

917 SW Oak St. Suite 417 Portland, OR 97205

TEL: 503,525,2724

FAX: 503,296,5454

www.crag.org

Christopher Winter Co-Executive Director chris@crag.org

March 30, 2016

#### VIA ELECTRONIC SUBMISSION AT:

http://www.oregon.gov/deq/RulesandRegulations/Pages/comments/Ctoxics2016temp.aspx

Ms. Joni Hammond Acting Director Oregon Department of Environmental Quality 811 SW 6th Avenue Portland, OR 97204-1390 Ms. Jane O'Keefe Chair, Oregon Environmental Quality Commission 811 SW 6th Avenue Portland, OR 97204-1390

Re:

Comments on Proposed Temporary Rules for Control of Hazardous Air Poliutants from Colored Art Glass Manufacturing ("CAGM") Facilities

Dear Acting Director Hammond and Chair O'Keefe:

Thank you for the opportunity to comment on the proposed temporary rules relating to emissions of heavy metals from CAGM facilities. As you know, the rule package was posted to DEQ's web site on the afternoon of Monday, March 14, 2016, with a vote of the Environmental Quality Commission ("EQC") scheduled for the next day, less than 24 hours later. After numerous requests from House Speaker Kotek and elected leaders from across the Portland Metro area, Multnomah County Chair Kafoury, and numerous citizens and stakeholders, the EQC made a very reasonable decision to allow for a 14-day public comment period on the proposed temporary rules.

This brief period of time to review the proposed temporary rule package has proven to be invaluable. After carefully reviewing the proposal, we now submit these written comments on behalf of Crag Law Center, Northwest Environmental Defense Center ("NEDC"), Neighbors for Clean Air, OPAL Environmental Justice, Eastside Portland Air Coalition ("EPAC"), Coalition for Communities of Color, Oregon Environmental Council, Oregon Physician for Social Responsibility, Verde, Beyond Toxics, and the Portland African American Leadership Forum.

In short, while we are in favor of the EQC adopting temporary rules, we believe that the rules as drafted are inadequate for a number of reasons to be discussed in more detail below. As an alternative, we have attached to our comments suggested revisions to those rules, and we ask that the EQC consider our proposal at its upcoming meeting on April 20, 2016.

Our comments and proposed revisions to the temporary rules are based upon three principles:

- 1) The temporary rules should be designed to protect human health from emissions of metals from glassmaking facilities until a permanent rule can be put into place, which we understand DEO has committed to do in the near-term;
- 2) The temporary rules should ensure effective public participation, transparency, and accountability in any DEQ decisions that authorize emissions from regulated facilities, particularly by the communities most affected by the pollution; and
- 3) The temporary rules should ensure equal protection for all communities regardless of race, ethnicity, and economic class.

Based on these three principles, we have several significant concerns with the temporary rules as drafted. We summarize those concerns below and provide additional detail in the sections that follow.

The temporary rules do not reflect a health-based approach to regulating emissions from CAGM facilities. The rules principally require the implementation of emissions-control equipment by September 1, 2016, thus reflecting a technology-based approach – and not a health-based approach – to regulation. The rules also allow for emissions of chromium VI from uncontrolled furnaces based on whether those emissions would cause ambient concentrations of chromium VI to exceed 1.6 ng/m³ at receptors to be specified by DEQ at a later time. This proposed standard is 20 times greater than the existing ambient benchmark concentration in DEQ's air toxics regulations. Thus, the proposed temporary rules allow for an exception to the generally applicable technological requirements without adequate protections for human health.

The EQC should reject this approach to regulation, both in the temporary rules and in the permanent rules. Instead, the regulations should require that all facilities regulated by the temporary rules adopt readily available emissions control equipment on all sources of hazardous air pollutants. There is simply no reason to allow uncontrolled emissions of HAPs from stationary industrial sources in this day and age. In addition, the permanent rules should provide for additional operational or other restrictions if emissions of HAPs subject to emissions controls continue to threaten human health.

