IN THE SUPREME COURT OF THE STATE OF OREGON

OIL RE-REFINING COMPANY, Petitioner, Petitioner on Review, v. ENVIRONMENTAL QUALITY COMMISSION, Department of Environmental Quality for the State of Oregon, Respondent, Respondent on Review.	OAH Case No. 1001690 CA A149365 SC S063590

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, ENVIRONMENTAL QUALITY COMMISSION

Review of the Decision of the Court of Appeals
on Appeal from a Proposed and Final Order of the
Environmental Quality Commission

Opinion Filed: September 10, 2015
Author of Opinion: Presiding Judge Armstrong, P.J.
Concurring Judges: Judge Nakamoto and Judge Egan

Continued….

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, ENVIRONMENTAL QUALITY COMMISSION

INTRODUCTION

Petitioner Oil Re-Refining Company (ORRCO) transported several loads of hazardous waste and then burned it. Respondent Environmental Quality Commission (EQC) fined ORRCO for (1) disposing of that waste without a permit to operate a hazardous waste treatment facility, in violation of ORS 466.095(1)(c); and (2) transporting the waste without the manifest that federal and state law require to track the material, in violation of 40 CFR § 263.20(a)(1) and OAR 340-100-0002(1). The court of appeals affirmed EQC's determination, rejecting ORRCO's argument that it should be absolved from liability because it relied on the waste generator's characterization of the material as non-hazardous.

This court should affirm. As explained below, the applicable statutes and regulations impose strict liability on entities that treat hazardous waste without a permit or transport hazardous waste without a manifest. ORRCO's degree of culpability is relevant to the amount of the fine, which is not at issue here, but it is not relevant to whether ORRCO is subject to civil liability for violating the laws governing hazardous waste.

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

Questions Presented

1. Is an entity strictly liable for violating ORS 466.095(1)(c), which prohibits facilities from treating hazardous waste without a permit?

2. Is an entity strictly liable for violating 40 CFR § 263.20(a)(1) (as incorporated by OAR 340-100-0002(1)), which prohibits the transportation of hazardous waste without a manifest?

Proposed Rule of Law

Yes, an entity is strictly liable if it operates a hazardous waste treatment site without the required permit, or if it transports hazardous waste without the required manifest. A generator's mischaracterization of waste as non-hazardous does not relieve treatment facilities and transporters of their obligations under state and federal hazardous waste laws.

REGULATORY BACKGROUND

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA), 42 USC §§ 6901–6992k, "in response to the environmental and public health risks associated with the mismanagement of hazardous waste." *United States v. Manning*, 527 F3d 828, 832 (9th Cir 2008). The stated policies of RCRA are to (1) reduce and eliminate the generation of hazardous waste; and (2) minimize the threat posed by such waste to human health and the environment. 42 USC § 6902(b). Subtitle C of the act contains RCRA's core

provisions, mandating a comprehensive hazardous waste management system. *See* 42 USC §§ 6921–6939. Those provisions charge the Environmental Protection Agency (EPA) with the implementation of a "'cradle to grave' regulatory system overseeing the treatment, storage, and disposal of hazardous waste." *United States v. MacDonald*, 339 F3d 1080, 1082 (9th Cir 2003).

RCRA expressly allows states to implement and enforce their own hazardous waste programs, as long as those programs are consistent with, equivalent to, and no less stringent than federal requirements. 42 USC §§ 6926, 6929. Pursuant to that authorization, the Oregon Legislature enacted a statewide hazardous waste program, which the EPA approved. *See* ORS 466.005–ORS 466.995; Final Authorization of State Hazardous Waste Management Program, 51 Fed Reg 3779, 3780 (Jan 30, 1986). The stated purpose of Oregon's hazardous waste program is to "[p]rotect the public health and safety and environment of Oregon to the maximum extent possible," and to "[e]xercise the maximum amount of control" over the transportation, treatment, and disposal of hazardous waste in the state. ORS 466.010(1)(b)(A)–(B). Oregon's Department of Environmental Quality (DEQ) administers and enforces that program. ORS 466.015.

The "manifest" system is central to the cradle-to-grave regulatory approach mandated by state and federal law. *See* 40 CFR §§ 263.20–263.25; *see also* OAR 340-100-0002(1) (adopting 40 CFR parts 260 to 268 by

reference). A manifest form must accompany hazardous waste at all times during transport—from cradle (the point of generation) to grave (the designated disposal site). *See* 40 CFR § 263.20(a)–(d). The manifest identifies "the quantity, composition, and the origin, routing, and destination of hazardous waste."[1] 42 USC § 6903(12); ORS 466.005(11).

The manifest system is critical to the tracking and safe handling of hazardous waste. Requiring a manifest at all times during transportation of hazardous waste ensures "appropriate monitoring, recordkeeping, and reporting throughout the system." Standards Applicable to Transporters of Hazardous Waste and Public Hearing (Proposed Rule), 43 Fed Reg 18,506, 18,506 (Apr 28, 1978); *see also* Standards Applicable to Transporters of Hazardous Waste (Final Rule), 45 Fed Reg 12,737, 12,741 (Feb 26, 1980) ("The manifest system * * * provides accountability during each step of the movement of hazardous waste from the generator to the designated disposal site.").

Accordingly, state and federal law place stringent obligations on all handlers of hazardous waste. A generator seeking off-site transport of its waste must initially determine whether that material qualifies as "hazardous waste"

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[1] For a sample EPA Uniform Hazardous Waste Manifest form and instructions, see http://www.epa.gov/hwgenerators/hazardous-waste-manifest-system (last visited March 25, 2016).

under RCRA.[2] 40 CFR § 262.11. If so, the generator must prepare a manifest form before offering the waste for transport. 40 CFR § 262.20(a)(1). Generators are strictly liable for mischaracterizing hazardous waste as non-hazardous; a generator's "good faith mistake" or negligence in the initial characterization of waste does not absolve it from liability. Standards Applicable to Generators of Hazardous Waste, 45 Fed Reg 12,724, 12,727 (Feb 26, 1980).

