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**Date:** October 6, 2008  
**To:** Environmental Quality Commission  
**From:** Dick Pedersen, Director  
**Subject:** Agenda Item I, Rule Adoption: Expedited Enforcement Process  
October 24, 2008 EQC Meeting

**Why this is Important**

The Department of Environmental Quality (DEQ) is exploring ways to achieve deterrence and compliance in a less resource-intensive manner. The proposed rules lay the groundwork for DEQ programs to issue expedited enforcement offers (EEOs) as an alternative to traditional formal enforcement actions to settle less serious violations of state environmental laws that do not result in a significant adverse impact on human health or the environment. Through the EEO process, DEQ expects to achieve faster compliance with state environmental laws as well as greater deterrence for future violations because inspectors will be able to spend more time in the field.

**Department Recommendation and EQC Motion**

DEQ recommends that the Environmental Quality Commission adopt the proposed rules describing “expedited enforcement offers” (Attachment A.1: OAR 340-012-0030 and Attachment A.2: OAR 340-012-0038) and the circumstances under which DEQ may use an EEO. (Attachment A.4: OAR 340-012-0170).

If the above rules are adopted, DEQ also recommends that the EQC adopt the proposed revision to the State of Oregon Clean Air Act Implementation Plan or SIP (Attachment A.5, OAR 340-200-0040) to reflect that such a rulemaking modified the SIP on the date of the EQC meeting when the expedited enforcement rules were adopted. The Division 12 (Enforcement Procedure and Civil Penalties) rules which this rulemaking would amend are listed as part of the SIP. DEQ must update OAR 340-200-0040 and seek EPA approval when any changes are made to SIP rules.

DEQ also recommends the EQC adopt the proposed revisions to OAR 340-012-0155 (Attachment A.3) that delete language in that rule referring to the sunset date for the underground storage tank field citation “pilot program.” That sunset date has passed and the field citation program has been a permanent DEQ program for over three years.

**Background and Need for Rulemaking**

DEQ expects the expedited enforcement process to be less expensive and faster than the traditional formal enforcement process. DEQ will be able to undertake a greater number of enforcement actions and possibly improve compliance and deterrence. DEQ could develop an expedited enforcement program based on

existing authority, but decided to seek EQC adoption of the proposed rules in order to provide consistency across DEQ programs and certainty for the regulated community by specifying in rule the penalty amounts and the types of violations eligible for EEOs.

**Effect of Rule**                    **Expedited Enforcement Process**

The proposed rules describe the procedures and conditions under which DEQ programs may offer expedited enforcement. The proposed rules do not require DEQ programs to use EEOs. Programs that decide to use expedited enforcement will coordinate with the Office of Compliance and Enforcement to determine which violations may be handled through the process. These decisions and other implementation decisions will be incorporated into an internal management directive commonly known as the “Enforcement Guidance.”

After an IMD is developed, DEQ inspectors will be able to issue EEOs to settle less serious violations of DEQ rules and state law. An alleged violator will have the choice of accepting the EEO and paying a reduced penalty in exchange for waiving their contested case hearing and other appeal rights. If an alleged violator decides to accept the EEO, it would have 30 calendar days to sign and return the EEO form and pay the reduced penalty. In some cases the EEO may require a violator to take a specified corrective action within a specific amount of time. An EEO that is signed and paid becomes a final order of the EQC and can be used as a possible factor to increase penalties in future enforcement actions.

An alleged violator to whom DEQ makes an EEO is under no obligation to accept the offer. If the alleged violator wants to contest any part of DEQ’s findings, it may reject DEQ’s offer and proceed through the formal enforcement process where it may exercise its right to a contested case hearing.

**Commission Authority**

The EQC has authority to take this action under ORS 468.020 and ORS 468.130.

**Stakeholder Involvement**

DEQ held a daylong advisory committee meeting that included representatives of environmental groups, industry, and local government. At the meeting DEQ presented an initial draft of the proposed rule and received comments from the advisory committee members on various aspects of the proposed rule, including what to call the program, what percent reduction was appropriate for EEO penalties, whether to include economic benefit in expedited enforcement, and whether DEQ should include EEOs in its monthly press release summarizing enforcement actions taken by DEQ (see Advisory Committee Report in Attachment G). In addition, DEQ met with several standing DEQ stakeholder committees representing industry

and environmental interests to raise awareness of the expedited enforcement rulemaking and to solicit feedback and comment on the proposed rules.

**Public Comment** A public comment period extended from April 1, 2008 to May 15, 2008, and included public hearings in Medford, Bend, and Portland. DEQ received written comments from ten different individuals representing industry, local government, environmental groups and the general public. No one attended the public hearings. No revisions to the draft rules were made in response to public comments. A summary of public comments and DEQ's responses are provided in Attachment B.

**Key Issues**                      **Title of Program**

DEQ wants to make it clear to parties receiving EEOs that DEQ is making an *offer* to settle the violation up front in exchange for the party's waiver of contested case rights as specified under the state's Administrative Procedures Act. The APA allows for informal disposition of proceedings by agreed settlement. In the case of EEOs, participation in the program is completely voluntary and an alleged violator must accept the offer for it to take effect.

**Eligibility**

The proposed rule prohibits DEQ from using EEOs to settle any Class I violation (the most serious of DEQ's three classifications) that has been repeated within the previous three years or to settle a violation that had a significant adverse impact on human health or the environment. The proposed rule also describes certain minimum criteria a DEQ program must consider when deciding to offer expedited enforcement. Violations not meeting the minimum criteria include those with a significant adverse impact on human health or the environment, as well as circumstances where the violator has a lengthy history of noncompliance, received a large economic benefit, and/or had an aggravated mental state. DEQ programs may expand upon those criteria when developing expedited enforcement programs.

**Penalty Amount**

DEQ used two primary considerations in formulating its proposal for calculating EEO penalties:

- 1. The EEO penalty must be easily calculated based on noncontroversial facts so that an inspector is able to issue an EEO in the field during an inspection.** Proposed EEO penalties are based on two easily determined factors: the applicable penalty matrix and the classification. The matrix

establishes the general size of the penalty based on the size and sophistication of the alleged violator. The classification reflects the importance of the law violated. The proposed EEO penalties do not address other legally and factually complex factors in the penalty formula used in traditional formal enforcement actions, including: magnitude of the harm, prior enforcement history, duration of the violation, the violator's efforts to correct the violation, the mental state of the violator, and economic benefit.

**2. The penalty must be sufficiently potent to achieve deterrence but also sufficiently attractive to encourage settlement.** By making the EEO penalty 40 percent of the moderate base penalty listed in the rules under the applicable matrix and classification, the penalty will bear a relationship to the size of penalty that would normally be assessed, but will always be lower than the penalty that would be assessed in a typical formal enforcement action.

### **Counting EEOs as “prior significant actions” in future enforcement actions**

Division 12 enforcement rules define prior significant actions to include “any violation cited in [a formal enforcement action], with or without admission of a violation, that becomes final by payment of a civil penalty, by a final order of the Commission or the Department, or by judgment of a court.” As proposed, EEOs would meet this definition because they are formal enforcement actions that become final both by payment of a civil penalty and by becoming final orders of the EQC.

DEQ believes that treating EEOs as prior significant actions would not discourage some alleged violators from accepting an EEO. Avoiding the costs and inconvenience of a contested case hearing process, as well as incurring a significantly reduced penalty, are already sufficient incentives to accept an EEO. On the other hand, the purpose of treating prior significant actions as an aggravating factor in formal enforcement cases is to escalate penalties for continuing or repeated violations; DEQ does not see the need to minimize the enforcement consequences for unknown future violations. If a party has its own strategic reason to avoid having a record of prior significant action with DEQ, it may choose to appeal the violations rather than accept the EEO.