- The draft temporary rules are too narrow in their design and therefore do not address many additional related threats to human health. The temporary rules should apply to all glass manufacturing facilities state-wide and should address the full suite of heavy metals that are known to be associated with those facilities. By focusing too narrowly on emissions of only three FIAPs from CAGM facilities in the Portland Metro region, DEQ is failing to protect human health in economically disadvantaged and racially diverse areas. The overly narrow scope of the draft rules is an issue of environmental justice, because DEQ is not taking action to provide equal protections for human health in economically disadvantaged and racially diverse areas. DEQ must assess whether these temporary rules will result in a disproportionate impact on these communities under Oregon's environmental justice law and Title VI of the Civil Rights Act.
- The draft temporary rules do not allow for adequate public participation in DEQ decisions that affect human health. Under these rules, many important decisions would be made unilaterally by DEQ without any public notice and comment, including the type of emissions control and monitoring equipment to be installed, how that equipment is to operated and maintained, the source testing protocols, details of air dispersion modeling, and the location and means of measuring ambient concentrations of chromium VI.

The temporary rules should instead prohibit the emissions of heavy metal from facilities regulated by the temporary rules unless and until the source obtains a permit from DEQ authorizing those emissions. The permit application should include information on the proposed manufacturing processes, including identification of raw materials and the rates at which they are used, emissions control equipment, and a source test plan. The public should then have a full and fair opportunity to review that information and to provide public comments on the draft permit. Only after the permit is issued after public notice and comment should the facility be allowed to emit regulated pollutants.

Below, we provide more detail on each of these topics. We also set forth several additional concerns regarding specific components of the temporary rules at the end of this comment letter. And we again encourage the EQC to consider our alternative draft rules.

A. The Draft Temporary Rules Do Not Reflect a Health-Based Approach to Air Toxics Regulation.

In his letter to Governor Brown dated February 14, 2016, former DEQ Director Dick Pedersen stated that the agency would be pursuing "health or risk based standards for air toxics impacts from industrial sources," and that recent events have identified that "a more aggressive approach is needed to make the necessary progress to reduce air toxics impacts from industrial sources." While our groups were encouraged to learn that DEQ intends to implement a permanent set of rules that adopts a health-based approach to regulating air toxics, it is important to point out that these temporary rules do not do so, even for the limited CAGM source category.

# 1. The Emissions Limitations in the Proposed Temporary Rule Are Not Based Upon Any Estimation of Impacts to Human Health.

The core requirement of the proposed temporary rule is contained in OAR 340-244-9030(1)<sup>1</sup>, which would mandate installation of one or more emissions control devices on all glass-making furnaces that use arsenic, cadmium, chromium, or nickel as raw materials. This is a technology-based requirement. Moreover, the proposed rule also requires that each emissions control device must meet certain performance requirements. OAR 340-244-9030(2).

In particular, the proposed rule includes an emissions limitation of 0.2 pounds of particulate matter per ton of glass produced. *Id.* We presume that DEQ recommends this limitation because it is included in the National Emission Standards for Hazardous Air Pollutants ("NESHAPs") that apply to glass manufacturing facilities (*i.e.*, these NESHAPs do not apply only to CAGM facilities). *See* 40 C.F.R. Part 63, Subpart SSSSS, Table 1. The glass manufacturing NESHAPs were adopted pursuant to Section 112 of the Clean Air Act, 42 U.S.C. § 7412. Under that provision of the Clean Air Act, EPA develops NESHAPs based on available control technology.

Thus, the emissions limitations in the proposed temporary rule are not based on any underlying analysis or estimation of whether the resulting emissions of HAPs would or would not protect public health. To this point in time, DEQ has not explained how it arrived at these emissions limitations or whether these figures are reflective of a human health risk assessment and/or will protect adequately public health. While this may be a step in the right direction, it is important for the EQC to be informed of the basis for these emissions limitations and for EQC and DEQ to retain their discretion to impose stricter requirements later in time if necessary to protect public health. EQC and DEQ must ensure that no actions take or statements made at this time constrain future regulatory authority or limit their ability to craft a permanent rule that focuses on human health risk.

