**2nd Meeting of the Advisory Committee**

**for DEQ’s Division 12 Rulemaking**

**April 5, 2013**

**9:00 – 1:00 p.m.**

Attendees:

Committee Members:

* Gerald Linder, Clean Water Services; Association of Clean Water Agencies
* Courtney Johnson, Crag Law Center, conservation and environmental justice advocate
* Christopher Rich, Perkins Coie law firm
* Don Haagensen, Cable Huston law firm; Associated Oregon Industries
* Matthew Criblez, Portland Bureau of Environmental Services
* Merlyn Hough, Director, Lane Regional Air Protection Agency
* David Misel, Rejuvenation, small business and manufacturing representative

DEQ Staff:

* Ron Doughten, Facilitator
* Les Carlough, Senior Policy Advisor
* Jenny Root, Environmental Law Specialist
* Nanc Tuttle, Executive Support

The meeting convened at 9:05 a.m. with opening remarks and committee introductions by Les Carlough and Jenny Root. They reviewed the agenda and asked how the committee would like to review the suggested rule changes.

**Review of Minutes from November 28, 2012, meeting**

The November minutes were reviewed and the following corrections were made and approved:

* Page 1, under Committee Members: Association of Oregon Industries should be Associated Oregon Industries.
* Page 4, paragraph 4: Mr. Hough noted a typo where the 0.01 should be 0.1.

**Discussion and committee comments on proposed Div. 12 rules**

The committee reviewed suggested rule changes page-by-page.

Throughout the document, the term “The department” was changed to “DEQ” to comply with the DEQ style guide.

**340-012-0030 (Definitions)** – The committee briefly discussed proposed definitions for “Field Penalty” which was not previously defined in Division 12, and “Final Order and Stipulated Penalty Demand Notice” which replaced “Penalty Demand Notice” to reflect current terminology. Mr. Haagensen noted a couple typos and stated that he has a concern about the change in the term “Prior Significant *Action*” to “Prior Violation” because some cases are settled without agreement with the respondent that there was a violation. Dr. Carlough explained that the change was not intended to force a respondent into implied admission, but to distinguish the term from the term “Formal Enforcement *Action*” which is a complete case that could include multiple “Prior Significant Actions.” Committee members discussed possibly using the terms “Prior Significant Allegation (PSA),” “Prior Finalized Allegation (PFA),” or “Prior Alleged Violation.” Committee members agreed about the issue but did not coalesce around one term. Members having further thoughts were invited to send their suggested language via e-mail to OCE.

*Subsequent Action: Mr. Haagensen emailed a suggested alternative: “Prior Significant Matter.” DEQ recommends retaining the original term “Prior Significant Action” because all the proposed alternatives either create new confusion or continue the problem Mr. Haagensen first raised.*

**340-012-0038 –** Dr. Carlough explained that no substantive changes were intended and that DEQ was just trying to reduce redundancy. Mr. Rich suggested that the rule be changed to give a person who receives a Warning Letter with Opportunity to Correct or Pre-enforcement Notice 20 to 30 days to respond to the inspector with information clarifying the facts surrounding the alleged violations, before the inspector refers the alleged violations to the Office of Compliance and Enforcement for formal enforcement. Mr. Haagensen agreed with that suggestion. Ms. Johnson asked whether such a requirement is needed in rule.

*Subsequent Action: DEQ agrees that it is in the interest of all parties for DEQ to have the best available information before it initiates formal enforcement action. DEQ will make sure staff understand that they should request any needed information in the Warning Letters or Pre-enforcement Actions, and make sure they have and consider that information if needed for a determination about formal enforcement. However, DEQ believes this issue is more related to internal DEQ work-flow and need not be in rule and that delaying enforcement may not be reasonable in all cases.*

**340-012-0041** – Committee members suggest for consistency that the rules capitalize “Field Penalty.” Ms. Root agreed to make those changes.

**340-012-0045** – Dr. Carlough indicated that the changes to this rule were intended to reduce redundancy because much of that text was repeated in later rules. Mr. Rich stated that eliminating the reference to the general discretion to settle violations favors using the penalty matrix in every case. The committee discussed that deletion but no recommendations for change were made. Mr. Rich suggested he would think about the issue and perhaps propose a replacement for the stricken paragraph 3.

**340-012-0054** – Mr. Haagensen suggested that using the term “complete” for the Class II violations of “failing to submit a *complete* permit application or permit renewal application” and for failing to provide a timely, accurate, or *complete* notification of an asbestos abatement project” may over-emphasize the importance of very small defects in the documents. Mr. Rich agreed. Dr. Carlough explained that DEQ typically tries to encourage the correction of small defects before enforcement. He said that this change to these classifications was to capture significant defects in the documents. The committee discussed modifying the term to “substantially complete” but also noted how the phrase would create a burden for DEQ to prove what is “substantial.”

