

1600 SE 190th Avenue, Portland Oregon 97233 • PH. (503) 988-5508 • Fax (503) 988-3389

BEFORE THE MULTNOMAH COUNTY HEARINGS OFFICER

Notice of Civil Violation issued)	NO. ZV-2021-14224
to Heather Moon for property)	FINDINGS OF FACT,
located at 645 SE Pounder)	CONCLUSIONS OF LAW
Road, Corbett Oregon 97019 in)	AND DECISION, ORDER
unincorporated Multnomah County.)	OF CIVIL PENALTY

A. BACKGROUND INFORMATION

1. **Site Location:** 645 SE Pounder Road, Corbett Oregon 97019; also known as tax lot 700, Section 2BA, Township 1 South, Range 4 East, W.M. (1S 4E 02BA -00700); Alt Account # R994020700 (the “Property”). (Exhibit 1).

2. Description of Alleged Violations:

- a. Failure to comply with Stop Work Orders issued to Respondent on April 28, 2020, and January 8, 2021. Specifically, Respondent continued to conduct, or allow others to conduct, non-permitted ground disturbing activities, including grading and excavation work, on the Property after January 8, 2021, in violation of Multnomah County Code (“MCC”) 39.1540 (Section 1.1 of Exhibit 8-R);
- b. Conducting, or allowing others to conduct, non-permitted development activity on the Property, specifically significant non-permitted ground disturbing activity, including grading and excavation work, without prior County review or approval in violation of MCC 39.6210 (Section 1.3 of Exhibit 8-R);¹ and
- c. Conducting, or allowing others to conduct, non-permitted ground disturbing activities and construction work within the public right-of-way for SE Pounder Road adjacent to the Property, directly impacting the ability of a County culvert to properly function, in violation of section 18.100 of the Multnomah County Road Rules (“MCRR) (Section 1.4 of Exhibit 8-R).

3. Appeal Proceedings:

- a. Multnomah County Planning Director Carol Johnson (the “Director”) issued Notice of Civil Violation ZV-2021-14224 (the “NCV”) to Heather Moon (“Respondent”) on March

¹ The County initially alleged that these activities also took place within a Significant Environmental Concern – Stream (SEC-s) overlay area in violation of MCC 39.5510 (Section 1.2 of Exhibit 8-R). However, the County subsequently determined that the Property and adjacent right-of-way where the alleged development activities occurred are located outside of the SEC-s overlay. Therefore, the County withdrew that portion of the NCV.

16, 2021.² The Notice of Civil Violation included continuing daily civil penalties of \$4,200.00 per day. (\$1,050.00 per violation x four violations). (Exhibit 8-R). Respondent filed an appeal of the NCV on April 5, 2021. (Exhibit 10).

- b. Multnomah County Hearings Officer Joe Turner (the “Hearings Officer”) held a public hearing regarding the appeal of the NCV on August 20, 2021. Multnomah County planning director Carol Johnson, Multnomah County Staff Attorney Katherine Thomas, Multnomah County Code Compliance Officer Robert Hyde, and Multnomah County Transportation Division Engineering Services Manager Emily Miletich appeared on behalf of the County. Respondent, Heather Moon, appeared on her own behalf.
- c. At the conclusion of the August 20, 2021 hearing, the Hearings Officer closed the record regarding the NCV. However, the Hearings Officer held the record open regarding the determination of the County’s administrative costs subject to the following schedule:
 - i. Up to 45 days, and no later than October 4, 2021, for the County to submit a breakdown of its administrative costs incurred in this enforcement proceeding; and
 - ii. Two weeks from the date the County submits its breakdown of administrative costs, and no later than October 18, 2021, for Respondent to submit any dispute of the County’s administrative costs analysis.
 - iii. The Hearings Officer further allowed Respondent to request additional time to reply to the County’s breakdown of administrative costs based on her work schedule.

B. FINDINGS OF FACT:

1. Heather Moon, owns the Property located at 645 SE Pounder Road, Corbett Oregon 97019; also known as TL 700, Section 2BA, Township 1 South, Range 4 East, W.M. (1S 4E 02BA -00700); Alt Account # R994020700 (the “Property”). (Exhibit 1).
2. Sometime between 2016 and 2018, Respondent, or other persons acting at Respondent’s direction, used mechanical equipment to remove all of the vegetation from a roughly 10,298 square foot area on the eastern portion of the Property abutting SE Pounder Road and within the SE Pounder Road right-of-way. The clearing activity left exposed soil with no vegetative cover on the cleared areas of the Property and right-of-way. (Respondent testimony and Exhibits 1, 2, and 7).
3. On April 27, 2020, the County received a complaint alleging that “Non-permitted property development activity, including significant ground disturbance, excavation and site clearing work [were occurring on the Property].” Photos included with the complaint showed large areas of vegetation removal and exposed soils on the Property and within the SE Pounder Road public right-of-way, grading within the SE Pounder Road public right-of-way, soil and

² The Director originally sent a Notice of Civil Violation letter with the Civil Fine Calculation worksheet to Respondent via certified mail. However, that letter was returned to the County as “unclaimed” on April 2, 2021. (Exhibit 8 and Director testimony).

debris within the section of the Pounder Road ditch abutting the Property, and construction equipment parked in the right-of-way. (Exhibit 1).

