Environmental Quality Commission

X Rule Adoption Item
☐ Action Item
☐ Information Item

Agenda Item C
April 3, 1998 Meeting

Title:

Pollution Control Tax Credits and Plastics Recycling Tax Credits Rule Adoption

Summary:

Chapter 340 Division 16 (Pollution Control Tax Credits) implements ORS 468.150 through 468.190.

The rule proposal would:

- Incorporate 1995 legislative amendments;
- Increase the fee for applying for tax relief by 50%;
- Reduce the refund for applications denied certification by 50%;
- Raise the maximum fee for application to $15,000;
- Eliminate the cost of the duplicated independent accounting review, provide for a waiver of the independent review, and increase the threshold when a review is required;
- Update outdated citations, reorganize rules, and clarify application requirements;
- Clarify which facility costs are eligible and ineligible to be claimed for tax credit purposes; and
- Reorganizing the rules for clarity and correcting impediments to efficient processing.

Chapter 340 Division 17 (Plastics Recycling Tax Credits) implements ORS 468.451 through 468.491.

The rule proposal would:

- Incorporate 1995 legislative amendments;
- Increase the fee for applying for tax relief by 50%;
- Reduce the refund for applications denied certification by 50%;
- Provide for a waiver of the independent review, increase the threshold when a review is required;
- Update outdated citations and application requirements.

For Chapter 340 Division 16,

Amend	OAR 340-016-0005 and OAR 340-016-0010
Repeal	OAR 340-016-0015 through OAR 340-016-0050 and
Adopt	OAR 340-016-0055 through OAR 340-016-0085

For Chapter 340 Division 17,

Amend	OAR 340-017-0010 through OAR 340-017-0055

Margaret C. Vandehey — Report Author
Lee Lotthridge — Division Administrator
Langdon Marsh — Director

March 13, 1998

†Accommodations for disabilities are available upon request by contacting the Public Affairs Office at (503)229-5317(voice)/(503)229-6993(TDD).

State of Oregon
Department of Environmental Quality **Memorandum**

Date: March 13, 1998

To: Environmental Quality Commission

From: Langdon Marsh

Subject: Agenda Item C, April 3, 1998 EQC Meeting
Pollution Control Tax Credits and Plastics Recycling Tax Credits

Background

On July 29, 1997, the Director authorized the Tax Credit staff to proceed to a rule-making hearing on proposed rules which:

- For Chapter 340 Division 16, would amend two Pollution Control Tax Credit rules. Additionally, it would repeal the remainder of rules and adopt new rules in their place due to major reorganization. Division 16 implements ORS 468.150 through 468.190. (Attachment A)

- For Chapter 340 Division 17, this proposal would amend the Plastics Recycling Tax Credits rules. Division 17 implements ORS 468.451 through 468.491. (Attachment B)

Pursuant to the authorization, the Department published the hearing notice in the Secretary of State's Bulletin on October 1, 1997. The Hearing Notice and informational materials were sent to the mailing list of those persons who have asked to be notified of rule-making actions, and to a mailing list of persons known by the Department to be potentially affected by or interested in the proposed rule-making action on September 15, 1997. This list included all people who requested applications in the past year. Approximately eight hundred notices were mailed. The materials included the proposed Chapter 340, Division 16 and information on how to obtain a copy of the proposed Chapter 340, Division 17. Associated Oregon Industries requested two extensions in order to discuss the proposed rules with their membership. Postcard notices of these extensions were mailed on October 23, 1997, and again on December 9, 1997, to the same mailing lists as the original and to any parties requesting notification or requesting application since the original notification.

A Public Hearing was held October 16, 1997, with Mitch West serving as Presiding Officer. Written comment was received through January 15, 1998. The Presiding Officer's Report (Attachment D) summarizes the oral testimony presented at the hearing and lists all the written comments received at the hearing. (Copies of the comments are available upon request.)

Department staff evaluated the comments received (Attachment E). Based upon that evaluation, modifications to the initial rule-making proposal are being recommended by the Department. These modifications are summarized below and detailed in Attachments F.

The following sections summarize the issue that this proposed rule-making action is intended to address, the authority to address the issue, the process for development of the rule-making proposal including alternatives considered, a summary of the rule-making proposal presented for public hearing, a summary of the significant public comments and the changes proposed in response to those comments, a summary of how the rule will work and how it is proposed to be implemented, and a recommendation for Commission action.

Issue this Proposed Rulemaking Action is Intended to Address

This Proposed Rulemaking Action is intended to amend:

1. Both the pollution control facility tax credit rules and plastics recycling tax credit rules by:

   - Incorporating 1995 legislative amendments;
   - Reducing the tax credit program's reliance on the General Fund to cover the cost of filing, investigating and granting or rejecting pollution control and plastics recycling tax credit applications. The General Funds would otherwise be available for DEQ studies, programs or services, to other state services, or to the taxpayers;
   - Eliminating the cost of the duplicated independent accounting review for the applicant; and
   - Updating outdated citations and application requirements.

2. The pollution control facility tax credit rules by:

   - Clarifying what facility costs are eligible and ineligible to be claimed for tax credit purposes; and
   - Reorganizing the rules for clarity and correcting impediments to efficient processing.

Relationship to Federal and Adjacent State Rules

There is no relationship to federal or adjacent state rules.

Comparable Washington State Program: Discontinued in 1981. Purpose was to encourage pollution control and to compensate Washington companies because the Washington State standards were more stringent than federal standards. 151 firms applied and received a tax credit between 1967 through 1981. The amount taken as a credit against public or use tax through 1997 was $63.2 million with another $84.4 million available until phase out is complete. (50% of the investment may be taken a credit at 2% per year with no limit on the number of years.)

Comparable California Program: California utilizes a federal income tax deduction and a sales/use tax exemption for investing in or purchasing air pollution control equipment.

Comparable Idaho Program: Idaho has a state income tax exemption and sales tax exemption for investing in or purchasing air and water pollution control equipment when they are required by the state or federal government.

Authority to Address the Issue

The EQC has the statutory authority to address these issues under ORS 468.020, ORS 468.461 and ORS 468.486, ORS 468.150, ORS 468.165 and ORS 468.190.

Process for Development of the Rulemaking Proposal (including Advisory Committee and Alternatives Considered)

In late 1995, the Director appointed a thirteen member Advisory Committee to provide pre-consultation as part of the Department's tax credit rule and decision making process. In his opening remarks on October 10, 1995, the Director specifically asked the Advisory Committee to identify processing efficiencies and to incorporate 1995 legislation that included new rule-making for the Pollution Prevention pilot program. The Pollution Prevention pilot program rules were adopted July 12, 1996. The amendments to the Pollution Control Facility and the Plastics Recycling tax credit rules (Attachment A and B respectively) would be amended with this proposal. The Committee members were applicants, their industry representatives, one representative from Oregon Economic Development Department and one representative from Oregon Department of Agriculture (ODA). Staff members represented all eligible tax credit activities: hazardous and solid waste; material recovery; air quality; and water quality.

After meeting over thirteen months, the Committee concluded their pre-consultation with staff which resulted in their recommendation to the Department. The Department accepted parts of the Advisory Committee recommendation but rejected the parts that provided an increased tax credit benefit and did not cover the cost of administering the program.

Because the Department proposed rules that would reduce the tax credit, they presented both the Advisory Committee recommendation and the Department's proposal in the public hearing documents explaining the differences. Both approaches were presented to the Environmental Quality Commission during two work-sessions.

Comments received during the Public Comment Period and during the work sessions were considered and incorporated as indicated in Attachment F.

Summary of Rulemaking Proposal Presented for Public Hearing and Discussion of Significant Issues Involved.

The public hearing documents described what was proposed; the background on development of the rule-making proposal — why there is a need for the rule; who is affected by the rules including the public, regulated community or other agencies; and how it affects these groups. Where the Department's proposed rule and the Advisory Committee recommendation were not in agreement, both perspectives were presented. The proposed amendments to the Plastics Recycling Tax Credits (OAR Chapter 340, Division 17) were minimal and for the most part those amendments paralleled some of proposed amendments to the Pollution Control Tax Credits (OAR Chapter 340, Division 16.)

1. The following topics were covered in the public hearing documents for the pollution control facility tax credit rules:

   a) Incorporation of 1995 legislative amendments:
      - Program extended to December 31, 2003 for facilities built on or before December 31, 2001.
      - Update the authority by which cooperatives and non-profit corporations may take tax relief. A corporation organized under ORS Chapter 65 may take tax relief only under ORS 307.405. However, a corporation organized under ORS Chapter 62 may make an irrevocable election to take tax relief under either ORS 315.304 or ORS 307.405.
      - Restrict the method for determining the portion of the facility cost allocable to pollution control to the "percentage of time the facility is used for pollution control" when the facility cost does not exceed $50,000.
      - Preliminary Application Process to pre-certify facility eligibility.

   b) Fee increase for applying for the certification of a pollution control facility .The public hearing documents presented the revenue and expenditure report for a three–year period that clearly showed the programs' inability to pay for the cost of certifying tax credits. Both the Advisory Committee recommendation and the Department's proposal regarding fees were presented. Additionally, both the recommendation and the proposal were applied to the actual applications received over the same three–year period as reported for revenues and expenditures to determine the revenue that would have been generated and the amount of the reduction in the program's operating deficit.

Pollution Control Tax Credit Fee Proposal
As Presented in Public Hearing Documents

	Advisory Committee Recommendation	Department's Proposal
Preliminary Application Fee	1995 Legislative amendments included the ability to obtain a preliminary certification of a pollution control facility. The public hearing documents presented both the Advisory Committee recommendation and the Department's proposal regarding the fee for applying for the preliminary certification.	
	A non-refundable $250 preliminary application fee.	One-half of one percent of the estimated facility cost.
	Recommendation was based on the fact that the statute does not guarantee that a preliminary certificate means the applicant would receive a final certification once the facility is built.	Proposal based on the fact that the Department would incur the cost of the engineering review of the facility plans before making a recommendation regarding issuance or denial of a preliminary certification of the facility.
	The applicant would be able to deduct the preliminary application fee paid from the final application fee.	The applicant would be able to deduct the preliminary application fee paid from the final application fee.
		Changes to proposal in response to public comment and Commission direction.
		No change

Fees continued...

	Advisory Committee Recommendation	Department's Proposal
Final Application Fee	The public hearing documents presented a Revenue and Expenditure summary for three years (July 1, 1993, to July 30, 1996) to determine the program's revenue requirements. The documents also presented the results of applying the Advisory Committee recommended fee schedule and the Department's proposed schedule to the actual applications received during the same study period.	
Filing Fee	No change from the current fee ($50) for facilities with costs under $10,000. Increased to $100 for all other facilities.	Elimination of the current non-refundable filing fee of $50. **Changes to proposal in response to public comment and Commission direction.** No change
Processing Fee	Increased from the current 0.5% to 0.75% of the facility cost. Increased maximum from $5,000 to $10,000.	Increased from the current 0.5% to 1% of the facility cost. Increased maximum from $5,000 to $10,000. **Changes to proposal in response to public comment and Commission direction.** Minimum $50. Increase maximum to $15,000.
Fee Refund	The public hearing documents presented the current policy of refunding 100% of the application processing fee when the claimed facility is denied certification. Both the Department's proposal and the Advisory Committee recommendation addressed the need to reduce the number of applications claiming clearly ineligible facilities and the number of applicant's providing sketchy information.	
	Refund 50% of the application processing fee paid for denied or rejected applications.	No refund of the application. It generally costs the same amount to deny an application as it does to approve it. **Changes to proposal based upon public comment and Commission direction.** Accept Advisory Committee recommendation..

Fees continued...

	Advisory Committee Recommendation	Department's Proposal
Fees Alternatives to Field Burning	The Oregon Department of Agriculture (ODA) processes applications for alternatives to field burning and ODA has another source of funds to pay for the cost of the application review.	
	Fifty dollars for the optional preliminary application.	Fifty dollars for the optional preliminary application.
	Fifty dollars for the final application.	Fifty dollars for the final application.
	Non-refundable.	Non-refundable.
		Changes to proposal based upon public comment and Commission direction.
		No change.

c) Application Processing efficiencies were identified in the public hearing documents as:

- Placing more emphasis on an application that is "complete and ready to process" and the Director's ability to request additional information rather than the filing/submission dates with a focus on removing impediments to timely application processing.
- Clarifying the difference between an "extension of the time to submit an application" and additional time the applicant may need to respond to the "Department's request for additional information."
- Increasing the number of days the Department has to request additional information from 30 to 60 days.
- Providing a waiver of the independent accounting review if the cost of the facility can be thoroughly documented by invoices and canceled checks, is not part of a larger construction project and consists of a single pollution control component or a single pollution control process.
- Raising the facility cost that triggers the independent accounting review from $20,000 to $50,000. The applicant would obtain and pay for an independent accounting review when the facility cost is between $50,000 and $250,000. The Applicant would choose an accounting firm under contract with the Department to perform accounting review of facilities with costs that exceed $250,000. The rule would be clear that the applicant would pay the cost of this review. **See page 15 for changes to the proposal based upon**

Commission comments.

- Expanding the definition of the Environmental Quality Commission to include their "sub-delegate." The public comment documents explained that before any actions that are the responsibility of the Commission could be sub-delegated to the Department the two parties would have to enter into a sub-delegation agreement. An example of a sub-delegated action that could be included in the agreement would be for the Department to approve or deny an extension of time to file an application.

- Redefining "useful life" to reference the *Asset Guideline Period* used to report the depreciation of the facility to the Internal revenue Service.

d) The proposal clarified and updated the eligible and ineligible facility costs to be consistent with Department and EQC policies that have developed over time. For the purpose of receiving a tax credit, certain items included in the facility cost are not eligible because the make an insignificant contribution to the actual pollution control or they provide other benefits of economic value. Some examples include capitalized property tax or interest, spare parts, maintenance, financing costs, owner's time, start up costs, $700 if a CFC facility has the ability to return coolant to the air conditioning system, 10% of the cost of a tank gauge system, etc.

e) Portion of the Facility Cost Allocable to Pollution Control

Please Note: Based upon public comment and Commission direction, the Department will <u>not</u> propose any substantive amendments to the rule regarding the "return on investment" and "facilities that are integral to the operation of an applicant's business" as presented in the public hearing documents.

The Advisory Committee's recommendation and the Department's proposal for determining the percentage allocable to pollution control were very different. The public hearing documents presented both the Advisory Committee recommendation and the Department's proposal. This rule includes two complex concepts as they relate to tax credits:

- <u>The Return on Investment</u>
  The public hearing documents provided statistics on the five percent of all applications that enter into the return on investment calculation, explaining that the estimated average annual cash flow analysis was anything but objective.

  The Advisory Committee's recommendation simplified the return on investment calculation by eliminating the current method. The public comment documents explain how the committee and staff embraced the concept of the simplification but lacked support for the method itself. The method simply reproduced the overall average and median results achieved by the current method but it slightly increased the overall dollar amount allocable to pollution control. However, each individual application did not achieve consistent results when compared to the results achieved under the current rule. As with the current rule, investments in a facility with an average annual cash flow that equals the cost of the facility over its useful life would be certified as 100% allocable to pollution control.

On the other hand, the Department's proposal corrected the return on investment calculation represented in the current rule to more closely represent a standard return on investment calculation. This could be done by a change in how the rule prescribes the use of Table 1 attached to the rules. The DEQ's proposed rule would have substantially reduced the portion of the facility cost allocable to pollution control from the current rule. Under the Department's proposed rule, a facility must have virtually no positive annual cash flow projected over its useful life before it would be certified at 100% allocable to pollution control.

The Department proposed keeping the current description of how Tables 1 and 2 are developed but recommended providing the tables with the application rather than in rule. Additionally, the Department proposal reorganized this rule and clarified the terms used in the equations. **The Department included the changes as presented in this paragraph in the proposed rule. No substantive amendments are presented.**

- Facilities Integral to the Operation of the Applicant's Business
  The public hearing documents described the origins of the two separate methods for determining the portion of the facility cost allocable to pollution control for facilities that are integral to the applicant's business. The results of these sections of the rule were to reduce the portion of the facility cost allocable to pollution control so much that it was not beneficial for these businesses to apply for a tax credit.

  The Advisory Committee recommended eliminating all references to these "integral facilities." The results would be similar to the pre-1993 results which treated commercial solid waste and hazardous waste landfills, solid and hazardous waste recycling businesses, and environmental service providers in a manner identical to all other facilities.

  The Department also proposed eliminating the separate method used to determine the portion of the facility cost allocable to pollution control. However, the Department proposed keeping the definition of a facility that is integral to the applicant's business. If a facility met that definition, the annual cash flow projections would have to include the income and expenditures of the operational unit that the facility belonged to rather than considering the facility as an isolated unit. The Department's proposal would have included some facilities that had been excluded by the 1993 rule but with a much reduced portion allocable to pollution control.

f) Updating and clarifying eligible alternatives to open field burning to include alternatives that will result in the reduction of:

- Open field burning through such activities as marketing of grass straw or grass straw products; and

- Acreage requiring open field burning through such methods as new crop processing equipment and facilities. The equipment or facility would reduce or eliminate acreage requiring burning by 1) producing alternative crops that do not require open field burning; or 2) by introducing rotation crops that support grass seed production without open field burning.

2. The following topics were covered in the public hearing documents for the plastics recycling tax credit rules by:

   a) Incorporating the 1995 legislative amendment to extended the program to December 31, 2003 for investments made on or before December 31, 2001.

   b) Fee increase for applying for the plastics recycling tax credit. The public hearing documents presented the revenue and expenditure report for a three–year period that clearly showed the programs' inability to pay for the cost of certifying tax credits. Both the Advisory Committee recommendation and the Department's proposal regarding fees were presented. Additionally, both the recommendation and the proposal were applied to the actual applications received over the same three–year period as reported for revenues and expenditures to determine the revenue that would have been generated and the amount of the reduction in the program's operating deficit.

Plastics Recycling Tax Credit Fee Proposal
As Presented in Public Hearing Documents

	Advisory Committee Recommendation	Department's Proposal
Preliminary Application Fee	There is currently no preliminary application fee since the process is relatively simple and does not go before the Commission.	
	$50 preliminary application fee.	No preliminary application fee.
		Changes to proposal in response to public comment and Commission direction.
		No change.

Fees continued...

	Advisory Committee Recommendation	Department's Proposal
Final Application Fee		
Filing Fee	No change from the current fee ($50) for facilities with costs under $10,000. Increase to $100 for all other facilities.	Eliminate the current non-refundable filing fee of $50. **Changes to proposal in response to public comment and Commission direction.** No change
Processing Fee	Increase from the current 0.5% to 0.75% of the facility cost. Increase maximum from $5,000 to $10,000.	Increase from the current 0.5% to 1% of the facility cost. No change in maximum of $5,000. **Changes to proposal in response to public comment and Commission direction.** No change.

Fee Refund

The public hearing documents presented the current policy of refunding 100% of the application processing fee when the claimed facility is denied certification. Both the Department's proposal and the Advisory Committee recommendation addressed the need to reduce the number of applications claiming clearly ineligible facilities and the number of applicant's providing sketchy information.

	Advisory Committee Recommendation	Department's Proposal
Fee Refund	Refund 50% of the application processing fee paid for denied or rejected applications.	No refund of the application. It generally costs the same amount to deny an application as it does to approve it. **Changes to proposal based upon public comment and Commission direction.** Refund 50% of the application processing fee paid for denied or rejected applications.

c) Application Processing Efficiencies were identified in the public hearing documents as:

- Providing a waiver of the independent accounting review if the cost of the facility can be thoroughly documented by invoices and canceled checks..
- Raising the facility cost that triggers the independent accounting review from $20,000 to $50,000.
- Expanding the definition of the Environmental Quality Commission to include their "sub-delegate." The public comment documents explained that before any actions that are the responsibility of the Commission could be sub-delegated to the Department the two parties would have to enter into a sub-delegation agreement. An example of a sub-delegated action would be for the Department to approve or deny an extension of time to file an application.

