Oregon Department of Environmental Quality

**DRAFT**

DATE: (of notice publication)

**Notice of Proposed Temporary Rulemaking**

Composting Special Pathogen Reduction Temporary Rule 2019

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| DEQ recommendation to the EQC  |

DEQ recommends that the Oregon Environmental Quality Commission:

1. Determine that failure to act promptly would result in serious prejudice to the public interest or the interests of the parties concerned as provided under the Justification section of this staff report.

2. Adopt TEMPORARY rules as attached to this notice as part of chapter 340 of the Oregon Administrative Rules to be effective on filing with the Oregon Secretary of State.

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|  Overview |

DEQ has identified an error in the current DEQ solid waste compost rules that, if not corrected, will cause serious prejudice to the Port of Tillamook Bay (POTB), Tillamook Biogas, LLC, and parties to contracts associated with the operation of the POTB’s anaerobic digester. The DEQ compost rules need to be modified to correct an error relating to the requirements for managing liquid digestate from the anaerobic digestion of manure. The rules currently require liquid digestate from anaerobic digesters not located at an agricultural operation to meet pathogen limits and testing requirements that, when processing manure, are cost-prohibitive and impracticable. Digesters located at agricultural operations are not required to meet these same limits and testing requirements. The rules should apply the same pathogen reduction requirements for liquid digestate regardless of where an anaerobic digester is located.

Correcting this rule error has become urgent because DEQ received a petition to reconsider a permit modification recently issued to the POTB. DEQ granted the petition to reconsider on January 31, 2019. While the permit remains in effect, there is regulatory uncertainty regarding pathogen reduction limits and testing requirements and legal risk to the POTB and Tillamook Biogas, LLC, should the facility begin operations. DEQ intends to proceed with permanent rule-making to address the error. However, in the interim, the Environmental Quality Commission can correct this error and address the regulatory and legal uncertainty by adopting this proposed temporary rule amendment.

The error in the rule applies the pathogen reduction requirements inconsistently and creates prejudice against the public and affected parties. The regulatory uncertainty relating to this decision will delay operations of the POTB’s anaerobic digester. Failure to act promptly will result in the POTB’s public infrastructure remaining underutilized. The Governor’s North Coast Regional Solutions Team has been working closely with the POTB and its contracted operator, Tillamook Biogas, LLC, to ensure this valuable community asset does not remain idle. Delayed operations will postpone the odor and pathogen reduction benefits provided by the digestion process, creating prejudice against the public. Residents of rural Tillamook County also stand to benefit from the green power promised to the local utility. The project’s power purchase agreement, as well as farmer and feedstock agreements, will be at risk if this facility remains idle, creating prejudice against the public and affected parties. This proposed rule change, addresses prejudice by correcting the error and applying the pathogen reduction requirements consistently to all anaerobic digester operations.

The proposed temporary rule modification would provide an exemption from the pathogen reduction testing limits for liquid digestate from manure digesters not located at agricultural operations. It would also require that liquid digestate from manure digestion that is applied to soil be done so at agronomic rates to be environmentally protective.

As a temporary rule, the proposed changes would be effective for a maximum of 180 days. DEQ staff are working on a proposed permanent rule amendment to implement the same changes as proposed in the temporary rule. Staff intend to bring that proposed permanent rule for commission consideration and action in August 2019.

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|  Statement of need  |

DEQ added anaerobic digestion requirements to the DEQ compost rules in 2013. The current rule language applies requirements inconsistently to manure digesters based on where the facility is located. The proposed temporary rule amendment corrects this oversight until DEQ can adopt a permanent rule.

Prior to 2013, the Port of Tillamook Bay’s anaerobic digester operated under a DEQ solid waste treatment permit. After adding anaerobic digester requirements to the compost rules, DEQ issued a new compost permit to POTB’s anaerobic digestion facility in 2013. This permit allowed the facility, which is not located at an agricultural operation, to digest manure only. At the time, DEQ incorrectly considered the POTB digester an agricultural operation and the 2013 permit did not require POTB to meet the pathogen reduction limits or testing requirements because the liquid digestate was to be returned to farmland for land application.

