

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
2 OF THE STATE OF OREGON

3)
4 IN THE MATTER OF) MUTUAL AGREEMENT
5 HERBERT MALARKEY) AND FINAL ORDER
6 ROOFING COMPANY,)
an Oregon corporation,) CASE NO. AQ/V-NWR-2020-159
7 Respondent.)

7 WHEREAS:

8 1. On October 20, 2021, the Oregon Department of Environmental Quality (DEQ)
9 issued Notice of Civil Penalty Assessment and Order No. AQ/V-NWR-2020-159 (Notice) to
10 Respondent. DEQ assessed a \$2,105,405 civil penalty to Respondent for the violations alleged in
11 the Notice.

12 2. On November 9, 2021, Respondent filed a timely request for hearing.

13 I. AGREEMENT

14 Respondent and DEQ hereby agree that:

15 1. This Mutual Agreement and Final Order (MAO) shall be effective upon the date
16 fully executed (the MAO Effective Date).

17 2. Exhibit 1 of the Notice is amended by changing the “C” factor in the civil penalty
18 formula for Violation No. 1, from a value of 0 to a value of -3.

19 3. Exhibit 1 of the Notice is further amended by changing the economic benefit portion
20 of the civil penalty for Violation No. 1, from \$31,024 to \$18,330.

21 4. Exhibit 1 of the Notice is further amended by reducing the total number of years
22 DEQ is assessing a civil penalty for Violation No. 1, from 11 years to 9 years.

23 5. Exhibit 2 of the Notice is amended by changing the “C” factor in the civil penalty
24 formula for Violation No. 2, from a value of -2 to a value of -3.

25 6. Exhibit 2 of the Notice is further amended by changing the economic benefit portion
26 of the civil penalty for Violation No. 2, from \$2,005,381 to \$1,386,213.

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1 7. Respondent's Facility is subject to additional requirements under 40 CFR, Part 60
2 Subparts UU and JJJJ and 40 CFR Part 63, Subparts LLLLLL and DDDDDD that were not included in
3 the Notice. Respondent failed to comply with some of the requirements under these NSPS and
4 NESHAPs subparts, in violation of 40 CFR Part 60, Subparts UU, JJJJ and OAR Chapter 340-238-
5 0060(1); and 40 CFR Part 63, Subparts LLLLLL, DDDDDD and OAR Chapter 340-244-0220(1).
6 DEQ hereby amends the Notice to include these violations but is electing to not assess civil
7 penalties for these violations.

8 8. Based on these changes in Section I, Paragraphs 2 through 6 above, the total civil
9 penalty is reduced from \$2,105,405 to \$1,454,043.

10 9. Pursuant to Oregon Administrative Rule (OAR) 340-012-0030(19) and OAR 340-
11 012-0145(2), the violations alleged in the Notice and as amended by this MAO, will be treated as
12 prior significant actions in the event a future violation occurs.

13 10. Respondent waives any and all rights and objections Respondent may have to the
14 form, content, manner of service and timeliness of the Notice; to a contested case hearing and
15 judicial review of the Notice; and to service of a copy of this MAO.

16 11. This MAO resolves any and all claims of DEQ, based upon the facts and violations
17 alleged in the Notice as amended by the MAO. This MAO is not intended to limit, in any way,
18 DEQ's right to proceed against Respondent in any forum for any past or future violations not
19 expressly settled herein.

20 12. Respondent releases and waives any and all claims of any kind, known or unknown,
21 past or future, against the State of Oregon or its agencies, instrumentalities, employees, officers, or
22 agents, arising out of the matters and events relating to the matter set out in the Notice and this
23 MAO. Any and all claims includes but is not limited to any claim under 42 USC § 1983 et seq., any
24 claim under federal or state law for damages, declaratory, or equitable relief, and any claim for
25 attorney's fees or costs.