#### **Next Steps**

If approved by the EQC, the proposed rules will be effective on the date they are filed with the Secretary of State. DEQ would file the rule November 14, 2008.

DEQ's Office of Compliance and Enforcement will assist program efforts to develop expedited enforcement processes and guide the application of certain enforcement decisions (such as which violations may be eligible for expedited enforcement) in the IMDs. OCE will also coordinate with the Business Office and

Business Systems Development Office to develop the EEO template and tracking systems.

- Attachments**
- A. Proposed Rule Revisions
    - A.1 Revisions to OAR 340-012-0030
    - A.2 Revisions to OAR 340-012-0038
    - A.3 Revisions to OAR 340-012-0155
    - A.4 Revisions to OAR 340-012-0170
    - A.5 Revisions to OAR 340-200-0040
  - B. Summary of Public Comments and Agency Responses
  - C. Presiding Officer's Report on Public Hearings
  - D. Statement of Need and Fiscal and Economic Impact
  - E. Land Use Evaluation Statement
  - F. Relationship to Federal Requirements Questions
  - G. Advisory Committee Membership List and Meeting Summary
- Available Upon Request**
- 1. Rule Implementation Plan
  - 2. Public Comments
  - 3. EEO template (draft)

Approved:

Section: \_\_\_\_\_

Division: \_\_\_\_\_

Report Prepared By: Courtney Brown  
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### 340-012-0030

#### Definitions

All terms used in this division have the meaning given to the term in the appropriate substantive statute or rule or, in the absence of such definition, their common and ordinary meaning unless otherwise required by context or defined below:

(1) "Alleged Violation" means any violation cited in a Notice of Noncompliance, Warning Letter, Pre-Enforcement Notice, or Expedited Enforcement Offer that the department or other government agency records after observation, investigation or data collection, or for which the department receives independent evidence sufficient to issue a Notice of Noncompliance, Warning Letter, Pre-Enforcement Notice, or Expedited Enforcement Offer.

(2) "Class I Equivalent," which is used to determine the value of the "P" factor in the civil penalty formula, means two Class II violations, one Class II and two Class III violations, or three Class III violations.

(3) "Commission" means the Environmental Quality Commission.

(4) "Compliance" means meeting the requirements of the applicable statutes, and commission or department rules, permits or orders.

(5) "Conduct" means an act or omission.

(6) "Director" means the director of the department or the director's authorized deputies or officers.

(7) "Department" means the Department of Environmental Quality.

(8) "Expedited Enforcement Offer" (EEO) means a written offer by the department to settle an alleged violation pursuant to the expedited procedure described in OAR 340-012-0170(2).

(9) "Flagrant" or "flagrantly" means the respondent had actual knowledge that the conduct was unlawful and consciously set out to commit the violation.

(10) "Formal Enforcement Action" (FEA) means a proceeding initiated by the department that entitles a person to a contested case hearing or that settles such entitlement, including, but not limited to, Notices of Violation, Notices of Civil Penalty, Penalty Demand Notices, department orders, commission orders, Mutual Agreement and Orders, and other consent orders.

- (11) "Intentional" means the respondent acted with a conscious objective to cause the result of the conduct.
- (12) "Magnitude of the Violation" means the extent and effects of a respondent's deviation from statutory requirements, rules, standards, permits or orders.
- (13) "Negligence" or "Negligent" means the respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation.
- (14) "Penalty Demand Notice" (PDN) means a written notice issued to a respondent by the department demanding payment of a stipulated penalty pursuant to the terms of an agreement entered into between the respondent and the department.
- (15) "Pre-Enforcement Notice" (PEN) means a written notice of an alleged violation that the department is considering for formal enforcement.
- (16) "Person" includes, but is not limited to, individuals, corporations, associations, firms, partnerships, trusts, joint stock companies, public and municipal corporations, political subdivisions, states and their agencies, and the federal government and its agencies.
- (17) "Prior Significant Action" (PSA) means any violation cited in an FEA, with or without admission of a violation, that becomes final by payment of a civil penalty, by a final order of the commission or the department, or by judgment of a court.
- (18) "Reckless" or "Recklessly" means the respondent consciously disregarded a substantial and unjustifiable risk that the result would occur or that the circumstance existed. The risk must be of such a nature and degree that disregarding that risk constituted a gross deviation from the standard of care a reasonable person would observe in that situation.
- (19) "Residential Owner-Occupant" means the person who owns or otherwise possesses a single family dwelling unit, and who occupies that dwelling at the time of the alleged violation. The violation must involve or relate to the normal uses of a dwelling unit.
- (20) "Respondent" means the person to whom an FEA is issued.
- (21) "Systematic" means any violation that occurred or occurs on a regular basis.
- (22) "Violation" means a transgression of any statute, rule, order, license, permit, or any part thereof and includes both acts and omissions.
- (23) "Warning Letter" (WL) means a written notice of an alleged violation for which formal enforcement is not anticipated.

(24) "Willful" means the respondent had a conscious objective to cause the result of the conduct and the respondent knew or had reason to know that the result was not lawful.

Stat. Auth.: ORS 468.020 & 468.130

Stats. Implemented: ORS 459.376, 459.995, 465.900, 468.090-140, 466.880-895, 468.996-997, 468A.990-992 & 468B.220

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05



**340-012-0038**

**Warning Letters, Pre-Enforcement Notices, Notices of Permit Violation and Expedited Enforcement Offers**

(1) A Warning Letter (WL) is a written notice of an alleged violation for which formal enforcement is not anticipated. WLs may contain an opportunity to correct noncompliance as a means of avoiding formal enforcement. A WL generally will identify the alleged violation(s) found, what needs to be done to comply, and the consequences of further noncompliance. WLs will be issued under the direction of a manager or authorized representative. A person receiving a WL may provide information to the department to clarify the facts surrounding the alleged violation(s). If the department determines that the conduct identified in the WL did not occur, the department will withdraw or amend the WL, as appropriate, within 30 days. A WL is not an FEA and does not afford any person a right to a contested case hearing.

(2) A Pre-Enforcement Notice (PEN) is a written notice of an alleged violation that the department is considering for formal enforcement. A PEN generally will identify the alleged violations found, what needs to be done to comply, the consequences of further noncompliance, and the formal enforcement process that may occur. PENs will be issued under the direction of a manager or authorized representative. A person receiving a PEN may provide information to the department to clarify the facts surrounding the alleged violations. If the department determines that the conduct identified in the PEN did not occur, the department will withdraw or amend the PEN, as appropriate, within 30 days. Failure to send a PEN does not preclude the department from issuing an FEA. A PEN is not a formal enforcement action and does not afford any person a right to a contested case hearing.

(3) Notice of Permit Violation (NPV):

(a) Except as provided in subsection (3)(e) below, an NPV will be issued for the first occurrence of an alleged Class I violation of an air, water or solid waste permit issued by the department, and for repeated or continuing alleged Class II or Class III violations of an air, water, or solid waste permit issued by the department when a Notice of Noncompliance or WL has failed to achieve compliance or satisfactory progress toward compliance.

