



Oregon

Kate Brown, Governor

Department of Environmental Quality
Office of Compliance and Enforcement
700 NE Multnomah Street, Suite 600
Portland, OR 97232
(503) 229-5382
FAX (503) 229-5787
TTY 711

January 21, 2022

CERTIFIED MAIL No. 7018 1830 0001 5906 2551

Everett Custom Homes Inc.
c/o Douglas R. Grim, Registered Agent
1 SW Columbia Street, Suite 900
Portland, OR 97204

Re: Notice of Civil Penalty Assessment and Order
No. WQ/SW-NWR-2021-515

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 at: <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 DEQ has issued you a total civil penalty of \$4,350 for water quality violations at the Everett Heights construction site in Portland. You have coverage under the NPDES Construction Stormwater Discharge General Permit No. 1200-C for construction activities at the site. On September 27, 2021, DEQ inspected the site and found that you failed to adequately implement many aspects of your Erosion and Sediment Control Plan (ESCP). This resulted in highly turbid stormwater leaving the site and causing pollution of an unnamed stream. These are violations of Oregon environmental law.

DEQ issued this penalty because implementing the ESCP is essential to ensure compliance with the terms of your NPDES 1200-C Permit, as it includes pollution control measures that are specific to your site. These measures are intended to prevent the discharge of sediment to surface waters, as sediment can harm aquatic life and impact beneficial uses of those waters. Stormwater from the site discharges to an unnamed stream that is a tributary to Fanno Creek, which provides important habitat for aquatic species and recreational opportunities for Oregonians.

DEQ appreciates your efforts to correct the violation by implementing corrective actions at the site. DEQ considered these 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.oregon.gov

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 via check, money order, or e-check (ACH) by following the instructions on the attached invoice and logging in to Your DEQ Online here: <https://ordeq-edms-public.govonlinesaas.com/pub/login>. Payments sent by mail must be sent to the address on the invoice.

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 Esther Westbrook at 503-229-5374 or toll free in Oregon at 800-452-4011, extension 5374.

Sincerely,



Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

cc: Vic Remmers, Everett Custom Homes Inc., 3330 NW Yeon Ave., Suite 100, Portland,
OR 97210
Boris Barrera, Northwest Region, DEQ
Christine Svetkovich, Northwest Region, DEQ
Accounting, DEQ

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
2 OF THE STATE OF OREGON
3

4 IN THE MATTER OF:) NOTICE OF CIVIL PENALTY
EVERETT CUSTOM HOMES INC.,) ASSESSMENT AND ORDER
5 an Oregon corporation,)
Respondent.) NO. WQ/SW-NWR-2021-515
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7

8 I. AUTHORITY

9 The Department of Environmental Quality (DEQ) issues this Notice of Civil Penalty
10 Assessment and Order pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through
11 468.140, ORS Chapters 183 and 468B, and Oregon Administrative Rules (OAR) Chapter 340,
12 Divisions 011, 012, 041, and 045.

13 II. FINDINGS OF FACT

14 1. On December 11, 2018, DEQ issued coverage to Respondent under the National
15 Pollutant Discharge Elimination System (NPDES) Construction Stormwater General Permit No.
16 1200-C, DEQ Permit No. 32953 (Previous Permit) for a residential subdivision construction
17 project “Everett Heights,” located at 5920 SW 48th Avenue in Portland, Multnomah County,
18 Oregon (the Site). The Previous Permit expired on December 14, 2020. On December 15, 2020,
19 DEQ issued the current Permit (the Permit), and Respondent’s coverage was subsequently
20 renewed. Respondent had coverage under the Permit at all material times.

21 2. The Site is approximately 2.3 acres in size, and the total disturbed area at the Site is
22 approximately 2.0 acres.

23 3. The Permit authorizes construction activities that may discharge to surface waters or
24 conveyance systems leading to surface waters of the state.

25 4. Respondent began construction activities at the Site on or about July 8, 2021.

26 5. Schedule A, Condition 4 of the Permit requires Respondent to implement the erosion
27 and sediment control plan (ESCP).

- 1 6. DEQ inspected the Site on September 27, 2021. At the time of the inspection:
- 2 a. The entire site had been disturbed and was bare soil. Areas that had not recently
- 3 been worked did not have any temporary stabilization measures in place. There
- 4 was evidence of rilling from erosion and stormwater flowing off-site.
- 5 b. There were areas where the sediment fencing was installed incorrectly, needed
- 6 maintenance, or had sediment buildup that reached half-way above ground fence
- 7 height, rendering the sediment fencing ineffective.
- 8 c. There were three stormwater catch basins that did not have any biobags installed.
- 9 d. The area being used as a construction entrance was not installed according to the
- 10 specifications in the ESCP.
- 11 e. The area used as a construction entrance had visible sediment trackout onto the
- 12 road (SW Pendleton Street).
- 13 f. There was a pile of debris and trash on the ground. There was no waste container
- 14 on site.

