

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

IN THE MATTER OF:) **RULING ON MOTIONS FOR**
) **SUMMARY DETERMINATION**
BASCO LOGGING, INC.)
) OAH Case No. 2020-ABC-03869
) Agency Case No. WQ/NP-WR-2019-231
)

HISTORY OF THE CASE

On January 27, 2020, the Department of Environmental Quality (DEQ) issued Basco Logging, Inc., a Notice of Civil Penalty Assessment and Order (Notice). On March 26, 2020, Basco Logging requested a hearing.

On July 2, 2020, DEQ 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 August 24, 2020, Presiding ALJ Whitaker convened a prehearing conference in ALJ Fair's absence. Attorney Dominic Carollo appeared on Basco Logging's behalf. Environmental Law Specialist Anzie St. Clair appeared on DEQ's behalf. Presiding ALJ Whitaker scheduled the hearing for February 2, 2021, and set deadlines for the submission of motions, witness lists, and exhibits.

On September 16, 2020, WaterWatch of Oregon, The Steamboaters, Native Fish Society, Oregon Wild, and Umpqua Watersheds (WaterWatch) filed a Petition for Party Status. On September 21, 2020, DEQ served a copy of the petition on the parties.

On September 25, 2020, DEQ filed a Motion for Partial Summary Determination, and WaterWatch filed a Proposed Motion for Summary Determination.

On September 28, 2020, WaterWatch filed an Amended Petition for Party Status and an Amended Proposed Motion for Summary Determination. On September 29, 2020, DEQ served a copy of the amended petition on the parties.¹

On September 30, 2020, ALJ Fair directed WaterWatch to cease filing any motions until such time that party status was conferred. ALJ Fair also informed DEQ and Basco Logging that they did not have to file any responses to WaterWatch's motion for summary determination.

On October 9, 2020, DEQ issued an Order Granting and Denying in Part [WaterWatch]'s Amended Petition for Party Status, denying WaterWatch full party status but granting it limited

¹ On October 2, 2020, Basco Logging filed a response to WaterWatch's amended petition with DEQ.

party status, including the opportunity to file a brief in regards to DEQ's Motion for Partial Summary Determination and Basco Logging's anticipated cross-motion for summary determination.

On October 13, 2020, Basco Logging filed a Response to DEQ's Motion for Partial Summary Determination and Cross-Motion for Summary Determination.

On October 30, 2020, DEQ filed a Response to Basco Logging's Cross Motion for Summary Determination and Reply in Support of DEQ's Motion for Partial Summary Determination.

On November 3, 2020, WaterWatch filed a Brief in Support of DEQ's Partial Motion for Summary Determination and Response to [Basco Logging]'s Cross-Motion for Summary Determination.

On November 5, 2020, the Oregon Farm Bureau Federation (Federation) filed a Petition for Limited Party Status. On November 6, 2020, DEQ served a copy of the petition on the parties. On November 10, 2020, WaterWatch filed a Response to the [Federation]'s Petition for Limited Party Status. On November 12, 2020, the Federation filed a Reply to WaterWatch's Response to Petition for Limited Party Status.

On November 13, 2020, Basco Logging filed a Reply in Support of Cross-Motion for Summary Determination and Motion to Strike. On November 18, 2020, ALJ Fair amended the schedule for the filing of motions to allow parties to respond to Basco Logging's Motion to Strike.

On November 18, 2020, DEQ issued an Order Granting and Denying in Part the [Federation]'s Petition for Party Status, granting the Federation limited party status, including the opportunity to file a brief regarding to DEQ's Motion for Partial Summary Determination and Basco Logging's Cross-Motion for Summary Determination.

On November 20, 2020, the Federation filed a Brief in Support of [Basco Logging]'s Cross-Motion for Summary Determination and Response to DEQ's Motion for Partial Summary Determination.

On November 20, 2020, DEQ filed a Response in Opposition to Basco Logging's Motion to Strike and a Motion to Amend Briefing Schedule.

On December 1, 2020, ALJ Fair granted DEQ's Motion to Amend Briefing Schedule, providing DEQ an opportunity to respond to the Federation's brief. On December 4, 2020, DEQ filed a Response in Opposition to the [Federation]'s Brief Regarding DEQ's [Motion for Partial Summary Determination] and [Basco Logging]'s Cross-Motion for Summary Determination.

On December 21, 2020, the OAH issued the Ruling on Motion to Strike, denying the motion.

On December 28, 2020, DEQ issued an Amended Order Granting and Denying in Part the [Federation]’s Petition for Party Status and an Amended Order Granting and Denying in Part [WaterWatch]’s Amended Petition for Party Status.

ISSUES

1. Whether there are any genuine issues as to any material facts and, if not, whether a party is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.
2. Whether Basco Logging discharged wastes into waters of the state that reduced the quality of such waters below the standard established by the Environmental Quality Commission (Commission). ORS 468B.025(1)(b) and OAR 341-041-0036.
3. Whether Basco Logging caused pollution of waters of the state. ORS 468B.025(1)(a).