(b) An NPV is in writing, specifies the violation and states that a civil penalty will be imposed for the permit violation unless the permittee submits one of the following to the department within five working days of receipt of the NPV:

(A) A written response from the permittee certifying that the permittee is complying with all terms and conditions of the permit from which the violation is cited. The response

must include a description of the information on which the permittee's certification relies sufficient to enable the department to determine that compliance has been achieved. The certification must be signed by a Responsible Official based on information and belief after making reasonable inquiry. For purposes of this rule, "Responsible Official" means one of the following:

(i) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(ii) For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

(iii) For a municipality, state, federal, or other public agency: either a principal executive officer or appropriate elected official.

(B) A written proposal, acceptable to the department, describing how the permittee will bring the facility into compliance with the permit. At a minimum, an acceptable proposal must include the following:

(i) A detailed plan and time schedule for achieving compliance in the shortest practicable time;

(ii) A description of the interim steps that will be taken to reduce the impact of the permit violation until the permittee is in compliance with the permit; and

(iii) A statement that the permittee has reviewed all other conditions and limitations of the permit and no other violations of the permit were discovered; or

(C) For a water quality permit violation, a written request to the department that the department follow procedures described in ORS 468B.032. Notwithstanding the requirement for a response to the department within five working days, the permittee may file a request under this paragraph within 20 days from the date of service of the NPV.

(c) If a compliance schedule approved by the department under paragraph (3)(b)(B) provides for a compliance period of more than six months, the compliance schedule must be incorporated into a final order that provides for stipulated penalties in the event of any failure to comply with the approved schedule. The stipulated penalties may be set at amounts equivalent to the base penalty amount appropriate for the underlying violation as set forth in OAR 340-012-0140;

(d) If the NPV is issued by a regional authority, the regional authority may require that the permittee submit information in addition to that described in subsection (3)(b).

(e) The department may assess a penalty without first issuing an NPV if:

(A) The violation is intentional;

(B) The water or air violation would not normally occur for five consecutive days;

(C) The permittee has received an NPV or an FEA with respect to any violation of the permit within the 36 months immediately preceding the alleged violation;

(D) The permittee is subject to the Oregon Title V operating permit program and violates any rule or standard adopted under ORS chapter 468A or any permit or order issued under ORS chapter 468A; or

(E) The requirement to provide an NPV would disqualify a state program from federal approval or delegation. The permits and permit conditions to which this NPV exception applies include:

(i) Air Contaminant Discharge Permit (ACDP) conditions that implement the State Implementation Plan under the federal Clean Air Act;

(ii) Water Pollution Control Facility (WPCF) permit conditions that implement the Underground Injection Control program under the federal Safe Drinking Water Act;

(iii) National Pollutant Discharge Elimination System (NPDES) Permit conditions; and

(iv) Municipal Landfill Solid Waste Disposal Permit conditions that implement Subtitle D of the federal Solid Waste Disposal Act.

(f) For purposes of section (3), a "permit" includes permit renewals and modifications. No such renewal or modification will result in the requirement that the department provide the permittee with an additional advance notice before formal enforcement if the permittee has received an NPV, or other FEA, with respect to the permit, within the 36 months immediately preceding the alleged violation.

(4) An Expedited Enforcement Offer (EEO) is a written offer by the department to settle an alleged violation that the department has determined may be resolved through its expedited enforcement procedures. An EEO will identify the alleged violation or violations to which the EEO applies and the amount for which the department will settle the alleged violation(s). It may also specify corrective actions that must be taken to address those violations. An EEO constitutes the department's offer to settle the violation(s) through a consent order. The EEO will be incorporated into a final commission order only if the alleged violator accepts the department's offer to settle by signing the EEO, paying the full amount stipulated in the offer, and waiving any right to administrative and judicial review regarding the EEO, the final commission order, or any violations settled therein. Violations cited in an EEO that are incorporated into a final

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Attachment A2

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commission order will be treated as “prior significant actions” in any subsequent formal enforcement action.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 468.020

Stats. Implemented: ORS 459.376, 468.090-468.140, 468A.990 & 468B.025

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 25-1979, f. & ef. 7-5-79; DEQ 22-1984, f. & ef. 11-8-84; DEQ 16-1985, f. & ef. 12-3-85; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; Renumbered from 340-012-0040, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

### **340-012-0155**

#### **Additional or Alternate Civil Penalties**

(1) The following violations and violators may be subject to additional civil penalties as specified below:

(a) In addition to any other penalty prescribed by these rules, any person who intentionally or recklessly violates any provisions of ORS 164.785, 459.205-459.426, 459.705-459.790, ORS Chapters 465, 466, 467, 468, or 468A or 468B or any rule or standard or order of the commission adopted or issued pursuant to ORS 459.205-459.426, 459.705-459.790, ORS Chapters 465, 466, 467, 468, 468A, or 468B, that results in or creates the imminent likelihood for an extreme hazard to the public health or that causes extensive damage to the environment, may incur a civil penalty of up to \$100,000. When determining the civil penalty to be assessed under this subsection, the director will apply the following procedures:

(A) Select one of the following base penalties after evaluating the cause of the violation:

(i) \$50,000 if the violation was caused intentionally;

(ii) \$75,000 if the violation was caused recklessly;

(iii) \$100,000 if the violation was caused flagrantly.

(B) Then determine the civil penalty through application of the following formula:  $BP + [(.1 \times BP) (P + H + O + C)] + EB$ .

(b) In addition to any other penalty prescribed by these rules, any person who intentionally or negligently causes or permits the discharge of oil to waters of the state will incur a civil penalty not to exceed \$20,000 dollars for each violation. The amount of the penalty is determined by doubling the penalty derived from application of the \$8,000 penalty matrix in 340-012-0140(2) and the civil penalty formula contained in OAR 340-012-0045.

(c) In addition to any other penalty prescribed by these rules, any person who willfully or negligently causes or permits the discharge of oil to state waters will incur, in addition to any other penalty derived from application of the \$8,000 penalty matrix in 340-012-0140(2) and the civil penalty formula contained in OAR 340-012-0045, a civil penalty commensurate with the amount of damage incurred. The amount of the penalty will be determined by the director with the advice of the director of the Oregon Department of Fish and Wildlife. In determining the amount of the penalty, the director may consider the gravity of the violation, the previous record of the violator in complying with the

provisions of ORS 468B.450 to 468B.460, and such other considerations the director deems appropriate.

(d) In addition to any other penalty prescribed by these rules, any person who has care, custody or control of a hazardous waste or a substance that would be a hazardous waste except for the fact that it is not discarded, useless or unwanted will incur a civil penalty according to the schedule set forth in this subsection for the destruction, due to contamination of food or water supply by such waste or substance, of any of the following wildlife that are property of the state:

(A) Each game mammal other than mountain sheep, mountain goat, elk or silver gray squirrel, \$400.

(B) Each mountain sheep or mountain goat, \$3,500.

(C) Each elk, \$750.

(D) Each silver gray squirrel, \$10.

(E) Each game bird other than wild turkey, \$10.

(F) Each wild turkey, \$50.

(G) Each game fish other than salmon or steelhead trout, \$5.

(H) Each salmon or steelhead trout, \$125.

(I) Each fur-bearing mammal other than bobcat or fisher, \$50.

(J) Each bobcat or fisher, \$350.

(K) Each specimen of any wildlife species whose survival is specified by the wildlife laws or the laws of the United States as threatened or endangered, \$500.

(L) Each specimen of any wildlife species otherwise protected by the wildlife laws or the laws of the United States, but not otherwise referred to in this section, \$25.

(2) The following violations are subject to the civil penalties specified below, in lieu of civil penalties calculated pursuant to OAR 340-012-0045:

- | (a) The department will assess a field penalty as specified under OAR 340-150-0250 unless the department determines that an owner, operator or permittee is not eligible for the field penalty.

