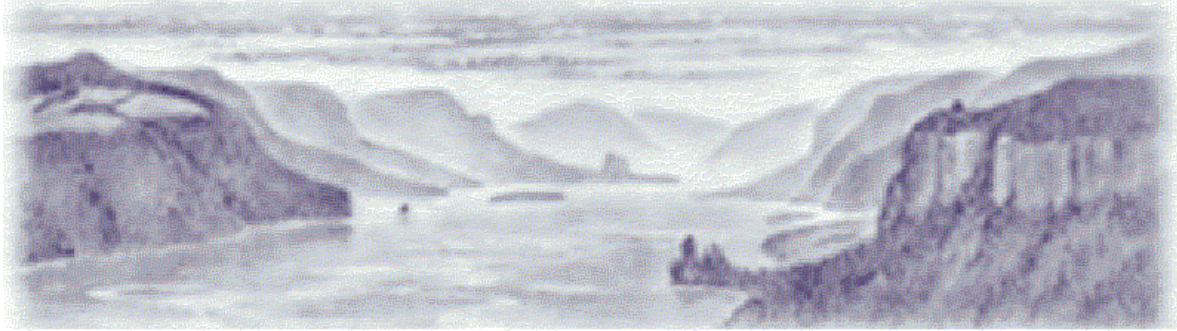




FRIENDS OF THE COLUMBIA GORGE

VIA E-MAIL AND FIRST-CLASS MAIL

August 28, 104

Oregon Department of Environmental Quality
Attn: Jill Inahara
811 SW 6th Avenue
Portland, OR 97204

Re: Proposed Revisions to Oregon Air Quality Permitting Rules

Department of Environmental Quality:

Friends of the Columbia Gorge would like to comment on the proposed revisions to the Department of Environmental Quality's ("DEQs") administrative rules governing the issuance of air quality permits. Friends is a nonprofit organization with approximately 5,000 members, dedicated to protecting and enhancing the air quality related resources of the Columbia River Gorge. We encourage the DEQ and the Environmental Quality Commission to address the concerns and suggestions raised below.

1. Extend Comment Period and consult with the Columbia River Gorge Commission and USDA Forest Service.

Friends does not have a record of receiving direct notice of the proposed rule revisions and has not had sufficient time to review the proposed revisions to the DEQ's air quality rules. The proposed revisions include changes to rules that address air pollution that would affect air quality in the Columbia River Gorge. To ensure adequate input from affected stakeholders and expert agencies, the DEQ should extend the comment period. The DEQ should also provide additional time to consult with the Columbia River Gorge Commission and the USDA Forest Service on proposed changes to DEQ regulations and how those changes would advance the purposes of the Columbia River Gorge National Scenic Area Act and Management Plan.

2. Preliminary recommendations for clarifications to DEQ's regulations related to air quality impacts to air quality related values in the Columbia River Gorge

DEQ's current regulations establish authority and requirements for protecting air quality related values within the Columbia River Gorge. This includes air quality related values occurring on federal land (both Class I and Class II areas) as well as state and private land within the Columbia River Gorge National Scenic Area. The DEQ is also required by the National Scenic Area Act and Management Plan to regulate air emissions to protect the Columbia River Gorge National Scenic Area.

While these laws and regulations are already in place, the DEQ's current rules should be revised to provide greater clarity on how DEQ will regulate air pollution to protect air quality related values in the Columbia River Gorge.

a. Legal Background

The Clean Air Act includes minimum standards for air quality protection and authorizes states to implement those standards so long as state regulations are no less stringent than the federal regulations. The Clean Air Act is explicit that the federal standards do not preempt all state regulations and that states and political subdivisions retain the authority to regulate air emissions so long as the regulations are "no less stringent than" the federal standards. 42 USC § 7416 (Retention of State authority).¹

While the Columbia River Gorge is not regulated under the Clean Air Act as a Class I area, it appears that the DEQ's regulations already provide protections for air quality related resources in the Columbia River Gorge National Scenic Area that exceed the minimum standards required by the Clean Air Act. These protections include standards for protecting air quality related values found within all federal forest lands, including Class II areas such as the National Scenic Area. For example, DEQ's regulations authorize the DEQ to impose conditions or decline to issue a permit if a proposed facility would significantly impair "other air quality related values" based on recommendations from the Federal Land Manager ("FLM").² These recommendations must be based on the Federal Land Managers' Air Quality Related Values