4. On April 28, 2020, Code Compliance Specialist (“CCS”) Bill Gotzinger issued a Stop Work Order for “non-permitted development activity conducted on the Property, specifically extensive non-permitted disturbance, grading, site clearing and excavation work, and non-permitted development activity within a stream overlay area.” (p. 1 of Exhibit 2). The Stop Work Order was sent by certified mail on April 28, 2020, and signed for by Respondent on May 4, 2020. The Stop Work Order required that Respondent:

Immediately cease all non-permitted development activity being conducted on the property, specifically the extensive non-permitted ground disturbance, grading, site clearing and excavation work and immediately install adequate erosion control measures (silt fencing, plastic covering, straw bales, etc.) to prevent any mud, debris or sediment run-off from entering the public right-of-way or adjacent properties.

(p. 2 of Exhibit 2).

5. The Stop Work Order required that Respondent schedule and attend a Pre-Filing Meeting with the County by June 12, 2020, and submit applications for a Significant Environmental Concern (SEC) permit and an Erosion & Sediment Control (ESC) permit for approval of the development and construction activity occurring on the Property. (Exhibit 2).
6. Respondent or other persons acting at Respondent’s direction, placed erosion control fencing on the Property and planted grasses in some of the disturbed areas. (Respondent testimony and Exhibit 3). However, areas of exposed soils remained on the Property and within the Pounder Road right-of-way as of January 5, 2021. (Exhibit 3). Respondent did not take any of the remaining actions set forth in Section 2 of the Stop Work Order, such as attending a pre-filing meeting or submitting applications for the work conducted on the Property. (Johnson testimony and Staff Report).
7. Mr. Gotzinger left the County and the County did not hire a new CCS until December 2020. (Johnson testimony).
8. On December 28, 2020, newly assigned CCS Joreen Whitson reviewed a backlog of unanswered voice messages, which had been left during an extended absence of the previous Code Compliance Specialist. Six messages were left by Aaron Simmons between May 11, 2020 and May 18, 2020 regarding 645 SE Pounder Road. Mr. Simmons identified himself as the brother of property owner and Respondent Heather L. Moon. Mr. Simmons stated that he had placed silt fencing on the Property as requested by CCS Gotzinger and that they were only clearing blackberry bushes. CCS Whitson responded that an inspector would come to verify that the erosion control measures were present and installed correctly. (Exhibit 13 and Staff Report).
9. At some time after April 28, 2020, Respondent had two large cedar logs delivered to the Property which she intended to have cut up into planks. The logs were delivered onto the public right-of-way abutting the Property. Respondent had the logs cut into sections and used

the excavator to move the logs onto the Property. (Respondent testimony and Exhibits 3 and 4).

10. On January 3, 2021, Vera Jagendorf left a message on the Code Compliance voicemail stating that someone was once again working with equipment on the Property and in the right of way and possibly causing environmental harm to the nearby creek. (Exhibit 13 and Staff Report).
11. On January 5, 2021, CCS Robert Hyde inspected the Property and took photographs. During that visit, Respondent stated to CCS Hyde that she was only landscaping and that no further work would be conducted without a permit. CCS Hyde also observed that rock had been placed on the Property, and a County culvert had been blocked, which was causing silt to spill into the roadway. (Exhibit 3).
12. On January 8, 2021, CCS Joreen Whitson issued a second Stop Work Order for “extensive non-permitted ground disturbing activity.” (p. 1 of Exhibit 4). The County served Respondent with the Stop Work Order by certified mail. The certified letter was returned unclaimed on January 12, 2021. However, CCS Robert Hyde also posted a copy of the Stop Work Order on the Property on January 8, 2021 and spoke with Respondent about the Stop Work Order. The Stop Work Order required Respondent to immediately stop all work on the Property and install and maintain adequate erosion control measures and “Contact the Land Use Planning Division within one working day to determine all permits required.” (Exhibit 4).
13. While at the Property to post the Stop Work Order on January 8, 2021, CCS Hyde observed additional ground disturbing activity, in particular extensive excavation, and water spilling onto the SE Pounder Road right of way due to the plugged culvert. Respondent asserted that she was preparing the slope to plant grass. (Exhibit 4 and Staff Report).
14. On January 11, 2021, the County received a formal complaint about the Property from Vera Jagendorf, stating that work was continuing on the Property with a backhoe and that water was being pumped across the SE Pounder Road right of way into a nearby stream. A new zoning violation case, ZV-2021-14224, was opened. CCS Hyde visited the Property and observed evidence of additional ground disturbing activity, including additional excavation (digging and stripping) and an excavator apparently stuck in a hole on the Property. In addition, a log had been moved back into the right-of-way and straw bales placed on the Property and/or in the right-of-way. Vehicles and equipment used on the site and in the right-of-way tracked mud and sediment onto the paved surface of SE Pounder Road. (Exhibit 5 and Staff Report).
15. On January 12, 2021, CCS Hyde visited the Property and observed that the Property was flooded, and water was pooled in the SE Pounder Road right of way. A second excavator had been brought onto the Property. The smaller excavator had been removed from the hole on the Property but remained parked in the Pounder Road right-of-way abutting the Property. (Exhibit 5).
16. On January 13, 2021, CCS Hyde visited the Property and observed that water was pooled on the Property and hay bales had been placed on the Property, but that water continued to enter the SE Pounder right of way from the Property. The hay bales were placed without

consultation with the County to determine whether that placement would serve as adequate temporary erosion control. Two excavators remained on the Property. (Staff Report and Exhibit 5).

