



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
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TTY 711

February 24, 2021

CERTIFIED MAIL: 7017 0530 0000 7760 2744

Conners I Limited Partnership
David Brandt, Registered Agent
405 S.W. 6th Street
Redmond OR 97756

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/SW-ER-2020-209

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 \$6,117 for failing to comply with the National Pollutant Discharge Elimination System (NPDES) 1200-C construction stormwater general permit (the Permit) covering your construction site located at the northwest corner of Tucson Way and Conners Avenue in Bend, Oregon. Specifically, you failed to implement and update your Erosion and Sediment Control Plan (ESCP), failed to implement the Permit's required control measures, and failed to conduct visual monitoring.

DEQ issued this penalty because the permit requires that you select, design, install, implement and maintain control measures to ensure that you minimize the potential for erosion of soil and the discharge of significant amounts of sediment. These control measures must be incorporated into the ESCP that reflects current activities at the property. You are also required to perform adequate visually monitoring, which you failed to do for nearly six months in 2020, to ensure the control measures are effective. Without effective control measures, you are unable to adequately minimize erosion and the discharge of soil from your construction activities.

DEQ appreciates your efforts to correct and to minimize the impacts of the violations by revising your ESCP and implementing the measures in that revised plan. 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.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: Michael Kennedy, NWR, DEQ

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2 OF THE STATE OF OREGON

3 IN THE MATTER OF:) NOTICE OF CIVIL PENALTY
4 CONNERS I LIMITED PARTNERSHIP,) ASSESSMENT AND ORDER
Respondent.) CASE NO. WQ/SW-ER-2020-209

5 I. AUTHORITY

6 DEQ issues this Notice of Civil Penalty Assessment and Order (Notice) pursuant to Oregon
7 Revised Statutes (ORS) 468.100, ORS 468.126 through 468.140, ORS Chapters 183 and 468B, and
8 Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012, and 045.

9 II. FINDINGS OF FACT

10 1. On May 5, 2020, DEQ received an application for coverage under the National Pollutant
11 Discharge Elimination System Stormwater Discharge General Permit 1200-C, effective December 15,
12 2015 (the Permit) from Respondent for tax lot 2101, located at the northwest corner of Tucson Way and
13 Connors Avenue in Bend, Oregon, consisting of approximately 1.48 acres (the Site).

14 2. Since on or about May 2020, Respondent has engaged in construction activities including
15 clearing, grading, excavating, and stockpiling at the Site.

16 3. On July 20, 2020, Respondent submitted an erosion and sediment control plan (ESCP).

17 4. The ESCP requires Respondent to install the following best managements practices (BMPs),
18 in accordance with the details provided in the ESCP, prior to beginning construction:

19 a. Silt fencing surrounding the entire Site installed to meet the specifications in drawing E-
20 1 of the ESCP;

21 b. Inlet protection installed to meet the specifications in drawing E-2B of the ESCP in two
22 catch basins: one located at the corner of Tucson Way and Connors Avenue and the other located on
23 Tucson Way;

24 c. A gravel construction entrance from Connors Avenue installed to meet the specifications
25 in drawing E-8 of the ESCP; and

26 d. A lined concrete truck washout pit installed to meet the specifications in drawing E-7 of
27 the ESCP.

1 5. On August 10, 2020, DEQ assigned Respondent coverage under the Permit.

2 6. On November 4, 2020, DEQ conducted an inspection at the Site. At the time of the
3 inspection:

4 a. There was no sediment fencing installed along NE Tucson Avenue;

5 b. Sediment fencing installed along the north property line was installed backwards and not
6 secured or trenched into the ground, as set forth in drawing E-1 of the ESCP;

7 c. Gravel at the construction entrance was not installed as required by drawing E-8 of the
8 ESCP. Specifically the gravel was smaller than 3 to 6 inches in size, not a minimum of 8 inches deep,
9 and not installed over a geotextile liner;

10 d. Respondent used an unlined pit as a concrete truck washout location at the Site;

11 e. There was no inlet protection installed in the catch basin at the corner of Tucson Way
12 and Conners Avenue;

13 f. There were stockpiles of soil stored at the Site. There was no material on the Site for
14 covering the stockpiles nor were sediment fencing or other BMPs installed around the stockpiles;

15 g. Respondent had cleared all of the Site and a portion of a lot immediately west of the Site
16 (taxlot 2108). There were no BMPs installed on the bare soil on either the Site or taxlot 2108;

17 h. Respondent was storing uncovered construction materials on the taxlot 2108;

18 i. Respondent was storing an uncovered dumpster at the Site;

19 j. There was sediment and visual staining on Conners Avenue, leading from the Site to the
20 drywell catch basin at the corner of Tucson Way and Conners Avenue; and

21 k. Respondent was unable to provide DEQ with any reports of visual monitoring as
22 required by Schedule B, condition 1 of the Permit from the time it began construction through the date
23 of DEQ's inspection.

