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BEFORE THE OREGON DEPARTMENT ENVIRONMENTAL QUALITY  
OF THE STATE OF OREGON

IN THE MATTER OF: )  
ICON CONSTRUCTION & ) ANSWER TO NOTICE OF CIVIL PENALTY  
DEVELOPMENT, LLC, ) ASSESSMENT AND ORDER AND  
Respondent. ) HEARING REQUEST  
No. WQ/SW-NWR-2021-151

ICON Construction & Development, LLC (“ICON” or “Respondent”) files this response to the June 3, 2022 Notice of Civil Penalty Assessment and Order (“Notice”) issued by the Oregon Department of Environmental Quality (“DEQ”). ICON received the Notice electronically on June 3, 2022.

DEQ alleges that ICON violated Oregon law and the conditions of the National Pollution Discharge Elimination System (“NPDES”) Construction Stormwater General Permit No. 1200-C (the “Permit”) at the locations of four projects in Canby, Oregon (the “City”). DEQ asserts that ICON commenced construction prior to obtaining coverage under the Permit, violated conditions of the Permit, and engaged in construction activities that caused discharges to a water of the state. DEQ seeks to assess a civil penalty nevertheless.

ICON denies the basis for the Notice as further outlined below. DEQ seeks actions and remedies that are outside the scope of its legal authority to demand or order. Further, DEQ’s penalty calculations are based on inaccurate allegations and assumptions that are not supported by the evidence or law. Further, DEQ acted in bad faith, seeking to entrap ICON and to intimidate ICON by falsely accusing ICON of intentionally misleading DEQ.

1                                   **REQUEST FOR HEARING & INFORMAL RESOLUTION**

2            ICON requests a hearing and an opportunity to discuss informal resolution with the DEQ  
3 Office of Enforcement and Compliance. ICON reserves the right to seek resolution of the penalty  
4 through completion of a Supplemental Environmental Project.

5                                   **ATTORNEY FEES**

6            Should this matter proceed to a final order against ICON, ICON reserves the right to seek  
7 attorney fees pursuant to ORS 183.497(1)(a) at the court’s discretion and ORS 183.497(1)(b)  
8 because DEQ has acted without a reasonable basis in law or in fact. ORS 183.497(1).

9                                   **GROUNDS FOR REQUEST FOR HEARING**

10           The penalty assessed in this case is inappropriate for several reasons, including the  
11 following: The allegations made in the Notice are inaccurate and incorrect. DEQ does not have  
12 jurisdiction to levy a penalty against ICON for 1) activities on a site from which stormwater does  
13 not drain or otherwise connect to waters of the state, 2) pre-construction activities, or 3) failure to  
14 submit reports not required by the Permit. DEQ seeks to impose penalties for “intentional”  
15 violations where there was no intentional act. DEQ’s approach to permit implementation and  
16 enforcement changed without notice to ICON. Further, DEQ acted in bad faith, seeking to  
17 intimidate ICON and to entrap ICON and its contracted engineer and CESCL.

18                               **SPECIFIC RESPONSES TO FINDINGS OF FACT & STATEMENT OF FACTS**

19            1.       Respondent admits it is the owner of the following four construction sites  
20 (collectively, the “Projects”) in Canby, Oregon:

21                   (a)     The Beckwood development located at N Pine Street and N 17th Avenue  
22 (the “Beckwood Project”);

23                   (b)     The Hamilton Acres development located at 1467 N. Pine Street (the  
24 “Hamilton Acres Project”);

25                   (c)     The Redwood Landing II development located at 1238 N. Redwood Street  
26 (the “Redwood II Project”); and

1 (d) The Redwood Landing III development located at 1234, 1212, and 1176  
2 N. Redwood Street (the “Redwood III Project”).

3 2. Paragraph 2 contains a legal conclusion, to which no response is required.

