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

IN THE MATTER OF:	)	**PROPOSED AND FINAL ORDER**
	)	
INTERNATIONAL RESOURCE	)	
MANAGEMENT, INC. DBA	)	OAH Case No. 2020-ABC-03773
WASTEXPRESS	)	Agency Case No. LQ/HW-NWR-2017-083

HISTORY OF THE CASE

On January 3, 2018, the Department of Environmental Quality (DEQ or Department) issued a Notice of Civil Penalty Assessment and Order (Notice) to International Resource Management, Inc. dba WasteXpress (Appellant). The Notice alleged Appellant transported hazardous waste from two separate entities, SolarWorld Americas, Inc. and Benchmade Knife, on multiple occasions without a hazardous waste manifest and proposed a civil penalty of $50,400. On January 19, 2018, Appellant requested a hearing.

On May 21, 2020, the Environmental Quality Commission referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing. ALJ Allen convened a prehearing conference on August 11, 2020. Attorney Thomas Benke appeared on behalf of Appellant. Jeff Bachman appeared as the authorized representative of DEQ. The purpose of the prehearing conference was to identify the issues for hearing and establish a schedule for prehearing filings. At the conference, the parties agreed to an in-person hearing to be held January 19 through 21, 2021 in Tualatin, Oregon.

Pursuant to the schedule established at the PHC, Appellant filed its motion for summary determination (motion or MSD) on November 13, 2020.

On December 4, 2020, the OAH reached out to the parties via email proposing to covert the scheduled hearing to a virtual hearing using Skype for Business to address ongoing closures of state facilities in response to the COVID-19 pandemic. On December 4, 2020, Appellant consented to the conversion. Later that day, DEQ responded indicating that, after consultation with Mr. Benke, the parties determined the hearing should be rescheduled so as to remain in-person.

On December 8, 2020, DEQ filed its response to the MSD.[1] In its response, DEQ acknowledged certain deficiencies in the Notice (as identified by Appellant in the MSD) and

[1] DEQ labeled its responsive filing as a reply rather than a response. Because Appellant filed a reply brief responding to DEQ's response to the MSD, this order categorizes DEQ's filing as a response brief to avoid confusion.

indicated it would be filing an amended notice at a later date.

On December 15, 2020, ALJ Allen convened another prehearing conference to reset the hearing dates and address the proposed amended notice. Based on Mr. Bachman's representations at the conference regarding the amended notice, the ALJ granted Appellant's request for an extension to the filing deadline for its reply brief. The ALJ also reset the in-person hearing to July 27 through 29, 2021. On December 17, 2020, DEQ issued an Amended Notice of Civil Penalty Assessment and Order (Amended Notice) proposing a civil penalty of $46,800. Appellant filed its reply to the MSD on December 28, 2020. On April 30, 2021, ALJ Allen denied the MSD.

On May 25, 2021, ALJ Allen emailed the parties again proposing to convert the hearing to a virtual conference proceeding, or in the alternative select new hearing dates, in response to the ongoing COVID-19 pandemic. ALJ Allen instructed the parties to respond with their preferred option no later than June 4, 2021. Appellant consented to the conversion via email on May 28, 2021. DEQ did not respond by the established deadline.

On July 21, 2021, DEQ filed an Amended Notice of Civil Penalty Assessment and Order 2 (Second Amended Notice), removing all allegations related to the transportation of chemicals from Benchmade Knife and reducing the proposed civil penalty assessment to $16,800.

On July 9, 2021, ALJ Allen notified the parties that the hearing was converted to a virtual conference proceeding using Cisco's Webex platform. On July 12, 2021, the OAH issued an Amended Notice of Video Conference Hearing.

On July 26, 2021, Mr. Benke filed Appellant's Request for Contested Case Hearing and Answer to Amended Notice of Civil Penalty Assessment and Order 2 (Answer to Second Amended Notice).

A hearing was held on July 27, 2021, via Webex. Mr. Benke appeared on behalf of Appellant. Mr. Bachman appeared on behalf of DEQ. Testifying on behalf of Appellant was Jeremy Komp. Testifying on behalf of the Department were Brian DeDoncker, an Environmental Health Specialist with Clark County Public Health in Washington, and DEQ Hazardous Waste Inspectors Laurie Cook and Jay Collins. The parties submitted written closing arguments on August 27, 2021, and written responses to closing arguments on September 10, 2021. The record closed upon receipt of those responses on September 10, 2021.