Summary of Significant Public Comment and Changes Proposed in Response:

Pollution Control Tax Credit Rules: The Department received 46 public comments. Seven people presented oral testimony. Four presented oral testimony consistent with their written comments. Thirty grass seed growers or processors present signed a common letter.

Plastic Recycling: The Department did not receive any written comments or oral testimony.

1. Fee Increase and Refunds

Preliminary Applications

Comment	There should be a reduction of the fee charged for the preliminary applications since the approval isn't binding on DEQ or EQC. The preliminary application should not be mandatory.
Changes Proposed	The Department did not change the proposed fee for preliminary application based on these comments. However the proposed rule will be clear that the preliminary application is optional. Generally, an applicant with an atypical facility would submit a preliminary application. In order for the Department to make a recommendation to the Commission, the Department would perform a review of the planned facility to determine if it was eligible under the rule. The proposed rule will be clear about the extent of the preliminary certificate and its relationship to receiving a final certificate. If a designed facility is determined to be an eligible pollution control facility as evidenced by a preliminary certification then the facility would be eligible for a final certificate <u>if the facility is built as certified on the preliminary certificate and</u>

<u>its supporting documents (the preliminary application and the report to the Commission)</u>. This does not guarantee that once the facility is built that it would automatically receive a final certificate since the actual facility, the cost of the facility, and the portion of the facility cost allocable to pollution control would not have been reviewed.

<u>No Fee Increase</u>

Public Comments — The public hearing documents did not include detailed information to assess the efficiency of the program's operation. Without more details, we cannot support a fee increase. If a fee increase cannot be avoided, we can support the lower fee increase recommended by the Advisory Committee. The Department should not propose a fee increase. It is difficult to understand how DEQ can increase fees over 100% without any historical accounting justification for the increase.

Commission's Comments — The tax credit program should be wholly fee supportable by the tax credit recipients and cease its dependence on General Fund.

Changes Proposed — The Department did not propose the lower fee increase recommended by the Advisory Committee. The Department did not defer the fee increase from the proposed rules. The Department will propose a minimum application fee of $50 and a maximum application fee of $15,000.

In order to achieve the Commission's direction, the Department met with the Advisory Committee in the development of the rules regarding fees in Attachment A and Attachment B.

This maximum is an increase of $10,000 over the current $5,000 maximum and $5,000 more than the $10,000 maximum recommended by the Advisory Committee and the Department's proposal.

The Department presented a three-year revenue and expenditure report in the public hearing documents. Staff also applied the Department's proposed fee schedule and the Advisory Committee recommendation to all the applications received during that same three-year period, comparing their ability to meet the expenditures of the program. The Department considers the analysis of these three years as presented in the public hearing documents as adequate to estimate the cost of the program as required in ORS 468.165 (5):

> *By rule and after hearing the commission may adopt a schedule of reasonable fees which the department may require of applicants for certificates issued under section 6 of this 1995 Act and ORS*

468.170. Before the adoption or revision of any such fees the commission shall estimate the total cost of the program to the department. The fees shall be based on the anticipated cost of filing, investigating, granting and rejecting the applications and shall be designed not to exceed the total cost estimated by the commission. Any excess fees' shall be held by the department and shall be used by the commission to reduce any future fee increases.

Fee Refund

Public Comments: The Advisory Committee recommended that a refund of 50% of the application processing fee should be made without any conditions when an application is denied or rejected.

Changes Proposed: The Department will propose the 50% refund based on this comment and subsequent meetings with the Advisory Committee. The Department proposed no refund in the public hearing documents. The proposed rule will provide a refund 50% of the fee paid if an application is denied or rejected. This excludes the $50 application fee for alternatives for field burning.

To determine the fee schedule that would accomplish the Commission's direction, the Department applied several fee schedules to the actual applications received during the study period July 1, 1993, to July 30, 1996. (The same period as presented in the public hearing documents.) The Department removed the $153,985 in General Fund used during the period to reduce the program's operating deficit. The program's revenue and expenditure report showed an operating deficit of $395,411.

Tax Credit Program
7/1/93 to 6/30/96

	Fees	464,601
	Refunds	(87,119)
Fee Revenue Only		377,482
Expenditures		772,893
	Surplus or (Deficit)	(395,411)

The Department met with the Advisory Committee three additional times to develop a schedule. Both the Department and the Advisory Committee agreed to a 1% of the facility cost application fee, a minimum of $50, a 50% refund if the application is denied at anytime, and that the cost of the Department's independent accounting review would be paid out of the excess fee revenue.

2. Application Processing

Public Comment: The applicant should have 60 days from the date of the Department's request for additional information to respond to the request.

Change Proposed: The Department will incorporate this suggestion into the proposed rule.

3. Independent Accounting Review

Public Comments

- DEQ and the EQC should continue to utilize independent accounting firms in order to protect the integrity of the program on behalf of the DEQ, the EQC and the public.
- The proposed rule is unfair to the accounting firms not already on the department's list as the rules would be imposed without allowing these accounting firms to be added to the list. Under existing professional standards, all accounting firms are required to be independent with respect to the applicant. This rule amounts to a restraint of trade for firms not on the department's list.
- The applicant's accounting firm already provides many accounting and auditing functions, have a working knowledge of the applicant's accounting systems and would be more efficient at reviewing the applicant's facility cost information and therefore, it would be less costly.

Commission's Comments: The Department's ability to seek accounting reviews of complex facilities and to obtain reviews made in concert with the program's rules and statute is a crucial step toward making a recommendation for approval or denial to the Commission. The Department should propose a middle ground.

Changes Proposed: The Department agrees that certification of a pollution control facility has the potential to impact Oregon's tax revenues in a dramatic way – over the life of the program the impact has been about $515 million in potential relief from Oregon tax liability. The Department met with the Advisory Committee and developed the following proposal:

- Facility Cost ≤ $50,000 - No independent accounting review would be required. (Raised from the current threshold of $20,000.) – This was consistent with the Advisory Committee recommendation and the Department's proposal.

- Facility Cost between $50,000 and $500,000 - Independent accounting review performed by the applicant's accounting firm according to Department's written guidance and paid by the applicant. The Department would not perform a second review.

- Facilities Cost ≥ $500,000 - An employee of the applicant could perform the accounting work required prior to submitting the application. The Department would select a firm from accounting firms under contract with the Department to conduct the independent review. The cost of this review would be paid from the proposed fee (increased to 1% of the facility cost, minimum $50.00, maximum of $15,000 and 50% refund for denied applications.) This proposal would raise the upper threshold of this requirement from $250,000 to $500,000.

- A waiver would be available for any facility with simple and adequate documentation of costs.

- The Department will publish a Request for Proposal (RFP) to expand the list of firms under contract with the Department. The current engineering and accounting firm list was established according to the strict State contracting rules.

4. Portion of the Facility Cost Allocable to Pollution Control

Comment — The Department's proposed rule regarding how the portion of the facility cost that is allocable to pollution control is calculated is severely reduced. We recommend that the Department review the changes to these calculations to continue to offer a firm incentive for installation of pollution control equipment.

UST projects should not be required to determine the "The Portion of the Facility Cost Allocable to Pollution Control."

Changes Proposed — **The Department removed substantive amendments to the rule regarding the "determination of the percentage of the facility cost allocable to pollution control" from the proposed rules.** None of the proposals provided an incentive for recycling or a desirable implementation of the legislative intent. A much broader group would need to be involved to determine the direction of a rule that so greatly impacts Oregon's tax revenues.

The Department will reorganized the rule, making clarifying amendments so the rule will be easier to decipher. The changes are made to aid applicants, reviewers and groups that may need to understand the rule being presented. The return on investment calculations will not change even though the elements of the equations and the Tables have been given terms that make it easier to determine how they are used. These proposed amendments should not be misinterpreted to mean that the Department considers that this rule achieves a logical results based on sound economical principles.

5. Facilities Integral to the Applicant's Business.

Public Comments: Alternatives to field burning facilities should not be considered integral to the applicant's business. The Department and the Commission should adopt rules that encourage rather than penalize operations that have recycling as either a primary purpose or where recycling is integral to the facility.

Changes Proposed: **The Department removed any substantive amendments to the rule as it pertains to a facility that is integral to an applicant's business from the rule on "Determining the Percentage Allocable to Pollution Control".** None of the proposals provided an incentive for recycling or a desirable implementation of the legislative intent. A much broader group would need to be involved to determine the direction of a rule that so greatly impacts Oregon's tax revenues.

Summary of How the Proposed Rule Will Work and How it Will be Implemented

All persons who request an application after March 1, 1998, will receive a memo informing them of the proposed rule changes. People who have requested applications in the last year are on the mailing list to receive this document and have received the public hearing documents. They will be informed that they may request the new application packet. The tax credit documents will be placed on the Internet at www.deq.state.or under the DEQ Reference Section. Once the rules have been approved, the new application packets will be sent to anyone who requests an applications.

Applicants with applications submitted to the Department before the rules are adopted but for which Commission action is pending may elect for their applications to be reviewed under the new rule by informing the Department in writing. If they elect for their application to be reviewed under these proposed rules, they would be required to submit any additional fees.

The Tax Credit Coordinator will provide any training the reviewers may require although most reviewers have participated in this rule making process. The Tax Credit Coordinator will also provide a Fee Schedule to the Business Office. The Department of Revenue has reviewed these rules. However, the changes in these rules do not affect how the Department of Revenue processes the tax credit certificates.

Recommendation for Commission Action

It is recommended that the Commission adopt the rules/rule amendments regarding Pollution Control Facility Tax Credits as presented in Attachment A and the Reclaimed Plastic Tax Credits as presented in Attachment B of the Department Staff Report.

Attachments

A. Pollution Control Facility Tax Credit Rule Proposed for Adoption
B. Reclaimed Plastic Tax Credit Rule Amendments Proposed for Adoption
C. Supporting Procedural Documentation:
   1. Legal Notice of Hearing
   2. Fiscal and Economic Impact Statement
   3. Land Use Evaluation Statement
   4. Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements
   5. Cover Memorandum from Public Notice
D. Presiding Officer's Report on Public Hearing
E. Department's Evaluation of Public Comment
F. Advisory Committee Membership
G. Rule Implementation Plan

Reference Documents (available upon request)

Written Comments Received (listed in Attachment E)
(Other Documents supporting rule development process or proposal)

Approved:

Section: ____________________

Division: ____________________

Report Prepared By: Margaret C. Vandehey

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Date Prepared: February 23, 1998

DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION 16
Pollution Control *Facility* Tax Credits

NOTE:

The ***underlined, bold, italicized*** portions of text represent proposed rule additions.

The ~~*{bracketed, struck out, italicized}*~~ portions of text represent proposed rule deletions.

PURPOSE

340-016-0005 The purpose of these rules is to prescribe procedures and criteria to be used by the Department and Commission for issuance of tax credit~~*{s}*~~ ***certificates*** for pollution control facilities. These rules are to be used in connection with ORS 468.150 to 468.190 ~~*{and apply only to facilities on which construction has been completed after December 31, 1983, except where otherwise noted herein.}*~~ ***These rules become effective upon filing with the Secretary of State or on May 1, 1998 whichever is the later date and apply to all applications received by the Department on or after that date except where otherwise noted herein. An applicant with an application pending Commission action on the date these rules become effective may elect to proceed under these rules by informing the Department in writing.***

Stat. Auth.: ORS Ch. 468
Stats. Implemented: ORS
Hist.: DEQ 12-1984, f. & ef. 7-13-84

DEFINITIONS

340-016-0010 ***The definitions in this rule give meaning to the term or phrase as used in OAR 340-016-0005 through OAR 340-016-0080.***

(1) "Applicant" means any person who applies for a pollution control tax credit under these rules.

~~*{(1)}*~~***(2)*** "Circumstances Beyond the Control of the Applicant" means facts, conditions and circumstances which the applicant's due care and diligence would not have avoided.

~~*{(2)}*~~***(3)*** "Commission" means Environmental Quality Commission ***or the Commission's delegate***.

~~*{(3)}*~~***(4)*** "Department" means Department of Environmental Quality.

~~*{(4)}*~~***(5)*** **"Facility"** ~~*{means a pollution control facility.}*~~ ***as used in context means:***

(a) A pollution control facility as set forth in ORS 468.150 and ORS 468.155; or

(b) The facility as claimed on the application.

~~*{(5)}*~~***(6)*** "Like-for-Like Replacement Cost" means the current price of providing a new facility of the same type, size and construction materials as the~~*{ original}*~~ ***facility that is being replaced based upon the Consumer Price Index (CPI) - All Urban Consumers as published by the Bureau of Labor Statistics***.

~~*{(6)}*~~***(7)*** "Material Recovery" means any process***, such as pre-segregation,*** for obtaining ***materials*** from solid waste, hazardous waste or used oil.~~*{by presegregation or otherwise, materials which}*~~ ***The recovered materials shall*** still have useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled for the same or other purpose. ***The recovered material shall have useful physical or chemical properties that yield a***

competitive end–product of real economic value. ~~***[This does not include any process in which the major purpose is the production of fuel from solid waste, hazardous waste or used oil which can be utilized for heat content or other forms of energy. It does not include any type of process which burns waste to produce energy or to reduce the amount of waste. However, it does not eliminate from eligibility a pollution control device associated with a process which burns waste if such device is otherwise eligible for pollution control tax credit under these rules.]***~~ ***The material recovery process does not include processes:***

(a) In which the major purpose is the production of fuel from solid waste, hazardous waste or used oil which can be utilized for heat content or other forms of energy; or

(b) That burns waste to produce energy or to reduce the amount of waste. However, it does not eliminate from eligibility a pollution control device associated with a process which burns waste if such device is otherwise eligible for pollution control tax credit under these rules.

~~***[(7)] "Principal Purpose" means the most important or primary purpose. Each facility may have only one principal purpose.***~~

(8) "Pollution Control" means the elimination, prevention, control or reduction of air, water or noise pollution; or the utilization of solid waste, hazardous waste, or the recycling or properly disposing of used oil except where otherwise noted herein.

~~***[(8)]***~~***(9)*** "Reconstruction or Replacement" means the provision of a new facility with qualities and pollution control characteristics equivalent to the ~~***[original]***~~ facility ***that is being replaced***. This does not include repairs or work done to maintain the facility in good working order.~~***[***~~

~~***[(9) "Sole Purpose" means the exclusive purpose.]***~~

(10)~~***[(a)]***~~ "Spill or Unauthorized Release" means~~***[the]***~~

(a) The discharge, deposit, injection, dumping, spilling, emitting, releasing, leakage or placing of oil, hazardous materials or other polluting substances into the air or into or on any land or waters of the state, as defined in ORS 468.700, except as authorized by a permit issued under ORS Chapter 454, 459, 468 or 469, ORS 466.005 to 466.385, 466.880(1) and (2), 466.890 and 466.995(1) and (2) or federal law while being stored or used for its intended purpose; and

(b) For purposes of determining eligibility for tax credits under these rules, polluting substances released into the environment in conjunction with operation of a previously approved facility or activity where such facility or activity was operated in compliance with requirements imposed by the Department or the Federal Environmental Protection Agency, and where the polluting substances which must now be cleaned up are determined by the Department to have been an unanticipated result of the approved facility or activity and are not deemed to be a "spill or unauthorized release".

(11) "Substantial Completion" means the completion of the erection, installation. modification, or construction of all elements of the claimed facility which are essential to perform its purpose.

(12) "Useful Life" means the number of years the claimed facility is capable of operating before replacement or disposal. ***The applicant shall provide a statement of how the useful life of the facility was determined. The minimum useful life shall not be less than three years or the Asset Guideline Period used to report the depreciation of the facility to the Internal Revenue Service.***

Stat. Auth.: ORS 468.150 - 468.190
Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1985, f. & ef. 3-12-85; DEQ 20-1987, f. & ef. 12-16-87; DEQ 6-1990, f. & cert. ef. 3-13-90

~~***[Procedures for Receiving Tax Credit Certification***~~

~~***340-016-0020***~~

~~***(1) Filing of Application:***~~

~~***(a) A written application for tax credit certification shall be made to the Department on a form provided by the Department;***~~

~~***(b) The application shall be submitted within two years of substantial completion of construction of the facility. Failure to submit a timely application shall make the facility ineligible for tax credit certification;***~~

~~***(c) The Commission may grant an extension of time to submit an application if circumstances beyond the control of the applicant would make a timely filing unreasonable;***~~

~~***(d) An extension shall only be considered if applied for within two years of substantial completion of construction of the facility. An extension may be granted for no more than one year. Only one extension may be granted;***~~

~~***(e) Within 30 days of receipt of an application, the Department shall request any additional information that applicant needs to submit in order for the application to be considered complete. The Department may also require any other information necessary to determine whether the construction is in accordance with Department statutes, rules and standards;***~~

~~***(f) An application shall not be considered filed until all requested information is furnished by the applicant, and the Department notifies the applicant in writing that the application is complete and ready for processing;***~~

~~***(g) An application may be withdrawn and resubmitted by applicant at any time within two years of substantial completion of construction of the facility without paying an additional processing fee, unless the cost of the facility has increased. An additional processing fee shall be calculated by subtracting the cost of the facility on the original application from the cost of the facility on the resubmitted application and multiplying the remainder by one-half of one percent;***~~

~~***(h) If the Department determines the application is incomplete for processing and the applicant fails to submit requested information within 180 days of the date when the Department requested the information, the application will be rejected by the Department unless applicant requests in writing additional time to submit requested information;***~~

~~***(i) If the application is submitted after the two year period following substantial completion and the applicant has not filed an extension request, the application will be rejected by the Department.***~~

~~***(2) Commission Action:***~~

~~***(a) Notice of the Department's recommended action on the application shall be mailed at least seven days before the Commission meeting where the application will be considered unless the applicant waives the notice requirement in writing. The Commission shall act on an application for certification before the 120th day after the filing of a complete application. The Commission may consider and act upon an application at any of its regular or special meetings. The matter shall be conducted as an informal public informational hearing, not a contested case hearing, unless ordered otherwise by the Commission;***~~

~~***(b) Certification:***~~

~~***(A) If the Commission determines that the facility is eligible, it shall make appropriate findings and certify the actual cost of the facility and the portion of the actual cost properly allocable to pollution control, material recovery or recycling as set forth in ORS 468.190. Each certificate shall bear a separate serial number for each such facility;***~~

~~***(B) The actual cost or portion of the actual cost certified shall not exceed the taxpayer's own cash investment in the facility or portion of the facility;***~~

~~*(C) No determination of the proportion of the actual cost of the facility to be certified shall be made until a complete application is filed;*~~

~~*(D) If two or more facilities constitute an operational unit, the Commission may certify such facilities under one certificate;*~~

~~*(E) A certificate is effective for purposes of tax relief in accordance with ORS 307.405, 316.097 and 317.116 if erection, construction or installation of the facility was completed and certified before December 31, 1995;*~~

~~*(F) Certification of a pollution control facility qualifying under ORS 468.165(1) shall be granted for a period of ten consecutive years. The ten-year period shall begin with the tax year of the person in which the facility is certified under this section. However, if ad valorem tax relief is utilized by a corporation organized under ORS Chapter 61 or 62 the facility shall be exempt from ad valorem taxation, to the extent of the portion allocable, for a period of 20 consecutive years, or ten years if construction is commenced after June 30, 1989 and completed before December 31, 1990, from the date of its first certification by the Commission;*~~

