

**CITY OF NEWPORT, OREGON**

**IN THE MATTER OF:**

**OREGON BREWING COMPANY  
2320 SE MARINE SCIENCE DR.  
NEWPORT, OREGON 97365**

**CONSENT AGREEMENT**

**I. FINDINGS**

1. The City of Newport, Oregon (hereinafter "City") operates a publicly owned treatment works (hereinafter "POTW") as defined by Title 40 of the Code of Federal Regulations (hereinafter "40 CFR") 403.3(q) and regulates use of the system through the Newport Municipal Code (hereinafter "NMC") Chapter 5.15.
2. Oregon Brewing Company (hereinafter "OBC" or "Facility") operates a brewing facility within the City located at 2320 SE Marine Science Drive, Newport, OR 97365. The Facility is a non-domestic (hereinafter "industrial") user of the City's POTW.
3. As an industrial user, the Facility is subject to the industrial pretreatment standards outlined in 40 CFR Part 403 which is incorporated by reference at NMC 5.15.065. The City has issued Industrial User Permit to OBC, Permit No. 001-2019 (hereinafter "Permit"). This Permit was issued under the City's authority under NMC 5.15.060 to require pretreatment. The Permit is consistent with the City's National Pollutant Discharge Elimination System (hereinafter "NPDES") permit, and 40 CFR Part 403.
4. The City and OBC entered into a Consent Agreement for Wastewater Industrial User Permit Enforcement on July 30, 2020, which states that "OBC wishes to bring the Facility into full compliance with its obligations as an industrial user of the City's municipal sanitary sewer system and remedy the NMC Chapter 5.15 Violations." Additionally, it states, "OBC has worked to bring the Facility into compliance. Specifically, OBC has spent more than \$1,000,000 to purchase, install, and implement a comprehensive wastewater treatment system that will bring the Facility into compliance with the Permit and NMC Chapter 5.15."
5. The July 30, 2020 Consent Agreement states that OBC's ongoing work included a pH neutralization system, total suspended solids (TSS) treatment, biochemical oxygen demand (BOD) treatment, installation and upgrade of monitoring systems in the treatment process, and significant staff resources and data collection and reporting procedures.

6. As verification of Permit compliance, the July 30, 2020 Consent Agreement required five consecutive days of demonstrated compliance for BOD, TSS, and pH. In October 2020, OBC demonstrated five consecutive days of permit compliance and the Consent Agreement was terminated on October 28, 2020.
7. Since the termination of the Consent Agreement on October 28, 2020, OBC has failed to demonstrate permit compliance for pH.

Date	No. of Gallons pH is less than 6	No. of Gallons pH is less than 5.0	No. of Gallons pH is greater than 10
November 2020	~22,189	--	~7391
December 2020	~45,298	~528	~21,774
January 2021	~43,324	~1,057	~50,359
February 2021	~93,179	~88	~46,285
March 2021	0	0	0
April 2021	0	0	0
May 2021	0	0	0
June 2021	0	0	0
July 2021	0	0	0
August 2021	0	0	0

8. Since the termination of the Consent Agreement on October 28, 2020, OBC has failed to demonstrate permit compliance for BOD Daily limitations. Note: These numbers reflect the total occurrences of both concentration and mass violations even if they occurred on the same day.

Date	No. of BOD Daily Maximum Concentration (mg/L) Violations	No. of BOD Daily Maximum Mass (lbs/day) Violations
November 2020	6	6
December 2020	5	7
January 2021	3	3
February 2021	8	8
March 2021	12	12
April 2021	5	6
May 2021	1	1
June 2021	10	7
July 2021	10	13
August 2021	1	4

9. Since the termination of the Consent Agreement on October 28, 2020, OBC has failed to demonstrate permit compliance for BOD Weekly Average limitations. Note: These

numbers reflect the total occurrences of both the weekly average concentration and mass violations even if they occurred for the same week.

