**Document Review Checklist**

* Every document that will be shared with anyone outside of DEQ staff must go through management review. This includes reports and PowerPoint presentations.
* The Notice of Rulemaking and EQC Staff Report must also be reviewed and approved by the relevant Division Administrator.
* Each required reviewer should add their name and the date when they complete their final review and approve the document for distribution.

|  |
| --- |
| **Document Review Sign Off Sheet – EQC Staff Report** |
| **Reviewer** | **Name** | **Date** | **Date** | **Date** |
| Program Mgr. |  |  |  |  |
| DA |  |  |  |  |
| Communications |  |  |  |  |
| ARC or AQRC |  |  |  |  |

Instructions for this form are in gold font.

Delete all gold text before publishing document.

Links: [**LINK**](http://deqsps/programs/rulemaking/SitePages/Rulemaking%20Resources.aspx) go to SharePoint rulemaking resources and should be deleted before publishing.

If you use tables in your document, they must use the formatting illustrated in the table below, as to fonts and borders. You can copy and paste to other locations in the document.

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| C:\Users\mgoldst\AppData\Local\Microsoft\Windows\Temporary Internet Files\Content.Word\LogoColorRegular.png**Table Title (Arial 16, bold)****Additional Title (Arial 14, bold)****Even More Info, Date (Arial 12, bold)**-use only solid line borders-for outside borders, use 21/4 thickness-for inside borders, use 11/4 thickness |
| **Subheading 1 (Arial 14, bold)** | **Subheading 2, (Arial 14, bold)** |
| **Sub-sub-heading 1 (Arial 12, bold)** | **Sub-subheading 2, (Arial 12, bold)** |
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|  | **State of Oregon Department of Environmental Quality** |
| **Oregon Environmental Quality Commission Meeting****Meeting Date****Agency Staff Report****Rulemaking Action Item No.****Composting Permanent 2019** |
|  |

**Table of Contents**

[DEQ Recommendation to the EQC 2](#_Toc4051276)

[Introduction 3](#_Toc4051277)

[Optional Additional Topic](#_Toc4051278) **[Error! Bookmark not defined.](#_Toc4051278)**

[Statement of need 5](#_Toc4051279)

[Rules affected, authorities, supporting documents 7](#_Toc4051280)

[Fee Analysis 9](#_Toc4051281)

[Statement of fiscal and economic impact 10](#_Toc4051282)

[Federal relationship 14](#_Toc4051283)

[Land use 15](#_Toc4051284)

[EQC Prior Involvement 17](#_Toc4051285)

[Advisory Committee 18](#_Toc4051286)

[Public Engagement 20](#_Toc4051287)

[Public Hearing 21](#_Toc4051288)

[Summary of Public Comments and DEQ Responses 23](#_Toc4051289)

[Implementation 27](#_Toc4051290)

[Five Year Review 29](#_Toc4051291)

[Accessibility Information 31](#_Toc4051292)

#

# DEQ Recommendation to the EQC

DEQ recommends that the Environmental Quality Commission adopt the proposed rules in Attachment A as part of Chapter 340 of the Oregon Administrative Rules.

# Introduction

## Short summary

DEQ proposes that the Oregon Environmental Quality Commission approve the proposed permanent rule relating to pathogen reduction standards in composting. The proposed rule is identical to, and would make permanent, the temporary rule amendment the EQC adopted on February 25, 2019.

## Brief history

DEQ added anaerobic digester regulations to DEQ composting rules during the 2012 Conversion Technology Rulemaking. These regulations included OAR 340-096-0140 (Special Rules Pertaining to Composting: Pathogen Reduction). OAR 340-096-0140 established methods for pathogen reduction, as well as testing schedules and pathogen limits. DEQ intended these provisions to ensure that facilities are designed and operated in a manner that protects public health and the environment and that compost and digestate available to the public have met pathogen reduction limits.

In the fall of 2018, DEQ was reviewing an application for a permit modification to the Port of Tillamook Bay (POTB)’s anaerobic digester permit. DEQ identified an inconsistency in the pathogen reduction requirements of OAR 340-096-0140. In particular, OAR 340-096-0140 required different pathogen reduction requirements for digestate based on whether or not the generating digester was considered an “agricultural operation,” as defined by ORS 467.120(2)(a). As a result, digestate produced by a digester on an agricultural operation (e.g., a farm) did not have to meet a specified pathogen reduction limit. However, digestate produced by an anaerobic digester not on a farm had to meet the limit set forth in OAR 340-096-0140, despite the fact that digestate from all anaerobic digesters in Oregon is applied to farm soil for crop production. EPA research indicates soil application of digestate completes the pathogen reduction process and renders the digestate safe for human health and the environment as long as it is applied at agronomic application rates.

