



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

January 12, 2021

VIA CERTIFIED MAIL: 7018 1830 0000 8294 1787

Basco Logging, Inc.
Attn: Juan Yraguen, Registered Agent
1039 Park Hill Lane
Sutherlin OR 97479

VIA USPS AND EMAIL

Dominic Carollo
Yockim Carollo LLP
630 SE Jackson Street Suite 1
PO Box 2456
Roseburg, OR 97470
dcarollo@yockimlaw.com

Re: Amended Notice of Civil Penalty Assessment and Order
DEQ Case No. WQ/NP-WR-2019-231
OAH Case No. 2020-ABC-03869

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued the attached Amended Notice to Basco Logging Inc., reducing the civil penalty to \$53,578 for violating state water quality standards and causing pollution in connection with repairs to the Winchester Dam on the North Umpqua River in fall 2018. DEQ clarified its causing pollution allegations, revised its M factor findings in both of its penalty calculations, and corrected several typographical errors.

As detailed in Section V of the attached Amended Notice, you have 20 days to respond to this Amended Notice. You may send your answer 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

Please note that issuance of this Amended Notice does not alter the schedule and February 2, 2021 hearing date set by Presiding Administrative Law Judge Whitaker on August 24, 2020. However, DEQ has requested a continuance to allow the parties adequate time to respond in advance of a hearing.

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If you have any questions, please contact Anzie St. Clair at 971-808-7368 or toll free in Oregon at 800-452-4011, extension 5422.

Sincerely,



Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

cc: David Waltz, DEQ, Western Region
Zach Loboy, DEQ, Western Region
Accounting, DEQ
Administrative Law Judge Samantha Fair, Office of Administrative Hearings, PO Box 14020,
Salem, OR 97309-4020 and OED_OAH_Referral@oregon.gov
Maura Fahey, Crag Law Center, 3141 E Burnside St., Portland OR 97214 and maura@crag.org
T. Beau Ellis, Vial Fotheringham LLP, 17355 SW Boones Ferry Rd. Suite A, Lake Oswego, OR
97035 and Beau.Ellis@vf-law.com

1 5. By letter dated November 16, 2017, the Oregon Water Resources Department (OWRD)
2 notified the Winchester Water Control District of several leaks and unusual hydraulics at the southern
3 end of the dam, requiring further investigation and repair.

4 6. On or about October 9, 2018, the Winchester Water Control District hired Respondent to
5 perform in-water repairs to the dam, near the south shore. Respondent began work on or before
6 October 11, 2018 and completed work on or after November 6, 2018.

7 7. In connection with the dam repair activities, including construction and removal of a coffer
8 dam, Respondent discharged sediment to the North Umpqua River which caused instream turbidity to
9 exceed 10 NTU on October 12, 15, 16, 18, 19, 22, 29, 30, 31, and November 1, 2, 5, and 6 of 2018.

10 8. On at least October 15, 2018, Respondent's dam repair activities caused visible turbidity in
11 the North Umpqua River below the dam, extending approximately 600 feet downstream. Turbidity in
12 this stretch of the North Umpqua River on October 15, 2018 measured 155 NTU, representing an
13 approximate 7,650% increase over background conditions.

14 9. On at least October 23, 2018, during Respondent's dam repair activities, Respondent
15 discharged wet ("green," liquid, or uncured) concrete to the North Umpqua River and caused a visible
16 plume extending approximately one-third of a mile downstream.

17 10. On October 23, 24, and 25, 2018, river water flowed over and in contact with the wet and
18 curing concrete without adequate filters or containment.

19 11. Wet concrete, when it comes into contact with and becomes suspended in waters, alters the
20 physical, chemical, and biological properties of those waters by introducing suspended, settleable, and
21 dissolved solids, by increasing pH and silt, and by changing the color and taste of the waters.

22 12. Solid and liquid concrete and concrete washout are very alkaline, with a typical pH of 11-13
23 units.

24 13. The wet concrete, as released into the North Umpqua River by Respondent, tended to render
25 such waters harmful to drinking water, drinking water treatment systems, aesthetic and recreational
26 uses, and to wildlife and aquatic life.

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1 14. On October 23, 2018, the City of Roseburg Drinking Water Treatment Plant shut down its
2 intake as a result of Respondent's concrete discharges.

3 15. On or about October 23, 24, and 25, 2018, Respondent's activities and concrete discharges
4 resulted in the death of juvenile chinook salmon, juvenile steelhead, lamprey larvae, and mussels.

5 16. Respondent did not have a valid state or federal permit or authorization to discharge wastes
6 to the North Umpqua River.

7 17. Respondent did not coordinate its activities with DEQ before beginning work.

8 18. Respondent inquired with the U.S. Army Corps of Engineers and the Oregon Department of
9 State Lands about permitting, but did not ultimately obtain from either agency a valid permit or
10 certification with limitations or conditions governing the dam repair activities.