15 7. Respondent's ESCP that was submitted to DEQ on or about August 22, 2018 contains

16 the following conditions or requirements:

- 17 a. Install matting and implement hydraulic applications as erosion prevention
- 18 measures. (Construction Matrix on Sheet EC-00.) Provide temporary stabilization
- 19 for that portion of the site where construction activities cease for 14 days or more
- 20 with a covering of blown straw and a tackifier, loose straw, or an adequate
- 21 covering of compost mulch until work resumes on that portion of the site.
- 22 (Standard Note 27 on Sheet EC-00.)
- 23 b. Install sediment fence along perimeter. (Sheet EC-10, Detail Drawing 4.2-A on
- 24 Sheet EC-30.) Remove trapped sediment before it reaches one-third of the above
- 25 ground fence height and before fence removal. (Standard Note 21 on Sheet EC-
- 26 00.)

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- c. Install biobags on catch basins. (Sheet EC-10, Detail Drawing 4.2-B on Sheet EC-31.)
- d. Install construction entrance from SW Pendleton Street. (Sheet EC-10, Detail Drawing 4.2-A on Sheet EC-30.) Construction entrances shall be installed at the beginning of construction and maintained for the duration of the project. (Note 4 on Sheet EC-10.)
- e. Prevent tracking of sediment onto public or private roads using BMPs such as: graveled (or paved) exits and parking areas, gravel all unpaved roads located onsite, or use an exit tire wash. (Standard Note 11 on Sheet EC-00.) Additional measures including, but not limited to, tire washes, street sweeping, and vacuuming, may be required to ensure that all paved areas are kept clean for the duration of the project. (Note 4 on Sheet EC-10.)
- f. Establish material and waste storage areas. (Standard Note 10 on Sheet EC-00.)

8. There is an unnamed perennial stream within the environmental conservation zone in the southwest corner of the Site, identified as "Tract A." The unnamed stream is a natural body of surface water, and is considered "waters of the state" under ORS 468B.005(10). The unnamed stream is a tributary of Fanno Creek.

9. On September 27, 2021, highly turbid stormwater from the Site escaped the perimeter sediment fence and flowed south along SW 48th Avenue then entered the stream.

10. On September 27, 2021, the stream was brown and turbid immediately downstream of the disturbed area on the Site.

11. On September 27, 2021, the stream was flowing clear immediately upstream of the point where it received stormwater discharge from the Site.

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1 III. CONCLUSIONS

2 1. On or before September 27, 2021, Respondent violated Schedule A, Condition 4
3 of the Permit and ORS 468B.025(2) by failing to substantially implement the ESCP, as described
4 in Section II, Paragraphs 1 - 6 above. This is a Class I violation according to OAR 340-012-
5 0055(1)(r). DEQ hereby assesses a \$2,250 civil penalty for this violation.

6 2. On or about September 27, 2021, Respondent violated ORS 468B.025(1)(a) by
7 causing pollution of waters of the state, as described in Section II above. Specifically,
8 Respondent discharged sediment-laden stormwater from the Site, which altered the physical,
9 chemical or biological properties of an unnamed stream by changing the color and turbidity of
10 the stream, which tends to render it harmful to fish or aquatic life. This is a Class I violation
11 according to OAR 340-012-0055(1)(a). DEQ hereby assesses a \$2,100 civil penalty for this
12 violation.

13 IV. ORDER TO PAY CIVIL PENALTY

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

16 Pay a total civil penalty of \$4,350. The determination of the civil penalties is attached
17 as Exhibit Nos. 1 and 2, which are incorporated as part of this Notice.

18 If you do not file a request for hearing as set forth in Section V below, please pay the
19 penalty via check, money order, or e-check (ACH) by following the instructions on the attached
20 invoice and logging in to Your DEQ Online here: [https://ordeq-edms-](https://ordeq-edms-public.govonlinesaas.com/pub/login)
21 [public.govonlinesaas.com/pub/login](https://ordeq-edms-public.govonlinesaas.com/pub/login). Payments sent by mail must be sent to the address on the
22 invoice.