NOTICE OF CIVIL PENALTY ASSESSMENT AND ORDER

On January 27, 2020, DEQ issued Basco Logging the Notice, proposing to assess Basco Logging civil penalties in the total amount of \$58,378. In the Notice, DEQ proposed to assess the civil penalties based upon the following conclusions:

1. [Basco Logging] violated ORS 468B.025(1)(b) by discharging wastes into waters of the state and the discharge caused a reduction in the quality of the waters below water quality standards established by the Environmental Quality Commission. Specifically, as described in Section II, paragraphs 7 and 8,² [Basco Logging]’s dam repair activities resulted in the discharge of wastes where the discharge caused greater than a 10% cumulative increase in the background level of turbidity in North Umpqua River in violation of water quality standards pursuant to OAR 340-041-0036. North Umpqua River is “waters of the state” pursuant to ORS 468B.005(10). Sediment discharge from the dam repair area is a “waste” pursuant to ORS 468B.005(2) and (9). * * *.
2. [Basco Logging] violated ORS 468B.025(1)(a) by causing pollution to the North Umpqua River, without a permit, as described in Section II, paragraphs 9 through 13. Specifically, [Basco Logging] poured wet concrete into an in-water area during dam repairs which entered the North Umpqua River, a water of the state pursuant to ORS 468B.005(10), and killed the aquatic species described in Section II, paragraphs 9 and 10,³ which constitutes “pollution” as defined in ORS

² The dam repair activities, described in Section II, paragraphs 7 and 8, included the construction and removal of a cofferdam, and allegedly caused instream turbidity to exceed 10 Nephelometric Turbidity Units on a series of dates from October 12 through November 6, 2018. Notice at 2.

³ The aquatic species, described in Section II, paragraphs 9 and 10, were juvenile chinook salmon, juvenile steelhead, lamprey larvae, and mussels. Notice at 2.

Notice at 3.

STATEMENT OF UNDISPUTED FACTS

1. The Winchester Water Control District (District) owns and operates the Winchester Dam, located on the North Umpqua River in Oregon. (Yraguen Aff. at 1.) The Winchester Dam has been in operation since 1900. (Ex. R01 at 1; Yraguen Aff. at 1.) The Winchester Dam supports recreational activities, including boating and swimming, and providing a pool that serves as an aesthetic reservoir for property owners above the Winchester Dam. The Winchester Dam includes a fish ladder that allows anadromous fish to move upriver and is used by the Oregon Department of Fish and Wildlife (ODFW) for broodstock collection. (Yraguen Aff. at 1.)

2. The Umpqua River Basin is located in Southwestern Oregon and flows into the Pacific Ocean. The Winchester Dam is located in Douglas County, Oregon. (Waltz Aff. at 2.) Pursuant to OAR 340-041-0320, DEQ has designated specific beneficial uses for the North Umpqua River that include: public, private and industrial water supplies; irrigation; livestock watering; fish and aquatic life; wildlife and hunting; fishing; boating; water contact recreation; aesthetics; and hydropower. (*Id.*; Ex. A1 at 3.)

3. The District has repaired the Winchester Dam on six or seven occasions since 1990 without a removal/fill permit as the projects “have been deemed by state and federal agencies” as exempt because the maintenance and repair activities did not enlarge the structure or widen it by more than twenty percent of its original footprint and did not seriously impact water quality. (Yraguen Aff. at 2.)

4. Juan Yraguen is a member of the District’s Board and the president and general manager of Basco Logging. (Yraguen Aff. at 1.)

5. On or about October 3, 2018, Keith Mills of the Oregon Water Resources Department (OWRD) inspected the Winchester Dam and informed the District that a preexisting leak had worsened and that immediate, emergency repairs were necessary. Later that day, the District hired Basco Logging to perform the repairs. (Yraguen Aff. at 2.)

6. From October 4 through October 9, 2018, Mr. Yraguen communicated about the need for emergency repairs with OWRD, the Oregon Department of State Lands (DSL), ODFW, and the United States Army Corps of Engineers (Corps). (Yraguen Aff at 3.)

7. On October 5, 2018, Jason Brandt of ODFW emailed Mr. Yraguen about the dam repair project. In the email, Mr. Brandt stated:

The North Umpqua River is an incredibly important aquatic system supporting populations of * * * Coho Salmon * * * which are listed as Threatened under the Endangered Species Act, along with a number of

species listed on the Department Sensitive Species List such as Chinook Salem * * *, steelhead * * *, Umpqua Chub * * *, Pacific Lamprey * * *, and Western Brook Lamprey. * * *. The stretch of the North Umpqua where this project is to occur is designated Essential Salmonid Habitat by the Department of State Lands and Essential Fish Habitat by the National Marine Fisheries Service, meaning habitat that is critical to the survival and continued existence of a number of important fish species may be impacted by this project. As such it is extremely important that measures are taken to limit possible negative impacts to aquatic resources from the proposed project.

Please contact * * * the National Marine Fisheries Service and * * * the US Army Corp of Engineers [and] Department of State Lands before starting any work to obtain necessary permits. The proposed work would take place outside of the recommended in-water work window for the North Umpqua (July 1-August 31). However, as the proposed work is related to dam safety the Department is amenable to the project taking place outside of that time frame and has the following recommendations to limit potential impacts to fish and wildlife:

* * * * *

Coffer dam rock material used for work area isolation should be clean with limited particulates. Turbidity around and downstream of the proposed work area should be monitored. If there are noticeable downstream turbidity effects in the main channel and/or below the Old Hwy 99 bridge work should be delayed until the water has cleared. Coordinate with ODEQ for specifics on any water quality related issues/permits.

