Oregon Department of Environmental Quality

Dec. 11-12, 2013

Oregon Environmental Quality Commission meeting
Rulemaking, Action item: D

Updates to OAR Chapter 340, Divisions 011, 012 and 200

DEQ recommendation to EQC

DEQ recommends that the Oregon Environmental Quality Commission:

Adopt the proposed PERMANENT rules in Attachment A as part of chapter 340 of the Oregon Administrative Rules. Approve incorporating these rule amendments into the Oregon Clean Air Act State Implementation Plan under OAR 340-200-0040.

Overview

Short summary

DEQ proposes the following changes to chapter 340 of the Oregon Administrative Rules.

- Division 011 amendments would:
  - Align with the Oregon Attorney General Model Rules under OAR 340-003-0501 through 0690. The Model Rules that apply to Environmental Quality Commission proceedings became effective Jan. 31, 2012.
  - Address procedures for filing and serving documents in contested cases and other general contested case proceedings.
  - Establish a new fee for onsite septic system program public records requests. This would allow DEQ to recover the costs of fulfilling such requests.
  - Repeal OAR 340-011-0605 that became obsolete in 2007 with the passage of Measure 49. Measure 49 substantially reduced the impact of Measure 37 and the required director's review.
  - Make minor housekeeping changes, including clarification of the lay representative rule at OAR 340-011-0510(1).

- Division 012 amendments would implement 2009 Oregon legislation that increased DEQ's civil penalty statutory maximums, many last updated in 1973. Other proposed changes include aligning violation classification and magnitudes with DEQ program priorities, providing greater mitigating credit for correcting violations, and housekeeping that includes eliminating duplicative text.

- Division 200 amendments would update the Oregon Clean Air Act State Implementation Plan. Section 110 of the Clean Air Act, 42 U.S.C. §7410 requires state and local air pollution control agencies to adopt federally-approved control strategies to minimize air pollution. The resulting body of regulations is a State Implementation Plan or SIP. By incorporating updated civil penalties and violations, these proposed rules would be a revision to Oregon's SIP. DEQ must submit rule changes to EPA and EPA must approve the rules as meeting the requirements of the Clean Air Act. If the Oregon Environmental Quality Commission amends the proposed rule, DEQ will submit SIP revisions to EPA for approval.

Key Proposed Amendments

If approved, this proposal would:

Civil penalty matrices (OAR 340-012-0140)

- Increase the top base penalty in the current $8,000 penalty matrix to $12,000
- Increase the top base penalty in the current $6,000 penalty matrix to $8,000
- Increase the top base penalty in the current $2,500 penalty matrix to $3,000
- No changes to the current $1,000 penalty matrix

Change to factors in the civil penalty formula (OAR 340-012-0145) by:

- Increasing credit for the "C" factor to apply mitigating credit for a violator's efforts to correct violations
- Expanding the use of the "M" factor to assign a broader range of penalty aggravation when considering the mental state of the violator

Increase additional or alternate penalties for violations that pose an extreme hazard to public health or cause extensive environmental damage (OAR 340-012-0155)

Base penalties in this category would increase from $50,000 to $100,000 to a new range of $100,000 to $200,000 depending on whether violations are caused intentionally, recklessly or flagrantly.

Increase administrative penalty maximums to $100,000 for certain spill violations of oil or hazardous materials

Penalties for intentionally or negligently spilling hazardous materials into waters of the state, or intentionally or negligently failing to clean up spills of oil or hazardous materials would increase from a maximum of $10,000 per day to a maximum of $100,000 per day. Penalties for intentionally or negligently spilling oil into waters of the state would increase from a maximum of $20,000 per day to a maximum of $100,000 per day. Final penalties would be determined according to a new formula and additional factors not in the current rule.

Establish a base fee for onsite septic system program public records requests

Currently, DEQ may only charge for public records requests if they require more than 15 minutes of staff time. DEQ estimates that public records requests in the onsite septic system program require 50 to 75 hours of staff time per month. Few requests exceed the 15-minute threshold; therefore, DEQ receives little revenue to cover the costs for this work. This amendment would allow DEQ to recover the costs for fulfilling these public records requests.

Regulated parties

The proposed changes do not impose any new requirements upon regulated entities. Division 011 includes rules that supplement the Oregon Attorney General Model Rule for administrative procedures. Division 011 applies to any person involved in a contested case proceeding in front of the Environmental Quality Commission. The rules outline the contested case hearings processes. Division 012 outlines the processes DEQ must follow in assessing penalties or issuing other formal enforcement actions. These rules do not contain any requirements for regulated entities.

Statement of need

1. **Division 011**

What problem is DEQ trying to solve?

Division 011 no longer aligns with the Oregon Attorney General Model Rules. The affected rules address procedures for filing and serving documents for contested cases and other general contested case proceedings. OAR 340-011-0009 incorporates the Model Rules.

The onsite septic system program does not receive revenue from records request fulfillment despite a significant amount of work done each month.

How would the proposed rule solve the problem?

Aligning Division 011 to the Oregon Attorney General Model Rules would eliminate confusion and provide clear direction to DEQ staff and the public for filing and service of documents and other contested case proceedings.

DEQ would be able to recover the costs for fulfilling public records requests in the onsite septic system program.

How will DEQ know the problem has been solved?

DEQ is required to use the Attorney General Model rules, and the Division 011 changes adopt those required rules. Adopting the changes should reduce possible confusion over having two sets of rules with different requirements.

The onsite septic system program tracks the time spent to fulfill public records requests and the revenue received for the various services that are provided. DEQ will be able to track the time and cost of the work and compare it to the revenue received from the new fee to determine if the costs are being covered.

2. **Division 012**

What problem is DEQ trying to solve?

Division 012 does not reflect DEQ's current civil penalty statutory maximums.

How would the proposed rule solve the problem?

The rules would implement the 2009 Senate Bill that increased civil penalty maximums.

How will DEQ know the problem has been solved?

Depending on the factual circumstances of each case, DEQ will use the new penalty rules that are likely to increase some penalties consistent with the new statutory maximums.

Request for other options

During the public comment period, DEQ requested input on whether to consider other options for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

Rules affected, authorities, supporting documents

Lead division	Program or activity
Office of the Director	Office of Compliance and Enforcement

OAR Chapter 340 action – Division 011, 012 and 200

Amend	340-011-0005, 340-011-0010, 340-011-0024, 340-011-0029, 340-011-0046, 340-011-0053, 340-011-0061, 340-011-0310, 340-011-0330, 340-011-0340, 340-011-0360, 340-011-0370, 340-011-0380, 340-011-0390, 340-011-0500, 340-011-0510, 340-011-0515, 340-011-0520, 340-011-0525, 340-011-0530, 340-011-0535, 340-011-0540, 340-011-0545, 340-011-0550, 340-011-0555, 340-011-0565, 340-011-0570, 340-011-0573, 340-011-0575, 340-011-0580, 340-011-0585, 340-012-0026, 340-012-0027, 340-012-0028, 340-012-0030, 340-012-0038, 340-012-0041, 340-012-0045, 340-012-0053, 340-012-0054, 340-012-0055, 340-012-0060, 340-012-0065, 340-012-0066, 340-012-0067, 340-012-0068, 340-012-0071, 340-012-0072, 340-012-0073, 340-012-0074, 340-012-0079, 340-012-0081, 340-012-0082, 340-012-0083, 340-012-0097, 340-012-0130, 340-012-0135, 340-012-0140, 340-012-0145, 340-012-0150, 340-012-0155, 340-012-0160, 340-012-0162, 340-012-0165, 340-012-0170 and 340-200-0040
Repeal	340-011-0605

Statutory authority

ORS 183.335, 183.341, 183.452, 192.410-505, 195.305, 454, 454.050, 454.625, 459.045, 459.376, 459.995, 459A.585, 459A.590, 465.280, 465.400-410, 466, 466.070-080, 466.625, 466.720, 466.746, 466.882, 466.858-994, 467, 467.030, 468.020, 468.065, 468.090-140, 468.996, 468A , 468A.025, 468A.045, 468A.327, 468B, 468B.015, 468B.035, 468B.350, and 783.620-992

Statutes implemented

ORS 183.025, 183.090, 183.335, 183.341, 183.390, 183.410, 183,413, 183.415, 183.425, 183.440, 183.450, 183.452, 183.457, 183.460, 183.464, 183.470, 183.480, 183.482, 183.484, 183.745, 183.090, 192.410-440, 192.501, 192.502, 197.352, 454, 454.635, 454.645, 459, 459.205, 459.376, 459.705-790, 459.992, 459.995, 459A.580-585, 459A.590, 459A.665, 459A.660, 459A.685, 465, 465.021, 465.210, 465.900, 465.992, 466, 466.210, 466.255, 466.265-270, 466.530, 466.635-680, 466.706-835, 466.858-895, 466.990-994, 467.050, 467.990, 468, 468.020, 468.035, 468.070, 468.090-140, 468.996, 468A, 468A.020, 468A.025, 468A.060, 468A.990, 468A.992, 468B, 468B.025, 468B.220, 468B.305, 468B.450, 783.620, and 783.992

Documents relied on for rulemaking ORS 183.335(2)(b)(C)

Document title	Document location
Oregon Attorney General Model Rules	Oregon Department of Justice website
Senate Bill 105A	Oregon State Legislature website
Oregon Revised Statutes	DEQ statutes webpage
Oregon Administrative Rules, Chapter 340 Divisions 011 and 012	DEQ administrative rules webpage
Water Quality Policy Option Package #120	DEQ's Governor's Balanced Budget 2013-15

Fee Analysis

Oregon Environmental Quality Commission approval of this rule proposal would establish new fees. EQC authority to act on the proposed fees is ORS 192.410 - ORS 192.505 and ORS 468.020.

Brief description of proposed fees

The proposed rules would establish a $7.50 base fee for onsite program public record request.

Reasons

The proposed fees would address 12 counties where DEQ operates the onsite program. DEQ maintains records in Warrenton, Coos Bay, Medford and Pendleton field offices. DEQ estimates it takes 50 to 75 hours of staff time per month to respond to public requests for septic system records. The proposed $7.50 base fee for record requests would help maintain staff support to provide these records. Currently, DEQ may only charge for public records if they require more than 15 minutes of staff time, but few requests exceed that timeframe.

Fee proposal alternatives considered

DEQ considered maintaining the status quo as an alternative to establishing a $7.50 base fee. The result would be reduced support staff to respond to onsite septic system public record requests.

Fee payer

The fee payer would be any member of the public seeking septic system records, including homeowners, pumpers, installers and realtors.

Affected party involvement in fee-setting process

The proposed fee went through the legislative process in 2012.

Summary of impacts

The impact of establishing this fee may reduce the number of records sought. It may be an incentive to find other sources of the records such as asking the septic system installer to provide the record.

Fee payer agreement with fee proposal

There was no opposition testimony to establishing the base fee presented during the legislative hearing.

Links to supporting documents for proposed fees

2013-2015 DEQ Agency Budget Request

How long will the proposed fee sustain the program?

The current fee proposal is expected to sustain the program for the 2013-2015 biennium.

Expected change in revenue (+/-)	+$8,370	0.003%
Min GF required by statue/rule to fund program	n/a	0%
Proposed fee allows General Fund replacement	n/a	0%
Expected effective date	01/02/2014	

Transactions and revenue

	Number of transactions	Number of Fee Payers	Impact on revenue (+/-)	Total revenue (+/-)
Current biennium	1,116	1,116	$8,370	$8,370
Next biennium	1,488	1,488	$11,160	$11,16 0

Statement of fiscal and economic impact ORS 183.335 (2)(b)(E)

Fiscal and Economic Impact

This proposal would not have an economic impact on businesses, individuals or government entities unless they violate Oregon's environmental regulations. There would be a minimal economic impact on individuals or entities that request onsite septic system public records.

The proposal would raise most penalties and entities penalized under these rules would likely experience an economic impact. The amount of impact would depend on the type of entity, the type of violation, and surrounding circumstances, as specified in OAR 340-012-0140.

Penalties:

- Would likely increase by 50 percent for the following entities:
  - The largest businesses, including business with a Tier 1 industrial National Pollutant Discharge Elimination System wastewater discharge permit, owner of more than ten underground storage tank facilities or a large-quantity generator of hazardous waste,
  - The largest municipalities, those with municipal sewage treatment facility with a flow of more than five million gallons per day, and
  - State agencies.
- Would likely increase by 25 percent to 33 percent for smaller businesses and smaller municipalities.
- Would not increase for individuals in the public and specified small businesses, including homeowner open burning, homeowner asbestos, homeowner onsite sewage, owner of one underground storage tank, owner of a heating oil tank and dry cleaning businesses.

Applying the maximum 50 percent increase to the 382 violations assessed penalties in 2011 and 2012 under the Division 12 matrices, the proposal would increase the average penalty from $4,250 to $6,375. Penalties that DEQ assesses outside the Division 12 assessment process, including expedited enforcement offer, field citation or mutual agreement and order, are lower than the penalties calculated under Division 12 and, if included, would significantly lower the above averages.

There would also be an economic impact to any entity penalized for an intentional, reckless or flagrant violation that results in or creates the imminent likelihood for an extreme hazard to the public health or that causes extensive damage to the environment. Amendment to OAR 340-012-0155(1)(a) would increase such penalties by 100 percent to a maximum of $200,000. DEQ assesses few of these penalties, and there were none in 2011 or 2012.

The proposal increase penalties to entities penalized for specified spill violations would increase the economic impact to these entities. The maximum penalty for negligent or intentional discharge of hazardous materials into waters of the state and the maximum penalty for negligent or intentional failure to clean up spills of oil or hazardous materials spilled into waters of the state would increase from $10,000 to $100,000. The maximum penalty for negligent or intentional discharge of oil into waters of the state would increase from $20,000 to $100,000. DEQ did not assess any penalties for these types of violations during 2011 or 2012.

There would be payment of a $7.50 base fee for onsite septic system program public records requests. This fee is the minimum amount that would be paid for each public records request. The total amount could exceed $7.50 if substantial support staff time is needed to fulfill the request or if there is a large number of documents that are being copied. Existing records request fees in Division 011 would apply in these cases, but would be rare for onsite septic system program public records requests.

Statement of Cost of Compliance

Impacts on public

There would be minimal fiscal or economic impact to the public in the form of payment of a $7.50 base fee for onsite septic system program public records requests. Prospective buyers typically request these records when looking for information about the property. These requests are at the will of the prospective buyer or their real estate agent. The other rule amendments do not impose regulatory requirements, obligations or restrictions on the public, individuals, government or businesses. The rules define DEQ's civil penalty process and determine DEQ's civil penalty calculations for violations of Oregon's environmental regulations.

Impact on other government entities other than DEQ

a. Local governments: In most cases, there would be no fiscal or economic impact. The rules do not impose regulatory requirements, obligations or restrictions upon local governments. The exception would be for a government entity that violates Oregon's environmental regulations where the proposed rules could result in a larger penalty depending on the specific facts of the case. If a local government is requesting onsite septic system program records, it might have to pay the $7.50 base fee.

b. State agencies: In most cases, there would be no fiscal or economic impact. The rules do not impose regulatory requirements, obligations or restrictions upon state agencies. The exception would be for a state agency that violates Oregon's environmental regulations where the proposed rules could result in a larger penalty depending on the specific facts of the case. If a state agency is requesting onsite septic system program records, it might have to pay the $7.50 base fee.

c. Impact on DEQ: The fiscal or economic impact to DEQ is unknown at this time for the majority of the proposed rule amendments, but there would likely be no fiscal or economic impact. There is a possibility of a slight increase in DEQ resources if increased penalty calculations result in a greater number of civil penalty appeals that proceed to a formal contested case hearing. There would be a positive fiscal impact on DEQ with the $7.50 base fee for onsite septic system program public records requests, as DEQ receives little compensation for the majority of these requests. DEQ would be better able to cover the costs associated with fulfilling these requests.

d. Impact on large businesses (all businesses that are not small businesses below):
In most cases, there would be no fiscal or economic impact. The rules do not impose regulatory requirements, obligations or restrictions. The exception would be for a business that violates Oregon's environmental regulations where the proposed rules could result in a larger penalty depending on the specific facts of the case. If a large business is requesting onsite septic system program records, it would pay the $7.50 base fee.

Impact on small businesses (those with 50 or fewer employees) ORS 183.336

In most cases, there would be no fiscal or economic impact. The rules do not impose regulatory requirements, obligations or restrictions. The exception would be for a small business that violates Oregon environmental regulations where the proposed rules could result in a larger penalty depending on the specific facts of the case. If a small business requests onsite septic system program records, it would pay the $7.50 base fee.

a) Estimated number of small businesses and types of businesses and industries with small businesses subject to proposed rule.	Every small business in Oregon subject to DEQ regulatory requirements could be subject to the proposed rules. However, these rules only affect small businesses assessed a penalty for violating Oregon environmental regulations or those that must file or serve documents for a contested case hearing.
b) Projected reporting, recordkeeping and other administrative activities, including costs of professional services, required for small businesses to comply with the proposed rule.	No additional activities are required to comply with the proposed rules.
c) Projected equipment, supplies, labor and increased administration required for small businesses to comply with the proposed rule.	No additional resources are required to comply with the proposed rules.
d) Describe how DEQ involved small businesses in developing this proposed rule.	DEQ included small business representatives on its advisory committee during the rulemaking process.

Document title	Document location
Oregon Revised Statutes	DEQ statutes webpage
Oregon Administrative Rules Chapter 340 Divisions 011, 012 and 200	DEQ administrative rules webpage

Advisory committee

DEQ appointed an advisory committee for Division 012 and considered the committee's recommendations on this fiscal and economic impact statement. In compliance with ORS 183.333, DEQ asked for the committee's recommendations on:

- Whether the proposed rules would have a fiscal impact,
- The extent of the impact, and
- Whether the proposed rules would have a significant impact on small businesses and complies with ORS 183.540.

The committee reviewed the fiscal impact statement and documented its recommendation in the approved minutes dated April 5, 2013.

The committee agreed with the fiscal impact statement and had no further comments or suggestions. In compliance with ORS 183.540, the committee considered how to reduce the economic impact on small business and determined that Division 012 already accounts for costs to small business by placing smaller, less sophisticated violators on lower penalty matrices. The Division 012 rules only apply to businesses and individuals that violate Oregon's environmental regulations and are subject to subsequent civil penalties. The rules impose no new regulatory obligations or fees.

DEQ did not appoint an advisory committee for Division 011. Proposed changes to this rule reflect changes to align with the current Oregon Attorney General Model Rules, and the Water Quality Policy Option Package #120 that was approved by the 2013 Oregon Legislature.

Housing cost

To comply with ORS 183.534, DEQ determined the proposed rules would have minimal effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached, single-family dwelling on that parcel. The rules impose no new regulatory obligations but do require payment of a $7.50 base fee if development of the property includes submittal of an onsite septic system program public records request.

Federal relationship

"It is the policy of this state that agencies shall seek to retain and promote the unique identity of Oregon by considering local conditions when an agency adopts policies and rules. However, since there are many federal laws and regulations that apply to activities that are also regulated by the state, it is also the policy of this state that agencies attempt to adopt rules that correspond with equivalent federal laws and rules..."

Relationship to federal requirements

DEQ determined this rule proposal is "in addition to federal requirements" as required under ORS 468A.327(1)(a) and OAR 340-011-0029(1)(a).

The proposed amendments to Division 011 implement changes to the Department of Justice's Oregon Attorney General Model Rules.

The proposed amendments to Division 012 implement the increased civil penalty maximums authorized by Senate Bill 105A and Oregon statutes, and define DEQ's civil penalty process and penalty calculations.

What alternatives did DEQ consider if any?

Division 011: DEQ did not consider other alternatives since the Division 011 rules must align with the Oregon Attorney General Model Rules, and because the onsite program is a fee-supported program with a fee for service design.

Division 012: DEQ developed the proposed amendments through advice from the rulemaking committees. During that process, many alternatives were considered regarding whether and how to implement the statutory penalty maximums increased by Senate Bill 105A (2009). Other alternatives considered include not modifying the penalties at all, modifying the base penalties in the penalty formula by different amounts, and changing penalty formula factors in different ways.

Land use

"It is the Commission's policy to coordinate the Department's programs, rules and actions that affect land use with local acknowledged plans to the fullest degree possible."

OAR 340-018-0010

Land-use considerations

To determine whether the proposed rules involve programs or actions that are considered a *land-use action*, DEQ considered:

- Statewide planning goals for specific references. Section III, subsection 2 of the DEQ State Agency Coordination Program document identifies the following statewide goal relating to DEQ's authority:

Goal	Title
5	Open Spaces, Scenic and Historic Areas, and Natural Resources
6	Air, Water and Land Resources Quality
11	Public Facilities and Services
16	Estuarial resources
19	Ocean Resources

- OAR 340-018-0030 for EQC rules on land-use coordination. Division 18 requires DEQ to determine whether proposed rules will significantly affect land use. If yes, how will DEQ:
  - Comply with statewide land-use goals, and
  - Ensure compatibility with acknowledged comprehensive plans, which DEQ most commonly achieves by requiring a Land Use Compatibility Statement.
- DEQ's mandate to protect public health and safety and the environment.
- Whether DEQ is the primary authority that is responsible for land-use programs or actions in the proposed rules.
- Present or future land uses identified in acknowledged comprehensive plans.

Determination

DEQ determined that the proposed rules listed under the Chapter 340 Action section above do not affect existing rules, programs or activities that are considered land-use programs and actions in OAR 340-018-0030 or in the DEQ State Agency Coordination Program.

Stakeholder and public involvement

Public hearings and comment

DEQ held one public hearing. The comment period closed Sept. 20, 2013, at 5 p.m. DEQ received nine public comments. The summary of comments and DEQ responses section below addresses each public comment. The commenter section below lists all people who provided comments on this proposal.

Advisory committees

DEQ convened two advisory committees for this rulemaking. One committee focused on implementation of the statutory penalty increases related to spills of oil or hazardous materials. The other advised DEQ on all the potential amendments to Division 012 including the recommendations from the spill advisory committee. DEQ did not convene an advisory committee for the Division 011 or 200 portions of this rulemaking.

The Spill Advisory Committee met Oct. 12, 2010, and Jan. 22, 2013, and also reviewed a final draft of the proposed rules. Members attending at least one of the meetings included:

- Jess Brown, Hazardous Materials Transportation Specialist, Oregon Department of Transportation
- Eliza Dozono, attorney, Miller Nash LLP, representing Western States Petroleum Association
- Brian Doherty, attorney, Miller Nash LLP, representing the Western States Petroleum Association
- Debra Dunn, President, Oregon Trucking Associations
- Jeff Fishel, Spill Enforcement Coordinator, Washington Department of Ecology
- Miles Johnson, attorney, Columbia Riverkeeper
- Tim Parker, owner, Northwest Green Products/BioBlend
- C. Kent Roberts, attorney, Schwabe, Williamson & Wyatt, representing the maritime industry
- Bob Salinger, Conservation Director, Audubon Society of Portland
- Kate Spaulding, Compliance Officer, Environmental Protection Agency
- Michael Titone, Executive Director in 2013, Columbia River Steamship Operators Association
- Captain Jim Townley, Executive Director in 2010, Columbia River Steamship Operators Association
- Richard Vincent, Vice President, Port of Portland
- Derek White, Emergency Management Coordinator, Columbia County (2010); Hydro Emergency Services Manager, PacifiCorp (2013).

The Division 12 Advisory Committee met Nov. 28, 2012, and April 5, 2013, and also reviewed a final draft of the proposed rules. Attendees included:

- Aubrey Baldwin, attorney, Earthrise Law Center
- Matthew Criblez, Environmental Compliance Manager, Portland Bureau of Environmental Services
- Don Haagensen, attorney, Cable Huston, Benedict, Haagensen & Lloyd LLP, representing Associated Oregon Industries

- Merlyn Hough, Agency Director, Lane Regional Air Protection Agency
- Phil Houk, Mayor, Pendleton
- Courtney Johnson, attorney, Crag Law Center
- Paul Koprowski, Air Program Coordinator, Oregon Operations, US Environmental Protection Agency
- Gerald P. Linder, attorney, Clean Water Services, representing Oregon Association of Clean Water Agencies,
- David Misel, representing Rejuvenation, Inc.
- Mike O'Connor, owner, Continental Cleaners
- Christopher Rich, attorney, Perkins Coie law firm

EQC prior involvement

DEQ shares general rulemaking information with EQC when adding a rulemaking to the DEQ Rulemaking Plan and monthly status reports. DEQ shared information about this rulemaking with the EQC in the Director's Report on June 20, 2013. At EQC's request, DEQ presented an informational item to the commission about the rulemaking Oct. 17, 2013. DEQ shared information about the 2013 legislative session that included Water Quality Policy Option Package #120 during the Dec. 7, 2012 EQC meeting. Rulemaking to implement Package #120 commenced after legislative approval on June 26, 2013. The $7.50 base fee for onsite septic system public records requests was included in Package #120.

Public notice

The Secretary of State published the Notice of Proposed Rulemaking with Hearing for this rulemaking in the September 2013 *Oregon Bulletin*. DEQ also:

- Posted notice on DEQ's webpage http://www.deq.state.or.us/regulations/proposedrules.htm Aug. 15, 2013.
- E-mailed notice Aug. 15, 2013 to:
  - Interested parties through GovDelivery
  - Interested parties on file with DEQ that are not on GovDelivery lists
  - The following key legislators required under ORS 183.335:
    - Jackie Dingfelder, Chair, Environment and Natural Resources Committee
    - Alan Olsen, Vice-Chair, Environment and Natural Resources Committee
    - Jules Bailey, Chair, Energy and Environment Committee
    - Deborah Boone, Vice-Chair, Energy and Environment Committee
    - Mark Johnson, Vice-Chair, Energy and Environment Committee
    - Chris Edwards, Co-Chair, Ways and Means, Subcommittee on Natural Resources
    - Ben Unger, Co-Chair, Ways and Means, Subcommittee on Natural Resources
  - Members of the advisory committee
- Hard copies of notices were posted through the U.S. Mail Aug. 15, 2013, to those interested parties for whom DEQ had no email address
- Emailed notice to the US. Environmental Protection Agency Aug. 1, 2013

- Published notice in The Oregonian Aug. 15, 2013

Presiding Officers' Record

At the beginning of the hearing, the presiding officer summarized procedures for the hearing including notification that DEQ was recording the hearing. The presiding officer asked that anyone wanting to present verbal comments to complete, sign and submit a registration form. The presiding officer adjourned the hearing 20 minutes after it was convened because no members of the public attended the hearing.

According to Oregon Administrative Rule 137-001-0030, the presiding officer summarized the content of the notice given under Oregon Revised Statute 183.335. Because there were no attendees at the hearing, there is no attendees list to add to DEQ's interested parties list for this rule or to the commenter section of this staff report.

Summary of comments and DEQ responses

The following table organizes the public comments received by the close of the public comment period into nine categories with cross references to the commenter number. DEQ's response follows the summary. Original comments are on file with DEQ.

1	**Comment**	Approval of the rulemaking process and general agreement with proposed rule changes. Commenters numbers: 1, 3 and 4 listed in the *Commenter* section below
	Response	DEQ appreciates the collegial atmosphere that the members of the advisory committees brought to the meetings and the thoughtful and objective discussions about how DEQ should implement the statutory penalty increases through the proposed rules.
2	**Comment**	The rules should not specify that "The EB [economic benefit] ***will*** be determined using the U.S. Environmental Protection Agency's BEN computer model" (*emphasis applied*) because there are circumstances where BEN does not capture economic benefit. In those cases, other tools should be used. Commenter number: 2 listed in the *Commenter* section below
	Response	The rule would not preclude alternative means of estimating economic benefit when appropriate. The term "will" indicates that DEQ intends to use BEN unless there is a situation in which it would be inappropriate. The rule does not specify that DEQ's intent is to use *only* BEN, so DEQ could use BEN for the avoided and delayed costs and use other calculations and experts to calculate indirect benefits like advantage-of-risk, competitive advantages or illegal profits. However, because those indirect benefits are speculative and difficult to estimate, DEQ would rarely, if ever, assess them. DEQ asserts that clarifying its intent to use BEN improves certainty in the penalty assessment and hearing process.
3	**Comment**	Proposed rule OAR 340-012-0160(4) states "Regardless of any other penalty amount listed in this division, the director has the discretion to increase the penalty

to $25,000 per violation per day of violation based upon the facts and circumstances of the individual case." EPA relies on that rule in finding that the penalty provisions in Division 12 are consistent with EPA requirements for authorized programs.

