Oregon
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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas J. Paul, Acting Director

SUBJECT: Agenda Item A, August 21, 2014
Water Resources Commission Meeting

Consideration of the Exceptions and Issuance of Final Order
In the Matter of Charles Moore, Water Well Constructor License #731

I. Introduction

A contested case hearing was held in Salem on August 5-6, 2013, to consider the Department's allegations that Mr. Charles Moore violated water well construction standards. The Department issued an Amended Proposed Order on January 8, 2014, finding that Mr. Moore violated seven water well construction standards during the course of constructing new wells and deepening existing wells. The Commission is responsible for reaching a conclusion on the Director's Amended Proposed Final Order, ultimately issuing a final order to resolve the allegations.

II. Background

Between December 19 and 30, 2011, Mr. Moore deepened a well on property owned by Julie Smith (Well Log: WASC 51933). Mr. Moore was the licensed and bonded water well constructor for the deepening project. Upon review of the well log and hydrogeology of the area, the Department concluded that the well allowed water from an upper aquifer to commingle with water from a lower aquifer, in violation of OAR 690-215-0045(2). The Department also concluded that Mr. Moore failed to case and seal the well as required by OAR 690-210-0150(1). The Department attempted to work with Mr. Moore to allow him to voluntarily bring the well into compliance. However, the Department's efforts were unsuccessful and the Department issued a Notice of Violation on May 8, 2012. Mr. Moore requested a hearing and a contested hearing was held by the Office of Administrative Hearings on August 13, 2012. Administrative Law Judge (ALJ) Joe Allen presided over the matter. On September 24, 2012, ALJ Allen issued a proposed final order finding that the Notice of Violation failed to comply with the requirements of ORS 183.415 because it did not cite the subsection of administrative rule violated. On November 6, 2012, the Department issued a Final Order adopting the ALJ's Proposed Order and withdrawing the notice.

Subsequently, on December 13, 2012, the Department issued a new notice correcting the deficiencies found by ALJ Allen. This notice is currently at issue before the Commission. In this notice, the Department brought the previous allegations pertaining to the Smith well and included new allegations pertaining to the Rhodes well, Bankowski well, North Hurlburt well and South Hurlburt well. The Department alleged violations of OAR 690-210-0150(1) related to casing and sealing for all five wells, and violations of OAR 690-215-0045(2) related to commingling for the two wells deepened. In the notice, the Department sought to impose civil penalties of $7,000, and to suspend Mr. Moore's well construction license. Mr. Moore again requested a hearing. On August 5 and 6, 2013, the Office of Administrative Hearings conducted a hearing. ALJ Allen again presided over the matter. Assistant Attorney General Matt DeVore represented the Department and attorney Wyatt Rolfe represented Mr. Moore. Julie Smith, Juno Pandian, Kristopher Byrd, and Kenneth Lite testified on behalf of the Department. Mr. Moore, Karl Moore, and Steve Kaser testified on behalf of Mr. Moore. The record closed at the conclusion of the hearing.

On October 18, 2013, ALJ Allen issued a proposed order finding that the notice constituted an amended notice and was precluded by administrative rule. The ALJ further proposed that the Department not assess civil penalties or impose a license suspension based on the notice. In response to the ALJ's proposed order, Mr. Moore submitted exceptions on November 14, 2013.

On January 7, 2014, the Department Director issued an amended proposed order. The amended proposed order made several changes to the ALJ's proposed order and found that the Department proved the allegations against Mr. Moore. In response to the Director's amended proposed order, Mr. Moore submitted new exceptions on February 6, 2014. By letter dated May 7, 2014, Mr. Moore also requested leave from the Commission to make oral argument on Mr. Moore's exceptions.

At the May 2014 Commission meeting, the Commission formed a subcommittee to consider the exceptions to the Director's amended proposed final order in this case. The Commission appointed Commissioners Bruce Corn, Dennis Doherty, and Ray Williams to the subcommittee. The subcommittee met three times during the intervening months. The subcommittee (and Commission by copy) received copies of Mr. Moore's exceptions, as well as the full record in this matter to facilitate review of the exceptions. The subcommittee requested further written argument from the parties on specific issues:

1) Whether the December 13, 2012, Notice of Violation was an improper amendment of the May 8, 2012, Notice of Violation or a new Notice of Violation altogether.

2) Whether the penalty proposed in the Amended Proposed Final Order is appropriate.

III. Discussion

The subcommittee will make its recommendation to the Commission and deliberate with the full Commission during closed executive session on August 21, 2014. After its deliberations are complete, the Commission will reconvene in public session and may at that time vote on how to proceed with the Final Order.

IV. Alternatives

The Commission may consider the following alternatives for proceeding:

1. Deny all the exceptions and affirm the Director's Proposed Final Order.
2. Adopt some exceptions and issue a modified Final Order.
3. Refer the matter back to the Office of Administrative Hearings for gathering of further evidence.
4. Allow the parties to present oral argument.

V. Recommendation

The subcommittee plans to present its recommendation to the full Water Resources Commission during the August 21st meeting.

Kris Byrd
503-986-0819

Attachment 1: Mr. Moore's Argument on Issues
Attachment 2: WRD Argument on Issues
Attachment 3: Table 225-1
Attachment 4: OAR 690-225-0050 and OAR 690-225-0110

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July 14, 2014

VIA FACSIMILE & US MAIL
(with email courtesy copy)

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RE: *In the Matter of Charles Moore, Water Well Construction License #731*
OAH Reference No.: WR-13-003; Agency Case No.: WWC 731

Dear Mr. DeVore:

Enclosed, pursuant to your June 26, 2014 letter relaying the Water Resources Commission's request for limited written argument on Mr. Moore's exceptions, is *Appellant's Brief.*

Very truly yours,

SCHROEDER LAW OFFICES, P.C.

Tara J. Jackson
Paralegal

TJJ:wer

Enclosures

cc: Client
Kris Byrd

BEFORE THE OREGON WATER RESOURCES COMMISSION

IN THE MATTER OF CHARLES MOORE, WATER WELL CONSTRUCTION LICENSE #731,	OAH Reference No.:WR-13-003
	Agency Case No.: WWC 731
Appellant	**APPELLANT'S BRIEF**

Comes now, Charles Moore ("Moore"), by and through his attorneys of record, Wyatt E. Rolfe, Laura A. Schroeder and Schroeder Law Offices, P.C. to respond to the request of the Oregon Water Resources Commission to submit written argument addressing the following two issues:

1) Whether the December 13, 2012 Notice of Violation was an improper amendment of the May 8, 2012 Notice of Violation;
2) Whether the penalty proposed in the Amended Proposed Order is appropriate.

I. Notice of Violation Amendment

The Notice issued December 13, 2012, constitutes an improper Amended Notice of the Department's May 8, 2012 Notice of Violation. Oregon Administrative Rule ("OAR") 137-003-530(4)(a) serves as a limitation upon the Department's inherent authority to withdraw a notice of violation where the purpose served is to amend the subject notice.

