



# 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

March 12, 2021

CERTIFIED MAIL No. 7017 0530 0000 7760 2928

K & E Excavating, Inc.  
c/o Kerry D. Kuenzi, Registered Agent  
3871 Langley St. SE  
Salem, OR 97317

Re: Notice of Civil Penalty Assessment and Order  
No. WQ/P-ER-2021-004

***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 <http://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 \$8,400 for discharging wastes into waters of the state without holding a permit from DEQ, in violation of ORS 468B.050(1). On December 2, 2019, you discharged approximately 2,000 gallons of turbid wastewater from High Bar Mine into the Burnt River. DEQ also cited you, without penalty, for failing to immediately report the discharge to DEQ and failing to conduct required monitoring of the wastewater treatment ponds on a total of 84 days during 2020.

DEQ issued this penalty because discharging wastes into waters of the state without a discharge permit is a serious violation of Oregon environmental law. Turbidity is a pollutant that can harm aquatic life and impact beneficial uses of the river. The monitoring requirements in the Permit are intended to prevent unpermitted discharges, and the reporting requirements are intended to ensure that DEQ and local authorities are promptly informed of any incidents that could impact human health or the environment.

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)

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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 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: Justin Sterger, Bend Office, DEQ  
Accounting, DEQ  
John Koestler, WQ, DEQ

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2 OF THE STATE OF OREGON

3 IN THE MATTER OF: ) NOTICE OF CIVIL PENALTY  
4 K & E EXCAVATING, INC., ) ASSESSMENT AND ORDER  
5 an Oregon corporation, )  
6 Respondent. ) CASE NO. WQ/P-ER-2021-004

7 I. AUTHORITY

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

12 II. FINDINGS OF FACT

13 1. Respondent owns and operates a placer mining operation called “High Bar Mine” (the  
14 Facility) located on Pine Creek Road, approximately six miles northeast of Hereford, Baker County,  
15 Oregon.

16 2. On or about April 1, 2020, DEQ transferred coverage under Water Pollution Control  
17 Facilities (WPCF) Permit No. 103028 (the Permit) to Respondent.

18 3. The Permit allows Respondent to construct, install, modify, or operate a wastewater  
19 collection, treatment, control and disposal system in conformance with all the requirements, limitations,  
20 and conditions in the Permit. The Permit prohibits any discharge to waters of the state.

21 4. On or about December 2, 2020, one of the wastewater treatment ponds at the Facility  
22 overflowed, causing the discharge of approximately 2,000 gallons of turbid wastewater.

23 5. The wastewater was industrial wastewater generated from Respondent’s mining operations.

24 6. The wastewater flowed into the Burnt River.

25 7. Respondent does not have a waste discharge permit from DEQ that allows it to discharge  
26 into waters of the state.

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1 8. Schedule D.4.b of the Permit requires Respondent to immediately notify DEQ in the event  
2 of any malfunction of the stormwater or wastewater system. Additionally, Schedule F.D.4 requires  
3 Respondent to report any noncompliance that may endanger health or the environment to DEQ within  
4 24 hours of becoming aware of the circumstances.

5 9. On December 3, 2020, Baker County notified DEQ about the discharge. On the same day,  
6 DEQ left a voicemail message for Respondent regarding the discharge.

7 10. On December 4, 2020, Respondent reported the discharge to the Oregon Emergency  
8 Response System and submitted a spill report to DEQ.

9 11. Schedule B.1 of the Permit requires Respondent to monitor the operation and efficiency of  
10 all its treatment and disposal facilities. Specifically, Respondent must monitor following items or  
11 parameters daily when the treatment ponds contain water:

- 12 a. inspect nearby surface water for turbidity seepage;
- 13 b. inspect dikes and containment system for each pond; and
- 14 c. measure dike freeboard for each pond.

15 12. Respondent did not conduct monitoring for the three parameters or items described in  
16 Section II, Paragraph 11 above on the following dates during 2020 when the treatment ponds contained  
17 water: April 26; May 2, 3, 10, 17-31; June 1, 2, 6, 7, 12-14, 20, 21, 26-30; July 1-7, 10-12, 18, 19, 25,  
18 26; August 1, 2, 8, 9, 16, 23, 30; September 4-7, 12, 13, 21, 26, 27; October 3, 4, 11, 17, 18, 24, 25; and  
19 November 1, 6, 8, 12-15, 21, 22, 25-29.

### 20 III. CONCLUSIONS

21 1. On or about December 2, 2020, Respondent violated ORS 468B.050(1)(a) by discharging  
22 wastes into waters of the state from an industrial activity without holding a permit from DEQ, as described  
23 in Section II, Paragraphs 1-7 above. Specifically, Respondent discharged approximately 2,200 gallons of  
24 turbid wastewater from its treatment ponds to the Burnt River. The Burnt River is a “water of the state,” as  
25 defined by ORS 468B.005(10). According to OAR 340-012-0055(1)(c), this is a Class I violation. DEQ  
26 hereby assesses an \$8,400 civil penalty for this violation.

