August 28, 2014

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Oregon Department of Environmental Quality
811 SW 6th Ave
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via email

Re: Public Comment on Air Quality Rule Updates

On behalf of Neighbors for Clean Air, the Northwest Environmental Defense Center and Columbia Riverkeeper (collectively the "Commenters"), please accept the following comments regarding the proposal by the Oregon Department of Environmental Quality ("DEQ") for changes and updates to its air quality rules.

About the Commenters

Neighbors for Clean Air was founded in 2009 by residents of Northwest Portland who were concerned about the presence of air toxics in their local communities. Since it's founding in Northwest Portland, NCA has expanded the scope of its mission. NCA is dedicated to helping communities around Oregon understand and address the affects of air pollution, especially hazardous air pollutants, in their neighborhoods.

The Northwest Environmental Defense Center was founded in 1969 by a group of professors, law students, and attorney alumni at Lewis & Clark Law School. NEDC is dedicated to the preservation and protection of the Pacific Northwest's natural resources. NEDC's members are lawyers, scientists, students, and citizens committed to using the law to advocate for cleaner water and air, to preserve public lands and wildlife habitat across the region.

Columbia Riverkeeper's mission is to protect and restore the Columbia River and all life connected to it, from its headwaters to the Pacific Ocean. Columbia Riverkeeper represents over 7,000 members and supporters in Oregon and Washington who work, play, boat, fish, swim, live, and breathe throughout the Columbia River watershed. Columbia Riverkeeper regularly comments on state agency decisions impacting the Columbia River, Oregon's environment, and public health.

I. DEQ must provide notice and comment on rules proposed in response to *UARG v. EPA*.

DEQ's notice of proposed changes to the rules regulating greenhouse gas emissions violates the agency's own rules. Consistent with Oregon's public disclosure and participation laws, DEQ must provide public notice of the subject matter of its proposed rules. DEQ may not do "something else," as it has proposed, regarding rule revisions to Oregon's Prevention of Significant Deterioration ("PSD") and Title V permit requirements in response to the U.S. Supreme Court's decision in *Utility Air Regulatory Group v. EPA*, 573 U.S. ___, 134 S. Ct. 2427 (2014) ("*UARG*"). Prior to the adoption, amendment or repeal of any rule, DEQ must give notice of its intended action and the notice must include, among other things:

> An objective, simple and understandable statement summarizing the subject matter and purpose of the intended action in sufficient detail to inform a person that the persons interested may be affected . . .

ORS 183.335. DEQ's public notice, however, fails to identify an intended action. Rather, DEQ "requests public comment on whether Oregon's rules should be retained as they are, revised to agree with the court's ruling, ***or revised in other ways***." State of Oregon Department of Environmental Quality, *Invitation to Comment: DEQ extends comment period to Aug. 28, 2014: Air quality permitting, Heat Smart, and gasoline dispensing facility updates* (July 30, 2014) (emphasis added). Thus the portion of DEQ's notice regarding rule changes in light of *UARG* to "revise[] in other ways" violates the agency's own rules. If DEQ wants to take some other step besides keeping its rules or revising them to match the Supreme Court's decision, DEQ must issue a new notice that contains the agency's proposed rule revisions and provides for public comment.

II. DEQ should retain its current regulations on GHGs for PSD and Title V.

If and when it does issue a notice of proposed rulemaking on this subject, DEQ should propose rules consistent with the Supreme Court's decision in *UARG* as well as Oregon's policy for addressing climate change, based on the agency's independent state authority. The Supreme Court's decision in *UARG* does not affect Oregon's ability to regulate sources based on greenhouse gas emissions. In *UARG*, the Supreme Court determined that EPA lacks the authority under the CAA to require PSD and Title V permits based solely on a source's potential greenhouse gas emissions. 134 S. Ct. at 2446 (concluding that because "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate," "EPA therefore lacked authority to 'tailor' the Act's unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers."). The Supreme Court explained that "[w]hen EPA replaced [the numerical permit thresholds of 100 and 250 tons per year] with others of its own choosing, it went well beyond the 'bounds of its statutory authority.'" *Id.* at 2445 (internal citations omitted). Consistent with the basic tenets of federalism and administrative law, EPA's authority as a federal agency is limited.

DEQ, however, can and should regulate greenhouse gas emissions under its state law authority. In contrast to EPA's limited authority under the CAA, Oregon retains broad authority

to regulate greenhouse gas emissions within the state. The CAA's savings clause makes clear that states may regulate above and beyond federal standards. 42 U.S.C. § 7416 (stating that "[n]othing in this chapter 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 requirements respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan" the state standard must be more stringent than federal requirements). Essentially, the federal standards are a floor and not a ceiling, and states have the discretion to impose more stringent limitations. Thus while the CAA limits the scope of EPA's authority (and in this particular case, EPA's authority to regulate greenhouse gas emissions), it reserves broad authority to the states to impose more stringent limitations, including limits on greenhouse gas emissions.

A recent EPA memorandum supports this interpretation. *See* July 24, 2014 EPA Memorandum, Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in *Utility Air Regulatory Group v. Environmental Protection Agency* (attached as Exhibit 5) (noting that "[w]e do not read the Supreme Court decision to preclude states from retaining permitting requirements for sources of GHG emissions that apply independently under state law even where those requirements are no longer required under federal law."). Under Oregon state law DEQ does in fact has the authority to regulate greenhouse gas emissions through permit requirements. ORS 468A.040(1) ("By rule the Environmental Quality Commission may require permits for air contamination sources classified by type of air contaminants, by type of air contaminant source or by area of the state"); OAR 340-200-0020(8) (defining "air contaminant" as "dust, fume, gas, mist, odor, smoke, vapor, pollen, soot, carbon, acid or particulate matter, or any combination thereof").

Given the threats to public health posed by greenhouse gas emissions, Oregon's policy of addressing climate change, and growing concerns about the impacts of climate change on global warming, DEQ should regulate greenhouse gas emissions. In 2009, EPA determined that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare" and that "the body of scientific evidence compelling supports this finding." 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) ("Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act"). Scientists generally agree that the climate is changing. *See, e.g.*, Intergovernmental Panel on Climate Change, Working Grp. I, *Summary for Policymakers*, *in* Climate Change 2013: The Physical Science Basis, 4 (Stocker, T.F., et al. eds., 2013) (attached as Exhibit 6) (stating that "[w]arming of the climate system is unequivocal"). Further, "[i]t is *extremely likely* that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in greenhouse gas concentrations." *Id.* at 17. The Intergovernmental Panel on Climate Change warns that "[c]ontinued emissions of greenhouse gases will cause further warming and changes in all components of the climate system" and that "[l]imiting climate change will require substantial and sustained reductions of greenhouse gas emissions." *Id.* at 19. Regulating greenhouse gas emissions, especially from large industrial sources, is a first step forward for Oregon to achieve those reductions.

