



# 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

January 10, 2022

CERTIFIED MAIL: 7018 1830 0001 5906 3183

Port of Morrow  
c/o Ryan Neal, Executive Director  
P. O. Box 200  
2 East Marine Drive  
Boardman, OR, 97818

Re: Notice of Civil Penalty Assessment and Order  
Case No. WQ/I-ER-2021-106

***DEQ is committed to balancing its vital obligation to enforce the law and protect the environment with a consideration of the dramatic disruptions to public health and the economy caused by the COVID-19 outbreak. We understand the outbreak may impact your ability to timely appeal, pay the assessed civil penalty, or comply with this order. You may submit to DEQ documentation identifying whether COVID-19-related disruption affects your ability to comply with this order. Visit our webpage <https://www.oregon.gov/deq/Pages/covid-19.aspx> for more information about documenting specific COVID-19 disruptions your facility may be encountering and how that affects your ability to comply. DEQ will exercise reasonable discretion regarding settlement of this order.***

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued you a civil penalty of \$1,291,551 for violating your wastewater disposal permit by land applying nitrogen in wastewater in amounts exceeding allowable limits and for failing to comply with monitoring requirements.

The Port of Morrow's wastewater land application sites are located in the Lower Umatilla Basin Groundwater Management Area (LUBGWMA). DEQ established the LUBGWMA in 1990 due to elevated concentrations, greater than 7 milligrams per liter (mg/L), of nitrate-nitrogen in groundwater. Current concentrations of nitrate-nitrogen in the LUBGWMA have been measured as high as 76 mg/L.

The purpose of the LUBGWMA declaration is to identify and implement measures that will reduce nitrate loading and reduce regional groundwater nitrate concentrations to below 7 mg/L. These measures include the nitrogen loading limits in the Port of Morrow's wastewater disposal permit. The permit prohibits the land application of wastewater to approved sites during the winter "non-growing season" defined as November through February each year when residual nitrate-nitrogen in the soil at four and five feet below ground surface exceeds 30 pounds per acre. Beginning in November 2018 through February 2021, the Port of Morrow land applied nitrogen containing wastewater when the soil residual nitrate-nitrogen level exceeded 30 pounds per acre at the fourth and fifth foot level on 1,164

separate occurrences. DEQ estimates that the Port of Morrow applied approximately 165 tons of nitrogen in excess of the amount allowed under the permit.

Recent modeling by DEQ hydrogeologists has determined that winter (November-February) land application creates significant contamination potential to the high levels of nitrate-nitrogen in the LUBGWMA. Separate from this enforcement action DEQ has proposed a draft renewed permit for the Port of Morrow that eliminates winter land application. Exceedances of the nitrate-nitrogen limit in the existing permit are likely to cause additional adverse impacts to nitrate-nitrogen levels in the LUBGWMA.

DEQ issued this penalty because groundwater adversely impacted by the Port of Morrow's wintertime land application of nitrogen containing wastewater is used as drinking water by residents of the LUBGWMA. High nitrate concentrations in drinking water are linked with serious health concerns for infants and pregnant or nursing women. Relative to the state average, the population in the LUBGWA has a high percentage of people who meet factors related to environmental justice, as defined by the U.S. Environmental Protection Agency (EPA). This includes race, income, education, language, and age. DEQ is committed to the principals of environmental justice, and to ensuring that the agency's actions – including compliance and enforcement – address the interests of Oregon communities, especially communities of color, low-income and other traditionally underrepresented populations, as much as state and federal laws allow.

Included in Section IV of the enclosed Notice is an order requiring you to develop and implement a plan to achieve compliance with the nitrogen loading limits in your current permit.

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 – 503-229-6762

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.

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If you have any questions, please contact Jeff Bachman at 503-229-5950 or toll free in Oregon at 800-452-4011, extension 5950.