¹ "Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977 [enacted Aug. 7, 1977]), 209, 211(c)(4), and 233 [42 USCS §§ 7543, 7545(c)(4), and 7573] (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112 [42 USCS § 7411 or 7412], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

² OAR 340-225-0070 establishes standards for preventing significant impairment of AQRVs in Class I areas. However, OAR 340-225-0070(9) extends protections to Class II areas as well. The rule provides additional authority to protect "other air quality related values" based on recommendations from the Federal Land Manager that employ guidance from the Federal Land Managers' Air Quality Related Values Work Group Report ("FLAG Report"). The FLAG Report in turn provides protocols and standards for protecting air quality related values on all federal forest land, including Class II areas. As a result, DEQ already exceeds the minimum standards imposed by the Clean Air Act.

Work Group Report (“FLAG Report”). The FLAG guidance explicitly covers impacts to Class II areas. In addition, DEQ regulations require the DEQ to encourage permit applicants to demonstrate that a project would “not cause or contribute to significant impairment of visibility on the Columbia River Gorge National Scenic Area.”³ The rules authorize the DEQ to not issue a permit if it determines that a project would result in significant impairment.⁴

The Columbia River Gorge National Scenic Area Act provides a mandate and additional authority for the DEQ to protect air quality related values in the Columbia River Gorge. The National Scenic Area was created by Congress for the purpose of protecting and enhancing the scenic, natural, cultural, and recreation resources of the Columbia River Gorge. The first and primary purpose of the Scenic Area Act, enacted by Congress at 16 U.S.C. § 544a(1), is “to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge.” The second purpose of the Scenic Area Act, enacted at 16 U.S.C. § 544a(2), is to “protect and support the economy of the Columbia River Gorge area,” but only in a manner consistent with the first purpose. The second purpose of the Act is subordinate to the first purpose.

As an Oregon state agency, DEQ is required by ORS 196.155 to “carry out [its] respective functions and responsibilities in accordance with . . . the Columbia River Gorge National Scenic Area Act.” The Management Plan for the Columbia River Gorge National Scenic Area is required by the Scenic Area Act. The Management Plan is an interstate planning regulation that was adopted by the Columbia River Gorge Commission (“Gorge Commission”) and Forest Service in order to implement the Act.

The Scenic Area Act defines how to determine whether a project would “adversely affect” the scenic, cultural, recreational, or natural resources of the Scenic Area.⁵ The Management Plan, in turn, requires the State of Oregon to protect and enhance air quality in the Scenic Area “consistent with the purposes of the Scenic Area Act.” The Plan further requires the State of Oregon, in conjunction with the State of Washington and the Forest Service, to “continue to monitor air pollution and visibility levels in the Gorge,” to “conduct an analysis of monitoring and emissions data to identify all sources, both inside and outside the Scenic Area, that significantly contribute to air pollution” in the Scenic Area,” and to “develop and implement a regional air quality strategy to carry out the purposes of the Scenic Area Act.” Finally, the Management Plan requires the State of Oregon, in conjunction with the State of Washington and

³ OAR 340-225-0070(3)(a) .

⁴ OAR 340-225-0070(3)(c).

⁵ 16 U.S.C. § 544(a):

(a) “adversely affect” or “adversely affecting” means . . . a reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the scenic area, the determination of which is based on—

(1) the context of a proposed action;

(2) the intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence;

(3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts; and

(4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant [e]ffects to an insignificant level”

the Forest Service, to provide annual progress reports to the Columbia River Gorge Commission (“Gorge Commission”) on progress made in implementing these requirements.

