



# Oregon

Kate Brown, Governor

## Department of Environmental Quality

Office of Compliance and Enforcement

700 NE Multnomah St Ste 600

Portland, OR 97232-4100

(503) 229-5696

FAX (503) 229-5100

TTY: 711

August 28, 2017

CERTIFIED MAIL: 7016 2140 0000 2409 5069

Garibaldi Leasing & Development, Inc.  
c/o Paul A. Daniels, Registered Agent  
106 Keenon Drive  
Garibaldi, OR 97118

Re: Notice of Civil Penalty Assessment and Order  
Case No. WQ/SW-NWR-2017-111

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued you a civil penalty of \$6,847 for causing pollution to waters of the state as a result of your construction activities at 102 Arizona Way, in Garibaldi, Oregon, and for operating without a 401 water quality certification and without registering for coverage under the National Pollutant Discharge Elimination System General Permit number 1200-C (the Permit).

DEQ issued this penalty because turbidity in the water column and deposition of sediments can degrade water quality and may harm aquatic life by covering up food sources, abrading fish gills, and smothering fish eggs and invertebrate organisms living in the river. Turbidity is included in the definition of "pollution" under Oregon environmental law. In addition, compliance with the Permit and the 401 water quality certification helps to ensure your construction activities protect waters of the state.

Included in Section IV is an order requiring you to complete your application for a 401 water quality certification by submitting to DEQ a post-construction Stormwater Management Plan and paying the Tier 1 review fee of \$985 for which you were invoiced in April.

If you wish to appeal this matter, DEQ must receive a request for a hearing within 20 calendar days from your receipt of this letter. The hearing request must be in writing. Send your request to DEQ Office of Compliance and Enforcement:

Via mail – 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232

Via email – [DEQappeals@deq.state.or.us](mailto:DEQappeals@deq.state.or.us)

Via fax – 503-229-5100

Once DEQ receives your request, we will arrange to meet with you to discuss this matter. If DEQ does not receive a timely written hearing request, the penalty will become due. Alternatively, you can pay the penalty by sending a check or money order to the above address.

The attached Notice further details DEQ's reasons for issuing the penalty and provides further instructions for appealing the penalty. Please review and refer to it when discussing this case with DEQ.

DEQ may allow you to resolve part of your penalty through the completion of a Supplemental Environmental Project (SEP). SEPs are environmental improvement projects that you sponsor instead



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of paying a penalty. Further information is available by calling the number below or at <http://www.oregon.gov/deq/Regulations/Pages/SEP.aspx>.

DEQ's rules are available at <http://www.oregon.gov/deq/Regulations/Pages/Statutes.aspx> or by calling the number below.

If you have any questions, please contact Courtney Brown at 503-229-6839 or toll free in Oregon at 800-452-4011, extension 6839.

Sincerely,



Sarah G. Wheeler, Acting Manager  
Office of Compliance and Enforcement

Enclosures

cc: Daria Gneckow, Northwest Region  
Shaumae Hall, Accounting, DEQ  
John Koestler, WQ, DEQ  
Paul Daniels, P.O. Box 736, Garibaldi, OR 97118

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2 OF THE STATE OF OREGON

3 IN THE MATTER OF: ) NOTICE OF CIVIL PENALTY  
4 GARIBALDI LEASING AND ) ASSESSMENT AND ORDER  
5 DEVELOPMENT, INC., )  
an Oregon corporation, )  
6 Respondent. ) CASE NO. WQ/SW-NWR-2017-111

7 I. AUTHORITY

8 The Department of Environmental Quality (DEQ) issues this Notice of Civil Penalty Assessment  
9 and Order (Notice) pursuant to Oregon Revised Statutes (ORS) 468.100, ORS 468.126 through 468.140,  
10 ORS Chapter 468B, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions  
11 011, 012, 045, 048.

12 II. FINDINGS OF FACT

13 1. Since on or about October 31, 2016, through the present, Respondent has engaged in  
14 construction activities at a site located at 102 Arizona Way in Garibaldi, Oregon (“the project site”).

15 2. The construction activities at the project site cover approximately 1.2 acres.