- | (b) Any owner or operator of a vessel discharging ballast water in violation of ORS 783.635 may incur a civil penalty not to exceed \$5,000 for each violation. In determining the amount of the penalty, the director will consider whether the violation was intentional, negligent or without any fault and will consider the quality and nature of risks created by the violation, the previous record of the violator in complying with the provisions of ORS 468B.450 to 468B.460, and such other considerations the director deems appropriate.
- | (c) Any owner or operator of a vessel violating the ballast water reporting requirements in ORS 783.640 will incur a civil penalty not to exceed \$500 per violation.
- | (d) Air emission sources operating under the Western Backstop SO2 Trading Program will be assessed a civil penalty of at least \$5,000 for each ton and each day of violation in excess of the applicable allowance limitation as determined by OAR chapter 340 division 228.
- | (e) Any owner or operator of a confined animal feeding operation that has not applied for or does not have a permit required by ORS 468B.050 will be assessed a civil penalty of \$500.
- | (f) Any person that fails to comply with Toxics Use and Hazardous Waste Reduction Plan, system or summary requirements of ORS 465.003 to 465.034 may incur a civil penalty of \$500 for each violation on each day.

Stat. Auth.: ORS 465, 466, 468.020, 468.130, 468.996 & 783.992

Stats. Implemented: ORS 465.021, 466.785, 466.835, 466.992, 468.090 - 468.140, 468.996, 468B.220, 468B.450 & 783.992

Hist.: DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 9-2000, f. & cert. ef. 7-21-00; DEQ 1-2003, f. & cert. ef. 1-31-03; Renumbered from 340-012-0049, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

**340-012-0170**

**Compromise or Settlement of Civil Penalty by Department**

(1) The department may compromise or settle a civil penalty assessed in a formal enforcement action at any amount that the department deems appropriate. In determining whether a penalty should be compromised or settled, the department may take into account the following:

(a) New information obtained through further investigation or provided by the respondent that relates to the penalty determination factors contained in OAR 340-012-0045;

(b) The effect of compromise or settlement on deterrence;

(c) Whether the respondent has or is willing to employ extraordinary means to correct the violation or maintain compliance;

(d) Whether the respondent has had any previous penalties which have been compromised or settled;

(e) Whether the respondent has the ability to pay the civil penalty as determined by OAR 340-012-0160;

(f) Whether the compromise or settlement would be consistent with the department's goal of protecting human health and the environment; and

(g) The relative strength or weakness of the department's evidence.

(2) Expedited Enforcement Offers:

(a) The department may pursue informal disposition of any alleged violation by making an expedited enforcement offer.

(b) The decision as to whether to make an expedited enforcement offer with respect to any alleged violation is within the department's sole discretion, except as otherwise provided in this section (2).

(c) In determining whether to make an expedited enforcement offer, the department must consider the amount of the economic benefit gained by the alleged violator as a result of the noncompliance; whether the alleged violator has been the subject of a formal enforcement action or been issued a warning letter or pre-enforcement notice for the same or similar violations; whether the alleged violation is isolated or ongoing; and the mental state of the alleged violator.



(d) The department will not make an expedited enforcement offer to settle a Class I violation that has been repeated within the previous three years or to settle a violation that would be a major magnitude violation under OAR 340-012-0130(3) regardless of whether a selected magnitude under OAR 340-012-0135 applies.

(e) The penalty amount for an alleged violation cited in an expedited enforcement offer will be 40% of the moderate base penalty listed in OAR 340-012-0140 under the applicable matrix and the applicable classification.

(f) Participation in the expedited enforcement program is voluntary. An alleged violator to whom the department makes an expedited enforcement offer is under no obligation to accept the offer.

(g) A person to whom an expedited enforcement offer is made has 30 calendar days from the date of the offer to accept the offer by signing the expedited enforcement offer and submitting the signed expedited enforcement offer and payment for the total amount stipulated in the expedited enforcement offer. The signed expedited enforcement offer and payment are deemed submitted when received by the department.

(h) By signing the expedited enforcement offer and submitting payment to the department in the total amount stipulated in the expedited enforcement offer, the alleged violator accepts the expedited enforcement offer, consents to the issuance of a final order of the commission which may include a compliance schedule, and agrees to waive any right to appeal or seek administrative or judicial review of the expedited enforcement offer, the final order, or any violation cited therein.

(i) Expedited enforcement offers incorporated into final orders of the commission will be treated as prior significant actions in accordance with OAR 340-012-0145.

(j) The department may initiate a formal enforcement action for any violation not settled by acceptance of the expedited enforcement offer.

Stat. Auth.: ORS 459., 466, 467, 468.020 & 468.130, 183.415, 183.745

Stats. Implemented: ORS 468.130-140, 183.415, 183.470, 183.745, 459.376, 459.995, 465.900, 466.990, 466.994, 468.035, 468.090-140, 468B.220

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; Renumbered from 340-12-075; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; Renumbered from 340-012-0047, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

**340-200-0040**

### **State of Oregon Clean Air Act Implementation Plan**

(1) This implementation plan, consisting of Volumes 2 and 3 of the State of Oregon Air Quality Control Program, contains control strategies, rules and standards prepared by the Department of Environmental Quality and is adopted as the state implementation plan (SIP) of the State of Oregon pursuant to the federal Clean Air Act, **42 U.S.C.A 7401 to 7671q**.

(2) Except as provided in section (3), revisions to the SIP will be made pursuant to the Commission's rulemaking procedures in division 11 of this chapter and any other requirements contained in the SIP and will be submitted to the United States Environmental Protection Agency for approval. The State Implementation Plan was last modified by the Commission on October 23, 2008.

(3) Notwithstanding any other requirement contained in the SIP, the Department may:

(a) Submit to the Environmental Protection Agency any permit condition implementing a rule that is part of the federally-approved SIP as a source-specific SIP revision after the Department has complied with the public hearings provisions of **40 CFR 51.102** (July 1, 2002); and

(b) Approve the standards submitted by a regional authority if the regional authority adopts verbatim any standard that the Commission has adopted, and submit the standards to EPA for approval as a SIP revision.

**NOTE:** Revisions to the State of Oregon Clean Air Act Implementation Plan become federally enforceable upon approval by the United States Environmental Protection Agency. If any provision of the federally approved Implementation Plan conflicts with any provision adopted by the Commission, the Department shall enforce the more stringent provision.

Stat. Auth.: ORS 468.020

Stats. Implemented: ORS 468A.035

Hist.: DEQ 35, f. 2-3-72, ef. 2-15-72; DEQ 54, f. 6-21-73, ef. 7-1-73; DEQ 19-1979, f. & ef. 6-25-79; DEQ 21-1979, f. & ef. 7-2-79; DEQ 22-1980, f. & ef. 9-26-80; DEQ 11-1981, f. & ef. 3-26-81; DEQ 14-1982, f. & ef. 7-21-82; DEQ 21-1982, f. & ef. 10-27-82; DEQ 1-1983, f. & ef. 1-21-83; DEQ 6-1983, f. & ef. 4-18-83; DEQ 18-1984, f. & ef. 10-16-84; DEQ 25-1984, f. & ef. 11-27-84; DEQ 3-1985, f. & ef. 2-1-85; DEQ 12-1985, f. & ef. 9-30-85; DEQ 5-1986, f. & ef. 2-21-86; DEQ 10-1986, f. & ef. 5-9-86; DEQ 20-1986, f. & ef. 11-7-86; DEQ 21-1986, f. & ef. 11-7-86; DEQ 4-1987, f. & ef. 3-2-87;