On February 25, 2019, EQC adopted a temporary rule amendment to ensure that testing requirements for digestate applied to land as a fertilizer (e.g., “land applied”) were the same regardless of whether the anaerobic digester producing the digestate qualifies as an “agricultural operation.” The temporary rule amendment exempts digestate from having to meet the pathogen limits of OAR 340-096-0140 if the digestate is land applied at agronomic rates in compliance with federal requirements for biosolids under 40 C.F.R. §503.32(b)(5). These federal biosolids requirements are comprised of site restrictions on the application of digestate to ensure that biological processes within soil, and exposure to sun and weather, further reduce pathogens in digestate to safe levels for public health and the environment. They restrict farming practices, such as animal grazing and public access, on land where the digestate is applied for a period of time to allow further pathogen reduction. Compliance with these federal site restrictions, coupled with land application at agronomic rates, ensures that pathogen reduction for digestate occurs at safe levels that are environmentally protective.

The temporary rule will expire on August 24, 2019. The proposed rule would make the temporary rule amendment permanent.

## Regulated parties

The proposed rule would affect digestate produced by anaerobic digesters that are not considered “agricultural operations” (as the term is defined by ORS 467.120(2)(a)). These affected anaerobic digesters would not have to meet the limit and testing requirements in OAR 340-096-0140 when producing digestate that is land applied at agronomic application rates and consistent with site restrictions in 40 C.F.R. §503.32(b)(5).

## Outreach efforts

To collect information to improve the rule and give the public and affected parties an opportunity to comment, DEQ made the following outreach efforts:

* DEQ held a public comment period on the temporary rule amendment, before EQC adopted it, from February 7, 2019, to February 14, 2019. DEQ changed the proposed temporary rule amendment in response to comments.
* DEQ convened a fiscal advisory committee to review DEQ’s estimate of the fiscal impact of the proposed rules. The committee met on April 1, 2019. This meeting was open to the public to attend or to listen to by phone.
* DEQ sent updates about the rulemaking process through a GovDelivery email list.
* DEQ published a public notice requesting comment on the rule. The public notice included draft rule language and invited comment on any part of the rule.
* DEQ accepted public comments on the permanent rule through the DEQ website and other formats from April 15, 2019, to May 17, 2019.
* DEQ will also hold a public hearing on May 15, 2019.

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 Management reviewed and edited this section. It was then published with the Public Notice. Do not modify it except to correct typographical errors.

# Statement of need

##

## What need would the proposed rule address?

The proposed rule would address the need for a consistent approach to pathogen reduction standards for digestate applied to soil on farms.

Before the temporary rule adoption, OAR 340-096-0140 required all digestate produced by anaerobic digesters to meet certain pathogen reduction standards. However, agricultural operations producing digestate only for on-farm use were not subject to this rule. This created an inconsistency: digestate produced for on-farm use by anaerobic digesters not considered agricultural operations had to meet pathogen reduction standards that digestate produced for on-farm use by agricultural operations were exempt from. These pathogen reduction requirements were modeled on EPA’s Biosolids 503 regulations for Class A biosolids and were intended for composting operations. The goal of Class A processes is to reduce the level of pathogens below the level at which they may cause disease when exposed to the public. Class A biosolids may be used without site restrictions, and must be tested to show that the microbiological requirements are met. As a result, in producing digestate for on-farm use, anaerobic digesters not located on agricultural operations, in order to meet pathogen reduction limits, would need to operate the digester for a longer period of time or at hotter temperatures, or both, than a digester located at an agricultural operation.

In February, the EQC adopted a temporary rule amendment to correct this inconsistency. The temporary rule ensured that digestate would be exempt from the pathogen reduction limits, regardless of whether the digester is considered an agricultural operation or not, if the digestate is applied to land at agronomic rates and consistent with site restrictions set forth in 40 C.F.R. §503.32(b)(5). These site restrictions are taken from federal Biosolids 503 regulations for Class B biosolids, which do not have to meet Class A biosolids pathogen reduction requirements but are restricted to application to the land as fertilizer. These site restrictions include, for instance, restricting for a period of time public access and certain farming practices (such as animal grazing) on land to which Class B biosolids have been applied. Without a permanent rule change, however, the temporary rule will expire in August 2019.

## How would the proposed rule address the need?

The proposed rule addresses the need described above by ensuring that digestate is exempt from pathogen reduction testing limits when it is applied to soil at agronomic application rates and under federal site restrictions, regardless of whether or not the digester is located on an agricultural operation.