ISSUES

1. Whether Appellant violated 40 CFR §263.20(a)(l) by accepting and transporting hazardous waste without a hazardous waste manifest. 40 CFR §261.21 and 40 CFR §261.2(b)(3).

2. If so, whether DEQ may assess a civil penalty of $16,800 against Appellant. OAR 340-012-0068(1)(e) and OAR 340-012-0045.

EVIDENTIARY RULINGS

DEQ's Exhibits A1 through A3[2] and A20 were admitted into the record without objection. Exhibits A5 through A13 were admitted over Appellant's objections of relevance. The ALJ sustained Appellant's objections to Exhibits A14 through A19 as irrelevant and excluded those documents from the record. Appellant's Exhibits R1 through R7, R16, R17, R20, R21, and R27 were admitted into the record without objection.[3]

STIPULATED FACTS[4]

1. Appellant operates a waste transporting, management, and consulting business located at 11618 N. Lombard Street in Portland, Oregon.

2. During the period relevant to this order, Appellant was registered with DEQ as a hazardous waste transporter and operated under U.S. Environmental Protection Agency (EPA) identification number ORQ000023150.

3. In 2010 and 2011, Appellant accepted and transported used Kester soldering flux (Kester flux or IPA) from SolarWorld Americas, Inc. (Solarworld) to Apollo Chemical & Equipment Co. (Apollo), on the following dates and amounts measured in gallons (g), without being provided a uniform hazardous waste manifest by SolarWorld:

Date	12/20/10	1/13/11	2/8/11	3/3/11	4/14/11	5/23/11	6/28/11	8/10/11	9/27/11
Amount	810 g	440 g	275 g	400 g	440 g	440 g	440 g	440 g	440 g

4. In July 2015, the Washington Department of Ecology discovered approximately 30 55-gallon drums containing used Kester flux being stored at a property in Yacolt, Washington.

5. On October 1, 2015, Apollo disposed of 23 of the 55-gallon containers of used Kester flux, found on the Yacolt property, as hazardous waste.

FINDINGS OF FACT

1. SolarWorld operates a facility in Hillsboro, Oregon for the manufacture of photovoltaic solar panels. SolarWorld uses Kester flux in its manufacturing process. (Test. of Cook; Ex. R27 at 1-2.)

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[2] DEQ withdrew Exhibit A4 at the outset of the hearing.

[3] Based on DEQ's removal of allegations related to Benchmade Knife, Appellant withdrew Exhibits R8 through R15, R18, R19, and R22 through R26.

[4] Stipulated facts include only those expressly stipulated to by Appellant in its Answer to DEQ's Second Amended Notice.

2. According to the Safety Data Sheet (SDS), Kester flux contains between 85 and 100 percent isopropanol/isopropyl alcohol (IPA). Kester flux is a highly flammable chemical with a flashpoint as low as 12 degrees Celsius / 54 degrees Fahrenheit. (Ex. A1 at 2-5.)

3. SolarWorld treats Kester flux as a single-use chemical wash. After it passes through SolarWorld's manufacturing process, the used Kester flux consists almost exclusively of IPA, with varying amounts of water and minimal traces of other elements. (Exs. R2 at 2 and R27 at 2.)

4. Prior to December 2010, SolarWorld managed the used IPA as hazardous waste and contracted with Appellant to transport the IPA to a disposal facility under a uniform hazardous waste manifest. While not reusable in its manufacturing process, SolarWorld believed that the used IPA remained a commercially viable product for other manufacturers without reclamation or processing. In an effort to manage its waste stream more responsibly, SolarWorld requested that Appellant look for alternative uses for its used IPA. (Test. of Komp; Ex. R27 at 2.)

5. On October 4, 2010, Appellant contacted Jay Collins, a DEQ hazardous waste inspector, via email and inquired whether the used IPA from SolarWorld could be sold for reuse by one or more entities in their own production and manufacturing processes. In addition, Appellant asked whether, under the proposed circumstances, the generator would have to count the IPA toward its monthly hazardous waste generation totals and whether the IPA would need to be treated as hazardous waste. (Test. of Komp and Collins; Ex. R2 at 2.)