A. Background

Charles Moore holds Well Constructor License #731 issued by the Oregon Water Resources Department ("the Department"). (Ex. A6 at 1). On or about May 8, 2012, the Department issued a Notice of Violation; Assessment of Civil Penalties; Proposed Order; License Suspension and Opportunity for Hearing ("Original Notice") in Office of Administrative Hearing ("OAH") case WR 12-002 (OWRD Case No. WWC 731). In the Original Notice, the Department raised certain allegations related to a well on the property of Julie Smith in Mosier, Oregon (Smith Well). The Notice alleged that Moore failed to case and seal the Smith Well to a

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depth required by OAR 690-210-0150. In addition, the Original Notice alleged Moore's deepening caused the comingling of aquifers in violation of OAR 690-215-0045. (Ex. A17.)

Moore requested a hearing on the Original Notice and the parties appeared before Senior Administrative Law Judge ("ALJ") Allen on August 13, 2012. On September 24, 2012, the ALJ issued a proposed order finding the Department's Original Notice failed to comply with the requirement of ORS 183.415 and, consequently, could not serve as the basis for agency action. On November 6, 2012, the Department issued a Final Order adopting the ALJ's proposed order and withdrawing the Original Notice. (Exs. A18, A23, A27, and A28.)

On December 13, 2012, the Department issued the Notice at issue in this matter, again under OWRD Case No. WWC 731 ("Second Notice"). The Second Notice re-alleged violations pertaining to the Smith Well and corrected deficiencies within the Original Notice. The Second Notice also included new allegations based upon evidence presented during the hearing on the Original Notice. (Ex. A44.)

An in-person hearing convened in Salem, Oregon, on August 5 and 6, 2013 under OAH Case No. WR 13-003. The record closed at the conclusion of the hearing. On October 18, 2013, Senior ALJ Allen issued a Proposed Order finding that the Notice issued December 13, 2012, constituted an Amended Notice and that the Department is precluded from issuing such notice after close of the evidentiary record under OAR 137-003-0530(4)(a). ALJ proposed that the Department may not assess civil penalties or license suspension based on the Notice.

Moore submitted exceptions to the Proposed Order on November 14, 2013, asserting:

1) The Proposed Order failed to conclusively resolve the entire case on procedural grounds as determined by the ALJ; and, alternatively

2) The Proposed Order failed to provide a substantive decision, on the merits, that the Notice of Violation is in error.

On January 8, 2014, the Department issued an Amended Proposed Order that rejected the proposed order of Senior ALJ Allen and responded to Moore's exceptions. Within the Amended

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Proposed Order the Department concluded its Original Notice was properly withdrawn under inherent authority of the Department and therefore the Second Notice did not constitute an improper amendment of the Original Notice.

Moore timely filed exceptions to the Department's Amended Proposed Order on February 6, 2013. On June 26, 2014, attorney Matt Devore communicated to Moore's counsel, Wyatt Rolfe, that a subcommittee of the Commission desired further written argument. Relevant to this brief, Moore asserts that the Second Notice constitutes an improper amendment of the Original Notice.

B. The Department's December 13, 2012 Notice of Violation Constitutes and Amended Notice.

The late filing and amendment of documents in contested case proceedings is governed by OAR 137-003-0530. Prior to 2012, an agency or department was freely capable of amending a notice during a contested case proceeding. Effective January 31, 2012, however, the Uniform and Model Rules of Procedure under the Administrative Procedures Act (APA, Oregon Revised Statutes ("ORS") Chapter 183) were amended to include limitations on an agency or department's ability to amend a notice in contested case proceedings after close of the evidentiary record. OAR 137-003-0530 now provides, in relevant part:

> (4) Notwithstanding any other provision of these rules, after the notice required by ORS 183.415 is issued:
>
> (a) An agency may issue an amended notice:
>
> (A) Before the hearing; or,
>
> (B) During the hearing, but before the evidentiary record closes, if the administrative law judge determines that permitting the amendment will not unduly delay the proceeding or unfairly prejudice the parties.

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The Model Rules of Procedure now prescribe the methodology an agency must undertake in order to amend a Notice of Violation. The Oregon Water Resources Commission has adopted the Attorney General's Model Rules of Procedure for Contested Cases. OAR 690-002-0000.

Within in its Original Notice dated May 8 2012, the Department asserted that Moore failed to properly case and seal the Smith well. To support this allegation, the Department relied upon OAR 690-210-0150 which governs the casing and sealing of water supply wells within consolidated formations. The Department's Original Notice, however, did not cite the rule verbatim or specify the particular subsection(s) of the relevant rule. (Ex. A28 at 6.) Following a hearing and close of the evidentiary record, Senior ALJ Allen issued a Proposed Final Order concluding that the Department's Original Notice failed to satisfy ORS 183.415. In turn, the Department issued a Final Order on November 6, 2012 that adopted ALJ Allen's opinion. The Final Order opined that the Original Notice recited what appeared to be an amalgamation of language derived from OAR 690-210-0150(l)(a).[1] The Department likewise identified the Original Notice's failure to cite specifically to a particular subsection of the cited administrative rule, explaining it was possible for a well constructor to violate one or both sections in the course of drilling a well. Finally, the Final Order concluded that insufficient notice could not serve as the basis for agency action and that the Department had failed to provide adequate notice to Moore. Ex. A28 (Department Final Order dated 11/06/2012, *citing Villanueva v. Board v. Psychologist Examiners*, 175 Or App 345 (2001), *adhered to on recon*, 179 Or App 134 (2002)). As such, the Original Notice could not serve as the basis for the proposed assessment of civil penalty or license suspension against Moore. *Id.*

On December 13, 2012, the Department issued the Second Notice at issue in this matter. The Second Notice amended the procedural defects that plagued the Department's Original

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[1] Counsel for Moore notes the Final Order contained an apparent typographical error, citing OAR 690-230-0150(1)(a), rather than the rule at issue.

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Notice, but also added new allegations related to the Rhodes, Bankowski, North Hurlburt and South Hurlburt wells.

It is apparent that the Department's Second Notice constitutes an amended notice as contemplated by OAR 137-003-0530(4). The Second Notice contains allegations and legal conclusions borrowed verbatim from the Original Notice. As described by Senior ALJ Allen within his Proposed Order dated October 18, 2013:

> Nothing in the model rules defines the term "amended notice." Therefore, one must begin with the plain, ordinary meaning of the term. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) ("[W]ords of common usage typically should be given their plain, natural, and ordinary meaning."). The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006) ("Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense."). In this case, the operative term at issue is "amend."
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> > Merriam-Webster provides definitions of "amend" which include, in relevant part:
> >
> > **3 a:** to put right: CORRECT, RECTIFY* * * : to make emendations in (as a text) * * * **c** (1) : to change or modify in any way for the better* * * (2): to change or alter in any way esp. in phraseology* * * *specif*: to alter (as a motion, bill, or law) formally by modification, deletion, or addition[.]
> >
> > (Emphasis original.) *Webster's Third New Int'l Dictionary*, 68 (unabridged ed. 2002).
>
> When such definitions are applied to the context of a contested case notice under the relevant rule, it is apparent that an amended notice constitutes any notice that has been changed or modified, regardless of whether the alterations constitute additions to or deletions from the original notice. Here, OWRD withdrew the original Notice, corrected certain deficiencies, added additional allegations, and reissued the document as a new notice. Importantly, the Notice at issue here contains allegations and legal conclusions borrowed verbatim from the original Notice. Moreover, in its closing brief, OWRD acknowledges it issued the Notice re-alleging the same allegations as to the Smith Well and states, "The Second Notice was issued to assure that Appellant was fully informed of the legal basis for the allegations[.]" OWRD Closing Argument at 22. Regardless of how the Department characterizes the document, the Notice at issue constitutes an amended notice as contemplated by OAR 137-003-0530(4)(a). To rule otherwise would be to favor form over substance with respect to an agency or department's characterization of a notice.