4 **Beckwood Project**

5 3. Respondent admits that it performed tree falling activities between the dates of  
6 June 18 and July 2, 2021. On July 16, 2021, after receiving the Clackamas County-issued grading  
7 permit #G0001121 and erosion permit #SP 21-96:6214 from the City, Respondent began stump  
8 removal activities. Respondent understood these activities (tree falling and stump removal) to  
9 fall outside of DEQ’s jurisdiction and did not understand them to be 1200-C permit covered  
10 activities. After DEQ notified Respondent of potential DEQ penalties associated with this work  
11 on August 2, 2021, Respondent ceased all activities immediately. These activities resumed after  
12 Respondent obtained 1200-C permit coverage on September 22, 2021. Respondent otherwise  
13 denies paragraph 3.

14 4. Respondent denies paragraph 4. At all material times, the Beckwood Project did  
15 not connect to the City’s stormwater system or other conveyance system connected to surface  
16 waters of the state.

17 5. Paragraph 5 contains a legal conclusion, to which no response is required.

18 6. Respondent denies paragraph 6. Respondent denies that tree falling and harvest at  
19 the Beckwood Project between June 18 and July 2, 2021, and stump removing between July 16  
20 and August 2, 2021 constitute “construction activity.” The City’s Senior Planner, Ryan Potter,  
21 indicated that tree removal and activities preceding development construction did not require a  
22 1200-C Permit. Respondent did not engage in clearing or grading activities during this time.

23 7. Respondent admits that to the best of its knowledge, DEQ received all permit  
24 application material on June 28, 2021. Respondent otherwise denies paragraph 7.

25 8. Paragraph 8 contains a legal conclusion, to which no response is required.

26

1           9.       Respondent admits that Consultant Bruce Goldson, PE, who was suffering from a  
2 broken leg resulting in limited to no mobility and an inability to physically visit the Project at the  
3 time the application material was gathered and submitted to DEQ, submitted an Erosion and  
4 Sediment Control Plan (ESCP) with the Permit application materials that described the existing  
5 site conditions as “Vacant – With Trees.” Respondent admits that the ESCP was filled out  
6 consistent with the City’s Senior Planner Ryan Potter’s indication that tree removal did not  
7 require a 1200-C permit, and that the ESCP stated that construction work would begin July of  
8 2021. Respondent otherwise denies paragraph 9.

9           10.      Respondent admits that on July 12, 2021, Goldson, who was suffering from a  
10 broken leg resulting in limited to no mobility and an inability to physically visit the Project,  
11 submitted a revised ESCP that described the existing site conditions as “Vacant – With Trees.”  
12 This approach was also consistent with past practices that had not been called into question by  
13 DEQ previously. Respondent otherwise denies paragraph 10.

14          11.      Respondent admits that on July 29, 2021, Goldson, who was suffering from a  
15 broken leg at the time resulting in limited to no mobility and an inability to physically visit the  
16 Project, submitted a second revised ESCP that described the existing site conditions as “Vacant –  
17 With Trees.” This approach was also consistent with past practices that had not been called into  
18 question by DEQ previously. Respondent otherwise denies paragraph 11.

19          12.      Respondent admits that DEQ performed an inspection of the Beckwood Project  
20 on August 2, 2021, immediately after asking consultant Goldson to submit an updated *future*  
21 construction plan showing a *possible* connection to waters of the state in order to claim  
22 jurisdiction. In fact, DEQ inspector Michael Kennedy was on site at the Beckwood Project mere  
23 hours after confirming his receipt of the requested plan showing a possible future connection to a  
24 water of the state. Respondent admits that Darren Gusdorf – who understood there to be a  
25 distinction between stumping, clearing, and grading under the local jurisdiction’s erosion and  
26 sediment control and grading permit approvals and beginning actual construction development

1 on the site (only the latter of which he believed triggered the need for a 1200-C permit) – sent an  
2 email to DEQ confirming that ICON had been working on tree removal. Respondent otherwise  
3 denies paragraph 12.