6. As part of his duties as a hazardous waste inspector, Mr. Collins is responsible for finding reuse opportunities for previously used materials. Any used material may be managed as a product, rather than hazardous waste, if it has a legitimate reuse purpose without additional processing. Otherwise, a hazardous waste determination must be made at the point of generation for spent or discarded material. (Test. of Collins.)

7. Mr. Collins responded to Appellant's October 4, 2010 email on the same day indicating that, as proposed, the secondary use of SolarWorld's used IPA was considered "legitimate reuse rather than recycling * * *." (Ex. R2 at 2.) Additionally, Mr. Collins wrote, "Products going for reuse are not hazardous waste, they are not counted, and things not counted are not reported." (*Id*. at 1-2.)

8. In late 2010, SolarWorld began selling its used IPA to Appellant, at times for a nominal amount, who then transported and sold the material to Apollo. (Test. of Komp and Cook.)

9. Apollo uses IPA as an ingredient in its cleaning products. IPA serves as both a drying agent and anti-foaming agent. During the relevant period, the used IPA from SolarWorld required no treatment or processing before being used in Apollo's manufacturing process. Apollo considered the used IPA to be a valuable product rather than a waste product. (Ex. R3; test. of Komp.)

10. During the relevant period, Appellant also transported used IPA from Precision Wire to Apollo for use in its products. At the time of transport, the used IPA from SolarWorld contained no crystals or other unacceptable inclusions. All used IPA transported to Apollo by Appellant was shipped under a bill of lading, rather than a uniform hazardous waste manifest. (Test. of Komp.)

11. Apollo provided Appellant with the necessary specifications, regarding water and impurity content, for the used IPA to be viable as a direct reuse ingredient. During the relevant period, Appellant tested samples of each load of used IPA from SolarWorld prior to transport to Apollo. On at least one occasion, Appellant rejected a load of used IPA because it contained too much water for Apollo to reuse in its products. On a separate occasion, Apollo rejected a batch of SolarWorld's used IPA because it failed to meet the specifications provided. In each instance, Appellant transported the rejected IPA to a disposal facility under a uniform hazardous waste manifest. (Test. of Komp; Ex. R20 at 1.)

12. In or about 2011, a local fire inspector informed Apollo Chemical that it could not store the then-current quantities of used IPA from SolarWorld and Precision Wire in its facility due to fire risks. Thereafter, Apollo transferred an unknown number of 55-gallon drums containing used IPA to Joseph Gent who owned a warehouse facility across from Apollo Chemical's manufacturing facility in Portland. Mr. Gent subsequently transported the barrels to his property in Yacolt, Washington (Yacolt property). (Test. of Cook; Ex. R20 at 1.)

13. In June 2015, the Washington Department of Ecology received a complaint of high-intensity rubbish fires using a chemical accelerant. In response, on June 9, 2015, Brian DeDoncker, an environmental health specialist with Clark County Public Health,[5] visited the Yacolt property and discovered approximately 30 blue 55-gallon barrels of used IPA (the IPA in issue). (Test. of DeDoncker; Ex. A20.)

14. The barrels all bore similar white labels with handwritten notations reading, "SolarWorld IPA" or "SolarWorld Kester flux." (Test. of DeDoncker; Ex. A20.) Some of the barrels were stored outdoors. Of those barrels, some did not have any type of lid or covering to keep foreign elements out. Many of the barrels covered by lids were bulging at the sides and/or top. At least one barrel was turned on its side, seeping chemicals onto the ground and emitting a hissing sound. A few barrels were stored in a covered barn on the property. The barrels found on the Yacolt property were moved back to Apollo following Mr. DeDoncker's visit. (Test. of DeDoncker; Ex. A20.)

15. Because SolarWorld and Apollo are located in Oregon, Mr. DeDoncker contacted DEQ for assistance. Sometime between June and August 9, 2015, Laurey Cook, a DEQ hazardous waste inspector, visited Apollo and found the barrels of IPA in issue stored inside Apollo's facility. Ms. Cook also noted several barrels of used IPA from Precision Wire being stored outdoors at Apollo's facility. (Test. of Cook; Ex. R20 at 1.)

