



January 28, 2022

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VIA HAND DELIVERY AND EMAIL

Office of Compliance and Enforcement—Appeals
Oregon Department of Environmental Quality
700 NE Multnomah Street, Suite 600
Portland, OR 97232
DEQappeals@deq.state.or.us

RE: In the Matter of Port of Morrow, Case No. WQ/I-ER-2021-106 -- Request for a Contested Case Hearing and Answer

Dear Appeals Coordinator:

I enclose the Port of Morrow's Request for a Contested Case Hearing and Answer in response to the Notice of Civil Penalty Assessment and Order issued by the Oregon Department of Environmental Quality ("Department") on January 10, 2022.

Before the Department refers the Request for a Contested Case Hearing to the Office of Administrative Hearings, the Port requests an informal discussion with the Department regarding this matter.

Please contact me with any questions.

Sincerely yours,

A handwritten signature in black ink that reads 'Michael R. Campbell'.

Michael R. Campbell

cc (w/encl. – via email): Kieran O'Donnell, ODEQ (kieran.odonnell@deq.oregon.gov)
Jeff Bachman, ODEQ (jeff.bachman@deq.oregon.gov)
Crystal S. Chase, Stoel Rives

Enclosure (Request for A Contested Case Hearing and Answer)

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BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:
PORT OF MORROW,
a port district of the State of Oregon,

Respondent.

REQUEST FOR A CONTESTED CASE
HEARING AND ANSWER

CASE NO. WQ/I-ER-2021-106

I. REQUEST FOR A CONTESTED CASE HEARING

1. The Oregon Department of Environmental Quality (DEQ) issued Notice of Civil Penalty Assessment and Order, Case No. WQ/I-ER-2021-106 (Notice), to Respondent Port of Morrow (Port) on January 10, 2022.

2. Pursuant to ORS 183.745, ORS 468.135(1), and OAR 340-011-0530, the Port hereby requests a contested case hearing on the Notice. This hearing request is timely pursuant to ORS 183.745(2) and OAR 340-011-0530(1) because it is filed within 20 days of service of the Notice.

3. The Port is represented in this matter by:

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II. ANSWER

4. Section I of the Notice asserts the legal authority for the Notice and therefore does not require a response.

5. The Port admits paragraph II.1 of the Notice.

6. The Port admits paragraph II.2 of the Notice with two clarifications. First, all the facilities from which the Port is authorized to receive wastewater by Schedule A(1) of Water Pollution Control Facilities Permit No. 102325 (the Permit) are operated by other

1 entities, not the Port. Second, DEQ issued the Permit to the Port on December 1, 2017,
2 effective December 21, 2017.

3 7. With respect to paragraph II.3 of the Notice, the Port admits that most of the
4 land application sites that were cited for violations are within the Lower Umatilla Basin
5 Groundwater Management Area, but denies that all are.

6 8. The Port admits paragraph II.4 of the Notice.

7 9. Paragraphs II.5 and II.6 of the Notice describe the conditions of the Permit,
8 which speak for themselves, and thus require no response.

9 10. The Port does not dispute paragraph II.7 of the Notice.

10 11. Paragraph II.8 of the Notice describes condition B(9) of the Permit, which
11 speaks for itself, and thus requires no response.

12 12. The Port does not dispute paragraph II.9 of the Notice.

13 13. Paragraphs II.10 and II.11 of the Notice describe conditions B(6)(G) and
14 B(14) of the Permit, which speak for themselves, and thus require no response.

15 14. With respect to paragraph II.12 of the Notice, the Port collected the required
16 information related to total dissolved solids (TDS), which was included in the analytical
17 reports enclosed with the annual reports for 2018 and 2019 that the Port submitted to DEQ.
18 In accordance with the oral instructions of the Port's DEQ contact at the time, the annual
19 reports also included a summary of TDS loading for each farm, but not for each field at each
20 farm, which the DEQ contact found unnecessary. At the direction of DEQ, the Port
21 subsequently provided DEQ with a summary of the TDS loading for each field for 2018 and
22 2019. Except as specifically admitted in this paragraph, the Port denies paragraph II.12 of
23 the Notice.

24 15. With respect to paragraph III.1 of the Notice, the Port admits that the
25 applications of wastewater described in paragraph II.7 of the Notice to fields where soil
26 nitrate exceeded 30 pounds per acre in the fourth and fifth foot of the soil were inconsistent

1 with condition A(13)(C)(ii) of the Permit. The Port denies, however, that it is liable for any
2 civil penalty for these applications of wastewater. In the alternative, the Port denies that it is
3 liable for a civil penalty in the amount of \$1,227,600.

4 a. No civil penalty may be imposed to the extent that it is based on
5 alleged violations for which an action for a penalty is barred by ORS 12.110(2).

6 b. ORS 468.130(3) provides that a “penalty imposed under this section
7 [ORS 468.140] may be remitted or mitigated upon such terms and conditions” as the
8 Environmental Quality Commission, or DEQ pursuant to the authority delegated by
9 ORS 468.130(4), “considers proper and consistent with public health and safety.” To
10 the extent that a penalty may be imposed for the alleged violations, the penalty should
11 be remitted in its entirety or mitigated for reasons that include, but are not limited to,
12 the following:

13 i. When the Permit was issued, the Port believed that it had or
14 would have sufficient land application acreage available to comply with the
15 nitrate loading limits in condition A(13)(C)(ii) of the Permit. An unexpected
16 combination of less available acreage and unusually high winter precipitation,
17 however, forced the Port to apply wastewater to sites that exceeded the nitrate
18 levels specified in the condition, notwithstanding the Port’s efforts to avoid
19 such applications.

