



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

November 20, 2018

CERTIFIED MAIL: 7016 0750 0000 3470 3173

McFarlane's Bark, Inc.
Joseph Q. Kaufman, Registered Agent
405 W. Arlington Street
Gladstone OR 97027

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/SW-NWR-2018-155

This letter is to inform you that DEQ has issued you a civil penalty of \$9,427 for failing to comply with the NPDES 1200-Z Permit. You have coverage under the Permit for your facility located at 13345 S.E. Johnson Road in Milwaukie. During the 2017/2018 sampling year, you only collected and analyzed one sample from your two outfalls from July 1 through December 31, 2017. DEQ issued this penalty because you have previously been assessed penalties for violations of the 1200-Z Permit.

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/Statutes.aspx> or by calling the number below.

If you have any questions, please contact Susan Elworth at 503-229-5152 or toll free in Oregon at 800-452-4011, extension 5152.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kieran O'Donnell".

Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures
cc: Michael Kennedy, NWR, DEQ

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

3 IN THE MATTER OF:) NOTICE OF CIVIL PENALTY
4 MC FARLANE'S BARK, INC.,) ASSESSMENT AND ORDER
5 Respondent.) NO. WQ/SW-NWR-2018-155

6 I. AUTHORITY

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

10 II. FINDINGS OF FACT

11 1. On February 5, 1999, DEQ assigned Respondent coverage under the National
12 Pollutant Discharge Elimination System Stormwater Discharge General Permit Number 1200-Z
13 (the Permit), which authorizes Respondent to discharge stormwater from its facility located
14 13345 SE Johnson Road, in Milwaukie, only in conformance with the Permit. The Permit was
15 renewed on August 1, 2017 and is effective through July 31, 2022.

16 2. Schedule B, Table 5 of the Permit requires Respondent to monitor its stormwater
17 discharge for pollutants four times per year. Specifically, two samples must be collected
18 between January 1 and June 30, and again between July 1 and December 31 of each year.

19 3. According to a discharge monitoring report received by DEQ on July 23, 2018,
20 Respondent collected samples from its two discharge points on November 21, 2017, January 19,
21 2018 and March 1, 2018 in the 2017/2018 monitoring year.

22 III. CONCLUSIONS

23 Respondent has violated ORS 468B.025(2), and Schedule B, Table 5 of the Permit by
24 failing to monitor its stormwater discharge. Specifically, Respondent failed to collect two
25 samples from both of its discharge points between July 1, 2017 and December 31, 2017. These
26 are Class I violations, according to OAR 340-012-0055(1)(o). DEQ assesses a \$9,427 civil
27 penalty for these violations.

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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 \$9,427. The determination of the civil penalty is
4 attached as Exhibit No. 1 and is incorporated as part of this Notice. If you do not file a request for
5 hearing as set forth in Section V below, your check or money order must be made payable to "**State**
6 **Treasurer, State of Oregon**" and sent to the **DEQ, Business Office, 811 S.W. Sixth Avenue,**
7 **Portland, Oregon 97204.** Once you pay the penalty, the Notice becomes final.

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

24 Active duty service-members have a right to stay proceedings under the federal Service
25 Members Civil Relief Act. For more information, please call the Oregon State Bar at 1-800-

1 452-8260 or the Oregon Military Department at 1-800-452-7500. Additional information can be
2 found online at the United States Armed Forces Legal Assistance (AFLA) Legal Services
3 Locator website <http://legalassistance.law.af.mil/content/locator.php>.

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

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14 Date

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Kieran O'Donnell, Manager
Office of Compliance and Enforcement

EXHIBIT 1

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

VIOLATION 1: Failing to monitor its stormwater discharge at least two times on or before December 31, 2017, in violation of ORS 468B.025(2) and Schedule B, Table 5 of the Permit.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0-0055(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). 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 8 according to OAR 340-012-0145(2)(a), because Respondent has one Class I violation in case no. 2017-EEO-2921, three Class I violations in case no. WQ/SW-NWR-14-138 and three Class I equivalent violations in case no. WQ/SW-NWR-13-177.

"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. There were two occurrences of the violation because Respondent failed to collect one sample prior to December 31, 2017 from two separate discharge points.

"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. Negligence means Respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation. When Respondent failed to ensure that two sampling events occurred prior to December 31, 2017, it failed to take reasonable care to avoid the foreseeable risk that it would violate the Permit.

"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 hired a consultant to ensure that future samples are collected and analyzed.

"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 \$227. This is the amount Respondent gained by avoiding spending \$360 to collect and analyze one sample from two separate discharge points prior to December 31, 2017. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

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

$$\begin{aligned} &= \$4,000 + [(0.1 \times \$4,000) \times (8 + 0 + 2 + 4 - 1)] + \$227 \\ &= \$4,000 + (\$400 \times 13) + \$227 \\ &= \$4,000 + \$5,200 + \$227 \\ &= \$9,427 \end{aligned}$$