[5] At all times relevant to this order, the Washington Department of Ecology contracted with Clark County Public Health to use its environmental health specialists for hazardous waste complaints. (Test. of DeDoncker.)

16. Sometime between Mr. DeDoncker's visit to the Yacolt property and August 9, 2015, Ms. Cook visited SolarWorld to determine how the IPA was used in its original process. Because SolarWorld was unable to use the IPA more than once as a cleaning agent, Ms. Cook determined that the material—despite being subsequently transported to Apollo for its use in manufacturing cleaning products—was spent when it left SolarWorld. Later, DEQ determined that the used IPA was waste after SolarWorld's first use because, according to DEQ, "it was never treated as a valuable product." (Test. of Cook.)

17. Sometime after June 2015, Apollo Chemical transferred approximately 23 of the barrels found on the Yacolt property to a RCRA disposal facility under a hazardous waste manifest. Apollo used the remaining seven barrels of used IPA from the Yacolt property in its manufacturing process after June 2015. (Test. of Cook and Komp.)

CONCLUSIONS OF LAW

1. DEQ failed to establish that Appellant violated 40 CFR §263.20(a)(l), because it failed to show the used IPA transported by Appellant during the period in issue was a hazardous waste at the time of transport.

2. DEQ may not assess a civil penalty against Appellant.

OPINION

DEQ alleges that Appellant violated 40 CFR §263.20(a)(l) by accepting and transporting hazardous waste without a hazardous waste manifest and seeks to impose a civil penalty for the alleged violation. As the proponent of the allegation and proposed civil penalty, the Department bears the burden of proving its allegation and the appropriateness of the proposed penalty by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *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, the standard of proof that generally applies in agency proceedings, including license-related proceedings, is the preponderance standard.) Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987).

The burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175, 179 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e*., the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e*., the burden of persuasion)). Accordingly, any party advocating a particular position bears the burdens of production and persuasion as to that position. As such, DEQ must prove, by a preponderance of the evidence, that Appellant (1) transported a hazardous waste (as opposed to a hazardous material); (2) the transportation of that hazardous waste required issuance of a hazardous waste manifest by the generator; (3) Appellant transported said waste without said manifest; and (4) that the proposed civil penalty is appropriate.

As set forth below, DEQ failed to establish, by a preponderance of the evidence, that the used IPA transported by Appellant, from SolarWorld to Apollo, during the period in issue constituted a hazardous waste. Accordingly, DEQ failed to establish that a hazardous waste manifest was required for the transportation of the used IPA in issue. As such, DEQ did not establish Appellant violated 40 CFR §263.20(a)(l).[6]

Under the authority granted by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901, *et seq*., the EPA promulgated regulations governing the storage, treatment, transportation, and disposal of hazardous and non-hazardous waste materials for the protection of the environment. Such regulations are found at 40 CFR parts 260 through 265.

40 CFR §261.2 (2007) defines solid waste, in relevant part, as follows:

> (a)(1) A *solid waste* is any discarded material that is not excluded under § 261.4(a) or that is not excluded by a variance granted under §§ 260.30 and 260.31.
>
> (2) A *discarded material* is any material which is:
>
> (i) *Abandoned,* as explained in paragraph (b) of this section; or
>
> (ii) *Recycled,* as explained in paragraph (c) of this section; or
>
> (iii) Considered *inherently waste-like,* as explained in paragraph (d) of this section[.]
>
> * * * * *
>
> (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[.]

(Emphasis original.)

40 CFR §262.11 (2007) governs hazardous waste determinations and provides, in relevant part:

[6] Because DEQ failed to establish the used IPA was a solid and/or a hazardous waste at the time of transport by Appellant, it is unnecessary to address the remaining elements of the alleged violation in any significant detail.

> A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste using the following method:
>
> (a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4.
>
> (b) He must then determine if the waste is listed as a hazardous waste in subpart D of 40 CFR part 261.

In its original Notice, DEQ characterized the used IPA in issue as spent material for the purpose of alleging transportation of hazardous waste without the required manifest. Then, however, in response to arguments Appellant raised in its motion for summary determination, DEQ removed references to spent material and characterized the material as discarded in its next two amended notices. Because the Second Amended Notice—the operative notice at issue—refers to the used IPA only as discarded, rather than spent, this order does not address the distinction raised in closing arguments.