The regulations on transporters are equally stringent, consistent with RCRA's cradle-to-grave approach.[3] To ensure that a manifest accompanies hazardous waste at all times, RCRA flatly prohibits a transporter from accepting hazardous waste for off-site transport without a manifest form, signed by the generator. 40 CFR § 263.20(a)(1). Before transporting hazardous waste,

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[2] A "generator" is "any person, by site, whose act or process produces hazardous waste * * * or whose act first causes a hazardous waste to become subject to regulation." 40 CFR § 260.10; *see also* OAR 340-100-0010(2)(r) (definition of generator under Oregon law).

Material constitutes "hazardous waste" under RCRA and state law if it is (1) a solid waste that is (2) not exempt, and is either (3a) a listed hazardous waste or (3b) displays certain characteristics that render a substance hazardous. *See* 40 CFR §§ 261.1 to 261.41; *see generally* Oregon State Bar, Environmental Law, Volume 1: Regulation and Permitting § 4.1-2, at 4-16 to 4-27 (2013 ed.). Because ORRCO does not contest that the material it transported and burned qualifies as hazardous waste, the statutory criteria for hazardous waste are not implicated by this case.

[3] A "transporter" is "a person engaged in the offsite transportation of hazardous waste by air, rail, highway, or water." 40 CFR § 260.10.

the transporter must sign and date the manifest, and provide a copy to the generator. *Id.* § 263.20(b). The manifest must accompany the hazardous waste at all times during transport. *Id.* § 263.20(c). Upon delivering the hazardous waste to another transporter or to the destination facility, the delivering transporter must obtain the signature of the receiving transporter or facility on the manifest, retain a copy of the manifest, and give the remaining copies to the receiving transporter or facility. *Id.* § 263.20(d).

Ultimately, the destination facility must sign and date the manifest, note any discrepancies, and give copies to the transporter and the generator. *Id.* § 264.71(a)(2). The generator and transporter must each keep a copy of the signed manifest for three years. *Id.* § 262.40(a); *id.* § 263.22(a). Additionally, generators are required to submit a biennial report to the EPA regional administrator that, among other things, describes each hazardous waste shipment, and identifies all transporters and facilities that handled the waste. *Id.* § 262.41(a).

In addition to the manifest system, state and federal law impose stringent requirements on operators of hazardous waste treatment facilities. Among those requirements, ORS 466.095(1)(c) provides that "no person shall * * * [e]stablish, construct or operate a hazardous waste treatment site in this state without obtaining a hazardous waste treatment site permit." *See also* 42 USC § 6925(a) (imposing a similar requirement under federal law); 40 CFR

§ 270.1(c) (mandating a RCRA permit for the treatment, storage, and disposal of any hazardous waste). That permit requirement is essential to the safe handling and disposal of hazardous waste because it ensures that treatment facilities meet state and federal safety standards, while providing regulators "with valuable information regarding the amount, content, and location of hazardous waste." Michelle M. Boynton, *Environmental Law—Getting Strict with Hazardous Waste Permits*, 15 J. Corp. L. 623, 637–38 (1990).

STATEMENT OF FACTS

Although ORRCO challenges legal conclusions from EQC's final order, it does not contest the commission's factual findings. Accordingly, the following unchallenged findings are the facts for this appeal. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351 (1995), *abrogated on other grounds by State v. Hickman/Hickman*, 358 Or 1, 358 P3d 987 (2015).

A. ORRCO receives and transports hazardous waste.

ORRCO owns and operates a facility in Portland, Oregon, at which it "accepts materials such as used oil and filters, anti-freeze, fuels, and oily absorbents for recycling and disposal." (ER-30). ORRCO also serves as the transporter for some of the materials that it accepts from generators for recycling or disposal at its facility. (*See* ER-34–35).

For each load that it receives, ORRCO requires the generator of the material to complete a "Waste/Material Profile." (ER-31). The Waste/Material Profile form asks for a description of the waste or material, and the process by which it was generated. (*See* ER-31; Rec 41–44). It also requires the generator to certify that the material is not hazardous waste, and to agree to "pay all costs necessary for proper analysis, transportation, storage and disposal" in the event that the waste is in fact hazardous. (ER-31–32).

Additionally, for each load that it transports, ORRCO uses a bill of lading, "typically filled out by the driver who is collecting and transporting the material." (ER-32; *see also* Rec 49–51). The bill of lading form asks for a description of the waste or material. (ER-32). It also requires the generator to guarantee that it will "pay for all disposal costs" if laboratory tests find that the material qualifies as hazardous waste. *Id.* A bill of lading is a shipping document; it does not satisfy the manifest requirement under state and federal law, which require generators to use EPA's uniform hazardous waste manifest form. *See* 40 CFR § 262.20(a)(1).