Commenter number: 2 listed in the *Commenter* section below

Response DEQ understands that retaining flexibility for the director to issue the maximum penalty in any given situation is important to EPA's determination that Oregon meets minimum requirements of the federally delegated programs. The only proposed changes to this rule are (i) to reflect that the current statutory maximum penalty is $25,000 and (ii) a renumbering of the paragraph.

4 **Comment** DEQ's penalty rules should adequately address potential spills of coal, liquefied natural gas and crude oil near the Columbia River.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response Oregon Senate Bill 105A (2009) increased the statutory penalty maximums for negligent or intentional spills of oil or hazardous materials into state waters and for negligent or intentional failures to clean up such spills. The new maximum penalty was designed to address larger, more-damaging spills, which could include the types of spills to which the commenters refer. Under the proposed penalty rules related to these spills, a penalty could be as much as $100,000 per violation per day, depending on a variety of factors and circumstances set forth in proposed rule OAR 340-012-0155(b). In addition, if the circumstances of the spill met the criteria set forth in proposed rule OAR 340-012-0155(1)(a), DEQ could assess a penalty of up to $250,000.

5 **Comment** Proposed OAR 340-012-0140(3)(a)(K) places spills "occurring during a commercial activity" in the $8,000 penalty matrix. The rule may be unclear that spills from derelict commercial vessels are also in that matrix because they might not occur "during" a commercial activity.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response DEQ agrees that spills from derelict commercial vessels should be in the $8,000 penalty matrix regardless of whether the spill occurred "during" a commercial activity. DEQ asserts the most appropriate way to address this concern is by amending the proposed classification to specifically include all derelict vessels over 35 feet in length, regardless of whether there is proof that the vessel is currently or was involved in a commercial activity. DEQ recommends the threshold for this category because derelict vessels greater than 35 feet in length:

(1) Are more likely to have been used for commercial purposes than for personal or recreational purposes;
(2) Are less easily hauled out of the water and cannot be pulled with a regular boat trailer, making cleanup more difficult;
(3) Are more likely made of metal than wood or fiberglass and more likely to be scrapped, which leads to releases of oil and hazardous materials;
(4) Carry more fuel than smaller boats; and

(5) Are the focus of the Oregon State Marine Board Derelict Vessel Task Force.

DEQ recommends the following redline modification of proposed rule OAR 340-012-0140(3)(a)(K) to implement the commenters' suggestion:

"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**."

Derelict vessels 35 feet and under would be in the lower $3,000 penalty matrix.

6 **Comment** The "H" factor (history of correcting prior violations cited in formal enforcement actions) in the penalty formula rules at proposed rule OAR 340-012-0145(3)(a) should not reduce a current penalty just because the person merely complied with a previous order. Penalty reduction under the "H" factor should only be given when the person took action substantially beyond the previous order.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response There are two related penalty factors at issue with this comment. The "P" factor is related to the number of violations previously cited in recent formal enforcement actions and the "H" factor is related to whether the person corrected those prior violations. The "H" factor reduces the effect of the "P" factor when assessing a penalty for a current violation, only if the person corrected the prior violations. Pursuant to 340-012-0145(3)(d), the combination of the "P" and "H" factors *cannot reduce the base penalty*. If the person showed extraordinary efforts to correct the prior violations, the combination of the "P" and "H" factors will be zero, but will not reduce the base penalty.

7 **Comment** The "H" factor (history of correcting prior violations cited in formal enforcement actions) in the penalty formula rules at proposed rule OAR 340-012-0145(3)(a) should increase a penalty if the person did not respond to the previous order – otherwise the "H" factor creates a windfall and no disincentive for not following orders.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response As discussed in comment six above, if a person has previous violations cited in a formal enforcement action, the combined effect of the "P" and "H" factors will generally be to increase a penalty for a current violation. If the person has not complied with a past order, there will be little or no mitigation of the "P" factor with the effect that the current penalty will be increased. In addition, outstanding compliance issues from a past order are typically addressed with additional penalties for the ongoing or repeated violation of the statute, rule or permit. The current enforcement action may also or instead include a penalty for violation of the previous order. These subsequent penalties for continuing violations likely would be higher than the original penalty because the "P" factor, the "M" factor (mental state), "O" factor (occurrences or duration), "C" (efforts to correct), and EB (economic benefit) would all likely be higher.

8 **Comment** The "C" factor (efforts to correct or mitigate the violation) in OAR 340-012-0145(6) should not be used to mitigate a current penalty based on the person merely doing what they are required to do. Mitigation for "extraordinary" efforts is warranted, but the value of the mitigation should be lower than in proposed rule OAR 340-012-0145(6)(a) and (b).

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response The proposed changes to the mitigation and aggravation effects of the "C" factor improve the existing penalty formula. Of the factors in the penalty formula, only the "C" factor can reduce the penalty below the base penalty. The proposed rule offers a smaller reduction for smaller efforts and larger reductions for increasingly larger efforts, and it increases the penalty if appropriate efforts are not taken. We believe this approach creates an incentive for quicker corrective action, creates an incentive for sharing information about the violation and corrective action, helps rebuild DEQ's relationship with the regulated party, and better addresses the total circumstances of the situation. It also aids in settlement, when appropriate, which conserves state resources.

9 **Comment** OAR 340-012-0160(2), which allows mitigation of the penalty for violations that are "voluntarily disclosed," lacks sufficient detail. For example, it doesn't specify whether penalties would be reduced for voluntary disclosure when the party was already required to disclose and it doesn't specify the amount of the penalty reduction. In addition, there should be a way to increase a penalty for violations that are not reported or are covered up.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response OAR 340-012-0160(2) supplements the DEQ director's discretion in choosing which violations will receive penalty and determining the appropriateness of any penalty. The rule lists the factors that the director will consider in deciding whether a violation was voluntarily disclosed. Based on a similar EPA policy, the director has directed staff on how to apply that discretion. A document describing the director's general intent for implementing this rule is entitled "The Department of Environmental Quality's Internal Management Directive on Self-policing, Disclosure and Penalty Mitigation," and is available at http://www.deq.state.or.us/programs/enforcement/SelfPolDisPen.pdf. Notably, the director will not consider mitigation for most voluntary reporting if the self-reporting was otherwise required.

Several processes escalate enforcement of violations that are not reported or are covered up. First, in cases where there was a requirement to report the violation, the failure to report is subject to possible penalty in addition to the violation itself. Second, evidence that a person has withheld required information or not corrected violations will generally increase the "O" (ongoing or repeated), "M" (mental state), and "C" (efforts to correct) factors and therefore increase the size of the penalty. Last, while DEQ is not a criminal law enforcement agency, falsifying required reports, intentional omissions from required reports, and covering up violations can subject the person to possible criminal investigation by the Oregon State Police, EPA's Criminal Investigation Division, or other criminal investigatory agency.

10 **Comment** OAR 340-012-0145(4) (the Occurrences “O” factor) impermissibly allows DEQ to treat violations occurring on different days as a single violation because ORS 468.140(2) states “Each day of violation under [these penalty statutes] constitutes a separate offense.

Commenter numbers: 3 and 4 listed in the *Commenter* section below

Response ORS 468.140(1) and (2) and OAR 340-012-0145(4) specify that each day of violation is a separate offense for which a separate penalty may be assessed. However, neither the statutes nor rules require DEQ to issue a separate penalty for each separate day of violation. Instead, ORS 468.130(2)(e) specifies that the penalty rules must consider “whether the violation was repeated or continuous.” OAR 340-012-0145(4) implements that statute, giving DEQ the ability, in its discretion, to determine whether separate penalties should be assessed for each occurrence or whether a penalty assessed for one occurrence should be aggravated when the violation was repeated or continuous. Eliminating the “O” factor would be inconsistent with the statutory directions and take away a useful penalty factor.

Commenters

Comments received by close of public comment period

The table below lists four people and organizations that submitted comments on the proposed rules by the deadline for submitting public comment. Original comments are on file with DEQ.

1 **Commenter** Gerald P. Linder, attorney for Clean Water Services and ACWA representative, and Janet A. Gillaspie, Executive Director
Affiliation Oregon Association of Clean Water Agencies

This commenter submitted comments under category 1 in the *Summary of comments and DEQ responses* section above.

2 **Commenter** Paul Koprowski, Air Program Coordinator
Affiliation Oregon Operations, U.S. Environmental Protection Agency

This commenter submitted comments under categories 2 and 3 in the *Summary of comments and DEQ responses* section above.

3 **Commenter** Miles Johnson, Clean Water Attorney
Affiliation Columbia Riverkeeper

This commenter submitted comments under categories 1, 4, 5, 6, 7, 8, 9 and 10 in the *Summary of comments and DEQ responses* section above.

4 **Commenter** Marla Nelson, Legal Fellow
Affiliation Northwest Environmental Defense Center

This commenter submitted comments under categories 1, 4, 5, 6, 7, 8, 9 and 10 in the *Summary of comments and DEQ responses* section above.

Implementation

Notification

The proposed rules would become effective upon filing with the Oregon Secretary of State after EQC adoption.

Division 011 amendments:

- Parties affected by the onsite records fee will be notified when they request records and when affected parties review the fee schedule on the DEQ website.
- DEQ staff who oversee septic system records have been notified of the upcoming change and will receive additional training on implementing the new fee. Several counties also charge a fee for septic records and DEQ staff can learn from their experiences on what works best. DEQ is also exploring ways to make the onsite records request process easier for affected parties such as the acceptance of credit card payments, and the delivery of records via email or fax.
- Parties affected by changes to the other public records fees will be notified about the current fees as part of the estimate when they make the request.
- Parties affected by changes in the contested case procedural rules will be notified during the contested case process.
- No other notices are necessary for these rules.

For Division 012 amendments, staff from DEQ's Office of Compliance and Enforcement will do the following:

- DEQ staff who conduct inspections and use Division 012 have been previously involved and notified of the proposed changes. Upon adoption, staff from DEQ's Office of Compliance and Enforcement will work with staff and managers to update the expected enforcement response for the new classifications. Those changes in how DEQ will employ its enforcement discretion will be recorded in an update to DEQ's internal management directive, called the *Enforcement Guidance*. Staff will be notified and trained on the revisions.
- The Office of Compliance and Enforcement will update its website to include the updated information and links to resources related to the updates. It will also notify potentially affected party groups through informational letters to the relevant trade associations and other groups and making descriptions of the changes available to trade or other publications interested in the penalty issues.
- Office of Compliance and Enforcement staff will begin using the updated Division 012 rules upon their effective date for the purposes of calculating and assessing civil penalties and other formal enforcement actions.
- Parties subject to penalties will be notified of the new rules as part of their formal notice when a contested case process is initiated.

For Division 200, DEQ will notify EPA that the state implementation plan rules have been updated to include the revised Division 012 penalty rules. No other notifications are necessary.

Five-year review

Requirement ORS 183.405

The state Administrative Procedures Act requires DEQ to review **new** rules within five years of the date the EQC adopts the proposed rules. Though the review will align with any changes to the law in the intervening years, DEQ based its analysis on current law.

Exemption

The APA exemptions from the five-year rule review under ORS 183.405(4) and 183.405(5) do not apply to the proposed rules.

DEPARTMENT OF ENVIRONMENTAL QUALITY

DIVISION 11

RULES OF GENERAL APPLICABILITY AND ORGANIZATION

Rules of Practice and Procedure

340-011-0005

Definitions

Unless otherwise defined in this division, the words and phrases used in this division have the same meaning given them in ORS 183.310, the rules of the Office of Administrative Hearings, the Model Rules or other divisions in Oregon Administrative Rules, Chapter 340, as context requires.

(1) "Commission" means the Environmental Quality Commission.

(2) "~~Department~~DEQ" means the Department of Environmental Quality.

(3) "Director" means the director of ~~the department~~DEQ or the director's authorized delegates.

(4) " Rules of the Office of Administrative Hearings" means the Attorney General's Rules, OAR 137-003-0501 through 137-003-0700.

(5) "Model Rules" or "Uniform Rules" means the Attorney General's Uniform and Model Rules of Procedure, OAR chapter 137, division 001 (excluding 137-001-0008 through 137-001-0009), OAR chapter 137, division 003, and OAR chapter 137, division 004, as in effect on January 1, 2006.

(6) "Participant" means the ~~respondent~~person named in the notice of a right to a contested case hearing and requested a hearing, a person granted either party or limited party status in the contested case under OAR 137-003-0535, an agency participating in the contested case under 137-003-0540, and ~~the department~~DEQ.

~~(7) "Respondent" means the person to whom a formal enforcement action is issued.~~

(~~8~~7) "Formal Enforcement Action" has the same meaning as defined in OAR 340, division 012.

Stat. Auth.: ORS 183.341 & 468.020
Stats. Implemented: ORS 183.341
Hist.: DEQ 69(Temp), f. & ef. 3-22-74; DEQ 72, f. 6-5-74, ef. 6-25-74; DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 122, f. & ef. 9-13-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 10-1997, f. & cert. ef. 6-10-97; DEQ 3-1998, f. & cert. ef. 3-9-98; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; DEQ 10-2002, f. & cert. ef. 10-8-02; DEQ 18-2003, f. & cert. ef. 12-12-03; DEQ 5-2008, f. & cert. ef. 3-20-08

Rulemaking

340-011-0010

Notice of Rulemaking

(1) Notice of intent to adopt, amend, or repeal any rule(s) shall be in compliance with applicable state and federal laws and rules, including ORS Chapter 183, 468A.327 and sections (2) and (3) of this rule.

(2) To the extent required by ORS Chapter 183 or 468A.327, before adopting, amending or repealing any permanent rule, ~~the Department~~DEQ will give notice of the rulemaking:

(a) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 14 days before a hearing;

(b) By providing a copy of the notice to persons on ~~the Department~~DEQ's mailing lists established pursuant to ORS 183.335(8), to the legislators specified in 183.335(15), and to the persons or association that requested the hearing (if any):

(A) At least 21 days before a hearing granted or otherwise scheduled pursuant to ORS 183.335(3); or

(B) At least 14 days before a hearing before the Commission if granted or otherwise scheduled under OAR 340-011-0029(3);

(c) In addition to the news media on the list referenced in (b), to other news media the Director may deem appropriate.

(3) In addition to meeting the requirements of ORS 183.335(1), the notice provided pursuant to section (1) of this rule shall contain the following:

(a) Where practicable and appropriate, a copy of the rule proposed to be adopted, amended or repealed with changes highlighted;

(b) Where the proposed rule is not set forth verbatim in the notice, a statement of the time, place, and manner in which a copy of the proposed rule may be obtained and a description of the subject and issues involved in sufficient detail to inform a person that the person's interest may be affected;

(c) If a hearing has been granted or scheduled, whether the presiding officer will be the Commission, a member of the Commission, an employee of ~~the Department~~DEQ, or an agent of the Commission;

(d) The manner in which persons not planning to attend the hearing may offer for the record written comments on the proposed rule.

Stat. Auth.: ORS 183 & ORS 468, 468A.327
Stats. Implemented: ORS 183.025 & 183.335
Hist.: DEQ 69(Temp), f. & ef. 3-22-74; DEQ 72, f. 6-5-74, ef. 6-25-74; DEQ 122, f. & ef. 9-13-76; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; DEQ 1-2008, f. & cert. ef. 2-25-08

340-011-0024

Rulemaking Process

The rulemaking process shall be governed by the Attorney General's Model Rules, OAR 137-001-0005 through 137-001-0060. As used in those rules, the terms, "agency," "governing body," and "decision maker" generally should be interpreted to mean "Commission." The term "agency" may also be interpreted to be the "~~Department~~DEQ" where context requires.

Stat. Auth.: ORS 183 & ORS 468
Stats. Implemented: ORS 183.025 & ORS 183.335
Hist.: DEQ 7-1988, f. & cert. ef. 5-6-88 (and corrected 9-30-88)

340-011-0029

Policy on Disclosure of the Relationship Between Proposed Rules and Federal Requirements

(1) In order to clearly identify the relationship between the proposed adoption, amendment or repeal of rules and applicable federal requirements, and to facilitate consideration and rulemaking by the Environmental Quality Commission, ~~the Department~~DEQ, must:

(a) Prepare a statement of whether the intended action imposes requirements different from, or in addition to, any applicable federal requirements and, if so, a written explanation of:

(A) The public health, environmental, scientific, economic, technological, administrative or other reasons, as appropriate, for differing from or adding to applicable federal requirements; and

(B) Alternatives considered, if any, and the reasons that the alternatives were not pursued.

(b) Include the statement in the notice of intended action pursuant to ORS 183.335(1) and any additional notice given prior to a rulemaking hearing pursuant to OAR 340-011-0010(2).

(c) Include the statement in the final staff report presented to the Commission when rule adoption, amendment or repeal is recommended.

(2) The statement prepared under section (1)(a) of this rule must be based upon information available to ~~the Department~~DEQ at the time the statement is prepared.

(3) An opportunity for an oral hearing before the Commission regarding the statement prepared under section (1)(a) of this rule must be granted, and notice given in accordance with OAR 340-011-0010(2)(b)(B), if:

(a) The rulemaking proposal applies to a source subject to the Oregon Title V Operating Permit Fees under OAR 340 Division 220;

(b) The request for a hearing is received within 14 days after the notice of intended action is issued under ORS 183.335(1), from 10 persons or from an association having no fewer than 10 members;

(c) The request describes how the persons or association that made the request will be directly harmed by the rulemaking proposal; and

(d) The notice of intended action under ORS 183.335(1) does not indicate that an oral hearing will be held before the Commission.

(4) Nothing in this rule applies to temporary rules adopted pursuant to OAR 340-011-0042.

(5) The Commission delegates to ~~the Department~~DEQ the authority to prepare and issue any statement required under ORS 468A.327.

Stat. Auth.: ORS 468.020, ORS 468A.327
Stats. Implemented: ORS 183.025 & 183.335
Hist.: DEQ 28-1994, f. & cert. ef. 11-17-94; DEQ 1-2008, f. & cert. ef. 2-25-08

340-011-0046

Petition to Promulgate, Amend, or Repeal Rule: Contents of Petition, Filing of Petition

The filing of petitions for rulemaking and action thereon by the Commission shall be in accordance with the Attorney General's Uniform Rule of Procedure set forth in OAR 137-001-0070. As used in that rule, the term "agency" generally refers to the Commission but may refer to ~~the Department~~DEQ if context requires.

Stat. Auth.: ORS 183.335 & ORS 468.020
Stats. Implemented: ORS 183.390
Hist.: DEQ 7-1988, f. & cert. ef. 5-6-88

340-011-0053

Periodic Rule Review

Periodic review of agency rules shall be accomplished once every ~~three~~ five years in accordance with ORS 183.~~545~~ 405 and the Attorney General's Model Rule OAR 137-001-~~0085~~0100.

Stat. Auth.: ORS 183.335 & ORS 468.020
Stats. Implemented: ORS 183.~~540 & ORS 545 &ORS 550~~405
Hist.: DEQ 7-1988, f. & cert. ef. 5-6-88

340-011-0061

Declaratory Ruling: Institution of Proceedings, Consideration of Petition and Disposition of Petition

The declaratory ruling process shall be governed by the Attorney General's Uniform Rules of Procedure, OAR 137-002-0010 through 137-002-0060. As used in those rules, the terms "agency," "governing body, and "decision maker" generally should be interpreted to mean "Commission." The term "agency" may also be interpreted to be the "~~Department~~DEQ" where context requires.

Stat. Auth.: ORS 183.335 & ORS 468.020
Stats. Implemented: ORS 183.410
Hist.: DEQ 7-1988, f. & cert. ef. 5-6-88

Public Records Access and Reproduction

340-011-0310

Purpose

Increased public involvement and awareness of environmental issues has placed greater demands on viewing and copying ~~Department~~DEQ records. OAR 340-011-0310 et seq. allows ~~the Department~~DEQ to recover its costs for providing these services, as authorized by Oregon statute. Furthermore, these rules serve to ensure that all ~~Department~~DEQ records remain available for viewing and intact for future use.

Stat. Auth.: ORS 192.410 - ORS 192.505 & ORS 468.020
Stats. Implemented: ORS 192.410 - ORS 192.440
Hist.: DEQ 23-1994, f. & cert. ef. 10-21-94; DEQ 9-2000, f. & cert. ef. 7-21-00

340-011-0330

Requests for Review or to Obtain Copies of Public Records

(1) The right to review records includes the right to review the original record where practicable. It does not provide the right to the requestor to locate the record himself or to review the original record when it contains exempt material.

(2) Request to review or copy public records should be made to, and will be handled by, the appropriate ~~Department~~DEQ staff maintaining the records requested. For questions, contact ~~the Department~~DEQ's general information number listed in the phone book and website at www.oregon.gov/deq.

(3) Requests for ~~Department~~DEQ records should be as specific as possible, including type of record, subject matter, approximate record date, and relevant names of parties. Whenever possible, the request should include the site location or county of the facility if known. If the request is unclear or overly burdensome, ~~the Department~~DEQ may request further clarification of the request. If ~~the Department~~DEQ cannot identify specific records responsive to a record request, ~~the Department~~DEQ may provide general files or distinct sections of records that are likely to contain the requested records.

(4) Requests to either review or obtain copies of records may be made in writing, by telephone or in-person. ~~The Department~~DEQ may require a request to be made in writing if needed for clarification or specification of the record request.

(a) Each ~~Department~~DEQ office will establish daily hours during which the public may review ~~the Department~~DEQ's records. The hours maintained in each office will be determined by staff and equipment available to accommodate record review and reproduction.

(b) Pursuant to ORS 192.430(1) and this rule, each ~~Department~~DEQ office shall designate and provide a supervised space, if available, for viewing records. This space will accommodate at least one reviewer at a time.

(c) ~~The Department~~DEQ accommodates public records requests from persons with disabilities in accordance with the Americans with Disabilities Act.

(d) ~~The Department~~DEQ's ability to accommodate in-person requests may be limited by staff and equipment availability. Additionally prior to making records available for public review, ~~the Department~~DEQ will ascertain whether the record requested is exempt from public disclosure under ORS chapter 192 and other applicable law.

(5) Time to provide requested records: ~~The Department~~DEQ will respond to a record request as quickly as reasonable. This time frame will vary depending on the volume of records requested, staff availability to respond to the record request, the difficulty in determining whether any of the records are exempt from disclosure, and the necessity of consulting with legal counsel. If ~~the Department~~DEQ determines that it will require more than 30 days to respond to a record request, it will inform the requestor of the estimated time necessary to comply with the record request.

Stat. Auth.: ORS 192.410 - ORS 192.505 & ORS 468.020
Stats. Implemented: ORS 192.420 & ORS 192.430
Hist.: DEQ 23-1994, f. & cert. ef. 10-21-94; DEQ 9-2000, f. & cert. ef. 7-21-00

340-011-0340

Costs for Record Review and Copying

(1) Outside Copying/Loaning Records -- In order to protect the integrity of ~~Department~~DEQ records, no records may be loaned or taken off-premises by non-~~a person besides~~ ~~Department~~DEQ staff unless ~~the Department~~DEQ has a contract with the person removing the records.

(2) Hardcopy Records:

(a) Persons Requesting to Make Copies Themselves: Requestors are allowed to use their own equipment to make copies of requested records depending on the facilities available within each ~~Department~~DEQ office. Use of non-~~Department~~DEQ equipment within a ~~Department~~DEQ office will not be allowed without staff being present. Staff time will be charged at $30.00 per hour. ~~The Department~~DEQ office may determine that use of non-~~Department~~DEQ equipment will not be allowed based on:

(A) Staff time available to oversee the copying; and

(B) Space limitations for the equipment.

(b) Reimbursement of ~~Department~~DEQ staff time: An hourly rate of $30.00 will be assessed for any staff time greater than 15 minutes spent locating records, reviewing records to delete exempt material, supervising the inspection of records, copying records, certifying records, and mailing records. ~~The Department~~DEQ may charge for the cost of searching for records regardless of whether ~~the Department~~DEQ was able to locate the requested record.

(c) Reimbursement of Department of Justice Attorney General time: If necessary to respond to a record request, an hourly rate (as of August 2013, $159 for attorneys, $79 for paralegals) ~~of $90.00~~ will be assessed for any Department of Justice ~~Attorney General~~ time spent reviewing records to delete exempt material.

(d) Copy Charges: The fee schedule listed below is reasonably calculated to reimburse ~~the Department~~DEQ for the actual costs of making records available and providing copies of records. The per-page copy charge includes 15 minutes of staff time for routine file searches.

(A) Department Administrative Rule sets:

(i) Complete set: $35.00;

(ii) Update Service: $115.00 (per annum);

(iii) Individual Divisions: $0.05 (per page).

(B) Hardcopy (black and white, letter or legal size): $0.25 per page. Costs for other sized or color copies will be ~~the Department~~DEQ's actual cost plus staff time.

(C) Additional charges:

(i) Fax charges: $0.50 (per page);

(ii) Document certification: $2.50 (per certificate);

(iii) Invoice processing: $5.00 (per invoice);

(iv) Express Mailing: actual or minimum of $9.00;

(v) Archive Retrieval: actual or minimum of $10.00;~~.~~

(vi) Onsite wastewater management program public record request: $7.50 base fee.

(e) Whenever reasonable~~feasible~~, ~~the Department~~DEQ will provide double-sided copies of a record request. Each side of a double-sided copy will constitute one page.

(3) Electronic Records:

(a) Copies of requested electronic records may be provided in the format or manner maintained by ~~the Department~~DEQ. ~~The Department~~DEQ will perform all downloading, reproducing, formatting and manipulating of records. Public access to ~~Department~~DEQ computer terminals may be possible as such terminals become available in the future.

(b) Reimbursement of ~~Department~~ DEQ staff time: An hourly rate of $40.00 will be assessed for any staff time spent locating records, reviewing records to delete exempt material, supervising the inspection of records, downloading and manipulating records, certifying records and mailing records. ~~The Department~~DEQ may charge for the cost of searching for records regardless of whether ~~the Department~~DEQ was able to locate the requested records.

(c) Reimbursement of Department of Justice Attorney General time: If necessary to respond to a record request, an hourly rate (as of August 2013, $159 for attorneys, $79 for paralegals)~~of $90.00~~ will be assessed for any Department of Justice ~~Attorney General~~ time spent reviewing records to delete exempt material.

(d) Hardcopy printouts (black and white; legal or letter size): $0.25 per page. Costs for other sized or color copies will be ~~the Department~~DEQ's actual cost plus staff time.

(e) ~~Other media (if provided by the DepartmentDEQ):~~

~~(A) Diskettes: $1.00 each;~~

~~(B) 2 hour VHS videocassette: $6.00 each;~~

~~(C) Magnetic Audio Tapes: $3.00 each;~~

~~(D)~~ Compact ~~D~~disks (CDs) and digital video disks (DVDs): $3.00 each.

(f) Additional charges:

(A) Fax charges: $0.50 (per page);

(B) Document certification: $2.50 (per certificate);

(C) Invoice processing: $5.00 (per invoice);

(D) Express Mailing: actual or minimum of $9.00;

(E) Archive Retrieval: actual or minimum of $10.00.

Stat. Auth.: ORS 192.410 - ORS 192.505 & ORS 468.020
Stats. Implemented: ORS 192.440
Hist.: DEQ 23-1994, f. & cert. ef. 10-21-94; DEQ 9-2000, f. & cert. ef. 7-21-00

340-011-0360

Collecting Fees

(1) Method: Payment may be made in the form of cash, check, or money order. Make checks payable to "Department of Environmental Quality."

(2) Billing: Requestors wishing to be billed may make such arrangements at the time of record request. Purchase orders will only be accepted for orders $10.00 or more.

(3) Receipts: A receipt may be given, upon request, for charges incurred.

(4) Reasonable costs associated with responding to a request to review or copy a record not specifically addressed by these rules may be assessed including the actual costs for ~~the Department~~DEQ to have another person make copies of the records.

(5) Prepayment of Copy Costs: Depending on the volume of the records requested, the difficulty in determining whether any of the records are exempt from disclosure, and the necessity of consulting with legal counsel, ~~the Department~~DEQ may preliminarily estimate the charges for responding to a record request and require prepayment of the estimated charges. If the actual charges are less than the prepayment, any overpayment will be refunded to the requestor.

Stat. Auth.: ORS 192.410 - ORS 192.505 & ORS 468.020
Stats. Implemented: ORS 192.440
Hist.: DEQ 23-1994, f. & cert. ef. 10-21-94; DEQ 9-2000, f. & cert. ef. 7-21-00

340-011-0370

Certification of Copies of Records

Certification of both hard and electronic copies of records will be provided. ~~The Department~~DEQ will only certify that on the date copied, the copy was a true and correct copy of the original record. ~~The Department~~DEQ cannot certify as to any subsequent changes or manipulation of the record.

