



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 16, 2021

CERTIFIED MAIL: 7017 0530 0000 7760 3017

Fishhawk Lake Reserve and Community, LLC
c/o Bluestone and Hockley Realty, Inc., Registered Agent
9320 SW Barbur Blvd., Suite 300
Portland, OR 97219

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/NP-NWR-2019-244

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 Fishhawk Lake Reserve and Community, LLC (FLRC) a civil penalty of \$439,200 for violations of water quality law that occurred during its draining of Fishhawk Lake in August 2019. FLRC's draining of the lake caused a large fish kill of salmon and trout and significantly impaired water quality in Fishhawk Creek downstream of the dam.

Included in Section IV of the enclosed Notice of Civil Penalty Assessment and Order is an order requiring you to develop and implement a plan to minimize the ongoing adverse impacts operation of the dam has on water quality in Fishhawk Creek.

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 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: Daria Gneckow, Northwest Region, DEQ
Tiffany Yelton-Bram, Northwest Region, DEQ
Accounting, DEQ
Tim Smith, Oregon Department of Justice
Elizabeth Howard, Schwabe Williamson & Wyatt PC, 1211 SW 5th Ave, Ste 1900,
Portland OR 97204

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

| | | |
|-----------------------------------|---|-----------------------------|
| IN THE MATTER OF: |) | NOTICE OF CIVIL PENALTY |
| FISHHAWK LAKE RESERVE AND |) | ASSESSMENT AND ORDER |
| COMMUNITY, INC. an Oregon not for |) | CASE NO. WQ/NP-NWR-2019-244 |
| profit corporation, |) | |
| Respondent. |) | |

I. AUTHORITY

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

II. FINDINGS OF FACT

1. At all relevant times, Respondent owned and operated the dam that creates Fishhawk Lake, an anthropogenic lake created by an impoundment of Fishhawk Creek and located partially in Columbia and partially in Clatsop Counties near Birkenfeld, Oregon.

2. The dam includes an underdrain that allows Respondent to control the water level in the lake by carrying water from the lake downstream to Fishhawk Creek.

3. On or about August 12, 2019, Respondent fully opened the underdrain in order to drain the lake and facilitate repair of the underdrain.

4. Complete draining of the lake occurred sometime between August 12 and August 22, 2019.

5. By draining the lake, Respondent killed an estimated 30,391 fish in Fishhawk Lake and Fishhawk Creek, including 20,539 Coho parr, 4,047 Steelhead Trout, 5,346 Cutthroat Trout, and 459 trout of undetermined species.

6. The draining of the lake killed fish that were sucked through the underdrain to Fishhawk Creek by depleting dissolved oxygen in Fishhawk Creek.

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1 7. The draining of the lake also trapped fish in small pools of water in the lake bed where
2 they were killed by increased temperature and/or dissolved oxygen depletion caused by the draining of
3 the lake.

4 8. ORS 468B.005(5) states that "Pollution" or "water pollution" "means such alteration of
5 the physical, chemical or biological properties of any waters of the state, including change in
6 temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous,
7 solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself
8 or in connection with any other substance, create a public nuisance or which will or tends to render
9 such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic,
10 commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock,
11 wildlife, fish or other aquatic life or the habitat thereof."

12 9. Turbidity is caused by particles suspended or dissolved in water that scatter light making
13 the water appear cloudy or murky. Sediment particles are a common cause of turbidity in water bodies.

14 10. From or about August 12, 2019 through October 9, 2019, the opening of the underdrain
15 caused sediment-laden water to drain from Fishhawk Lake to Fishhawk Creek in amounts that had the
16 potential to impair the beneficial uses of Fishhawk Creek.

17 11. OAR 340-041-0036 states: "No more than a ten percent cumulative increase in natural
18 stream turbidities may be allowed, as measured relative to a control point immediately upstream of the
19 turbidity causing activity."

20 12. To determine increases in natural stream turbidity as result of the draining of sediment
21 laden water from Fishhawk Lake to Fishhawk Creek, samples were collected in Fishhawk Creek just
22 upstream of the lake. On August 22, 23, and 29, 2019, downstream samples were collected in
23 Fishhawk Creek downstream of the lake just below the dam. Respondent installed a series of three
24 turbidity curtains in Fishhawk Creek just below the dam on September 19, 2019, to mitigate turbidity in
25 Fishhawk Creek resulting from the draining of sediment laden water from the lake. Downstream
26 turbidity samples collected in Fishhawk Creek after September 19, 2019, were taken from Fishhawk
27 Creek below the turbidity curtains installed by Respondent.