20 ii. Because of the unexpected challenges faced by the Port in
21 meeting condition A(13)(C)(ii), DEQ in January 2019 authorized the Port to
22 apply wastewater to sites with combined fourth- and fifth-foot nitrogen levels
23 of 80 pounds per acre or less. Only 6 of the 66 fields identified in
24 paragraph II.7 of the Notice had combined fourth- and fifth-foot nitrogen
25 levels of more than 80 pounds per acre.

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1 iii. The winter applications of wastewater to fields whose nitrate
2 levels exceeded the limits in condition A(13)(C)(ii) had no adverse effect on
3 groundwater nitrate levels.

4 c. To the extent that a penalty may be imposed for the alleged violations,
5 the magnitude of the violations should be minor, rather than moderate, pursuant to
6 OAR 340-012-0130(4) because the alleged violations had no more than a *de minimis*
7 adverse effect on human health or the environment and posed no more than a *de*
8 *minimis* threat to human health or the environment.

9 d. To the extent that a penalty may be imposed for the alleged violations,
10 the “H” factor should be minus two, rather than zero, because the Port has corrected
11 all previous violations cited as prior significant actions.

12 e. To the extent that a penalty may be imposed for the alleged violations,
13 the “M” factor should be zero, rather than eight. The application of wastewater in the
14 winter to sites that exceeded 30 pounds of nitrate per acre was unintentional and
15 beyond the reasonable control of the Port.

16 f. To the extent that a penalty may be imposed for the alleged violations,
17 the “C” factor should be minus five, rather than zero, because the Port has made and
18 continues to make extraordinary efforts to avoid applying wastewater in the winter to
19 sites that exceed 30 pounds of nitrate per acre.

20 16. With respect to paragraph III.2 of the Notice, the Port admits that it did not
21 monitor and record the plant tissue nitrogen removal information described in condition B(9),
22 Table 11, of the Permit. The Port denies, however, that this violated the Permit. In the
23 alternative, to the extent that not monitoring and recording plant tissue nitrogen removal
24 information violated the Permit, the Port denies that it is liable for any civil penalty or a civil
25 penalty in the amount of \$63,951.

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1 a. Although condition B(9) of the Permit requires the Port to monitor and
2 record plant tissue nitrogen removal, condition B(1) provides that monitoring must be
3 conducted in accordance with the approved Operation, Monitoring, and Management
4 (OM&M) Plan. There are no standard methods for monitoring plant tissue nitrogen
5 removal, DEQ provided no useful guidance on the appropriate method
6 notwithstanding the Port’s requests for such guidance, and until 2021 the OM&M
7 Plan did not include a DEQ-approved method.

8 b. No civil penalty may be imposed to the extent that it is based on
9 alleged violations for which an action for a penalty is barred by ORS 12.110(2).

10 c. ORS 468.130(3) provides that a “penalty imposed under this section
11 [ORS 468.140] may be remitted or mitigated upon such terms and conditions” as the
12 Environmental Quality Commission, or DEQ pursuant to the authority delegated by
13 ORS 468.130(4), “considers proper and consistent with public health and safety.” To
14 the extent that a penalty may be imposed for the alleged violations, the penalty should
15 be remitted in its entirety or mitigated for reasons that include, but are not limited to,
16 the following:

17 i. Until DEQ’s approval of a method for monitoring plant tissue
18 nitrogen removal in the OM&M Plan in 2021, the Port was uncertain
19 regarding both what information should be collected and how it should be
20 collected. There are no standard methods, no method is specified in the
21 Permit, and DEQ had not provided any useful guidance to the Port on an
22 appropriate method.

23 ii. Measuring nitrogen in plant tissue is neither an accurate nor a
24 useful measure of the amount of nitrogen removed from fields by crops, and
25 the information does not measure compliance with any Permit requirement or
26 serve any other purpose under the Permit.

1 iii. The absence of plant tissue nitrogen removal information for
2 the 2018, 2019, and 2020 crop years had no adverse effect on groundwater
3 nitrate levels and posed no risk of an adverse effect on those levels.

4 d. To the extent that a penalty may be imposed for the alleged violations,
5 the magnitude of the violations should be minor, rather than moderate, pursuant to
6 OAR 340-012-0130(4) because the alleged violations had no more than a *de minimis*
7 adverse effect on human health or the environment and posed no more than a *de*
8 *minimis* threat to human health or the environment.

9 e. To the extent that a penalty may be imposed for the alleged violations,
10 the “H” factor should be minus two, rather than zero, because the Port has corrected
11 all previous violations cited as prior significant actions.

12 f. To the extent that a penalty may be imposed for the alleged violations,
13 the “M” factor should be zero, rather than four. The failure to monitor for plant tissue
14 nitrogen was unintentional and beyond the reasonable control of the Port because
15 neither the Permit nor DEQ specified a monitoring method and because there are no
16 standard methods.

17 g. To the extent that a penalty may be imposed for the alleged violations,
18 the “C” factor should be minus three, rather than zero, because the Port made
19 reasonable efforts to correct the alleged violations.

20 17. The Port denies paragraph III.3 of the Notice. Although the annual reports for
21 2018 and 2019 did not include monthly summaries of TDS loading for each field based on
22 the oral instructions of the Port’s DEQ contact, the Port substantially complied with
23 condition B(14)(D) of the Permit by collecting the required TDS monitoring information and
24 including it in the appendices to the annual reports.

25 18. With respect to paragraph IV.1, and as stated above, the Port denies that it is
26 liable for a civil penalty or, in the alternative, a civil penalty in the amount of \$1,291,551.