If the proposed rule is not adopted, the temporary rule would expire in August 2019 and the inconsistent application of pathogen reduction testing limits, to digestate produced by agricultural operations for on-farm use and digestate produced by digesters not considered agricultural operations for on-farm use, would be reinstated.

## How will DEQ know the rule addressed the need?

There is currently one DEQ permitted anaerobic digester this rule change directly affects. DEQ expects another to be directly affected in spring of 2020. DEQ will work with the Oregon Department of Agriculture in monitoring these anaerobic digesters, along with anaerobic digesters located on agricultural operations, to ensure that pathogen reduction standards of their digestate is consistent. DEQ will know the need was met if digester operators can operate safely without being subject to inconsistent or unnecessary pathogen reduction requirements.

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# Rules affected, authorities, supporting documents

## Lead division

Land Quality

## Program or activity

Materials Management

## Chapter 340 action

### Amend – OAR

340-096-0140 (permanent)

### Statutory authority – ORS

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 468.020 | 468.065 | 459.045 | 459A.025 |  |

### Statutes Implemented – ORS

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 459.005 | 459.015 | 459.205 |  |  |

## Documents relied on for rulemaking

| Document title | Document location |
| --- | --- |
| EQC Staff Report for Composting Special Pathogen Reduction Temporary Rule 2019 (Feb. 25, 2019) | <https://www.oregon.gov/deq/EQCdocs/02252019_ItemA_CompostTempRules.pdf>  |
| 40 Code of Federal Regulations Part 503 – Standards for the Use or Disposal of Sewage Sludge; Subpart D – Pathogens and Vector Attraction Reduction | <https://www.govinfo.gov/content/pkg/CFR-2018-title40-vol32/xml/CFR-2018-title40-vol32-part503.xml>  |
| EPA Environmental Regulations and Technology – *Control of Pathogens and Vector Attraction in Sewage Sludge* | <https://www.epa.gov/sites/production/files/2015-07/documents/epa-625-r-92-013.pdf>  |
| Washington Dept. of Ecology - *Guidelines: Operating an Anaerobic Digester Exempted From Solid Waste Handling Permit*  | <https://fortress.wa.gov/ecy/publications/documents/0907029.pdf>  |

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# Fee Analysis

This rulemaking does not involve fees.

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# Statement of fiscal and economic impact

## Fiscal and Economic Impact

This rulemaking’s purpose is to permanently adopt the temporary rule amendments to the compost rules that the Environmental Quality Commission adopted on February 25, 2019. Therefore, adopting the proposed rule amendments will not have any fiscal impact different from, or in addition to, the impact the temporary rule amendments imposed.

The temporary rule amendments corrected an inconsistency in the treatment of digestate under OAR 340-096-0140. The temporary rule amendments corrected this inconsistency and clarified that digestate, when applied to land as a fertilizer (e.g., “land applied”) at agronomic rates in compliance with federal biosolids requirements as set forth in 40 C.F.R. §503.32(b)(5), does not need to meet pathogen limits for fecal coliform, regardless of whether the anaerobic digester is an agricultural operation or not. (Land application of digestate at agronomic rates and in compliance with federal biosolids site restrictions assure that pathogen reduction is to safe levels that are environmentally protective.) The temporary rule amendments are effective from February 26, 2019 to August 24, 2019.

When compared to the version of OAR 340-096-0140 in effect before February 26, 2019, the temporary and proposed permanent rule amendments could have a positive fiscal impact on DEQ-permitted anaerobic digesters that do not meet the standards for being considered an agricultural operation. Such anaerobic digesters, when producing digestate for land application, would not have to operate their anaerobic digestion technologies either for as long of a time, or at as high of a temperature, or both, in order to meet the previously more stringent pathogen reduction requirements. This may result in a savings in energy and labor costs.

The remainder of this fiscal impact statement will further describe the impact that adopting the proposed changes could cause, when compared to the version of OAR 340-096-0140 that was in effect before February 26, 2019.

## Statement of Cost of Compliance

### State and federal agencies

DEQ anticipates no direct or indirect impact on state or federal agencies.

### DEQ

#### Direct Impacts

There are no anticipated direct impacts to DEQ.

#### Indirect Impacts

There are no anticipated indirect impacts to DEQ.

### Local governments

#### Direct Impacts

There are no anticipated direct impacts to local governments.

#### Indirect Impacts

There are no anticipated indirect impacts to local governments.

### Public

#### Direct Impacts

DEQ does not anticipate direct impacts to members of the public because they are not subject to the rule.

#### Indirect Impacts

There are no anticipated indirect impacts to the public.

