + 4 “O” + 8 “M” + 2 “C”)] + $0 “EB”).

The total civil penalties owed by the Company for all the violations are $59,015. The Company has asserted that it has financial limitations, although it provided no evidence of such limitations. OAR 340-011-0570(2) provides:

The administrative law judge may not reduce or mitigate a civil penalty below the amount established by the application of the civil penalty formula contained in OAR 340, division 12.

Pursuant to OAR 340-011-0570(2), the ALJ does not have the legal authority to reduce the civil penalty below the amount established by the application of the civil penalty formula.15 The Company must pay the civil penalties in the total amount of $59,015. Pursuant to ORS 468.135 and ORS 183.745(2), the civil penalty is due and payable within 10 days after the order.

---

15 OAR 340-012-0162 provides DEQ the discretion to reduce a penalty based on a determination of a respondent’s inability to pay. However, the respondent must complete a financial disclosure form provided by DEQ and submit any other documentation requested by DEQ.
becomes final.

**Order for Corrective Action**

ORS 468.100(1) provides, in part:

Whenever the Environmental Quality Commission has good cause to believe that any person is engaged or is about to engage in any acts or practices which constitute a violation of ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.505 to 454.535, 454.605 to 454.755 and ORS chapters 468, 468A and 468B, or any rule, standard or order adopted or entered pursuant thereto, or of any permit issued pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.505 to 454.535, 454.605 to 454.755 and ORS chapters 468, 468A and 468B, the commission may institute actions or proceedings for legal or equitable remedies to enforce compliance thereto or to restrain further violations.

DEQ established that Respondents violated a removal action order issued pursuant to ORS 465.260(4) and the following statute and administrative rules: ORS 468B.025(1)(a), OAR 340-044-0015(2)(c), OAR 340-102-0011(2), OAR 340-064-0015(1) and (2), OAR 340-064-0035(4), OAR 340-111-0010(2)(b), OAR 340-210-0215(1), and OAR 340-216-0020(3). Based upon these violations, DEQ may issue an order against the Company for corrective action to enforce their compliance with those statutes and administrative rules. DEQ is entitled to issue an order for corrective action to require the Company to perform the following:

- Within 10 days of issuance of a Final Order or when the Proposed and Final Order becomes final, the Company must store all tires at the Facility in accordance with the standards for waste tire storage sites at OAR 340-064-0035(4);

- Within 10 days of issuance of a Final Order or when the Proposed and Final Order becomes final, the Company must submit a plan to DEQ demonstrating how the Company will manage storm water runoff from the Facility and will implement this plan within 30 days of DEQ approval;

- Within 10 days of issuance of a Final Order or when the Proposed and Final Order becomes final, the Company must cease operations of the Class V underground injection systems DW1A and DW1B;

- Within 10 days of issuance of a Final Order or when the Proposed and Final Order becomes final, the Company must submit a complete application for a Simple ACDP to DEQ;

- Within 10 days of the issuance of a Final Order or when the Proposed and Final Order becomes final, the Company must remove all debris at the Facility so that the Work Plan can be implemented; and
Within 20 days of the issuance of a Final Order or when the Proposed and Final Order becomes final, the Company must implement the Work Plan and submit documentation to DEQ, demonstrating the completion of the Work Plan.

ORDER

1. NW Metals Inc. violated OAR 340-044-0015(2)(c) and must pay a civil penalty in the total amount of $14,400 for this violation;

2. NW Metals Inc. violated ORS 468B.025(1)(a) and must pay a civil penalty in the total amount of $6,600 for this violation;

3. NW Metals Inc. violated OAR 340-102-0011(2) and must pay a civil penalty in the total amount of $1,050 for this violation;

4. NW Metals Inc. violated OAR 340-064-0015(1) and must pay a civil penalty in the total amount of $7,600 for this violation;

5. NW Metals Inc. violated OAR 340-064-0015(2) and OAR 340-064-0035(4) and must pay a civil penalty in the total amount of $4,800 for this violation;

6. NW Metals Inc. violated OAR 340-111-0010(2)(b) but is assessed no civil penalty for this violation;

7. NW Metals Inc. violated OAR 340-210-0215(1) but is assessed no civil penalty for this violation;

8. NW Metals Inc. violated OAR 340-216-0020(3) and must pay a civil penalty in the total amount of $10,165 for this violation;

9. NW Metals Inc. violated a Removal Action Order and must pay a civil penalty in the total amount of $14,400 for this violation.

All civil penalties are due and payable 10 days after the order imposing the civil penalties becomes final by operation of law or on appeal.

10. NW Metals Inc. must perform the following corrective actions:

- Within 10 days of issuance of a Final Order or when the Proposed and Final Order becomes final, NW Metals Inc. must store all tires at the Facility in accordance with the standards for waste tire storage sites at OAR 340-064-0035(4);

- Within 10 days of issuance of a Final Order or when the Proposed and Final Order becomes final, NW Metals Inc. must submit a plan to DEQ demonstrating how NW Metals Inc. will manage storm water runoff from the Facility and will implement this plan within 30 days of DEQ approval;
- Within 10 days of issuance of a Final Order or when the Proposed and Final Order becomes final, NW Metals Inc. must cease operations of the Class V underground injection systems DW1A and DW1B;

- Within 10 days of issuance of a Final Order or when the Proposed and Final Order becomes final, NW Metals Inc. must submit a complete application for a Simple ACDP to DEQ;

- Within 10 days of the issuance of a Final Order or when the Proposed and Final Order becomes final, NW Metals Inc. must remove all debris at the Facility so that the Work Plan can be implemented; and

- Within 20 days of the issuance of a Final Order or when the Proposed and Final Order becomes final, NW Metals Inc. must implement the Work Plan and submit documentation to DEQ, demonstrating the completion of the Work Plan.

Samantha A. Fair  
Administrative Law Judge  
Office of Administrative Hearings

**APPEAL RIGHTS**

If you are not satisfied with this decision, you have the right to have the decision reviewed by the Oregon Environmental Quality Commission (Commission). To have the decision reviewed, you must file a “Petition for Review” within 30 days of the date this order is served on you. Service, as defined in Oregon Administrative Rule (OAR) 340-011-0525, means the date that the decision is mailed to you, and not the date that you receive it.

The Petition for Review must comply with OAR 340-011-0575 and must be **received** by the Commission within 30 days of the date the Proposed and Final Order was mailed to you. You should mail your Petition for Review to:

Environmental Quality Commission  
c/o Richard Whitman, Director, DEQ  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232

You may also fax your Petition for Review to (503) 229-6762 (the Director’s Office).

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as provided in OAR 340-011-0575. The exceptions and brief must be **received** by the
Commission within 30 days from the date the Commission received your Petition for Review. If you file a Petition but not a brief with exceptions, the Environmental Quality Commission may dismiss your Petition for Review.

If the Petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0575.

Unless you timely file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Commission 30 days from the date this Proposed Order is mailed to you. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. See ORS 183.480 et. seq.
CERTIFICATE OF MAILING

On August 29, 2019, I mailed the foregoing Proposed and Final Order issued on this date in OAH Case No. 2018-ABC-02082.

By: First Class Mail

NW Metals Inc
7600 NE Killingsworth St
Portland OR 97218

Adam Kimmell
Law Offices of Adam Kimmell
2323 SE Tacoma Street
Portland OR 97202

By: Electronic Mail

Courtney Louise Brown, Agency Representative
Department of Environmental Quality
700 NE Multnomah St., Suite 600
Portland OR 97232-4100

Lucy for Anesia N Valihov
Hearing Coordinator