* * * * *

Any concrete work shall be done completely in the dry. Green concrete is detrimental to fish and any green concrete should be entirely cured/dry before re-watering occurs[.]

(Ex. A3 at 1-2.)

8. Prior to commencing repairs, Anita Andazola of the Corps informed Mr. Yraguen that the nature of the circumstances and proposed repair project fit the definition for emergency repairs on existing dams. Ms. Andazola advised Basco Logging it could perform the project and obtain a permit after the repairs were complete. She also offered to prepare an optional emergency authorization. (Ex. A10 at 1; Yraguen Aff. at 3.)

9. Melody Rudenko of DSL advised Mr. Yraguen that the proposed repair project was exempt from state removal/fill requirements based upon the regulatory exemption for the

proposed emergency repairs. (Yraguen Aff. at 3-4.) On October 9, 2018, Ms. Rudenko emailed Mr. Yraguen, noting their prior discussion of an exemption for the repair activity under OAR 141-085-0530(4) and included a copy of the administrative rule plus the definition of maintenance as used in the administrative rule. The included excerpt of OAR 141-085-0530(4) stated, in part:

Fill or removal or both for maintenance or reconstruction of * * * dams,
* * * are exempt if:

d. The maintenance or reconstruction would not significantly adversely affect wetlands or other waters of this state to a greater extent than the wetlands or waters of the state were affected as a result of the construction of those structures[.]

(Ex. A12 at 2-3.)

10. From October 15 through October 31, 2018, Basco Logging performed the emergency repairs to Winchester Dam. (Yraguen Aff. at 5.) Basco Logging began the repair project with preparatory actions that included the construction of a cofferdam, located upstream from the Winchester Dam, composed of shot quarry rock. (Yraguen Aff. at 5-6.)

11. On October 23, 2018, Mr. Mills inspected, measured and photographed the Winchester Dam repair site. Mr. Mills observed that the repair project should proceed as planned “from a dam safety perspective.” (Yraguen Aff. at 6.) After the inspection, Basco Logging performed repairs by pouring green concrete in isolated spots on the Winchester Dam, 16 to 17 feet below the water line. (*Id.*) During the course of these repairs, releases of green concrete into the North Umpqua River occurred. (*Id.* at 7.)

12. From October 24 through 28, 2018, Basco Logging poured concrete and cured it on dry ground before its placement into the river channel. (Yraguen Aff. at 6.)

13. From October 29 through November 6, 2018, Basco Logging wrapped up the project and deconstructed the cofferdam. (Yraguen Aff. at 7.)

14. In a report prepared by ODFW employee Fabian Carr about his observations during the Winchester Dam repairs, he noted the following:

Oct. 23, 2018 - * * *. Cement was used on site and I investigated a possible fish kill. No fish found due to heavy plume in the water. * * *.

Oct. 24, 2018 - * * *. Still some cement plume in the pool at base of dam on the south side. All mortality collected at base of dam. A few wildlife predators witnessed below dam. Mortality collected; juvenile steelhead 6, juvenile chinook 5.

Oct. 25, 2018 - * * *. Went below dam on south side of river. Waded

around from boat ramp to top of island looking for any possible mortalities from the cement plume. All mortality was found around the island while looking around the mussel beds. Mortality juvenile steelhead 1, mussels 3, ammocetes⁴ 1.

Oct. 27, 2018 - * * *. Collected one more chinook mortality from the first [cement] pour.

(Ex. A18 at 20, 24.) Mr. Carr's report did not note any further attempts to search for dead aquatic life or any further findings of dead aquatic life after October 27, 2018

15. On November 21, 2018, Ms. Rudenko emailed Mr. Yraguen, and stated:

I wanted to follow-up with you on the exemption we previously discussed for maintenance of water control structures and repairs to the Winchester dam. As you can see from the [October 9, 2018 email] one of the conditions of that exemption is that the maintenance of the dam would not significantly adversely affect the waterway to a greater extent than the affect of the original construction (condition d). Because of this condition on maintenance of water control structures future maintenance of the Winchester dam may not be eligible for this exemption. The difficulties in isolating the work area of the maintenance work and the consequences of the uncured concrete contacting the waterway have demonstrated that condition d of this exemption may not be met in future maintenance work and a permit for that work may be required.

(Ex. A12 at 1.)

16. Basco Logging did not obtain any permits from federal or state agencies or complete an application for federal emergency authorization for the October 2018 repair project. (Ex. A10 at 1; Waltz Aff. at 3.)

17. Solid and liquid concrete and concrete washout are very alkaline and typically have a pH of 11-13 units. Alkaline water is caustic and harmful to aquatic life, including fish because it can burn eyes, gills, and other areas of contact. Extremes of pH or rapid pH changes can exert stress conditions or kill aquatic life. (Waltz Aff. at 2-3.)