## 2. The Temporary Rules Should Not Allow for the Emissions of any Heavy Metals from an Uncontrolled Furnace.

While the proposed temporary rules adopt a technology-based approach to the regulation of air emissions from CAGMs, those rules then carve out a gaping hole by allowing for the uncontrolled emissions of hexavalent chromium under certain conditions. See OAR 340-244-9040(2)-(4). Thus, the rules allow for an exception to the otherwise applicable technological requirements. These temporary rules therefore embody the wrong approach to regulating emissions of HAPs from CAGM. As we discuss above, the temporary rules should mandate installation of modern emissions control equipment on all furnaces before authorization of any emissions of HAPs from the regulated source category. The permanent rules must then provide

<sup>&</sup>lt;sup>1</sup> Any citation to OAR 340-244-9000-9050 is intended to refer to the draft temporary rules prepared by DEQ.

for the imposition of additional operational or other restrictions if emissions still threaten human health.

The inherent problems with the approach set forth in the temporary rules as drafted are readily apparent on the face of the rules themselves. The draft temporary rules state that "CAGMs may not use arsenic, cadmium or chromium VI in raw materials in any glass-making furnace that is not controlled by an emissions control device DEQ approved." OAR 340-244-9040(1). In the same section, however, the temporary rules set forth two options that apparently would allow for emissions of chromium VI from an uncontrolled furnace, OAR 340-244-9040(3)-(4) (Option 1 and Option 2). Thus, the temporary rules, on their face, are internally inconsistent. These poorly drafted regulations will lead to confusion and uncertainty later in time.

Moreover, we are very concerned that DEQ is proposing to use 1.6 ng/m³ as a standard for ambient concentrations of chromium VI. DEQ has failed to provide any basis whatsoever for adopting this standard in the temporary rule, and after an extensive review of the literature we were unable to identify any other explanation. Several years ago, DEQ established an ambient henchmark concentration ("ABC") for chromium VI – .08 ng/m³. Those ABCs were subject to scientific review by DEQ's Air Toxics Scientific Advisory Committee. The standard for chromium VI that DEQ now proposes in the temporary rule is 20 times less protective than DEQ's own existing ABC. DEQ has failed to articulate any reason to deviate from its own benchmark. Finally, the ABC that was adopted by DEQ is consistent with, and likely derived from. EPA's Integrated Risk Information System ("IRIS") Chemical Assessment Summary for chromium VI. EPA established .08 ng/m³ as the concentration necessary to limit the risk of excess cancers from inhalation exposure to 1 in 1.000,000.

The simple and straightforward solution to this problem is to prohibit the use of any heavy metals in furnaces that are not equipped with an emissions control device. While we understand that Bullseye Glass disagrees that the use of chromium III may result in the emissions of chromium VI, we also understand that both EPA and DEQ have acknowledged the very real possibility that this conversion may occur under certain conditions in glassmaking furnaces. Given the well-documented threats to human health posed by use of chromium III and emissions of chromium VI, there is simply no excuse to allow the uncontrolled emissions of chromium under these temporary rules. Bullseye is the company that will profit from causing this pollution of Portland's air quality, and it is Bullseye that must bear the costs of ensuring that this pollution will not harm human health. In an area such as this where there is a significant disagreement or where this significant uncertainty as to emissions of a chemical as toxic as chromium VI, the most efficient and straightforward solution is to require that Bullseye install modern emissions

<sup>&</sup>lt;sup>2</sup> See http://www.deq.state.or.us/aq/toxics/does/abc.pdf.

<sup>&</sup>lt;sup>3</sup> See http://www.deq.state.or.us/aq/toxics/benchmark.htm.

<sup>&</sup>lt;sup>1</sup> See https://efpub.epa.gov/neea/iris/iris\_documents/documents/subs//0144\_summary.pdf/at-pg, 21.

control equipment on its furnaces. We strongly urge EQC to reject Bullseye's self-serving argument that use of chromium III as a raw material will not result in emissions of chromium VI.

## B. The Temporary Rules Are Too Narrow in Their Design.

The proposed temporary rules should be amended to east a wider net, because the rules as currently written are simply too narrow to address the known threats to human health caused by emissions that are currently unregulated or poorly regulated by DEQ. These issues are critical, because the rules in their current form fail to protect the communities outside of Southeast Portland and North Portland that are adjacent to the two principle CAGMs - Bullseye and Uroboros. There are, however, known hotspots of arsenic that may be associated with glass manufacturers in the Cully and Sumner neighborhoods, and there are also risks to human health caused by the emissions of additional heavy metals from CAGMs.