Sincerely,



Kieran O'Donnell, Manager  
Office of Compliance and Enforcement

Enclosures

cc: Justin Sterger, DEQ  
Chad Gubala, DEQ  
Accounting, DEQ  
Michael Campbell, Stoel Rives LLP, 760 SW Ninth Ave Ste 3000, Portland OR 97205

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

3 IN THE MATTER OF: )  
4 PORT OF MORROW, )  
a port district of the state of Oregon, )  
5 Respondent. ) NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER  
CASE NO. WQ/I-ER-2021-106

6  
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 468B, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011 and  
11 012.

12 II. FINDINGS OF FACT

13 1. In 1990, DEQ declared the Lower Umatilla Basin a Groundwater Management Area  
14 (GWMA) because nitrate-nitrogen concentrations exceeded 7 milligrams per liter (mg/L) in many area  
15 groundwater samples. This level is 70% of the Oregon maximum measurable level of 10 mg/L (Federal  
16 Safe Drinking Water Standard) and is the trigger level for declaring a GWMA. Under the Oregon  
17 Groundwater Protection laws (ORS 468B.180), DEQ is required to declare a GWMA if area-wide  
18 groundwater contamination is present as a result of suspected non-point source activities.

19 2. Respondent operates industrial facilities in Boardman, Oregon, and disposes of  
20 wastewater generated by those facilities pursuant to Water Pollution Control Facilities Permit No.  
21 102325 (the Permit). The Permit authorizes Respondent to construct, install, modify or operate a  
22 wastewater collection, treatment and control system and dispose of wastewater through land application  
23 in conformance with the requirements, limits and conditions of the Permit. The Permit was in effect at  
24 all material times.

25 3. Respondent's facilities and wastewater land application sites that were cited for  
26 violations are located in the Lower Umatilla Basin Ground Management Area.

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1 4. Respondent's wastewater contains nitrogen from industrial sources and Schedule A of  
2 the Permit limits the amount of nitrogen which may be applied to land application sites.

3 5. Schedule A, Condition 13(C)(ii) of the Permit states: "Application sites where the sum  
4 of soil nitrate (N), in the 4th and 5th foot, is greater than or equal to 30 lbs/ac [pounds per acre] are  
5 prohibited from receiving winter irrigation."

6 6. Schedule A, Condition 13 of the Permit defines the winter irrigation season as  
7 November through February.

8 7. During the 2018-2019, 2019-2020 and 2020-2021 winter irrigation seasons, Respondent  
9 applied nitrogen in wastewater during the winter irrigation season after soil nitrate present at the 4<sup>th</sup> +  
10 5<sup>th</sup> foot level had reached 30 pounds per acre as follows.

Farm Name	Field Number	Days Nitrogen Applied
Farm 1 – Portview	138	40
Farm 1 – Portview	139(1)	25
Farm 1 – Portview	139(3)	13
Farm 1 - Portview	140	5
Farm 1 – Portview	141	4
Farm 1 – Portview	142	33
Farm 1 – Portview	147	14
Farm 1 – Portview	148	11
Farm 1 – Portview	152	7
Farm 1 – Portview	154 (3)	31
Farm 1 – Portview	156	3
Farm 1 – Portview	157	5
Farm 2 – Southport	201	2
Farm 3 – Eastport	314	13
Farm 3 – Eastport	315	23
Farm 3 – Eastport	317	34
Farm 3 – Eastport	318	31
Farm 3 – Eastport	319	26
Farm 3 – Eastport	320	25
Farm 3 – Eastport	321	38
Farm 3 – Eastport	322	27
Farm 3 – Eastport	m322	11
Farm 3 – Eastport	323	23
Farm 3 – Eastport	325	22
Farm 3 – Eastport	325 (2)	3
Farm 3 – Eastport	326	17
Farm 3 – Eastport	326a	16
Farm 3 - Eastport	m327	16