### Large businesses - businesses with more than 50 employees

#### Direct Impacts

DEQ anticipates a direct impact to one large business in the future. The rule amendment will directly affect Shell New Energies, a DEQ-permitted anaerobic digester in Oregon. While Shell New Energies has fewer than ten employees, it is a subsidiary of Shell Oil, a national company.

The direct impact on Shell New Energies would likely be a decrease in facility operational costs, if the facility starts to process manure, as planned in the future. For digestate that will be land applied at agronomic rates in compliance with federal biosolids site restrictions, the digester would not have to process its feedstock (e.g., the material that is used in anaerobic digestion) for either as long or at as high of a temperature, or both, as would be required in order to achieve the pathogen reduction limits set forth in OAR 340-096-0140.

#### Indirect Impacts

There are no indirect impacts to large businesses.

### Small businesses – businesses with 50 or fewer employees

#### Direct Impacts

DEQ anticipates a direct impact to the anaerobic digester of one small business, the Port of Tillamook Bay. The rule amendment would likely prevent an increase in facility operational costs because the anaerobic digester would potentially not need to process the feedstock for either as long, or at an increased temperature, or both, to achieve pathogen reduction limits.

#### Indirect Impacts

There are no indirect impacts to small businesses.

#### a. Estimated number of small businesses and types of businesses and industries with small businesses subject to proposed rule.

The proposed rule amendment will affect the anaerobic digester of at least one small business, the Port of Tillamook Bay.

#### b. Projected reporting, recordkeeping and other administrative activities, including costs of professional services, required for small businesses to comply with the proposed rule.

The proposed rule change will not require any additional administrative activities by the Port of Tillamook Bay’s anaerobic digester.

#### c. Projected equipment, supplies, labor and increased administration required for small businesses to comply with the proposed rule.

The proposed amendments will not require any business to use additional resources.

#### d. Describe how DEQ involved small businesses in developing this proposed rule.

DEQ spoke with the two affected anaerobic digester operators about the amendment. DEQ will also conduct a public comment period during which any person will be able to comment about the rule changes.

## Documents relied on for fiscal and economic impact

DEQ did not use any documents to determine fiscal impact. DEQ discussed the fiscal impact of this rule with affected anaerobic digester facility operators in developing its staff report for the temporary rule.

## Advisory committee fiscal review

DEQ appointed an advisory committee.

As ORS 183.33 requires, DEQ asked for the committee’s recommendations on:

* Whether the proposed rules would have a fiscal impact,
* The extent of the impact, and
* Whether the proposed rules would have a significant adverse impact on small businesses; if so, then how DEQ could comply with ORS 183.540 reduce that impact.

The committee reviewed the draft fiscal and economic impact statement. The committee agreed with DEQ that the proposed rule, when compared to the version of OAR 340-096-0140 in effect before the temporary rule’s adoption, would likely result in a decrease in the cost of compliance for anaerobic digesters not considered agricultural operations. The committee reviewed and discussed the fiscal impact statement and determined that the proposed rule would not have a significant adverse impact on small businesses in Oregon.

Advisory committee members’ comments are summarized in written meeting minutes posted on the advisory committee web page here: [Composting Pathogen Reduction 2019](https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rcomposting2019.aspx).

## Housing cost

As ORS 183.534 requires, DEQ evaluated whether the proposed rules would have an effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached, single-family dwelling on that parcel. DEQ determined the proposed rules would have no effect on the development costs because the DEQ Solid Waste Composting rules only affect DEQ-permitted composting facilities.

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# Federal relationship

ORS 183.332, 468A.327 and OAR 340-011-0029 require DEQ to attempt to adopt rules that correspond with existing equivalent federal laws and rules unless there are reasons not to do so.

The proposed rules are not different from or in addition to federal requirements.

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# Land use

## Land-use considerations

In adopting new or amended rules, ORS 197.180 and OAR 340-018-0070 require DEQ to determine whether the proposed rules significantly affect land use. If so, DEQ must explain how the proposed rules comply with state wide land-use planning goals and local acknowledged comprehensive plans.

Under OAR 660-030-0005 and OAR 340 Division 18, DEQ considers that rules affect land use if:

* The statewide land use planning goals specifically refer to the rule or program, or
* The rule or program is reasonably expected to have significant effects on:
* Resources, objectives or areas identified in the statewide planning goals, or
* Present or future land uses identified in acknowledged comprehensive plans

DEQ determined whether the proposed rules involve programs or actions that affect land use by reviewing its Statewide Agency Coordination plan. The plan describes the programs that DEQ determined significantly affect land use. DEQ considers that its programs specifically relate to the following statewide goals:

|  |  |
| --- | --- |
| Goal | Title |
| 5 | Natural Resources, Scenic and Historic Areas, and Open Spaces |
| 6 | Air, Water and Land Resources Quality |
| 11 | Public Facilities and Services |
| 16 | Estuarine Resources |
| 19 | Ocean Resources |

Statewide goals also specifically reference the following DEQ programs:

* Nonpoint source discharge water quality program – Goal 16
* Water quality and sewage disposal systems – Goal 16
* Water quality permits and oil spill regulations – Goal 19

## Determination

DEQ determined that the rule being amended in this rulemaking affects programs or activities that the DEQ State Agency Coordination Program considers a land-use program.

