
Date: June 22, 2006

To: Environmental Quality Commission

From: Stephanie Hallock, Director

Subject: Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc., June 22-23, 2006, Environmental Quality Commission (EQC) Meeting

Appeal to the EQC

Respondents Ryan J. Kell and the HighTech Now, Inc., appeal the Proposed Order assessing them a \$10,546 civil penalty on the ground that they were denied an opportunity to obtain the assistance of legal counsel. The Department of Environmental Quality (DEQ) cross-appeals the Administrative Law Judge (ALJ) decision to eliminate \$23,392 in economic benefit penalty DEQ assessed.

Key people involved

Ryan H. Kell	Respondent, in his individual capacity, and as representative for Respondent HighTech Now, Inc.
Jeff Bachman	Environmental Law Specialist, DEQ
Lynne Perry	Oregon Assistant Attorney General, representing DEQ

Background

This appeal should proceed whether or not Respondents appear for oral argument before the Commission. DEQ's position has been fully briefed and representatives from DEQ and DOJ will be present for oral argument. DEQ has properly served the respondents.

The only contact information DEQ has ever had for Mr. Kell and HighTech Now, Inc., is a Portland post office box. Shortly after issuance of the Notice of Violation and Assessment of Civil Penalty, Mr. Kell directed DEQ to send all correspondence regarding the case to that post office box and throughout this case, DEQ and the Office of Administrative Hearings (OAH) have done so (via certified mail). Until recently, Respondents claimed everything DEQ and OAH sent. Recent process has, however, been returned to DEQ marked "unclaimed." As of November 15, 2005, DEQ Exceptions and Brief and the notice providing the date of the appeal before the EQC, both of which were sent by certified mail, had not been claimed.

DEQ rules do not, however, require service by certified mail. Documents may also be served personally or pursuant to OAR 340-011-0525(4), "Documents sent by the department or commission through the U.S. Postal Service by regular mail to a person's last known address are presumed to have been received, subject to evidence to the contrary." DEQ has been unable to

Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc.

June 22-23, 2006, EQC Meeting

Page 2 of 11

find a different address for Respondents. It did, however, mail the notice of the date for the December oral argument before the EQC to the Respondents' post office box by regular first-class mail on September 22, 2005, and its Exceptions and Brief by regular first-class mail on November 14, 2005. Thus, despite Respondents' failure to claim certified mail from DEQ, Respondents are presumed to have received the documents served by regular mail and this matter should proceed accordingly. Any other outcome would signal to these and other respondents that DEQ Final Orders could be derailed or delayed merely by rejecting (or failing to claim) DEQ correspondence. The rules provide for multiple ways of serving documents, in large measure, to avoid this untenable outcome.

The situation is somewhat confused as Respondents, without claiming the certified mailings, have kept abreast of recent proceedings in the case. On November 25, 2005, Respondents submitted a request to reschedule the Appeal before the Commission set for December 22, 2005. The Commission granted this request by Certified and Regular Mail on December 5, 2005. The certified mail was returned to the Commission's Assistant as unclaimed.

Overview of events

Date	Facts	Cite
November 20, 2003	DEQ issues Notice of Violation and Assessment of Civil Penalty (Notice) to Ryan H. Kell and HighTech Now, Inc., assessing Respondents a civil penalty of \$71,962 for failing to perform a hazardous waste determination, illegally storing hazardous waste, and failing to pay hazardous waste generators fees.	Attachment II (Bates page 385-397)
December 12, 2003	Respondent appealed the Notice and Order.	Attachment HH (Bates page 376-384)
September 28, 2004	Contested case hearing was held.	
November 12, 2004	The ALJ requested that the parties provide additional written legal argument on the issue of whether Mr. Kell could be held personally liable for the civil penalties assessed by DEQ.	Attachment Y (Bates page 260)
December 30, 2004	The ALJ granted DEQ an extension until January 19, 2005, to file its argument on personal liability and granted Mr. Kell an extension until January 28, 2005, to file his argument.	Attachment U (Bates page 248)
January 19,	DEQ filed its written legal argument regarding Mr. Kell's	Attachment S

Bates page 2

Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc.