11 19. Respondent did not implement adequate water pollution control measures during the dam
12 repair activities. Respondent did not stop work when its work area visibly discharged sediment or wet
13 concrete to the river.

14 III. CONCLUSIONS

15 1. Respondent violated ORS 468B.025(1)(b) by discharging wastes into waters of the state and
16 the discharge caused a reduction in the quality of the waters below water quality standards established by
17 the Environmental Quality Commission. Specifically, as described in Section II, above, Respondent's dam
18 repair activities resulted in the discharge of wastes where the discharge caused greater than a 10%
19 cumulative increase in the background level of turbidity in North Umpqua River in violation of water
20 quality standards pursuant to OAR 340-041-0036. North Umpqua River is "waters of the state" pursuant
21 to ORS 468B.005(10). Sediment discharge from the dam repair area is a "waste" pursuant to ORS
22 468B.005(2) and (9). These are Class I violations according to OAR 340-012-0055(1)(b). DEQ hereby
23 assesses Respondent a \$31,661 civil penalty for these violations.

24 2. Respondent violated ORS 468B.025(1)(a) by causing pollution to the North Umpqua River,
25 without a permit, as described in Section II above. Specifically, Respondent poured wet concrete into an
26 in-water area during dam repairs which entered the North Umpqua River, a water of the state pursuant to
27 ORS 468B.005(10). Respondent's wet concrete as released to the North Umpqua River constitutes

1 “pollution” as defined in ORS 468B.005(5) because it tended to render waters in the North Umpqua River
2 harmful, deleterious, and injurious to public health, aquatic life, and beneficial uses including drinking
3 water, aquatic life, recreation, and aesthetics, as described in Section II, above. This is a Class I violation
4 pursuant to OAR 340-012-0055(1)(a). DEQ hereby assesses Respondent a \$21,917 civil penalty for this
5 violation.

6 IV. ORDER TO PAY CIVIL PENALTY

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

9 1. Pay a total civil penalty of \$53,578. The determination of the civil penalties are attached as
10 Amended Exhibits 1 and 2 and are incorporated as part of this Notice. If you do not file a request for
11 hearing as set forth in Section V below, your check or money order must be made payable to "**State**
12 **Treasurer, State of Oregon**" and sent to the **DEQ, Business Office, 700 NE Multnomah Street,**
13 **Suite 600, Portland, Oregon 97232.**

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

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

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1 unincorporated association, trust or government body, you must be represented by an attorney or a duly
2 authorized representative, as set forth in OAR 137-003-0555.

3 Active duty Service members have a right to stay proceedings under the federal Service
4 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-
5 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed
6 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military
7 Department does not have a toll free telephone number.

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

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1/12/2021
Date


Kieran O'Donnell, Manager
Office of Compliance and Enforcement

AMENDED EXHIBIT 1

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

VIOLATION 1: Violating ORS 468B.025(1)(b) by causing an exceedance of state water quality standards.

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

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-012-0135(2)(b)(A)(v), because Respondent increased turbidity by 50 or more NTUs over background, as described in Section II, paragraph 8 of the Notice.

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 \$12,000 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(i) and applicable pursuant to OAR 340-012-0140(2)(a)(D) as Respondent violated ORS 468B.025(1)(b), did not have an NPDES permit, and the violation is not otherwise classified.

"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 3 according to OAR 340-012-0145(4)(c) because there were from seven to 28 occurrences of the violation. Each day of violation constitutes a separate occurrence. Respondent caused exceedances of water quality standards on at least October 12, 15, 16, 18, 19, 22, 23, 29, 30, 31, and November 1, 2, 5, and 6 of 2018, resulting in 14 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," as that term is defined in OAR 341-012-0030(20). Respondent is an experienced contractor and has previously held an NPDES General Permit No. 1200-C for construction activities, which requires preventative measures to prevent erodible soils associated with construction from entering waters of the state. On or about October 5, 2018, before beginning its proposed dam work, Respondent contacted ODFW. ODFW informed Respondent that the North Umpqua River supported numerous threatened and sensitive species, it was important to take measures to minimize impacts to those populations, coffer dam rock material should be clean with limited

particles, turbidity should be monitored, work should stop if there were noticeable downstream turbidity effects, green concrete should be entirely cured or dry before coming in contact with river water, and Respondent should coordinate with DEQ for more specifics on water quality requirements and permits. Respondent knew that failing to implement appropriate turbidity control techniques during its in-water repair could result in large quantities of soils and sediment entering the river and in a violation.

Despite advance notice and Respondent's knowledge, Respondent proceeded with dam repair activities without contacting DEQ or retaining an engineer or environmental consultant to assist with the construction, design, and environmental compliance of the coffer dam, selected and discharged coffer dam material containing fine particles, and discharged turbid water from the work area into the river through pumps. When Respondent first placed the coffer dam material into the water, it caused visible, noticeable changes in the river water's turbidity. Respondent did not stop work or adequately minimize turbid discharges when its work caused obvious impacts to water quality.