~~*(G) Portions of a facility qualifying under ORS 468.165(1)(c) may be certified separately under this section if ownership of the portions is in more than one person. Certification of such portions of a facility shall include certification of the actual cost of the portion of the facility to the person receiving the certification. The actual cost certified for all portions of a facility separately certified under this subsection shall not exceed the total cost of the facility that would have been certified under one certificate. The provisions of ORS 316.097(8) or 317.116 whichever is applicable, shall apply to any sale, exchange or other disposition of a certified portion of a facility.*~~

~~*(c) Rejection: If the Commission rejects an application for certification, or certifies a lesser actual cost of the facility or a lesser portion of the actual cost properly allocable to pollution control, material recovery or recycling than was claimed in the application for certification, the Commission shall cause written notice of its action, and a concise statement of the findings and reasons therefore, to be sent by registered or certified mail to the applicant.*~~

~~*(3) Appeal: If the application is rejected by the Commission for any reason, or if the applicant is dissatisfied with the certification of actual cost or portion of the actual cost properly allocable to pollution control, resource recovery or recycling, the applicant may appeal from the rejection as provided in ORS 468.110. The rejection of the certification is final and conclusive on all parties unless the applicant takes an appeal therefrom as provided in ORS 468.110 before the 30th day after notice was mailed by the Commission.*~~]

Stat. Auth.: ORS 468.150 - 468.190
Stats. Implemented: ORS

Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1985, f. & ef. 3-12-85; DEQ 20-1987, f. & ef. 12-16-87; DEQ 6-1990, f. & cert. ef. 3-13-90

[~~*Qualification of Facility for Tax Credits*~~

~~*340-016-0025*~~

~~*(1) "Pollution control facility" or "facility" shall include any land, structure, building, installation, excavation, machinery, equipment or device, or alternative methods for field sanitation and straw utilization and disposal as approved by the Field Burning Advisory Committee and the Department, or any addition to, reconstruction of or improvement of, land*~~

~~***or an existing structure, building, installation, excavation, machinery, equipment or device reasonably used, erected, constructed or installed by any person, which will achieve compliance with Department statutes and rules or Commission orders or permit conditions before certification, where applicable, if:***~~

~~***(a) The principal purpose of the facility is to comply with a requirement imposed by the Department, the Federal Environmental Protection Agency or regional air pollution authority to prevent, control or reduce air, water or noise pollution or solid or hazardous waste or to recycle or provide for the appropriate disposal of used oil. To meet the definition of principal purpose, the facility must be established to comply with the environmental requirements specified in this subsection for the control, reduction, or prevention of pollution, or for the material recovery of solid waste, hazardous waste or used oil. Other benefits of economic value that are a result of the facility, are not eligible for tax credit and must be eliminated through the return on investment calculation; or***~~

~~***(b) The sole purpose of the facility is to prevent, control or reduce a substantial quantity of air, water or noise pollution or solid or hazardous waste or to recycle or provide for the appropriate disposal of used oil. In order to meet the definition of sole purpose, the only function or use of the facility must be the control, reduction, or prevention of pollution, or, for the material recovery of solid waste, hazardous waste or used oil. Sole purpose is not applicable where the facility is established in response to the environmental requirements identified in subsection (a) of this section. Other benefits of economic value which result from the facility are not eligible for tax credit and must be eliminated through the return on investment calculation.***~~

~~***(2) Such prevention, control or reduction required by this subsection shall be accomplished by:***~~

~~***(a) The disposal or elimination of or redesign to eliminate industrial waste and the use of treatment works for industrial waste as defined in ORS 468.700;***~~

~~***(b) The disposal or elimination of or redesign to eliminate air contaminants or air pollution or air contamination sources and the use of air cleaning devices as defined in ORS 468.275;***~~

~~***(c) The substantial reduction or elimination of or redesign to eliminate noise pollution or noise emission sources as defined by rule of the Commission;***~~

~~***(d) The use of a material recovery process which obtains useful material from material that would otherwise be solid waste as defined in ORS 459.005, hazardous waste as defined in ORS 466.005, or used oil as defined in ORS 468.850;***~~

~~***(e) The treatment, substantial reduction or elimination of or redesign to treat, substantially reduce or eliminate hazardous waste as defined in ORS 466.005; or***~~

~~***(f) Approved alternative field burning methods and facilities which shall be limited to:***~~

~~***(A) Equipment, facilities, and land for gathering, densifying, processing, handling, storing, transporting and incorporating grass straw or straw-based products which will result in reduction of open field burning;***~~

~~***(B) Propane flamers or mobile field sanitizers which are alternatives to open field burning and reduce air quality impacts; and***~~

~~***(C) Drainage tile installations which will result in a reduction of grass seed acreage under production.***~~

~~***(g) Installation or construction of facilities which will be used to detect, deter, or prevent spills or unauthorized releases. This does not include any facility installed, constructed or used for cleanup after a spill or unauthorized release has occurred.***~~

~~***(3) "Pollution Control Facility" or "Facility" does not include:***~~

~~***(a) Air conditioners;***~~

~~***(b) Septic tanks or other facilities for human waste;***~~

~~***(c) Property installed, constructed or used for moving sewage to the collecting facilities of a public or quasi public sewerage system;***~~

~~***(d) Any distinct portion of a pollution control facility that makes an insignificant contribution to the principal or sole purpose of the facility including the following specific items:***~~

~~***(A) Office buildings and furnishings;***~~

~~***(B) Parking lots and road improvements;***~~

~~***(C) Landscaping;***~~

~~***(D) External lighting;***~~

~~***(E) Company or related signs; and***~~

~~***(F) Automobiles.***~~

~~***(e) Facilities not directly related to the operation of the industry or enterprise seeking the tax credit;***~~

~~***(f) Asbestos abatement; or***~~

~~***(g) Replacement or reconstruction of all or a part of any facility for which a pollution control facility certificate has previously been issued under ORS 468.170, except:***~~

~~***(A) If the cost to replace or reconstruct the facility is greater than the like-for-like replacement cost of the original facility due to a requirement imposed by the Department, the Federal Environmental Protection Agency or a regional air pollution authority, then the facility may be eligible for tax credit certification up to an amount equal to the difference between the cost of the new facility and the like-for-like replacement cost of the original facility; or***~~

~~***(B) If a facility is replaced or reconstructed before the end of its useful life then the facility may be eligible for the remainder of the tax credit certified to the original facility.***~~

~~***(h) Property or facilities installed, constructed or used for cleanup of emergency spills or unauthorized releases. This includes any facility installed, constructed or used for cleanup after a spill or unauthorized release has occurred.***~~

~~***(4) Any person may apply to the Commission for certification under ORS 468.170 of a pollution control facility or portion thereof erected, constructed or installed by the person in Oregon if:***~~

~~***(a) The air or water pollution control facility was erected, constructed or installed on or after January 1, 1967;***~~

~~***(b) The noise pollution control facility was erected, constructed or installed on or after January 1, 1977;***~~

~~***(c) The solid waste facility was under construction on or after January 1, 1973, or the hazardous waste, used oil, material recovery, or recycling facility was under construction on or after October 3, 1979, and if:***~~

~~***(A) The facility's principal or sole purpose conforms to the requirements of ORS 468.155(1);***~~

~~***(B) The facility will utilize material that would otherwise be solid waste as defined in ORS 459.005, hazardous waste as defined in ORS 466.005 or used oil as defined in ORS 468.850:***~~

~~***(i) By mechanical processing or chemical processing; or***~~

~~***(ii) Through the production, processing, presegregation, or use of:***~~

~~***(I) Materials which have useful chemical or physical properties and which may be used for the same or other purposes; or***~~

~~***(II) Materials which may be used in the same kind of application as its prior use without change in identity.***~~

~~***(C) The end product of the utilization is an item of real economic value;***~~

~~***(D) The end product of the utilization, is competitive with an end product produced in another state; and***~~

~~***(E) The Oregon law regulating solid waste imposes standards at least substantially equivalent to the federal law.***~~

~~***(d) The hazardous waste control facility was erected, constructed or installed on or after January 1, 1984 and if:***~~

~~***(A) The facility's principal or sole purpose conforms to the requirements of ORS 468.155(1); and***~~

~~***(B) The facility is designed to treat, substantially reduce or eliminate hazardous waste as defined in ORS 466.005.***~~

~~***(5) The Commission shall certify a pollution control, solid waste, hazardous waste or used oil facility or portion thereof, for which an application has been made under ORS 468.165, if the Commission finds that the facility:***~~

~~***(a) Was erected, constructed or installed in accordance with the requirements of ORS 468.165(1);***~~

~~***(b) Is designed for, and is being operated or will operate in accordance with the requirements of ORS 468.155; and***~~

~~***(c) Is necessary to satisfy the intents and purposes of and is in accordance with the applicable Department statutes, rules and standards.]***~~

Stat. Auth.: ORS 468.150 - 468.190
Stats. Implemented: ORS

Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1985, f. & ef. 3-12-85; DEQ 20-1987, f. & ef. 12-16-87; DEQ 6-1990, f. & cert. ef. 3-13-90

~~***[Determination of Percentage of Certified Facility Cost Allocable to Pollution Control***~~

~~***340-016-0030***~~

~~***(1) Definitions:***~~

~~***(a) "Annual Incremental Cash Flow" means the estimated annual cash flow for each year of the useful life of a claimed pollution control facility integral to the applicant's business calculated as follows:***~~

~~***(A) Calculate the applicant's annual cash flow with the claimed facility by subtracting the annual operating expenses for the applicant's business from the gross annual income for the applicant's business for each year of the useful life of the claimed facility; and***~~

~~***(B) Calculate the applicant's annual cash flow assuming that the claimed facility was not erected, constructed, or installed by subtracting the annual operating expenses for the applicant's business using this assumption from the gross annual income for the applicant's business using this assumption for each year of the useful life of the claimed facility; and***~~

~~***(C) Subtract the applicant's annual cash flow assuming that the claimed facility was not erected, constructed, or installed from the annual cash flow with the claimed facility for each year of the useful life of the claimed facility.***~~

~~***(b) "Annual Operating Expenses" means the estimated costs of operating the claimed facility or the applicant's business if pollution control facilities are integral to the operation of the applicant's business, including labor, utilities, property taxes, insurance, and other cash expenses, less any savings in expenses attributable to installation of the claimed facility. Depreciation, interest expenses, and state and federal taxes are not included;***~~

~~*(c) "Average Annual Cash Flow" means the estimated average annual cash flow from the claimed facility for the first five full years of operation calculated as follows:*~~

~~*(A) Calculate the annual cash flow for each of the first five full years of operation by subtracting the annual operating expenses from the gross annual income for each year; and*~~

~~*(B) Sum the five annual cash flows and divide the total by five. Where the useful life of the claimed facility is less than five years, sum the annual cash flows for the useful life of the facility and divide by the useful life.*~~

~~*(d) "Claimed Facility Cost" means the actual cost of the claimed facility minus the salvage value of any facilities removed from service. Certification of the actual cost of the claimed facility must be documented by a certified public accountant for facilities with a claimed facility cost over $20,000;*~~

~~*(e) "Gross Annual Income" means the estimated total annual income from the claimed facility or the applicant's business if pollution control facilities are integral to the operation of the applicant's business, derived from sale or reuse of recovered materials or energy or any other means including savings that may occur as a result of the facility;*~~

~~*(f) "Internal Rate of Return" means the rate of return that will equate the present value of annual incremental cash flows over the useful life of the claimed facility with the present value of the claimed facility cost;*~~

~~*(g) "Pollution Control Facilities Integral to the Operation of the Applicant's Business" means that the business is unable to operate or is only able to operate at reduced income levels, without the claimed pollution control facility. Such instances include, but are not limited to, commercial solid waste and hazardous waste landfills, solid and hazardous waste recycling businesses, and environmental service providers. Pollution control facilities integral to the operation of the applicant's business does not include a facility as defined in OAR 340-016-0025(1)(a) unless the pollution control facilities meet one or more of the factors included in this definition. Factors that the Department may use to determine whether pollution control facilities are integral to the operation of the business include:*~~

~~*(A) Pollution control facilities represent in excess of 25 percent of the total assets of the business; or*~~

~~*(B) The claimed pollution control facilities were erected, constructed, or installed in response to market demand for such pollution control facilities. This may occur as the result of requirements imposed by the Department, the Federal Environmental Protection Agency or regional air pollution authority, on parties unaffiliated with the applicant; or*~~

~~*(C) Erection, construction, or installation of the claimed facility and any previously certified pollution control facilities, allows the applicant to generate gross revenues at least 50 percent greater than would have been generated in the absence of the claimed facility and any previously certified pollution control facilities; or*~~

~~*(D) The applicant's operating expenses related to operation of the claimed facilities and any previously certified pollution control facilities are at least 50 percent of the operating expenses of the applicant's business.*~~

~~*(h) "Salvage Value" means the value of a facility at the end of its useful life minus what it costs to remove it from service. Salvage value can never be less than zero.*~~

~~*(2) In establishing the portion of costs properly allocable to the prevention, control or reduction of air, water or noise pollution or solid or hazardous waste or to recycling or properly disposing of used oil for facilities qualifying for certification under ORS 468.170, the Commission shall consider the following factors and make appropriate findings regarding their applicability:*~~

~~*(a) The extent to which the facility is used to recover and convert waste products into a salable or usable commodity;*~~

~~***(b) The estimated annual percent return on the investment in the facility;***~~

~~***(c) The alternative methods, equipment and costs for achieving the same pollution control objective;***~~

~~***(d) Related savings or increases in costs which occur or may occur as a result of the installation of the facility; or***~~

~~***(e) Other factors which are relevant in establishing the portion of the actual cost of the facility properly allocable to the prevention, control or reduction of air, water or noise pollution or solid or hazardous waste or to recycling or properly disposing of used oil.***~~

~~***(3) The portion of actual costs properly allocable shall be from zero to 100 percent in increments of one percent. If zero percent, the Commission shall issue an order denying certification.***~~

~~***(4) In considering the factors listed in this rule, the Commission may determine in its findings that one or more factors are more important than others and may assign different weights to the factors when determining the portion of costs properly allocable to pollution control.***~~

~~***(5) When considering the estimated annual percent return on investment in the facility, subsection (2)(b) of this rule, for applicants where pollution control facilities are integral to the operation of the business, and for applications received on or after February 1, 1993, the following steps will be used:***~~

~~***(a) Using the applicant's primary four digit Standard Industrial Classification (SIC):***~~

~~***(A) Determine the industry median profit before taxes as a percent of total assets for the five years prior to the year of completion of the claimed facility from Robert Morris Associates, Annual Statement Studies; and***~~

~~***(B) Determine the industry average profit before taxes as a percent of total assets by summing the median profit before taxes as a percent of total assets for the five years prior to the year of completion of the claimed facility and divide by five. Where five years are not available, sum the number of years that are available and divide by the number of years.***~~

~~***(b) Determine the reference annual percent return on investment from Table 2. Select the reference percent return from Table 2 that corresponds with the year construction was completed on the claimed facility. For each future calendar year not shown in Table 2, the reference percent return shall be the five year average of the rate of return before taxes on total assets for all United States manufacturing corporations for the five years prior to the calendar year of interest:***~~

~~***(A) If the industry average profit before taxes as a percent of total assets is greater than the reference rate of return, the percent allocable would be zero percent;***~~

~~***(B) If the industry average profit before taxes as a percent of total assets is less than the reference rate of return, the percent allocable will be determined from the following formula:***~~

$$\cancel{PA = \frac{(RROI - IROI) \times 100}{RROI}}$$

~~***where:***~~

~~***PA is the percentage of actual costs properly allocable to pollution control in percent, rounded off to the nearest whole number.***~~

~~***IROI is the industry average annual profit before taxes as a percent of total assets.***~~

~~***RROI is the reference annual percent return on investment from Table 2.***~~

~~***(c) If the Annual Statement Studies do not list the industry median profit before taxes as a percent of total assets for the applicant's primary four digit SIC, the applicant and the Department will determine whether an alternate SIC is appropriate for the applicant's business. If no alternate SIC is appropriate, the percent allocable will be determined using the procedures in subsection (d) of this section;***~~

~~***(d) If an applicant whose pollution control facilities are determined by the Department to be integral to the applicant's business is dissatisfied with the percent allocable determination made using the procedures in subsections (5)(a) and (b) of this rule, or if no SIC is appropriate for the applicant's business, the applicant will furnish the following information to the Department:***~~

~~***(A) An income statement, balance sheet, statement of cash flows, and federal and state tax returns (if applicable) for the applicant's business for the applicant's three fiscal years prior to the date of submission of the application. If three years of such statements are not available, the applicant will submit information for the years that are available;***~~

~~***(B) Revenue and expense projections, and cash flow projections for the applicant's business beginning with the year the application is submitted and continuing for the entire useful life of the pollution control facility. The level of detail of these projections shall be substantially equivalent to the level of detail of information submitted in paragraph (A) of this subsection. The Department may elect to provide the applicant with a worksheet for this purpose;***~~

~~***(C) Revenue and expense projections, and cash flow projections for the applicant's business for the entire useful life of the claimed facility and assuming that the claimed pollution control facility is not erected, constructed or installed;***~~

~~***(D) A projection of the applicant's future capital expenditures for pollution control facilities;***~~

~~***(E) A letter signed by the applicant authorizing the Department to contract with an independent certified public accountant to review the financial information provided by the applicant. The applicant will agree to reimburse the Department for the cost of this review;***~~

~~***(F) Using the information submitted in paragraphs (A) through (D) of this subsection, the Department will calculate an Internal Rate of Return for the claimed facility by considering the claimed facility cost and annual incremental cash flow. The Internal Rate of Return will be compared to the reference rate of return:***~~

~~***(i) If the applicant's Internal Rate of Return is greater than the reference rate, the percent allocable will be zero percent;***~~

~~***(ii) If the applicant's Internal Rate of Return is less than the reference rate, the percent allocable will be determined by the following formula:***~~

$$\cancel{PA = \frac{(RROI - IRR) \times 100}{RROI}}$$

~~***where:***~~

~~***PA is the percentage of actual costs properly allocable to pollution control in percent, rounded off to the nearest whole number.***~~

~~***IRR is the Internal Rate of Return for the claimed facility.***~~

~~***RROI is the reference annual percent return on investment from Table 2.***~~

~~*(6) When considering the estimated annual percent return on investment in the facility, subsection (2)(b) of this rule, and for applicants where pollution control facilities are not integral to the operation of the business, the following steps will be used:*~~

~~*(a) Determine the claimed facility cost, average annual cash flow and useful life of the claimed facility. The Department may require additional information on or documentation of gross annual income estimates for evaluation purposes;*~~

~~*(b) Determine the return on investment factor by dividing the claimed facility cost by the average annual cash flow;*~~

~~*(c) Determine the annual percent return on investment by using Table 1. At the top of Table 1, find the number equal to the useful life of the claimed facility. In the column under this useful life number, find the number closest to the return on investment factor. Follow this row to the left until reaching the first column. The number in the first column is the annual percent return on investment for the claimed facility. For a useful life greater than 30 years, or percent return on investment greater than 25 percent, Table 1 can be extended by utilizing the following equation:*~~

$$\cancel{IR = \frac{1-(1+i)^{-n}}{i}}$$

~~*where:*~~
~~*IR is the return on investment factor.*~~
~~*i is the annual percent return on investment.*~~
~~*n is the useful life of the claimed facility.*~~