June 22-23, 2006, EQC Meeting

Page 3 of 11

Date	Facts	Cite
2005	personal liability.	(Bates page 235-245)
January 31, 2005	Mr. Kell requested an extension for filing his argument so that he could obtain the assistance of legal counsel.	Attachment R (Bates page 234)
February 16, 2005	The ALJ granted Mr. Kell an extension until March 8, 2005, to file his argument.	Attachment Q (Bates page 233)
March 8, 2005	Mr. Kell filed his legal argument.	Attachment P (Bates page 225-232)
April 27, 2005	The ALJ issued a Proposed Order holding Respondents liable for the violations, and assessing a reduced civil penalty of \$10,546.	Attachment O (Bates page 193-224)
May 13, 2005	DEQ requested that the ALJ issue an Amended Proposed Order that would more fully set forth the factual bases and legal reasoning underlying his decision.	Attachment N (Bates page 190-192)
July 8, 2005	The ALJ issued an Amended Proposed Order assessing Respondents a civil penalty of \$10,546.	Attachment M (Bates page 156-189)
August 8, 2005	Respondents filed a petition for EQC review of the Proposed Order. DEQ also filed a petition for EQC review.	Attachments K and L (Bates page 154-155)

Summary of ALJ Findings of Fact—see ALJ Proposed Order [Attachment M]

Date	Facts	Cite
1998	Mr. Kell began an electronics recycling business, which he incorporated as HighTech Now, Inc.	Findings of Fact (FOF) 1 (Bates page 158)
June 8, 2002	A fire burned and destroyed much of the warehouse in which Respondents' business was located, damaging a number of the computer monitors stored in the warehouse awaiting recycling.	FOF 4 (Bates page 158)
June 24, 2002	Mr. Kell received a letter from DEQ entitled "Clean up Instructions." The letter referred to the fire and advised Mr. Kell that fire-damaged electronics may no longer be	FOF 6 (Bates page 158-159)

Bates page 3

Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc.

June 22-23, 2006, EQC Meeting

Page 4 of 11

Date	Facts	Cite
	<p>subject to recycling and would therefore be a solid waste subject to a hazardous waste determination. The letter further stated that if Mr. Kell intended to recycle any of the wastes from the fire, he needed to verify that that the wastes were recyclable by submitting a recycling plan. The letter concluded by directing Mr. Kell to submit documentation of hazardous waste determinations and/or a recycling plan within 30 days.</p>	<p>Attachment CC, A-1 (Bates page 280-282)</p>
	<p>After he received the letter, Mr. Kell called the DEQ inspector and explained that the monitors in the warehouse were not waste because he still planned to recycle them. The inspector told him that he needed to properly manage the damaged monitors and to determine whether they were wastes. The next day Mr. Kell called the inspector's manager, thanking him for the clean up instructions but still maintaining that the damaged monitors were recyclable. The manager told Mr. Kell that DEQ would work with him, but that Mr. Kell had to ensure that the monitors could still be recycled. Mr. Kell had no further contact with DEQ until he received a Notice of Noncompliance on October 17, 2002 for failing to perform hazardous waste determinations, illegally storing hazardous waste and other violations.</p>	<p>FOF 8 and 9 (Bates page 159)</p>
<p>July 29, 2002</p>	<p>Mr. Kell met with the owner of the warehouse, the Freeman Group, and agreed in writing that he and HighTech Now would pay for removal of the personal and company property from the site.</p>	<p>FOF 11 (Bates page 160) Referencing Attachment CC A-6 (Bates page 313)</p>
<p>August 15, 2002</p>	<p>Mr. Kell received \$165,000 from his insurance company and paid his clean up contractor \$12,000 the next day. After receiving the deposit, the contractor began the cleanup by putting some of the monitors in boxes and other components in dumpsters. Nothing was removed from the warehouse.</p>	<p>FOF 12 and 13 (Bates page 160)</p>
<p>Early September 2002</p>	<p>A representative of the Freeman Group called Mr. Kell regarding the cleanup. Mr. Kell became angry and hung up.</p>	<p>FOF 14 (Bates page 160)</p>

Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc.