17. On January 20, 2021, CCS Hyde visited the Property and observed that large boulders had been placed on the Property in an apparent attempt to stop mud from flowing off of the Property and onto SE Pounder Road, but that water and mud continued to enter the SE Pounder Road right of way from the Property. He also observed that the culvert remained plugged and that vehicles traveling on SE Pounder Road were tracking mud from the Property up and down the road. (Exhibit 5).
18. On January 25, 2021, CCS Hyde visited the Property and observed that the excavators had been removed from the Property, but that soil remained exposed, leaving a large hole on the Property. In addition, the culvert remained plugged, causing silt to continue to flow across SE Pounder Road. Large boulders and some hay bales remained on the Property. (Exhibit 5).
19. Clearing, grading, and excavating activities on the Property allowed heavy rains to saturate the soil on the Property and cause mud, debris, and water to flow onto and across SE Pounder Road. Sediment and debris from the Property blocked the east-west aligned County culvert that carried stormwater runoff beneath SE Pounder Road as well as the north-south aligned private culvert that carried stormwater runoff beneath the driveway serving the Property. Water flowing across SE Pounder Road eroded the embankment on the east side of the road. The embankment on the east side of SE Pounder Road failed on February 23, 2021. (Miletich testimony and Exhibits 5, 6, 9, 12, 15, and 16).
20. The Corbett Water District attempted to repair the failing embankment on the east side of SE Pounder Road. However, the repaired embankment failed again prior to March 1, 2021. (Photo F of Exhibit 15).
21. On March 2, 2021, County Engineering staff made a field visit to SE Pounder Road adjacent to the Property and observed that the roadway embankment on the east side of Pounder Road near the Property had failed and slid towards Pounder Creek, destabilizing the east half of the roadway. The pavement in this section of roadway was visibly depressed with alligator cracking present adjacent to the failed slope. (Exhibit 15, Photos B, F and G). The slope failure is a result of oversaturation of the roadbed that was caused by at least partial blockage of the County's culvert, which carries water runoff from the uphill slope on the west side of the roadway to Pounder Creek on the east side of the road. (pp. 2-4 of Exhibit 16). County Engineering staff also found that water was sheeting off the slope of the frontage of the Property in multiple areas and flowing down the road. (Exhibit 15, Photos A, B and C).
 - a. County Engineering staff were unable to locate the west end of the culvert (inlet), which would (had it been functioning) help drain the sheeting water into Pounder Creek. (Exhibit 15, Photos A, B and E). The culvert was not visible and staff surmised it was buried under mud, hay bales, large rocks or silt, all of which were present in the right of way adjacent to the Property; working in the right of way without a permit is a violation of MCRR 18.100, and such work and actions directly caused and created a road hazard under ORS 368.256. (Staff Report).

b. Additional information reported by County staff includes:

- i. Some of the water running off the hill on the south side of the Property's driveway was flowing down a newly cut ditch (presumed to be cut by Respondent) along the County right of way from the Property (645 SE Pounder Road) all the way to the shared driveway of 821/915/921 SE Pounder Road. (Exhibit 15, Photo H.)
- ii. The new ditch was about 520 feet long and had been cut along the County right of way; this was a surprise and unknown to County staff because the County had not been working in the area. In addition to the water coming from the slope south of the Property's driveway, there was also significant ponding just north of the driveway. There is an existing ditch that runs along the County right of way north of the driveway and County staff surmised there is likely a culvert beneath the driveway that is no longer functioning, leading to the ponding. This water had filled the existing ditch and was sheeting across the road, just north of the failure across the road. (Exhibit 15, Photo B)

22. On March 10, 2021, a Multnomah County Road crew worked in the right of way to unplug the County culvert, but they were not able to successfully complete this task. The County Survey crew was out previously on February 24, 2021 to stake the limits of right of way. (Exhibit 9).

23. The County issued Notice of Civil Violation ZV-2021-14224 on March 3, 2021. The County sent the NCV and Civil Fine Calculation worksheet to Respondent via certified mail. However, the certified mail was returned to the County as not deliverable. Therefore, the County resent the NCV and Civil Fine Calculation worksheet to Respondent via certified and first class mail. The certified mail was returned as not deliverable; however, the first class letter was not returned. (Johnson testimony and Exhibit 8).

24. The Notice of Civil Violation included continuing daily civil penalties of \$4,200.00 per day, based on the following calculations:

$$\text{Civil Fine (\$)} = (X)(Y)(\$15)$$

$$X = [H+P+R+C+E]$$

$$Y = (A)(G)$$

<u>X base</u>		<u>Y variable</u>	
H istory	4	A ction to Enforce	2
P rior Violation	2	G ravity	3
R epeated	2		
C ause	4		
E fforts to Correct	2		

$$X \text{ total} = 14$$

$$Y \text{ total} = 5$$

$$\text{Civil Fine (\$)} = (X)(Y)(\$15) = (14)(5)(\$15) = \$1,050.00/\text{violation/day}$$

(\$1,050.00/violation/day)(four violations) = \$4,200.00/day in civil fines.

(Exhibit 8).

25. The Notice of Civil Violation set out the following “Appeal Rights:”

Pursuant to MCC 39.1530 and MCC 39.1550, YOU MAY APPEAL this Notice of Civil Violation to a County Hearings Officer. To appeal, you must complete and return the enclosed Notice of Violation Appeal form together with payment of the \$250.00 appeal fee payable to “Multnomah County” **within 14 days of** the date of this notice:

26. The County received Respondent’s appeal form on April 5, 2021. The appeal form was dated March 30, 2021, (14 days from the date the second NCV was mailed) and postmarked April 3, 2021. (Exhibit 10). Respondent did not include the required appeal fee with the written appeal and as of the date of the appeal hearing Respondent had not paid the fee. (Director testimony). The County agreed to waive this procedural defect and allow the appeal to proceed, provided Respondent paid the fee. (Johnson testimony). At the hearing on August 20, 2021, Respondent agreed to pay the appeal fee. (Respondent testimony). Therefore, the hearings officer proceeded with the appeal hearing.