*Subsequent Decision: DEQ recommends inserting the term “complete” but recognizes that minor defects should not lead to immediate enforcement. While use of the term “substantially” does reflect DEQ’s perspective that the violation should be Class II when the defect is more than minor, it creates an unnecessary burden for DEQ at hearing.*

**340-012-0055** – Dr. Carlough explained that the classification for “failing to substantially implement a stormwater plan in accordance with an NPDES permit” was currently under review and discussion within DEQ. He asked that the committee send their comments regarding this classification to DEQ rather than discuss during the meeting.

*Subsequent Action: DEQ is recommending that classification read: “failing to substantially implement a stormwater plan in accordance with an NPDES permit.”*

**340-012-0097** – Mr. Haagensen asked about the addition of paragraph “(j) Failing to have a closed, direct-coupled delivery for perchloroethylene by a dry cleaning operator” because the operator is not responsible for the delivery and relies on the delivery truck to do it right. Dr. Carlough mentioned that, if the question is about fairness of penalty, the penalty matrices may distinguish between larger delivery business and smaller drycleaner businesses.

*Subsequent Decision: DEQ staff overseeing the drycleaner program explain that: (1) when a delivery is made, it is the responsibility of both entities to have operational direct-coupling equipment and (2) it is possible for an operator to add PERC without having it delivered by another entity. Therefore, DEQ is recommending the originally proposed classification be retained.*

**340-012-0130 (magnitudes)** – Dr. Carlough briefly described that magnitude is intended to represent the significance of the actual environmental effects or threats of the particular violation, that is, the specifics of a case rather than the hypothetical effects which are considered by the classifications. He reviewed with the committee the different types of magnitudes.

Mr. Rich indicated that, in his opinion, the changes are going in the wrong direction because they seem to eliminate the ability of a respondent to challenge DEQ’s findings on magnitude. He explained, if a respondent has information that a violation had a de minimis effect, DEQ should consider that information. Selected magnitudes sometimes are based on factors not related to actual impact and DEQ should not foreclose argument about whether it actually had a minor effect. To do otherwise would be to base the magnitude on the hypothetical rather than the actual effect, which duplicates the classification.

Mr. Haagensen agreed, explaining that similar violations can have very different actual or threatened effects. He suggested that the word “opportunity” in paragraph 2 be retained to show that a respondent may challenge the DEQ finding. He also suggested a middle-ground approach, giving the respondent the opportunity *and* the burden, which would allow the respondent to challenge the DEQ’s finding on a selected magnitude with one of the “default” magnitudes in 340-012-0130 (3 or 4) if the respondent can show that it is more probable than the magnitude alleged under OAR 340-012-0130 and 340-012-0135.

The committee discussed the rule at great length. Mr. Linder stated that it is expensive to argue about magnitude determinations when all parties agree the application of the selected magnitude doesn’t equitably fit the circumstances. He agreed that any tool that would help get to a better solution should be considered. Mr. Hough stated that the agencies could consider alternative lower magnitudes in settlement so this change was not necessary. Ms. Johnson expressed concern that the change would undermine the selected magnitudes by making them less certain and would increase DEQ transaction costs of enforcement.

*Subsequent Action: DEQ recommends adopting the approach suggested by Mr. Haagensen, in which the person against whom the violation is alleged has the opportunity and the burden to prove that a magnitude under paragraph (1), (3) or (4) of this rule is more probable than the alleged magnitude, regardless of whether the magnitude is alleged under OAR 340-012-0130 or 340-012-0135.*

**340-012-0135 (selected magnitudes)** – Mr. Hough asked about the change proposed at 340-012-0135(1)(f), noting that it appeared to allow more opportunity for DEQ to pick a lower magnitude. Ms. Root explained that some asbestos paperwork violations (*e.g*., late notifications) don’t relate well to the selected magnitudes because the amount of asbestos isn’t really relevant to the harm if the actual asbestos abatement project was done correctly. DEQ was attempting to separate violations that would likely have a potential human health threat where the amount of asbestos would be more relevant in determining magnitude. Mr. Rich suggested that perhaps this rule should apply to all magnitudes. The committee discussed the tradeoffs in having firmly set selected magnitudes while giving DEQ discretion in application. Mr. Rich pointed out that the final clause of 340-012-0135(5) should be deleted for consistency. DEQ agreed that this was an inadvertent error which should be corrected.

