



# Oregon

Kate Brown, Governor

Department of Environmental Quality  
Office of Compliance and Enforcement  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232-4100  
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TTY 711

June 5, 2020

CERTIFIED MAIL: 7017 1450 0000 8310 3336

David J. Silliman, Katherine J. Coen, Janice S. Roth and Diane V. Niemeyer  
20028 S.W. 72<sup>nd</sup> Avenue  
Tualatin OR 97062

Re: Notice of Civil Penalty Assessment and Order  
Case No. WQ/SW-WR-2020-007

*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 civil penalty of \$22,522 for failing to apply for coverage under the National Pollutant Discharge Elimination System Stormwater Discharge General Permit Number 1200-C and for violating a state water quality standard at a property you own in Veneta.

In August and September 2019 you allowed land clearing and grading activities at the property, including the expansion of an existing logging road and culvert. You did not apply for the required construction stormwater permit and the activity resulted in a significant amount of sediment being deposited into Wilson Creek. Wilson Creek is classified as a fish-bearing stream.

The permit requires owners and operators of construction and land clearing activities to implement stormwater control measures and monitor runoff to protect water quality and to minimize the amount of pollutants that could enter waters of the state. Of particular concern for construction and land clearing projects is the potential increase in total suspended solids which can block light from reaching submerged vegetation, reducing photosynthesis and dissolved oxygen. Suspended solids also decrease water clarity, which can affect the ability of fish to see and catch food, can also clog fish gills, reduce growth rates, decrease resistance to disease, and prevent egg and larval development. When suspended solids settle to the bottom of a water body, they can smother the eggs of fish and aquatic insects, as well as suffocate newly hatched insect larvae.

Included in Section IV of the attached Notice is an order requiring you to submit an application for coverage under the 1200-C Permit within 30 days of the date of the Notice and to remove the sediment from Wilson Creek. You must maintain coverage under the Permit and implement the best management practices required under the Permit until permanent stormwater control measures are installed at the property.

DEQ appreciates your efforts to minimize the impacts of the violations by seeding a portion of the bare soil and adding gravel to a portion of the road. In order to prevent further sediment from entering Wilson Creek, you must properly install sediment fencing or straw wattles in locations likely to erode and rock check dams in the roadside ditches to slow the velocity of the water and prevent erosion clogging or being discharged directly into the stream. \$11,122 of the civil penalty represents the economic benefit you gained by failing to apply for coverage under the permit, to implement adequate measures to prevent sediment from entering Wilson Creek, and to remove the sediment from Wilson Creek. 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](mailto: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 Susan Elworth at 503-229-5152 or toll free in Oregon at 800-452-4011, extension 5152.

Sincerely,



Kieran O'Donnell, Manager  
Office of Compliance and Enforcement

Enclosures

cc: Kathy Jacobsen, WR, DEQ

Eric Brekstad, Oregon Department of Forestry, 87950 Territorial Road, Veneta OR 97487

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF: )  
DAVID J. SILLIMAN, KATHERINE J. )  
COEN, JANICE S. ROTH, AND DIANE ) NOTICE OF CIVIL PENALTY  
V. NIEMEYER, ) ASSESSMENT AND ORDER  
Respondents. ) CASE NO. WQ/SW-2019-007

I. AUTHORITY

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

II. FINDINGS OF FACT

1. On December 15, 2015, DEQ issued General Permit National Pollutant Discharge Elimination System Stormwater Discharge Permit Number 1200-C (Permit) which expires on December 14, 2020.

2. Respondents own a 12.19 acre property adjacent to 24364 Bolton Hill Road in Veneta Oregon (the Property).

3. A portion of Wilson Creek, including its headwaters, is located on the Property. Wilson Creek is a fish-bearing stream.

4. On May 30, 2019, Oregon Department of Forestry (ODF) received a Notification of Operations which proposed a forestry operation on the Property. The forestry operation would utilize the existing culvert on the Property to cross Wilson Creek, along with a 12 to 18 foot wide dirt road.

5. In July 2019, the existing culvert was replaced and a minimal amount of fill (including boulders and soil) was placed on the Property to support the new culvert.

