



Oregon

Kate Brown, Governor

Department of Environmental Quality
Office of Compliance and Enforcement
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TTY 711

May 29, 2020

CERTIFIED MAIL: 7017 1450 0000 8310 3305

City of Rainier
Attn: City Manager
106 W. B Street
Rainier, OR 97048

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ-SW-NWR-2020-041

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 \$35,191 for violating conditions of the National Pollutant Discharge Elimination System (NPDES) Construction Stormwater General Permit No. 1200-C (the "Permit") assigned to the "A Street Rail Safety Improvement Project" site located on A Street between Fox Creek and E. 6th Street in Rainier, Oregon (the "Project").

DEQ issued this penalty because your construction activities resulted in the placement of sediment on the banks of Fox Creek, which increases water pollution from turbidity. Sediment carried in stormwater runoff from construction sites is considered a waste that poses a risk of harm to beneficial uses of waters of the state, including the use of those waters as habitat for aquatic organisms. The discharge of sediment can degrade water quality and harm aquatic life by covering up food sources and smothering invertebrate organisms living in Fox Creek.

The Permit requires that registrants implement the erosion and sediment control plan (ESCP) that is developed and submitted to DEQ as part of the Permit application for the proposed activities. The purpose of the ESCP is to identify the site-specific control measures intended to limit erosion and prevent sediment and turbidity from leaving the construction site. During DEQ's inspection of the Project, DEQ observed that substantial elements of the ESCP had not been implemented as designed and that significant amounts of sediment had been discharged from the Project.

In addition, DEQ is concerned that you failed to consistently perform visual monitoring required by the Permit. In addition, some monitoring was incomplete and improperly documented, despite being performed by persons certified in an erosion and sediment control program that has been approved by DEQ. Effective, complete, and timely visual monitoring is required to ensure your erosion and sediment controls are working to prevent the discharge of harmful sediment and erosion at the site.

Included in Section IV of the Notice is an order requiring you to immediately submit a revised ESCP that reflects current site conditions and best management practices that are effective at controlling erosion and sediment discharges from the Project.

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 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: Michael Kennedy, Northwest Region
Christine Svetkovich, DEQ
Accounting, DEQ

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2 OF THE STATE OF OREGON

3 IN THE MATTER OF:) NOTICE OF CIVIL PENALTY
4 THE CITY OF RAINIER) ASSESSMENT AND ORDER
5 A municipality of the state of Oregon,)
Respondent.) CASE NO. WQ/SW-NWR-2020-041

6 I. AUTHORITY

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

11 II. FINDINGS OF FACT

12 1. Respondent is the owner and operator of the “A Street Rail Safety Improvement Project”
13 located on A Street between Fox Creek and E. 6th St, in Rainier, Oregon (the Project).

14 2. The Project encompasses an approximately 7 acre area.

15 3. Respondent was assigned coverage under the National Pollutant Discharge Elimination
16 System General Permit Number 1200-C (the Permit) on October 16, 2018. Respondent began
17 construction activities at the Project on approximately August 15, 2019.

18 4. DEQ issued the permit pursuant to ORS 468B.050 and section 402 of the Federal Clean
19 Water Act.

20 5. Schedule A, condition 12.a of the Permit requires Respondent to ensure that an erosion
21 and sediment control plan (ESCP) is prepared and revised as necessary to reflect site conditions for the
22 construction activity regulated by the Permit.

23 6. Schedule A, condition 8.a of the Permit requires Respondent to implement the ESCP.

24 7. Schedule A, condition 8.b.iii of the Permit requires Respondent to “prevent the
25 discharge of significant amounts of sediment to surface waters or conveyance systems leading to
26 surface waters.” In addition, the Permit prohibits “[s]ediment laden or turbid flows of stormwater that
27 are not filtered or settled to remove sediments and turbidity” and that this is a condition that indicates

1 “that a significant amount of sediment has left or is likely to leave the site.”

