



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

March 2, 2022

CERTIFIED MAIL: 7018 1830 0001 5906 3381

Airpark Development LLC
c/o Weston Investment Co. LLC, Registered Agent
101 SW Main St. Suite 1100
Portland, OR 97204

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/401-NWR-2021-120

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 \$8,000 for failing to comply with the 401 Water Quality Certification (WQC) issued for the "PCC Access Road" project in Scappoose, Oregon. Specifically, you have failed to implement post-construction remedial planting of native species.

DEQ issued this penalty because the failure to comply with the 401 WQC by failing to implement post-construction remedial plantings may adversely impact water quality. DEQ requires post-construction remedial planting to reduce turbid runoff to waters of the state and provide important habitat.

Despite DEQ sending you a Warning Letter with Opportunity to Correct in August 2020 and a Pre-Enforcement Notice in July 2021, you have not corrected this violation. Included in Section IV of the enclosed Notice is an order requiring you to implement the approved Remedial Planting Plan.

You may pay the civil penalty as follows:

Pay online with e-check (ACH) or Credit Card. Go to Your DEQ Online here: <https://ydo.oregon.gov>. Select Register Account or Login, then select Pay Invoices/Fees on your account dashboard. Enter the Invoice number and Account ID included on the attached payment slip. Note: US Bank charges a 2.3% convenience charge for credit card transactions. ACH payments have no additional charges.

Pay by check or money order: Make checks payable to "Department of Environmental Quality" and mail to the address on the enclosed payment slip. Please make sure to include the payment slip with your check or money order and note the case number on your check.

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.

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 Courtney Brown at 503-229-6839 or toll free in Oregon at 800-452-4011, extension 6839.

Sincerely,



Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

cc: Jeffrey Brittain, Portland Headquarters
Steve Mrazik, DEQ
Accounting, DEQ
Ed Freeman, Airpark Development LLC, P.O. Box 7154, Lake Oswego, OR 97035

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:)
AIRPARK DEVELOPMENT LLC,) NOTICE OF CIVIL PENALTY
a limited liability corporation,) ASSESSMENT AND ORDER
Respondent.) CASE NO. WQ-401-NWR-2021-120

I. AUTHORITY

The Department of Environmental Quality (DEQ) issues this Notice of Civil Penalty Assessment and Order (Notice) pursuant to Oregon Revised Statutes (ORS) 468.005, 468.100, ORS 468.126 through 468.140, ORS Chapter 468B, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012, and 048.

II. FINDINGS OF FACT

1. On August 30, 2018, DEQ issued a 401 Water Quality Certification (WQC) for the U.S. Army Corps of Engineers Permit Application #2018-133 for the “PCC Access Road” project located at the terminus of Crown Zellerbach Road, in Scappoose, Oregon (the Project).

2. The 401 WQC is a department order pursuant to ORS 468.005(4) and ORS 183.310(6).

3. The 401 WQC condition 17 states: “The Applicant must implement and comply with the terms of the approved post-construction stormwater management plan, which describes BMPs to prevent or treat pollution in stormwater anticipated to be generated by the project, in order to comply with state water quality standards. The Applicant must implement BMPs, as proposed in the stormwater management plan, including operation and maintenance dated March 27, 2018.”

4. Respondent's post-construction stormwater management plan proposed 80% survival of DEQ-approved native shrubs, seeds and vegetation plugs.

5. The “extended dry basin” (also known as the “south treatment facility”) was planted with 100% non-native and invasive species.

6. As of the date of this Notice and Order Respondent has not implemented the DEQ approved Remedial Planting Plan.

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1 III. CONCLUSIONS

2 Since on or before August 3, 2020, through the present, Respondent has violated 401 WQC
3 condition 17 by failing to comply with the terms of the approved post-construction stormwater
4 management plan. Specifically, the “extended dry basin” (also known as the “south treatment facility”)
5 was not planted with native herbaceous cover and shrubs. Violating a department order is a Class I
6 violation, according to OAR 340-012-0053(1)(a). DEQ hereby assesses a \$8,000 civil penalty for these
7 violations.

