

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
ENVIRONMENTAL QUALITY COMMISSION**

IN THE MATTER OF:)	PROPOSED AND FINAL ORDER
)	
TERRAFIRMA FOUNDATION)	OAH Case No. 2024-ABC-06612
REPAIR, INC.)	Agency Case No. WQ/NP-WR-2023-597

HISTORY OF THE CASE

On October 26, 2023, the Department of Environmental Quality (DEQ) issued a Notice of Civil Penalty Assessment and Order (Notice) to TerraFirma Foundation Repair, Inc., dba TerraFirma Foundation Systems (Respondent), assessing civil penalties in the total amount of \$27,600 for causing pollution to waters of the state. On November 14, 2023, Respondent filed a Response to the Notice.

On June 28, 2024, DEQ referred this matter and a related matter involving Winchester Water Control District (WWCD) to the Office of Administrative Hearings (OAH). DEQ requested that the two matters be consolidated for hearing purposes.¹ The OAH assigned Senior Administrative Law Judge (ALJ) Elizabeth Jarry to preside at hearing.

On July 11, 2024, Respondent filed an Amended Response to DEQ’s Notice of Civil Penalty and Request for Hearing. On the same date, DEQ accepted the Amended Response.

On August 13, 2024, ALJ Jarry held a prehearing conference by telephone. Attorneys Dominic Carollo and Nolan Smith appeared for Respondent and WWCD (collectively, the respondents). Environmental Law Specialist Erin Saylor appeared for DEQ. Attorneys Victoria White and Maura Fahey appeared for WaterWatch of Oregon.² ALJ Jarry granted the unopposed consolidation request, set a hearing for April 15 to 18, 2025, and set various filing deadlines. On that same date, ALJ Jarry also notified the parties that the OAH had reassigned the matter to ALJ Dove Gutman.

On August 16, 2024, DEQ filed a request to change the ALJ. On August 19, 2024, the OAH issued a Ruling on Request for Change of Administrative Law Judge, granting the request and reassigning the matter to ALJ Jarry.

¹ The OAH assigned Case No. 2024-ABC-06610 to *In the Matter of Winchester Water Control District*.

² On July 30, 2024, WaterWatch of Oregon, The Steamboaters, Native Fish Society, Oregon Wild, and Umpqua Watershed filed an Amended Petition for Party Status in the matter involving WWCD. On August 15, 2024, DEQ issued an Order Granting and Denying in Part WaterWatch of Oregon, The Steamboaters, Native Fish Society, Oregon Wild, and Umpqua Watersheds’ Petition for Party Status, granting the petitioners limited party status in the matter involving WWCD.

On August 30, 2024, WWCD filed an Unopposed Motion to Amend the Hearing Schedule, requesting that the hearing be reset to April 1 to 4, 2025. On September 3, 2024, ALJ Jarry granted the request and reset the hearing.

On December 13, 2024, DEQ filed a Motion for Summary Determination with supporting documents, and the respondents filed a Motion for Summary Determination with supporting documents. On January 10, 2025, DEQ filed a Response to Respondents' Motion for Summary Determination, and the respondents filed a Response to DEQ's Motion for Summary Determination with supporting documents. On January 24, 2025, DEQ filed a Reply in Support of DEQ's Motion for Summary Determination, and the respondents filed a Reply in Support of Motion for Summary Determination. On March 6, 2025, ALJ Jarry issued a Ruling on Motions for Summary Determination, granting the motions, in part.³

On March 21, 2025, the respondents requested a continuance of the hearing. Also on March 21, 2025, DEQ and the Limited Parties filed responses objecting to the continuance request. On March 24, 2025, ALJ Jarry granted the request and set a prehearing conference for April 1, 2025.

On April 1, 2025, ALJ held a prehearing conference by telephone. Mr. Carollo and Mr. Smith appeared for the respondents, Ms. Saylor appeared for DEQ, and attorneys Mike Sargetakis and Alexandria Dolezal appeared for the Limited Parties. ALJ Jarry reset the hearing for October 13 through 16, 2025, and set deadlines for submission of exhibits, witness lists, and declarations.

On October 13 and 14, 2025, ALJ Jarry held the hearing via videoconference. Ms. Saylor represented DEQ. Mr. Carollo and Mr. Smith represented the respondents. Robert Kirschner, Ms. White, and Jim McCarthy appeared for the Limited Parties. DEQ called the following witnesses to testify: Haley Teach, DEQ 401 Water Quality Certification Program Coordinator; Chance Plunk, DEQ TMDL⁴ Specialist and former 401 Project Manager; Kirk Blaine, Oregon Senior Wild Fish Manager for the Wild Salmon Center; Holly Huchko, Oregon Department of Fish and Wildlife (ODFW) Endangered Species Act Specialist; Ryan Beckley, President and owner of TerraFirma and Board President for WWCD; Rebecca Anthony, ODFW Water Quality and Mitigation Specialist; Greg Huchko, ODFW Umpqua Watershed District Manager; Gregory Apke, ODFW Fish Passage and Screens Program Manager; and Tony Janicek, Oregon Water Resources Department (OWRD) State Engineer for Water Resources and Dam Safety Program Manager. The respondents called the following witnesses to testify: Summer Baranko, Secretary and Board Member of the WWCD; and Mr. Beckley. The hearing record remained open for receipt of the parties' written closing arguments. On December 3, 2025, DEQ filed its Closing Brief, the respondents filed their Closing Brief, and the Limited Parties filed their Post-Hearing Closing Brief. On December 15, 2025, the respondents filed an unopposed request to extend the deadline for filing closing reply briefs. ALJ Jarry granted the request. On January 9, 2026, the hearing record closed after receipt of DEQ's Closing Reply

³ The ruling did not resolve the issues in this order.

