

From: [ROOT Jenny](#)
To: [Paul Koprowski](#); ["Vergeront, Julie"](#)
Cc: [CURTIS Andrea](#)
Subject: Division 12 Rulemaking - SIP Update/Revision
Date: Thursday, August 01, 2013 2:03:04 PM
Attachments: [INVITATION.TO.COMMENT.docx](#)
[NOTICE.docx](#)
[RULES.REDLINE.docx](#)

Hi Paul and Julie:

Per Oregon DEQ's Performance and Partnership Agreement with EPA to submit notice of SIP rulemaking materials within 45 days of a public hearing, attached are Oregon DEQ's proposed revisions to our

Division 12 civil penalty rules, along with the Notice of Proposed Rulemaking and Invitation to Comment.

You'll notice that very little in Division 12 has changed since you reviewed and provided comments in June. However, I did want to address the two Items you commented on:

Economic benefit determinations using BEN - we only use the BEN model to calculate delayed or avoided costs for compliance. At this time, we do not generally attempt to determine market share or illegal profits as we simply don't have the resources or financial expertise to do so. We do, however, have the option of not using BEN when the costs are indeterminate or de minimis.

Field Burning Penalties- Additional penalty per acre burned. You are correct that this rule was drafted in error. We were trying to capture a slew of unusual "in lieu of" and "in addition to" penalties in various statutes, of which, this is one. However, after further internal discussions, we have decided not to include this penalty in Division 12 (current Division 12 does not include it). During our last rulemaking in 2006, DEQ decided to remove all references to field burning in Division 12 since we no longer administer the field burning program. In 2001, the Oregon legislature directed DEQ to enter into an Memorandum of Understanding with the Oregon Department of Agriculture to administer and enforce Oregon's field burning program. (ORS 468A.585). We are concerned that adding this rule back to Division 12 may create confusion and concern among agricultural and legislative stakeholders that DEQ is re-claiming field burning enforcement.

Please let me know if you have any additional questions or concerns!

Jenny Root
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From: Koprowski, Paul [mailto:Koprowski.Paul@epa.gov]
Sent: Wednesday, June 26, 2013 1:55 PM
To: ROOT Jenny
Cc: Downey, Scott; Kelly, Christine; Vergeront, Julie

Subject: EPA comments on draft enforcement rulemaking

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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