Before accepting a load at its facility, ORRCO reviews the Waste/Management Profile to ensure that "the information is specific and clear," and it refuses to accept the load if the profile is "obviously inaccurate." (ER-32). Even when the profile appears adequate on its face, ORRCO tests a sample of the material once the load arrives at its facility. (ER-33). ORRCO

runs several tests on each sample, including a Hydro Chlor-D-Tect test,[4] a pH test,[5] and a flash-point test.[6] *Id.* It accepts a load only if indicators of hazardous waste are absent. *See id.*

B. ORRCO transports hazardous waste without a manifest, and burns hazardous waste at its facility without a permit.

In 2004, Absorbent Technologies, Inc. (ATI) produced a starch-based soil amendment at its facilities in Albany, Oregon. (ER-33). ATI used methanol to extract water from that soil amendment, resulting in a methanol and water waste requiring disposal. *Id.*

In January 2004, ATI contacted ORRCO about the possibility of ORRCO taking ATI's methanol and water waste for disposal or fuel recovery. (ER-34). Before transporting or receiving any of that waste, ORRCO's compliance

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[4] Chlor-D-Tect tests are portable test kits developed to detect "the total amount of chlorine in an oil sample." Deborah A. Minucci & Stephen R. Finch, *Portable Test Method for the Detection of Halides in Used Oil*, *in* Waste Testing and Quality Assurance: Second Volume 365 (David Friedman ed., 1990). The presence of at least 1,000 parts per million of chlorine establishes "a rebuttable presumption that the substance is hazardous waste." (ER-33).

[5] Low or high pH levels indicate corrosiveness, a characteristic of hazardous waste. State of Oregon, Department of Environmental Quality, *Fact Sheet: How to Determine if Your Waste is Hazardous*, at 2, http://www.deq.state.or.us/lq/hw/docs/DetWasteHaz.pdf (last visited March 25, 2016). pH levels below 2.5 or above 12.5 indicate hazardous waste. (ER-33).

[6] If a substance has a flash point of less than 140 degrees Fahrenheit (60 degrees Celsius), then it "is considered flammable, and has an ignitability characteristic of hazardous waste." (ER-33).

manager met with ATI officials; received an explanation of ATI's manufacturing process; asked whether the methanol and water waste had been used as a solvent; and received a sample. *Id.* In response to those inquiries, ATI did not tell ORRCO that the methanol and water waste was hazardous. *Id.*

ORRCO decided to accept ATI's methanol and water waste. *Id.* Between January and March 2004, ORRCO received six loads of that material. *Id.* Additionally, between July and September 2004, ORRCO transported three more loads of the methanol and water waste from ATI's facility to ORRCO's facility. (ER-35). The Waste/Material Profiles accompanying those nine loads did not characterize the material as hazardous waste. (ER-35–36).

None of the loads transported by ORRCO were accompanied by a hazardous waste manifest. (ER-35). ORRCO burned all nine loads of the methanol and water waste at its facility, even though it did not have a treatment-facility permit at the time. (ER-36).

C. EQC determines that ORRCO is strictly liable under Oregon's hazardous waste laws.

In September 2009, DEQ assessed a civil penalty against ORRCO for its handling and treatment of ATI's methanol and water waste. (Rec 1–9). Specifically, DEQ fined ORRCO for (1) violating ORS 466.095(1)(c) by "operating a hazardous waste treatment site without obtaining a hazardous waste treatment site permit"; and (2) violating 40 CFR § 263.20(a)(1) (as

adopted by OAR 340-100-0002(1)) by "accepting hazardous waste for transport without the waste being accompanied by a hazardous waste manifest." (Rec 8, 32–34).

After ORRCO requested a hearing, EQC concluded that the material transported and treated by ORRCO was hazardous waste. (ER-37). ORRCO nonetheless argued that it could not be held liable because ATI—as generator of the methanol and water waste—had the obligation to accurately characterize that material before offering it for transport. (ER-38–39).

Rejecting that argument, EQC concluded that ORRCO was strictly liable for transporting hazardous waste without a manifest, and for treating hazardous waste without a permit. The commission reasoned that neither ORS 466.095(1)(c) nor 40 CFR § 263.20(a)(1) requires a particular mental state for a violation. (ER-40–41). It also noted that a generator's failure to accurately characterize hazardous waste in the first instance does not relieve a transporter or treatment facility from its obligations under Oregon's hazardous waste laws. *Id.*

D. The court of appeals affirms EQC's interpretation of Oregon's hazardous waste laws.

After ORRCO sought judicial review, the court of appeals affirmed EQC's order. *Oil Re-Refining Co. v. Environmental Quality Comm.*, 273 Or App 502, 504, 361 P3d 46 (2015). The court held that entities are strictly liable

for violations of ORS 466.095(1)(c) and 40 CFR § 263.20(a)(1), and that a generator's mischaracterization of waste does not relieve treatment facilities and transporters of their obligations under those provisions. *Id.* at 508–17. Among other reasons, the court noted that neither provision requires proof of a particular mental state, in contrast with other provisions in Oregon's hazardous waste laws that do so. *Id.* at 514–15, 517. It also reasoned that strict liability for treatment facilities and transporters is consistent with state and federal hazardous waste regulations. *Id.* at 511–14.

This court subsequently granted ORRCO's petition for judicial review.

SUMMARY OF ARGUMENT

Hazardous waste treatment facilities and transporters are strictly liable for violations of ORS 466.095(1)(c) and 40 CFR § 263.20(a)(1). Both EQC and the court of appeals correctly concluded that ORRCO was strictly liable for violating those provisions in this case, and that it was not absolved from civil liability merely because the generator had not characterized its waste as hazardous.

This court should affirm. First, entities are strictly liable for operating a hazardous waste treatment site without a permit, in violation of ORS 466.095(1)(c). Nothing in the text of that provision requires proof of a culpable mental state. And the unqualified text of ORS 466.095(1)(c) contrasts with other provisions in Oregon's hazardous waste law, which *do* require

consideration of a violator's mental state. Moreover, strict liability is consistent with the legislatively declared purposes underlying Oregon's hazardous waste program because it induces accurate characterization and safe handling of hazardous waste.