Pursuant to these authorities, DEQ, in cooperation with the Southwest Washington Clean Air Agency (“SWCAA”) and the Forest Service, prepared the Columbia River Gorge Air Study and Strategy, which was presented to the Gorge Commission for approval. On September 13, 2011, the Gorge Commission approved the Strategy as consistent with the Management Plan. To implement the requirements of the Scenic Area Act and Management Plan, the Strategy analyzes trends in visibility in the Scenic Area through 2009, reviews multiple existing sources of air pollution, provides thresholds for measuring significant adverse impacts to air quality in the National Scenic Area, and ultimately requires “continued improvement” in air quality in the Scenic Area.

Through both existing DEQ regulations and the mandates of the National Scenic Area Act and Management Plan, the DEQ has both a legal mandate and authority to regulate air pollution emissions to protect air quality related values in the Columbia River Gorge. The DEQ’s draft revisions would modify the air quality rules governing projects that would affect air quality related values in the Columbia River Gorge. Friends recommends that the DEQ use this opportunity to provide greater clarity on how those rules should be implemented to protect air quality in the Gorge.

b. Preliminary recommendations for clarifying DEQ air quality rules affecting air quality related resources in the Columbia River Gorge.

As explained above, OAR 340-225-0070 includes standards for preventing significant impairment of air quality related values in both Class I and Class II areas. The DEQ’s draft revisions would modify standards for addressing impacts to visibility in the Columbia River Gorge National Scenic Area and also clarify requirements for addressing impacts from pollution deposition in the National Scenic Area. Friends provides the following preliminary recommendations that will clarify standards for protecting the Gorge.

i. OAR 340-225-0070(3) Visibility impact analysis requirements:

The DEQ’s current rules include language addressing whether a project would “not cause or contribute to significant impairment of visibility on the Columbia River Gorge National Scenic Area.” The rules also include a description of the process for making a determination of significant impairment. The draft revisions would make modeling of visibility impacts to the National Scenic Area mandatory, but would strip the requirement that the applicant demonstrate that the proposed facility “not cause or contribute to significant impairment of visibility.”

Friends’ recommends three changes to this section. First, retain the proposed revision that makes it explicit that visibility modeling for the National Scenic Area is mandatory. Second, retain the original language establishing a contribution to significant impairment as the standard for protecting visibility in the National Scenic Area. Third, revise the “determination of significant impairment” procedures to clarify that the determination addresses any significant impairment of any air quality related values protected by the regulations, including air quality related values in

Class II areas. The DEQ should also clarify that the determination of significant impairment should be based on the criteria listed in OAR 340-225-0070(5).

ii. OAR 340-225-0070(4) Types of visibility modeling required:

The draft revisions would modify OAR 340-225-0070(4) to authorize the DEQ to require regional haze and plume blight modeling for projects based on recommendations from the FLM under the FLAG Report. The revisions would eliminate references that limit this modeling to Class I areas.

Friends supports the recommended revisions.

iii. OAR 340-225-0070(5) Criteria for visibility impacts:

OAR 340-225-0070(5) includes criteria for determining whether visibility impacts will result in significant impairment, authorizes emission offsets, and requires the DEQ to not issue a permit if impairment to visibility would occur. The current rules only “encourage” the applicant to demonstrate visibility impacts based on the FLAG guidance criteria.

Friends recommends the DEQ revise the language only “encouraging” applicant to base their analysis on FLAG guidance criteria.

iv. OAR 340-225-0070(6) Deposition modeling:

OAR 340-225-0070(6) currently only requires deposition modeling for receptors in Class I areas. The proposed revisions would require deposition modeling for the Columbia River Gorge National Scenic Area. The draft revisions do not explicitly state that the DEQ shall not issue a permit if the project would significant impairment from deposition. Notably, other existing regulations also authorize the DEQ to require deposition modeling for the National Scenic Area and require the DEQ to not issue a permit if significant impairment would occur. See e.g. OAR 340-225-0050(3)(a),⁶ OAR 340-225-0070(5),⁷ OAR 340-225-0070(9).

Friends supports the recommended revision. Friends also recommends that the DEQ revise this section to clarify that significant impairment of air quality related values caused by deposition impacts is prohibited.

v. OAR 340-225-0070(7) Visibility Monitoring:

OAR 340-225-0070(7) currently only requires visibility monitoring for Class I areas. The current requirement has the potential to create confusion regarding DEQ’s obligations requiring ongoing monitoring of visibility in the National Scenic Area as required by the Management Plan.