DEQ’s statewide goal compliance and local plan compatibility procedures adequately cover the proposed rule. Under OAR 340-018-0050(2)(a), ensuring compatibility with acknowledged comprehensive plans may be accomplished through a Land Use Compatibility Statement. The proposed rule change to OAR 340-096-0140 would affect pathogen reduction standards that a composting facility must meet for its compost or digestate. Under OAR 340-096-0080, a Land Use Compatibility Statement is required to obtain a composting facility permit.

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# EQC Prior Involvement

DEQ initially presented the proposed temporary rule amendments to the EQC at its January 25, 2019, meeting. At the EQC’s request, DEQ held a public comment period on the temporary rule. Following the public comment period and revisions to the proposed temporary rule, the EQC approved the temporary rule at a second meeting on February 25, 2019.

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# Advisory Committee

## Background

DEQ convened the Composting Pathogen Reduction 2019 Advisory Committee. The committee included representatives from an agricultural operation that operates an anaerobic digester, water interests from Tillamook County, where an off-farm anaerobic digester is expected to become operational soon, and dairy farmers. The committee met once.

The committee’s web page is located at: [Composting Pathogen Reduction 2019](https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rcomposting2019.aspx).

The committee members were:

| Composting Pathogen Reduction 2019 Advisory Committee |
| --- |
| **Name** | **Representing** |
| Tim Bielenberg | Oak Lea Dairy, agricultural operations and anaerobic digesters |
| Tammy Dennee | Oregon Dairy Farmers Association, dairy farmers |
| Kristan Mitchell | Oregon Refuse and Recycling Association, composting facilities |
| Ray Monroe | Tillamook County Soil and Water Conservation District, water |
| Rob Russell | Tillamook Bay Watershed Council, water |

## Meeting notifications

To notify people about the advisory committee’s activities, DEQ:

* Sent GovDelivery bulletins, a free e-mail subscription service, to the following lists:
* Rulemaking
* Composting
* Added advisory committee announcements to DEQ’s calendar of public meetings at [DEQ Calendar](http://www.oregon.gov/deq/Get-Involved/Pages/Calendar.aspx).
* On April 15, 2019, DEQ provided notice of meetings and links to committee information through postings on Facebook and Twitter.

## Committee discussions

Beyond the recommendations described under the Statement of Fiscal and Economic Impact section above, the committee appreciated DEQ’s explanation for the reasons for the rulemaking and reviewed the proposed rule language. The committee did not have additional comments for DEQ.

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# Public Engagement

## Public notice

DEQ provided notice of the proposed rulemaking and rulemaking hearing on April 15, 2019, by:

* Filing notice with the Oregon Secretary of State for publication in the May 2019 Oregon Bulletin;
* Posting the Notice, Invitation to Comment and Draft Rules on the web page for this rulemaking, located at: [Composting rulemaking](https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rcomposting2019.aspx)
* Emailing 11,438 interested parties on the following DEQ lists through GovDelivery:
* Rulemaking
* Composting
* Emailing the following key legislators required under [ORS 183.335](http://www.leg.state.or.us/ors/183.html):
* Senator Michael Dembrow, Chair, Senate Committee on Environment and Natural ResourcesSenator Michael Dembrow, Chair, Senate Committee on Environment and Natural ResourcesSenator Michael Dembrow, Chair, Senate Committee on Environment and Natural Resources
* Senator Alan Olsen, Vice-chair, Senate Committee on Environment and Natural ResourcesSenator Alan Olsen, Vice-chair, Senate Committee on Environment and Natural Resources
* Representative Ken Helm, Chair, House Committee on Energy and EnvironmentRepresentative Ken Helm, Chair, House Committee on Energy and EnvironmentRepresentative Ken Helm, Chair, House Committee on Energy and Environment
* Representative E. Werner Reschke, Vice-chair, House Committee on Energy and Environment
* Representative Sheri Schouten, Vice-chair, House Committee on Energy and EnvironmentRepresentative Sheri Schouten, Vice-chair, House Committee on Energy and Environment
* Emailing advisory committee members,
* Postings on Twitter and Facebook
* Posting on the DEQ event calendar: [DEQ Calendar](http://www.oregon.gov/deq/Get-Involved/Pages/Calendar.aspx)

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## Public Hearing

New section – not copied from Notice of Rulemaking

DEQ held one public hearing. DEQ received no comments at the hearing. Later sections of this document include a summary of the seven comments received during the open public comment period, DEQ’s responses, and a list of the commenters. Original comments are on file with DEQ.