Date	BOD Weekly Average Concentration (mg/L)	BOD Weekly Average Mass (lbs/day)
November 2020	1	3
December 2020	1	--
January 2021	1	--
February 2021	1	1
March 2021	2	2
April 2021	0	0
May 2021	0	0
June 2021	3	1
July 2021	1	1
August 2021	0	0

10. The Permit requires the City to investigate instances of noncompliance.
11. The City has issued citations to OBC for alleged violations of the Permit. The Parties dispute various legal and factual bases for the citations.
12. The Parties enter into this Consent Agreement as a means to resolve the outstanding citations, while bringing the Facility into full compliance with the Permit.

## **II. AGREEMENT**

**THEREFORE, IT IS HEREBY AGREED BETWEEN OBC AND THE CITY, as follows:**

1. Within 60 days after the effective date of this Consent Agreement, OBC shall submit a technical compliance plan and schedule to the City, which details how the Facility will achieve full compliance with the Permit.
  - a. The compliance plan and schedule must include activities and dates to complete the following:
    - i. Characterize the distillery discharge and provide or describe OBC's plans for treatment of distillery discharge.
    - ii. Provide a sampling and analysis plan that addresses OBC's in-house lab QA/QC activities and equipment calibration schedule and verification. The QA/QC plan shall include at a minimum, split samples for verification of BOD concentrations analyzed by an outside lab, at a rate of 1 outside lab sample per 10 samples analyzed in-house. If in-house sampling and practices demonstrate consistency and agreement with verification at which



- c. At least 90 consecutive days of substantive compliance with the Permit TSS requirements.

OBC shall comply with the requirements in 2.a, 2.b, and 2.c concurrently. OBC shall provide written notice to the City five days prior to the commencement of the 90-day compliance demonstration period. For the purposes of this section, "substantive compliance" means that within the 90-day compliance period, the facility will meet the compliance stipulations presented in Attachment A. Permit requirements will be measured at the sampling equipment operated by OBC and split samples will be provided to the City during the compliance period. The Parties acknowledge that, with mutual agreement during the term of this Consent Agreement, the Permit's BOD requirements may be amended to analyze COD, including associated changes to QA/QC requirements.



and that such COD limits will apply to the 90-day compliance period described in this section and in Attachment A.

3. To constitute completion for purposes of Section II.2, upon finishing each task OBC will provide written notice to the City and each task must be found by the City to be satisfactorily completed. The City's determination of satisfactory completion will not be unreasonably withheld. Attachment A will be used to determine satisfactory completion. Completion of tasks 2.(a)-(c) above will resolve citations issued pursuant to the Permit up through the date of completion.
4. If OBC fails to complete the obligations identified in Section II of this Consent Agreement at the conclusion of the compliance period, including any extensions of the timelines negotiated by the Parties, the City will provide written notice of such failure to OBC. After notice of the failure by the City, OBC will be in default of this Consent Agreement and will be immediately subject to a single, non-recurring Stipulated Penalty in the amount of \$35,000. If the penalty is assessed under Section II, OBC waives its rights to appeal or contest the penalty in any way.
5. OBC will be assessed stipulated charges for failure to comply with its Permit limits and federal limits. Stipulated charges will be assessed as follows:
  - a. pH Stipulated Charges will be assessed using the formula: Total pH Charge (\$) = SUM(pHxQ), where pH is the dollar amount corresponding to the pH ranges in the table below, Q is the multiplier associated with the quantity in gallons discharged at that pH, and SUM is the sum of all individual ranges and quantities.

pH	
pH Range	Charge
5 to 6, 10 to 11	\$100
4 to 5, 11 to 12	\$500
Less than 4. Greater than 12	\$2,000

