



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

May 8, 2020

CERTIFIED MAIL: 7017 1450 0000 8310 3190

Wilbur Ellis Company, LLC
c/o Registered Agent Solutions, Inc., Registered Agent
8130 SW Beaverton-Hillsdale Hwy
Portland, OR 97225

Re: Notice of Civil Penalty Assessment and Order
Case No. WQ/SW-NWR-2019-218

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 Wilbur Ellis Company, LLC, a Notice of Civil Penalty Assessment and Order in the amount of \$14,053 for violations of the NPDES Stormwater Discharge General Permit No. 1200-Z, issued for the facility located at 12530 SE Jennifer St, in Clackamas, Oregon. Specifically, DEQ has penalized you for failing to conduct stormwater monitoring during the 2018-2019 monitoring year and failing to implement your Stormwater Pollution Control Plan.

DEQ issued this penalty because monitoring is an important condition of the Permit and this is the second year that Wilbur Ellis has failed to comply with all of the Permit's monitoring requirements. 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. DEQ understands that you sought to obtain a monitoring variance for the period of missed monitoring. However, the variance did not meet the Permit's requirements for approval and was, therefore, denied.

DEQ is also concerned that you re-submitted a request for a monitoring variance that DEQ had previously denied, and this second request claimed that you implemented a bioswale that you had not implemented according to the specifications described in the applicable SWPCP.

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/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: Leora Goble, Wilbur-Ellis Feed LLC, 16300 Christensen Road, Suite 135, Tukwila, WA 98188
Michael Kennedy, DEQ, Northwest Region
Daria Gneckow, DEQ, Northwest Region
Christine Svetkovich, DEQ, Northwest Region
Accounting, DEQ

BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

| | | |
|--|---|-----------------------------|
| IN THE MATTER OF: |) | |
| WILBUR ELLIS COMPANY, LLC |) | NOTICE OF CIVIL PENALTY |
| a foreign limited liability corporation, |) | ASSESSMENT AND ORDER |
| Respondent. |) | CASE NO. WQ/SW-NWR-2019-218 |

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

II. FINDINGS OF FACT

1. Respondent is registered under the National Pollutant Discharge Elimination System Stormwater Discharge General Permit No. 1200-Z (the Permit) for the facility located at 12530 SE Jennifer Street in Clackamas, Oregon (the Facility).

2. Schedule B, condition 2.f. of the Permit requires permit registrants to monitor for benchmark pollutants four times per monitoring year, with two samples taken between January 1 and June 30, and two samples between July 1 and December 31.

3. Respondent submitted a discharge monitoring report (DMR) and lab reports for the grab sample monitoring it performed for the 2018-2019 monitoring year.

4. Respondent took only two of the four required grab samples during the first half of the 2018-2019 monitoring year and did not perform any monitoring in the second half of the monitoring year.

5. Respondent indicated in the DMR that it had "no discharge" during January 1, 2019, through June 30, 2019, and requested a monitoring variance for that period of the 2018-2019 monitoring year.

6. Schedule B, condition 3 requires that supporting data and analysis demonstrating why the monitoring did not occur be submitted with the DMR.

1 7. Respondent's monitoring variance was the same as a monitoring variance it had
2 previously submitted to DEQ for the 2017-2018 monitoring year, which DEQ had rejected.
3 Respondent did not submit any new supporting data and analysis to demonstrate why the monitoring
4 did not occur.

5 8. Respondent sampled its stormwater discharge on September 12, 2018, when it had
6 rained 0.24 inches.

7 9. According to rain gauge data from NOAA's Clackamas 1.9 NNW, OR US
8 US1ORCC0006 station, there was rain in excess of 0.24 inches on these days during Respondent's
9 regular business hours during the 2018-2019 monitoring year: 10/8/18, 10/26/18, 10/29/18, 11/6/18,
10 12/12/19, 12/17/18, 12/18/18, 12/21/18, 12/24/18, 1/4/19, 1/7/19, 1/8/19, 1/17/19, 1/21/19, 1/23/19,
11 2/4/19, 2/5/19, 2/9/19, 2/11/19, 2/12/19, 2/13/19, 2/15/19, 2/20/19, 2/28/19, 3/7/19, 3/9/19, 3/12/19,
12 3/26/19, 3/28/19, 3/29/19, 4/5/19, 4/8/19, 4/9/19, 5/16/19, 5/20/19, 5/23/19, 6/27/19, and 6/28/19.