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Farm 3 – Eastport	328	21
Farm 3 – Eastport	329	32
Farm 3 – Eastport	329a	15
Farm 3 – Eastport	329b	20
Farm 3 – Eastport	329c	13
Farm 3 – Eastport	331	24
Farm 3 – Eastport	332	20
Farm 3 – Eastport	333	34
Farm 3 – Eastport	333b	6
Farm 3 – Eastport	333c	17
Farm 3 – Eastport	333d	8
Farm 3 – Eastport	m334	25
Farm 3 – Eastport	335	26
Farm 3 – Eastport	336	27
Farm 3 – Eastport	338	28
Farm 3 – Eastport	340	28
Farm 3 – Eastport	m340	2
Farm 3 – Eastport	343	16
Farm 3 – Eastport	353	24
Farm 3 – Eastport	353(2)	25
Farm 3 – Eastport	355	8
Madison Farm	1	14
Madison Farm	98	19
Madison Farm	99	17
Madison Farm	101	1
Madison Farm	102	11
Madison Farm	103	1
Madison Farm	104	5
Madison Farm	105	25
Madison Farm	108	20
Madison Farm	109	17
Madison Farm	110	9
Madison Farm	114	8
Madison Farm	115	17
Madison Farm	116	12
Madison Farm	117	8
Madison Farm	118	15
Madison Farm	119	28

8. Schedule B, Condition 9 of the Permit requires Respondent to monitor and record crop information for nitrogen removal (plant tissue) at harvest for each authorized application site each year.

9. Respondent did not monitor crops at harvest for nitrogen removal on 121 separate occasions each year in 2018, 2019 and 2020.





1 IV. ORDER TO PAY CIVIL PENALTY AND TO COMPLY

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

4 1. Pay a total civil penalty of \$1,291,551. The determination of the civil penalties are attached  
5 as Exhibits 1 and 2 and are incorporated as part of this Notice.

6 If you do not file a request for hearing as set forth in Section V below, your check or money  
7 order must be made payable to "**State Treasurer, State of Oregon**" and sent to the **DEQ, Business**  
8 **Office, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232.**

9 2. Within 45 days of this order becoming final by operation of law or on appeal, submit to  
10 DEQ for review and approval a plan and schedule for achieving compliance with the winter irrigation  
11 limit in Schedule A, Condition 13(C)(ii) of Respondent's wastewater disposal permit.

12 3. Within 30 days of receiving DEQ comments on the plan and schedule, revise the plan  
13 consistent with DEQ's comments, submit the plan and schedule DEQ and begin implementation.

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

15 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ  
16 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If  
17 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached  
18 exhibits, you must do so in your request for hearing, as factual matters not denied will be considered  
19 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for  
20 further information about requests for hearing.) You must send your request to: **DEQ, Office of**  
21 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax  
22 it to **503-229-6762** or email it to [DEQappeals@deq.state.or.us](mailto:DEQappeals@deq.state.or.us). An administrative law judge  
23 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS  
24 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be  
25 represented by an attorney at the hearing, however you are not required to be. If you are an individual,  
26 you may represent yourself. If you are a corporation, partnership, limited liability company,  
27 unincorporated association, trust or government body, you must be represented by an attorney or a duly



1 authorized representative, as set forth in OAR 137-003-0555.

2 Active duty Service members have a right to stay proceedings under the federal Service  
3 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-  
4 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed  
5 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military  
6 Department does not have a toll free telephone number.

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

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16 1 / 10 / 2022  
17 Date


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Kieran O'Donnell, Manager  
Office of Compliance and Enforcement

EXHIBIT 1

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

VIOLATION NO. 1 Failure to comply with a wastewater permit condition in violation of ORS 468B.025(2) by failing to comply with conditions of Schedule A, Condition 13 of the Permit regarding winter irrigation of effluent.

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

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)(E)(ii) because Respondent has a Tier 1 industrial source WPCF 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 10 pursuant to OAR 340-012-0145(2)(a) because Respondent has prior significant actions consisting of 9 or more Class I equivalent violations stemming from Case Nos. WQ/I-ER-15-105 and WQ/I-ER-2016-108.