Stat. Auth.: ORS 192.410 - ORS 192.505 & ORS 468.020
Stats. Implemented: ORS 192.440
Hist.: DEQ 23-1994, f. & cert. ef. 10-21-94; DEQ 9-2000, f. & cert. ef. 7-21-00

340-011-0380

Fee Waivers and Reductions

(1) Ordinarily there will be no charge for one copy of a public record:

(a) When the material requested is currently being distributed as part of the public participation process such as a news release or public notice.

(b) When the material requested has been distributed through mass mailing and is readily available to ~~the Department~~DEQ at the time of request.

(c) When the records request is made by a local, state, or federal public/governmental entity or a representative of a public/governmental entity acting in a public function or capacity. Even if a person qualifies under this subsection, ~~the Department~~DEQ may still charge for either record review or copying based on the following factors:

(A) Any financial hardship on ~~the Department~~DEQ;

(B) The extent of time, expense and interference with ~~the Department~~DEQ's regular business;

(C) The volume of the records requested; or

(D) The necessity to segregate exempt from non-exempt materials.

(2) Public Interest Annual Fee Waivers:

(a) An approved annual fee waiver allows the requestor to either review or obtain one copy of a requested record at no charge. Fee waivers are effective for a one year period..

(b) A person including members of the news media and non-profit organizations may be entitled to an annual fee waiver provided that a Fee Waiver Form is completed and approved by ~~the Department~~DEQ. The form must identify the person's specific ability to disseminate information of the kind maintained by ~~the Department~~DEQ to the general public and that such information is generally in the interest of and benefit to the public within the meaning of the Public Records Law. Additional information may be requested by ~~the Department~~DEQ prior to granting any fee waiver.

(c) Even if a person has a fee waiver, ~~the Department~~DEQ may charge for either record review or copying based on the following factors:

(A) Any financial hardship on ~~the Department~~DEQ;

(B) The extent of time, expense and interference with ~~the Department~~DEQ's regular business;

(C) The volume of the records requested;

(D) The necessity to segregate exempt from non-exempt materials; and

(E) The extent to which the record request does not further the public interest or the particular needs of the requestor.

(3) Case-by-Case Waivers or Reductions: A person that does not request, or is not approved for an annual waiver, may request a waiver or a reduction of record review or reproduction costs on a case-by-case basis.

Stat. Auth.: ORS 192.410 - ORS 192.505 & ORS 468.020
Stats. Implemented: ORS 192.440
Hist.: DEQ 23-1994, f. & cert. ef. 10-21-94; DEQ 9-2000, f. & cert. ef. 7-21-00

340-011-0390

Exempt Records

All records held by ~~the Department~~DEQ are public records unless exempt from disclosure under ORS chapter 192 or other applicable law. If ~~the Department~~DEQ determines that all or part of a requested public record is exempt from disclosure, ~~the Department~~DEQ will notify the requestor and the reasons why ~~the Department~~DEQ considers the record exempt.

Stat. Auth.: ORS 192.410 - ORS 192.505 & ORS 468.020
Stats. Implemented: ORS 192.501 & ORS 192.502
Hist.: DEQ 23-1994, f. & cert. ef. 10-21-94; DEQ 9-2000, f. & cert. ef. 7-21-00

Contested Cases

340-011-0500

Contested Case Proceedings Generally

~~(1)~~ Except as otherwise provided in OAR 340, division 011, contested cases will be governed by the Rules of the Office of Administrative Hearings, specifically OAR 137-003-0501 through 0700. ~~The term "agency" generally will be interpreted to mean "Department". The term "decision maker" generally will be interpreted to mean "Commission." The term "party" generally will be interpreted to mean "participant."~~

~~(2) In computing any period of time prescribed or allowed by this Division, the day of the act or event from which the designated period of time begins to run will not be included. The last day of the time period is included, unless it is a Saturday or a legal holiday (including Sunday), in which event the time period runs until the end of the next day that is not a Saturday or a legal holiday.~~

Stat. Auth.: ORS 183.341 & ORS 468.020
Stats. Implemented: ORS 183.341
Hist.: DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0098 by DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0510

Agency Representation by Environmental Law Specialist

(1) Environmental Law Specialists, and other ~~department~~DEQ personnel as approved by the director, are authorized to appear on behalf of ~~the department~~DEQ and commission in contested case hearings involving formal enforcement actions issued under OAR 340, division 012, and issuance, revocation, modification, or denial of licenses, permits, ~~and~~ certifications or other authiorizations, including general permit coverage or registrations.

(2) Environmental Law Specialists or other approved personnel may not present legal argument as defined under OAR 137-003-0545 on behalf of ~~the department~~DEQ or commission in contested case hearings.

(3) When ~~the department~~DEQ determines it is necessary to consult with the Attorney General's office, an administrative law judge will provide a reasonable period of time for an agency representative to consult with the Attorney General's office and to obtain either written or oral legal argument~~, if necessary~~.

Stat. Auth.: ORS 183.341, 183.452 & 468.020
Stats. Implemented: ORS 183.452
Hist.: DEQ 16-1991, f. & cert. ef. 9-30-91; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0103 by DEQ 18-2003, f. & cert. ef. 12-12-03; DEQ 5-2008, f. & cert. ef. 3-20-08

340-011-0515

Authorized Representative of ~~Respondent~~ a Participant other than a Natural Person in a Contested Case Hearing

A corporation, partnership, limited liability company, unincorporated association, trust and government body may be represented by either an attorney or an authorized representative in a contested case hearing before an administrative law judge or the commission to the extent allowed by OAR 137-003-0555.

Stat. Auth.: ORS 183.341 & 468.020
Stats. Implemented: ORS 183.457
Hist.: DEQ 6-2002(Temp), f. & cert. ef. 4-24-02, thru 10-21-02; DEQ 10-2002, f. & cert. ef. 10-8-02; Renumbered from 340-011-0106 by DEQ 18-2003, f. & cert. ef. 12-12-03; DEQ 5-2008, f. & cert. ef. 3-20-08

340-011-0520

Liability for the Acts of a ~~Respondent's~~ Person's Employees

A ~~respondent~~ person is legally responsible for not only its direct acts but also the acts of its employee when the employee is acting within the scope of the employment relationship, regardless of whether the ~~respondent~~ person expressly authorizes the act in question. The mental state ("~~R~~M" factor under OAR 340-012-~~0045~~0145) of an employee can be imputed to the employer. Nothing in this rule prevents ~~the department~~DEQ from issuing a formal enforcement action to an employee for violations occurring during the scope of the employee's employment.

Stat. Auth.: ORS 183.341 & ORS 468.020
Stat. Implemented: ORS 468.005, 468.130 & 468.140
Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0525

Service and Filing of Documents

(1) Service ~~of a formal enforcement action or other document by the department or commission can~~will be made either personally~~,~~ or by certified mail~~ or by regular mail~~. Service is perfected when received by the ~~respondent~~named person, if by personal service, or when mailed, if sent by mail. Service may be made upon:

(a) The ~~respondent~~named person;

(b) Any other person designated by law as competent to receive service of a summons or notice for ~~the respondent~~that person; or

(c) The ~~respondent's~~ person's attorney or other authorized representative.

(2) A ~~respondent~~ person holding a license or permit issued by ~~the department~~DEQ or commission, or who has submitted an application for a license or permit, will be conclusively presumed able to be served at the address given in the license or permit application, as it may be amended from time to time.

(3) ~~Service by regular mail may be proven by a certificate executed by the person effecting service.~~Filing of a document can be accomplished by personal service, facsimile, mail or electronically. A participant filing any document shall at the same time, provide a copy of the document to ~~the~~all other participants.

(4) Regardless of other provisions in this rule, documents ~~sent~~ served or filed by ~~the department~~DEQ or commission through the U.S. Postal Service by regular mail to a person's last known address are presumed to have been received, subject to evidence to the contrary.

Stat. Auth.: ORS 183.341 & ORS 468.020
Stats. Implemented: ORS 183.413 & ORS 183.415
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 122, f. & ef. 9-13-76; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0097 by DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0530

Requests for Hearing

(1) Unless a request for hearing is not required by statute or rule, or the requirement to file a request for hearing is waived in the formal enforcement action, a ~~respondent~~ person has 20 calendar days from the date of service of the ~~formal enforcement action~~notice of a right to a contested case hearing in which to file a written request for hearing unless another timeframe is allowed by statute or rule.

(2) The request for hearing must include a written response ~~to the formal enforcement action~~ that admits or denies all factual matters alleged ~~therein~~in the notice, and alleges any and all affirmative defenses and the reasoning in support thereof. Due to the complexity, ~~F~~factual matters not denied will be considered admitted, and failure to raise a defense will be a waiver of the defense. New matters alleged in the request for hearing are denied by ~~the department~~DEQ unless admitted in subsequent stipulation.

(3) An amended request for hearing may be accepted by ~~the department~~DEQ if ~~the department~~DEQ determines that the filing of an amended request will not unduly delay the proceeding or unfairly prejudice the participants. The ~~respondent~~ participant must provide ~~the department~~DEQ with a written explanation why an amended request for hearing is needed ~~with the amended request for hearing~~.

(4) A late request for hearing ~~may~~ will be accepted by ~~the department~~DEQ if:

(a) ~~the department determines that the cause for the late request was beyond the reasonable control of the respondent.~~ The request is postmarked within 20 calendar days of service of the notice, and;

(b) DEQ receives the late request for hearing within 60 days of the date the notice became final upon default.

(5) A late request for hearing may be accepted by DEQ if:

(a) Either the request is received by DEQ before entry of a default order or within 60 days of the date the notice became final upon default, and;

(b) There was good cause for the failure to timely request a hearing.

(6) The ~~respondent~~ person must provide ~~the department~~DEQ with a written explanation why the request for hearing was ~~not filed in a timely manner~~late. If the ~~respondent~~ person fails to provide the written explanation, ~~the department~~DEQ must ~~can~~not accept the late request for hearing. ~~The department~~DEQ may require that the explanation be supported by an affidavit.

(~~5~~7) The filing of a late request for hearing does not stay the effect of any final order.

(~~6~~8) ~~The department~~DEQ will deny a late request for hearing that is filed more than 60 days after ~~entry of a~~the notice became final ~~order~~ by default.

~~A final order by default is considered entered when the order is signed by the director on behalf of the department or commission.~~

Stat. Auth.: ORS 183.341 & ORS 468.020
Stats. Implemented: ORS 183.415, 183.464, 183.482 183.745 & ORS 183.484
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 122, f. & ef. 9-13-76; DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0107 by DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0535

Final Orders by Default

(1) ~~The department may enter a final order by default on behalf of the commission, based upon a prima facie case made on the record, when respondent defaults as set forth in OAR 137-003-0670(1).~~If a person fails to request a hearing within the time allowed and no further evidence is necessary to make a prima facie case, the notice of a right to a contested case hearing will become final by operation of law as provided in OAR 137-003-0672.

~~(2) If the respondent has defaulted, the formal enforcement action states that the department's record to date will automatically become the contested case record upon default, and no further evidence is necessary to make a prima facie case of the facts alleged in the formal enforcement action, no contested case hearing will be conducted and the department will issue a final order by default.~~

(~~3~~2) If the ~~respondent~~ person ~~has defaulted~~ fails to request a hearing within the time allowed and ~~the department~~DEQ determines that evidence, ~~besides that~~in addition to the evidence~~which is~~ in ~~the department~~DEQ's record, ~~to date,~~ is necessary to make a prima facie case ~~of the facts alleged in the formal enforcement action~~, ~~the department~~DEQ will proceed to a contested case hearing for the purpose of establishing a prima facie case ~~upon which the administrative law judge may issue a proposed order by default~~.

(3) If the participant files a timely request for hearing but either: withdraws the request; or, ~~–~~ after being provided notice of the time and place of the hearing, either fails to appear at a hearing or notifies either the administrative law judge or DEQ, in writing, that the participant~~y~~ does not intend to appear at the hearing, DEQ will enter and serve a final order by default.

(4) If more than one ~~respondent~~ person is named in the ~~formal enforcement action~~notice of a right to a contested case hearing and any ~~and at least one respondent~~ person defaults~~s~~ as provided in ~~section (1) of~~ this rule, the notice will become final ~~as provided in this rule~~ as it pertains to any ~~that~~ person in default.

~~the department will issue a final order by default against the defaulting respondent. An administrative law judge will conduct a contested case hearing, as necessary, for the respondents who did not default.~~

~~(5) If the formal enforcement action states that a department or commission order becomes a final order unless a timely request for hearing is filed with the department, the order becomes final on the day after the last day that a timely request for hearing should have been filed. No further order need be served on the respondent.~~

Stat. Auth.: ORS 183.335 & ORS 468.020
Stat. Impl.: ORS 183.415 & ORS 183.090
Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0540

Consolidation or Bifurcation of Contested Case Hearings

~~Each and every violation is a separate and distinct violation, and in cases of continuing violations, each day's continuance is a separate and distinct violation.~~ Proceedings for the assessment of multiple civil penalties for multiple violations may~~, however,~~ be consolidated into a single proceeding or bifurcated into separate proceedings, at ~~the department~~DEQ's discretion. Additionally, ~~the department~~DEQ, at its discretion, may consolidate or bifurcate contested case hearings involving the same fact or set of facts constituting the violation.

Stat. Author ORS 183.341 & ORS 468.020
Stat. Implemented: ORS 183.415
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 21-1992, f. & cert. ef. 8-11-92; Renumbered from 340-012-0035 by DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0545

Burden and Standard of Proof in Contested Case Hearings; ~~Department~~DEQ Interpretation of Rules and Statutory Terms

(1) The participant who asserts a fact or position is the proponent of that fact or position and has the burden of presenting evidence to support that fact or position, unless the burden is specifically allocated differently by a statute or rule.

(2) All findings in a proposed or final order must be based on a preponderance of evidence in the record unless another standard is specifically required by statute or rule.

(3) In reviewing ~~the department~~DEQ's interpretation of a ~~department~~DEQ rule as applied in a formal enforcement action, an administrative law judge must follow ~~the department~~DEQ's interpretation if that interpretation is both plausible and reasonably consistent with the wording of the rule and the underlying statutes. The administrative law judge may state, on the record, an alternative interpretation for consideration on appeal.

(4) With the exception of exact terms that do not require interpretation, an administrative law judge shall give ~~the department~~DEQ's interpretation of statutory terms the appropriate deference in light of ~~the department~~DEQ's expertise with the subject matter, ~~the department~~DEQ's experience with the statute, ~~the department~~DEQ's involvement in the relevant legislative process, and the degree of discretion accorded ~~the department~~DEQ by the legislature.

Stat. Author ORS 183.341 & ORS 468.020
Stat. Implemented: ORS 183.450
Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0550

Discovery

(1) Motions for discovery will only be granted if the motion establishes that:

(a) The participant seeking the information attempted to obtain the information through an informal process. If the participant is seeking information from a public agency, the participant must make a public record request prior to petitioning for discovery; and

(b) The discovery request is reasonably likely to produce information that is generally relevant and necessary to the matters alleged in the ~~formal enforcement action~~ notice of a right to a contested case hearing and the request for hearing, or is likely to facilitate resolution of the case.

(2) An administrative law judge is not authorized to order depositions, admissions, interrogatories or site visits unless ~~the department~~DEQ authorizes the same in writing in the specific case.

Stat. Author ORS 183.341 & ORS 468.020
Stat. Implemented: ORS 183.425, 183.440 & 183.450
Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0555

Subpoenas

(1) Subpoenas for the attendance of witnesses or production of documents at a contested case hearing will be issued in accordance with OAR 137-003-0585.

(2) Copies of the subpoena must be provided to the administrative law judge and all participants at the time of service to the person to whom the subpoena is issued.

(3) Service of a subpoena for the attendance of a witness must be completed by personal service unless the witness has indicated that he is willing to appear and the subpoena is mailed at least 10 days prior to the hearing. Personal service should be effected at least 7 days prior to the hearing.

(4) Service of a subpoena for the production of documents at a contested case hearing may be effected by regular mail provided that it is done sufficiently in advance of the hearing to allow reasonable time to produce the documents.

(5) Service of a subpoena for both the attendance of a witness and production of documents must be completed as provided under section (3) of this rule.

(6) Any witness who appears at a hearing under a subpoena will receive fees and mileage as set forth in ORS 44.415(2). ~~The fees and mileage must be paid by the participant for whom the subpoena was issued and may be paid at either the time of service of the subpoena or at the hearing.~~

Stat. Author ORS 183.341 & ORS 468.020
Stat. Implemented: ORS 183.425, 183.440 &468.120
Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0565

Immediate Review

~~**by Agency**~~

Immediate review under OAR 137-003-0640 ~~by the agency~~ is not allowed. ~~(See OAR 137-003-0640)~~

Stat. Auth.: ORS 183.341 & ORS 468.020
Stats. Implemented: ORS 183.341
Hist.: DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0124 by DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0570

Permissible Scope of Hearing

(1) The scope of a contested case hearing will be limited to those matters that are relevant and material to either proving or disproving the matters alleged in ~~formal enforcement action~~the notice and request for hearing. Equitable remedies will not be considered by an administrative law judge.

(2) The administrative law judge may not reduce or mitigate a civil penalty below the amount established by the application of the civil penalty formula contained in OAR 340, Division 12.

Stat. Auth.: ORS 183.341 & ORS 468.020
Stats. Implemented: ORS 183.450 & ORS 468.130
Hist.: DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0131 by DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0573

Proposed Orders in Contested Cases

(1) Following the close of the record for a contested case hearing, the administrative law judge will issue a proposed order. The administrative law judge will serve the proposed order on each participant.

~~A proposed contested case order must conform to the requirements of OAR 137-003-0645(3).~~

(2) Within 15 days after a proposed contested case order is ~~issued~~served, a participant in the contested case hearing may file a motion requesting that the administrative law judge clarify or supplement a proposed order. The motion must specify why the participant believes that the proposed order fails to conform to the requirements of OAR 137-003-0645~~(3)~~ and recommend changes to the order. The motion must be ~~served on~~filed with the administrative law judge and a copy provided to all participants~~ in the contested case hearing~~.

(3) The administrative law judge may grant or deny a motion filed under section (2) of this rule within 15 days. If the motion is granted, the administrative law judge may take the matter under advisement and reissue the proposed

order unchanged or may issue an amended proposed order. If the administrative law judge fails to act on the motion within 15 days, the motion is deemed denied by operation of law.

(4) The filing of a timely motion for clarification under section (2) of this rule tolls the period for filing a Petition for Commission Review of the proposed contested case order under OAR 340-011-0575. Tolling of the period begins on the day the motion is ~~served on~~filed with the administrative law judge and ends on the day the motion is denied, deemed denied by operation of law, or the proposed order is reissued without changes. If the administrative law judge issues an amended proposed order, the amended order will be treated as a new proposed order for the purpose of ~~the~~ fil~~l~~ing a timely Petition for Commission Review under 340-011-0575.

(5) The motion for clarification authorized by this rule is intended to alter the provisions of OAR 137-003-0655 but not to eliminate the authority of the administrative law judge to correct a proposed order in the manner specified in section (2) of that rule.

(6) A motion for clarification and any response to a motion for clarification will be part of the record on appeal.

Stat. Auth.: ORS 468.020, 183.341, 183.~~,~~452
Stats. Implemented: ORS 468A.020, 468.070, 468.090 - ~~0~~140, 183.341, 183.452
Hist.: DEQ 5-2008, f. & cert. ef. 3-20-08

340-011-0575

Review of Proposed Orders in Contested Cases

(1) For purposes of this rule, filing means receipt in the office of the director or other office of ~~the department~~DEQ.

(2) Commencement of Review by the Commission: The proposed order will become final unless a participant or a member of the commission files~~, with the commission,~~ a Petition for Commission Review within 30 days of service of the proposed order. The timely filing of a Petition is a jurisdictional requirement and cannot be waived. Any participant may file a petition whether or not another participant has filed a petition.

(3) Contents of the Petition for Commission Review. A petition must be in writing and need only state the participant's or a commissioner's intent that the commission review the proposed order. Each petition and subsequent brief must be captioned to indicate the participant filing the document and the type of document (for example: Respondents Exceptions and Brief; ~~Department~~DEQ's Answer to Respondent's Exceptions and Brief).

(4) Procedures on Review:

(a) Exceptions and Brief: Within 30 days from the filing of a petition, the participant(s) filing the petition must file written exceptions and brief. The exceptions must specify those findings and conclusions objected to, and also include proposed alternative findings of fact, conclusions of law, and order with specific references to the parts of the record upon which the participant relies. The brief must include the arguments supporting these alternative findings of fact, conclusions of law and order. Failure to take an exception to a finding or conclusion in the brief, waives the participant's ability to later raise that exception.

(b) Answering Brief: Each participant, except for the participant(s) filing that exceptions and brief, will have 30 days from the date of filing of the exceptions and brief under subsection (~~5~~4)(a), in which to file an answering brief.

(c) Reply Brief: If an answering brief is filed, the participant(s) who filed a petition will have 20 days from the date of filing of the answering brief under subsection (~~5~~4)(b), in which to file a reply brief.

(d) Briefing on Commission Invoked Review: When one or more members of the commission wish to review the proposed order, and no participant has timely filed a Petition, the chair of the commission will promptly notify the participants of the issue that the commission desires the participants to brief. The participants must limit their briefs to those issues. The chair of the commission will also establish the schedule for filing of briefs. When the commission wishes to review the proposed order and a participant also requested review, briefing will follow the schedule set forth in subsections (a), (b), and (c) of this section.

(e) Extensions: The commission or director may extend any of the time limits contained in section (~~5~~4) of this rule. Each extension request must be in writing and filed with the commission before the expiration of the time limit. Any request for an extension may be granted or denied in whole or in part.

(f) Dismissal: The commission may dismiss any petition, upon motion of any participant or on its own motion, if the participant(s) seeking review fails to timely file the exceptions or brief required under subsection (~~5~~4)(a) of this rule. A motion to dismiss made by a participant must be filed within 45 days after the filing of the Petition. At the time of dismissal, the commission will also enter a final order upholding the proposed order.

(g) Oral Argument: Following the expiration of the time allowed the participants to present exceptions and briefs, the matter will be scheduled for oral argument before the commission.

(5) Additional Evidence: A request to present additional evidence must be submitted by motion and must be accompanied by a statement showing good cause for the failure to present the evidence to the administrative law judge. The motion must accompany the brief filed under subsection (~~5~~4)(a) or (b) of this rule. If the commission grants the motion or decides on its own motion that additional evidence is necessary, the matter will be remanded to an administrative law judge for further proceedings.

(6) Scope of Review: The commission may substitute its judgment for that of the administrative law judge in making any particular finding of fact, conclusion of law, or order except as limited by ~~OAR 137-003-0655~~ORS 183.650 and OAR 137-003-0665.

(7) ~~Service of documents on other participants:~~ All documents ~~required to be~~ filed with the commission under this rule must also be copied~~served~~ upon each participant in the contested case hearing.

~~Service can be completed by personal service, certified mail or regular mail.~~

Stat. Auth.: ORS 183.341 & 468.020
Stats. Implemented: ORS 183.460, 183.464 & 183.470
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 115, f. & ef. 7-6-76; DEQ 25-1979, f. & ef. 7-5-79; DEQ 7-1988, f. & cert. ef. 5-6-88; DEQ 1-2000(Temp), f. 2-15-00, cert. ef. 2-15-00 thru 7-31-00; DEQ 9-2000, f. & cert. ef. 7-21-00; Renumbered from 340-011-0132 by DEQ 18-2003, f. & cert. ef. 12-12-03; DEQ 5-2008, f. & cert. ef. 3-20-08

340-011-0580

Petitions for Reconsideration or Rehearing

(1) A participant is not required to seek either reconsideration or rehearing of a final order prior to seeking judicial review.

(2) Any petition for reconsideration or rehearing must be received by ~~the department~~DEQ within 60 days of service of the final order. Unless specifically set forth in this rule, the procedures for petitions for reconsideration or rehearing are those in OAR 137-003-0675.

(3) A petition for reconsideration or rehearing does not stay the effect of the final order.

(4) The director, on behalf of the commission, shall issue orders granting or denying petitions for reconsideration and rehearing.

Stat. Auth.: ORS 183.341 and 468.020
Stats. Implemented: ORS 183.480 and ORS 183.482
Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03

340-011-0585

Petitions for a Stay of the Effect of a Final Order

(1) A petition to stay the effect of any final order must be received by ~~the department~~DEQ within 60 days of service of the final order. Unless specifically set forth in this rule, the procedures for petitions for a stay are those in OAR 137-003-0690 through 0700.

(2) If a participant submits a petition for reconsideration or rehearing or a late request for hearing, the petition for a stay must accompany that petition.

(3) A petition for a stay must contain all the elements set forth in OAR 137-003-0690 and be served upon all participants as set forth in 137-003-0690(4).

(4) Any participant may seek to intervene in the stay proceeding as set forth in OAR 137-003-0695 by filing a response to the petition for a stay with ~~the department~~DEQ.

(5) The director, on behalf of the commission, shall issue an order granting or denying the petition for a stay within 30 days of receipt of the petition.

Stat. Auth.: ORS 183.341 & 468.020
Stats. Implemented: ORS 183.480 & 183.482
Hist.: DEQ 18-2003, f. & cert. ef. 12-12-03

~~**340-011-0605**~~

~~**Miscellaneous Provisions**~~

~~Delegation of Authority to the Director of Department of Environmental Quality -- Responding to Claims Under ORS 197.352. The director shall have the authority to carry out the responsibilities and exercise the authorities of the Commission and the Department in responding to claims under ORS 197.352 (2004 Ballot Measure 37), including:~~

~~(1) Review of claims under OAR 125-145-0100;~~

~~(2) Denial of claims under OAR 125-145-0100; and~~

~~(3) Approval of claims under OAR 125-145-0100, except that the Director may only approve a claim by not applying the statute or rule that is the basis of the claim unless the Legislative Assembly has apportioned funds for payment of claims under Chapter 1, Oregon Laws 2005.~~

~~Stat. Auth.: ORS 468.020, 197.352~~
~~Stats. Implemented: ORS 468.020 & 197.352~~
~~Hist.: DEQ 5-2006, f. & cert. ef. 5-12-06~~

DIVISION 12

ENFORCEMENT PROCEDURE AND CIVIL PENALTIES

340-012-0026

Policy

(1) The goals of enforcement are to:

(a) Protect the public health and the environment;

(b) Obtain and maintain compliance with applicable environmental statutes and ~~the department~~DEQ's rules, permits and orders;

(c) Deter future violators and violations; and

(d) Ensure an appropriate and consistent statewide enforcement program.

(2) ~~The department~~DEQ shall endeavor by conference, conciliation and persuasion to solicit compliance.

(3) ~~The department~~DEQ endeavors to address all alleged violations in order of priority, based on the actual or potential impact to human health or the environment, using increasing levels of enforcement as necessary to achieve the goals set forth in section (1) of this rule.

(4) ~~The department~~DEQ subjects violators who do not comply with an initial enforcement action to increasing levels of enforcement until they come into compliance.

~~(5) The department assesses civil penalties based on the class of violation, the magnitude of violation, the application of the penalty matrices and aggravating and mitigating factors, and the economic benefit realized by the respondent.~~

~~(a) Classification of Violation. Each violation is classified as Class I, Class II or Class III. Class I violations have the greatest likelihood of actual or potential impact to human health or the environment or are of the greatest significance to the regulatory structure of the given environmental program. Class II violations are less likely than Class I violations to have actual or potential impact to human health or the environment. Class III violations have the least likelihood of actual or potential impact to human health and the environment. (See OAR 340-012-0053 to 340-012-0097.)~~

~~(b) Magnitude of Violation. For Class I and Class II violations, the department uses a selected magnitude or determines the magnitude based on the impact to human health and the environment resulting from that particular violation. A magnitude is not determined for Class III violations. (See OAR 340-012-0130 and 340-012-0135.)~~

~~(c) Base Penalty Matrices. The department uses the base penalty matrices to determine an appropriate penalty based on the classification and magnitude of the violation. (See OAR 340-012-0140.)~~

~~(d) Aggravating and Mitigating Factors. The department uses the aggravating and mitigating factors to adjust the base penalty to reflect the particular circumstances surrounding the violation. These factors include the duration of the violation, the respondent's past compliance history, the mental state of the respondent, and the respondent's cooperativeness in achieving compliance or remedying the situation. (See OAR 340-012-0145.)~~

~~(e) Economic Benefit. The department adds the economic benefit gained by the respondent to the civil penalty to achieve deterrence and create equity between the respondent and those regulated persons who have borne the expense of maintaining compliance. (See OAR 340-012-0150.)~~

(~~6~~5) ~~The department~~DEQ endeavors to issue a formal enforcement action within six months from completion of the investigation of the violation.

