



Oregon

Kate Brown, Governor

Department of Environmental Quality

Office of Compliance and Enforcement

700 NE Multnomah St Ste 600

Portland, OR 97232-4100

(503) 229-5696

FAX (503) 229-5100

TTY: 711

June 12, 2017

CERTIFIED MAIL: 7014 2870 0001 3378 4898

Mitchell Park LLC
c/o Stephen James Modjeski, Registered Agent
10826 S.E. Idleman Rd.
Happy Valley, OR 97086

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/SW-NWR-2017-065

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued you a civil penalty of \$13,949 for causing pollution to waters of the state and violating the National Pollutant Discharge Elimination System General Permit number 1200-C ("NPDES 1200-C") issued for the construction site located at 11775 S.E. 129th Ave., in Happy Valley, Oregon.

DEQ issued this penalty because construction activities at the site caused turbid water discharges to an unnamed tributary that drains through a culvert pipe to Mt Scott Creek. Like Mt Scott Creek the unnamed tributary is considered "waters of the state" of Oregon. DEQ regulates turbid water discharges because turbidity in the water column and deposition of sediments can degrade water quality. Turbidity also tends to create a public nuisance and harm other beneficial uses of public waters of the state. Turbidity is included in the definition of pollution under Oregon environmental law. Additionally, plastic sheeting had been placed within a creekbed of an unnamed tributary that flows through the construction site and ultimately discharges to Mt Scott Creek. Any alteration in the physical properties of waters of the state, such as placing waste plastic sheeting in a tributary, is also considered pollution.

This formal enforcement action also includes a penalty for violating conditions of the NPDES 1200-C permit at this site. That permit requires an up-to-date and accurate erosion and sediment control plan (ESCP) to be developed and implemented for construction sites. The most recent ESCP developed for this site does not match the stormwater management systems and Best Management Practices actually implemented on site. Failing to implement an accurate ESCP is a violation of the NPDES 1200-C permit.

Included in Section IV is an order requiring you to submit a revised ESCP for the site that meets the requirements of the NPDES 1200-C permit and accurately identifies stormwater controls and BMPs, as well as additional areas of disturbance used in association with construction activities.

\$8,099 of the civil penalty represents the economic benefit you gained by failing to implement an ESCP that meets the requirements of the permit. If you complete these requirements, DEQ will consider recalculating the costs as delayed rather than avoided and will reduce the civil penalty accordingly.



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,



Sarah G. Wheeler, Acting Manager
Office of Compliance and Enforcement

Enclosures

cc: Daria Gneckow, Northwest Region
Christine Svetkovich, DEQ
Shaumae Hall, Accounting, DEQ
John Koestler, WQ, DEQ

1 9. Schedule A, condition 12.a of the Permit states that permit registrants must ensure that an
2 ESCP is prepared and revised as necessary to reflect site conditions for the construction activity
3 regulated by this permit. The Permit states that design, installation and maintenance of erosion and
4 sediment controls must be adequate to address factors such as the amount frequency, intensity, and
5 duration of precipitation, the nature of the resulting stormwater runoff and other characteristics
6 expected to be present at the site.

7 10. An ESCP dated June 20, 2016 was developed for the Site (the "original" ESCP). This ESCP
8 was revised March 15, 2017 (the "revised" ESCP).

9 11. During the DEQ inspection on March 16, 2017, DEQ staff observed facilities and site
10 activities intended to control stormwater and stormwater pollution that were not identified on the
11 "original" or the "revised" ESCPs. Specifically, a concrete settling tank is being used to capture
12 stormwater and de-watered groundwater and is not identified in the ESCP; a green plastic pipe is set up
13 to discharge directly to the unnamed tributary in a location the ESCP identifies as a "50' drainage
14 buffer"; utility trenching in the southeast corner of the site along S.E. 129th generated large volumes of
15 sediment and channeled stormwater runoff from the site to a culvert that drains to Mt. Scott Creek and
16 is not identified in the ESCP; an offsite stockpile at King Street and 132nd Ave. was being used for dirt
17 excavated from the Site and is not identified in the ESCP. In addition, staff observed best management
18 practices (BMPs) that were implemented at the Site that were not identified in the ESCP.

19 12. During the DEQ inspection, DEQ staff observed BMPs that were poorly maintained
20 resulting in rills and evidence of concentrated stormwater flows leaving the Site.

