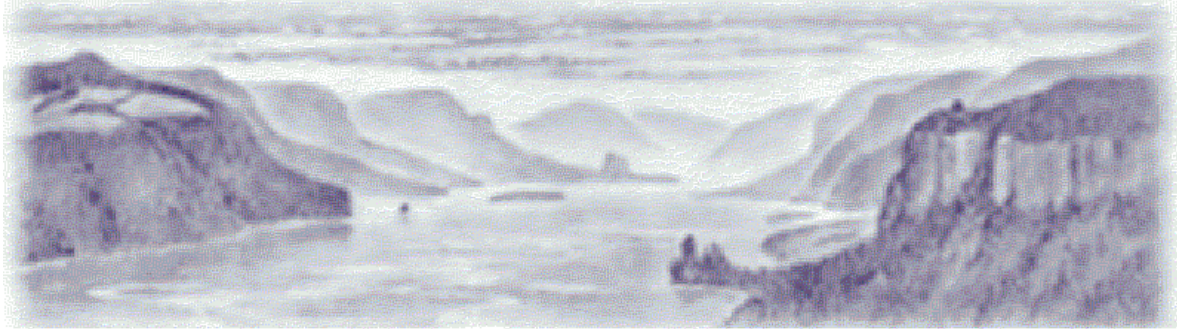




FRIENDS OF THE COLUMBIA GORGE

VIA E-MAIL AND FIRST-CLASS MAIL

September 15, 2014

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

Re: Proposed Revisions to Oregon Air Quality Permitting Rules

To Whom It May Concern:

Friends of the Columbia Gorge would like to comment on the proposed revisions to the Department of Environmental Quality's ("DEQs") administrative rules governing air quality permits. Friends previously submitted comments on August 28, 2014. The following comments reiterate and expand on those comments.

Friends is a nonprofit organization with approximately 5,000 members, dedicated to protecting and enhancing the resources of the Columbia River Gorge. Friends has been an advocate for the protection and improvement of air quality in the Columbia River Gorge for many years, including advocating for the implementation of the Columbia River Gorge National Scenic Area Act and other federal and state laws that serve to protect and enhance the scenic, natural, cultural, and recreational resources of the Gorge. Air pollution has been documented to cause significant adverse impacts to each of these protected resources. As a result, Friends encourages the DEQ and the Environmental Quality Commission ("EQC") to adopt revisions that clarify and strengthen air quality permitting rules.

A. Legal background for protecting AQRVs in the Columbia River Gorge.

DEQ has two sources of authority for regulating air pollution to protect air quality related ("AQRVs") in the Columbia River Gorge. First, the DEQ's general air quality permitting rules include standards that protect AQRVs on federal land within the Columbia River Gorge. Second,

the Columbia River Gorge National Scenic Area Act creates an independent mandate to prevent adverse impacts to the scenic, natural, cultural, and recreational resources of the Gorge.

The DEQ's authority to regulate air quality is also informed by the mandates of the Columbia River Gorge National Scenic Area Act and Management Plan, which provide additional mandates and authority to regulate air pollution 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 for the permitting standards that protect air quality and AQRVs in the Columbia River Gorge.

1. DEQ's AQRVs analysis and prevention of significant impairment.

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 state's and political subdivisions retain the authority to regulate air emissions so long as the regulations are "no less stringent than" the federal standards.¹

While the Clean Air Act establishes a floor for protecting AQRVs in Class I areas, it gives state's discretion to adopt additional protective measures for AQRVs on federal land in Class II areas. The DEQ's current rules establish protection for both Class I and Class II areas. The rules include explicit standards for preventing significant impairment of AQRVs in both Class I and Class II areas if the impacts are identified by the Federal Land Manager ("FLM") through guidance established in the *Federal Land Managers' Air Quality Related Values Work Group Phase I Report* ("FLAG Report" or "FLAG guidance").²

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 FLM based on the FLAG guidance.³ 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

¹ 42 USC § 7416 (Retention of State authority):

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 75 Fed. Reg. 66125, Oct. 27, 2010.

³ OAR 340-225-0070(9).

National Scenic Area.”⁴ The rules authorize the DEQ to not issue a permit if it determines that a project would result in significant impairment.⁵

2. DEQ is required to implement the Columbia River Gorge National Scenic Area Act.

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 Columbia River Gorge National Scenic Area Act mandates that the DEQ prevent adverse impacts from air pollution on the scenic, natural, cultural, and recreational 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.

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.⁶ 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

⁴ OAR 340-225-0070(3)(a) .

⁵ OAR 340-225-0070(3)(c), -0070(5)(b).

⁶ 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, documents existing sources of air pollution, and establishes thresholds for measuring whether an individual sources is causing significant impacts to Gorge air quality. While documenting individual sources causing significant impacts, the Strategy ultimately adopts an overall goal of “continued improvement” for air quality in the Scenic Area. The Management Plan also requires annual reporting from the DEQ to the Gorge Commission on the progress towards continued improvement.

ORS 196.155 requires the DEQ to implement these standards. The DEQ should revise its air quality permitting regulations to ensure clarity and consistency between those regulations and the DEQ’s obligations under ORS 196.155.