13 10. Schedule B, condition 2.e. of the Permit requires that pH sampling be measured either
14 directly in the flow or within 15 minutes of sample calibration.

15 11. Schedule B, condition 8.a.i.3 of the Permit requires that permit registrants must submit
16 pH field notes and chain of custody with its monitoring results.

17 12. Respondent did not submit any field notes indicating the pH sampling method it used on
18 September 12, 2018, and November 28, 2018.

19 13. Schedule A, condition 10.a.v. of the Permit requires permit registrants to submit a Tier I
20 report to DEQ within 60 days of receiving the monitoring results, in the event of an exceedance of a
21 reference concentration for any impairment pollutant identified in a permit assignment letter.

22 14. On August 18, 2017, and on October 24, 2019, DEQ sent Respondent letters informing
23 it that it was required to monitor for the impairment pollutant BOD.

24 15. On November 28, 2018, Respondent exceeded the reference concentration for BOD.

25 16. As of the date of this Notice, Respondent did not submit a Tier I report to DEQ in
26 response to the BOD exceedance.

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1 17. Schedule F, Section C3 of the Permit requires that monitoring be conducted according to
2 test procedures approved under 40 CFR part 136.

3 18. 40 CFR part 136 requires filtering of grab samples within 15 minutes of collection for
4 dissolved metals.

5 19. On November 28, 2018, Respondent did not field filter the grab sample for dissolved
6 lead.

7 20. Schedule A, condition 6.d of the Permit requires permittees to implement the SWPCP
8 and any revisions to the Plan.

9 21. Schedule A, condition 6.e of the Permit requires the SWPCP be kept current and revised
10 as necessary to reflect applicable changes to the site.

11 22. On December 22, 2014, Respondent developed an addendum to its SWPCP proposing
12 the installation of a 110 foot long bioswale oriented east-west in the northern part of the Facility. DEQ
13 approved the proposed addendum on January 16, 2015.

14 23. On February 5, 2020, DEQ performed an inspection of the Facility. At the time of the
15 inspection the bioswale installed at the Facility was approximately 65 feet in length, was oriented
16 north-south and was located in an area that did not undergo infiltration testing.

17 III. CONCLUSIONS

18 1. Respondent has violated ORS 468B.025(2) and Schedule B, condition 2.f. of the Permit
19 by failing to monitor its stormwater discharge twice during the second half of the 2018-2019 monitoring
20 year, as described in Section II, paragraphs 2 through 9 above. These are Class I violations pursuant to
21 OAR 340-012-0055(1)(o). DEQ hereby assesses a \$10,653 civil penalty for these violations.

22 2. Respondent has violated ORS 468B.025(2) and Schedule B, condition 8.a.i.3 of the
23 Permit by failing to submit pH field notes for pH sampling performed on September 12, 2018, and
24 November 28, 2018, as described in Section II, paragraphs 10 through 12 above. This is a Class II
25 violation pursuant to OAR 340-012-0053(2). DEQ has not assessed a civil penalty for this violation.

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3. Respondent has violated ORS 468B.025(2) and Schedule A, condition 10.a.v. of the Permit by failing to submit a Tier I report to DEQ in response to the BOD, an impairment pollutant, exceedance on November 28, 2018, as described in Section II, paragraphs 13 through 16 above. This is a Class II violation pursuant to OAR 340-012-0053(2). DEQ has not assessed a civil penalty for this violation. Respondent has violated ORS 468B.025(2) and Schedule F, Section C3 of the Permit by failing to field filter the dissolved lead sample taken on November 28, 2018, as described in Section II, paragraphs 17 through 19 above. This is a Class I violation according to OAR 340-012-0055(1)(o). DEQ has not assessed a civil penalty for this violation.