26 13. This MAO shall be binding on Respondent and its respective successors, agents, and
27 assigns. The undersigned representative of Respondent certifies that he or she is fully authorized to

1 execute and bind Respondent to this MAO. No change in ownership, corporate or partnership status
2 of Respondent, or change in the ownership of the properties or businesses affected by this MAO
3 shall in any way alter Respondent's obligation under this MAO, unless otherwise approved in
4 writing by DEQ through an amendment to this MAO.

5 14. Verifiable electronic, facsimile, or scanned signatures on this MAO shall be treated
6 the same as original signatures.

7 15. If Respondent fails to satisfactorily complete the requirements in Section II,
8 Paragraph 3 below, upon receipt of a written Penalty Demand Notice from DEQ, Respondent shall
9 pay the following stipulated civil penalties:

10 A. \$250 for each day that Respondent is late in providing to DEQ the
11 monthly report required by Section II, Paragraph 3.E of this MAO; and

12 B. \$2,400 for each day or each occurrence, that Respondent violates any
13 requirement of Section II, Paragraphs 3.A through 3.D and Section II, Paragraph 3.F of this
14 MAO.

15 16. Within twenty (20) days of receipt of a Penalty Demand Notice from DEQ,
16 Respondent may contest the Penalty Demand Notice. Respondent agrees that the issue shall be
17 limited to Respondent's compliance or noncompliance with this MAO. The amount of the
18 stipulated civil penalty is established in advance by this MAO and is not a contestable issue.

19 17. Respondent agrees to refrain from using the value of any Supplemental
20 Environmental Projects (SEPs) described in Section II, Paragraph 2 of this MAO as a tax deduction
21 or as part of a tax credit application; and, whenever Respondent publicizes a SEP or the results of a
22 SEP, Respondent will state in a prominent manner that the project was undertaken as settlement of a
23 DEQ enforcement action. Approved SEPs will be incorporated into this MAO by amendment.
24 Respondent will be deemed to have completed the SEP(s) when DEQ receives a final report
25 documenting completion of the SEP(s).

26 18. This MAO will terminate at the time DEQ issues an Oregon Title V Operating
27 Permit to Respondent, all civil penalties due in accordance with Section I, Paragraph 14 of this

1 MAO and Section II, Paragraphs 1 and 2 of this MAO are paid in full, and Respondent, through
2 any potential third party, fully completes all SEPs, if undertaken.

3 19. The requirements under Section II, Paragraphs 3.B through 3.G will terminate at
4 the time DEQ issues an Oregon Title V Operating Permit to Respondent.

5 II. FINAL ORDER

6 The Environmental Quality Commission (EQC) hereby enters a final order:

7 1. Imposing upon Respondent a total civil penalty of \$1,454,043 for the violations
8 alleged in the Notice. Respondent shall pay \$290,809 of the civil penalty to DEQ within 30 days of
9 the MAO Effective Date. Payment must be made by check or money order made payable to
10 “Department of Environmental Quality” and mailed to: DEQ, Business Office, 700 NE
11 Multnomah Street, Suite 600, Portland, Oregon 97232. DEQ shall consider payment postmarked
12 by the U.S. Postal Service on or before the 30th day as compliant with this paragraph.

13 2. Requiring that Respondent, within 90 days of the MAO Effective Date (the SEP
14 application period), submit to DEQ for approval one or more SEP application(s) that meet DEQ’s
15 SEP approval criteria. The SEP(s) may contribute up to \$1,163,234 to one or more third party
16 organizations to implement one or more SEPs that will provide environmental benefits, with a
17 preference to air quality benefits, in the vicinity of the Facility. Upon written request of
18 Respondent made in advance of the SEP application deadline, DEQ will extend the deadline by
19 60 days if, despite Respondent’s demonstrated diligent efforts, Respondent has yet to identify a
20 DEQ-approvable project or been able to complete an approvable SEP application. Within 30
21 days of DEQ’s approval of the SEP application(s), Respondent must transmit payment of up to
22 \$1,163,234 to the third-party organization(s) and provide DEQ with documentation of the
23 payment(s). Documentation of SEP application(s), requests and approvals, payments, and SEP
24 Final Report may be sent to DEQ and Respondent in electronic format. If, at the end of the SEP
25 application period, as may be extended, Respondent is unable to allocate any portion of the
26 \$1,163,234 to a DEQ approved SEP, then Respondent must pay the remaining portion of the
27 \$1,163,234 penalty to the State of Oregon within 30 days after the close of the SEP application