Q	
Volume (gallons)	Multiplier
50-1200	1
1200-2400	2
2400-3600	3
>3600	10

In a 24-hour period charges will be assessed per tier. For example, if within a 24-hour period OBC discharged 500 gallons at pH 5.5 and 1,300 gallons at pH 4.5, the total charge would be: SUM(\$100 x 1, \$500 x 2) = \$100+\$1,000 = \$1,100.

b. BOD Stipulated Charges will be assessed based on the total pounds of BOD discharged for that specific day. The City will assess a stipulated charge per pound of BOD in excess of the mass equivalent of 300 mg/l, as required by NMC 5.15.060.E and NMC 5.15.070, at a rate of \$0.99/lb, which includes the existing Extra Strength charge of \$0.31/lb and an additional charge of \$0.68/lb.

c. TSS Stipulated Charges will be assessed based on the total pounds of TSS discharged for that specific day. The City will assess a stipulated charge of \$0.68 per pound of TSS in excess of 350 mg/L.

d. Failure of OBC to meet any of the milestones set forth in Section II.1 and the compliance plan and schedule submitted as required in Section II.1, will result in OBC being subject to Stipulated Penalties. For each day OBC fails to meet any of the above deadlines, a stipulated penalty for each violation per day is as follows:

<b>Period of Noncompliance</b>	<b>Penalty Per Deliverable Per Day</b>
One (1) to thirty (30) days	\$50
31 <sup>st</sup> and subsequent days	\$500

For example, if noncompliance is two (2) days, then OBC shall pay a stipulated penalty of \$100 (i.e., 2 x \$50). If noncompliance is 32 days, then OBC shall pay a stipulated penalty of \$2,500 (i.e., (30 x \$50) + (2 x \$500)).

e. Stipulated penalties under this Consent Agreement shall begin to accrue on the day after performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Agreement.

f. The City shall receive payment for stipulated charges and penalties from OBC within forty-five (45) Days of a written demand by the City. The City may enforce the collection of any such amounts that are delinquent or unpaid as provided for under NMC 5.15.070.

6. OBC is required by the Permit to submit monthly monitoring reports. The monthly reports must also include the following during the term of this Consent Agreement:

a. Progress made on each milestone as set forth in Section II.1, and projection for completing each milestone on time.

b. For each milestone set forth in Section II.1 that OBC has not been able to meet, identification of any problems encountered, actions taken to rectify the situation, and when compliance is expected to be achieved.

7. Resolution of Existing Citations. Within 30 days of the execution of this Consent Agreement, OBC agrees to pay the City \$0.68/lb BOD discharged in excess of the mass equivalent of 300 mg/l by OBC from October 10, 2020 through the execution date of this Consent Agreement. This sum is in addition to extra strength charges already assessed. As of August 24, 2021, this sum is \$25,517.57. In exchange for this sum and the other provisions of this Consent Agreement, City will withdraw existing citations with Newport Municipal Court, issued from October 10, 2020 through the execution date of this Consent Agreement.

### **III. ADDITIONAL PROVISIONS**

1. Notices provided under this Consent Agreement shall be hand delivered or mailed with an original signature. Notices will be deemed received on the date mailed if such notice is mailed first class mail, postage prepaid addressed as follows, with a copy sent via e-mail to the listed email address:

To OBC:

Oregon Brewing Company  
ATTN: Jack Waibel  
2320 OSU Drive  
Newport, OR 97365  
[jackw@rogue.com](mailto:jackw@rogue.com)

To City:

City of Newport  
ATTN: Clare Paul  
169 SW Coast Highway  
Newport, OR 97365  
[c.paul@newportoregon.gov](mailto:c.paul@newportoregon.gov)