DEQ 5-1987, f. & ef. 3-2-87; DEQ 8-1987, f. & ef. 4-23-87; DEQ 21-1987, f. & ef. 12-16-87; DEQ 31-1988, f. 12-20-88, cert. ef. 12-23-88; DEQ 2-1991, f. & cert. ef. 2-14-91; DEQ 19-1991, f. & cert. ef. 11-13-91; DEQ 20-1991, f. & cert. ef. 11-13-91; DEQ 21-1991, f. & cert. ef. 11-13-91; DEQ 22-1991, f. & cert. ef. 11-13-91; DEQ 23-1991, f. & cert. ef. 11-13-91; DEQ 24-1991, f. & cert. ef. 11-13-91; DEQ 25-1991, f. & cert. ef. 11-13-91; DEQ 1-1992, f. & cert. ef. 2-4-92; DEQ 3-1992, f. & cert. ef. 2-4-92; DEQ 7-1992, f. & cert. ef. 3-30-92; DEQ 19-1992, f. & cert. ef. 8-11-92; DEQ 20-1992, f. & cert. ef. 8-11-92; DEQ 25-1992, f. 10-30-92, cert. ef. 11-1-92; DEQ 26-1992, f. & cert. ef. 11-2-92; DEQ 27-1992, f. & cert. ef. 11-12-92; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 8-1993, f. & cert. ef. 5-11-93; DEQ 12-1993, f. & cert. ef. 9-24-93; DEQ 15-1993, f. & cert. ef. 11-4-93; DEQ 16-1993, f. & cert. ef. 11-4-93; DEQ 17-1993, f. & cert. ef. 11-4-93; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 1-1994, f. & cert. ef. 1-3-94; DEQ 5-1994, f. & cert. ef. 3-21-94; DEQ 14-1994, f. & cert. ef. 5-31-94; DEQ 15-1994, f. 6-8-94, cert. ef. 7-1-94; DEQ 25-1994, f. & cert. ef. 11-2-94; DEQ 9-1995, f. & cert. ef. 5-1-95; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 14-1995, f. & cert. ef. 5-25-95; DEQ 17-1995, f. & cert. ef. 7-12-95; DEQ 19-1995, f. & cert. ef. 9-1-95; DEQ 20-1995 (Temp), f. & cert. ef. 9-14-95; DEQ 8-1996(Temp), f. & cert. ef. 6-3-96; DEQ 15-1996, f. & cert. ef. 8-14-96; DEQ 19-1996, f. & cert. ef. 9-24-96; DEQ 22-1996, f. & cert. ef. 10-22-96; DEQ 23-1996, f. & cert. ef. 11-4-96; DEQ 24-1996, f. & cert. ef. 11-26-96; DEQ 10-1998, f. & cert. ef. 6-22-98; DEQ 15-1998, f. & cert. ef. 9-23-98; DEQ 16-1998, f. & cert. ef. 9-23-98; DEQ 17-1998, f. & cert. ef. 9-23-98; DEQ 20-1998, f. & cert. ef. 10-12-98; DEQ 21-1998, f. & cert. ef. 10-12-98; DEQ 1-1999, f. & cert. ef. 1-25-99; DEQ 5-1999, f. & cert. ef. 3-25-99; DEQ 6-1999, f. & cert. ef. 5-21-99; DEQ 10-1999, f. & cert. ef. 7-1-99; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-020-0047; DEQ 15-1999, f. & cert. ef. 10-22-99; DEQ 2-2000, f. 2-17-00, cert. ef. 6-1-01; DEQ 6-2000, f. & cert. ef. 5-22-00; DEQ 8-2000, f. & cert. ef. 6-6-00; DEQ 13-2000, f. & cert. ef. 7-28-00; DEQ 16-2000, f. & cert. ef. 10-25-00; DEQ 17-2000, f. & cert. ef. 10-25-00; DEQ 20-2000 f. & cert. ef. 12-15-00; DEQ 21-2000, f. & cert. ef. 12-15-00; DEQ 2-2001, f. & cert. ef. 2-5-01; DEQ 4-2001, f. & cert. ef. 3-27-01; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 15-2001, f. & cert. ef. 12-26-01; DEQ 16-2001, f. & cert. ef. 12-26-01; DEQ 17-2001, f. & cert. ef. 12-28-01; DEQ 4-2002, f. & cert. ef. 3-14-02; DEQ 5-2002, f. & cert. ef. 5-3-02; DEQ 11-2002, f. & cert. ef. 10-8-02; DEQ 5-2003, f. & cert. ef. 2-6-03; DEQ 14-2003, f. & cert. ef. 10-24-03; DEQ 19-2003, f. & cert. ef. 12-12-03; DEQ 1-2004, f. & cert. ef. 4-14-04; DEQ 10-2004, f. & cert. ef. 12-15-04; DEQ 1-2005, f. & cert. ef. 1-4-05; DEQ 2-2005, f. & cert. ef. 2-10-05; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 7-2005, f. & cert. ef. 7-12-05; DEQ 9-2005, f. & cert. ef. 9-9-05; DEQ 2-2006, f. & cert. ef. 3-14-06; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06; DEQ 3-2007, f. & cert. ef. 4-12-07; DEQ 4-2007, f. & cert. ef. 6-28-07; DEQ 8-2007, f. & cert. ef. 11-8-07

## Summary of Public Comment and Agency Response

**Title of Rulemaking: Expedited Enforcement Rulemaking**

**Prepared by: Courtney Brown**

**Date: May 19, 2008**

**Comment period** The public comment period opened on April 1, 2008, and closed at 5:00 pm on May 15, 2008. The Department of Environmental Quality held public hearings on April 17, 2008, in Bend, April 24, 2008, in Medford, and May 7, 2008, in Portland. No members of the public attended the hearings. Nine commenters submitted written comments through regular or electronic mail.

**Organization of comments and responses** Summaries of individual comments and DEQ's responses are provided below. Comments are summarized in categories. The person who provided each comment is referenced by number.

<b>List of Commenters and Reference Numbers</b>				
Reference Number	Name	Organization	Address	Date on comments
1	Douglas Quirke	Oregon Clean Water Action Project	<a href="mailto:doug@acwap.org">doug@acwap.org</a>	5/15/08
2	Brent Foster	Columbia Riverkeeper	<a href="mailto:brentfoster@gorge.net">brentfoster@gorge.net</a>	5/15/08
3	Holly Sears	Oregon Refuse & Recycling Association	<a href="mailto:HollyS@orra.net">HollyS@orra.net</a>	5/15/08
4	Roger Dilts	Clean Water Services	<a href="mailto:DiltsR@CleanWaterServices.org">DiltsR@CleanWaterServices.org</a>	5/15/08
5	John Ledger	Associated Oregon Industries	<a href="mailto:johnledger@aoi.org">johnledger@aoi.org</a>	5/15/08
6	Monte Harmon		PO Box 620 La Pine, OR 97739	5/12/08
7	Brenna Bell	Willamette Riverkeeper	1515 SE Water Ave, Suite 102 Portland, OR 97214	5/8/08
8	Ann		<a href="mailto:twofivestars@aol.com">twofivestars@aol.com</a>	4/21/08
9	Samir M. Jiries	Waste Management of Oregon, Inc.	7227 NE 55 <sup>th</sup> Avenue Portland, OR 97218	5/13/08
10	Tom Wood	Northwest Pulp & Paper Association	Stoel Rives LLP 900 S.W. Fifth Ave, Suite 2600 Portland, OR 97204	5/15/08

<b>Summary of Comments and Agency Responses</b>	
<b>Comment 1</b>	The public should receive notification of expedited enforcement offers (EEOs) including via DEQ's website. DEQ should maintain a page on its website that lists EEOs as well as past offers and the status of past offers.  Commenter: 1
<b>Response</b>	DEQ is currently improving availability of enforcement information to the public and plans to post all final orders, including EEOs, on the website.
<b>Comment 2</b>	Penalties assessed under EEOs should be more than 40% of the moderate base penalty.