1 period to the DEQ address in Paragraph 1 above. DEQ shall consider payment postmarked by the
2 U.S. Postal Service on or before the 30th day as compliant with this paragraph.

3 3. Requiring Respondent to comply with the following schedule and conditions
4 (documentation, applications, and correspondence can be submitted in electronic format):

5 A. Within 180 days of the MAO Effective Date, in accordance with
6 OAR 340- 218-040(1)(b), submit an administratively complete Oregon Title V Operating Permit
7 application to DEQ, including complete information to incorporate all applicable requirements of 40
8 CFR Part 60, Subparts UU and JJJJ and 40 CFR Part 63, Subparts LLLLL and DDDDD, and any
9 other NSPS or NESHAP subpart applicable to the Facility;

10 B. Within 45 days of the MAO Effective Date, prepare and submit a written
11 Operation, Maintenance, and Monitoring Plan (hereinafter referred to as “the OMM Plan”) to DEQ
12 for approval, that includes at a minimum, the following:

13 (1) Specify the regenerative thermal oxidizer (RTO) operating limits or
14 ranges for temperature that reduces the formaldehyde emissions from the drying and curing oven
15 by at least 96%;

16 (2) Operation of the wet-formed fiberglass mat production process at a
17 rate equal to or less than the average application rate achieved during a DEQ-approved
18 performance test (subsequent to the September 30, 2020, test) and specified in the OMM plan; or
19 keep the fiberglass mat production rate equal to or less than 1.42 tons per hour in any three-hour
20 block period, whichever is less;

21 (3) Describe how Respondent will operate the RTO so that the average
22 operating temperature in any three-hour block period is no less than the temperature established
23 in a DEQ-approved performance test (e.g., 1,613 degrees Fahrenheit (°F)).

24 (4) Must not use a resin with a free-formaldehyde content greater than
25 that of the resin used during the DEQ-approved performance test and specified in the OMM
26 plan;

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1 (5) Specify the monitoring frequency (e.g., hourly, daily) associated with
2 each monitoring parameter; and

3 (6) Establish the RTOs maintenance and inspection schedule according
4 to the manufacturer's recommendation that Respondent will follow;

5 (7) During normal operation, if an operating parameter deviates from the
6 limit or range established in Section II, Paragraphs 3.B(1) through 3.B(4) above, Respondent
7 must initiate corrective actions within one hour to return the operating parameter to the
8 appropriate limit or range, according to the provisions of the OMM Plan or discontinue
9 operations that generate formaldehyde emissions from the drying and curing oven. The
10 corrective actions must be completed in an expeditious manner as specified in the OMM Plan;
11 and

12 (8) Maintain and inspect the RTO according to the procedures specified
13 in the OMM Plan.

14 C. Operate, maintain and inspect the wet-form fiberglass process and RTO in
15 accordance with the DEQ-approved OMM Plan.

16 D. Continuously monitor the RTO operating temperature in 15-minute and 3-
17 hour block averages during drying and curing oven operations.

18 E. Following DEQ approval of the OMM Plan, submit monthly reports to
19 DEQ on the 15th day of each month for the previous month, that includes all parameters of
20 Section II, Paragraphs 3.B through 3.D above monitored per OMM plan; any deviation or excess
21 emissions noted, and corrective actions taken.

