



# 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 10, 2021

CERTIFIED MAIL: 7017 0530 0000 7760 2966

Adena Long, Director  
City of Portland, Bureau of Parks & Recreation  
1120 SW 5<sup>th</sup> Avenue, Suite 858  
Portland OR 97204

Re: Notice of Civil Penalty Assessment and Order  
Case No. LQ/CU-NWR-2020-197

***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 DEQ has issued you a civil penalty of \$458,266 for failing to comply with an Order on Consent (Consent Order), executed between the City of Portland and DEQ in October 2014. The Consent Order requires the City to complete permanent stormwater control construction, including paving, at the City's property located near N.W. Yeon Avenue and N.W. St. Helens Road (the Property) within five years of finalizing the Consent Order. As of the date of this Notice, the construction has not commenced.

DEQ is issuing this penalty because the City's continued non-compliance with the Consent Order may be adversely impacting public health and the environment. The Property drains stormwater through conveyances to the Portland Harbor Superfund reach of the Willamette River. Due to the City's failure to timely complete construction of the stormwater control system, a wetland developed on the Property in an area known to be contaminated with polychlorinated biphenyls (PCBs). The City's continued delay in completing permanent stormwater control features at the Property may be contributing PCB contamination to the Willamette River. Specifically, the City's failure to pave a portion of the Property may increase the risk because the pavement will act as a containment barrier preventing stormwater from contacting any residual soil contamination.

DEQ appreciates the City's effort to address the violation by initiating the development permit process, and to minimize the impacts of the violation by installing and maintaining temporary stormwater control features at the Property. DEQ considered these efforts when determining the amount of civil penalty. \$448,666 of the civil penalty represents the cost the City has avoided by failing to install the permanent stormwater control features since October, 2019. If the City complies with the Consent Order by

completing the construction requirements, DEQ will consider recalculating the costs as delayed rather than avoided and will reduce the civil penalty accordingly.

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 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,



Kieran O'Donnell, Manager  
Office of Compliance and Enforcement

Enclosures

cc: Alex Liverman, NWR, DEQ

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2 OF THE STATE OF OREGON

3 IN THE MATTER OF: ) NOTICE OF CIVIL PENALTY  
4 CITY OF PORTLAND, ) ASSESSMENT AND ORDER  
5 Respondent. ) CASE NO. LQ/CU-NWR-2020-19

6 I. AUTHORITY

7 DEQ issues this Notice of Civil Penalty Assessment and Order (Notice) pursuant to Oregon  
8 Revised Statutes (ORS) 468.100, ORS 468.126 through 468.140, ORS 465.900, ORS Chapter 183 and  
9 Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012, and 122.

10 II. FINDINGS OF FACT

11 1. Respondent is the owner of a property located near N.W. Yeon Avenue and N.W. St. Helens  
12 Road in Portland; specifically tax lots 100, 200 and 300 in Section 19, Township 1 North, Range 1 East  
13 (the Property).

14 2. In October 2014, Respondent entered into an Order on Consent, DEQ No. 14-02 (Consent  
15 Order) with DEQ to facilitate the productive reuse of the Property and protect public health and the  
16 environment. The Consent Order became effective as a final order on October 3, 2014.

17 3. Section 5.A of the Consent Order requires Respondent to complete permanent stormwater  
18 feature construction, including paving, at the Property within five years of the effective date of the  
19 Consent Order, October 3, 2019, regardless of any delays in site development.

20 4. As of the date of this Notice, Respondent has not installed permanent stormwater control  
21 features at the Property.

22 III. CONCLUSIONS

23 Respondent violated a final order of DEQ by failing to complete permanent stormwater controls  
24 within five years of entering into the Consent Order, in violation of Section 5.A of the Consent Order.  
25 Specifically, Respondent was required to install permanent stormwater control features, including  
26 paving, at the Property by no later than October 3, 2019. As of the date of this Notice, Respondent has  
27 not installed permanent stormwater control features. This is a Class I violation, according to OAR 340-  
012-0053(1)(a). Pursuant to ORS 465.900, DEQ assesses a \$458,266 civil penalty for this violation.