In 2004 Oregon's Legislative Assembly found that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon" and that "[g]lobal warming will have detrimental effects on many of Oregon's largest industries, including agriculture, wine making, tourism, skiing, recreational and commercial fishing, forestry and hydropower generation, and will therefore negatively impact states workers, consumers and residents." ORS 468A.200(3), (6). Thus ten years ago Oregon's Legislative Assembly determined that "[t]here is a need to assess the current level of greenhouse gas emissions in Oregon, to monitor the trend of greenhouse gas emissions in Oregon over the next several decades and *to take necessary action to begin reducing greenhouse gas emissions* in order to prevent disruption of Oregon's economy and quality of life and to meet Oregon's responsibility to reduce the impacts and the pace of global warming." ORS 468A.200(7) (emphasis added). Continuing to regulate major industrial sources of greenhouse gases would also further Governor Kitzhaber's goals for Oregon to focus on combatting climate change by reducing greenhouse gases. John A. Kitzhaber, M.D., Governor, 10-Year Energy Action Plan (Dec. 14, 2012) (attached as Exhibit 11) (stating Oregon's goals for 2020 and 2050 "are to reduce greenhouse gas emissions by 10 percent and at least 75 percent below 1990 levels, respectively.").

DEQ should retain its greenhouse gas emission rules that require PSD and Title V permits from major emitters. Doing so is consistent with the Supreme Court's decision in *UARG*. *See, e.g.*, 134 S. Ct. at 2443 ("A brief review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens."). DEQ should not exempt these large sources of greenhouse gases from permitting requirements, regardless of the initial rationale for promulgating the greenhouse gas permitting rules.

Permits provide the means to obtain the data necessary to assess current levels of greenhouse gas emissions from larger industrial sources in Oregon and to monitor any trends of greenhouse gas emissions in Oregon over the next several decades. Permits for new sources will also help to restrict greenhouse gas emissions in Oregon by imposing emission limitations. This is precisely the type of action that Oregon's Legislative Assembly envisioned ten years ago. What's more, EPA has relieved much of the regulatory burden that would otherwise fall to DEQ, an agency of limited resources. *See, e.g.*, Office of Air Quality Planning and Standards, U.S. EPA, PSD and Title V Permitting Guidance for Greenhouse Gases (Mar. 2011) (attached as Exhibit 7). *See also* Office of Air and Radiation, U.S. EPA, Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production (Mar. 2011) (attached as Exhibit 8).

III. DEQ's proposed sustainment and reattainment area designations are unnecessary, overly complicated, and undercut the purposes of the Clean Air Act.

The proposed changes to DEQ's new source review (NSR) program are unjustified by DEQ's analysis, create a system so complicated as to essentially prevent citizen engagement and oversight of DEQ's permitting process, potentially violate the anti-backsliding provisions of the Clean Air Act, and undercut the programs contained within the Act to address air quality

problems. Currently, areas in Oregon are designated as attainment, nonattainment, or maintenance. DEQ's proposal would complicate this by adding two new designations: attainment/sustainment and nonattainment/reattainment. In addition, DEQ is proposing to change its NSR program to differentiate the treatment of "major sources" and "federal major sources" in nonattainment and maintenance areas. Under current regulations both types of changes are subject to the same level of scrutiny; under the proposal, "major sources" would be subject to a lesser level of scrutiny.

a. DEQ's proposed new sustainment designation is unnecessary.

DEQ justifies the new sustainment designation by pointing out that under DEQ's rules, areas that are near or above national ambient air quality standards find it "difficult or impossible for new and expanding businesses to demonstrate that their added emissions will not cause or contribute to air quality violations" because current rules do not provide for offset possibilities. For reattainment areas, DEQ believes that providing for a relaxation of permitting requirements for "major sources" in nonattainment areas that have met the ambient air quality standards will incentivize governments to push to reach attainment more quickly.

DEQ has identified a solution in search of a problem. While DEQ has identified one area it is proposing to designate as sustainment, as described below and in section IV the choice of Lakeview as a sustainment area is a poor one: Lakeview is not "near" the standard, it is clearly violating the standard and the solution that DEQ has proposed provides no guarantee to solve or even address the problem in a meaningful way. These proposed designations appear to be unnecessary and the Commenters urge DEQ to scrap the general treatments in favor of a case-by-case approach[1] or at least seriously reconsider and provide additional justification for its approach to these "problems."

In addition, the structure of the proposed rule change takes an already complex program and makes it even more complicated. The proposed regulatory language is over reliant on cross-references in setting the requirements for new sources or modifications. In order for citizens to understand how a new source would be regulated under DEQ's proposal, there is no single

[1] Other states that have created additional designations provide clear mechanisms for ensuring those areas do not violate the underlying federal standards. For example, California has created a nonattainment-transitional designation. According to CA Code of Regulations, [a]n area designated as nonattainment-transitional for a pollutant is close to attaining the state standard(s) for that pollutant. The nonattainment-transitional designation provides an opportunity for a district to review and potentially to modify its attainment plan." CA CODE REGS. tit. 17, § 70303.1(a) (2004). To achieve this designation, the district must not exceed the state standard for that air pollutant more than three times during a calendar year at any monitoring location. CAL. HSC. CODE § 40925.5(a). Also, according to the CA Air Resources Board an area designated as nonattainment transitional is **"**[a] subcategory of the nonattainment designation category for state standards that signals progress and implies the area is nearing attainment. Districts with nonattainment-transitional status may revise their attainment plans to delay adoption of control measures anticipating attainment without the measures." *Glossary of Air Pollution Terms*, CA Air Resources Board, http://www.arb.ca.gov/html/gloss.htm. This case-by-case process is very different than the reattainment program that DEQ is proposing to create. Instead of relaxing the same conditions for all of these areas, the California program considers instead whether certain upcoming control measures may be delayed while awaiting redesignation as attainment/maintenance. This type of case-by-case program would be a much better approach than the one-size fits all relaxation of new source review requirements that DEQ is proposing for reattainment areas or even the one-size fits all approach to sustainment areas.

regulation or list for them to consider. Instead, they have to keep track of a dizzying array cross-references to different regulatory sections. Commenters have identified at least one place where these cross-references were not completely thought through or vetted. *See* Section IV.b. The Commenters are concerned that the overreliance on cross-references in this proposal could raise serious questions about the functioning of the program in the future. In addition, while understanding all these connections may create billable hours for industry attorneys, it prevents regular citizens from participating in any meaningful manner.