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Proposed Final Order at 6.

ALJ Allen's analysis is instructive. The Department is pursuing the same violations for the Julie Smith well that it included under the original (May 2012) Agency Case No. WWC 731. It amended the Original Notice to correct deficiencies identified under ORS 183.415, also under Agency Case No. WWC 731, issuing the Second Notice in December 2012. Under OAR 137-003-0530(4), the Second Notice is improper because it constitutes a notice amendment following the first hearing and close of the evidentiary record on August 13, 2012. The plain language of OAR 137-003-0530(4) defines the scope of its application. The agency may issue an amended notice:

> (A) Before the hearing; or,
> (B) During the hearing, but before the evidentiary record closes, if the administrative law judge determines that permitting the amendment will not unduly delay the proceeding or unfairly prejudice the parties.

The Department's practice of withdrawing the Original Notice through a final order after closure of the evidentiary record acts to circumvent the regulation. If sustained, the Department is capable of not only circumventing OAR 137-003-0530(4), but also subjecting well drillers, including Moore, to multiple contested cases on the same matter until the Department finally succeeds in obtaining its desired outcome.

C. Not an Exercise of Inherent Authority

The Department asserts that nothing in OAR 137-003-0530(4) limits an agency's inherent authority to withdraw a notice any time prior to issuance of a final order. (*Oregon Water Resources Department's Closing Argument* at 21 through 23.) The Department relies on a footnote in the Attorney General's Administrative Law Manual to support this proposition. (2012 AG Manual at 92, FN 197.) Within its footnote to Section III (C)(1)(e) addressing notice amendments under OAR 137-003-0530(4), the AG Manual states that "[t]his limitation on amending the notice does not affect an agency's inherent authority to withdraw a notice at any

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time prior to the issuance of a final order unless there is a specific statute or rule that prevents such action." *2012 AG manual*, at 92, footnote 197.

The Department's argument that it withdrew, as opposed to amended, its Original Notice is not supported by the Attorney General's Administrative Law Manual. The footnote itself expresses that an agency's inherent authority may be limited by statute or rule. The cited commentary relied upon by the Department limits its discussion to notices withdrawn *prior* to a final order. Nothing in the AG Manual speaks to an agency's ability to withdraw a notice after the evidentiary record is closed and then subsequently reissue that notice with amendments. Nor does the AG Manual provide for withdrawal of a notice through a final order in a contested case. Instead, the cited commentary indicates action an agency may take prior to issuing a final order, rather than through it.

In this case, OAR 137-003-0530(4) itself specifically limits any inherent authority on behalf of the Department to withdraw its notice of violation. The plain language of OAR 137-003-0530(4) provides that an agency or department may amend a notice only before close of the evidentiary record. The rule specifically limits an agency's ability to withdraw its notice after the evidentiary record is closed and then subsequently amend it. As recognized by Senior ALJ Allen: "The distinction between withdrawal of a notice and amendment of that notice without formal withdrawal is one without a difference. The practical effect is the same. Amendment would, even without express withdrawal, effect withdrawal of the prior notice by operation of law." *Proposed Final Order* at 5, FN 3 (Oct. 18, 2013).

The AG Manual does not squarely address the procedural posture of Moore's case—namely that the Department entered a Final Order adopting the ALJ's Proposed Order. Even if viewed as a proper withdrawal of the Original Notice, the Department withdrew the Original Notice for the single purpose of amending its Original Notice following the close of the evidentiary record. An agency's authority to reconsider its final order is distinguishable from its

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authority to amend its Notice of Violation following the close of the evidentiary record in a contested case. As determined by Senior ALJ Allen:

> Nothing prevented OWRD from issuing a new notice alleging the additional violations based on evidence discovered at hearing. Nonetheless, OWRD elected to modify its prior notice, to correct deficiencies identified in the Final Order, and included in the Notice the additional allegations at issue here. Those additional allegations cannot now be parsed out in an attempt to preserve some portion of the Department's current Notice. Rather, those new allegations, having been tied to the original Notice through amendment, live or die, with the validity of the current Notice.

Proposed Final Order at 6 (Oct. 18, 2013).

The current proceedings arise from an improper amended notice. As provided by OAR 137-003-0530(4), the Department was required to amend its Original Notice prior to closure of the evidentiary record in Moore's first contested case hearing.

II. Whether the Penalty Proposed in the Amended Proposed Order is Appropriate

A. The Proposed Penalty is Based Upon an Improper Consideration of OAR 690-225-0050.

Through the course of these proceedings, Moore has consistently expressed concerns regarding this case's procedural context and the appropriateness of the penalties sought. Namely, the Department's proposal to assess *maximum* civil penalties, suspend Moore's license and impose corrective action in the absence of first establishing the existence of violations through a hearing and final order. Moore likewise contended that the proposed penalties were improper in the absence of findings of fact addressing the factors that may be considered under OAR 690-225-0050. *Memorandum in Support of Moore's Motion for Partial Summary Determination* at 18-20.

In selecting the appropriate type and degree of enforcement, the Department may consider the following: whether the licensee's file demonstrates a pattern of prior similar violations; whether the licensee has cooperated in attempting correction of any violation in a timely fashion; the gravity and magnitude of the violation including whether there is an immediate or long-term threat to human health or the ground water resource; whether the

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damage to the ground water resource is reversible; whether the violation in the instances cited was repeated or continuous; whether a cause of the violation was an unavoidable accident; the opportunity and degree of difficulty to correct the violation; and any other relevant factors. Amended Proposed Order at 15 (citing OAR 690-225-0050).

Of the many considerations enumerated within OAR 690-225-0050, the Department's proposal to assess maximum civil penalties is premised upon four. Within its Amended Proposed Order, the Department determines:

- "Appellant has demonstrated a pattern of similar violations, not only in wells constructed between 2002 and 2011, but by his own testimony, throughout his career";
- "Appellant has been unwilling to cooperate in correction of these violations";
- "Appellant has been aware of the issues regarding the Smith well since January 2012, and regarding the other wells since August 2012, yet has failed to correct the violations";
- "The gravity and the magnitude of the violations are significant as the commingling of aquifers contribute to groundwater level declines, impacting wells drawing water from the impacted aquifer as well as surface water flows at elevations where the aquifers are exposed in streams."

Amended Proposed Order at 15-16. The Department next concludes that "[i]mposition of a $1000 penalty per violation is appropriate due to the Appellant's pattern of misconstruction, failure to take corrective action, and the threat to the resource caused by his misconstruction of wells." *Amended Proposed Order* at 16.