16 3. On or about April 12, 17, 24, and on May 5, 2017, sediment and turbid stormwater was  
17 observed discharging from the project site to Hobson Creek (also known as Whitney Creek) and to an  
18 unnamed tributary that drains to Hobson Creek, waters of the state.

19 4. On May 5, 2017, DEQ staff inspected the project site and took turbidity samples of  
20 Hobson Creek and an unnamed tributary of Hobson Creek that runs along Arizona Way. The turbidity  
21 of Hobson Creek below the discharge from the project site increased 243 percent above the natural  
22 stream turbidity upstream of the project site.

23 5. Turbidity samples taken of the unnamed tributary to Hobson Creek along Arizona Way  
24 showed an increase in turbidity of 5,908 percent.

25 6. Sediment and turbid stormwater are considered “wastes” according to ORS  
26 468B.005(9). Turbidity is included in the definition of “pollution” in ORS 468B.005(5).

27 7. The state of Oregon’s water quality standard for turbidity at OAR 340-041-0036  
prohibits more than a ten percent cumulative increase in natural stream turbidities.



1 DEQ hereby assess a civil penalty of \$2,904 for this violation.

2 3. Respondent has violated OAR 340-048-0015 by failing to obtain a section 401 WQC for its  
3 federal permit authorization issued by the Army Corp of Engineers on March 29, 2017. This is a Class II  
4 violation according to OAR 340-012-0053(2). DEQ hereby assesses a civil penalty of \$621 for this  
5 violation.

6 IV. ORDER TO PAY CIVIL PENALTY AND TO COMPLY:

7 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondents are  
8 hereby ORDERED TO:

9 1. Pay a total civil penalty of \$6,847. The determinations of the civil penalties are attached as  
10 Exhibits No. 1, No. 2, and No. 3 and are incorporated as part of this Notice.

11 If you do not file a request for hearing as set forth in Section V below, your check or money  
12 order must be made payable to "**State Treasurer, State of Oregon**" and sent to the **DEQ, Business**  
13 **Office, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**. Once you pay the penalty,  
14 the Findings of Fact, Conclusions and Order become final.

15 2. Within 20 days after the order becomes final by operation of law or on appeal, Respondent  
16 must submit a post-construction Stormwater Management Plan to DEQ, Attn: Roxy Nayar, 700 NE  
17 Multnomah St., Suite 600, Portland, Oregon 97232 and pay the 401 WQC Tier I review fee of \$985 in  
18 accordance with the DEQ invoice issued on April 12, 2017.

19 V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

20 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ  
21 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If  
22 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached  
23 exhibit, you must do so in your request for hearing, as factual matters not denied will be considered  
24 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for  
25 further information about requests for hearing.) You must send your request to: **DEQ, Office of**  
26 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax  
27 it to **503-229-5100**, or email it to **DEQappeals@deq.state.or.us**. An administrative law judge

1 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS  
2 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be  
3 represented by an attorney at the hearing, however you are not required to be. If you are an individual,  
4 you may represent yourself. If you are a corporation, partnership, limited liability company,  
5 unincorporated association, trust or government body, you must be represented by an attorney or a duly  
6 authorized representative, as set forth in OAR 137-003-0555.

7 Active duty service-members have a right to stay proceedings under the federal Service  
8 Members Civil Relief Act. For more information, please call the Oregon State Bar at 1-800-  
9 452-8260 or the Oregon Military Department at 1-800-452-7500. Additional information can be found  
10 online at the United States Armed Forces Legal Assistance (AFLA) Legal Services Locator website  
11 <http://legalassistance.law.af.mil/content/locator.php>.

12 If you fail to file a timely request for hearing, the Notice will become a final order by default  
13 without further action by DEQ, as per OAR 340-011-0535(1). If you do request a hearing but later  
14 withdraw your request, fail to attend the hearing or notify DEQ that you will not be attending the  
15 hearing, DEQ will issue a final order by default pursuant to OAR 340-011-0535(3). DEQ designates  
16 the relevant portions of its files, including information submitted by you, as the record for purposes of  
17 proving a prima facie case.