13. The results of turbidity analysis of water samples are reported in Nephelometric Turbidity Units (NTUs).

14. The results of the turbidity sampling referred to in Paragraph 10 are as follows:

| Sampling Date | Upstream Results in NTUs | Downstream Results in NTUs | Percentage Increase in Turbidity |
|---------------|--------------------------|----------------------------|----------------------------------|
| 08-22-19 | 0.49 | 77 | 15,614% |
| 08-23-19 | 2.11 | 47.4 | 2,146% |
| 08-29-19 | 1.88 | 55.9 | 2,873% |
| 09-20-19 | 2.77 | 7.35 | 165% |
| 09-21-19 | 2.79 | 6.33 | 127% |
| 09-22-19 | 2.39 | 5.84 | 144% |
| 09-23-19 | 3.01 | 4.39 | 46% |
| 09-24-19 | 2.39 | 5.89 | 147% |
| 09-25-19 | 2.39 | 4.35 | 82% |
| 09-26-19 | 2.16 | 4.57 | 112% |
| 09-27-19 | 2.26 | 3.47 | 54% |
| 09-28-19 | 2.39 | 4.02 | 70% |
| 10-03-19 | 1.45 | 3.65 | 152% |
| 10-09-19 | 1.87 | 3.40 | 82% |

15. OAR 340-041-0007(11) states that “The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry may not be allowed.”

16. Sedimentation of streambeds degrades spawning and rearing habitat for salmonid fish species, including coho salmon.

1 4. Respondent violated ORS 468B.025(1)(b) by discharging a waste into waters of the state that
2 reduced the quality of such waters below a water quality standard established by the Environmental
3 Quality Commission. Specifically, as described in Section II, Paragraphs 13-16, above, Respondent
4 discharged sediment to Fishhawk Creek resulting in the creation of appreciable bottom deposits that are
5 deleterious to fish and other aquatic life in violation of the water quality standard established in OAR 340-
6 041-0007(11). This is a Class I violation pursuant to OAR 340-012-0055(1)(b). DEQ assesses a \$21,600
7 civil penalty for this violation.

8 IV. ORDER TO PAY CIVIL PENALTY AND COMPLY

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

11 1. Pay a total civil penalty of \$439,200. The determination of the civil penalties are attached
12 as Exhibit 1-5 and are incorporated as part of this Notice.

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

16 2. Within 6 months of this order becoming final. Respondent must submit to DEQ for
17 review a lake water quality management plan (WQMP) and 10 year schedule for achieving compliance
18 with water quality standards for temperature and dissolved oxygen within Fishhawk Lake and at a
19 designated compliance point downstream in Fishhawk Creek.

20 At a minimum the WQMP must include the following elements: 1) condition assessment
21 and analysis of existing water quality data; 2) goals and objectives, including discussion of applicable
22 water quality standards; 3) evaluation of activities that may impact beneficial uses, such as
23 maintenance dredging, dam maintenance, algaecide use, or any other activity that may have adverse
24 impacts on water quality; 4) proposed management strategies; 5) timeline for strategy implementation;
25 6) monitoring, evaluation, and reporting; 7) planned efforts to maintain management strategies over
26 time, including reasonable assurance of intention to comply and maintain adequate financial resources
27 for plan implementation; 8) citation of Respondent's legal or governance authorities for

1 implementation; 9) proposal to work with other subwatershed entities for holistic water quality and
2 aquatic habitat improvements.

3 3. Within 30 days of receiving DEQ comments on the WQMP, revise the plan consist with
4 DEQ's comments.

5 4. Upon receiving notice that DEQ has no more comments on the WQMP, implement the
6 plan.

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

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

10 2/16/2021
11 Date

10 Kieran O'Donnell
11 Kieran O'Donnell, Manager
12 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) 340-012-0155

VIOLATION NO. 1 Violating OAR 340-041-0007(10) by creating conditions that are deleterious to fish or other aquatic life.

CIVIL PENALTY FORMULA: Pursuant to OAR 340-012-0155(1)(a)(B), The formula for determining the amount of penalty for each violation is: $BP + [(1 \times BP) (P + H + O + C)] + EB$

"BP" is the base penalty, which is \$150,000 for a violation that was caused by reckless conduct, as defined in OAR 340-012-0030(20), and caused extensive damage to the environment, pursuant to OAR 340-012-0155(1)(a)(A)(ii). Based on prior communications, Respondent knew that DEQ and the Oregon Department of Fish and Wildlife had concerns that work on the dam could have adverse effects of fish and other aquatic life, and that these agencies had offered assistance in mitigating harm. Respondent nevertheless drained the lake without consulting on, or implementing any, measures to protect fish and aquatic life resulting in the death of an estimated 30,391. This evidences a conscious disregard by Respondent to a substantial and unjustifiable risk that fish would be harmed by its actions. The risk of harm to fish was a degree and nature that disregarding that risk constituted a gross deviation from the standard of care a reasonable person would observe in that situation.

"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.

"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 determining avoided compliance costs would require too much speculation on the part of DEQ to arrive at a reasonable estimate.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{C})] + \text{EB}$
= \$150,000 + [(0.1 x \$150,000) x (0 + 0 + 0 + 0)] + \$0
= \$150,000 + (\$15,000 x 0) + \$0
= \$150,000 + \$0 + \$0
= \$150,000

EXHIBIT 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 \$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)(D).

"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)(e) because DEQ is assessing separate penalties for multiple occurrences of the violation.