In October 2018, DEQ issued a permit modification to authorize the POTB to accept additional feedstocks for digestion. While issuing the modification, DEQ came to understand that the POTB did not meet the definition of an agricultural operation and identified the inconsistency in the rule that would subject the POTB facility to a standard that is unnecessary, impracticable, cost prohibitive, and applied inconsistently between similar operations. As a result, DEQ included a permit condition to allow the POTB to land apply liquid digestate at agronomic rates in compliance with an Oregon Department of Agriculture approved nutrient management plan as an alternative to meeting the pathogen reduction limits and testing requirements. DEQ recognized that this inconsistency would need to be addressed when DEQ next revised the compost rules.

In December 2018, DEQ received a petition to reconsider the POTB permit decision. DEQ determined that the rule correction is urgent to provide regulatory and legal certainty to non-agricultural operations, ensuring they can manage liquid digestate in a manner similar to an agricultural operation. Without the rule correction, the POTB will be required to meet pathogen reduction limits and testing requirements that are not feasible. DEQ is asking the EQC to adopt the proposed temporary rule change to provide legal certainty for digester operations.

The proposed amended temporary rule language would allow the POTB, and other manure digesters not located at agricultural operations, to be commercially viable while providing environmental benefits. This proposed temporary rule amendment would provide for safely and effectively managing liquid digestate from anaerobic digesters that digest manure as other state and federal laws allow. This proposed temporary rule amendment will encourage anaerobic digestion and ensure that manure that is land applied is done so in an environmentally protective manner.

DEQ has allowed the Oregon Department of Agriculture (ODA) to regulate digesters located at agricultural operations under Confined Animal Feeding Operation (CAFO) water quality permits. Manure digesters located at CAFO-permitted agricultural operations are exempt from pathogen rule requirements, while those not co-located with agricultural operations must meet the additional requirements. DEQ determined that the pathogen reduction requirements for the anaerobic digestion of manure should be the same, regardless of where a digester is located. These proposed temporary rule amendments will correct this inconsistency.

In most instances, liquid digestate from anaerobic digesters is applied on agricultural lands at agronomic rates under a CAFO permit and ODA-approved nutrient management plan. DEQ researched EPA and other states’ digestate management requirements and consulted with the Oregon Department of Agriculture. Soil application of liquid digestate at agronomic rates is a safe and appropriate management method. Furthermore, the land application of digested manure is more environmentally protective than the land application of raw manure, given the pathogen and methane reduction benefits.

The proposed temporary rule modification would provide an exemption from the pathogen reduction testing limits for liquid digestate from manure digesters not located at agricultural operations. It would also require that liquid digestate from manure digestion be applied to soil at agronomic rates.

As a temporary rule, the proposed changes would be effective for a maximum of 180 days. DEQ staff are working on a proposed permanent rule amendment to implement the same changes as proposed in the temporary rule. Staff intend to bring that proposed permanent rule for Commission consideration and action in August 2019.

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|  Justification |

In the case of the Port of Tillamook Bay, DEQ has issued the permit modification in question and the permit is active. However the regulatory uncertainty relating to this decision will delay operations of the DEQ-permitted facility. Failure to act promptly would result in the POTB’s public infrastructure remaining underutilized, wasting a valuable community asset. Furthermore, regulatory uncertainty will delay operations, postponing the odor and pathogen reduction benefits provided by the digestion process, and putting farmer, feedstock, and power purchase agreements at risk. Without this facility:

* Manure management options are limited for participating dairy farmers;
* Feedstock agreements for managing organic materials such as seafood processing waste are at risk, limiting alternatives to landfilling; and
* The local utility and its customers risk losing a sustainable source of green power promised by the power purchase agreement.

The POTB’s community digester was initially built in 2003 to address the manure management needs of Tillamook County’s dairy industry. The facility was closed in 2017 for financial reasons and has remained idle since. For the first time since the facility was shuttered, all permits and agreements are in place for operations to resume. The Port has a third-party operator agreement in place with Tillamook Biogas, LLC. DEQ modified the POTB permit to accept type 3 feedstocks, from which revenue makes the operation commercially viable. Manure agreements are in place with participating dairy farms, and a power purchase agreement has been executed with the local utility, Tillamook PUD. These agreements are at risk should this facility not become operational.

While the details of these agreements are proprietary, feedstock agreements are subject to non-performance clauses. One agreement provides for the facility to accept seafood processing waste beginning April 1, 2019. Seafood processing is seasonal in nature and missing this window of opportunity will place this feedstock agreement at risk. As stated earlier, the commercial viability of the operations are tied to the addition of type 3 feedstocks. Putting these feedstock agreements at risk places the entire project at risk.