As touched upon within Moore's Exceptions, the Department's justifications for assessing maximum civil penalties are misplaced. The Department has improperly pointed to the very wells at issue in this case as evidence of a *demonstrated* pattern of similar violations that justifies a maximum civil penalty. In essence, the Department reasons that the current

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allegations suffice to establish a demonstrable history of similar violations. Intuitively, the argument cannot pass muster. In the absence of a previous final order finding such violations, a demonstrable history of violations cannot exist. Moreover, Moore's general testimony regarding his historical construction practices cannot serve the Department's purpose. General testimony regarding unspecified wells in unspecified locations does not rise to the level of establishing a demonstrable history of well construction violations.

In this matter, Moore has simply exercised his statutory rights to notice and a hearing on the violations. ORS 183.415; ORS 183.745. Yet the Amended Proposed Order construes Moore's decision as evidence justifying maximum penalties. It improperly characterizes Moore as unwilling to correct the violations and failing to take the opportunity to correct the violations. Amended Proposed Order at 15. No licensee should be penalized for exercising their right to a hearing on the Department's violations. In fact, this is the approach taken by one of the considerations enumerated within OAR 690-225-0050. In determining the appropriateness and degree of enforcement, OAR 690-225-0050(8) provides that the Director may also consider the Department's costs in attempting to gain voluntary compliance of the cited violation. However, costs related to travel or field investigation must be excluded. In addition, "[t]he costs may be considered until the Department receives respondent's answer to the written notice and opportunity for hearing." OAR 690-225-0050(8). In other words, the provision prevents the Department from imposing a higher degree of enforcement based upon costs incurred as a result of the respondent exercising his right to answer and request a hearing. The same should be hold true with the other considerations enumerated under OAR 690-225-0050. The civil penalties proposed within the Amended Proposed Order are inappropriately based upon Moore exercising his rights to a hearing on the merits.

Finally, the record demonstrates that the civil penalties proposed were not arrived at pursuant to OAR 690-225-0050. While the Department's December 13, 2012 Notice of Violation references OAR 690-225-0050, it provides no further insight as to how the Department

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arrived at the maximum civil penalty for each violation. No analysis is included, nor facts identified, as to why $1000 per violation is sought as opposed to another permissible amount under OAR 690-225-0110(1)(b).[2] At hearing, Moore introduced Appellant's Exhibit R6 which contained an email chain between Well Construction and Compliance Section Manager Juno Pandian and Department employee Barry Norris. Responding to Mr. Norris's inquiry as to how the $1000 maximum amount was arrived at, Ms. Pandian offered only: "we usually assess the max if it is construction violations. This can be reduced through a stipulated agreement if he chooses that route." Appellant's Exhibit R6. The email correspondence serves as evidence that no substantive consideration was given to the factors enumerated under OAR 690-225-0050 when arriving at the $1000 penalty per violation. Rather, the Department systematically seeks to impose maximum civil penalties in cases of construction violations.

B. The Sealing and Commingling Violations are Unfairly Stacked.

With respect to the Smith and Rhoades wells, the Amended Proposed Order improperly seeks to stack violations for the same construction work, thereby exceeding the maximum civil penalty allowed under ORS 537.992(2). *See also* OAR 690-225-0110(1)(b). Under the Department's interpretation and application of the consolidated formation rule, compliance or non-compliance with OAR 690-210-0150(1) is dispositive as to whether the Department's alleged commingling violations under OAR 690-215-0045(2) survive or fail. This is improper under the facts of this case because the violations do not exist exclusive of one another. In addition, the Department's regulatory scheme does not provide that the consolidated formation rule is applicable in well deepenings. Rather, Department Division 215 deepening regulations expressly address when Division *210* Standards are applicable to deepenings. For example, OAR 690-215-0090 provides that "[i]f a water supply well becomes artesian upon deepening, the

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[2] **690-225-0110** (1) The amount of civil penalty shall be determined consistent with the following schedule:
* * * (b) Not less than $50 nor more than $1,000 for each occurrence defined in these rules as a major violation;

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well shall be cased, sealed and completed in accordance with OAR 690-210-0155." More importantly, 690-215-0040 provides:

> **Casing and Sealing Wells after Disturbance**
>
> (1) If during the installation of casing, liner pipe, seals, packers, or during repair or deepening of a water supply well, the pre-existing casing is withdrawn, or moved as to compromise the annular seal, the well shall be cased and sealed in accordance with the rules set forth in OAR 690-210.
>
> (2) If the annular seal is not compromised when cleaning out a water supply well or installing liner pipe, the water supply well shall not require re-casing or re-sealing.

(Underscore added). The negative implication of OAR 690-215-0040 is that regulations set forth in OAR 690-210 are not applicable in deepenings unless the original casing and seal are disturbed. This interpretation is supported by the various deepening logs submitted by Appellant and serves as additional support that the Department's current interpretation of OAR 690-210-0150 deviates from its historical application. (Ex. R1 at 1–26.) The logs demonstrate that the Department has not previously required additional casing and seal where the annular seal is not disturbed in a deepening.

In support of stacking both deepening (Div. 215) and construction (Div. 210) violations for the Smith and Rhodes wells, the Department cites OAR 690-210-0005(1) and asserts that "[w]ell constructors are obligated to deepen wells in compliance with the case and seal standards provided in OAR 690-210-0150." *Amended Proposed Order* at 13. The trouble is that the cited regulation is inapplicable to the circumstances. OAR 690-210-0005(1) provides:

> (1) The following well construction standards apply to all methods of water supply well construction. The methods include, but are not limited to, drilling, driving, jetting, boring, and digging.

Under OAR 690-210-0005(1), the Division 210 regulations are imposed upon all *methods* of well construction. The provision contemplates different *industry* methods of well construction and excavation of the borehole. The rule does not incorporate the Division 210 minimum water supply well construction standards into Division 215's standards for deepenings. Rather, a

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Water Supply Well Constructor is only responsible for the alteration work they performed under OAR 690-215. OAR 690-215-0006(3). This is reflected within the water well constructor certification for the Smith and Rhodes wells (Ex. A10 and Ex. A30) which provide:

> I accept responsibility for the construction, deepening, alteration, or abandonment *work performed* on this well during the construction dates reported above. All work performed *during this time* is in compliance with Oregon well construction standards. This report is true to the best of my knowledge and belief.

(emphasis added).

The well deepening regulations do not impose liability upon the driller to re-construct an existing water supply well and then certify that the entire well meets the current standards for new water supply well construction following the alteration. Yet, this is the interpretation the Department seeks to impose by pursuing both commingling *and* casing violations against Moore with respect to the Smith and Rhodes wells. If such a standard existed, it could clearly exist within the current deepening regulations. If such a standard existed, the well constructor certifications would not be limited to only work performed. Here, the Department lacks authority to stack violations under both OAR 690 Division 210 and Division 215 for the same deepening work.