"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. DEQ advised Respondent on multiple occasions, including in person meetings on October 17, 2018 and July 10, 2019 and email communications that draining the lake and dam repair activities would adversely affect water quality yet Respondent took no measures to abate turbidity when it drained the lake and continued to discharge turbid lake water until discharges to the creek ceased.

"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 to arrive at a reasonable estimate of compliance costs avoided or delayed by Respondent.

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

Single violation calculation:

$$\begin{aligned} &= \$6,000 + [(0.1 \times \$6,000) \times (0 + 0 + 0 + 8 + 0)] \\ &= \$6,000 + (\$600 \times 8) \\ &= \$6,000 + \$4,800 \\ &= \$10,800 \end{aligned}$$

Pursuant to ORS 468.140(2), each day of violation constitutes a separate violation. DEQ assesses separate penalties for the violations that occurred on August 24-28, August 30-31 and September 1-13. Respondent's final civil penalty is calculated by multiplying the number of violations for which a penalty is assessed, 20, by the amount of penalty for a single violation, \$10,800, for a total penalty of \$216,000.

EXHIBIT 3

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

VIOLATION 3: Reducing the quality of state waters below a water quality standard established by the Environmental Quality Commission (turbidity standard August 22 and 29) in violation of ORS 468B.025(1)(b).

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 by 50 or more nephelometric turbidity units (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 \$12,000 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(i) and applicable pursuant to OAR 340-012-0140(2)(a)(D).

"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)(e) because DEQ is assessing separate penalties for each occurrence of the violation.

"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. DEQ advised Respondent on multiple occasions that draining the lake and dam repair activities would adversely affect water quality yet Respondent took no measures to abate turbidity when it drained the lake.

"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 to arrive at a reasonable estimate of compliance costs avoided or delayed by Respondent.

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

Single Penalty Calculation:

$$\begin{aligned} &= \$12,000 + [(0.1 \times \$12,000) \times (0 + 0 + 0 + 8 + 0)] \\ &= \$12,000 + (\$12,000 \times 8) \\ &= \$12,000 + \$9,600 \\ &= \$21,600 \end{aligned}$$

Pursuant to ORS 468.140(2), each day of violation constitutes a separate violation. DEQ assesses separate penalties for the two major magnitude occurrences of the violation (8/22 and 8/29). Respondent's final civil penalty is calculated by multiplying the number of violations for which a penalty is assessed, 2, by the amount of penalty for a single violation, \$21,600, for a total penalty of \$43,200.

EXHIBIT 4

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

- VIOLATION 4: Reducing the quality of state waters below a water quality standard established by the Environmental Quality Commission (August 23 turbidity standard violation) in violation of ORS 468B.025(1)(b).
- CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(b).
- MAGNITUDE: The initial magnitude of the violation is moderate pursuant to OAR 340-012-0135(2)(b)(B)(v) because Respondent increased turbidity by more than 20 but less than 50 NTU over background. The magnitude is increased to major pursuant to OAR 340-012-0135(2)(c)(B) because Respondent increased turbidity in a stream in which salmonids may be rearing.
- 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)(D).
- "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 the violation occurred on a single occasion.
- "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. DEQ advised Respondent on multiple occasions that draining the lake and dam repair activities would adversely affect water quality yet Respondent took no measures to abate turbidity when it drained the lake.
- "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 to arrive at a reasonable estimate of compliance costs avoided or delayed by Respondent.

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

$$\begin{aligned} &= \$6,000 + [(0.1 \times \$6,000) \times (0 + 0 + 0 + 8 + 0)] + 0 \\ &= \$6,000 + (\$600 \times 8) + 0 \\ &= \$6,000 + \$2,400 + 0 \\ &= \$8,400 \end{aligned}$$

EXHIBIT 5

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

- VIOLATION 5: Reducing the quality of state waters below a water quality standard established by the Environmental Quality Commission (creating appreciable bottom deposits) in violation of ORS 468B.025(1)(b).
- 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 340-012-0130(3) as there is no selected magnitude specified in OAR 340-012-0135 applicable to this violation and DEQ finds that the violation had a significant adverse impact on human health or the environment. Respondent increased sedimentation in a stream where salmonids may have been spawning and rearing. The sedimentation also adversely affected macroinvertebrate communities.
- 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 \$12,000 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(i) and applicable pursuant to OAR 340-012-0140(2)(a)(D).
- "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 the violation occurred on a single occasion.
- "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. DEQ advised Respondent on multiple occasions that draining the lake and dam repair activities would adversely affect water quality yet Respondent took no measures to abate turbidity when it drained the lake.
- "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 to arrive at a reasonable estimate of compliance costs avoided or delayed by Respondent.

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

$$\begin{aligned} &= \$12,000 + [(0.1 \times \$12,000) \times (0 + 0 + 0 + 8 + 0)] + 0 \\ &= \$12,000 + (\$12,000 \times 8) + 0 \\ &= \$12,000 + \$9,600 + 0 \\ &= \$21,600 \end{aligned}$$