### Presiding Officers’ Record

#### Hearing 1

|  |  |
| --- | --- |
| Date | May 15, 2019 |
| Place | 700 NE Multnomah Street, Conference Room, Thirdy Floor, Portland, Oregon |
| Start Time | 6:00 pm |
| End Time | 6:26 pm |
| Presiding Officer | Audrey O’Brien |

#### Presiding Officer:

One person attended the hearing in person. The presiding officer convened the hearing and explained that the hearing was for the compost permanent rulemaking. Signs were posted stating that DEQ was recording the hearing. No person presented any oral testimony or written comments.

## Summary of Public Comments and DEQ Responses

### Public comment period

DEQ accepted public comment on the proposed rulemaking from April 15, 2019 until 4 p.m. on May 17, 2019.

DEQ did not change the proposed rules in response to comments.

### Comments received by close of public comment period

DEQ received comments from two individuals during the public comment period. The table below lists the persons who submitted public comments about the proposed rules by the deadline. Original comments are on file with DEQ. Some comments related to the permit for the Port of Tillamook Bay digester and to the basis for the temporary rule amendment to OAR 340-096-0140 that was adopted in February 2019. For the purposes of this proposed permanent rulemaking, DEQ is providing responses only to comments related to the proposed permanent rulemaking. Original comments are included in full after the staff report.

| **List of Commenters** |
| --- |
| **#** | **Name** | **Organization** | **Comment Number** |
| 1 | Ryan Talbott, May 15, 2019 | Center for Food Safety | 1 |
| 2 | Kevin Maas | Farm Power Northwest LLC | 2, 3, 4, 5, 6, 7 |

#### Comment 1

DEQ’s website states that the comment period on the Composting Pathogeny Reduction 2019 Rulemaking closes at 4 pm on May 17. However, an update published on May 7 states the comment period has been extended. What is the extended deadline?

#### Response

The public comment period was not extended. The reference to a deadline extension on the DEQ website was posted in error; upon receipt of this comment, DEQ corrected the error on the website on May 15th. DEQ also provided the correct deadline to the commentator on the day the comment was received.

#### Comment 2

Most anaerobic digesters in the state are actually sewage sludge digesters at municipal wastewater treatment plants that must follow the full range of regulations in 40 C.F.R. §503 or its equivalent elsewhere in OAR 340. DEQ is asking to create a new class of digesters that is not on a farm, not required to process any manure, and allowed to accept unlimited amounts of municipal organic waste, but required to follow only a single fragment of biosolids regulations—§503.32(b)(5)—while being exempted from the rest.

#### Response

The proposed rule change would not alter the treatment of biosolids, which will continue to be regulated by applicable federal and state regulations such as 40 C.F.R 503 and OAR Chapter 340, Division 50. The proposed rule change would change the application of pathogen limits to digestate, depending on the use of that digestate, but gives DEQ the authority to reinstate pathogen limits for all digestate if such compliance is necessary to protect human health or the environment. Digestate must still be tested for pathogens; and composting facilities subject to OAR 340-096-0140 must still document and implement a pathogen reduction plan that addresses the requirements of 40 C.F.R. Part 503 and must still receive DEQ’s written approval for any use of liquid digestate other than discharge to an approved wastewater treatment system or discharge under a water quality permit issued under ORS 468B.050. DEQ also has authority under OAR 340-096-0080 and OAR 340-096-0090 to review and approve the types and volumes of feedstocks a composting facility may receive.

#### Comment 3

DEQ ignores that such on‐farm digesters have always been required to operate primarily on manure (no less than 85%) and operate within other agricultural CAFO permitting, location, and operation restrictions. There is no similar requirement to actually process manure at any percentage. The permanent rule even allows disposal of effluent under a “nutrient management plan”—not on a permitted dairy farm and not covered by any land application or discharge permit at all.

#### Response

OAR 340-096-0140 has never required the processing of manure at a particular percentage for either on-farm or off-farm digesters. When evaluating on-farm digesters, DEQ consulted with Oregon Department of Agriculture to evaluate whether on farm digesters can be appropriately regulated by the NPDES water quality permit required of confined animal feeding operations that Oregon Department of Agriculture oversees. As long as on-farm digesters accept less than 15% off-farm wastes, DEQ and ODA consider that the on-farm digester is regulated appropriately through the water quality permits required of confined animial feeding operations and Oregon Department of Agriculture. An on-farm digester seeking to accept non-manure feedstocks and operate on less than 85% manure can apply for a DEQ Solid Waste permit.. A number of on-farm digesters currently operate under a DEQ Solid Waste permit in this manner.