C. The Civil Penalties Proposed are Improper Under the Rule of Lenity

Moore has previously raised the issue that violations of the Department's well construction regulations subject licensees to potential criminal sanctions. ORS 537.990; 537.535. As more particularly described within the Exceptions, the Due Process Clause requires the regulations themselves provide fair notice of the standard required or proscribed. U.S. Const. amend. XIV. It is Moore's position that OAR 690-210-0150 falls short of this standard because the regulation fails to provide adequate notice to the regulated community as to the standard required or activity proscribed when constructing wells within consolidated formations. At the federal level, courts have declined to allow agencies to "punish" regulated entities for rule

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violations when the promulgating agency's interpretation of the rule was not readily apparent.[3]

The potential for criminal sanctions under OAR 690-210-0150 and OAR 690-215-0045(2) begs another question: Should any "plausible" interpretation of the Department's regulations be afforded deference when criminal liability could be imposed as a result of the interpretation? The answer should be a resounding "no." Agencies should not be capable of promulgating ambiguous or vague regulations with criminal implications, and then utilize any plausible interpretation to enforce them.

In Oregon, courts usually defer to an agency's plausible interpretation of its own rule—including an interpretation made in the course of applying the rule—if that interpretation is not inconsistent with the wording of the rule, its context, or any other source of law. *Don't Waste Oregon Com. v. Oregon Facility Siting Council.*, 320 Or. 132, 142, 881P.2d 119; *Goin v. Employment Dept.*, 203 Or.App. 758, 763-64, 126 P.3d 734 (2006). However, the tide is changing in administrative law. In a recent concurring opinion of the 6th Circuit, Judge Sutton addressed "hybrid" regulations which, like Oregon's well construction regulations, subject violators to both civil and criminal penalties. See *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring). Judge Sutton spoke to the question of how federal courts should reconcile two conflicting doctrines of statutory construction that intersect within such hybrid regulations. On the one hand, courts regularly afford deference to an agency's interpretation of either 1) an ambiguous federal statute ("Chevron deference"),[4] or 2) the agency's own rule ("Auer" deference.).[5] On the other hand, the "rule of lenity" provides that

[3] *See, e.g.*, Diamond Roofing Co. v. Occupational Safety & Health Review Com., 528 F.2d 645, 650 (5th Cir. 1976) ("If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express."); Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119, 122 (7th Cir. 1981) (noting that there must be adequate notice in order to punish a regulated entity for violating an agency regulation); Dravo Corp. v. Occupational Safety & Health Review Com., 613 F.2d 1227, 1234 (3rd Cir. 1980) ("[A]n employer should not be subject to penal sanctions for nonadherence to safety standards without adequate notice in the regulations of the exact contours of his responsibility.").

[4] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[5] *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)

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ambiguous criminal statutes must be interpreted in the manner most favorable to the defendant.[6] The two doctrines collide where an agency promulgates "hybrid" regulations that impose both civil and criminal liability. The problem is compounded where civil and criminal liability hinge upon the agency's interpretation of its own regulation. In Judge Sutton's opinion, the rule of lenity must prevail across the line when dealing with hybrid regulations. Otherwise, "if agencies are free to ignore the rule of lenity, the state could make an act a crime in a remote statement issued by an administrative agency. The agency's pronouncement need not even come in a notice-and-comment rule. All kinds of administrative documents, ranging from manuals to opinion letters, sometimes receive Chevron deference." *Carter* 736 F.3d at 732 (6th Cir. 2013) (Sutton, J., concurring).

The rule of lenity does not apply to construction of the Oregon Criminal Code. See ORS 161.025(2); see also *Bailey v. Lampert*, 342 Or 321, 327, 153 P.3d 95 (2007) ("[T]he legislature has eliminated the availability of any 'rule of lenity' by statute."). However, neither the legislature nor a court of appellate jurisdiction has addressed the rule of lenity in the construction of "hybrid" regulations in the State of Oregon. In the course of these proceedings, Moore has aptly demonstrated that the Department's consolidation formation rule is deceptive and ambiguous. In addition, Moore has provided ample evidence that the Department's commingling rule has been historically interpreted in a different manner by the drilling community. Because each rule carries potential criminal liability, the rule of lenity counsels against the Department's interpretation and application of these regulations. The Department's imposition of civil or criminal penalties should not be premised upon rule interpretations that are not fairly apparent in the text of the rules themselves.

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[6] See *State v. Welch*, 264 Or. 388, 393, 505 P.2d 910 (1973) (" 'It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.' " (quoting *Bell v. United States*, 349 U.S. 81, 83-84, 75 S.Ct. 620, 99 L.Ed. 905 (1955))).

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The text of the Department's consolidation rule can be reasonably interpreted to require casing and sealing to the first consolidated layer reached at least 13 feet below the surface. Similarly, in the absence of any regulatory definition for the term "commingling" and conflicting definitions of the term "aquifer,"[7] the Department's commingling rule can be reasonably interpreted to require actual movement of useable quantities of water. In the absence of clear standards for constructing or deepening wells within consolidated formations, the rule of lenity provides that the less punitive interpretation of the regulations should be enforced. Under the rule of lenity, the civil penalties sought within the Amended Proposed Order are not appropriate.

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[7] See OAR 690-200-0050 (9) "Aquifer" means a geologic formation, group of formations, or part of a formation that contains saturated and permeable material capable of transmitting water in sufficient quantity to supply wells or springs and that contains water that is similar throughout in characteristics such as potentiometric head, chemistry, and temperature (see Figure 200-2).

OAR 690-008-0001(1) "Aquifer" means a water-bearing body of naturally occurring earth materials that is sufficiently permeable to yield useable quantities of water to wells and/or springs.

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SUMMARY

The Notice of Violation giving rise to these proceedings constitutes an Amended Notice in violation of OAR 137-003-0530(4). The Department carries no inherent authority to withdraw a Notice of Violation after closure of the evidentiary record for the purpose of amending it. In addition, the penalties sought by the Department are not appropriate. They are based upon impermissible evidence and considerations under OAR 690-225-0050. Moreover, the civil penalties sought are unfairly stacked in a manner that enables the Department to assess a civil penalty that exceeds the regulatory cap. Finally, the penalties sought arise from an interpretation and application of the consolidated formation rule and commingling rule that runs afoul of the rule of lenity.

DATED this 14 th day of July, 2014.

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DECLARATION OF SERVICE

I, Tara J. Jackson, am a paralegal at Schroeder Law Offices, P.C. I hereby acknowledge that on July 14, 2014, I caused to be served a true copy of the foregoing ***APPELLANT'S BRIEF*** by US mail and facsimile by depositing it for mailing, postage prepaid, and faxing it to the following persons at their last-known address and fax number, as outlined below:

Kris Byrd
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
Fax: (503) 986-0902

Matt B. Devore
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301
Fax (503) 378-3784

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Dated this 14th day of July, 2014.

Tara J. Jackson, Paralegal
Schroeder Law Offices, P.C.
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BEFORE THE OREGON WATER RESOURCES COMMISSION

STATE OF OREGON

IN THE MATTER OF:	**OREGON WATER RESOURCES DEPARTMENT'S ARGUMENT ON ISSUES IDENTIFIED BY SUBCOMMITTEE**
CHARLES MOORE, WATER WELL CONSTRUCTOR LICENSE #731	OAH Ref. No.: WR-13-003 Agency Case No.: 13-003

The Water Resources Commission formed a subcommittee to consider the above referenced matter. The subcommittee requested written arguments on two issues:

1) Whether the December 13, 2012 Notice of Violation was an improper amendment of the May 8, 2012 Notice of Violation or a new Notice of Violation altogether.