27. The site is not located within the SEC-s overlay. (Johnson testimony and Staff Report).

28. Respondent had been allowing a friend to store some of his construction equipment on her Property. At her request, the friend tried to move his equipment off of the Property in January 2021. The friend’s excavator became stuck in the mud on the Property while it was being moved. The friend rented a larger excavator from a company in Hood River to remove the excavator that was stuck in the mud. The rental company was unable to retrieve the larger excavator for four days due to a mudslide that closed portions of the I-84 freeway. (Respondent testimony).

C. CONCLUSIONS OF LAW:

Based upon the above findings of fact and the following conclusions, the Hearings Officer affirms three of the four violations set out in the NCV.

1. The Hearings Officer finds that Respondent was afforded due process of law, based on the following.
 - a. The County served Respondent with the NCV by certified mail, return receipt requested through the United States Postal Service, as required by MCC 39.1530(D). The certified mail was returned to the County as unclaimed. Therefore, the County made a second attempt to deliver the NCV to Respondent via certified and first class mail. On April 23, 2021, the certified mail was returned as not deliverable; however, the first class letter was not returned.

- b. Respondent filed an appeal of the NCV. Although the appeal was received by the County six days after the 14 day deadline provided by MCC 39.1530(C) and did not include the required appeal fee, the County agreed to waive these procedural defects and allow the appeal hearing to proceed. Respondent appeared at the online appeal hearing and was provided the opportunity to present her appeal.

2. MCC 39.1510 provides:

Any use of land, land division, adjustment to property boundaries, work within a County right-of-way, or other activity by a person in violation of any provision of:

(A) MCC Chapters 39, 29.001 through 29.207 and 29.500 through 29.583; Multnomah County Road Rules or the terms and conditions of any permit issued under those code provisions; or

(B) Any statute adopted by the Oregon Legislature and those land use planning goals and rules of the Land Conservation and Development Commission (LCDC) that apply directly to the County through ORS 197.646 may be subject to enforcement and fines as provided in this Enforcement Code.

3. MCC 39.1505 defines a “violation” as “Any act or failure to act that is prohibited or not allowed, including any failure to take any required action, under the goals, laws, rules, regulations or permits specified in MCC 39.1510.”

4. MCC 39.1540 provides:

A Stop Work Order may be issued whenever the code enforcement staff or other Department of Community Services staff has determined that non-permitted construction and/or land use is occurring on property or within any County right-of-way, or has determined that construction and/or land use is occurring not in compliance with any land use or building permit issued for a property or a transportation permit within a County right of way. Failure to comply with a Stop Work Order may result in a Notice of Civil Violation.

5. MCC 39.6210(A) provides:

Unless exempt under this Code, whether under MCC 39.6215, 39.5080, 38.5510 or otherwise, no ground disturbing activity shall occur except pursuant to one of the following permits: a Minimal Impact Project (MIP) permit, an Erosion and Sediment Control permit (ESC), an Agricultural Fill permit (AF), a Geologic Hazards permit (GH), or a Large Fill permit.³

6. MCC 39.6215 provides exemptions from the ground disturbing activity permit

³ MCC 39.5080 provides exemptions from the requirement to obtain a Geological Hazards permit and MCC Chapter 38 provides exemptions for activities in the Columbia River Gorge National Scenic Area, neither of which are applicable here.

requirements, including.

G. Residential gardening disturbing less than 5,000 square feet of ground surface area and landscape maintenance disturbing less than 10,000 square feet of ground surface area when either activity is at least 100 feet from the top of the bank of any watercourse located at a lower elevation to and in the surface drainage path of the ground disturbing activity. Landscape maintenance includes normal planting, transplanting, and replacement of trees and vegetation. Landscape maintenance does not include preparatory ground disturbing activity for a development project.

7. MCC 39.2000 provides the following relevant definitions.

Excavation - The motorized removal of earth material or other motorized activity resulting in the exposure of the ground surface or other earth layer to wind, water, ice, gravity, or other element, including, but not limited to, cutting, digging, grading, stripping, trenching, dredging, bulldozing, benching, terracing, mining or quarrying, and vegetation or tree removal. Work conducted by hand without the use of motorized equipment is not excavating.

Fill - The deposit (noun or verb) of any earth materials by motorized means for any purpose, including, but not limited to, stockpiling, storage, dumping, raising elevation or topography, and tracking materials such as mud onto a road surface with vehicle tires. Work conducted by hand without the use of motorized equipment is not filling.

Ground Disturbing Activity – Any excavating or filling or combination thereof.

8. The Hearings Officer finds that Respondent undertook, or allowed others to undertake, ground disturbing activity - excavation and fill - on the Property without required permits.

- a. Respondent used, or allowed others to use, motorized mechanical equipment (an excavator) to strip all of the vegetation and expose the ground surface on a roughly 10,298 square foot area of the Property.
- b. In addition, Respondent undertook additional excavation activity on the Property in January 2021, using a larger excavator to extract the excavator that had become stuck in the mud on the Property. The applicant also undertook fill activities by placing rocks on the Property.

9. The ground disturbing activities on the Property do not fall within the exemption provided by MCC 39.6215.

- a. Respondent's ground disturbing activities excavated (removed all vegetation and exposed the ground surface) on more than 10,000 square feet of area on the Property. In addition, although Respondent replanted portions of the excavated areas on the Property, large areas of bare soil remained on the Property nine months after

Respondent undertook the initial excavation activity on the Property. Therefore, the Hearings Officer finds that Respondent's activities are not exempt as residential gardening or landscape maintenance.

