



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

June 12, 2020

CERTIFIED MAIL: 7017 1450 0000 8310 3367

Ferndell Estates LLC
c/o Lisa Ann Joerin, Registered Agent
2165 SW Main St.
Portland, OR 97205

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/SW-NWR-2020-063

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 DEQ has issued you a total civil penalty of \$26,009 for water quality violations at the Ferndell Estates construction site in West Linn (the Site). You have coverage under the NPDES Stormwater Discharge Permit No. 1200-C (the Permit) for construction activities at the Site, which discharges stormwater directly to the Willamette River. On March 5, 2020, DEQ inspected the Site and found that you failed to implement many conditions of your Erosion and Sediment Control Plan (ESCP). Also, you failed to conduct visual monitoring as required in the Permit. These are violations of Oregon environmental law.

DEQ issued this penalty because implementing the ESCP is essential to ensure compliance with the terms and conditions of the Permit, as it includes pollution control measures that are specific to your Site. These measures are intended to prevent the discharge of sediment to the Willamette River, as sediment can harm aquatic life and impact beneficial uses of the river. The Permit requires regular visual monitoring of the entire Site so that any problems or deficiencies with erosion and sediment control measures can be identified and promptly corrected.

Included in Section IV of the attached Notice is an order requiring you to submit a revised ESCP addressing the Site's inactive status to DEQ within fourteen (14) days of this Notice becoming final, and to implement erosion and sediment controls identified in the ESCP within thirty (30) days of this Notice becoming final.

\$15,142 of the civil penalty represents the economic benefit you gained by failing to revise the ESCP and implement adequate erosion and sediment controls at the Site. 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 Esther Westbrook at 503-229-5374 or toll free in Oregon at 800-452-4011, extension 5374.

Sincerely,



Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

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

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
2 OF THE STATE OF OREGON

3
4 IN THE MATTER OF:) NOTICE OF CIVIL PENALTY
5 FERDELL ESTATES LLC,) ASSESSMENT AND ORDER
6 an Oregon limited liability company,)
7 Respondent.) NO. WQ/SW-NWR-2020-063

8 I. AUTHORITY

9 The Department of Environmental Quality (DEQ) issues this Notice of Civil Penalty
10 Assessment and Order pursuant to Oregon Revised Statutes (ORS) 468.100 and 468.126 through
11 468.140, ORS Chapters 183 and 468B, and Oregon Administrative Rules (OAR) Chapter 340,
12 Divisions 011, 012, and 045.

13 II. FINDINGS OF FACT

14 1. On May 21, 2019, DEQ issued coverage to Respondent under the National Pollutant
15 Discharge Elimination System (NPDES) General Permit No. 1200-C (Permit). The Permit
16 expires on December 14, 2020, and was effective at all material times.

17 2. The Permit authorizes construction activities that may discharge to surface waters or
18 conveyance systems leading to surface waters of the state. Specifically, Respondent's coverage
19 under the Permit authorizes construction activities at "Ferndell Estates," a residential subdivision
20 construction project located at 3300 and 3350 Riverside Court in West Linn, Clackamas County,
21 Oregon (the Site). The Site discharges to the Willamette River. The total disturbed area at the
22 Site is approximately 2.7 acres.

23 3. Respondent began construction activities at the Site on or around June 11, 2019.

24 4. Respondent temporarily ceased construction activities at the Site in January 2020.

25 5. As of the date of this Notice, the Site is inactive.

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1 6. DEQ inspected the Site on March 5, 2020. At the time of the inspection:

2 a. The catch basins at the Site lacked inlet protection and were full of sediment and
3 debris;

4 b. There were unstabilized slopes at the Site with visible erosion and channeling.
5 The wattles were incorrectly installed on the slopes at the Site. The wattles were
6 placed parallel to the contours rather than perpendicular and were not trenched
7 into the ground, allowing the free movement of sediment past the wattles; and

8 c. There were areas of bare ground that had not been stabilized with vegetation,
9 mulch or another method after construction ceased;

10 7. Respondent's ESCP, dated July 29, 2019, contains the following conditions or
11 requirements:

12 a. Install catch basins inlet protection where indicated on Sheet 12.3, and as
13 specified on Sheet 12.4, Curb Inlet Detail and Catch Basin Insert Bag Detail.

14 b. Install wattles on slopes where indicated on Sheet 12.3, and as specified on Sheet
15 12.4, Detail Drawing 4-27.