2) Whether the penalty proposed in the Amended Proposed Final Order is appropriate.

In response to the subcommittee's request, the Water Resources Department provides the following arguments to the subcommittee of the Water Resources Commission:

1. Second Notice of Violation

a. Administrative Rules in Contested Hearings

Prior to January 31, 2012, the Attorney General's Uniform and Model Rules of Procedure for contested case hearings allowed an agency to amend a notice "at any time after the issuance of the notice," pursuant to OAR 137-003-0530(4). However since January 31, 2012, OAR 137-

003-0530(4)(a) has provided that an "agency may issue an amended notice: (A) Before the hearing; or, (B) During the hearing, but before the evidentiary record closes, if the administrative law judge determines that permitting the amendment will not unduly delay the proceeding or unfairly prejudice the parties." The issue has been raised as to whether the Notice of Violation pending before the Commission is an improper amendment to the prior Notice of Violation and contrary to the limitations in OAR 137-003-0530(4)(a), or a new Notice of Violation altogether.

To explain the intent of the Model Rules of Procedure for contested case hearings, the Attorney General publishes an Administrative Law Manual. The AG Manual "clarifies issues not directly addressed by the rules." AG Manual p. 1, January 2012. The AG Manual serves as the official interpretation and explanation of the model rules. The AG Manual is cited by appellate courts as the AG's interpretation of statues and model rules. *See Cole v. DMV*, 336 Or. 565, 590 fn 22 (2004) (citing AG Manual for proper procedures that agencies should follow); *Gritter v. AFSD*, 182 Or. App. 249, 254 (2002) (citing AG Manual for AG's interpretation of statutes and administrative rules), *reversed as moot by* 183 Or. App. 578 (2002); *Forelaws on Bd. v. Energy Facility Siting Council,* 311 Or. 350, 359 fn 12 (1991) (citing commentary in AG Manual for AG's interpretation of statute and model rules); *Minor v. AFSD*, 105 Or. App. 178, 182 fn 5 (1991) (citing the AG Manual for AG's interpretation of administrative statutes).

When the AG Manual was republished in 2012 after the amendment to OAR 137-003-0530(4) mentioned above, the editors added subsection (e) to Section III(C)(1) to address "Amending the Notice." 2012 AG Manual, page 92. Subsection (e) provides further explanation for the rule limiting amendments of notice. The explanation specifically distinguishes amending a notice from withdrawing a notice. In a footnote, the AG Manual states that "[t]his limitation on amending the notice does not affect an agency's inherent authority to withdraw a notice at any

time prior to the issuance of a final order unless there is a specific statute or rule that prevents such action." 2012 AG manual, page 92, footnote 197. The footnote acknowledges that an agency maintains inherent authority to withdraw a notice at any time prior to making a final decision on the merits, unless the agency is limited by statute.

Further, an agency's authority to withdraw and reconsider an order extends even after a final decision is entered. In cases of judicial review, an agency maintains plenary authority to withdraw its order for purposes of reconsideration and may affirm, modify, or reverse the order, so long as the agency acts prior to the date set for hearing in court and within the limits set by courts. 2012 AG Manual, Page 178-179; *Gritter v. AFSD*, 182 Or. App. 249 (2002) (finding that, during an appeal, the agency's authority to withdraw an order was limited by ORS 183.482(6)), *reversed as moot by* 183 Or. App. 578 (2002); *Boydston v. Liberty Northwest Ins. Corp.*, 166 Or. App. 336 (2000) (agencies have plenary authority to withdraw and reconsider the merits of a decision, absent legislative limits). In situations with deficient notice, a court may reverse the agency's order and remand it to the agency to start over, absent statutory prohibitions. *Drayton v. Dept. of Transportation*, 209 Or. App. 656 (2006), *reversed by* 340 Or. 275 (2006) *remanded to* 186 Or. App. 1 (2003) (remanding agency order for further action by agency); *Jenkins v. Board of Parole,* 313 Or. 234 (1992) (remanding agency order for further action due to deficient notice); *Olympia Brewing Co. v. Department of Revenue,* 284 Or. 669 (1978) (statutory provision prevented remand and required dismissal).

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b. Principles of Claim Preclusion

Claim preclusion (or "res judicata")[1] requires an entity to prosecute all alternative theories in the initial proceeding, rather than reaching a resolution on one theory, and subsequently bringing suit based on another theory. *Rennie v. Freeway Transport,* 294 Or. 319 (1982). Claim preclusion may bar a claim in a subsequent suit if the following elements are met:

1. The parties in prior and present suits must be identical.
2. There must have been an earlier final judgment on the merits of a claim, and
3. There must be a second claim that is based on the same facts.

Bloomfield v. Weakland, 339 Or. 504 (2005); *Drews II v. EBI Co,* 310 Or. 134 (1990); *Maracalin v. U.S.*, 63 Fed. Appx. 494 (C.A. Fed., 2003). Claim preclusion requires that a final judgment be reached on the merits of the previous claim and that the claim be "material or essential" to the judgment. A judgment based on technical or procedural grounds does not constitute a judgment on the merits. Cases decided upon technical grounds are conclusive only as to the technical points actually decided. *Bloomfield v. Weakland*, 339 Or. 504 (2005).

c. Application of Rules to Factual Situation

In this matter, the Department issued a Notice of Violation on May 8, 2012 ("First Notice"; Exhibit A17). The Office of Administrative Hearings (OAH) conducted a contested case hearing on August 13, 2012. After the close of evidence in that hearing, the Department withdrew the Notice of Violation on November 6, 2012. (Exhibits A17 and A28). The Final Order Withdrawing the First Notice contained no findings or conclusions of law on the merits of the case.

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[1] The phrase "res judicata" is Latin for "a thing adjudicated" and premised on the theory that the claim has been "definitively settled by judicial decision." Black's Law Dictionary 1336-1337, (8th ed 2004). "Res Judicata" has been more freely translated as "a thing judicially acted upon or decided" or "a thing or matter settled by judgment." 47 Am Jur 2d *Judgments* § 463 (2006).

On December 13, 2012, the Department issued a new Notice of Violation ("Second Notice"; Exhibit A44). The Second Notice was based in part, on allegations contained in the May 8, 2012 Notice of Violation, and in part on new allegations in response to evidence presented during the hearing on the First Notice. (Exhibit A44).

The Department issued the Second Notice to ensure that Appellant was fully informed of legal basis for the allegations, as required by ORS 183.415, while also ensuring that the Department could continue to protect the public health, welfare, and safety of the ground water resource, as required by ORS 537.505 through 537.525. The First Notice was withdrawn by the Department and no statutes or rules prevented the Department from withdrawing the First Notice and filing a Second Notice based upon the same factual allegations. Additionally, nothing in the withdrawal itself suggested that it was done "with prejudice" or otherwise prevented the Department from filing a Second Notice. Appellant has been fully informed of the legal basis for the allegations against him and has had a fair opportunity to challenge those allegations. The Department has not subverted the intent of OAR 137-003-0530(4)(a) but has exercised its inherent authority and provided a fair process for all the parties impacted.