Stat. Auth.: ORS 459.995, 466, 467, 468.020, 468.996, 468A & 468B
Stats. Implemented: ORS 183.090, 454.635, 454.645, 459.376, 459.995, 465.900, 466.210, 466.880-895, 468.090-140, 468A.990, 468.992, 468B.025, 468B.220 & 468B.450
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

~~340-012-0027~~

~~Rule Effective Date~~

~~These rules will become effective on March 31, 2006~~

~~Stat. Auth.: ORS 468.020~~
~~Stats. Implemented: ORS 183.355, 454, 459, 465, 466, 468, 468A & 468B~~
~~Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06~~

340-012-0028

Scope of Applicability

Amendments to OAR 340-012-0026 to 340-012-0170 shall only apply to formal enforcement actions issued by ~~the Department~~DEQ on or after the effective date of such amendments and not to any contested cases pending or formal enforcement actions issued prior to the effective date of such amendments.

Stat. Auth.: ORS 454, 459.995, 466, 467, 468.020 & 468.996
Stats. Implemented: ORS 183.090, 454.635, 454.645, 459.376, 459.995, 465.900, 466.210, 466.880-895, 468.090-140, 468A.990, 468A.992, 468B.025, 468B.220 & 468B.450
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; Renumbered from 340-012-0080; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

340-012-0030

Definitions

All terms used in this division have the meaning given to the term in the appropriate substantive statute or rule or, in the absence of such definition, their common and ordinary meaning unless otherwise required by context or defined below:

(1) "Alleged Violation" means any violation cited in a ~~Notice of Noncompliance, Warning Letter, Pre-Enforcement Notice, or Expedited Enforcement Offer that the department~~ written notice issued by DEQ or other government agency.

~~records after observation, investigation or data collection, or for which the department receives independent evidence sufficient to issue a Notice of Noncompliance, Warning Letter, Pre-Enforcement Notice, or Expedited Enforcement Offer.~~

(2) "Class I Equivalent," which is used to determine the value of the "P" factor in the civil penalty formula, means two Class II violations, one Class II and two Class III violations, or three Class III violations.

(3) "Commission" means the Environmental Quality Commission.

(4) "Compliance" means meeting the requirements of the applicable statutes, and commission or ~~department~~DEQ rules, permits or orders.

(5) "Conduct" means an act or omission.

(6) "Director" means the director of ~~the department~~DEQ or the director's authorized deputies or officers.

(7) "~~Department~~DEQ" means the Department of Environmental Quality.

(8) “Expedited Enforcement Offer” (EEO) means a written offer by ~~the department~~DEQ to settle an alleged violation pursuant to the expedited procedure described in OAR 340-012-0170(2).

(9) “Field Penalty” as used in this division, has the meaning given that term in OAR Chapter 340, Division 150.

(10) "Final Order and Stipulated Penalty Demand Notice" means a written notice issued to a respondent by DEQ demanding payment of a stipulated penalty pursuant to the terms of an agreement entered into between the respondent and DEQ.

(~~9~~11) "Flagrant" or "flagrantly" means the respondent had actual knowledge that the conduct was unlawful and consciously set out to commit the violation.

(~~10~~12) "Formal Enforcement Action" (FEA) means a proceeding initiated by ~~the department~~DEQ that entitles a person to a contested case hearing or that settles such entitlement, including, but not limited to, ~~Notices of Violation,~~ Notices of Civil Penalty Assessment and Order, Final Order and Stipulated Penalty Demand Notices, department ~~orders,~~or commission orders originating with the Office of Compliance and Enforcement, Mutual Agreement and Orders, accepted Expedited Enforcement Offers, Field Penalties, and other consent orders.

(~~11~~13) "Intentional" means the respondent acted with a conscious objective to cause the result of the conduct.

(~~12~~14) "Magnitude of the Violation" means the extent and effects of a respondent's deviation from statutory requirements, rules, standards, permits or orders.

(~~13~~15) "Negligence" or "Negligent" means the respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation.

(16) “Notice of Civil Penalty Assessment and Order” means a notice provided under OAR 137-003-0505 to notify a person that DEQ has initiated a formal enforcement action that includes a financial penalty and may include an order to comply.

~~(14) "Penalty Demand Notice" (PDN) means a written notice issued to a respondent by the department demanding payment of a stipulated penalty pursuant to the terms of an agreement entered into between the respondent and the department.~~

(~~15~~17) "Pre-Enforcement Notice" (PEN) means an informal written notice of an alleged violation that ~~the department~~DEQ is considering for formal enforcement.

(~~16~~18) "Person" includes, but is not limited to, individuals, corporations, associations, firms, partnerships, trusts, joint stock companies, public and municipal corporations, political subdivisions, states and their agencies, and the federal government and its agencies.

(~~17~~19) "Prior Significant Action" (PSA) means any violation cited in an FEA, with or without admission of a violation, that becomes final by payment of a civil penalty, by a final order of the commission or ~~the department~~DEQ, or by judgment of a court.

(~~18~~20) "Reckless" or "Recklessly" means the respondent consciously disregarded a substantial and unjustifiable risk that the result would occur or that the circumstance existed. The risk must be of such a nature and degree that disregarding that risk constituted a gross deviation from the standard of care a reasonable person would observe in that situation.

(~~19~~21) "Residential Owner-Occupant" means the natural person who owns or otherwise possesses a single family dwelling unit, and who occupies that dwelling at the time of the alleged violation. The violation must involve or relate to the normal uses of a dwelling unit.

(~~20~~22) "Respondent" means the person ~~to whom~~named in ~~an~~ a formal enforcement action (FEA)~~ is issued~~.

(~~21~~23) "Systematic" means any violation that occurred or occurs on a regular basis.

(~~22~~24) "Violation" means a transgression of any statute, rule, order, license, permit, or any part thereof and includes both acts and omissions.

(~~23~~25) "Warning Letter" (WL) means an informal written notice of an alleged violation for which formal enforcement is not anticipated.

(~~24~~26) "Willful" means the respondent had a conscious objective to cause the result of the conduct and the respondent knew or had reason to know that the result was not lawful.

Stat. Auth.: ORS 468.020 & 468.130

Stats. ~~-~~Implemented: ORS 459.376, 459.995, 465.900, 468.090-140, 466.880 - 466.895, 468.996 - 468.997, 468A.990 -
468A.992 & 468B.220
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 14-2008, f. & cert. ef. 11-10-08

340-012-0038

Warning Letters, Pre-Enforcement Notices, and Notices of Permit Violation~~ and Expedited Enforcement Offers~~

(1) A Warning Letter (WL) ~~is a written notice of an alleged violation for which formal enforcement is not anticipated. WLs~~ may contain an opportunity to correct noncompliance as a means of avoiding formal enforcement. A WL generally will identify the alleged violation(s) found, what needs to be done to comply, and the consequences of further noncompliance. WLs will be issued under the direction of a manager or authorized representative. A person receiving a WL may provide information to ~~the department~~DEQ to clarify the facts surrounding the alleged violation(s). If ~~the department~~DEQ determines that the conduct identified in the WL did not occur, ~~the department~~DEQ will withdraw or amend the WL, as appropriate, within 30 days. A WL is not an FEA and does not afford any person a right to a contested case hearing.

(2) A Pre-Enforcement Notice (PEN) ~~is a written notice of an alleged violation that the department is considering for formal enforcement. A PEN~~ generally will identify the alleged violations found, what needs to be done to comply, the consequences of further noncompliance, and the formal enforcement process that may occur. PENs will be issued under the direction of a manager or authorized representative. A person receiving a PEN may provide information to ~~the department~~DEQ to clarify the facts surrounding the alleged violations. If ~~the department~~DEQ determines that the conduct identified in the PEN did not occur, ~~the department~~DEQ will withdraw or amend the PEN, as appropriate, within 30 days. Failure to send a PEN does not preclude ~~the department~~DEQ from issuing an FEA. A PEN is not a formal enforcement action and does not afford any person a right to a contested case hearing.

(3) Notice of Permit Violation (NPV):

(a) Except as provided in subsection (3)(e) below, an NPV will be issued for the first occurrence of an alleged Class I violation of an air, water or solid waste permit issued by ~~the department~~DEQ, and for repeated or continuing alleged

Class II or Class III violations of an air, water, or solid waste permit issued by ~~the department~~DEQ when a ~~Notice of Noncompliance or~~ WL has failed to achieve compliance or satisfactory progress toward compliance.

(b) An NPV must be ~~is~~ in writing, specify~~ies~~ the violation and state~~s~~ that a civil penalty will be imposed for the permit violation unless the permittee submits one of the following to ~~the department~~DEQ within five working days of receipt of the NPV:

(A) A written response from the permittee certifying that the permittee is complying with all terms and conditions of the permit from which the violation is cited. The response must include a description of the information on which the permittee's certification relies sufficient to enable ~~the department~~DEQ to determine that compliance has been achieved. The certification must be signed by a Responsible Official based on information and belief after making reasonable inquiry. For purposes of this rule, "Responsible Official" means one of the following:

(i) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(ii) For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

(iii) For a municipality, state, federal, or other public agency: either a principal executive officer or appropriate elected official.

(B) A written proposal, acceptable to ~~the department~~DEQ, describing how the permittee will bring the facility into compliance with the permit. At a minimum, an acceptable proposal must include the following:

(i) A detailed plan and time schedule for achieving compliance in the shortest practicable time;

(ii) A description of the interim steps that will be taken to reduce the impact of the permit violation until the permittee is in compliance with the permit; and

(iii) A statement that the permittee has reviewed all other conditions and limitations of the permit and no other violations of the permit were discovered; or

(C) For a water quality permit violation, a written request to ~~the department~~DEQ that ~~the department~~DEQ follow procedures described in ORS 468B.032. Notwithstanding the requirement for a response to ~~the department~~DEQ within five working days, the permittee may file a request under this paragraph within 20 days from the date of service of the NPV.

(c) If a compliance schedule approved by ~~the department~~DEQ under paragraph (3)(b)(B) provides for a compliance period of more than six months, the compliance schedule must be incorporated into a final order that provides for stipulated penalties in the event of any failure to comply with the approved schedule. The stipulated penalties may be set at amounts equivalent to the base penalty amount appropriate for the underlying violation as set forth in OAR 340-012-0140;

(d) If the NPV is issued by a regional authority, the regional authority may require that the permittee submit information in addition to that described in subsection (3)(b).

(e) ~~The department~~DEQ may assess a penalty without first issuing an NPV if:

(A) The violation is intentional;

(B) The water or air violation would not normally occur for five consecutive days;

(C) The permittee has received an NPV or an FEA with respect to any violation of the permit within the 36 months immediately preceding the alleged violation;

(D) The permittee is subject to the Oregon Title V operating permit program and violates any rule or standard adopted under ORS Chapter 468A or any permit or order issued under Chapter 468A; or

(E) The requirement to provide an NPV would disqualify a state program from federal approval or delegation. The permits and permit conditions to which this NPV exception applies include:

(i) Air Contaminant Discharge Permit (ACDP) conditions that implement the State Implementation Plan under the federal Clean Air Act;

(ii) Water Pollution Control Facility (WPCF) permit or rule authorization conditions that implement the Underground Injection Control program under the federal Safe Drinking Water Act;

(iii) National Pollutant Discharge Elimination System (NPDES) Permit conditions; and

(iv) Municipal Landfill Solid Waste Disposal Permit conditions that implement Subtitle D of the federal Solid Waste Disposal Act.

(f) For purposes of section (3), a ~~"permit" includes~~ permit renewal~~s~~ or ~~and~~ modification~~s. No such renewal or modification will~~ does not result in the requirement that ~~the department~~DEQ provide the permittee with an additional advance notice before formal enforcement if the permittee has received an NPV, or other FEA, with respect to the permit, within the 36 months immediately preceding the alleged violation.

~~(4) An Expedited Enforcement Offer (EEO) is a written offer by the department to settle an alleged violation that the department has determined may be resolved through its expedited enforcement procedures. An EEO will identify the alleged violation or violations to which the EEO applies and the amount for which the department will settle the alleged violation(s). It may also specify corrective actions that must be taken to address those violations. An EEO constitutes the department's offer to settle the violation(s) through a consent order. The EEO will be incorporated into a final commission order only if the alleged violator accepts the department's offer to settle by signing the EEO, paying the full amount stipulated in the offer, and waiving any right to administrative and judicial review regarding the EEO, the final commission order, or any violations settled therein. Violations cited in an EEO that are incorporated into a final commission order will be treated as "prior significant actions" in any subsequent formal enforcement action.~~

~~[Publications: Publications referenced are available from the agency.]~~

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 459.376, 468.090 - 468.140, 468A.990 & 468B.025
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 25-1979, f. & ef. 7-5-79; DEQ 22-1984, f. & ef. 11-8-84; DEQ 16-1985, f. & ef. 12-3-85; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; Renumbered from 340-012-0040, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 14-2008, f. & cert. ef. 11-10-08

340-012-0041

Formal Enforcement Actions

(1) FEAs may require that the respondent take action within a specified timeframe or may assess civil penalties. ~~The department~~DEQ may issue an NPV or FEA whether or not it has previously issued a ~~Notice of Noncompliance,~~ WL or PEN related to the issue or violation. Unless specifically prohibited by statute or rule, ~~the department~~DEQ may issue an FEA without first issuing an NPV.

(2) A Notice of Civil Penalty Assessment ~~(CPA~~and Order~~)~~ may be issued for the occurrence of any class of violation that is not limited by the NPV requirement of OAR 340-012-0038(3).

(3) An Order may be in the form of a commission or department order, including any written order that has been consented to in writing by the parties thereto, including but not limited to, a Mutual Agreement and Order (MAO).

(4) A Final Order and Stipulated Penalty Demand Notice ~~(PDN)~~ may be issued according to the terms of any written final order that has been consented to in writing by the parties thereto, including, but not limited to, a MAO.

(5) A pre-enforcement offer to settle may be made pursuant to DEQ's expedited enforcement procedures in OAR 340-012-0170(2) or Field Penalty procedures prescribed by OAR Chapter 340, Division 150.

(~~5~~6) The enforcement actions described in sections (2) through (~~4~~5) of this rule in no way limit ~~the department~~DEQ or commission from seeking any other legal or equitable remedies, including revocation of any ~~department~~DEQ-issued license or permit, provided by ORS Chapters 183, 454, 459, 465, 466, 467, 468, 468A, and 468B.

Stat. Auth.: ORS 454.625, 459.376, 465.400-410, 466.625, 467.030, 468.020, 468A.025, 468A.045 & 468B.035
Stats. Implemented: ORS 454.635, 454.645, 459.376, 459.995, 465.900, 466.210, 466.880-895, 468.090-140, 468A.990, 468.992, 468B.025, 468B.220 & 468B.450
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

340-012-0045

Civil Penalty Determination Procedure

~~Except as provided in OAR 340-012-0038(3), in addition to any other liability, duty, or other penalty provided by law, the department~~DEQ may assess a civil penalty for any violation, in addition to any other liability, duty, or other penalty provided by law. Except for civil penalties assessed under either OAR 340-012-0155 ~~(2),~~ or OAR 340-012-0160, ~~the department~~DEQ determines the amount of the civil penalty using the following ~~procedures~~formula~~:~~: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB.

(1) BP is the base penalty and is determined by the following procedure:

(~~1~~a) The classification of each violation is determined ~~by consulting~~ according to OAR 340-012-0053 to OAR 340-012-0097.

(~~2~~b) The magnitude of the violation is determined ~~as follows:~~according to OAR 340-012-0130 and OAR 340-012-0135.

~~(a) The selected magnitude categories in OAR 340-012-0135 are used.~~

~~(b) If a selected magnitude is not specified in OAR 340-012-0135, or if information is not reasonably available to determine which selected magnitude applies, 340-012-0130 is used to determine the magnitude of the violation.~~

(c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.

(~~d~~2) The base penalty is adjusted by the application of aggravating or mitigating factors ~~(P = prior significant actions, H = history in correcting prior significant actions, O = repeated or ongoing violation, M = mental state of the violator and C = efforts to correct) as~~ set forth in OAR 340-012-0145.

(~~e~~3) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.~~(2) The results of the determinations made in section (1) are applied in the following formula to calculate the penalty: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB.~~

~~(3) In addition to the factors listed in section (1) of this rule, the director may consider any other relevant rule of the commission in assessing a civil penalty and will state the effect that rule had on the penalty amount.~~

Stat. Auth.: ORS 468.020
Stats. Implemented: ORS 454.635, 454.645, 459.376, 459.995, 465.900, 466.210, 466.880-895, 468.090-140, 468.992, 468A.990, 468B.025, 468B.220 & 468B.450

Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 1-2003, f. & cert. ef. 1-31-03; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

340-012-0053

Classification of Violations that Apply to all Programs

(1) **Class I:**

(a) Violating a requirement or condition of a commission or department order, consent order, agreement, consent judgment (formerly called judicial consent decree) or compliance schedule contained in a permit;

(b) Submitting false, inaccurate or incomplete information to ~~the department~~DEQ where the submittal masked a violation, caused environmental harm, or caused ~~the department~~DEQ to misinterpret any substantive fact;

(c) Failing to provide access to premises or records as required by statute, permit, order, consent order, agreement or consent judgment (formerly called judicial consent decree); or

(d) Using fraud or deceit to obtain ~~department~~DEQ approval, permit, certification, or license.

(2) **Class II:** Violating any otherwise unclassified requirement.

Stat. Auth.: ORS 468.020 & 468.130
Stats. Implemented: ORS 459.376, 459.995, 465.900, 465.992, 466.990 - 466.994, 468.090 - 468.140 & 468B.450
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0054

Air Quality Classification of Violations

(1) **Class I**:

(a) Constructing a new source or modifying an existing source without first obtaining a required New Source Review/Prevention of Significant Deterioration (NSR/PSD) permit;

(b) Operating a major source, as defined in OAR 340-200-0020, without first obtaining the required permit;

(c) Exceeding a Plant Site Emission Limit (PSEL);

(d) Failing to install control equipment or meet performance standards as required by New Source Performance Standards under OAR 340 division 238 or National Emission Standards for Hazardous Air Pollutant Standards under OAR 340 division 244;

(e) Exceeding a hazardous air pollutant emission limitation;

(f) Failing to comply with an Emergency Action Plan;

(g) Exceeding an opacity or emission limit (including a grain loading standard) or violating an operational or process standard, that was established pursuant to New Source Review/Prevention of Significant Deterioration (NSR/PSD)~~, or the Western Backstop SO2 Trading Program~~;

(h) Exceeding an emission limit or violating an operational or process standard that was established to limit emissions to avoid classification as a major source, as defined in OAR 340-200-0020;

(i) Exceeding an emission limit, including a grain loading standard, by a major source, as defined in OAR 340-200-0020, when the violation was detected during a reference method stack test;

(j) Failing to perform testing or monitoring, required by a permit, rule or order, that results in failure to show compliance with a Plant Site Emission Limit (PSEL) or with an emission limitation or a performance standard set pursuant to New Source Review/Prevention of Significant Deterioration (NSR/PSD), National Emission Standards for Hazardous Air Pollutants (NESHAP), New Source Performance Standards (NSPS), ~~Reasonable~~ Reasonably ~~Achievable~~ Available Control Technology (RACT), Best Achievable Control Technology (BACT), Maximum Achievable Control Technology (MACT), Typically Achievable Control Technology (TACT), Lowest Achievable Emission~~s~~ Rate~~s~~ (LAER) or adopted pursuant to section 111(d) of the Federal Clean Air Act;

(k) Causing emissions that are a hazard to public safety;

(l) Violating a work practice requirement for asbestos abatement projects;

(m) Improperly ~~S~~storing or openly accumulating friable asbestos material or asbestos-containing waste material;

(n) Conducting an asbestos abatement project, by a person not licensed as an asbestos abatement contractor;

(o) Violating an OAR 340 division 248 disposal requirement for asbestos-containing waste material;

(p) Failing to hire a licensed contractor to conduct an asbestos abatement project;

(q) Openly burning materials which are prohibited from being open burned anywhere in the state by OAR 340-264-0060(3), or burning materials in a solid fuel burning device, fireplace, trash burner or other device as prohibited by OAR 340-262-0900(1);~~.~~

(r) Failing to install certified vapor recovery equipment;~~.~~

(s) Delivering for sale a noncompliant vehicle by an automobile manufacturer in violation of Oregon Low Emission Vehicle rules set forth in OAR 340 division 257;~~.~~

(t) Exceeding an Oregon Low Emission Vehicle average emission limit set forth in OAR 340 division 257;~~.~~

(u) Failing to comply with Zero Emission Vehicle (ZEV) sales requirements set forth in OAR 340 division 257;~~.~~

(v) Failing to obtain a Motor Vehicle Indirect Source Permit as required in OAR 340 division 257; or~~.~~

(w) Selling, leasing, or renting a noncompliant vehicle by an automobile dealer or rental car agency in violation of Oregon Low Emission Vehicle rules set forth in OAR 340 division 257.

(2) **Class II**:

(a) Constructing or operating a source required to have an Air Contaminant Discharge Permit (ACDP)~~,~~ or registration without first obtaining such permit or registration, unless otherwise classified;

(b) Violating the terms or conditions of a permit or license, unless otherwise classified;

(c) Modifying a source in such a way as to require a permit modification from ~~the department~~DEQ without first obtaining such approval from ~~the department~~DEQ, unless otherwise classified;

(d) Exceeding an opacity limit, unless otherwise classified;

(e) Exceeding a Volatile Organic Compound (VOC) emission standard, operational requirement, control requirement or VOC content limitation established by OAR 340 division 232;

(f) Failing to timely submit ~~an~~ a complete ACDP annual report;

(g) Failing to timely submit a certification, report, or plan as required by rule or permit, unless otherwise classified;

(h) Failing to timely submit a complete permit application or permit renewal application;

(i) Failing to comply with the open burning requirements for commercial, construction, demolition, or industrial wastes in violation of OAR 340-264-0080 through 0180;

(j) Failing to comply with open burning requirements in violation of any provision of OAR 340 division 264, unless otherwise classified; or burning materials in a solid fuel burning device, fireplace, trash burner or other device as prohibited by OAR 340-262-0900(2).

(k) Failing to replace, repair, or modify any worn or ineffective component or design element to ensure the vapor tight integrity and efficiency of a stage I or stage II vapor collection system;

(l) Failing to provide timely, accurate or complete notification of an asbestos abatement project;

(m) Failing to perform a final air clearance test or submit an asbestos abatement project air clearance report for an asbestos abatement project; ~~or~~

(n) Violating on road motor vehicle refinishing rules contained in OAR 340-242-0620; or~~.~~

(o) Failing to comply with an Oregon Low Emission Vehicle reporting, notification, or warranty requirement set forth in OAR division 257.

(3) **Class III**:

(a) Failing to perform testing or monitoring required by a permit, rule or order where missing data can be reconstructed to show compliance with standards, emission limitations or underlying requirements;

(b) Constructing or operating a source required to have a Basic Air Contaminant Discharge Permit without first obtaining the permit;

(c) Modifying a source in such a way as to require construction approval from ~~the department~~DEQ without first obtaining such approval from ~~the department~~DEQ, unless otherwise classified;

(d) Failing to ~~provide proper notification of an asbestos abatement project or failing to~~ revise a notification of an asbestos abatement project when necessary, unless otherwise classified;

(e) Submitting a late air clearance report that demonstrates compliance with the standards for an asbestos abatement project; or

(f) Licensing a noncompliant vehicle by an automobile dealer or rental car agency in violation of Oregon Low Emission Vehicle rules set forth in OAR 340 division 257.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 468.020, 468A.025 & 468A.045
Stats. Implemented: ORS 468.020 & 468A.025
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 5-1980, f. & ef. 1-28-80; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 31-1990, f. & cert. ef. 8-15-90; DEQ 2-1992, f. & cert. ef. 1-30-92; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1993, f. & cert. ef. 11-4-93;

DEQ 20-1993(Temp), f. & cert. ef. 11-4-93; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 13-1994, f. & cert. ef. 5-19-94; DEQ 21-1994, f. & cert. ef. 10-14-94; DEQ 22-1996, f. & cert. ef. 10-22-96; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; Renumbered from 340-012-0050, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06; DEQ 6-2006, f. & cert. ef. 6-29-06; DEQ 2-2011, f. 3-10-11, cert. ef. 3-15-11

340-012-0055

Water Quality Classification of Violations

(1) **Class I:**

(a) Causing pollution of waters of the state;

(b) Reducing the water quality of waters of the state below water quality standards;

(c) Discharging any waste that enters waters of the state, either without a waste discharge permit or from a discharge point not authorized by a waste discharge permit;

(d) Operating a discharge source or conducting a disposal activity without first obtaining an individual permit or applying for coverage under a general permit for that discharge or disposal activity;

(e) Failing to comply with statute, rule, or permit requirements regarding notification of a spill or upset condition, which results in a non-permitted discharge to public waters;

(f) Failing to take appropriate action, as required by the municipal wastewater treatment works owner's ~~department~~DEQ-approved pretreatment-compliance oversight program, against an industrial discharger to the municipal treatment works who violates any pretreatment standard or requirement, if the violation impairs or damages the treatment works, or causes major harm or poses a major risk of harm to public health or the environment;

(g) Making unauthorized changes, modifications, or alterations to a facility operating under a Water Pollution Control Facility (WPCF) or National Pollutant Discharge Elimination System (NPDES) permit;

(h) Allowing operation or supervision of a wastewater treatment and collection system without proper certification, by the permittee and/or owner;

(i) Applying biosolids or domestic septage to a parcel of land that does not have ~~department~~DEQ approval for land application;

(j) Applying biosolids that do not meet the pollutant, pathogen or one of the vector attraction reduction requirements of 40 CFR 503.33(b)(1) through (10);

(k) Violating a technology-~~-~~based effluent limitation, except for removal efficiency, in an NPDES or WPCF permit if:

(A) The discharge level (except for pH and bacteria) exceeds the limitation by 50 percent or more;

(B) The discharge is outside the permitted pH range by more than 2 pH units;

(C) The discharge exceeds a bacteria limit as a result of an inoperative disinfection system where there is no disinfection; or

(D) The discharge of ~~reclaimed~~ recycled water exceeds a bacteria limit by more than five times the limit.

(l) Violating a water quality based effluent limitation in an NPDES permit;

(m) Violating a WPCF permit limitation in a designated groundwater management area if the exceedance is of a parameter for which the groundwater management area was established;

(n) Failing to report an effluent limitation exceedance;

(o) Failing to collect monitoring data required in Schedule B of the permit;

(p) Contracting for operation or operating a prohibited Underground Injection Control (UIC) system other than a cesspool that only disposes of human waste;

(q) Operating an Underground Injection Control (UIC) system that causes a data verifiable violation of federal drinking water standards in an aquifer used as an underground source of drinking water; or

(r) Failing to substantially implement a ~~an erosion~~ stormwater ~~and sediment control~~ plan in accordance with an NPDES permit.

(2) **Class II:**

(a) Violating a technology-based effluent limitation, except for removal efficiency, in an NPDES or WPCF permit if:

(A) ~~the~~ The discharge level (except for pH and bacteria) exceeds the limitation by 20 percent or more, but less than 50 percent, for biochemical oxygen demand (BOD), carbonaceous chemical oxygen demand (CBOD), and total suspended solids (TTS), or by 10 percent or more, but less than 50 percent, for all other limitations;

(B) ~~the~~ The discharge is outside the permitted pH range by more than 1 pH unit but less than or equal to 2 pH units;

(C) ~~the~~ The discharge exceeds a bacteria limit by a factor of five or more, unless otherwise classified; or

(D) ~~the~~ The discharge of ~~reclaimed~~ recycled water exceeds a bacteria limit by an amount equal to or less than five times the limit;~~.~~

(b) Failing to timely submit a report or plan as required by rule, permit, or license, unless otherwise classified;

(c) Causing any wastes to be placed in a location where such wastes are likely to be carried into waters of the state by any means;

(d) Violating any management, monitoring, or operational plan established pursuant to a waste discharge permit, unless otherwise classified; ~~or~~

(e) Failing to timely submit or implement a Total Maximum Daily Load (TMDL) Implementation Plan, by a Designated Management Agency (DMA), as required by department order; or~~.~~

(f) Failing to comply with the requirements in OAR 340-044-0018(1) to obtain authorization by rule to construct and operate an underground injection system.