2. Reference to "day" in this Consent Agreement means a calendar day.
3. Nothing in this Consent Agreement shall be interpreted to be an Industrial Wastewater Discharge Permit, or a modification of a permit nor shall it relieve OBC of any obligation imposed under the Clean Water Act, any federal, state, or local pretreatment program, the Permit, nor shall it in any way relieve OBC of its obligation to comply with any federal, state or local law in any manner related to the substance of this Consent Agreement. Other than as provided in this Consent Agreement, OBC shall not discharge wastewater into the City's sanitary sewer system where such discharge would constitute a Slug Discharge or would cause interference or pass through at the City's POTW, as defined in 40 CFR 403.3. For the purpose of this Agreement, a Slug Discharge, specifically for BOD (or equivalent COD), is a 24 hour discharge that is above 1,400 BOD pounds (or equivalent COD pounds) or a 48 hour discharge that is above 2,600 BOD pounds (or equivalent COD pounds) between May 1 through October 31; and a 24 hour discharge that is above 1,900 BOD pounds (or equivalent COD pounds) or a 48 hour discharge that is above 3,600 BOD pounds (or equivalent COD pounds) between November 1 through April 30. If a Slug Discharge, interference, or pass through occurs OBC will be charged a daily civil penalty as defined in NMC 5.15.080.



4. The City does not warrant or aver in any manner, by its agreement to the schedule and terms contained herein, that OBC will achieve compliance with applicable provisions of federal, state, or local laws, regulations, or permits.
5. OBC shall not be liable for breach of this Consent Agreement as a result of a failure to perform or for a delay in performance of any provision in this Consent Agreement if such performance is delayed or prevented by Force Majeure. The term "Force Majeure" means any cause reasonably beyond OBC's control which could not be avoided with the exercise of due care, whether unforeseen, foreseen, foreseeable, or unforeseeable, and which occurs without the fault or negligence of the Party whose performance is affected by Force Majeure. Increased cost for the performance of any action required by this Consent Agreement will not be deemed to constitute Force Majeure. OBC will notify the City in writing within seven days after becoming aware of any event that constitutes Force Majeure. Such notice will identify the event causing the delay or anticipated delay, estimate the anticipated length of delay, state the measures taken or to be taken to minimize the delay, and estimate the timetable for implementation of the measures.
6. Nothing herein shall be deemed to limit or preclude the U.S. Environmental Protection Agency or State of Oregon from taking further enforcement action against OBC for the matters covered by this Consent Agreement. Therefore, this Consent Agreement shall not be construed as waiving any right or authority available to such entities such as the assessment of civil or criminal penalties, damages or other liability resulting from discharge from the Facility to the City's POTW. The right to order further enforcement or remedial action and/or monitoring and maintenance is also specifically reserved by the City for (1) matters not covered by this Consent Agreement, and (2) matters covered by this Consent Agreement after the term of the Consent Agreement has ended.
7. By agreement of the City and OBC, this Consent Agreement shall be considered final and effective upon the date stated herein. This Consent Agreement shall terminate after OBC has achieved full compliance with the August 1, 2019 Permit's effluent limits for pH, BOD, and TSS for 90 consecutive days. Nothing herein shall be deemed to preclude the City from seeking stipulated penalties under Section II.5 for any failure to meet milestones that occur prior to the termination date of this Consent Agreement.
8. This Consent Agreement constitutes the final, complete, and exclusive agreement and understanding among the City and OBC with respect to the settlement embodied in this document and supersedes all prior settlement agreements and understandings regarding settlement, whether oral or written, concerning the settlement embodied herein. No other document (including earlier drafts), nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Consent Agreement or the settlement it represents, nor shall it be used in construing the terms of this Consent Agreement.
9. OBC waives any rights it may have to appeal or otherwise object to the provisions and requirements set forth in this Consent Agreement. OBC further releases and waives any and

all claims of any kind, known or unknown, past or future, against the City or its employees or officers, arising out of the City's enforcement of the NMC Chapter 5.15 Violations. This release and waiver will survive termination of this Consent Agreement.