4 13. Respondent denies paragraph 13. On August 5, 2021, Goldson, who was suffering  
5 from a broken leg at the time and could not access the site, submitted a third revised ESCP with  
6 an updated and current existing conditions map and drone photograph of the site’s active  
7 conditions. This updated ESCP’s existing conditions plan/map clearly showed that all trees had  
8 been removed.

9 14. Respondent admits paragraph 14.

#### 10 **Hamilton Acres Project**

11 15. Respondent admits that it performed construction activities at the Hamilton Acres  
12 Project between October 2019 and Present. Respondent otherwise denies paragraph 15.

13 16. Respondent denies paragraph 16. Hamilton Acres did not and still does not  
14 possess any connection to waters of the state. The City asked Respondent to install an overflow  
15 pipe on November 26, 2019, but the pipe was plugged and provided no pathway to the City’s  
16 stormwater system. Hamilton Acres does not have a connection to waters of the state.

17 17. Respondent admits paragraph 17.

18 18. Respondent admits paragraph 18.

19 19. Paragraph 19 contains a legal conclusion, to which no response is required.

20 20. Paragraph 20 contains a legal conclusion, to which no response is required.

21 21. Respondent admits paragraph 21.

22 22. Respondent denies paragraph 22. Respondent’s erosion control inspector(s)  
23 performed forty-two inspections between March 13, 2020 and August 2, 2021 and documented  
24 erosion control measures were in place and functioning properly. DEQ unlawfully seeks to  
25 penalize ICON for alleged violations that were resolved in Mutual Agreement and Order  
26 (“MAO”), DEQ Case No. WQ/SW-MWR-2020-091 (“This MAO resolves all civil claims of

1 DEQ, based upon the facts alleged, for the violations expressly alleged in the Notice as amended  
2 by the MAO.”); *see also* Notice of Civil Penalty Assessment and Order in DEQ Case No.  
3 WQ/SW-NWR-2020-091 (“On or about March 13, 2020 through May 21, 2020, Respondent has  
4 violated ORS 468B.025(2) and . . . the Permit by failing to implement the ESCP developed for  
5 the Project”).

6 23. Paragraph 23 contains a legal conclusion, to which no response is required.

7 24. Respondent admits paragraph 24.

8 25. Paragraph 25 contains a legal conclusion, to which no response is required.

9 26. Respondent admits paragraph 26.

10 27. Paragraph 27 contains a legal conclusion, to which no response is required.

11 28. Respondent denies paragraph 28. DEQ has not identified the information on  
12 which it is relying to assert a failure to conduct visual monitoring with the frequency DEQ  
13 believes was required under the 1200-C permit. DEQ relies on rainfall data from the Aurora  
14 airport over five miles away from the Project site, as opposed to local rainfall data. This data is  
15 not representative of rainfall at the Project, and does not trigger visual monitoring requirements.

16 29. Respondent admits paragraph 29.

17 **Redwood II Project**

18 30. Respondent admits that it performed construction activities at the Redwood II  
19 Project between February 22 and September 12, 2021. Respondent otherwise denies paragraph  
20 30.

21 31. Respondent denies paragraph 31. At all material times, Redwood Landing II was  
22 not connected to waters of the state via the City’s system. The stormwater system at the  
23 Redwood II Project is designed to send stormwater to UICs. The system is also designed to  
24 overflow in extreme precipitation events (as required by the City), but the catch basin that would  
25 receive that overflow (on 13th/Redwood) was plugged at all material times. This results in a

26

1 system with no physical pathway from the Redwood II Project stormwater system to the City's  
2 storm drains or system, or waters of the state at all material times in the Notice.

3 32. Respondent admits paragraph 32.

4 33. Respondent admits paragraph 33.

5 34. Respondent admits paragraph 34.