18. Turbidity is a measure of the clarity, or lack of clarity, in water and is a surrogate for measuring suspended solids in the water. Turbidity causes light to be scattered and absorbed, blocking light that supports photosynthesis, primary productivity, and the food chain, altering water temperatures, and obscuring food sources. Suspended solids are a concern for drinking water safety as they can reduce the effectiveness of disinfection treatments, harbors pathogens, contributes to disinfection by-products, causes unpleasant tastes and odors, and carry nutrients, heavy metals, pesticides and other toxic chemicals. (Waltz Aff. at 5.)

⁴ Ammocoetes are lamprey larvae.

19. For the period of 2000 to 2020, the average turbidity value of the North Umpqua River, five miles below the Winchester Dam, was 5.7 Nephelometric Turbidity Units (NTUs) with more than half of the tested samples having values between 2 and 6 NTUs. (Waltz Supp. Aff. at 2.)

20. For the period of 2008 to 2018, the average turbidity value of the North Umpqua River, five miles below the Winchester Dam, was 7.4 NTUs with more than half of the tested samples having values between 3 and 7 NTUs. (Waltz Supp. Aff. at 3.)

CONCLUSION OF LAW

There are genuine issues as to material facts and neither party is entitled to a favorable ruling as a matter of law.

OPINION

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * * * *

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

Pursuant to OAR 137-003-0580(6)(a), in issuing this ruling, the ALJ considered the following:

- DEQ's Motion for Partial Summary Determination;
- Affidavit of David Waltz;
- Exhibits A1 thru A22;
- Proposed and Final Orders of City of Coos Bay; Johnson Rock Products; Custom Excavating;

- Basco Logging's Response to DEQ's Motion for Partial Summary Determination and Cross-Motion for Summary Determination;
- Affidavit of Juan Yraguen;
- Affidavit of Dominic M. Carollo;
- Exhibits R1 and R2;

- DEQ's Response to Basco Logging's Cross Motion for Summary Determination and Reply in Support of DEQ's Motion for Partial Summary Determination;
- Supplemental Affidavit of David Waltz;
- Exhibits A23 through A40;
- Courtesy Copies of 1967 and 1997 laws;

- WaterWatch et al's Brief in Support of DEQ's Partial Motion for Summary Determination and Response to Respondent's Cross-Motion for Summary Determination;

- Basco Logging's Reply in Support of Cross-Motion for Summary Determination and Motion to Strike;

- Oregon Farm Bureau Fed's Brief in Support of Respondent's Cross-Motion for Summary Determination and Response to DEQ's Motion for Partial Summary Determination; and

- DEQ's Response in Opposition to the Federation's Brief Regarding DEQ's and Basco Logging's Cross-Motions for Summary Determination;
- Commission's Order re: Marshall's Oil; Proposed and Final Order re: Stayton.

Pursuant to OAR 137-003-0580(7), in considering DEQ's motion, the evidence was reviewed in the light most favorable to Basco Logging, the non-moving party, and, in considering Basco Logging's motion, the evidence was reviewed in the light most favorable to DEQ, the non-moving party.

Statutes and Administrative Rule Relevant to DEQ's Notice

In its Notice, DEQ alleges that Basco Logging violated ORS 468B.025(1)(a) and (b).

ORS 468B.025(1) provides:

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 be carried into the waters of the state by any means.

(b) Discharge any wastes into the waters of the state if the discharge reduces the quality of such waters below the water quality standards established by rule for such waters by the Environmental Quality Commission.

For the alleged violation of ORS 468B.025(1)(b), DEQ alleged that Basco Logging's discharge reduced the water quality standards established by OAR 340-041-0036, which provides, in relevant part:

Turbidity (Nephelometric Turbidity Units, NTU): No more than a ten percent cumulative increase in natural stream turbidities may be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

(1) Emergency activities: Approval coordinated by the Department with the Oregon Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare[.]

ORS 468B.005 provides definitions for several of the terms included in ORS 468B.025. It provides, in relevant 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.

DEQ’s Jurisdiction to Enforce Water Quality Standards

Basco Logging asserts that DEQ has no jurisdiction or statutory authority to “enforce the state’s water quality standards under ORS 468B.025 against removal/fill activities, including discharges or deposits of dredged and fill materials into water of the state, that are expressly authorized under the federal [Clean Water Act] and state removal/fill laws.” Basco Logging Response at 1.

The purpose of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 USC § 1251(a). Congress further recognized that it is the primary responsibility and right of the States “to prevent, reduce, and eliminate pollution” and that States should manage the programs, including the permit programs. 33 USC § 1251(b). 33 USC § 1344(a) of the Clean Water Act, commonly called Section 404, provides for the issuance of permits for the discharge of dredged or fill material into navigable waters. 33 USC § 1344(f), titled “Non-prohibited discharge of dredged or fill material,” provides, in part:

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material-

* * * * *

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, * * *;

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title[.]

In compliance with Congress' recognition of the States' authority, 33 USC § 1344(g) further provides that States may administer their own permit programs "for the discharge of dredged or fill material" that must at least comply with federal requirements. 33 USC § 1344(h)(1)(A). Finally, 33 USC § 1370 specifically provides, in part:

nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Thus, the Clean Water Act expressly recognizes that States can adopt and enforce more stringent standards regarding discharges of pollutants into their waters. The Clean Water Act does not preempt Oregon's legitimate interest in the quality of waters of the state or preempt the laws and administrative rules Oregon adopts and enforces that may be more stringent than federal law.