⁴ Total Maximum Daily Load.

Brief and the respondents' Response to DEQ's Closing Brief.⁵

ISSUES

1. Whether Respondent caused pollution to waters of the state by placing tire mats directly into the North Umpqua River. ORS 468B.025(1)(a).
2. Whether Respondent caused pollution to waters of the state by discharging concrete-contaminated water into the North Umpqua River. ORS 468B.025(1)(a).
3. Whether Respondent should be assessed civil penalties for violations of ORS 468B.025(1)(a), and, if so, in what amount. OAR 340-012-0045.

EVIDENTIARY RULINGS

Exhibits A1 through A49 and A51 through A53, offered by DEQ, were admitted into the record without objection. DEQ withdrew Exhibit A50.

Exhibits R1 through R6, R8 through R13, R15, R16, R19, R21 through R34, R38, R40, R43 through R66, R70 through R78, R80 through R83, R85 through R87, R89 through R94, R97 through R99, R103, R104, R112, R113, R117 through 120, R122, R125, R128, R129, R131, R134, R135, R137 through R140, R144 through R146, R158 through R161, R164, R168, R170 through R172, R176, and R179 through R191, offered by Respondent, were admitted into the record without objection. Exhibits R7, R14, R17, R18, R37, R41, R99, R136, R148 through R150, R153, R157, and R173, offered by Respondent, were admitted into the record over DEQ's objections. Exhibit R143, offered by Respondent, was not admitted into the record due to lack of relevancy. Respondent withdrew Exhibits R39 and R142.

FINDINGS OF FACT

1. The Winchester Dam is located at mile 7.0 of the North Umpqua River (river), in Douglas County, Oregon. WWCD, a group of private landowners residing on or near the reservoir upstream from the dam, owns and maintains the dam, which "consists of a rock-filled timber crib weir flanked by a concrete fish ladder on the north end and a concrete spillway-powerhouse structure on the south end." (Ex. R16 at 5, 8.)
2. The Department of State Lands designated the river as Essential Salmonid Habitat, and the National Marine Fisheries Service designated it as Essential Fish Habitat for coho and Chinook salmon. (Ex. A1 at 13.)
3. On July 7, 2023, WWCD submitted a joint permit application (JPA) to the U.S. Army Corps of Engineers (USACE) and DEQ for repairs to the Winchester Dam. (Ex. A1.)

⁵ DEQ's Order Granting and Denying in Part WaterWatch of Oregon, The Steamboaters, Native Fish Society, Oregon Wild, and Umpqua Watersheds' Petition for Party Status allowed the Limited Parties to file a 20-page written closing argument.

4. The proposed repair project included the use of a cofferdam to isolate an in-water work area downstream of the dam and water management systems to “allow sufficient dewatering of the downstream face for repairs.” (Ex. A1 at 9.) A cofferdam is a temporary structure built within or across a waterbody to create a dry work area isolated from the surrounding area. (Test. of Plunk.)

5. In a section the section of the JPA titled, “Temporary Access Road and Work Platforms,” WWCD included the following:

Work platforms used during the repair work on the timber dam section will result in the following impacts:

* * * * *

- Below the dam between the temporary isolation barrier and the dam, a temporary aggregate work base will be installed resulting in 2,960 SF of impacts including 110 CY of fill and 110 CY of removal (Figure 6E, Attachment 2). All aggregate will be removed after construction activities are completed.

(Ex. A1 at 10.) The JPA provided that the temporary work platform “will include the installation of geotextile fabric and aggregate that will be entirely removed once construction is complete.” (*Id.* at 11.)

6. The plans in the JPA for the downstream work performed below the ordinary high water mark indicated that the cofferdam would be constructed of sandbags and super sacks and that the work platform would consist of “crushed rock.” (Ex. A1 at 39.) Additionally, “[i]f required by site conditions, pumps equipped with a fish screen may be installed to pump water out of the isolation area to a temporary water quality facility placed in an upland area on the south bank.” (*Id.* at 9.)

7. On July 18, 2023, DEQ issued a 401 Water Quality Certification (WQC) to WWCD for the dam repair project based on the July 7, 2023 JPA. (Ex. A2.)

8. Condition 8 of the 401 WQC provides, in part:

Erosion and Sediment Control: During construction, erosion control measures must be implemented to prevent or control movement of soil into waters of the state. The Applicant is required to develop and implement an effective erosion and sediment control plan. * * *.

In addition, the Applicant must:

* * * * *

- d. Use removable pads or mats to prevent soil compaction at all

construction access point through, and staging areas in, riparian or wetland areas to prevent soil compaction, unless otherwise authorized by DEQ.

(Ex. A2 at 4; emphasis in original.)