21 III. CONCLUSIONS

22 1. Respondent has violated ORS 468B.025(1)(a) by causing pollution to an unnamed tributary
23 of Mt. Scott Creek, waters of the state, by placing plastic sheeting in the creek on February 21, 2017,
24 through at least March 16, 2017, and by discharging turbidity on March 14 and 15, 2017 to an unnamed
25 tributary that drains through a culvert pipe to Mt. Scott Creek. Plastic sheeting placed in waters of the
26 state, referred to in Section II, paragraph 5, above, alters the physical properties of waters of the state and
27 tends to create a public nuisance or render the waters harmful to public and beneficial uses and is

1 considered "pollution" according to ORS 468B.005(5). Turbidity is included in the definition of
2 pollution in ORS 468B.005(5). This is a Class I violation, according to OAR 340-012-0055(1)(a). DEQ
3 hereby assesses a \$2,850 civil penalty for these violations.

4 2. From on or before March 14, 2017, through the present, Respondent has violated ORS
5 468B.025(2) by violating Schedule A, conditions 8.a and 12.a of the Permit by failing to develop and
6 substantially implement an accurate ESCP that reflects current conditions and controls at the Site and that
7 prevents the discharge of significant amounts of sediment from the site. This is a Class I violation
8 according to OAR 340-012-0055(1)(r). DEQ hereby assesses an \$11,099 civil penalty for these violations.

9 IV. ORDER TO PAY CIVIL PENALTY AND TO COMPLY

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

12 1. Pay a total civil penalty of \$13,949. The determinations of the civil penalties are attached as
13 Exhibits No.1 and No.2 and are incorporated as part of this Notice.

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

18 2. Within 30 days after the order becomes final by operation of law or on appeal, submit a
19 revised ESCP for the Site that meets the requirements of the NPDES 1200-C General Permit and
20 accurately identifies the stormwater facilities in use at the site, as well as any additional areas of
21 disturbance or areas used in association with the construction activities (such as off-site soil stockpiles)
22 and that proposes additional BMPs to address turbid water runoff. Written documentation
23 demonstrating Respondent's compliance must be sent to: Daria Gneckow, DEQ, 700 N.E. Multnomah
24 St., Suite 600, Portland, OR 97232-4100.

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

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

16 Active duty service-members have a right to stay proceedings under the federal Service
17 Members Civil Relief Act. For more information, please call the Oregon State Bar at 1-800-
18 452-8260 or the Oregon Military Department at 1-800-452-7500. Additional information can be found
19 online at the United States Armed Forces Legal Assistance (AFLA) Legal Services Locator website
20 <http://legalassistance.law.af.mil/content/locator.php>.

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

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9 June 12, 2017

10 Date

Sarah Wheeler

11 Sarah G. Wheeler, Acting 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: Causing pollution to waters of the state on or about February 21, 2017, through March 16, 2017, in violation of ORS 468B.025(1)(a).

CLASSIFICATION: These are Class I violations pursuant to OAR 340-012-0055(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)(F)(ii), because the Site is between one and five 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 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 3 according to OAR 340-012-0145(4)(c) because the violation was first documented on February 21, 2017 and most recently observed on March 16, 2017 for a total of 24 occurrences. Each day of violation is a separate occurrence when determining the O factor.

"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 is registered for coverage under the NPDES 1200-C Permit which requires permittees to control turbidity by implementing erosion and sediment controls. By installing plastic sheeting into a creekbed and discharging turbid water to waters of the state, Respondent failed to take reasonable care to avoid a foreseeable risk that its actions would alter the physical characteristics of waters of the state and cause pollution to those waters.

"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. The economic benefit to Respondent in failing to prevent conditions resulting in pollution is captured in the civil penalty calculation in Exhibit No.2.

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

$$\begin{aligned} &= \$1,500 + [(0.1 \times \$1,500) \times (0 + 0 + 3 + 4 + 2)] + \$0 \\ &= \$1,500 + (\$150 \times 9) + \$0 \\ &= \$1,500 + \$1,350 + \$0 \\ &= \$2,850 \end{aligned}$$

EXHIBIT No.2

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

VIOLATION No.2: Violating ORS 468B.025(2) by violating Schedule A, conditions 8.a and 12.a.i of the NPDES 1200-C General Permit.

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 \$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)(ii), because the site is between one and five 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 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. The violation was observed on March 16, 2017, and has 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. By failing to revise and implement an accurate ESCP that applies to all the construction activities at the Site and complies with the Permit requirements, Respondent failed to take reasonable care to avoid a foreseeable risk that it would violate its permit.

"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 \$8,099. This is the amount Respondent gained by avoiding \$60 for matting, \$456 to perform BMP maintenance, \$10,200 in inspection and corrective action costs and approximately \$2,700 in consultant costs to revise the ESCP by October 1, 2016. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
 $= \$1,500 + [(0.1 \times \$1,500) \times (0 + 0 + 4 + 4 + 2)] + \$8,099$
 $= \$1,500 + (\$150 \times 10) + \$8,099$
 $= \$1,500 + \$1,500 + \$8,099$
 $= \$11,099$