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

24 You have a right to a contested case hearing on this Notice, if you request one in writing.
25 DEQ must receive your request for hearing **within 20 calendar days** from the date you receive
26 this Notice. If you have any affirmative defenses or wish to dispute any allegations of fact in this
27 Notice or attached exhibits, you must do so in your request for hearing, as factual matters not

1 denied will be considered admitted, and failure to raise a defense will be a waiver of the defense.
2 (See OAR 340-011-0530 for further information about requests for hearing.) You must send your
3 request to: **DEQ, Office of Compliance and Enforcement, 700 NE Multnomah Street, Suite**
4 **600, Portland, Oregon 97232**, fax it to **503-229-5100** or email it to
5 DEQappeals@deq.oregon.gov. An administrative law judge employed by the Office of
6 Administrative Hearings will conduct the hearing, according to ORS Chapter 183, OAR Chapter
7 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be represented by an
8 attorney at the hearing, however you are not required to be. If you are an individual, you may
9 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
11 a duly 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
18 default without further action by DEQ, as per OAR 340-011-0535(1). If you do request a hearing
19 but later withdraw your request, fail to attend the hearing or notify DEQ that you will not be
20 attending the hearing, DEQ will issue a final order by default pursuant to OAR 340-011-0535(3).
21 DEQ designates the relevant portions of its files, including information submitted by you, as the
22 record for purposes of proving a prima facie case.

23
24
25
26 1/21/2022
Date

Kieran O'Donnell
Kieran O'Donnell, Manager
Office of Compliance and Enforcement

EXHIBIT NO. 1

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

VIOLATION 1: Failing to substantially implement the Erosion and Sediment Control Plan (ESCP), in violation of Schedule A, Condition 4 of the Permit and ORS 468B.025(2).

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

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 has coverage under the NPDES 1200-C General Permit for a construction site that is more than one but less than five acres in size. The disturbed area at the Site is approximately 2 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), because there were more than 28 occurrences of the violation. Each day of violation constitutes a separate occurrence. Respondent failed to substantially implement the plan from July 8, 2021 through September 27, 2021, which was more than 28 days.

"M" is the mental state of the Respondent and receives a 4 according to OAR 340-012-0145(5)(c), because Respondent's conduct was negligent. The 1200-C Permit and the ESCP prepared by Respondent's engineer require implementation of erosion and sediment control measures in order to prevent the discharge of significant amounts of sediment from the Site. By failing to install or maintain erosion control measures included in the ESCP, Respondent

failed to take reasonable care to avoid a foreseeable risk that it would violate its Permit and discharge turbid stormwater from the Site.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of -3 according to OAR 340-012-0145(6)(c), because Respondent made reasonable efforts to correct the violation. Respondent implemented corrective actions at the Site on September 29, 2021.

"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 because DEQ has insufficient evidence on which to base a finding that Respondent received an economic benefit from the violation.

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

$$\begin{aligned} &= \$1,500 + [(0.1 \times \$1,500) \times (0 + 0 + 4 + 4 - 3)] + \$0 \\ &= \$1,500 + [\$150 \times 5] + \$0 \\ &= \$1,500 + \$750 + \$0 \\ &= \$2,250 \end{aligned}$$

EXHIBIT NO. 2

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

VIOLATION 2: Causing pollution of waters of the state, in violation of ORS 468B.025(1)(a).

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)(c)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(F)(ii) because Respondent has coverage under the NPDES 1200-C General Permit for a construction site that is more than one, but less than five acres in size. The disturbed area at the Site is approximately 2 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 0 according to OAR 340-012-0145(4)(a), because there was only one occurrence of the violation. DEQ documented the pollution resulting from Respondent's activities on September 27, 2021.

"M" is the mental state of the Respondent and receives a 4 according to OAR 340-012-0145(5)(c), because Respondent's conduct was negligent. The 1200-C Permit and the ESCP prepared by Respondent's engineer require implementation of erosion and sediment control measures in order to prevent the discharge of significant amounts of sediment from the Site. Respondent's site inspection conducted on September 21, 2021 noted that sediment fencing on the southwest portion of the Site (the conservation zone) had accumulated sediment that needed removal. Respondent's site inspection on the morning of September 27, 2021 noted several problems, including stormwater runoff causing significant rilling, sediment fencing on the southwest portion of the site being in danger of being over-topped with mud and dirty

water, and sediment-laden water and mud collecting outside of the sediment fence. When Respondent failed to install or maintain erosion control measures included in the ESCP, and failed to ensure that the measures were sufficient to prevent discharge during a heavy rain event, Respondent failed to take reasonable care to avoid a foreseeable risk that it would discharge turbid stormwater from the Site and cause pollution of state waters.

"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 because DEQ has insufficient evidence on which to base a finding that Respondent received an economic benefit from the violation.

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 + 0 + 4 + 0)] + \0
 $= \$1,500 + [\$150 \times 4] + \$0$
 $= \$1,500 + \$600 + \$0$
 $= \$2,100$