B. Recommendations for clarifying DEQ air quality rules affecting AQRVs 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 Columbia River Gorge.

1. OAR 340-225-0070(1) Exemptions from AQRV standards for non-federal major sources.

OAR 340-225-0070(1) states that sources that are not “federal major sources are exempt from the” AQRV rules. As written, the exemption would cover all non-federal major sources of pollution without any additional screening thresholds that would ensure, on a case-by-case basis, that a new source would not impair AQRVs and avoid adverse impacts to the National Scenic Area. Screening thresholds could include review of whether the source would be a significant contributor to air quality problems within areas protected by the AQRV standards in ORS 340-225. The threshold for non-federal major source should factor in project-specific circumstances, such as the distance between the proposed project and the categories of federal lands addressed in the FLAG Report. The screening thresholds could rely on basic modeling protocols and emission estimates to ensure that the actual thresholds for adverse impacts/significant impairment are not exceeded.

In order to develop specific revisions, the DEQ should consult with the Forest Service to identify appropriate screening thresholds, such as distance from federal lands, and appropriate guidance from the FLAG Report.

Recommended Revisions for OAR 340-225-0070(1):

- Develop minimum screening criteria for projects that are not “federal major sources” to determine whether projects should be exempt from all AQRV protection standards and National Scenic Area protection standards. Screening thresholds should include project-specific analysis to determine whether the proposed facility would be a significant contributor to AQRVs protected by OAR 340-225.

2. OAR 340-225-0070(3), (4), (5). Visibility impact analysis and visibility impact criteria:

The current AQRV rules include standards for modeling visibility impacts from haze and visibility impacts from plume blight. OAR 340-225-0070(3), (4). The rules also provide criteria for evaluating visibility impacts and require the DEQ to not issue a permit if visibility impacts would cause significant impairment. OAR 340-225-0070(5). These rules include standards for modeling impacts to the National Scenic Area and criteria for evaluating impacts. OAR 340-225-0070(a), (5).

The DEQ’s current rules state that the DEQ must encourage an applicant to demonstrate that a proposed facility would “not cause or contribute to significant impairment of visibility on the Columbia River Gorge National Scenic Area.” OAR 340-225-0070(3)(a). The rules also include two separate procedures for making a determination of significant impairment as a basis for not issuing a permit. OAR 340-225-0070(3)(e) establishes that significant impairment to Class I areas is a basis for not issuing a permit. However, the “Criteria for visibility impacts” in OAR 340-225-0070(5)(b) establishes a broader scope by not limiting the review of significant impairment to Class I areas. The determination of significant impairment under OAR 340-225-0070(5)(b) must be made in consultation with the FLM. Under this rule the DEQ has a mandate to not issue a permit if significant impairment would occur, even if the impairment would affect Class II areas. This is reinforced by OAR 340-225-0070(9), which authorizes non-issuance/denial of a permit due to impacts to “other AQRVs,” including AQRVs in Class II areas.

The DEQ’s draft revisions would make modeling of visibility impacts to the National Scenic Area mandatory instead of voluntary. Draft OAR 340-225-0070(4)(b). The proposed revisions would delete the requirement that the modeling demonstrate that the facility would “not cause or contribute to significant impairment of visibility.” *Id.* The draft revisions would modify OAR 340-225-0070(4)(b) 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. At the same time, the draft revisions for Draft OAR 340-225-0070(6)(b) would retain the broader standard for

determining significant impairment. These criteria would apply to modeling required under -0070(43) and -0070(45).

Thus, it appears the draft revisions retain the broad prohibition of significant impairment of AQRVs based on FLM input. However, the organization and wording of this requirement could be improved. Because the “criteria for visibility impacts” in -0070(65)(b) applies to the haze modeling in 0070(43) and plume blight modeling in -0070(45), it appears that the “determination of significant impairment” standard in -0070(43)(ed) may be redundant. The easy solution would be to simply delete -0070(43)(ed). If further clarification is needed, 0070(43) and -0070(45) could be revised to cross-reference the visibility impact criteria in -0070(65)(b).

Finally, the visibility modeling standards and criteria for visibility impacts do not directly implement the requirements of the National Scenic Area Act, Management Plan, and Air Quality Strategy. The DEQ should revise these provisions by adding language tying that standard to the adverse impact standard from the National Scenic Area Act pursuant to ORS 196.155. This could be accomplished by adding language to the “criteria for visibility impacts” in -0070(65)(b) that specifically incorporate the National Scenic Area standards.

Recommended Revisions for Draft OAR 340-225-0070(43)(b), -0070(45), and 0070(65)(b):

- Retain the proposed revision that makes it explicit that visibility modeling for the National Scenic Area is mandatory.
- Retain “significant impairment” as threshold for impacts to the National Scenic Area and add language tying that threshold to adverse impacts as defined by the National Scenic Area Act pursuant to ORS 196.155. Revise Draft OAR 340-225-0070(65)(b) to incorporate National Scenic Area standards.
- Delete Draft OAR 340-225-0070(43)(ed) and retain the criteria for significant impairment in OAR 340-225-0070(65)(b). If necessary, cross-reference -0070(65)(b) in the modeling requirements in -0070(43) and -0070(45).
- Revise the language in Draft OAR 340-225-0070-0070(65)(b) to require applicants to base their analysis on FLAG guidance.

