



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

April 27, 2022

CERTIFIED MAIL: 7018 1830 0001 6172 5727

Oregon Department of Transportation
c/o Kris Strickler, Director
355 Capitol Street, NE
Salem, Oregon 97301-3871

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/401-NWR-2021-504

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued the Oregon Department of Transportation (ODOT) a civil penalty of \$3,900 for violating a condition of the 401 Water Quality Certification issued by DEQ for the Tumalt Creek Restoration Project in Multnomah County. Specifically, on September 1 and 2, 2021, ODOT violated the condition of the certification requiring work to cease when work on the project resulted in a turbidity increase in Tumalt Creek of 50 nephelometric turbidity units (NTUs).

Increased turbidity can be detrimental to the survival of aquatic species and habitat. To protect state waters, people conducting projects subject to 401 conditions must ensure that best management practices (BMPs) are properly implemented to minimize turbidity during in-water work and must cease work immediately if operations cause a turbidity increase of 50 NTUs or more.

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.

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.oregon.gov
Via fax – 503-229-6762

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 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: Jeff Brittain, DEQ
Steve Mrazik, DEQ
Serena Hewitt, Oregon Department of Justice
Accounting, DEQ

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2 OF THE STATE OF OREGON

3 IN THE MATTER OF:) NOTICE OF CIVIL PENALTY
4 OREGON DEPARTMENT OF) ASSESSMENT AND ORDER
5 TRANSPORTATION, an agency of)
the state of Oregon,) CASE NO. WQ/401-NWR-2021-504
6 Respondent.)

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, ORS 468.126 through 468.140,
10 ORS Chapters 183 and 468, and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012
11 and 048.

12 II. FINDINGS OF FACT

13 1. On July 9, 2021, DEQ issued Respondent a Clean Water Action Section 401 Water
14 Quality Certification (401 Certification) for the Tumalt Creek Restoration Project in Multnomah
15 County, Oregon.

16 2. The project involved returning Tumalt Creek to its original channel after the creek was
17 rerouted by a landslide.

18 3. Paragraph 15(b) of the 401 Certification required Respondent to cease work on the
19 project and inform DEQ if at any time work resulted in an increase of turbidity in Tumalt Creek of 50
20 nephelometric turbidity units (NTUs) or more as measured from an representative background point.

21 4. On September 1 and 2, 2021, Respondent failed to cease work on the project when the
22 project resulted in a turbidity increase in Tumalt Creek by 50 or more NTUs as measured from the
23 representative background point.

24 III. CONCLUSION

25 On or about September 1 and 2, 2021, Respondent violated Paragraph 15(b) of its 401
26 Certification, a Department Order pursuant to ORS 468.005(4) and ORS 183.310(6), by failing to cease
27 work on the Tumalt Creek Restoration Project when work resulted in a turbidity increase of 50 NTUs

1 or more in Tumalt Creek. These are Class I violations pursuant to OAR 340-012-0053(1)(a). DEQ
2 assesses a \$3,900 civil penalty for these violations.

3 IV. ORDER TO PAY CIVIL PENALTY IF APPLICABLE: AND TO COMPLY

4 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is
5 hereby ORDERED TO: Pay a total civil penalty of \$3,900. The determination of the civil penalty is
6 attached as Exhibit 1 and is incorporated as part of this Notice.

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

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

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

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

18 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ
19 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If
20 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached
21 exhibit, you must do so in your request for hearing, as factual matters not denied will be considered
22 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for
23 further information about requests for hearing.) You must send your request to: **DEQ, Office of**
24 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax
25 it to **503-229-6762** or email it to DEQappeals@deq.oregon.gov. An administrative law judge
26 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS
27 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be

1 represented by an attorney at the hearing, however you are not required to be. If you are an individual,
2 you may represent yourself. If you are a corporation, partnership, limited liability company,
3 unincorporated association, trust or government body, you must be represented by an attorney or a duly
4 authorized representative, as set forth in OAR 137-003-0555.

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

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4/27/2022
Date



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 Violation of a Department Order.
- CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0053(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 \$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)(H) because Respondent had a Clean Water Act Section 401 Water Quality Certification for 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 a value of 10 pursuant to OAR 340-012-0145(2) because Respondent has prior significant actions consisting of nine or more Class I equivalent violations stemming from Case Nos. WQ/D-NWR-12-039, WQ/M-ER-2016-144 and WQ/401-NWR-2020-141.
- "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 2 according to OAR 340-012-0145(4)(b) because there was more than one but less than seven occurrences of the violation. There were two occurrences of the violation, on September 1 and 2, 2021.
- "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. The requirement to cease work when activities result in an increase in turbidity of 50 NTUs or more over background is an express condition of Respondent's certification. By failing to cease work, Respondent failed to exercise reasonable care to avoid the foreseeable risk of committing 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 has insufficient information to determine any avoided or delayed compliance costs.

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

$$\begin{aligned} &= \$1,500 + [(0.1 \times \$1,500) \times (10 + 0 + 2 + 4 + 0)] + \$0 \\ &= \$1,500 + (\$150 \times 16) + \$0 \\ &= \$1,500 + \$2,400 + \$0 \\ &= \$3,900 \end{aligned}$$

Oregon Department of Environmental Quality
 700 NE Multnomah Street, Suite 600
 Portland, OR 97232-4100



State of Oregon
 Department of Environmental Quality

Phone: 503-229-5437
 Fax: 503-229-5850

CIVIL PENALTY - ORS 468.135(2)

DATE:	April 27, 2022
RESPONSE DATE :	July 6, 2022
TOTAL PENALTY:	\$3,900.00

Account Name:	NWP#14 - TUMALT CREEK RELOCATION		
Account Type:	Vendor/Organization/Company	Reference Number:	CPGFD2200030
SubSystem ID:	N/A	FIMS Acct. ID:	7378

Penalty Summary

Penalty Amount	Interest	Adjustment	Amount Paid	Total Penalty
\$ 3,900.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 3,900.00

Payment of this penalty is subject to the exercise of your options or right to appeal as described in the enclosed enforcement documents.

To Pay Online with ACH or Credit Card Visit <https://ydo.oregon.gov> and select 'Register Account'



 PLEASE RETURN THIS PORTION WITH YOUR PAYMENT



REFERENCE NO.	CPGFD2200030		
PAYCODE:	00401 7400 10040 74001 0500 000000 00		
FEE PROGRAM ID:	950	RESPONSE DATE:	July 6, 2022
FIMS ACCT. ID:	7378	TOTAL PENALTY DUE:	\$3900.00

AMOUNT ENCLOSED:

MAKE CHECK PAYABLE TO: Department of Environmental Quality

DEQ FINANCIAL SERVICES - LBX4244
 PO BOX 4244
 PORTLAND OR 97208-4244

Check this box if updated address information has been provided on the back of the form.

00401 7400 10040 74001 0500 000000 0095000073788(CPGF)220003000003900007



State of Oregon
Department of
Environmental
Quality

State of Oregon Department of Environmental Quality

CIVIL PENALTY - ORS 468.135(2)

700 NE Multnomah Street, Suite 600
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Phone: 503-229-5437
Fax: 503-229-5850

Penalty Detail

Transaction Date	Description	Amount
4/22/2022	2021-504 WQ-M-NWR-2021-504	\$3,900.00

SFMS Agencies Use:

Trans Code	Treasury Fund	SFMS	Index	PCA (5)	Agency Object	Project #	Phase
723	00401	7400	10040	74001	0500	00000	00

Address Changes

Please visit <https://ydo.oregon.gov> to update your mailing address online or provide the following information:

Name _____
Address _____
City, State, Zip _____