9. Condition 9 of the 401 WQC provides:

Deleterious Waste Materials: The Applicant is prohibited from placing biologically harmful materials and construction debris where they could enter waters of the state, including wetlands (wetlands are waters of the state). This includes, but is not limited to: * * * cement cured for less than 24 hours; * * * tires * * *.

The following specific requirements apply:

- a. Cure concrete, cement, or grout for at least 24 hours before any contact with flowing waters[.]

(Ex. A2 at 5; emphasis in original.)

10. On July 26, 2023, USACE authorized the project under Nationwide Permit No. 3, Maintenance (Nationwide Permit). (Ex. A3.) In the authorization letter, USACE advised:

In order for this authorization to be valid, you must ensure the work is performed in accordance with * * * the Oregon Department of Environmental Quality * * * Section 401 Water Quality Certification Conditions * * *.

(Ex. A3 at 2.)

11. The Nationwide Permit includes the following provision: “This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the maintenance activity. * * *.” (*Id.* at 20.)

12. WWCD hired Respondent as contractor for the dam repair project. (Test. of Baranko; Beckley.)

13. On August 7, 2023, Respondent commenced maintenance work on the dam. (Test. of Plunk.)

14. On August 8, 2023, Respondent used mats, comprised of “heavy truck tire casings, bound with reinforcing cables,” to construct a temporary access road downstream of the dam below the ordinary high water mark. (Exs. R75 at 6; A38 at 3, 6; test. of Plunk.) Respondent also began constructing the cofferdam with super sacks, placing a work platform made of the tire mats directly on top of the cofferdam. (Test. of Plunk; Ex. A4 at 10-11.)

15. The tire mats on the work platform were in contact with the river water in multiple spots. (Test. of Plunk; Exs. A4 at 10-11, 13; A12 at 2-3; A15 at 1; A16 at 1; A25 at 1; A26 at 1.) For much of the project, TerraFirma left a section of unused tire mats in the river near the work platform. (Exs. A4 at 11; A16 at 1; A25 at 1; A51 at 1; test. of Blaine.)

16. Water continually seeped through the dam face and into the in-water work area downstream of the dam throughout the repair project. (Test. of Plunk and Beckley.) The in-water work area filled completely with water during non-work hours, and workers pumped out the water before resuming work each day. (Test. of Beckley.)

17. In the morning of August 12, 2023, workers poured concrete into forms for the wall and a sill. The concrete pour ended at approximately 8:30 a.m. Water seeped continually seeped through the dam and across the top of the newly poured concrete sill. Respondent pumped the contaminated water into a baker tank. (Ex. A38 at 18.)

18. By August 15, 2023, Respondent had constructed a settlement pond downstream from the dam below the ordinary high water mark as an alternative to the Baker tank for dewatering the work area. (Exs. A16; A38 at 27.) On the same date, Respondent pumped water from the in-water work area to the settlement pond. The settlement pond leaked, discharging water down the bedrock and into the river. (Ex. R31 at 1-2; test. of Plunk.)

19. On August 15, 2023, DEQ sent Respondent an email regarding its field observations that required “immediate attention” from the week of August 14, 2023. (Ex. R75 at 3.) The email included the following:

The work area on the downstream side of the dam was proposed as a “crushed rock work platform” however a series of woven mats constructed of used car tires has been deployed instead. Tires are considered a deleterious waste material per Condition #9 of your 401 WQC and must be removed from areas where they currently are or could enter waters. Please explain why this change was made and which agencies have authorized this modification.

(*Id.* at 6.)

20. On August 15, 2023, Melanie O’Meara from USACE emailed DEQ to inquire about the tire mats. (Ex. R60 at 4-5.) Ms. O’Meara noted, “the portion [of the tire mats] that is near the constructed bridge is well above the water so last week during my site visit I did not have any concerns.” (*Id.* at 5.) She further wrote:

The [remaining] installed mats, reported to us yesterday/today, appear to be within the authorized dewatering area and appear to be replacing what was to be a gravel access road. From a Clean Water Act Section 404 standpoint, I am initially not concerned as I do not see a substantive expansion of the temporary impacts footprint, but rather a change in material. * * * All that said, I would like your input based on the material and potential impacts to water quality and species. Would this be a potential violation of the * * * DEQ Section 401 WQC? * * *.

(*Id.*)

21. On August 19, 2023, a representative from DOWL, the engineering firm hired by WWCD for the repair project, informed Respondent that all water should be pumped to and treated in an upland location. (Ex. A38 at 39.)

22. On August 21, 2023, workers poured concrete from approximately 6:10 a.m. to 8:00 a.m., placing 42 cubic yards of the sill footing. Water continuously seeped through the dam face and over the freshly poured concrete sill. During the pour, workers pumped water into the settlement pond without a silt sack in place. Workers later added a silt sack, but it slipped off. (Exs. A13 at 1; A38 at 45.) Turbid water leaked from the settlement pond and flowed down the bedrock into the river, causing discolored plumes to form in the river. (Exs. A14 at 5-7; A16-A19.)

23. On August 21, 2023, Mr. Beckley emailed DEQ and other agencies regarding the concrete pour that occurred that morning. He reported the following:

This morning we had a concrete pour scheduled for 6AM, placing (42) cubic yards of the sill footing. As I reported previously, we are unable to completely stop the small amount of water that is flowing through the dam face and as a result water was present during the pour, although it was effectively contained. We used a variety of methods including piping, lining and sandbags to concentrate and contain the water away from the concrete, and all water was pumped into containment.

