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BEFORE THE STATE OF OREGON
OREGON HEALTH AUTHORITY
CENTER FOR HEALTH PROTECTION

In the Matter of

Bellinger Produce, LLC, PWS
OR4195236

Respondent

NOTICE OF INTENT TO IMPOSE
CIVIL PENALTY

To: Robert Jack Bellinger
Bellinger Produce, LLC
29088 Bridge Road
Hermiston, OR 97838

Pursuant to Oregon Revised Statute (ORS) 448.280, ORS 448.285, and Oregon Administrative Rule (OAR) 333-061-0090, the Oregon Health Authority, Public Health Division, Center for Health Protection, Drinking Water Services (DWS) intends to impose a civil penalty of \$650 against Bellinger Produce, LLC for violations of OAR 333-061-0025.

Bellinger Produce, LLC has at all times mentioned herein owned and operated, and continues to own and operate, the Bellinger Produce water system (hereinafter "Water System"), which is a transient non-community public water system serving approximately 100 people and subject to regulation under ORS 448.115 to 448.290 and OAR 333-061-0005 to 333-061-0272.

Bellinger Produce, LLC (hereinafter “Water Supplier”) is therefore a water supplier as defined in ORS 448.115(12) and OAR 333-061-0020 and has specific responsibilities as defined in OAR 333-061-0025. These responsibilities include taking all reasonable actions to assure water delivered to users does not exceed maximum contaminant levels and that water system facilities are free of public health hazards. OAR 333-061-0025. Maximum containment level (MCL) is defined in OAR 333-061-0020 and means the maximum allowable level of contaminant in the water delivered to users of a public water system and the MCL for nitrate in drinking water is 10 mg/L as specified in OAR 333-061-0030(1). Nitrate occurs in drinking water as runoff from fertilizer use, leaching from septic tanks or sewage, or the erosion of natural deposits.

Due to the failure to comply with the MCL for nitrate, DWS served a Notice of Violation and Administrative Order (Order) to Water Supplier regarding the Water System on December 7, 2018. The Order cited two violations of rules as specified above. First, that Water supplier failed to take all reasonable actions to ensure that the water did not exceed the MCL for nitrate in violation of OAR 333-061-0025. Second, that the presence of nitrate at levels exceeding the MCL violated OAR 333-061-0030(1). The Order required Water Supplier to monitor for nitrate at the Water System every month and immediately collect a confirmation sample if any monthly sample exceeded the MCL for nitrate as specified in OAR 333-061-0030(1). The Order specified that it would be a violation if the average of any monthly sample and confirmation sample exceeded the MCL or if a confirmation sample was not collected following a monthly sample that exceeded the MCL.

Water Supplier did not appeal the Order and afterward complied with the Order, collecting monthly samples every month from February through September 2019. Water Supplier reported a monthly sample on October 2, 2019, which was determined to have a nitrate concentration of 57.2 mg/L. Two confirmation samples were reported on October 3, 2019 and determined to have nitrate concentrations of 59.6 and 60.8 mg/L respectively. The average of the monthly sample and either confirmation exceeded the MCL for nitrate of 10 mg/L, in violation of the Order. The Order is incorporated by reference.

Water Supplier’s failure to comply with the Order issued by DWS is a violation for which a civil penalty may be assessed as prescribed by OAR 333-061-0090(3)(i).

CONCLUSIONS OF LAW

Violation No. 1: Water Supplier is in violation of OAR 333-061-0090(3)(i) for failing to comply with an order issued by DWS.

Violation No. 2: Water Supplier is in violation of OAR 333-061-0025 for failing to take all reasonable actions to assure water delivered to users does not exceed maximum contaminant levels and that water system facilities are free of public health hazards.

Violation No. 3: Water Supplier is in violation of OAR 333-061-0030(1) because drinking water at the Water System fails to comply with the MCL for nitrate.

CIVIL PENALTY

Pursuant to ORS 448.280 and OAR 333-061-0090, DWS intends to impose a total civil penalty in the amount of \$650 based upon the population served by the public water system and each day a violation of OAR 333-061-0025 occurred. DWS considered mitigating and aggravating factors as described below in determining the total civil penalty amount.

Each violation is a separate and distinct offense according to OAR 333-061-0090. The per day civil penalty amount for a violation at a public water system serving 100 people is \$50 per day according to OAR 333-061-0090(4). DWS intends to impose a civil penalty of \$50 per day for the violation of OAR 333-061-0025 as set out in the civil penalty schedule.

For each violation, DWS intends to impose a civil penalty for each day of non-compliance, a total of 13 days. The number of days is based on the period from October 3, 2019 through October 15, 2019. 13 days is appropriate for violation 2 because the confirmation sample with nitrate exceeding the MCL was reported on October 3, 2019, demonstrating that Water Supplier failed to maintain and operate the treatment at the Water System as it had during previous months; and as of October 15, 2019 (when this Notice was written), monitoring has not yet been reported by Water Supplier demonstrating it has corrected the violation.

The total proposed civil penalty is \$650 (13 x 1 x \$50).

If the violations identified in this notice continue or if you violate any other applicable law or rules, you may be subject to additional civil penalties per day per violation.

CIVIL PENALTY FACTORS CONSIDERED

In assessing the civil penalty, DWS considered the factors set out in ORS 448.285(2).