The Clean Water Act does raise issues of potentially, mutually exclusive permitting schemes. 33 USC § 1342, commonly called Section 402, provides a mechanism for the issuance of permits for the discharge of pollutants, subject to conditions, by the Environmental Protection Agency (EPA) or its state equivalent "except as provided in sections 1328 and 1344." 33 USC § 1342(a)(1). Because Section 402 of the Clean Water Act specifically excepts Section 404, the EPA lacks authority to issue a Section 402 permit regarding the discharge of removal/fill material. *See Coeur Alaska, Inc. v. SE Alaska Conservation Council*, 557 US 261, 274 (2009) ("The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402.").

In Oregon, ORS 468B.035 designates the Commission (and thus DEQ)⁵ as the state agency for implementation and enforcement of federally-mandated water pollution control. Additionally, Oregon adopted a permitting scheme for removal and fill activities, set out in ORS 196.795 through 196.931, similar to Section 404. ORS 196.810(1)(a) provides:

Except as otherwise specifically permitted under ORS 196.600 to 196.921, a person may not remove any material from the beds or banks of any waters of this state or fill any waters of this state without a permit

⁵ ORS 468.030 establishes DEQ under the Commission, and, pursuant to ORS 468.035(1)(j), DEQ enforces the air and water quality pollution laws of Oregon.

issued under authority of the Director of the Department of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan.

ORS 196.921(9) provides:

Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the maintenance or reconstruction of structures such as dikes, dams, levees, groins, riprap, tidegates, drainage ditches, irrigation ditches and tile drain systems, provided that:

(a) The structure was serviceable within the past five years; and

(b) Such maintenance or reconstruction would not significantly adversely affect wetlands or other waters of this state to a greater extent than the wetlands or waters of this state were affected as a result of the original construction of those structures.

Basco Logging cites to *Thompson v. IDS Life Ins. Co.*, 274 Or 649 (1976) to support its proposition that DEQ does not have jurisdiction to enforce ORS 648B.025. In *Thompson*, the plaintiff brought a civil action under the Public Accommodations Act against the defendant, alleging that it engaged in sexual discrimination when it sold an insurance policy to plaintiff on terms different than it would offer to a male. The defendant argued that the Public Accommodations Act, which prohibits all discrimination in public accommodations, conflicts with Oregon's insurance law, which prohibits unfair discrimination in an insurance policy's benefits or terms. The Court noted the "problem with construing the statutes so as to include insurance under the Public Accommodations Act and to still give effect to [insurance law] is that different standards are established." *Id.* at 654. The Court applied several rules of constructions in its analysis. First, that administrative conflicts should be avoided. Thus, the Court concluded that simply not including insurance in the Public Accommodations Act avoided any conflict between the Labor Commissioner (who enforces the Public Accommodations Act) and the Insurance Commissioner (who enforces the insurance laws). Second, that a specific or special act controls over a general act, even if the general act is enacted later. *Id.* at 656. "Absent a plain indication of intent to repeal the special act, the special act will continue to have effect and the general act will be modified by construction so the two can stand together; one as the general law of the state and the other as the law of the particular case or as an exception to the general rule." *Id.* (internal citation omitted.) Thus, the insurance law, being the specific law, would modify the Public Accommodations Act, the general law, by providing an exception for insurance discrimination claims. Finally, there is the rule that a legislative act is not to be deemed meaningless. *Id.* In 1973, the Oregon legislature amended the Public Accommodations Act to include sex and marital status discrimination prohibitions and passed an insurance statute specifically prohibiting marital status discrimination in health insurance policies. The Court concluded that, if insurance was intended to be included in the Public Accommodations Act, there would have been no reason for the legislature to enact the insurance statute. Basco Logging asserts, that as in *Thompson*, Oregon's removal/fill laws provide a different standard

than ORS 468B.025 and are specific to removal/fill activities rather than the general pollution prohibition in ORS 468B.025. Basco Logging concludes that there is a conflict that can only be harmonized by treating Oregon’s removal/fill laws as an exception to ORS 468B.025.

Basco Logging’s argument is not persuasive. Both ORS 196.921(9) and 33 USC § 1344(f)(1)(B) are exemptions to regulation. 33 USC § 1344(f)(1)(B) provides that maintenance and emergency reconstruction of dams are not subject to regulation by Section 402 or 404. Similarly, ORS 196.921(9) provides that Oregon’s removal and fill permitting requirements are not applicable to maintenance and reconstruction of dams that meet certain qualifications. Dam repair activities that qualify for these exemptions are not within the exclusive jurisdiction of the respective agencies, as the Corps or DSL do not regulate those exempt activities. Because Basco Logging performed its dam repairs pursuant to this exception, there is no conflict between DEQ and DSL (or the Corps), and Basco Logging’s activities remain subject to the pollution prohibitions of ORS 468B.025.