The idea of providing additional assistance to communities at risk of violating the National Ambient Air Quality Standards (NAAQS) is not new. EPA has created Ozone and PM Advance programs to help these areas. These programs are much more comprehensive than the solution offered by DEQ's proposed sustainment area designation. The Commenters support these types of early action programs, especially when they involve more detailed analysis of problem areas and stakeholder buy-in. The use of offset requirements, when paired with comprehensive modeling, in areas below the NAAQS could in theory be a good supplement to EPA's early action programs. However, there are several pieces of DEQ's proposed sustainment area designation, and the connected changes to the State New Source Review (NSR) rules, that the Commenters are concerned with.

The sustainment area designation should not be used in areas that are clearly violating the NAAQS, even if they have not yet been designated as nonattainment. It is one thing to test a new approach in an area at risk for, but not actually, violating the NAAQS. It is something else entirely to risk the health of Oregonians on a new program that could delay necessary action to protect them. For instance, the most recent data provided by DEQ shows that the proposed sustainment area in Lakeview is clearly in violation of the NAAQS. Data from 2013 indicates that $PM_{2.5}$ levels were *nearly three times* the primary $PM_{2.5}$ standard.[2] The Commenters are very concerned that for these types of areas that are clearly violating the NAAQS, designation as sustainment may delay designation as nonattainment. This could put the community in a regulatory limbo where comprehensive planning to attain the NAAQS is deferred in favor of a program, which as described below, has no guarantee of attaining the NAAQS. This delay is not merely a regulatory hoop to jump through: air quality above the NAAQS causes significant health problems. For these reasons, the Commenters urge DEQ to only designate areas as sustainment that are not clearly violating the NAAQS.

b. Proposed changes to the NSR requirements are insufficient to ensure air quality.

The Commenters are also concerned that the proposed changes to the NSR requirements in sustainment areas, which are meant to help achieve attainment, are insufficient. Under DEQ's proposal, sources subject to State NSR in sustainment areas are required to either conduct an Air Quality Analysis (modeling) or demonstrate a Net Air Quality Benefit (offsets). This is different than State NSR sources in attainment areas that only have the option of conducting an Air

[2] In discussions with DEQ personnel, 2013 was held up as "a bad winter." However, given the effects of climate change, *see supra*, Oregon may be in line to have more of these "bad" winters in the future. In addition, there is a difference between a change of 20-30% because of a "bad" winter and the 100% increase that was seen in 2013. Absent additional data, the Commenters do not believe that DEQ should dismiss the levels from 2013 as an aberration without considering whether permanent changes in the emission inventory may be responsible.

Quality Analysis. The putative reason for the additional option is that in areas near the NAAQS it is difficult or impossible for sources to meet the Air Quality Analysis. DEQ's reasoning is that by allowing offsets, and incenting offsets from "priority" sources, new sources or modifications that increase emissions may have the effect of decreasing human exposure to air pollutants and keeping an area below the NAAQS (or getting it back under the NAAQS).

While this approach to using offsets may in theory be a good one, the Commenters believe that DEQ's proposal is insufficient to actually achieve its goals. First, it is unclear whether this program would even work in areas that are above the NAAQS (i.e. the proposed Lakeview sustainment areas). A requirement of State NSR in sustainment areas (and attainment areas) is that the source demonstrates it will not cause or contribute to a new violation of the NAAQS even if their emissions model below the significant impact level (SIL). OAR 340-224-0245(4), OAR 340-224-0270(1)(d). Read in context, this requirements does not appear to allow for a *de minimus* contribution: the SILs were intended to represent a *de minimus* level of impact that can be ignored and this provision is notwithstanding levels below the SIL.[3] Unless the modeling shows zero impact, it is unclear whether, even under the sustainment designation, new sources and modifications can meet the requirements of State NSR. This is yet another reason why the sustainment area designation should not be used in areas clearly violating the NAAQS; these areas should be designated as nonattainment.

Additionally, the Commenters are concerned that the offset ratios chosen by DEQ are wholly insufficient to achieve the goals of the sustainment program. For sources choosing to demonstrate a Net Air Quality Benefit in a sustainment area, the offset ratio is only 0.1:1 and can drop as low as 0.05:1. This means that a new source with emissions of 100 tpy $PM_{2.5}$ would only need to reduce 5 tpy from wood stoves to "offset" their emissions. Even if the additional 100 tpy does not itself cause problems (the source would still not be allowed to cause or contribute to a violation of the NAAQS), the reduction that the sustainment program would offer is minimal. Given these extremely low requirements for offsets, it is entirely unclear whether reductions from the sustainment program would be able to achieve the goal of keeping an area under the NAAQS, let alone reducing emissions in an area violating the NAAQS enough to help the area get below dangerous levels. If DEQ moves ahead with the sustainment program, the Commenters urge the Agency to modify the offset ratios to a more modest level so that the program might actually have a chance of succeeding in stabilizing or reducing the ambient concentration of air pollutants.

c. DEQ's proposed reattainment designation is unnecessary.

The Commenters are also concerned with DEQ's proposed reattainment area designation program. DEQ has not identified any areas where designation as reattainment would currently be applied. There is no way to understand the practical application of the reattainment program without any context to apply it. This makes the reattainment program a very clear case of a solution in search of a problem. A much better approach to handling areas that have attained

[3] The authority to "ignore" those sources that model below the SIL has become suspect. *See infra* Section VII. The Commenters believe that reading this provision of Oregon's regulations in a strict sense—*any* addition that results in violation of the NAAQS or *any* addition of pollution to an area above the NAAQS—insulates Oregon's program from a similar legal challenge.

compliance with the NAAQS but have not yet been redesignated by EPA as maintenance can be found in California. Instead of the one-size-fits-all approach proposed by DEQ, California's program looks at areas on a case-by-case basis to determine what, if any, requirements are no longer necessary achieve or maintain compliance.

In addition, it is unclear whether a source subject to Major NSR in reattainment area would need to meet both OAR 340-224-0050 (nonattainment) and OAR 340-224-0055 (reattainment) for a pollutant designated as reattainment. Indeed, the regulations could potentially be read as only requiring a federal major new source of a reattainment pollutant to meet the requirements of the reattainment section, OAR 340-224-0055. This would be a clear violation of the Clean Air Act because the requirements of that division bear no semblance to the requirements of Nonattainment New Source Review in the Clean Air Act (which would still be required because the reattainment area is still federally designated nonattainment).

The reattainment program also raises serious questions of whether the proposal complies with the anti-backsliding provisions of the Clean Air Act. The proposal categorically relaxes permitting requirements prior to redesignation as a maintenance area. This raises questions as to whether the proposal would weaken Oregon's State Implementation Plan (SIP). DEQ has not provided any analysis of the program's compliance with the Clean Air Act.