- b. The ground disturbing activities occurring on the Property in January 2021 were not for the purpose of landscape maintenance or gardening. These activities were undertaken to remove the smaller excavator that had become mired in the mud on the site. These ground disturbing activities do not fall within any of the other exemptions provided by MCC 39.6215.
 - i. While it is unfortunate that the smaller excavator become stuck on the Property, it is irrelevant to whether the violations occurred. Respondent, or other persons authorized by Respondent, used mechanical equipment to excavate the Property to extract the smaller piece of construction equipment. This activity constitutes "excavation" as defined by MCC 39.2000. Respondent could have avoided this issue by waiting to move the equipment off of the Property until the ground was dry. The equipment had been stored on the Property for at least nine months. But Respondent chose to move the equipment during an extremely wet period, which caused the equipment to become stuck on the Property.

10. Respondent undertook the above ground disturbing activities without required permits. This is a violation of MCC 39.6210(A). Therefore, Section 1.3 of the NCV should be affirmed

11. MCRR 18.100 requires a permit for:

[A]ny construction, installation, or the placement of any object or fixture; or the planting or placement of any vegetation within the public right-of-way or for any modification of existing construction or use in the right-of-way except as provided in this Section. A Permit shall not be required for any short-term use of 8 hours or less if the County Engineer determines such use is not a hazard to the public and will have no detrimental impact to the right-of-way.

12. MCRR 18.110 provides the following exemptions from the permit requirements of Section 18:

- A. Any vehicle lawfully parked in the right-of-way;
- B. A Banner Permit as provided under Section 19;
- C. A Memorial Sign as provided for under Section 20;
- D. A Special Event or other event conducted pursuant to a permit issued under Section 21;
- E. A permitted Bridge Special event authorized and conducted in compliance with MCC 29.700-29.714;
- F. For authorized activities conducted under the Adopt a Road Program as provided at Section 24 and subject to a duly issued Permit under Section 24;
- G. For authorized activities conducted under the Owner Maintenance Program as provided at Section 25 and subject to a duly issued Permit under Section 25.

13. Multnomah County maintains vegetation within public rights-of-way. A permit issued by the County Engineer is required for an abutting property owner to take over vegetation maintenance within right-of-way. MCCR 24.100.
14. The Hearings Officer finds that Respondent undertook, or allowed others to undertake vegetation removal, ground disturbing activity, excavation, and fill, within the SE Pounder Road right-of-way without required permits.
 - a. Respondent used motorized mechanical equipment (an excavator) to conduct excavation activity within the majority of the SE Pounder Road right-of-way abutting the site, or allowed others to do so; Respondent stripped all of the vegetation and exposed the ground surface.
 - b. Respondent placed fill (rocks) within the SE Pounder Road right-of-way abutting the site;
 - c. Respondent placed other objects (logs and hay bales) within the SE Pounder Road right-of-way abutting the site;
 - d. Respondent parked construction equipment (excavators, trailers, a pump and hose) within the SE Pounder Road right-of-way abutting the site;
 - e. Respondent allowed vehicles to track mud and sediment onto the surface of SE Pounder Road; and
 - f. Respondent excavated a new ditch along the County right of way from the subject property (645 SE Pounder Road) all the way to the shared driveway of 821/915/921 SE Pounder Road.
15. All of the above activities within the right-of-way continued for more than eight hours, were conducted without required permits, and do not fall within any of the exemptions provided by MCCR 18.110. This is a violation of MCCR 18.100. Therefore, Section 1.4 of the NCV should be affirmed.
 - a. The fact that road conditions on the I-84 freeway delayed the rental company from picking up the larger excavator is irrelevant. The excavator was not legally parked or operated in the right-of-way. Therefore, the length of time it was parked in the right-of-way is irrelevant. If the duration of parking were relevant, Respondent could have parked the excavator on the Property rather than leaving it in the right-of-way.
 - b. The fact that Respondent placed logs, bales, and rocks in the right-of-way in an attempt to stop mud from flowing onto the roadway is also irrelevant. The Code clearly requires a permit for such activities. The purpose of the permit is to allow for County review and approval to ensure that such measures are effective.
16. MCC 39.1540 authorizes the County to issue a Stop Work Order when work is being

conducted on private property or in the public rights-of-way without required permits and approvals. Failure to comply with a Stop Work Order may result in a Notice of Civil Violation.

17. The County issued Stop Work Orders to Respondent on April 28, 2020, and January 8, 2021.

a. The April 28, 2020 Stop Work Order required Respondent to:

Immediately cease all non-permitted development activity being conducted on the property, specifically the extensive non-permitted ground disturbance, grading, site clearing and excavation work and immediately install adequate erosion control measures (silt fencing, plastic covering, straw bales, etc.) to prevent any mud, debris or sediment run-off from entering the public right-of-way or adjacent properties. Failure to comply with this Stop Work Order, failure to cease all development and construction activity and failure to install erosion control measures will result in the issuance of a Notice of Civil Violation and associated civil penalties.

The April 28, 2020 Stop Work Order further required Respondent to schedule and attend a Pre-Filing Meeting with the County by June 12, 2020, and submit applications for a Significant Environmental Concern (SEC) permit and an Erosion & Sediment Control (ESC) permit for approval of the development and construction activity occurring on the Property.

b. The January 8, 2021 Stop Work Order required Respondent to immediately stop work and install and maintain adequate erosion control measures and “Contact the Land Use Planning Division within one working day to determine all permits required.”

