



Oregon

Kate Brown, Governor

Department of Environmental Quality
Office of Compliance and Enforcement
700 NE Multnomah Street, Suite 600
Portland, OR 97232-4100
(503) 229-5696
FAX (503) 229-5100
TTY 711

February 7, 2020

CERTIFIED MAIL: 7017 1450 0000 8310 0533

Westside Rock & Reclaim, LLC
John R. Malnerich, Registered Agent
6655 S.W. Hergert Road
Cornelius OR 97113

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/SW-NWR-2019-171

This letter is to inform you that DEQ has issued you a civil penalty of \$14,031 for failing to comply with the requirements of the National Pollutant Discharge Elimination System Stormwater Discharge General Permit No.1200-A (the Permit) for your facility located at 6655 S.W. Hergert Road in Cornelius.

In July 2019, you were discharging turbid water from your wheel wash, which increased the turbidity level in a roadside ditch by more than 4000 percent. Additionally, you failed to maintain a Stormwater Pollution Control Plan (SWPCP) that accurately reflects the current site conditions at your facility. Specifically, you have discontinued mining and are no longer sampling one discharge point as a result. Finally, during the 2018/2019 monitoring year, you failed to perform all of the monitoring required by the Permit and submit an accurate monitoring report.

DEQ issued this penalty because the implementation of stormwater control measures and best management practices in the SWPCP reduce pollutant loads in stormwater discharges. Sediment and turbidity can block light from reaching submerged vegetation, reducing photosynthesis and dissolved oxygen. It also decreases water clarity, which can affect the ability of fish to see and eat, clog fish gills, reduce growth rates, decrease resistance to disease, and prevent egg and larval development. When sediment is deposited on the bottom of streams, it can smother the eggs of fish and aquatic insects, as well as suffocate newly hatched larvae. Therefore, it is critical that you maintain an updated SWPCP that reflects the current activities and stormwater controls in place at your facility.

Included in Section IV of the attached Notice is an order requiring you to submit a revised SWPCP, which complies with the Permit and reflects current activity occurring and controls being utilized at you facility. DEQ appreciates your efforts to discontinue use of the wheel wash and the purchase of a vacuum sweeper to minimize sediment entering the roadside ditch and considered those efforts when determining the amount of civil penalty.

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

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 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 Susan Elworth at 503-229-5152 or toll free in Oregon at 800-452-4011, extension 5152.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kieran O'Donnell", with a long horizontal flourish extending to the right.

Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

cc: Lisa Reinhart, DOGAMI, 229 Broadalbin Street SW, Albany OR 97312-2246

1 5. Schedule B, condition 2.f and Table 5 of the Permit require Respondent to monitor its
2 stormwater discharge for pollutants; specifically Respondent must analyze its samples for pH, total
3 suspended solids (TSS), total oil and grease, and settleable solids (SS). Schedule B, condition 8 of the
4 Permit requires Respondent to submit a discharge monitoring report to DEQ or DEQ's agent by July
5 31st of each year that identifies the sampling results for the previous monitoring year and includes the
6 laboratory results from the testing laboratory.

7 6. On July 31, 2019, DEQ's agent, the Department of Geology and Mineral Industries
8 (DOGAMI), received a discharge monitoring report from Respondent for the 2018/2019 monitoring
9 year. Respondent collected and analyzed samples on October 29, 2018, December 28, 2018, April 9,
10 2019 and May 21, 2019 from outfall B only.

11 7. Attached to the monitoring report was the laboratory results from the testing laboratory for
12 samples collected from outfall B as follows:

Oil and Grease	October 29 2018 December 28, 2018 April 9, 2019 May 21, 2019
TSS	October 29, 2019 December 28, 2018 April 9, 2019 May 21, 2019
SS	December 28, 2018 April 9, 2019 May 21, 2019
pH	October 26, 2018 December 28, 2018 April 9, 2019 May 21, 2019

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22 8. The laboratory results of the October 29, 2018 sample state that the sample exceeded the
23 hold time for pH.

24 9. The monitoring report did not list results for the oil and grease analysis of any samples, for
25 TSS analysis of the sample collected on October 29 2018, and for SS analysis of the samples collected
26 on December 28, 2018 and April 9, 2019

27 10. On July 15, 2019, DOGAMI conducted an inspection of the Facility.