## 1. The temporary rules should apply State-wide.



The temporary rules as written apply only to the Portland Air Quality Maintenance Area ("AQMA"). OAR 340-244-9000. DEQ has not explained why it has limited the geographic scope of the rules.

At this point, it is not clear whether there are other CAGM facilities in Oregon outside of the Portland AQMA. That fact alone, however, should not stand in the way of EQC approving a temporary rule that applies state-wide. If there are other CAGMs in the State, then of course they should have to comply with the same regulations and implement the same emissions controls as CAGM facilities located in the Portland AQMA. Otherwise, facilities outside of the Portland area would gain a competitive advantage over facilities in the Portland area as a result of being subject to fewer environmental regulations. Moreover, those facilities outside of the Portland area would also be subjecting their neighbors to the same kinds of health threats that have already been identified by the Forest Service and DEQ through the moss study and ambient air monitoring.

On the other hand, if there are no CAGMs outside of the Portland AQMA, then a temporary rule that would apply to the entire State would discourage any businesses seeking to construct a new facility from choosing a geographic location based on whether or not their emissions would be regulated.

## 2. The temporary rules should apply to all glass manufacturers.

In addition to applying State-wide, the temporary rules should also capture all glass manufacturers. We are gravely concerned that DEQ has failed to respond adequately to data from the Forest Service moss study suggesting that there are additional hotspots of arsenic in the City of Portland, including one in the Cully neighborhood (Glass Alchemy at NE 60th/Columbia) and one in the Sumner neighborhood near (Owens Illinois at 9710 Glass Plant Rd.). We have yet to learn of any coordinated response from DEQ on this issue, while the agency instead focuses on passing temporary rules that would protect only a cross-section of the

general public, while leaving out the most ethnically and racially diverse census tract in the State.

Again, it is straightforward for DEQ to simply require standard emissions controls on all furnaces used by glass manufacturers that utilize heavy metal HAPs as raw materials. There is no reasonable basis to allow for uncontrolled emissions of heavy metals at any glass facilities in the State. Each and every facility should be required to install basic emissions control equipment.

This is an issue of environmental justice, because the Cully neighborhood is the most diverse census tract in Portland. DEQ must therefore determine whether its actions in passing the temporary regulation – and in responding to the air toxics crisis in Portland – is resulting in a disproportionate adverse impacts on minority and low income communities. Under Oregon statutory law, DEQ must consider the effects of the action on environmental justice issues, which include impacts on minority and low income communities. See ORS 182,545(1).

Similarly, as a recipient of federal funding from EPA. DEQ must comply with Title VI of the Civil Rights Act and EPA's implementing regulations. See 40 C.F.R. Part 7. DEQ "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex." 40 C.F.R. § 7.35(b) (emphasis added). Here, by limiting the scope of the temporary rules to CAGMs even though other glassmakers may very well be causing hotspots of arsenic in a diverse community like the Cully neighborhood. DEQ is administering its program in way that has the effect of subjecting individuals in the Cully to discrimination based on their race. DEQ's regulatory program is placing a disproportionate environmental burden on racially diverse community. The remedy for violations of Title VI of the Civil Rights Act include the possible revocation of EPA funding for DEQ. 40 C.F.R. § 7.130(a).

In short, DEQ should extend the temporary rules to capture all glassmakers in the State. And under both State and Federal law DEQ must analyze whether its temporary rule would have the effect of subjecting an environmental justice community to disproportionate treatment. DEQ must ensure that it is providing equal protection to all people who may be effected by these toxic emissions. To this point in time, DEQ has failed to address and it continues to fail to address other toxic hotspots in the Portland Metro area that may very well be caused by other glassmaking facilities.

3. The temporary rules should apply to all heavy metals used by glass manufacturers.

Finally, the temporary rules should be extended to apply to all heavy metals used by glass manufactures. Again, DEQ has failed to provide any explanation for why it would continue to allow for uncontrolled emissions of heavy metals from furnaces utilized by glass manufacturers.