16 c. The entire site must be temporarily stabilized using vegetation or a heavy mulch
17 layer, temporary seeding, or other method should all construction activities cease
18 for 30 days or more. Sheet 12.1, Standard ESCP Drawing Note 34.

19 8. Schedule B, Condition (1)(b) of the Permit requires that when the site is active, all
20 ESCP controls and practices must be monitored visually on a daily basis when stormwater
21 runoff, including runoff from snowmelt, is occurring, and at least once every fourteen (14)
22 calendar days, regardless of whether stormwater runoff is occurring. When the site is inactive for
23 periods greater than fourteen (14) consecutive calendar days, visual monitoring must be
24 performed at least once per month.

25 9. According to rain gauge data, there were at least 44 days when Respondent should
26 have conducted visual monitoring at the Site between June 11, 2019 and March 5, 2020.

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1 b. Within thirty (30) days of this Notice becoming final, implement erosion and
2 sediment controls identified in the ESCP at the Site and send documentation to
3 Michael Kennedy at the address above.

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

5 You have a right to a contested case hearing on this Notice, if you request one in writing.
6 DEQ must receive your request for hearing **within 20 calendar days** from the date you receive
7 this Notice. If you have any affirmative defenses or wish to dispute any allegations of fact in this
8 Notice or attached exhibits, you must do so in your request for hearing, as factual matters not
9 denied will be considered admitted, and failure to raise a defense will be a waiver of the defense.
10 (See OAR 340-011-0530 for further information about requests for hearing.) You must send your
11 request to: **DEQ, Office of Compliance and Enforcement, 700 NE Multnomah Street, Suite**
12 **600, Portland, Oregon 97232**, fax it to **503-229-5100** or email it to
13 DEQappeals@deq.state.or.us. An administrative law judge employed by the Office of
14 Administrative Hearings will conduct the hearing, according to ORS Chapter 183, OAR Chapter
15 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be represented by an
16 attorney at the hearing, however you are not required to be. If you are an individual, you may
17 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
19 a duly 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.

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

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8
9 6/12/2020

10 Date

Kieran O'Donnell

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 1: Failing to implement control measures or practices described in 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 \$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 Respondent has coverage under the NPDES 1200-C General Permit for a construction site that is more than one but less than five 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. Each day of violation constitutes a separate occurrence. Respondent failed to implement control measures or practices described in the ESCP from June 11, 2019 through the date of this Notice, which was more than 28 days.

"M" is the mental state of the Respondent and receives a 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 from the Site. By failing to install and maintain many of the measures and features included in the ESCP, Respondent failed to take reasonable care to avoid a foreseeable 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). As of the date of this Notice, Respondent has not implemented the required corrective actions at the Site or submitted a revised ESCP to DEQ.

"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 \$15,142. This is the amount Respondent gained by avoiding spending a total of \$12,568 to implement best management practices at the Site, and \$2,000 to revise the ESCP. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model

PENALTY CALCULATION: $Penalty = BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$
 $= \$1,500 + [(0.1 \times \$1,500) \times (0 + 0 + 4 + 4 + 2)] + \$15,142$
 $= \$1,500 + [\$150 \times 10] + \$15,142$
 $= \$1,500 + \$1,500 + \$15,142$
 $= \$18,142$

EXHIBIT NO. 2

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

VIOLATION 2: Failure to conduct visual monitoring in violation of Schedule B, Conditions (1)(a) and (1)(b) of the Permit and ORS 468B.025(2).

CLASSIFICATION: These are Class I violations 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 \$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 Respondent has coverage under the NPDES 1200-C General Permit for a construction site that is more than one but less than five 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. Each day of violation is a separate occurrence. Between June 11, 2019 and March 5, 2020, Respondent failed to inspect the Site on at least 44 days.

"M" is the mental state of the Respondent and receives a 4 according to OAR 340-012-0145(5)(c), because Respondent's conduct was negligent. Respondent is permitted under the NPDES 1200-C Permit which expressly requires Respondent to visually monitor all erosion and sediment controls and outfalls daily when stormwater runoff is occurring so that it may identify problems at the site in order to prevent discharges. By failing to perform any visual monitoring at the Site, 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 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 \$5,167. This is the amount Respondent gained by avoiding spending \$7,920 to conduct visual monitoring at the Site on at least 44 occasions. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
 $= \$1,500 + [(0.1 \times \$4,000) \times (0 + 0 + 4 + 4 + 0)] + \$5,167$
 $= \$1,500 + [\$150 \times 8] + \$5,167$
 $= \$1,500 + \$1,200 + \$5,167$
 $= \$7,867$