1 11. During the inspection, the wheel wash at the Facility was discharging into the ditch which
2 runs parallel to the Facility's entrance road, through outfall B, into the roadside ditch and into the
3 unnamed creek.

4 12. During the inspection, DOGAMI collected a sample from the ditch which parallels the
5 entrance road. The sample had a turbidity reading of over 1,000 nephelometric turbidity units (NTU).

6 13. During the inspection, DOGAMI collected a sample from the unnamed creek directly
7 downstream of its confluence with the roadside ditch (downstream of outfall B) which had a turbidity
8 reading of 176 NTU.

9 14. During the inspection, DOGAMI collected a sample from the unnamed creek directly
10 upstream of its confluence with the roadside ditch which had a turbidity reading of 4.24 NTU.

11 15. On July 16, 2019, Respondent informed DOGAMI that it was no longer utilizing the wheel
12 wash and has begun using a street vacuum to control loose dirt and other materials at the Facility exit.

13 III. CONCLUSIONS

14 1. Respondent violated ORS 468B.025(1)(b) and OAR 340-041-0036 by reducing the water
15 quality of waters of the state below a water quality standard. Specifically Respondent created more than
16 a ten percent cumulative increase in natural stream turbidity of the roadside ditch from 4.24 NTU to
17 176 NTU, or by approximately 4,150%, as alleged in Section II, paragraphs 10 through 14. The
18 roadside ditch is waters of the state, as that term is defined in ORS 468B.005(10). This is a Class I
19 violation according to OAR 340-012-0055(1)(b). DEQ hereby assesses a \$6,562 civil penalty for this
20 violation.

21 2. Respondent violated ORS 468B.025(2) and Schedule A, Condition 8.e of the Permit by
22 failing to keep its SWPCP current and updated as necessary to reflect changes to the Facility.
23 Specifically, as alleged in Section II, paragraphs 3, 4 and 15, Respondent is no longer actively mining
24 the Facility, is storing heavy equipment at the Facility, is no longer using the wheel wash, and is using a
25 commercial vacuum. None of these conditions are set forth in its SWPCP. This is a Class II violation
26 according to OAR 340-012-0055(2)(b). DEQ hereby assesses a \$7,469 civil penalty for this violation.

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1 3. Respondent violated ORS 468B.025(2) and Schedule B of the Permit by failing to monitor
2 its stormwater discharge. Specifically, Respondent failed to analyze the sample collected from outfall
3 B on October 26, 2018 for SS and did not conduct a valid analysis of that sample for pH, as alleged in
4 Section II, paragraphs 6 through 9. Additionally, Respondent did not collect and analyze samples from
5 outfall A during the 2018/2019 sampling year. These are Class I violations according to OAR 340-012-
6 0055(1)(o). DEQ did not assess a civil penalty for these violations.

7 4. Respondent violated ORS 468B.025(2) and Schedule B of the Permit by submitting a
8 monitoring report that did not identify the sampling results. Specifically, as alleged in Section II,
9 paragraphs 6 through 9, Respondent failed to include the laboratory results for oil and grease, for TSS
10 from October 28, 2018, and for SS from December 28, 2018 and April 9, 2019 on its monitoring report.
11 This is a Class III violation according to OAR 340-012-0055(3)(a). DEQ did not assess a civil penalty
12 for this violation.

13 IV. ORDER TO PAY CIVIL PENALTY AND TO COMPLY

14 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is
15 hereby ORDERED TO:

16 1. Pay a total civil penalty of \$14,031. The determination of the civil penalties are attached as
17 Exhibits 1 and 2, and are incorporated as part of this Notice. If you do not file a request for hearing as set
18 forth in Section V below, your check or money order must be made payable to "**State Treasurer, State of**
19 **Oregon**" and sent to the **DEQ, Business Office, 700 NE Multnomah Street, Suite 600, Portland,**
20 **Oregon 97232.**

21 2. Within 30 days of this order becoming final by operation of law or on appeal, submit an
22 updated SWPCP that meets all the requirements set forth in Schedule A, Condition 7 to: Lisa Reinhart,
23 DOGAMI, 229 Broadalbin Street SW, Albany OR 97312-2246.