Further, in *NEDC v. Environmental Quality Commission*, 232 Or App 619 (2009), the Oregon Court of Appeals addressed the issue of the Commission’s authority to regulate turbid wastewater that resulted from dredging operations. In *NEDC*, the Commission issued an NPDES permit (a Section 402 permit) for small suction dredge mining⁶ that provided certain discharge limitations, specifically turbidity limitations. *Id.* at 624. A mining company argued that the Commission exceeded its authority in issuing the permit because the discharge of dredged material was regulated solely by the Corps. Ultimately, the Court found for the mining company because the permit at issue was too broad in that it purported to regulate *all* waste discharges. However, after a lengthy review of the law and history of Sections 402 and 404 enforcement, the Court concluded that “turbid wastewater – i.e., the discharge of water that contains suspended solids – is a pollutant that is regulated by the EPA rather than as the ‘discharge of dredged material.’” *Id.* at 644. The Court found, as follows:

In sum, small suction dredge mining involves discharges of dredged material that are permitted by the Corps and discharges of turbid wastewater that are permitted by the EPA. The 700-PM permit does not grapple with those distinctions, regulating all discharges of waste from small suction dredge mining without regard to the nature of the discharges. Thus, because of its lack of specificity and consequent overbreadth, the permit exceeds EQC’s statutory authority to implement the Clean Water Act.

Id. at 645. Thus, in *NEDC*, the Court recognized that the Corps (and similarly DSL) and the Commission (and DEQ) have concurrent jurisdiction over dredging operations. Nonetheless, their jurisdictions are limited by the nature of the discharges regulated: 1) discharge of dredged material is regulated by the Corp; and 2) discharge of turbid wastewater is regulated by the Commission. *See also Coeur Alaska*, 557 US at 279, 288 (The Court upheld Defendant’s actions in which it obtained a Section 404 permit for discharge of its waste material, a slurry of rock and

⁶ Small suction dredge mining involves the passage of streambed sediments and water over a sluice tray that trap dense particles. The lighter particles are discharged back into the stream as tailings, which accumulate to form piles. *NEDC*, 232 Or App at 623.

water, that was deposited into a nearby lake because it was fill material and noted that the EPA retained authority under Section 402 to regulate the subsequent discharge of suspended solids from the lake into a downstream creek, for which Defendant had obtained a Section 402 permit).

In conclusion, there is no conflict between removal/fill operations conducted pursuant to ORS 196.921(9) and DEQ's enforcement of ORS 468B.025. Additionally, because DEQ has authority over turbid wastewater discharges even in operations conducted pursuant to a Section 404 permit or a DSL permit, DEQ has jurisdiction to enforce ORS 468B.025 against Basco Logging for any turbid wastewater discharges, as alleged in the Notice.

Void for Vagueness

Basco Logging also asserts that “the gross vagueness in the statutory scheme and DEQ’s regulatory programs would make enforcement of the water quality standards under ORS 468B.025, * * *, an unconstitutional violation of [Basco Logging’s] due process rights.” Basco Logging Response at 2. As support, Basco Logging cites to *United States v. Lanier*, 520 US 259 (1997), in which the Supreme Court stated, “the vagueness doctrine bars enforcement of a ‘statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Id.* at 266 (internal citations omitted). Laws are vague that fail to provide fair warning of impermissible conduct and that impermissibly delegate basic policy matters on an ad hoc and subjective basis. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 US 489, 498 (1982); *see also Papachristou v. City of Jacksonville*, 405 US 156 (1972). The Supreme Court clarified that, “the touchstone is whether the statute, *either standing alone or as construed*, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *Lanier*, 520 US at 266 (emphasis added).

Although the majority of cases with vagueness challenges are brought against criminal statutes, the Oregon Supreme Court ruled that “the protection against vague laws that the Due Process Clause affords applies to both criminal and civil laws.” *Delgado v. Souders*, 334 Or 122, 147 (2002). However, civil statutes are “subject to greater tolerance” for vagueness than criminal ones, although ones that “threaten to inhibit the exercise of constitutionally affected rights, such as the right to free speech, demand a higher level of clarity.” *Id.* at 148. Although Basco Logging notes that the Winchester Dam protects the District’s water rights, Basco Logging has no property interest in these water rights. Basco Logging was merely the contractor hired by the District to perform the repair project. Therefore, ORS 468B.025 is not subject to the higher levels of protection that a criminal statute or a statute that deprives the litigant of a constitutionally protected right would receive.

Similar to its jurisdictional argument, Basco Logging argues that individuals of “common intelligence” would conclude that only ORS 196.921(9) applies to the Winchester Dam project because ORS 196.921(9) specifically references water control structures, unlike ORS 468B.025, and provides a different water quality standard than ORS 468B.025. Thus, Basco Logging is not arguing that any specific term or terms within ORS 468B.025 are vague and, instead, is arguing that the “vagueness” is in the application of ORS 468B.025 to the 2018 project. However, vagueness challenges focus on the language of the challenged statute, *either standing alone or as*

construed, and: 1) whether such language fails to provide fair warning of impermissible conduct; and 2) whether the statute impermissibly delegates policy in an ad hoc and subjective manner. On its face, ORS 468B.025(1)(a) prohibits any person from causing pollution to the waters of the state. ORS 468B.005(5) and (10) provide specific definitions for pollution (including discharge of any substance which renders such waters harmful to aquatic life) and waters of the state (including rivers within Oregon). Thus, a person of common intelligence would have fair warning that discharging a substance in the North Umpqua River that harms aquatic life, the conduct alleged by DEQ in its Notice, is prohibited by ORS 468B.025(1)(a).