⁶ “Concentration and deposition modeling may also be required for sources emitting other [non-heavy metal] compounds on a case-by-case basis.”

⁷ Authorizing additional impacts analysis based on the FLAG Report, which includes standards for deposition modeling for impacts to federal forest land in Class II areas.

To ensure consistency and clarity between the applicable laws, Friends recommends that the DEQ revise this section to address required visibility monitoring for the National Scenic Area.

In addition, Friends recommends that the DEQ include standards requiring monitoring of deposition impacts for projects that would cause impairment, but at a level less than significant.

vi. OAR 340-225-0070(8) *Additional Impacts Analysis*:

OAR 340-225-0070(8) currently requires additional impacts analysis for certain federal major sources, including how the proposed new source would affect visibility in conjunction with “general commercial, residential, industrial, and other growth associated with the source.” The DEQ does not propose revisions to this section.

Friends recommends that the DEQ revise this section to clarify how the additional impacts analysis will related to ongoing monitoring for impacts to the National Scenic Area and existing requirements for modeling impacts to the National Scenic Area. Friends also recommends that the DEQ clarify how this requirement relates to OAR 340-225-0030(4), which requires the applicant to supply baseline information on “the nature and extent of all commercial, residential, industrial, and other source emission growth, that has occurred since January 1, 1978, in the area the source or modification would significantly affect.” It may be appropriate to revise these sections to address existing requirements for monitoring continued improvement in the National Scenic Area.

vii. OAR 340-225-0070(9) “*Other Air Quality Related Values*”:

OAR 340-225-0070(9) authorizes the DEQ, in consultation with the FLM based on the FLAG guidance, to require a project applicant to analyze potential impacts to “other Air Quality Related Values and how to protect them.” This includes authority to require emission offsets and a requirement to “not issue a permit for the proposed source” if the project would result in “significant impairment.” Importantly, the FLAG guidance includes standards for analyzing impacts to federal forest land in both Class I and Class II areas. The FLAG guidance includes standards for analyzing impacts from visibility and from deposition. As such, the current rules require the DEQ to not issue a permit if the proposed source would cause significant impairment to visibility or from deposition in both Class I and Class II areas.

Friends’ preliminary recommendation is that the DEQ consider whether OAR 340-225-0070(9) should be revised to clarify the potential scope of other air quality related values. This could include clarifying the scope of the FLAG guidance. This could also include clarifying and ensuring consistency between the DEQ air permit regulations and the DEQ’s obligations under the National Scenic Area Act and Management Plan.

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viii. OAR 340-200-0020(134) Definition of “Significant Impairment”:

DEQ’s rules already authorize the DEQ to require offsets or not issue a permit if a proposed new source of pollution would cause significant impairment to air quality related resources in Class II areas, including the National Scenic Area. *See e.g.*, OAR 340-225-0070(9). The current definition of “significant impairment” only references “visibility impairment” in the context of impacts to Class I areas. To ensure consistency with existing air quality rules and consistency with the DEQ’s obligations under the National Scenic Area Act, the DEQ should revise the definition of significant impairment to include impacts to any air quality related values regulated by the DEQ.

3. Revisions to greenhouse gas emissions rules.

The DEQ’s notice of rulemaking explains that the proposed revisions were initiated in part to respond to a recent federal Supreme Court ruling interpreting the authority of the Clean Air Act to regulate greenhouse gas emissions. Friends notes that the State of Oregon retains authority to adopt more protective standards to prevent adverse impacts from greenhouse gas emissions. Friends strongly encourages the DEQ to adopt revisions to establish the highest level of protection from greenhouse gas emissions.

4. Conclusion

Friends encourages the DEQ to engage in additional consultation with the Columbia River Gorge Commission and the USDA Forest Service regarding revisions to the air quality permitting regulations. Friends encourages the DEQ to revise the air quality permitting rules to ensure consistency with and advance the purposes of the Columbia River Gorge National Scenic Area Act.

Sincerely,

A handwritten signature in blue ink, appearing to read "Richard Till", with a stylized flourish extending from the end.

Richard Till
Conservation Legal Advocate