#### Comment 4

Under 40 C.F.R. 503, the EPA requires testing and annual land loading limits for persistent pollutants including arsenic, lead, and mercury. However, the proposed rule ignores non-­‐pathogen pollutants in Type 3 feedstocks, as well as the risk of physical contaminants.

#### Response

This rulemaking focused on pathogen limits for digestate and does not change any other requirements that apply to digestate. DEQ must approve where digestate is land applied and works with ODA to make sure that digestate that is land applied is done so in compliance with requirements that protect the environment and human health.DEQ will continue to monitor feedstock types and volumes and operations plans through existing solid waste and composting regulations, and address non-pathogen pollutants as authority allows under other existing water quality, solid waste and hazardous waste rules.

#### Comment 5

DEQ includes in its “Documents relied on for rulemaking” an EPA publication titled Control of Pathogens and Vector Attraction in Sewage Sludge, which says little about pathogen reduction after soil application, but what it does say is not encouraging: Table 2-4 shows that both bacteria and viruses survive longer in soil than the 30-day restriction on harvest, grazing, and access. There is no evidence that DEQ considered or analyzed any common manure-­‐application procedures, such as applying digestate to bare soil before planting corn, which could affect the reduction in pathogens they hope for after eliminating testing requirements required by OAR.

#### Response

The proposed rule change would exempt digestate that is land applied at agronomic rates and consistent with site restrictions in 40 C.F.R. §503.32(b)(5) from meeting the fecal coliform limit of 1,000 Most Probable Number per gram of total solids, but does not eliminate the requirement to perform pathogen testing. Digesters subject to OAR 340-096-0140 must continue to test digestate for pathogen reduction and document and implement a pathogen reduction plan pursuant to sections 3, 4 and 5 of OAR 340-096-0140.

In the EPA publication that the commenter cited, Table 2-3 of *Control of Pathogens and Vector Attraction in Sewage Sludge* shows that anaerobic digestion is a treatment that significantly reduces the number of pathogens that would otherwise exist in sewage sludge. The EPA guidance states, “**Studies of anaerobic or aerobic digestion of sludges have shown that the corresponding reduction in the pathogen population will be significant and sufficient so that environmental attenuation can reduce pathogen levels to below detection limit within the time period of site restrictions** […].” A discussion of how the site restrictions in 40 C.F.R. §503.32(b)(5) allow time for further reduction in the pathogen population of class B biosolids can be found in Section 5.5 of the guidance. See <https://www.epa.gov/sites/production/files/2015-04/documents/control_of_pathogens_and_vector_attraction_in_sewage_sludge_july_2003.pdf> (pages 11, 15 and 38).

Biosolids such as digested sewage sludges typically contain a high count of fecal coliforms, enteric bacteria that can be used as indicators of the likelihood of the presence of bacterial pathogens. Manure prior to digestion also contains a very high fecal coliform count that is significantly reduced through digestion and then further reduced through the land application process allowed by the proposed regulations within the time frame required prior to crop growth. Common Type 3 feedstocks, such as food waste, fish processing waste and fats, oils and grease, generally contain a much lower fecal coliform count and can generally meet the pathogen limits identified in rule.

#### Comment 6

The proposed rule adds only one brief fragment of 40 C.F.R. §503.32 with the proposed rule but chose not to add any regulations from earlier sections related to land application (§503.10 through §503.18), regulations which apply to all the other anaerobic digesters in Oregon which can land-apply digestate from substantially unlimited amounts of non-manure feedstocks. It appears that DEQ has selected a tiny portion of 40 C.F.R. §503 to provide regulatory cover for its blanket exemption of a new class of anaerobic digester.

#### Response

The proposed rule change does federal and state DEQ is changing only the requirement to meet the pathogen limit and is not removing the requirements to meet all other federal or state requirements that apply to non-digested or digested wastes. The pathogen testing limits of OAR 340-096-0140(2) equal the analytical standards for Class A biosolids in 40 C.F.R. 503.32(a). The proposed rule change would change the applicability of pathogen limits on digestate to more closely track the differing federal treatment of pathogen requirements for Class A and Class B biosolids.