(3) **Class III:**

(a) Failing to submit a complete discharge monitoring report;

(b) Violating a technology-~~-~~based effluent limitation, except for removal efficiency, in an NPDES or WPCF permit if:

(A) ~~the~~ The discharge (except for pH and bacteria) exceeds the limitation by less than 20 percent for biochemical oxygen demand (BOD), carbonaceous chemical oxygen demand (CBOD), and total suspended solids (TSS), or by less than 10 percent for all other limitations;

(B) ~~the~~ The discharge is outside the permitted pH range by 1 pH unit or less; or

(C) ~~the~~ The discharge (except for ~~reclaimed~~ recycled water) exceeds a bacteria limit by less than five times the limit;~~.~~

(c) Failing to achieve a removal efficiency established in an NPDES or WPCF permit;

(d) Failing to register an Underground Injection Control (UIC) system, except for a UIC system prohibited by rule; or

(e) Failing to follow the owner's ~~department~~DEQ-approved pretreatment program procedures, where such failure did not result in any harm to the treatment works and was not a threat to the public health or the environment.

Stat. Auth.: ORS 468.020 & 468B.015
Stats. Implemented: ORS 468.090 - 468.140, 468B.025, 468B.220 & 468B.305
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 17-1986, f. & ef. 9-18-86; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0060

Onsite Sewage Disposal Classification of Violations

(1) **Class I:**

(a) Performing sewage disposal services without a current license;

(b) Installing or causing to be installed an onsite wastewater treatment system or any part thereof, or repairing or causing to be repaired any part thereof, without first obtaining a permit;

(c) Disposing of septic tank, holding tank, chemical toilet, privy or other treatment facility contents in a manner or location not authorized by ~~the department~~DEQ;

~~or~~

(d) Owning, operating or using an onsite wastewater treatment system that is discharging sewage or effluent to the ground surface or into waters of the state; or

(e) Failing to comply with statute, rule, license, permit or order requirements regarding notification of a spill or upset condition, which results in a non-permitted discharge to public waters. ~~.~~

(2) **Class II:**

(a) Failing to meet the requirements for satisfactory completion within 30 days after written notification or posting of a Correction Notice at the site;

(b) Operating or using a nonwater-carried waste disposal facility without first obtaining a letter of authorization or permit;

(c) Operating or using an onsite wastewater treatment system or part thereof without first obtaining a Certificate of Satisfactory Completion or WPCF permit;

(d) Advertising or representing oneself as being in the business of performing sewage disposal services without a current license;

(e) Placing into service, reconnecting to or changing the use of an onsite wastewater treatment system in a manner that increases the projected daily sewage flow into the system without first obtaining an authorization notice, construction permit, alteration permit, ~~or~~ repair permit or WPCF permit;

(f) Failing to connect all plumbing fixtures to, or failing to discharge wastewater or sewage into, a ~~department~~DEQ-approved system, unless failure results in sewage discharging to the ground surface or to waters of the state;

(g) Allowing, by a licensed sewage disposal business, an uncertified installer to supervise or be responsible for the construction or installation of a system or part thereof;

(h) Failing to submit an annual maintenance report by a service provider of alternative treatment technologies; ~~or~~

(i) Failing to report that a required operation and maintenance contract has been terminated, by a service provider of alternative treatment technologies~~.~~;

(j) Exceeding an effluent limit concentration in a WPCF permit for discharge to a soil absorption system;

(k) Exceeding the maximum daily flow limits in a WPCF permit to an onsite system;

(l) Failing to collect monitoring data required in Schedule B of a WPCF permit;

(m) Making unauthorized changes, modifications, repairs or alterations to a facility operating under a WPCF permit;

(n) Violating any management, monitoring or operational plan established pursuant to a WPCF permit unless otherwise classified; or

(o) Failing to timely submit a report or plan as required by rule, permit or license unless otherwise classified.

(3) **Class III:**

(a) Failing to obtain an operation and maintenance contract from a certified service provider, by an owner of an alternative treatment technology, recirculating gravel filter or commercial sand filter; or

(b) Placing an existing onsite wastewater treatment system into service or changing the dwelling or type of commercial facility, without first obtaining an authorization notice, where the design flow of the system is not exceeded.

Stat. Auth.: ORS 454.050, 454.625 & 468.020
Stats. Implemented: ORS 454.635, 454.645 & 468.090 - 468.140
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 4-1981, f. & ef. 2-6-81; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 3-2005, f. 2-10-05, cert. ef. 3-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0065

Solid Waste Management Classification of Violations

(1) **Class I**:

(a) Establishing or operating a disposal site without first obtaining a registration or permit;

(b) Accepting solid waste for disposal in a permitted solid waste unit or facility that has been expanded in area or capacity without first submitting plans to ~~the department~~DEQ and obtaining ~~department~~DEQ approval;

(c) Disposing of or authorizing the disposal of a solid waste at a location not permitted by ~~the department~~DEQ to receive that solid waste;

(d) Violating a lagoon freeboard limit that results in the overflow of a sewage sludge or leachate lagoon;

(e) Accepting for treatment, storage, or disposal at a solid waste disposal site, without approval from ~~the department~~DEQ, waste defined as hazardous waste, waste from another state which is hazardous under the laws of that state, or wastes prohibited from disposal by statute, rule, permit, or order;

(f) Failing to properly construct, maintain, or operate in good functional condition, groundwater, surface water, gas or leachate collection, containment, treatment, disposal or monitoring facilities in accordance with the facility permit, ~~department~~DEQ approved plans, or ~~department~~DEQ rules;

(g) Failing to collect, analyze or report groundwater, surface water or leachate quality data in accordance with the facility permit, the facility environmental monitoring plan, or ~~department~~DEQ rules;

(h) Mixing for disposal or disposing of recyclable material that has been properly prepared and source separated for recycling;

(i) Failing to establish or maintain financial assurance as required by statute, rule, permit or order;

(j) Failing to comply with the terms of a permit terminated due to a failure to submit a timely application for renewal; or

(k) Operating a composting facility in a manner that causes a discharge to surface water of pollutants, leachate or stormwater when that discharge is not authorized by a NPDES permit.

(2) **Class II**:

(a) Failing to accurately report the amount of solid waste disposed, by a permitted disposal site or a metropolitan service district;

(b) Failing to timely or accurately report the weight and type of material recovered or processed from the solid waste stream;

(c) Failing to comply with landfill cover requirements, including but not limited to daily, intermediate, and final covers, or limitation of working face size;

(d) Operating a Household Hazardous Waste (HHW) collection event or temporary site without first obtaining ~~department~~DEQ approval or without complying with an approved plan for a HHW collection event; ~~or~~

(e) Receiving or managing waste in violation of or without a ~~department~~DEQ-~~-~~approved Special Waste Management Plan; or

(f) Unless otherwise specifically classified, operating a composting facility in a manner that fails to comply with the facility's registration, permit, ~~department~~DEQ-approved plans or ~~department~~DEQ rules.

(3) **Class III**:

(a) Failing to post required signs;

(b) Failing to control litter;

(c) Failing to notify ~~the department~~DEQ of any name or address change; or

(d) Violating any labeling requirement under ORS 459A.675-685.

Stat. Auth.: ORS 459.045 & 468.020
Stats. Implemented: ORS 459.205, 459.376, 459.995 & 468.090 - 468.140
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 1-1982, f. & ef. 1-28-82; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 26-1994, f. & cert. ef. 11-2-94; DEQ 9-1996, f. & cert. ef. 7-10-96; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06; DEQ 6-2009, f. & cert. ef. 9-14-09

340-012-0066

Solid Waste Tire Management Classification of Violations

(1) **Class I:**

(a) Establishing or operating a waste tire storage site without first obtaining a permit;

(b) Disposing of waste tires or tire-derived products at an unauthorized site;

(c) Violating the fire safety requirements of a waste tire storage site permit;

(d) Hauling waste tires without first obtaining a waste tire carrier permit; or

(e) Failing to establish and maintain financial assurance as required by statute, rule, permit or order.

(2) **Class II:** Failing to maintain written records of waste tire generation, storage, collection, transportation, or disposal.

(3) **Class III:**

(a) Failing to keep required records on use of vehicles;

(b) Failing to post required signs;

(c) Hiring or otherwise using an unpermitted waste tire carrier to transport waste tires; or

(d) Hauling waste tires in a vehicle not identified in a waste tire carrier permit or failing to display required decals as described in a permittee's waste tire carrier permit.

Stat. Auth.: ORS 459.785 & 468.020
Stats. Implemented: ORS 459.705 - 459.790, 459.992 & 468.090 - 468.140
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0067

Underground Storage Tank (UST) Classification of Violations

(1) **Class I:**

(a) Failing to investigate or confirm a suspected release;

(b) Failing to establish or maintain the required financial responsibility mechanism;

(c) Failing to obtain the appropriate general permit registration certificate before installing or operating an UST;

(d) Failing to install spill and overfill protection equipment that will prevent a release, or failing to demonstrate to ~~the department~~DEQ that the equipment is properly functioning;

(e) Failing to install, operate or maintain a method or combination of methods for release detection such that the method can detect a release from any portion of the UST system;

(f) Failing to protect from corrosion any part of an UST system that routinely contains a regulated substance;

(g) Failing to permanently decommission an UST system;

(h) Failing to obtain approval from ~~the department~~DEQ before installing or operating vapor or groundwater monitoring wells as part of a release detection method;

(i) Installing, repairing, replacing or modifying an UST system in violation of any rule adopted by ~~the department~~DEQ;

(j) Failing to conduct testing or monitoring, or to keep records where the failure constitutes a significant operational compliance violation;

(k) Providing, offering or supervising tank services without the appropriate license; or

~~(l) Demonstrating negligence or incompetence in performing tank services; or~~

(~~m~~l) Failing to assess the excavation zone of a decommissioned or abandoned UST when directed to do so by ~~the department~~DEQ.

(2) **Class II:**

(a) Continuing to use a method or methods of release detection after period allowed by rule has expired;

(b) Failing to have a trained UST system operator for an UST facility after March 1, 2004;

(c) Failing to apply for a modified general permit registration certificate;

(d) Failing to have an operation certificate for each compartment of a multi-chambered or multi-compartment UST when at least one compartment or chamber has an operation certificate;

(e) Installing, repairing, replacing or modifying an UST or UST equipment without providing the required notifications;

(f) Failing to decommission an UST in compliance with the statutes and rules adopted by ~~the department~~DEQ, including, but not limited to, performance standards, procedures, notification, general permit registration and site assessment requirements;

(g) Providing tank services at an UST facility that does not have the appropriate general permit registration certificate;

(h) Failing to obtain the identification number and operation certificate number before depositing a regulated substance into an UST, by a distributor;

(i) Failing, by a distributor, to maintain a record of all USTs into which it deposited a regulated substance;

(j) Allowing tank services to be performed by a person not licensed by ~~the department~~DEQ;

(k) Failing to submit checklists or reports for UST installation, modification or suspected release confirmation activities;

(l) Failing to complete an integrity assessment before adding corrosion protection;

(m) Failing by an owner or permittee to pass the appropriate national examination before performing tank services; or

(n) Failing to provide the identification number or operation certificate number to persons depositing a regulated substance into an UST.

(3) **Class III:** Failing to notify the new owner or permittee of ~~the department~~DEQ's general permit registration requirements, by a person who sells an UST.

Stat. Auth.: ORS 466.720, 466.746, 466.882, 466.994 & 468.020
Stats. Implemented: ORS 466.706 - 466.835, 466.994 & 468.090 - 468.140
Hist.: DEQ 2-1988, f. 1-27-88, cert. ef. 2-1-88; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 15-1991, f. & cert. ef. 8-14-91; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2003, f. & cert. ef. 2-14-03; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0068

Hazardous Waste Management and Disposal Classification of Violations

(1) **Class I:**

(a) Failing to make a complete and accurate hazardous waste determination of a residue as required by OAR 340-102-0011;

(b) Failing to meet Land Disposal Restriction (LDR) requirements when disposing of hazardous waste;

(c) Operating a hazardous waste treatment, storage or disposal facility (TSD) without first obtaining a permit or without having interim status;

(d) Treating, storing or accumulating hazardous waste in a hazardous waste management unit, as defined in 40 CFR 260.10, that does not meet the unit design or unit integrity assessment criteria for the hazardous waste management unit;

(e) Accepting, transporting or offering for transport hazardous waste without a uniform hazardous waste manifest;

(f) Transporting, ~~delivering or designating on a manifest delivery of~~or offering for transport, hazardous waste to a facility not authorized or permitted to manage hazardous waste; ~~or failing to submit an exception report;~~

(g) Failing to comply with management requirements for ignitable, reactive, or incompatible hazardous waste;

(h) Illegally treating or disposing of a hazardous waste;

(i) Failing to submit Land Disposal Restriction notifications;

(j) Failing to have and maintain a closure plan or post closure plan for a ~~Treatment, Storage or Disposal (~~TSD~~)~~ facility or for each regulated hazardous waste management unit, as defined in 40 CFR 260.10, by the owner or operator of facility or unit;

(k) Failing to carry out closure or post closure plan requirements, by an owner or operator of a TSD facility, such that the certification for completing closure or post closure work is not submitted, or is incomplete, inaccurate, or non-compliant with the approved plans;

(l) Failing to establish or maintain financial assurance or hazard liability requirements in 40 CFR 264.147 or 40 CFR 265.147, by an owner or operator of a TSD facility;

(m) Failing to follow emergency procedures in a Contingency Plan or other emergency response requirements during an incident in which a hazardous waste or hazardous waste constituent is released to the environment or the incident presents a risk of harm to employees, emergency responders or the public;

(n) Failing to comply with the export requirements in 40 CFR 262.52 for hazardous wastes;

(o) Failing to properly install a groundwater monitoring system in compliance with permit requirements, by an owner or operator of a TSD facility;

(p) Failing to properly control volatile organic hazardous waste emissions, by a large-quantity hazardous waste generator or TSD facility, when such failure could result in harm to employees, the public or the environment;

(q) Failing to inspect, operate, monitor, keep records or maintain in compliance with a permit: hazardous waste landfill units, incineration equipment, Subpart X treatment equipment, hazardous waste treatment units, pollution abatement equipment for hazardous waste treatment or disposal, or hazardous waste monitoring equipment; ~~or~~

(r) Failing to immediately clean up spills or releases or threatened spills or releases of hazardous waste, by any person having ownership or control over hazardous waste; or~~.~~

(s) Failing to submit an exception report.

(2) **Class II:**

(a) Failing to place an accumulation start date on a container used for accumulation or storage of hazardous waste;

(b) Failing to label a tank having a capacity of 100 gallons or more, or containers equaling more than 110 gallon capacity used for accumulation or storage of hazardous waste;

(c) Failing to post required emergency response information next to the telephone, by a small quantity generator;

(d) Accumulating hazardous waste more than thirty (30) days beyond the specified accumulation time frame;

(e) Failing to submit a manifest discrepancy report;

(f) Shipping hazardous waste on manifests that do not comply with ~~department~~DEQ rules;

(g) Failing to prevent the unknown or unauthorized entry of a person or livestock into the waste management area of a ~~treatment, storage or disposal~~TSD facility;

(h) Failing to conduct required inspections at hazardous waste generator accumulation sites or hazardous waste permitted storage areas;

(i) Failing to prepare a contingency plan;

(j) Failing to ~~follow~~ comply with the requirements of a groundwater monitoring program, unless otherwise classified;

(k) Failing to maintain adequate aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination;

(l) Generating, treating, storing or disposing of hazardous waste without complying with the Personnel Training requirements;

(m) Failing to keep containers of hazardous waste closed, except when adding or removing wastes;

(n) Failing to comply with the requirements for management of containers, including satellite accumulation, other than the requirements for ignitable, reactive or incompatible waste, by a hazardous waste generator or storage facility;

(o) Failing to comply with the preparedness, prevention, contingency plan or emergency procedure requirements, unless otherwise classified;

(p) Failing to manage universal waste and waste pesticide residue in compliance with the universal waste management requirements or waste pesticide requirements;

(q) Failing to obtain a hazardous waste EPA identification number when required;

(r) Failing to comply with 40 CFR 264 or 265 Subparts J, W or DD standards, other than unit design or unit integrity assessment;

(s) Failing to comply with 40 CFR 264 or 265 Subparts AA, BB or CC standards for hazardous waste generator and TSD facilities, unless otherwise classified; or

(t) Failing to timely submit an annual report, by a hazardous waste generator, TSD facility, or hazardous waste recycling facility.

(3) **Class III:**

(a) Accumulating hazardous waste up to thirty (30) days beyond the specified accumulation time frame;

(b) Failing to label containers equaling 110 gallon capacity or less used for the accumulation or storage of hazardous waste;

(c) Failing to label a tank having less than 100 gallon capacity used for the accumulation or storage of hazardous waste;

(d) Failing to maintain on site, a copy of the one-time notification regarding hazardous waste that meets treatment standards by a hazardous waste generator; or

(e) Failing to submit a contingency plan to all police, fire, hospital and local emergency responders.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 459.995, 466.070 - 466.080, 466.625 & 468.020
Stats. Implemented: ORS 466.635 - 466.680, 466.990 - 466.994 & 468.090 - 468.140
Hist.: DEQ 1-1982, f. & ef. 1-28-82; DEQ 22-1984, f. & ef. 11-8-84; DEQ 9-1986, f. & ef. 5-1-86; DEQ 17-1986, f. & ef. 9-18-86; DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 13-2002, f. & cert. ef. 10-9-02; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0071

Polychlorinated Biphenyl (PCB) Classification of Violations

(1) **Class I:**

(a) Treating, storing or disposing of PCBs anywhere other than a permitted PCB disposal facility or a location authorized by ~~the department~~DEQ; or

(b) Establishing, constructing or operating a PCB disposal facility without first obtaining a permit or ~~department~~DEQ authorization.

(2) **Class II:** Violating any other requirement related to the treatment, storage, generation or disposal of PCBs is classified under OAR 340-012-0053.

Stat. Auth.: ORS 459.995, 466.625, 467.030, 468.020 & 468.996
Stats. Implemented: ORS 466.255, 466.265 - 466.270, 466.530 & 466.990 - 466.994
Hist.: DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0072

Used Oil Management Classification of Violations

(1) **Class I:**

(a) Using used oil as a dust suppressant, pesticide, or otherwise spreading used oil directly in the environment;

(b) Burning a used oil mixture where the used oil mixture has less than 5,000 Btu/pound;

(c) Offering for sale used oil as specification used oil fuel when the used oil does not meet used oil fuel specifications;

(d) Selling off-specification used oil fuel to a facility not meeting the definition of an industrial boiler or furnace;

(e) Burning off-specification used oil in a device that does not meet the definition of an industrial boiler or furnace and is not otherwise exempt;

(f) Failing to make an on-specification used oil fuel determination when required, by a used oil generator, transporter, burner or processor;

(g) Storing or managing used oil in a surface impoundment;

(h) Failing to determine whether used oil exceeds the permissible halogen content, by a used oil transporter, burner or processor;

(i) Failing to perform required closure on a used oil tank or container, by a used oil processor or re-refiner;

(j) Failing to maintain required secondary containment at a used oil transfer facility or by a processor, burner, or marketer of used oil; or

(k) Failing to immediately clean up spills or releases or threatened spills or releases of used oil, by any person having ownership or control over the used oil.

(2) **Class II:**

(a) Failing to obtain a one~~-~~ time written notification from a burner before shipping off-specification used oil fuel, by a used oil generator, transporter, processor or re-refiner;

(b) Failing to develop, follow and maintain records of a written waste analysis plan, by a used oil processor;

(c) Failing to close or cover a used oil tank or container;

(d) Failing to timely submit annual used oil handling reports, by a used oil processor;

(e) Failing to label each container or tank used for the accumulation or storage of used oil on site, unless otherwise classified;

(f) Failing to keep a written operating record at the facility, by a used oil processor;

(g) Failing to prepare and maintain an up-to-date preparedness and prevention plan, by a used oil processor; or

(h) Transporting, processing, re-refining, burning or marketing used oil without first obtaining an EPA ID number.

(3) **Class III:**

(a) Failing to label one container or tank in which used oil was accumulated on site, if five or more tanks or containers are present;

(b) Failing to label up to two containers used for the accumulation or storage of used oil on site; or

(c) Failing to label a tank having less than 100 gallon capacity when used for the accumulation or storage of used oil on site.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 459.995, 468.020, ~~468~~459A.~~869~~590, ~~468~~459A.595~~.870~~ & 468.996
Stats. Implemented: ORS 459A.580 - 459A.585, 459A.590 & 468.090 - 468.140
Hist.: DEQ 33-1990, f. & cert. ef. 8-15-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0073

Environmental Cleanup Classification of Violations

(1) ~~**Class I:**~~ Violating any otherwise unclassified environmental cleanup-related requirements ~~are~~ is addressed under OAR 340-012-0053.

(2) **Class II:** Failing to provide information under ORS 465.250.

Stat. Auth.: ORS 465.280, 465.400 - 465.410, 465.435 & 468.020
Stats. Implemented: ORS 465.210 & 468.090 - 468.140
Hist.: DEQ 22-1988, f. & cert. ef. 9-14-88; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0074

Underground Storage Tank (UST) Cleanup Classification of Violations

(1) **Class I:**

(a) Failing to report a confirmed release from an UST;

(b) Failing to initiate or complete the investigation or cleanup, or to perform required monitoring, of a release from an UST;

(c) Failing to conduct free product removal;

(d) Failing to properly manage petroleum contaminated soil; or

(e) Failing to mitigate fire, explosion or vapor hazards.~~;~~

~~(f) Demonstrating negligence or incompetence in performing soil matrix cleanup services; or~~

~~(g) Providing or supervising soil matrix cleanup services without obtaining the appropriate license.~~

(2) **Class II:**

(a) Failing to report a suspected release from an UST;

(b) Failing to timely submit reports or other documentation from the investigation or cleanup of a release from an UST; or

(c) Failing to timely submit a corrective action plan or submitting an incomplete corrective action plan.

Stat. Auth.: ORS 466.746, 466.994 & 468.020
Stats. Implemented: ORS 466.706 - 466.835 & 466.994
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0079

Heating Oil Tank (HOT) Classification of Violations

(1) **Class I:**

(a) Failing to report a release from an HOT as required by OAR 340-163-0020(4) when the failure is discovered by ~~the department~~DEQ;

(b) Failing to initiate and complete the investigation or cleanup of a release from an HOT;

(c) Failing to initiate and complete free product removal;

(d) Failing to certify that heating oil tank services were conducted in compliance with all applicable regulations, by a service provider;

(e) Failing, by a responsible party or service provider, to conduct corrective action after ~~the department~~DEQ rejects a certified report; or

~~(f) Demonstrating negligence or incompetence in performing HOT services; or~~

(~~g~~f) Providing or supervising HOT services without first obtaining the appropriate license.

(2) **Class II:**

(a) Failing to submit a corrective action plan;

(b) Failing to properly decommission an HOT;

(c) Failing to hold and continuously maintain ~~errors and omissions or professional liability~~ insurance as required by OAR 340-163-0050~~, by a HOT service provider~~;

(d) Failing to have a supervisor present when performing HOT services;

(e) Failing to timely report a release from an HOT as required by 340-163-0020(4)~~within 72 hours~~ when the failure is reported to ~~the department~~DEQ by the responsible person or the service provider; or

(f) Offering to provide heating oil tank services without first obtaining the appropriate service provider license.

Stat. Auth.: ORS 466.746, 466.858 - 466.994 & 468.020
Stats. Implemented: ORS 466.706, 466.858 - 466.882, 466.994 & 468.090 - 468.140
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0081

Oil and Hazardous Material Spill and Release Classification of Violations

(1) **Class I:**

(a) Failing to immediately clean up spills or releases or threatened spills or releases of oil or hazardous materials, by any person having ownership or control over the oil or hazardous materials;

(b) Failing to immediately notify the Oregon Emergency Response System (OERS) of the type, quantity and location of a spill of oil or hazardous material~~,~~; and corrective and cleanup actions taken and proposed to be taken if the amount of oil or hazardous material released exceeds the reportable quantity~~,~~ or will exceed the reportable quantity within 24 hours;

(c) Spilling or releasing any oil or hazardous materials which enters waters of the state;

(d) Failing to activate alarms, warn people in the immediate area, contain the oil or hazardous material or notify appropriate local emergency personnel;

(e) Failing to immediately implement a required plan; or

(f) Failing to take immediate preventative, repair, corrective, or containment action in the event of a threatened spill or release.

(2) **Class II:**

(a) Failing to submit a complete and detailed written report to ~~the department~~DEQ of a spill of oil or hazardous material;

(b) Failing to use the required sampling procedures and analytical testing protocols for oil and hazardous materials spills or releases;

(c) Failing to coordinate with ~~the department~~DEQ during the emergency response to a spill after being notified of ~~the department~~DEQ's jurisdiction;

(d) Failing to immediately report spills or releases within containment areas when reportable quantities are exceeded and exemptions are not met under OAR 340-142-0040;

(e) Failing to immediately manage any spill or release of oil or hazardous materials consistent with the National Incident Management System (NIMS);

(f) Improperly or without approval of ~~the Department~~DEQ, treating, diluting or disposing of spill, or spill-related waters or wastes; or

(g) Using chemicals to disperse, coagulate or otherwise treat a spill or release of oil or hazardous materials without prior ~~department~~ DEQ approval.

(3) **Class III:**

(a) Failing to provide maintenance and inspections records of the storage and transfer facilities to ~~the department~~DEQ upon request; or

(b) Failing, by a vessel owner or operator, to make maintenance and inspection records, and oil transfer procedures available to ~~the department~~DEQ upon request.

Stat. Auth.: ORS 466.625 & 468.020
Stats. Implemented: ORS 466.635 - 466.680, 466.992 & 468.090 - 468.140
Hist.: DEQ 1-2003, f. & cert. ef. 1-31-03; DEQ 7-2003, f. & cert. ef. 4-21-03; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0082

Contingency Planning Classification of Violations

(1) **Class I:**

(a) Failing to immediately implement the oil spill prevention and emergency response contingency plan or other applicable contingency plan, after discovering a spill;

(b) Operating an onshore or offshore facility without an approved or conditionally approved oil spill prevention and emergency response contingency plan;

(c) Entering into the waters of the state, by a covered vessel without an approved or conditionally approved oil spill prevention and emergency response contingency plan or purchased coverage under an umbrella oil spill prevention and emergency response contingency plan;

(d) Failing to implement prevention measures identified in the facility or covered vessel spill prevention plan that directly results in a spill;

(e) Failing to maintain equipment, personnel and training at levels described in an approved or conditionally approved oil spill prevention and emergency response contingency plan;

(f) Failing to establish and maintain financial assurance as required by statute, rule or order; or

(g) Failing by the owner or operator of an oil terminal facility, or covered vessel, to take all appropriate measures to prevent spills or overfilling during transfer of petroleum or hazardous material products.

(2) **Class II:**

(a) Failing to submit an oil spill prevention and emergency response contingency plan to ~~the department~~DEQ at least 90 calendar days before beginning operations in Oregon, by any onshore or offshore facility or covered vessel;

(b) Failing to have available on site, a simplified field document summarizing key notification and action elements of a required vessel or facility contingency plan;

(c) Failing, by a plan holder, to submit and implement required changes to a required vessel or facility contingency plan following conditional approval;

(d) Failing, by a covered vessel or facility contingency plan holder, to submit the required vessel or facility contingency plan for re-approval at least ninety (90) days before the expiration date of the required vessel or facility contingency plan;

(e) Failing to submit spill prevention strategies as required; or

(f) Failing to obtain ~~department~~DEQ approval of the management or disposal of spilled oil or hazardous materials, or materials contaminated with oil or hazardous material, that are generated during spill response.

(3) **Class III:**

(a) Failing to provide maintenance and inspections records of the storage and transfer facilities to ~~the department~~DEQ upon request;

(b) Failing, by a vessel owner or operator, to make maintenance and inspection records and oil transfer procedures available to ~~the department~~DEQ upon request;

(c) Failing to have at least one copy of the required vessel or facility contingency plan in a central location accessible at any time by the incident commander or spill response manager;

(d) Failing to have the covered vessel field document available to all appropriate personnel in a conspicuous and accessible location;

(e) Failing to notify ~~the department~~DEQ within 24 hours of any significant changes that could affect implementation of a required vessel or facility contingency plan; or

(f) Failing to distribute amended page(s) of the plan changes to ~~the department~~DEQ within thirty (30) calendar days of the amendment.