At approximately 7:00AM I discovered a “silt sock” in [our] final containment structure had slipped off the discharge pipe, and the turbidity of our discharge was above allowable limits (27 over baseline of 2.7). I would note that the volume of water was very low, and that measurements taken at 20’ downstream and 100’ downstream have been at baseline (2.7) the entire time. We also detected a slightly elevated PH in our primary containment tank (10.0 over the baseline of 5.7 in the stagnate channel below the fish ladder[]). We immediately stopped pumping out of the Frack tank, repaired the silt sock and added bio bags and filter booms.

I contacted Andy Ablee, Roseburg WTP manager and he reported that the PH baseline at their intake was between 7.4 and 8.7 over the past 12 hours. * * *

(Ex. A13 at 1-2.)

24. On August 22, 2023, workers pumped water, which had seeped through the dam onto the freshly poured concrete, into the settlement pond. A silt sack in the settlement pond reached capacity, and “water with extremely high turbidity” flowed down the bedrock and into the river. (Test. of Plunk; Exs. R26 at 1-2; A4 at 11-12; A9 at 1; A10 at 1.)

25. On September 3, 2023, workers removed the tire mats and large boulders from the work site downstream of the dam. Water and debris fell off the mats and into the river. (Test. of H. Huchko; Exs. A26 at 1-2; A28 at 1.)

26. Since the 1960s, tire manufacturers have used 6PPD, an antioxidant and antiozonant, to reduce tire breakdown and prevent blowouts. (Ex. A35 at 2.) When 6PPD reacts with ozone, several transformation products, including 6PPD-quinone (6PPDQ), are created. 6PPDQ is present in stormwater runoff from roadways, and it can leach directly from the surface of tires into water. (*Id.* at 2, 37-40.) 6PPDQ is the primary cause of urban runoff mortality syndrome in coho salmon and is harmful to other aquatic life, such as steelhead, rainbow trout, and Chinook salmon. (*Id.* at 2, 37-40, 43-47.)

27. Uncured concrete can increase the pH in water. Water with high pH must be treated prior to discharge. (Test. of Teach.) When placed in water, “uncured concrete can cause pH values to exceed 11 under certain flow conditions.” (Ex. A35 at 2.) Elevated pH levels in a stream can harm aquatic organisms by decreasing reproduction, reducing biodiversity, decreasing growth, and damaging skin, gills, olfactory organs, and eyes. Salmonids and some other species can be harmed when chronically exposed to pH values above 9.0. (*Id.* at 2, 12-31.)

CONCLUSIONS OF LAW

1. Respondent caused pollution to waters of the state by placing tire mats directly into the North Umpqua River.
2. Respondent caused pollution to waters of the state by discharging concrete-contaminated water into the North Umpqua River.
3. Respondent should be assessed civil penalties for violations of ORS 468B.025(1)(a) in the total amount of \$27,000.

OPINION

DEQ proposes to assess Respondent civil penalties in the amount of \$27,600 based on allegations that Respondent caused pollution to waters of the state by placing tire mats directly into waters of the state and discharging concrete-contaminated water to waters of the state.⁶ As the proponent of the allegations, DEQ has the burden to establish, by a preponderance of the evidence, that the allegations are correct and that it is entitled to assess the civil penalties. OAR 340-011-0545(1) (general rule that the burden of proof is on the proponent of the fact or position). OAR 340-011-0545(2) (“All findings in a proposed or final order must be based on a preponderance of evidence in the record[.]”). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

⁶ The parties do not dispute that the North Umpqua River is a water of the state pursuant to ORS 468B.005(10).

Pollution

ORS 468B.025(1) provides, in pertinent part:

Except as provided in ORS 468B.050 or 468B.053, no person shall:

(a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.

ORS 468B.005(9) defines “wastes” as “sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive or other substances which will or may cause pollution or tend to cause pollution of any waters of the state.” ORS 468B.005(5) defines “pollution” as:

* * * alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself or in connection with any other substance, create a public nuisance or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof.

Respondent asserts that to establish pollution of the river, DEQ must prove that actual “alteration of the physical, chemical, or other biological properties of” the river occurred. Respondent’s Closing Brief at 67-68.

Contrary to Respondent’s assertion, DEQ is not required to prove that the tire mats or concrete contaminated water actually altered the physical, chemical, or other biological properties of the river to establish “pollution” under ORS 468B.025(1)(a). The definition of “pollution” includes “discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, * * * which will *or tends to* render such waters harmful, detrimental or injurious to * * * fish or other aquatic life or the habitat thereof.” ORS 468B.005(5); emphasis added.

DEQ presented unrefuted evidence to establish that tires and uncured concrete will or tend to render water harmful to fish or other aquatic life. Tires contain 6PPD, which reacts with ozone and creates a transformation product, 6PPDQ. 6PPDQ can leach directly from the surface of tires into water and is the primary cause of urban runoff mortality syndrome in coho salmon. 6PPDQ is also harmful to other aquatic life, such as steelhead, rainbow trout, and Chinook salmon. Uncured concrete can increase the pH level in water, and elevated pH levels in a stream can harm aquatic organisms by decreasing reproduction, reducing biodiversity, decreasing growth, and damaging skin, gills, olfactory organs, and eyes. Salmonids and some other species

can be harmed when chronically exposed to pH values above 9.0. Accordingly, DEQ established that tires and uncured concrete cause pollution when discharged or placed in waters of the state.

