



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

July 6, 2017

CERTIFIED MAIL: 7016 2140 0000 2420 3211

Oregon Cherry Growers, Inc.
c/o Tim Ramsey, Registered Agent
1520 Woodrow St., NE
Salem, OR 97301

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/I-ER-2017-108

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued you a civil penalty of \$10,600 for exceeding the effluent limits in your wastewater discharge permit. Effluent limits are set to protect fish and other aquatic life from excessive pollution in your wastewater and to ensure water quality is protected for other beneficial uses.

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.



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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,



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

Enclosures

cc: Carl Nadler, Eastern Region, The Dalles Office, DEQ
Don Butcher, Eastern Region, Pendleton Office, DEQ
Shaumae Hall, Accounting, DEQ
John Koestler, WQ, DEQ

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2 OF THE STATE OF OREGON

3 IN THE MATTER OF:)
4 OREGON CHERRY GROWERS, INC.,) NOTICE OF CIVIL PENALTY
an Oregon cooperative,) ASSESSMENT AND ORDER
5 Respondent.) CASE NO. WQ/I-ER-2017-108

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 Chapters 183 and 468B and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012
10 and 045.

11 II. FINDINGS OF FACT

12 1. At all relevant times, Respondent operated a wastewater collection, treatment and
13 disposal system at 801 West First Street, The Dalles, Oregon, pursuant to National Pollutant Discharge
14 Elimination System Permit No. 100841 (the permit), issued by DEQ.

15 2. The permit authorized Respondent to operate a wastewater collection, treatment, control
16 and disposal system and to discharge to public waters adequately treated wastewater only in
17 conformance with the requirements, limitations and conditions set forth in the permit. The permit was
18 in effect at all material times.

19 3. Schedule A, Condition 1.a of the permit limits the mass load of total suspended solids
20 (TSS) in Respondent's effluent to a maximum of 943 pounds per day.

21 4. On December 16, 2016, Respondent discharged 3,950 pounds of TSS in its effluent.

22 5. On December 18, 2016, Respondent discharged 4,182 pounds of TSS in its effluent.

23 6. Schedule A, Condition 1.a of the permit limits pH in Respondent's effluent to a range of
24 6.3 to 9.0 standard units.

25 7. On March 11 and 12, 2017, Respondent discharged effluent with a pH of 5.1 standard
26 units.

27 ///

1 further information about requests for hearing.) You must send your request to: **DEQ, Office of**
2 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax
3 it to **503-229-5100**, or email it to **DEQappeals@deq.state.or.us**. An administrative law judge
4 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS
5 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be
6 represented by an attorney at the hearing, however you are not required to be. If you are an individual,
7 you may 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 a duly
9 authorized representative, as set forth in OAR 137-003-0555.

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

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

21
22
23
24 July 6, 2017

25 Date

24 Sarah G. Wheeler

25 Sarah G. Wheeler, Acting Manager
26 Office of Compliance and Enforcement
27

EXHIBIT 1

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

VIOLATION 1: Exceeding permit effluent limits for TSS, in violation of ORS 468B.025(2).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(k)(A).

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0135(2)(a)(C)(i) as Respondent's effluent was diluted by the receiving stream by a factor of 10 or more.

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 \$2,000 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(ii).

"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 2. P is assigned an initial value of 4 pursuant to OAR 340-012-0145(2)(a) because Respondent has prior significant actions consisting of three Class I equivalent violations stemming from Case Nos. WQ/I-ER-13-014 and -13-041. The initial value is reduced by 2 pursuant to OAR 340-012-0145(2)(d)(A)(i), because all the formal enforcement actions in which prior significant actions were cited were issued more than three years before the date the current violation occurred.

"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 were two occurrences of the violation.

"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 has failed to make timely improvements to its treatment system demonstrating a failure to exercise reasonable care to avoid the foreseeable risk of committing the violations.

"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) as Respondent made reasonable efforts to ensure that the violation would not be repeated by working with its consulting engineers and renting equipment to improvement treatment.

"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. DEQ has insufficient information as to the needed upgrades to arrive at a reasonable estimate of avoided or delayed compliance costs.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$2,000 + [(0.1 x \$2,000) x (2 + 0 + 2 + 4 + (-1))] + \$0
= \$2,000 + (\$200 x 7) + \$0
= \$2,000 + \$1,400 + \$0
= \$3,400

EXHIBIT 2

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

- VIOLATION 2: Exceeding permit effluent limits for pH, in violation of ORS 468B.025(2).
- CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(1).
- MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0135(2)(a)(C)(ii) as the receiving stream flow was more than twice the rate used to calculate Respondent's pH limit.
- 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 \$2,000 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(ii).
- "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 2. P is assigned an initial value of 4 pursuant to OAR 340-012-0145(2)(a) because Respondent has prior significant actions consisting of three Class I equivalent violations stemming from Case Nos. WQ/I-ER-13-014 and -13-041. The initial value is reduced by 2 pursuant to OAR 340-012-0145(2)(d)(A)(i), because all the formal enforcement actions in which prior significant actions were cited were issued more than three years before the date the current violation occurred.
- "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 were two occurrences of the violation.
- "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 violation resulted from operator error when Respondent failed to adjust the alkalinity of its wastewater. This constitutes a failure to exercise reasonable care to avoid the foreseeable risk of committing the violations.
- "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 has engaged in training and other measures to avoid a repeat of the violation.

"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 Respondent's economic benefit was de minimis as the violation did not result from the delay or avoidance of compliance costs.

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

$$\begin{aligned} &= \$2,000 + [(0.1 \times \$2,000) \times (2 + 0 + 2 + 4 + (-1))] + \$0 \\ &= \$2,000 + (\$200 \times 7) + \$0 \\ &= \$2,000 + \$1,400 + \$0 \\ &= \$3,400 \end{aligned}$$

EXHIBIT 3

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

- VIOLATION 3: Exceeding permit effluent limits for BOD₅, in violation of ORS 468B.025(2).
- CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(k)(A).
- MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0135(2)(a)(C)(i) as Respondent's effluent was diluted by the receiving stream by a factor of 10 or more.
- 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 \$2,000 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(ii).
- "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 2. P is assigned an initial value of 4 pursuant to OAR 340-012-0145(2)(a) because Respondent has prior significant actions consisting of three Class I equivalent violations stemming from Case Nos. WQ/I-ER-13-014 and -13-041. The initial value is reduced by 2 pursuant to OAR 340-012-0145(2)(d)(A)(i), because all the formal enforcement actions in which prior significant actions were cited were issued more than three years before the date the current violation occurred.
- "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 3 according to OAR 340-012-0145(4)(c) because there were 12 occurrences of the violation.
- "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 has failed to make timely improvements to its treatment system demonstrating a failure to exercise reasonable care to avoid the foreseeable risk of committing the violations.
- "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. DEQ has insufficient information as to the needed upgrades to arrive at a reasonable estimate of avoided or delayed compliance costs.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$2,000 + [(0.1 x \$2,000) x (2 + 0 + 3 + 4 + 0)] + \$0
= \$2,000 + (\$200 x 9) + \$0
= \$2,000 + \$1,800 + \$0
= \$3,800