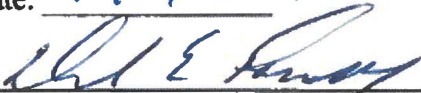
10. This Consent Agreement is effective September 1, 2021 and may only be modified or amended in writing subject to the written approval of both parties.
11. This Consent Agreement is binding on each party and its respective successors, agents, and assigns. The undersigned representative of each party certifies that they are fully authorized to execute and bind the party to this Agreement. No change in ownership, corporate or partnership status of OBC, or change in the ownership of the Facility affected by this Consent Agreement shall in any way alter the parties' obligations under this Consent Agreement, unless mutually approved in writing through an amendment to this Consent Agreement.
12. Facsimile or scanned signatures below by the undersigned representative of each party executing this Consent Agreement are the same as original signatures.

**CITY OF NEWPORT**



Spencer R. Nebel, City Manager

Date: 9/1/2021



David Powell, Public Works Director

Date: 9/1/2021

**OREGON BREWING COMPANY**

\_\_\_\_\_  
Dharma Tamm, President

Date: \_\_\_\_\_

## **Attachment A: 90 Day Compliance Completion Stipulations**

The following point system will be used by the City to determine if OBC either passes or fails the 90 consecutive days of compliance for pH, BOD and TSS as outlined in parts 2(a) – 2(c) in the Consent Agreement as well as the 5-day BOD test QA/QC test failures.

While in the 90-day compliance period if OBC has discharges that are in violation with the BOD test QA/QC failures, pH, BOD and TSS Permit limits points will accrue as described below. If OBC accrues **15 or more points** then they fail the 90-compliance period and the Consent Agreement.

### **pH**

pH Range	Volume (gallons)	
	50-3600	>3600
5 to 6, 10 to 11	1 Point	2 Points
4 to 5, 11 to 12	2 Points	3 Points
Less than 4, Greater than 12	3 Points	4 Points

Points will be assigned per day (24 hours, 12am – 11:59pm). If multiple pH ranges are hit within a 24-hour period, each will be counted and added together. For example: 500 gallons discharged with 5.5 pH = 1 Point and 500 gallons discharged with 4.5 pH = 2 Points. A total of 3 Points would be given for that 24-hour period.

### **BOD**

Daily BOD lbs	Weekly Avg BOD lbs	Points
500 – 600	450 – 500	1 Point
601 - 700	501 – 550	2 Points
>700	>550	3 Points

### **TSS**

Daily TSS Concentration (mg/l)	Weekly Avg TSS Concentration (mg/l)	Points
1,000 – 1,300	1,000 – 1,300	1 Point
1,301 – 1,600	1,301 – 1,600	2 Points
>1,600	>1,600	3 Points

### **Lab 5-Day BOD Testing QA/QC**

During the 90-day compliance period if there are 5-day BOD tests QA/QC Failures and there are no redundant BOD results for the failed QA/QC test then **1 point will be given for each failure.**



all claims of any kind, known or unknown, past or future, against the City or its employees or officers, arising out of the City's enforcement of the NMC Chapter 5.15 Violations. This release and waiver will survive termination of this Consent Agreement.

10. This Consent Agreement is effective September 1, 2021 and may only be modified or amended in writing subject to the written approval of both parties.
11. This Consent Agreement is binding on each party and its respective successors, agents, and assigns. The undersigned representative of each party certifies that they are fully authorized to execute and bind the party to this Agreement. No change in ownership, corporate or partnership status of OBC, or change in the ownership of the Facility affected by this Consent Agreement shall in any way alter the parties' obligations under this Consent Agreement, unless mutually approved in writing through an amendment to this Consent Agreement.
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**CITY OF NEWPORT**

**OREGON BREWING COMPANY**

\_\_\_\_\_  
Spencer R. Nebel, City Manager

  
\_\_\_\_\_  
Dharma Tamm, President

Date: \_\_\_\_\_

Date: 09/02/21

\_\_\_\_\_  
David Powell, Public Works Director

Date: \_\_\_\_\_