As previously stated, the current standard is applied inconsistently between similar operations. The standard is not economically viable for permittees processing manure to comply with, while at the same time the current rule does not result in environmental benefit. This was not DEQ’s intent when it originally proposed the rule.

The proposed temporary rule amendment would limit legal uncertainty related to the petition for reconsideration, without applying a standard to the permittee that is not operationally obtainable. The proposed rule amendment will allow for the safe and effective management of liquid digestate from manure digesters, regulate all manure digesters equally regardless of location, and allow the POTB and other anaerobic digesters to be commercially viable while providing environmental benefits.

The legal certainty the temporary rule amendment provides will allow for the POTB’s anaerobic digester to resume operations. This will enable the facility to begin receiving manure and additional organic wastes, providing pathogen reduction and methane capture benefits, and increasing biogas production, creating renewable energy while protecting the environment. Without this temporary rule amendment, the POTB digester will remain idle, putting the operator, Tillamook Biogas, LLC, at risk of non-performance under contract agreements with the POTB, the Tillamook County Creamery Association, participating dairy farmers, Tillamook PUD, seafood processors and other type 3 feedstock providers.

The proposed temporary rule amendment as presented for your consideration would:

* Eliminate the inconsistent application of the pathogen reduction rule, regulating all facilities that digest manure equally, regardless of location;
* Encourage the anaerobic digestion of manure and the associated environmental benefits of pathogen reduction and biogas capture; and
* Limit legal uncertainty related to the petition for reconsideration, providing for the Port of Tillamook Bay’s anaerobic digester to resume operations.

**Prejudice to the public and affected parties**

The error in the rule applies the pathogen reduction requirements inconsistently and creates prejudice against the public and affected parties. Failure to act promptly will result in the POTB’s public infrastructure remaining underutilized. Delayed operations will postpone the odor and pathogen reduction benefits provided by the digestion process, creating prejudice against the public. Residents of rural Tillamook County also stand to benefit from the green power promised to the local utility. The project’s power purchase agreement, as well as farmer and feedstock agreements, will be at risk if this facility remains idle, creating prejudice against the public and affected parties. This proposed rule change addresses prejudice by correcting the error and applying the pathogen reduction requirements consistently to all anaerobic digester operations.

DEQ intends to address this inconsistency through permanent rulemaking. However, this matter is urgent given the current permit consideration and warrants this temporary rule amendment.

**Consequences of not taking immediate action**

* Underutilization or closure of public infrastructure at the POTB would continue without the temporary rule and permanent rule changes
* Anaerobic digesters not located at agricultural operations will face impracticable and cost prohibitive operating costs resulting from equipment and operational changes required to meet pathogen reduction limits. This is inconsistent with requirements for anaerobic digesters located at agricultural operations. This inconsistency in how the pathogen reduction rule is applied affects the commercial viability of facilities not located at agricultural operations, without environmental benefit.
* Potential environmental damage may occur from raw manure being applied to farm land without the environmental benefits gained from the process of pathogen reduction that occurs during anaerobic digestion
* Potential environmental damage may occur from increased methane release due to increased storage and land application of raw manure that is not processed through anaerobic digestion. In contrast, biogas captured at anaerobic digestion facilities is not vented to the atmosphere, can be flared, upgraded to renewable natural gas for use in vehicles, or burned to create electricity, mitigating this potent greenhouse gas.

**Affected parties**

* Anaerobic digesters that accept manure feedstock
* Port of Tillamook Bay
* Tillamook Biogas, LLC
* Tillamook PUD
* Tillamook County Creamery Association
* Participating dairy farmers
* Other feedstock providers

DEQ will hold a public comment period to accept public comments on the proposed temporary rule changes. After responding to any comments received, DEQ intends to ask the EQC to adopt the temporary rule changes. If EQC approves the temporary rule changes, the rule language would become effectively immediately. DEQ will then undertake a permanent rule-making to address this concern.