18. Respondent continued to engage in, or, allow others to engage in, non-permitted ground disturbing activity (excavation and fill) after the Stop Work Orders were issued on April 28, 2020 and January 8, 2021. In addition, Respondent did not contact Land Use Planning or Transportation to submit applications for permits as required by the Stop Work Orders. This is a violation of the Stop Work Orders. Therefore, Section 1.1 of the NCV should be affirmed.

a. As noted above, the fact that Respondent undertook additional work on the Property and in the right-of-way in an attempt to stop mud from flowing onto the roadway is irrelevant. The Stop Work Orders clearly required that Respondent meet with the County to determine what permits and actions were necessary to mitigate the damage caused by Respondent’s unpermitted activities. The purpose of the required meeting and permits was to allow County review and approval to ensure that any additional work actually improved the situation and did not result in further damage.

19. Respondent, as the owner of the Property, is responsible for all of the above violations. MCC 39.1530.

20. The site is not located within the SEC-s overlay. Therefore, Section 1.2 of the NCV should be dismissed.

21. MCC 39.1550(C) authorizes the Hearings Officer to require Respondent to:

- (1) Obtain any and all necessary permits, inspections and approvals;
- (2) Install any equipment necessary to achieve compliance;
- (3) Make any and all necessary repairs, modifications, and/or improvements to the structure, real property, or equipment involved;
- (4) Reimburse the County for actual costs of remediation, its reasonable administrative costs, as well as its attorney fees and costs for its enforcement actions, including appeals;
- (5) Pay a civil fine for the violation and any fees and costs to the County;
- (6) Pay a reduced fine;
- (7) Undertake any other action reasonably necessary to remedy the violation.

22. The Hearings Officer finds that Respondent should be required to:

- a. Immediately cease any further unpermitted ground disturbing activity or other development on the subject property or in the adjacent SE Pounder Road right of way and not resume, or allow or direct her agents, contractors, invitees, or any other person on the subject property to engage in any further unpermitted ground disturbing activity or other development on the subject property or in the adjacent SE Pounder Road right of way;
- b. Immediately cease any further unpermitted activities in the right-of-way; specifically, ceasing obstruction of road drains, ditches and culverts; placing machinery in the right of way; working in and disturbing the right of way; removing and disturbing fill adjacent and within the right of way; moving and depositing or causing fill to deposit into the right of way; activities that hinder, redirect or prevent the flow of water over, across, under or within the right of way as designed and engineered by the County road official, and activities that result in a hazard to the traveling public and compromise the design and engineering of the right of way;
- c. Obtain and comply with all required permits and approvals necessary to correct the violations on the site and within the right-of-way, subject to the following schedule:
 - i. Within ten (10) days from the date of this Final Order, submit an application for a pre-filing meeting to the Land Use Planning (“LUP”) office to determine all permit applications, approvals, and/or corrective actions required to resolve the compliance issues identified for the Property and the adjacent public right-of-way; and
 - ii. Within thirty (30) days from the date of the pre-filing meeting, submit an application(s) to the LUP office, and the Transportation Division, if necessary, for all permits and corrective actions required to potentially authorize the development activity that is the subject of the NCV or to restore the impacted

areas of the Property and the SE Pounder Road public right-of-way to the condition that existed before Respondent undertook, or allowed others to undertake, land disturbing activities on the Property; and

iii. In the event the permit application(s) are deemed incomplete by staff, within 180 days of receiving an incomplete application notification letter from the LUP office, make the necessary corrections or requested supplemental materials to make the permit application(s) complete; and

(A) If the required permit application(s) is approved, complete all work and comply with all conditions of approval required by the approved permit(s) within the timelines specified by the approval(s); or

(B) If the required permit application(s) are not approved, and Respondent has utilized or forgone all appeal rights provided by relevant code and statute, then Respondent shall, within fifteen (15) days from the date of the final decision denying the permit application(s), schedule and attend a meeting with the Code Compliance office and the LUP office to discuss the options available for moving forward with the resolution of this compliance case;

d. Provide, without compensation to Respondent, any permits of entry or temporary construction easements necessary for the County to construct the repair in the right of way; and

e. Following the County's repair and construction of the adjoining culvert, apply for, obtain, and implement a County driveway permit to repair the damaged driveway slope caused by Respondent's unauthorized activities. Respondent shall be responsible for the costs of all permits and repairs and all repairs must adhere to County Engineer requirements.

23. MCC 39.1560 provides:

Violations as defined in MCC 39.1510 may be subject to fines and liens. Fines may be assessed for each violation each day.

(A) The maximum fines per violation shall not exceed \$3,500 for each day of noncompliance; the minimum fine per violation shall not be less than \$45 for each day of noncompliance.

(B) The Director shall set criteria for determining the fines, appeal fees and administrative fees as appropriate.

24. Pursuant to MCC 39.1560(B), the Director adopted the Enforcement Code Administrative Rules dated March 1, 2011 ("the Rules," Exhibit 14). Rule 4.2 sets out the following formulas for calculation of civil fine amounts.

Civil Fine (\$) = (X)(Y)(\$15)

a. Variable X = [H+P+R+C+E] is calculated as follows:

- i. H is the rating of Respondent's performance of the required corrective actions requested or demanded by the Director for a particular violation. H shall equal:
 - (A) 0 if Respondent took actual and substantial steps, more than verbal assurance, towards attempting full performance of the required corrective actions or other resolution of the matter;
 - (B) 1 if Respondent took actual, but minor, steps, more than verbal assurance, towards attempting full performance of the required corrective actions or other resolution of the matter; and
 - (C) 4 if Respondent took inconsequential or no actual steps, regardless of verbal assurance, towards attempting full performance of the required corrective actions or other resolution of the matter.