As to issue of claim preclusion, the Department is not barred from proceeding on the current allegations. The First Notice was withdrawn and the allegations contained therein were not resolved in a final order on the merits. The withdrawal was based upon a procedural issue. The improper construction and deepening of the Smith well were not issues essential to the withdrawal. The claims raised in the First Notice are not barred from the current proceeding.

The Department has statutory authority to file Notices of Violation for alleged violations of Oregon Ground Water Well rules. ORS 537.787. In addition, the Department has inherent authority to withdraw Notices of Violation. 2012 AG manual, page 92, footnote 197.

Administrative Rules, including OAR 137-003-0530, do not preclude the Department from withdrawing and re-issuing a Notice of Violation. In this instance, the Department acknowledged the deficient notice and therefore withdrew the First Notice, rather than reaching a final disposition on the merits.

The Department properly withdrew the First Notice upon determining that it failed to provide sufficient notice to Appellant. The Department issued a Second Notice to provide Appellant a full and fair opportunity to know the legal basis for the allegations and a new hearing to require the Department to prove the allegations against him. The Department is not precluded from pursing the current allegations in the Second Notice as to the Smith well.

2. Proposed Penalty

The Water Resources Commission has the authority to regulate the construction and maintenance of wells according to ORS 537.505 to 537.795 and 537.992. If the Water Resources Commission finds that any well, including any well exempt under ORS 537.545, is by the nature of its construction, operation or otherwise causing wasteful use of groundwater, is unduly interfering with other wells or surface water supply, is a threat to health, is polluting groundwater or surface water supplies, the Commission may order discontinuance of the use of the well, impose conditions upon the use of such well or order permanent abandonment of the well, pursuant to ORS 537.775(1).

The Water Resources Commission, upon the Commission's own initiative, or upon complaint alleging violation of any provision of ORS 537.505 to 537.795 and 537.992, or any rule adopted pursuant thereto, may investigate to determine whether a violation has occurred, pursuant to ORS 537.787. If the investigation indicates that a violation has occurred, the

Commission shall notify the persons responsible for the violation, including but not limited to any well constructor involved. The Department may cause an investigation to determine whether a violation of the standards or rules governing well construction standards has occurred, pursuant to OAR 690-225-0020. The Department shall notify the persons believed responsible for the violation, including but not limited to any Water Supply Well Constructor involved.

If, after notice and opportunity for hearing, the Commission determines that one or more violations have occurred, the Commission may: provide additional time for remedy of the violation if the Commission has reason to believe adequate repair or other remedy will be carried out within the specified period; suspend, revoke or refuse to renew the water well constructor's license; assess a civil penalty; and impose any reasonable condition on the water well constructor's license to insure compliance with applicable laws and provide protection to the ground water of the State of Oregon, pursuant to ORS 537.787. Such action shall be conducted as a contested case proceeding according to the applicable provisions of ORS chapter 183.

The Department may at any time select the most appropriate enforcement tool, including assessment of civil penalties, to gain compliance, pursuant to OAR 690-225-0100. However, the Department may not impose a civil penalty if compliance has been achieved in another manner prior to final decision in the proceeding. In this matter, the Department attempted to work with Mr. Moore to allow him to voluntarily bring the Smith well into compliance. Over the months of January and February 2012, the Department made several attempts to explain the basis for the violation and gain Mr. Moore's support to correct the violations. (Exhibit A16). Despite the Department's attempts, Mr. Moore did not believe his well construction violated the well construction standards. For this reason, voluntary compliance could not be achieved. The

Department took enforcement action as a last resort after every other avenue for compliance was exhausted.

In selecting the appropriate type and degree of enforcement, the Department may consider: whether Appellant's file demonstrates a pattern of prior similar violations; whether the Appellant has cooperated in attempting correction of any violation in a timely fashion; the gravity and magnitude of the violation, including whether there is an immediate or long-term threat to human health or the groundwater resource; the opportunity and degree of difficulty to correct the violation and any other relevant factor, pursuant to OAR 690-225-0050. In this case, Mr. Moore has demonstrated a pattern of similar violations in wells constructed between 2002 and 2011, as documented by the five wells at issue in this proceeding. Mr. Moore has been unwilling to cooperate in correction of these violations. The gravity and magnitude of the violations are significant as the commingling of aquifers is a significant cause of groundwater level declines, affecting not only the wells drawing water from that aquifer, but also all aquifers that remain interconnected. Mr. Moore has been aware of the issues regarding the Smith well since January 2012, and regarding the other wells since August 2012, yet has failed to take the opportunity to correct the violations.

The Department may, upon finding that violations have occurred, provide a specified time for remedy, pursuant to ORS 537.992 and OAR 690-225-0030(1)(a). Appellant should be required to bring the five wells at issue in this proceeding into compliance with minimum well construction standards within 120 days of the date of the Final Order in this matter.

The Department may, upon finding that violations have occurred, impose a civil penalty against any person who, in the construction of a well, violates any provision of ORS 537.747 to 537.795 and 537.992, or any rule promulgated pursuant thereto, pursuant to ORS 537.992 and

OAR 690-225-0030(1)(b). Violations of OAR 690-210-0150(1) and OAR 690-215-0045(2) are not listed on Table 225-1 as minor violations, and therefore declared major violations pursuant to OAR 690-225-0110(3). Major violations may be assessed a civil penalty of no less than $50 nor more than $1,000 per violation. OAR 690-225-0110(1)(b). In this instance, Appellant has committed five violations of OAR 690-210-0150(1) and two violations of OAR 690-215-0045(2), for a total of seven violations. Imposition of a $1,000 penalty per violation is appropriate due to Appellant's pattern of misconstruction and the threat to the resource caused by his misconstruction of wells. The Commission may assess civil penalties of up to $7,000.

The Department may, upon finding that violations have occurred, suspend Appellant's license, pursuant to ORS 537.992 and OAR 690-225-0030(1)(c). If Appellant is unable or unwilling to bring the five wells at issue in this proceeding into compliance with the minimum well construction standards within 120 days of the date of the Final Order in this matter, a suspension of Appellant's license is appropriate. A suspension is appropriate due to Appellant's pattern of misconstruction, the threat to the resource caused by his misconstruction of wells, and the need to prevent future misconstructions.

The Department may, upon finding that violations have occurred, impose reasonable conditions on Appellant's license, pursuant to ORS 537.992 and OAR 690-225-0030(1)(e). If Appellant's license is suspended, it is appropriate to require that Appellant's license remain suspended until the requirements in the final order of this proceeding have been satisfied, including bringing all five wells subject to this proceeding into compliance with the minimum well construction standards and paying the civil penalty. Any license suspension should be lifted only upon issuance of an Order Lifting Suspension issued by the Department.

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3. Summary

The Department has statutory authority to file Notices of Violation and inherent authority to withdraw Notices once filed. The First Notice did not reach a final decision on the merits and was not amended, but withdrawn under the Department's inherent authority. The Final Order of withdrawal of the First Notice did not preclude the Department from issuing a Second Notice on some of the same allegations.

