

From: [CARLOUGH Les](#)
To: [WESTBROOK Esther](#); [ROOT Jenny](#)
Cc: [FELDON Leah](#); [ELWORTH Susan](#)
Subject: RE: Div. 12 Rulemaking: response to comment on derelict vessels
Date: Monday, September 30, 2013 7:41:13 AM

Thanks Esther, Nice work.

Jenny -- This should go in the rulemaking file. I'll add much of this to the Response to Comments in the Staff Report.

From: WESTBROOK Esther
Sent: Friday, September 27, 2013 5:16 PM
To: CARLOUGH Les; ROOT Jenny
Cc: SMITH Scott
Subject: Div. 12 Rulemaking: response to comment on derelict vessels

Les and Jenny,

On September 20, 2013, NEDC and Columbia Riverkeeper (Riverkeeper) submitted joint comments on DEQ's proposed revisions to OAR Chapter 340, Division 12. Riverkeeper made the following comment about the proposed language in OAR 340-012-0140(3)(a)(K):

1. Derelict commercial vessels.

Or. Admin. R. 340-012-0140 defines which actors or activities are covered under each of the three penalty matrices. Riverkeeper generally supports DEQ's proposed rule changes at Or. Admin. R. 340-012-0140(2)(a)(N), (3)(a)(K), and (4)(a)(P) that set forth the penalty matrices applicable to oil and hazardous materials spills based on the activity that the violator was engaging in at the time of the spill. However, Riverkeeper believes that the language of proposed Or. Admin. R. 340-012-0140(3)(a)(K) could present some ambiguity about which penalty matrix applies to spills from derelict vessels.

Proposed Or. Admin. R. 340-012-0140(3)(a)(K), which designates violations subject to the proposed \$8,000 penalty matrix, applies to spills "occurring *during* a commercial activity." (emphasis added). Riverkeeper supports DEQ's intent to reach commercial operators, but fears that this language could allow commercial owners of abandoned vessels to argue for a lower penalty matrix on the basis that a spill occurring after the vessel was abandoned did not occur 'during' a commercial activity.

Derelict vessels are serious problem, especially in the Columbia River. The Washington Department of Ecology's recent ordeal with the derelict barge Davy Crocket is a fairly extreme example, but real nonetheless and highlights the issue of spills from abandoned vessels as well as the need for adequate enforcement mechanisms. Riverkeeper requests that DEQ clarify the proposed changes to Or. Admin. R. 340-012-0140 to define the penalties applicable to spills from derelict commercial vessels.

After reviewing the comments, Les and I agreed that we should clarify this rule to include derelict vessels for the reasons articulated by Riverkeeper. Today I met with Scott Smith, who works in DEQ's Emergency Response Section and deals with derelict vessels as part of his duties. We attempted to craft language to include derelict "commercial" vessels in OAR 340-012-0140(3)(a)(K), but we had trouble using the term "commercial" in this context because it created ambiguity about

which vessels or activities would be included and which would be excluded. For example, a large military vessel likely would be excluded under this definition because it was not used in commerce, although it might present an imminent environmental hazard. Similarly, if a boat has been abandoned it may be difficult to establish that it is a “commercial” vessel since it is not currently being used for a commercial purpose. The owner (if known) may argue he owns it for recreational purposes. Scott suggested that we use a distinction based on size to include larger vessels that pose more of an environmental threat and exclude smaller vessels that pose less threat and are more likely to be personal or recreational boats.

We called Rachel Bullene at the Oregon State Marine Board to get her opinion. Scott and Rachel both worked on Oregon’s Derelict Vessel Task Force. The Task Force focused its efforts on vessels 35 feet or greater in length which are not moored in private marinas, and any vessel that has ever been in commercial service. We discussed DEQ’s objectives and concerns related to crafting rule language to include derelict vessels. Rachel also recommended that we use a size distinction in the rule language. She reviewed her data and after some discussion we determined that a length of 35 feet was an appropriate size distinction for several reasons. First, boats that are 35 feet and under can be hauled out of the water and pulled with a regular boat trailer, therefore it is easier for DEQ or other agencies to conduct a cleanup if necessary. Also, boats 35 feet and under are more likely made of wood or fiberglass, as opposed to metal hulled boats. One of the activities that leads to releases of oil and hazardous materials is scrapping, which is focused on metal boats. We also considered that small boats 35 feet and under typically do not carry very much fuel, and are more likely to be used for personal or recreational purposes.

Based on these considerations, I recommend that we edit the proposed language in OAR 340-012-0140(3)(a)(K) as follows:

Any violation of an oil and hazardous material spill and release statute, rule, or related order committed by a person other than a person listed in OAR 340-012-0140(2)(a)(N) occurring during a commercial activity or involving a derelict vessel over 35 feet in length.

With this change, spills violations involving derelict vessels over 35 feet will be on the new \$8,000 matrix. Spills violations involving derelict vessels 35 feet or smaller will be on the new \$3,000 matrix according to OAR 340-012-0140(3)(a)(P), which applies to “Any violation of an oil and hazardous material spill and release statute, rule, or related order committed by a person not listed under another matrix. However, for the reasons discussed above it is not likely that DEQ will find many spills violations involving derelict vessels of that size.

Please let me know if you have any questions or would like to discuss this further.

Esther L. Westbrook, J.D.

Environmental Law Specialist

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