Stat. Auth.: ORS 468B.350
Stats. Implemented: ORS 468B.345
Hist.: DEQ 1-2003, f. & cert. ef. 1-31-03; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0083

Ballast Water Management Classification of Violations

(1) **Class I:**~~-~~

(a) Discharging ~~of~~ ballast water in violation of OAR 340-143-0010; ~~without authorization.~~

(b) Failing to report ballast water management information required by OAR 340-143-0020 or OAR 340-143-0040(2) to DEQ;

(c) Failing to develop and maintain a vessel-specific ballast water management plan in accordance with OAR 340-143-0020(5); or

(d) Failing to make a ballast water log or record book available in accordance with OAR 340-143-0020(6)(b).

(2) **Class II:**

(a) Failing to report ballast water management information to ~~the department~~DEQ at least 24 hours before entering ~~the~~ waters of ~~this~~ the state in accordance with OAR 340-143-0020(1); or

~~(b) Failing to file an amended ballast water management report after a change in the vessel's ballast water management plan.~~

(b) Failing to maintain a complete ballast water log or record book in accordance with OAR 340-143-0020(6).

Stat. Auth.: ORS 783.~~600~~ 620 - 783.992
Stats. Implemented: ORS 783.620
Hist.: DEQ 1-2003, f. & cert. ef. 1-31-03; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0090 [Renumbered to **340-012-0135**]

340-012-0097

Dry Cleaning Classification of Violations

(1) **Class I:**

(a) Discharging dry cleaning wastewater to a sanitary sewer, storm sewer, septic system, or boiler ~~or~~ into waters of the state;

(b) Failing to have a secondary containment system under and around each dry cleaning machine or each tank or container of stored solvent;

(c) 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;

(d) Failing to timely repair the cause of a release within a containment system of dry cleaning solvent;

(e) Failing to immediately clean up a release or repair the cause of a release outside of a containment system of dry cleaning solvents or waste water contaminated with solvent;

(f) Illegally treating or disposing of hazardous waste generated at a dry cleaning facility;

(g) Transporting, delivering or designating on a manifest, delivery of hazardous waste generated at a dry cleaning facility to a destination facility not authorized or permitted to manage hazardous waste;

~~or~~

(h) Failing to use closed, direct-coupled delivery, by a person delivering perchloroethylene to a dry cleaning facility; or

(i) Failing to have closed, direct-coupled delivery for perchloroethylene, by a dry cleaning operator.

~~(h) Failing to conduct weekly perchloroethylene leak inspections, and to measure the perchloroethylene refrigerated condenser outlet temperature and log the results, by a dry cleaning owner or operator.~~

(2) **Class II:**

(a) Failing to place or store hazardous waste generated at a dry cleaning facility in properly labeled and closed containers;

(b) Accumulating hazardous waste beyond the specified accumulation time period;

(c) Failing, by a dry cleaning owner or operator, to prominently post the Oregon Emergency Response System telephone number so the number is immediately available to all employees of the dry cleaning facility;

(d) Failing to immediately clean up a release within a containment system of dry cleaning solvent or hazardous waste;

~~(e) Failing to use closed, direct-coupled delivery, by a person delivering perchloroethylene to a dry cleaning facility;~~

~~(f) Failing to have closed, direct-coupled delivery for perchloroethylene, by a dry cleaning operator;~~

(~~g~~e) Failing to remove all dry cleaning solvent or solvent containing residue or to disconnect utilities from the dry cleaning machine within 45 days of the last day of dry cleaning machine operations; or

(~~h~~f) Failing to timely submit an annual report to ~~the department~~DEQ, by a dry cleaning owner or operator.

(3) **Class III:** Failing to notify ~~the department~~DEQ of change of ownership or operator or closure at a dry cleaning business or dry cleaning store.

Stat. Auth.: ORS 466.070 - 466.080, 466.625 & 468.020
Stats. Implemented: ORS 466.635 - 466.680, 466.990, 466.994 & 468.090 - 468.140
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0130

Determination of Violation Magnitude

(1) The appropriate magnitude of ~~For~~ each civil penalty is determined by first applying the selected magnitude in OAR 340-012-0135. If none is applicable,~~assessed,~~ the magnitude is moderate unless evidence shows that the magnitude is major under paragraph (3) or minor under paragraph (4).~~:~~

~~(a) A selected magnitude is specified in 340-012-0135 and information is reasonably available to the department to determine the application of that selected magnitude; or~~

~~(b) The department determines, using information reasonably available to it, that the magnitude should be major under section (3) or minor under section (4).~~

(2) ~~If the department determines, using information reasonably available to the department, that a general or selected magnitude applies, the department's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that another magnitude applies and is more probable than the presumed magnitude.~~ The person against whom the violation is alleged has the opportunity and the burden to prove that ~~another~~ a magnitude under paragraph (1), (3) or (4) of this rule ~~applies and~~ is more probable than the ~~presumed~~ alleged magnitude, regardless of whether the magnitude is alleged under OAR 340-012-0130 or 340-012-0135.

(3) The magnitude of the violation is major if ~~the department~~ DEQ finds that the violation had a significant adverse impact on human health or the environment. In making this finding, ~~the department~~DEQ will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or commission and ~~department~~DEQ rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, ~~the department~~DEQ may consider any single factor to be conclusive.

(4) The magnitude of the violation is minor if ~~the department~~ DEQ finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or ~~other environmental receptors~~ the environment. In making this finding, ~~the department~~ DEQ will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and ~~department~~DEQ rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. ~~In making this finding, the department may consider any single factor to be conclusive.~~

Stat. Auth.: ORS 468.020 & 468.130
Stats. Implemented: ORS 459.376, 459.995, 465.900, 465.992, 466.990 - 466.994, 468.090 - 468.140 & 468B.450
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06

340-012-0135

Selected Magnitude Categories

(1) Magnitudes for selected Air Quality violations will be determined as follows:

~~if sufficient information is reasonable available to the department to make a determination:~~

(a) Opacity limit~~ation~~ violations:

(A) Major -- Opacity measurements or readings of 20 percent opacity or more over the applicable limit~~ation~~, or an opacity violation by a federal major source as defined in OAR 340-200-0020;

(B) Moderate -- Opacity measurements or readings greater than 10 percent opacity and less than 20 percent opacity over the applicable limit~~ation~~; or

(C) Minor -- Opacity measurements or readings of 10 percent opacity or less over the applicable limit~~ation~~.

(b) ~~Operation~~ Operating ~~of~~ a major source, as defined in OAR 340-200-0020, without first obtaining the required permit: Major -- ~~The~~ if a Lowest Achievable Emission Rate (LAER) or Best Achievable Control Technology (BACT) analysis shows ~~need~~ that ~~for~~ additional controls ~~and/~~or ~~if~~ offsets are or were needed, ~~are required~~ otherwise apply OAR 340-012-0130.

(c) Exceeding an emission limit established pursuant to New Source Review/Prevention of Significant Deterioration (NSR/PSD): Major – if exceeded the emission limit by more than 50 percent of the limit, otherwise apply OAR 340-012-0130.

(d) Exceeding an emission limit established pursuant to federal National Emission Standards for Hazardous Air Pollutants (NESHAPs): Major – if exceeded the Maximum Achievable Control Technology (MACT) standard emission limit for a directly-measured hazardous air pollutant (HAP), otherwise apply OAR 340-012-0130.

(~~c~~e) Air contaminant emission limit~~ation~~ violations for selected air pollutants: Magnitude determinations under this subsection shall be made based upon significant emission rate (SER) amounts listed in OAR 340-200-0020 (Tables 2 and 3).

(A) Major:

(i) Exceeding the annual emission limit as established by permit, rule or order by more than the annual ~~above amount~~SER; or

(ii) Exceeding the ~~monthly~~ short-term (less than one year) emission limit ~~-~~as established by permit, rule or order by more than ~~ten percent of the~~the applicable short-term ~~above amount~~SER.~~;~~

~~(iii) Exceeding the daily limit as established by permit, rule or order by more than 0.5 percent of the above amount; or~~

~~(iv) Exceeding the hourly limit as established by permit, rule or order by more than 0.1 percent of the above amount.~~

(B) Moderate:

(i) Exceeding the annual emission limit as established by permit, rule or order by an amount from 50 up to and including 100 percent of the annual ~~above amount~~SER; or

(ii) Exceeding the ~~monthly~~ short-term (less than one-year) emission limit as established by permit, rule or order by an amount from ~~five~~ 50 up to and including ~~ten~~ 100 percent of the ~~above amount~~applicable short-term SER~~;~~.

~~(iii) Exceeding the daily limit as established by permit, rule or order by an amount from 0.25 up to and including 0.50 percent of the above amount; or~~

~~(iv) Exceeding the hourly limit as established by permit, rule or order by an amount from 0.05 up to and including 0.10 percent of the above amount.~~

(C) Minor:

(i) Exceeding the annual emission limit as established by permit, rule or order by an amount less than 50 percent of the ~~above amount~~annual SER; or

(ii) Exceeding the ~~monthly~~ short-term (less than one year) emission limit as established by permit, rule or order by an amount less than ~~five~~ 50 percent of the ~~above amount~~applicable short-term SER.~~;~~

~~(iii) Exceeding the daily limit as established by permit, rule or order by an amount less than 0.25 percent of the above amount; or~~

~~(iv) Exceeding the hourly limit as established by permit, rule or order by an amount less than 0.05 percent of the above amount.~~

(~~d~~f) Violations of Emergency Action Plans: Major -- Major magnitude in all cases.

(~~e~~g) Violations of on road motor vehicle refinishing rules contained in OAR 340-242-0620: Minor -- Refinishing 10 or fewer on road motor vehicles per year.

(~~f~~h) Asbestos violations --These selected magnitudes apply unless the violation does not cause the potential for human exposure to asbestos fibers:

(A) Major -- More than 260 ~~lineal~~ linear feet or more than 160 square feet of asbestos-containing material or asbestos-containing waste material;

(B) Moderate -- From 40 linea~~l~~r feet up to and including 260 linea~~l~~r feet or from 80 square feet up to and including 160 square feet of asbestos-containing material or asbestos-containing waste material; or

(C) Minor -- Less than 40 linea~~l~~r feet or 80 square feet of asbestos-containing material or asbestos-containing waste material.

(D) The magnitude of the asbestos violation may be increased by one level if the material was comprised of more than five percent asbestos.

(~~g~~i) Open burning violations:

(A) Major -- Initiating or allowing the initiation of open burning of 20 or more cubic yards of commercial, construction, demolition and/or industrial waste; or 5 or more cubic yards of prohibited materials (inclusive of tires); or 10 or more tires;

(B) Moderate -- Initiating or allowing the initiation of open burning of ~~5~~ 10 or more, but less than 20 cubic yards of commercial, construction, demolition and/or industrial waste; or 2 or more, but less than 5 cubic yards of prohibited materials (inclusive of tires); or 3 to 9 tires; or if ~~the department~~DEQ lacks sufficient information upon which to make a determination of the type of waste, number of cubic yards or number of tires burned; or

(C) Minor -- Initiating or allowing the initiation of open burning of less than ~~5~~ 10 cubic yards of commercial, construction, demolition and/or industrial waste; or less than 2 cubic yards of prohibited materials (inclusive of tires); or 2 or less tires.

(D) The selected magnitude may be increased one level if ~~the department~~DEQ finds that one or more of the following are true, or decreased one level if ~~the department~~DEQ finds that none of the following are true:

(i) The burning took place in an open burning control area;

(ii) The burning took place in an area where open burning is prohibited;

(iii) The burning took place in a non-attainment or maintenance area for PM10 or PM2.5; or

(iv) The burning took place on a day when all open burning was prohibited due to meteorological conditions.

(~~h~~j) Oregon Low Emission Vehicle Non-Methane Gas (NMOG) or Green House Gas (GHG) fleet average emission limit violations:

(A) Major -- Exceeding the limit by more than 10 percent~~;~~; or

~~or~~

(B) Moderate -- Exceeding the limit by 10 percent or less.

(2) Magnitudes for selected ~~violations pertaining to~~ Water Quality violations will be determined as follows: ~~if sufficient information is reasonably available to the department to make a determination:~~

(a) Violating wastewater discharge permit effluent limitations:

(A) Major:

(i) The dilution (D) of the spill or technology based effluent limitation exceedance was less than two, when calculated as follows: D = ((QR /4) + QI)/ QI, where QR is the estimated receiving stream flow and QI is the estimated quantity or discharge rate of the incident;

(ii) The receiving stream flow at the time of the water quality based effluent limitation (WQBEL) exceedance was at or below the flow used to calculate the WQBEL; or

(iii) The resulting water quality from the spill or discharge was as follows:

(I) For discharges of toxic pollutants: CS/D was more than CAcute, where CS is the concentration of the discharge, D is the dilution of the discharge as determined under (2)(a)(A)(i), and CAcute is the concentration for acute toxicity (as defined by the applicable water quality standard);

(II) For spills or discharges affecting temperature, when the discharge temperature is at or above 32 degrees centigrade after two seconds from the outfall; or

(III) For BOD5 discharges: (BOD5)/D is more than 10, where BOD5 is the concentration of the five-~~-~~day Biochemcial Oxygen Demand of the discharge and D is the dilution of the discharge as determined under (2)(a)(A)(i).

(B) Moderate:

(i) The dilution (D) of the spill or the technology based effluent limitation exceedance was two or more but less than 10 when calculated as follows: D = ((QR /4)+ QI)/ QI, where QR is the estimated receiving stream flow and QI is the estimated quantity or discharge rate of the discharge; or

(ii) The receiving stream flow at the time of the WQBEL exceedance was greater than, but less than twice, the flow used to calculate the WQBEL.

(C) Minor:

(i) The dilution (D) of the spill or the technology based effluent limitation exceedance was 10 or more when calculated as follows: D = ((QR/4) + QI)/ QI, where QR is the receiving stream flow and QI is the quantity or discharge rate of the incident; or

(ii) The receiving stream flow at the time of the WQBEL exceedance was twice the flow or more of the flow used to calculate the WQBEL.

(b) Violating numeric water ~~-~~quality standards:

(A) Major:

(i) Increased the concentration of any pollutant except for toxics, dissolved oxygen, pH, and turbidity, by 25 percent or more of the standard;

(ii) Decreased the dissolved oxygen concentration by two or more milligrams per liter below the standard;

(iii) Increased the toxic pollutant concentration by any amount over the acute standard or by 100 percent or more of the chronic standard;

(iv) Increased or decreased pH by one or more pH units from the standard; or

(v) Increased turbidity by 50 or more nephelometric turbidity units (NTU) over background.

(B) Moderate:

(i) Increased the concentration of any pollutant except for toxics, pH, and turbidity by more than 10 percent but less than 25 percent of the standard;

(ii) Decreased dissolved oxygen concentration by one or more, but less than two, milligrams per liter below the standard;

(iii) Increased the concentration of toxic~~s~~ pollutants by more than 10 percent but less than 100 percent of the chronic standard;

(iv) Increased or decreased pH by more than 0.5 pH unit but less than 1.0 pH unit from the standard; or

(v) Increased turbidity by more than 20 but less than 50 NTU over background.

(C) Minor:

(i) Increased the concentration of any pollutant, except for toxics, pH, and turbidity, by 10 percent or less of the standard;

(ii) Decreased the dissolved oxygen concentration by less than one milligram per liter below the standard;

(iii) Increased the concentration of toxic pollutants by 10 percent or less of the chronic standard;

(iv) Increased or decreased pH by 0.5 pH unit or less from the standard; or

(v) Increased turbidity by 20 NTU or less over background.

(c) The selected magnitude under (2)(a) or (b) may be increased one or more levels if the violation:

(i) Occurred in a water body that is water~~-~~ quality limited (listed on the most current 303(d) list) and the discharge is the same pollutant for which the water body is listed;

(ii) Depressed oxygen levels or increased turbidity and/or sedimentation in a stream in which salmonids may be rearing or spawning as indicated by the beneficial use maps available at OAR 340-041-0101 through 0340;

(iii) Violated a bacteria standard either in shell~~-~~fish growing waters or during the period from June 1 through September 30; or

(iv) Resulted in a documented fish or wildlife kill.

(3) Magnitudes for selected Solid Waste violations ~~pertaining to Solid Waste~~ will be determined as follows:

~~if sufficient information is reasonably available to the department to make a determination:~~

(a) Operating a solid waste disposal facility without a permit or disposing of solid waste at an unpermitted site:

(A) Major -- The volume of material disposed of exceeds 400 cubic yards;

(B) Moderate -- The volume of material disposed of is greater than or equal to 40 cubic yards and less than or equal to 400 cubic yards; or

(C) Minor -- The volume of materials disposed of is less than 40 cubic yards.

(D) The magnitude of the violation may be raised by one magnitude if the material disposed of was either in the floodplain of waters of the state or within 100 feet of waters of the state.

(b) Failing to accurately report the amount of solid waste disposed:

(A) Major -- The amount of solid waste is underreported by 15 percent or more of the amount received;

(B) Moderate -- The amount of solid waste is underreported by 5 percent or more, but less than 15 percent, of the amount received; or

(C) Minor -- The amount of solid waste is underreported by less than 5 percent of the amount received.

(4) Magnitudes for selected Hazardous Waste violations ~~pertaining to Hazardous Waste~~ will be determined as follows:

~~if sufficient information is reasonably available to the department to make a determination:~~

(a) Failure to make a hazardous waste determination;~~:~~

(A) Major -- Failure to make the determination on five or more waste streams;

(B) Moderate -- Failure to make the determination on three or four waste streams; or

(C) Minor -- Failure to make the determination on one or two waste streams.

(b) Hazardous Waste treatment, storage and disposal violations of OAR 340-012-0068(1)(b), (c), (h), (k), (l), (m), (p), (q) and (r):

(A) Major:

(i) Treatment, storage, or disposal of more than 55 gallons or 330 pounds of hazardous waste; or

(ii) Treatment, storage, or disposal of ~~more than~~at least ~~three gallons~~one quart or ~~18~~ 2.2 pounds of acutely hazardous waste.

(B) Moderate:

(i) Treatment,storage, or disposal of 55 gallons or 330 pounds or less of hazardous waste; or

(ii) Treatment, storage, or disposal of ~~three~~ less than one quart~~gallons~~ or ~~18~~ 2.2 pounds ~~or less~~ of acutely hazardous waste.

(c) Hazardous waste management violations classified in OAR 340-012-0068(1)(d), (e) (f), (g), (i), (j), (n), (s) and (2)(a), (b), (d), (e), (h), (i), (k), (m), (n), (o), (p), (r) and (s):

(A) Major:

(i) Hazardous waste management violations involving more than 1,000 gallons or 6,000 pounds of hazardous waste; or

(ii) Hazardous waste management violations involving ~~more than~~at least ~~20~~ one ~~gallon~~quart~~s~~ or ~~120~~ 2.2 pounds of acutely hazardous waste.

(B) Moderate:

(i) Hazardous waste management violations involving more than 250 gallons or 1,500 pounds, up to and including 1,000 gallons or 6,000 pounds of hazardous waste; or

(ii) Hazardous waste management violations involving ~~more than 5 gallons~~less than one quart or 2.2 ~~30 pounds, up to and including 20 gallons or 60 pounds~~ pounds of acutely hazardous waste.

(C) Minor:

(i) Hazardous waste management violations involving 250 gallons or 1,500 pounds or less of hazardous waste~~; or~~ and no acutely hazardous waste.

~~(ii) Hazardous waste management violations involving 5 gallons or 30 pounds or less of acutely hazardous waste.~~

(5) Magnitudes for selected Used Oil violations (OAR 340-012-0072) will be determined as follows~~ if sufficient information is reasonably available to the department to make a determination~~:

(a) Used Oil violations set forth in OAR 340-012-0072(1)(f), (h), (i), (j); and (2)(a) through (~~j~~h):

(A) Major -- Used oil management violations involving more than 1,000 gallons or 7,000 pounds of used oil or used oil mixtures;

(B) Moderate -- Used oil management violations involving more than 250 gallons or 1,750 pounds, up to and including 1,000 gallons or 7,000 pounds of used oil or used oil mixture; or

(C) Minor -- Used oil management violations involving 250 gallons or 1,750 pounds or less of used oil or used oil mixtures.

(b) Used Oil spill or disposal violations set forth in OAR 340-012-0072(1)(a) through (e), (g) and (k).

(A) Major -- A spill or disposal involving more than 420 gallons or 2,940 pounds of used oil or used oil mixtures;

(B) Moderate -- A spill or disposal involving more than 42 gallons or 294 pounds, up to and including 420 gallons or 2,940 pounds of used oil or used oil mixtures; or

(C) Minor -- A spill or disposal of used oil involving 42 gallons or 294 pounds or less of used oil or used oil mixtures.

[ED. NOTE: Tables & Publications referenced are available from the agency.]

Stat. Auth.: ORS 468.065 & 468A.045
Stats. Implemented: ORS 468.090 - 468.140 & 468A.060
Hist.: DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 1-2003, f. & cert. ef. 1-31-03; Renumbered from 340-012-0090, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06; DEQ 6-2006, f. & cert. ef. 6-29-06

340-012-0140

Determination of Base Penalty

(1) Except for Class III violations and as provided in~~for some penalties assessed under~~ OAR 340-012-0155, the base penalty (BP) is determined by applying the ~~type,~~ class and magnitude of the violation to the matrices set forth in this section. For Class III violations, no magnitude determination is required.

(2) $~~8,000~~12,000 Penalty Matrix:

(a) The $~~8,000~~12,000 penalty matrix applies to the following:

(A) Any violation of an air quality statute, rule, permit or related order committed by a person that has or should have a Title V permit or an Air Contaminant Discharge Permit (ACDP) issued pursuant to New Source Review (NSR) regulations or Prevention of Significant Deterioration (PSD) regulations, or section 112(g) of the federal Clean Air Act.

(B) Open burning violations as follows:

(i) Any violation of OAR 340-264-0060(3) ~~an open burning statute, rule, permit or related order~~ committed by an ~~permitted~~ industrial facility operating under an air quality permit.

(ii) Any violation of OAR 340-264-0060(3) in which 25 or more cubic yards of prohibited materials or more than 15 tires are burned, except when committed by a residential owner-occupant.

(C) Any violation of the Oregon Low Emission Vehicle rules (OAR 340-257) by an automobile manufacturer.

(D) Any violation of ORS 468B.025(1)(a) or (1)(b), or of ORS 468B.050(1)(a) by a person without a~~n~~ National Pollutant Discharge Elimination System (NPDES) permit, unless otherwise classified.

(E) Any violation of a water quality statute, rule, permit or related order by:

(i) A person that has an NPDES permit, or that has or should have a Water Pollution Control Facility (WPCF) permit, for a municipal or private utility sewage treatment facility with a permitted flow of five million or more gallons per day.

(ii) A person that has a ~~major~~ Tier 1 industrial source NPDES or WPCF permit.

(iii) A person that has a population of 100,000 or more, as determined by the most recent national census, and either has or should have a WPCF Municipal Stormwater Underground Injection Control (UIC) System Permit, or has an NPDES Municipal Separated Storm Sewer Systems (MS4) Stormwater Discharge Permit.

~~(iv) A person that has or should have a WPCF permit for a major vegetable or fruit processing facility, for a major mining operation involving over 500,000 cubic yards per year, or for any mining operation using chemical leaching or froth flotation.~~

(~~i~~v) A person that installs or operates a prohibited Class I, II, III, IV or V UIC system, except for a cesspool.

(v) A person that has or should have applied for coverage under an NPDES Stormwater Discharge 1200-C General Permit for a construction site that disturbs 20 or more acres.

(F) Any violation of the ballast water statute in ORS Chapter 783 or ballast water management rule in OAR 340, Division 143.

(G) Any violation of a Clean Water Act Section 401 Water Quality Certification by a 100 megawatt or more hydroelectric facility.

(H) Any violation of a Clean Water Act Section 401 Water Quality Certification for a dredge and fill project except for Tier 1, 2A or 2B projects.

(~~F~~I)~~)~~ Any violation of an underground storage tanks statute, rule, permit or related order committed by the owner, operator or permittee of 10 or more UST facilities or a person who is licensed or should be licensed by ~~the department~~DEQ to perform tank services.

(~~G~~J) Any violation of a heating oil tank statute, rule, permit, license or related order committed by a person who is licensed or should be licensed by ~~the department~~DEQ to perform heating oil tank services.

(~~H~~K) Any violation of ORS 468B.485, or related rules or orders regarding financial assurance for ships transporting hazardous materials or oil.

(~~I~~L) Any violation of a used oil statute, rule, permit or related order committed by a person who is a used oil transporter, transfer facility, processor or re-refiner, off-specification used oil burner or used oil marketer.

(~~(J~~M) Any violation of a hazardous waste statute, rule, permit or related order by:

(i) A person that is a large quantity generator or hazardous waste transporter.

(ii) A person that has or should have a treatment, storage or disposal facility permit.

(~~K~~N) Any violation of an oil and hazardous material spill and release statute, rule, or related order committed by a covered vessel or facility as defined in ORS 468B.300 or by a person who is engaged in the business of manufacturing, storing or transporting oil or hazardous materials.

~~-~~(~~L~~O) Any violation of a polychlorinated biphenyls (PCBs) management and disposal statute, rule, permit or related order.

(~~M~~P) Any violation of ORS Chapter 465, UST or environmental cleanup statute, rule, related order or related agreement.

(~~N~~Q) Unless specifically listed under another penalty matrix, any violation of ORS Chapter 459 or any violation of a solid waste statute, rule, permit, or related order committed by:

(i) A person that has or should have a solid waste disposal permit.

(ii) A person with a population of 25,000 or more, as determined by the most recent national census.

(b) The base penalty values for the $12,000~~8,000~~ penalty matrix are as follows:

(A) Class I:

(i) Major — $~~8000~~12,000;

(ii) Moderate — $~~4000~~6,000;

(iii) Minor — $~~2000~~3,000.

(B) Class II:

(i) Major — $~~4000~~6,000;

(ii) Moderate — $~~2000~~3,000;

(iii) Minor — $~~1000~~1,500.

(C) Class III: $~~750~~1,000.

(3) $~~6,000~~8,000 Penalty Matrix:

(a) The $~~6,000~~8,000 penalty matrix applies to the following:

(A) Any violation of an air quality statute, rule, permit or related order committed by a person that has or should have an ACDP permit, except for NSR, PSD and Basic ACDP permits, ~~.~~ unless listed under another penalty matrix.

(B) Any violation of an asbestos statute, rule, permit or related order except those violations listed in section (5) of this rule.

(C) Any violation of a vehicle inspection program statute, rule, permit or related order committed by an auto repair facility.

(D) Any violation of the Oregon Low Emission Vehicle rules (OAR 340-257) committed by an automobile dealer or an automobile rental agency.

(E) Any violation of a water quality statute, rule, permit or related order committed by:

(i) A person that has an NPDES Permit, or that has or should have a WPCF Permit, for a municipal or private utility sewage treatment facility with a permitted flow of two million or more, but less than five million, gallons per day.

(ii) A person that has a ~~minor~~ Tier 2 industrial source NPDES or WPCF Permit~~, or has or should have a WPCF Permit, for an industrial source~~.

(iii) A person that has or should have applied for coverage under an NPDES or a WPCF General Permit, except an NPDES Stormwater Discharge 1200-C General Permit for a construction site of ~~one acre or more, but~~ less than five acres in size or 20 or more acres in size. ~~and except for an NPDES 700-PM General Permit for suction dredges.~~

(iv) A person that has a population of less than 100,000 but more than 10,000, as determined by the most recent national census, and has or should have a WPCF Municipal Stormwater UIC System Permit or has an NPDES MS4 Stormwater Discharge Permit.

~~(v) A person that has or should have a WPCF permit for a mining operation involving from 100,000 up to 500,000 cubic yards other than those operations using chemical leachate or froth flotation.~~

(v~~i~~) A person that owns, and that has or should have registered, a UIC system that disposes of wastewater other than stormwater or sewage or geothermal fluids.

(F) Any violation of a Clean Water Act Section 401 Water Quality Certification by a less than 100 megawatt hydroelectric facility.

(G) Any violation of a Clean Water Act Section 401 Water Quality Certification for a Tier 2A or Tier 2B dredge and fill project.

(~~F~~H) Any violation of an UST statute, rule, permit or related order committed by a person who is the owner, operator or permittee of five to nine UST facilities.

(~~G~~I) Unless specifically listed under another penalty matrix, any violation of ORS Chapter 459 or other solid waste statute, rule, permit, or related order committed by:

(i) A person that has or should have a waste tire permit; or

(ii) A person with a population of more than 5,000 but less than or equal to 25,000, as determined by the most recent national census.