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1 2. On or about December 2, 2020, Respondent violated Schedule D.4.b of the Permit and ORS  
2 468B.025(2) by failing to immediately report to DEQ the discharge of 2,200 gallons of turbid wastewater  
3 from its treatment ponds to the Burnt River, as described in Section II, Paragraphs 8-10 above. The  
4 discharge occurred on December 2, 2020, and Respondent waited a full two days, until December 4, 2020,  
5 to report the discharge to DEQ. According to OAR 340-012-0055(2)(b), this is a Class II violation. DEQ  
6 has not assessed a civil penalty for this violation.

7 3. Respondent violated Schedule B.1 of the Permit and ORS 468B.025(2) by failing to conduct  
8 monitoring on 84 occasions, as described in Section II, Paragraphs 11 and 12 above. According to OAR  
9 340-012-0055(1)(o), these are Class I violations. DEQ has not assessed a civil penalty for these violations.

#### 10 IV. ORDER TO PAY CIVIL PENALTY

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

13 Pay a civil penalty of \$8,400. The determination of the civil penalty is attached as Exhibit No. 1  
14 and incorporated as part of this Notice.

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

#### 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. You  
21 must ensure that DEQ receives the request for hearing **within 20 calendar days** from the date you  
22 receive this Notice. If you have any affirmative defenses or wish to dispute any allegations of fact in  
23 this Notice or attached exhibit, you must include them in your request for hearing, as factual matters  
24 not denied will be considered admitted, and failure to raise a defense will be a waiver of the defense.  
25 (See OAR 340-011-0530 for further information about requests for hearing.) You must send the request  
26 for hearing to: **DEQ, Office of Compliance and Enforcement - Appeals, either via mail to 700 NE**  
27 **Multnomah St., Suite 600, Portland, Oregon 97232**, or via e-mail to **DEQappeals@deq.state.or.us**,


1 or via fax to **503-229-5100**. An administrative law judge employed by the Office of Administrative  
2 Hearings will conduct the hearing, according to ORS Chapter 183, OAR Chapter 340, Division 011 and  
3 OAR 137-003-0501 to 0700. You have a right to be represented by an attorney at the hearing, or you  
4 may represent yourself unless you are a corporation, agency or association.

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

10 If you fail to file a request for hearing in writing within 20 calendar days of receipt of the  
11 Notice, the Notice will become a final order by default without further action by DEQ, as per OAR  
12 340-011-0535(1). If you do request a hearing but later withdraw your request, fail to attend the hearing  
13 or notify DEQ that you will not be attending the hearing, DEQ will issue a final order by default  
14 pursuant to OAR 340-011-0535(3). DEQ designates the relevant portions of its files, including  
15 information submitted by you, as the record for purposes of proving a prima facie case.

16  
17  
18 3/12/2021

19 Date

17  
18 

19 Kieran O'Donnell, Manager  
20 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: Failing to timely submit a Tier II report in violation of Schedule A, Condition 11.f of NPDES Permit No. 1200-Z and ORS 468B.025(2).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0055(2)(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 \$2,000 for a Class II, moderate magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(B)(ii) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(iii), because Respondent has coverage under an NPDES general permit.

"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. Respondent was required to submit the Tier II report on September 1, 2020, but has not submitted it as of the date of this Notice, which is a duration of more than 28 days. Each day of violation is a separate occurrence.

"M" is the mental state of the Respondent and receives a value of 8 according to OAR 340-012-0145(5)(d), because Respondent failed to act intentionally with actual knowledge of the requirement. Respondent holds an NPDES 1200-Z Permit, which specifically requires that it submit a Tier II report if the second year geometric mean exceeds benchmarks. On September 19, 2019, BES sent Respondent a letter informing it of the geometric mean exceedances and informing it of the requirement to submit a Tier II report by December 31 of that year. Respondent subsequently requested, and was granted, three separate extensions of the deadline to submit the Tier II report. Respondent failed to submit the Tier II report by

the final deadline of September 1, 2020. Additionally, on October 22, 2020 BES issued a Warning Letter with Opportunity to Correct, but Respondent did not submit a Tier II report within 30 days as requested. When Respondent failed to submit the Tier II report as required under the Permit and according to its agreement with BES, it had actual knowledge of the requirement.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of 2 according to OAR 340-012-0145(6)(g), because Respondent did not address the violation as described in paragraphs (6)(a) through (6)(e) and the facts do not support a finding under paragraph (6)(f).

"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:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
 $= \$2,000 + [(0.1 \times \$2,000) \times (0 + 0 + 4 + 8 + 2)] + \$0$   
 $= \$2,000 + [\$200 \times 14] + \$0$   
 $= \$2,000 + \$2,800 + \$0$   
 $= \$4,800$