**340-12-0140** – The committee reviewed the proposed changes to the matrix, which were based on the suggestions from the first advisory committee meeting in November 2012. The highest matrix was expanded to a maximum base penalty of $12,000. This is a $4,000 increase for the top step of the highest matrix. The second highest matrix was increased from $6,000 to $8,000, a $2,000 increase. The third highest matrix was increased from $2,500 to $3,000, a $500 increase. The lowest matrix was not changed, as recommended by the advisory committee in its November meeting.

Ms. Johnson stated that she is generally in agreement but thought the increases are too conservative. Mr. Linder thought the changes were reasonable and that the Association of Clean Water Agencies, which he represents on the committee, would not be outraged by them. Mr. Misel agreed the penalties should be increased, especially for bad actors. Mr. Criblez suggested that the upper bounds of the base penalty, $12,000, is appropriate, but also thinks the mitigating and aggravating factors should be important to account for circumstances. Mr. Haagensen stated his opinion that the statutory change in the maximum penalty should lead to penalty increases, but he believes DEQ’s current enforcement program works and therefore there is no reason to concurrently increase the factors. Mr. Hough suggested that DEQ consider increasing the multiplier from 0.1 to 0.2 or 0.3, but later agreed with others that this change would not produce the desired results. Mr. Haagensen suggested that the $3,000 matrix apply to hazardous waste generators who generate less than 220 pounds of hazardous waste per month “during the month of violation,” and suggested minor changes in the dollar values of the new Class III penalties based on mathematical proportionality with the current Class III penalty amounts.

*Subsequent Action: DEQ agrees with Mr. Haagensen and will change the language for the hazardous waste generators as recommended.* *DEQ will also adjust the Class III violation in the proposed $8,000 matrix from $750 to $700 and the Class III violation in the proposed $3,000 matrix from $300 to $250.*

**340-012-0145 (Penalty Factors) –** Ms. Root noted that the addition to the “O” factor is a clarification mostly related to some air and water violations that might be repeated on one day. She explained that the change was to correct wording that was unintentionally left out in a previous Division 12 update. The committee discussed how the statute should be interpreted and how the rule change relates to the statute. Mr. Haagensen suggested phrasing the rule to say that a “violation can be repeated *independently* on the same day . . .” to discourage citing multiple violations that result from the same cause. Ms. Johnson agreed that the word “independently” should be added back. DEQ agreed to make that change.

Regarding the “M” mental state factor, the committee liked the changes. Ms. Johnson suggested that it is important that the levels of proof increase with the higher levels of mental state and agreed with the changes designed to separate bare constructive knowledge from negligence. Mr. Haagensen and Mr. Rich also agreed with that change and both suggested that the constructive knowledge should be based on what the person should have reasonably known. Mr. Haagensen suggested wording: “2 if the respondent had constructive knowledge “reasonably should have known” of the requirement. Mr. Rich asked about the changes related to when the respondent acted or failed to act intentionally. He said he thought that the “intentional” mental state had been misused previously and had been lumped in with reckless which should be a higher mental state. Dr. Carlough explained that the current proposal is to have reckless and intentional be equivalent but to clarify that intentional means a conscious act with actual knowledge of the requirement.

*Subsequent Action: DEQ added the phrase “reasonably should have known” as recommended.*

Mr. Hough pointed out a phrase that was incorrectly repeated and should be deleted under the “C” factor. DEQ noted the error and will correct. Mr. Rich suggested the expansion of the “C” factor is a positive change that helps ensure compliance and rewards extra efforts. The committee seemed to largely agree.

**340-012-0150 –** Dr. Carlough noted that a lot of text had been removed to eliminate confusion. Mr. Rich asked if the section now required the use of the EPA BEN model because the current rule makes application of the model optional unless requested by a respondent. Dr. Carlough stated “yes, the proposed rule would require BEN to be used in situations where economic benefit is assessed.”

**340-012-0155** – The committee reviewed the proposal to increase penalties under paragraph (1) from a maximum of $100,000 to the new statutory maximum of $250,000. The committee then discussed the new penalties for negligent or intentional spills of oil or hazardous material. Mr. Rich pointed out that DEQ is again using the term “intentional” which is used in the authorizing statute. Dr. Carlough agreed and explained the purpose of the changes and additions. The committee discussed negligent and reckless and how penalties were determined using the multipliers proposed. Ms. Johnson suggested that the rules be clarified using the term “adjusted base penalty” rather new base penalty. DEQ agrees and will use “adjusted base penalty.”