18  
19  
20 August 28, 2017  
21 Date

20 Sarah Wheeler  
21 Sarah G. Wheeler, Acting Manager  
22 Office of Compliance and Enforcement  
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27

EXHIBIT No.1

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

VIOLATION 1: Operating a discharge source without first applying for coverage under a general permit in violation of ORS 468B.050(1)(b), since on or about October 30, 2016, until July 26, 2017.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(d).

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 \$1,500 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(F)(ii) because Respondent should have applied for coverage under an NPDES Stormwater Discharge 1200-C General Permit for a construction site that is more than one, but less than five acres.

"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 the same 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 according to OAR 340-012-0145(4)(d), as the violation lasted from on or about October 31, 2016, when Respondent began construction, until Respondent submitted a complete application for Permit coverage on July 26, 2017, for more than 28 occurrences of the violation.

"M" is the mental state of the Respondent, and receives a value of 2 according to OAR 340-012-0145(5)(b). Respondent has been involved with numerous construction projects in the past and therefore, reasonably should have known of the requirement to obtain permit coverage prior to engaging in construction activities that may discharge to surface waters.

"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 has made reasonable efforts to correct the violation by obtaining coverage under the Permit.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the 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 \$1,372. This is the amount Respondent gained by delaying paying the permit fee until May 30, 2017, delaying approximately \$4,500 in fees to hire a consultant to develop an ESCP until May 30, 2017, and avoiding approximately \$2,000 to perform erosion and sediment control inspections of the site since October 31, 2016.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$1,500 + [(0.1 \times \$1,500) \times (0 + 0 + 4 + 2 + -3)] + \$1,372$   
 $= \$1,500 + (\$150 \times 3) + \$1,372$   
 $= \$1,500 + \$450 + \$1,372$   
 $= \$3,322$

EXHIBIT No. 2

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

VIOLATION 2: Violating ORS 468B.025(1)(a) by causing pollution to Hobson Creek, waters of the state, from on or about April 12, 2017, through on or about May 5, 2017.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(a).

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 \$1,500 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(4)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(F)(ii) because Respondent should have applied for coverage under an NPDES Stormwater Discharge 1200-C General Permit for a construction site that is more than one, but less than five acres.

"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 the same 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 3 according to OAR 340-012-0145(4)(c), as the violation was ongoing from April 12 through May 5, 2017, for a total of 24 days.

"M" is the mental state of the Respondent, and receives a value of 8 according to OAR 340-012-0145(5)(d) because Respondent's conduct was reckless. By engaging in construction activities without implementing effective and appropriate best management practices to prevent the discharge of turbid stormwater off the site, Respondent consciously disregarded a substantial and unjustifiable risk that it would cause pollution to waters of the state. Disregarding this risk constituted a gross deviation from the standard of care a reasonable person would observe in this situation. Turbid discharges were observable discharging from

the site yet Respondent implemented few effective best management practices in order to prevent or mitigate the discharges.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of -2 according to OAR 340-012-0145(6)(d) because Respondent eventually made some efforts to minimize the effects of the violation by implementing some best management practices.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the 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 \$54. This is the amount Respondent gained by delaying spending approximately \$3,832 for straw wattles, straw mulching and soil stabilization matting from October 2016, until May 2017, to implement best management practices to control sediment transport and turbid stormwater discharges off site.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
= \$1,500 + [(0.1 x \$1,500) x (0 + 0 + 3 + 8 + -2)] + \$54  
= \$1,500 + (\$150 x 9) + \$54  
= \$1,500 + \$1,350 + \$54  
= \$2,904

EXHIBIT No. 3

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

VIOLATION No. 3: Violating OAR 340-048-0015 by failing to obtain a 401 water quality certification.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0053(2).

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

**Under OAR 340-012-0150(4), the Department elects to assess a penalty for this violation only for the amount of economic benefit realized by the Respondent.**

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the 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 \$621. This is the amount Respondent has gained by avoiding spending \$985 on the Tier I review fee required to obtain a 401 WQC. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $Penalty = BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$   
=  $\$0 + [(0.1 \times \$0) \times (0 + 0 + 0 + 0 + 0)] + \$621$   
=  $\$0 + (\$0 \times 0) + \$621$   
=  $\$0 + \$0 + \$621$   
=  $\$621$