



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

September 15, 2021

CERTIFIED MAIL: 7018 1830 0001 5903 8914

Gaston Heights LLC
c/o Tim McDonald, Registered Agent
233 SE 2nd St.
Hillsboro, OR 97213

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/SW-NWR-2021-081

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 \$82,891 for engaging in construction activities prior to obtaining registration under the National Pollutant Discharge Elimination System (NPDES) Construction Stormwater General Permit No. 1200-C (the Permit) at 410 Hedin Terrace, in Gaston, Oregon (the Site).

DEQ issued this penalty because your construction activities took place for approximately a year without required coverage under an NPDES general or individual permit. The Permit requires that registrants implement and maintain sufficient erosion and sediment controls and best management practices to prevent the discharge of sediment from the site and into waters of the state or conveyances that lead to waters of the state. 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. Without appropriate permit coverage, the discharge of sediment-laden construction stormwater can degrade water quality and harm aquatic life by covering up food sources and smothering invertebrate organisms living in Wapato Creek and its tributaries.

Furthermore, DEQ is particularly concerned that you deliberately set out to commit the violation. Specifically, you continued construction activities at the Site, including grading, grubbing, stumping, and stockpiling fill outside of the area where you were permitted to work, not only without coverage under the Permit but also after being issued Stop Work Orders by the City of Gaston and Clean Water Services, DEQ's agent in the implementation of the Permit.

\$73,291 of the civil penalty represents the economic benefit you gained by failing to comply with the conditions of the Permit that would apply if you were lawfully conducting work at the Site.

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,

A handwritten signature in blue ink, appearing to read 'K O'Donnell', is written over a horizontal line.

Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

cc: Blair Edwards, Northwest Region, DEQ
Christine Svetkovich, Northwest Region, DEQ
Accounting, DEQ
Tony Gilbertson, CWS, 2550 SW Hillsboro Hwy, Hillsboro, OR 97123

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:) NOTICE OF CIVIL PENALTY
GASTON HEIGHTS LLC,) ASSESSMENT AND ORDER
a limited liability corporation,)
Respondent.) CASE NO. WQ/SW-NWR-2021-081

I. AUTHORITY

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

II. FINDINGS OF FACT

1. Respondent is the owner and operator of the “Gaston Heights” residential development project (the Project) located at 410 Hedin Ter., in Gaston, Oregon (the Site). The total disturbance area of the Project is 16.56 acres.

2. The Site slopes towards and has the potential to discharge construction stormwater to an unnamed upper fork of Wapato Creek.

3. Respondent was initially assigned coverage under the National Pollutant Discharge Elimination System (NPDES) Construction Stormwater Discharge Permit Number 1200-C (the Permit) for construction activities on Phase 2 of work on the Site. Respondent’s permit coverage terminated in 2015 because Respondent did not renew its registration.

4. On or about May 15, 2020, through the present, Respondent logged, disked, graded and grubbed the Site, clearing it of trees and vegetation and groundcover at the Site. These activities occurred in the location of Phases 3, 4, and 5 of the Project, as described in the “Gaston Heights Phasing Plan” dated November 9, 2020 (the Master Plan).

5. In August of 2020, Respondent placed a stockpile at a portion of the Site where Phase 4 construction is planned according to the Master Plan.

6. “Construction Activity” is defined in Schedule D, condition 7.5.1(i) of the Permit as “including but not limited to clearing, grading, ... grubbing, stumping and land disturbing activities.”

7. Construction activity may cause an increase in the discharge of wastes into waters of the state.

8. On or about March 16, 2021, Respondent submitted an application to Clean Water Services for coverage under the National Pollutant Discharge Elimination System Construction Stormwater Discharge Permit Number 1200-C (the Permit) for construction activities on Phase 3 of the Project.

9. On July 23, 2021, DEQ assigned Respondent coverage under the Permit for Phase 3 of the Project.

III. CONCLUSIONS

On or about May 15, 2020, through July 23, 2021, Respondent violated ORS 468B.050(1)(d) and OAR 340-045-0033(6) by engaging, without a permit, in construction activity at the Site which would cause an increase in the discharge of wastes into waters of the state and would otherwise alter the physical, chemical, or biological properties of waters of the state, as described in Section II above. Specifically, Respondent engaged in clearing, grading, grubbing, stumping, stockpiling at the Site on Phases 3, 4 and 5 without a permit and where these activities may cause a discharge of wastes to Wapato Creek, a “water of the state” pursuant to ORS 468B.005(10). Stormwater runoff carrying sediment from Respondent’s compacted or disturbed soils and construction activities are “wastes” pursuant to ORS 468B.005(2) and were likely to enter waters of the state and to alter their physical, chemical, and biological properties. Respondent’s activities on Phases 3, 4 and 5 of the project required a general or individual permit pursuant to OAR 340-045-0033(6) and ORS 468B.050(1)(d). This is a Class I violation, according to OAR 340-012-0055(1)(d). DEQ hereby assesses an \$82,891 civil penalty for this violation.

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1 IV. ORDER TO PAY CIVIL PENALTY

2 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is
3 hereby ORDERED TO: Pay a total civil penalty of \$82,891. The determination of the civil penalty is
4 attached as Exhibit No.1 and is incorporated as part of this Notice.

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

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

23 Active duty Service members have a right to stay proceedings under the federal Service
24 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-
25 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed
26 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military
27 Department does not have a toll free telephone number.

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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11 Date

9 / 15 / 2021


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Kieran O'Donnell, Manager
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: Violating ORS 468B.050(1)(d) by engaging in construction activity without a permit.

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

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)(iii) and applicable pursuant to OAR 340-012-0140(3)(a)(E)(iii), as Respondent has applied for coverage under an NPDES General Permit for a construction site that disturbed 16.56 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. Each day of violation is a separate occurrence. Respondent engaged in construction activities without Permit coverage since at least May 15, 2020, until July 23, 2021, for a span of over 14 months.

"M" is the mental state of Respondent, and receives a value of 10 according to OAR 340-012-0145(5)(e) because Respondent acted flagrantly. Respondent first applied for Permit coverage for Phase 1 and Phase 2 of the Gaston Heights project at the Site in 2015. On June 4, 2020, CWS informed Respondent's engineer that previous permit coverage had been terminated due to Respondent's failure to renew coverage and that no new modifications can be made to construction activities there without renewing permit coverage. In November 2020, the City of Gaston issued Respondent a stop work order due to non-

compliance with the Permit. On February 4, 2021, Respondent told CWS that it had proceeded with construction activities because it was taking too long to obtain permits and it needed to get to work due to funding concerns. Despite having actual knowledge it was unlawful to proceed with unpermitted construction activities, Respondent continued to engage in construction activities at the Site. Respondent was issued a Stop Work order by CWS on Feb. 15, 2021. By engaging in construction activities without a permit Respondent consciously set out to commit the 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)(d) because Respondent eventually made some efforts to correct the violation by obtaining coverage under the Permit.

"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 total value of \$73,291. Respondent gained this economic benefit by avoiding the costs of implementing best management practices (\$90,771), avoided costs associated with an environmental management plan (\$5,098), avoided the costs of an engineer to revise an ESCP (40 hours at \$180/hour) and avoided the costs of an erosion and sediment control inspector to perform 70 visual monitoring events (\$95/hour) since construction activities began in May 15, 2020.

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 + 10 + -2)] + \$73,291
= \$4,000 + (\$400 x 14) + \$73,291
= \$4,000 + \$5,600 + \$73,291
= \$82,891