- ii. P is the number of prior, affirmed violations of the same section of the MCC by Respondent. P shall equal:
 - (A) 1 if there are no prior violations.
 - (B) 2 if there has been one violation within the last five years; and
 - (C) 4 if there have been two or more violations within the last five years.

- iii. R is the frequency of occurrence of the violation. R shall equal:
 - (A) 1 if the violation occurred as a one-time event; and
 - (B) 2 if the violation is occurring or occurred as an intermittent, repeated or continuous event.

- iv. C is Respondent's intent to cause the violation. C shall equal:
 - (A) 1 if Respondent did not intend the violation, but rather the violation was inadvertent. An inadvertent violation is one that is unavoidable, accidental or caused by others not under the control or influence of Respondent;
 - (B) 2 if the violation occurred as a result of Respondent's negligence. A violation occurs as a result of Respondent's negligence if Respondent fails to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation;
 - (C) 4 if the violation occurred as a result of Respondent's reckless or intentional acts. A violation occurs as a result of Respondent's reckless act if Respondent acts with indifference to the consequences of that act. A violation occurs as a result of Respondent's intentional act if Respondent knows the results that will flow from the act and desires those results to occur, regardless of whether Respondent knows that the act is a violation of law.

- v. E is the rating of Respondent's responsiveness to the Director's communications and/or requests. E shall equal:
 - (A) 0 if Respondent was highly responsive such that repetition of the Director's communications and/or requests was minimal;
 - (B) 1 if Respondent was moderately responsive such that the Director found a need to repeat only a small portion of prior communications and/or requests; and
 - (C) 2 if Respondent was minimally responsive or not responsive.

b. Variable $Y = [A \times G]$ is calculated as follows:

- i. A is the number of prior requests or demands by the Director for Respondent's performance of required corrective actions. A shall equal:
 - (A) 1 if this is the first such request or demand by the Director within the last five years;
 - (B) 2 if this is the second such request or demand by the Director within the last five years; and
 - (C) 3 if there have been more than two such requests or demands by the Director within the last five years.

- ii. G is the severity and magnitude of the violation as measured by the imminence of the threat to public health or safety or to natural resources, physical size, geographic extent, duration of time, frequency of occurrence, actual or potential economic harm or otherwise. Partial correction of a violation by any person after the NOV is issued does not reduce the value assigned to this factor. G shall equal:
 - (A) 1 if there is no immediate threat to public health or safety or to natural resources, and the remaining measures of severity and magnitude of the violation prove minor;
 - (B) 2 if there is no immediate threat to public health or safety or to natural resources, but the remaining measures of severity or magnitude of the violation prove moderate. The remaining measures of severity or magnitude of a violation prove moderate when required corrective actions can be taken in due course without a risk of irreparable harm; and
 - (C) 3 if the violation poses an immediate threat to public health or safety or to natural resources or the remaining measures of severity or magnitude of the violation prove substantial. The remaining measures of severity or magnitude of a violation prove substantial when required corrective actions must be taken immediately to prevent irreparable harm.

25. The County proposed the following fines in this case for the violations set out in the NCV:

<u>X base</u>		<u>Y variable</u>	
History	4	Action to Enforce	2
Prior Violation	2	Gravity	3
Repeated	2		
Cause	4		
Efforts to Correct	2		

X total = 14

Y total = 5

Civil Fine (\$) = (X)(Y)(\$15) = (14)(5)(\$15) = \$1,050.00/violation/day
(\$1,050.00/violation/day)(three affirmed violations) = \$3,150.00/day in civil fines.

26. The Hearings Officer finds that the fines proposed by the County are appropriate and consistent with the County’s adopted Enforcement Code Administrative Rules for the affirmed violations, with one exception. Rule 4.2(b)(2) provides:

P is the number of prior, affirmed violations of the same section of the same section of the MCC by Respondent. **P** shall equal:

- (A) **1** if there are no prior violations.
- (B) **2** if there has been one prior violation.
- (C) **4** if there have been two or more violations within the last five years.

27. In this case, there were no prior *affirmed* violations of any of the code sections noted in the NCV. Therefore, the fine amount should be recalculated with **P** equal to 1.

<u>X base</u>		<u>Y variable</u>	
H istory	4	A ction to Enforce	2
P rior Violation	1	G ravity	3
R epeated	2		
C ause	4		
E fforts to Correct	2		

X total = 13

Y total = 5

Civil Fine (\$) = (X)(Y)(\$15) = (13)(5)(\$15) = \$975.00/violation/day
 (\$975.00/violation/day)(three affirmed violations) = \$2,925.00/day in civil fines.

28. Therefore, Respondent should be required to pay Multnomah County a continuing fine of \$2,700.00 per day (\$900.00 for the violations of MCC 39.1540, \$900.00 for the violation of MCC 39.6210, and \$900.00 for the violations of MCRR 18.100) pursuant to MCC 39.1560 and, as applicable, MCC 39.1545 and 39.1550, plus interest in accordance with law, beginning on March 19, 2021 (the date the County mailed the NCV plus three additional days for delivery) and continuing until the violations are corrected.

29. In addition, Respondent should be required to reimburse Multnomah County for its present and future costs, disbursements, and other expenses in accordance with MCC 39.1550(C)(2)(d), in an amount to be determined in a subsequent Supplemental Final Order after the close of the open record period discussed in Section A.1.c of this Final Order.