In sum, the proposed sustainment and reattainment area designations are overly complicated, making citizen engagement or understanding next to impossible. The only area identified by DEQ as susceptible to use these programs is clearly a poor test case. It is unclear whether the sustainment area program is sufficient to actually help an area comply with the NAAQS, potentially putting an area in a limbo between attainment and nonattainment while Oregonians' health is being effected. For these reasons, the Commenters urge DEQ abandon the proposed changes to the New Source Review program until the details are more fully vetted and an actual need is identified.

IV. DEQ must not designate Lakeview as a state sustainment area.

DEQ must not designate Lakeview as a state sustainment area. Lakeview has consistently exceeded the 24-hour $PM_{2.5}$ NAAQS in the past three years and should be re-designated as a nonattainment area. Designating Lakeview as a sustainment area will allow the county to shirk the express requirements of the CAA.

a. Because Lakeview has exceeded 24-hour $PM_{2.5}$ NAAQS, it should be redesignated as nonattainment, not sustainment.

EPA revised the NAAQS for $PM_{2.5}$ in 2006, lowering the 24-hour standard from 65 $\mu g/m^3$ to 35 $\mu g/m^3$. This standard is met whenever the three year average of the annual 98th percentile of values at monitoring sites is less than or equal to 35 $\mu g/m^3$. *See* 40 C.F.R. § 50.13(c) ("The 24-hour primary and secondary $PM_{2.5}$ standards are met when the 98th percentile 24-hour concentration, as determined in accordance with appendix N of this part, is less than or equal to 35 $\mu g/m^3$"). Lakeview was not formally designated as a nonattainment area in the 2009 area designations due to insufficient monitoring information.

According to DEQ's own data, however, Lakeview has persistently exceeded the $PM_{2.5}$ 24-hour standard. EPA's guidance concerning designation of nonattainment areas for the 24-hour $PM_{2.5}$ NAAQS recommends that the three most recent calendar years of monitoring data for $PM_{2.5}$ be used to identify a violation of the 24-hour $PM_{2.5}$ NAAQS. *See* Memorandum from Robert J. Meyers, Acting Assistant Administrator, to EPA Regional Administrators—Regions I-X, "Area Designations for the Revised 24-Hour Fine Particle National Ambient Air Quality Standard," June 8, 2007 (attached as Exhibit 2). In 2012, Lakeview's three-year average was 47 $\mu g/m^3$. For 2013 alone, Lakeview's 98th percentile concentration was 94 $\mu g/m^3$. *See also* Exhibit 1 at 3. In the information provided, DEQ offers no explanation for why the 98th percentile concentration in 2013 was nearly three times the primary standard. Lakeview is not a "borderline" violator of the primary standard and should be redesignated as nonattainment.

State sustainment designation in this context is not what Congress intended. If redesignated as nonattainment, Oregon would have to modify its SIP to (1) require implementation of all reasonably available control measures for attainment of the NAAQS as expeditiously as practicable (including requiring emissions reductions from existing sources), (2) require reasonable further progress, (3) include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant in the area, (4) identify and quantify emissions from new or modified major stationary sources in the area and ensure construction will not interfere with reasonable further progress, (5) require permits for new or modified major stationary sources in the area, (6) include enforceable emission limitations and incentives to achieve attainment, and (7) contingency measures if the area fails to make reasonable further progress. 42 U.S.C. § 7502(c). DEQ admits that designating Lakeview as a state sustainment area will allow Lakeview to avoid nonattainment designation and the attendant rigorous standards. *See* DEQ Notice at 858 ("Local officials expect to bring the area quickly back into attainment with the standards *to avoid* a federal nonattainment designation and the resulting impacts on costs for businesses seeking to locate there.") (emphasis added). However, DEQ provides no evidence to support the expectations of local officials: in fact the most recent year of data shows Lakeview at nearly three times the primary standard, making quick and lasting compliance with the standard unlikely.

b. DEQ's justification for designating Lakeview as a sustainment area is flawed.

Designating Lakeview as a sustainment area will postpone the in-depth assessment of the air quality issues in the region required for nonattainment areas, and thereby exacerbate data problems. First, DEQ improperly focuses on residential woodstoves. Although residential woodstoves likely contribute to air quality issues in the region, they are not the only problem and should not be the sole focus of DEQ's or Lakeview's efforts. Second, allowing intermediate sized industrial emission sources to establish or expand operations will exacerbate the data problem EPA has faced in the past. *See* Exhibit 1 at 3 (explaining that although Lakeview violated the $PM_{2.5}$ standard, it has never been designated nonattainment due to insufficient monitoring information). Allowing continued growth of industrial emissions, while focusing on residential woodstoves, is unlikely to move Lakeview away from a violation of the $PM_{2.5}$ 24-hour NAAQS.

DEQ improperly assumes with insufficient justification that woodstoves are the primary air quality problem in Lakeview. *See* Exhibit 1 at 2 (stating that the rules "provide incentives for new or modified industrial sources to reduce emissions in the same airshed by purchasing emission offsets from the sources that are considered to be significantly contributing to the air quality problems in the area, such as woodstoves."). DEQ relied on estimates from Lake County and SE Oregon residential wood heating surveys and extrapolated those numbers based on assumed common usage of woodstoves in Lakeview to determine wood combustion in the Lakeview area. In contrast, under nonattainment designation Lakeview would be required to complete "a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as [EPA] may determine necessary . . .." 42 U.S.C. § 7502(c)(3).

As of this proposal DEQ does not have the extent of data necessary to definitely show that uncertified wood stoves *are* the problem, making their designation as priority sources problematic. DEQ makes no attempt to quantify emissions coming in from outside of the air shed, such as forest fires. Prescribed silvicultural burning is common in the winter months, and emissions from this type of activity looks very similar to and is likely categorized with the emissions attributed to residential wood stoves. And yet under the sustainment designation, new industrial emission sources would in fact *replace* rather than *reduce* emissions based on the 0.1:1 offsets ratio. This is a *lower* offset ratio than is required in *maintenance* areas, which are actually in compliance with the air quality standards. DEQ should implement an offset ratio for sustainment areas that is at least 1:1.

In fact, even at the 0.1:1 ratio may understate the effective ratio of offsets these industrial emissions will be required to obtain. DEQ provides no procedure for quantifying emission reductions from wood stove change replacements that would be used to offset industrial emissions. Indeed, it appears that because of the reference in OAR 340-224-0510(1) to OAR 340-240-0550, offsets from wood stoves ***would be limited to wood stove replacements in Klamath Falls nonattainment and maintenance areas***. OAR 340-240-0550(1)(b). In addition, the provisions of OAR 340-240-0050(2) would seem to repeal the net air quality benefit determination required for offsets, though the citation is to a provision that does not reference net air quality benefit determinations.