	Commenter: 1, 2, 7
<b>Response</b>	DEQ believes that the 40% penalty would create an effective penalty while also encouraging the recipient to accept the EEO rather than seek other reduction through a contested case process.
<b>Comment 3</b>	40% of the moderate base penalty would not seem to provide a disincentive for accepting an EEO.  Commenter: 9
<b>Response</b>	This is the only comment in favor of the 40% amount. See the Response to Comment 2, above.
<b>Comment 4</b>	The public should be notified of any internal management directives (IMDs) regarding expedited enforcement, the process for developing the IMDs should be transparent and open to the public with an opportunity for public comment, and IMDs should be available to the public. Alternatively, IMDs should be co-promulgated with the rule, or developed pursuant to this rule and then adopted by subsequent rule.  Commenter: 1, 3, 5, 10
<b>Response</b>	All violations of DEQ's statutes, rules, permits and orders are subject to possible penalties according to authorities given DEQ through statutes and rules. However, these authorities also give the Director discretion in deciding whether to issue a penalty in any particular case and how to settle particular penalties issued. An IMD is the mechanism the Director uses to direct staff about the Director's expectations regarding that discretion. IMDs are not rules and are not, therefore, required to go through public notice and comment. However, some DEQ programs will likely conduct stakeholder outreach when determining how to implement these rules and in determining which violations should be subject to the EEO process. Final decisions will be incorporated into IMDs for staff. IMDs are public record and will be made available upon request.
<b>Comment 5</b>	The proposed OAR 340-012-0170(2) and OAR 340-012-0038(4) should be revised to state that EEOs will only be made in situations that do not result in significant adverse impact on human health or the environment  Commenter: 2
<b>Response</b>	Proposed revisions to OAR 340-012-0170(2) state that an EEO will not be offered to "settle a violation that would be a major magnitude violation under OAR 340-012-0130(3)." OAR 340-012-0130(3) states that "the magnitude of the violation is major if the department finds that the violation had a significant adverse impact on human health or the environment."
<b>Comment 6</b>	Will final orders of the commission based on EEOs have the effect of precluding citizen suit enforcement under the CAA and CWA?  Commenter: 2
<b>Response</b>	DEQ believes that the penalties it issues – including those it will issue in EEOs – in the delegated federal programs are adequate to achieve compliance and that there would be no need for further citizen or federal enforcement on the same issues. However, whether the EEOs would legally bar citizen suit is a question for the federal courts and is not something DEQ can guarantee.

<b>Comment 7</b>	EEOs should not be treated as “prior significant actions.”  Commenter: 3, 5, 9, 10
<b>Response</b>	A violator’s participation in expedited enforcement is completely voluntary. If a violator believes, for any reason, that the EEO offer is erroneous, the violator may reject the offer and exercise its right to a contested case hearing. Because EEOs will be offered to settle violations of law and result in a final order in the matter, the department believes that it is appropriate that a violator’s history of noncompliance be a factor that is taken into account when the agency is calculating the amount of future civil penalties in a formal enforcement action.
<b>Comment 8</b>	Allow EEO recipients the opportunity to provide DEQ with pertinent information regarding the violation within the 30 days allowed for acceptance of the EEO.  Commenter: 3, 5, 9
<b>Response</b>	An EEO recipient may always provide pertinent information for DEQ’s consideration and possible action. If an EEO recipient believes that the EEO is unwarranted for any reason, it may reject the offer to settle and proceed through the formal enforcement process where it will have the opportunity to present exculpatory evidence before an impartial tribunal in a contested case hearing.
<b>Comment 9</b>	EEOs should be offered only where the violator realized no more than a <i>de minimis</i> economic benefit.  Commenter: 4
<b>Response</b>	In deciding whether to issue an EEO, DEQ will consider the amount of economic benefit received. The details of how DEQ will apply that discretion will be set forth in an IMD.
<b>Comment 10</b>	Whether an alleged violator has been the subject of prior expedited enforcement should be an additional factor DEQ considers when deciding whether to make an EEO.  Commenter: 4
<b>Response</b>	EEOs are formal enforcement actions pursuant to OAR 340-012-0030 and therefore DEQ must consider, pursuant to the proposed rule, violations previously cited in EEOs.
<b>Comment 11</b>	EEOs should not be offered when a violator acted recklessly, with actual knowledge, intentionally, or flagrantly.  Commenter: 4
<b>Response</b>	The mental state is one of the factors DEQ must consider in deciding whether to make an EEO. When programs develop specific IMDs, it is highly likely that they will use the formal enforcement process in situations where the violator acted intentionally, willfully or flagrantly.

<b>Comment 12</b>	<p>The definition of “prior significant action” (OAR 340-012-0030(17)) and the calculation of prior significant actions to penalty determinations (OAR 340-012-0145(2)) should be revised to include EEOs.</p> <p>Commenter: 4</p>
<b>Response</b>	<p>Once fully executed, EEOs are final orders and therefore fit within the definition of “prior significant action” as defined in the rules the commenter cited.</p>
<b>Comment 13</b>	<p>Expedited enforcement should be adopted as a pilot project.</p> <p>Commenter: 5 (suggests a three to five year trial period), 10 (suggests a 2 year trial period).</p>
<b>Response</b>	<p>The proposed rules clarify DEQ’s authority to settle penalties through an EEO process. Some DEQ programs will institute expedited enforcement in the near future, while others either have no plans to do expedited enforcement or will hold off on doing it until a later time. Because implementation of expedited enforcement will be staggered, DEQ programs will be able to observe and learn from the experiences of other programs that implemented expedited enforcement before them. Additionally, DEQ’s underground storage tank program has a “field citation” program which has been in place since 2003. The proposed rules were developed and informed by the experiences of the underground storage tank field citation program.</p>
<b>Comment 14</b>	<p>Expedited enforcement should be limited to violations such as open burning and asbestos (and stormwater, says 10).</p> <p>Commenter: 5, 10</p>
<b>Response</b>	<p>DEQ agrees that the EEO process might not be a good fit for enforcement of some violations. As each program considers whether to adopt an EEO process under these rules, DEQ will consider whether the violations could be addressed with EEOs and whether the EEO process fits within program resources and priorities.</p>
<b>Comment 15</b>	<p>The proposal gives no indication of the method the Department intends to use to force compliance with the rules. It is unclear how this approach will achieve the goals of deterrence.</p> <p>Commenter: 6, 7</p>
<b>Response</b>	<p>The EEOs for ongoing violations will contain compliance schedules and requirements that, upon acceptance of the EEO, become final orders. Additionally, in some cases where unilateral compliance orders are needed, DEQ may opt not to offer an EEO and to pursue traditional formal enforcement. DEQ expects that expedited enforcement will free up inspector time currently spent in the office working on referrals and other components of formal enforcement actions. This extra time will be spent “in the field” performing inspections and giving technical advice. Studies have shown that “field presence” is the biggest factor in achieving deterrence.</p>
<b>Comment 16</b>	<p>Repeat violators of any type of violation (not just repeated Class I violations) in the past three years should not be eligible for EEOs.</p> <p>Commenter: 7</p>

