



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

May 18, 2018

CERTIFIED MAIL No. 7016075034703371

Heiser Edition, LLC
c/o Dennis R. Elmer, Jr., Registered Agent
421 NE 3rd St., Suite 1
McMinnville, OR 97128

Re: Notice of Civil Penalty Assessment and Order
No. WQ/SW-WR-2018-028

This letter is to inform you that DEQ has issued you a total civil penalty of \$12,000 for water quality violations at the Heiser Addition construction site (Site) in McMinnville. You failed to substantially implement the erosion and sediment control plan (ESCP) for the Site, for which you have coverage under the NPDES Stormwater Discharge Permit No. 1200-C. On January 23 and 24, 2018, DEQ staff inspected the Site and found that many aspects of your ESCP implementation were deficient, including: disturbed areas with unstabilized soil throughout the Site, unprotected catch basins, an unprotected stormwater detention basin, and lack of phasing. Also, you discharged highly turbid stormwater from the Site to an unnamed stream, causing pollution of waters of the state. DEQ has also cited you, without penalty, for failing to conduct visual monitoring as required in the Permit.

DEQ issued this penalty because implementing the ESCP is essential to ensure compliance with the terms of your NPDES 1200-C Permit, as it includes pollution control measures that are specific to your Site. Your direct discharge of turbid stormwater resulted in the pollution of waters of the state. The introduction of sediment into surface waters can harm aquatic life and impact beneficial uses of those waters.

DEQ appreciates your efforts to address these violations by implementing erosion and sediment controls at the Site after DEQ's inspection. DEQ considered these efforts when determining the amount of civil penalty.

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.

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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,



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

cc: Jill Seale, Western Region, DEQ
Shaumae Hall, Accounting, DEQ
John Koestler, WQ, DEQ

- b. Catch basins at the Site were either unprotected or effectively unprotected because filtration devices were in disrepair and had not been replaced as needed;
- c. Clearing and grading of the Site was not phased, resulting in large areas of unstable soils, erosion, and movement of sediment off-site;
- d. The majority of the site was comprised of bare, disturbed soils with no temporary or permanent soil stabilization measures in place; and
- e. The stormwater detention pond had bare soils with no slope stabilization or erosion control measures in place, and no outlet protection.

5. Respondent's Erosion and Sediment Control Plan (ESCP) dated May 9, 2017 contains the following conditions or requirements:

- a. Install perimeter sediment control, including storm drain inlet protection as well as all sediment basins, traps, and barriers prior to land disturbance (Standard Note 12 on Sheet C050);
- b. Phase clearing and grading to the maximum extent practical to prevent exposed inactive areas from becoming a source of erosion (Standard Note 8 on Sheet C050);
- c. Apply temporary and/or permanent soil stabilization measures immediately on all disturbed areas as grading progresses (Standard Note 16 on Sheet C050); and
- d. Long term slope stabilization measures "including slope matting" shall be in place over all exposed soils by October 1 (Erosion and Sediment Control BMP Implementation Note 3 on Sheet C052; Detail Drawing on Sheet C053).

6. On January 23 and 24, 2018, the Site was discharging highly turbid stormwater from its stormwater system to an unnamed stream that flows perpendicular to SW Redmond Hill Road.

1 7. The unnamed stream is a natural surface water, and is “waters of the state” under
2 ORS 468B.005(10).

3 8. The discharge of turbid stormwater altered the physical, chemical or biological
4 properties of the waters described above and will or tends to, either by itself or in connection
5 with any other substance, create a public nuisance or which will or tends to render such waters
6 harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial,
7 industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife,
8 fish or other aquatic life or the habitat thereof, and is “pollution” under ORS 468B.005(5).

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10 9. Schedule B, Condition 1(b) of the Permit states that all ESCP controls and practices
11 must be monitored visually on a daily basis when stormwater runoff, including runoff from
12 snowmelt, is occurring when the site is active.

13 10. On January 23 and 24, 2018, the site was active, there was significant rainfall, and
14 stormwater runoff from the site occurred.

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16 11. Respondent submitted visual inspection records for January 2018 showing it did not
17 conduct visual monitoring on January 23 or 24, 2018.

18 III. CONCLUSIONS

19 1. From June 2017 through January 24, 2018, Respondent violated Schedule A,
20 Condition 8.a of the Permit and ORS 468B.025(2) by failing to substantially implement the
21 ESCP, as described in Section II, paragraphs 1-5 above. This is a Class I violation according to
22 OAR 340-012-0055(1)(r). DEQ hereby assesses a \$6,000 civil penalty for this violation.