(~~H~~J) Any violation of a hazardous waste management statute, rule, permit or related order committed by a person that is a small quantity generator.

(K) 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.

(b) The base penalty values for the $~~6,000~~8,000 penalty matrix are as follows:

(A) Class I:

(i) Major — $~~6,000~~8,000.

(ii) Moderate — $~~3,000~~4,000.

(iii) Minor — $~~1,500~~2,000.

(B) Class II:

(i) Major — $~~3,000~~4,000.

(ii) Moderate — $~~1,500~~2,000.

(iii) Minor — $~~750~~1,000.

(C) Class III: $~~500~~ 700.

(4) $~~2,500~~3,000 Penalty Matrix:

(a) The $~~2,500~~3,000 penalty matrix applies to the following:

(A) Any violation of any statute, rule, permit, license, or order committed by a person not listed under another penalty matrix.

(B) Any violation of an air quality statute, rule, permit or related order committed by a person not listed under another penalty matrix.

(C) Any violation of an air quality statute, rule, permit or related order committed by a person that has or should have a Basic ACDP or an ACDP or registration only because the person is subject to Area Source NESHAP regulations.

(~~C~~D) Any violation of OAR 340-264-0060(3) in which 25 or more cubic yards of prohibited materials or more than 15 tires are burned by a residential owner-occupant.

(~~D~~E) Any violation of a vehicle inspection program statute, rule, permit or related order committed by a natural person, except for those violations listed in section (5) of this rule.

(~~E~~F) Any violation of a water quality statute, rule, permit, license or related order not listed under another penalty matrix and committed by:

(i) A person that has an NPDES permit, or has or should have a WPCF permit, for a municipal or private utility wastewater treatment facility with a permitted flow of less than two million gallons per day.

(ii) A person that has or should have applied for coverage under an NPDES Stormwater Discharge 1200-C General Permit for a construction site that is more than one, but less than five acres.

(iii) A person that has a population of 10,000 or less, as determined by the most recent national census, and either has an NPDES MS4 Stormwater Discharge Permit or has or should have a WPCF Municipal Stormwater UIC System Permit.

(iv) A person who is licensed to perform onsite sewage disposal services or who has performed sewage disposal services.

(v) A person, except for a residential owner-occupant, that owns and either has or should have registered a UIC system that disposes of stormwater, ~~or~~ sewage or geothermal fluids.

(vi) A person that has or should have a WPCF individual stormwater UIC system permit.

(vii) Any violation of a water quality statute, rule, permit or related order committed by a person that has or should have applied for coverage under an NPDES 700-PM General Permit for suction dredges.

(~~F~~G) Any violation of an onsite sewage disposal statute, rule, permit or related order, except for a violation committed by ~~the~~ a residential owner-occupant.

(H) Any violation of a Clean Water Act Section 401 Water Quality Certification for a Tier 1 dredge and fill project.

(~~(~~I~~G~~) Any violation of an UST statute, rule, permit or related order if the person is the owner, operator or permittee of two to four UST facilities.

(~~(H~~J) Any violation~~, except a violation related to a spill or release,~~ of a used oil statute, rule, permit or related order, except a violation related to a spill or release, committed by a person that is a used oil generator.

(~~I~~K) ~~Unless listed under another penalty matrix,~~ ~~a~~Any violation of a hazardous waste management statute, rule, permit or related order committed by a person ~~that is a conditionally exempt generator if the violation does not impact the person's generator status~~that is a conditionally exempt generator, ~~,~~unless listed under another penalty matrix.

(~~J)~~L) Any violation of ORS Chapter 459 or other solid waste statute, rule, permit, or related order committed by a person with a population less than 5,000, as determined by the most recent national census.

(~~K~~M) Any violation of the labeling requirements of ORS 459A.675 through 459A.685.

(~~L~~N) Any violation of rigid pesticide container disposal requirements by a conditionally exempt generator of hazardous waste.

(O) Any violation of ORS 468B.025(1)(a) or (b) resulting from turbid discharges to waters of the state caused by non-residential uses of property disturbing less than one acre in size.

(P) 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.

(b) The base penalty values for the $~~2,500~~3,000 penalty matrix are as follows:

(A) Class I:

(i) Major — $~~2500~~3,000;

(ii) Moderate — $~~1250~~1,500;

(iii) Minor — $~~625~~750.

(B) Class II:

(i) Major — $~~1250~~1,500;

(ii) Moderate — $~~625~~750;

(iii) Minor — $~~300~~375.~~.~~

(C) Class III: $~~200~~250.

(5) $1,000 Penalty Matrix:

(a) The $1,000 penalty matrix applies to the following:

(A) Any violation of an open burning statute, rule, permit or related order committed by a residential owner-occupant at the residence, not listed under another penalty matrix.

(B) Any violation of visible emissions standards by operation of a vehicle.

(C) Any violation of an asbestos statute, rule, permit or related order committed by a residential owner-occupant.

(D) Any violation of an onsite sewage disposal statute, rule, permit or related order of OAR chapter 340, division 44 committed by a residential owner-occupant.

(E) Any violation of an UST statute, rule, permit or related order committed by a person who is the owner, operator or permittee of one UST facility.

(F) Any violation of an HOT statute, rule, permit or related order not listed under another penalty matrix.

(G) Any violation of OAR chapter 340, division 124 or ORS 465.505 by a dry cleaning ~~facility~~ owner or operator, dry store owner or operator, or supplier of perchloroethylene.~~statute, rule, permit or related order.~~

(H) Any violation of ORS Chapter 459 or other solid waste statute, rule or related order committed by a residential owner-occupant.

(~~H~~I) Any violation of a statute, rule, permit or order relating to rigid plastic containers, except for violation of the labeling requirements under OAR 459A.675 through 459A.685.

(~~I~~J) Any violation of a statute, rule or order relating to the opportunity to recycle.

(~~J~~K) Any violation of OAR chapter 340, division 262 or other statute, rule or order relating to solid fuel burning devices, except a violation related to the sale of new or used solid fuel burning devices or the removal and destruction of used solid fuel burning devices.

(~~K~~L) Any violation of an UIC system statute, rule, permit or related order by a residential owner-occupant, when the UIC disposes of stormwater, ~~or~~ sewage or geothermal fluids.

~~(L) Any violation by a person that has or should have applied for coverage under an NPDES 700-PM General Permit for Suction Dredges.~~

(M) Any Violation of ORS 468B.025(1)(a) or (b) resulting from turbid discharges to waters of the state caused by residential use of property disturbing less than one acre in size.

(b) The base penalty values for the $1,000 penalty matrix are as follows:

(A) Class I:

(i) Major — $1,000;

(ii) Moderate — $500;

(iii) Minor — $250.

(B) Class II:

(i) Major — $500;

(ii) Moderate — $250;

(iii) Minor — $125.

(C) Class III: $100.

Stat. Auth.: ORS 468.020 & 468.090 - 468.140
Stats. Implemented: ORS 459.995, 459A.655, 459A.660, 459A.685 & 468.035
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 33-1990, f. & cert. ef. 8-15-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 4-1994, f. & cert. ef. 3-14-94; DEQ 9-1996, f. & cert. ef. 7-10-96; DEQ 19-1998, f. & cert. ef. 10-12-98; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; Renumbered from 340-012-0042, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06; DEQ 6-2006, f. & cert. ef. 6-29-06; DEQ 2-2011, f. 3-10-11, cert. ef. 3-15-11

340-012-0145

Determination of Aggravating or Mitigating Factors

(1) Each of the aggravating or mitigating factors is determined, as described below, and then applied to the civil penalty formula in OAR 340-012-0045~~(2)~~.~~.~~

(2) "P" is whether the respondent has any prior significant actions (PSAs). A violation becomes a PSA on the date the first formal enforcement action (FEA) in which it is cited is issued.

(a) Except as otherwise provided in this section, the values for "P" and the finding that supports each are as follows:

(A) 0 if no PSAs or there is insufficient information on which to base a finding under this section.

(B) 1 if the PSAs included one Class II violation or two Class III violations; or~~.~~

(C) 2 if the PSA~~(ss)~~ included one Class I violation or Class I equivalent.

(D) For each additional Class I violation or Class I equivalent, the value of "P" is increased by 1.

(b) The value of "P" will not exceed 10.

(c) If any of the PSAs were issued under ORS 468.996, the final value of "P" will be 10.

(d) In determining the value of "P," ~~the department~~DEQ will:

(A) Reduce the value of "P" by:

(i) 2 if all the ~~formal enforcement actions~~FEAs in which PSAs were cited were issued more than three years before the date the current violation occurred.

(ii) 4 if all the ~~formal enforcement actions~~FEAs in which PSAs were cited were issued more than five years before the date the current violation occurred.

(B) Include the PSAs:

(i) At all facilities owned or operated by the same ~~violator~~ respondent within the state of Oregon; and

(ii) That involved the same media (air, water or land) as the violations that are the subject of the current FEA.

(e) In applying subsection (2)(d)(A), the value of "P" may not be reduced below zero.

(f) PSAs that are more than ten years old are not included in determining the value of "P."

(3) "H" is the respondent's history of correcting PSAs. The values for “H” and the finding that supports each are as follows:

~~(a) The values for "H" and the finding that supports each are as follows:~~

(~~A~~a) -2 if the ~~Respondent~~ respondent corrected all prior violations cited as PSAs.

(~~B~~b) -1 if the violations were uncorrectable and the respondent took reasonable efforts to minimize the effects of the violations cited as PSAs; or

(~~C~~c) 0 if there is no prior history or if there is insufficient information on which to base a finding under paragraphs (3)(a)~~(A)~~ or (~~B~~b).

(~~b~~d) The sum of values for "P" and "H" may not be less than 1 unless the respondent took extraordinary efforts to correct or minimize the effects of all PSAs. In no case may the sum of the values of "P" and "H" be less than zero.

(4) "O" is whether the violation was repeated or ongoing. A violation can be repeated independently on the same day, thus multiple occurrences may occur within one day. Each repeated occurrence of the same violation and each day of a violation with a duration of more than one day is a separate occurrence when determining the "O"factor. Each separate violation is also a separate occurrence when determining the "O" factor. The values for "O"and the finding that supports each are as follows:

~~(a) The values for "O" and the finding that supports each are as follows:~~

(~~A~~a) 0 if ~~the violation existed for one day or less and did not recur on the same day,~~ there was only one occurrence of the violation, or if there is insufficient information on which to base a finding under paragraphs (4)(~~a~~b)~~(B)~~ through (4)(~~a~~d)~~(D).~~.

(~~B~~b) 2 if ~~the violation recurred on the same day, or existed for or occurred on more than one day up to and including six days, which need not be consecutive days~~ there were more than one but less than seven occurrences of the violation.

(~~C~~c) 3 if ~~the violation existed for or occurred from seven to 28 days, which need not be consecutive days.~~there were from seven to 28 occurrences of the violation.

(~~D~~d) 4 if there were more than 28 occurrences of the violation.

(~~b~~e) ~~The department~~DEQ may, at its discretion, assess separate penalties for each ~~day~~ occurrence of ~~that~~ a violation. ~~occurs.~~ If ~~the department~~DEQ does so, the O factor for each affected violation will be set at 0. If DEQ assesses one penalty for multiple occurrences, the penalty will be based on the highest classification and magnitude applicable to any of the occurrences.

(5) "M" is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply. The values for "M" and the finding that supports each are as follows:

~~(a) The values for "M" and the finding that supports each are as follows:~~

(~~A~~a) 0 if there is insufficient information on which to base a finding under paragraphs (5)(~~a~~b)~~(B)~~ through (5)(~~a~~d)~~(D).~~.

(b) 2 if the respondent had constructive knowledge (reasonably should have known) of the requirement.

(~~B~~c) ~~2~~ 4 if the respondent's conduct was negligent.

~~or the respondent had constructive knowledge (reasonably should have known) that the conduct would be a violation. Holding a permit that prohibits or requires conduct is presumed to constitute at least constructive knowledge and may be actual knowledge depending on the specific facts of the case.~~

(~~C~~d) ~~6~~ 8 if the respondent's conduct was reckless~~,~~ or the respondent acted or failed to act ~~had~~ intentionally with actual knowledge of the requirement.

~~that its conduct would be a violation and respondent's conduct was intentional. A respondent that previously received a Notice of Noncompliance, WL, PEN or any FEA for the same violation is presumed to have actual knowledge. Holding a permit that prohibits or requires conduct may be actual knowledge depending on the specific facts of the case.~~

(~~D~~e) 10 if respondent acted flagrantly.

(6) "C" is the respondent's efforts to correct or mitigate the violation. The values for "C" and the finding that supports each are as follows:

~~(a) The values for "C" and the finding that supports each are as follows:~~

(~~A~~a) -~~3~~ 5 if the respondent made extraordinary efforts to correct the violation~~,~~ or ~~took extraordinary efforts~~ to minimize the effects of the violation, and made extraordinary efforts to ensure the violation would not be repeated.

(b) -4 if the respondent made extraordinary efforts to ensure that the violation would not be repeated.~~.~~

(~~B~~c) -~~2~~ 3 if the respondent made reasonable efforts to correct the violation, or took reasonable affirmative efforts to minimize the effects of the violation.~~, or~~

(~~extraordinary efforts to ensure the violation would not be repeated.~~

~~C~~d) -~~1~~ 2 if the respondent eventually made some efforts to correct the violation, or ~~took affirmative efforts~~ to minimize the effects of the violation.

(e) -1 if the respondent made reasonable efforts to ensure that the violation would not be repeated.

(~~D~~f) 0 if there is insufficient information to make a finding under paragraphs (6)(a)~~(A)~~ through (6)(~~a~~e)~~(C)~~, or (6)(~~a~~g) ~~(E),~~ or if the violation or the effects of the violation could not be corrected or minimized.

(~~E~~g) 2 if the respondent did not address the violation as described in paragraphs (6)(a)~~(A)~~ through (6)(~~a~~e)~~(C)~~ and the facts do not support a finding under paragraph (6)(~~a~~f)~~(D).~~.

Stat. Auth.: ORS 468.020 & 468.130
Stats. Implemented: ORS 459.376, 459.995, 465.900, 465.992, 466.990 - 994, 468.090 - 140 & 468B.450
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

340-012-0150

Determination of Economic Benefit

(1) The Economic Benefit (EB) is the approximate dollar value of the benefit gained and the costs avoided or delayed (without duplication) as a result of the respondent's noncompliance. The EB ~~may~~ will be determined using the U.S. Environmental Protection Agency's BEN computer model. DEQ may make, for use in the model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent.

~~Upon request of the respondent, the department will provide the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate are presumed to apply to all respondents unless a specific respondent can demonstrate that the standard value does not reflect that respondent's actual circumstance. Upon request of the Respondent, the department will use the model in determining the economic benefit component of a civil penalty.~~

(2)~~The department may make, for use in the applicable model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent. Economic benefit will be calculated without duplicating or double-counting the advantages realized by respondent as a result of its noncompliance~~ Upon request of the respondent, DEQ will provide the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate are presumed to apply to all respondents unless a specific respondent can demonstrate that the standard value does not reflect the respondent's actual circumstance.~~.~~

(3) ~~The department~~DEQ need not calculate EB if ~~the department~~DEQ makes a reasonable determination that the EB is de minimis or if there is insufficient information ~~reasonably available to the department~~ on which to make an estimate under ~~section (2) of~~ this rule.

(4) ~~The department~~DEQ may assess EB whether or not it assesses any other portion of the civil penalty using the formula in OAR 340-012-0045.

(5) ~~The department~~DEQ's calculation of EB may not result in a civil penalty for a violation that exceeds the maximum civil penalty allowed by rule or statute. However, when a violation has occurred or been repeated for more than one day, ~~the department~~DEQ may treat the violation as extending over at least as many days as necessary to recover the economic benefit of the violation.

~~When the purpose of treating a violation as extending over more than one day is to recover the economic benefit, the department has the discretion not to impose the base penalty portion of the civil penalty. Nothing in this section precludes the department from assessing a penalty of up to the maximum allowed for the violation by statute.~~

Stat. Auth.: ORS 468.020 & 468.090 - 468.140
Stats. Implemented: ORS 459.376, 459.995, 465.900, 465.992, 466.210, 466.990, 466.994, 467.050, 467.990, 468.090 - 468.140 & 468.996
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

340-012-0155

Additional or Alternate Civil Penalties

(1) DEQ may assess additional civil penalties for ~~T~~the following violations ~~and violators may be subject to additional civil penalties~~ as specified below:

(a)~~In addition to any other penalty prescribed by these rules,~~ DEQ may assess a civil penalty of up to $250,000 to any person who intentionally or recklessly violates any provisions of ORS 164.785, 459.205-459.426, 459.705–459.790, Chapters 465, 466, 467, 468, or 468A or 468B or any rule or standard or order of the commission adopted or issued pursuant to 459.205–459.426, 459.705–459.790, Chapters 465, 466, 467, 468, 468A, or 468B, that results in or creates the imminent likelihood for an extreme hazard to ~~the~~ public health or that causes extensive damage to the environment~~, may incur a civil penalty of up to $100,000~~. When determining the civil penalty to be assessed under this subsection, the director will use ~~apply~~ the ~~following~~ procedures set out below:

(A) ~~Select one of~~ T~~t~~he following base penalties apply ~~after evaluating the cause of the violation~~:

(i) $~~50,000~~100,000 if the violation was caused intentionally;

(ii) $~~75,000~~150,000 if the violation was caused recklessly;

(iii) $~~100,000~~200,000 if the violation was caused flagrantly.

(B) ~~Then determine the civil penalty through application of t~~ The civil penalty is calculated using the following formula: BP + [(.1 x BP) (P + H + O + C)] + EB.

(b)~~In addition to any other penalty prescribed by these rules,~~ A~~a~~ny person who intentionally or negligently causes or permits the discharge of oil or hazardous materials into waters of the state or intentionally or negligently fails to clean up a spill or release of oil or hazardous materials into waters of the state will incur a civil penalty not to exceed $~~20,000~~100,000 dollars for each violation. The amount of the penalty is determined as follows:

(A) ~~Determine T~~the class and magnitude of the violation are determined according to OAR 340-012-0045, then ~~determine~~ the base penalty is determined according to OAR 340-012-0140.

(B) ~~Determine t~~The multiplier for the base penalty is determined by adding the following values:

(i) 2 points if the violation was caused negligently; or 3 points if the violation was caused recklessly; or 4 points if the violation was caused intentionally with actual knowledge that a violation would occur; and

(ii) 1 point if the oil or hazardous material is or contains any constituent listed as a "hazardous substance" in 40 CFR 302; or 2 points if the oil or hazardous material is or contains any constituent listed as an "extremely hazardous substance" under 40 CFR 355; and

(iii) 2 points if the volume of the oil or hazardous material spilled, lost to the environment, or not cleaned up exceeds 1,000 gallons; and

(iv) 1 point if the violation impacted an area of particular environmental value where oil or hazardous materials could pose a greater threat than in other non-sensitive areas, for example, sensitive environments such as those listed in OAR 340-122-0115(50), drinking water sources, and cultural sites.

(C) ~~Multiply t~~The base penalty from paragraph (A) is multiplied by the sum of the points from paragraph (B) to determine the adjusted base penalty. ~~Using the adjusted base penalty as "BP," apply t~~The civil penalty formula in OAR 340-012-0045 is applied using the adjusted base penalty for the BP factor.

(c) ~~In addition to any other penalty prescribed by these rules, any~~ Any person who willfully or negligently causes or permits the discharge of oil to state waters will incur, in addition to any other penalty derived from application of the ~~$8,000~~applicable penalty matrix in 340-012-0140(2) and the civil penalty formula contained in OAR 340-012-0045, a civil penalty commensurate with the amount of damage incurred. The amount of the penalty will be determined by the director with the advice of the director of the Oregon Department of Fish and Wildlife. In determining the amount of the penalty, the director may consider the gravity of the violation, the previous record of the violator in complying with the provisions of ORS 468B.450 to 468B.460, and such other considerations the director deems appropriate.

(d) ~~In addition to any other penalty prescribed by these rules, any~~ Any person who has care, custody or control of a hazardous waste or a substance that would be a hazardous waste except for the fact that it is not discarded, useless or unwanted. will incur a civil penalty according to the schedule set forth in ~~this subsection~~ORS 496.705 for the destruction, due to contamination of food or water supply by such waste or substance, of any of the ~~following~~ wildlife referred to in ORS 496.705 that are property of the state.~~:~~

~~(A) Each game mammal other than mountain sheep, mountain goat, elk or silver gray squirrel, $400.~~

~~(B) Each mountain sheep or mountain goat, $3,500.~~

~~(C) Each elk, $750.~~

~~(D) Each silver gray squirrel, $10.~~

~~(E) Each game bird other than wild turkey, $10.~~

~~(F) Each wild turkey, $50.~~

~~(G) Each game fish other than salmon or steelhead trout, $5.~~

~~(H) Each salmon or steelhead trout, $125.~~

~~(I) Each fur-bearing mammal other than bobcat or fisher, $50.~~

~~(J) Each bobcat or fisher, $350.~~

~~(K) Each specimen of any wildlife species whose survival is specified by the wildlife laws or the laws of the United States as threatened or endangered, $500.~~

~~(L) Each specimen of any wildlife species otherwise protected by the wildlife laws or the laws of the United States, but not otherwise referred to in this section, $25.~~

(e) DEQ may assess a civil penalty of $500 to any owner or operator of a confined animal feeding operation that has not applied for or does not have a permit required by ORS 468B.050.

(2) Civil penalties for certain violations are subject to the following maximums in lieu of the maximum daily penalty provided in OAR 340-012-160(4):

~~The following violations are subject to the civil penalties specified below, in lieu of civil penalties calculated pursuant to OAR 340-012-0045:~~

(a) DEQ may assess a civil penalty of up to $1,000 for each day of violation to any person that fails to comply with the prohibitions on the sale or distribution of cleaning agents containing phosphorus in ORS 468B.130.

(b) DEQ may assess a civil penalty of up to $500 for each violation of each day to any person that fails to comply with Toxics Use Reduction and Hazardous Waste Reduction Act requirements of ORS 465.003 to 465.034.

(c) DEQ may assess a civil penalty of up to $500 for each violation of ORS 459.420 to 459.426. Each battery that is improperly disposed of is a separate violation, and each day an establishment fails to post the notice required by ORS 459.426 is a separate violation.

(d) DEQ may assess a civil penalty of up to $500 for each violation of the requirement to provide the opportunity to recycle as required by ORS 459A.005.

(3) DEQ may assess the civil penalties below in lieu of civil penalties calculated pursuant to OAR 340-012-0045:

(a) ~~The department~~DEQ will assess a ~~field~~ Field P~~p~~enalty as specified under OAR 340-150-0250 unless ~~the department~~DEQ determines that an owner, operator or permittee is not eligible for the ~~field~~ Field ~~penalty~~Penalty.

(b) DEQ may assess Expedited Enforcement Offers as specified under OAR 340-012-0170(2).

~~(b) Any owner or operator of a vessel discharging ballast water in violation of ORS 783.635 may incur a civil penalty not to exceed $5,000 for each violation. In determining the amount of the penalty, the director will consider whether the violation was intentional, negligent or without any fault and will consider the quality and nature of risks created by the violation, the previous record of the violator in complying with the provisions of 468B.450 to 468B.460, and such other considerations the director deems appropriate.~~

~~(c) Any owner or operator of a vessel violating the ballast water reporting requirements in ORS 783.640 will incur a civil penalty not to exceed $500 per violation.~~

~~(d) Air emission sources operating under the Western Backstop SO2 Trading Program will be assessed a civil penalty of at least $5,000 for each ton and each day of violation in excess of the applicable allowance limitation as determined by OAR chapter 340 division 228.~~

~~(e) Any owner or operator of a confined animal feeding operation that has not applied for or does not have a permit required by ORS 468B.050 will be assessed a civil penalty of $500.~~

~~(f) Any person that fails to comply with Toxics Use and Hazardous Waste Reduction Plan, system or summary requirements of ORS 465.003 to 465.034~~

~~may incur a civil penalty of $500 for each violation on each day.~~

Stat. Auth.: ORS 465, 466, 468.020, 468.130, 468.996 & 783.992
Stats. Implemented: ORS 459.995, 465.021, 466.785, 466.835, 466.992, 468.090 - 468.140, 468.996, 468B.220, 468B.450 & 783.992
Hist.: DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 9-2000, f. & cert. ef. 7-21-00; DEQ 1-2003, f. & cert. ef. 1-31-03; Renumbered from 340-012-0049, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06; DEQ 14-2008, f. & cert. ef. 11-10-08

340-012-0160

~~Department~~DEQ Discretion Regarding Penalty Assessment

(1) In addition to the authority ~~at~~ described in section (~~3~~4) below, ~~the department~~DEQ has the discretion to increase a base penalty determined under OAR 340-012-0140 to that derived using the next highest penalty matrix. Factors that may be taken into consideration in increasing a base penalty include the respondent's compliance history, the likelihood of future violations, the degree of environmental or human health impact, the deterrence impact and other similar factors.

(2) In determining a civil penalty, the director may reduce any penalty by any amount the director deems appropriate if the respondent has voluntarily disclosed the violation to ~~the department~~DEQ. In deciding whether a violation has been voluntarily disclosed, the director may take into account any considerations the director deems appropriate, including whether the violation was:

(a) Discovered through an environmental auditing program or a systematic compliance program;

(b) Voluntarily discovered;

(c) Promptly disclosed;

(d) Discovered and disclosed independent of the government or a third party;

(e) Corrected and remedied;

(f) Prevented from recurring;

(g) Not repeated;

(h) Not the cause of significant harm to human health or the environment; and

(i) Disclosed and corrected in a cooperative manner.

(3) For the violation of spilling oil or hazardous materials into waters of the state, if the respondent exceeds relevant DEQ regulations pertaining to spill preparation and takes all other reasonably expected precautions to prevent spills and be prepared for spill response, DEQ may reduce the penalty for the spill by 10%. Depending on circumstances, such precautions may include, without limitation, employee safety training, company policies designed to reduce spill risks, availability of spill response equipment or staff, or use of alternative non-toxic oils.

(~~3~~4) Regardless of any other penalty amount listed in this division, the director has the discretion to increase the penalty to $~~10,000~~25,000 per violation per day of violation based upon the facts and circumstances of the individual case.

(~~4~~5) DEQ may issue separate civil penalties to each potentially liable person for any violation or violations, regardless of whether the violations arise out of the same facts or circumstances~~For violations of a department-issued permit with more than one permittee, the department may issue separate civil penalties to each permittee~~, given compliance objectives, including the level of deterrence needed.

Stat. Auth.: ORS 468.020, 468.130
Stats. Implemented: ORS 183.745, 459.376, 459.995, 465.900, 465.992, 466.990, 466.994, 468.090-468.140, 468.996, 468B.450
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

340-012-0162

Inability to Pay the Penalty

(1) After a penalty is assessed, ~~the department~~DEQ may reduce a penalty based on the respondent's inability to pay the full penalty amount. In order to do so, ~~the department~~DEQ must receive information regarding the respondent's financial condition on a form required by ~~the department~~DEQ along with any additional documentation requested by ~~the department~~DEQ.

(2) If the respondent is currently unable to pay the full penalty amount, the first option is to place the respondent on a payment schedule with interest. ~~The department~~DEQ may reduce the penalty only after determining that the respondent is unable to meet a payment schedule of a length ~~the department~~DEQ determines is reasonable.

(3) In considering the respondent's ability to pay a civil penalty, ~~the department~~DEQ may use the U.S. Environmental Protection Agency's ABEL, INDIPAY or MUNIPAY computer models to evaluate a respondent's financial condition or ability to pay the full civil penalty amount. Upon request of the respondent, ~~the department~~DEQ will provide the respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model;

(4) ~~The department~~DEQ, at its discretion, may refuse to reduce an assessed civil penalty. In exercising this discretion, ~~the department~~DEQ may take into consideration any factor related to the violations or the respondent, including but not limited to the respondent's mental state, whether the respondent has corrected the violation or taken efforts to ensure the violation will not be repeated, whether the respondent's financial condition poses a serious concern regarding the respondent's ability to remain in compliance, the respondent's future ability to pay, and the respondent's real property or other assets.

Stat. Auth.: ORS 468.020, 468.130
Stats. Implemented: ORS 454.635, 454.645, 459.376, 459.995, 465.900, 465.992, 466.990-466.994, 468.090-468.140, 468B.220-468B.450
Hist.: DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

340-012-0165

Stipulated Penalties

Nothing in OAR chapter 340, division 12 affects the ability of the commission or ~~department~~DEQ to include stipulated penalties in a Mutual Agreement and Order, Consent Order, Consent Judgment or any other order or agreement issued under ORS Chapters 183, 454, 459, 465, 466, 467, 468, 468A, or 468B.