<b>Response</b>	How DEQ will exercise the Director's discretion in this area will be determined by the separate DEQ program areas. DEQ does not want to preclude more than one EEO for repeated minor violations.
<b>Comment 17</b>	DEQ believes it will "most likely" take more enforcement actions as a result of the rule change. Can DEQ provide assurance that the percentage of violators undergoing enforcement actions will increase when the proposed rulemaking takes effect?  Commenter: 7
<b>Response</b>	The rationale behind DEQ's statement is provided in the response to comment 15. DEQ cannot provide assurance that the percentage of violators subject to enforcement will increase.
<b>Comment 18</b>	Do not allow violators to walk away. Be serious about violations.  Commenter: 8
<b>Response</b>	DEQ endeavors to motivate compliance and to deter future violations from occurring. We believe that the EEOs will help create better deterrence because they will allow faster resolution of the penalties for lesser violations and let inspectors conduct more inspections.
<b>Comment 19</b>	Expedited enforcement creates incentives on DEQ inspectors to pursue expedited enforcement over formal enforcement.  Commenter: 10
<b>Response</b>	An inspector's decision to make an expedited enforcement offer or refer a case for formal enforcement will be governed by an IMD that will guide and narrow an inspector's discretion. As with all DEQ policies, the department expects that it will be implemented and followed by staff.
<b>Comment 20</b>	Expedited enforcement offers monetary incentives for Oregon businesses to forfeit their due process rights and the proposal is not straightforward or fair.  Commenter: 10
<b>Response</b>	No due process rights are being forfeited. Participation in an expedited enforcement process is completely voluntary. A violator always has the right to a contested case hearing and the expedited enforcement process does not forfeit that right.
<b>Comment 21</b>	Explain the inclusion of revisions to the SIP in the proposed rules  Commenter: 10
<b>Response</b>	Under its delegated authority to administer certain provisions of the Clean Air Act, DEQ must ensure that the State Implementation Plan (SIP) rules reflect the latest date that any rules were adopted that relate to the SIP. Because revisions to enforcement rules may impact how DEQ enforces certain provisions of air quality rules that affect the SIP, DEQ is revising the latest date in the SIP rules to reflect when the rule is scheduled to be presented to the EQC for adoption.



**State of Oregon**  
**Department of Environmental Quality**

**Memorandum**

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**Presiding Officer's Report**

Date: May 19, 2008  
To: Environmental Quality Commission  
From: Courtney Brown, Office of Compliance and Enforcement  
Subject: Presiding Officer's Report for Rulemaking Hearing  
Title of Proposal: Expedited Enforcement Rulemaking

- April 17, 2008, 5:30 pm, DEQ Bend Office, 300 SE Reed Market Rd., Bend;  
Presiding Officer: Ranei Nomura

DEQ convened the rulemaking hearing on the proposal referenced above at 5:30 p.m. and closed it at 6:00 p.m. Besides the Presiding Officer, no other persons attended this hearing; no people testified; no written comments were submitted at this hearing.

- April 24, 2008, 4:00 pm to 6:00 pm, DEQ Medford Office, 221 Stewart Ave., Suite 201, Medford;  
Presiding Officer: Ranei Nomura

DEQ convened the rulemaking hearing on the proposal referenced above at 4:00 p.m. and closed it at 6:10 p.m. Besides the Presiding Officer, no other persons attended this hearing; no people testified; no written comments were submitted at this hearing.

- May 7, 2008, 5:30 pm, DEQ Headquarters, 811 SW 6th Ave., Portland;  
Presiding Officer: Courtney Brown

DEQ convened the rulemaking hearing on the proposal referenced above at 5:30 p.m. and closed it at 5:45 p.m. Besides the Presiding Officer and Brian White of DEQ's Office of Communication and Outreach, no other persons attended this hearing; no people testified; no written comments were submitted at this hearing.

**DEPARTMENT OF ENVIRONMENTAL QUALITY**  
**Chapter 340**  
**Proposed Rulemaking**  
**STATEMENT OF NEED AND FISCAL AND ECONOMIC IMPACT**

*New environmental enforcement rules describing the use of expedited enforcement*

This form accompanies a Notice of Proposed Rulemaking

<b>Title of Proposed Rulemaking</b>	Revisions to Oregon’s environmental enforcement rules that describe the use of an expedited enforcement process (OAR chapter 340, division12)
<b>Statutory Authority or other Legal Authority</b>	ORS 468.020; ORS 468.130
<b>Statutes Implemented</b>	ORS 183.415, 183.470, 183.745, 459.376; 459.995; 465.900; 466.990; 466.994; 468.035, 468.090-140, 468B.220
<b>Need for the Rule(s)</b>	DEQ’s formal enforcement process can be resource-intensive and time-consuming. The proposed rules describe a process of expedited enforcement that will be a less expensive and faster form of enforcement. With expedited enforcement, DEQ may offer violators “expedited enforcement offers” to settle violations as an alternative to traditional formal enforcement. The rules will require violators to waive their rights to appeal the violation and will provide for reduced penalty amounts. The rules also establish minimum criteria for when the Department may offer to settle a violation with an “expedited enforcement offer” and provide that such offers will be made only in situations where the violation did not result in significant adverse impact on human health or the environment.
<b>Documents Relied Upon for Rulemaking</b>	None.
<b>Requests for Other Options</b>	<b>Pursuant to ORS 183.335(2)(b)(G), DEQ requests public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing negative economic impact of the rule on business.</b>
<b>Fiscal and Economic Impact, Statement of Cost Compliance</b>	
<b>Overview</b>	<p>The new rules describe the procedures by, and certain conditions under which, DEQ will offer expedited enforcement – but these rules do not create any such program. As a consequence, there are no direct fiscal impacts beyond those minimal impacts associated with the rulemaking effort. If these proposed rules are adopted, any DEQ program that wants to implement expedited enforcement will develop an “internal management directive”. An internal management directive would include the violations eligible for expedited enforcement and any other details necessary to effectively implement expedited enforcement in that program.</p> <p>To the regulated community, expedited enforcement offers the possibility of lower penalties for some violations. However, because DEQ expects that with expedited enforcement in place programs will be able to perform more inspections, it is likely that programs will discover violations that would not have been previously discovered and would therefore do more overall enforcement. Also because expedited enforcement will make it easier and less expensive to do enforcement, DEQ may be in a position to increase enforcement actions on violations that would not have been subject to enforcement before. Finally, whether a particular violation is subject to expedited enforcement or formal enforcement will depend on the particulars of a program’s internal management directive and the facts of each case. It is, therefore, difficult to</p>

	<p>estimate the overall fiscal impact to the regulated community.</p> <p>Like penalties assessed in formal enforcement actions, penalties imposed through expedited enforcement will be paid to the state's General Fund (except when directed otherwise by statute). It is not possible to estimate the level of penalties or how many enforcement actions will be generated through expedited enforcement because DEQ program participation has not yet been determined and the level of noncompliance with environmental regulations at any given moment cannot be predicted.</p>	
<b>Impacts to General Public</b>	See Overview section above. There will be no fiscal impacts to the general public as a result of these proposed rules.	
<b>Impacts to Small Business</b> (50 or fewer employees – ORS183.310(10))	See Overview section above. There will be no fiscal impacts to small business as a result of these proposed rules.	
<b>Cost of Compliance on Small Business</b> (50 or fewer employees – ORS183.310(10))	a) Estimated number of small businesses subject to the proposed rule	n/a
	b) Types of businesses and industries with small businesses subject to the proposed rule	n/a
	c) Projected reporting, recordkeeping and other administrative activities required by small businesses for compliance with the proposed rule, including costs of professional services	n/a.
	d) The equipment, supplies, labor, and increased administration required by small businesses for compliance with the proposed rule	n/a
	e) A description of the manner in which DEQ involved small businesses were involved in the development of this rulemaking	There is a small business representative on the Advisory Committee for this rule proposal.
<b>Impacts to Large Business</b> (all businesses that are not "small businesses" under ORS183.310(10))	See Overview section above. There will be no fiscal impacts to large business as a result of these proposed rules.	
<b>Local Government</b>	See Overview section above. There will be no fiscal impacts to local government as a result of these proposed rules.	