24 7. On December 29, 2020, DEQ received a revised ESCP that incorporates the adjacent tax lot.

25 8. On January 4, 2021, DEQ received documentation that Respondent had implemented all of
26 the BMPs set forth in its revised ESCP and the Permit.

27 9. Rainfall occurred at the Property on October 11 and 14, 2020.

1 III. CONCLUSIONS

2 1. Respondent violated ORS 468B.025(2) and Schedule A, condition 8.a of the Permit by failing
3 to implement the control measures or practices contained in its ESCP, as alleged in Section II,
4 paragraphs 4 and 6.a through 6.e above. Specifically, Respondent failed to install sediment fencing as
5 specified in drawing E-1 of the ESCP, a gravel construction entrance as specified in drawing E-8 of the
6 ESCP, a concrete truck washout as specified in drawing E-7 of the ESCP, and inlet protection as
7 specified in drawing E-2B of the ESCP. These are Class I violations according to OAR 340-012-
8 0055(1)(r). DEQ hereby assesses a \$2,911 civil penalty for these violations.

9 2. Respondent violated ORS 468B.025(2) and Schedule A, conditions 7.a.iii, 7.e.i, and 7.e.ii of
10 the Permit by failing to implement the required control measures, as alleged in Section II, paragraphs 6.f
11 through 6.i above. Specifically, Respondent failed install mulches, compost, or erosion control blankets or
12 mats to minimize exposed inactive areas of the Site, in violation of Schedule A, condition 7.a.iii of the
13 Permit. Respondent had an uncovered waste container and construction supplies stored on the Site and the
14 adjacent lot, in violation of Schedule A, condition 7.e.i of the Permit. Finally, Respondent had not taken
15 any measures to control stockpile erosion such as covering the stockpiles or installing sediment fences
16 around stockpiles, in violation of Schedule A, condition 7.e.ii of the Permit. These are Class II violations
17 according to OAR 340-012-0053(2). DEQ hereby assesses a \$370 civil penalty for these violations.

18 3. Respondent violated ORS 468B.025(2) and Schedule B, condition 1 of the Permit by failing to
19 visually monitor the Site, as alleged in Section II, paragraphs 6.k and 9 above. Specifically, Respondent
20 failed to visually monitor the Site on October 11 and 14, 2020, when stormwater runoff was occurring and
21 at least once every fourteen calendar days, regardless of whether stormwater runoff was occurring. These
22 are Class I violations according to OAR 340-012-0055(1)(o). DEQ hereby assesses a \$2,836 civil penalty
23 for these violations.

24 4. Respondent violated ORS 468B.025(2) and Schedule A, condition 12.a.1 of the Permit by
25 failing to keep its ESCP up to date. Specifically, Respondent failed to update its ESCP to incorporate the
26 construction activities on taxlot 2108. This is a Class II violation according to OAR 340-012-0055(2)(b).
27 DEQ did not assess a civil penalty for this violation.

1 5. Respondent violated ORS 468B.025(2) and Schedule A, condition 13.a of the Permit by failing
2 to take corrective actions within 24 hours of when significant amounts of sediment are visible. Per
3 Schedule A, condition A.8.b of the Permit, significant amounts of sediment includes sediment from the
4 construction site being deposited on any property outside of the construction activity covered by the
5 Permit. As alleged in Section II, paragraph 6.j, sediment was deposited onto Connors Avenue.
6 Respondent failed to take corrective action within 24 hours as rainfall had not occurred at the Property
7 since October 14, 2020. This is a Class II violation according to OAR 340-012-0053(2). DEQ did not
8 assess a civil penalty for this violation.