22 F. In order to change the limit and/or range of any operating parameters
23 specified in the OMM Plan, Respondent must conduct a performance test to re-establish new
24 limits and/or operating range and submit the new limit or range to DEQ for approval. (Upon
25 receipt of a new source test plan and/or source test report, DEQ will prioritize accordingly to
26 review and provide feedback and/or approval as expeditiously as it is able.) Once DEQ approves,

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1 Respondent must update the OMM Plan or relevant portion of the OMM Plan to incorporate the
2 new limit or range for use.

3 G. Written documentation to demonstrate compliance with the requirements
4 in Section II, Paragraph 3 must be submitted to George Yun at Oregon DEQ, 700 NE
5 Multnomah Street, Portland, OR 97232 or George.Yun@deq.oregon.gov with a copy to Jenny
6 Root at Jenny.Root@deq.oregon.gov.

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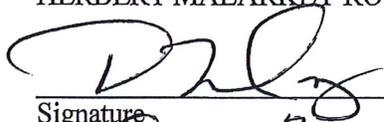
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HERBERT MALARKEY ROOFING COMPANY

7/26/2022
Date


Signature
Dale Rusting
Name (print)
President
Title (print)

DEPARTMENT OF ENVIRONMENTAL QUALITY and
ENVIRONMENTAL QUALITY COMMISSION

7/27/2022
Date


Kieran O'Donnell, Manager
Office of Compliance and Enforcement
on behalf of DEQ pursuant to OAR 340-012-0170
on behalf of the EQC pursuant to OAR 340-011-0505

AMENDED EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION No. 2: Operating the Facility without an Oregon Title V Permit, in violation of ORS 468A.045(1)(b), 340-218-0010(1) and OAR 340-218-0120(2)(a).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0054(1)(e).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 applicable to this violation, and the information reasonably available to DEQ does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$6,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(2)(a)(A) because Respondent should have been operating the Facility under an Oregon Title V Operating Permit.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(19), in the same media as the violation at issue that occurred at a facility owned or operated by Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because there are no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(c), because there is no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 pursuant to OAR 340-012-0145(4)(d), because there were more than 28 occurrences of the violation. Respondent operated the Facility without a Title V Permit for more than 28 days out of each year that DEQ is assessing a penalty for.

"M" is the mental state of Respondent and receives a value of 4 according to OAR 340-012-0145(5)(c), because Respondent was negligent. Respondent has dedicated environmental compliance staff and has operated under a DEQ air quality permit for many years. As such, the company is familiar with air quality permitting regulations. When Respondent made modifications to its drying and curing oven in 2009, Respondent should have conferred with a consultant or other air quality professional to determine whether the modifications would have the potential to increase formaldehyde emissions and require a different permit from DEQ. By failing to take reasonable care to do so, Respondent failed to take reasonable care

to avoid a foreseeable risk that it would operate the Facility without the correct air quality permit from DEQ.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of -3 according to OAR 340-012-0145(6)(c), because Respondent made reasonable efforts to correct or minimize the effects of the violation. Respondent has agreed to obtain a Title V Operating Permit and has entered into a Mutual Agreement and Order that establishes a timeline for application submittal.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of Respondent's noncompliance. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of \$18,330. This is the amount of economic benefit Respondent gained by delaying paying \$5,000 for preparation and consultant's review of a Title V permit application, and by avoiding paying \$12,000 in permit fees. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$6,000 + [(0.1 x \$6,000) x (0 + 0 + 4 + 4 + -3)] + \$18,330
= \$6,000 + (600 x 5) = \$18,330
= \$6,000 + \$3,000 + \$18,330
= \$9,000 + \$18,330

In accordance with ORS 468.140(2), each day of violation constitutes a separate offense and is subject to a civil penalty up to \$25,000 per day. Respondent has operated without a Title V Permit from 2010 until present. DEQ is assessing a separate civil penalty for each year from 2010 through 2020 that Respondent operated without an Oregon Title V Permit.

In recognition of Respondent's self-disclosure of the violation, DEQ is electing to reduce the gravity portion of the civil penalty by 50%. $\$9,000 \times .5 = \$4,500$.