Second, entities are strictly liable for transporting hazardous waste without a manifest, in violation of 40 CFR § 263.20(a)(1) (incorporated by OAR 340-100-0002(1)). Strict liability is consistent with that rule's text and context. Like ORS 466.095(1)(c), nothing in the text of 40 CFR § 263.20(a)(1) specifies a required mental state, in contrast with other regulations that do. Additionally, strict liability for transporting hazardous waste without a manifest is fully consistent with other state and federal laws, and does not impose an undue burden on transporters.

ARGUMENT

ORRCO does not dispute that it operated a hazardous waste treatment site without a permit, and that it transported hazardous waste without a manifest. Instead, ORRCO argues that it should be absolved from liability because the generator of the waste did not characterize that waste as hazardous. In other words, despite the clear and unequivocal prohibitions in ORS 466.095(1)(c) and 40 CFR § 263.20(a)(1), ORRCO asks this court to insert a "knowing" or "good reason to know" requirement into the text of those provisions.

This court should decline to do so. As argued below, entities are strictly liable for violations of the permitting and manifest requirements at issue in this case.

A. Entities are strictly liable for operating a hazardous waste treatment site without a required permit, in violation of ORS 466.095(1)(c).

EQC correctly concluded that entities are strictly liable for violations of ORS 466.095(1)(c).[7] The statute's text and context confirm that the legislature intended to impose strict liability on entities that operate a hazardous waste treatment facility without a permit. Additionally, strict liability is consistent with the legislatively declared purposes of Oregon's hazardous waste statute—which provide additional context for ORS 466.095(1)(c)'s permit requirement.

1. The statute's text and context confirm that the legislature intended to impose strict liability.

Noticeably absent from ORRCO's argument is an analysis of ORS 466.095(1)(c)'s text and context. And yet, as this court has emphasized,

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[7] ORS 466.095(1)(c) is part of a regulatory scheme administered by EQC and DEQ. *See* ORS 466.015; ORS 466.020. As a result, the amount of deference owed to the agency's interpretation depends on whether the disputed term is exact, inexact, or delegative. *Springfield Education Assn v. School District No. 19*, 290 Or 217, 223, 621 P2d 547 (1980). Here, the court of appeals correctly concluded that the terms set forth by ORS 466.095(1)(c) are inexact because, although they are not "so precise as to be 'exact terms,'" they "do express a complete legislative policy." *Oil Re-Refining Co.*, 273 Or App at 515–16. As such, EQC's interpretation "is not entitled to deference on review." *Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 687, 318 P3d 735 (2014).

"there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (internal quotation marks and citations omitted). Accordingly, the "first step" of statutory interpretation requires "an examination of text and context" of the statute itself. *Id.*, 346 Or at 171; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993).

The text of ORS 466.095(1)(c) provides that "no person shall * * * [e]stablish, construct or operate a hazardous waste treatment site in this state without obtaining a hazardous waste treatment site permit[.]" Nothing in the statutory text requires proof of a culpable mental state. To the contrary, the plain text of the provision—in particular, the phase "*no person shall*"—unambiguously indicates that the legislature intended to prohibit *any* unauthorized treatment of hazardous waste, regardless of a violator's knowledge, mental state, or level of care. *See* ORS 466.095(1)(c) (emphasis added); *PGE*, 317 Or at 614 ("The legislature knows how to include qualifying language in a statute when it wants to do so. It did not do so here.").

Additionally, statutory context confirms the legislature's intent to impose strict liability for violations. The provision mandating civil penalties unambiguously provides that "*any* person who violates" ORS 466.095(1)(c) "*shall* incur a civil penalty" up to a maximum statutory amount for each day of

the violation. ORS 466.990(1) (emphasis added). That unqualified text stands in stark contrast to the provision governing criminal penalties, which allows sanctions for certain violations only if a person "*knowingly* violates" the law. ORS 466.995(3)–(4) (emphasis added). It also contrasts with a statutory provision that allows EQC to assess an *additional* penalty—beyond the civil penalty mandated by ORS 466.990(1)—if a person "intentionally or recklessly violates" any provision of ORS chapter 466 and the violation caused an extreme hazard to the public health or extensive environmental damage.

ORS 468.996(1).

The intent to impose strict liability for violations is further confirmed by the statutorily mandated process for calculating civil penalties. Although the unqualified text of ORS 466.990(1) *requires* a civil penalty for violations, other statutory provisions allow EQC to consider a violator's mental state when determining the *amount* of that civil penalty. *See* ORS 468.130(2)(f) (listing factors relevant to EQC's civil-penalty calculation, including "[w]hether the cause of the violation was an unavoidable accident, negligence or an intentional act"). Consistent with that statutory scheme, EQC has promulgated regulations that allow it to consider a violator's mental state when determining the *amount* of a civil penalty. *See* OAR 340-012-0045(2) (requiring adjustments to civil-penalty calculations based on "aggravating or mitigating factors"); OAR 340-012-0145(5) (explicitly listing a liable party's "mental state"—*i.e.*, its

"constructive knowledge," "negligent" conduct, "reckless" conduct, or "actual knowledge"—as an aggravating or mitigating factor affecting the amount of a civil penalty).

Lastly, federal RCRA permitting requirements—which predate Oregon's hazardous waste law—also require treatment-facility permits, without qualification. *See* 42 USC § 6925(a) (requiring owners and operators of treatment facilities to have a permit); 40 CFR § 270.1(c) (mandating permits for treatment facilities). Those provisions are particularly significant because Oregon's hazardous waste program must be consistent with, equivalent to, and no less stringent than federal requirements. 42 USC §§ 6926, 6929; *see also* 40 CFR § 271.22(a)(1)(ii) (authorizing EPA to withdraw approval of a state's hazardous waste program if judicial interpretation of state law causes the program to be less stringent than RCRA); ORS 466.086 (authorizing EQC and DEQ to take "any act necessary" to ensure federal approval of Oregon's hazardous waste program).

