

From: [Koprowski, Paul](#)
To: [ROOT Jenny](#)
Cc: [Downey, Scott](#); [Kelly, Christine](#); [Vergeront, Julie](#)
Subject: EPA comments on draft enforcement rulemaking
Date: Wednesday, June 26, 2013 1:55:45 PM

Hi Jenny,

Thanks for sending Julie the information she needed to complete her review of the draft rules. Julie provided the following comments:

“We have completed our review of the proposed changes to Division 12 based on EPA’s criterion for authorized Clean Air Act programs. Region 10 staff involved with the EPA waste and water programs are currently reviewing the proposed changes to Division `12 that affect those specific EPA authorized programs and will provide you separately with any additional comments they have.

As we have previously stated, we have relied on the provisions of OAR 340-012-0160(3), which gives ODEQ the discretion to deviate from the penalty matrices of Division 12 and assess penalties of up to \$10,000 per day (proposed to be \$25,000) per violation based on the facts and circumstances of the individual case, in finding that Division 12 is consistent with Clean Air Act requirements for authorized programs. We have two comments for your consideration on the current version of the proposed changes to Division 12:

1. OAR 340-12-0150(1): ODEQ proposes to make use of EPA’s BEN model mandatory in all cases (changing the use of BEN from permissive to mandatory). Note that, based on EPA’s experience, there are situations where the BEN model does not result in capturing economic benefit, for example, where there are no delayed expenditures, but the violation enabled the violator to capture additional market share. In such cases, EPA would consider whether to base economic benefit on unlawful profits.
2. OAR 340-012-0155 (2)(e): Under this proposed provision, penalties for violation of field burning requirements would be subject to a minimum penalty of \$20 per acre burned and a maximum penalty of \$40 per acre burned in lieu of the daily maximum penalties in OAR 340-012-0160(4). The statutory authority for this provision, ORS 468.140(6), however, provides that the \$20 and \$40 per acre burned minimums and maximums are “in addition to any other penalty provide by law” and also apply only in the case of field burning that is caused intentionally or negligently. Thus, the proposed regulatory language appears to be inconsistent with the authorizing statute. “

As Julie stated above the water and RCRA programs are also taking a look and may provide comments at a later date. I’ll be sure to check back with our enforcement group to see if there are any further comments for you.

Paul

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