6 35. Paragraph 35 contains a legal conclusion, and Respondent further notes that the  
7 new permit did not require that the February 15, 2021 ESCP updates be submitted to DEQ for  
8 review or approval, nor did DEQ communicate that requirement in its correspondence regarding  
9 the new permit. In addition, the ESCP was updated and kept on-site by February 15, 2021.

10 36. Paragraph 36 contains a legal conclusion, to which no response is required.

11 37. Paragraph 37 contains a legal conclusion, to which no response is required.

12 38. Respondent admits paragraph 38.

13 39. Respondent admits paragraph 39.

14 40. Respondent admits paragraph 40.

15 41. Paragraph 41 contains a legal conclusion, to which no response is required.

16 42. Paragraph 42 contains a legal conclusion, to which no response is required.

17 43. Respondent denies paragraph 43. DEQ's allegation in this paragraph is based on  
18 the mistaken belief that leakage from a water truck on July 28, 2021 went to the City's  
19 stormwater system. Instead, the catch basin photographed by DEQ on July 28 as receiving water  
20 leaking from a water truck is located within the Redwood II Project, not in a public street, and  
21 had (has) no live connection to the city storm water system. The entire system the catch basin is  
22 connected to is capped and will remain capped until the city authorizes or requires that the cap be  
23 removed. Thus, contrary to the alleged violation, there is no physical mechanism for turbid water  
24 to have entered the storm system or waters of the state. Accordingly, there is no evidence that  
25 Respondent placed wastes, let alone *intentionally*, in a location where they were likely to be  
26 carried into waters of the state by any means.

1 44. Respondent denies paragraph 44. DEQ's photos from the July 28, 2021 inspection  
2 show *limited* trackout and general cleanliness, with trackout and dust apparent in only one  
3 limited area.

4 45. Paragraph 45 contains a legal conclusion, to which no response is required.

5 46. Respondent denies paragraph 46. Respondent installed erosion control measures  
6 when it began construction on February 22, 2021. On March 1, 2021, CESCL inspector Goldson  
7 visually monitored, inspected, and reported on the installations and effectiveness of these  
8 implemented best management practices ("BMPs").

9 47. Respondent denies paragraph 47. DEQ has not identified the information on  
10 which it is relying to assert a failure to conduct visual monitoring with the frequency DEQ  
11 believes was required under the 1200-C permit. DEQ relies on rainfall data from the Aurora  
12 airport over five miles away from the Project site, as opposed to local rainfall data. This data is  
13 not representative of rainfall at the Project, and does not trigger visual monitoring requirements.

14 48. Respondent denies paragraph 48. The dates of alleged failed reporting are closer  
15 than 14 days apart and therefore cannot constitute three violations.

### 16 **Redwood III Project**

17 49. Respondent admits paragraph 49.

18 50. Respondent denies paragraph 50. Redwood Landing III was not connected to a  
19 City outfall, and waters of the state via the City's system at all material times in the Notice.  
20 Redwood II was also not connected to waters of the state via an open city storm line at any of the  
21 times relevant to this Notice.

22 51. Paragraph 51 contains a legal conclusion, to which no response is required.

23 52. Respondent denies paragraph 52. Geo Pacific inspected the Redwood Landing III  
24 site while observing Redwood II and included a statement in their report that "no vegetation had  
25 been removed at this time." No activities related to site-wide brush clearing, grading, or heavy  
26 equipment staging took place at Redwood III before June 18, 2021.

1           53.     Respondent denies paragraph 53. Respondent applied for coverage under the 2020  
2 permit on April 22, 2021.

3           54.     Paragraph 54 contains a legal conclusion, to which no response is required.

4           55.     Respondent denies that clearing and grading work at the Redwood III Project site  
5 had commenced before Respondent submitted a permit application on April 22, 2021.

6 Respondent admits that the ESCP submitted on April 22, 2021 describes the existing site  
7 conditions as cleared of trees with grass ground cover.

8           56.     Respondent admits paragraph 56.