Viewed as a whole, the statutory text and context indicate that the legislature knows how to incorporate a mental-state requirement when it wants to do so—and it did not do so in ORS 466.095(1)(c) or its corresponding civil penalties provision. *See PGE*, 317 Or at 614 (so stating); *see also* ORS 174.010 (in construing a statute, courts may not "insert what has been omitted, or * * * omit what has been inserted"). The text and context of ORS 466.095(1)(c) are

dispositive; entities are strictly liable if they operate a hazardous waste treatment site without a required permit.

2. Strict liability for treatment-facility permit violations is consistent with the legislatively declared policies of Oregon's hazardous waste program.

Moreover, strict liability for treatment facilities is consistent with the legislatively declared purposes of Oregon's hazardous waste law, which provide additional context for ORS 466.095(1)(c). The statute explicitly states that the hazardous waste program exists to "[p]rotect the public health and safety and environment of Oregon *to the maximum extent possible*" and to "[e]xercise the *maximum amount of control*" over the transportation, treatment, and disposal of hazardous waste. ORS 466.010(1)(b)(A)–(B) (emphasis added).

Strict liability for treatment-facility violations is the only rule consistent with those purposes. *Awareness* of hazardous materials is the central tenet of the cradle-to-grave approach underlying state and federal law—once transporters and treatment facilities know waste is hazardous, they can handle that waste accordingly. Strict liability for violations of hazardous waste requirements induces treatment facilities to confirm that the materials they receive are properly characterized before they treat, store, or dispose of those materials. Treatment facilities have an incentive to test materials that they receive for hazardous waste characteristics, as ORRCO did here. (ER-35–36).

And if a facility doubts its ability to accurately test material for hazardous waste characteristics, it can shift costs arising from mistaken characterizations back to the generator through indemnification or higher prices, providing additional incentive for the generator to properly classify its waste.

The rule proposed by ORRCO provides none of those incentives, and is not consistent with the legislature's stated goals. Allowing treatment facilities to rely on a generator's initial waste characterization—and, consequently, absolving those facilities from liability for mishandling waste that is, in fact, hazardous—removes any incentive for treatment facilities to test materials for hazardous waste characteristics. Indeed, by focusing on whether transporters had actual knowledge or good reason to know that waste was hazardous, ORRCO's proposed rule would result in perverse incentives: treatment facilities would be induced *not* to test materials classified as non-hazardous, and *not* to ask questions about those materials, because maintaining ignorance of hazardous waste characteristics would be key to avoiding liability.

Given those effects, it is not surprising that courts have repeatedly characterized RCRA as a strict-liability statute—including its requirements for hazardous waste treatment facilities. *See, e.g.*, *United States v. Domestic Indus., Inc.*, 32 F Supp 2d 855, 866–67 (ED Va 1999) (collecting cases); *United States v. Production Plated Plastics, Inc.*, 742 F Supp 956, 960 (WD Mich 1990), *aff'd*, 955 F2d 45 (6th Cir 1992), *cert den*, 506 US 820 (1992) (applying

strict liability to treatment facility operating without a permit). Because strict liability is the only rule that protects Oregon's health, safety, and environment "to the maximum extent possible," this court should affirm the decision below. *See* ORS 466.010(1)(b)(A).

B. Entities are strictly liable for transporting hazardous waste without a manifest, in violation of 40 CFR § 263.20(a)(1).

EQC also imposed civil liability on ORRCO for transporting hazardous waste without a manifest, in violation of 40 CFR § 263.20(a)(1) (as incorporated by OAR 340-100-0002(1)). (ER-37). The commission interpreted Oregon's hazardous waste laws as mandating strict liability for violations of that provision. (ER-41). Specifically, EQC noted that 40 CFR § 263.20(a)(1) "does not specify that any particular mental state is required." *Id.* Thus, "[a]ny failure by ATI to accurately characterize the water/methanol product as hazardous waste does not relieve ORRCO of its obligation to comply" with the transporter manifest requirements. *Id.*

That interpretation is correct.[8] Strict liability for transportation of hazardous waste without a manifest is consistent with the text and context of 40

[8] This court defers to an agency's plausible interpretation of its own rule, as long as that interpretation is not inconsistent with the text of the rule, its context, or any other source of law. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). Here, EQC interpreted the scope and applicability of 40 CFR § 263.20(a)(1), which is incorporated by reference in one of EQC's own rules, OAR 340-100-0002(1). Because EQC

Footnote continued…

CFR § 263.20(a)(1), as well as with other state and federal laws. It effectuates the policies underlying Oregon's hazardous waste laws, and it does not impose an undue burden on transporters.

1. The text and context of the regulation confirm that regulators intended to impose strict liability.

Like ORS 466.095(1)(c)'s permit requirement for treatment facilities, 40 CFR § 263.20(a)(1)'s prohibition against transportation of hazardous waste without a manifest is unqualified and unambiguous: "A transporter *may not accept* hazardous waste from a generator unless the transporter is also provided with a manifest form * * * signed in accordance with the requirements of § 262.23." (Emphasis added.) That provision imposes no culpable mental-state requirement for violations of the manifest rule, and nothing in its text limits violations to instances in which a transporter *knowingly* transports hazardous waste without a manifest.