8 IV. ORDER TO PAY CIVIL PENALTY

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

11 1. Pay a total civil penalty of \$8,000. The determinations of the civil penalties are attached as
12 Exhibit No.1 and is incorporated as part of this Notice.

13 If you do not file a request for hearing as set forth in Section V below, please pay the penalty as
14 follows:

15 Pay online with e-check (ACH) or credit card. Go to Your DEQ Online here:
16 <https://ydo.oregon.gov>. Select Register Account or Login, then select Pay Invoices/Fees on your account
17 dashboard. Enter the Invoice number and Account ID included on the attached payment slip. Note: US
18 Bank charges a 2.3% convenience charge for credit card transactions. ACH payments have no additional
19 charges, or

20 Pay by check or money order: Make check payable to “Department of Environmental Quality”
21 and mail to the address on the enclosed payment slip. Please make sure to include the payment slip with
22 your check or money order and note the case number on your check.

23 2. Immediately implement the Remedial Planting Plan developed by Environmental
24 Science & Assessment, LLC (dated August 4, 2021) and approved by DEQ on October 15, 2021.

25 3. Within 30 days of this order becoming final by operation of law or on appeal, written
26 documentation demonstrating Respondent's compliance must be sent to: DEQ, Attn: Jeffrey Brittain,
27 700 NE Multnomah, Suite 600, Portland, OR 97232.

1 If you do not file a request for hearing as set forth in Section V below, your check or money
2 order must be made payable to "State Treasurer, State of Oregon" and sent to the **DEQ, Business**
3 **Office, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**. Once you pay the penalty,
4 the Notice becomes final.

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

6 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ
7 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If
8 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached
9 exhibit, you must do so in your request for hearing, as factual matters not denied will be considered
10 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for
11 further information about requests for hearing.) You must send your request to: **DEQ, Office of**
12 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax
13 it to **503-229-6762** or email it to DEQappeals@deq.state.or.us. An administrative law judge
14 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS
15 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be
16 represented by an attorney at the hearing, however you are not required to be. If you are an individual,
17 you may represent yourself. If you are a corporation, partnership, limited liability company,
18 unincorporated association, trust or government body, you must be represented by an attorney or a duly
19 authorized representative, as set forth in OAR 137-003-0555.

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

25 If you fail to file a timely request for hearing, the Notice will become a final order by default
26 without further action by DEQ, as per OAR 340-011-0535(1). If you do request a hearing but later
27 withdraw your request, fail to attend the hearing or notify DEQ that you will not be attending the

1 hearing, DEQ will issue a final order by default pursuant to OAR 340-011-0535(3). DEQ designates
2 the relevant portions of its files, including information submitted by you, as the record for purposes of
3 proving a prima facie case.
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8 3/2/2022

9 Date

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11 Kieran O'Donnell, Manager
12 Office of Compliance and Enforcement
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EXHIBIT No.1

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

VIOLATION No.1: Failing to comply with a department order by violating condition 17 of the 401 Water Quality Certification.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0053(1)(a) because a 401 Water Quality Certification is an order pursuant to ORS 183.310(6) and ORS 468.005(4).

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 \$4,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(3)(a)(G), because Respondent violated a Tier 2A 401 Water Quality Certification.

"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 constitutes a separate occurrence. On or about August 3, 2020, the "extended dry basin" (also known as the "south treatment facility") was not planted with vegetation according to the approved vegetation plan. As of the date of this Notice and Order, the plantings have not been corrected.

"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. Respondent received a copy of the 401 WQC which expressly requires that its conditions be "strictly adhered to by the Applicant." By failing to ensure that native vegetation was planted with 80% survivorship in accordance with the approved post-construction stormwater management plan Respondent

failed to take reasonable care to avoid a foreseeable risk that it would violate the 401 WQC and Oregon law.

"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). Respondent has yet to implement the Remedial Planting Plan approved by DEQ on October 15, 2021.

"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. Respondent gained no economic benefit through this violation.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$4,000 + [(0.1 x \$4,000) x (0 + 0 + 4 + 4 + 2)] + \$0
= \$4,000 + (\$400 x 10) + \$0
= \$4,000 + \$4,000 + \$0
= \$8,000