#### Comment 7

DEQ’s inconsistency between the positions and justifications offered at each stage of rulemaking is highlighted by the permit it re-issued for the Port of Tillamook Bay digester. While the emergency rulemaking was built around the needs of the Port of Tillamook Bay digester, its solid waste permit now has an approved Digestate Management Plan that does not mention site restrictions consistent with 40 C.F.R. §503.32(b)(5); indeed, the permit itself does not require them.

#### Response

This comment relates to the POTB digester’s solid waste permit and the basis for the temporary rule. For this current rulemaking, DEQ is providing responses only on comments related to the proposed permanent rule. However, permitted solid waste facilities are required to comply with all applicable federal, state and local laws or regulations regardless of whether such laws and regulations are listed in the permit.

# Implementation

## Notification

The proposed rules would become effective upon filing on approximately July 19, 2019. DEQ would notify affected parties by:

* emailing through the GovDelivery email list;
* directly contacting known affected facilities; and
* posting an announcement on the DEQ website.

## Compliance and enforcement

Affected parties – DEQ anticipates that two facilities would be subject to the proposed rule: Shell New Energies and the anaerobic digester of the Port of Tillamook Bay. Both currently have DEQ solid waste permits. Should either facility request a change in their operations plan to accept new feedstock, DEQ will review the operations plan and require any revisions, as needed, or approve the plan. DEQ already conducts inspections as part of these facilities’ permits. Inspections may identify violations of the proposed rule.

DEQ staff – The permit writing team and enforcement staff will work together to develop training materials for permit writers and inspectors to implement the proposed rules.

## Measuring, sampling, monitoring and reporting

Affected parties – Testing and monitoring requirements would be incorporated into the permits of affected parties.

DEQ staff – DEQ staff would process and review compliance reports submitted by affected parties to determine compliance with the applicable requirements. DEQ staff will also consult with the Oregon Department of Agriculture on agronomic rates and Nutrient Management Plans.

## Systems

Website – Upon rule adoption, DEQ would update the Composting webpages on its website.

Database - DEQ would update its existing SWIFT database as needed to track compliance with the amended applicable requirements.

Invoicing - DEQ would use its existing database for invoicing.

## Training

Affected parties - If the proposed rules are approved by EQC, permit writers will provide technical assistance to affected parties.

DEQ staff - DEQ permit writers have been involved in the development of the rule and could schedule internal trainings if needed.

# Five Year Review

Leave blank – rules coordinator will complete this section

ORS 183.405

## Requirement

Oregon law requires DEQ to review newrules within five years after EQC adopts them. The law also exempts some rules from review. DEQ determined whether the rules described in this report are subject to the five-year review. DEQ based its analysis on the law in effect when EQC adopted these rules.

### Exemption from five-year rule review

DELETE THIS PARAGRAPH IF NO RULES ARE EXEMPT FROM REVIEW:

The Administrative Procedures Act exempts CHOOSE ONE: SOME … ALL of the proposed rules from the five-year review because the proposed rules would:

DELETE ANY THAT DON’T APPLY:

 Amend or repeal an existing rule. ORS 183.405(4).

 Implement a court order or a civil proceeding settlement. ORS 183.405(5)(a).

 Adopt a federal law or rule by reference. ORS 183.405((5)(b).

 Implement legislatively approved fee changes. ORS 183.405(5)(c).

 Correct errors or omissions in the existing rules. ORS 183.405(d).

DELETE THIS PARAGRAPH IF ANY OF THE RULES ARE EXEMPT FROM REVIEW:

None of these proposed rules are exempt from the five-year review under ORS 183.405(4) and 183.405 (5) of the Administrative Procedures Act.

### Five-year rule review required

No later than DATE FIVE YEARS FROM ADOPTION. DEQ will review the newly adopted rules for which ORS 183.405 (1) requires review to determine whether:

* The rule has had the intended effect
* The anticipated fiscal impact of the rule was underestimated or overestimated
* Subsequent changes in the law require that the rule be repealed or amended
* There is continued need for the rule.

DEQ will use “available information” to comply with the review requirement allowed under ORS 183.405 (2).

DEQ will provide the five-year rule review report to the advisory committee to comply with ORS 183.405 (3).

# Accessibility Information

You may review copies of all documents referenced in this announcement at:

Oregon Department of Environmental Quality

700 NE Multnomah St., Ste. 600

Portland, OR, 97232

To schedule a review of all websites and documents referenced in this announcement, call Audrey O’Brien, Oregon Department of Environmental Quality, Materials Management, 700 NE Multnomah St., Ste. 600, Portland, OR, 97232, (503) 229-5072 (800-452-4011, ext. 5622 toll-free in Oregon).

DEQ can provide documents in an alternate format or in a language other than English upon request. Call DEQ at 800-452-4011 or email deqinfo@deq.state.or.us.