The regulatory context confirms that violations are not contingent on what a transporter knows or should know. The unqualified text of 40 CFR § 263.20(a)(1)'s manifest requirement stands in stark contrast to the explicit mental-state requirement of the *immediately following subsection*: 40 CFR

(…continued)
chose to incorporate the transporter standard set forth in 40 CFR § 263.20(a)(1) as its own rule, this court should defer to the commission's interpretation if it is plausible. That said, even if this court were to review for legal error, EQC's interpretation is correct.

§ 263.20(a)(2) prohibits a transporter from accepting hazardous waste for export to another country "if he *knows* the shipment does not conform to the EPA Acknowledgment of Consent" document. Moreover, at the time of EQC's adoption of federal hazardous waste regulations, EPA had interpreted unqualified text in other federal rules as imposing bright-line requirements, precluding defenses based on good-faith mistakes.[9] *See* Standards Applicable to Generators of Hazardous Waste, 45 Fed Reg 12,724, 12,727 (Feb 26, 1980) (generators are strictly liable under 40 CFR § 262.11 for mischaracterizing hazardous waste as non-hazardous; a generator's "good faith mistake" in the initial characterization of waste does not absolve it from liability).

Oregon's hazardous waste laws provide additional statutory context for EQC's rulemaking, and confirm that transporters are strictly liable for violations of 40 CFR § 263.20(a)(1)'s manifest requirement, as adopted by OAR 340-100-0002(1). The civil-penalties provision unambiguously provides that "*any* person who violates" one of the commission's rules "s*hall* incur a civil penalty" up to a maximum statutory amount. ORS 466.990(1) (emphasis

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[9] At the time of ORRCO's actions in this case, EQC had incorporated federal regulations "promulgated through July 1, 2002." OAR 340-100-0002(1) (2004) (adopting 40 CFR parts 260 to 268 in their entirety, among other provisions). All regulations and statutory provisions quoted as context in this part of EQC's brief were promulgated or enacted prior to that date.

added). That liability provision contrasts with other parts of Oregon's hazardous waste statute, which *do* include a culpable mental-state requirement. *See* ORS 468.130(2)(f) (allowing the commission to consider whether a violation resulted from "an unavoidable accident, negligence or an intentional act" when determining the *amount* of a civil penalty); ORS 468.929 ("A person commits the crime of unlawful transportation of hazardous waste in the second degree if the person * * * knowingly transports hazardous waste.").

As the court of appeals correctly concluded below, inserting a mental-state requirement into 40 CFR § 263.20(a)(1)—when none is mentioned—would be inconsistent with Oregon's hazardous waste statute. *Oil Re-Refining Co.*, 273 Or App at 514–15. Limiting civil violations to instances in which a transporter *knowingly* transports hazardous waste without a manifest would render part of the civil-penalty statutory scheme superfluous—*i.e.*, the portion of the statute that allows EQC to reduce the amount of a civil penalty based on mental states *less than knowing*. *See* ORS 468.130(2)(f). And, under ORRCO's proposed rule, civil violations would require a culpable mental state equal to that of criminal violations—even though the criminal provision explicitly lists a mental state but the civil-penalty provision does not. *Compare* ORS 468.929 (limiting criminal violations to instances in which a transporter "knowingly transports hazardous waste"), *with* ORS 466.990(1) (stating that violators "shall incur a civil penalty," without qualification).

Such a rule would be inconsistent with the legislatively declared policies underlying Oregon's hazardous waste program. *See* ORS 466.010(1)(b)(A)–(B) (stating that the purpose of the statute is to protect the public and environment "to the maximum extent possible" and to exercise "the maximum amount of control" over the transportation of hazardous waste). For those reasons, entities are strictly liable for transporting hazardous waste without a manifest, in violation of 40 CFR § 263.20(a)(1).

2. Contrary to ORRCO's arguments, strict liability under 40 CFR § 263.20(a)(1) is consistent with other federal laws.

Rather than reasoning from the text and context of 40 CFR § 263.20(a)(1), ORRCO argues that EQC's interpretation of that rule is flawed for other reasons. It contends that EQC's interpretation (1) is inconsistent with RCRA provisions governing generators' waste characterization obligations (Pet BOM 12–15); and (2) conflicts with Department of Transportation regulations, *id.* at 18–34.

Neither argument has merit. As explained below, strict liability for violations of 40 CFR § 263.20(a)(1) is fully consistent with the regulations ORRCO cites.

a. Holding transporters strictly liable is consistent with RCRA provisions governing waste characterization by generators.

ORRCO initially argues that the imposition of strict liability on entities that transport hazardous waste without a manifest is inconsistent with 40 CFR § 262.11, which requires generators to determine whether that waste is hazardous in the first instance. It contends that strict liability for transporting hazardous waste without a manifest improperly shifts the duty to characterize waste, from generators to transporters. (Pet BOM 12–13).

Generators unquestionably have a duty to accurately characterize hazardous waste. *See* 40 CFR § 262.11 ("A person who generates a solid waste * * * must determine if that waste is a hazardous waste * * *."). But, as the court of appeals correctly concluded, a transporter's duty to ensure that a manifest accompanies hazardous waste under 40 CFR § 263.20(a)(1) "does not in any way transfer the obligations of a generator onto a transporter." *Oil Re-Refining Co.*, 273 Or App at 513–14. Instead, both requirements exist in tandem to ensure that hazardous waste is tracked from cradle to grave: generators have a duty to accurately characterize hazardous waste in the first instance (prior to transportation) *and* transporters have a duty to ensure that a manifest accompanies any waste that is, in fact, hazardous. *See* 40 CFR § 262.11; *id.* § 263.20(a)(1). In other words, even when a generator

mischaracterizes waste, RCRA liability for transporting hazardous waste without a manifest still extends cradle to grave, not cradle to crib.