June 22-23, 2006, EQC Meeting

Page 5 of 11

Date	Facts	Cite
September 10, 2002	The Freeman Group contacted DEQ regarding the lack of progress at the site and changed the lock on the gate surrounding the property. Mr. Kell did not have a key to the new lock.	FOF 15 (Bates page 160)
September 11, 2002	A DEQ Inspector and a contractor for the Freeman Group visited the warehouse and documented that a large number of damaged computer monitors were still on the site.	FOF 16 (Bates page 160) Referencing Attachment CC, A-2 (Bates page 283)
September 23, 2002	The Freeman Group's attorney sent Mr. Kell a letter advising him that he was in default of his lease and that his lease would be terminated, unless he removed and disposed of the waste in the warehouse within ten days.	FOF 17 (Bates page 160) Referencing Attachment CC, A-7 (Bates page 314)
September 25, 2002	DEQ and The Freeman Group's contractor went to the warehouse and collected samples of the wastes. Six of the eleven samples exceeded the regulatory threshold for a lead toxicity hazardous waste.	FOF 18 (Bates page 160) Referencing Attachment CC, A-3 (Bates page 288)
October 10-22, 2002	A contractor from the Freeman Group removed the hazardous waste from the warehouse and properly disposed of it.	FOF 19 (Bates page 160) Referencing Attachment CC, A-4 (Bates page 299)
	Mr. Kell paid the Freeman Group some of the insurance money he received in August 2002. The Freeman Group sued Mr. Kell for what it believed was the cost of disposing of the material in the building. The lawsuit was settled by Mr. Kell paying the Freeman Group an additional \$50,000.	FOF 21 (Bates page 161)
March 2004	After a criminal trial, Mr. Kell was found guilty of a misdemeanor charge of unlawful storage of hazardous waste. He was sentenced to probation and payment of fines.	FOF 23 (Bates page 161)

ALJ Conclusions of Law

In his Conclusions of Law, the ALJ found, among other things, that:

1. Respondent failed to perform a required hazardous waste determination.
2. Respondent stored hazardous waste without a hazardous waste storage permit.
3. Respondent failed to file a hazardous waste generator report.
4. Respondent committed the violations and is liable for civil penalties totaling \$10,546.
5. Mr. Kell, as president, is also personally liable for the violations and the civil penalties.

Issues on appeal

Respondents and DEQ filed exceptions to the Amended Proposed Order.

In their Exceptions and Brief (Attachment J), Respondents take exception to ALJ's comment that they were given time to find an attorney. No specific relief is requested.

In its Answering Brief (Attachment I), DEQ argues that Respondents were given ample opportunity to retain counsel.

In its Exceptions and Brief (Attachment H), DEQ requests that the Commission restore the \$23,392 in economic benefit penalty eliminated by the ALJ as the ALJ decision was not supported by substantial evidence in the record or the applicable law.

Respondents did not file an Answering Brief.

Summary of exceptions and response

Respondents Exception: Respondents took exception to the ALJ statement, on page 2 of the Amended Proposed Order (Attachment M), that "Respondent was given until March 8, 2005, to respond to DEQ's Supplemental Hearing Memorandum. This date was over seven weeks since the Memorandum was issued and provided plenty of time to find an attorney and/or to prepare a response." Mr. Kell stated that he requested an extension for filing his brief on January 31, 2005, but that request was denied. He argues that having only until March 8, 2005, to respond to the Department's January 19, 2005, motion allowed insufficient time for him to find an attorney.

DEQ Response to Respondents Exception: Respondents were actually granted the one and only request for an extension to hire an attorney that Respondents made. The ALJ extended the time to respond to DEQ argument from January 28 until March 8, 2005. Not only were the Respondents given five weeks from the time they requested an extension to retain an attorney,

Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc.

June 22-23, 2006, EQC Meeting

Page 7 of 11

the ALJ stated in his letter granting the extension that the Respondents could request another extension beyond March 8, 2005, (Attachment Q). The Respondents, however, never requested another extension, but instead personally filed their written argument on March 8, 2005. Furthermore, the language with which the Respondents take issue has no bearing on the ALJ findings of fact and conclusions of law. The substance of the Order would not change even if the Commission were to strike the offending language.

DEQ First Exception: DEQ took exception to several findings of fact on which the ALJ relied in determining that Respondents did not receive an economic benefit as a result of committing the violation. DEQ took exception to the portion of FOF 15 (Attachment M) in which the ALJ found that “the Freeman Group was jointly responsible for the alleged hazardous waste in the warehouse.” DEQ asserts that the statement is a conclusion of law and not a finding of fact and thus should be deleted. Furthermore, DEQ argues that the statement is incorrect even as a conclusion of law. DEQ also took exception to the statement in FOF 21 that “Kell paid the Freeman Group some of the insurance money he received in August 2002” and the statement in FOF 23 that Mr. Kell paid a monetary fine as part of his criminal sentence. The ALJ based these findings on alleged testimony by Mr. Kell, but DEQ asserts that the transcript of that testimony is absent of any such statements by Mr. Kell (Attachment G). Therefore, there is no evidence in the record to support the ALJ findings that Mr. Kell paid a portion of his insurance proceeds to the Freeman Group or that he paid a criminal fine. The ALJ erred when he relied on these findings as grounds for eliminating the economic benefit penalty.