The Department has authority to impose civil penalties up to $7,000 for the seven violations found. The Department also has authority to suspend Appellant's well construction license, if he is unable or unwilling to bring the five wells subject to this proceeding into compliance within 120 days. Should Appellant's license be suspended, the Department has authority to maintain that suspension until the requirements in the final order of this proceeding have been satisfied, including bringing all five wells into compliance with the minimum well construction standards and paying the civil penalty. The proposed penalties are appropriate due to the extent of the misconstruction by Mr. Moore and the impact that these improper constructions will continue to have on the aquifers.

DATED this 14th day of July 2014.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

Matt DeVore

Matt B. DeVore, #063103
Assistant Attorney General
Of Attorneys for the Oregon Water
Resources Department

CERTIFICATE OF SERVICE

I certify that on July 14th, 2014, I served the within OREGON WATER RESOURCES DEPARTMENT'S ARGUMENT ON ISSUES IDENTIFIED BY SUBCOMMITTEE on the parties hereto by electronic mail, a true, exact and full copy thereof to:

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Schroeder Law Offices PC
1915 N.E. Cesar E. Chavez Blvd.
Portland, OR 97212

Kris Byrd
Well Construction & Compliance
Oregon Water Resources Department
725 N.E. Summer Street, Suite A
Salem, Oregon 97301-1271

DATED this 14th day of July 2014.

Matt DeVore

Matt B. DeVore, #063103
Assistant Attorney General

TABLE 225-1

MINOR WELL CONSTRUCTION VIOLATIONS

Oregon Statute Reference	Value Assignment	Title
ORS 537.762	Minor	REPORT OF COMMENCEMENT OF CONSTRUCTION
ORS 537.765	Minor	WELL REPORT
ORS 537.789	Minor	WELL IDENTIFICATION NUMBER

Administrative Rule Reference	Value Assignment	Title
690-200-0048	Minor	WELL IDENTIFICATION LABEL
690-205-0060	Minor	WATER SUPPLY WELL DRILLING MACHINES
690-205-0070	Minor	REPORT OF COMMENCEMENT OF CONSTRUCTION
690-205-0080	Minor	WELL REPORT REQUIRED
690-210-0270	Minor	PITLESS WELL ADAPTERS AND UNITS
690-210-0280	Minor	ACCESS PORTS AND AIRLINES
690-210-0290	Minor	LINER PIPE
690-210-0370	Minor	WELL TEST
690-215-0055 LABELMAINTENANCE	Minor	WELL IDENTIFICATION
690-230-0050	Minor	DESCRIPTION OF PROPOSED WELL USE
690-230-0060	Minor	IDENTIFICATION OF INTENDED WELL USE
690-230-0080	Minor	PUMP TESTING OF LOW-GEOTHERMAL INJECTION WELLS
690-230-0090	Minor	WATER TEMPERATURE MEASUREMENT

TABLE 225-1

MINOR WELL CONSTRUCTION VIOLATIONS

Oregon Statute Reference	**Value Assignment**	**Title**
ORS 537.762	Minor	REPORT OF COMMENCEMENT OF CONSTRUCTION
ORS 537.765	Minor	WELL REPORT
ORS 537.789	Minor	WELL IDENTIFICATION NUMBER

Administrative Rule Reference	**Value Assignment**	**Title**
690-200-0048	Minor	WELL IDENTIFICATION LABEL
690-205-0185	Minor	WATER SUPPLY WELL DRILLING MACHINES
690-205-0200	Minor	WATER SUPPLY WELL CONSTRUCTION NOTICE REQUIRED (START CARD)
690-205-0210	Minor	WELL REPORT REQUIRED (WATER SUPPLY WELL LOG)
690-210-0270	Minor	PITLESS WELL ADAPTERS AND UNITS
690-210-0280	Minor	ACCESS PORTS AND AIRLINES
690-210-0290	Minor	LINER PIPE
690-210-0370	Minor	WELL TEST
690-215-0055	Minor	WELL IDENTIFICATION LABEL MAINTENANCE
690-230-0050	Minor	DESCRIPTION OF PROPOSED WELL USE (START CARD)
690-230-0060	Minor	IDENTIFICATION OF INTENDED WELL USE (WELL LOG)
690-230-0080	Minor	PUMP TESTING OF LOW-TEMPERATURE GEOTHERMAL INJECTION WELLS WITH AN ANTICIPATED INJECTION RATE OF LESS THAN 15,000 GALLONS PER DAY
690-230-0090	Minor	WATER TEMPERATURE MEASUREMENT

690-225-0050

Factors Affecting Selection of Type and Degree of Enforcement

In selecting the appropriate type and degree of enforcement, the Director may consider the following factors:

(1) Whether the constructor's file demonstrates a pattern of prior similar violations;

(2) Whether the respondent has cooperated in attempting correction of any violation in a timely fashion;

(3) The gravity and magnitude of the violation, including whether there is an immediate or long-term threat to human health or the ground water resource;

(4) Whether the damage to the ground water resource is reversible;

(5) Whether the violation in the instances cited was repeated or continuous;

(6) Whether a cause of the violation was an unavoidable accident;

(7) The opportunity and degree of difficulty to correct the violation;

(8) The cost to the Department, except for travel costs and the initial field investigation, in attempting to gain voluntary compliance of the cited violation. The costs may be considered until the Department receives respondent's answer to the written notice and opportunity for hearing; and

(9) Any other relevant factor.

Stat. Auth.: ORS Ch. 183, 536, 537 & 540
Hist.: WRD 13-1986, f. 10-7-86, ef. 11-1-86; WRD 9-2001, f. & cert. ef. 11-15-01

690-225-0110
Schedule of Civil Penalties

(1) The amount of civil penalty shall be determined consistent with the following schedule:

(a) Not less than $25 nor more than $250 for each occurrence defined in these rules as a minor violation;

(b) Not less than $50 nor more than $1,000 for each occurrence defined in these rules as a major violation;

(c) First occurrence, in a calendar year, of a missing or late start card fee shall be $150;

(d) Second occurrence, in a calendar year, of a missing or late start card fee shall be $250;

(e) Third, and each subsequent, occurrence, in a calendar year, of a missing or late start card fee shall be $250 and may include suspension of the Water Supply Well Constructor’s license, and any other action authorized by law.

(2) For purposes of assessing a civil penalty, the start card fee referred to in subsections (1)(c), (d), and (e) of this rule shall not be considered late if it is received in the Salem

office of the Water Resources Department within five days of the receipt of the start card, provided the start card was submitted in a timely manner as described in OAR 690-205-0200.

(3) Table 1 lists minor violations of well construction standards. All other violations are declared to be major.

[ED. NOTE**:** The Table referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 536.090 & ORS 537.505 - ORS 537.795 Stats. Implemented: ORS 536.090, ORS 537.505 - ORS 537.795
Hist.: WRD 13-1986, f. 10-7-86, ef. 11-1-86; WRD 7-1988, f. & cert. ef. 6-29-88; WRD 7-1989(Temp), f. & cert. ef. 9-29-89; WRD 10-1989, f. & cert. ef. 11-20-89; WRD 8-1993, f. 12-14-93, cert. ef. 1-1-94; WRD 5-2006, f. & cert. ef. 6-20-06