9           57.     Paragraph 57 contains a legal conclusion, to which no response is required.

10          58.     Paragraph 58 contains a legal conclusion, to which no response is required.

11          59.     Respondent admits paragraph 59. The Notice misspells “private” as “provide.”

12          60.     Respondent admits paragraph 60.

13          61.     Respondent denies paragraph 61.

14          62.     Respondent admits that the plastic sheeting in the concrete wash out was torn, but  
15 denies that garbage collected in the wash out area. Respondent further denies that this resulted in  
16 impacts to waters of the state, and otherwise denies paragraph 62.

17          63.     Paragraph 63 contains a legal conclusion, to which no response is required.

18          64.     Respondent denies paragraph 64.

19          65.     Respondent denies paragraph 65. The stormwater catch basin at Redwood II  
20 Project had BMPs in place and was not connected to the City’s public sewer system. Therefore  
21 no discharge could have occurred to a water of the state. Respondent otherwise denies paragraph  
22 65.

23          66.     Respondent denies paragraph 66. Consultant and designated CESCL Paul  
24 Schmidt attended the July 28, 2021 inspection, subsequently tested the ground for any petroleum  
25 sheen when mixed with water, and found none.

26          67.     Paragraph 67 contains a legal conclusion, to which no response is required.

1           68.     Respondent admits paragraph 68.

2           69.     Respondent denies Section III. Conclusions.

3           70.     Respondent denies that DEQ has authority to issue the Order to Pay Civil Penalty  
4 and to Comply set forth on pages 15 to 16 of the Notice. Respondent also denies that DEQ has  
5 authority to 1) assert jurisdiction over Project stormwater management systems that are not  
6 connected to a water of the state; 2) require submittal of a revised ESCP when no such submittal  
7 is required under the plain language of the Permit; and 3) require further work associated with  
8 the 2020 1200-C Permit or ESCP.

9           71.     Respondent denies DEQ's calculation of the civil penalty as erroneous in several  
10 respects, including but not limited to the following:

11           Exhibit 1: Beckwood Project Site Violation 1

12                   (a)     The base penalty is incorrect. Respondent did not violate ORS  
13 468B.050(1)(d) or OAR 340-045-0033(6). Respondent did not conduct construction activities  
14 without a 1200-C Permit.

15                   (b)     The occurrence calculation is incorrect. Respondent did not engage in  
16 activities that violated the statute or rules cited above.

17                   (c)     Respondent did not act or fail to act intentionally or with actual knowledge  
18 of "the requirement." Respondent acted consistent with direction from the City. Tree clearing  
19 and grading are not construction activities that require coverage under a 12000-C general permit.

20           Exhibit 1: Beckwood Project Site Violation 2

21                   (a)     The base penalty is incorrect. Respondent did not violate ORS  
22 468B.050(1)(d) or OAR 340-045-0033(6). Respondent did not conduct construction activities  
23 without a 1200-C Permit, and therefor was not required to submit an ESCP to DEQ at the alleged  
24 time.

25                   (b)     The occurrence calculation is incorrect. Respondent did not engage in  
26 activities that violated the statute or rules cited.

1 (c) Respondent did not act or fail to act intentionally or with actual knowledge  
2 of “the requirement.” Respondent’s consultant suffered a debilitating injury that prevented him  
3 from physically visiting the site. DEQ did not provide Respondent with any notice that it had  
4 changed its implementation of the permit terms. Further, Respondent’s consultant *did* provide  
5 additional information indicating the status of the Property in the submittal with the updated  
6 ESCP.

7 Exhibit 2: Hamilton Acres Project Site Violation 1

8 (a) The occurrence calculation is incorrect. DEQ previously resolved an  
9 enforcement action against Respondent for a number of dates listed in Paragraph 28 of the  
10 Notice. DEQ is precluded under that Mutual Agreement and Order from including those  
11 occurrences in this enforcement action. Further, DEQ relies on inaccurate data to assert local  
12 rainfall triggered monitoring requirements.