9 IV. ORDER TO PAY CIVIL PENALTY

10 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is
11 hereby ORDERED to pay a total civil penalty of \$6,117. The determination of the civil penalties are
12 attached as Exhibits 1 through 3, and are incorporated as part of this Notice. If you do not file a request for
13 hearing as set forth in Section V below, your check or money order must be made payable to "**State
14 Treasurer, State of Oregon**" and sent to the **DEQ, Business Office, 700 NE Multnomah Street,
15 Suite 600, Portland, Oregon 97232.**

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

17 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ
18 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If
19 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached
20 exhibits, you must do so in your request for hearing, as factual matters not denied will be considered
21 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for
22 further information about requests for hearing.) You must send your request to: **DEQ, Office of
23 Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax
24 it to **503-229-5100** or email it to DEQappeals@deq.state.or.us. An administrative law judge
25 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS
26 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be
27 represented by an attorney at the hearing, but you are not required to be. If you are a corporation,

1 partnership, limited liability company, unincorporated association, trust or government body, you must
2 be represented by an attorney or a duly authorized representative, as set forth in OAR 137-003-0555.

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

8 ////

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

15
16
17 2/24/2021
18 Date


17 
18 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 implement the control measures or practices contained in its ESCP, in violation of ORS 468B.025(2) and Schedule A, condition 8.a of the Permit.

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). Respondent has coverage under the Permit for a construction project that is more than one but less than five 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 is a separate violation. According to Respondent's Permit application, it began construction in May 2020 and it was required to install of the BMPs in its ESCP prior to beginning construction. The BMPs were not installed during DEQ's inspection in November 2020 and DEQ has not received documentation showing that the BMPs have been installed as of the date of the Notice. Thus the violation has been on-going since May 2020.

"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. Reckless means Respondent consciously disregarded a substantial and unjustifiable risk that the result would occur or that the circumstances existed. Respondent submitted the ESCP setting forth what BMPs it

knew it was required to implement under its Permit coverage. Respondent failed to implement any of the BMPs set forth in its ESCP. Failing to implement any of the BMPs constituted a gross deviation from the standard of care another person would have observed in the same situation.

"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 and took reasonable affirmative efforts to minimize the effects of the violation. Respondent submitted documentation to DEQ showing that it has implemented the BMPs required under its ESCP.

"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 \$61. This is the amount Respondent gained by delaying spending \$2,867 to install a construction entrance and sediment fencing per the specifications in its ESCP. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

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

$$\begin{aligned} &= \$1,500 + [(0.1 \times \$1,500) \times (0 + 0 + 4 + 8 - 3)] + \$61 \\ &= \$1,500 + (\$150 \times 9) + \$61 \\ &= \$1,500 + \$1,350 + \$61 \\ &= \$2,911 \end{aligned}$$

EXHIBIT 2

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

VIOLATION NO. 2 Failing to implement the control measures set forth in Schedule A, condition 7, in violation of ORS 468B.025(2) and Schedule A, condition 7 of the Permit.

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0053(2).

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: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"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 \$370. This is the amount Respondent gained by delaying spending, until January 4, 2021, \$29,780 to install straw bales and wattles to meet the requirements in Schedule A, condition 7. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

DEQ is choosing to assess a penalty for the value of the "EB" factor only.

EXHIBIT 3

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

VIOLATION NO. 3 Failing to visually monitor the areas set forth in Schedule B, condition 1.a of the Permit, in violation of ORS 468B.025(2) and Schedule B, condition 1 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 \$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). Respondent has coverage under the Permit for a construction project that is more than one but less than five 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 3 according to OAR 340-012-0145(4)(c) because there were from seven to 28 occurrences of the violation. Respondent failed to visually monitor, as required under Schedule B, condition 1 of the Permit, on nine separate occasions – specifically on October 11th and 14th, 2020 and otherwise every 14 days from May when construction began through the date of DEQ's inspection in November 2020.

"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. Respondent applied for and obtained coverage under the Permit which required Respondent to visually monitor the areas set forth in Schedule B, condition 1.a of the Permit. Respondent reasonably should have known of the requirement.

"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. Respondent cannot now conduct monitoring which was required in the past.

"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 \$586. This is the amount Respondent gained by avoiding spending \$900 to visually monitor on nine separate occasions. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
 $= \$1,500 + [(0.1 \times \$1,500) \times (0 + 0 + 3 + 2 + 0)] + \586
 $= \$1,500 + (\$150 \times 5) + \$586$
 $= \$1,500 + \$750 + \$586$
 $= \$2,836$