Tire Mats

Respondent constructed a work platform using tire mats placed on top of the cofferdam downstream of the dam. Respondent asserts that the use of tire mats was authorized in Condition 8 of the 401 WQC, which required the “[u]se removable pads or mats to prevent soil compaction at all construction access points through, and staging areas in, riparian or wetland areas to prevent soil compaction, unless otherwise authorized by DEQ.” Exhibit A2 at 4. Additionally, Respondent asserts that the use of tire mats was in accordance with Condition (A)(3)(c) of Nationwide Permit, which authorized “temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the maintenance activity.” Exhibit R9 at 20.

Condition 8 of the 401 WQC allowed the use of unspecified types of mats for erosion and sediment control, but it did not address in-water use of mats. Additionally, that condition cannot be read in isolation. Condition 9 prohibited “placing biologically harmful materials and construction debris where they could enter waters of the state[.]” Exhibit A2 at 5. Tires are listed as a deleterious waste material in Condition 9. Accordingly, mats made of tires, when placed in locations where they could enter waters of the state, are prohibited under Condition 9. While the Nationwide Permit also permitted the use of unspecified types of mats, in the authorization letter dated July 26, 2023, USACE stated that the work must be performed in accordance with the 401 WQC conditions. Therefore, because tire mats were not allowed under the 401 WQC conditions, the Nationwide Permit likewise did not authorize the use of tire mats placed where they could enter waters of the state.

With respect to the allegation that pieces of the tire mats fell into the river during the removal process, the evidence is insufficient to support such a finding. DEQ’s witness, who viewed the process from a distance, testified that she believed, but was not certain, that she saw pieces of the mats falling into the river.

Respondent argues that the tire mats on the work platform were elevated from the surface of the water within the isolated work area. The preponderance of the evidence, including witness testimony and photographs, establishes that portions of the tire mats used on the work platform came into direct contact with the river. Additionally, Respondent left an unused portion of the tire mats sitting directly in the river during much, if not all, of the project.

For the reasons discussed, DEQ established that Respondent caused pollution to waters of the state, in violation of ORS 468B.025(1)(a), by placing tire mats in the river.

Uncured Concrete

DEQ alleges that Respondent discharged concrete-contaminated water on August 13, 21, and 23, 2023 into waters of the state. Respondent disputes that allegation.⁷

⁷ Respondent also asserts that it used a “special concrete mix specifically designed to avoid leaching into water and that there was no evidence presented indicating that the mix failed to accomplish its purpose.”

DEQ failed to establish by a preponderance of the evidence that Respondent discharged concrete-contaminated water into the river on August 13, 2023. The evidence shows that water continuously seeped through the dam face and over the concrete that was poured on August 12, 2023, and that Respondent pumped the water into a baker tank. After work ceased that day, water contaminated by concrete that had cured less than 24 hours would have filled the in-water work area overnight. There is insufficient evidence, however, to establish what happened to that water or that Respondent discharged that concrete-contaminated water into the river on August 13, 2023.

On August 21, 2023, workers poured concrete at the dam from approximately 6:10 a.m. to 8:00 a.m. Water continuously seeped through the dam face and over the freshly poured concrete sill, and workers pumped the water into the settlement pond without a silt sack in place. Although workers later added a silt sack, it slipped off. Turbid water, which, more likely than not, was contaminated with uncured concrete, leaked from the settlement pond and flowed down the bedrock into the river. Plumes formed in the river as the result of the discharge. Therefore, the preponderance of the evidence establishes that Respondent discharged concrete-contaminated water into the river on August 21, 2023.

DEQ established that another discharge of concrete-contaminated water occurred on August 22, 2023. Because water continually seeped through the dam face over the concrete that had been poured on August 21, 2023, concrete-contaminated water would have filled in the in-water work area overnight. On August 22, 2023, workers pumped water from the work area into the settlement pond. Water flowing through the dam face through approximately 8:00 a.m. would have contacted concrete that had cured for less than 24 hours. During that day, the silt sack in the settlement pond reached capacity, and “water with extremely high turbidity” pumped into the settlement pond. Exhibit R26 at 2. The settlement pond leaked again, and the turbid water flowed into the river. The preponderance of the evidence establishes that Respondent discharged concrete-contaminated water into the river on August 22, 2023.

For the reasons discussed, DEQ established that Respondent caused pollution to waters of the state, in violation of ORS 468B.025(1)(a), by discharging concrete-contaminated water into the river.

Assessment of Civil Penalties

For the violations of ORS 468B.025(1)(a), DEQ proposes to assess civil penalties. ORS 468.140 provides, in part:

- (1) In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of

Respondents’ Closing Brief at 68. Respondent did not present sufficient evidence regarding the effect of that concrete mix to overcome DEQ’s evidence that uncured concrete in water is harmful to fish and other aquatic life. Moreover, Condition 9 of the 401 WQC specifically required that concrete cure for at least 24 hours before contacting flowing waters. The condition did not include an exclusion for certain types of concrete mixtures.

violation in the amount prescribed by the schedule adopted under ORS 468.130:

* * * * *

(b) Any provision of ORS * * * 468B.