2 8. On January 28, 2020, DEQ performed an inspection of the Project. At the time of the
3 inspection:

4 a. There were significant amounts of sediment that had discharged from the Project
5 onto the banks of Fox Creek;

6 b. Newly installed stormwater catchbasins did not have the inlet filtration installed,
7 as described in the ESCP;

8 c. Curb inlets did not have sediment dams installed as described in the ESCP;

9 d. Check dams to slow the velocity of stormwater and provide stabilization in a
10 swale were not installed as described in the ESCP;

11 e. The stormwater swale was connected and acted as a conveyance to a slope that is
12 upgradient of Fox Creek. Sediment fence was installed cross-gradient on the slope. The stormwater
13 swale, conveyance, and slope were not in a condition as described in the ESCP; and

14 f. There were no wattles around the regraded area north of the rails on the east end
15 of the Project.

16 9. Schedule A, condition 12.c.iv(6) requires that a revision to the ESCP must be submitted
17 to DEQ if there is a change in Erosion and Sediment Control Inspector.

18 10. Schedule B, condition 1.a of the Permit requires that the designated Erosion and
19 Sediment Control Inspector perform visual monitor of the conditions of the site, including: i) all areas
20 of the site disturbed by construction activity to ensure that Best Management Practices (BMPs) are in
21 proper working order; ii) discharge points identified in the ESCP for evidence of or the potential for
22 discharge of pollutants and to ascertain whether erosion and sediment control measures are effective in
23 preventing significant impacts to surface waters; iii) and BMPs identified in the current ESCP to assess
24 whether they are functioning properly.

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1 11. Schedule B, condition 1.b of the Permit requires that all ESCP controls and practices
2 must be monitored visually on a daily basis when the site is active and when stormwater runoff is
3 occurring and at least every fourteen (14) calendar days, regardless of whether stormwater runoff is
4 occurring.

5 12. Schedule B, condition 1.c of the Permit requires that visual monitoring document, in
6 relevant part: the file or site number, weather conditions during the inspection, observations for each
7 discharge location, including observations at the discharge location if the discharge is to a conveyance
8 system leading to surface waters, inspections of all BMPs, locations of BMPs in need of maintenance,
9 locations of BMPs that failed to operate as designed or proved inadequate for a particular location,
10 location(s) where additional BMPs are needed, corrective action required and implementation dates, all
11 revisions and documentation of reasons for changes or modifications to the ESCP and other corrective
12 measures.

13 13. Respondent's visual monitoring inspection reports dated 10/16/19, 10/17/19, 10/18/19,
14 10/23/19, 11/2/19, 11/10/19, 11/18/19, 12/23/19, 1/3/20, 1/6/20, 1/7/20, 1/10/20, and 1/13/20 were not
15 completed by the Erosion and Sediment Control Inspector designated in the ESCP. In addition, the
16 reports do not contain: the file or site number, weather conditions during the inspection, observations at
17 the discharge points, observations at Fox Creek (where the swale discharges). None of Respondent's
18 inspection reports identify that the swale design in the ESCP does not correspond with the swale design
19 that was constructed. None of the reports identify that the flow directions at the outfalls are incorrect,
20 that the velocity stabilization described in the ESCP was not installed, that slope stabilization described
21 in the ESCP was not implemented, and that the sediment fence was being undercut and required
22 maintenance.

23 14. Respondent's inspection report dated 12/9/19 indicates a change in the Erosion and
24 Sediment Control Inspector. This change was not submitted to DEQ. Additionally, this report does not
25 contain: the file or site number, weather conditions during the inspection, observations at the discharge
26 points, observations at Fox Creek (where the swale discharges) identify that the swale design in the
27 ESCP does not correspond with the swale design that was constructed. This report identifies that the

1 flow directions at the outfalls are incorrect, the velocity stabilization described in the ESCP was not
2 installed, slope stabilization described in the ESCP was not implemented, and the sediment fence was
3 being undercut and required maintenance.

4 15. According to National Oceanic & Atmospheric Administration rain gauge data from
5 Rainier, Oregon (4.9WNW, ORUS US1ORCB0029) there have been over 36 additional days, not listed
6 in Section II paragraphs 13 and 14 above as dates that Respondent performed visual monitoring, that
7 had more than a trace amount of rain since August 15, 2019, through January 28, 2020.

8 16. As of the date of this Notice and Order, Respondent has not submitted a revised ESCP to
9 DEQ reflecting current Project conditions.