Similarly, ORS 468B.025(1)(b) prohibits a person from discharging any wastes into waters of the state if such discharge reduces the water quality below Environmental Quality Commission standards. ORS 468B.025, not only defines pollution (including alteration of the properties of waters, including turbidity) and waters of the state, it also defines wastes (including any substance that causes pollution). Water quality standards limit turbidity increases to no more than 10 percent. *See* OAR 340-041-0036. Thus, a person of common intelligence would have fair warning that discharging a substance in the North Umpqua River that alters its turbidity by more than 10 percent, the conduct alleged by DEQ in its Notice, is prohibited by ORS 468B.025(1)(b).

Additionally, the language of ORS 468B.025(1)(a) and (b) is sufficiently clear, coupled with the above statutorily-defined terms and the administratively-defined water quality standards listed in OAR chapter 340, division 41, that the speculative danger of arbitrary enforcement and unfettered discretion does not render it void for vagueness. In conclusion, ORS 468B.025(1)(a) and (b), as applied to Basco Logging's activities, is not unconstitutionally vague.

In conclusion, Basco Logging is not entitled to a favorable ruling on its cross motion for summary determination either on the theory that DEQ does not have jurisdiction over its repair activities or its theory that ORS 468B.025 is unconstitutionally vague.

Discharging Wastes into, and Causing Pollution of, Waters of the State

A. Discharging Wastes

In its Notice, DEQ charged Basco Logging with violating ORS 468B.025(1)(b) by “discharging wastes into waters of the state” by its “dam repair activities [that] resulted in the discharge of wastes where the discharge caused greater than a 10% cumulative increase in * * * turbidity * * * in violation of water quality standards pursuant to OAR 340-041-0036.” Notice at 3. The Notice specially alleged that sediment discharge from the dam repair area, including the cofferdam material, was the “waste.” *Id.* In support of its allegation, DEQ provided an abundance of evidence, including 1) downstream turbidity testing results that showed a significant rise in turbidity values confined to the hours of 10 a.m. to 6 p.m. on multiple days during the dam repair period; 2) witnesses' reports of visible turbidity originating from the cofferdam; and 3) photographs taken on multiple days during the dam repairs showing increased visible turbidity from the dam repair activities, including from the cofferdam.

However, in response to DEQ's motion, Basco Logging provided an affidavit from its president Mr. Yraguen, in which he indicated that the materials used to construct the cofferdam did not cause any appreciable sedimentation or turbidity. *See* Affidavit of Juan Yraguen at 7. Therefore, Basco Logging has presented facts, through Mr. Yraguen's affidavit, that establish that DEQ's initial factual contention (that Basco Logging discharged sediment into the North Umpqua River) is in dispute. Because Basco Logging has presented facts that dispute that any sediment discharge originated from its dam repair activities, it has established that DEQ's additional factual contentions (that the sediment discharge caused an increase in the turbidity of the water and that increase was more than 10 percent of the water quality standards) are also in dispute. Despite DEQ's evidence, in particular the very persuasive photographic evidence showing highly visible sediment discharge originating from the dam repair activities, Basco Logging has presented evidence with its response that no such sediment discharge occurred. Therefore, Basco Logging is entitled to a hearing on the issue of its alleged violation of ORS 468B.025(1)(b). *See Watts v. Board of Nursing*, 282 Or App 705, 714 (2016) ("If there is evidence creating a relevant fact issue, then no matter how 'overwhelming' the moving party's evidence may be, or how implausible the nonmoving party's version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing.").

B. Causing Pollution

In its Notice, DEQ also charged Basco Logging with violating ORS 468B.025(1)(a) by "causing pollution to the North Umpqua River, * * *. Specifically, [Basco Logging] poured wet concrete * * * which entered the North Umpqua River,* * *, and killed the aquatic species * * *, which constitutes "pollution" as defined in ORS 468B.005(5)." Notice at 3. In his affidavit, Mr. Yraguen acknowledged that Basco Logging's dam repairs caused a release of wet concrete on October 23, 2018, to the North Umpqua River. Affidavit of Juan Yraguen at 7. DEQ presented the following uncontroverted evidence regarding the toxicity of liquid concrete and the status of aquatic life following its release:

- Liquid concrete is caustic and harmful to aquatic life, including fish because it can burn eyes, gills, and other areas of contact;
- Liquid concrete is extremely alkaline and extreme pH or rapid pH changes can exert stress conditions or kill aquatic life;
- On October 23, 2018, no dead aquatic life was found; and
- During the period October 24 through 27, 2018, seven dead juvenile steelhead, six dead juvenile chinook, three dead mussels, and one dead ammocetes were recovered below the Winchester Dam.