- (a) The past history of the person incurring the penalty in taking all feasible steps or procedures necessary or appropriate to correct the violation:
 - The Water System has a history of violating the MCL for nitrate since as early as 2004. In addressing the nitrate exceedance, Water Supplier has failed and succeeded on a number of occasions to take all feasible steps to correct the violation. For example, nitrate has exceeded the MCL in sample results collected at the Water System more than 20 times since 2004. Water Supplier's failure to operate the Water System so that nitrate is consistently below the MCL supports imposing the maximum the civil penalty in this matter. In contrast, Water Supplier installed a nitrate treatment system in 2007 and thereafter reported nitrate results for the Water System below the MCL more than 40 times between 2008 and 2018. Water Supplier's attempt to comply with the rules supports reducing the civil penalty in this matter.
 - On January 27, 2015, Water Supplier mailed a letter to DWS requesting a period of four years to connect the Water System to the City of Hermiston's water system. Connecting to and receiving drinking water from the City of Hermiston would have resolved the situation and corrected the violation. Water Supplier's failure to achieve its proposal supports imposing the maximum the civil penalty in this matter.
 - The Order issued December 8, 2018, in part, required Water Supplier to monitor for nitrate every month for 12 consecutive months. This requirement was completed for nine consecutive months and DWS considered this attempt to comply with the Order to support reducing the civil penalty in this matter. Water Supplier's violation of the Order's key requirement in October 2019, that nitrate not exceed the MCL, supports imposing the maximum civil penalty in this matter.
- (b) Prior violations:
 - Over the last five years, Water Supplier has violated numerous drinking water regulations, some on numerous occasions. These prior violations include one violation of OAR 333-061-0025(1), three violations of OAR 333-061-0025(2), five violations of OAR 333-061-0025(5), eight violations of OAR 333-061-0030(1), two violations of OAR 333-061-0036(6), two violation of OAR 333-061-0050(2), one violation of OAR 333-061-0064, one violation of OAR 333-061-0065(4), and two violations of OAR 333-061-0070(12). DWS considered these prior violations to support imposing the maximum civil penalty in this matter.
- (c) Economic and financial conditions of the person incurring the penalty:

- DWS has no information about Water Supplier's economic or financial details, or the economic or financial conditions at the Water System. DWS considered this factor neutral when determining the appropriate civil penalty in this matter.

NOTICE OF RIGHT TO REQUEST A HEARING

You are entitled to a hearing as provided by the Administrative Procedure Act (Oregon Revised Statutes, Chapter 183). To request a hearing, you must file a written request with DWS within 20 days from the date this notice was mailed. **The request for hearing must be sent to: David Emme, Manager; Oregon Health Authority, Drinking Water Services; PO Box 14450; Portland, OR 97293-0450. If a request for hearing is not received within the 20-day period, you will have waived your right to a hearing.**

If you request a hearing, DWS will notify you of the time and place at which the hearing will be held. You may enlist representation by legal counsel. Per ORS 413.041, a party that is not a natural person may be represented by an attorney or by any officer or authorized agent or employee of the party. Parties are ordinarily represented by counsel. DWS will be represented by an Assistant Attorney General. Prior to the hearing date, DWS will provide you with information on the procedures, right of representation and other rights of parties relating to the conduct of the hearing. An administrative law judge from the Office of Administrative Hearings will be assigned to preside over the hearing, as required by ORS 183.635.

If you do not request a hearing within the 20 days, withdraw the request for hearing, notify DWS or the administrative law judge that you will not appear at a scheduled hearing, or fail to appear at a scheduled hearing, DWS may issue a final order by default imposing a civil penalty. If DWS issues a final order by default, DWS designates its files on this matter as the record for the purpose of proving a *prima facie* case upon default.

Notice to Active Duty Servicemembers

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

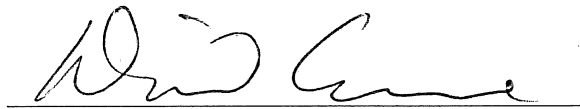
For purposes of ORS 293.229 through 293.233 and ORS 293.250, the civil penalty specified herein will become a liquidated debt if a final order is issued. Pursuant to

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ORS 293.231 DWS is required to assign liquidated and delinquent civil penalties to the Department of Revenue, as provided in ORS 293.250, not later than 90 days after the final order is issued. Reasonable administrative costs, collection costs, attorney's fees, and all other costs and charges necessary for the collection of any amount not paid when due, including but not limited to collection charges assessed by the Department of Revenue may be added to the amount due of \$650.

If you need to receive the information in this letter in an alternate format, or if you have any questions about the requirements in this notice, please contact Brad K. Daniels at (971) 673-0405.

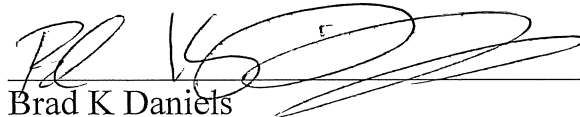
Dated this 17th day of October, 2019.



Dave Emme, Manager
Drinking Water Services
Oregon Health Authority

cc: Bill Goss, Oregon Health Authority, Drinking Water Services
Melissa Ney, Oregon Department of Agriculture
Amy Word, Oregon Health Authority, Drinking Water Services

DATE of Service: October 17, 2019



By certified and first class mail