13 (b) Respondent did not act flagrantly. The dates of rainfall are inaccurate, and  
14 Respondent was not required to perform visual monitoring.

15 (c) Respondent did not receive an economic benefit. The dates of rainfall are  
16 inaccurate, and Respondent was not required to perform visual monitoring.

17 Exhibit 2: Hamilton Acres Project Site Violation 2

18 (a) The occurrence calculation is incorrect. DEQ previously addressed  
19 penalties under these occurrences in a separate enforcement action.

20 (b) Respondent did not act flagrantly.

21 (c) Respondent did not receive an economic benefit.

22 Exhibit 2: Hamilton Acres Project Site Violation 3

23 (a) The base penalty is incorrect. Respondent did not violate ORS  
24 468B.050(1)(d) or OAR 340-045-0033(6). Respondent did not fail to submit an ESCP to DEQ.  
25 No such submittal was required. Respondent updated and kept the ESCP onsite by February 15,  
26 2021.

1 (b) The occurrence calculation is incorrect. Respondent did not engage in  
2 activities that violated the statute or rules cited above.

3 (c) Respondent did not act or fail to act intentionally or with actual knowledge  
4 of “the requirement.”

5 (d) Respondent did not receive an economic benefit. Respondent did develop  
6 an updated ESCP, therefore Respondent expended the funds listed as an “economic benefit.”

7 Exhibit 2: Hamilton Acres Project Site Violation 4

8 (a) The base penalty is incorrect. Respondent did not violate ORS  
9 468B.025(1)(a). Respondent did not place wastes in an area possibly connected to waters of the  
10 state.

11 (b) The occurrence calculation is incorrect. Respondent did not engage in  
12 activities that violated the statute cited.

13 (c) Respondent did not act or fail to act intentionally or with actual knowledge  
14 of “the requirement.” Respondent did not engage in activities that violated the statute cited.

15 Exhibit 3: Redwood Landing II Project Site Violation 1

16 (a) The base penalty is incorrect. Respondent did not violate ORS  
17 468B.025(2). DEQ relies on inapplicable data to assert that rainfall triggered monitoring  
18 requirements.

19 (b) The occurrence calculation is incorrect. DEQ relies on inapplicable data to  
20 assert that rainfall triggered monitoring requirements on the specified dates.

21 (c) Respondent did not act or fail to act intentionally or with actual knowledge  
22 of “the requirement.”

23 (d) Respondent did not receive an economic benefit.

24 Exhibit 3: Redwood Landing II Project Site Violation 2

25 (a) Respondent did not act or fail to act intentionally or with actual knowledge  
26 of “the requirement.”

1           Exhibit 3: Redwood Landing II Project Site Violation 3

2           (a)     The base penalty is incorrect. Respondent did not violate ORS  
3 468B.025(2). Respondent was not required to submit an ESCP to DEQ by the date alleged.  
4 Further, Respondent updated and kept the ESCP onsite by February 15, 2021.

5           (b)     The occurrence calculation is incorrect. Respondent did not engage in  
6 activities that violated the statute cited.

7           (c)     Respondent did not act or fail to act intentionally or with actual knowledge  
8 of “the requirement.” Respondent was not required to submit its updated ESCP to DEQ.

9           (d)     Respondent did not receive an economic benefit. Respondent did develop  
10 an updated ESCP, therefore Respondent expended the funds listed as an “economic benefit.”

11           Exhibit 3: Redwood Landing II Project Site Violation 4

12           (a)     The base penalty is incorrect. Respondent did not violate ORS  
13 468B.025(1)(a). Respondent did not and could not have caused pollution to a water of the state.

14           (b)     The occurrence calculation is incorrect. Respondent did not engage in  
15 activities that violated the statute cited above.