Pursuant to ORS 468.130, the Environmental Quality Commission promulgated administrative rules for the assessment of civil penalties. The procedure for calculating civil penalties is set forth in OAR 340-012-0045,⁸ which provides:

DEQ may assess a civil penalty for any violation, in addition to any other liability, duty, or other penalty provided by law. Except for civil penalties assessed under either OAR 340-012-0155 or OAR 340-012-0160, DEQ determines the amount of the civil penalty using the following formula: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$.

(1) BP is the base penalty and is determined by the following procedure:

(a) The classification of each violation is determined according to OAR 340-012-0053 to 340-012-0097.

(b) The magnitude of the violation is determined according to OAR 340-012-0130 and 340-012-0135.

(c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.

(2) The base penalty is adjusted by the application of aggravating or mitigating factors set forth in OAR 340-012-0145.

(3) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.

Base Penalty

Violations for causing pollution to waters of the state are Class I violations pursuant to 340-012-0055(1)(a).

The magnitude of violation is determined pursuant to OAR 340-012-0130, which provides:

⁸ This version of the administrative rule was in effect when DEQ issued the Notice. The rule had a minor correction in November 2024 and was amended effective January 9, 2025; however, those changes did not affect the pertinent parts of the rule.

(1) The appropriate magnitude of each civil penalty is determined by first applying the selected magnitude in OAR 340-012-0135. If none is applicable, the magnitude is moderate unless evidence shows that the magnitude is major under paragraph (3) or minor under paragraph (4).

(2) The person against whom the violation is alleged has the opportunity and the burden to prove that a magnitude under paragraph (1), (3) or (4) of this rule is more probable than the alleged magnitude, regardless of whether the magnitude is alleged under OAR 340-012-0130 or 340-012-0135.

(3) The magnitude of the violation is major if DEQ finds that the violation had a significant adverse impact on human health or the environment. In making this finding, DEQ will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or commission and DEQ rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, DEQ may consider any single factor to be conclusive.

(4) The magnitude of the violation is minor if DEQ finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or the environment. In making this finding, DEQ will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and DEQ rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation.

Because there is no applicable magnitude for violations of ORS 468B.025(1)(a) in OAR 340-012-0135, the magnitude of each violation is moderate unless evidence indicates that the violation is major or minor. DEQ assigned a moderate magnitude to both violations of the statute because “the information reasonably available to DEQ does not indicate a minor or major magnitude.” Exhibits 1 and 2 at 1. Respondent did not meet its burden under OAR 340-012-0130(2) to show that the violation should be minor. Therefore, the appropriate magnitude for both violations is moderate.

OAR 340-012-0140⁹ sets the base penalty for Class I violations and provides, in part:

(1) Except for Class III violations and as provided in OAR 340-012-0155, the base penalty (BP) is determined by applying the class and magnitude of the violation to the matrices set forth in this section. For

⁹ The administrative rule has been amended multiple times since 2023; however, the pertinent parts of the rule remain unchanged. Accordingly, the current rule is included in this order.

Class III violations, no magnitude determination is required.

(2) \$12,000 Penalty Matrix:

(a) The \$12,000 penalty matrix applies to the following:

* * * * *

(D) Any violation of ORS 468B.025(1)(a) * * *.

* * * * *

(b) The base penalty values for the \$12,000 penalty matrix are as follows:

(A) Class I:

* * * * *

(ii) Moderate — \$6,000[.]

The base penalty for Class I moderate violations is \$6,000 pursuant to OAR 340-012-0140(2)(b)(A)(ii).

Aggravating and Mitigating Factors

OAR 340-012-0145 defines the aggravating and mitigating factors that are applicable to the civil penalty formula. Each of those factors is addressed below.

Prior Significant Actions

OAR 340-012-0145(2) provides, in pertinent part:

“P” is whether the respondent has any prior significant actions (PSAs). A violation becomes a PSA on the date the first formal enforcement action (FEA) in which it is cited is issued.

(a) Except as otherwise provided in this section, the values for “P” and the finding that supports each are as follows:

(A) 0 if no PSAs or there is insufficient information on which to base a finding under this section.

DEQ does not allege that Respondent has any prior significant actions. Pursuant to OAR 340-012-0145(2)(a)(A), the value of “P” is 0 for both violations.

History of Correcting Significant Actions

OAR 340-012-0145(3) provides, in pertinent part:

“H” is the respondent's history of correcting PSAs. The values for “H” and the finding that supports each are as follows:

* * * * *

(c) 0 if there is no prior history or if there is insufficient information on which to base a finding under paragraphs (3)(a) or (b).

Because Respondent does not have any prior significant actions, there is no history of correcting them. Pursuant to OAR 340-012-0145(3)(c), the value of “H” is 0 for both violations.