Pursuant to 40 CFR §261.2(a)(1), to be a solid waste, a material must be discarded. Logically, what is not discarded is not waste. As relevant to this matter, the federal regulations define a discarded material as including any material which has been abandoned. 40 CFR §261.2(a)(2)(i). The regulations identify abandoned materials, for the purposes of a solid waste determination, as those abandoned by being (1) disposed of; (2) burned or incinerated; or (3) accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned. 40 CFR §261.2(a)(2)(i),(b).

DEQ first argues that the used IPA found on the Yacolt property in June 2015 was, at all times, a discarded material, because SolarWorld had previously managed the used IPA as hazardous waste, indicating it no longer had value to SolarWorld. DEQ argues SolarWorld sent its used IPA to Apollo in an attempt to avoid losing its conditionally exempt generator status and being reclassified as a small or even large quantity generator of hazardous waste. I am unpersuaded by that argument. DEQ's argument fails to address evidence in the record indicating SolarWorld's intent to minimize its waste generation and responsibly manage its waste streams. The uncontroverted evidence in the record shows SolarWorld believed that, while unacceptable as a production wash in its manufacturing process, the used IPA was suitable for several other uses without additional processing. The record shows that Solar World asked Appellant to seek out available markets for the used IPA because it wished to manage the used IPA in a responsible manner. Moreover, the record reveals that Appellant was advised by DEQ personnel that the used IPA was suitable for other applications such as carpet cleaning or window washer fluids.

At hearing, Mr. Collins testified that among his job duties as a hazardous waste inspector for DEQ was finding reuse and recycle options for materials that might otherwise be managed as hazardous waste. The record shows that Appellant reached out to Mr. Collins with the proposal to broker the used IPA to Apollo for use in its cleaning solvents. Mr. Collins advised Appellant that the direct reuse plan, without additional processing, was permissible and that the used IPA could be treated as a product, rather than hazardous waste, for waste generation reports and

transportation. Moreover, the record shows that Apollo considered the used IPA it accepted from SolarWorld to be suitable for direct use (*i.e.*, without additional processing) as an ingredient in its cleaning products. Additionally, the record shows Apollo was accepting similar used IPA from another entity, Precision Wire, for the same purpose. Apollo considered the used material to have significant economic value because, without the used IPA, it would have to buy new IPA from a commercial manufacturer at significant cost. Additionally, the record shows Apollo was accepting similar used IPA from another entity, Precision Wire, for the same purpose. Based on the preponderant weight of the evidence, I am convinced the used IPA in issue had value to both SolarWorld and Apollo at the time Appellant transported the material. Therefore, DEQ failed to prove the used IPA in issue was discarded because it was abandoned, burned or incinerated, or because it was inherently waste-like.

DEQ acknowledges that the used IPA would not meet the federal definition of a solid waste if it was reused pursuant to 40 CFR §261.2(e), which exempts from the definition of solid waste those materials shown to be recycled by being used or reused as ingredients in an industrial process to make a product, with certain inapplicable caveats. Nonetheless, DEQ also asserts that, regardless of the parties intent at the time the material was transported, Apollo's failure to use the material that was subsequently transported and stored at the Yacolt property governs its designation as a hazardous waste retroactively to hold Appellant liable for transporting hazardous waste without proper documentation. Thus, according to DEQ, because the used IPA that Appellant transported in 2010 and 2011 was eventually disposed of or and/or burned by Apollo sometime after June 2015, the used IPA required a hazardous waste manifest at the time of transport in 2010 and 2011.

DEQ's arguments rely heavily on its interpretation of the federal regulations to require ongoing monitoring of a customer's ultimate use of a product or be liable for that customer's later mismanagement of potentially hazardous materials. DEQ provided no evidence of legislative or agency intent, or other basis for this interpretation at hearing. Instead, DEQ relies in closing arguments on OAR 340-011-0545(3), which requires an administrative law judge to give deference to DEQ's interpretations of its own administrative rules. DEQ's argument is not persuasive because DEQ is seeking deference for the agency's interpretation of a *federal regulation*, rather than a DEQ-promulgated rule. Although DEQ adopted the federal regulations at issue through OAR 340-100-0002, DEQ did not author or promulgate those regulations and therefore its interpretation is not entitled to deference.