"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 insufficient information on which to base a finding under paragraphs (3)(a) or (b).

"O" is whether the violation was repeated or ongoing, and receives a value of 3 pursuant to OAR 340-012-0145(4)(c) because there were seven or more but less than 29 occurrences of the violation. Each day of over application on each Farm and Field Number represents a separate occurrence. Respondent applied on 1,164 occurrences in violation of the permit as detailed in the Notice. DEQ is assessing a separate penalty for 66 of the violations. To arrive at "O" DEQ divides the total number of violations by the number of violations penalized. Therefore, each assessed penalty represents 17.6 occurrences for an "O" factor value of 3.

"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. Respondent knew the Permit imposes limits on nitrogen in its land applied wastewater. Respondent intentionally applied

nitrogen in excess of the winter irrigation limit, knowing it would cause exceedance of the permitted limit.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of 0 according to OAR 340-012-0145(6)(f) because the violation or the effects of the violation could not be corrected or minimized.

"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 \$0 as DEQ has insufficient information on which to arrive at reasonable estimation of compliance costs avoided or delayed.

SINGLE OCCURRENCE PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})]$

$$\begin{aligned} &= \$6,000 + [(0.1 \times \$6,000) \times (10 + 0 + 3 + 8 + 0)] \\ &= \$6,000 + [\$600 \times 21] \\ &= \$6,000 + \$12,600 \end{aligned}$$

MULTIPLE PENALTY CALCULATION

Single occurrence penalty calculation x number of violations penalized + economic benefit

In exercising its enforcement discretion, DEQ elects to assess separate base penalties for 66 of the 1,164 occurrences of the violation, assessing a separate base penalty for each of the 66 farm and field number locations where the violation occurred.

FINAL PENALTY CALCULATION

$$\$18,600 \times 66 + \$0 = \$1,227,600$$

EXHIBIT 2

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

VIOLATION NO. 2 Failure to comply with a wastewater permit condition in violation of ORS 468B.025(2) by failing to conduct monitoring required by Schedule B of the Permit.

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

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)(E)(ii) because Respondent has an a Tier 1 industrial source WPCF 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 10 pursuant to OAR 340-012-0145(2)(a) because Respondent has prior significant actions consisting of 9 or more Class I equivalent violations stemming from Case Nos. WQ/I-ER-15-105 and WQ/I-ER-2016-108.

"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 insufficient information on which to base a finding under paragraphs (3)(a) or (b).

"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. Respondent failed to conduct annual plant tissue monitoring for nitrogen removal at 121 fields in 2018, 2019 and 2020 for a total of 363 occurrences of the violation. DEQ is assessing a separate penalty for three of the violations. To arrive at "O" DEQ divides the total number of violations by the number of violations penalized. Therefore, each assessed penalty represents 121 occurrences for an "O" factor value of 4.

"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. The monitoring requirements are express conditions of Respondent's Permit. By failing to take the actions necessary to

conduct the monitoring, Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing the violation.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of 0 according to OAR 340-012-0145(6)(f) because the violation or the effects of the violation could not be corrected or minimized.

"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 \$13,551. This is the amount Respondent gained by avoiding \$19,602 in monitoring costs. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

SINGLE OCCURRENCE PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})]$

$$\begin{aligned} &= \$6,000 + [(0.1 \times \$6,000) \times (10 + 0 + 4 + 4 + 0)] \\ &= \$6,000 + (\$600 \times 18) \\ &= \$6,000 + \$10,800 \\ &= \$16,800 \end{aligned}$$

MULTIPLE PENALTY CALCULATION

(Single occurrence penalty calculation x number of violations penalized) + economic benefit

In exercising its enforcement discretion, DEQ elects to assess separate base penalties for 3 of the 363 occurrences of the violation, assessing a separate base penalty for each year Respondent committed the violation.

FINAL PENALTY CALCULATION

$$(\$16,800 \times 3) + \$13,551 = \$63,951$$