

From: [Knudsen Larry](#)
To: [CARLOUGH Les](#)
Cc: [ROOT Jenny](#)
Subject: RE: Div 11 and 12 Rulemaking Review
Date: Friday, July 19, 2013 4:44:57 PM
Attachments: [JUSTICE-#4437444-v1-LK comments on div 11 and div 12 rules.DOCX](#)

Les,

Thanks for the opportunity to comment on the rulemaking documents. I have included a couple of general comments below and few additional review comments or questions are embedded in the attached redline version of the document. These are mostly very minor in nature. In a few cases, I suggested edits to the text and I tried to highlight those in yellow so they would be easier to find.

Notice. I think there is a significant risk that a reviewing court would find the fiscal impact statement inadequate if someone chooses to challenge the rule on procedural grounds. ORS 183.335(2)(b)(E) requires the agency to estimate the “economic impact” of the new rule on government and the public and business. This estimate must include “cost of compliance” but the fiscal impact statement is not limited to the cost of compliance issue. As I read your notice, it concludes that there is no economic impact because underlying regulations and the cost of complying with those regulations do not change. That’s all well and true, but it seems unrealistic to me to assume that none of the groups at issue will be paying more penalties under the revised rules. If there will be more penalties collected, then there will be a real fiscal impact. To be safe, you should consider preparing some gross estimates based on the historic levels of penalties and percentage of increases. The courts will not require you to produce new data to prepare the report but they will expect you to apply existing data to the picture.

I’d also note that we probably need to give these types of procedural issues more thought going forward. Historically, the courts have awarded only costs and not attorney’s fees in cases involving procedural challenges to rules. Recently, however, the Court of Appeals awarded \$49,000 in attorney’s fees against ODA based on a faulty discussion of substantial public need supporting temporary rules. The defect was purely procedural.

Rule Effective Date. Do you know when the rule is going to the Commission? Assuming it is in December do you intend to file with the Secretary of State before the end of the month? I ask because LC is becoming very sticky on filing issues and the law is not as clear as it should be with respect to delayed effective dates. As you probably know the statutes says a rule becomes effective when filed unless the rule specifies a later effective date. I have always assumed you could do a blanket effective date like you have done with 340-012-0027 (and DEQ and other agencies have done it this way before.). Technically, however, the delayed effective date is not specified in each rule. The SOS rules are more liberal 166-500-0010(7), but I don’t think LC would feel bound by them.

If the rules are going to be adopted in December and filed at or near the beginning of the new year, I should consider repealing 0027 and just go with the SOS filing date. However, if you need to adopt the rule revisions earlier and want to give the public a period of advance warning before the

come into effect, then you should go with the rule as you have drafted it.

Larry Knudsen
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From: CARLOUGH Les [mailto:CARLOUGH.Les@deq.state.or.us]
Sent: Monday, July 15, 2013 9:10 AM
To: Knudsen Larry; GARRAHAN Paul
Cc: ROOT Jenny
Subject: Div 11 and 12 Rulemaking Review
Importance: High

Larry, here are the Division 11 and 12 rulemaking documents for review. I think you said that you and Paul would decide who would review. Give me a call with any questions or if you need more information. Please copy both Jenny and I on your response as we are tag-teaming this over the next couple weeks. Thanks.

Les 503-229-5422

From: ROOT Jenny
Sent: Friday, July 12, 2013 4:30 PM
To: CARLOUGH Les
Subject: FW: Divs. 11 and 12 Rulemaking Review
Importance: High

Les,

Stephanie has completed her review and I believe we can now send the Notice of Rulemaking packet on to DOJ. Attached are the current documents (since I don't think DOJ has access to our SharePoint). I'm sending these to you because I don't know who you determined was the appropriate person at DOJ to review them. Or you can tell me, and I'll forward on.

From: CALDERA Stephanie
Sent: Friday, July 12, 2013 1:55 PM
To: ROOT Jenny
Subject: RE: Divs. 11 and 12 Rulemaking Review
Importance: High

Hi Jenny,

I have reviewed for my basic edits and saved to the directories below.

Thanks!
- Stephanie

From: ROOT Jenny

Sent: Friday, July 05, 2013 4:58 PM
To: CALDERA Stephanie
Subject: Divs. 11 and 12 Rulemaking Review

Hi Stephanie,

As we discussed yesterday, the Notice, Invitation to Comment and rules are ready for your [review](#). I believe I've addressed Maggie's concerns and incorporated all of her suggested edits. I've also added a narrative to SharePoint of how OCE involved the programs in this rulemaking effort. It's located [here](#). Feel free to move it if you feel there is a more suitable place for it. One note- I'm waiting to receive the comment email address from Mary-Frances, so you'll still see a highlight from Maggie on the Invitation to Comment document.

We'd like to be able to send this to DOJ for review by end of next week, if possible, and on to the EMT and others to "preview" shortly thereafter. However, I do recall you saying that next week is very busy for you. So, if you could review at your earliest convenience, that would be great! Again, thanks so much for all of your help!

Jenny Root
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Oregon Dept. of Environmental Quality
503-229-5874

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