As the proponent of the allegation that Basco Logging violated ORS 468B.025(1)(a), DEQ has the burden to establish, by a preponderance of the evidence, that the allegation is correct. *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

There was no dispute that Basco Logging caused a release of liquid concrete into the North Umpqua River. Because the North Umpqua River is a river located in Douglas County, Oregon, it is a water of the state, as defined by ORS 468B.005(10). Thus, the final question is whether DEQ established that the liquid concrete was “pollution.” DEQ established that liquid concrete is: 1) extremely alkaline and its release can change the pH of water, causing stress to, or death of, aquatic life; and 2) caustic and can burn the eyes, gills, and other body parts of fish and aquatic life.

As defined by ORS 468B.005(5), pollution includes alterations to the chemical properties of water, such as a change in the water’s pH. Although liquid concrete can change the pH of water, there was no evidence presented of an actual change in the North Umpqua River’s pH during the dam repair. Pollution also includes the discharge of any substance “which will or tends to render such waters harmful, detrimental or injurious to * * * fish or other aquatic life or the habitat thereof.” ORS 468B.005(5). DEQ established that liquid concrete is a caustic substance that can burn the body parts of fish and other aquatic life. Thus, the liquid concrete is “pollution” because it is a substance that tends to render water harmful, detrimental or injurious to fish and other aquatic life. However, despite this conclusion, DEQ is not entitled to a favorable ruling on its allegation that Basco Logging violated ORS 468B.025(1)(a).

In its Notice, DEQ alleged that Basco Logging’s release of the liquid concrete “killed the aquatic species” of the North Umpqua River. Therefore, DEQ alleged a release that caused *actual* harm to aquatic species, not just a threat of harm. ORS 183.415(3) requires notices of agency action to contain certain information, such as “(d) a short and plain statement of the matters asserted or charged.” The Oregon Court of Appeals explained the purpose of these notice requirements in *Murphy v. Oregon Medical Board*, 270 Or App 621 (2015). In *Murphy*, the Oregon Medical Board sought to revoke Dr. Murphy’s medical license based upon an allegation that he engaged in unprofessional and dishonorable conduct in violation of ORS 677.188(4)(a). Within the body of the notice issued to Dr. Murphy, the Oregon Medical Board provided “a short factual statement” for the basis of the violation as Dr. Murphy’s consumption of alcohol while on call in violation of a hospital’s drug free work place policy (Dr. Murphy was contracted by a hospital to perform anesthesia services). *Id.* at 629. The Oregon Court of Appeals found that the Oregon Medical Board could only proceed against Dr. Murphy on the ground as stated in its notice (that his violation of the hospital’s policy was unprofessional and dishonorable) and could not proceed on the basis that his conduct violated the ethical standards of the medical community. *Id.* at 630-631. The Oregon Court of Appeals explained that “having provided that explicit explanation of the basis on which it was choosing to proceed, the board could not then change course at the contested case hearing * * * without first providing [Dr. Murphy] adequate notice so that he could have the opportunity to prepare a defense.” *Id.* at 631.

The Court reiterated this position in *Sachdev v. Oregon Medical Board*, 292 Or App 778 (2018). In *Sachdev*, the Oregon Court of Appeals determined that ORS 183.415(3)(c) requires an agency’s notice to “indicate which statutory ground the board will - not might – press at the contested case proceeding,” or, as in this matter, which facts DEQ will press at the contested case proceeding. *Id.* at 788. Although *Sachdev* concerned the compliance of an agency’s notice

with ORS 183.415(3)(c),⁷ the Oregon Court of Appeals' findings would also be applicable to the compliance of the Amended Notice with ORS 183.415(3)(d). Therefore, DEQ may only proceed on the factual allegations as written in its Notice. In sum, DEQ must establish that Basco Logging's release of the liquid concrete caused actual harm to fish and aquatic life, not just a threat of harm.

DEQ provided evidence that no dead animals were recovered on October 23, 2020, the day of the liquid concrete release. During the four days immediately following the release, ODFW staff found 13 dead fish, 3 dead mussels, and 1 dead ammocetes. However, DEQ did not provide persuasive evidence of the causal link between the release of the liquid concrete and the 17 dead animals. There was no evidence of any physical damage to the dead animals that would support a finding the liquid concrete's caustic properties burned the animals. There was no evidence that the animals were coated in the liquid concrete. There was no evidence that these 17 dead animals, found over a period of four days following the day of the release, were the result of a massive or unusual die off event that could be attributed to the liquid concrete. Without persuasive evidence of a causal link between the release of the liquid concrete and the dead animals, DEQ failed to establish that the release "killed the aquatic species" of the North Umpqua River. Therefore, DEQ is not entitled to a favorable ruling on its allegation that Basco Logging violated ORS 468B.025(1)(a).

RULING

The Department of Environmental Quality's Motion for Partial Summary Determination, filed on September 25, 2020, is DENIED.

Basco Logging, Inc.'s Cross-Motion for Summary Determination, filed on October 13, 2020, is DENIED.

Samantha A. Fair

Administrative Law Judge
Office of Administrative Hearings

⁷ ORS 183.415(3)(c) requires agency action notices to contain "a reference to the particular sections of the statutes and rules involved."

CERTIFICATE OF MAILING

On January 5, 2021, I mailed the foregoing RULING ON MOTION FOR SUMMARY DETERMINATION issued on this date in OAH Case No. 2020-ABC-03869.

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