The risks of not implementing adequate turbidity controls and discharging in October and November turbid water and rock material with fine particles into sensitive aquatic habitat, directly upstream of a drinking water source, and in a stretch of river with recreational uses were substantial and unjustifiable and constitute a gross deviation from the standard of care a reasonable person would observe in that situation.

Accordingly, Respondent consciously disregarded a substantial and unjustifiable risk that the result would occur or that the circumstances existed.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of 2 according to OAR 340-012-0145(6)(g) because Respondent 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).

"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 \$4,061. This is the amount Respondent gained by avoiding spending \$3,360 to pay an experienced professional engineer to assess site conditions and to develop and certify a repair plan that includes adequate in-water best management practices and by avoiding spending \$1,760 to monitor the work area for turbidity during construction. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$12,000 + [(0.1 x \$12,000) x (0 + 0 + 3 + 8 + 2)] + \$4,061
= \$12,000 + (\$1,200 x 13) + \$4,061
= \$12,000 + \$15,600 + \$4,061
= \$31,661

AMENDED EXHIBIT 2

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

VIOLATION 2: Violating ORS 468B.025(1)(a) by causing pollution to waters of the state.

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

MAGNITUDE: The magnitude of the violation is major pursuant to OAR 340-012-0130(3) as there is no selected magnitude specified in OAR 340-012-0135 applicable to this violation and DEQ finds that the violation had a significant adverse impact on human health or the environment. In making this finding, DEQ considered the following: Respondent's activities caused visible plumes of a concrete mixture in sensitive aquatic habitat, a drinking water supply, and an area with aesthetic and recreational beneficial uses. The concrete entered the river just upstream of a drinking water supply intake which was temporarily shut down as a result on October 23, 2018. The concrete poured or otherwise released by Respondent into the river increased the downstream river water's total suspended solids, settleable solids, dissolved solids, and pH. Respondent did not use or successfully implement best practices to minimize the extent to which the wet concrete came into contact with and chemically altered river water. Best practices include performing concrete work in the dry and when not possible using in-water curing control methods such as a turbidity curtain or grout bags and not pouring the concrete directly into the water column. Concrete, when uncontrolled during in-water work, raises pH levels of the receiving waterbody and can do so to levels that are toxic to aquatic life. The concrete released to the river by Respondent resulted in the death of juvenile chinook salmon, juvenile steelhead, lamprey larvae, and mussels, as described in Section II, paragraphs 9 through 13 and 15 of the Amended Notice.

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 \$12,000 for a Class I, major magnitude violation in the matrix listed in OAR 340-012-0140(2)(b)(A)(i) and applicable pursuant to OAR 340-012-0140(2)(a)(D) as Respondent violated ORS 468B.025(1)(a), did not have an NPDES permit, and the violation is not otherwise classified.

"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 2 according to OAR 340-012-0145(4)(b) because there was more than one but less than seven occurrences of the violation. Each day constitutes a separate violation. On at least October 23, 2018, Respondent discharged wet or "green" concrete to the North Umpqua River and on October 23, 24, and 25, 2018 allowed river water to flow over and in contact with wet and curing concrete, causing pollution on or about October 23, 24 and 25, 2018. This amounts to 3 occurrences.

"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" as that term is defined in OAR 341-012-0030(15). Respondent is an experienced contractor and in approximately 2006 held an NPDES General Permit No. 1200-C for construction activities, which requires preventative measures to prevent harmful materials associated with construction from entering waters of the state. On or about October 5, 2018, before beginning its proposed dam work, Respondent contacted ODFW. ODFW informed Respondent that the North Umpqua River supported numerous threatened and sensitive species, it was important to take measures to minimize impacts to those populations, turbidity should be monitored, work should stop if there were noticeable downstream turbidity effects, green concrete should be entirely cured or dry before coming in contact with river water, and Respondent should coordinate with DEQ for more specifics on water quality requirements and permits.

It was foreseeable that uncontrolled and unpermitted discharges or releases of wet concrete and concrete washout was prohibited and could cause harm to water quality, aquatic life, or drinking water.

Despite foreseeable risks and advance notice, Respondent proceeded with dam repair activities without contacting DEQ, did not use or successfully implement best management practices, did not fully isolate the work area, poured concrete where it was in contact with river water and susceptible to washout, lifted the hose during pouring so that it washed out into the river, pumped concrete-contaminated river water from the work area over the edge of the dam, and did not stop work when its work caused obvious impacts to water quality.

Accordingly, Respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a 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)(g) because Respondent 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).

"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 \$317. This is the amount Respondent gained by avoiding spending \$400 to provide continuous pH monitoring during at least one day of construction, in addition to the \$3,360 described in Amended Exhibit 1.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$12,000 + [(0.1 x \$12,000) x (0 + 0 + 2 + 4 + 2)] + \$317
= \$12,000 + (\$1,200 x 8) + \$317
= \$12,000 + \$9,600 + \$317
= \$21,917