<b>State Agencies Other Than DEQ</b>	See Overview section above. There will be no fiscal impacts to state agencies as a result of these proposed rules.
<b>DEQ</b>	See Overview section above. There are no fiscal impacts to DEQ as a result of these proposed rules. There may be fiscal impacts to a DEQ program that chooses to implement expedited enforcement but those impacts are expected to be minimal and would not require any additional FTE.
<b>Assumptions</b>	
<b>Housing Costs</b>	DEQ has determined that this proposed rulemaking will have no effect on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on that parcel.
<b>Administrative Rule Advisory Committee</b>	An internal agency rulemaking team narrowed the scope of issues and developed the draft proposed rule amendments. DEQ then reconvened the external Advisory Committee previously used during the DEQ's last revision to Division 12 enforcement rules and added some additional members representing small business, Eastern Oregon, and the environmental community. The Advisory Committee was comprised of 9 regular members and 1 ex-officio member. The regular members represented big and small business, public water management agencies, DEQ-regulated industries and environmental groups. The ex-officio member represented the U.S. Environmental Protection Agency. The Advisory Committee met one time on January 15, 2008. The Advisory Committee reviewed and commented on a draft version of the rules prior to the public comment period. The group did not have the goal of reaching consensus on recommendations and did not produce a written product.

Prepared by \_\_\_\_\_

Printed name \_\_\_\_\_

Date \_\_\_\_\_

Approved by DEQ Budget Office \_\_\_\_\_

Printed name \_\_\_\_\_

Date \_\_\_\_\_

State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
**Land Use Evaluation Statement**

**Rulemaking Proposal**  
**for**  
**Revisions to Oregon's Environmental Enforcement Rules Regarding**  
**Expedited Enforcement Procedures**

**1. Explain the purpose of the proposed rules.**

The new rules describe the process by and conditions under which the Department will offer expedited enforcement. The rules establish reduced penalty amounts and threshold criteria DEQ will consider when determining whether a violation is eligible for expedited enforcement. Expedited enforcement will be much faster and less expensive than traditional formal enforcement actions.

**2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program?**

Yes \_\_\_ No X

**a. If yes, identify existing program/rule/activity:**

**b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?**

Yes \_\_\_ No \_\_\_ (if no, explain):

**c. If no, apply the following criteria to the proposed rules.**

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal

5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and rules that relate to statewide land use goals are considered land use programs if they are:

1. Specifically referenced in the statewide planning goals; or
2. Reasonably expected to have significant effects on
  - a. resources, objectives or areas identified in the statewide planning goals, or
  - b. present or future land uses identified in acknowledged comprehensive plans.

In applying criterion 2 above, two guidelines should be applied to assess land use significance:

- The land use responsibilities of a program/rule/action that involved more than one agency, are considered the responsibilities of the agency with primary authority.
- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

**In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.**

The Department has reviewed the criteria and determined that the proposed rules will not affect land use. The rules do not establish any new substantive requirements for a program affecting land use or change any existing substantive requirements of a program affecting land use. The proposed rules may affect the penalty amount assessed for a given violation of such requirements and the enforcement procedures used in response to the violation of such requirements, but will not affect any of the underlying program requirements.

- 3. If the proposed rules have been determined a land use program under 2. above, but are not subject to existing land use compliance and compatibility procedures, explain the new procedures the Department will use to ensure compliance and compatibility.**

N/A

State of Oregon  
DEPARTMENT OF ENVIRONMENTAL QUALITY

**Relationship to Federal Requirements**

**REVISIONS TO OREGON'S ENVIRONMENTAL ENFORCEMENT RULES TO  
ALLOW FOR EXPEDITED ENFORCEMENT**

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*Answers to the following questions identify how the proposed rulemaking relates to federal requirements and potential justification for differing from, or adding to, federal requirements. This statement is required by OAR 340-011-0029(1).*

**1. Is the proposed rulemaking different from, or in addition to, applicable federal requirements? If so, what are the differences or additions?**

The proposed amendments are in addition to applicable federal requirements.

There are no federal statutes or regulations that directly apply to DEQ's compliance and enforcement program, but DEQ's enforcement regulations and policies are developed in consultation with EPA. In order to maintain delegation of federal environmental programs such as air quality, water quality and hazardous waste, EPA requires DEQ to adequately enforce state program requirements.

**2. If the proposal differs from, or is in addition to, applicable federal requirements, explain the reasons for the difference or addition (including as appropriate, the public health, environmental, scientific, economic, technological, administrative or other reasons).**

EPA requires DEQ to adequately enforce federally-delegated programs. How that enforcement is implemented is at DEQ's discretion. The proposed additions to DEQ's enforcement practices are intended to benefit the department both administratively and fiscally.

The proposal authorizes the use of a faster and less resource-intensive form of enforcement in addition to DEQ's traditional formal enforcement process. DEQ's traditional formal enforcement process can take a long time and require a lot of agency resources. As a result, DEQ may, in some instances, be unable to respond to less serious violations of environmental law. DEQ expects that expedited enforcement will allow DEQ to respond to a wider spectrum of violations in a much shorter timeframe and will likely be more economical to the agency to do so.

While expedited enforcement authorizes smaller penalties, DEQ expects that it will allow for more inspections and a greater field presence, which will further promote specific and general deterrence from violations.

**3. If the proposal differs from, or is in addition to, applicable federal requirements, did the Department consider alternatives to the difference or addition? If so, describe the alternatives and the reason(s) they were not pursued.**

No alternatives were considered.



Agenda Item I, Rule Adoption: Expedited Enforcement Process  
October 23, 2008 EQC Meeting  
Attachment G

**Expedited Enforcement Offers**  
**Attendees at Rulemaking Advisory Committee Meeting 1/15/08**

Advisory Committee Members present:

Paul Koprowski, U.S. Environmental Protection Agency (ex-officio member)  
Don Haagensen, (Cable, Huston, Benedict, Haagensen & Lloyd LLP)  
Chris Rich (representing Oregon Environmental Council)  
David Ris (City of Gresham, representing Oregon Association of Clean Water Agencies)  
Kathryn Van Natta (NW Pulp & Paper Association)  
Jack Billings (Alpine Abatement, representing small business)  
Tom Bispham (former DEQ administrator)  
Mark Riskedahl, Northwest Environmental Defense Center)

Advisory Committee Members Not Present:

Travis Williams, Willamette Riverkeeper  
John Morrissey, Lane Regional Air Protection Agency

DEQ and EPA Staff Present:

Jane Hickman, DEQ, Office of Compliance and Enforcement  
Les Carlough, DEQ, OCE  
Courtney Brown DEQ, OCE  
Ranei Nomura, DEQ, Water Quality, Western Region  
Janine Camilleri, DEQ, WQ  
Bryan White, DEQ, Office of Communications and Outreach  
Mike Slater, U.S. EPA