When DEQ first conducted air quality sampling in Southeast Portland, it analyzed the samples for a suite of heavy metals that include: chromium, cobalt, arsenic, selenium, cadmium, lead, nickel, manganese, and beryllium. All of these heavy metals are known to be associated with manufacturing of colored glass. During October of 2015, DEQ identified concentrations of arsenic, cadmium, lead, and nickel at concentrations above the ambient benchmark concentrations set by DEQ. While DEQ did not determine concentrations of chromium III vs. chromium V1, air quality samples also gave rise to a concern of elevated concentrations of chromium V1. Even the Statement of Need that accompanies the temporary rule package notes that "uncontrolled glass furnaces processing colored glass to which arsenic, cadmium, chromium, and nickel are added likely emit these metals at levels that can pose an immediate threat to the health of people nearby." This statement, of course, says nothing about risks to human health from long-term exposure, which may also be of concern.

The temporary rules, however, regulate the emissions of only cadmium, arsenic, and chromium VI. OAR 340-244-9040(1). There is no explanation whatsoever as to why DEQ is prepared to allow through these temporary rules the uncontrolled emissions or lead, nickel, and all of the other heavy metals. The temporary rules should be expanded to apply at least to nickel and lead and ideally to all of the heavy metals currently listed in OAR 340-244-9040(3)(c) and (4)(c).

C. The Temporary Rules Do Not Allow for Public Participation in DEQ Decisions That Affect Human Health and That Will Authorize Emissions of Heavy Metals From the Regulated Source Category.

The draft temporary rules establish a problematic and unworkable process whereby DEQ would authorize facilities to emit pollution before those facilities would have to obtain permits from DEQ to do so. This structure has the process exactly backwards - the temporary rules should prohibit regulated facilities from utilizing heavy metals in glassmaking furnaces unless and until they have obtained from DEQ a permit authorizing them to do so. Instead, under the proposed structure, DEQ would authorize pollution before the permits are issued, and the public and community members who would be affected by that pollution would therefore have no say over many critical DEQ decisions.

In fact, under the temporary rules, DEQ would have no obligation to even notify the affected public that it had authorized polluting activities. Thus, the temporary rules as written would create a black box process where many critical decision would be made by DEQ without any public notice or public comment. This is a regulatory structure that is doomed to exacerbate the public's lack of trust in DEQ, and it will also prevent the public from developing an understanding of how air quality in Portland is being managed for the common good.

The first thing to note is that the proposed rules require a regulated facility to apply for a permit by September 1, 2016. OAR 340-244-9020. However, as written, the temporary rules

<sup>&</sup>lt;sup>5</sup> The October 2015 data is available at http://www.deg.state.or.us/nwr/docs/PowellSE22nddata.pdf.

also require that a regulated facility install emissions control by a date "no later than" September 1, 2016. OAR 340-244-9030. Thus, under these temporary rules, by the time the facility applies for a permit it will already have installed emissions control equipment. Moreover, the temporary rules allow facilities to continue to emit heavy metals from uncontrolled furnaces before September 1, 2016 without having a permit to do so. OAR 340-244-9030(1).

The temporary rules also set forth several decisions to be made by DEQ in approving the design and installation of emission control equipment. Under these temporary rules, all of these decisions will be made by DEQ before September 1, 2016, all without any public notice or comment. Those decisions include:

- The design of all emissions control devices. OAR 340-244-9030(3)(a),
- The design of the monitoring device to be installed on the emissions control device. OAR 340-244-9030(3)(d).
- Operating parameters for the emissions control devices. OAR 340-244-9030(3)(f)(A).
- The design of the source test plan that would be utilized to measure emissions from the facility. OAR 340-244-9030(3)(f), -9040(3)(a), (4)(a).
- The design of a protocol for air dispersion modeling. OAR 340-244-9040(3)(b), (4)(b).
- Determination of the receptors to be protected and the location of measurement for determining compliance with the 1.6 ng/m<sup>3</sup> standard of chromium VI. OAR 340-244-9040(3)(b), (4)(b).

Many of these decisions would have to be made by DEQ in response to a Notice to Construct the emissions control device to be submitted by the regulated facility to the agency. OAR 340-244-9030(3)(b). DEQ would have only 10 days to craft the specific requirements, or the Notice to Construct would be deemed to have been approved without any conditions being imposed. OAR 340-244-9030(3)(b).