DEQ has a variety of procedures for quantifying industrial emissions to a relatively high degree of certainty. The same cannot be said for emissions from residential wood stoves. There is a high degree of variability in the use and emissions profiles of older wood stoves, greatly affecting the actual quantity of emission reduction that would come from replacement. DEQ cannot ensure that the addition of actual, quantifiable industrial emissions to the Lakeview airshed will be offset by actual, quantifiable emission decreases from wood stove replacements.

Even accepting DEQ's procedures for quantifying industrial emissions, in this instance DEQ likely underestimates emissions from the wood products industry. Industry emissions are not relatively constant year round; much like wood stoves, emissions from the wood products industry varies due to seasonal changes in fuel source. For example, cold, wet or dirty fuel requires more fuel and produces emissions. Utilization may vary depending on the season; for instance, by increasing during the winter to provide the additional heat to offset temperature

differences. DEQ's analysis also ignores the maintenance, start up and shut down times that are often necessary as a part of industrial processes and which leads to greater emissions. DEQ has also failed to demonstrate that industrial emissions (which would continue through the winter) will not also suffer from the inversion issues in the winter that the agency attributes to wood stoves. Thus industrial sources in fact may result in a greater adverse impact to the region.[4]

Industrial sources might generally be away from residential regions, but this will not always be true. In fact, DEQ states that "[a]ll existing industrial sources are located within the [urban growth boundary (UGB)], and new industrial sources would most likely locate within the UGB." Exhibit 1 at 4. The fact that industrial sources might be located away from ambient air quality monitors simply means that these harmful emissions will be harder to detect, not that they will no longer exist. DEQ ignores this fact when assessing "effective emissions" at the single ambient air quality monitor in Lakeview, located in a residential area, by using concentrations at the monitor to determine emissions by source category as a percentage. Exhibit 1 at 6. DEQ should get an accurate inventory by monitoring emissions in the region, and only then craft a program to address sources that have been demonstrated to be priority sources of $PM_{2.5}$ emissions.

What's more, DEQ is seeking to redesignate Lakeview as a sustainment area in combination with Lakeview's proposal to join EPA's PM Advance program. Once instituted, EPA is likely to consider these "buffer" programs under section 107(d)(3)(A) in addition to any NAAQS violation when considering whether to redesignate Lakeview as nonattainment. 42 U.S.C. § 7407(d)(3)(A) (allowing EPA to consider "air quality data, planning and control considerations, or any other air quality related considerations [EPA] deems appropriate"). Thus the buffers themselves will become part of any redesignation decision by EPA. Not only that, but Lakeview's request for redesignation from the Environmental Quality Commission cites to inaccurate data. Lakeview's letter supporting DEQ's request to the Environmental Quality Commission for sustainment designation omits 2013 data and incorrectly states that "[t]he rolling three year average of the 98^{th} %ile shows Lakeview just at the standard." Exhibit 1 at 10. In fact, Lakeview's $PM_{2.5}$ emissions far exceeded the $PM_{2.5}$ standard in 2013.

DEQ improperly relies on EPA's PM Advance program as justification for designating Lakeview as a sustainment area. Part of DEQ's justification for designating Lakeview as a state sustainment area is to allow Lakeview to apply for and implement EPA's PM Advance program. DEQ explains that the rule is needed, *inter alia*, because "[d]esignating Lakeview as a nonattainment area would preclude the community's active voluntary efforts to meet federal air quality standards under the PM Advance program." DEQ Notice at 858. *See also* EPA, *PM Advance Elibility* (last accessed Aug. 13, 2014) (attached as Exhibit 3) (noting that to be eligible to participate in the PM Advance program "[t]he area(s) to which the . . . local government is signing up is/are not designated nonattainment for either the 1997 or 2012 annual $PM_{2.5}$ NAAQS and/or the 2006 24-hour $PM_{2.5}$ NAAQS."). DEQ states that the proposed rule would address its claimed need because the "Lakeview community voluntarily participates in EPA's 'PM Advance' program" and "DEQ has determined that the PM Advance plan and designation as a sustainment area would complement each other to address stationary sources within the

[4] Other than suggesting that air pollution problems are worse in the winter, DEQ provides no information to assess how additional emissions in the summer months may affect air quality in the Lakeview airshed.

Lakeview area." DEQ Notice at 858. Yet designation as sustainment is not necessary for Lakeview to participate in the PM Advance program.

In fact, because Lakeview should properly be designated as nonattainment, it is not eligible for the PM Advance program. EPA describes the PM Advance program as providing "a framework for local actions to reduce $PM_{2.5}$ and its precursors in attainment and maintenance areas and thus maintain the $PM_{2.5}$ NAAQS" but "it does not create or remove any statutory or regulatory requirements." Memorandum from Stephen D. Page, Director of Office of Air Quality Planning and Standards, to Regional Air Division Directors, Regions I-X, "PM Advance – Supporting Local Efforts to Improve Air Quality," Jan. 17, 2013 (attached as Exhibit 4), page 1. The PM Advance program is intended to preserve or improve areas at risk of violating the $PM_{2.5}$ NAAQS, not for areas that have and continue to violate the standard. Exhibit 4 at 5 (noting that "[t]he goals of the program are to (1) help attainment areas ensure continued health protection for their citizens, (2) better position areas to remain in attainment, and (3) efficiently direct available resources toward actions to address PM problems quickly"); *see also id.* at 13 ("It is important to note that signing up for PM Advance does not shield an area from being redesignated to nonattainment if the area eventually violates the $PM_{2.5}$ NAAQS.").

Thus, by proposing to designate Lakeview as a sustainment area under the new state designations, DEQ is undercutting the express Congressional intent as set forth in the CAA. Instead of being designated nonattainment as it should, especially given the most recently available data, the Lakeview airshed will limp along as "sustainment" with absolutely no guarantee or likelihood that the sustainment designation will have any major impact on $PM_{2.5}$ ambient concentrations. Instead of spending time and energy creating from scratch a brand new, untested area designation program, DEQ should be investing its energy, resources, and technical knowledge in helping the Town of Lakeview undertake the process that the Clean Air Act lays out to deal with areas violating the National Ambient Air Quality Standards: nonattaiment planning. While the Commenters appreciate that this planning takes time, energy, and money, failing to do so and relying instead on an untested program puts the health of Lakeview residents at risk.

V. DEQ should provide additional information and analysis before removing state regulations for industries no longer operating in the state.

Under DEQ's proposal, five industry-specific rules would be repealed because the industries no longer operate in Oregon. The specific rules are for neutral sulfite semi-chemical pulp mills, sulfite pulp mills, primary aluminum plants, laterite ore production of ferronickel, and charcoal producing plants ("industrial categories").[5]

In the public information packet, DEQ states that if a new facility in one of these industrial categories wants to begin operation in Oregon, and requires an air permit, more stringent federal standards would apply and that these standards are incorporated by reference into Oregon's regulations. DEQ does not state what specifically these federal standards are in the description of the rule change. In the "crosswalk" of the proposed rule changes, DEQ states that

[5] The regulation of charcoal producing plants is only applicable in portions of the state. OAR 340-240-0010.