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1 2. On January 23 and 24, 2018, Respondent violated ORS 468B.025(1)(a) by causing
2 pollution of waters of the state, as described in Section II above, paragraphs 6-8 above. This is a
3 Class I violation according to OAR 340-012-0055(1)(a). DEQ hereby assesses a \$6,000 civil
4 penalty for this violation.

5 3. On January 23 and 24, 2018, Respondent violated Schedule B, Condition 1(b) of
6 the Permit by failing to conduct visual monitoring, as described in Section II, paragraphs 9-11
7 above. This is a Class I violation according to OAR 340-012-0055(1)(o). DEQ has not assessed
8 a civil penalty for this violation.
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10 IV. ORDER TO PAY CIVIL PENALTY

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

13 Pay a total civil penalty of \$12,000. The determination of the civil penalties is
14 attached as Exhibit Nos. 1 and 2, and incorporated as part of this Notice.
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16 If you do not file a request for hearing as set forth in Section V below, your check or
17 money order must be made payable to "**State Treasurer, State of Oregon**" and sent to the **DEQ,**
18 **Business Office, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232.** Once you
19 pay the penalty, the Findings of Fact, Conclusions and Order become final.

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

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

11 Active duty service-members have a right to stay proceedings under the federal Service
12 Members Civil Relief Act. For more information, please call the Oregon State Bar at 1-800-
13 452-8260 or the Oregon Military Department at 1-800-452-7500. Additional information can be
14 found online at the United States Armed Forces Legal Assistance (AFLA) Legal Services
15 Locator website <http://legalassistance.law.af.mil/content/locator.php>.
16

17 If you fail to file a timely request for hearing, the Notice will become a final order by
18 default without further action by DEQ, as per OAR 340-011-0535(1). If you do request a hearing
19 but later withdraw your request, fail to attend the hearing or notify DEQ that you will not be
20 attending the hearing, DEQ will issue a final order by default pursuant to OAR 340-011-0535(3).
21 DEQ designates the relevant portions of its files, including information submitted by you, as the
22 record for purposes of proving a prima facie case.
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24
25 May 10, 2018
26 Date

25 Sarah Wheeler
26 Sarah G. Wheeler, Acting Manager
27 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 1: Failing to substantially implement the Erosion and Sediment Control Plan (ESCP), in violation of Schedule A, Condition 8.a of the Permit and ORS 468B.025(2).

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) because Respondent has coverage under the NPDES 1200-C General Permit for a construction site between five and 20 acres in size.

"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 failed to substantially implement the plan when construction activities began around June 2017, and through January 29, 2018, which was more than 28 days.

"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 1200-C Permit and the ESCP prepared by Respondent's engineer require implementation of erosion and sediment control measures in order to prevent the discharge of significant amounts of sediment into surface waters. By failing to install and maintain most of the measures and features included in the ESCP, Respondent failed to take reasonable care to avoid a foreseeable risk that it would violate the Permit and discharge turbid stormwater into waters of the state.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of -3 according to OAR 340-012-0145(6)(c), because Respondent made reasonable efforts to correct the violation. Respondent implemented erosion and sediment control measures at the site by January 29, 2018.

"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's economic benefit from delaying spending \$13,953 on erosion and sediment control measures was \$0, calculated using the U.S. Environmental Protection Agency's BEN computer model, pursuant to OAR 340-012-0150(1).

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 - 3)] + \$0
= \$4,000 + [\$400 x 5] + \$0
= \$4,000 + \$2,000 + \$0
= \$6,000

EXHIBIT NO. 2

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

VIOLATION 2: Causing pollution of waters of the state, in violation of ORS 468B.025(1)(a).

CLASSIFICATION: This is a Class I violation 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 \$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) because Respondent has coverage under the NPDES 1200-C General Permit for a construction site between five and 20 acres in size.

"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 2 according to OAR 340-012-0145(4)(b), because there were more than one but less than seven occurrences of the violation. DEQ documented the violation during site inspections on January 23 and 24, 2018.

"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 holds a 1200-C Permit, which specifically prohibits turbid flows of stormwater that are not filtered or settled to remove sediments and turbidity. By failing to implement adequate erosion and sediment controls, Respondent caused the discharge of highly turbid stormwater from its construction site to a stream, which showed a failure to take reasonable care to avoid a foreseeable risk that it would cause pollution and violate Oregon environmental law.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of -1 according to OAR 340-012-0145(6)(e), because Respondent made reasonable efforts to ensure the violation would not be repeated. Respondent implemented erosion and sediment control measures at the site by January 29, 2018 to prevent future discharges of turbid stormwater.

"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: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$4,000 + [(0.1 x \$4,000) x (0 + 0 + 2 + 4 - 1)] + \$0
= \$4,000 + [\$400 x 5] + \$0
= \$4,000 + \$2,000 + \$0
= \$6,000