4. Respondent has violated ORS 468B.025(2) and Schedule A, condition 6.d and 6.e of the Permit by failing to implement the SWPCP and its DEQ-approved addendum by failing to install the bioswale according to the approved design, as described in Section II, paragraphs 20 through 23. This is a Class I violation according to OAR 340-012-0055(1)(r). DEQ hereby assesses a \$3,400 civil penalty for this violation.

IV. ORDER TO PAY CIVIL PENALTY

Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is hereby ORDERED TO: Pay a total civil penalty of \$14,053. 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 Street, Suite 600, Portland, Oregon 97232**. Once you pay the penalty, the Findings of Fact, Conclusions and Order become final.

V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached exhibits, you must do so in your request for hearing, as factual matters not denied will be considered admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for

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 contact the Oregon State Bar at 1-800-
12 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed
13 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military
14 Department does not have a toll free telephone number.

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.

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25 Date

5/8/2020

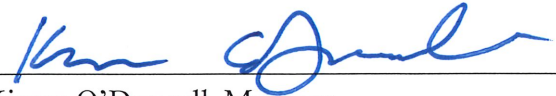
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Kieran O'Donnell, Manager
Office of Compliance and Enforcement

EXHIBIT No.1

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

VIOLATION 1: Violating ORS 468B.025(2) by violating Schedule B, condition 2.f. of the Permit by failing to monitor its stormwater discharge two times in the 2018-2019 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 4. Respondent was cited in case no. WQ/SW-NWR-2018-154 for two class I violations and was cited in EEO #2017-EEO-2936 for 1 class I violation. According to OAR 340-012-0145(2)(a)(A),(B) the total value of these prior significant actions is 4.

"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. Respondent failed to take two of the four required grab samples.

"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 two instances of monitoring during the period of July 1 to December 31 of each monitoring year. Additionally, Respondent was cited for violating the Permit's monitoring requirement in EEO #2018-EEO-3916 during the 2018-2019 monitoring year. By failing to adhere to the Permit's monitoring requirements Respondent consciously disregarded a

substantial and unjustifiable risk that it would violate the Permit's timing requirement and 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 \$1,053. This is the amount Respondent gained by avoiding spending \$1380 (\$360 for analytical costs for each sample and \$100 in labor costs to collect each sample). This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$4,000 + [(0.1 x \$4,000) x (4 + 0 + 2 + 8 + 0)] + \$1,053
= \$4,000 + (\$400 x 14) + \$1,053
= \$4,000 + \$5,600 + \$1,053
= \$10,653

EXHIBIT No.2

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

VIOLATION No.5: Violating ORS 468B.025(2) by violating Schedule A, condition 6.d., and 6.e. of the Permit by failing to implement the SWPCP and its DEQ-approved addendum.

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

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0130(4), as DEQ finds that the violation posed no more than a de minimis threat to human health and the environment.

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)(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 4. Respondent was cited in case no.: WQ/SW-NWR-2018-154 for two class I violations and was cited in EEO #2017-EEO-2936 for 1 class I violation. According to OAR 340-012-0145(2)(a)(A), (B) the total value of these prior significant actions is 4.

"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 4 according to OAR 340-012-0145(4)(d) because there were more than 28 occurrences of the violation. DEQ approved Respondent's SWPCP addendum on or about January 16, 2015. DEQ observed the non-conforming conditions at the Facility on or about February 5, 2020. Each day of violation is a separate occurrence.

"M" is the mental state of the Respondent, and receives a value of 2 according to OAR 340-012-0145(5)(b), because Respondent had constructive knowledge of the permit requirement because Respondent applied for coverage under the Permit and has a copy of the Permit. Respondent therefore, reasonably should have known to implement a DEQ-approved SWPCP or revise the SWPCP so it reflects current conditions at the site.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of -3 according to OAR 340-012-0145(6)(c) because Respondent made reasonable efforts to correct the violation by revising the SWPCP and submitting it to DEQ.

"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. Respondent gained no economic benefit through this violation.

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 \times \$2,000) \times (4 + 0 + 4 + 2 + -3)] + \0
= $\$2,000 + (\$200 \times 7) + \$0$
= $\$2,000 + \$1,400 + \$0$
= $\$3,400$