From: Garrahan Paul
To: CURTIS Andrea
Subject: RE: EQC approval of LRAPA rules - 2010 Industrial Streamlining Corrections
Date: Friday, June 28, 2013 2:51:20 PM

Andrea: I have analyzed the information you have provided and offer the following advice addressing three separate aspects to this question: (1) was the notice substantively sufficient? (2) was the notice distributed as required? And (3) how does the passage of five years of time from LRAPA's adoption of these rules affect this decision?

[Preliminary note: The records you provided were regarding LRAPA's 2008 Industrial Streamlining Rule, not a 2010 rule. You did not provide information related to the 2010 updates and corrections to the 2008 rule. To the extent new notice was provided, including a new fiscal impact statement, and the new rule re-adopted the 2008 rule, as opposed to analyzing and adopting only the revised elements of the rules, it is possible that the 2010 rulemaking notice could supersede the 2008 notice. After you read the advice provided here, it would probably be worthwhile for you to provide me with similarly comprehensive rulemaking documents for the other LRAPA rulemakings for my review.]

1. Substantive Sufficiency of the Notice

Although some aspects of the notice could have more explicitly and consistently described the intent for these rules, after adoption by LRAPA, to go to the EQC for approval and incorporation into the SIP, I believe the notice was sufficient. The SOS Bulletin notice was listed under DEQ's chapter 340 rulemaking authority, it clearly indicated that amendments to OAR 340-200-0040 would be made, and it listed DEQ staff and address under "Rules Coordinator." I think that is sufficient to put the public on notice that this action would include the EQC's incorporation of the rules into the SIP via an amendment to OAR 340-200-0040. That said, it would have been much preferable had the text of the notice explicitly described the same thing. (See discussion in next paragraph regarding newspaper notice.)

The public hearing notice published in the Register Guard explicitly conveyed that the EQC would be undertaking rulemaking. It said:

"These rules will be included in Oregon's State Implementation Plan (SIP). If adopted by the LRAPA Board of Directors, the rules will be forwarded to Oregon Department of Environmental Quality (DEQ) for adoption by the Oregon Environmental Quality Commission (EQC) as an amendment to OAR 340-200-0040. If the EQC adopts the rule, it will be submitted by DEQ to the U.S. Environmental Protection Agency (EPA) as a revision to the SIP. This is a joint LRAPA/EQC hearing and LRAPA is servicing as hearings officer for EQC at this hearing."

That statement is precisely what I wish the SOS Bulletin notice had stated. It clearly and comprehensively describes the intended process. Finally, LRAPA's memorandum also included pretty good descriptions of the intended process (though not as well-stated as the Register Guard notice). [ASIDE: The LRAPA memo stated that anyone who provides oral or written testimony would be notified of the time and place for final EQC action. So if you proceed in that manner, you should

make a note to provide such notice.]

For these reasons, although there was room for improvement, I conclude that the notice was substantively sufficient.

2. Distribution of Notice

As described in LRAPA's May 4, 2011 memo to the EQC, the notice was placed in the SOS Bulletin, the Register Guard, and several other Lane County newspapers. OAR 340-011-0010(2)(b) requires rulemaking notice to go to DEQ's mailing list and legislators. (ORS 183.335(1)(d) also requires notice to legislators, and ORS 183.335(1)(c) requires notice be sent to the agency's mailing list.) The information you have provided does not clearly indicate whether the notice was sent to DEQ's mailing list and to legislators. If not, then the notice was insufficiently provided and the EQC's adoption of the rule at this time would likely be struck down by a court on those grounds, if challenged.

3. Effect of Passage of Five Years from LRAPA's Adoption

There is no firm "expiration date" or "statute of limitations" on how long after notice is provided an agency may adopt a rule. I advise that the agency must consider what an independent observer might conclude is reasonable under the circumstances. In effect, if challenged, that is the role the judges on the Court of Appeals would play. The likely argument would be that you hadn't given legally adequate notice because commenters did not have an opportunity to address how the rules would affect current conditions. You might also face challenges on the grounds that the fiscal impact statement relied on outdated information (a current analysis of whether the impacts described have, in fact, been borne out in practice in Lane County since the rules were adopted would probably be worthwhile, if you decide to take the risks on this). I think that there would be substantial risk that this rule would be invalidated on these grounds, if challenged. [And regarding other LRAPA rules, the shorter the period since LRAPA adoption, the less the risk for the EQC to approve and incorporate them into the SIP without providing separate notice and opportunity for public comment.]

Please let me know if you would like to talk through this issue further, or if there are any facts or circumstances that you think could mitigate some of the risks I've described above. I would be happy to discuss and consider this advice further.

Paul Garrahan
Assistant Attorney-in-Charge, Natural Resources Section
Oregon Department of Justice
971-673-1943 (Portland Office; T, Th & F)
503-947-4593 (Salem Office; M & W)

From: CURTIS Andrea [mailto:CURTIS.Andrea@deq.state.or.us]
Sent: Monday, June 24, 2013 11:31 AM
To: GARRAHAN Paul
Subject: EQC approval of LRAPA rules - 2010 Industrial Streamlining Corrections

Paul,

Attached are records from LRAPA's 2010 Industrial Streamlining Corrections Rule. We want to assess whether LRAPA's public notice was satisfactory and whether there's any need for DEQ to duplicate the public notice before proposing the rules to EQC for adoption.

Attachments include:

- Fiscal Impact Statement (I'll get a signed copy from LRAPA, but for this exercise, the attached unsigned copy seems fine)
- DEQ's Notice submitted to SOS
- December 2009 SOS Bulletin
- An affidavit of a newspaper ad published Dec 11, 2009 (there are two other newspaper ads not included that were published 12/26/09 and 12/24/09)
- Notice to interested parties
- LRAPA Board Minutes for January 12, 2010 (with public hearing and rule adoption)
- Hearing Officer Report

We don't have a letter from DEQ saying the proposed rules are as stringent as DEQ's. Considering the proposal is a correction to the 2008 rules instead of new requirements, is it ok that we don't have a letter?

Records for the other LRAPA rulemakings will come in a separate email.

Thanks,

Andrea Curtis
Oregon Department of Environmental Quality
Air Quality Division
503-229-5946
curtis.andrea@deq.state.or.us

From: GINSBURG Andy
Sent: Thursday, June 13, 2013 12:26 PM
To: OLIPHANT Margaret; CURTIS Andrea
Subject: FW: EQC approval of LRAPA rules

Can you get this info to Paul?

Thanks.

Andy Ginsburg
Air Quality Administrator
Oregon Department of Environmental Quality
(503) 229-5397 - Office
(503) 572-7195 - Mobile

From: Garrahan Paul [mailto:Paul.Garrahan@doj.state.or.us]
Sent: Thursday, June 13, 2013 9:59 AM
To: GINSBURG Andy
Subject: EQC approval of LRAPA rules

Andy: To ensure that I provide thorough advice, could you ask your staff to send me all of the relevant LRAPA rulemaking documents used to approve the four rules that the EQC must now approve and submit to EPA for incorporation into the SIP? It would be helpful to have the rulemaking and hearing notices, including the FIS and other related documents.

It would also be helpful, for my comparison, to get the same set of documents for last year's approval of the Oakridge PM 2.5 plan approval, including both LRAPA's rulemaking documents and those DEQ used to approve that plan.

I want to include an assessment of whether differences in the processes, if any, might present any legal risks. And also try to figure out how to align the process for the four rulemakings that the EQC needs to approve with the process that worked fairly well for the Oakridge approval.

Thanks.

Paul Garrahan
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