~~*(d) Determine the reference annual percent return on investment from Table 2. Select the reference percent return from Table 2 that corresponds with the year construction was completed on the claimed facility. For each future calendar year not shown in Table 2, the reference percent return shall be the five-year average of the rate of return before taxes on total assets for all United States manufacturing corporations for the five years prior to the calendar year of interest;*~~

~~*(e) Determine the portion of actual costs properly allocable to pollution control from the following equation:*~~

$$\cancel{PA = \frac{(RROI - ROI) \times 100}{RROI}}$$

~~*where:*~~

~~*PA is the percentage of actual costs properly allocable to pollution control in percent, rounded off to the nearest whole number.*~~

~~*ROI is the annual percent return on investment from Table 1.*~~

~~*RROI is the reference annual percent return on investment from Table 2.*~~

~~*If ROI is greater than or equal to RROI, then the portion of actual costs properly allocable to pollution control shall be zero percent.*~~

~~*[ED. NOTE: The Table(s) referenced in this rule is not printed in the OAR Compilation. Copies are available from the Department of Environmental Quality.]*~~

Stat. Auth.: ORS 468.150 - 468.190
Stats. Implemented: ORS

Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1985, f. & ef. 3-12-85; DEQ 20-1987, f. & ef. 12-16-87; DEQ 6-1990, f. & cert. ef. 3-13-90; DEQ 2-1993(Temp), f. & cert. ef. 1-29-93; DEQ 3-1993, f. & cert. ef. 3-9-93

~~[Procedure to Revoke Certification~~

~~340-016-0035~~

~~(1) Pursuant to the procedures for a contested case under ORS 183.310 to 183.550, the Commission may order the revocation of the final tax credit certification if it finds that:~~

~~(a) The certification was obtained by fraud or misrepresentation; or~~

~~(b) The holder of the certificate has failed substantially to operate the facility for the purpose of, and to the extent necessary for, preventing, controlling or reducing air, water or noise pollution or solid waste, hazardous wastes or recycling or disposing of used oil as specified in such certificate, or has failed to operate the facility in compliance with Department or Commission statutes, rules, orders or permit conditions where applicable.~~

~~(2) As soon as the order of revocation under this section has become final, the Commission shall notify the Department of Revenue and the county assessor of the county in which the facility is located of such order.~~

~~(3) If the certification of a pollution control or solid waste, hazardous wastes or used oil facility is ordered revoked pursuant to subsection (1)(a) of this rule, all prior tax relief provided to the holder of such certificate by virtue of such certificate shall be forfeited and the Department of Revenue or the proper county officers shall proceed to collect those taxes not paid by the certificate holder as a result of the tax relief provided to the holder under any provision of ORS 307.405, 316.097 and 317.116.~~

~~(4) Except as provided in section (5) of this rule, if the certification of a pollution control or solid waste, hazardous wastes or used oil facility is ordered revoked pursuant to subsection (1)(b) of this rule, the certificate holder shall be denied any further relief provided under ORS 307.405, 316.097 or 317.116 in connection with such facility, as the case may be, from and after the date that the order of revocation becomes final.~~

~~(5) Once a determination has been made under section (1) of this rule, the commission may revoke tax credits held for any facility or piece of equipment which is for the purpose of preventing, controlling, reducing, or eliminating pollution to the same media and which is at a location adjacent to the non-complying facility.~~

~~(6) Upon notification by the certificate holder that the facility has been inspected by DEQ and found to be in compliance, the commission may reinstate any revoked tax credit certification if the commission finds the non-complying facility has been brought into compliance.~~

~~(7) If the Commission reinstates certification, the Commission shall notify the Department of Revenue or the county assessor of the county in which the facility is located that the tax credit certification is reinstated for the remaining period of the tax credit, less the period of revocation. The period of revocation would be from the date the Commission revokes the certificate to the date the Commission reinstates the certificate.~~

~~(8) The Commission may withhold revocation of a certificate when operation of a facility ceases if the certificate holder indicates in writing that the facility will be returned to operation within five years time. In the event that the facility is not returned to operation as indicated, the Commission shall revoke the certificate.]~~

Stat. Auth.: ORS Ch. 468

Stats. Implemented: ORS

Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1985, f. & ef. 3-12-85; DEQ 20-1987, f. & ef. 12-16-87

~~*[Procedures for Transfer of a Tax Credit Certificate*~~

~~***340-016-0040** To transfer a tax credit certificate from one holder to another, the Commission shall revoke the certificate and grant a new one to the new holder for the balance of the available tax credit following the procedure set forth in ORS 307.405, 316.097, and 317.116.]*~~

Stat. Auth.: ORS Ch. 468
Stats. Implemented: ORS

Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1985, f. & ef. 3-12-85

~~*[Fees for Tax Credit Certification*~~

~~***340-016-0045***~~

~~*(1) An application processing fee of one-half of one percent of the cost claimed in the application of the pollution control facility to a maximum of $5,000 shall be paid with each application. However, if the application processing fee is less than $50, no application processing fee shall be charged. A non-refundable filing fee of $50 shall be paid with each application. No application is complete until the filing fee and processing fee are submitted. An amount equal to the filing fee and processing fee shall be submitted as a required part of any application for a pollution control facility tax credit.*~~

~~*(2) Upon the Department's receipt of an application, the filing fee becomes non-refundable.*~~

~~*(3) The application processing fee shall be refunded in whole if the application is rejected.*~~

~~*(4) The fees shall not be considered by the Environmental Quality Commission as part of the cost of the facility to be certified.*~~

~~*(5) All fees shall be made payable to the Department of Environmental Quality.*~~

~~*(6) Notwithstanding section (1) of this rule, the Department may increase the processing fee above the maximum of $5,000, when an application necessitates an unusually extensive evaluation or analysis to determine the portion of the facility allocable to pollution control or material recovery.]*~~

Stat. Auth.: ORS Ch. 183 & 468.150 - 468.190
Stats. Implemented: ORS

Hist.: DEQ 31-1981, f. 10-19-81, ef. 11-1-81; DEQ 12-1984, f. & ef. 7-13-84; Renumbered from 340-11-200; DEQ 5-1985, f. & ef. 3-12-85; DEQ 6-1990, f. & cert. ef. 3-13-90

~~*[Taxpayers Receiving Tax Credit*~~

~~***340-016-0050***~~

~~*(1) A person receiving a certificate under this section may take tax relief only under ORS 316.097 or 317.116, depending upon the tax status of the person's trade or business*~~

~~*except if the taxpayer is a corporation organized under ORS Chapter 61 or 62, or any predecessor to ORS Chapter 62 relating to incorporation of cooperative associations, or is a subsequent transferee of such a corporation, the tax relief may be taken only under ORS 307.405.*~~

~~*(2) If the person receiving the certificate is an electing small business corporation as defined in Section 1361 of the Internal Revenue Code, each shareholder shall be entitled to take tax credit relief as provided in ORS 316.097, based on that shareholder's pro rata share of the certified cost of the facility.*~~

~~*(3) If the person receiving the certificate is a partnership, each partner shall be entitled to take tax credit relief as provided in ORS 316.097, based on that partner's pro rata share of the certified cost of the facility.*~~

~~*(4) Upon any sale, exchange or other disposition of a facility written notice must be provided to the Department of Environmental Quality by the company, corporation or individual for whom the tax credit certificate has been issued. Upon request, the taxpayer shall provide a copy of the contract or other evidence of disposition of the property to the Department of Environmental Quality.*~~

~~*(5) The company, corporation or individual claiming the tax credit for a leased facility must provide a copy of a written agreement between the lessor and lessee designating the party to receive the tax credit and a copy of the complete and current lease agreement for the facility.*~~

~~*(6) The taxpayer claiming the tax credit for a facility with more than one owner shall provide a copy of a written agreement between the owners designating the party or parties to receive the tax credit certificate.]*~~

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the Department of Environmental Quality.]

Stat. Auth.: ORS Ch. 468
Stats. Implemented: ORS
Hist.: DEQ 12-1984, f. & ef. 7-13-84; DEQ 5-1985, f. & ef. 3-12-85

APPLICATION PROCEDURES

340-016-0055 Any Oregon taxpayer may apply for the certification of a pollution control facility to take relief from their Oregon tax liability. The applicant and the facility shall be eligible under ORS 307.405, ORS 315.304, and ORS 468.150 to 468.190. The applicant shall submit the application to the Department on the application form provided by the Department.

(1) Application for Preliminary Certification. An applicant may apply for preliminary certification of a pollution control facility to determine if a future facility would meet the certification requirements as set forth in OAR 340-016-0060. The applicant may submit the optional preliminary application anytime before the construction of the pollution control facility is complete. If the Commission issues a preliminary certificate and if the applicant constructs the facility as represented on the preliminary application and the preliminary certificate then the facility shall meet the requirements as set forth in OAR 340-016-0060. The preliminary certification of a facility does not exempt the applicant from submitting a timely application for final certification as set forth in section (2) of this rule.

(2) Application for Final Certification. The applicant shall submit all information, exhibits and substantiating documents requested on the application for final certification. The Department shall reject the application for final certification if the applicant fails to submit the application:

(a) After the construction of the facility is substantially complete and the facility is placed in service;

(b) Within two years after construction of the facility is substantially completed; and

(c) Before January 1, 2002.

(3) Complete Application. The applicant shall submit to the Department an application as set forth in section (1) or section (2) that is complete and ready to process. For an application to be complete and ready to process, the applicant shall:

(a) Complete all required application fields;

(b) Provide all appropriate exhibits;

(c) Explain how the facility is eligible for a pollution control tax credit as set forth in OAR 340-016-0060. The applicant shall include supporting documentation if the facility is eligible for certification based upon orders or permit limitations;

(d) Include the appropriate fees established in OAR 340-016-0065;

(e) Provide documentation that substantiates the facility cost as claimed on the application for final certification and as set forth in OAR 340-016-0070;

(f) Contain a statement that the facility is in compliance with Department statutes, rules and standards, and any documentation regarding non-compliance;

(g) Sign the application certifying that all claims made on the application are true and accurate;

(h) Provide a copy of a written agreement between the lessor and lessee designating the party to receive the tax credit if the applicant is claiming a tax credit for a leased facility. The applicant shall provide a copy of the cover, first and signature pages of the complete and current lease agreement for the facility. The Department may request a copy of the complete agreement; and

(i) Provide a copy of a written and signed agreement between the owners designating the party or parties to receive the tax credit certificate if the applicant is claiming the tax credit for a facility with more than one owner.

(4) Department Notification. The Department shall notify the applicant in writing when:

(a) Rejecting an application for the applicant's failure to file a timely application as set forth in sections (1) and (2) of this rule or rejecting an application for failure to provide a timely response as set forth in subsection (5)(a) of this rule.

(b) Requiring additional information from the applicant. The Department shall request additional information within 60 days from the date the Department received the application if the Department is unable to complete the review;

(c) Requiring additional information, for applications for final certification only, if the Department is unable to determine the actual cost of the facility or the portion of the actual cost of the facility properly allocable to pollution control;

(d) Notifying the applicant of the date, time and place of the Commission meeting where the Commission shall take action on the application; and

(e) Notifying the applicant of the action-taken by the Commission. If the Commission rejects an application for certification; certifies a lesser actual cost of the facility; or certifies a lesser portion of the actual cost properly allocable to pollution control, material recovery or recycling than the applicant claimed in the application for certification, the Commission shall

cause written notice of its action, and a concise statement of the findings and reasons therefore, to be sent by registered or certified mail to the applicant.

(5) Applicant Response to Notification. The applicant:

(a) Shall respond to the Department within 60 days of receipt of the Department's written notification when the Department requests additional information as set forth in section (4) of this rule. The applicant shall respond by providing the additional information requested or by submitting a written estimate of the time needed to provide the information necessary to complete the application.

(b) May appeal from the rejection or reduction as provided in ORS 468.170(3) and ORS 468.110.

(6) Extension of Time. The Commission may grant an extension of time to submit an application for final certification. An extension of time:

(a) Shall only be considered for applications that may exceed the time limits set forth in section (2) of this rule;

(b) Shall not extend application processing beyond December 31, 2003; and

(c) Shall only be granted for circumstances beyond the control of the applicant that would make filing a timely application unreasonable.

ED. NOTE: The Application referenced in this rule is available from the Department of Environmental Quality.

ELIGIBILITY

340-016-0060

(1) Eligible Facilities. Facilities eligible for pollution control tax credit certification shall include any land, structure, building, installation, excavation, machinery, equipment or device, or alternative methods for field sanitation and straw utilization and disposal. An eligible facility shall be reasonably used, erected, constructed or installed as:

(a) A new facility;

(b) An addition or improvement to an existing facility; or

(c) The reconstruction or replacement of an existing facility.

(2) Purpose of Facility. The facility shall meet the principal purpose requirement to be eligible for a pollution control facility tax credit certification, or if the facility is unable to meet the principal purpose requirement, the facility shall meet the sole purpose requirement to be eligible for a pollution control tax credit:

(a) Principal Purpose Requirement. The principal purpose of the facility is the most important or primary purpose of the facility. Each facility shall have only one principal purpose. The facility shall be established to comply with environmental requirements imposed by the Department, the federal Environmental Protection Agency or a regional air pollution authority to control, reduce, or prevent air, water or noise pollution, or for the material recovery of solid waste, hazardous waste or used oil; or

(b) Sole Purpose Requirement. The sole purpose of the facility shall be the exclusive purpose of the facility. The only function or use of the facility shall be the control, reduction, or prevention of pollution; or for the material recovery of solid waste, hazardous waste or used oil.

(3) Facility Compliance. The facility shall achieve compliance with Department statutes and rules, or Commission orders or permit conditions before the Commission issues certification as a pollution control facility.

(4) Eligible Activities. The facility shall prevent, reduce, control, or eliminate:

(a) Air contamination by use of air cleaning devices as defined in ORS 468A.005 or through equipment designed to prevent, reduce or eliminate air contaminants prior to discharge to the outdoor atmosphere;

(b) Open Field Burning. The facility shall reduce or eliminate:

(A) Open field burning and may include equipment, facilities, and land for gathering, densifying, handling, storing, transporting and incorporating grass straw or straw based products;

(B) Air quality impacts from open field burning and may include propane burners or mobile field sanitizers; or

(C) Grass seed acreage that requires open field burning. The facility may include:

(i) Production of alternative crops that do not require open field burning;

(ii) Production of rotation crops that support grass seed production without open field burning; or

(iii) Drainage tile installations and new crop processing facilities.

(c) Hazardous Waste. The facility shall treat, substantially reduce or eliminate hazardous waste as defined in ORS 466.005 or utilized material as set forth in subsection (5)(e) of this rule;

(d) Industrial Waste. The facility shall dispose of, eliminate or be redesigned to eliminate industrial waste and the use of treatment works for industrial wastewater as defined in ORS 468B.005;

(e) Hazardous Waste, Solid Waste and Used Oil Material Recovery. The facility shall eliminate or obtain useful material from material that would otherwise be solid waste as defined in ORS 459.005, hazardous waste as defined in ORS 466.005, or used oil as defined in ORS 468.850. The facility shall produce an end product of utilization that is an item of real economic value and is competitive with an end product produced in another state. The facility shall produce the end product by mechanical processing, chemical processing; or through the production, processing, pre-segregation, or use of materials which:

(A) Have useful chemical or physical properties and which may be used for the same or other purposes; or

(B) May be used in the same kind of application as its prior use without change in identity.

(f) Noise Pollution. The facility shall substantially reduce, eliminate or be redesigned to eliminate noise pollution or noise emission sources set forth in OAR 340-035-0005 through OAR 340-035-0100;

(g) Spills or Unauthorized Releases. The facility shall be used to detect, defer or prevent spills or unauthorized releases. This does not include any facility installed, constructed or used for cleanup after a spill or unauthorized release has occurred.

FEES

340-016-0065 The application fee shall be made payable to the Department of Environmental Quality and shall not be refunded to the applicant except as set forth in section (3) of this rule. The application fee shall be based upon the facility cost after any reductions as set forth ORS 340-016-0070(1).

(1) Application Fee for Preliminary Certification. If the applicant chooses to submit the optional application for preliminary certification as set forth in OAR 340-016-0055(1), the applicant shall submit the appropriate preliminary application fee of:

(a) One-half of one percent of the estimated facility cost as claimed on the preliminary application. The minimum fee shall be $50 and the maximum fee shall be $7,500; or

(b) $50 for preliminary applications claiming alternatives to open field burning.

(2) Application Fee for Final Certification. The applicant shall submit the appropriate final application fee:

(a) One percent of the estimated facility cost as claimed on the final application. The minimum fee shall be $50 and the maximum fee shall be $15,000. If the applicant received a preliminary certificate and the facility claimed on the final application:

(A) Was built substantially as represented on the preliminary certification, the applicant may subtract the amount of the preliminary application fee paid from the final application fee; or

(B) Was not built substantially as represented on the preliminary certification, the applicant shall not subtract the amount of the preliminary application fee paid from the final application fee.

(b) $50 for final applications claiming alternatives to open field burning.

(3) Refunds. The Department shall refund 50% of the preliminary and final application fee paid only if the preliminary or the final application is rejected or denied. The preliminary and final application fee for alternatives to open field burning shall not be refunded any amount under this rule.

DETERMINING THE FACILITY COST

340-016-0070

(1) Facility Cost. The applicant shall provide documentation sufficient to substantiate the facility cost. The facility cost shall be reduced by the:

(a) Salvage value of a pre-existing facility if the applicant is replacing a facility. The salvage value shall never be less than zero and shall be the value of the pre-existing facility at the end of its useful life minus the cost to remove it from service;

(b) Amount of any government grants received to pay part of the facility cost;

(c) Present value of any other state tax credits for which the investment is eligible; and

(d) Ineligible facility costs as set forth in section (3) and as determined by comparing the actual facility costs with eligible costs as set forth in section (2);

(2) Eligible Costs. For costs to be eligible, they shall make a significant contribution to pollution control and shall directly relate to the acquisition and installation of the facility. Eligible costs may include:

(a) Machinery, equipment and devices;

(b) Structures and buildings;

(c) Design or engineering;

(d) Employee or contractor labor;

(e) Indirect costs limited to employees of the applicant's business that directly performed the engineering, acquisition or installation work;

(f) Government fees associated with the installation of the equipment;

(g) Freight;

(h) Excavation;

(i) Materials and supplies needed for installation;

(j) Travel directly related to purchased equipment;

(k) For underground and aboveground storage tank systems holding petroleum, waste oil and hazardous substances:

(A) Modification and decommissioning of existing tank systems; and

(B) Ninety percent of any automatic tank gauging system;

(l) Essential backup systems;

(m) Replacement or reconstruction of all or a part of any facility for which a pollution control facility certificate has previously been issued under ORS 468.170, limited to:

(A) An amount equal to the difference between the cost the new facility and the like-for-like replacement cost of the original facility if the facility is being replaced due to a new requirement imposed by the Department, the federal Environmental Protection Agency or a regional air pollution authority; or

(B) The remainder of the tax credit certified to the facility being replaced if a facility is replaced or reconstructed before the end of its useful life; and

(n) Other costs directly related to the principal or sole purpose of the facility.