10 III. CONCLUSIONS

11 1. From on or about January 28, 2020, through the present, Respondent has violated ORS
12 468B.025(2) and Schedule A, condition 8.a of the Permit by failing to implement the ESCP developed
13 for the Project. Specifically, Respondent failed to install as described in the ESCP: inlet filtration,
14 sediment dams, check dams, wattles, and sediment fencing. In addition, Respondent failed to install the
15 stormwater swale as described in the ESCP by failing to stabilize the swale with best management
16 practices and installing the swale to connect to a slope above Fox Creek. This is a Class I violation,
17 according to OAR 340-012-0055(1)(r). DEQ hereby assesses a \$20,305 civil penalty for this violation.

18 2. From on or about August 15, 2019, through January 28, 2020, Respondent has violated ORS
19 468B.025(2) and Schedule B, condition 1.b of the Permit by failing to perform required visual monitoring
20 at the Project in accordance with the frequency in required in the Permit. Specifically, Respondent failed to
21 perform visual monitoring on at least 36 days when the site was active and when stormwater runoff was
22 occurring. This is a Class I violation according to OAR 340-012-0055(1)(o). DEQ hereby assesses a
23 \$14,886 civil penalty for this violation.

24 3. On or about January 28, 2020, Respondent violated ORS 468B.025(2) and Schedule A,
25 condition 8.b of the Permit by failing to prevent the discharge of significant amounts of sediment from
26 the Project. Specifically, by failing to implement adequate erosion and sediment controls at the Project,
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Respondent discharged significant amounts of sediment to the banks of Fox Creek. This is a Class II violation according to OAR 340-012-0053(2). DEQ has not assessed a civil penalty for this violation.

4. Respondent has violated ORS 468B.025(2) and Schedule B, condition 1.a of the Permit by failing to conduct visual monitoring at the Project in accordance with Permit requirements on the dates alleged in Section II, paragraph 13 above. Specifically, the visual monitoring was not completed by the Erosion and Sediment Control Inspector designated in the ESCP. These are Class II violations according to OAR 340-012-0053(2). DEQ has not assessed a civil penalty for this violation.

5. Respondent has violated ORS 468B.025(2) by violating Schedule B, condition 1.c of the Permit by failing to properly document visual monitoring at the Project in accordance with Permit requirements on the dates alleged in Section II, paragraph 13 above. Specifically, Respondent's inspection reports did not contain: the file or site number, weather conditions during the inspection, observations at the discharge points, observations at Fox Creek (where the swale discharges), that the swale design in the ESCP does not correspond with the swale design that was constructed or the actual flow directions at the outfalls, that the velocity stabilization described in the ESCP was not installed, that slope stabilization described in the ESCP was not implemented, and that the sediment fence was being undercut and required maintenance. These are Class II violations according to OAR 340-012-0053(2). DEQ has not assessed a civil penalty for this violation.

6. Respondent violated ORS 468B.025(2) and Schedule A, condition 12.c.iv(6) of the Permit by failing to submit a revision of the ESCP to DEQ when it changed its erosion and sediment control inspector. This is a Class II violation according to OAR 340-012-0053(2). DEQ has not assessed a civil penalty for this violation.

IV. ORDER TO PAY CIVIL PENALTY AND TO COMPLY

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

1. Pay a total civil penalty of \$35,191. The determinations of the civil penalties are attached as Exhibits No.1 and No.2 and are incorporated as part of this Notice.

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1 2. Revise the ESCP to accurately depict current conditions at the Project and to accurately
2 depict the swale and best management practices that are appropriately sized and effective at controlling
3 erosion and sediment at the Project.

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

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

9 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ
10 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice.
11 To contest DEQ's revocation of permit coverage you must ensure that DEQ receives the request for
12 hearing **within 60 calendar days** from the date you receive this Notice and Order. See OAR 340-045-
13 0060(2)(b). If you have any affirmative defenses or wish to dispute any allegations of fact in this
14 Notice or attached exhibits, you must do so in your request for hearing, as factual matters not denied
15 will be considered admitted, and failure to raise a defense will be a waiver of the defense. (See OAR
16 340-011-0530 for further information about requests for hearing.) You must send your request to:
17 **DEQ, Office of Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland,**
18 **Oregon 97232**, fax it to **503-229-5100** or email it to DEQappeals@deq.state.or.us. An administrative
19 law judge employed by the Office of Administrative Hearings will conduct the hearing, according to
20 ORS Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right
21 to be represented by an attorney at the hearing, however you are not required to be. If you are an
22 individual, you may represent yourself. If you are a corporation, partnership, limited liability company,
23 unincorporated association, trust or government body, you must be represented by an attorney or a duly
24 authorized representative, as set forth in OAR 137-003-0555.