3. 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. Notably, other existing regulations also authorize the DEQ to require deposition modeling for the National Scenic Area. *See e.g.* OAR 340-225-0070(5),⁷ OAR 340-225-0050(3)(a).⁸

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.

⁸ “Concentration and deposition modeling may also be required for sources emitting other [non-heavy metal] compounds on a case-by-case basis.”

Friends supports the recommended revision. Friends also recommends that the DEQ revise this section to include a standard prohibiting significant impairment of AQRVs and incorporating the adverse affect standards from the National Scenic Area Act.

Recommended Revisions for Draft OAR 340-225-0070(76):

- Retain the proposed revision requiring deposition modeling for impacts to the National Scenic Area.
- Add language addressing significant impairment and incorporating National Scenic Area standards for adverse impacts.

4. 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.

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 for requiring deposition monitoring for projects that require offsets for impacts from deposition and for projects that would cause impairment, but at a level less than significant.

Recommended Revisions for Draft OAR 340-225-0070(87):

- Add a new subsection requiring monitoring of impacts to the National Scenic Area and explicitly referencing the National Scenic Area Act, Management Plan, and Air Quality Strategy standards.

5. OAR 340-225-0070(8) Additional Impacts Analysis and baseline data required by OAR 340-225-0030(4):

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 is not clear whether OAR 340-225-0030(4) is explicitly required by any other

provision in Chapter 225. It appears that DEQ's heavy reliance on cross-incorporation has inadvertently left OAR 340-225-0030(4) as an orphaned application standard. The DEQ should clarify how this baseline disclosure fits within the permitting scheme.

Recommended Revisions for Draft OAR 340-225-0070(98):

- Revise the additional impacts analysis to ensure consistency with existing requirements for “continued improvement” of air quality in the National Scenic Area.
- Revise the section to clarify relationship to the application requirements in OAR 340-225-0030(4).

6. OAR 340-225-0070(9) “Other Qir 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.” The FLAG guidance includes standards for analyzing impacts from visibility and from deposition. Importantly, the FLAG guidance includes standards for analyzing impacts to federal forest land in both Class I and Class II areas. As a result, 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 recommends that the DEQ revise OAR 340-225-0070(9) to clarify the types of “other AQRVs” subject to the rule. This could include clarifying the scope of the FLAG guidance and applicability to Class II areas. This section should also be revised to explicitly incorporate National Scenic Area Act standards, including standards from the Management Plan and thresholds for individual significant impacts identified in the Air Quality Strategy.

Recommended Revisions for Draft OAR 340-225-0070(109):

- Revise to provide examples of “other AQRVs” identified in the FLAG Report, including AQRVs found in Class II areas.
- Revise to incorporate National Scenic Area standards for adverse impacts, including standards from the Management Plan and thresholds for individual significant impacts identified in the Air Quality Strategy.

7. 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.

Recommended Revisions for Draft OAR 340-200-0020(16234):

- Revise definition of significant impairment to include impacts to other AQRVs pursuant to recommendations from the FLM and the FLAG Report.
- Revise to clarify relationship between “significant impairment” and “adverse impacts” as defined by the National Scenic Area Act.

8. OAR 340-200-0020(6) Definition of “FLAG”:

DEQ’s correctly define “FLAG” as the *Federal Land Managers’ Air Quality Related Values Work Group Phase I Report*. The definition states that this includes the “Revised” version of the report and cites a specific Federal Register listing. The DEQ should revise this section to clarify that the FLAG guidance includes all subsequent updates to the FLAG Report.

Recommended Revisions for Draft OAR 340-200-0020(6):

- Clarify the definition to include all subsequent revisions and updates to the FLAG guidance.

9. OAR 340-204-0050 Designation of Prevention of Significant Deterioration Areas:

The DEQ’s rule define the areas subject to Prevention of Significant Deterioration (“PSD”) standards as Class I and Class II and defines the boundaries for those areas. The Clean Air Act states that “[t]he extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.” 42 USC § 7472(a)(4) (emphasis added). The DEQ’s rules appear to conflict with this requirement by limiting the window of time when the DEQ will consider changes to the boundaries of Class I areas. The DEQ’s current rule limits the window to “changes . . . which occurred between August 7, 1977, and November 15, 1990.” OAR 340-204-0050(4) (emphasis added).

The DEQ’s current rules appear to directly conflict with the requirements of the Clean Air Act. The DEQ should revise this section to acknowledge any approved alteration of an area boundary that may occur subsequent to 1990.

Recommended Revisions for Draft OAR 340-204-0050(4):

- Revise language to acknowledge any change to boundaries that may occur subsequent to August 7, 1977 or November 15, 1990.

C. 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 green house 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.

D. Conclusion

Friends encourages the DEQ to engage in additional consultation with the Columbia River Gorge Commission and the USDA Forest Service to develop final proposed revisions for the air quality permitting regulations that relate to protecting air quality in the National Scenic Area. 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