



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 24, 2021

CERTIFIED MAIL: 7017 0530 0000 7760 3062

Oregon Department of Transportation
c/o Mr. Kris Strickler, Director
355 Capitol St, NE MS 11
Salem, OR 97301

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/401-NWR-2020-141

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

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued you a civil penalty of \$2,550 for violating conditions of your 401 Certification related to in-water work on the U.S. Highway 101 bridge replacement over Farmer Creek, in Tillamook County.

DEQ issued this penalty because your 401 Certification requires you to prevent soil and turbid discharges from entering public waters during construction except as specifically authorized for in-water work. Farmer Creek supports aquatic life and is designated as habitat for threatened Oregon Coast coho salmon. The introduction of sediment to surface waters can harm aquatic life and impact beneficial uses of those waters. Unless and until transferred, the 401 Certification applies to you, and you are held responsible for the activities of your contractors and subcontractors. Your contractor or subcontractor used improper materials to fill sand bags during construction which then, on July 21, 2020, ruptured and released sediment to Farmer Creek, causing a visible increase in turbidity.

DEQ appreciates your efforts to address the violation by immediately stopping work, reporting the incident, and working with your contractors to remove the dirt from the sandbags and replace them with sand. 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 Anzie St. Clair at 971-808-7368 or toll free in Oregon at 800-452-4011, extension 5422.

Sincerely,



Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

cc: Haley Teach, DEQ, 401 Program
Steve Mrazik, DEQ
Accounting, DEQ

Ron Francis, Oregon Department of Transportation, Region 2 Technical Center, 445 Airport Rd.,
Building B, Salem, OR 97301, and Ronald.L.Francis@odot.state.or.us

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

3 IN THE MATTER OF:)
4 OREGON DEPARTMENT OF) NOTICE OF CIVIL PENALTY
5 TRANSPORTATION, an agency of the) ASSESSMENT AND ORDER
6 State of Oregon,) CASE NO. WQ/401-NWR-2020-141
7 Respondent.)

8 I. AUTHORITY

9 The Department of Environmental Quality (DEQ) issues this Notice of Civil Penalty Assessment
10 and Order (Notice) pursuant to Oregon Revised Statutes (ORS) 468.100, ORS 468.126 through 468.140,
11 ORS Chapter 183 and 468B, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012,
12 041, 045, and 048.

13 II. FINDINGS OF FACT

14 1. Respondent is a public agency of the State of Oregon, created under ORS 184.615.

15 2. On March 8, 2019, DEQ issued Respondent a Clean Water Act Section 401 Water Quality
16 Certification (the 401 Certification) in connection with Respondent's Application for a Clean Water
17 Action Section 404 Permit to replace a bridge over Farmers Creek located at U.S. Highway 101
18 milepost 82.91 to 82.93 (the Project), issued by the United States Army Corps of Engineers. The
19 Project application described a temporary water management plan to bypass creek water around the site
20 during construction work in the creek bed. The temporary water management plan, as a component of
21 Respondent's Project description and erosion and sediment control measures, stated that a sandbag
22 barrier would be constructed with each bag containing 30 pounds of dry sand.

23 3. The 401 Certification authorizes Respondent to perform the work described in its Project
24 application provided Respondent adheres to certain conditions to assure Respondent's compliance with
25 state water quality standards, promulgated in OAR Chapter 340, Division 41.

26 4. Under the 401 Certification, Respondent is responsible for the work of its contractors and
27 subcontractors, and the work that any other entity performs related to the 401 Certification (401 Cert.,
condition 1).

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1 5. Respondent hired Bent LLC as its general contractor for the Project. Bent LLC
2 subcontracted to Chris Dials LLC, an entity that was administratively dissolved.

3 6. The 401 Certification imposes the following conditions on Respondent and its Project:

- 4 a. "Work authorized by this 401 WQC is limited to the work described in the Application
5 or Pre-Construction Notification submitted to the USACE and additional application
6 materials (hereafter "the permit application materials"), unless otherwise authorized by
7 DEQ. If the project is operated in a manner not consistent with the project description
8 contained in the permit application materials, the Applicant is not in compliance with
9 this 401 WQC and may be subject to enforcement." (401 Certification, condition 2.)
- 10 b. "During construction, erosion and sediment control measures must be implemented to
11 prevent or control movement of sediment, soil or pollutants into waters of the state.
12 The Applicant is required to develop and implement an effective erosion and sediment
13 control plan." (401 Certification, condition 8.)
- 14 c. "The Applicant . . . must store construction materials, in areas that will not impact
15 water quality either directly or due to potential discharges." (401 Certification,
16 condition 9.)

17 7. On or before July 21, 2020, while performing work on the Project, Respondent's contractor
18 or subcontractor filled sand bags with soil and sediment, instead of clean sand. The sand bags were
19 placed in Farmer Creek to create a barrier to isolate an in-water work area.