(3) Ineligible Costs. The applicant and the Department shall reduce the facility cost by any ineligible costs. Ineligible costs are any distinct portion of a pollution control facility that makes an insignificant contribution to the principal or sole purpose of the facility; or provides benefits of economic value; or where the costs are not directly related to the operation of the industry or enterprise seeking the tax credit but were installed as a result of the facility. Ineligible costs include but are not limited to:

(a) Office buildings and furnishings;

(b) Parking lots and road improvements;

(c) Automobiles;

(d) Landscaping;

(e) External lighting;

(f) Company or related signs;

(g) Air conditioners;

(h) Property installed, constructed or used for clean up of emergency spills or unauthorized releases, as defined by the Commission;

(i) Septic tanks or other facilities for human waste including property installed, constructed or used for moving sewage to the collecting facilities of a public or quasi-public sewerage system;

(j) Removal of equipment replaced by the facility except for tanks as set forth in paragraph (2)(k)(A) of this rule;

(k) Replacement or reconstruction of all or a part of any facility for which a pollution control facility certificate has previously been issued under ORS 468.170, except as set forth in subsection (2)(m) of this rule;

(l) Application fees for a pollution control tax credit;

(m) Start-up costs;

(n) Asbestos abatement;

(o) Purchased equipment used to install the facility;

(p) Maintenance, operation, or repair of a facility, including spare parts;

(q) Owner's time;

(r) Interest, warranty charges, financing costs, capitalized costs (property taxes, capitalized interest, etc.), insurance premiums, legal fees, court costs, patent searches and feasibility studies; and

(s) Travel for research purposes.

(4) Statement of Facility Cost. The applicant shall provide an auditor's statement that the facility cost claimed on the application for final certification is eligible and allocable as set forth in this rule and ORS 340-016-0070. The facility cost prior to any reductions, as set forth ORS 340-016-0070(1), shall determine the degree of independence of the auditor:

(a) The applicant may prepare the auditor's statement when the facility cost:

(A) Does not exceed $50,000; or

(B) Exceeds $500,000. When the facility cost exceeds $500,000, the applicant shall also allow the Department to perform an independent accounting review to be paid by the Department.

(b) The applicant shall have the auditor's statement prepared by an independent Certified Public Accountant when the facility cost exceeds $50,000 but does not exceed $500,000.

(5) Waiver of External CPA's Audit. The applicant may submit a written request and the Department may grant a waiver of the independent accounting review:

(a) If the facility cost can be thoroughly documented by less than twenty invoices or canceled checks;

(b) If the facility is not part of a larger construction project; and

(c) If the facility consists of a single pollution control component or a single pollution control process.

(6) More Than One Owner. If there is more than one owner applying for tax relief for the same facility, each owner may be required to obtain a separate certification of cost as set forth in this section. The facility cost claimed by each owner separately shall not exceed the total cost of the facility.

DETERMINATION OF PORTION OF FACILITY COST ALLOCABLE TO POLLUTION CONTROL

340-016-0075 The applicant shall provide the information necessary for the Commission and the Department to determine the portion of the facility cost allocable to pollution control as set forth in ORS 468.190 and this rule. The portion of the facility cost properly allocable to pollution control shall be from zero to 100 percent in increments of one percent. If the portion is zero percent, the Commission shall issue an order denying the certification. The facility cost for this rule shall be the cost as set forth in OAR 340-016-0070(1) after the reduction of the salvage value.

(1) Facility Cost Does Not Exceed $50,000. The Commission shall only consider the percentage of time the facility is used for pollution control as opposed to any other purpose when determining the percentage of the facility cost allocable to pollution control for facilities with costs that do not exceed $50,000. The remaining sections in this rule shall not be applicable to these facilities.

(2) Facility Cost Exceeds $50,000. The Commission shall consider the five factors in this section when establishing the portion of the facility costs properly allocable to pollution control for facilities qualifying for certification under ORS 468.170. These five factors shall be considered only when the facility cost exceeds $50,000 under sections (3), (4) and (5) of this rule. In considering the five factors and their applicability to these rules, the Commission may determine in its findings that one or more factors are more important than others and may assign different weights to the factors when determining the portion of costs properly allocable to pollution control:

(a) The extent to which the facility is used to recover and convert waste products into a salable or usable commodity;

(b) The estimated annual percent return on the investment in the facility;

(c) The alternative methods, equipment and costs for achieving the same pollution control objective;

(d) Related savings or increases in costs which occur or may occur as a result of the installation of the facility; or

(e) Other factors which are relevant in establishing the portion of the actual cost of the facility properly allocable to the prevention, control or reduction of air, water or noise pollution, solid or hazardous waste or to recycling or properly disposing of used oil.

(3) Non-Integral Facilities. The Department shall determine the percentage of the facility cost allocable to pollution control as set forth in this section if the facility is not "integral to the operation of the applicant's business" as set forth in subsection (4)(a) of this rule. The applicant shall:

(a) Determine the Average Annual Cash Flow from the facility. The average annual cash flow is calculated by summing the five annual cash flows in this subsection as calculated through paragraph (3)(a)(C) and dividing the sum by five. Where the useful life of the facility is less than five years, sum the annual cash flows for the useful life of the facility and divide the sum by the useful life. The applicant shall:

(A) Estimate gross annual revenue for each of the first five full years of operation. Revenue includes the estimated total annual income directly related to the operation of the facility. Revenue includes income derived from sale or reuse of recovered materials or energy or any other means including savings that may occur as a result of the facility. The Department may require additional information or documentation regarding gross annual revenue estimates for evaluation purposes;

(B) Estimate the annual operating expenses for each of the first five full years of operation. Operating expenses shall be the estimated annual cost of operating the facility. Operating expenses may include labor, utilities, property taxes, insurance, and other cash expenses, less any savings in expenses attributable to installation of the facility. Operating expenses shall not include depreciation, interest expenses, and state and federal taxes; and

(C) Subtract the estimated annual operating expenses set forth in paragraph (3)(a)(B) from the estimated gross annual revenues set forth in paragraph (3)(a)(A) for each of the first five full years of operation.

(b) Determine the Return on Investment Factor (ROI Factor) by dividing the facility cost by the average annual cash flow as set forth in subsection (3)(a) of this rule.

(c) Determine the Facility Return on Investment (Facility ROI) by using the Facility ROI -Table 1 provided with the application. At the top of Table 1, find the number equal to the number of years of the useful life of the facility. In the column under the useful life, find the number closest to the ROI Factor as set forth in subsection (3)(b) of this rule. Follow this row to the leftmost column to find the Facility ROI. Table 1 shall be developed utilizing the following equation:

$$\text{ROI Factor} = \frac{1-(1+\text{Facility ROI})^{-UL}}{\text{Facility ROI}}$$

where:

ROI Factor	***as set forth in subsection (3)(b)***
Facility ROI	***ROI percentages from 0 to 36 in increments of 0.25% - Table 1***
UL	***is the Useful Life of the facility***

(d) Determine the National Return on Investment (National ROI) from the National ROI - Table 2 provided with the application. Select the National ROI that corresponds with the year construction was completed on the facility. The National ROI Table 2 shall be developed by averaging the prior five years' rates of return before taxes on total assets for all United States manufacturing corporations as found in the Quarterly Financial Report for Manufacturing, Mining and Trade Corporations, published by the U.S. Department of Commerce, Bureau of the Census.

(e) Determine the Portion of Actual Costs Properly Allocable to Pollution Control. If the Facility ROI as set forth in subsection (3)(c) is:

(A) Greater than or equal to the National ROI as set forth in subsection (3)(d) then the percentage of the facility cost properly allocable to pollution control shall be zero percent.

(B) Less than the National ROI as set forth in subsection (3)(d) then the percentage of the facility cost properly allocable to pollution control shall be determined by the equation:

$$P_A = \frac{(\text{National ROI} - \text{Facility ROI})}{\text{National ROI}} \times 100$$

where:

P_A	***is the percentage of actual facility cost properly allocable to pollution control represented as a percentage, rounded off to the nearest whole number***
National ROI	***as set forth in subsection (3)(d)***
Facility ROI	***as set forth in subsection (3)(c)***

(4) Facilities Integral to the Operation of the Applicant's Business. This section applies only to facilities costing over $50,000, to applications received by the Department on or after February 1, 1993, and to any facility that the Commission determines to be "integral to the operation of the applicant's business" as set forth in this section. The Department shall use the

steps in this section to determine the portion of the facility cost that is allocable to pollution control for facilities determined to be "integral to the operation of the applicant's business."

(a) Determine if the Facility is Integral to the Operation of the Applicant's Business. A facility is integral to the operation of the applicant's business when the business is unable to operate or is only able to operate at reduced income levels, without the claimed pollution control facility as determined by the Commission. Such instances include, but are not limited to, commercial solid waste and hazardous waste landfills, solid and hazardous waste recycling businesses, and environmental service providers. A pollution control facility integral to the operation of the applicant's business does not include a facility that meets the principal purpose requirement as set forth in OAR 340-016-0060(3)(a) unless the pollution control facility meets one or more of the factors included in this definition. Factors that the Department may use to determine whether a pollution control facility is integral to the operation of the business include:

(A) The facility represent in excess of 25 percent of the total assets of the business; or

(B) The facility was erected, constructed, or installed in response to market demand for such pollution control facilities. This may occur as the result of requirements imposed by the Department, the Federal Environmental Protection Agency or regional air pollution authority, on parties unaffiliated with the applicant; or

(C) Erection, construction, or installation of the facility and any previously certified pollution control facilities, allows the applicant to generate gross revenues at least 50 percent greater than would have been generated in the absence of the claimed facility and any previously certified pollution control facilities; or

(D)The applicant's operating expenses related to operation of the facility and any previously certified pollution control facilities are at least 50 percent of the operating expenses of the applicant's business.

(b) Determine the National Return on Investment (National ROI) from National ROI Table 2 provided with the application. Select the National ROI that corresponds with the year construction was completed on the facility. Table 2 shall be developed as set forth in subsection (3)(d) of this rule.

(c) Determine the Industry Average Profit (Industry AP) by summing the "industry median profit before taxes as a percent of total assets" for the five years prior to the year the facility was completed as found in Robert Morris Associates, Annual Statement Studies under the applicant's primary four digit Standard Industrial Classification (SIC) and dividing the sum obtained by five. Where five years are not available, sum the number of years that are available and divide by the number of years available. If the Annual Statement Studies do not list the "industry median profit before taxes as a percent of total assets" for the applicant's SIC, the applicant and the Department shall determine whether an alternate SIC is appropriate for the applicant's business. If no alternate SIC is appropriate for the applicant's business or if an applicant is dissatisfied with the percent allocable determination made using the procedures in this section, the percent allocable shall be determined using the procedures set forth in section (5) of this rule;

(d) Determine the Portion of Actual Costs Properly Allocable to Pollution Control. If the Industry AP as set forth in paragraph (4)(c) is:

(A) Greater than or equal to the National ROI as set forth in subsection (4)(b), the percentage of the facility cost allocable to pollution control shall be zero percent;

(B) Less than the National ROI as set forth in paragraph (4)(b), the percentage of the facility cost allocable to pollution control shall be determined by the equation:

$$P_A = \frac{(\text{National ROI} - \text{Industry AP})}{\text{National ROI}} \times 100$$

where:

P_A	*is the percentage of actual costs properly allocable to pollution control in percent, rounded off to the nearest whole number*
National ROI	*as set forth in subsection (4)(b)*
Industry AP	*as set forth in subsection (4)(c)*

(5) Alternate for Facilities Integral to Applicant's Business. If the applicant and the Department determine that no alternate Standard Industrial Classification (SIC) is appropriate for the applicant's business as set forth in subsection (4)(c) of this rule, the percent allocable to pollution control shall be determined using the procedures set forth in this section.

(a) Definitions. The following definitions shall be used in this section:

(A) "Annual Incremental Cash Flow" means the estimated annual cash flow for each year of the useful life of the claimed pollution control facility that is integral to the operation of applicant's business calculated as follows:

(i) Calculate the applicant's annual cash flow including the claimed facility by subtracting the annual operating expenses for the applicant's business from the gross annual income for the applicant's business for each year of the useful life of the claimed facility; and

(ii) Calculate the applicant's annual cash flow assuming that the claimed facility was not erected, constructed, or installed by subtracting the annual operating expenses for the applicant's business using this assumption from the gross annual income for the applicant's business using this assumption for each year of the useful life of the claimed facility; and

(iii) Subtract the applicant's annual cash flow assuming that the claimed facility was not erected, constructed, or installed from the annual cash flow with the claimed facility for each year of the useful life of the claimed facility.

(B) "Annual Operating Expenses" means the estimated costs of operating the applicant's business including labor, utilities, property taxes, insurance, and other cash expenses, less any savings in expenses. Depreciation, interest expenses, and state and federal taxes are not included;

(C) "Gross Annual Income" means the estimated total annual income from the applicant's business including savings that may occur;

(D) "Internal Rate of Return" means the rate of return that will equate the present value of the annual incremental cash flows over the useful life of the claimed facility with the present value of the claimed facility cost;

(b) The applicant shall furnish the following information to the Department:

(A) An income statement, balance sheet, statement of cash flows, and federal and state tax returns (if applicable) for the applicant's business for the applicant's three fiscal years prior to the date of submission of the application. If three years of such statements are not available, the applicant shall submit information for the years that are available;

(B) Revenue and expense projections, and cash flow projections for the applicant's business beginning with the year the application is submitted and continuing for the entire useful life of the pollution control facility. The level of detail of these projections shall be substantially

equivalent to the level of detail of information submitted in paragraph (A) of this subsection. The Department may elect to provide the applicant with a worksheet for this purpose;

(C) Revenue and expense projections, and cash flow projections for the applicant's business for the entire useful life of the claimed facility assuming that the claimed pollution control facility was not erected, constructed or installed;

(D) A projection of the applicant's future capital expenditures for the pollution control facility;

(E) A letter signed by the applicant authorizing the Department to contract with an independent certified public accountant to review the financial information provided by the applicant. The applicant shall agree to reimburse the Department for the cost of this review;

(F) Using the information submitted in paragraphs (A) through (D) of this subsection, the Department shall calculate an Internal Rate of Return for the claimed facility by considering the claimed facility cost and annual incremental cash flow. The Internal Rate of Return shall be compared to the National ROI from Table 2 as set forth in subsection (4)(b) of this rule;

(G) If the applicant's Internal Rate of Return is greater than the reference rate, the percent allocable shall be zero percent;

(H) If the applicant's Internal Rate of Return is less than the reference rate, the percent allocable shall be determined by the following formula:

$$P_A = \frac{(\text{National ROI} - \text{IRR})}{\text{National ROI}} \times 100$$

where:

P_A	*is the percentage of actual costs properly allocable to pollution control in percent, rounded off to the nearest whole number.*
IRR	*is the Internal Rate of Return for the claimed facility.*
National ROI	*as set forth in subsection (4)(b) of this rule*

ED. NOTE: The Tables referenced in this rule are available from the Department of Environmental Quality.

CERTIFICATION
340-016-0080

(1) The Preliminary Certificate. The Commission shall pre-certify the eligibility of a facility if the Commission determines the facility is eligible for a pollution control tax credit certificate as set forth in OAR 340-016-0060. The certificate shall be prima facie evidence that the facility is qualified for certification for tax relief under ORS 468.167. Preliminary certification shall not ensure that the facility constructed will receive certification under ORS 468.167 or tax relief under ORS 307.405 or 315.304.

(2) The Final Certificate. The Commission shall certify the actual cost of a pollution control facility as set forth in OAR 340-016-0070 and the portion of the cost properly allocable to pollution control as set forth in ORS 468.190 and OAR 340-016-0075 if the Department determines the facility is eligible for pollution control tax credit certification as set forth in OAR 340-016-0060. The certificate:

(a) Shall bear a separate serial number for each such facility;

(b) May certify two or more facilities which constitute an operational unit under one certificate;

(c) Is effective for purposes of tax relief according to the provisions of ORS 307.405 or ORS 315.304;

(d) Shall be granted:

(A) For 10 consecutive years beginning with tax year of the person taking the tax credit; or

(B) For 20 consecutive years for corporations organized under ORS Chapters 62 or 65 that utilize ad valorem tax–relief. The portion of the facility allocable to pollution control shall be exempt from ad valorem taxation.

(e) Shall be limited to that portion of the eligible and allocable facility costs, as set forth in OAR 340-016-0070 and OAR 340-016-0075 representing the taxpayer's investment in the pollution control facility.

(f) May certify portions of a facility qualifying under ORS 468.165(1)(c) separately under this section if portions of the facility are owned by more than one person. The actual cost certified for all portions of a facility separately certified under this subsection shall not exceed the total cost of the facility that would have been certified under one certificate. The provisions of ORS 307.405 or ORS 315.304, whichever is applicable, shall apply to any sale, exchange or other disposition of a certified portion of a facility.

(g) May certify a lesser actual cost of the facility or a lesser portion of the actual cost properly allocable to pollution control, material recovery or recycling than was claimed in the application for certification.

(3) Revocation. The Commission may order the revocation of the final tax credit certification as set forth in ORS 468.185. The Department shall notify the Department of Revenue and the county assessor of the county in which the facility is located as soon as the order of revocation or reinstatement under this section has become final.

(a) Cause for Revocation. Pursuant to the procedures for a contested case under ORS 183.310 to 183.550, the Commission may order revocation of a tax credit for:

(A) Fraud or Misrepresentation, if the certificate was obtained by fraud or misrepresentation. All prior tax relief provided to the certificate holder by virtue of such certificate shall be forfeited. The Department of Revenue or the proper county officers shall proceed to collect taxes not paid by the certificate holder as a result of the tax relief provided to the holder under any provision of ORS 307.405 and 315.304; or

(B) Failure to Operate Facility, if the certificate holder has failed substantially to operate the facility for the purpose of, and to the extent necessary to meet the specifications of the certificate; or in compliance with the applicable Department or Commission statutes, rules, orders or permit conditions. The certificate holder shall be denied any further relief provided under ORS 307.405 or 315.304 in connection with such facility from and after the date that the order of revocation becomes final;

(b) Suspended Revocation. The Commission may suspend the revocation of a certificate when operation of a facility ceases if the certificate holder indicates in writing that the facility will be returned to operation within five years time. In the event that the facility is not returned to operation as indicated, the Commission shall revoke the certificate.

(c) Impact on Adjacent Facilities. The Commission may revoke tax credits held for any facility or piece of equipment which is for the purpose of preventing, controlling, reducing, or eliminating pollution to the same media and which is at a location adjacent to the non-complying facility.

(d) Reinstatement. The Commission may reinstate any revoked tax credit certification if the Commission finds the non-complying facility has been brought into compliance. The tax

credit certification shall be reinstated for the remaining period of the tax credit, less the period beginning on the date the Commission revokes the certificate and ending on the date the Commission reinstates the certificate.

(4) Sale, Exchange or Disposition of Facility. The certificate holder shall provide the Department with written notice upon any sale, exchange or other disposition of the certified pollution control facility. Upon request, the taxpayer shall provide a copy of the contract or other evidence of disposition of the property to the Department of Environmental Quality. Upon sale or exchange of the facility, the certificate holder may request that the Commission transfer a tax credit from one holder to another, the Commission shall reissue the certificate to the new holder, and the Department shall report the transfer of the certificate to the Department of Revenue as set forth in ORS 307.405 and 315.304.

DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION 17
***Reclaimed* Plastics ~~*[Recycling]*~~ Tax Credits**

NOTE:

The ***underlined, bold, italicized*** portions of text represent proposed rule additions.

The ~~*[bracketed, struck out, italicized]*~~ portions of text represent proposed rule deletions.

PURPOSE

340-*0*17-*0*010 The purpose of these rules is to prescribe procedures and criteria to be used by the Department and Commission for issuance of tax credits to Oregon businesses that make investments in order to collect, transport, or process reclaimed plastic or to manufacture a reclaimed plastic product. These rules are to be used in connection with ORS 468. ~~*[925]*~~***451*** to 468.~~*[965]*~~***491*** and apply only to investments made on or after January 1, 1986 and before ~~*[July 1, 1995]*~~ ***December 31, 2001***, except where otherwise noted herein.