1 IV. ORDER TO PAY CIVIL PENALTY

2 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is  
3 hereby ORDERED TO pay a total civil penalty of \$458,266. The determination of the civil penalty is  
4 attached as Exhibit 1 and is incorporated as part of this Notice. If you do not file a request for hearing as  
5 set forth in Section V below, your check or money order must be made payable to "State Treasurer,  
6 State of Oregon" and sent to the DEQ, Business Office, 700 NE Multnomah Street, Suite 600,  
7 Portland, Oregon 97232.

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

9 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ  
10 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If  
11 you have affirmative defenses or wish to dispute allegations of fact in this Notice or attached exhibit,  
12 you must do so in your request, as factual matters not denied will be considered admitted, and failure to  
13 raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for information about requests  
14 for hearing.) You must send your request to: **DEQ, Office of Compliance and Enforcement, 700 NE**  
15 **Multnomah Street, Ste 600, Portland, Or 97232**, fax it to **503-229-5100** or email it to  
16 [DEQappeals@deq.state.or.us](mailto:DEQappeals@deq.state.or.us). An administrative law judge employed by the Office of Administrative  
17 Hearings will conduct the hearing, according to ORS Chapter 183, OAR Chapter 340, Division 011 and  
18 OAR 137-003-0501 to 0700. You have a right to be represented by an attorney at the hearing, however  
19 you are not required to be. If you are an individual, you may represent yourself. If you are a limited  
20 liability company, corporation, partnership, unincorporated association, trust or government body, you  
21 must be represented by an attorney or a duly authorized representative, set forth in OAR 137-003-0555.

22 Active duty Service members have a right to stay proceedings under the federal Service  
23 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-  
24 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed  
25 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military  
26 Department does not have a toll free telephone number.

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

7  
8 2 / 10 / 2021  
9 Date

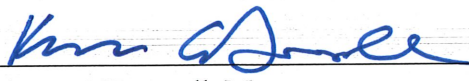
  
Kieran O'Donnell, Manager  
Office of Compliance and Enforcement

EXHIBIT 1

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

VIOLATION NO. 1 Failing to complete permanent stormwater control features within five years of entering into a Consent Order, in violation of the Consent Order.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0053(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 \$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)(P). Respondent violated an order issued under ORS Chapter 465.

"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) because Respondent has no prior significant actions in the same media as the current violation.

"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 is a separate occurrence. Respondent was required to install permanent stormwater control features on or before October 3, 2019, thus the violation has been on-going since that time.

"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. In December 2019, DEQ issued to Respondent a Warning Letter with Opportunity to Correct which informed Respondent of the need to install the permanent stormwater control features. Although the City was required to apply for a land use permit prior to beginning construction, this process was concluded in August 2020, yet the City did not apply for a site

development permit until December 2020. The City knew that it needed to take steps to complete the requirement under the Consent Order. When the City did not immediately apply for a site development permit upon receiving land use approval, it failed to take reasonable care to avoid the foreseeable risk of continuing to violate the Consent Order.

"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 correct the violation and to minimize the effects of the violation. Respondent has submitted a site development permit in order to move forward with construction of the permanent stormwater controls at the property. Additionally, Respondent is working to implement and maintain interim stormwater controls at the property.

"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 \$448,666. This is the amount Respondent gained by avoiding spending \$440,000 since October 2019 to design, construct and maintain approximately 23,000 square feet of pavement, a sediment manhole and a lined filtration basin stormwater treatment feature. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
= \$6,000 + [(0.1 x \$6,000) x (0 + 0 + 4 + 4 - 2)] + \$448,666  
= \$6,000 + (\$600 x 6) + \$448,666  
= \$6,000 + \$3,600 + \$448,666  
= \$458,266