20 8. On July 21, 2020, a sand bag ruptured and discharged soil and sediment to Farmer Creek.

21 9. The discharge caused a visible turbidity plume extending approximately 2,000 feet
22 downstream.

23 10. The Project application did not describe the discharges of soil and sediment from sand bags
24 to Farmer Creek.

25 11. On July 21, 2020, Respondent reported the discharge to DEQ and stopped work for the day.

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1 III. CONCLUSIONS

2 1. On July 21, 2020, as described in Section II above, Respondent violated conditions 2, 8, and
3 9 of the 401 Certification by operating the Project inconsistent with the Project description, by failing
4 to implement the erosion and sediment control plan, and by failing to prevent construction materials
5 from entering and impacting the water quality of Farmer Creek. Specifically, Respondent violated the
6 401 Certification where Respondent's contractor or subcontractor filled sandbags with soil and
7 sediment, contrary to the temporary water management plan, and where the sandbag filled with
8 improper materials ruptured during construction and entered Farmer Creek, inconsistent with the
9 Project description and impacting water quality. This is a Class I violation according to OAR 340-012-
10 0053(1)(a). DEQ hereby assesses a \$2,550 civil penalty for this violation.

11 IV. ORDER TO PAY CIVIL PENALTY

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

14 1. Pay a total civil penalty of \$2,550. The determination of the civil penalty is attached as Exhibit
15 1 and is incorporated as part of this Notice.

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

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

20 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ
21 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If
22 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached
23 exhibit, you must do so in your request for hearing, as factual matters not denied will be considered
24 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for
25 further information about requests for hearing.) You must send your request to: **DEQ, Office of**
26 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax
27 it to **503-229-5100** or email it to DEQappeals@deq.state.or.us. An administrative law judge

1 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS
2 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be
3 represented by an attorney at the hearing, however you are not required to be. If you are an individual,
4 you may represent yourself. If you are a corporation, partnership, limited liability company,
5 unincorporated association, trust or government body, you must be represented by an attorney or a duly
6 authorized representative, as set forth in OAR 137-003-0555.

7 Active duty Service members have a right to stay proceedings under the federal Service
8 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-
9 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed
10 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military
11 Department does not have a toll free telephone number.

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

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21 2/24/2021
22 Date


21 
22 Kieran O'Donnell, Manager
23 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) 340-012-0045

- VIOLATION NO. 1 Violating the 401 Certification by operating the Project inconsistent with the Project description, by failing to implement the erosion and sediment control plan, by failing to prevent construction materials from impacting water quality.
- CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0053(1)(a) because the 401 Certification is a department order pursuant to ORS 468.140(3)(b)(B).
- 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) because Respondent violated the 401 Certification and the Project is a Tier 1 dredge and fill project.
- "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 an initial value of 46 according to OAR 340-012-0145(2)(a)(C), because Respondent has three Class I violations in case no. WQ/M-ER-2016-144, issued on October 10, 2016, at least 37 Class I violation in case no. WQ/D-WR-12-039, and five Class I violations in case no. WQ/SW-NWR-11-068. According to OAR 340-012-0145(2)(b), this amount is reduced to 10 because the value of P will not exceed 10. According to OAR 340-012-0145(2)(d)(A)(i), this amount is further reduced by 2 because all the formal enforcement actions in which prior significant actions were cited were issued more than three years before the date the current violation occurred. The final P value is 8.
- "H" is Respondent's history of correcting prior significant actions, and receives a value of 0 according to OAR 340-012-0145(3)(c) because there is insufficient information on which to base a finding under paragraphs (3)(a) or (b).
- "O" is whether the violation was repeated or ongoing, and receives a value of 0 according to OAR 340-012-0145(4)(a) because there was only one occurrence of the violation. Each day

of violation is a separate occurrence. On July 21, 2020, Respondent violated one or more conditions of its 401 Certification as described in the Notice.

"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 received a copy of its 401 Certification and reasonably should have known of the requirement to follow its Project description and plan documents, including its erosion and sediment control plan, and to prevent construction materials from impacting water quality.

"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 took reasonable affirmative efforts to minimize the effects of the violation. Respondent stopped work on the same day and reported the incident to DEQ. On August 20, 2020, Respondent submitted documentation to DEQ that the sandbags had been refilled with sand. Respondent submitted turbidity monitoring reports for August and September to DEQ, showing there were no additional high turbidity events.

"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 de minimis pursuant to OAR 340-012-0150(4). The amount Respondent may have gained from its contractor or subcontractor delaying filling sandbags with sand is less than the amount Respondent incurred responding to the high turbidity.

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

$$\begin{aligned} &= \$1,500 + [(0.1 \times \$1,500) \times (8 + 0 + 0 + 2 + -3)] + \$0 \\ &= \$1,500 + (\$150 \times 7) + \$0 \\ &= \$1,500 + \$1,050 + \$0 \\ &= \$2,550 \end{aligned}$$