Additionally, ORRCO argues that strict liability for transporting hazardous waste without a manifest is inconsistent with 40 CFR § 263.10(c). (BOM 13–14). Generally, transporters of hazardous waste are obligated to comply only with the transporter rules contained in 40 CFR part 263. But 40 CFR § 263.10(c) sets forth two circumstances in which transporters must *also* comply with rules governing *generators* under 40 CFR part 262: (1) when a transporter imports "hazardous waste into the United States from abroad"; or (2) when a transporter "[m]ixes hazardous wastes." According to ORRCO, that provision identifies "the *only* time a transporter becomes obligated to characterize the waste material." (Pet BOM 13 (emphasis in original)).

ORRCO is correct that RCRA places a *direct obligation* on transporters to characterize waste only when they import or mix hazardous materials. But that does not address the relevant question in this case, which is whether transporters are liable for transporting hazardous waste without a manifest, *regardless* of whether the generator has made a proper characterization. The lack of a direct obligation on transporters is beside the point—even when transporters are not obligated to make an initial waste characterization under the rules governing generators, they must *always* comply with the transporter rules contained in 40 CFR part 263. And those rules include 40 CFR

§ 263.20(a)(1)'s prohibition against transporting hazardous waste without a manifest. Although RCRA does not *require* transporters to second-guess a generator's waste characterization, its manifest requirement nonetheless provides incentives for transporters to do so, as a means of avoiding liability for transporting hazardous waste without a manifest.

b. Strict liability for transporters is consistent with Hazardous Materials Transportation Act regulations.

ORRCO also cites Department of Transportation (DOT) rules promulgated under the Hazardous Materials Transportation Act (HMTA), 49 USC §§ 5101–5128. (Pet BOM 18–42). It contends that 49 CFR § 171.2(f)—which states that a "carrier who transports a hazardous material in commerce may rely on information provided by the offeror of hazardous material"—absolves transporters from RCRA's manifest requirement when generators mischaracterize waste. That argument conflates two separate statutory regimes. 49 CFR § 171.2(f) applies to compliance with HMTA safety rules, *not* RCRA's manifest requirement.

HMTA and RCRA—while overlapping at times—are separate and distinct. HMTA "governs the safety aspects of transportation"; in contrast, "RCRA's transportation requirements focus on the tracking of [hazardous] wastes to assure that they reach their proper destination." 4A Environmental Law Practice Guide: State and Federal Law § 29.04[1], at 29-42.1 (Michael B.

Gerrard, ed., 2015). Transporters of hazardous waste "must comply with both sets of regulations." *Id.* at 29-43. Notably, "EPA imposes a number of requirements *over and above* those imposed by DOT." *Id.*, § 29A.02[2], at 29A-10 (emphasis added). In other words, compliance with HMTA's safety rules does not automatically ensure compliance with RCRA's cradle-to-grave manifest requirements.

The regulation that ORRCO cites—49 CFR § 171.2(f)—allows carriers to rely on information provided by a shipper for purposes of HMTA compliance; it has nothing to do with RCRA's manifest requirement. That provision provides:

> No person may transport a hazardous material in commerce unless the hazardous material is transported *in accordance with applicable requirements of this subchapter* * * *. Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect.

49 CFR § 171.2(f) (emphasis added). Thus, by its terms, 49 CFR § 171.2(f) allows a carrier to rely on information provided by a shipper when complying with rules in Subchapter C of the HMTA's regulations, 49 CFR §§ 171–80. Those rules set forth HMTA's transportation-safety standards—*i.e.*, requirements regarding "shipping papers, marking, labeling, transport-vehicle placarding, and packaging of hazardous materials." *See Colo. Pub. Utilities*

Comm'n v. Harmon, 951 F2d 1571, 1575 (10th Cir 1991); 4A Environmental Law Practice Guide § 29A.04[4], at 29A-26 to 29A-39 (discussing HMTA's transportation-safety requirements). They do not apply to RCRA manifests, which are governed by an *entirely separate title*. *See* 40 CFR § 263.20(a)(1). None of the sources cited by ORRCO relate to RCRA manifests; all of those sources discuss shipping papers and other transportation-safety information required by HMTA. (*See* Pet BOM 19–21).

Indeed, EPA declined to adopt 49 CFR § 171.2 for purposes of RCRA. It initially proposed to adopt all DOT rules promulgated under HMTA, including 49 CFR § 171. *See* Standards Applicable to Transporters of Hazardous Waste and Public Hearing (Proposed Rule), 43 Fed Reg 18,506, 18,510 (Apr 28, 1978). In its final rules, however, EPA decided *not* to incorporate all HMTA regulations by reference, and deleted its reference to 49 CFR § 171. *See* Standards Applicable to Transporters of Hazardous Waste (Final Rule), 45 Fed Reg 12,737, 12,740, 12,743 (Feb 26, 1980). EPA cautioned transporters that "*both* sets of regulations apply to their activity." *Id.* at 12,740 (emphasis added); *see also* 40 CFR § 263.10(a), note ("Regardless of DOT's action, EPA retains its authority to enforce [RCRA] regulations.").

ORRCO points out that RCRA regulations must be "consistent with" HMTA regulations. (Pet BOM 23–31); *see also* 42 USC § 6923(b). But regulatory provisions can be consistent without being coterminous or identical.

Properly construed, 49 CFR § 171.2(f)'s reliance standard and 40 CFR § 263.20(a)(1)'s manifest requirement impose different—yet entirely consistent—obligations: transporters of hazardous waste may rely on information provided by shippers for compliance with HMTA's transportation-safety standards, but they are strictly liable for violations of RCRA's separate manifest requirements.