Respondents Response to DEQ First Exception: None filed.

DEQ Second Exception: DEQ also took exception to the ALJ conclusions of law and opinion in which he found that Mr. Kell and HighTech Now did not receive an economic benefit for illegally storing hazardous waste. Specifically, DEQ asserts that the ALJ erred by finding:

- (1) That the economic benefit was based on the cost of properly disposing of all the waste in the warehouse and not just the hazardous waste.
- (2) That the \$50,000 the Freeman Group accepted to settle its legal claims against Mr. Kell fully compensated the Freeman Group for its costs in disposing of the hazardous waste.
- (3) That the Freeman Group was jointly responsible for the costs of disposing of the hazardous waste.
- (4) That Kell’s alleged payments of insurance proceeds to the Freeman Group in August 2002 and a criminal fine in 2004 should offset a portion of the hazardous waste disposal costs he avoided.

DEQ asserts that the record clearly indicates that the economic benefit was based solely on the cost of disposal of the hazardous waste (not all of the waste in the warehouse), and that \$50,000 did not fully compensate The Freeman Group for its costs in disposing of the hazardous waste.

Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc.

June 22-23, 2006, EQC Meeting

Page 8 of 11

Furthermore, there is no evidence in the record that Mr. Kell paid The Freeman Group some of his insurance proceeds in August 2002 or that he ever paid a criminal fine. DEQ also argues that Mr. Kell and HighTech Now were wholly and independently responsible for the cost of abating the illegal storage of hazardous waste at the site. The fact that DEQ could have compelled The Freeman Group, as the property owner, to clean up a release of hazardous materials on its property, does not diminish Mr. Kell and HighTech Now's liability for the full cost of disposing of the waste.

Respondents Response to DEQ Second Exception: None filed.

EQC authority

The Commission has the authority to hear this appeal under OAR 340-011-0575.

The Department's contested case hearings must be conducted by an ALJ.¹ The Proposed Order was issued under current statutes and rules governing the ALJ Panel.²

Under ORS 183.600 to 183.690, the Commission's authority to change or reverse an ALJ's proposed order is limited.

The most important limitations are as follows:

- (1) The Commission may not modify the form of the ALJ's Proposed Order in any substantial manner without identifying and explaining the modifications.³
- (2) The Commission may not modify a recommended finding of historical fact unless it finds that the recommended finding is not supported by a preponderance of the evidence.⁴ Accordingly, the Commission may not modify any historical fact unless it has reviewed the entire record or at least all portions of the record that are relevant to the finding.
- (3) The Commission may not consider any new or additional evidence, but may only remand the matter to the ALJ to take the evidence.

The rules implementing these statutes also have more specific provisions addressing how Commissioners must declare and address any *ex parte* communications and potential or actual conflicts of interest.⁵

¹ ORS 183.635.

² ORS 183.600 to 183.690 and OAR 137-003-0501 to 137-003-0700.

³ ORS 183.650(2).

⁴ ORS 183.650(3). A historical fact is a determination that an event did or did not occur or that a circumstance or status did or did not exist either before or at the time of the hearing.

⁵ OAR 137-003-0655(7), referring to ORS Chapter 244; OAR 137-003-0660.

Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc.

June 22-23, 2006, EQC Meeting

Page 9 of 11

Alternatives

The Commission may:

1. Adopt the ALJ Amended Proposed Order as a Final Order.
2. Adopt a Final Order that strikes, from the Amended Proposed Order, the language to which the Respondents took exception, and determine whether Respondents are entitled to any other relief.
3. Adopt a Final Order granting DEQ's appeal by:
 - a. Modifying the decision by deleting findings of fact not supported by a preponderance of evidence in the record; and
 - b. Reversing the ALJ conclusions of law that Respondents did not receive an economic benefit for illegally storing waste and issue a Final Order assessing a penalty of \$33,939.
4. Remand the case to the ALJ for further proceedings.