Stat. Auth.: ORS 454.625, 459.995, 468.020 & 468.996
Stats. Implemented: ORS 183.090 & 183.415
Hist.: DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; DEQ 19-1998, f. & cert. ef. 10-12-98; Renumbered from 340-012-0048, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05

340-012-0170

Compromise or Settlement of Civil Penalty by ~~Department~~DEQ

(1) ~~The department~~DEQ may compromise or settle a civil penalty assessed in a formal enforcement action at any amount that ~~the department~~DEQ deems appropriate. In determining whether a penalty should be compromised or settled, ~~the department~~DEQ may take into account the following:

(a) New information obtained through further investigation or provided by the respondent that relates to the penalty determination factors contained in OAR 340-012-0045;

(b) The effect of compromise or settlement on deterrence;

(c) Whether the respondent has or is willing to employ extraordinary means to correct the violation or maintain compliance;

(d) Whether the respondent has had any previous penalties which have been compromised or settled;

(e) Whether the respondent has the ability to pay the civil penalty as determined by OAR 340-012-~~0160~~0162;

(f) Whether the compromise or settlement would be consistent with ~~the department~~DEQ's goal of protecting human health and the environment; and

(g) The relative strength or weakness of ~~the department~~DEQ's evidence.

(2) Expedited Enforcement Offers:

(a) ~~The department~~DEQ may pursue informal disposition of any alleged violation by making an expedited enforcement offer.

(b) The decision as to whether to make an expedited enforcement offer with respect to any alleged violation is within ~~the department~~DEQ's sole discretion, except as otherwise provided in this section (2).

(c) In determining whether to make an expedited enforcement offer, ~~the department~~DEQ must consider the amount of the economic benefit gained by the alleged violator as a result of the noncompliance; whether the alleged violator has been the subject of a formal enforcement action or been issued a warning letter or pre-enforcement notice for the same or similar violations; whether the alleged violation is isolated or ongoing; and the mental state of the alleged violator.

(d) ~~The department~~DEQ will not make an expedited enforcement offer to settle a Class I violation that has been repeated within the previous three years or to settle a violation that would be a major magnitude violation under OAR 340-012-0130(3) regardless of whether a selected magnitude under 340-012-0135 applies.

(e) The penalty amount for an alleged violation cited in an expedited enforcement offer will be 40% of the moderate base penalty listed in OAR 340-012-0140 under the applicable matrix and the applicable classification.

(f) Participation in the expedited enforcement program is voluntary. An alleged violator to whom ~~the department~~DEQ makes an expedited enforcement offer is under no obligation to accept the offer.

(g) A person to whom an expedited enforcement offer is made has 30 calendar days from the date of the offer to accept the offer by ~~signing the expedited enforcement offer and submitting the signed expedited enforcement offer and payment~~ paying~~for~~ the total amount stipulated in the expedited enforcement offer, or by making a payment toward the total amount if DEQ has approved a payment plan. The ~~signed~~ expedited enforcement offer ~~and~~ payment and acceptance are deemed submitted when received by ~~the department~~DEQ.

(h) By ~~signing the expedited enforcement offer and~~ submitting payment to ~~the department~~DEQ of ~~in~~ the total amount stipulated in the expedited enforcement offer or a payment toward the total amount if DEQ has approved a payment plan, the alleged violator accepts the expedited enforcement offer, consents to the issuance of a final order of the commission which may include a compliance schedule, and agrees to waive any right to appeal or seek administrative or judicial review of the expedited enforcement offer, the final order, or any violation cited therein.

(i) Expedited enforcement offers incorporated into final orders of the commission will be treated as prior significant actions in accordance with OAR 340-012-0145.

(j) ~~The department~~DEQ may initiate a formal enforcement action for any violation not settled by acceptance of the expedited enforcement offer.

Stat. Auth.: ORS 459, 466, 467, 468.020 & 468.130, 183.415, 183.745
Stats. Implemented: ORS 468.130-140, 183.415, 183.470, 183.745, 459.376, 459.995, 465.900, 466.990, 466.994, 468.035, 468.090 - 140 & 468B.220
Hist.: DEQ 78, f. 9-6-74, ef. 9-25-74; DEQ 22-1984, f. & ef. 11-8-84; DEQ 22-1988, f. & cert. ef. 9-14-88, Renumbered from 340-012-0075; DEQ 4-1989, f. & cert. ef. 3-14-89; DEQ 15-1990, f. & cert. ef. 3-30-90; DEQ 21-1992, f. & cert. ef. 8-11-92; Renumbered from 340-012-0047, DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 14-2008, f. & cert. ef. 11-10-08

DIVISION 200

GENERAL AIR POLLUTION PROCEDURES AND DEFINITIONS

General

340-200-0040

State of Oregon Clean Air Act Implementation Plan

(1) This implementation plan, consisting of Volumes 2 and 3 of the State of Oregon Air Quality Control Program, contains control strategies, rules and standards prepared by DEQ and is adopted as the state implementation plan (SIP) of the State of Oregon pursuant to the federal Clean Air Act, 42 U.S.C.A 7401 to 7671q.

(2) Except as provided in section (3), revisions to the SIP will be made pursuant to the Commission's rulemaking procedures in division 11 of this chapter and any other requirements contained in the SIP and will be submitted to the United States Environmental Protection Agency for approval. The State Implementation Plan was last modified by the Commission on [INSERT DATE OF EQC ADOPTION OF RULES].

(3) Notwithstanding any other requirement contained in the SIP, DEQ may:

(a) Submit to the Environmental Protection Agency any permit condition implementing a rule that is part of the federally-approved SIP as a source-specific SIP revision after DEQ has complied with the public hearings provisions of 40 CFR 51.102 (July 1, 2002); and

(b) Approve the standards submitted by a regional authority if the regional authority adopts verbatim any standard that the Commission has adopted, and submit the standards to EPA for approval as a SIP revision.

NOTE: Revisions to the State of Oregon Clean Air Act Implementation Plan become federally enforceable upon approval by the United States Environmental Protection Agency. If any provision of the federally approved Implementation Plan conflicts with any provision adopted by the Commission, DEQ shall enforce the more stringent provision.

Stat. Auth.: ORS 468.020, 468A.035 & 468A.070
Stats. Implemented: ORS 468A.035
Hist.: DEQ 35, f. 2-3-72, ef. 2-15-72; DEQ 54, f. 6-21-73, ef. 7-1-73; DEQ 19-1979, f. & ef. 6-25-79; DEQ 21-1979, f. & ef. 7-2-79; DEQ 22-1980, f. & ef. 9-26-80; DEQ 11-1981, f. & ef. 3-26-81; DEQ 14-1982, f. & ef. 7-21-82; DEQ 21-1982, f. & ef. 10-27-82; DEQ 1-1983, f. & ef. 1-21-83; DEQ 6-1983, f. & ef. 4-18-83; DEQ 18-1984, f. & ef. 10-16-84; DEQ 25-1984, f. & ef. 11-27-84; DEQ 3-1985, f. & ef. 2-1-85; DEQ 12-1985, f. & ef. 9-30-85; DEQ 5-1986, f. & ef. 2-21-86; DEQ 10-1986, f. & ef. 5-9-86; DEQ 20-1986, f. & ef. 11-7-86; DEQ 21-1986, f. & ef. 11-7-86; DEQ 4-1987, f. & ef. 3-2-87; DEQ 5-1987, f. & ef. 3-2-87; DEQ 8-1987, f. & ef. 4-23-87; DEQ 21-1987, f. & ef. 12-16-87; DEQ 31-1988, f. 12-20-88, cert. ef. 12-23-88; DEQ 2-1991, f. & cert. ef. 2-14-91; DEQ 19-1991, f. & cert. ef. 11-13-91; DEQ 20-1991, f. & cert. ef. 11-13-91; DEQ 21-1991, f. & cert. ef. 11-13-91; DEQ 22-1991, f. & cert. ef. 11-13-91; DEQ 23-1991, f. & cert. ef. 11-13-91; DEQ 24-1991, f. & cert. ef. 11-13-91; DEQ 25-1991, f. & cert. ef. 11-13-91; DEQ 1-1992, f. & cert. ef. 2-4-92; DEQ 3-1992, f. & cert. ef. 2-4-92; DEQ 7-1992, f. & cert. ef. 3-30-92; DEQ 19-1992, f. & cert. ef. 8-11-92; DEQ 20-1992, f. & cert. ef. 8-11-92; DEQ 25-1992, f. 10-30-92, cert. ef. 11-1-92; DEQ 26-1992, f. & cert. ef. 11-2-92; DEQ 27-1992, f. & cert. ef. 11-12-92; DEQ 4-1993, f. & cert. ef. 3-10-93; DEQ 8-1993, f. & cert. ef. 5-11-93; DEQ 12-1993, f. & cert. ef. 9-24-93; DEQ 15-1993, f. & cert. ef. 11-4-93; DEQ 16-1993, f. & cert. ef. 11-4-93; DEQ 17-1993, f. & cert. ef. 11-4-93; DEQ 19-1993, f. & cert. ef. 11-4-93; DEQ 1-1994, f. & cert. ef. 1-3-94; DEQ 5-1994, f. & cert. ef. 3-21-94; DEQ 14-1994, f. & cert. ef. 5-31-94; DEQ 15-1994, f. 6-8-94, cert. ef. 7-1-94; DEQ 25-1994, f. & cert. ef. 11-2-94; DEQ 9-1995, f. & cert. ef. 5-1-95; DEQ 10-1995, f. & cert. ef. 5-1-95; DEQ 14-1995, f. & cert. ef. 5-25-95; DEQ 17-1995, f. & cert. ef. 7-12-95; DEQ 19-1995, f. & cert. ef. 9-1-95; DEQ 20-1995 (Temp), f. & cert. ef. 9-14-95; DEQ 8-1996(Temp), f. & cert. ef. 6-3-96; DEQ 15-1996, f. & cert. ef. 8-14-96; DEQ 19-1996, f. & cert. ef. 9-24-96; DEQ 22-1996, f. & cert. ef. 10-22-96; DEQ 23-1996, f. & cert. ef. 11-4-96; DEQ 24-1996, f. & cert. ef. 11-26-96; DEQ 10-1998, f. & cert. ef. 6-22-98; DEQ 15-1998, f. & cert. ef. 9-23-98; DEQ 16-1998, f. & cert. ef. 9-23-98; DEQ 17-1998, f. & cert. ef. 9-23-98; DEQ 20-1998, f. & cert. ef. 10-12-98; DEQ 21-1998, f. & cert. ef. 10-12-98; DEQ 1-1999, f. & cert. ef. 1-25-99; DEQ 5-1999, f. & cert. ef. 3-25-99; DEQ 6-1999, f. & cert. ef. 5-21-99; DEQ 10-1999, f. & cert. ef. 7-1-99; DEQ 14-1999, f. & cert. ef. 10-14-99, Renumbered from 340-020-0047; DEQ 15-1999, f. & cert. ef. 10-22-99; DEQ 2-2000, f. 2-17-00, cert. ef. 6-1-01; DEQ 6-2000, f. & cert. ef. 5-22-00; DEQ 8-2000, f. & cert. ef. 6-6-00; DEQ 13-2000, f. & cert. ef. 7-28-00; DEQ 16-2000, f. & cert. ef. 10-25-00; DEQ 17-2000, f. & cert. ef. 10-25-00; DEQ 20-2000 f. & cert. ef. 12-15-00; DEQ 21-2000, f. & cert. ef. 12-15-00; DEQ 2-2001, f. & cert. ef. 2-5-01; DEQ 4-2001, f. & cert. ef. 3-27-01; DEQ 6-2001, f. 6-18-01, cert. ef. 7-1-01; DEQ 15-2001, f. & cert. ef. 12-26-01; DEQ 16-2001, f. & cert. ef. 12-26-01; DEQ 17-2001, f. & cert. ef. 12-28-01; DEQ 4-2002, f. & cert. ef. 3-14-02; DEQ 5-2002, f. & cert. ef. 5-3-02; DEQ 11-2002, f. & cert. ef. 10-8-02; DEQ 5-2003, f. & cert. ef. 2-6-03; DEQ 14-2003, f. & cert. ef. 10-24-03; DEQ 19-2003, f. & cert. ef. 12-12-03; DEQ 1-2004, f. & cert. ef. 4-14-04; DEQ 10-2004, f. & cert. ef. 12-15-04; DEQ 1-2005, f. & cert. ef. 1-4-05; DEQ 2-2005, f. & cert. ef. 2-10-05; DEQ 4-2005, f. 5-13-05, cert. ef. 6-1-05; DEQ 7-2005, f. & cert. ef. 7-12-05; DEQ 9-2005, f. & cert. ef. 9-9-05; DEQ 2-2006, f. & cert. ef. 3-14-06; DEQ 4-2006, f. 3-29-06, cert. ef. 3-31-06; DEQ 3-2007, f. & cert. ef. 4-12-07; DEQ 4-2007, f. & cert. ef. 6-28-07; DEQ 8-2007, f. & cert. ef. 11-8-07; DEQ 5-2008, f. & cert. ef. 3-20-08; DEQ 11-2008, f. & cert. ef. 8-29-08; DEQ 12-2008, f. & cert. ef. 9-17-08; DEQ 14-2008, f. & cert. ef. 11-10-08; DEQ 15-2008, f. & cert. ef 12-31-08; DEQ 3-2009, f. & cert. ef. 6-30-09; DEQ 8-2009, f. & cert. ef. 12-16-09; DEQ 2-2010, f. & cert. ef. 3-5-10; DEQ 5-2010, f. & cert. ef. 5-21-10; DEQ 14-2010, f. & cert. ef. 12-10-10; DEQ 1-2011, f. & cert. ef. 2-24-11; DEQ 2-2011, f. 3-10-11, cert. ef. 3-15-11; DEQ 5-2011, f. 4-29-11, cert. ef. 5-1-11; DEQ 18-2011, f. & cert. ef. 12-21-11; DEQ 1-2012, f. & cert. ef. 5-17-12; DEQ 7-2012, f. & cert.ef 12-10-12; DEQ 10-2012, f. & cert. ef. 12-11-12; DEQ 4-2013, f. & cert. ef. 3-27-13

Information Item
Division 12 Rulemaking

State of Oregon Department of Environmental Quality

Leah Feldon, Manager, OCE

Les Carlough, Senior Policy Advisor, OCE

Jenny Root, Environmental Law Specialist & Division 12 Rules Coordinator

Topics for Today

- General overview of the enforcement process
- Senate Bill 105A (2009)
- Our Div 12 rulemaking process
- Overview of the expected proposed changes

The 35,000-foot View

- **DEQ's mission is to be a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water.**
- **Tools for achieving the mission:**
  - **Permitting & rulemaking**
  - **Public outreach and education**
  - **Technical assistance**
  - **Informal enforcement**
  - **Penalties & orders**

Enforcement Goals

- Correct the current violations
- Deter future noncompliance
- Encourage voluntary initiative
- Ensure economic fairness

Compliance Monitoring Actions

DEQ inspectors are located primarily in the regions. They identify violations through three primary means:

- **Reviewing self-monitoring reports**
- **Inspecting facilities**
- **Investigating complaints**

Three related authorities that guide what are violations, what penalties are associated with them, and whether to assess penalties:

- **Program substantive statutes & rules**
- **Division 12 rules**
- ***Enforcement Guidance***

Enforcement Guidance

- Creates consistency in:
  - informal warning letters
  - which cases will be referred for civil penalty
- Allows for reasonable flexibility to consider mitigating or aggravating circumstances

Initiation of formal enforcement

- Inspectors prepare and send a “referral” to OCE.
- OCE’s Environmental Law Specialists evaluate the evidence and law, and draft the formal enforcement action.
- The OCE Manager signs and mails the documents to the responsible party or parties, the “Respondent(s).”

Appeal Process

- The Respondent has 20 days in which to send in payment or make a written Request for Hearing.

- During this time DEQ may be in contact with the Respondent, working on corrective action or other issues.
- According to DOJ rules, failure to timely appeal results in a default order.

Informal Discussion

The ELS, inspector and Respondent meet to:

- Review the facts and evidence;
- Hear and weigh any new mitigating information;
- Explain the enforcement process and answer questions; and
- Discuss the compliance order to resolve any issues with the required actions and timelines.

Settlement

- **Reasons could include:**
  - Change the required actions or deadlines in the compliance order
  - Modify the factual allegations or penalty factors based on new information
  - Include a payment plan plus interest
  - Reduce the penalty because of financial hardship
  - Consider “litigation risk”
  - Supplemental Environmental Project (SEP)
- **Settlements are incorporated into a Mutual Agreement & Order**.

Contested Case Hearing

- Conducted by an administrative law judge (ALJ) from the Office of Administrative Hearings.
- Similar to a court trial, but less formal.
- The ALJ is required to render neutral and objective findings of fact in the Proposed Order.
- The Respondent may pay according to the Proposed Order, or DEQ and the Respondent may settle.
- The Respondent and/or DEQ may appeal the Proposed Order to the EQC.

Appeal to the EQC

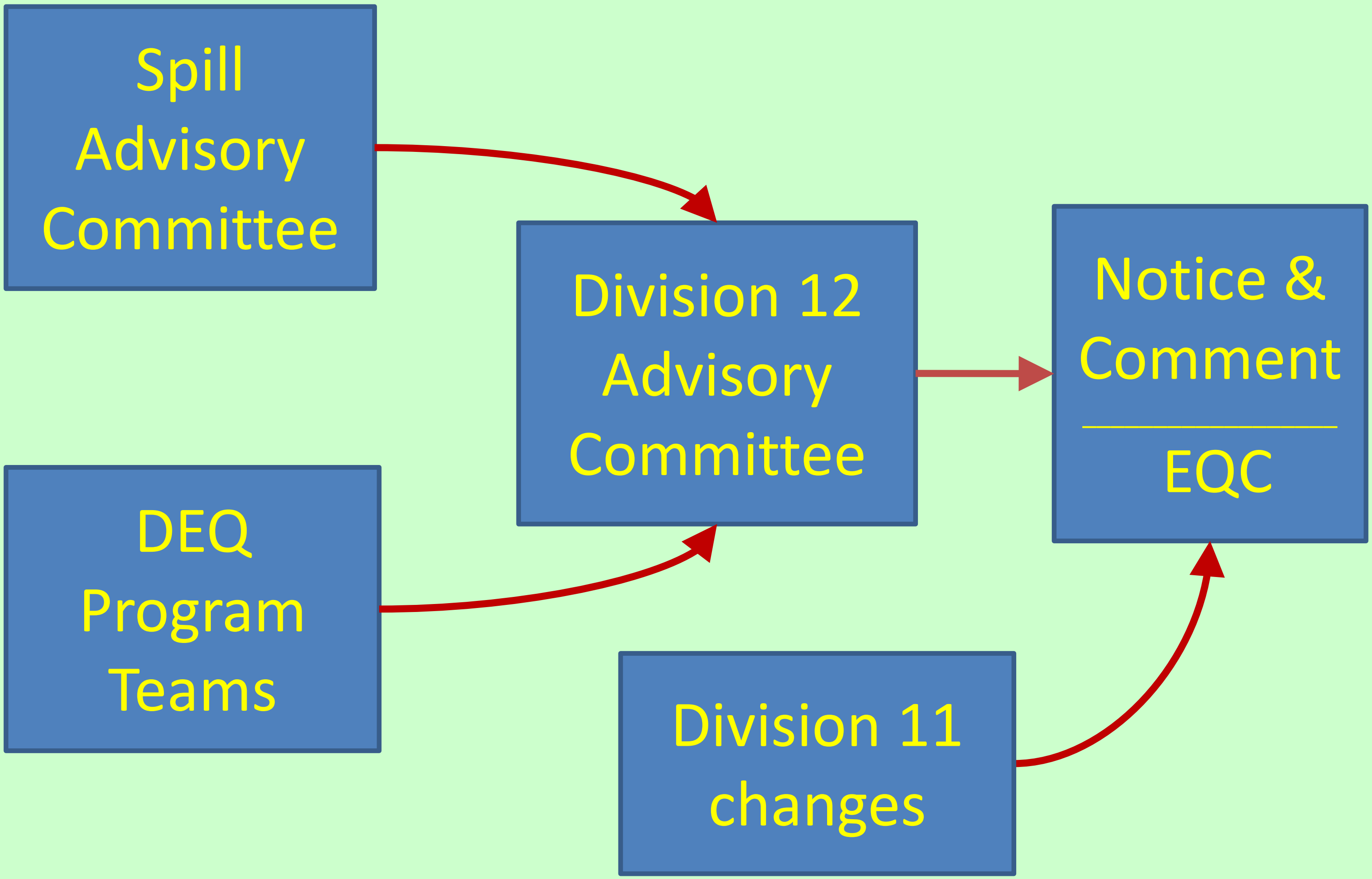
- Filing of an appeal
- Briefing
- Calendaring
- Submission of documents to you
- Argument and questioning
- Final Order
- Possible appeal to the Court of Appeals

Senate Bill 105A (2009)

<u>Increases maximum penalties for:</u>

- Most violations from $10,000 to $25,000 per day.
- Negligent or intentional spills of oil or hazardous materials into waters of the state, or failure to clean up such spills, to $100,000 per day.
- Violations causing extreme damage done intentionally from $100,000 to $250,000 per day.

Rulemaking Plan



Spill Advisory Committee

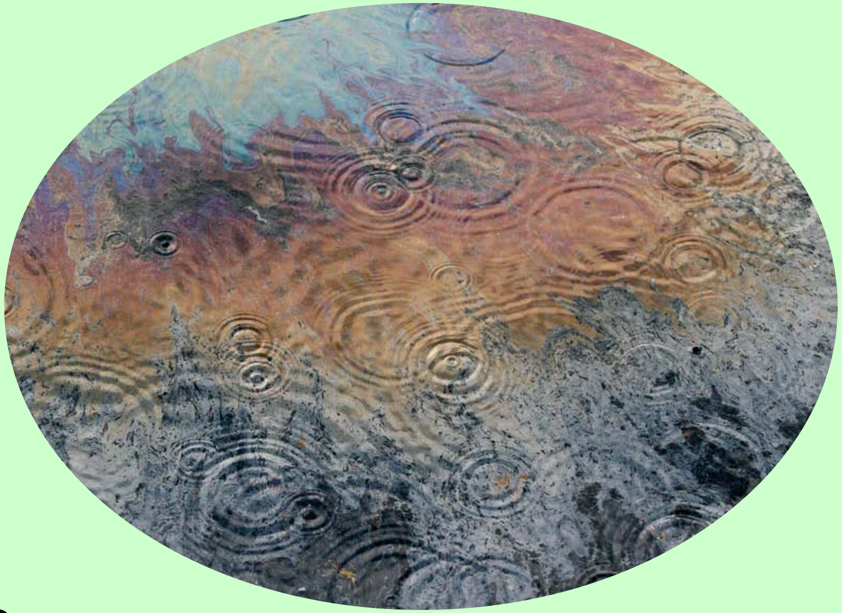
Name	Organization
Jess Brown	ODOT Motor Carrier Division
Brian Doherty	Western States Petroleum Assn.
Debra Dunn	Oregon Trucking Association
Jeff Fishel	Washington DOE Spill Enforcement
Bob Salinger	Audubon Society of Portland
Kate Spaulding	EPA Spills Compliance
Nick Teeter	Hexion Specialty Chemicals, Inc.
Capt. Jim Townley	Columbia River Steamship Operators Assn.
Derek White	Columbia County Emergency Response

Spill Advisory Committee

Comments & Suggestions

- DEQ is not issuing sufficient penalties in number or size.
- DEQ should consider a ticketing program to increase the number of penalties it assesses.
- DEQ should consider additional factors and circumstances in calculating a penalty.

Spill Penalty Proposal



Penalty considerations:

- Existing factors
- Type of entity
- Mental state
- Volume spilled
- Hazardous substance
- Impacted especially sensitive area
- Special mitigation for having taken advance precautionary measures

Division 12 Advisory Committee

Name	Organization
Aubrey Baldwin	Earthrise Law Center
Matthew Criblez	Portland Bureau of Environmental Services
Don Haagensen	Associated Oregon Industries
Merlyn Hough	Lane Regional Air Protection Agency
Phil Houk	Mayor of Pendleton
Courtney Johnson	Crag Law Center
Paul Koprowski	EPA Oregon Operations
Gerald P. Linder	Clean Water Services & Oregon Association of Clean Water Agencies
David Misel	Rejuvenation Inc.
Mike O'Connor	Continental Cleaners
Christopher Rich	Perkins Coie law firm

Penalty Calculation Formula

Penalty = BP + ((0.1 x BP) x (P + H + O + M + C)) + EB

Class	**Magnitude**	**BP from Matrix**	**Aggravating and Mitigating Factors**	**Economic Benefit (EB)**
I	Major	$8,000	Prior significant actions (P)	Delayed
II	Moderate	$6,000	History of correction (H)	Avoided
III	Minor	$2,500	Occurrences (O)	
		$1,000	Mental state (M)	
			Correction efforts (C)	

1. Determine Class
2. Determine Magnitude
3. Determine base penalty (BP) from the applicable matrix
4. Calculate aggravating and mitigating factors
5. Add the economic benefit

$8,000 Matrix (proposed $12,000)

	Class I	Class II	Class III
Major	$8000	$4000	$750
Moderate	$4000	$2000	$750
Minor	$2000	$1000	$750

Examples in matrix:

- Biggest air contaminant sources and critical permits
- Biggest sewage plants, industrial wastewater dischargers, major vegetable or fruit processing facilities, large mines
- Persons owning more than 10 underground storage tanks; tank service providers
- Used oil handlers, burners or marketers
- Large quantity generators of hazardous waste
- Solid waste violations by a large municipality of >25,000 population

$6,000 Matrix (proposed $8,000)

	Class I	Class II	Class III
Major	$6000	$3000	$500
Moderate	$3000	$1500	$500
Minor	$1500	$750	$500

Examples in matrix:

- Air violations by a person needing a state air contaminant discharge permit
- Violation of asbestos requirements, except homeowners
- Auto repair facility violations of vehicle inspection program requirements
- Water quality violations by municipal facilities with capacity of 2,000,000 to 5,000,000 gal/day; minor industrial source permittees; and most persons on general permits
- Underground storage tank violations by a person with 5 to 9 tanks
- Solid waste violations by a person needing a waste tire permit or a municipality with a population of 5,000 to 25,000
- Small quantity generators of hazardous waste

$2,500 Matrix (proposed $3,000)

	Class I	Class II	Class III
Major	$2500	$1250	$200
Moderate	$1250	$625	$200
Minor	$625	$300	$200

Examples in matrix:

- Any violation by a person not listed in another matrix
- Water quality violations by a municipal sewage facility with capacity of <2,000,000 gal/day; construction stormwater for 1-5 acres; municipality with a population of 10,000 or less; onsite sewage disposal service providers
- Violation of onsite sewage disposal rules except by a homeowner
- Underground storage tank violations by the owner of 2 to 4 tanks
- Violations by used oil generators, except for spills and releases
- Hazardous waste violations by conditionally exempt generator

$1,000 Matrix (no change proposed)

	Class I	Class II	Class III
Major	$1000	$500	$100
Moderate	$500	$250	$100
Minor	$250	$125	$100

Examples in matrix:

- Open burning violations by homeowner
- Asbestos violations by a homeowner
- Onsite sewage violations by a homeowner
- Underground storage tank violations by an owner of one tank
- Any heating oil tank violations not listed elsewhere
- Violations of the dry cleaning laws
- Woodstove violations except sales or removal of uncertified stoves

Proposals for Division 12

- Increase DEQ's civil penalty statutory maximums:
  - $8,000 matrix becomes $12,000
  - $6,000 matrix becomes $8,000
  - $2,500 matrix becomes $3,000
  - $1,000 matrix remains $1,000
- Align violation classification and magnitudes with DEQ program priorities
- Create greater mitigating credit for correcting violations
- Housekeeping that includes eliminating duplicative text

Proposals for Division 11

- Align DEQ contested-case procedural rules with the updated Oregon Attorney General Model Rules.
- Establish a new fee for onsite septic system program public records requests.
- Repeal OAR 340-011-0605 which became obsolete after Measure 49 (2007).
- Minor housekeeping changes.

Proposal for Division 200

- Update the Oregon Clean Air Act State Implementation Plan with the new penalty rules as required by the EPA under the Clean Air Act


Questions or comments?