



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

October 10, 2018

CERTIFIED MAIL: 7016 0750 0000 3470 3098

Oregon Cherry Growers, LLC
c/o Corporation Service Company, Registered Agent
1127 Broadway Street, NE, Suite 310
Salem, OR 97301

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/SW-WR-2018-134

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued Oregon Cherry Growers, LLC a civil penalty of \$9,372 for failing to perform monitoring of impairment pollutants during the 2017-2018 monitoring year as required under the NPDES 1200-Z General Permit for the facility located at 1502 Woodrow St., NE, in Salem, Oregon.

DEQ issued this penalty because monitoring is an important condition of the Permit and this is the second year that Oregon Cherry Growers has failed to comply with the Permit's requirements for impairment pollutant monitoring. Monitoring may reveal the presence of harmful levels of pollutants that pose a threat to waters of the state. In addition, monitoring allows permittees and DEQ to gauge the effectiveness of stormwater controls and best management practices at reducing levels of pollutants in discharges.

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>

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DEQ's rules are available at <http://www.oregon.gov/deq/Regulations/Pages/administrative-rules.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,



Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

cc: Erick Watkins, Oregon Cherry Growers Inc., PO Box 1600, Lodi, CA 95241
Jill Seale, DEQ, Eugene Office
John Koestler, WQ, DEQ
Julie Cheney, Accounting, DEQ

1 III. CONCLUSIONS

2 Respondent has violated ORS 468B.025(2) and Schedule B, condition 1.b of the Permit by
3 failing to monitor for impairment pollutants in the 2017-2018 monitoring year. This is a Class I violation
4 pursuant to OAR 340-012-0055(1)(o). DEQ hereby assesses a \$9,372 civil penalty for this violation.

5 IV. ORDER TO PAY CIVIL PENALTY

6 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is
7 hereby ORDERED TO: Pay a total civil penalty of \$9,372. The determination of the civil penalty is
8 attached as the Exhibit and is incorporated as part of this Notice.

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

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

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

1 Active duty service-members have a right to stay proceedings under the federal Service
2 Members Civil Relief Act. For more information, please call the Oregon State Bar at 1-800-
3 452-8260 or the Oregon Military Department at 1-800-452-7500. Additional information can be found
4 online at the United States Armed Forces Legal Assistance (AFLA) Legal Services Locator website
5 <http://legalassistance.law.af.mil/content/locator.php>.

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

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15 10/10/18
16 Date

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Kieran O'Donnell, Manager
Office of Compliance and Enforcement

EXHIBIT

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

VIOLATION: Violating ORS 468B.025(2) by violating Schedule B, condition 1.b of the Permit by failing to monitor impairment pollutants two times in the 2017-2018 monitoring year.

CLASSIFICATION: This is a Class I violation 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 \$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 an NPDES General Permit.

"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 according to OAR 340-012-0145(2)(a)(C) because Respondent has one prior significant action (EEO #2015-EEO-1013) which included 1 class I violation.

"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 was more than one but less than seven occurrences of the violation. Specifically, Respondent failed to perform two instances of impairment pollutant monitoring at its two outfalls for a total of four occurrences.

"M" is the mental state of the Respondent, and receives a value of 8 according to OAR 340-012-0145(5)(d), because Respondent's conduct was reckless. Respondent applied for coverage under the Permit and has a copy of the Permit, which expressly requires Respondent to perform monitoring for impairment pollutants twice per monitoring year. Additionally, Respondent was cited for violating this monitoring requirement in the Permit in EEO #EEO-2015-EEO-1013 during the 2014-2015 monitoring year. By failing to adhere to the Permit's

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monitoring requirements Respondent consciously disregarded a substantial and unjustifiable risk that it would fail to perform required monitoring during the 2017-2018 monitoring year and violate Oregon law.

"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 \$572. This is the amount Respondent gained by avoiding spending \$880 on analysis of four impairment pollutants at its two outfalls twice during the 2017-2018 monitoring year by June 30, 2018. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

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

$$\begin{aligned} &= \$4,000 + [(0.1 \times \$4,000) \times (2 + 0 + 2 + 8 + 0)] + \$572 \\ &= \$4,000 + (\$400 \times 12) + \$572 \\ &= \$4,000 + \$4,800 + \$572 \\ &= \$9,372 \end{aligned}$$