16           (c)     Respondent did not act or fail to act intentionally or with actual knowledge  
17 of “the requirement.” Respondent did not and could not have caused pollution to a water of the  
18 state.

19           Exhibit 4: Redwood Landing III Project Site Violation 1

20           (a)     The base penalty is incorrect. Respondent did not violate ORS  
21 468B.050(1)(d) or OAR 340-045-0033(6). Respondent did not conduct construction activities  
22 without a 1200-C Permit.

23           (b)     The occurrence calculation is incorrect. Respondent did not engage in  
24 activities that violated the statute or rules cited above.

25           (c)     Respondent did not act or fail to act intentionally or with actual knowledge  
26 of “the requirement.” Respondent acted under the direction from the City. Respondent

1 reasonably understood that it conducted only pre-construction activities that do not require  
2 coverage under a 1200-C general permit.

3 Exhibit 4: Redwood Landing III Project Site Violation 2

4 (a) The base penalty is incorrect. Respondent did not violate ORS  
5 468B.050(1)(d) or OAR 340-045-0033(6). Respondent did not conduct construction activities  
6 without a 1200-C Permit. The ESCP was not in effect (or required to be in effect) at the time of  
7 the alleged violation.

8 (b) The occurrence calculation is incorrect. Respondent did not engage in  
9 activities that violated the statute or rules cited.

10 (c) Respondent did not act or fail to act intentionally or with actual knowledge  
11 of “the requirement.” Respondent’s consultant suffered a debilitating injury that prevented him  
12 from physically visiting the site.

13 Exhibit 4: Redwood Landing III Project Site Violation 3

14 (a) Respondent did not act or fail to act intentionally or with actual knowledge  
15 of “the requirement.”

16 (b) Respondent did not receive an economic benefit.

17 Exhibit 4: Redwood Landing III Project Site Violation 4

18 (a) Respondent did not act or fail to act intentionally or with actual knowledge  
19 of “the requirement.”

20 (b) Respondent did not receive an economic benefit.

21 Exhibit 4: Redwood Landing III Project Site Violation 5

22 (a) The base penalty is incorrect. Respondent did not violate ORS  
23 468B.025(1)(a). Respondent did not and could not have caused pollution to a water of the state.

24 (b) The occurrence calculation is incorrect. Respondent did not engage in  
25 activities that violated the statute cited.

26

1 (c) Respondent did not act or fail to act intentionally or with actual knowledge  
2 of “the requirement.” Respondent did not and could not have caused pollution to a water of the  
3 state.

4 **GENERAL DENIAL**

5 72. Any allegation not specifically admitted is denied.

6 **AFFIRMATIVE DEFENSES**

7 Respondent alleges the following affirmative defenses:

8 73. DEQ has no authority or jurisdiction to regulate, enforce water quality standards,  
9 or to issue a notice of violation for activities occurring on property not connected to a water of  
10 the state. *See* ORS 468B.050.

11 74. Because the Projects were not connected to surface waters of the state,  
12 Respondent could not violate ORS 468B.050 and no Permit coverage or ESCP should have been  
13 required.

14 75. Respondent did not conduct construction activities or other activities described in  
15 ORS 468B.050(d) on the Projects prior to obtaining coverage under a 1200-C permit.

16 76. Respondent had a 1200-C Permit to cover any construction activities within the  
17 Project sites, and complied with such permit.

18 77. DEQ unlawfully seeks to penalize ICON for alleged violations that were resolved  
19 in Mutual Agreement and Order (“MAO”), DEQ Case No. WQ/SW-MWR-2020-091.

20 78. DEQ is acting outside the range of discretion delegated to it by law and  
21 inconsistent with agency rules and practice, without the required explanation for doing so.

22 79. DEQ sought to entrap and intimidate ICON and its consultant engineer.

23 80. DEQ falsely accused ICON and its consultant engineer of intentionally  
24 misleading DEQ and intentionally falsifying documents.

25

26