Stat. Auth.: ORS 468.925 - 468.965
Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

[**ED. NOTE:** The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

DEFINITIONS

340-*0*17-*0*015

(1) "Investment" means the amount of money a person invests to acquire or construct equipment, personal property or machinery necessary to collect, transport, or process reclaimed plastic or to manufacture a reclaimed plastic product. An investment shall be determined to have been made on the date a sales contract is agreed to by the buyer or the date of issuance of a purchase order.

(2) "Circumstances ~~*[b]*~~***B***eyond the ~~*[c]*~~***C***ontrol of the ~~*[a]*~~***A***pplicant" means facts, conditions and circumstances which applicant's due care and diligence would not have avoided.

(3) "Commission" means Environmental Quality Commission ***or the Commission's sub-delegate***.

(4) "Department" means Department of Environmental Quality.

"Personal ~~*[p]*~~***P***roperty" means any investment in property directly related to the operation of the industry or enterprise seeking the tax credit, which make a significant contribution to the collection, transportation or processing of reclaimed plastic or the manufacture of a reclaimed plastic product, excluding land and buildings.

(5)

~~(6)~~

(6) "Qualifying ~~*[b]*~~***B***usiness" means a business in Oregon that collects, transports, or processes reclaimed plastic or manufactures a reclaimed plastic product ~~*[which will achieve*~~

~~compliance with Department statutes and rules or Commission orders or permit conditions before certification of tax credit]~~.

(7) "Reclaimed ~~[p]~~Plastic" means plastic from industrial consumers, commercial users or post-consumer waste. "Reclaimed Plastic" includes shredded plastics, regrind, pellets or any other similar products manufactured from Oregon industrial consumers, commercial users, or post consumer waste that is sold for the purpose of making an end product out of reclaimed plastic and is intended to be used to manufacture a non-medical or non-food plastic product.

(8) "Reclaimed ~~[p]~~Plastic Product" means a plastic product of real economic value for which more than 50 percent of the plastic used in the product is reclaimed plastic.

(9) "Special ~~[c]~~Circumstances" means emergencies which call for immediate erection, construction or installation of a facility, cases where applicant has relied on incorrect information provided by Department personnel as demonstrated by letters, records of conversations or other written evidence, or similar adequately documented circumstances which directly resulted in applicant's failure to file a timely application for preliminary certification.

Stat. Auth.: ORS 468.925 - 468.965
Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

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PROCEDURES FOR RECEIVING PRELIMINARY TAX CREDIT CERTIFICATION

340-017-0020

(1) Filing of Application:

(a) Any person proposing to apply for final certification of an investment made in Oregon to collect, transport or process reclaimed plastic or to manufacture a reclaimed plastic product pursuant to ORS 468.~~[935]~~461 shall file an application for preliminary certification with the Department of Environmental Quality. The application shall be made on a form provided by the Department. The preliminary certificate need not be issued prior to construction for compliance with this requirement;

(b) The investment must not be made until 30 days after ~~[filing]~~ an application ~~[with DEQ unless DEQ]~~***is received by the Department unless the Department*** reviews the application and notifies the applicant that the application is complete. If the investment is made within 30 days after ***submitting***~~[filing]~~ the application and the Department has not notified the applicant that the application is complete, the application will be rejected by the Department;

(c) The Commission may waive the filing of the ***preliminary*** application if it finds the filing inappropriate because special circumstances render the filing unreasonable and if it finds such investment would otherwise qualify for tax credit certification pursuant to ORS 468.~~[925]~~***925451*** to 468.~~[965]~~***965491***;

(d) Within 30 days of the ***receipt of***~~[filing of]~~ an application for ***preliminary certification***, the Department shall request any additional information that applicant needs to submit in order for the application to be considered complete. ~~[After examination of the application, the Department may also request corrections and revisions to the plans and~~

~~***specifications.***~~***]*** The Department may require any other information necessary to determine whether the proposed investment is in accordance with Department statutes, rules and standards;

(e) The application shall not be considered complete until the Department receives the information requested and notifies the applicant in writing that the application is complete and ready for processing. However, if the Department does not make a timely request pursuant to subsection (1)(d) of this rule, the application shall be deemed complete 30 days after ***receipt of the application[~~filing~~]***.

(2) Approval of Preliminary Certification:

(a) If the Department determines that the proposed investment is eligible, it shall within 60 days of receipt of a completed application issue a preliminary certificate approving the investment. The preliminary certificate does not include a determination of the full extent to which a facility is eligible for tax credit;

(b) If within 60 days of the receipt of a completed application, the Department fails to issue a preliminary certificate of approval and the Commission fails to issue an order denying certification, the preliminary certificate shall be considered to have been issued. ***[~~The investment must comply with the plans, specifications and any corrections or revisions previously submitted~~]***;

(c) Issuance of a preliminary tax credit certification does not guarantee final tax credit certification.

(3) Denial of Preliminary Certification:

(a) If the Department determines that the investment does not comply with the Department statutes, rules and standards, the Commission shall issue an order denying certification within 60 days of receipt of a completed application;

(b) Notice of the Department's recommended action to deny an application shall be mailed to the applicant at least seven calendar days before the Commission meeting where the application will be considered unless the applicant waives the notice requirement in writing.

(4) Appeal: Within 20 days from the date of mailing of the order, the applicant may demand a hearing. The demand shall be in writing, shall state the grounds for hearing and shall be mailed to the Director of the Department. The hearing shall be conducted in accordance with the applicable provisions of ORS 183.310 to 183.550.

Stat. Auth.: ORS 468.925 - 468.965
Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

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PROCEDURES FOR FINAL TAX CREDIT CERTIFICATION

340-*0*17-*0*025

(1) Filing of Application:

(a) A written application for final tax credit certification shall be submitted to the Department on a form provided by the Department;

(b) Within 30 days of receipt of an application, the Department shall request any additional information that applicant needs to submit in order for the application to be considered complete. The Department may also require any other information necessary to determine whether the investment is in accordance with Department statutes, rules and standards;

(c) An application shall not be considered filed until all requested information is submitted by the applicant, and the Department notifies the applicant in writing that the application is complete and ready for processing;

(d) The application must be submitted between January 1, 1986 and ***~~[June 30, 1995]~~*** ***December 31, 2001***. Failure to file a timely application shall make the investment ineligible for tax credit certification;

(e) ***The application must be filed complete prior to December 31, 2001;*** ***~~[The Commission may grant an extension of time to file an application if circumstances beyond the control of the applicant would make a timely filing unreasonable;~~***

~~(f) An extension shall only be considered if applied for between January 1, 1986 and June 30, 1995. An extension may be granted for no more than one year. Only one extension may be granted;]~~

~~[(g)]~~(f) An application may be withdrawn and resubmitted by applicant at any time between January 1, 1986 and ***December 31, 2001******~~[June 30, 1995]~~*** without paying an additional processing fee, unless the amount of the investment has increased. An additional processing fee shall be calculated by subtracting the cost of the investment on the original application from the cost of the investment on the resubmitted application and multiplying the remainder by ***~~[one half of]~~***~~one half of~~ one percent;

~~[(h)]~~(g) If the Department determines the application is incomplete for processing and applicant fails to submit requested information within 180 days of the date when the Department requested the information, the application will be rejected by the Department. If the applicant makes a written request for additional time to submit requested information, the Department may grant additional time so long as applicant is required to submit requested information by ***~~[June 30, 1995]~~*** ***December 31, 2001***.

(2) Commission Action:

(a) Notice of the Department's recommended action on the application shall be mailed to the applicant at least seven days before the Commission meeting where the application will be considered unless the applicant waives the notice requirement in writing;

(b) The Commission shall act on an application for certification before the 120th day after the filing of a complete application. Failure of the Commission to act constitutes approval of the application;

(c) The Commission may consider and act upon an application at any of its regular or special meetings. The matter shall be conducted as an informal public informational hearing, not a contested case hearing, unless ordered otherwise by the Commission.

(d) Certification:

(A) If the Commission determines that the investment is eligible, it shall certify the actual cost of the facility and the portion of the actual cost properly allocable to the investment made for the purpose of collecting, transporting or processing reclaimed plastic or manufacturing a reclaimed plastic product. Each certificate shall bear a separate serial number for each such facility;

(B) No determination of the proportion of the investment to be certified shall be made until receipt of the application;

(C) A certificate is effective for purposes of tax relief in accordance with ORS *[~~316.103~~]315.324[~~and 317.106~~]* if investment was made on or after January 1, 1986 and before *[~~July 1, 1995;~~]December 31, 2001;*

(D) Certification under to ORS 468.*[~~935~~]461* shall be granted for a period of five consecutive years. *[~~t~~]T*he five-year period shall begin with the tax year of the person in which the facility is certified under this section.

(e) Rejection: If the Commission rejects an application for certification, or certifies a lesser actual cost of the investment or a lesser portion of the actual cost properly allocable to the collection, transportation or processing of reclaimed plastic or to the manufacture of a reclaimed plastic product than was claimed in the application for certification, the Commission shall cause written notice of its action, and a concise statement of the findings and reasons therefore, to be sent by registered or certified mail to the applicant.

(3) Appeal: If the application is rejected for any reason, or if the applicant is dissatisfied with the certification of actual cost or portion of the actual cost allocated to the collection, transportation or processing of reclaimed plastic or to the manufacture of a reclaimed plastic product, the applicant may appeal as provided in ORS 468.110. The rejection of the certification is final and conclusive on all parties unless the applicant appeals as provided in ORS 468.110 before the 30th day after notice was mailed by the Commission.

Stat. Auth.: ORS 468.925 - 468.965
Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

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DETERMINATION OF PERCENTAGE OF CERTIFIED INVESTMENT COSTS ALLOCABLE TO COLLECTION, TRANSPORTATION OR PROCESSING OF RECLAIMED PLASTIC OR MANUFACTURING A RECLAIMED PLASTIC PRODUCT

340-*0*17-*0*030

(1) Definitions:

(a) "Claimed Investment Costs" means the actual cost of the claimed equipment, machinery, or personal property*[~~.~~]:*

(A) Certification of the actual cost of the claimed equipment, machinery, or personal property must be documented by a certified public accountant for claimed investment costs which are over *[~~$20,000~~]$50,000*;

<u>(B) The Department may waive the accountant's certification if the investment can be thoroughly documented by invoices or canceled checks. The applicant may submit the a request for waiver with the complete application.</u>

(b) "Net Investment Cost" means the claimed investment costs minus the salvage value of any equipment, machinery or personal property removed from service;

(c) "Salvage Value" means the value of a piece of equipment, machinery or personal property at the end of its useful life minus what it costs to remove it from service. Salvage value can never be less than zero.

(2) In establishing the percent of costs properly allocable to the investment costs incurred to allow a person to collect, transport or process reclaimed plastic or to manufacture a reclaimed plastic product, the Commission shall consider the following factors and make appropriate findings regarding their applicability:

(a) The estimated percent of time the equipment, machinery or personal property is utilized to collect, transport or process reclaimed plastic or manufacture a reclaimed plastic product, based on projections for the first year of operation;

(b) The alternative methods, equipment and costs for achieving the same objective;

(c) Other factors which are relevant in establishing a portion of the actual cost of the investment properly allocable to the collection, transportation or processing of reclaimed plastic or to the manufacture of a reclaimed plastic product.

(3) The portion of actual costs properly allocable shall be from 0 to 100 percent in increments of one percent. If zero percent, the ~~*[c]*~~<u>C</u>ommission shall issue an order denying certification.

(4) The portion of actual costs properly allocable shall not include costs for~~*[:*~~

~~***(a) Air conditioners;***~~

~~***(b) Septic tanks or other facilities for human waste;***~~

~~***(c) Property installed, constructed or used for moving sewage to the collecting facilities of a public or quasi-public sewerage system;***~~

~~***(d) Equipment, personal property or machinery not directly related to the operation of the industry or enterprise seeking the tax credit; or***~~

~~***(e) A]***~~<u>a</u>ny distinct portion of the investment which makes an insignificant contribution to the collection, transportation or processing of reclaimed plastic or the manufacture of a reclaimed plastic product.~~***[including the following specific items:***~~

~~***(A) Office furnishings;***~~

~~***(B) Parking lots and road improvements;***~~

~~***(C) Landscaping;***~~

~~***(D) External lighting;***~~

~~***(E) Company or related signs; and***~~

~~***(F) Automobiles].***~~

Stat. Auth.: ORS 468.925 - 468.965
Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

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AMOUNT OF TAX CREDITS AVAILABLE

340-*0*17-*0*035

(1) For purposes of monitoring the Department's tax credit limit, the Department will consider the sum of the preliminary certifications issued in each calendar year. When preliminary certification is waived under OAR 340-017-0020, the year of final certification will be used~~[.]~~:

(a) A preliminary certificate which is granted and then ~~[cancelled]~~***canceled*** within the same calendar year shall not be counted as part of the $1.5 million annual certification limit after it has been ~~[cancelled]~~***canceled***;

(b) When a final certification is granted during the same year as a preliminary certification the lessor value of the two shall be used.

(2) Not more than $1.5 million in investment costs will be issued preliminary certification in any calendar year. In each calendar year, a minimum of $500,000 of the $1.5 million will be reserved for investments costing $100,000 or less.

(3) The maximum cost certified for each investment shall not exceed $500,000 except as permitted by section (~~[4]~~5) of this rule.

~~[(3)]~~*(4)* If the applications exceed the $1,500,000 limit, the Commission shall prioritize investments, based on the date of ~~[filing of applications for final]~~***preliminary*** certification. Those applications ~~[filed]~~***received*** and determined by the Department to be complete first will receive first priority for certification. The total amount for which the investment is eligible shall be certified so long as there are adequate funds to do so.

~~[(4)]~~*(5)* If the applications certified in any calendar year do not total $1,000,000, the Commission may increase the certified costs above the $500,000 maximum for previously certified investments. The increases shall be allocated based upon the method of prioritization used in section ~~[(3)]~~*(4)* of this rule. The increased allocation to previously certified investments under this section shall not include any of the $500,000 reserved under section (2) of this rule.

~~[(5)]~~*(6)* When considering the percent***age*** of costs properly allocable to the investment costs incurred to allow a person to collect, transport or process reclaimed plastic or to manufacture a reclaimed plastic product~~[.]~~, the following steps will be used:

(a) Determine the claimed investment costs;

(b) Determine the salvage value, if any, of ~~[any]~~***the*** equipment which is being taken out of service;

(c) Determine the net investment cost;

(d) Determine the estimated percent***age*** of time the equipment, machinery, or personal property will be utilized to collect, transport or process reclaimed plastic or manufacture a reclaimed plastic product, based on projections for the first year of operation;

(e) Determine the total allocable cost multiplying the net investment cost by the percent***age of*** time the equipment, machinery or personal property will be utilized to collect, transport or process reclaimed plastic or manufacture a reclaimed plastic product.

Stat. Auth.: ORS 468.925 - 468.965

Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

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PROCEDURE TO REVOKE CERTIFICATION

340-*0*17-*0*040

(1) Pursuant to the procedures for a contested case under ORS 183.310 to 183.550, the Commission may order the revocation of the final tax credit certification issued under to ORS 468.~~*[940]*~~*466*, if it finds that:

(a) The certification was obtained by fraud or misrepresentation; or

(b) The holder of the certificate has failed substantially to operate the qualifying business as specified in such certificate.

(2) As soon as the order of revocation under this rule has become final, the Commission shall notify the Oregon Department of Revenue.

(3) If the certification of an investment is ordered revoked pursuant to subsection (1)(a) of this rule, all prior tax relief provided to the holder of such certificate shall be forfeited and the Department of Revenue or the proper county officers shall proceed to collect those taxes not paid by the certificate holder as a result of the tax relief provided to the holder under any provision of ORS ~~*[316.103 and 317.106]*~~*315.324*.

(4) If the certification of an investment is ordered revoked pursuant to subsection (1)(b) of this rule, the certificate holder shall be denied any further relief provided under ~~*[316.103 and 317.106]*~~*315.324* in connection with such facility from and after the date that the order of revocation becomes final.

(5) The Department may withhold revocation of a certificate when the investment ceases to be used for the collection, transportation or processing of reclaimed plastic or the manufacture of a recycled plastic product if the certificate holder indicates in writing that recycling activities specified in the certificate will commence again within five years time. The Department will provide the Department of Revenue with a copy of the certificate holder's written indication of intent to recommence recycling activities specified in the certificate. In the event that the facility is not returned to operation as indicated, the Department shall revoke the certificate.

Stat. Auth.: ORS 468.925 - 468.965
Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

[**ED. NOTE:** The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

PROCEDURES FOR TRANSFER OF A TAX CREDIT CERTIFICATE

340-*0*17-*0*045 To transfer a tax credit certificate from one holder to another, the Commission shall revoke the certificate and grant a new one to the new holder for the balance of the available tax credit following the procedure set forth in ORS ~~*[316.103 and 317.106]*~~*315.324*.

Stat. Auth.: ORS Ch. 468
Hist.: DEQ 4-1986, f. & ef. 2-12-86

FEES FOR FINAL TAX CREDIT CERTIFICATION

340-*0*17-*0*050

(1) An application processing fee of ~~*[one-half of]*~~ one percent of the cost claimed in the application for final certification but no more than $5,000 shall be paid with each application *for final certification*. ~~*[However, if the application processing fee is less than $50, no application processing fee shall be charged. In addition, a non-refundable filing fee of $50 shall be paid with each application.]*~~ No *final* application is complete until the ~~*[filing fee and]*~~processing fee ~~*[are]*~~*is* submitted. ~~*[An amount equal to the filing fee and processing fee shall be submitted as a required part of any application for a plastics recycling tax credit.*~~

~~*(2) Upon the Department's receipt of an application, the filing fee becomes non-refundable.]*~~

~~*[(3)]*~~*(2)*~~*[The application processing fee shall be refunded in whole if the application is rejected.]*~~ ***One half of the processing fee paid as set forth in section (1) of this rule shall be refunded if the final application is rejected or withdrawn.***

~~*[(4)]*~~*(3)* The fees shall not be considered by the Environmental Quality Commission as part of the cost of the investment to be certified.

~~*[(5)]*~~*(4)* All fees shall be made payable to the Department of Environmental Quality.

Stat. Auth.: ORS 468.925 - 468.965
Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

[**ED. NOTE:** The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

TAXPAYERS RECEIVING TAX CREDIT

340-*0*17-*0*055

(1) A person receiving a certificate under this Division may take tax relief only under ORS ~~*[316.103 or 317.106]*~~*315.324*, depending upon the tax status of the person's trade or business.

(2) If the person receiving the certificate is an electing small business corporation as defined in **section 1361** of the **Federal Internal Revenue Code**, each shareholder shall be entitled to take tax credit relief as provided in ORS ~~*[316.103]*~~*315.324*, based on that shareholder's pro rata share of the certified cost of the investment.

(3) If the person receiving the certificate is a partnership, each partner shall be entitled to take tax credit relief as provided in ORS ~~*[316.103]*~~*315.324*, based on that partner's pro rata share of the certified cost of the investment.

(4) Upon any sale, exchange or other disposition of equipment, personal property or machinery written notice must be provided to the Department of Environmental Quality by the company, corporation or individual for whom the tax credit certificate has been issued. Upon request, the taxpayer shall provide a copy of the contract or other evidence of disposition of the property to the Department of Environmental Quality.