$\$4,500 \text{ per year} \times 9 \text{ years} = \$40,500$. $\$40,500 + \$18,330$ economic benefit equals a total civil penalty of \$58,830 for this violation.

AMENDED EXHIBIT 2

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION No. 3: Failing to meet the NESHAP Subpart HHHH requirements by failing to install, maintain and operate a thermal oxidizer, other control device or to implement a process modification to meet the NESHAP Subpart HHHH emission limit of 0.05 pounds of formaldehyde per ton of fiberglass mat produced or to reduce uncontrolled formaldehyde emissions by 96 percent or more, in violation of 40 CFR 63.2986 and 40 CFR 63.2983, adopted and incorporated by reference in OAR 340-244-0220(1) and (5).

CLASSIFICATION: These are Class I violations pursuant to OAR 340-012-0054(1)(i).

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-012-0135(d), because the Respondent exceeded the Maximum Achievable Control Technology standard emission limit in 40 CFR 63.2983 for a directly-measured (via emissions testing) hazardous air pollutant (formaldehyde).

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$12,000 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(i) and applicable pursuant to OAR 340-012-0140(2)(a)(A) because Respondent violated an air quality rule and should have been operating under an Oregon Title V Operating Permit.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(19), in the same media as the violation at issue that occurred at a facility owned or operated by Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because there are no prior significant actions.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(c), because there is no prior history.

"O" is whether the violation was repeated or ongoing and receives a value of 4 pursuant to OAR 340-012-0145(4)(d), because there were more than 28 occurrences of the violation. In accordance with OAR 340-012-0145(4), each day of violation with a duration of more than one day is a separate occurrence. Respondent operated without a thermal oxidizer or other control from 2010 until at least, September 2018 and by doing so, failed to meet the formaldehyde emission limit in 40 CFR 63.2983.

"M" is the mental state of Respondent and receives a value of 4 according to OAR 340-012-0145(5)(c), because Respondent was negligent. Respondent has dedicated environmental compliance staff and has operated under a DEQ air quality permit for many years. As such, the company is familiar with air quality permitting regulations. When Respondent made modifications to its drying and curing oven in 2009, Respondent should have conferred with a consultant or other air quality professional to determine whether the modifications would have the potential to increase formaldehyde emissions, subjecting Respondent to additional regulations including the federal subpart HHHH NESHAP that required Respondent to install a thermal oxidizer or other control to reduce its formaldehyde emissions and meet the emission limit in subpart HHHH. By failing to take reasonable care to do so, Respondent failed to take reasonable care to avoid a foreseeable risk that it would operate the Facility in violation of state and federal air quality regulations.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of -3 according to OAR 340-012-0145(6)(c), because Respondent made reasonable efforts to correct or minimize the effects of the violation by installing a regenerative thermal oxidizer to control its formaldehyde emissions and conducting a performance test that demonstrated compliance with the formaldehyde emission limit in 40 CFR 63.2983.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of Respondent's noncompliance. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of \$1,386,213. This is the amount of economic benefit Respondent gained by delaying spending approximately \$626,865 from 2010 to September 2018 to purchase and install a thermal oxidizer and avoiding approximately \$120,978 each year from 2010 to September 2018 to operate and maintain the thermal oxidizer. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
 $= \$12,000 + [(0.1 \times \$12,000) \times (0 + 0 + 4 + 4 + -3)] + \$1,386,213$
 $= \$12,000 + (1,200 \times 5) = \$1,386,213$
 $= \$12,000 + \$6,000 + \$1,386,213$
 $= \$18,000 + \$1,386,213$

In recognition of Respondent's self-disclosure of the violation, DEQ is electing to reduce the gravity based portion of the civil penalty by 50%. $\$18,000 \times .5 = \$9,000$

$$= \$9,000 + \$1,386,213$$
$$= \$1,395,213$$