Attachments

- A. Letter from Cat Skaar, Assistant to the Commission, to Respondents notifying them that the appeal will be heard June 22, 2006 in Portland.
- B. Letter from Ryan Kell requesting postponement of appeal until the next Commission meeting in Portland, dated February 16, 2006.
- C. Letter from Cat Skaar, Assistant to the Commission, to Respondents notifying them that the appeal has been set for March 2, 2006.
- D. Letter from Cat Skaar, Assistant to the Commission, to Respondents granting Request to reschedule appeal set for December 22, 2005, dated December 5, 2005
- E. Letter from Respondents to Cat Skaar requesting rescheduling of appeal, dated November 25, 2005.
- F. Letter from Cat Skaar to parties notifying them that appeal has been set for December 22, 2005.
- G. Transcript of hearing testimony of Ryan H. Kell and Kevin J. Freeman, hearing date September 28, 2005.
- H. DEQ Exceptions and Brief, dated October 7, 2005.
- I. DEQ Reply Brief, dated October 4, 2005.
- J. Mr. Kell's Exceptions and Brief, dated September 7, 2005.
- K. DEQ Petition for Commission Review, dated August 8, 2005.
- L. Respondent Petition for Commission Review, dated August 8, 2005.
- M. ALJ Amended Proposed Order, dated July 8, 2005.
- N. DEQ Request to ALJ for issuance of a revised Proposed Order, mailed May 12, 2005.
- O. ALJ Proposed Order, dated April 27, 2005.
- P. Kell Supplemental Written Argument, dated March 8, 2005.
- Q. ALJ granting of Mr. Kell's request for extension, dated February 16, 2005.
- R. Kell Request for extension to file supplemental written argument, dated January 31, 2005.
- S. DEQ Supplemental Hearing Memorandum and Motion to Exclude, dated January 19, 2005.
- T. Objection by Mr. Kell to DEQ's request for extension, dated January 6, 2005.
- U. ALJ's granting of DEQ request for extension in filing argument, dated December 30, 2004.
- V. Additional argument from Mr. Kell, dated December 22, 2004.
- W. Kell Objection to DEQ Request for Extension, dated December 18, 2004.
- X. DEQ Request for Extension on deadline to file argument, dated December 13, 2004.
- Y. ALJ Request for supplemental written argument, dated November 12, 2004.
- Z. DEQ Request for Extension, dated November 30, 2004.
- AA. Respondent Hearing Memorandum, dated November 8, 2004.
- BB. DEQ Hearing Memorandum, dated October 7, 2004.
- CC. Hearing Exhibits
 - A-1 Letter from DEQ to Ryan Kell entitled "Clean up instructions, dated June 21, 2002.
 - A-2 Photographs of HighTech Now site, dated September 11, 2002.

Agenda Item B: Contested Case No. LQ/HW-NWR-02-194 in the Matter of Ryan H. Kell and HighTech Now, Inc.

June 22-23, 2006, EQC Meeting

Page 11 of 11

A-3 Analytical report for sampling event at HighTech Now site, dated October 15, 2002.

A-4 Hazardous waste manifests for shipment of wastes from High Tech Now Site, dated October 10-22, 2002.

A-5 Letter from Kevin Freeman to Ryan Kell, dated June 18, 2002.

A-6 Clean up agreement between The Freeman Group and Ryan Kell, dated July 29, 2002.

A-7 Letter from Freeman Group attorney to Ryan Kell, dated September 23, 2002.

A-8 Letter and spreadsheet from Kevin Freeman to Rebecca Christiansen, DEQ, dated January 22, 2003.

A-9 Hazardous Waste Generator's Report, dated October 10, 2002.

A-10 Registration Verification Report, dated January 8, 2003.

A-11 Hazardous waste generator fee invoice, dated August 7, 2003.

A-12 Agency for Toxic Substances and Disease Registry Public Health Statement for Lead, dated August 1997.

R-1 Letter from DEQ to Ryan Kell, entitled Clean up Instructions, dated June 10, 2002.

R-2 Partial, unsigned draft letter from Rebecca Christiansen to Ryan Kell, undated.

R-3 DEQ Guidance Sheet, "How to Determine if Your Waste is Hazardous," dated December 14, 2000.

R-4 Invoice from Cooper Construction to HighTech Now, Inc., dated September 24, 2002.

R-5 Memorandum regarding site visits to the HighTech Now site, dated October 21, 2002.

DD. Amendment to Notice of Assessment of Civil Penalty reducing civil penalties sought at hearing, dated September 28, 2004. CC. Notice of Hearing, dated August 26, 2004.

EE. Letter from ALJ granting postponement, dated July 27, 2004.

FF. DEQ request for postponement of Hearing, dated July 14, 2004.

GG. Notice of Hearing, dated July 13, 2004.

HH. Respondent's Answer, dated December 5, 2003.

II. Notice of Assessment of Civil Penalty

Report Prepared by: Cat Skaar
Assistant to the Commission

Phone: (503) 229-5301