(5) The company, corporation or individual claiming the tax credit for leased equipment, personal property, or machinery must provide a copy of a written agreement between the lessor

and lessee designating the party to receive the tax credit and a copy of the complete and current lease agreement for the facility.

(6) The taxpayer claiming the tax credit for the equipment, personal property, or machinery with more than one owner shall provide a copy of a written agreement between the owners designating the party or parties to receive the tax credit certificate.

NOTE: ORS 468.955(3) refers in error to ORS 316.097 and 317.116, which relate to Pollution Control Tax Credits, rather than Plastics Recycling Tax Credits. OAR 340-17-040(3) refers instead to claiming Plastics Recycling Tax Credit under ORS 316.103 and 317.106, consistent with legislative intent.

[**Publications:** The publication(s) referred to or incorporated by reference in this rule are available from the Department of Environmental Quality.]

Stat. Auth.: ORS 468.925 - 468.965
Hist.: DEQ 4-1986, f. & ef. 2-12-86; DEQ 29-1989(Temp), f. & cert. ef. 12-14-89; DEQ 7-1990, f. & cert. ef. 3-13-90

[**ED. NOTE:** The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

NOTICE OF PROPOSED RULEMAKING HEARING

OAR Chapter 340 Division 16 | OAR Chapter 340 Division 17

DATE: October 16, 1997 **TIME:** 9:00 AM **LOCATION:** Room 3A
Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204

HEARINGS OFFICER(s): Mitch West

STATUTORY AUTHORITY: ORS 468.165
or **OTHER AUTHORITY:** ORS 468.020
STATUTES IMPLEMENTED: ORS 468.150 through 468.190 and ORS 468.451 through 468.491

AMEND: OARs 340-16-005, 340-16-010, and 340-17-010 through 340-17-055

REPEAL: OAR 340-16-015 through 340-16-050, including Tables 1 and 2

ADOPT: OAR 340-16-055 through 340-16-085

- ☒ This hearing notice is the initial notice given for this rulemaking action.
- ☐ This hearing was requested by interested persons after a previous rulemaking notice.
- ☒ Auxiliary aids for persons with disabilities are available upon advance request.

SUMMARY: These rule amendments were developed through the advisory committee process. Committee members represented a cross section of tax credit program applicants or their industry representative. On considering the advice of the committee, the Department is proposing amendments to the pollution control and reclaimed plastics tax credit rules that would: a) incorporate 1995 Legislative amendments to ORS 468.150 through 468.190 and 468.451 through 468.491; b) provide application fees sufficient to covered the cost of filing, investigating, granting and rejecting tax credit applications; c) reduce the refund amount for denied or withdrawn applications; d) clarify that the cost of the accountant's review is paid by the applicant; e) simplify the method used to determine the percent allocable to pollution control (which includes the return on investment calculation); e) refocus the designation of a facility as integral to the applicant's business; f) clarify and expand the lists of eligible and ineligible facility costs; and g) clarify and update examples of field burning facilities.

LAST DATE FOR COMMENT: October 20, 1997

AGENCY RULES COORDINATOR: Susan M. Greco, (503) 229-5213
AGENCY CONTACT FOR THIS PROPOSAL: Margaret C. Vandehey
ADDRESS: 811 S. W. 6th Avenue
Portland, Oregon 97204
TELEPHONE: (503) 229-6878 or Toll Free 1-800-452-4011

Interested persons may comment on the proposed rules orally or in writing at the hearing. Written comments will also be considered if received by the date indicated above.

Susan Greco
Signature

9/9/97
Date

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Pollution Control Facilities and Reclaimed Plastic Products Tax Credit Rules

Fiscal and Economic Impact Statement

Introduction

DEQ developed these rule amendments through the advisory committee process. Committee members represented a cross section of tax credit program applicants or their industry representative. Upon considering the advice of the committee, the Department is proposing amendments to the pollution control and reclaimed plastics tax credit rules that would amend:

The pollution control facility tax credit rules (ORS 468.150 through 468.190) by:

- Incorporating 1995 legislative amendments.
- Increasing fees to apply for certification of a pollution control facility. Fees would cover the cost of filing, investigating and granting or rejecting tax credit applications rather than use general funds that would otherwise be available for DEQ studies, programs or services, to other state services, or to the taxpayers. This includes reducing the amount of the refunded fee for denied applications.
- Eliminating the cost of the duplicated independent accounting review for the applicant.
- Placing more emphasis on an application that is "complete and ready to process" and on the Director's ability to request additional information rather than the filing/submission dates. The proposed amendments focus on removing impediments to timely application processing.
- Including examples of eligible and ineligible facility costs that the EQC has identified as making insignificant contributions to pollution control.
- Updating and clarifying eligible alternatives to open field burning to include alternatives that will result in the reduction of:
    - Open field burning through such activities as marketing of grass straw or grass straw products; and
    - Grass seed acreage in production that requires open field burning through such methods as new crop processing equipment and facilities. The equipment or facility would reduce or eliminate grass seed acreage in production by 1) producing alternative crops that do not require open field burning; or 2) by introducing rotation crops that support grass seed production without open field burning.
- Reorganizing rules for clarity.

The plastics recycling tax credit rules (ORS 468.451 through 468.491) by:

- Incorporating 1995 legislative amendments.
- Increasing fees to apply for certification of a plastics recycling facility. The cost of filing,

investigating and granting or rejecting pollution control and plastics recycling tax credit applications would be paid by these fees rather than through the use general funds that would otherwise be available for DEQ studies, programs or services, to other state services, or to the taxpayers.

General Public

These rules and associated fees apply only to businesses seeking tax credits. The program operating deficit depletes general fund that would otherwise be available for DEQ programs, services and studies, or for other state services, or back to the taxpayers. Otherwise, there will be little or no fiscal or economic impact on the general public.

Tax credits certified by the Commission can be claimed by a certificate holder as a direct credit against the certificate holder's State income tax liability, or for cooperatives and non-profit corporations, as a credit against ad valorem taxes.

Small Business

The majority (over eighty percent) of the applications represent small businesses with 50 or fewer employees. Small businesses utilize the tax credit program primarily for CFC recovery equipment, field burning activities, and underground and aboveground storage tank systems. The median facility cost claimed on tax credit applications is $58,000. These rule amendments have several potential implications to the small business:

1. The application fee for a facility costing under $10,000 would not change from $50. However, it would increase to 1% of the facility cost for all applications over $10,000.
2. There would be a $50 fee for applicants claiming a field burning facility.
3. The duplicate accountant review of an application (one before the application is submitted and one performed by an accountant firm under contract with the Department) would be eliminated. The facility cost that triggers the independent accounting review requirement would be raised from $20,000 to $50,000.
4. Applicants with facilities that consist of a single component or process may request a waiver of the external accountant's review if the cost of their facility can be thoroughly documented by invoices or canceled checks, if it is not part of a larger construction project, and if it consists of a single pollution control component or a single pollution control process.
5. Application requirements and responsibilities have been clarified with the consequence of saving the applicant time.

Large Business

Large businesses represent under 20% of number of applications received by the Department. They have significant amounts of capital invested in pollution control facilities and will be directly impacted by the proposed rule amendments. They will pay for more of the cost of the program by paying higher application fees (1% of the cost of the facility to be certified.) The maximum application processing fee, which would pay the cost for staff time, engineering and accounting reviews, would increase from $5000 to $15,000 for any one application. Large businesses with a low-cost facility would enjoy the same benefits as the small business applicant.

Local Governments

Local governments are not eligible for certification of a pollution control or plastic recycling tax credit and therefore, a change in program benefits will not have a direct financial impact on local governments.

The tax credit statutes and rules allow cooperatives and non-profit corporations to claim credits against ad valorem taxes. Changes in tax credit program benefits to such organizations could potentially result in an increase or decrease in ad valorem tax collections by local governments. However, this proposal does not change the impact on ad valorem tax collection from the current rule.

State Agencies

The Department of Environmental Quality (DEQ) is already involved in processing tax credit applications and the proposed rule amendments will not impact staffing. However, the amendments would provide application fees sufficient to cover the cost to administer the tax credit program which are estimated to be about $250,000 per year for the next five years. The average annual program expenditure for the last three years was $258,000 and the average cost to certify a facility was $1556. The total facility cost certified over the last three years was $198,000,000. The median facility cost was $58,000 and the average facility cost was $400,000.

The Oregon Department of Agriculture (ODA) processes field burning applications submitted to the Oregon Department of Environmental Quality (DEQ). This amendment would limit the application fee for field burning tax credits to a $50 fee for the preliminary and the final application since ODA has another funding source to cover program expenditures.

There should be no additional impact on other agencies.

Assumptions

The Department of Environmental Quality (DEQ) has little influence over the type or number of applications that may be submitted. Therefore, it is difficult to estimate the magnitude of the fiscal and economic impact of the proposed rule amendments. DEQ conducted a study of the fees which was the basis for making decisions regarding the fee amendments.

DEQ applied various fee schedules to actual applications received between 7/1/93 and 6/30/96 in order to meet the actual program expenditure for the same period:

Tax Credit Program
7/1/93 to 6/30/96

	Fees	464,601
	Refunds	(87,119)
Fee Revenue Only		377,482
Expenditures		772,893
	Surplus or (Deficit)	(395,411)

The proposed fee would provide $828,000 when applied against the actual applications. This excess $55,359 will pay the increased cost of the contract accounting and engineering reviews. The model ignored field burning applications which are processed by ODA and considers cost saving measures which are being undertaken at DEQ.

Two factors necessitate a fee increase:

a) Application fees are insufficient to cover the cost of filing, investigating, granting and rejecting tax credit applications, and

b) DEQ does not have the authority to hire staff to administer the tax credit programs. Therefore, an increasing number of tax credit applications are being processed by engineering and accountant firms who have entered into a Professional Services Contract with the Department of Environmental Quality.

Residential Development

This rule will have no impact on the cost of developing a 6,000 square foot parcel and the construction of a 1,200 square foot single family dwelling on that parcel.

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Rulemaking Proposal
for
Pollution Control Facilities and Reclaimed Plastic Products Tax Credit Rules

Questions to be Answered to Reveal Potential Justification for Differing from Federal Requirements.

1. Are there federal requirements that are applicable to this situation? If so, exactly what are they?

No

2. Are the applicable federal requirements performance based, technology based, or both with the most stringent controlling?

Not applicable.

3. Do the applicable federal requirements specifically address the issues that are of concern in Oregon? Was data or information that would reasonably reflect Oregon's concern and situation considered in the federal process that established the federal requirements?

Not applicable.

4. Will the proposed requirement improve the ability of the regulated community to comply in a more cost effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later?

Not applicable.

5. Is there a timing issue which might justify changing the time frame for implementation of federal requirements?

Not applicable.

6. Will the proposed requirement assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth?

Not applicable.

7. Does the proposed requirement establish or maintain reasonable equity in the requirements for various sources? (level the playing field)

Not applicable.

8. Would others face increased costs if a more stringent rule is not enacted?

Not applicable.

9. Does the proposed requirement include procedural requirements, reporting or monitoring requirements that are different from applicable federal requirements? If so, Why? What is the "compelling reason" for different procedural, reporting or monitoring requirements?

Not applicable.

10. Is demonstrated technology available to comply with the proposed requirement?

Not applicable.

11. Will the proposed requirement contribute to the prevention of pollution or address a potential problem and represent a more cost effective environmental gain?

Not applicable.

State of Oregon
Department of Environmental Quality **Memorandum**

Date: September 15, 1997

To: Interested and Affected Public

Subject: Rulemaking Proposal and Rulemaking Statements
Pollution Control and Plastics Recycling Tax Credit Rules

This memorandum contains information on a proposal by the Department of Environmental Quality (the Department) to repeal rules, adopt new rules and amend rules regarding the Pollution Control Tax Credit and Plastics Recycling Tax Credit programs. Both programs were authorized by the Legislative Assembly to provide an incentive for taxpayers to install pollution control facilities and to compensate them for required investments in pollution control facilities.

Each facility must qualify for the tax credit and prevent, control, reduce or recycle a significant quantity of pollution and the facility must meet governmental pollution control standards. The Department must determine the eligibility of the facility and the portion of the facility cost that is attributed to pollution control, reduction or elimination. The Department makes a recommendation to Environmental Quality Commission (EQC) and the EQC approves or denies the application — issuing certification accordingly.

All information in this memorandum pertains to the Pollution Control Tax Credit rules and only the information specifically identified pertains to the Plastics Recycling Tax Credit rules.

- For Chapter 340 Division 16, this proposal would amend two Pollution Control Tax Credit rules. Additionally, it would reorganize the remainder of rules which would involve repealing the current rules and adopting new rules in their place.

- For Chapter 340 Division 17, this proposal would amend the Plastics Recycling Tax Credits rules.

Pursuant to ORS 183.335, this memorandum also provides information about the Environmental Quality Commission's intended action to adopt these rules.

The EQC and Department has the statutory authority to address this issue under ORS 468.020, ORS 468.150, ORS 468.165 and ORS 468.190.

How the rule was developed

These rules were developed by Department staff with a thirteen-member advisory committee. Committee members were applicants, their industry representatives, one representative from Oregon Economic Development Department and one representative from Oregon Department of Agriculture (ODA). Staff members represented all eligible tax credit activities: hazardous and solid waste; material recovery; air quality; and water quality. The Committee met over thirteen

Public Notice

Chance to Comment Period Extended

At industry request, the deadline for submittal of written comments on the Department's pollution control tax credit rules has been extended to January 15, 1998. All comments will be considered. Please refer to the September 15, 1997, rulemaking proposal for more information.

This extended period will provide an opportunity for a second work session with the Environmental Quality Commission on January 09, 1998. The Department does not anticipate the Commission will take public comment at the work session. The targeted meeting date for the rulemaking proposal to be considered by the Commission will be April 3, 1998.

If you have any questions about the proposed rules or need a copy of the full rulemaking package, contact Margaret C. Vandehey by phone at (503) 229-6878, by Fax at (503) 229-6730, or by E-mail at vandehey.maggie@deq.state.or.us.

Written comments should be mailed to:
Tax Credit Coordinator, Management Services Division
Oregon Department of Environmental Quality
811 SW 6th Avenue
Portland, Oregon 97204
All comments must be received no later than 5:00 PM January 15, 1998.

MARION, OR DEC 19 P.M. 1997 97359

Public Notice

Chance to Comment Period Extended

At industry request, the deadline for submittal of written comments on the Department's pollution control and plastic recycling tax credit rules has been extended to November 28, 1997. All comments will be considered. Please refer to the September 15, 1997, rulemaking proposal for more information.

This extended period will provide an opportunity for a work session with the Environmental Quality Commission on November 21, 1997. However, the Department does not anticipate the Commission will take public comment at the work session. The targeted meeting date for the rulemaking proposal to be considered by the Commission will be January 9, 1998.

If you have any questions about the proposed rules or need a copy of the full rulemaking package, contact Margaret C. Vandehey by phone at (503) 229-6878, by Fax at (503) 229-6730, or by E-mail at vandehey.maggie@deq.state.or.us. On November 1, 1997, information will be available on our DEQ website at http://www.deq.state.or.us/.

Written comments should be mailed to:
Tax Credit Coordinator, Management Services Division
Oregon Department of Environmental Quality
811 SW 6th Avenue
Portland, Oregon 97204
All comments must be received no later than 5:00 PM November 28, 1997.

State of Oregon
Department of Environmental Quality — Memorandum

Date: October 21, 1997

To: Environmental Quality Commission

From: Mitch West, DEQ Budget section

Subject: Presiding Officer's Report for Rulemaking Hearing
Hearing Date and Time: October 16, 1997, 9:00 AM
Hearing Location: Room 3A, DEQ Headquarters

Title of Proposal: Proposed rulemaking regarding Pollution Control and Plastics Recycling Tax Credits

The rulemaking hearing on the above titled proposal was convened at 9:00 AM. People were asked to sign witness registration forms if they wished to present testimony. People were also advised that the hearing was being recorded and of the procedures to be followed.

Nine people were in ättendance, seven people signed up to give testimony.

Summary of Oral Testimony

Bob Meyer, representing the accounting firm of Deloitte & Touche LLP testified only with respect to the proposed OAR 340-16-070 (5) regarding accounting review. He testified that he objected to the way in which accounting firms were selected to conduct the accounting review of tax credit applications over $250,000. He noted that there are only four firms on the Department's list, and that the new firms would not have an opportunity to be added to the list until 1999. He requested that the rules be revised to allow any accounting firm to perform the review. He suggested that the proposed rules would operate in restraint of trade, and proposed that the Department issue instructions as to content of the review, rather than contracting with a select group of firms. He asked that if the Department elected not to follow this recommendation, that a new opportunity be provided to have firms placed on the approved list.

Tom Kessler, representing Kessler & Company , an accounting firm also testified concerning OAR 340-16-070 (5). He indicated that there are efficiencies in ongoing relationships between accounting firms and their clients which benefit both parties. He noted that under current rules, a firm was barred from preparing reviews for applicant that had been a client of the firm within the past two years. He testified that an accounting firm by nature is independent from the client who pays them, and must met specific standards in their work. He also requested that the rules be modified to allow any firm to prepare the review based on published instructions from he Department, and failing that, to have the contract reopened for competition and addition of firms to the list.

Steve Van Mouwerik, representing Anderson Hay and Grain testified with regard to the proposed field burning rules. He testified that his firm currently markets 50,000 acres worth of straw that would otherwise be burned in the fields. He indicated that many farmers are unable to market their straw because of a lack of dry storage. He said that many grass seed farmers are out-sourcing pollution control, but must build barns for dry storage to make straw marketing practical. He testified that this marketing of straw was a very low margin operation, such that the cost of the barns was not supportable by the value of the straw. He indicated that these barns do not currently qualify for tax credits, and asked that the rules be amended to allow such barns to qualify for tax credits.

Jim Britton, of the Oregon Department of Agriculture also testified regarding the rules relating to field burning. He provided statistics on the amount of straw marketed in Oregon, and indicated that Agriculture anticipates substantial growth in rice farming that will increase the available straw. He also provided and evidence of a number of new uses for straw, including practical manufacture of building panels, and indicated that projects to find other uses are underway. He also urged that barns constructed for the purpose of keeping straw dry for marketing be eligible for tax credits. He further indicated that such barns should not be considered an "integral facility".

Glenn Zimmerman, president of the Composting Council of Oregon testified with regard to the rules limiting those processes which may qualify for tax credits. He testified that the Department had recently adopted new rules regulating composting, and that many composters would encounter substantial expense in meeting the new rules. He asked that the definitions in OAR 340-16 be revised to included composting as a pollution control activity, making facilities constructed to meet the new rules eligible for tax credits.

Chris Wohlers, representing the Oregon Petroleum Marketers Association testified with regard to tax credits as related to underground storage tanks. He indicated that many tank owners find the process complex and intimidating, so that many qualified tank owners do not use it. He indicated that combining the rulemaking for plastics recycling for the rules for pollution control tax credits made the processing more confusing, and recommended that they be separated in rulemaking. He indicated that due to the 1998 compliance deadline, many owners would have to go out of business if they do not receive some assistance in conversion, and that many others would not be able to use the best available technology if they did not receive tax credits. He indicated that he had three specific concerns: 1) He felt that the current process works and should not be changed. 2) He was concerned that pre-certification may be mandatory, and would delay the process, interfering with the 1998 deadline. He indicated that it was not clear in rule, but that he would oppose mandatory pre-certification. 3) He indicated a concern with increased fees, and felt that there was not a clear need for a better product from the Department which would justify an increase. He said that the reason for the increase was unclear. Finally, he suggested that the Department should attempt to reach out to small dealers to make them better able to use the tax credit program.