6. The forestry operation on the Property was completed prior to July 15, 2019.

7. In August 2019, Respondents requested that Lane County change a portion of the Property's land use designation from Forest Use (F-2) to allow the building of a residence on the Property. Following Lane County's approval of that request, only 10 acres of the Property is currently zoned Forest Use (F-2).

1           8. In August and September 2019, Respondents allowed the following activities to be  
2 conducted at the Property:

3           a. The crossing over the culvert in Wilson Creek was expanded from 8 to 10 feet to 13 to  
4 15 feet and the dirt road was relocated and expanded in some areas to 30 to 35 feet wide, allowing for  
5 the placement of significant amount of fill materials including dirt and rock alongside the road near  
6 Wilson Creek and into Wilson Creek at the culvert;

7           b. A roadside drainage ditch was installed alongside the expanded road opposite of  
8 Wilson Creek, along with road drains from the roadside drainage ditch under the road which allowed  
9 water to flow under the road and towards Wilson Creek.

10           c. An area approximately 50 feet by 75 feet was cleared at the end of the road as the  
11 location for a residence.

12           9. On October 28, 2019, DEQ and ODF conducted an inspection at the Property. At the time of  
13 the inspection:

14           a. The headwaters of Wilson Creek was filled with sediment from equipment being driven  
15 through Wilson Creek;

16           b. Additional debris including dirt, stumps and branches had been placed into Wilson  
17 Creek throughout the Property.

18           c. Floating solids and hay bales were visible in Wilson Creek directly downstream of the  
19 culvert, along with sediment inside of the culvert.

20           d. The clearing at the end of the road consisted of bare soil and had rills above a tributary  
21 of Wilson Creek.

22           10. As of the date of this Notice, Respondents have not applied for coverage under the Permit.

23           11. On December 13, 2019, a portion of the Property had been seeded with grass and a portion  
24 of the road had been covered with gravel.

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### III. CONCLUSIONS

1. Respondents violated ORS 468B.025(1)(b) by reducing the water quality of waters of the state below a water quality standard. Specifically, Respondents violated OAR 340-041-0007(11) by causing the formation of appreciable bottom deposits which would be deleterious to fish or other aquatic life, when sediment was deposited into Wilson Creek, as alleged in Section II, paragraphs 3, 8, and 9. Wilson Creek is a "waters of the state," as defined in ORS 468B.005(10). This is a Class I violation according to OAR 340-012-0055(1)(b). DEQ hereby assesses a \$13,933 civil penalty for this violation.

2. Since at least August 2019, Respondents have violated ORS 468B.050(1)(d) and OAR 340-045-0033(6) by conducting an activity described in a general stormwater permit without first applying for coverage under that permit. Activities subject to coverage under the Permit include land clearing, grading, excavating and stockpiling that disturbs one or more acres and may discharge to surface waters or conveyance systems leading to surface waters. Respondents are "owners," as that term is defined in Schedule D, condition 5.t.ii of the Permit, as they have a legal interest in the Property. Because Respondents are owners, per Condition 1.a of the Permit, they were required to submit a complete application to DEQ for coverage under the Permit at least 30 days prior to beginning land clearing. Activities related to construction began at the Property sometime in August 2019 after the forestry operation was completed. This is a Class I violation according to OAR 340-012-0055(1)(d). DEQ assessed an \$8,589 civil penalty for this violation.

### IV. ORDER TO PAY CIVIL PENALTY AND TO COMPLY

Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondents are hereby ORDERED TO:

1. Pay a total civil penalty of \$22,522. The determinations of the civil penalties are attached as Exhibits 1 and 2 and are incorporated as part of this Notice. If you do not file a request for hearing as set forth in Section V below, your check or money order must be made payable to "State Treasurer, State of Oregon" and sent to the DEQ Business Office, 700 NE Multnomah St, Ste 600, Portland, Or 97232.



1           2. Within 30 days of this order becoming final by operation of law or on appeal, submit an  
2 application for coverage under the Permit, along with the permit application fee (\$2,193) to: DEQ,  
3 LeeAnn Gates, 165 E. 7<sup>th</sup> Avenue, Suite 100, Eugene OR 97401.

4           3. Within 30 days of this order becoming final by operation of law or on appeal, submit  
5 documentation that the sediment and debris in Wilson Creek has been removed, to: DEQ, Kathy  
6 Jacobsen, 165 E. 7<sup>th</sup> Avenue, Suite 100, Eugene OR 97401.