Dr. Carlough noted that there was a mitigation factor for spills if the person had taken efforts in advance to prevent the spill. Mr. Haagensen asked whether the credit should be given if the person meets rather than exceeds requirements. Mr. Rich stated the goal to encourage compliance and even beyond compliance is a good one and recommended increasing the mitigation to 20%. The committee discussed whether just meeting requirements deserves special credit. Dr. Carlough stated that this issue was also discussed by the Spill Penalty Advisory Committee which did not generally agree on that approach. He also said that DEQ considered bare compliance a requirement and the proposed reduction in penalty was to encourage those who go above and beyond compliance requirements.

*Subsequent Action: DEQ recommends not increasing the percentage reduction and applying the mitigation only for steps taken in addition to that required by law.*

**340-012-0170 –** Dr. Carlough mentioned one change to the existing rules on expedited enforcement. Currently acceptance of the offer must be made by both signing the offer and by payment. Respondents sometimes forget to sign the document but send in payment. This creates additional work for DEQ in trying to re-contact the respondent to determine whether acceptance of the offer was intended, especially if the offer has expired. The proposed change is elimination of the required signature so that payment itself is the acceptance of the offer.

**STATEMENT OF FISCAL AND ECONOMIC IMPACT–** Ms. Root passed out the Statement of Fiscal and Economical Impact that DEQ is required to provide to the committee. She asked that anyone having comments on the statement, please send those to her. At this point, DEQ plans to have the revision finalized by July.

Meeting adjourned at 1:07 p.m.

*Subsequent Action:-Ms. Root sent an email to committee members on April 9, 2013, reminding them to submit comments on the Statement of Fiscal and Economic Impact (email attachment) to her by April 12, 2013. DEQ received two comments on the statement. Paul Koprowski of EPA stated the document was “pretty straightforward” and that he had no further comments. Michael O’Connor, owner of Continental Cleaners stated, “The fiscal impact portion is fine.” No other committee members provided comments on the document.*

**ADDITIONAL RULE COMMENTS:**

Michael O’Connor (Continental Cleaners, small business owner) was not able to attend the meeting but submitted a written comment suggesting that DEQ create a reference page for acronyms and definitions.

*DEQ agrees that we should be clear in our communication with others outside our agency to ensure that acronyms and definitions are clearly understood. Acronyms and definitions about enforcement processes are presented in the currently proposed definition section. However, the classification section does include some acronyms and terms that are not defined in Division 12. We do not recommend adding those definitions to Division 12 because (1) they are defined in other program rules, (2) it would significantly expand the size of the Division 12 rules and (3) as a general rulemaking guideline, it is preferable to not create multiple definitions for the same term as future rulemaking changes cause confusion.*

Mr. O’Connor suggested that DEQ include a measure in ounces to supplement the OAR 340-012-0097(1)(c) classification for “failing to report a release outside of a containment system of more than one pound of dry cleaning solvent released in a 24-hour period.”

*DEQ agrees that the suggestion would be helpful for users, but because different solvents have very different densities, it wouldn’t make sense to specify the volume equivalent for all the possible solvents. DEQ suggests the following language as an interpretation aid for the most important solvent: “Failing to report a release outside of a containment system of more than one pound of dry cleaning solvent (approximately one cup if perchloroethylene) released in a 24-hour period.” (emphasis added)*

Paul Koprowski (US Environmental Protection Agency) was not able to attend the meeting but submitted a comment that the definition for “formal enforcement action” includes” Penalty Demand Notice” (but the definition for “Penalty Demand Notice” was stricken from the section), and the term “Notices of Violation” (although that term is no longer used)*.*

*Penalty Demand Notice has now been changed to “Final Order and Notice of Stipulated Penalty Demand” to reflect the current name of the document. We note this change was not made in the definition of formal enforcement action and will change accordingly. DEQ will also remove “Notices of Violation” from the definition of formal enforcement action.*

Mr. Koprowski requested that DEQ amend the definition of Pre-enforcement Notice by adding the word “informal” before “written notice.”

*Subsequent action: DEQ proposes making that change to the definitions of both Pre-enforcement Notice and Warning Letter.*

Mr. Linder was present at the meeting and later forwarded a comment from a member of the Association of Clean Water Agencies (ACWA), explaining that ACWA may want to comment on what constitutes an “extreme hazard” for the enhanced penalties for violations that “pose an extreme hazard to public health or cause extensive environmental damage,” pursuant to OAR 340-012-0155.

*The term is established by ORS 468.996 and has not been defined in either the statutes or the rules since 1991 when the statute was first adopted. DEQ believes that the term indicates an extraordinarily high standard for the amount of hazard. Ms. Root and Dr. Carlough only recall two cases in the last 20 years in which a penalty for “extreme hazard” was sought.*