30. As discussed in the Staff Report, the County intends to seek recovery of the costs of road remediation work on SE Pounder Road from Respondent through the process set forth in the road hazard statutes in ORS Chapter 368. The Hearings Officer has no jurisdiction to consider that separate process in this proceeding.

D. DECISION:

1. Section 1.2 of the Notice of Civil Violation issued to Heather Moon and dated March 3, 2021 in the matter of ZV-2021-14224 is **DISMISSED**, as the Property is outside of the SEC-s overlay.
2. The remainder of the Notice of Civil Violation issued to Heather Moon and dated March 3, 2021 in the matter of ZV-2021-14224 is **AFFIRMED**.
3. Pursuant to MCC 39.1550(C)(2), Heather Moon shall correct the violations on the subject property by:
 - a. Immediately ceasing any further unpermitted ground disturbing activity or other development on the subject property or in the adjacent SE Pounder Road right of way and not resuming, or allowing or directing her agents, contractors, invitees, or any other person on the subject property to engage in any further unpermitted ground disturbing activity or other development on the subject property or in the adjacent SE Pounder Road right of way;
 - b. Immediately ceasing any further unpermitted activities in the right-of-way; specifically, ceasing obstruction of road drains, ditches and culverts; placing machinery in the right of way; working in and disturbing the right of way; removing and disturbing fill adjacent and within the right of way; moving and depositing or causing fill to deposit into the right of way; activities that hinder, redirect or prevent the flow of water over, across, under or within the right of way as designed and engineered by the County road official, and activities that result in a hazard to the traveling public and compromise the design and engineering of the right of way;
 - c. Obtain and comply with all required permits and approvals necessary to correct the violations on the site and within the right-of-way, subject to the following schedule:
 - i. Within ten (10) days from the date of this Final Order, submit an application for a pre-filing meeting to the Land Use Planning (“LUP”) office to determine all permit applications, approvals, and/or corrective actions required to resolve the compliance issues identified for the Property and the adjacent public right-of-way; and
 - ii. Within thirty (30) days from the date of the pre-filing meeting submit an application(s) to the LUP office, and the Transportation Division, if necessary, for all permits and corrective actions required to potentially authorize the development activity that is the subject of the NCV or to restore the impacted areas of the Property and the SE Pounder Road public right-of-way to the condition that existed before Respondent undertook, or allowed others to undertake, land disturbing activities on the Property; and
 - iii. In the event the permit application(s) are deemed incomplete by staff, within 180 days of receiving an incomplete application notification letter from the LUP office, make the necessary corrections or submit requested supplemental materials to make the permit application(s) complete; and

- (A) If the required permit application are approved, complete all work and comply with all conditions of approval required by the approved permit(s) within the timelines specified by the approvals; or
 - (B) If the required permit application are not approved, and Respondent has utilized or forgone all appeal rights provided by relevant code and statute, then Respondent shall, within fifteen (15) days from the date of the final decision denying the permit application(s), schedule and attend a meeting with the Code Compliance office and the LUP office to discuss the options available for moving forward with the resolution of this compliance case;
- d. Provide, without compensation to Respondent, any permits of entry or temporary construction easements necessary for the County to construct the repair in the right of way;
 - e. Following the County's repair and construction of the adjoining culvert, apply for, obtain, and implement a County driveway permit to repair the damaged driveway slope caused by Respondent's unauthorized activities. Respondent shall be responsible for the costs of all permits and repairs and all repairs must adhere to County Engineer requirements;
 - f. Pay Multnomah County a continuing fine of \$2,700.00 per day (\$900.00 for the violations of MCC 39.1540, \$900.00 for the violation of MCC 39.6210, and \$900.00 for the violations of MCRR 18.100) pursuant to MCC 39.1560 and, as applicable, MCC 39.1545 and 39.1550, plus interest in accordance with law, beginning on March 19, 2021 (the date the County mailed the NCV plus three additional days for delivery) and continuing until the violations are corrected; and
 - g. Reimburse Multnomah County for its present and future costs, disbursements, and other expenses in accordance with MCC 39.1550(C)(2)(d), in an amount to be determined in a subsequent Supplemental Final Order after the close of the open record period discussed in Section A.1.c of this Final Order.
4. Pursuant to Multnomah County Code Section 39.1555 fines, fees and costs are payable on the effective date of this order and are a debt owed to the County, under ORS 30.460, and may be collected in the same manner as any other debt allowed by law. If fines fees or costs are not paid within 60 days after payment is ordered the County may file and record the order in the County Clerk Lien Record. The County may institute appropriate suit or legal action, in law or equity, in any court of competent jurisdiction to enforce the provisions of any order of the Hearings Officer, including, an action to obtain judgment for any civil fine, fees or costs imposed by such order.
- a. In this case, because the record remains open regarding the County's administrative costs for this proceeding, only the fines imposed in this Final Order are payable on the effective date of this order. The County's administrative costs will become payable upon the date of the future Supplemental Final Order in this case.

Dated this 10th day of September 2021.



Multnomah County Hearings Officer

*Multnomah County Code Section 39.1565 - **JUDICIAL REVIEW:** Review of the final order of a Hearings Officer under this subchapter by any aggrieved party, including Multnomah County, shall be by writ of review as provided in ORS 34.010 through 34.100, unless the Hearings Officer makes a land use decision, in which case the land use decision may be reviewed by the Land Use Board of Appeals pursuant to ORS Chapter 197. Any appeal of a Hearings Officer decision in the National Scenic Area may be reviewed by the Columbia River Gorge Commission.*