New Source Review/Prevention of Significant Deterioration (NSR/PSD), New Source Performance Standards (NSPS), and MACT[6] would apply. DEQ states that these rules would be more stringent than the existing standards.

The Commenters are concerned with the lack of detailed analysis provided to the public and believe that, in some circumstances, the existing rules are more stringent than identifiable federal standards, meaning that their repeal weakens Oregon's regulations.

The Commenters believe that DEQ has not adequately demonstrated that existing federal requirements for new sources will be at least as stringent as the existing state regulations.

First, DEQ has failed to identify any specific requirements that would apply to new sources in these categories other than to say that, *if they triggered NSR/PSD*, they would have to show that they would not violate the National Ambient Air Quality Standards (NAAQS) or the PSD increment. However, this does not answer the question of whether the requirements of NSR/PSD, if triggered, would be at least as stringent as the current rules. The current rules regulate the level of pollution that comes out of the source, not the impact that the source has on the ambient air. Comparing compliance with the NAAQS and PSD increment to the current regulations to assess stringency is therefore comparing apples to oranges. A new source could comply with the NAAQS and PSD increment and emit pollutants at a level above the existing regulations because these two programs regulate different things.

Second, all of the regulations that DEQ is proposing to delete ***do not have thresholds*** and apply to all sources within their respective industrial categories. Both the triggering of NSR/PSD and the application of MACT to a source have threshold, triggering values; below those levels, these programs do not apply. It is therefore possible, or even likely, that new source in one of the industrial categories could be located in Oregon and not subject to these federal programs. To determine whether Oregon's SIP will be as stringent as it currently is, and avoid violating the anti-backsliding clause of the Clean Air Act, DEQ should not rely on NSR/PSD or the application of MACT in its analysis.

Third, while NSPS regulations generally do not have thresholds on the size of the source, some of the industrial categories do not have NSPS regulations, or Oregon's regulations appear to be more stringent than the federal NSPS standards. The repeal of the pulp mill regulations appears justified since these sources would likely be covered under 40 C.F.R. Part 60, Subpart BB. However, the Commenters believe that DEQ should hold off on repealing these rules until DEQ completes a full comparison of the applicability and stringency of the federal Subpart BB and state the rules DEQ is proposing to delete. Only when this analysis is done and subject to public scrutiny, should DEQ move forward with this change.

The only other applicable NSPS that the Commenters were able to find in reviewing the applicability of federal regulations as compared to Oregon's existing rules was 40 C.F.R. Part 60, Subpart S, the regulation of Primary Aluminum Production Plants. The applicability of Subpart S appears to overlap with one of the regulations DEQ proposes deleting: OAR 340-236-0100.

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[6] Maximum Achievable Control Technology (MACT) is a requirement under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program.

However, it appears that Oregon's regulation has more stringent emission control requirements for most if not all of the pollutants of concern. Oregon's regulation sets a monthly limit of 1.2 lbs fluoride per ton and an annual limit of 1.0 lbs fluoride per ton. The comparable federal regulation is broken down by process type, with some limits as high as 2.0 lbs fluoride per ton. The federal standard also has a higher opacity limit for anode bake operations, 20%, than Oregon's flat 10% requirement. Finally, Subpart S does not regulate particulate matter emissions while OAR 34-236-0120(1)(b) sets a monthly limit of 7.0 lbs per ton and an annual average of 5.0 lbs per ton. The regulation that DEQ is proposing to delete appears more stringent than applicable federal standards.

The Commenters are concerned that DEQ has not fully analyzed whether the existing backdrop of federal regulations is sufficiently stringent enough that these state regulations are superfluous. Until such time as DEQ has completed that analysis, the Commenters urge DEQ not to repeal these regulations as it could weaken Oregon's program. Because these businesses are no longer located within the state, there is absolutely no reason to rush forward with repealing these regulations until a complete analysis is undertaken.

VI. DEQ should revise its rule requiring notification of EPA of permit applications subject to NSR to render it enforceable.

DEQ's regulations require permit applicants subject to NSR requirements to submit a copy of the NSR permit application directly to EPA. OAR 340-216-0040(8). History has demonstrated that permit applicants fail to comply with this regulation, without consequence. For example, as part of an application to modify the air quality permit for the Lakeview Cogeneration facility in Lakeview, the applicant failed to send a copy of their air permit application to EPA. *See* February 7, 2013 Letter from Dennis McLerran, EPA Regional Administrator, to Chris Zinda (attached as Exhibit 9). Once notified of this omission, DEQ still issued the permit modification but committed to evaluate ways to ensure that the requirement is met by either (1) revising the application forms for NSR permit actions, or (2) changing this rule. *See* January 28, 2013 Letter from Linda Hayes-Gorman, DEQ, to Chris Zinda (attached as Exhibit 10). DEQ also committed to notifying EPA by separate email or letter for future applications subject to NSR. *Id. See also* OAR 340-209-0060(4)(d) (requiring DEQ to give notice of NSR actions to EPA). This notification is essential for determining the requirements for sources in maintenance areas and for getting EPA review and comment. OAR 340-224-0060.

Yet DEQ's proposed revisions merely reiterate the permit applicant's individual responsibility to send NSR permit applications to EPA, with minor clarifications regarding the scope of information that must be submitted. DEQ Notice at 89. As shown by the example above, DEQ has no way of enforcing this regulation or ensuring whether permit applicants comply. As Albert Einstein said "nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced." Commenters are unaware of any other action taken by DEQ to fulfill its 2013 commitment to ensure the requirement is met. Now is the perfect time for DEQ to revise this regulation: DEQ has explained that many of the proposed rule revisions are meant to clarify, update, and reorganize the agency's rules. DEQ should require the permit applicant to copy EPA as part of its permit application to DEQ, or vice versa. This would ensure that both agencies are receiving the same application package, provide

for enforcement of the notification requirement to EPA, and avoid burdensome permit processing on the agencies' side (such as sending separate emails or letters of future NSR permit applications).

VII. DEQ must revise its regulations regarding Significant Impact Levels for $PM_{2.5}$ to maintain consistency with EPA's regulations and federal case law.

Congress established maximum allowable increases over baseline concentrations ("increments") for certain pollutants in section 163 of the CAA, 42 U.S.C. § 7473, and for other pollutants delegated EPA the authority to prevent significant deterioration of air quality that would result from these pollutants. 42 U.S.C. § 7476(a). Any permit applicant seeking to construct or modify a major emitting facility must demonstrate the resulting emissions will not cause or contribute to a violation of the increment more than once per year, or to any violation of the NAAQS ever. *Id.* § 7475(a)(3).