3. Strict liability is consistent with the policies underlying state and federal law, and does not impose an undue burden on transporters.

ORRCO further contends that strict liability for transporters imposes an impossible performance standard, because transporters may not always have access to accurate information regarding a generator's processes and conditionally exempt status under RCRA. (Pet BOM 14, 36–42). It argues that EQC's interpretation will compel transporters to "second-guess" the generator's characterization by engaging in expensive and duplicative testing, with no guarantee of accuracy. *Id.*

But a strict-liability regime need not assume that transporters will be able to achieve perfect compliance. As previously explained, strict liability induces handlers in general (and transporters in particular) to confirm that hazardous waste has been properly characterized before handling that waste. If a generator's waste characterizations or statements regarding its conditionally exempt status have sufficient indicia of reliability, the transporter may willing

to transport the waste and assume the financial risk that the characterizations are wrong. Alternatively, if a generator's representations lack reliability, strict liability induces the transporter to make further inquiries and test the waste. Any transporter costs associated with inquiries or testing (or even civil liability) ultimately are shifted to generators in the form of higher prices, offering further incentive for generators to accurately characterize waste in the first instance. And if a transporter doubts its ability to accurately confirm waste characterizations or a generator's status, it may be able to require indemnification as a condition for transporting waste—which also would shift the costs of mistaken representations back to the generator.

ORRCO's actions in this case illustrate the positive effect that strict liability has on transporters. ORRCO did not merely rely on ATI's waste characterization, presumably because it wanted to minimize the chances that it would be found liable for transporting hazardous waste without a manifest. Before ORRCO agreed to transport the methanol and water waste, ORRCO's compliance manager (1) met with the generator; (2) received an explanation of the generator's manufacturing process; (3) asked whether the methanol and water waste had been used as a solvent; (4) made inquiries regarding the generator's conditionally-exempt status; and (5) received a sample of the waste. (ER-34). Apparently recognizing that there was still a risk of error, ORRCO

included a warranty clause in its bill of lading—shifting the costs of a mistaken waste characterization back to the generator. (*See* ER-32).

The rule proposed by ORRCO would not induce any of those precautions. Absolving transporters from liability based on mistaken characterizations by generators would remove any incentive for transporters to make appropriate inquiries and adequately test materials prior to transport. If anything, transporters would be induced to maintain their ignorance of a waste's true classification, in order to avoid knowing or having reason to know that the waste was hazardous. And because the cost of further inquiries and testing would not be reflected in a transporter's price, ORRCO's rule also would dilute the incentives for generators to characterize waste accurately in the first instance.

4. The Eleventh Circuit's decision in *Crockett v. Uniroyal, Inc.* is inapplicable.

Lastly, ORRCO relies on *Crockett v. Uniroyal, Inc.*, 772 F2d 1524 (11th Cir 1985), a non-binding decision that the court of appeals correctly rejected as "inapplicable to the circumstances of this case." *See* (Pet BOM 17–18); *Oil Re-Refining Co.*, 273 Or App at 509 n 5. That decision has no bearing here.

Crockett involved a shipper's claim for indemnification and contribution against two railroad-carrier defendants, not a claim or prosecution under RCRA. 772 F2d at 1528. The question before the court was whether—under

Georgia negligence law—the railroad defendants had a duty to warn a cleaning company that empty railcars they delivered contained poison residue. *Id.* at 1530–34. Among other contentions, the plaintiff shipper argued that such a duty arose from federal hazardous waste regulations, because the defendants transported the empty railcars without a hazardous waste manifest. *See id.* at 1532–33.

The Eleventh Circuit expressed doubt that those regulations were even applicable to the shipper's indemnification and contribution claims. *See id.* at 1532 & n 7. Assuming the applicability of the federal regulations for the sake of argument, the court held that they did not impose a duty on defendants to warn the cleaning company that the empty railcars were potentially dangerous. *Id.* at 1532–34. Unlike this case, *Crockett* involved residual waste in empty railcars, which is explicitly *exempt from RCRA's requirements*. *See id.* at 1533 (quoting 40 CFR § 261.7(a)(1)).

In any event, even if the Eleventh Circuit's terse analysis could be read to suggest that a transporter can rely on the generator's initial waste characterization, that analysis is flawed because the court did not reason from the text and context mentioned above. *Crockett* made no attempt to reconcile the text of 40 CFR § 263.20(a)(1) with its immediate context—*i.e.*, the contrast between the unqualified language of that provision and the explicit mental-state requirement of its immediately following subsection, *compare id.*

§ 263.20(a)(1), *with id.* § 263.20(a)(2); and EPA's strict-liability interpretation of other provisions lacking an explicit mental-state requirement. *See* Standards Applicable to Generators of Hazardous Waste, 45 Fed Reg at 12,727. Moreover, the Eleventh Circuit had no opportunity to interpret EQC's adoption of that provision within the context of Oregon's hazardous waste law.

The text and context of 40 CFR § 263.20(a)(1)—which show an intention to impose strict liability on entities that transport hazardous waste without a manifest—is dispositive. *Crockett* does not support a contrary conclusion.

CONCLUSION

This court should affirm the court of appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 25, 2016, I directed the original Brief on the Merits of Respondent on Review, Environmental Quality Commission to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Aaron J. Bell, attorney for petitioner, by using the court's electronic filing system.

I further certify that on March 25, 2016, I directed the Brief on the Merits of Respondent on Review, Environmental Quality Commission to be served upon Christopher K. Harris, attorney for petitioner, by mailing a copy, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,518 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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