25 Active duty Service members have a right to stay proceedings under the federal Service
26 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-452-8260, the
27 Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal

1 Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not
2 have a toll free telephone number.

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

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11 May 29, 2020
12 Date


13 Kieran O'Donnell, Manager
14 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: Violating Schedule A, conditions 8.a of the Permit and ORS 468B.025(2), by failing to implement the ESCP developed for the Project.

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 \$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)(E)(iii), as Respondent has obtained coverage under an NPDES 1200-C Permit for a construction site up to 8 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 10 according to OAR 340-012-0145(2)(a), because Respondent was issued case no.: WQ/M-NWR-2017-228 which included 75 prior significant actions. However, according to OAR 340-012-0145(2)(b) the value of P will not exceed 10.

"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 to make a finding under OAR 340-012-0145(3)(a) and (b).

"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. The Respondent failed to adequately implement the ESCP from January 28, 2020, to the date of this Notice. Therefore there were more than 28 occurrences of the violation.

"M" is the mental state of Respondent, and receives a value of 4 according to OAR 340-012-0145(5)(d) because Respondent's conduct was negligent. Respondent is permitted under the NPDES 1200-C Permit which expressly requires Respondent to comply with the conditions

set forth in the Permit, including implementing an ESCP that reflects current site conditions. By failing to implement erosion and sediment controls described in the ESCP, Respondent failed to take reasonable care to avoid a foreseeable risk of conduct resulting in a violation.

"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 Respondents' 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 \$8,305. Specifically, Respondent gained an estimated \$5,769 in economic benefit by avoiding spending an estimated \$5,635 for straw wattles and an erosion blanket. And, Respondent gained an estimated \$2,536 in economic benefit by avoiding, since January 28, 2020, spending \$2,500 on revising its ESCP to match current conditions at the Project. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
 $= \$4,000 + [(0.1 \times \$4,000) \times (10 + 0 + 4 + 4 + 2)] + \$8,305$
 $= \$4,000 + (\$400 \times 20) + \$8,305$
 $= \$4,000 + \$8,000 + \$8,305$
 $= \$20,305$

EXHIBIT No.2

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

VIOLATION No.2: Violating Schedule B, condition 1.b of the Permit, in violation of ORS 468B.025(2), by failing to perform visual monitoring since on or about August 15, 2019, through January 28, 2020.

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 \$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)(E)(iii), as Respondent has obtained coverage under an NPDES 1200-C Permit for a construction site up to 8 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 10 according to OAR 340-012-0145(2)(a), because Respondent was issued case no.: WQ/M-NWR-2017-228 which included 75 prior significant actions. However, according to OAR 340-012-0145(2)(b) the value of P will not exceed 10.

"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 to make a finding under OAR 340-012-0145(3)(a) and (b).

"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 failed to perform visual monitoring on at least 36 occurrences.

"M" is the mental state of Respondent, and receives a value of 4 according to OAR 340-012-0145(5)(d) because Respondent's conduct was negligent. Respondent is permitted under the NPDES 1200-C Permit which expressly requires Respondent to comply with the conditions set forth in the Permit, including performing visual monitoring in accordance with the Permit. By failing to perform the required visual monitoring in accordance with the Permit,

Respondent failed to take reasonable care to avoid a foreseeable risk of conduct resulting in a violation.

"C" is Respondent's effort to correct 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 Respondents' 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 \$3,686. This is the amount Respondent gained by avoiding spending \$100/hour on labor costs to perform 36 one hour inspections of the Site in accordance with the Permit's visual monitoring requirements since activities began at the Site on May 3, 2019. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$4,000 + [(0.1 x \$4,000) x (10 + 0 + 4 + 4 + 0)] + \$3,686
= \$4,000 + (\$400 x 18) + \$3,686
= \$4,000 + \$7,200 + \$3,686
= \$14,886