In 2010, EPA established Significant Impact Levels ("SILs") for $PM_{2.5}$ to determine whether a new source may be exempt from certain requirements under the PSD program. 75 Fed. Reg. 64,864 (Oct. 20, 2010). EPA described a SIL as a numeric value that represents the level of ambient impact below which EPA has determined a source will have an insignificant effect on ambient air quality. 72 Fed. Reg. 54,112, 54,139 (Sept. 21, 2007). Thus EPA reasoned that if a new or modified source demonstrates its impact does not exceed a SIL at the relevant location, it may be exempt from the extensive air analysis and modeling required to show its additional emissions will not cause or contribute to a violation of the NAAQS ("cumulative air quality analysis"). 72 Fed. Reg. at 54,139. The theory was based on EPA's authority to create exemptions for certain *de minimis* impacts. *See Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). EPA considered a source whose emissions do not exceed the SIL as *de minimis*. 72 Fed. Reg. at 54,139 ("EPA considers the conduct of a cumulative air quality analysis and modeling by such a source to yield information of trivial or no value with respect to the impact of the proposed source or modification.").

In January 2013, the D.C. Circuit Court of Appeals vacated and remanded EPA's regulations at 40 C.F.R. §§ 51.166(k)(2) and 52.21(k)(2). *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013) ("EPA asserts that [because] it did not intend to automatically exempt a proposed source from the requirements of the Act without affording the permitting authorities discretion in applying the SILs, it requests that we vacate and remand the regulatory text promulgated in the rule at 40 C.F.R. §§ 51.166(k)(2) and 52.21(k)(2)"). Sierra Club argued that proposed sources in an area on the verge of violating the NAAQS or an increment could violate the NAAQS or an increment even if the resulting emission levels would fall below the SIL. Under EPA's policy, a permitting authority could authorize numerous sources as *de minimis* that in reality would have a cumulative impact in violation of the NAAQS or an increment. Because the CAA's PSD provisions require a demonstration that the source will not cause or contribute to a violation of the NAAQS or increment as a precondition to construction, 42 U.S.C. § 7475(a)(3), this permit regime would conflict with an express statutory command.

Following the decision in December of 2013, EPA amended its regulations at 40 C.F.R. §§ 51.166(k)(2) and 52.21(k)(2) to remove the vacated $PM_{2.5}$ SILs. 78 Fed. Reg. 73,698 (Dec. 9,

2013). DEQ must likewise revise its rules to maintain consistency with the federal regulations and the decision by the D.C. Circuit Court of Appeals.[7] *Id.* at 73,700 (explaining that the Court's vacatur of the regulations "means that these provisions can no longer be relied upon by either permit applicants or permitting authorities."). Indeed, EPA instructs permitting authorities in delegated states to "remove their corresponding SILs provisions . . . as soon as feasible, which may be in conjunction with the next otherwise planned SIP revision." *Id.* Since DEQ "proposes to clarify, update and reorganize Oregon's air quality rules" with this rule revision, *see* DEQ Notice at 846, this is precisely the time for DEQ to remove the $PM_{2.5}$ SILs from its rules.

VIII. DEQ should revise the grain loading standards and opacity standards

The Commenters appreciate that DEQ has spent a great deal of time working with regulated industry to develop the proposed changes to grain loading and opacity standards. Changes to these rules are very important to protect our airsheds from excessive pollution and to protect the health of Oregonians. While the proposed changes are a good first step in tightening up emissions of particulate matter, the Commenters believe it is important to remember that they are only a first step.

The grain loading and opacity standards have not been revised in a meaningful way since 1970. It is vitally important that DEQ update these regulations to reflect the increasing understanding that particulate matter is a significant threat to human health. In addition, the spirit of the Clean Air Act (and Oregon's regulations) grandfather clauses was that the oldest sources would eventually be retrofitted or retired and replaced with newer and cleaner equipment. For some sources this has held true, but for many it has not. There are several reasons that the grandfathering of sources has not lived up to the spirit of the policy.[8] It is therefore important for DEQ to revise these rules to update them to better reflect actual operations of these sources, and what they are actually able to achieve when run properly. However, updating the rules to match the reality on the ground should be but the first step. DEQ must make clear that this rule change is one step in modernizing control requirements. Surely by 2030 we can ask a source that has been around for over 60 years (and in some cases nearly 100 years) to make the capital investment in control equipment that will limit the emissions of dangerous particulate matter to a level sources could meet in the 1970's.

The Commenters also see no reason why in making the revisions, DEQ cannot immediately add a significant figure so that DEQ's regulations meet EPA's guidance on the use of significant figures. DEQ's rules have not meet EPA's guidance on significant figures for over twenty years; under DEQ's proposal, Oregon would not measure up until 2020. Sources being

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[7] This is different than revising Oregon's rules to be consistent with the recent *UARG v. EPA* decision. As the Commenters explained in section I, the CAA sets a minimum floor but states may, in most circumstances, be more restrictive. Oregon's current rules for GHG permitting are more restrictive than the federal rules as modified by the Supreme Court. In this instance, however, Oregon's proposed rules are less restrictive than the federal rules because they provide a *de minimus* exemption found contrary to the clear directives of the CAA.

[8] One of the reasons is surely the structure of Oregon's program to implement new source review. *See* Section X. The real consequence of this structure is that it allows sources to operate indefinitely without triggering new source review, making it contrary to the Clean Air Act. The ability to operate indefinitely without triggering new source review is made abundantly clear for some of the sources impacted by this rule change that were constructed prior to World War II.

able to violate the intended limits in DEQ's regulations by nearly 50% and still claim to be in compliance needs to end. This kind of "compliance through rounding" seriously undermines public confidence in DEQ's authority and the protections provided by its regulations.[9] DEQ should revise its proposed changes to immediately add a significant figure to the requirements for all sources.

IX. DEQ should not completely delete its procedures for informational and public hearings

The Commenters are concerned that DEQ is proposing to delete all its procedures for the holding informational and public hearings contained in OAR 340-209-0070. DEQ stated purpose is to provide additional flexibility to use modern technology to use fewer state resources for these meetings. However, as proposed, while DEQ's regulations would require informational meetings or public hearings in some instances, they provide no guidance on how they would be conducted.

For instance, the requirement in OAR 340-209-0070(1)(b) of 14 days notice before an informational hearing is not found elsewhere in DEQ's regulations. The Commenters suggest altering the proposed regulations to include a requirement for when and how notice of an informational hearing is provided. DEQ should modify OAR 340-209-0030(3)(d)(B) to include a timing requirement for notice. DEQ should add a section to OAR 340-209-0040 that would include the minimum information to be contained in a notice regarding an informational hearing. DEQ should also alter OAR 340-209-0050 and OAR 340-209-0060 to provide requirements for who is notified about a scheduled informational hearing.