**How temporary rule would avoid or mitigate consequences**

The proposed temporary rule change would eliminate the inconsistent application of the pathogen reduction rule and provide regulatory and legal certainty to all parties. This will allow the POTB digester to resume operations with clear rule and permit direction. This temporary rule amendment would regulate facilities that digest manure equally and allow for soil application of liquid digestate from anaerobic digesters not located at agricultural operations. The temporary rule would avoid potential negative environmental consequences by allowing all anaerobic digesters to manage manure similarly, regardless of location. The proposed temporary rule would eliminate costly equipment and operations upgrades necessary for manure anaerobic digesters to meet the current liquid digestate pathogen reduction limit and testing requirements. The proposed temporary rule would encourage the anaerobic digestion of manure and the associated environmental benefits of pathogen reduction and biogas capture.

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|  Rules affected, authorities, supporting documents |

**Land Division**

Materials Management

OAR 340-096-0140

* Amend OAR 340-096-0140 (1) and 140 (2) (new language is in bold font):

(1) All composting facilities must comply with this rule, except that agricultural operations as defined by ORS 467.120(2)(a) producing composted material and digestate only for on-farm use are not subject to the requirements of this rule. The department may require that an agricultural operation **or other facility excluded under section 2 of this rule** comply with this rule if the department determines that such compliance is necessary to protect human health or the environment.

(2) All composted material and digestate, excluding: **1)** composted material and digestate that is sent as feedstock to a composter possessing either a composting permit or registration, **or 2)** **digestate applied to soil at agronomic application rates and consistent with site restrictions in 40 C.F.R. §503.32(b)(5),** must meet the following limits:

**Statutory authority**

ORS 459.045, 459A.025, 468.020, 468.065

**Statute implemented**

ORS 459.005. 459.015, 459.205

**Legislation**

Does not apply

**Documents relied on for rulemaking**

| **Document title** | **Document location** |
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| Safe Management of Liquid Digestate from Anaerobic Digestion – White Paper | 40 Code of Federal Regulations Part 503 – Standards for the Use or Disposal of Sewage Sludge; Subpart D – Pathogens and Vector Attraction Reduction |
| Letter in support of temporary rule from ODFA | EPA Environmental Regulations and Technology Guidance Document – *Control of Pathogens and Vector Attraction in Sewage Sludge Under CFR Part 503* |
| Washington Dept. of Ecology *Guidelines: Operating an Anaerobic Digester Exempted From Solid Waste Handling Permit* | Washington Administrative Code 173-350 Solid Waste Handling Standards including sections: 220 Composting Facilities; 225 Other Organic Material Handling Activities; 230 Land Application; and 250 Anaerobic Digesters |

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|  Housing costs |

As ORS 183.534 requires, DEQ evaluated whether the proposed rules would have an effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached, single-family dwelling on that parcel.

DEQ determined the proposed rules would have no effect on the development costs because the DEQ Solid Waste Composting rules only affect DEQ permitted composting facilities.

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|  EQC Prior Involvement  |

DEQ presented these proposed temporary rule amendments to the EQC at the January 25, 2019 meeting. At the EQC’s request, DEQ is holding a public comment period on the temporary rule. DEQ also added additional information to this notice in response to EQC questions.

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|  Implementation  |

**Notification**

The proposed temporary rules would become effective upon filing with the Secretary of State, immediately after EQC adopts them. DEQ would notify affected parties immediately after EQC adoption.

**Compliance and enforcement**

* Affected parties – DEQ permitted Solid Waste facilities
* DEQ staff – Materials Management regional staff
* Oregon Dept. of Agriculture Confined Animal Feeding Operation staff

**Measuring, sampling, monitoring and reporting**

* Affected parties – DEQ permitted Solid Waste facilities
* DEQ staff – Material Management regional staff
* Oregon Dept. of Agriculture Confined Animal Feeding Operation staff

**Systems**

 None to update at this time

**Training**

* Affected parties – DEQ permitted Solid Waste facilities
* DEQ staff – Material Management Staff
* Oregon Dept. of Agriculture Confined Animal Feeding Operation staff

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|  Public Involvement |

**Public comment period**

DEQ opened a public comment period for this proposed temporary rule on February X, 2019. The comment period will close at 4:00 p.m. on February X, 2019. DEQ will not consider any comments submitted after 4:00 p.m. on February X, 2019.

**How to submit comments**

Any person can submit comments about this proposed temporary rule by submitting an email to: compostingtemp2019@deq.state.or.us.