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

25 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ
26 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If
27 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached

1 exhibits, you must do so in your request for hearing, as factual matters not denied will be considered
2 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for
3 further information about requests for hearing.) You must send your request to: **DEQ, Office of**
4 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax
5 it to **503-229-5100** or email it to DEQappeals@deq.state.or.us. An administrative law judge
6 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS
7 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be
8 represented by an attorney at the hearing, however you are not required to be. If you are an individual,
9 you may represent yourself. If you are a corporation, partnership, limited liability company,
10 unincorporated association, trust or government body, you must be represented by an attorney or a duly
11 authorized representative, as set forth in OAR 137-003-0555.

12 Active duty Service members have a right to stay proceedings under the federal Service
13 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-
14 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed
15 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military
16 Department does not have a toll free telephone number.

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

23
24 2/7/2020

25 Date

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25 Kieran O'Donnell, Manager
26 Office of Compliance and Enforcement
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EXHIBIT 1

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

VIOLATION 1: Reducing the water quality of the state below a water quality standard, in violation of ORS 468B.025(1)(b) and OAR 340-041-0036.

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

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-012-0135(2)(b)(A)(v) because Respondent increased turbidity 50 or more NTU over background.

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 \$8,000 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(A)(i) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(iii). Respondent has coverage under the NPDES 1200-A 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 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 0 according to OAR 340-012-0145(4)(a) because there was only one occurrence of the violation. DOGAMI documented the increase in turbidity on one day only.

"M" is the mental state of the Respondent, and receives a value of 2 according to OAR 340-012-0145(5)(b) because Respondent had constructive knowledge (reasonably should have known) of the requirement. During an inspection in October 2018, DOGAMI informed Respondent that turbid water was being discharged from outfall #2 into the roadside ditch. Additionally, the 1200A Permit specifically states that Respondent cannot cause or contribute to a violation of water quality standards. Respondent reasonably should have known that allowing turbid water to discharge into the roadside ditch could result in a violation of a water quality standard in the unnamed creek into which it discharges.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of -4 according to OAR 340-012-0145(6)(b) because Respondent made extraordinary efforts to ensure the violation would not be repeated. Respondent immediately discontinued use of

the wheel wash and purchased a commercial street vacuum to control dirt and other materials from vehicles exiting the Facility.

"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 \$162. This is the amount Respondent gained by delaying until August 2019, spending \$85,000 on a commercial vacuum to reduce the tracking of dirt and other materials from vehicles exiting the Facility. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$8,000 + [(0.1 x \$8,000) x (0 + 0 + 0 + 2 - 4)] + \$162
= \$8,000 + (\$800 x -2) + \$162
= \$8,000 + \$-1,600 + \$162
= \$6,562

EXHIBIT 2

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

VIOLATION 2: Failing to revise its SWPCP, in violation of ORS 468B.025(2) and Schedule A, Condition 8.e of the Permit.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0055(2)(b).

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 \$2,000 for a Class II, moderate magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(B)(iI) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(iii). Respondent has coverage under the NPDES 1200-A 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 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) because there were more than 28 occurrences of the violation. The violation has been on-going since at least 2018 when Respondent ceased mining at the Facility.

"M" is the mental state of the Respondent, and receives a value of 4 according to OAR 340-012-0145(5)(c) because Respondent's conduct was negligent. Negligence means Respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting a violation. Following the inspection, DOGAMI informed Respondent that it needed to update its SWPCP. Additionally, the 1200A Permit specifically states that Respondent's SWPCP must be keep current to reflect current conditions at the Facility. By failing to address on-going changes at its Facility when those occurred, Respondent failed to take the same care than another person would take in the same situation, resulting in the violation.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value 2 according to OAR 340-012-0145(6)(g) because Respondent did not address the violation as described in paragraphs (6)(a) through (6)(e) and the facts do not support a finding under paragraph (6)(f). Respondent has not submitted a revised SWPCP to DOGAMI.

"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 \$3,469. This is the amount Respondent gained by avoiding spending \$5,000 to update its SWPCP since October 2018. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$2,000 + [(0.1 x \$2,000) x (0 + 0 + 4 + 4 + 2)] + \$3,469
= \$2,000 + (\$200 x 10) + \$3,469
= \$2,000 + \$2,000 + \$3,469
= \$7,469