Rob Forrest, Representing Truax Harris Energy Company also testified regarding the rules applied to underground oil tanks. He also indicated that pre-certification should not be made mandatory. He indicated that the proposed rules would result in an average of a 31% decrease in eligible costs for tank owners. He indicated that the underground storage tank portion of the tax credit program is quite small relative to the whole, and that therefore the fee increase was disproportionately large. He further indicated that it was not clear what the Department would do with the increased fee revenues. He objected to the rule indicating that since gauge systems can also be used for inventory control, only 90% of the cost could qualify for tax credit. He stated that the gauge system is indivisible from the pollution control system and is a key piece of the environmental protection system. He concluded by stating that although the total dollars are small, many small station will need help in meeting the 1998 upgrade deadline.

Written Testimony

There was no written additional testimony provided at the hearing or delivered to the presiding officer. The Department of Agriculture delivered a written copy of the testimony of Jim Britton, signed by 30 farmers, exporters, and custom balers.

There was no further testimony and the hearing was closed at 9:40.

Attachment E
Department's Evaluation of Public Comment

OAR 340 Division 17 - Plastics Recycling Tax Credits
OAR 340 Division 16 - Pollution Control Tax Credits

The public comment period for proposed Plastic Recycling and Pollution Control Tax Credit Rule Amendments closed on January 15, 1998, after two extensions. Seven people gave oral testimony regarding the proposed Pollution Control Tax Credits rules amendments on October 16, 1997. No written or oral testimony was received regarding the proposed Plastic Recycling Tax Credit rule amendments. Fourteen members of the public submitted written testimony regarding the proposed pollution control tax credit rules amendments and thirty farmers, custom balers & haulers, and straw storage building owners signed a letter supporting the alternatives to open field burning. Four people submitted both written and oral testimony.

Written Testimony

Alternatives to Field Burning

A. Don Schellenberg
Oregon Farm Bureau
3415 Commercial St. SE Suite G
Salem, OR 97302-1569

Supports adoption especially of changes to OAR 340-016-0060 (5). Supports revision to OAR 340-016-0065 (2) because it makes the application process much less cumbersome and less expensive.

B. Steve Van Mouwerik, General Manager
Anderson Hay & Grain, Co.
2361 Hubbard Cut Off Road
Aurora, OR 97002

C. James Britton
Department of Agriculture
3420 Cherry
Salem, OR 97301

Mr. Van Mouwerik, Mr. Britton and the thirty farmers support post-harvest residue treatments as alternatives to open field burning in maintaining seed yield. Straw storage buildings are essential to protecting bales from inclement weather conditions in order to preserve their quality and to ensure a stable supply to be used as supplemental fiber, litter and production of linerboards and straw core panelboards.

This group supports treating alternatives to field burning facilities as not integral to the applicant's business – considering the facilities operational unit's, not the entire businesses' income and expenditures when determining the percentage of the facility cost allocable to pollution control.

Response 1 The Department will remove any substantive amendments to the rule as it pertains to a facility that is integral to an applicant's business from the rule making package that will be presented for adoption in April, 1998. None of the proposals provided an incentive for recycling or a desirable implementation of the legislative intent. A much broader group would need to be involved to determine the direction of a rule that so greatly impacts Oregon's tax revenues.

D.

State Representative Liz VanLeeuwen
27070 Irish Bend Loop
Halsey, OR 97348

Several years ago we worked out with your agency regarding the use of straw storage buildings for machinery storage after straw has been removed. It doesn't make sense to leave these expensive buildings sit for several months after the straw has been removed. This agreement is inconsistent with the Department's sole purpose interpretation.

Response 2 Most facilities that provide an alternative to open field burning are eligible as a principal purpose facility rather than a sole purpose facility. Definitions to principal and sole purpose facilities are found in ORS 468.155(1). Sole purpose from statute is paraphrased in the current rule under OAR 340-016-0025(1)(b) and is defined under OAR 340-016-0005(9) as meaning the "exclusive" purpose. The proposed rule would not change the interpretation of sole purpose but it would bring the two sections into one rule rather than two.

I'm concerned about your eligibility requirements as that relates to income. Where do you get the authority? Does DEQ or Revenue have some income tables you use to determine eligibility?

Response 3 The Commission is given authority to adopt rules regarding the percentage of the facility cost allocable to pollution control under ORS 468.190(4):

> *The commission may adopt rules establishing methods to be used to determine the portion of costs properly allocable to the prevention, control or reduction of air, water or noise pollution or solid or hazardous waste or to recycling or appropriately disposing of used oil.*

Additionally, ORS 468.191(1) directs the Environmental Quality Commission to consider five factors when in establishing the portion of facility costs properly allocable to pollution control. The return on investment in a pollution control facility is one of those factors. Income is used only in this context rather than as overall eligibility test. There is no eligibility table. (Facility eligibility is found in ORS 468.155 and ORS 468.165.) However, the return on investment is based on a present value calculation tied to a national reference rate table updated after the first quarter of every year. The method can be found in OAR 340-016-0030(6).

Accounting Reviews

E. Mark Symonds
Symonds, Evans and Larson
9600 SW Oak Street, Suite 3800
Portland, OR 97223

DEQ and the EQC should continue to utilize independent accounting firms in order to protect the integrity of the program on behalf of the DEQ, the EQC and the public.

Response 4 Based on these comments, direction from the Environmental Quality Commission and discussions with the advisory committee, the Department will propose a middle ground to the rule regarding the independent accounting review. Under the proposal, no independent accounting review would be required when the facility cost does not exceed $50,000. An independent accounting review performed by the applicant's accounting firm and paid for by the applicant would be required for facilities that cost between $50,000 and $500,000. For facilities costing $500,000 or more, the applicant would not be required to have an independent accounting review prior to submitting the application. However, the Department would select a firm from the Department's list and the Department would pay the cost of the review from fee revenue. A waiver would be available for any facility with simple documentation of costs.

F. David A. Kessler
Kessler & Company, PC
715 SW Morrison St. - 10th floor
Portland, OR 97205-1617

The proposed rule is unfair to the accounting firms not already on the department's list as the rules would be imposed without allowing these accounting firms to be added to the list. Under existing professional standards, all accounting firms are required to be independent with respect to the applicant. This rule amounts to a restraint of trade for firms not on the department's list.

Response 6 The Department will publish a Request for Proposal (RFP) once the rules are filed with the Secretary of State to update or expand the list. The current engineering and accounting firm list was established according to the strict State contracting rules.

The proposed rule would be more costly and time consuming for the applicant to interview accounting firms to perform their accounting review. Their current firm currently provides many accounting and auditing functions, have a working knowledge of the applicant's accounting systems and would be more efficient at reviewing the applicant's facility cost information and therefore, less costly.

Response 7 The Department will take the action as described in Response 4. Certification of a pollution control facility has the potential to impact Oregon's tax revenues in a dramatic way – over the life of the program the impact has been over $525 million in potential relief from Oregon taxpayers' liability. The Department's ability to seek accounting reviews of complex facilities and to obtain reviews made in concert with the program's rules and statute is a crucial step toward making a recommendation for approval or denial to the Commission.

The four firms under contract with the Department are located in the Portland Metropolitan area.

Response 8 The Department will re-open the contract process as stated in Response 6. There are accounting firms in the metropolitan area with offices throughout the state or that are accustomed to performing accounting functions statewide.

Underground Tanks

G. Mike Hawkins, President
Hawk Oil Company
PO Box 1388
Medford, OR 97501

H. John Phimister, Liaison Assistant
Western Stations Co.
Western Hyway Oil Co.
2929 NW 29th Ave.
Portland, OR 97210-1705

I. Wohlers Environmental Services, Inc.
PO Box 1132
Tualatin, Oregon 97062

Representing the Oregon Petroleum Marketers Association (OPMA)

Members of OPMA were not represented on the Advisory committee. A representative of Western States Petroleum was the only Advisory Committee Member that might be familiar with the petroleum market.

Response 9 The Department did not make any changes to the rule package based on this comment. This committee was made up of thirteen members including a representative of Western States Petroleum. There was a follow-up meeting with aboveground and underground storage tank owners and representatives.

Wohlers Environmental and OPMA did not find detailed information to assess the efficiency of the program's operation. The Rulemaking Package only included the program's income and expenditure data (presumably both the pollution control and plastic recycling.) Without more details, they cannot support a fee increase. If a fee increase cannot be avoided, this group finds the lower fee increase recommended by the Advisory Committee as supportable.

Response 10 The Department did not make any changes to the fee proposal based on this comment. The Department considers the information presented in the Rulemaking Package as adequate to estimate the cost of the program to the Department and as meets the requirements of OAR 468.165 (5):

> *By rule and after hearing the commission may adopt a schedule of reasonable fees which the department may require of applicants for certificates issued under section 6 of this 1995 Act and ORS 468.170. Before the adoption or revision of any such fees the commission shall estimate the total cost of the program to the department. The fees shall be based on the anticipated cost of filing, investigating, granting and rejecting the applications and shall be designed not to exceed the total cost estimated by the commission. Any excess fees shall be held by the department and shall be used by the commission to reduce any future fee increases.*

This group does not support a mandatory preliminary application process especially when its tied to a mandatory fee increase.

Response 11 The Department will make sure the proposed rule is clear that the preliminary application process is not mandatory. The preliminary application is proposed as an option available to the applicant anytime prior to the construction of the facility. It would generally be used when the eligibility of the facility is in question – the eligibility of an underground storage tank is generally not in question. If a facility is built as represented on the preliminary certificate, the applicant would be able to reduce the final application fee by the preliminary application fee submitted.

This group noted that the proposed rule regarding how the percentage of the facility cost that is allocable to pollution control is calculated would severely reduce this percentage. They strongly recommend that the Department review the changes to these calculations to continue to offer a firm incentive for installation of

pollution control equipment.

Response 12 The Department will remove any substantive amendments to the rule regarding the "determination of the percentage of the facility cost allocable to pollution control" from the proposed rules that will be presented for adoption in April 3, 1998. Though the Department will make several clarifying and formatting amendments to this rule, none of the proposals provided an incentive for recycling or a desirable implementation of the legislative intent. A much broader group would need to be involved to determine the direction of a rule that so greatly impacts Oregon's tax revenues.

UST projects should not be required to determine the "The Percentage of the Facility Cost Allocable to Pollution Control."

Response 13 The Department will not make any changes to the proposed rule regarding this comment. Under statute and the current rules, determining the portion of the facility cost allocable to pollution control is required. (See Response 3.) UST protection and leak detection systems do not have a return on investment within the context of tax credit program and generally do not go through the return on investment calculations. The application packet (that will coincide with the filing of the amended rule) will offer guidance and make it clear to the applicant when and if a return on investment calculation is required by rule.

The cost of the tank pad and other asphalt needed should not be considered part of "Parking lots and road improvements."

Response 14 The Department will not make any changes to the proposed rule regarding this comment. A pollution control facility does not include parking lots and road improvements as found in ORS 468,155(2). The tank's pads and asphalt eligibility would not change from the current rule. Any distinct portion of a pollution control facility that makes a significant contribution to the principal or sole purpose of the facility is an eligible cost under the current and the proposed rules.

Clearly the entity making the tax credit should get the tax credit. Negotiations between the landlords and the tenants should not be necessary and will create time delays and should be removed.

Response 15 The Department will not make a change to the proposed rule based on this comment. This provision is in the Department of Revenue administered rules ORS 315.340 (4) – taxpayers allowed the credit– and in current rule OAR 340-016-0050 (5)

> *The company, corporation or individual claiming the tax credit for a leased facility must provide a copy of a written agreement between the lessor and lessee designating the party to receive the tax credit and a copy of the complete and current lease agreement for the facility.*

The applicant should have 60 days from the date of the Department's request for additional information to respond to the request.

Response 16 The Department will incorporate this suggestion into the proposed rule.

General

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M.

Paul S. Cosgrove
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1300 SW Fifth Ave., Suite 3400
Portland, OR 97201-5696
Representing American Forest & Paper Association

We would ask that the Department's budget office recommendations be brought back to the advisory committee prior to it going to EQC.

Response 17 The Department has met with the advisory committee three times after the end of the advisory committee process and within the public comment period.

We ask that the proposal regarding the fee structure and the method for determining the percentage that is allocable to pollution control which includes facilities that are integral to an applicant's business be deferred from EQC action.

The rule regarding the determination of the percentage of the facility cost is very complex and at best difficult to administer. Developing rules such as this is exactly the reason why administration of the tax credit program is so costly.

Response 18 The Department will not defer rule making for fees.

The Department will defer the rule making pertaining to the method for determining the percentage of the facility cost allocable to pollution control as explained in Response 12.

The DEQ should solely rely upon the rules for rules rather than policy and guidance documents that have been placed into practice over time. Although we do not agree with the Department's recommendations (eligible costs), we believe its important that "policies and guidance documents" not be referenced by the Department in making eligibility determinations.

Response 19 The Department will include policies in rule. However, procedures and guidance documents will generally be provided outside rule. An example is the proposed removal of Tables 1 and 2 from rule but leaving the equations and the source of their development within the rule. The application will also be referenced in the proposed rule as well as guidelines for the accounting review. Both will be consistent with rule.

The EQC should accept the Advisory Committee Recommendations.

Response 20 The Department will present a fee proposal and an accounting review proposal different than represented in the Rulemaking Proposal and Rulemaking Statements published on September 15, 1997. The Department worked with the Advisory Committee regarding these changes and has had a work session with the EQC. See Responses 4, and 10.

The Department will defer making any proposal that would change the way the percentage of the facility cost that is allocable to pollution control (including a facility that is integral to the applicant's business) is determined as detailed in Response 12.

There should be a reduction of the fee charged for the preliminary approval submission since the approval isn't binding on DEQ or EQC. Since merely a cursory review is necessary, a fee of $250 should be sufficient.

Response 21 The Department will be clear in the rules about the extent of the optional preliminary application and its relationship to the final application process described in Response 11. If a designed facility receives a preliminary certification (meaning the facility plans have had an engineering review and the EQC has issued a certificate) the facility would be eligible if it is built as certified. A reduction in fee is not warranted. The Department incurs the majority of its costs in the engineering review.

The old Administrative Rule 340-16-040 indicated that a transfer of the tax credit was available following procedures set forth in 307.405

Response 22 The proposed rule will cross reference to the rules administered under the Department of Revenue (OAR 307.405). Transfers of certificate ownership will continue to be available to facilities that change ownership.

The proposed rule would allow the DEQ to arbitrarily increase the fees even though to requires the applicant to pay twice what it currently charged. Its difficult to understand how DEQ can increase its fees by over 100% without any historical accounting justification for the increase. DEQ can also request an additional CPA review which is an additional cost to the applicant.

Response 23 The Department's proposal will increase the fees as described in Response 10, and is based on historical income and expenditures. Under the proposal, the applicant would not be required to pay for an additional accounting review as detailed in Response 4.

The Advisory Committee recommended fee refund of 50% should be made without any conditions when an application is denied or rejected.

Response 24 The proposed rule will provide a refund of the greater amount of $50 or 50% of the fee paid if an application is denied or rejected . This excludes the $50 application fee for alternatives for field burning.

<u>Recycling</u>

N. Judy Crockett, Legislative Chair
Association of Oregon Recyclers
PO Box 483
Gresham, OR 97030-0107

The Department and the Commission should adopt rules that encourage rather than penalize operations that have recycling as either a primary purpose or where recycling is integral to the facility.

Response 25 See Response 3.

Oral Testimony

O. Bob Meyer
Deloitte & Touche LLP.
111 SW Fifth Ave., Suite 3900
Portland, OR 97204-3698

Mr. Meyer objects to the way in which accounting firms were selected. There are only four accounting firms on the Department's list. New firms would not have an opportunity to be added to the list until 1990. Rules should be revised to allow any accounting firm to perform rules under the Department's instructions regarding the content. The proposed rules would operate in restraint of trade.

See Responses 5 and 6.

P. David A. Kessler
Kessler & Company, PC
715 SW Morrison St. - 10th floor
Portland, OR 97205-1617

Oral testimony was consistent with written testimony under F. above.

Q. Steve Van Mouwerik, General Manager

Anderson Hay & Grain, Co.
2361 Hubbard Cut Off Road
Aurora, OR 97002

Oral testimony was consistent with written testimony under B. above.

R. James Britton
Department of Agriculture
3420 Cherry
Salem, OR 97301

Mr. Britton, presented the written testimony of thirty farmers as shown under C. above.

S. Glenn Zimmerman
PO Box 934
Aumsville, OR 97325

Mr. Zimmerman, president of the Composting Council of Oregon, testified with regard to the rules limiting those processes which may qualify for tax credits. The Department had recently adopted new rules regulating composting, and that many composters would encounter substantial expense in meeting the new rules. He asked that the definitions in OAR 340-16 be revised to included composting as a pollution control activity, making facilities constructed to meet the new rules eligible for tax credits.

Response 26 The Environmental Quality Commission does not have the rule making authority to amend facility eligibility or how the pollution control is achieved outside ORS 468.155(1). However, the Department will explore with counsel if the statute supports the inclusion of composting.

T. Wohlers Environmental Services, Inc.
PO Box 1132
Tualatin, Oregon 97062
Representing the Oregon Petroleum Marketers Association (OPMA)

Oral testimony was consistent with written testimony under "I" above.

U. Rob Forest
Truax Harris Energy Company

Pre-certification should not be made mandatory, especially for underground storage tanks owners. The proposed rules would result in an average of a 31% decrease in eligible costs for tank owners. Underground storage tank portion of the tax credit program is quite small relative to the whole, and that therefore the fee increase was disproportionately large. One hundred (rather than 90) percent of the cost of the gauge system should qualify for tax credit since the pollution control portion is indivisible from the system and is a key piece of the environmental protection system.

Response 27 Pre-certification is not mandatory as detailed in Response 11. The proposed rule would only bring into rule the current policy approved by the EQC in regarding eligible and ineligible costs 1990 (including 90% percent of the cost of the tank gauge system) for underground storage tank systems. The Department will ensure that the proposed rules accurately reflect the current practice which would not result in an average decrease in eligible costs. The Department will not propose a separate fee for applicants claiming underground storage tank systems based on this testimony. Fees are also detailed under Response 10.

Attachment F
Tax Credit Advisory Committee Members

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(Now with DEQ)
OEDD
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Bob Westcott
Wesco Parts Cleaners Inc.
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Canby, OR 97013

Attachment G

Rule Implementation Plan

All requests for application forms received after March 1, 1998, all people who have requested applications in the last year, and all applicant's with filed application pending Environmental Quality Commission action will receive a memo informing them of the proposed rule changes. The memo informs them how to obtain the application packet and other tax credit information: By calling (503) 229-6878 or on the Internet at www.deq.state.or under the DEQ Reference Section.

Applicant's with applications submitted to the Department before the rules are adopted but are pending Commission action may elect for their applications to be reviewed under the new rule by informing the Department in writing. If they elect to be reviewed under these proposed rules, they would be required to submit the additional fee.

An updated application packet has been tested and refined with fourteen applicants. Once the rules are finalized, an updated version will be available for most types of tax credits. The design of the application coincides with the rules which were developed in a checklist style. This is intended to guide the applicant through requirements that have changed since the current application packet was developed.

The Tax Credit Coordinator will provide any training the reviewers may require though most reviewers have participated in this rule making process. The Tax Credit Coordinator will also provide a Fee Schedule to the Business Office. The Department of Revenue has reviewed these rules but the changes do not affect their treatment of these tax credits.