The record establishes that Appellant transported approximately 4,125 gallons of used IPA from SolarWorld to Apollo during the relevant period, the equivalent of 75 55-gallon drums. The evidence also shows that, during the relevant period, Apollo tested and then accepted or rejected the used IPA based on its own specifications for useable product. Moreover, the record shows that, of the more than 4,000 gallons shipped from SolarWorld to Apollo, the Washington Department of Ecology found 1,650 gallons in 55-gallon drums stored on the Yacolt property totaling approximately 30 barrels.

While the record does not indicate how many drums Apollo had moved to the Yacolt property from its facility, or when, the record shows that the drums were left on that property for multiple years, with most being uncovered and exposed to the elements. Nonetheless, 385

gallons (*i.e.*, seven 55-gallon drums) of the used IPA found on the Yacolt property in 2015 was still useable to Apollo and therefore not disposed of as hazardous waste. As for the remainder of the used IPA found at that property in June 2015, there is no dispute that it contained inclusions that made it unusable to Apollo as of that time. Accordingly, DEQ required Apollo to dispose of the unusable material (approximately 1,265 gallons, or 23 55-gallon drums) as hazardous waste.

At the time Appellant transported the once-used IPA from SolarWorld to Apollo, the IPA was still useable by Apollo, without additional processing or recycling. And, according to the record, Apollo actually used a significant portion of the once-used IPA transported during the relevant period for its manufacture of cleaning products. The record indicates that Apollo also mismanaged a significant portion of that material, resulting in its eventual disposal as hazardous waste. At some point, after Appellant transported the used IPA to Apollo, Apollo decided to either discard a portion of the used IPA or accumulate it in lieu of disposal. At that time, Apollo likely engaged in speculative accumulation under the rules, thereby constituting abandonment of the used IPA. (*See e.g.*, 40 CFR §§261.1 (c)(8) and 261.2(c)(4).) Nonetheless, that later decision by Apollo does not convert the used IPA that Appellant transported from SolarWorld to Apollo during the relevant period into a discarded material under the relevant definition. Rather, the used IPA accepted by Apollo only became discarded in 2015, at the time Apollo determined it could not use the IPA, either due to a change in chemical make-up or simply due to the large volume provided by SolarWorld and others, and transported it to the RCRA disposal facility. It is unnecessary, for purposes of this adjudication, to determine when Apollo first began such speculative accumulation because there is no allegation that Appellant transported that material from Apollo to any other facility.

Moreover, DEQ's arguments regarding strict liability under RCRA appear misplaced. Specifically, DEQ cites to *Oil Re-Refining Co. v. Envtl. Quality Comm'n*, 361 Or 1 (2017) for the proposition that RCRA applies strict liability under certain hazardous waste manifest requirements. This argument misses the mark. In *ORRCO* the Court identified mental state, or intent, as a consideration appropriate only as part of a penalty determination, rather than for a finding of culpability for manifest violations. The Court did not indicate such logic also applied to solid waste/hazardous waste determinations. I decline the invitation to expand the Court's reasoning to hold Appellant liable *ex post facto* for the subsequent actions of Apollo.

40 CFR §263.20(a)(1) (2007) identifies the manifest requirement for transporters of hazardous waste and provides:

> A transporter may not accept *hazardous waste* from a generator unless the transporter is also provided with a manifest signed in accordance with the requirement of §262.23.

(Emphasis added.)

Because DEQ failed to establish that the used IPA transported by Appellant during the relevant period was a solid waste, it cannot establish it was hazardous waste at the time of transport. Because DEQ cannot establish that the used IPA was a hazardous waste, Appellant was not required to obtain a hazardous waste manifest pursuant to 40 CFR §263.20(a)(1).

Because DEQ did not establish that Appellant transported hazardous waste without a uniform hazardous waste manifest, no civil penalty is appropriate.

ORDER

I propose the Department of Environmental Quality issue the following order:

International Resource Management, Inc. dba WasteXpress did not transport hazardous waste without a uniform hazardous waste manifest during the period in issue.

DEQ may not assess a civil penalty against Appellant.

/s/ Joe L. Allen
Senior 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 November 9, 2021 I mailed the foregoing PROPOSED AND FINAL ORDER issued on this date in OAH Case No. 2020-ABC-03773**.**

By: Electronic Mail

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