Thus, by the time the facility applies for a permit in September 1, 2016, DEQ will already have made all of the substantive decisions that determine the design of the equipment to be installed, how that equipment is to be operated and tested, and how the air dispersion modeling is to be conducted. The public will be completely locked out of every single important decision relating to these facilities and will be forced to simply accept a permit that has been predetermined as a result of these earlier DEQ decisions.

There is a simple solution. The temporary rules should simply prohibit operation of any glassmaking furnace that utilizes any heavy metal as a raw material without an approved emissions control device. Facilities should be able to apply for permits immediately, and the permit application should include all of the information set forth above: the type of equipment, the type of monitoring device, and the source testing plan. DEQ would then draft the proposed permit and would allow for public notice and comment, allowing the public an opportunity to review the permit application materials. DEQ would then review public comments and either approve, modify, or reject the application for the permit. The revised temporary rules we have submitted along with these comments do just this.

Indeed, this is how every other environmental permitting program is designed to work to ensure adequate public participation. We cannot think of one other program in which all substantive decisions are made by DEQ behind closed doors before the public is given the opportunity to review a draft permit. The temporary rules as currently written would fundamentally deprive the public of necessary due process rights. The permit would be nothing more than a rubber stamp on decisions already made by DEQ with no public notice and no public comment. It is frankly disheartening to think in this day and age, after all that DEQ has been through over the past two months, it would even consider locking the impacted community out of the regulatory process in this manner. This is simply the wrong approach to take. Public participation will help DEQ to make better decisions while, at the same time, helping to rebuild the public's trust in the agency.

### D. Additional Recommendations.

The proposed temporary rules could be further strengthened by addressing the following issues:

- 1. OAR 340-244-9030 should specify that baghouse filters should be equipped with leak detection devices and an automatic shut-off to prevent emissions of HAPs in the event of a malfunction.
- OAR 340-244-9030 should specify that the source testing should be completed and approved by DEQ before standard operations commence.
  The 60-day period to conduct a source test is too long where DEQ already has data that prior emissions have exceeded health-based thresholds for acute exposure.
- 3. OAR 340-244-9030 should specify that all source testing should be completed under "representative operating conditions reflecting every type of batch and every type of glass manufactured by the facility." We understand that Bullseye Glass utilizes oxygen fuel in at least some of its glassmaking furnaces. All source tests should capture the complete range of equipment, fuels, and raw materials utilized by the facility.
- 4. The recordkeeping requirements in OAR 340-244-9040 should apply to all facilities and should include all raw materials containing HAPs.
- 5. OAR 340-244-9040 should specify the location and type of receptor that will be considered in reviewing air dispersion modeling information. Without knowing where the point of compliance, it is impossible to know whethe the standard of 1.6 ng/m<sup>3</sup> is protective of public health.

### E. Conclusion.

Thank you for providing this brief period of time to review the proposed temporary rules and for considering our written comments. We look forward to attending the upcoming meeting of the EQC on April 20, 2016. In the meantime, please contact our office if you have any questions regarding this information.

Sincerely, a

Co-Executive Director

### Enclosure

cc: Mr. Mark Riskedahl, Executive Director, Northwest Environmental Defense Center

Ms. Mary Peveto, President, Neighbors for Clean Air

Mr. Huy Ong, Executive Director, OPAL Environmental Justice

Ms. Amanda Jarman and Jessica Applegate, Eastside Portland Air Coalition

Ms. Maggie Tallmadge, Environmental Justice Manager, Coalition for Communities of Color

Ms. Andrea Durbin, Executive Director, Oregon Environmental Council

Ms. Kelly Campbell, Executive Director, Oregon Physicians for Social Responsibility

Mr. Alan Hipolito, Executive Director, Verde

Ms. Desire Rajee, EJ Committee Advisory, Portland African American Leadershop

Forum

Governor Kate Brown

Senator Ron Wyden

Senator Jeff Merkley

State Rep. Tina Kotek

State Rep. Barbara Smith-Warner

State Rep. Lew Frederick

State Sen. Chip Shields

State Sen. Diane Rosenbaum

State Rep. Ken Helm

State Rep. Kathleen Taylor

State Rep. Rob Nosse

State Rep. Alissa Keny-Guyer

State Sen. Michael Dembrow

State, Rep. Mitch Greenlick

Multnomah County Chair Deborah Kafoury

Mayor Charlie Hales