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

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

22           Active duty Service members have a right to stay proceedings under the federal Service  
23 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-  
24 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed  
25 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military  
26 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 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.

7  
8 6/5/2020

9 Date

Kieran O'Donnell

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: Reducing the water quality of waters of the state below a water quality standard, in violation of ORS 468B.025(1)(b).

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

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 \$3,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(F)(ii). Respondents should have had coverage under a NPDES 1200-C General Permit for a construction site of more than 1 but less than 5 acres.

"P" is whether Respondents have 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 Respondents' 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. The sediment in Wilson Creek was placed there during the logging activity in July 2019 and again when the road was expanded in September 2019. DEQ documented the sediment in Wilson Creek during its inspection in October 2019. Since it is unknown if the sediment has been removed from the creek since DEQ's inspection, the violation was on-going from at least July through October 2019.

"M" is the mental state of the Respondents, and receives a value of 4 according to OAR 340-012-0145(5)(c) because Respondents were negligent. Negligence means Respondents failed to take reasonable care to avoid a foreseeable risk of conduct resulting in a violation. Respondents' forestry plan states that it will maintain a 50 foot riparian management area along Wilson Creek and that they will prevent erosion and sedimentation into the creek by minimizing soil disturbance in this area. During inspections by ODF in July and September



2019, the inspection reports state that more mitigation measures are needed at the Property to ensure that sediment is not reaching the creek. When Respondents failed to ensure that its contractor followed the steps in its plan and outlined in the July and September inspection reports, they failed to exercise reasonable care to avoid the foreseeable risk that significant amounts of sediment would be deposited into the creek.

"C" is Respondents' efforts to correct or mitigate the violation, and receives a value of 2 according to OAR 340-012-0145(6)(g) because Respondents 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). Respondents have not provided DEQ with any documentation that they have taken steps to address the sediment in the stream.

"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 value of \$7,933. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model based upon the following cost estimates: delaying, from September until December 2019, spending \$2,640 to hydroseed the Property; avoiding, since September 2019, spending \$7,143 to implement other measures to prevent sediment from entering the creek including sediment fencing, straw wattles and rock check dams; and avoiding, since October 2019, spending \$540 to have the sediment removed from the creek.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
= \$3,000 + [(0.1 x \$3,000) x (0 + 0 + 4 + 4 + 2)] + \$7,933  
= \$3,000 + (\$300 x 10) + \$7,933  
= \$3,000 + \$3,000 + \$7,933  
= \$13,933

## EXHIBIT 2

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

- VIOLATION 2: Conducting an activity described in a general stormwater permit without first applying for coverage under that permit, in violation of ORS 468B.050(1)(d) and OAR 340-045-0033(6)
- 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 \$3,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140(4)(a)(F)(ii). Respondents should have had coverage under a NPDES 1200-C General Permit for a construction site of more than one but less than 5 acres.
- "P" is whether Respondents have 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 Respondents' 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. Respondents have been operating an activity covered by a stormwater general permit since at least August 2019 without applying for permit coverage, thus the violation has been ongoing since that time.
- "M" is the mental state of the Respondents and receives a value of 2 according to OAR 340-012-0145(5)(b) because Respondents had constructive knowledge (reasonably should have known) of the requirement. As developers of real property who previously notified ODF of land use changes, Respondents reasonably should have known of the requirement to obtain coverage under the 1200-C Permit prior to conducting construction activities that may impact Wilson Creek.

"C" is Respondents' efforts to correct or mitigate the violation and receives a value of 2 according to OAR 340-012-0145(6)(g), because Respondents 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). Respondents have not submitted an application for 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 value of \$3,189. This is the amount Respondents gained by avoiding spending \$2,143 for permit application fee to obtain coverage under the permit since August 2019, along with avoiding spending \$900 to conduct inspections required under the Permit. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
= \$3,000 + [(0.1 x \$3,000) x (0 + 0 + 4 + 2 + 2)] + \$3,189  
= \$3,000 + (\$300 x 8) + \$3,189  
= \$3,000 + \$2,400 + \$3,189  
= \$8,589