Similarly, while DEQ has suggested that it will continue to have physical meetings for public hearings, there seems to be little in the proposed regulations that would require physical meeting space. Absent the "reasonable place and time" restriction in OAR 340-209-0070(2) (which could in theory be "the internet"), the only applicable reference is an oblique reference in the public notice requirements that the notice provide procedures for submitting comments "whether in writing or in person." OAR 340-209-0040(1)(g), (2)(g).

The Commenters support the concept of updating DEQ's public meeting rules to allow flexibility to *add* modern technology to its process to allow greater flexibility. However, DEQ should not allow modern technology to *replace* its public involvement process. Replacing hard copy and newspaper notification or physical public meetings poses a serious environmental justice concern. Many environmental justice communities that are most effected by air pollution are also least likely to have reliable access to the Internet. If DEQ shifts too much to the use of modern technology, it risks leaving many effected people unable to adequately participate.

DEQ should more seriously think through how to modify its rules to provide flexibility while maintaining some minimum standards to ensure the public is able to participate. DEQ should not just completely remove any restrictions. This is especially true since DEQ does not have any concrete idea of how it intends to use this proposed "flexibility." Therefore, while the

[9] If you told Oregonians that a test result of 0.149 gr/dscf meets a limit of 0.1 gr/dscf, the Commenters are quite sure that a rather large majority of them (aside from the engineers) would look on incredulously.

Commenters support the concept of increased flexibility, they cannot support the complete deletion of informational meeting and public hearing requirements that DEQ is proposing.

X. DEQ should revise its rules to abandon the Plant Site Emission Limit (PSEL) Program because it is contrary to the Clean Air Act

All sources in Oregon, uses the Plant Site Emission Limit (PSEL) program to implement the Prevention of Significant Deterioration (PSD) program. The Commenters believe that the PSEL program does not meet the minimum requirements of the Clean Air Act and is therefore illegal.

The first problem with Oregon's PSD program is that it focuses on the PSEL to determine whether a "major modification" has occurred, and the PSEL is purportedly based on actual emissions in the mid-1970s. In Oregon, to qualify as a major modification, a change must result in "an increase in the PSEL" over the significant emission rate over the netting basis. OAR 340-200-0020(66)(a). The problem with Oregon's approach is that the PSEL is a permit limit, not a calculation of actual emissions or potential to emit of a new unit. A PSEL is "the total mass of emissions per unit of time of an individual air pollutant specified in a permit source." OAR 340-200- 0020(88). A PSEL is a plant-wide cap on annual emissions in a permit limit that is intended to function as a federally and practically enforceable limit on a source's potential to emit (PTE). Because the PSEL is a permit limit, the source must apply for an increase in its permit limit to ever qualify as a "major modification" under OAR 340- 200-0020(66)(a). However, the focus of the determination must be on whether actual emissions increase, not whether the permit limit changes.

Even assuming that this requirement for a change in PSEL is the result of less than careful drafting, the second problem with Oregon's program is that it requires a "major modification" to result in increase in permitted (not actual) emissions that is equivalent to an increase over the SER on a plant-wide basis. Instead of focusing on the pollution increase from the new emissions unit, Oregon's program determines whether an emissions increase is significant by reference to the entire facility. In this way, Oregon's program features "automatic netting" based on a permit limit from the 1970s. Thus, so long as the source had a PSEL in excess of emissions projected from the source after a physical or operational change, and never banked those emissions, no PSD permit is required. Indeed, even if a proposed change would have the potential to increase emissions more than the SER above current emission levels, so long as the source does not request a PSEL increase of more than the SER above current permitted limits, no PSD permit is required.

The third problem with Oregon's PSEL approach is that the PSEL is not based on projected or actual emissions during a time-frame that is contemporaneous with the physical or operational change in question, but during the "baseline period." OAR 340- 200-0020(3). The rules define baseline period as "any consecutive 12 calendar month period during calendar years 1977 or 1978." OAR 340-200- 0020(14). Oregon's definition of "baseline period" also allows DEQ to use an earlier time period "upon a determination that it is more representative of normal source operation." *Id.* The baseline emission rate is then adjusted as rules change and future permitting decisions are made. The adjusted baseline is referred to as the "netting basis," and is defined as follows:

> the baseline emission rate MINUS any emission reductions required by rule, orders, or permit conditions required by the SIP or used to avoid SIP requirements, MINUS any unassigned emissions that are reduced from allowable under OAR 340-222-0045, MINUS any emissions credits transferred off site, PLUS any emission increases approved through [NSR] regulations. OAR 340-200-0020(71).

The resultant "netting basis" in many cases may not, and in this case does not reflect actual emissions at any time that is reasonably contemporaneous with the physical or operational change in question. In fact, the "netting basis" reflects a thirty-year "look back" period, in clear contravention of the federal regulatory floor. Even EPA has acknowledged that Oregon's PSD program does not subject the same sources to PSD that the federal program does and that some sources that would trigger the federal program do not trigger Oregon's PSD program. *See* 68 Fed. Reg. 2891 (Jan.22, 2003).

Given that the PSEL program is inconsistent with the federal program because of its focus on permitted instead of actual or potential emissions, and its 30-year "look back" period, DEQ should discontinue use of this program.

Conclusion

The Commenters appreciate that DEQ personnel have undoubtedly spent a great deal of time putting together these proposed rule changes. Trying to engage stakeholders prior to formal proposal is a process the Commenters strongly endorse. However, given the width and breadth of these proposals, that engagement should have been more than simple summaries or PowerPoint presentations of what DEQ regarded as the most significant changes to Oregon's air quality rules. "Clarify and update" covers an impressive array of changes, not all of them mentioned in the summaries prepared by DEQ. The Commenters believe review and engagement with this proposal would have been more productive if stakeholders had been given actual details prior to formal proposal or if the comment period was significantly extended. While DEQ did provide two, two-week extensions to the public comment period, trying to get through over 1,000 pages of material, with an extreme amount of cross-referencing, it a daunting task. DEQ has been working on these rule changes for well over a year. Being able to review all of that work in a bit over two months and intelligently comment on DEQ's policy choices as well as the details is a difficult task to say the least.

This comment identifies several areas where the Commenters believe DEQ's work has been incomplete or insufficiently explained. We therefore urge DEQ to ease off its current schedule and review its work and provide more detailed analysis for public review. Very little in these proposals is necessary,[10] and a delay to make sure DEQ gets it right is appropriate.

Neighbors for Clean Air

Northwest Environmental Defense Center

Columbia Riverkeeper

[10] The Commenters believe that DEQ can move forward with some of the small bore proposals, such as fixing the Heat Smart certification program, while delaying the portions of this proposal that are more complicated or controversial.