Number of Occurrences of the Violation

OAR 340-012-0145(4) provides, in pertinent part:

“O” is whether the violation was repeated or ongoing. A violation can be repeated independently on the same day, thus multiple occurrences may occur within one day. Each repeated occurrence of the same violation and each day of a violation with a duration of more than one day is a separate occurrence when determining the “O” factor. Each separate violation is also a separate occurrence when determining the “O” factor. The values for “O” and the finding that supports each are as follows:

(a) 0 if there was only one occurrence of the violation, or if there is insufficient information on which to base a finding under paragraphs (4)(b) through (4)(d).

(b) 2 if there were more than one but less than seven occurrences of the violation.

(c) 3 if there were from seven to 28 occurrences of the violation.

(d) 4 if there were more than 28 occurrences of the violation.

(e) DEQ may, at its discretion, assess separate penalties for each occurrence of a violation. If DEQ does so, the O factor for each affected violation will be set at 0. If DEQ assesses one penalty for multiple occurrences, the penalty will be based on the highest classification and magnitude applicable to any of the occurrences.

For the violation related to the tire mats, DEQ proposes a value of 4 for “O,” alleging that there were more than 28 occurrences of the violation from August 8, 2023, when workers placed

the mats, through September 3, 2023, when workers removed the mats. As previously discussed, the tire mats were placed in locations where they entered the river, causing pollution. Accordingly, the violation occurred each date that the mats were in place, which is a total of 27 occurrences.¹⁰ Pursuant to OAR 340-012-0145(4)(c), the value of “O” is 3.

For the violation related to concrete, DEQ proposes a value of 2 for “O,” alleging that there were more than one but less than seven occurrences of the violation. As previously discussed, DEQ established two violations. Pursuant to OAR 340-012-0145(4)(b), the value of “O” is 2.

Mental State

OAR 340-012-0145(5) provides, in pertinent part:

“M” is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply. The values for “M” and the finding that supports each are as follows:

- (a) 0 if there is insufficient information on which to base a finding under paragraphs (5)(b) through (5)(d).
- (b) 2 if the respondent had constructive knowledge (reasonably should have known) of the requirement.
- (c) 4 if the respondent's conduct was negligent.
- (d) 8 if the respondent’s conduct was reckless or the respondent acted or failed to act intentionally with actual knowledge of the requirement.
- (e) 10 if respondent acted flagrantly.

OAR 340-012-0030 provides, in pertinent part:

- (11) “Flagrant” or “flagrantly” means the respondent had actual knowledge that the conduct was unlawful and consciously set out to commit the violation.
- (13) “Intentional” means the respondent acted with a conscious objective to cause the result of the conduct.

* * * * *

- (15) “Negligence” or “Negligent” means the respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or

¹⁰ DEQ miscounted the number of days in the Notice.

resulting in a violation.

* * * * *

(20) “Reckless” or “Recklessly” means the respondent consciously disregarded a substantial and unjustifiable risk that the result would occur or that the circumstance existed. The risk must be of such a nature and degree that disregarding that risk constituted a gross deviation from the standard of care a reasonable person would observe in that situation.

For the violation related to tire mats, DEQ contends that Respondent’s conduct was flagrant. Respondent contends that the record does not support a conclusion that it acted flagrantly, asserting that a representative from USACE had no concerns about the use of the tire mats and that DEQ did not tell Respondent to remove the mats.

On August 15, 2023, DEQ notified Respondent that tires were deleterious waste material under Condition 9 of the WQC and that the mats “must be removed from areas *where they currently are* or could enter waters.” Exhibit R75 at 6; emphasis added. To the extent Respondent relies on the lack of concern expressed by Melanie O’Meara from USACE, she was referring to “the portion [of the tire mats] that [were] near the constructed bridge,” not the tire mats on the work platform. Exhibit R60 at 5. Regarding the tire mats on the work platform, Ms. O’Meara specifically asked DEQ’s opinion as to whether the tires violated the 401 WQC or had any potential impact on water quality. Regardless of any alleged lack of concern on the part of USACE, DEQ, not USACE, determines whether an applicant violates a 401 WQC and assesses the impacts to water quality.

DEQ established that Respondent had actual knowledge that tire mats were a deleterious material per Condition 9 of the 401 WQC and needed to be removed. Contrary to DEQ’s notification on August 15, 2023, Respondent kept the mats in place until September 3, 2023. Therefore, Respondent consciously committed the violation and acted flagrantly. Therefore, the value of “M” is 10, pursuant to OAR 340-012-0145(5)(e).

For the violation related to concrete, DEQ contends that Respondent’s conduct was reckless. Respondent was aware that water continually seeped through the dam face, flowing over any freshly poured concrete. Respondent pumped concrete-contaminated water to a temporary settlement pond constructed below the ordinary high water mark rather than to an upland water quality facility as was described in the JPA. The settlement pond began leaking water into the river the same day Respondent constructed it. On August 19, 2023, DOWL confirmed the requirement for treating water in an upland location; however, Respondent continued to use the settlement pond, which subsequently leaked concrete-contaminated water to the river more than once. DEQ established that Respondent consciously disregarded a substantial and unjustifiable risk that a violation would occur. Respondent’s disregard of the risk of the violation constitutes a gross deviation from the standard of care a reasonable person would observe in that situation. Respondent’s conduct was reckless. Therefore, the value of “M” is 8, pursuant to OAR 340-012-0145(5)(d).

Efforts to Correct or Mitigate Violation

OAR 340-012-0145(6) provides, in pertinent part:

“C” is the respondent's efforts to correct or mitigate the violation. The values for “C” and the finding that supports each are as follows:

- (a) -5 if the respondent made extraordinary efforts to correct the violation or to minimize the effects of the violation, and made extraordinary efforts to ensure the violation would not be repeated.
- (b) -4 if the respondent made extraordinary efforts to ensure that the violation would not be repeated.
- (c) -3 if the respondent made reasonable efforts to correct the violation, or took reasonable affirmative efforts to minimize the effects of the violation.
- (d) -2 if the respondent eventually made some efforts to correct the violation, or to minimize the effects of the violation.
- (e) -1 if the respondent made reasonable efforts to ensure that the violation would not be repeated.
- (f) 0 if there is insufficient information to make a finding under paragraphs (6)(a) through (6)(e), or (6)(g) or if the violation or the effects of the violation could not be corrected or minimized.
- (g) 2 if the 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).

For the violation related to the tire mats, DEQ proposes a “C” value of 2. On August 15, 2023, DEQ informed Respondent that the tire mats were deleterious waste material per Condition 9 of the WQC and needed to be removed. Respondent failed to address the violation and left the tire mats in place. Therefore, the value of “C” is 2 for this violation, pursuant to OAR 340-012-0145(6)(g).

For the violation related to concrete, DEQ proposes a “C” value of 0. The effects of discharging concrete-contaminated water into the river could not be corrected or minimized. Therefore, the value of “C” is 0 for this violation, pursuant to OAR 340-012-0145(6)(f).

Economic Benefit

OAR 340-012-0150 provides, in pertinent part:

(1) The Economic Benefit (EB) is the approximate dollar value of the benefit gained and the costs avoided or delayed (without duplication) as a result of the respondent's noncompliance. Except as provided in (3), the EB will be determined using the U.S. Environmental Protection Agency's BEN computer model. DEQ may make, for use in the model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent.

* * * * *

(4) DEQ need not calculate EB if DEQ makes a reasonable determination that the EB is de minimis or if there is insufficient information on which to make an estimate under this rule.

For both violations, DEQ reasonably assigned an EB value of 0 due to insufficient information on which to make an estimate.

Civil Penalties Assessed

The civil penalty for the violation of ORS 468B.025(1)(a) related to the tire mats is \$15,000 (\$6,000 BP + [(0.1 x \$6,000 BP) x (0 P + 0 H + 3 O + 10 M + 2 C)] + \$0 EB).

The civil penalty for the violation of ORS 468B.025(1)(a) related to concrete is \$12,000 (\$6,000 BP + [(0.1 x \$6,000 BP) x (0 P + 0 H + 2 O + 8 M + 0 C)] + \$0 EB).

Pursuant to ORS 468.135 and ORS 183.745(2), the civil penalties are due and payable within 10 days after the order becomes final.

ORDER

TerraFirma Foundation Repair, Inc. caused pollution to waters of the state by placing tire mats directly into the North Umpqua River and by discharging concrete-contaminated water into the North Umpqua River. TerraFirma Foundation Repair, Inc. is ordered to pay civil penalties in the total amount of \$27,000 for violations of ORS 468B.025(1)(a).

The civil penalties are due and payable within 10 days after the order becomes final.

Elizabeth Jarry

Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

If you are not satisfied with this decision, you have the right to have the decision reviewed by the Oregon Environmental Quality Commission (Commission). To have the decision reviewed, you must file a “Petition for Review” within 30 days of the date this order is served on you. Service, as defined in Oregon Administrative Rule (OAR) 340-011-0525, means the date that the decision is **mailed** to you, and not the date that you receive it.

The Petition for Review must comply with OAR 340-011-0575 and must be **received** by the Commission within 30 days of the date the Proposed and Final Order was mailed to you. You should mail your Petition for Review to:

Environmental Quality Commission
c/o Leah Feldon, Director, DEQ
700 NE Multnomah Street, Suite 600
Portland, OR 97232

You may also fax your Petition for Review to (503) 229-6762 (the Director’s Office).

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as provided in OAR 340-011-0575. The exceptions and brief must be **received** by the Commission within 30 days from the date the Commission received your Petition for Review. If you file a Petition but not a brief with exceptions, the Environmental Quality Commission may dismiss your Petition for Review.

If the Petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0575.

Unless you timely file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Commission 30 days from the date this Proposed Order is mailed to you. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. *See* ORS 183.480 et. seq.

SERVICEMEMBERS’ CIVIL RELIEF ACT

Unless otherwise stated in this order, the Office of Administrative Hearings has no reason to believe that a party to this proceeding is subject to the Servicemembers’ Civil Relief Act (SCRA). If a servicemember is a party to this proceeding and did not appear for a hearing that convened during the servicemember’s period of service or within 90 days after their termination of service, the servicemember should immediately contact the agency to address any rights they may have under the SCRA.

CERTIFICATE OF MAILING

On March 6, 2026, I mailed the foregoing PROPOSED AND FINAL ORDER issued on this date in OAH Case No. 2024-ABC-06612.

By: Electronic and Certified Mail

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Anesia N Valihov for Lucy M Garcia
Hearing Coordinator